No. 331946-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZENS' COUNCIL,

Appellants,

v.

OKANOGAN COUNTY,

Respondent.

BRIEF OF RESPONDENT OKANOGAN COUNTY

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I. NATURE OF THE CASE

This case arises from the filing of a declaratory judgment action by appellants Conservation Northwest and Methow Valley Citizens' Council (collectively "CNW") challenging Ordinance 2014-7 (the "ATV ordinance") and Okanogan County's Motion to Dismiss granted by Judge Henry Rawson on December 26, 2014 (Memorandum Decision, CP 13-28) (see copy attached hereto at Appendix A),[1] Judgment filed January 12, 2015 (CP 8-11).

At trial CNW asked the Trial Court to find that "based on the record" the State Environmental Policy Act ("SEPA") determination of nonsignificance in the case was clearly erroneous and that the County ordinance approving off-road use, Ordinance 2014-7, was unlawful as it was in violation of the intent of ESHB 1632. Complaint at p. 9, CP 423. That request having been denied below, CNW now seeks the same remedy from the Court.

On appeal, the position of Okanogan County is that on the merits the decision of the Trial Court dismissing the SEPA appeal is supported by the record below and is also supported by additional factors:

[1] While not binding on the Court, "A memorandum decision very often is of benefit to this court in informing it of the theory of the trial court, and in giving to this court the trial court's observations in regard to the evidence." *In re Sipes*, 24 Wn.2d 603, 608, 167 P.2d 139, 141-42 (1946).

(1) Lack of standing to maintain the SEPA appeal: CNW provided no evidence that its members had a direct and immediate risk sufficient to meet the injury-in-fact test threshold for challenging a SEPA appeal.

(2) Lack of jurisdiction to conduct an appellate review by the Superior Court. By invoking a declaratory judgment proceeding under Chapter 7.24 RCW, CNW invoked the general jurisdiction of the Superior Court, which is appropriate to address the validity of legislative actions by the Board of County Commissioners, but which lacks the appellate standards of review available under the Land Use Petition Act ("LUPA") or writ of review proceedings required to invoke the appellate jurisdiction of the Superior Court.

The dismissal of the second claim, addressed to the consistency of legislative decisions to allow ATVs on public streets with ESHB 1632, is likewise fully supported by the record below and the absence of any dispute of material fact due to the failure of the SEPA claims and the traffic safety claims, which had no merit. The decision of the Trial Court to dismiss the second claim should also be affirmed.

II. COUNTERSTATEMENT OF THE CASE

On April 9, 2014, the Okanogan County SEPA responsible official issued a determination of nonsignificance ("DNS") under SEPA to the

effect that the adoption of a proposed ordinance allowing use of ATVs on certain County roads would not have a significant adverse environmental impact under SEPA, Chapter 43.21C RCW. CP 282-83. Appellants filed an administrative appeal as required by OCC 14.04.220.A.1.

On June 16, 2014, the Board of County Commissioners conducted an open-record public hearing on the SEPA appeal and, at the close of public testimony, took the matter under advisement and denied the appeal. Findings in support of the final decision were issued June 23, 2014 in Attachment A to Resolution 51-2014. *See* Resolution at CP 409-12.

On June 23, 2014, the Board of County Commissioners held a public hearing on the ATV ordinance and, at the close of public testimony, adopted the ordinance at issue here, Ordinance 2014-7. *See* findings at Attachment A to Exhibit 8 of Declaration of Perry Huston, CP 410-11, and Ordinance 2014-7 at CP 244-51 (Ex. 1 to Declaration of Perry Huston).

On July 10, 2014, CNW filed a complaint for declaratory judgment and injunctive relief, asking the Trial Court to find the SEPA determination "clearly erroneous" based on the administrative record below (Complaint at p. 9, lines 6-8 (CP 423)) and the failure of the County to meet the objectives of the underlying statute as amended by ESHB 1632 (*id.* at lines 8-10).

Okanogan County filed a motion to dismiss, noting objections to jurisdiction to review a quasi-judicial decision (the denial of the SEPA DNS appeal) in a declaratory judgment proceeding, as well as challenges to standing due to lack of injury in fact and lack of sufficient evidence to support a reversal of the responsible official's DNS on a clearly erroneous standard. CNW filed a cross-motion for summary judgment, seeking a reversal of the County's actions. Between the County's motion and supporting declarations and the CNW cross-motion for summary judgment, the Trial Court had the written record of the administrative SEPA proceedings below, but no transcript. While Okanogan County had objected to the Trial Court's engaging in an appellate review under the civil jurisdiction of a declaratory judgment proceeding, neither party objected to the Trial Court proceeding without a transcript of the proceedings below.

After argument, Judge Rawson took the matter under consideration and, on December 26, 2014, issued the decision granting Okanogan County's motion to dismiss both claims. The judgment was entered January 12, 2015 and CNW timely appealed.

III. SUMMARY OF ARGUMENT

Okanogan County submits that the case can be resolved and the CNW appeal denied on four different grounds:

1. Before a group such as CNW may seek judicial review of a SEPA decision, the group must demonstrate that one or more of its members has a direct and immediate interest ("injury in fact") threatened by the proposed County action and not merely an interest in avoiding hypothetical or potential harm to the public as a whole. The record below provides no basis for concluding that such injury occurred, and the County SEPA decision must be upheld.

2. The SEPA appeal process before the Board of County Commissioners was a quasi-judicial process involving administrative appeal with a public hearing on the adequacy of the DNS and a decision by the Board of County Commissioners based on that record. Appeals to the courts in such cases are addressed to the appellate authority of the Superior Court through LUPA for land use cases, Chapter 36.70C RCW, or a statutory writ of review under Chapter 7.16 RCW for non-land use cases. Since both remedies were open to CNW in the present case and provided adequate remedies at law, the Trial Court was without jurisdiction to hear a complaint about the adequacy of the SEPA determination below under the declaratory judgment statute, Chapter 7.24 RCW, and the decision of the Board of County Commissioners must be upheld and the appeal dismissed.

3. Assuming for purposes of argument that the Trial Court had jurisdiction to get to the merits of the SEPA determination on the record for purposes of appeal to the Court, the record before the Board of County Commissioners supports the denial of the administrative appeal both on the absence of any demonstration of injury in fact and on the failure to provide sufficient evidence to hold the decision of the responsible official in issuing the DNS clearly erroneous in light of the policy of ESHB 1632 and the legislative determinations at issue.

4. A legislative determination allowing ATVs additional access to certain roads to accomplish the purpose set forth by the legislature in adopting ESHB 1632 is a uniquely legislative decision and will be affirmed if any valid basis exists for its approval.

Given the stated intent of ESHB 1632 to increase access to recreational lands used by ATV owners, as well as the legislative determination that ATVs can be safely used on public streets, both discussed in more detail below, the Trial Court's decision to dismiss the "lack of consistency with ESHB 1632" argument was well founded and should be upheld by the Court.

IV. ARGUMENT

In reviewing the CNW SEPA appeal, the Court should ask itself three questions:

1. Do the CNW members have sufficient injury in fact to warrant judicial review of the SEPA decision?

2. Did the filing of a declaratory judgment action invoke the appellate review jurisdiction necessary to review a quasi-judicial decision on the record below?

3. Given the substantial weight to which a responsible official's decision is entitled, particularly in a legislative context, did CNW provide a reasonable basis for concluding the SEPA DNS was clearly erroneous?

The answer on the record before the Court in this case is "no" on all three points, any one of which is sufficient to support the decision below and deny the CNW appeal.

With respect to the second claim, lack of consistency between Ordinance 2014-7 and ESHB 1632, the question is whether CNW provided any evidence to show that the legislature in adopting ESHB 1632 provided any prohibition to opening public streets to ATV use that may be short or adjacent to environmental sensitive areas or that provide access to public lands, which is what Okanogan County did. The answer is "no," and the suit on legislative consistency was also properly dismissed.

A. Standard of Review Differs in Civil Actions and Appellate Actions

A threshold question is whether the Trial Court had the authority to treat the CNW declaratory judgment action as a request for appellate review of a quasi-judicial decision below. Courts have frequently distinguished between the general jurisdiction of the courts and the appellate jurisdiction of the courts as the proceedings are very different:

> A complaint for declaratory judgment invokes the superior court's trial jurisdiction, while a petition for certiorari invokes the superior court's appellate jurisdiction.

New Cingular Wireless PCS, LLC v. City of Clyde Hill, No. 71626-3-I, 2015 WL 1788055, at *1 (Wash. Ct. App. Apr. 20, 2015).

As evidenced in the Memorandum Decision, CP at 20-22, although the Complaint was for a declaratory judgment and injunction, the Trial Court treated the proceedings as an appellate review of the administrative record. The decision shows that the Trial Court granted the County motion based on lack of injury in fact and the failure of CNW to provide substantial evidence to overcome the substantial weight afforded the decision of the responsible official, and thus, CNW failed to demonstrate the decision of the County "clearly erroneous," an appellate standard of review. *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn.2d

267, 552 P.2d 674 (1976). See Memorandum Decision findings 15-17 at pp. 14-15, CP 26-27.

Had CNW filed a LUPA petition to secure an appellate review of the County decision, the appeal before the Court would be on the record before the County Commissioners. As noted by the Washington Supreme Court in a LUPA based appeal: "This court stands in the same position as the superior court. . . . Review is limited to the record before the City Council." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867, 873 (2002).

Alternatively, had the proper remedy been a writ of review under Chapter 7.16. RCW, which also invokes the appellate jurisdiction of the Superior Court, the same result is reached:

> Indeed, [in writ proceedings] this court sits in the same place as the superior court when reviewing a superior court's direct review of an administrative decision. *Heinmiller v. Dep't of Health*, 127 Wash.2d 595, 601, 903 P.2d 433, 909 P.2d 1294 (1995) (citing *Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 402, 858 P.2d 494 (1993)). We apply the same review to administrative decisions as the superior courts.

