

ORIGINAL

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**IN THE SUPERIOR COURT FOR SNOHOMISH COUNTY, WASHINGTON**

FRIENDS OF GUEMES ISLAND, a  
Washington non-profit corporation,

Plaintiff,

vs.

SKAGIT COUNTY BOARD OF  
COUNTY COMMISSIONERS and  
SKAGIT COUNTY,

Defendants.

NO. 06-2-09088-6

DECISION

THIS MATTER relates to Skagit County's decision to extend the scheduled ferry runs for the Anacortes to Guemes Island ferry from 6:00 p.m. to 10:00 p.m. Monday through Thursday, thereby adding five new runs per evening on those days. Friends of Guemes Island, plaintiff, which is an organized group of residents on Guemes Island, challenged this schedule change under RCW 43.21C.075. The focus of plaintiff's challenge is the county's threshold determination that there would be no significant adverse environmental impact arising from a mere change to the ferry schedule, and therefore no Environmental Impact Statement (EIS) needed to be prepared.

1 The court, having heard the evidence presented at trial on June 7 and 8, 2007, and the  
2 argument of counsel, finds as follows.

3 **PART I – FACTS**

4 1.1. Guemes Island is an 8.2 square mile island off the coast of Anacortes, Skagit  
5 County Washington. It is rural in character, and is populated by some 600 residents, which  
6 swells to some 2,000 residents during the seasonal recreational months. A colorful description of  
7 the island is found in a Supreme Court decision captioned *Smith v. Skagit County*, 75 Wn.2d 715,  
8 453 P.2d 832 (1969).

9 1.2. Since the early 1900s the island has been served by ferry service from Anacortes.  
10 It is approximately a five minute ferry trip from dock to dock. In 1964, Skagit County took over  
11 the ferry as part of its transportation system, and has managed it ever since.

12 1.3. Ferry service on Monday through Thursday has always ended at 6:00 p.m.,  
13 subject to a "no vehicle left behind policy" of continuing clean-up runs at the end of each  
14 weekday to accommodate any and all vehicles waiting in line at 6:00 p.m. This weekday  
15 schedule has contributed to a culture on the island that has discouraged off-island commuters and  
16 families with school-aged children, and has made the island a haven for persons with lifestyles  
17 that do not depend on convenience and access to urban amenities. The island is generally  
18 populated at this time with retired persons, artists, and seasonal vacationers.

19 1.4. In 1977, the county proposed to replace the 9-car ferry service to Guemes Island  
20 with a 22-car ferry. The county prepared a full EIS before agreeing to that replacement. That EIS  
21 concluded that natural growth trends of the Guemes Island population are the driving force  
22 behind demand for larger ferries and more frequent ferry service, not vice versa. It also stated,  
23 however, that a definitive ferry schedule (with no unscheduled "on-demand" runs) and minimum  
24 runs during commute hours, would perhaps be an effective means of moderating population  
25 growth on the island so as to preserve the rural lifestyle for present and future generations. It  
26 concluded that whereas changes in ferry sizing would not have a significant effect on population,  
27 housing or land use, ferry scheduling changes would.

28 1.5. In 1991 through 1992, the United States Geological Service (USGS) studied  
29 ground water quality and availability on Guemes Island, and published USGS Report No. 94-  
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1 4236. It found that ground water is the sole source of freshwater for the residents of Guemes  
2 Island, and the island was officially designated as a "sole source aquifer" by the Environmental  
3 Protection Agency on December 1, 1997. The USGS report also found that said natural resource  
4 was inadequate to support the then predicted growth trend on the island, and that there is a  
5 significant potential for seawater intrusion into the Guemes aquifers in the foreseeable future.  
6 This resulted in the county adopting an interim seawater intrusion policy on December 12, 1994,  
7 placing limitations on land development in areas where inadequate ground water is available.

8 1.6. In 1997, Skagit County adopted its Growth Management Act Comprehensive  
9 Land Use Plan. An EIS was prepared in conjunction with this document. Nothing in said plan or  
10 EIS made any analysis of a cause and effect relationship between ferry service and population  
11 growth on Guemes Island.

