

**RECORD OF THE PROCEEDINGS  
SKAGIT COUNTY BOARD OF COMMISSIONERS  
MONDAY, SEPTEMBER 13, 2004**

|                         |  |
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| 8:00 a.m. – 8:45 a.m.   | Work Session – Commissioners   |
| 8:45 a.m. – 9:30 a.m.   | Work Session – County Administrator  |
| 10:45 a.m. – 11:00 a.m. | Closed Record Hearing for Preliminary Plat Approval for Willabelle Estates Land Division (PL00-0861) submitted by Alfred Carlson |
| 11:00 a.m. – 11:25 a.m. | Consent Agenda and Miscellaneous Items   |
| 11:25 a.m. – 11:30 a.m. | Proclamation for National Preparedness and Weather Radio Awareness Month   |
| 11:30 a.m. – 11:45 a.m. | Public Comment Period  |
| 2:00 p.m. – 2:45 p.m.   | Update on Instream FLOW Rule Appeal by Mentor Law Firm   |
| 3:00 p.m. – 4:30 p.m.   | Executive Session (If Needed) – Personnel, Litigation and Land Acquisition   |

The Skagit County Board of Commissioners met in regular session on Monday, September 13, 2004, with Commissioners Ted W. Anderson, Don Munks and Kenneth A. Dahlstedt present.

**CLOSED RECORD HEARING FOR PRELIMINARY PLAT APPROVAL FOR WILLABELLE ESTATES LAND DIVISION (PL00-0861) SUBMITTED BY ALFRED CARLSON**

Brandon Black, Associate Planner, provided background information on the Willabelle Estates preliminary plat request (PL00-0861) submitted by Alfred Carlson. It is for the creation of a nine lot Conservation and Reserve Department (CaRD) land division on approximately nine acres along Lake McMurray.

Since no one was present to comment, Commissioner Munks moved and Commissioner Dahlstedt seconded the motion to close the hearing. The motion carried unanimously.

Commissioner Munks moved to approve the preliminary plat of Willabelle Estates. Commissioner Dahlstedt seconded the motion, which carried unanimously. **(Resolution No. R20040324)**

**CONSENT AGENDA**

Commissioner Munks motioned to approve the Consent Agenda for Monday, September 13, 2004, items 1 through 20. Commissioner Dahlstedt seconded the motion, which passed unanimously.

**COMMISSIONER'S OFFICE:**

1. Record of the Proceedings for Tuesday, September 7, 2004.

**ASSIGNED COUNCIL:**

2. Professional Services Contract with Corbin Volluz, Attorney at Law, to provide indigent defense representation for conflict cases. The contract is effective from July 1, 2004, through July 30, 2005. Compensation shall vary based on the services provided. **(Contract No. C20040411)**

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3. Professional Services Contract with Howson Law Office, PLLC, Attorneys at Law, to provide indigent defense representation for conflict cases. The contract is effective from July 1, 2004, through July 30, 2005. Compensation shall vary based on the services provided. **(Contract No. C20040412)**

**BUDGET AND FINANCE:**

4. Amendment No. 2 to **Contract No. C20030003** with Bullerville Utility District to extend the agreement for an additional 24 months and to change the County's representative. All other terms and conditions shall remain in effect. **(Amendment No. A20040169)**

**CONSERVATION FUTURES:**

5. Amendment No. 2 to **Contract No. C20020335** with U.S. Department of Agriculture (USDA), National Resources Conservation Service (NRCS), to amend the agreement to purchase conservation easements under the Farmland Protection Program by extending the completion date from September 30, 2004, to December 31, 2004. **(Amendment No. A20040170)**

**EMERGENCY MANAGEMENT:**

6. Resolution to establish a Hazard Mitigation Planning Committee for Skagit County. **(Resolution No. R20040325)**

**HUMAN SERVICES:**

7. Resolution to supersede **Resolution No. 12602** and authorize the Skagit County Human Services Department, instead of Skagit Recovery Center, to receive the established 7% contributions from liquor profits and tax for the purpose of assuring that Skagit County citizens receive detoxification services. The effective date is April 1, 2004. **(Resolution No. R20040326)**
8. Amendment No. 2 to **Contract No. C20030356** with Sea Mar Community Health Services to reduce the funding by \$250 for a new total of \$95,015. All other terms and conditions shall remain in effect. **(Amendment No. A20040171)**
9. Amendment No. 1 to **Contract No. C20030473** with Skagit County Community Action Agency (SCCAA) to increase the compensation for Rebecca Clark by \$1,500 for a new total of \$26,500, and extend the contract for two months to December 31, 2004. **(Amendment No. A20040172)**