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 295-96, 197 P.3d 1153, 1163 (2008) (citations omitted).

SEPA is very clear: where a local government allows an administrative appeal on a SEPA decision, any judicial appeal of that decision to Superior Court is addressed to the appellate jurisdiction of that court and must be "on the record." RCW 43.21C.075(6).

Where the Court of Appeals reviews matters arising from a civil action, such as a declaratory judgment proceeding under Chapter 7.24 RCW and a dismissal based on motions and declarations under CR 56, however, the standards of review is different.

In the case below, the case was decided on cross-motions for summary judgment that are reviewed de novo. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545, 546 (2007). A court will affirm the trial court's order granting summary judgment "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c)." *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676, 683 (2011). *See Wilkinson v. Chiwawa Communities Ass'n,*, 180 Wn.2d 241, 249, 327 P.3d 614, 618 (2014).

As the proceeding filed by CNW was a civil action rather than appellate review, and because CNW provided evidence that conflicted with the evidence presented by the County on the likelihood of harm, then the appropriate result under CR 56(c) is that material facts were present on

the issue of potential environmental harm and the matter must be remanded for trial on the contested merits--a proceeding absolutely prohibited by RCW 43.21C.075(3), (5), (6).

Only if the Court concludes that notwithstanding CNW's failure to pursue an adequate remedy at law in seeking appellate review of the County quasi-judicial decision to approve the DNS through LUPA or writ proceedings, and that the Trial Court was able to recast the civil proceeding into an appellate review, can this appeal go forward and the Court sit in the position of the Superior Court reviewing the proceedings below, applying the clearly erroneous standard of review.

But if not, the dismissal of the CNW SEPA claims below must be upheld on the alternate grounds that CNW failed to invoke the appellate capacity of the courts with its declaratory judgment proceedings, and the SEPA portion of the appeal must be dismissed for want of jurisdiction.

B. Lack of Injury in Fact to CNW Members Provides a Complete Barrier to the CNW SEPA Appeal in This Case

To secure appellate review of a local SEPA decision under RCW 43.21C.075, a party to the proceedings must demonstrate "injury in fact," before the courts will hear the merits of the case.

As stated in Richard L. Settle, *The Washington State Environmental Policy Act: a Legal and Policy Analysis* (12/2014), the

courts use a two-part test to determine if a party has standing to pursue a judicial appeal of a SEPA determination.

> (1) the interest that the party is seeking to protect must be "arguably within the zone of interests to be protected or regulated" by SEPA; and
>
> (2) the party must allege an "injury in fact," i.e., that he or she will be "specifically and perceptibly harmed" by the proposed action.

Settle § 20.03(1), page 20-17.

In the present case, it is a given that protecting the environment falls within the zone of interest to be protected. The standards by which ATV licenses are to be granted are established by the state and are beyond the reach of SEPA.

The "injury in fact" identified in the second part of the test requires more than allegations of hypothetical harmful consequences from the actions under appeal. The affiant's "belief" that the claimant's interest might be injured, particularly if the injury complained of is to occur sometime in the future, is clearly not sufficient. Specificity as to the place and type of harm to the individual's interest is the hallmark of a successful challenge. As noted in a leading decision:

> [T]he petitioner must allege an "injury in fact," i.e., that he or she will be "specifically and perceptibly harmed" by the proposed action. In other words, SNOCO must present evidentiary facts that show a direct adverse effect upon it if the court does not exercise its extraordinary authority. Further, in

> order to show injury in fact, SNOCO must present facts that show it will be adversely affected by the County's supposed failure to comply with SEPA. Its affidavits must collectively demonstrate sufficient evidentiary facts to indicate that it will suffer an injury in fact. *The pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected. ([W]hen a person alleges threatened injury, as opposed to existing injury, he or she must show immediate, concrete, and specific injury to him or herself; if the injury is merely conjectural or hypothetical, there can be no standing).*

Snohomish Cnty. Prop. Rights Alliance v. Snohomish Cnty., 76 Wn. App. 44, 53, 882 P.2d 807, 811 (1994) (emphasis supplied) (citations omitted). *See also Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000).

Where declarations fail to show any specific and perceptible harm or are conjectural as opposed to direct and immediate, standing will be denied. *Trepanier v. City of Everett*, 64 Wn. App. 380, 824 P.2d 524 (1992).

The declarations filed by CNW in the proceedings below express a general concern that harm to the environment may occur if additional public roads are opened to additional ATV use, but the claims are based on general studies and opinions, not tied to any specific location in Okanogan County. CNW's claim for environmental harm from the adoption of the ATV ordinance consisted of a list of roads with a number

marked in red and the assertion, without specifics, that the indicated roads may be short or may be adjacent to environmentally sensitive lands or may provide access to public lands. See CP 295-300 (color copy attached hereto at Appendix B).[2]

The list was accompanied by out-of-state studies on the possible harm to be done to sensitive lands by ATV use and the safety of ATVs driving on public roads. *See* Declaration of Melanie Rowland and attachments, CP 66-181.

But how, where or when any specific harm to a listed property would occur is only speculative. For example, while there is an assumption that ATV use may increase by reason of the adoption of Ordinance 2014-7, CNW provided no information that traffic would increase on a given section, or how the fact of increased use of public roads--without more--would cause the harm with which they were concerned on a given road. As such, the record below is completely devoid of any factual basis to conclude that the harm imagined, based on the members' "belief" that harm would occur, would in fact occur. The damages alleged were hypothetical, speculative and without any basis in material fact in the record.

[2] The clerk's papers are in black and white, and the materials attached are the color pages provided to the County below.

Further, there is nothing in the record to show that any property on the road list was a property with which a CNW member had any direct or immediate interest different from the public at large. The possible harm to a personal interest giving rise to the "injury in fact" necessary to proceed with the appeal was all speculative, conjectural and without any indication of specific and perceptible harm to a specific personal interest. As such, the materials submitted failed to meet the second test for judicial review and cannot support a claim of standing to review the SEPA decision below.

A summary of the pertinent evidence confirms the standing problem:

1. George Wooten, employee for appellant Conservation Northwest, lives in the town of Twisp (which does not permit off-road vehicle traffic on town roads) and expressed general interest for the environment, and the legality of a particular shortcut nowhere near property owned by himself, but no direct and immediate threat to a specific interest or property giving rise to "injury in fact." CP 182-90.

2. Melanie Rowland, attorney for appellants, also lives in Twisp (which does not permit off-road vehicle traffic on town roads). She expressed a general interest in protecting the environment and a "belief" that the use of public streets by ATVs will cause harm to the environment

in general--somewhere, sometime yet to be determined. Rowland declaration at 2-3, ¶ 4-6 (CP 67-68). She can point to no direct, immediate or specific harm to an interest unique to herself.

3. Lawrence David Hooper identified an unfortunate incident involving alcohol and trespassing, but provided no evidence that increasing ATV use on public roads would lead to more trespassing on his property. CP 163-69.

4. Phillip Millam lives "close to lands" managed by the Washington Department of Natural Resources ("WDNR") and did see some unfortunate unlawful conduct on public lands. But here again, this provided no basis for concluding that increasing ATV use on public roads would cause a direct and immediate harm to a specific interest related to himself. CP 170-72.

None of the declarations provided to the County meet the test of sufficient "injury in fact" to support an appeal by either the individuals or, in this case, CNW as an association on their behalf under the "injury in fact" tests identified above.

CNW argues that Okanogan County stipulated to standing in the proceedings below (Brief, CP 216). But that stipulation went to a specific provision of the Okanogan County appeal ordinance that a party must "comment" on a matter under review in a SEPA proceeding to invoke the

administrative appeal procedures for a hearing before the Board of County Commissioners. In this case, CNW and its members had commented, and the County Planning Director stipulated that the parties had complied with that requirement of the County code. Declaration of Perry Huston, Exhibit 5 (CP 315).

But commenting upon a proposal at the administrative level is not sufficient to secure standing for purposes of judicial review of a SEPA decision under RCW 43.21C.075. The cases are quite clear. The declarations supporting a claim for standing to seek review under RCW 43.21C.075 must show a direct and immediate harm if the proposal is to go forward, not a claim that is remote or speculative.

The declarations submitted by CNW look to possible future injury, that somewhere in Okanogan County the environment could possibly be affected by allowing ATVs on newly opened public roads.[3]

The appellants' members allege such use of public roads by ATVs could possibly affect the environment and, in doing so, affect the affiant's interest in the environment. But there are no immediate specifics on how or where such injury might occur by reason of the use on the new roads, or how the claimants would be directly and immediately affected as opposed to affected as members of the public generally interested in environmental

[3] The Huston Declaration, Exhibit 2, identified that the County had more than 335 miles of public roads already open to public use. CP 253-54.

protection and opposed to ATV use on public roads--the latter condition is not sufficient to satisfy the "injury in fact" tests required by the courts, as noted above.

A "belief" that a problem will occur or the fact of an isolated incident of trespass or unlawful conduct not tied to increase in the use of public roads is not a basis for the members of an association claiming "direct and personal injury" as required by the courts to hear a SEPA appeal under RCW 43.21C.075.[4]

While accidents and unlawful conduct have happened in the past, and could well be expected to happen in the future, the legislative finding was that increasing the ability to use ATVs lawfully on public roads may well reduce the incidence of unlawful use and environmental harm. That was the point of the findings stated by the legislature in adopting ESHB 1632, Section 2.