12 1.7. On March 28, 2002, the county commissioned Berk and Associates to perform the  
13 Guemes Island Ferry Operations Management Analysis. The fifty recommendations in that  
14 analysis were accepted by the county in Resolution R20030074. Nine of those recommendations  
15 pertained to the sailing schedule of the ferry. On January 27, 2003, the county began a plan of  
16 implementing these recommendations, and established the Guemes Island Ferry Schedule and  
17 Fare Task Force to spearhead that implementation. The Task Force was in existence from March  
18 11, 2003 until December 31, 2003, at which time it submitted its recommendations to the county  
19 commissioners.

20 1.8. On February 9, 2004, the county commissioners accepted the Task Force  
21 recommendations. These recommendations included the following: The ferry schedule would  
22 continue to end at 6:00 p.m. on weekdays, with a no vehicle left behind policy in effect for the  
23 close of the day. The reasons given for maintaining the status quo as to weekday schedules were  
24 the following:

- 25 (a) Extending the weekday schedule would increase operating costs and cause a fare  
26 increase;
- 27 (b) The residents of Guemes Island could not reach a clear consensus on extending the  
28 weekday schedule; and  
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1 (c) The consequences of extending the weekday schedule needed to be evaluated in a  
2 more comprehensive way. The subarea comprehensive land use planning process was  
3 suggested as an opportunity for this evaluation.

4 Finally, the county established an Operations and Performance Roundtable so that  
5 Guemes Island residents, through their ferry committee, could have ongoing dialogue and  
6 collaboration with the Skagit County Department of Public Works with respect to all issues  
7 relating to the Guemes Island ferry.

8 1.9. On February 10, 2003, the county established a Guemes Island Planning Advisory  
9 Committee for the purpose of initiating a new land use comprehensive plan for a subarea of the  
10 county consisting of Guemes Island. On January 24, 2005, the county approved a work plan for  
11 the Guemes Island Advisory Committee, charging it to study, among other things, future lot  
12 sizes, demographics, the ferry system, the aquifer, and seawater intrusion issues affecting  
13 Guemes Island. Those studies are now actively underway, may ultimately result in an EIS, and  
14 will be presented to the county commissioners for review and approval.

15 1.10. On May 30, 2006, the county adopted Resolution R20060184. That resolution  
16 modified the Guemes Island ferry schedule for a two-year trial period through June 2008, by  
17 adding five additional ferry runs on Monday through Thursday evenings between 6:30 p.m. and  
18 10:00 p.m., and ending the policy of having ferry service informally continue at after the last  
19 scheduled run until no vehicle was left behind at the Anacortes dock.

20 This resolution apparently abandoned the county commissioners' 2004 commitment to  
21 defer consideration of ferry schedule changes until a comprehensive evaluation of all  
22 consequences could be conducted as part of the Guemes subarea planning process. It also  
23 apparently preempted the work plan adopted by the county commissioners in 2005, for the  
24 Guemes Island Planning Advisory Committee, which work plan is currently being implemented  
25 and studies the overall land use and environmental consequences of modifying ferry schedules.

26 Instead, the county commissioners opted for a more practical approach; that is, to try the  
27 new ferry schedule out for two years and study its real life impacts thereafter. Relying upon this  
28 approach, the county did no environmental assessments of the proposed ferry schedule  
29 modifications and did not even issue a determination of non-significance (DNS). When the  
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1 environmental assessment, including a decision on whether an EIS is required, can be performed  
2 at that time, if the county decides to pursue a permanent schedule change.

3         2.2. RCW 43.21C.034 and WAC 197 11-090 authorize government agencies to use, in  
4 whole or in part, existing environmental documents if those documents adequately address all  
5 relevant environmental considerations.

6         In the instant case, both parties rely heavily upon preexisting studies and assessments,  
7 dating back as far as 1977. These assessments related to land use planning for Guemes Island,  
8 population trends, and ground water and ferry scheduling considerations. The plaintiffs argue,  
9 however, that these assessments never address the nexus between extending a ferry schedule to  
10 include evening commute hours and the acceleration of population growth and change in  
11 demographics on the island. The county, on the other hand, argues that said nexus is speculative  
12 at this time, and that a two-year trial period is needed before meaningful analysis can be  
13 conducted.

