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COURT OF APPEALS  
STATE OF WASHINGTON  
FILED  
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No. 64326-6

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

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CHRIS HUGHES, dba ADMINISTRATORS & CONSULTANTS, LLC,

Respondent,

v.

FRIENDS OF THE SAN JUANS,

Appellant,

and

SAN JUAN COUNTY, a political subdivision of the State of Washington;  
SHORELINES HEARINGS BOARD, an agency of the State of  
Washington,

Necessary Parties.

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REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

The parties' opening briefs demonstrate that this case is about two fundamentally different views of the private use of public resources. On the one hand, Appellant Friends of the San Juans ("Friends") seeks the responsible use of public resources and, where a proposed private use is both unnecessary and ecology harmful, a solution that avoids that use. This position is consistent with the Washington Shoreline Management Act ("SMA") and the San Juan County Shoreline Master Program ("SMP"). On the other hand, Respondent Chris Hughes ("Hughes") seeks to use public resources for "safe and practical" use of his property. In this instance, this position is not consistent with the SMA or SMP.

Friends submits this Reply brief to address the following issues that Hughes raises in his Brief of Respondent: (1) appellate court authority in reviewing an administrative determination; (2) the relationship between the Shorelines Hearings Board ("Board") authority and past decisions from the local permitting authority; (3) several unsupported facts; (4) a mischaracterization of the Board's review of off-site mitigation; and (5) the inapplicability of *May v. Roberts*, a recent Division II decision regarding a dock in Pierce County. The other issues raised in this appeal have been adequately briefed in Friends' Brief of Appellant and do not warrant further discussion in this Reply.

**B. Hughes Relies Inappropriately on San Juan County Superior Court “Findings of Fact.”**

Hughes suggests that several superior court findings of fact are verities on appeal because Friends did not assign them error. *See* Brief of Respondent at 22-23, 26, 30. This argument, however, demonstrates a misunderstanding of the role that the superior court plays in reviewing administrative decisions. *See Herman v. State Shorelines Hearings Bd.*, 149 Wn. App. 444, 204 P.3d 928 (2009). A superior court reviews agency orders in only a limited capacity and generally may not admit new evidence or decide disputed factual issue. *Id.* at 455-56.

Moreover, it is well settled that a court of appeals reviews the agency’s decision on the agency’s record and that superior court determinations are not relevant to that review. *Macey v. Dep’t of Social and Health Servs.*, 110 Wn.2d 308, 311, 752 P.2d 372 (1988); *Deaconess Med. Ctr. v. Dep’t of Revenue*, 58 Wn. App. 783, 791 n.4, 795 P.2d 146 (1990) (Petrich, J., concurring in part and dissenting in part). As Judge Petrich explained in his partial concurrence and dissent in *Deaconess Medical Center*, “this court reviews de novo the decision of the Board, without regard for the actions of the Superior Court.” 58 Wn. App. at 791 n.4. As a result, assignments of error to the superior court’s determinations are “wholly irrelevant.” *Macey*, 110 Wn.2d at 311.

Hence, the decision to be reviewed here is the Board's August 25, 2008 reversal of a permit for a single-user dock. Consequently, Hughes' arguments that either expressly or impliedly suggest that the decision to be reviewed is that of the San Juan County Superior Court, or any findings of fact therein, must be discarded. *E.g.*, Brief of Respondent, at 22-23. For example, Hughes asserts at page 22 that Friends did not assign error to Judge Linde's determination that a mitigation project was completed successfully, and that "the court's finding should not be disturbed on appeal." And at page 30, Hughes states that Judge Linde's condition that the dock be available for other users "was not assigned error and should remain a condition of issuance of the permit." Brief of Respondent, at 30.<sup>1</sup>

The superior court did not admit new evidence, and so could not have made new findings of fact. Thus, there could have been no determinations by the superior court that became verities on appeal, and any of Hughes' assertions to the contrary should be disregarded.