While appellants obviously disagree with that legislative assessment, none of the declarations show how the ordinance authorizing lawful use of County roads would demonstrate that one or more members of CNW would suffer the "immediate, concrete and specific injury to him

[4] "[A] non-profit corporation or association which shows that one or more of its members are specifically injured by a government action may represent those members in proceedings for judicial review." *See Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978).

or herself" required to warrant standing by CNW to challenge the SEPA determination.

Lack of standing is the appellants' Achilles heel in this case. As noted by the Court: "[S]tanding is a matter of our jurisdiction. Without jurisdiction, we cannot hear a case," *Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977, 981 (2008) and without standing an association's ability to bring a SEPA challenge before the Court must be denied, *Harris v. Pierce Cnty.*, 84 Wn. App. 222, 928 P.2d 1111 (1996). In *Harris*, as in the case before the Court, the legislative authority had adopted a trail plan and residents opposed to the plan filed suit alleging a lack of environmental review over the possible consequences of new trail use. The suit was dismissed on standing grounds with the court stating that adoption of a trail plan by the County could not be challenged by a group raising generalized concerns about possible impacts along the trail due to public use.

The record before the Court fails to identify a sufficient injury in fact to one or more of CNW's members to warrant standing to appeal the SEPA decision below and as such the dismissal in the Trial Court below must be upheld by the Court.

C. CNW Failed to Invoke the Appellate Capacity of the Superior Court in Filing a Declaratory Judgment Action Under Chapter 7.24 RCW to Review the Record of the SEPA Decision on Appeal from the Board of County Commissioners

The Board of County Commissioners took two material actions in the present case:

- A quasi-judicial hearing reviewing the decision of the responsible official's issuance of a DNS. The action was taken after a public hearing and is based on the record before the County to determine whether or not the decision was "clearly erroneous" or otherwise unlawful.

- A legislative decision in which the County Commissioners, charged with public safety in the County, would open one or more public highways to ATV use as authorized by the legislature in ESHB 1632. In this case the Commissioners are exercising "legislative discretion," which is a political, not judicial, function.

The SEPA statute, RCW 43.21C.075(2)(a), is very clear that "Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations." Further, that where the local government has an administrative appeal concerning SEPA (governed by RCW 43.21C.075(3)):

> Judicial review under subsection (5) of this section of an appeal decision made by an agency under subsection (3) of this section shall be on the record, consistent with other applicable law.

RCW 43.21C.075(6)(a).

While the lack of standing discussed above is fully sufficient to warrant dismissal of CNW's SEPA appeal, a second fatal flaw in the

CNW appeal in this case is that it filed a complaint for a declaratory judgment, which is sufficient to review a legislative determination of a local government, *Harris v. Pierce County,* 84 Wn. App. 222, but invokes only the general civil jurisdiction of the Trial Court and not the special "appellate jurisdiction" necessary to review a quasi-judicial determination below "on the record." The defect can be seen in CNW's seeking to have the Trial Court declare the Okanogan County SEPA DNS clearly erroneous and null and void "after review of the administrative record." Complaint at 9, item 1, CP 423.

A declaratory judgment proceeding under Chapter 7.24 RCW invokes the superior court's "original trial jurisdiction," whereas a writ of review under Chapter 7.16 RCW invokes the Superior Court's "appellate jurisdiction." *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, No. 71626-3-I, 2015 WL 1788055, at *2 (Wash. Ct. App. Apr. 20, 2015). Similarly LUPA, Chapter 36.70C RCW, also invokes the "appellate jurisdiction" of the Superior Court. RCW 36.70C.030.[5]

The general rule is that "One is not entitled to relief by way of a declaratory judgment if there is available a completely adequate alternative remedy." *Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn.

[5] "This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions [exclusions not applicable]." RCW 36.70C.030(1).

App. 92, 98-99, 38 P.3d 1040, 1043 (2002). *See also Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 627-28, 246 P.3d 822, 828-29 (2011).

In seeking to have the SEPA matter resolved by declaratory judgment, CNW is bound to have its claim dismissed for failure to invoke the proper appellate jurisdiction of the Trial Court. As noted consistently by the courts in similar cases where an adequate remedy is available, such as LUPA (Chapter 36.70C RCW) or writ of review (Chapter 7.16 RCW), the declaratory judgment action must be dismissed. *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 98-99, 38 P.3d at 1043.

1. The SEPA decision below was a quasi-judicial decision based on the record below.

There can be no question that the actions of the Board of County Commissioners, in holding a public hearing and taking testimony about the adequacy of the responsible official's DNS on June 16, 2014, and then denying that appeal, were exercises of a "quasi-judicial" function.

Our courts have developed a four-part test for determining whether administrative action is quasi-judicial. That test includes:

> (1) whether a court could have been charged with making the agency's decision;
>
> (2) whether the action is one which historically has been performed by courts;

> (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and
>
> (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

Williams v. Seattle Sch. Dist. No. 1, 97 Wn.2d 215, 218-19, 643 P.2d 426, 429 (1982) (citations omitted) (addressing the applicability of a writ of review).

When the County Commissioners sat as a deliberative body evaluating the validity of the underlying decision, based on the evidence and testimony before them, and heard and evaluated the evidence and testimony in making their decision, they were making a decision applying the law to the facts before them on the record. That is the hallmark of a judicial action and puts the administrative appeal squarely in the form of a quasi-judicial decision under the standards identified in *Williams*.

2. The legislature has provided statutory remedies for judicial review of quasi-judicial decisions.

Review of quasi-judicial decisions by administrative agencies involves the appellate jurisdiction of the Superior Court. Where the decision is made by a state agency, the appellate review is under the Washington Administrative Procedure Act, RCW 34.05.570, calling for review on the record before the administrative agency. Where the review is made by other than a state agency, statutory review is under the writ of

review, Chapter 7.16 RCW, unless the decision is a land use decision, in which case the Washington legislature requires review under LUPA, Chapter 36.70C RCW.

In both cases, the record of the proceedings below is brought before the Superior Court and the court decides whether the decision is supported by evidence in the record, is consistent with state law or otherwise meets or fails to meet the statutory tests for review.[6]

The Court at this time need not decide whether the appeal was more properly filed as a LUPA decision--a decision pertaining to the use of County roads generally is a "land use decision" requiring a LUPA petition under Chapter 36.70C RCW--or was merely the decision of an inferior tribunal requiring review under Chapter 7.16 RCW, because CNW filed neither. Instead CNW sought review of the administrative denial of its SEPA appeal before the Board of County Commissioners under Chapter 7.24 RCW, a wholly inappropriate forum because it commences a new civil action and requires the facts to be tried again.

> When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions, in the court in which the proceeding is pending.

[6] RCW 7.16.040 (grounds for granting the writ); RCW 36.70C.130 (standards for granting relief).

RCW 7.24.090 (Determination of issues of fact).

RCW 43.21C.075(6) specifically requires any appeal of an administrative decision in a SEPA appeal proceeding under RCW 43.21C.075(3) to be reviewed on the record. The case before the Trial Court below was an administrative appeal of the June 23, 2014 written decision of the Board of County Commissioners to uphold the DNS issued by the responsible official and deny the CNW appeal. That review is to be on the record, not in a new civil proceeding, and as such the dismissal of the CNW case by the Trial Court below can be upheld by a finding of the Court that CNW failed to invoke the appellate jurisdiction of the Trial Court in a timely fashion.

The existence of the other avenues of appeal and the ability to invoke the appellate jurisdiction of the Superior Court through a writ of review or LUPA appeal provided ample adequate remedy at law and as such are fatal to CNW's proceeding with this case with respect to SEPA review.

> [T]he usual attack against declaratory judgments is that the plaintiff has an adequate remedy at law. See *Sorenson v. Bellingham*, 80 Wash.2d 547, 496 P.2d 512 (1972). The lack of an adequate remedy at law is a prerequisite to the right to a declaratory judgment. *Hawk v. Mayer*, 36 Wash.2d 858, 220 P.2d 885 (1950); *Kahin v. Lewis*, 42 Wash.2d 897, 259 P.2d 420 (1953).

Watson v. Wash. Preferred Life Ins. Co., 81 Wn.2d 403, 407, 502 P.2d 1016, 1019 (1972).

Whether through LUPA or writ of review, CNW had an adequate remedy at law and as such the request for declaratory judgment under Chapter 7.24 RCW to secure an appellate review of the SEPA decision on appeal must be dismissed.

3. The fact that the SEPA decision must be reviewed at the same time as the underlying governmental action does not change the need to invoke appellate jurisdiction and not original civil jurisdiction of the Superior Court.

In the proceedings below, counsel relied on the following quotation from *Harris v. Pierce County*, 84 Wn. App. 222, 928 P.2d 1111 (1996), for the proposition that a declaratory judgment proceeding was an appropriate process for reviewing SEPA appeals as well as legislative matters.

> Our courts have held the following actions to be legislative in nature and therefore inappropriate for a statutory writ of certiorari: amendments to a zoning ordinance and the dismissal of the related SEPA appeal, *Raynes*, 118Wash.2d at 249, 821 P.2d 1204; the determination of where to locate a highway interchange, *Harris v. Hornbaker*, 98 Wash.2d 650, 658, 658 P.2d 1219 (1983); adoption of county-wide planning policy and related SEPA determinations, *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wash. App. 44, 882 P.2d 807 (1994), *review denied*, 125 Wash.2d 1025, 890 P.2d 464 (1995); adoption of county

> zoning code, *Leavitt v. Jefferson County*, 74 Wash. App. 668, 875 P.2d 681 (1994).

Harris, 84 Wn. App. at 228-29; CNW's reply brief at 4, CP 32.

A review of the cases referenced, however, shows that they do not stand for the proposition that a quasi-judicial decision dismissing independent administrative appeal based on the record before the Board of County Commissioners below is properly addressed through declaratory judgment.

