RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE
Oct 10, 2016, 10:59 am
RECEIVED ELECTRONICALLY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO.

Court of Appeals No. 331946-III

CONSERVATION NORTHWEST and
METHOW VALLEY CITIZENS COUNCIL,

Appellants,

v.

OKANOGAN COUNTY,

Respondent.

APPELLANTS' ANSWER TO RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720
BRICKLIN & NEWMAN, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
Telephone: (206) 264-8600
Facsimile: (206) 264-9300
bricklin@bnd-law.com
brooks@bnd-law.com

Melanie J. Rowland, WSBA #13055
10 Waxwing Lane
Twisp, WA 98856
(509) 997-6242
melanie@greatcat.com

Attorneys for Conservation Northwest and
Methow Valley Citizens Council

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

Page

I. INTRODUCTION. 1

II. IDENTITY OF THE RESPONDENT 4

III. DECISION OF THE COURT OF APPEALS 4

IV. STATEMENT OF THE CASE 4

V. ARGUMENT 5

A. The Court of Appeal's Decision is Consistent with All Published Opinions of the Court of Appeals. 5

B. The Court of Appeal's Decision Conforms with Previous Supreme Court Decisions and Does Not Provide "Compelling Grounds" to Grant Discretionary Review Under RAP 13.4(b)(1). 11

C. Okanogan County Does Not Cite a Basis Under RAP 13.4(b) for this Court to Grant Discretionary Review on the Contention that Material Facts Were in Dispute on Cross-Motions for Summary Judgment. 12

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Cases — Page

Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 11 P.3d 762 (2000) 8

Center for Biological Diversity v. Export-Import Bank of the United States, 2013 WL 5273088 (N.D. Cal. 2013) 13

Harris v. Pierce County, 84 Wn. App. 222, 928 P.2d 1111 (1996) 5, 6, 7, 8, 9

Lands Council v. Wash. State Parks & Recreation Comm'n, 176 Wn. App. 787, 309 P.3d 734 (2013) 4, 9, 10

Peoples National Bank of Washington v. Peterson, 82 Wn.2d 822, 514 P.2d 159 (1973) 13

Trimen Dev. Co. v. King County, 65 Wn. App. 692, 829 P.2d 226 (1992) 8, 9

Statutes and Regulations — Page

RCW 7.16 .... 5, 7

RCW 43.21C.075 .... 4, 11

RCW 43.21C.075(3)(c) 13

RCW 82.02.020 8

Court Rules — Page

CR 56(c) 3, 12, 14

RAP 13.4 1

RAP 13.4(b) 1, 3, 11, 12, 13, 14

RAP 13.4(b)(1) 1, 11, 12

RAP 13.4(b)(2) 1, 11

RAP 13.4(b)(4) 11

I. INTRODUCTION.

The primary basis of Okanogan County's petition for review is that the Court of Appeals' decision is inconsistent with other Washington appellate decisions, and thus review is warranted under RAP 13.4(b)(1)-(2). The County asserts first that the Court of Appeals erred in allowing the trial court to decide an appeal of the County's "determination of non-significance" under the State Environmental Policy Act ("SEPA") without invoking jurisdiction under a statutory writ of review, and that this holding is inconsistent with other decisions of the Washington Court of Appeals and this Court. Second, it argues, without citing any basis under RAP 13.4(b), that the Court of Appeals erred in allowing a grant of summary judgment despite the presence of disputed material facts.

Petitioners are incorrect as to both claims. The Court of Appeals decided these issues consistent with every other appellate decision in the state of Washington. Consequently, there is no basis under RAP 13.4(b)(1)-(2) for this Court to accept discretionary review in this matter. [1]

---

[1] Okanogan County's rambling, poorly organized Petition for Review appears to raise several arguments for consideration by this Court — some of which address the factors in RAP 13.4(b), while others make no such effort. We have done our best to identify and address all arguments that the County raises referencing RAP 13.4, but the danger lingers that the Court will discern issues in the Petition that we have not addressed. If that is the case, our silence should not be construed as concurrence in the County's claim that these ill-described issues merit review.