**C. The Board Is Not Required to Adhere to Past Permitting Decisions by San Juan County In Issuing Its Decisions.**

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<sup>1</sup> Notably, a superior court does not have authority to condition the issuance of a permit in reviewing a permit decision under the Washington Administrative Procedures Act. RCW 34.05.574. The APA authorizes a court to: "(a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order."

Hughes asserts that the Board's decision was improper on the grounds that it was inconsistent with other San Juan County permit decisions. Brief of Respondent, at 41. However, nowhere does the SMA bind the Board to past decisions by a lower decision-making entity such as San Juan County. Even if the Board were required to take notice of past local government decisions, it is a matter of settled law that "[t]he proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property." *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994). Moreover, "past inconsistent administration never brought to the Board for review cannot alter the plain meaning of the Master Program as applied to the case before it." *Id.* Consequently, the Board has held that it "may not disregard the plain language of the law simply because a local government may have acted inconsistently with its terms in the past." *Anderson v. San Juan County*, SHB No. 94-13, 5 (Jan. 9, 1995) (Final Findings of Fact Conclusions of Law and Order).

Moreover, the Board reviews county decisions de novo, "and it does not accord deference to the local government's decision." *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 516, 137 P.3d 31 (2007). While Hughes concedes that the scope and standard of the Board's review is de novo, he maintains that "[t]he right to review a case

de novo does not give the Board the right to impose new unwritten meaning to a local jurisdiction's regulations," and that "[t]he SHB should have deferred to SJC's past application of its code." Brief of Respondent, at 41. However, de novo review means exactly that; the Board may apply its legal interpretation of the SMA and SMP, and in fact, the state legislature established the Board with that express purpose. RCW 90.58.170. Indeed, because the Board exercises review authority over local decisions, it is more likely that where those decisions are inconsistent with Board decisions, the County itself is the entity in error.

Further, in *Preserve Our Islands*, the Washington Court of Appeals expressly recognized that Board decisions, rather than those of county governments, merit deference in APA review of shoreline decisions and held that "[b]ecause we review the Shorelines Hearings Board's decision, not that of the local government, to the extent we give deference, it is to the Board." 133 Wn. App. at 516. The court noted that "our courts have long recognized that the Board 'draws on its special knowledge and experience as **the entity charged with administering and enforcing the [SMA].**'" *Id.* (quoting *Weyerhaeuser Co. v. King County*, 91 Wn.2d 721, 736, 592 P.2d 1108 (1979)) (emphasis added). And the Board does not accord deference to the local government in reviewing its decision. *Id.* Thus, the Board's determination in a matter supersedes the position taken

by a local government where they conflict, and the Board was not required to ensure that its determination was consistent with other lower decisions of the County.

**D. The Record Does Not Support Several of Hughes' Assertions.**

Hughes offers numerous unsupported allegations in his brief that, in the absence of supporting documentation or testimony, or where directly controverted by the record, cannot withstand scrutiny.

At page 11, Hughes states that he met his burden of proof at the local level by showing that the project met the criteria of section 18.50.190.G.5 of the SMP. However, the San Juan County Hearing Examiner ("Hearing Examiner") denied the dock each time it came before him for review, and ultimately merely approved the settlement by which the County agreed with Hughes to permit the dock. Exh. R-Q at 14-18. Thus, at no time did the project receive a thorough review for its consistency with the SMA or SMP. The Hearing Examiner's October 27, 2006 Order Regarding Settlement omits any discussion regarding whether the dock met criteria established by the SMP. On the contrary, the Hearing Examiner expressly indicated his belief that the dock did not meet those standards, and that the legal system's preference for resolution by agreement compelled him to approve the settlement agreement. He stated that "the parties apparently disagree with the Examiner on the necessity

for the dock and on whether an alternate structure or moorage scheme might serve under the circumstances.” Exh. R-Q at unnumbered page between 16 and 17, Conclusion of Law 2.

At page 2, the Brief of Respondent misidentifies the amount of grating that the dock would incorporate. According to Chris Fairbanks, one of Hughes’ experts at the hearing, the float, including the ramp landing float, would include approximately 40% grating. Transcript of July 1-2, 10 Shorelines Hearings Board hearing (“TR”) at 326:10. The float, as opposed to the pier or ramp, rests directly on the water, and its grating is thus a factor in determining its impacts to eelgrass below. There is also no evidence in the record that the channel adjacent to the dock site extends as wide as 1300 feet. Brief of Respondent, at 1.