14         2.3. RCW 43.21C.030 and WAC 197-11-330 require a full EIS for all major actions  
15 which significantly affect the quality of the environment. WAC 197-11-060(4) does not,  
16 however, require consideration of impacts which are merely speculative, but it does require  
17 consideration of direct and indirect impacts caused by a proposal. For example, consideration of  
18 growth impacts caused by a proposal would be required, as well as the likelihood that a present  
19 proposal will serve as a precedent for future actions thereby causing more growth and  
20 compounding environmental impacts.

21         In the case of *King County v. Washington State Boundary Review Board for King County*,  
22 122 Wn.2d 648, 860 P.2d 1024 (1994), at page 664, the court warned about making preliminary  
23 decisions which might "snowball" and acquire virtually unstoppable administrative inertia. The  
24 court stated that the risk of postponing environmental review is that dangerous incrementalism  
25 will occur where the obligation to decide is postponed successively while project momentum  
26 builds. ". . . When government decisions may have a snowballing effect, decisionmakers need to  
27 be apprised of the environmental consequences before the project picks up momentum, not  
28 after."

29         See also *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976), at page 344:  
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1           Implicit in SEPA is the requirement that the decisionmakers consider more  
2           than what might be the narrow, limited environmental impact of the  
3           immediate pending action. The agency cannot close its eyes to the ultimate  
4           probable environmental consequences of its current action.

5           2.4.    In the instant case the county issued a DNS for a two-year trial modification to the  
6           ferry schedule. To support such a DNS, the record of the county's action must demonstrate that  
7           the environmental factors were considered in a manner sufficient to amount to prima facie  
8           compliance with SEPA. See *Sisley v. San Juan County*, 89 Wn.2d 78, 569 P.2d 712 (1977), at 85.  
9           It must also be demonstrated that the county actually considered all relevant environmental  
10          impacts of the proposed action. See *Lassila v. Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978), at  
11          814.

12          2.5.    When a DNS is challenged in court, the standard of review by the judge is  
13          whether the government agency's decision was "clearly erroneous." That is, despite whatever  
14          supporting evidence the agency may have in its records, the court can overturn a DNS if it can  
15          firmly conclude that a mistake has been committed. See *Sisley v. San Juan County*, at 84.

16          2.6.    The focus of the court's inquiry, however, is simply whether the government  
17          agency thoroughly considered all significant environmental impacts. After such consideration,  
18          the government agency is still free to disregard such impacts, and make an environmentally  
19          insensitive decision anyway. That is not the court's concern under SEPA; that is, instead, a  
20          political concern for the Skagit County Board of County Commissioners and their constituents.  
21          See *Public Utility Dist. No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn.  
22          App. 150, 151 P.3d 1067 (2007), at page 158.

23          2.7.    RCW 43.21C.090 provides that when a court reviews a government agency's  
24          decision to issue a DNS and opt out of an EIS, the court should accord the agency's decision  
25          "substantial weight."

26          In the instant case, however, the county's DNS documents were all prepared after this  
27          lawsuit was filed and pending. They were prepared for litigation purposes and not for use by the  
28          county commissioners in deciding whether to modify the ferry schedule or not. In fact, they were  
29          not even available until months after the resolution modifying the ferry schedule had already  
30          been passed and implemented.

1           Although these DNS documents are well drafted and helpful to the court, I consider them  
2 to be litigation pleadings prepared in an advocacy context, and I will not give them the  
3 "substantial weight" which would otherwise be appropriate.

4           2.8.     Finally, WAC 197-11-704(2) categorizes all actions as being either "project  
5 actions" or "non-project actions." It is admittedly a close call as to whether the county's  
6 resolution modifying the ferry schedule in the instant case was a project or a non-project action.

7           The plaintiffs argue that it is a project action because adding ferry runs to Guemes Island  
8 after 6:00 p.m. on weekdays is equivalent to building a whole new transportation system or  
9 facility. For example, they argue it is like a new bridge to the island being built just for the  
10 benefit of commuters coming home after work.