This case involves Conservation Northwest's ("CNW") and Methow Valley Citizens Council's ("MVCC") challenge to the inadequate environmental checklist required by SEPA, and prepared by Okanogan County, for an ordinance that would allow all-terrain vehicles ("ATVs") to use county roads that have a speed limit of 35 miles per hour or less. The Court of Appeals, in "a painfully long opinion necessitated by extended facts," (Opinion at 1) held that the environmental checklist prepared by the County did not meet SEPA requirements and, therefore, both the County's ordinance and the determination of non-significance based on it were invalid.[2]

First, Okanogan County incorrectly asserts that the trial court did not have jurisdiction to hear the case because other appellate courts have held that a trial court can entertain an appeal of a SEPA determination solely under appellate jurisdiction granted by a statutory writ of review. On the contrary, previous Court of Appeals decisions have made clear that SEPA itself provides an aggrieved individual the right to judicial review. Resort to a statutory writ or other jurisdictional grants is not necessary.

In this case, CNW and MVCC invoked SEPA's right to judicial review of the determination of non-significance and challenged the ATV

[2] Having found that the SEPA determination was unlawful, the Court of Appeals did not reach the merits of the plaintiffs' challenge to the validity of the ordinance under other state laws. Opinion at 71.

ordinance itself pursuant to the grant of jurisdiction in the Declaratory Judgments Act. The Court of Appeals found that this was proper.[3]

No decision by this Court or any published decision by the Court of Appeals has held that the only source of jurisdiction to decide a SEPA case is pursuant to a statutory writ of review. In fact, at least one of the cases that the County cites as supposedly being in conflict with the lower court's decision explicitly acknowledges that SEPA provides jurisdiction to a trial court. The "conflict" described in the County's petition has been wholly invented through the County's misreading of published opinions.

Second, the County argues that material facts were in dispute and, therefore, the trial court could not grant summary judgment under CR 56(c). But the County does not link this alleged error with any of the grounds for discretionary review. Instead, it argues that the Court of Appeals' decision creates a "paradox warranting reversal." Pet. at 17. A "paradox" is not a basis for discretionary review. *See* RAP 13.4(b).

The Court of Appeals' decision in this matter does not conflict with any other cases and does not involve an issue of substantial public interest

---

[3] CNW and MVCC first had to exhaust administrative remedies under county code provisions requiring an administrative appeal to the Board of County Commissioners ("BOCC") of a determination of non-significance. When the BOCC denied their appeal and then passed the ordinance, CNW and MVCC filed this challenge in Superior Court.

that needs to be addressed by this Court. Therefore, this Court should deny Okanogan County's petition for review.

II. IDENTITY OF THE RESPONDENT

Conservation Northwest ("CNW") and Methow Valley Citizens Council ("MVCC") submit this Answer to Okanogan County's Petition for Review.

III. DECISION OF THE COURT OF APPEALS

The decision at issue is the unpublished decision on the merits in *Conservation Northwest; et al. v. Okanogan County*; Case No. 33194-6-III (June 16, 2016) (hereinafter "Opinion").

IV. STATEMENT OF THE CASE

The County's statement of the case is generally accurate. We only correct the County's misstatement that:

> [T]he Court of Appeals ruled that the *Raynes v. Leavenworth* decision of this Court and the *Foster v. King County* decision in Division I of the Court of Appeals stood for the proposition that Chapter 43.21C.075 RCW granted an independent cause of action to review the administrative denial of a SEPA appeal by an inferior tribunal on the record and no writ was required to secure jurisdiction over the SEPA appeal.

Pet. at 3-4.

In fact, the Court of Appeals cited to the statute itself, RCW 43.21C.075, and *Lands Council v. Wash. State Parks & Recreation*

Comm'n, 176 Wn. App. 787, 802, 309 P.3d 734 (2013) for the proposition that "SEPA authorizes judicial review of an agency's compliance with its terms." Opinion at 41. The Court of Appeals cited to *Raynes* and *Foster* for a different (and well-established) rule — that if another remedy is available, such as SEPA's statutory grant of judicial review, then a statutory writ of review under chapter 7.16 RCW is not available. *Id.* at 40. (We discuss these issues in more detail below. *See infra* at 5 -11 (discussing SEPA's independent grant of jurisdiction) and *infra* at 12 - 14 (discussing irrelevance of rule that review by statutory writ is not available when review is available by other means).