**INFORMATION SERVICES:**

10. Contract with Diversint for software and hardware support. The agreement shall be effective September 13, 2004, and shall continue through September 12, 2006. Compensation shall be based on incremental usage and is expected to be approximately \$79,200 annually. **(Contract No. C20040413)**
11. Amendment No. 1 to Interlocal Agreement **No. C20030176** with the Skagit County Emergency Medical Services Commission to provide access and support of real-time 911 data. The amendment is effective September 1, 2004. Estimated cost for installation is \$7,000. **(Amendment No. A20040173)**
12. Resolution to authorize transfer of surplus computer equipment to the Burlington-Edison School District. **(Resolution No. R20040327)**

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**PLANNING & PERMIT CENTER:**

13. Amendment No. 1 to **Contract No. C20040062** with Kelly Services, Inc. for \$5,000 in additional compensation for front-desk reception coverage for a new contract total of \$10,000. All other terms and conditions shall remain in effect. **(Amendment No. A20040174)**

**YOUTH AND FAMILY SERVICES:**

14. Personal Services Agreement with Catholic Community Services to provide specialized child, adolescent, adult and/or family assessment, evaluation and treatment services. The agreement shall commence on July 1, 2004, and continue until June 30, 2006. Compensation shall not exceed \$10,000 annually. **(Contract No. C20040414)**

**PUBLIC WORKS:**

15. Resolution to authorize the disposal of excess property, which authorizes the transfer of a 1997 Ford Crown Victoria to Skagit 911 in exchange for a 1991 Chevrolet Caprice Sedan. **(Resolution No. R20040328)**
16. Coordinated Prevention Grant with the Department of Ecology to provide up to \$63,700 of funding to Solid Waste for the fluorescent bulb recycling project and an assistant for the moderate risk waste facility. The grant is effective October 1, 2004, and will continue through September 30, 2006. **(Contract No. C20040415)**
17. Vendor Services Agreement with Calypso Restoration to provide planting and/or vegetation maintenance services for the Martin Slough CREP site and the Brickyard Creek Sub Flood Control Zone. The agreement is effective August 31, 2004, and will continue through August 31, 2006. Compensation shall be \$54,000. **(Contract No. C20040416)**
18. Conservation Reserve Program (CREP) Contract with Skagit Conservation District for reimbursement costs for planting/and or vegetation costs for Martin Slough. It will also fund rental payments to the County for 15 years at approximately \$6,500 per year. The contract is effective from October 1, 2004 through September 30, 2019. **(Contract No. C20040417)**
19. Amendment No. 1 to Personal Services Agreement **No. C20040379** with Skagit Watershed Council to correct the effective date to begin on May 18, 2004, and continue through August 31, 2004. All other terms and conditions remain the same. **(Amendment No. A20040175)**
20. Resolution to award the contract and the construction contract for the Guemes Ferry Terminal Repair Project. The contract was awarded to the low bidder, Manson Construction, in the amount of \$598,000. The contract is effective upon execution. **(Resolution No. R20040329); (Contract No. C20040418).**

**MISCELLANEOUS ITEMS**

1. Vouchers audited and certified by the auditing officer as required by R.C.W. 42.24.080, and those expense reimbursement claims certified as required by R.C.W. 42.24.090, have been recorded on a listing, which has been made available to the Board.

As of this date, September 13, 2004, the Board by majority vote, did approve for payment those vouchers included in the above-mentioned list and further described as follows:

ACH Transfer Request Form and Certification to Premera Blue Cross from Clearing Fund 696 in the total dollar amount of \$95,537.34 (Transmittal No. C-118-04); and

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Warrants numbered 178899 through 179267 from Clearing Fund 696 in the total dollar amount of \$4,320,244.93 (Transmittal No. C-119-04); and

Payroll warrants numbered 963955 through 964095 in the total dollar amount of \$173,183.20 (Transmittal No. P-33-04); and

Payroll warrants numbered 152114 through 153011 in the total dollar amount of \$1,066,248.30 (Transmittal No. P 34-04).