11           I choose, however, to categorize it as a non-project action, that is, a mere change in the  
12 program or plan of operation for an existing transportation system. Transportation programs are  
13 often used to create incentives or disincentives for the public who use existing roads or ferries,  
14 and they are always subject to modification. Examples are:

- 15           (a) Car pooling programs;
- 16           (b) Park and ride programs;
- 17           (c) Public transportation incentives;
- 18           (d) HOV lanes;
- 19           (e) Increases or decreases in fares, fees and tolls; or
- 20           (f) In the instant case, establishing or modifying ferry schedules to either encourage or  
21 discourage ferry use after 6:00 p.m. on weekdays.

22           These are not new transportation projects, like a new bridge or a new highway  
23 interchange. These, instead, are new programs for the operation of an existing transportation  
24 system. These should, therefore, be categorized as non-project actions under SEPA.

25           Per WAC 197-11-442(1), government agencies have more flexibility in preparing  
26 environmental documents on non-project actions because there is normally less detailed  
27 information available on their possible environmental impacts. Such documents need only  
28 analyze environmental impacts at a highly generalized level of detail. See *Klickitat County*  
29

1 *Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 860 P.2d 390 (1993), at  
2 641 through 642.

### 3 **PART III – ENVIRONMENTAL IMPACT**

4 Plaintiff's basic premise is that the proposed ferry schedule change will induce  
5 accelerated growth on the island, and change the demographics, thereby leading to  
6 environmental degradation, particularly with respect to available ground water.

7 3.1. I find that historically Guemes Island does have a slower growth rate than the rest  
8 of Skagit County. Its growth rate has been between 1.1 percent and 2.9 percent for the past 16  
9 years, whereas Skagit County in general has grown at the rate of 10 percent per year, at least for  
10 the past six years.

11 I further find that the demographics of Guemes Island also differ from the rest of Skagit  
12 County, as follows:

- 13 (a) On Guemes Island, - the average number of persons per household is 1.9. In Skagit  
14 County generally, the average number of persons per household is 2.6;
- 15 (b) Only one-third of the residents of Guemes Island commute to work during the week;
- 16 (c) The median age of Guemes Island residents is 53 years old;
- 17 (d) Children are only 12 percent of the population of the island;
- 18 (e) Residents between 20 and 40 years of age represent only 6 percent of the population;
- 19 (f) 50 percent of the resident households on Guemes Island collect Social Security; and
- 20 (g) Over 50 percent of all houses on the island are vacant most of the year, although 80  
21 percent of those vacant houses are seasonally occupied for recreational purposes.

22 3.2 These statistics paint a picture of Guemes Island as being a unique enclave in  
23 Skagit County. This is apparently the result of a variety of factors, including the following:

- 24 (a) The inconvenience of the weekday ferry schedule before the recent change (per the  
25 argument of the plaintiffs);
- 26 (b) The constraints of limited potable water and limited soil suitable for on-site septic  
27 systems;
- 28 (c) The lack of on-island employment opportunities;
- 29 (d) The lack of convenient commercial services;
- 30

- (e) The relative lack of public services;
- (f) The relative inaccessibility of urban amenities; and
- (g) A variety of other real estate marketing factors.

3.3. Plaintiff argues that the ferry schedule is the primary factor among all those listed above which has constrained growth and demographic development. They point, for example, to the experience on Anderson Island in Pierce County, where the sudden addition of three new ferry runs per day, including a commute hour run at 7:30 p.m. instituted in 2004, caused an unprecedented housing and population boom which took over and transformed the island's former rural character in just three years. This outcome, incidentally, was not predicted by a consultant study which Pierce County had commissioned. That study projected a mere continuation of historical growth and demographics for 20 years into the future regardless of the ferry schedule.

3.4. The plaintiff's example of Anderson Island, however, is countered by examples of Shaw, Lopez and Lummi islands. All of these islands have a long history of frequent scheduled ferry service, even during commute hours, but none has seen a growth or development boom to date. Their growth rates remain at 2.5 percent per year, and their residential build-out remains well under 50 percent. What explains these differences from the Anderson Island experience? Which island is the best predictor for Guemes Island?

3.5. I must conclude that it remains uncertain and speculative that ferry scheduling considerations can be fairly characterized as being the primary factor in inducing growth and development of island communities. This issue needs more study before it can be meaningfully evaluated, and before it alone should trigger an EIS.