In *Harris*, appellants were challenging a trail plan through a writ of review, which the court denied because the plan was legislative and writs applied only to quasi-judicial functions. While a SEPA appeal had been made part of the case, it was not reviewed:

> 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*. SEPA grants an aggrieved person the right to judicial review on the issue of whether an agency complied with SEPA. *State v. Grays Harbor County*, 122 Wash.2d 244, 248, 857 P.2d 1039 (1993). In order to obtain review under SEPA statutes, however, the petitioner must establish standing. *See Save a Valuable Env't v. Bothell*, 89 Wash.2d 862, 576 P.2d 401 (1978). And CAT does not have standing to secure SEPA review.

Harris, 84 Wn. App. at 233, 928 P.2d at 1117 (emphasis supplied).

Thus *Harris* speaks to the need to file a declaratory judgment action for review of legislative matters, but does not support the claim that

declaratory judgment under Chapter 7.24 RCW is appropriate for a SEPA claim under RCW 43.21C.075.

Raynes and *Snohomish County Property Rights Alliance* appeals are to the same result.

In *Raynes*, the Town amended a zoning ordinance allowing trailers in a zone. From the discussion, the SEPA appeal and adoption of the ordinance were in the same proceeding. The appeal included both writ of review and declaratory judgment. The court's holding was that the ordinance could not be challenged by the writ and, under the declaratory judgment proceeding, the appearance of fairness doctrine did not apply. No discussion was made of the SEPA appeal, which could have been heard under the writ proceeding. The case does not support the argument that declaratory judgment is the proper mechanism to challenge a quasi-judicial decision below.

In *Harris v. Hornbaker*, 98 Wn.2d 650, 658 P.2d 1219 (1983), a prior SEPA decision involving a highway location was upheld and not appealed. In a subsequent proceeding challenging the proposed highway location, the court ruled that the SEPA issue had been addressed and resolved in the prior proceeding and, as such, was dismissed from the case at issue, based on the doctrine of res judicata.

Finally, in *Snohomish County Property Rights Alliance*, there was an administrative decision to issue an addendum to the EIS on county wide planning policies, but no administrative appeal. Thus the court distinguished the initial SEPA decision by the administrator as an administrative decision as distinguished from the results of a quasi-judicial review. As such, the writ proceeding on the record was not appropriate. With respect to injury in fact, however, in its direct as opposed to appellate review, the trial court found that none existed.[7]

RCW 43.21C.075 states specifically that any appeal of an administrative appeal under SEPA shall be "on the record," an approach not available under declaratory judgment proceedings. The cases relied on by CNW support the claim that a declaratory judgment proceeding was the proper vehicle for asserting a claim that a legislative decision was unlawful, but do not support the assertion that the declaratory proceedings

[7] "A review of the above factors indicates that the County Council's action on February 4, 1993 was legislative and not quasi-judicial. (1) The actions taken by the county planning director to comply with SEPA for county-wide planning policies were administrative in nature and were not similar to judicial fact-finding and dispute resolution. Thus, the court could not have been charged with the duty at issue in the first instance. (2) The courts have not historically performed the function of ensuring that counties comply with SEPA. That is a function best left to administrative bodies. (3) The County's action did not involve application of existing law to past or present facts, but rather, an enactment of new general law of prospective application. (4) The action more clearly resembles a legislative act. Accordingly, the County's SEPA compliance for the county-wide planning policies is not subject to review pursuant to the writ statute." *Snohomish Cnty. Prop. Rights Alliance v. Snohomish Cnty.*, 76 Wn. App. 44, 50, 882 P.2d 807, 810 (1994).

are appropriate to determine whether an administrative decision was "clearly erroneous" based on the record below.

What is also clear from those cases is that even when the court's jurisdiction is properly invoked through a combination of writ of review and declaratory actions (as in *Raynes*), the parties must still demonstrate injury in fact to secure standing to challenge a SEPA decision--a fatal defect in the present proceeding.

D. Assuming the Trial Court Had Jurisdiction to Conduct an Appellate Review Under Chapter 7.24 RCW, the Record Below Supports the Decision

The case was decided on cross-motions for summary judgment in which both the County and CNW put in the written portion of the record, and acknowledged that no transcript of the hearing was in the record, but neither party objected to the judge proceeding.

The Trial Court then conducted what in effect was an appellate review of the record before it and concluded that the SEPA appeal lacked merit for both standing and substantive grounds. See Memorandum Decision at 8-10 (CP 20-22) invoking both the clearly erroneous standard by which to review the record and the substantial weight to which the SEPA decision of the responsible official is entitled (Memorandum Decision at CP 22).

In addition, the Trial Court granted the County's motion to dismiss on the merits of compliance with the intent of ESHB 1632. *See generally* Memorandum Decision at 8-10 (CP 20-22).

1. The legislative policy expressed in ESHB 1632 to provide additional access for ATV users to nonhighway recreational facilities is a material consideration in determining that the decision of the responsible official is not clearly erroneous.

In any appeal of an administrative SEPA determination, the proper standard of review is "clearly erroneous."[8]

In discussing the criteria for a clearly erroneous review, the court said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
>
> . . . .
>
> The 'clearly erroneous' standard provides a broader review than the 'arbitrary or capricious' standard because it mandates a review of the entire record and all the evidence rather than just a search for substantial evidence to support the administrative finding or decision.

Norway Hill, 87 Wn.2d at 274-75, 552 P.2d at 678-79 (citation omitted).

[8] "We feel that the 'clearly erroneous' standard of review set out in RCW 34.04.130(6)(e) provides an appropriate scope of review in the area of 'negative threshold determinations' under SEPA. That standard will allow a reviewing court to give substantial weight to the agency determination as required by RCW 43.21C.090, yet at the same time it will allow a reviewing court to consider properly 'the public policy contained in the act of the legislature authorizing the decision or order.' " *Norway Hill Pres. & Prot. Ass'n v. King Cnty. Council*, 87 Wn.2d 267, 275, 552 P.2d 674, 679 (1976).

Of significance in the present case is that the clearly erroneous test looks at the public policy to be served by the legislation under review.

> Judicial review under the "clearly erroneous" standard set out in RCW 34.04.130(6)(e) also requires consideration of the "public policy contained in the act of the legislature authorizing the decision." Consequently, that public policy is "a part of the standard of review."

Id. (citations omitted).

The public policy of ESHB 1632 is set out in the final bill digest as follows:

> HB 1632-S.E - DIGEST (DIGEST AS ENACTED)
>
> Increases opportunities for safe, legal, and environmentally acceptable motorized recreation. Generates funds for use in maintenance, signage, education, and enforcement of motorized recreation opportunities. Stimulates rural economies by opening certain roadways to use by motorized recreationists. Requires all wheeled all-terrain vehicles to obtain a metal tag. Creates the multiuse roadway safety account.

HB 1632-S.E - DIGEST available at http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Digests/House/1632-S.DIG.pdf.

It is significant to note that in adopting the bill and amending RCW 46.09.310 (definitions), the definition of nonhighway roads to which the

authority to operate ATVs by County consent was amended to include "primitive roads." RCW 46.09.310(7).[9]

Further, the legislation provides ample evidence that the purpose of the bill is to enable access to back country and recreational facilities as seen in the two definitions which follow the addition of primitive roads:

> (6) "Nonhighway road recreation facilities" means recreational facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonhighway road recreational users.
>
> (7) "Nonhighway road recreational user" means a person whose purpose for consuming fuel on a nonhighway road or off-road is primarily for nonhighway road recreational purposes, including, but not limited to, hunting, fishing, camping, sightseeing, wildlife viewing, picnicking, driving for pleasure, kayaking/canoeing, and gathering berries, firewood, mushrooms, and other natural products.

ESHB 1632 at 2.

The legislation also provides for additional fees to fund enforcement, registration and other activities to ensure safe and appropriate use of ATVs. *See generally* ESHB 1632 §§ 4, 5, 7, 9, 10.

It is in the context of the policy of the legislative intent to expand access to recreational lands for recreational purposes that the authority to open County roads to additional ATV access and the necessary scope of

[9] "(7) 'Nonhighway road' means any road owned or managed by a public agency, *a primitive road*," RCW 46.09.310(5) [new material italicized].

environmental review and the reasons for CNW's request for an EIS below must be viewed.

The first two requests in the CNW appeal below go directly against the purpose and intent of ESHB 1632 to open more recreation lands to ATV use by extending the network of nonhighway roads available for such use.

The requests are found in the administrative notice of appeal, which asks the County to:

> - Remove all roads . . . shown in red. . . . In particular, we request that roads that travel through, or give access to, WDFW lands or state parklands be removed from this proposal. In the alternative, . . . [after a survey] where roads give access to sensitive lands . . . remove those roads from the proposal.
>
> - Remove all paved roads from the proposal.

Notice of Appeal at 11, CP 293.[10]

In addition to the declarations noting general concerns about the environment, CNW provided information about environmental problems emanating from ATV use in general, and possible safety concerns about ATV use on public streets.

The stated purpose of ESHB 1632 and the authority granted to the local legislative body was to increase access to public lands, including

[10] *See* Appendix B attached hereto for a copy of the roads listing with the "red" indications. CP 295-300.

parks and Washington Department of Fish and Wildlife ("WDFW") lands, by increasing use of public streets for access. So the fact that some of the streets approved for ATV use accessed public lands was not per se a significant adverse environmental impact of opening County roads to ATV use. Likewise, the request to remove all paved roads from approvals for ATV use directly contradicts the legislative determination that travel of appropriately registered vehicles on public roads would be in the public interest. As such, again the fact that the County Commissioners allowed vehicles meeting the tests for public road use on paved roads in the County, without more, cannot be the basis for overturning the DNS.