2. Marge Swint of the Planning and Permit Center requested a date and time for a closed record hearing for the preliminary plat approval for Bay Meadows, a 31-lot (CaRD) land division located on Josh Wilson Road. Commissioner Munks moved that the hearing on the preliminary plat approval for Bay Meadows be held on Tuesday, September 21, 2004, at 10:00 a.m. Commissioner Dahlstedt seconded the motion, which carried unanimously.
3. Audrey Smith, Skagit County Fair Manager, presented a Resolution to request that \$500 be authorized as a revolving fund for petty cash for the upcoming garage sale. Commissioner Munks moved and Commissioner Dahlstedt seconded the motion to approve the Resolution as outlined. The motion carried unanimously. **(Resolution No. R20040330)**

**PROCLAMATION FOR NATIONAL PREPAREDNESS AND WEATHER RADIO AWARENESS MONTH IN SKAGIT COUNTY**

Commissioner Munks read and moved approval of a proclamation declaring September as National Preparedness and Weather Radio Awareness Month in Skagit County. Commissioner Dahlstedt seconded the motion, which carried unanimously.

**PUBLIC COMMENT PERIOD**

No one was present to speak during the public comment period.

**UPDATE ON INSTREAM FLOW RULE APPEAL BY MENTOR LAW FIRM**

Joe Mentor, Jr., who is acting as a Special Deputy Prosecuting Attorney retained by the County to provide advice and counsel on water related issues, began the report. He stated that the Mentor Law Firm has been working for the County on this issue since October 1, 2004. The last briefing by the firm was on April 2004. Mr. Mentor said that the County has been named as a defendant in a lawsuit that was filed just over a week ago in Snohomish County Superior Court by the Swinomish and Sauk Suiattle Indian Tribes. The Tribes are alleging that the County is violating the state building code by continuing to issue building permits in rural areas where Skagit PUD or another public water system is available.

Mr. Mentor said that the lawsuit makes two specific allegations.

The first is that the County has violated the 1996 Memorandum of Agreement (MOA) by issuing new building permits that are downstream of the Skagit PUD pipeline, which is just east of Sedro-Woolley. The Tribes have not alleged that the County is violating the 1996 MOA by issuing permits upstream of the pipeline crossing. In the 1996 Agreement, the County specifically reserved the right to continue issuing building permits upstream of the crossing notwithstanding the implementation of an Instream Flow Rule presumably to be adopted at that time by the Department of Ecology (DOE). The agreement is silent regarding building permits downstream of the pipeline, and the Tribes are alleging that by continuing to issue permits downstream the County is violating the 1996 MOA.

Secondly, the Tribes are alleging that by continuing to issue building permits the County is also violating the state building code because the of the Skagit Instream Flow Rule, adopted by the DOE that sets flows at levels that are not met on a fairly regular basis.

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Commissioner Munks asked if the allegations relative to the state code pertained to permits issued above the pipeline. Mr. Mentor stated that the claim regarding the state building code pertained to any permits issued in the Skagit River Basin where public water service is not available. The claim relating to the 1996 MOA is specific only to permits downstream of the pipeline crossing. Mr. Mentor stated that his partner, James Tupper, who was also present, could answer specific questions relating to the litigation.

Commissioner Dahlstedt asked if the 1996 Agreement clearly stated that the County would put a moratorium on building in the lower delta area for exempt wells and if not why would there be any presumption that would occur. Mr. Mentor said that it is his understanding that this is the position the County is taking, and the Planning Department will continue to consider permits throughout the basin during the litigation.

Commissioner Anderson said that the County was not a party when the 1996 MOA was drafted, and that it was originally presented as a document relating to issues regarding jurisdictional water service areas. It was passed by the Commissioners at that time by a 2-1 vote, and he voted against it. However, in fairness to the other two Commissioners; Commissioner Wolden was convinced that agriculture would be exempt and Commissioner Hart was convinced that a lot of water would still be available since the Board was lead to believe there would be 200+ cfs still available.