Even more study, however, is somewhat problematic. Look at what happened on Anderson Island. A consultant's study of the induced growth issue and its long-term consequences proved to be 100 percent wrong. Perhaps the Skagit County Commissioners have a better approach; that is, to do a two-year trial period with the modified ferry schedule, and then step back and evaluate the actual results. Under this controlled experiment it can more reliably be determined whether ferry schedules themselves induce growth and development, and at what rate.

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## PART IV – SEPA COMPLIANCE OF THE COUNTY’S DNS

4.1. In the process of evaluating the proposed ferry schedule change, the Skagit County Department of Public Works issued two environmental checklists, one on July 27, 2006, and an extensive addendum on April 9, 2007. These checklists were not created in a vacuum. They drew upon land use plans, development regulations, consultant's studies relating to ferry service, consultant's studies relating to ground water and seawater intrusion, citizen committee recommendations, task force recommendations, a capital facilities plan for the ferry, and county commissioner resolutions relating to all of the above. These studies and documents spanned the years from 1977 through 2006, almost three decades.

4.2. It cannot be argued that the county failed to consider the environmental impacts covered in this extensive list of studies and documents. After all, the county itself generated or commissioned 100 percent of the studies and documents itself. Although it can be argued that the county did not base its ultimate decision to extend the ferry schedule on an environmentally sensitive interpretation of the data and predictions in these studies and documents, that argument is beyond the scope of SEPA and beyond the scope of this trial. That is a policy issue in the political realm that must be left to the discretion of the county commissioners and their constituents.

4.3. There are, however, some omissions of significance in the county's environmental review which are of concern to the Court, and which are within the Court's SEPA jurisdiction.

One omission relates to ground water issues. It has been over ten years since any comprehensive study has been done of these issues for Guemes Island, or since interim regulations relating to seawater intrusion were adopted by the county. Even ten years ago the studies predicted serious problems were fast approaching. San Juan islands with similar hydrogeological characteristics have identified these same problems, and two of those islands, Lopez and Orcas, have been forced to impose temporary building and occupancy moratoriums.

Skagit County must realistically foresee the same crisis for Guemes Island, and should be preparing for it, but the county has not even started a long-term watershed resource planning study for Guemes Island as provided for in RCW 90.82.

1           The environmental checklist for the ferry schedule project has two paragraphs relating to  
2 ground water and associated impacts. The county filled in these paragraphs by simply stating that  
3 no such impacts would result or merited consideration. This answer certainly highlights the  
4 county's generalized blind spot relating to the ground water crisis facing Guemes Island, and the  
5 lack of serious long-range planning with respect to the same. However, the cause and effect  
6 relationship between extending the ferry schedule and exacerbating the ground water crisis is  
7 speculative at best. The nexus between the two is dependent upon the theory that a commute  
8 hour ferry schedule will induce accelerated population growth, and change the demographics of  
9 the island's residents to such an extent that ground water resources will be adversely affected.  
10 Without such a nexus, a generalized reference to the ground water situation on Guemes Island,  
11 even a reference which is based upon 10-year-old data, is legally sufficient for a non-project  
12 action such as is proposed here.

13           4.4. The court must next look closely at the environmental checklist to see if the theory of  
14 induced growth was adequately acknowledged, considered, and evaluated by the county. There  
15 are two paragraphs in the environmental checklist which relate to issues of induced growth of  
16 vehicular trips, ferry usage and land development. However, these paragraphs conclude that  
17 these are not issues triggered by a mere extension of a ferry schedule. Therefore, no  
18 consideration or analysis was performed. Induced growth resulting from a commute hour ferry  
19 schedule was basically off the county's radar screen, and was not brought to the attention of the  
20 county commissioners when they proceeded to adopt the resolution extending ferry service in  
21 2006.

22           4.5     This potentially serious omission, however, must be put into the context of the  
23 actual wording of the resolution adopted in 2006. That resolution only approved a two-year trial  
24 program of evening ferry service on weekdays. The trial period automatically expires on June 30,  
25 2008, and the ferry schedule then automatically reverts to the previous schedule with the last  
26 ferry leaving for Guemes Island at 6:00 p.m. on weekdays.