V. ARGUMENT

A. The Court of Appeal's Decision is Consistent with All Published Opinions of the Court of Appeals.

The Court of Appeals determined that SEPA provides a statutory right of review for determinations made by governmental agencies implementing the statute. Okanogan County claims this holding conflicts with two earlier decisions of the court of appeals, but in neither of those cases was there a contrary holding.

First, the County cites *Harris v. Pierce County*, 84 Wn. App. 222, 928 P.2d 1111 (1996), for the proposition that "causes of action under SEPA must adhere to the statutory framework for invoking appellate review of

administrative decisions." Pet. at 7. *Harris* did not involve review of a SEPA decision; it involved judicial review of a county's legislative action: approval of a plan for a trail system through county parks. Unlike the present matter, in *Harris* there was no statute that granted the court authority to review approval of a parks trail plan. Thus, review of that non-SEPA decision was possible only via a statutory or constitutional writ of review:

> Because no statute authorizes a direct appeal in this case, the only potential methods of review are: review pursuant to statutory writ of certiorari, under RCW 7.16.040; and discretionary review pursuant to the court's inherent constitutional powers.

Harris, 84 Wn. App. at 228.

The County's misleading characterization of *Harris* relies on inserting inaccurate language into a quote. The petition misquotes the *Harris* opinion as follows:

> Because no statute authorizes a direct appeal in this case, **[The adequacy of a SEPA determination]** the only potential methods of review are: review pursuant to statutory writ of certiorari, under RCW 7.16.040; and discretionary review pursuant to the court's inherent constitutional powers.

Pet. at 7 (emphasis supplied).

The County's addition of the phrase "The adequacy of a SEPA determination" is simply wrong. Under the County's fabrication, the *Harris* court was ruling that SEPA does not provide its own grant of authority for judicial review of SEPA decisions. In fact, the court was

considering the challenge to a Pierce County legislative action itself and did not address the SEPA issue: "We hold that the trial court properly dismissed CAT's petition for a writ of review because the County's actions were legislative in nature and because CAT failed to establish standing. **Accordingly, we do not reach the issues regarding the validity of the [environmental impact statement].**"[4] *Harris*, 84 Wn. App. at 225 (emphasis supplied).

Directly contrary to Okanogan County's fabrication, the *Harris* court affirmed that SEPA provides its own independent right of review: "Second, although CAT **appears to be correct in its assertion that SEPA statutes provide an independent right of review**, CAT was not entitled to such review because it lacked standing." *Id.* at 232 (emphasis supplied).

This language also directly controverts the County's assertion that *Harris* "mak[es] no reference to change the traditional appellate method of securing appellate review of environmental decisions 'on the record' — the writ of review under Chapter 7.16 RCW." Pet. at 8. *Harris* recognized that

---

[4] Paradoxically, the *Harris* court reaffirmed that the statutory writ of review is available only for actions that are judicial or quasi-judicial in nature and that legislative actions, such as the park plan resolution adopted in *Harris* and the legislation at issue in this case, are inappropriate for the statutory writ of review. *Harris* 84 Wn. App. at 228, 928 P.2d 1111. Yet the County repeatedly asserts that the only way the Superior Court would have appellate jurisdiction over the SEPA appeal would be through the statutory writ of review. This argument shows a fundamental misunderstanding of the nature of a statutory writ of review.

SEPA provides its own independent right of review and that the "traditional" method of securing a writ of review is not necessary to bring a SEPA challenge.[5]

The County fares no better with its reference to *Trimen Dev. Co. v. King County*, 65 Wn. App. 692, 829 P.2d 226 (1992). The language referenced in *Trimen* is nothing more than dicta. "Dicta" means "observations or remarks made in pronouncing an opinion concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but **not necessarily involved in the case or essential to its determination**." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, Fn. 4, 11 P.3d 762 (2000) (emphasis supplied). A court's reasoning that is dicta is not of precedential value. *Id.* at 263.

