

Amy S. Vira
SAN JUAN COUNTY PROSECUTING ATTORNEY
350 Court Street • P.O. Box 760 • Friday Harbor, WA 98250
(360) 378-4101 (tel) • (360) 378-3180 (fax)

Victim Services
Nancy Vejvoda
Audrey Hansen

Deputies
Jonathan W. Cain
Amy S. Vira
Teresa Barnett
Daniel Reidy
Mason Wiley

August 4, 2023

BY EMAIL sasha.richart@sao.wa.gov

Ms. Sasha Richart
Team Bellingham, Washington State Auditor's Office
11 Bellwether Way, Suite 211
Bellingham, WA 98225

RE: San Juan County State Audit Letter - Fiscal Year Ending December 31, 2022

Dear Ms. Richart:

Pursuant to your request dated July 21, 2023, we submit this letter to describe and evaluate pending or threatened lawsuits, claims and assessments against San Juan County (the "County") which this office is statutorily obligated to defend and of which we are informed. Based upon the details below and subject to the limitations expressed in this letter, and the limitations expressed in your request it is our professional opinion that the matters described in this letter do not meet your standard of "material."

For ease of reference, the matters have been broken into two general categories:

A. Lawsuits and Claims. Our response includes matters for which a formal Notice of Claim for lawsuit has been filed that existed as of December 31, 2022, and new matters for the period from that date through today, except to the extent that such matters have been closed or resolved in a way in which they are not material. "Material" for purposes of this letter means matters involving requests for monetary relief in the amount exceeding \$50,000 in each claim. Claims which are covered by the Washington Counties Risk Pool ("Risk Pool") are included in this list, even though, in our opinion, the insurance coverage makes them non-material. We have included cases in which San Juan County is plaintiff and

where the defendant in the case has made or may make a counter claim for damages or an award of attorney fees which is considered to be material.

B. Non-Material Matters and Lawsuits. For the purpose of this response, we do not consider material those lawsuits and administrative appeals arising out of decisions by San Juan County or state boards such as the Shorelines Hearings Board or Growth Management Hearings Board, where the extent of any possible loss is limited to the imposition of costs and statutory attorney's fees to the losing party. Claims demanding injunctive or declaratory relief only, property assessment disputes, foreclosure proceedings, quiet title, condemnation claims, or tax refund claims are not described here, but rather are considered non-material claims. Civil and criminal land use or local ordinance code enforcement matters in which San Juan County is the plaintiff are not considered material unless a counterclaim seeking damages is asserted. Typically, costs and statutory attorney's fees are less than \$2,000 in each case. Finally, as stated above, we do not consider material any other individual lawsuit or claim which the amount in dispute is estimated to be less than \$50,000.

In the detail provided below, we have, when appropriate, estimated the likelihood of an unfavorable outcome and also estimated the amount or range of potential loss. In doing so, we mention whether the matter has been submitted under the County's insurance agreement with the Risk Pool. An indication that the Risk Pool has agreed to provide defense and indemnity usually will mean that the County's liability is limited to the deductible (\$10,000) and that the claim is therefore not material. In some matters, we do not express an opinion as to the likelihood of an outcome of certain litigation claims and assessments, or the amount or range of potential loss. Where no such information is provided, such omission is intentional and made because of inherent uncertainties of litigation, or the early stage of the proceeding.

Consistent with your request, this letter is based on facts that are known and assertions that have been reduced to writing and brought to our attention. We have, of course, consulted with the County, as the client, on the need to make financial disclosure with respect to unasserted possible claims or assessments. We are guided by clauses (b) and (c) of Paragraph 5 of the ABA Statement of Policy Regarding Lawyers' Response to Auditors' Requests for Information (1975, as amended) and related commentary, and we believe it would be inappropriate to respond to a general inquiry relating to the existence of unasserted possible claims or assessments involving the County. We can only furnish information concerning unasserted possible claims or assessments which the County has specifically requested, in writing that we comment upon. Nor can we comment on the adequacy of the County's listing, if any, of unasserted, tentative, draft, or possible claims or assessments or assertions.