At page 3, Hughes states that he “ask[ed] to share a dock with the Thorps [sic].” Brief of Respondent, at 3. It should be clarified that Hughes did not ask to use a dock owned by Russell and Marjorie Thorpe, but instead offered to allow them to use the proposed dock. Exh. R-G at 2. Hughes also did not request access via the beach along the Thorpes’ shoreline. TR at 443:3-12. And at page 28, Hughes asserts that the evidence at hearing showed that he asked owners of at least ten properties to share a dock. Brief of Respondent, at 28. Yet Hughes cites for this position only three exhibits, which indicate a request to use one dock and

two offers to share his dock. Exh. R-G at 1-3. Hughes' own testimony at the hearing demonstrated that he requested joint use of only three docks, that owned by his brother, one owned by Bob Millar, and one owned by the Hietbrinks. TR at 438:20-439:3.

Hughes also asserts at page 3 that he submitted an application for a dock utilizing state of the art mitigation to compensate for potential eelgrass loss of 233 square feet. The Brief of Respondent does not describe which attributes of the dock constituted "state of the art mitigation," but the dock's size and grating were standard when proposed in 2005. TR at 262:17-263:10 (testimony of A. Leitman that 6-foot wide floats were "very common" and that "[i]t's a pretty standard dock"). The dock was proposed for an experimental dock program operated by WDFW, and later discontinued in San Juan County upon request by the County Council on a recommendation from its Marine Resources Committee regarding dock impacts on eelgrass. Exh. R-H at 5-6 (January 22, 2007 letter from Bob Everitt, WDFW Regional Director, to Alan Lichter, Chair of the San Juan County Council explaining discontinuance of experimental dock program). In that letter, WDFW indicated that the SMP was more protective of shoreline ecosystems than WDFW regulations. Exh. R-H at 4.

Hughes states at page 4 that the Hearing Examiner approved the parties' agreement to pursue off-site mitigation under SJCC 18.30.160.D. However, the October 27, 2006 Order makes no such approval. It references a proposed compensatory mitigation project incorporated into a settlement agreement and notes merely that the settlement agreement would appear to require a habitat management plan to meet the requirements of SJCC 18.30.160.D. Exh. R-Q at unnumbered page between 16 and 17, Finding of Fact ("FOF") No. 24. Significantly, that same Order expressly declares that "San Juan County has no adopted methodology for addressing off-site mitigation." *Id.* at FOF No. 21.

At page 6, Hughes asserts that the buoy he removed was antiquated and grandfathered. However, there is no evidence in the record that the buoy was either antiquated or grandfathered. Instead, the evidence demonstrates that the buoy was owned by Nigel and Linda Thompson, and indicates that it was an unpermitted buoy. Exhs. P-LL, P-MM. Moreover, the evidence shows that instead of removing the unpermitted buoy upon receipt of a permit for a dock over eelgrass, the Thompsons sold the right to remove the buoy to Hughes. TR at 382:18-383:25, 393:15-394:16, 497:20-498:10 (indicating that Hughes removed his own buoy as off-site mitigation for the dock permit). Notably, the Washington Department of Natural Resource's authority for unauthorized use and occupancy of

public lands does not indicate that a buoy can be a grandfathered use of public lands, but instead suggests that a property owner must obtain a permit for that buoy. WAC 332-30-127 (establishing regulations regarding unauthorized use and occupancy of aquatic lands and identifying private users of public lands as trespassers).

Hughes, at page 15, states that the application did not meet the Army Corps of Engineers' ("Corps") 25-foot separation from eelgrass that would have allowed application of the Regional General Permit ("RGP") review, and that the Corps thus required Section 7 review. This assertion could be read to suggest a site-specific project review. On the contrary, the evidence at hearing indicated that the Corps did process the dock permit under the RGP program; in fact, the same agent that now represents Hughes in this appeal certified in its Application Form for RGP 6 for the dock that it "[m]eets all of the requirements of RGP 6." Exh. P-A at 19. As Amy Leitman testified at the hearing, this allowed the applicant to avoid the more rigorous site-specific biological evaluation that would otherwise have been required. TR at 248:1-249:24; 296:14-299:12.