The County environmental review acknowledged that the roads used may be adjacent to streams and other environmentally sensitive areas (see environmental checklist at p. 3, section B.1 and pp.13-14, section 4, CP 255, 265-66). But as noted by the responsible official, these areas are already open to travel by the public and no new construction is anticipated or required to implement the proposal.

In his staff report to the Board of County Commissioners hearing the SEPA appeal, Planning Director Huston pointed out that the assumption behind all of the appellants' objections was a belief that opening additional public roads, paved and unpaved, to ATV use would lead to unlawful activity, including environmental harm. The Director

noted, however, that there was no quantification or specification of specific problem areas as opposed to a general sense of concern. In the staff report opinion, the responsible official (as the SEPA responsible official whose opinion is entitled to substantial weight) indicated such conjecture was not enough in his opinion to require a change from the DNS to a requirement for an EIS. (See staff report, attached hereto as Appendix C, at pp. 4-9, including summary on pp. 7-9, CP 318-23.)

The staff report also emphasized the speculative nature of the CNW objections in saying the decision of the responsible official in issuing the DNS was not clearly erroneous. The record supports the decision below and should be affirmed.

2. ATV safety was not a SEPA issue.

CNW claims that vehicle safety should have been part of the environmental review requiring an EIS, citing papers from a research group indicating that use of ATVs is not safe. See Rowland Declaration and attachments (CP 66-181). But through ESHB 1632, the legislature has specifically declared a policy to allow additional ATV use on public highways with detailed requirements about minimum requirements, registration and the types of vehicles to be used. See RCW 46.09.310(19) (Definition of "Wheeled all-terrain vehicle"). In so doing, the state has preempted the issue of ATV design and safety for use on public roads and

specifically prohibited local governments from adopting regulations more stringent than the state requirements. RCW 46.09.360.

CNW's arguments that the County had an independent duty to evaluate the safety of ATVs operating within the regulatory constraints of Chapter 46.09 RCW, as amended by ESHB 1632, seek to use SEPA to have counties override a specific policy determination of the legislature, and this it may not do. The legislature has determined that vehicles operating within the parameters of Chapter 46.09 RCW may be safely operated on nonhighway roads, and the responsible official had no ability to find to the contrary.

3. The CNW environmental claims are not sufficient to demonstrate the decision below clearly erroneous.

The thrust of the CNW objections to the SEPA review is that by adopting the ordinance opening County roads with speed limits 35 mph and below to ATV use, somewhere, some place unlawful activity could occur or activity may occur that is harmful to public lands. Given the stated policy of the bill to increase access on County roads from nonhighway recreational road users to access nonhighway recreational

facilities, the legislature clearly intended access to public lands to be increased.[11]

The tradeoff was increased safety standards and increased funds for monitoring and enforcement. See statement of intent ESHB 1632, Section 2 and Digest quoted above. As written, the stated policy of the Code is to enable and better facilitate ATV users' access to nonmotorized recreational facilities, as evidenced in the definitions. Access to additional public roads by the counties, as authorized by the bill, was one tool to facilitate that objective.

The Declaration of Mr. Huston demonstrates that the County prepared an environmental checklist and that the County did receive and review public comments with respect to the proposed legislation, including appellants' concern about public safety and potential harm to the environment. Weighing all of the factors and the lack of specifics concerning the roads to be opened, the responsible official determined that no EIS would be required to open public roads to ATV use where the

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[11] "(8) 'Nonhighway road recreation facilities' means recreational facilities that are adjacent to, or accessed by, a nonhighway road and intended primarily for nonhighway road recreational users.
(9) 'Nonhighway road recreational user' means a person whose purpose for consuming fuel on a nonhighway road or off-road is primarily for nonhighway road recreational purposes, including, but not limited to, hunting, fishing, camping, sightseeing, wildlife viewing, picnicking, driving for pleasure, kayaking/canoeing, and gathering berries, firewood, mushrooms, and other natural products." RCW 46.09.310 (definitions).

speed limits were 35 miles per hour and below. The decision was not clearly erroneous.

1. The legislature had already determined that the intent of the legislation was to open up public road access opportunities to ATV users, subject to local control, and that such actions were designed to (a) improve safety and (b) reduce environmental harm. ESHB 1632, § 2.

2. In the face of that legislative declaration, and significant support from ATV user groups on both the safety and benefits of the program, including comments from the local sheriff's office, appellants here provided nothing more than academic studies about possible harm and possible dangers--precisely the same type of information considered by the legislature in developing the program. See Huston Declaration, Exhibit 6 (A-J) (CP 325-68), Exhibit 7 (A-HH) (CP 370-406).

3. Appellants here made a global allegation that because many roads were open to the public, there must be some problem somewhere, and it was the County's burden to prove the negative on each of the roads. But appellants pointed to no specific road section that would create a specific problem, particularly in connection with a specific personal impact on one of CNW's members. Staff report at pp. 4-9 and conclusions, CP 318-23.

Given the substantial weight that courts are to give to the decisions of responsible officials in reviewing SEPA cases and, in the case of legislative-related reviews, the need to consider the policy of the legislation in evaluating the decisions made, the DNS below was not clearly erroneous, and for both standing and substantive reasons, the DNS was properly upheld and the appeal should be dismissed.

E. The Dismissal of the Legislative Claim of Failure to Follow the Intent of ESHB 1632 Is Likewise Supported by the Record Below

The non-SEPA claim in the Trial Court, also dismissed on motion, was that the ATV ordinance was not consistent with the intent of the legislature for the same issues addressed in the SEPA appeal--public safety and risk of environmental upset. Ordinance 2014-7, enabling the use of County roads by properly licensed ATV owners, which improved the ability of ATV owners to use County facilities and to access nonmotorized recreational facilities, is a legislative act of the Board of County Commissioners involving the application of local policy to the legislative intent arising from the amendments to Chapter 46.09 RCW by reason of ESHB 1632, Intent.

Where the actions of the city or county are deemed to be legislative, then:

> [C]orrect standard of review is whether the actions of the Council were arbitrary or capricious. *Westside*, 96 Wash.2d at 176, 634 P.2d 862; *see also Teter v. Clark Cy.*, 104 Wash.2d 227, 234, 704 P.2d 1171 (1985). *If the court can reasonably conceive of any facts which justify a legislative determination, then that determination will be sustained. Teter*, at 234-35, 704 P.2d 1171.

Raynes v. City of Leavenworth, 118 Wn.2d 237, 250, 821 P.2d 1204, 1211 (1992) (emphasis supplied).

The facts requiring dismissal of the challenge to the legislative action of the County in adopting Ordinance 2014-7 are set forth in the findings of the Board of County Commissioners in making the adoption.

1. The County Commissioners noted the intent of the legislature to increase the opportunity for safe, legal and environmentally acceptable motorized recreation and to decrease unlawful use by following the mandates of the new law.

2. The objections to the adoption by CNW and related groups were to concerns about safety (determined by the legislature to be present when legislative guidelines were followed) and consequences of the very increased access to public lands and nonmotorized recreational vehicle facilities for nonmotorized recreational vehicle use, stated by the legislature to be the purpose of the legislative changes.

As noted above, the question on review of a legislative matter is whether the actions of the County were arbitrary and capricious under the facts of this case. As noted by the Washington Supreme Court, the threshold is very high: "Under the arbitrary and capricious standard, this court only reverses willful and unreasoning action in disregard of facts and circumstances." *Wash. Waste Sys., Inc. v. Clark Cnty.*, 115 Wn.2d 74, 81, 794 P.2d 508, 512 (1990).

As a matter of law, the objections raised by CNW to the actions of the Board of County Commissioners in adopting Ordinance 2014-7 do not rise to "willful and unreasoning action in disregard of facts and circumstances" as required to meet the test for reversal, and the Trial Court was correct in dismissing the legislative objections as well.

V. SUMMARY AND CONCLUSION

A. The Dismissal of the SEPA Appeal Must Be Upheld

In reviewing the record before the County, the grant of the County's motion to dismiss the SEPA appeal is supported by three points:

1. The submissions put forward by CNW do not demonstrate injury in fact required to secure standing for appellate review of a quasi-judicial decision of the Board of County Commissioners under RCW 43.21C.075, and as such, the dismissal of the SEPA appeal was appropriate and must be upheld.

2. The record below demonstrated that the requests of CNW with respect to safety issues and limiting access to recreational lands and public lands were contrary to the intent of ESHB 1632 and as such failed to meet the "clearly erroneous" test required to reverse the decision of the responsible official in issuing a DNS.

3. CNW sought the general civil jurisdiction of the Trial Court through declaratory judgment, Chapter 7.24 RCW, when RCW 43.21C.075(6) requires that appellate review is required, limiting review to the record below. Failure to invoke the appellate jurisdiction of the Trial Court is sufficient grounds as well to uphold the dismissal of the case by the Trial Court below and warrants affirming that action.

B. The Dismissal of the Legislative Challenge Must Also Be Upheld

As noted, if any set of facts can be identified upholding the adoption of a legislative action, the courts must uphold it. Ordinance 2014-7 was designed by the County to provide additional access for nonmotorized users to places of nonmotorized recreation as encouraged by and to serve the intended purposes of ESHB 1632. The materials provided below demonstrated that summary judgment dismissing the legislative appeal was appropriate as a matter of law, and the decision should be upheld on appeal.

VI. RELIEF REQUESTED

We respectfully request that the Court deny the captioned appeal and uphold the dismissal of the SEPA appeal and the legislative appeal by the Trial Court below.