Finally, you request the identification of "external legal counsel" who has devoted substantive attention to the matters listed. In this letter the term "special deputy prosecutor" is used to refer to external legal counsel. In every case in which a special deputy prosecutor is appointed and the underlying matter is covered by the Risk Pool, the cost of counsel is an expense that will be

paid by the Risk Pool after the deductible is satisfied, unless otherwise noted. When a special deputy prosecutor has been appointed his or her name is mentioned in the discussion of the case.

1. *Christopher Burn, Christine Johnson and Northern Lights, LLC v. San Juan County*
San Juan County Superior Court No. 17-2-05185-28

Plaintiffs are the owners of waterfront property on Waldron Island, a non-ferry served island. They filed suit seeking a declaration under RCW 36.87.090 that a purported county road abutting their respective properties was never opened after its establishment in the 1890s and that by statute, title should be quieted in them. The County answered that the road was opened all the way to the water and that the road exists as a matter of law and was never vacated. On cross motions for summary judgment the court ruled in favor of the plaintiffs. In June 2019, San Juan County appealed to the Court of appeals, Div. I, the appeal was granted, and the case remanded to the trial court. Settlement discussions are ongoing as the County has a long-standing consistent policy of protecting waterfront access. Although this matter is not subject to insurance, damages are not requested, and it is not significant from a financial standpoint because there are no grounds for an award of attorney fees. Mr. Philip Buri of Buri and Funston in Bellingham assisted on appeal as Special Deputy Prosecuting Attorney and Special Deputy Prosecutor Derek Little of Karr Tuttle Campbell is now working on the case. This case does not appear to be material because damages are not sought.

2. *Chamberlain Family L.P. et. Al v. San Juan County et al.*
San Juan County Superior Court No. 18-2-05105-28

This case is a quiet title action to determine the rights of the County to a segment of road known as "Upper Deer Harbor Road" and is located south of its intersection with Jack and Jill Lane in the hamlet of Deer Harbor on Orcas Island. The County claims title by use and occupation through prescriptive rights. The plaintiff obtained permission to file a third amended complaint in September 2022. This case does not involve a claim for monetary damages. Special Deputy Prosecutor Derek Little of Karr Tuttle Campbell has been assisting Deputy Prosecutor Jon Cain since spring of 2022. Because no damages are sought, this case is not considered significant for purposes of this report.

3. *San Juan County v. Washington Coalition for Open Government (WCOG)*
Whatcom County Case No. 20-2-01095-37 on Appeal to Washington State Court of Appeals
Division I No. 849417
WCOG v. San Juan County
Whatcom County Case No. 22-2-00414-37

This pair of cases concern one topic: whether, in response to a public records request, the County properly redacted descriptions of work on invoices received from outside counsel on cases involving on-going litigation. In the 2020 case the issue was raised as a counterclaim to other

matters now dismissed. In the 2022 case the issue was raised with WCOG as plaintiff as to additional invoices involving different dates and subject matters. Each case includes a claim for penalties, attorney fees and costs which are not covered by the County's Risk Pool. Special Deputy Prosecutor Jeff Myers of Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. is working on this case. On Friday July 8, 2022, Whatcom Superior Court Judge Olson ruled in case No. 20-2-0195-37 that County correctly redacted the invoices removing the description of work. In due course orders were entered that the County was the prevailing party and no attorney fees were awarded. An appeal was filed on January 19, 2023 and is currently in the briefing stage.