Hughes asserts for the first time in the appellate briefing that the rocky shore on his property prohibits storage of a dinghy. Brief of Respondent, at 32. Yet the Joint Aquatic Resources Permit Application form that Hughes submitted to WDFW and the Corps stated, "[c]urrently,

the property owners must use a small boat to land on the medium ban [sic] rocky shoreline.” Exh. P-A at 16. Thus, Hughes’ own documentation identifies his shoreline as a possible landing site for a small craft.

Hughes also argues for the first time that barge service is not available on a regular basis to Pearl Island. Brief of Respondent, at 34. But Humpback Hauling barge service operates for hire and can be scheduled as needed to transport people or materials to an outer island. Indeed, the Board and the parties in this matter hired the barge for a site visit. TR at 41:3-6.

**E. The Board Has Jurisdiction to Evaluate Off-Site Mitigation Terms in the Permit to Determine Whether the Project’s Impacts Are Consistent with the SMA and SMP.**

Hughes incorrectly asserts that the mitigation project by which he obtained the permit should be accepted as a verity, on the grounds that the Board did not have subject matter jurisdiction to review San Juan County’s Environmentally-Sensitive Areas Ordinance (“ESA”).<sup>2</sup> A close read of the Board’s August 25, 2008 decision (“Decision”), however, shows that the Board did not evaluate the proposed off-site mitigation against the express terms of the ESA, but instead naturally attempted to

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<sup>2</sup> The marine protection portion of the County’s Environmentally-Sensitive Areas ordinance, SJCC 18.30.160, is the existing version of its critical areas ordinance. San Juan County has not yet updated this ESA to a modern critical areas ordinance, which was due December 2005.

evaluate whether that mitigation rendered the permit consistent with the SMA and SMP. Decision, at Conclusions of Law (“COL”) No. 2, 15-17. Although the Board declined in its June 26, 2008 Order on Summary Judgment (“Order”) to dismiss Friends’ proposed issues regarding compliance of the permit and its off-site mitigation with the ESA, the subsequent Decision demonstrates that the Board reviewed a separate issue in their stead “[w]hether the Off-Site Mitigation Plan Compensates for Impacts to the Environment.” Decision, at COL No. 2. Thus, the Board did not directly evaluate the off-site mitigation plan against the ESA, but rather against SMA and SMP environmental criteria identified in the Brief of Appellant.

While the Board may not have direct subject matter jurisdiction to review a challenge under the County’s ESA, as it stated in its Order, the Board does have jurisdiction to review the off-site mitigation plan essential to the settlement agreement between the County and Hughes, and without which the County would not have issued the permit. *See Friends of the San Juans v. San Juan County, et al.*, SHB No. 08-005, 10-13 (June 26, 2008) (Order on Summary Judgment).<sup>3</sup> As the Board declared in that

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<sup>3</sup> Notably, it is not clear that the off-site mitigation in the settlement agreement resulted in a valid, enforceable contract. A contract requires consideration, an act or promise that is bargained for and given in exchange for another promise. *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994). Here, however, Hughes had performed the off-site mitigation

Order, “the SMA requires the Board to implement state shoreline management policies to minimize damage to the environment.” Order, at 12. Thus, while the Board did not directly evaluate the permit against the standards set forth in the ESA, it appropriately noted that the incorporation of the mitigation standards into the permit “merely informs the Board’s analysis under the standards it would apply in any event under the SMA and implementing regulations.” Order, at 13.