Mr. Mentor said that there are two obvious implications from the lawsuit: 1) By limiting the claim as to the violation of the 1996 MOA to the lower basin, the Tribes acknowledge that the County reserved the right to issue building permits in the upper basin. They are arguing that the County agreed by implication to not issue permits in the lower basin, even though there are almost 3,000 building lots downstream of the pipeline that are not able to water receive service from the PUD. 2) The Tribes make the argument that somehow the adoption of the Instream Flow Rule by DOE supercedes the 1996 MOA, even though DOE was a party to the agreement because the claim is based on a violation of state law. Mr. Mentor pointed out that the Upper Skagit Tribe has not joined in the lawsuit and has not made any claims against the County. Commissioner Anderson stated and Mr. Mentor confirmed that the Swinomish Tribe signed this agreement as well.

Mr. Mentor showed a map illustrating the watershed boundaries of the Skagit Basin. The map also showed the pipelines for Skagit PUD and the parcels of land that could be affected by the lawsuit if it is successful. The total number of potentially affected parcels is just over 5,800. Commissioner Anderson asked if they were all buildable lots. Mr. Mentor said that they are all lots of record. Some lots could be sub-standard, but those would be offset by property that could be developed under the CaRD Ordinance.

Commissioner Dahlstedt asked about the possible implications for property owners in the Samish Basin. Mr. Mentor said that assuming the Skagit Instream Flow Rule is valid, which has been appealed by the County, this would make an assumption that every parcel was served was in direct continuity to the Skagit River. While this rule does not specifically cover the Samish Basin, the implications are obvious if DOE moves forward in setting instream flows for the Samish.

Commissioner Anderson said that someone owning property outside the UGA, and not in an area served by PUD, would need their property to be reappraised because the value would be decreased if water was not available. This would undermine the County tax base.

Commissioner Munks asked that on the possibility that this lawsuit is upheld should property owners in rural areas make sure that public water service is available? Mr. Mentor said that for the immediate future a person would be well advised to look for public water sources for future development. He said that he would be reluctant to say that person couldn't build since there are still questions about how this rule might apply in an individual case.

Mr. Mentor said that in April 2004, the Commissioners agreed to sign a MOA to provide a water supply and a mitigation package for the continuation of building permit activity throughout the Skagit River Basin. The agreement was also signed by the Upper Skagit Tribe and presented to the other parties to the 1996 MOA. The County was then asked to participate in a mediation session with the other parties

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sponsored by the Governor's Water Policy Advisor. Since April, County staff has spent countless hours trying to reach an agreement that would be acceptable to the other parties. That work resulted in a "straw man" proposal that was presented by the Governor's Advisor to all the parties. After the Governor's Water Policy Advisor met individually with each of the parties, he determined that it would not serve any purpose to continue those discussions. Mr. Mentor stated that the bottom line is that the County signed an agreement that clearly stated what the Commissioners would support. After meeting with the other parties, he thought that we had an agreement in principal. The County had concerns throughout about long-term water supply issues for agricultural purposes and for all County residents to enjoy. They wanted a reservation of water from the Instream Flow Rule, which the other parties were not willing to support and this was part of why the talks ended.

Commissioner Munks said that the "straw man" proposal submitted by Jim Waldo from the Governor's Office was different from the negotiations. The Swinomish Tribe had provided a document to the County about their bottom line. He asked if that document was shared with Mr. Waldo. Mr. Mentor said he would check into that.

Commissioner Anderson said that he was opposed to the 1996 Agreement from the beginning and that in the dialogue at meetings prior to the final adoption, DOE assured him that there would be plenty of water for everyone and the wells upriver would be exempt. The City of Anacortes got a water right that is five or six times their need and also the ability to sell water to Island County. The DOE said that there would be an excess of 200 cfs that was not allocated. Commissioner Anderson said that even though the Swinomish parties filed the lawsuit, the other parties should have stepped forward when the Instream Flow Rule was set. He said that he wants his day in Court, and he is willing to take this matter to the highest level. Commissioner Anderson said that he questions the legality of setting an Instream Flow Rule that modified the 1996 document.