4. *James R. Burgess and Kristen I. Burgess v. San Juan County, and Hauschka Living Trust*
San Juan County Superior Court Case No. 22-2-05007-28

This is a case filed in January 2022 seeking declaratory relief and to quiet title to a segment of Prohaska Road that borders the plaintiff's property. Like the *Burn* Case, discussed as item No. 2, the claim is that the county failed to open Prohaska Road during a five-year period after it was established as a County Road in the late 1890s. The County disputes the allegation. Additionally, the Plaintiffs claim that no other equitable basis for County Road exists under law. No money damages are sought. There is a request for payment of costs and statutory attorney fees which are limited by law to an amount which is not considered significant at this time. Special Deputy Prosecutor Derek Little of Karr Tuttle Campbell is working on this case.

5. *Sean DeMeritt/Ocean Forest LLC, v. San Juan County*
San Juan County Superior Court Case No. 22-2-05049-28

This action concerns County parking requirements for a development and is brought by the developer requesting relief under the Land Use Petition Act (LUPA), declaratory relief, mandamus, constitutional writ, extraordinary writ, writ of certiorari, damages under Chapter 64.40 RCW, and a takings claim. The County believes that it has complied with the law and local ordinances, and that there are procedural defects which may be resolved in pre-trial hearings. The LUPA portion of this case was resolved in the County's favor by Order dated December 13, 2022. The plaintiff has not pursued the remaining claims to date. Despite the damages claim, because no specific damages are alleged, this matter is not deemed material at this time.

6. *Sean DeMeritt/Ocean Forest LLC, v. San Juan County*
San Juan County Superior Court Case No. 23-2-05077-28

This is a case filed in June of 2023 seeking a writ of mandamus and a complaint for damages resulting from alleged delay in processing a land use and building permit application. This matter was settled within a month of being filed and is not considered material. This case will not be reported in the future.

7. *San Juan County v. Purdue Pharma et al (Opioid Litigation)*
Ohio Multidistrict Litigation

San Juan County is one of the estimated 2,250 local government plaintiffs involved in multi-district litigation in the State of Ohio against several plaintiffs in what is known as the Opioid Litigation. The County is represented by Special Deputy Prosecutor David Ko and others at Keller Rohrbach Law Firm in Seattle on a contingency fee basis. A settlement has been reached with the distributor defendants which will result in payment of approximately \$25,000 per year to San Juan County for 17 years, subject to adjustment for attorney fees. Additional similar settlements with other defendants are anticipated. This litigation will likely bring services and/or funds for the benefit of San Juan County and is not considered to be a liability.

8. *Benton County et al [San Juan County] v. State of Washington.*
King County Case No. 21-2-12147-7 SEA

In *State v. Blake*, 197 Wn.2d 170, 173 (2021), the Washington Supreme Court invalidated Washington's simple drug possession statute. The effect of this decision is to render void all such convictions dating back to 1971. Under due process, all penalties, fines, and restitution ("legal financial obligations" or "LFOs") ordered in connection with simple possession convictions must be refunded. Shortly after the *Blake* decision, a putative class action was filed by the Civil Survival Project ("CSP") against King County, Snohomish County and the State of Washington seeking a refund of LFOs and other unspecified damages. Other counties were mentioned by the plaintiff but never served with a summons and complaint. The obligation to refund LFOs is not disputed, but the question of whether refunds are the responsibility of the County, or the State was in dispute. The counties' position is that this is exclusively a liability of the State of Washington. The *Blake* decision invalidates at least 54,000 convictions in superior court dating back to 1971 and implicates at least \$9.5 million in refunds of LFOs related to criminal convictions for simple drug possession obtained for the State of Washington out of King County. The State of Washington has rejected a tender of the CSP matter from the counties. In Fall 2021, the CSP putative class action lawsuit was dismissed with prejudice. Plaintiffs have filed an appeal that is unlikely to be resolved until 2023.