Trimen did not involve the appellate jurisdiction of trial courts in reviewing SEPA challenges. *Trimen* was a declaratory judgment action challenging a King County ordinance on the basis that it violated former RCW 82.02.020 (related to the imposition of development fees). *Trimen*, 65 Wn. App. at 697, 829 P.2d 226. No SEPA claims were raised. In fact, the language quoted by the County (Pet. at 7) is the only reference to SEPA

---

[5] The *Harris* court explained it also did not reach the SEPA issues because the plaintiff both lacked standing and failed to allege review under SEPA in its petition. *Harris*, 84 Wn. App. at 232, 928 P.2d 1111. Unlike *Harris*, plaintiffs CNW and MVCC properly requested review under SEPA in their complaint. Opinion at 35.

in the entire *Trimen* opinion. *Trimen*, 65 Wn. App. at 699-700. Those statements were dicta.

Moreover, the *Trimen* court's mention of SEPA was limited to a question regarding the statute of limitations, not the jurisdiction of a trial court acting in an appellate capacity. *Id.* The court's concern was whether a 30-day or 3-year statute of limitations applied, and it cited to SEPA as an example of how reference to the underlying decision being appealed provided the "mechanism for appeal," *i.e.,* the applicable statute of limitations. *Id.* The court did not address, even in dicta, whether SEPA provides appellate jurisdiction for a court to review a local government's SEPA determination.

Finally, not only is there no conflict with *Harris* or *Trimen*, but another published court of appeals opinion has explicitly held that SEPA provides an independent right of review. "SEPA grants an aggrieved person the right to judicial review of an agency's compliance with its terms." *Lands Council, supra,* 176 Wn. App. at 799 (citing *Harris*, 84 Wn. App. at 232, 928 P.2d 1111).

Despite the clear language quoted above, Okanogan County argues that *Lands Council* does not actually hold that SEPA grants an aggrieved person the right to judicial review because "the *Lands Council* case was before the Court on a writ of review." Pet. at 13. That is inaccurate. The

court of appeals determined it had jurisdiction to review both the agency's SEPA determination and the underlying action pursuant to SEPA's independent grant of jurisdiction.

The underlying action in *Lands Council* was an agency's land classification decision, akin to changing a zoning map, specifying the scope of allowed uses for certain park lands. That action was challenged on grounds that the agency made the land classification decision without complying with SEPA. The petitioners had alleged jurisdiction for their claim "under the Administrative Procedure Act, the uniform Declaratory Judgments Act, the statutory writ of certiorari, and SEPA," and the superior court dismissed the petition, finding that the agency complied with SEPA. *Lands Council*, 176 Wn. App. at 794.

The Court of Appeals reversed, utilizing only SEPA as the basis for jurisdiction (for both the challenge to the agency's compliance with SEPA and for the challenge to the underlying action the agency took in reliance on the agency's deficient SEPA efforts). *Id.* at 799 *et seq*. It explicitly did not address claims that jurisdiction was provided under any of the alternative jurisdictional allegations. "We make no decision on the alternative claims under the Administrative Procedure Act, uniform Declaratory Judgments Act, statutory certiorari, and constitutional certiorari." *Id.* at 808. Thus, the court of appeals relied exclusively on

SEPA's independent grant of jurisdiction. Okanogan County's claim that jurisdiction in *Lands Council* was based on a writ of review, not SEPA, is incorrect.

In sum, Okanogan County's argument that the Court of Appeals' decision in this matter creates conflict with other published opinions is unfounded. Not only is there no conflict with the cases that it has cited in its petition, but at least two published Court of Appeals decisions have explicitly stated that SEPA provides its own independent right of review. There is no basis under RAP 13.4(b)(2) for this Court to grant discretionary review.[6]

B. The Court of Appeal's Decision Conforms with Previous Supreme Court Decisions and Does Not Provide "Compelling Grounds" to Grant Discretionary Review Under RAP 13.4(b)(1).

Okanogan County cites three Supreme Court decisions for the

---

[6] Okanogan County briefly claims that the Court of Appeals' decision is not in the public interest and invokes discretionary review under RAP 13.4(b)(4). Pet. at 6. But the County does not offer any further explanation of how the jurisdictional issue it raises involves an issue of substantial public interest that should be determined by the Supreme Court. Therefore, this Court should not grant discretionary review under RAP 13.4(b)(4).