In addition, as the Board determined in the Order, it does have jurisdiction to evaluate provisions incorporated directly into the permit to the extent that issuance of that permit was dependant upon addressing impacts to eelgrass through the mitigation. Order, at 11; *see also Kailin v. Clallam County*, No. 63901-3-I, (Wn. Ct. App. Nov. 9, 2009) (concluding that “the shorelines hearings board [has] subject matter jurisdiction to consider appeals of aggrieved persons involving shoreline permits where consistency with the SMA and/or an applicable shoreline master program was at issue.”). Here, the Board merely analyzed the permit’s requirement to conduct mitigation against the standards established in the permit itself and for consistency with the SMA and SMP. Because the SMA and SMP

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over four (4) months before he executed a settlement agreement in exchange for the promise to perform that buoy removal. Thus, because Hughes had already fulfilled his promise in advance of entering into the agreement, the County could not have bargained for him to do so through its offer to settle the matter.

do not offer any standards for evaluating the appropriateness of off-site mitigation, the Board looked to other areas of the San Juan County Code for guidance, including the ESA's marine critical areas regulations. However, the Board found those provisions also lacked guidance for off-site mitigation and, in conjunction with the applicant's failure to design off-site mitigation that directly addressed likely impacts of the project, the Board correctly held that the proposed mitigation did not compensate for the project impacts.<sup>4</sup>

A determination that the Board could not evaluate shoreline substantial development permit terms for their efficacy in achieving shoreline protections mandated by the SMA and SMP would severely hamper the Board's ability to ensure development consistent with those laws. The Board must have authority to review those conditions of the permit that are so closely related to a project that it could not otherwise have been approved. Here, as the settlement agreement expressly stated, the County required "compensatory off-site mitigation measures to improve the marine environment" for undisputed eelgrass loss. Exh. R-Q at 5. To evaluate the dock proposal's environmental impacts against the

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<sup>4</sup> It should be noted that Friends also introduced evidence by the San Juan County Planning Department director who presided over the creation of the ESA's marine protection criteria that off-site mitigation, in contrast with on-site mitigation, was not contemplated when the County enacted those regulations. TR at 305:2-14.

dictates of the SMA and SMP to prevent or limit such impacts, the Board would have to evaluate the mitigation. And here, the substantial evidence demonstrated that Hughes did not attempt to ascertain environmental conditions at the project site and then design mitigation to address them and convinced the Board that the mitigation did not compensate for impacts. Decision, at COLs No. 16-17.

**F. Even If the Board Incorrectly Determined That the Off-Site Mitigation Did Not Compensate for Impacts, Resolution of That Issue Should be Subject to Remand.**

Even if this Court determines that the Board incorrectly found the mitigation insufficient, or that it did have standards by which to evaluate the off-site mitigation, the appropriate relief would be to remand to the Board for a hearing to determine whether the mitigation satisfies those standards. RCW 34.05.574. The APA authorizes a court to: “(a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.” Thus, the superior court could not have appropriately found that the off-site mitigation rendered the permit consistent with the SMA and SMP, and to the extent that this Court disagrees with the Board’s finding, it must remand the matter to the Board. *See Herman v. Shorelines Hrgs Bd.*, 149 Wn. App.

444, 455, 204 P.3d 928 (2009) (“[a] court considering a petition for judicial review may not generally...decide disputed factual issues. RCW 34.05.558 (judicial review confined to agency record)).

**G. Substantial Evidence and the Law Support the Board’s Determination that the Off-Site Mitigation Did Not Address Project Impacts.**

Friends identified several inadequacies in the off-site mitigation in its Brief of Appellant, including its failure to attempt to replace the quantity and quality of habitat likely to be lost with comparable habitat. Indeed, Hughes impliedly concedes that he failed to compensate for the dock impacts with the same quality habitat by asserting that “[a]ccepting the logic of the Board, which is that the mitigation might not provide as good of habitat as that which might be lost, would be the kiss of death for any eelgrass mitigation project, now or in the future.” Brief of Respondent, at 20.<sup>5</sup> Thus, Hughes asks this court to approve a standard that would allow the incremental degradation of shoreline habitat through individual mitigation projects that would fail to replace the quality and quantity of impacted habitat.