DATED: June 22, 2015

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TABLE OF APPENDICES

No.	Description
A	Memorandum Decision, CP 13-28
B	Annotated List of Road with red highlighting, as attached to a Notice of Appeal filed with the County May 29, 2014 (the black-and-white version of this is at CP 295-300, as part of Exhibit 4 to Declaration of Perry Huston)
C	Staff report for appeal hearing June 16, 2014 (Exhibit 5 to Declaration of Perry Huston, CP 315-23)

APPENDIX A

SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF OKANOGAN

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZEN COUNCIL, Plaintiffs, v. OKANOGAN COUNTY, Defendant.	No. 14-2-00346-5 COURT'S MEMORANDUM DECISION ON: PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT and DEFENDANT'S MOTION: DISMISSAL OF PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT and INJUNCTIVE RELIEF

1. STATEMENT OF THE CASE

The 63rd Legislature for Washington in 2013 during the 2nd Special Session passed Engrossed Substitute House Bill 1632, hereinafter referred to as "ESHB 1632". Generally the act related to the regulation of use of "off-road" vehicles in certain areas including registration and licensing; use; revenue and allocation thereof; and violations of statutory provisions. This legislation was a follow-up to prior enactments relative to off-road recreational vehicles.

The legislature found "*that off-road vehicle users have been overwhelmed with varied confusing rules, regulations, and ordinances from federal, state, county, and city land managers throughout the state to the extent standardization statewide is needed to maintain public safety and good order.*

(2) It is the intent of the legislature to: (a) Increase opportunities for safe, legal, and environmentally acceptable motorized recreation; (b) decrease the amount of unlawful or environmentally harmful motorized recreation; (c) generate funds for use in maintenance, signage, education, and enforcement of motorized recreation opportunities; (d) advance a culture of self-policing and abuse intolerance among motorized recreationists; (e) cause no change in the policies of any government agency with respect to public land; (f) not change any current ORV usage routes as authorized under prior legislation; (g) stimulate rural economies by opening certain roadways to use by motorized recreationists which will in turn stimulate economic activity through expenditures on gasoline, lodging, food and drink, and other entertainment purposes; and (h) require all wheeled all-terrain vehicles to obtain a metal tag." See Notes: Findings—Intent following RCW 46.09.442.

The legislation provided a new section in RCW 46.09 that "authorized and prohibited uses for wheeled all-terrain vehicles" (See RCW 46.09.455):

> *"(1) A person may operate a wheeled all-terrain vehicle upon any public roadway of this state, not including nonhighway roads and trails, having a speed limit of thirty-five miles per hour or less subject to the following restrictions and requirements:*
>
> *(a) A person may not operate a wheeled all-terrain vehicle upon state highways that are listed in chapter 47.17*

RCW; however, a person may operate a wheeled all-terrain vehicle upon a segment of a state highway listed in chapter 47.17 RCW if the segment is within the limits of a city or town and the speed limit on the segment is thirty-five miles per hour or less;

(b) A person operating a wheeled all-terrain vehicle may not cross a public roadway, not including nonhighway roads and trails, with a speed limit in excess of thirty-five miles per hour, unless the crossing begins and ends on a public roadway, not including nonhighway roads and trails, or an ORV trail, with a speed limit of thirty-five miles per hour or less and occurs at an intersection of approximately ninety degrees, except that the operator of a wheeled all-terrain vehicle may not cross at an uncontrolled intersection of a public highway listed under chapter 47.17 RCW;

(c)(i) ***A person may not operate a wheeled all-terrain vehicle on a public roadway within the boundaries of a county, not including nonhighway roads and trails, with a population of fifteen thousand or more unless the county by ordinance has approved the operation of wheeled all-terrain vehicles on county roadways, not including nonhighway roads and trails.***

(ii) The legislative body of a county with a population of fewer than fifteen thousand may, by ordinance, designate roadways or highways within its boundaries to be unsuitable for use by wheeled all-terrain vehicles.

(iii) Any public roadways, not including nonhighway roads and trails, authorized by a legislative body of a county under (c)(i) of this subsection or designated as unsuitable under (c)(ii) of this subsection must be listed publicly and made accessible from the main page of the county web site.

(iv) This subsection (1)(c) does not affect any roadway that was designated as open or closed as of January 1, 2013;

(d)(i) A person may not operate a wheeled all-terrain vehicle on a public roadway within the boundaries of a city or town, not including nonhighway roads and trails, unless the city or town by ordinance has approved the operation of wheeled all-terrain vehicles on city or town roadways, not including nonhighway roads and trails.

(ii) Any public roadways, not including nonhighway roads and trails, authorized by a legislative body of a city or town under (d)(i) of this subsection must be listed publicly and made accessible from the main page of the city or town web site.

(iii) This subsection (1)(d) does not affect any roadway that was designated as open or closed as of January 1, 2013;

(e) Any person who violates this subsection commits a traffic infraction.

(2) Local authorities may not establish requirements for the registration of wheeled all-terrain vehicles.

(3) A person may operate a wheeled all-terrain vehicle upon any public roadway, trail, nonhighway road, or highway within the state while being used under the authority or direction of an appropriate agency that engages in emergency management, as defined in RCW 46.09.310, or search and rescue, as defined in RCW 38.52.010, or a law enforcement agency, as defined in RCW 16.52.011, within the scope of the agency's official duties.

(4) A wheeled all-terrain vehicle is an off-road vehicle for the purposes of chapter 4.24 RCW." (Highlighting done by this writer for emphasis)

Under prior legislative authorization, Okanogan County had enacted Okanogan County Code 10.10 that authorized the operation of off-road vehicles on county roads designated for that purpose.

In RCW 46.09.540, the legislature authorized use of revenues for expenditures on grants administered by department of transportation to:

> *"...(a) Counties to perform safety engineering analysis of mixed vehicle use on any road within a county; (b) local governments to provide funding to erect signs providing notice to the motoring public that (i) wheeled all-terrain vehicles are present or (ii) wheeled all-terrain vehicles may be crossing; (c) the state patrol or local law enforcement for purposes of defraying the costs of enforcement of chapter 23, Laws of 2013 2nd sp. sess.; and (d) law enforcement to investigate accidents involving wheeled all-terrain vehicles..."*

The Defendant, Okanogan County, commenced in April 2014 consideration of Ordinance 2014-7 (P. Huston Ex 1) after enactment of ESHB 1632. As part of its consideration, Okanogan County prepared an environmental checklist pursuant to Washington State's Environmental Policy Act (SEPA, Chap 43.21C)(P. Huston Ex 2). The county proposal was an ordinance which would open an additional 597.23 miles (165.033 miles being paved) of existing county roads to all-terrain vehicle (ATV) use as authorized by RCW 46.09.455 (1)(c)(i).

Okanogan County manages a road system of 1266 miles. At the time of the environmental checklist, 335.73 miles of county roads were already open to ATV use. (P.Huston Ex 2 Pg 1).

Okanogan County's duly designated responsible official under the State Environmental Policy Act (SEPA) was Mr. Perry Huston (Director of Planning for said county). In accordance with SEPA, Mr. Huston undertook the preparation of the environmental checklist and issued a *determination of non-significance* (hereinafter designated "DNS")(P.Huston Ex 3) on the 9th day of April, 2014. Further, pursuant to SEPA, the DNS was legally published on April 16, 2014 and requested comments no later than May 2, 2014.

The Plaintiffs, Methow Valley Citizens Council (hereinafter referred to as "MVCC") and Conservation Northwest (hereinafter referred to as "CNW") filed a notice of appeal of the SEPA "DNS" for the proposed ordinance "Opening ATV Routes" (P.Huston Ex 3). The appeal was brought by MVCC and CNW pursuant to Okanogan County Code (OCC) 14.04.220 A.1. (P.Huston Ex 4). This appeal was received timely by the Okanogan County Commissioners who are authorized to hear appeals under OCC 14.04 et seq. An open (public) hearing on the appeal was scheduled before the Board of Okanogan County Commissioners (referred herein as BOCC) for the 16th day of June, 2014.

On the 16th day of June, 2014, the BOCC, sitting as a "quasi-judicial" body, heard the appeal of MVCC and CNW. Documents were filed and testimony was received from both proponents and opponents of the ordinance under consideration and the DNS filed by Mr. Huston.

This Court has received no transcript from the June 16th public hearing as part of the record of submission by MVCC and CNW under SEPA appeal procedures. Instead, the Plaintiffs have submitted declarations and supporting documentation that they state were provided to the commissioners at the hearing and thus were considered by the commissioners. They have been considered by

this court. However at the public hearing, the Plaintiffs were subjected to questioning or examination by Mr. Huston as were any other parties or persons appearing before the commissioners at the hearing. (P.Huston Ex 8 Attch A). The testimony and documentation submitted was considered by the BOCC, however no transcript has been submitted as part of this SEPA appeal. Each party relies upon the declarations submitted in support of or in opposition to motions made to this court.

This court has received OKANOGAN COUNTY COMMISSIONERS' Resolution 51-2014 (P.Huston Ex 8) along with BOCC's findings of fact relative to the SEPA Appeal and ATV Ordinance (attachment A) and conclusions of law (attachment B). The decision of the BOCC was to deny Plaintiffs' appeal of DNS under SEPA, adopt the findings of fact and conclusions of law, and adopt the resolution.(P.Huston Ex 8)

The Plaintiffs' did file an appeal under SEPA from the determination of the BOCC. Under Okanogan County Code Chapter 14.04 entitled "ENVIRONMENTAL POLICY", the county sets forth its SEPA procedures and policies. Chapters 14.04.200-280 set forth the county's rules (and policies) for SEPA's substantive authority along with procedures for appealing SEPA determinations to agencies or ***the courts***. Further the county adopted several Washington Administrative Code (WAC) sections including WAC 197-11-680 entitled "APPEALS".