Mr. Mentor said he is convinced that an agreement to implement an Instream Flow Rule is of benefit to Skagit County. He thinks the Agreement that the County signed in April was a good agreement that protects instream flows and habitat. He said that unfortunately we were not successful, but he hopes to go forward.

James Tupper, of Mentor Law Firm, provided an update on the timeline of the two pending lawsuits, the impact and consequences of the relief that the Tribes are seeking, and a brief outline of the response to their claims. The APA rule challenge was filed in April of 2003, two years after the Instream Flow Rule was filed. The County also filed a stipulation that no action would be taken on the case in order to allow the parties to reach a settlement. The stay ended in December of 2003. The Swinomish filed counterclaims in March 2004 against the County for breach of the 1996 MOA and for violating the state building code. The County filed a motion to dismiss and the judge granted the motion on procedural aspects. This prompted the Swinomish, joined with the Sauk Suiattle, to refile their claim against Skagit County. Regarding the APA rule challenge, the County filed to amend the petition to add claims that DOE exceeded their authority. The motion to amend was granted and the hearing date is scheduled for February 16, 2005. He noted that when they were filing to amend the complaint, DOE stated that if negotiations did not result in a settlement they (DOE) would be making their own ruling. Mr. Tupper felt this was an acknowledgment that a problem exists.

Mr. Tupper said that if the Swinomish Tribe is successful they are poised to seek a judgment that states that all County building permits that were issued from April 2001, when the Instream Flow Rule went into effect, until today were issued unlawfully. They are also seeking an injunction to keep the County from issuing a building permit to any building lot that cannot be served by public water.

Commissioner Munks asked if the Tribe was successful, could they seek a judgment to shut off wells during a low flow time. Mr. Tupper said that if they were successful there may be a judgment in Superior Court that those lots do not have a lawful building permit.

Commissioner Anderson said that since the Tribes signed the 1996 MOA, he felt this was their long-term plan. Mr. Tupper said that there was an agreement by the parties to resolve the exempt well issues. He

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said that the Skagit River Instream Flow Rule was the first one in the State of Washington that did not have an exception for exempt wells. He said that the first draft in June 1999 did address exempt wells and mirrored the intent of the 1996 MOA; however, the final document by DOE simply forgot the 1996 MOA and exempt wells.

Commissioner Dahlstedt said that 90% of the water in the Skagit River has already been committed to the Tribes. He said that this agreement was put out without an effort to maintain the integrity of the process.

Commissioner Anderson said that we need to look at the future of the County so that property owners have some assurance of what they can do with their property. He said that realistically we do not have a water problem and that DOE's credibility is at an all time low. He stressed that the Board agreed on a settlement in April that included many hard areas of compromise and it was a tough decision.

Commissioner Munks said that there were a lot of other aspects there were included in the "straw man" contract. This has been a long process, with thousand of hours spent by County staff. He also commented on the coordinated effort between the Upper Skagit Tribe and the County. He added that in the midst of mediations, the Swinomish filed their lawsuit in March and that he is very disappointed that a settlement could not be reached.

Mr. Tupper said that he would not anticipate a trial date before the end of 2005.

Mr. Mentor said that the law firm would vigorously defend the County's interest in those two cases. In the meantime, they will try to reach an agreement with DOE to amend the Instream Flow Rule. He said that the mediation has ended. He is also disappointed with the process, but that the County has no choice except to file the petition and formally ask for the rule to be amended. Mr. Mentor commented on the strong relationship with the Upper Skagit Tribe that has developed as a result of this process. He added that scientific information supports that up to 830 cfs could be used without harming fish. He said that science is on our side and we can show that there is an adequate water supply for the future

**ADJOURNMENT**

Commissioner Munks made a motion to adjourn the proceedings. Commissioner Dahlstedt seconded the motion, which passed unanimously.

**BOARD OF COMMISSIONERS  
SKAGIT COUNTY, WASHINGTON**

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Ted W. Anderson, Chairman

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Don Munks, Commissioner

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Kenneth A. Dahlstedt, Commissioner

ATTEST:

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Shirley Knapp acting of behalf of  
JoAnne Giesbrecht, Clerk of the Board  
Skagit County Board of Commissioners