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<sup>5</sup> Hughes also asserts that Chris Fairbanks, one of his expert witnesses, opined that both sites provide holding habitat for herring to congregate, suggesting that they provide similar quality habitat. On cross examination, however, Mr. Fairbanks clarified that he had earlier stated his belief that eelgrass at the dock site provides better biological services than eelgrass at the mitigation site. TR at 396:2-9.

In addition, the mitigation plan and results suffered from numerous flaws in their methodology. For example, as demonstrated by Friends' Exhibit P-MMM, each round of underwater marine surveys used different reference points and a different number of transects and even found that the same research sites along the transects were at different subtidal elevations. This last point is remarkable because there was no geologic event that could explain the movement of the seafloor. Even the amount of recovery could not be reported clearly; although Chris Fairbanks testified at hearing that eelgrass recovery extended to 2800 square feet, the habitat management plan stated that the scour area extended to only 1500 square feet. TR at 324:18-22; Exh. R-S at 3.

**H. *May v. Robertson* Distinguished.**

Hughes relies for support on a recent decision from Division II of the Washington Court of Appeals, *May v. Robertson*, 218 P.3d 211 (Wn. Ct. App. Oct. 13, 2009). However, that decision does not directly control this appeal. In addition, while that decision has a few basic elements in common with the present matter, such as its focus on a shoreline development, the fine details differ significantly. As an initial matter, the court there evaluated the Pierce County Shoreline Master Program and, in fact, expressly distinguished it from the more rigorous criteria that the SMP applies to dock requests. *E.g., id.* at 223 (San Juan County's

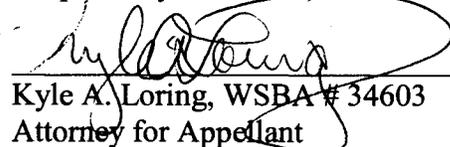
regulations prohibit piers that will “impair scenic values,” whereas the Pierce County regulations there commanded only that the pier not “unduly impair” area views). In addition, the structure in question in *May* was a joint-user pier, rather than a single-user pier, ramp, and float, and the nearest sensitive marine environment, eelgrass, lay several hundred feet distant, rather than directly beneath the proposed dock. *Id.* at 227. Thus, the *May* decision does not apply by analogy to the present matter.

**I. Conclusion.**

The Board’s decision should be upheld. Substantial evidence supports the Board’s findings that Hughes had adequate and feasible facilities for accessing his property on Pearl Island. In addition, the off-site mitigation plan does not directly address likely impacts, and the Board’s determination to that effect should not be disturbed. Friends respectfully requests statutory fees and costs pursuant to RAP 14 and RCW 4.84.010 and reimbursement of costs and fees paid below at superior court.

DATED this 8th day of March, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
Kyle A. Loring, WSBA # 34603  
Attorney for Appellant  
FRIENDS OF THE SAN JUANS

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

CHRIS HUGHES, dba )  
 ADMINISTRATORS & )  
 CONSULTANTS, LLC, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 FRIENDS OF THE SAN JUANS, )  
 )  
 Appellant, )  
 )  
 SAN JUAN COUNTY, a political )  
 subdivision of the State of Washington; )  
 SHORELINES HEARINGS BOARD, an )  
 agency of the State of Washington, )  
 )  
 Necessary Parties. )  
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DECLARATION  
OF  
SERVICE

FILED  
 COURT OF APPEALS  
 STATE OF WASHINGTON  
 2010 MAR -9 AM 11:07

I, Jana G. Marks, certify that I am a citizen of the United States and a resident of San Juan County, Washington State. I am over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto. On this day I caused to be served a true and correct copy of:

• **Reply Brief of Appellant**

in the above-numbered cause on the following persons by hand:

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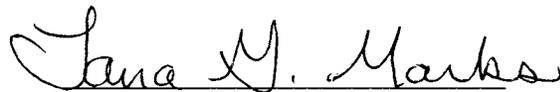
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**Original** "Reply Brief of Appellant" mailed by First Class Us Mail to:

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Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 8<sup>th</sup> day of March, 2010 at Friday Harbor, San Juan  
County, Washington.



Jana G. Marks, Office Manager  
Friends of the San Juans