Procedurally, the Plaintiffs did file a judicial appeal of the BOCC's quasi-judicial SEPA appeal determination; their adoption of Resolution 51-2014; and the subsequent enactment of Ordinance 2014-7. The Plaintiffs' set forth in their First Cause of Action a request for Declaratory Judgment asking this Court to find a Violation

of SEPA. In their Second Cause of Action they set forth a request for Declaratory Judgment asking this Court to find that Ordinance 2014-7 violates RCW 46.09.360. Further Plaintiffs' ask for injunctive relief.

COURT'S DECISION

In the matter before this court, the Plaintiffs seek declaratory judgment on two causes of action as well as injunctive relief. "*Before the court assumes jurisdiction and determines a question under the Declaratory Judgments Act, a justiciable controversy must be presented. Although the requirement has been the subject of varying judicial treatment, it is generally said that the necessary elements are:*

(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,

(2) between parties having genuine and opposing interests,

(3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract, or academic, and

(4) a judicial determination of which will be final and conclusive.

In the absence of all four elements, the court steps into the prohibited area of advisory opinion." 15 Wash.Prac.Civil Procedure §42:4 (2d ed.) See also *Diversified Indus.Dev.Corp. v. Ripley, 82 Wash 2d 811, 815, 514 P 2d 137 (1973).*

This Court has reviewed the pleadings, the motions and the declarations as set forth in Attachment 'A" hereto which is incorporated as though stated herein. Plaintiffs pray for a declaration

that the DNS is clearly erroneous and null and void; for declaration that Ordinance 2014-7 conflicts with the intent of Chapter 46.09 RCW is *ultra* vires and null and void; and for injunctive relief prohibiting Ordinance 2014-7 from going into effect or being implemented.

Defendant did not violate SEPA. The procedures carried out by Mr. Huston, including the checklist and DNS, gave due consideration to the comments and opinions provided by both proponents and opponents with due regard for the legislative intent set forth in Sec 1(2) of ESHB 1632. The appeal to the BOCC with an open (public) hearing gave further procedural review opportunity along with the advocacy of issues under consideration.

The subject roadways were and are currently being used for motorized or mechanized equipment/vehicles. Given the legislative mandate, the review of the Plaintiffs' declarations and materials, presents to this court a reiteration of arguments and positions, if not actually presented then intended to be presented to the legislature, but was specifically rejected as evidenced in the section above referenced (Sec 1(2) of ESHB 1632).

While the Plaintiffs set forth some evidence of unlawful use of ATVs, due to those that scoff at the law, those alone are insufficient to warrant an Environmental Impact Statement (EIS) and ignores the legislative declaration of intents and purposes. Further Plaintiffs set forth speculative actions or conjectured behaviors as to ATV operation that may affect habitat or environmentally sensitive areas which were clearly considered by the Washington Legislature and addressed in its stated intents and purposes along with regulatory enactments with law enforcement authority.

The pronouncement of the legislature was to increase legal operation, decrease illegal use and environmentally harmful ATV use and to provide for education, signage and enforcement with an intended advancement of self-policing and abuse intolerance. Historically those same issues have presented themselves in varying

degrees amongst different modes of travel throughout Okanogan County.

In discussion of the threshold determination of an action's environmental significance, the court must understand that the "environmental factors must have been evaluated to such an extent as to constitute prima facie compliance with SEPA procedural requirements." *Hayden v Port Townsend*, 93 Wn.2dd 870, 613 P 2d 1164 (1980).

Here an environmental checklist was prepared as part of the process towards enactment of Ordinance 2014-7 with a subsequent DNS as made by Mr. Huston. With this court finding that sufficient consideration has been given to environmental factors, in reviewing the totality of documents and pleadings submitted, upon review of the DNS and decision of the BOCC rejecting the appeal of the DNS by the Plaintiffs, the conclusion of this Court is that the decision of Mr. Huston *must be accorded substantial weight along with the Resolution 51-2014.* (highlighting of writer for emphasis)

Thus in applying a "clearly erroneous" standard for review, this Court, viewing the totality of evidence presented by both parties, cannot find a mistake has been committed by the Defendant. Therefore the *actions of the Defendant are not clearly erroneous* as Plaintiffs have alleged and the *impacts of ATV traffic have been adequately considered.* This Court has given substantial weight and deference to the decision by the County responsible SEPA official, Perry Huston, and the appeal review by the BOCC with their Findings and Conclusions along with Resolution 51-2014. This Court is not convinced that a mistake has been made by the Defendant with respect to SEPA.

As to the Plaintiffs' Second Cause of Action, this Court cannot find that the Defendant violated the intents and mandate of ESHB 1632 by the enactment of Ordinance 2014-7. While the Plaintiffs set forth some evidence of unlawful use, the Defendant has given due

consideration to the legislative mandate and law's intent to stimulate rural economies, provide signage, advance self-policing and abuse intolerance and increase opportunities for ATV use.

The Legislature clearly authorized the County to establish which roadways might qualify for ATV travel, thus leaving to ***"local"*** *control* the authority to decide.

ATVs are regulated under federal laws as to safety, emissions and other controls. Further regulation as to operation and use was legislatively intended by ESHB 1632 along with licensing, policing, signage and promotion of alternate recreational opportunities provided by ATVs with an emphasis upon economic stimulus to rural counties. Clearly the Legislature understood the economic impact of this newer form of recreational activity and has thus authorized the Defendant to decide whether its roadways are suitable and appropriate to be "shared" with other recreationists.

The Plaintiffs have failed to establish an actual, present dispute, but allege and submit speculative or hypothetical disagreement; based upon conjecture or talking points aimed at legislative bodies. The Plaintiffs talk of the *probability* of illegal off-road operation of ATVs; yet, the Legislature clearly understood and expressly addressed this issue in Section 1 of ESHB 1632. It has been raised again before the Defendant's responsible SEPA representative, Perry Huston, and processed through the SEPA appeal procedures to the BOCC who rejected the Plaintiffs position and enacted Ordinance 2014-7. Provisions have been enacted to prohibit such activity; provide for law enforcement; and provide for signage, etc. Just as our state highways have speed limits with enforcement penalties in place, persons still exceed those limits and "probably" will continue to exceed the limits. With ATVs, "probably" individuals would drive off of the county roadway; however, would they damage the environment and to what degree is speculative and conjecture. Thus

Plaintiff has failed to establish a "direct and substantial" dispute or actual dispute, but rather a potential or theoretical dispute.

The Defendant's adoption or enactment of Ordinance 2014-7 does not conflict with the intent of Chapter 46.09 RCW. The Plaintiffs have not submitted a justiciable controversy and has not presented an issue of major public importance. *Nollette v. Christianson*, 115 Wash.2d 594,596, 800 P 2d. 359(1990).

Plaintiffs' Motion for Summary Judgment is denied. The Defendant's Motion for Summary Judgment is granted along with its Motion for Dismissal.

COURT'S FINDINGS OF FACT

The Court makes the following findings in support of its above-stated decision, based upon the record before it, as follows:

1. The Washington Legislature enacted ESHB 1632 which was signed by the Governor on July 3, 2013 and effective July 28, 2013;
2. ESHB 1632 dealt with off-road vehicle users including ATVs and authorized counties with a population exceed 15,000 or more to approve by ordinance the operation of ATVs on county roadways;
3. The Legislature considered the value and opportunities that our state offers for recreational purposes, including, but not limited to, hunting, fishing, camping, sightseeing, wildlife viewing, picnicking, driving for pleasure, kayaking/canoeing, and gathering berries, firewood, mushrooms, and other natural products;
4. The Legislature considered the economic impact that recreationists, including ATVers, have on communities and expressly intended to stimulate rural communities economically

by opening certain roadways to use by motorized recreationists including ATVers;

5. Okanogan County considered enacting Ordinance 2014-7 which would open up additional county roadways to ATV useage;
6. As the responsible official under SEPA, Okanogan County Planning Director Perry Huston undertook and prepared an environmental checklist (P.Huston Ex.2) as provided under WAC 197-11-315 and WAC 197-11-960 concerning the new ordinance;
7. As to the proposed ordinance "Opening ATV Routes", a *Determination of Non-Significance* (DNS) threshold determination was made by Okanogan County Planning & Development, in accordance to WAC 197-11-350, identifying the proposed ordinance would not have a probable, significant, and adverse environmental impact (P.Huston Ex.3);
8. The DNS was published on April 16, 2014. Written comments were required by May 2, 2014 in order to preserve a party's standing to appeal a final determination;
9. On the 14th day of May, 2014 a Final Determination of Non-Significance was issued by the SEPA Responsible Official, Perry Huston, and the Plaintiffs, having offered written comments during SEPA comment period, filed a timely appeal (P.Huston Ex.5);
10. A hearing was held on the 16th day of June, 2014 before the Board of Okanogan County Commissioners (BOCC) for the purposes of considering the appeal brought by the Plaintiffs (MVCC and CNW) against the Final Determination of Non-Significance;
11. The BOCC conducted an open (public) hearing on the record; receiving testimony that was subject to cross-examination including the SEPA Responsible person, Appellants (MVCC and CNW) or their representatives, and other interested

parties ; written materials including declarations, treatises, reports and studies; personal accounts or experiences; and considered a "Staff Report" authored by P. Huston; (See P.Huston Ex 5, 6, 7 & 8)(See Declr of M.Rowland, G. Wooten,and D.Mann);

12. The BOCC, after considering all testimony and exhibits submitted at the public hearing held on June 16, 2014, issued, at a continuation of the June 16th hearing, on June 23rd Resolution 51-2014 denying the appeal of the Final SEPA Determination of Non-Significance, upholding the decision of the SEPA Responsible Office, and adopted Findings of Fact along with Conclusions of Law; (P.Huston Ex 8, attch A & B);
13. The BOCC did enact Ordinance 2014-7 on the 23rd day of June, 2014 opening a number of county roads for use by wheeled all-terrain vehicles in accordance to RCW 46.09.455(c)(i) with those roads listed as having a speed limit of 35 miles per hour;
14. The environment checklist prepared by Mr. Huston along with the DNS were reviewed by this court; sufficient consideration has been given to environmental factors relative to the proposed action by Mr Huston; and does appear to constitute prima facie compliance with SEPA procedural requirements;
15. The DNS, Environmental Checklist and Resolution 51-2014 must be accorded substantial weight by the Court and were not "clearly erroneous" as alleged;
16. The Plaintiffs have a) failed to demonstrate or show an actual, present and existing dispute; b) failed to prove a direct and substantial interest or damage; and/or c) presented speculative or hypothetical concerns which have been previously considered by the Legislature in enacting ESHB 1632 and subsequently considered by the Defendant;

17. The Plaintiff has failed to present a Justiciable Controvery for purposes of applying the Uniform Declaratory Judgment Act 7.24 RCW;

18. The Plaintiff should not be granted injunctive relief as it has failed to establish that the Defendant was clearly erroneous in its SEPA procedure, including appeal to the BOCC and its enactment of Ordinance 2014-7;

19. The legislative body for Okanogan County, the Board of County Commissioners, was authorized under ESHB 1632 to enact an ordinance that would permit the use of ATVs on county roads with a posted speed limit of 35 mph and that Ordinance 2014-7 was enacted, after SEPA procedural review, which opened approximately 597.23 miles.