Additionally, the County pads its petition by arguing that "[t]he cases cited by the Court below do not support its conclusion." Pet. at 10. But whether a court has adequately supported its conclusion through case law is not a basis for granting discretionary review. RAP 13.4(b). Accordingly, respondents CNW and MVCC will not waste the Court's time refuting the County's convoluted and illogical attempts to counter cases which the Court of Appeals correctly cited in coming to its conclusion that RCW 43.21C.075 provides an independent basis of review.

unremarkable proposition that a court must have appellate jurisdiction before it can review an agency decision, and then it claims that the Court of Appeals' decision is in conflict with these Supreme Court cases because there was no appellate jurisdiction here. Pet. at 9. But the County's argument is based on a flawed premise: that the Superior Court lacked jurisdiction because there is no statutory right of review under SEPA. We have just demonstrated the fallacy of that premise. This collateral argument by the County based on a flawed premise adds nothing to its Petition. The County has done no more than cite uncontroverted Supreme Court decisions in a flimsy attempt to create a conflict where none exists. This Court should not grant discretionary review under RAP 13.4(b)(1).

C. Okanogan County Does Not Cite a Basis Under RAP 13.4(b) for this Court to Grant Discretionary Review on the Contention that Material Facts Were in Dispute on Cross-Motions for Summary Judgment.

While the Superior Court did not address standing in its ruling, the Court of Appeals addressed the issue and ruled that CNW and MVCC's standing declarations were sufficient to demonstrate standing. Opinion at 49-50. The County's main contention in Section V.E of its petition appears to be that material facts were in dispute and, thus, the court of appeals erred under CR 56(c) when it reversed the Superior Court and granted plaintiffs' cross-summary judgment motion on standing. Pet. at 16. But the County

does not specify which of the four considerations under RAP 13.4(b), if any, supports a grant of discretionary review for this supposed transgression. The Supreme Court grants discretionary review in limited circumstances ("A petition for review will be accepted by the Supreme Court **only** [if] . . ."). RAP 13.4(b) (emphasis supplied). The County has not identified any circumstance in RAP 13.4(b) that applies here. Therefore, this Court should not accept review to address this issue.[7]

Additionally, Okanogan County did not raise the issue of disputed material facts in the Court of Appeals. It is improper for the County to seek review of the issue here for the first time. Typically, the Supreme Court does not review matters that were not presented to the Court of Appeals: "In reviewing a decision of the Court of Appeals, we are generally limited to questions presented before and determined by that court and to claims of error directed to that court's resolution of such issues." *Peoples National*

---

7 Okanogan County only identifies a supposed "paradox" warranting reversal, arguing that the Court of Appeals' ruling will not allow a trial court "to hold an independent trial on the merits of the SEPA decision." Pet. at 17. The County is confused. Standing to obtain judicial review raises an issue not addressed by the agency. Therefore, it can be addressed by reference to evidence not in the agency record. *See, e.g., Center for Biological Diversity v. Export-Import Bank of the United States*, 2013 WL 5273088, Fn. 6 (N.D. Cal. 2013) (recognizing that environmental plaintiffs typically demonstrate standing by submitting standing declarations from individual members). In contrast, the merits of the SEPA issues are resolved on the record created in front of the agency making the decision — in this case, the Okanogan Board of County Commissioners. RCW 43.21C.075(3)(c). There is no "paradox" in the superior court adjudicating standing *de novo* (and thus potentially deciding the issue on summary judgment) while deciding the underlying SEPA claims as a court sitting in an appellate capacity reviewing an agency record.