The *Benton County et al* lawsuit is a declaratory judgment action that was joined by San Juan County. Plaintiffs are seeking a court ruling that the direct and indirect expenses to all 39 counties from the Supreme Court Decision in *State v. Blake*, 197 Wn.2d 170, 173 (2021) are the obligation of the State of Washington. Twenty Counties and the Washington State Association of Counties are Plaintiffs. The State of Washington is the defendant. No damages are sought, and the County has entered into an agreement with the Administrative Office of the Courts for a share the legislative appropriation of payment of extraordinary costs and the reimbursement of legal and financial obligations against the State to both enforce the tender of any *Blake*-related suits and to ensure that *Blake*-related liabilities belong to the State, not the counties. The Washington Legislature has provided ample funding in the budget appropriation process to reimburse counties for the costs they have incurring in refunding LFOs on behalf of the state, including additional

funding for FY 2023 and proviso language that suggests an ongoing state responsibility. The trial court has made a ruling which supports the County's position but did not rule on all issues. Because the Blake reimbursement is being assumed by the State this case is not considered material.

9. *Code Enforcement Lawsuits*
San Juan County Superior Court

From time to time it is necessary to rely upon the courts to enforce the County's land use and building codes. There are two lawsuits pending currently; one involving the Sierman Property (Case No. 19-2-05183-28); and one involving the Foley Property (Case No. 21-2-05060-28). These cases typically request declaratory and injunctive relief. None of the cases involve claims or counterclaims against the County and therefore are not material. Robert Carmichael and Catherine Moore of Bellingham have been retained to assist the County as special deputy prosecutors. The County is moving forward with abatement proceedings on both properties.

10. *Maureen See and Sharon Abreu v. San Juan County et al.*
San Juan County Case No. 22-2-05073-28

This lawsuit has two parts. The first part, a request for injunctive relief was not material because no monetary damages were sought and no attorney fees awarded. The second part of the lawsuit is a claim for violation of the Open Public Meetings Act OPMA . The Plaintiffs seek penalties against the county and individual County Council Members Christine Minney, Cindy Wolf and former Jamie Stephens. Claims under the OPMA are not covered by the Risk Pool for defense or indemnification. Because general damages are not provided for by law this matter is not considered material. Special Deputy Prosecutors Callie Castillo and Mike Kitson at Lane Powell Law Firm are working on this case.

11. *Michael M. Moore, pro se v. San Juan County, et al*
USDC No. 2:22-cv-01479-LK

This lawsuit was filed by a pro se plaintiff in Federal District Court in November 2022. Though difficult to decipher, the complaint appeared to allege claims of due process, piracy and damages. The plaintiff voluntarily dismissed the complaint in May 2023. This matter is not considered material and will not be reported in the future.

12. *Various Public Records Requests – Claims for Attorney Fees and Penalties*
Claims made, but no formal action taken.

Each year San Juan County fulfills hundreds of public records requests. Some are small and easy, others are vague, broad and complicated. Due to the strict rules imposed by the legislature and the courts, the County may be responsible for attorney fees and penalties, even for minor unintentional mistakes in responding to public records requests. Throughout the year, requesters

Ms. Sasha Richart
August 4, 2023
Page 7

and their lawyers make demands for payment of attorney fees and penalties. Taken collectively, if these matters all ripened into claims in the same year, a material reportable event might occur. Such claims are not covered by the Risk Pool Insuring Agreement. Unless a claim has been formally made in a lawsuit or under the claim statute, this matter is not considered material.

13. *Various Claims.*

We have reviewed three claims filed with the County Auditor during the year 2022 and to date in 2023 for amounts greater than \$50,000. Two of these claims are considered non material. The third claim filed by Joseph Brotherton alleges approximately \$100,000 in damages resulting from a washed out bridge. This claim was submitted in December 2022. The claimant alleges damages occurred in late 2021. As of the date of this letter, no lawsuit has been filed. This matter is not considered material at this time.

As requested, this list included matters that existed as of December 31, 2022, as well as matters that arose subsequent to the date of this letter. If you have any questions regarding the contents of this letter, please call me.

Sincerely,



Amy S. Vira
San Juan County Prosecutor

cc: County Council
Hon. Natasha Warmenhoven, San Juan County Auditor
Mr. Michael J. Thomas, County Manager
Ms. Angie Baird, Risk Manager