27           The resolution specifically contemplates that at the end of the trial period, county staff  
28 will evaluate the results of the schedule change and report back to the county commissioners  
29 before any further action is taken.  
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1 This somewhat vague plan for evaluation and action at the end of the trial period was  
2 fortunately elaborated upon by the county's deputy prosecuting attorney, Mr. A. O. Denny, at the  
3 conclusion of the trial of this case last week. Mr. Denny's transcribed remarks have been filed as  
4 a part of the record of this case. The significance of these remarks is that Mr. Denny, as a  
5 speaking agent for the county, clearly stated that the original environmental checklists and DNS  
6 documents dealt only with a temporary two-year trial ferry schedule change, and that if this is  
7 ever converted to a permanent schedule change it will be a whole new action requiring another  
8 complete environmental review with either a new DNS <sup>Very Possibly</sup> or an EIS, and the original DNS JNA  
9 documents could no longer be relied upon.

10 These remarks are consistent with my earlier conclusion relating to the speculative nature  
11 of the induced growth theory. The first, and most appropriate time to meaningfully evaluate  
12 whether a ferry schedule change will or will not probably induce growth and development on  
13 Guemes Island is after a controlled experiment is conducted for a two-year trial period. That is  
14 preferable to some isolated and theoretical consultant's study such as was done for Anderson  
15 Island and later proved to be 100 percent wrong and misleading.

16 4.6. Therefore, I will hold the county to Mr. Denny's admissions and helpful  
17 elaborations. At the end of the two-year trial period the ferry schedule change will automatically  
18 revert to its former 6:00 p.m. cut-off, and no evening weekday extension will again be  
19 considered unless and until there is a new, thorough, and SEPA compliant environmental review,  
20 including, among other issues, the probability of induced growth, and the direct and indirect  
21 adverse environmental impacts resulting from the same.

#### 22 PART V - CONCLUSIONS AND DECISION

23 On the basis of the foregoing, this court hereby enters the following conclusions:

24 5.1. The Skagit County staff and responsible SEPA official considered all known and  
25 non-speculative environmental impacts of an extended ferry schedule for the Guemes Island  
26 ferry over a two-year trial period of time. This consideration was in prima facie compliance with  
27 SEPA.

28 5.2. The DNS issued by Skagit County's responsible SEPA official for said action was  
29 not clearly erroneous. It is hereby AFFIRMED subject to the following condition:  
30

1 At the end of the two-year trial period, on June 30, 2008, the ferry schedule change will  
2 automatically revert to its former 6:00 p.m. cut-off, and no weekday evening extension  
3 will again be considered unless and until there is a new, thorough, and SEPA compliant  
4 environmental review, including, among other issues, the probability of induced growth,  
5 and the direct and indirect adverse environmental impacts resulting from the same.

6 This condition, however, is to be narrowly construed, and does not relate to other routine  
7 ferry schedule changes which have no arguable growth inducing features.

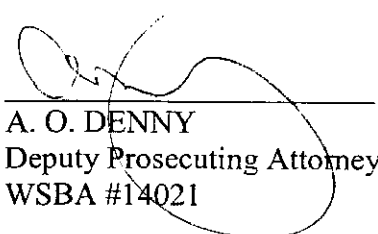
8 5.3 The plaintiffs' request for injunctive relief against the county is denied without  
9 prejudice.

10 ~~5.4 Skagit County is awarded statutory attorney's fees of \$200.00.~~ (LHA)

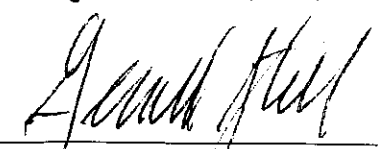
11 SIGNED this 5<sup>th</sup> day of October, 2007.

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15 JAMES H. ALLENDOREFER  
16 Judge

17 Presented by:

18   
19 A. O. DENNY  
20 Deputy Prosecuting Attorney  
21 WSBA #14021

22  
23 Approved as to form, consent to entry  
24 granted and service of copy accepted  
25 this 5 day of November, 2007.

26   
27 GERALD STEEL  
28 Attorney for Plaintiff  
29 WSBA #31084