Bank of Washington v. Peterson, 82 Wn.2d 822, 830, 514 P.2d 159 (1973). While there are exceptions to this rule ("Exceptions . . . include matters going to jurisdiction, right to maintain the action, illegality, invasion of fundamental constitutional rights, and lack of claim for relief." *id.*), none of these exceptions apply to the question of whether the lower court erred in deciding a summary judgment motion on supposedly disputed facts. In both the County's response brief and motion for reconsideration in the Court of Appeals, the County never argued that material facts were in dispute, which would have prevented the trial court from granting summary judgment to the plaintiffs. Because the County failed to raise this issue in the Court of Appeals, this Court should decline to review the issue now. [8]

VI. CONCLUSION

Okanogan County has not established that the Court of Appeals' decision merits review by this Court under any of the four criteria in RAP 13.4(b). The decision is not in conflict with any published opinions of the

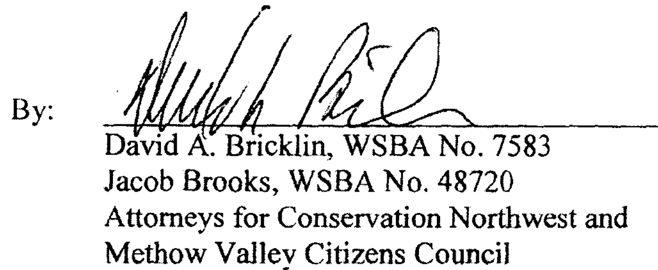
[8] Even though the County has not identified any basis for the Court to review this issue under RAP 13.4(b) and even though the County failed to preserve this issue for review by this Court, the County's argument on the merits is in error as well. Though the County characterizes the issue as one involving material facts in dispute, a close examination of the County's argument reveals it is actually contesting the legal conclusions to be drawn from undisputed facts presented to the trial court. It argues that the declaration of Perry Huston pointed out that the declarations provided by CNW and MVCC did not meet the standards "required by the Courts to demonstrate 'injury in fact.'" Pet. at 16. But Mr. Huston did not controvert the factual testimony of the plaintiffs' declarants. Rather, the County's fact witness presented a legal argument (that the undisputed facts were not sufficient to establish standing). Legal issues are routinely resolved on summary judgment. CR 56(c). The Court of Appeals did not err in doing so.

Court of Appeals or with any decisions of this Court. Okanogan County has not claimed that the Court of Appeals' decision raised a significant question of constitutional law, nor has it explained how the lower court's decision involves an issue of substantial public interest that this Court should address. For the foregoing reasons, this Court should deny Okanogan County's petition for review.

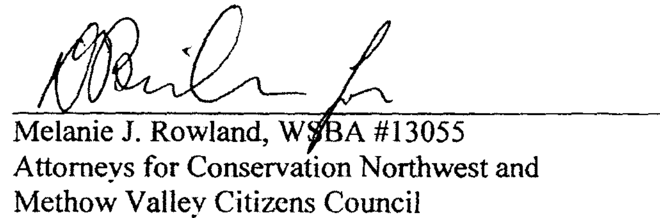
Dated this 10th day of October, 2016.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

David A. Bricklin, WSBA No. 7583
Jacob Brooks, WSBA No. 48720
Attorneys for Conservation Northwest and
Methow Valley Citizens Council



Melanie J. Rowland, WSBA #13055
Attorneys for Conservation Northwest and
Methow Valley Citizens Council

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE
Oct 10, 2016, 10:59 am
RECEIVED ELECTRONICALLY

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZENS COUNCIL,	NO. 93567-0
Plaintiff/Appellant, v.	Court of Appeals No. 331946 - III
OKANOGAN COUNTY	DECLARATION OF SERVICE
Defendants/Respondents,	

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for plaintiffs Conservation Northwest and Methow Valley Citizens Council herein. On the date and in the manner indicated below, I caused Appellants' Answer to Respondent's Petition for Discretionary Review to be served on:

Albert H. Lin
Okanogan County Prosecuting Attorney
PO Box 1130
Okanogan, WA 98840-1130

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to alin@co.okanogan.wa.us

Alexander Weal Mackie
Attorney at Law
PO Box 607
Winthrop, WA 98862-0607

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to amackie6404@gmail.com

Melanie Rowland
Attorney at Law
10 Waxwing Lane
Twisp, WA 98856

[ ] By United States Mail
[ ] By Legal Messenger
[ ] By Facsimile
[ ] By Federal Express/Express Mail
[X] By E-Mail to melanie@greatcat.net

DATED this 10th day of October, 2016, at Seattle, Washington.

PEGGY S. CAHILL