Counsel for the Defendant shall prepare Findings of Facts, Conclusions of Law and Orders in accordance with the Court Memorandum Decision.

Respectfully Submitted this 26th day of December, 2014.

HENRY A RAWSON, Judge
Okanogan County Superior Court

COURT'S ATTACHMENT "A"

PLEADINGS, MOTIONS, and DECLARATIONS reviewed by Court as part of Plaintiffs' and Defendant's Cross-Motions for Summary Judgment and Defendant's Motion for Dismissal

1. Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief;
2. Defendant's Answer and Affirmative Defenses;
3. Defendant's Motion to Dismiss;
4. Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss
5. Declaration of Perry Huston in Support of Motion to Dismiss (with exhibits)(also relied upon by Plaintiffs in their opposition to the Motion to Dismiss);
6. Memorandum in Opposition to Motion to Dismiss and In Support of Cross Motion for Summary Judgment;
7. Declaration of Melanie J. Rowland;
8. Declaration of George Wooten;
9. Declaration of David S. Mann;
10. Defendant's Response to Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss and Plaintiffs' Cross Motion for Summary Judgment;
11. Plaintiffs' Reply in Support of Cross Motion for Summary Judgment;

Note: an untimely declaration was filed by Spencer King as President of North Central ATV Club and an untimely filed Brief of Amicus Curiae on behalf of North Central ATV Club by Attorney Alexander H. Thomason. Neither were considered by the Court.

APPENDIX B

Appendix A - Annotated List of Roads

Rd_No	Road_Name	Speed	BMP	EMP	Length	Jur	FFC	Surface	To or thru WDFW	One mile or less	1-2 mile segment	Tunk Valley lek habitat	Other	Comments
11170	PATTERSON LK RD	20	4.410	4.830	0.420	5	07	BST		x			x	connects to +35 Twisp River Rd.
11170	PATTERSON LK RD	20	4.830	5.251	0.421	5	07	BST		x			x	
15170	ALTA LK RD	20	1.850	2.640	0.790	5	09	BST		x				
31740	FAIRGROUND ACC RD	20	0.000	0.178	0.178	5	09	BST						
35050	QUAIL LANE	20	0.000	0.226	0.226	5	09	BST						
35050	QUAIL LANE	20	0.226	0.600	0.374	5	09	BST						
35110	PINE DRIVE	20	0.000	0.199	0.199	5	09	BST						
35190	LONE PINE LANE	20	0.000	0.184	0.184	5	09	BST						
35230	RIVERVIEW DRIVE	20	0.000	0.490	0.490	5	09	BST						
35230	RIVERVIEW DRIVE	20	0.490	0.682	0.192	5	09	GRV						
39200	TONASKET SHOP RD	20	0.110	0.392	0.282	5	09	BST						
45860	ROSE ST	20	0.000	0.140	0.140	5	09	BST						
45890	BLACKLER RD	20	0.000	0.311	0.311	5	09	BST						
45920	DEEP BAY RD	20	0.000	0.077	0.077	5	09	BST						
10490	LIBBY CR RD	25	2.467	3.690	1.223	5	09	GRV						
10490	LIBBY CR RD	25	3.690	5.730	2.040	5	09	GRV						
10900	W FORK BUTTERMILK CR RD	25	0.000	0.220	0.220	5	09	BST						
12130	W CHEWUCH RD	25	0.000	0.310	0.310	5	09	BST		x				between Hwy 20 & +35
12510	CUB CR RD	25	0.000	2.023	2.023	5	09	BST	x					
15150	ANTOINE CR RD	25	3.274	3.840	0.566	5	09	BST						
15150	ANTOINE CR RD	25	3.840	3.858	0.018	5	09	GRV						
15150	ANTOINE CR RD	25	3.858	3.889	0.031	5	09	GRV						
15150	ANTOINE CR RD	25	3.889	5.760	1.871	5	09	GRV						
15170	ALTA LK RD	25	2.640	3.210	0.570	5	09	BST		x				
16580	PEDERSEN RD	25	0.000	0.290	0.290	5	09	BST		x				
17030	BENSON CR RD	25	0.000	0.740	0.740	5	09	BST						
17030	BENSON CR RD	25	0.740	1.640	0.900	5	09	BST						
17030	BENSON CR RD	25	1.640	2.391	0.751	5	09	BST						
17030	BENSON CR RD	25	2.391	3.093	0.702	5	09	GRV						
17030	BENSON CR RD	25	3.093	3.129	0.036	5	09	GRV						
19830	PENLEY RD	25	0.000	0.130	0.130	5	09	BST						
19830	PENLEY RD	25	0.130	0.171	0.041	5	09	GRV						
19880	HARRIS RD	25	0.000	0.270	0.270	5	09	BST						

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Rd_No	Road_Name	Speed	BMP	EMP	Length	Jur	FFC	Surface	To or thru WDFW	One mile or less	1-2 mile segment	Tunk Valley lek habitat	Other	Comments
22180	MORRIS RD	25	0.000	0.405	0.405	5	09	BST						
49530	BONAPARTE LK RD	30	6.107	6.302	0.195	5	08	BST						
10040	SQUAW CR RD	35	0.000	2.198	2.198	5	09	GRV						
10140	DANZL RD	35	0.000	1.503	1.503	5	09	GRV			x			
10200	MCFARLAND CR RD	35	0.000	0.882	0.882	5	09	BST						
10200	MCFARLAND CR RD	35	0.882	2.980	2.098	5	09	GRV						
10200	MCFARLAND CR RD	35	2.980	3.770	0.790	5	09	GRV						
10200	MCFARLAND CR RD	35	3.770	4.369	0.599	5	09	GRV						
10370	STOKES RD	35	0.000	0.560	0.560	5	09	GRV	x		x			
10370	STOKES RD	35	0.560	0.840	0.280	5	09	GRV	x		x			
10370	STOKES RD	35	0.840	0.920	0.080	5	09	GRV	x		x			
10370	STOKES RD	35	0.920	1.395	0.475	5	09	GRV	x		x			
10510	SMITH CANYON RD	35	0.000	1.853	1.853	5	09	GRV			x			
10550	BIGGERS RD	35	0.000	0.400	0.400	5	09	GRD		x				
10590	ALDER RD	35	0.000	0.330	0.330	5	09	BST		x				
10590	ALDER RD	35	0.330	0.743	0.413	5	09	GRV		x				
10650	LOOKOUT MTN RD	35	0.310	2.046	1.736	5	09	GRV			x			
10650	LOOKOUT MTN RD	35	3.887	4.072	0.185	5	09	GRV		x			x	From Hwy 153 to FS Rd.
10650	LOOKOUT MTN RD	35	4.195	4.239	0.044	5	09	GRV		x			x	
10710	POORMAN CR RD	35	2.449	3.090	0.641	5	09	GRV					x	
10710	POORMAN CR RD	35	3.090	3.420	0.330	5	09	GRV					x	
10710	POORMAN CR RD	35	3.420	3.808	0.388	5	09	GRV						leads only to private prop, WDFW or dead end
10750	POORMAN CR CUTOFF RD	35	0.000	1.061	1.061	5	09	GRV						
10760	REYNAUD LOOP RD	35	0.000	0.310	0.310	5	09	GRV						
10890	NEWBY CR RD	35	0.000	0.330	0.330	5	09	GRV		x				
10900	W FORK BUTTERMILK CR RD	35	0.220	0.500	0.280	5	09	GRV		x				
10900	W FORK BUTTERMILK CR RD	35	0.500	1.050	0.550	5	09	GRV		x				
10970	ELBOW COULEE RD	35	0.000	0.590	0.590	5	09	GRV	x					
10970	ELBOW COULEE RD	35	0.590	5.065	4.475	5	09	GRV	x					

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11030	FROST RD	35	0.000	0.040	0.040	5	09	GRV	x		x			frm Twisp thru Private to dead end FS Rd.
11030	FROST RD	35	0.040	0.700	0.660	5	09	GRV	x		x			
11030	FROST RD	35	0.700	1.805	1.105	5	09	GRV	x		x			
11100	OLD TWISP HWY S.	35	0.000	2.084	2.084	5	09	BST						
11130	WANDLING RD	35	0.000	0.200	0.200	5	09	GRV		x				
11130	WANDLING RD	35	0.200	0.480	0.280	5	09	GRV		x				
11150	BRENGMAN RD	35	0.000	0.240	0.240	5	09	GRV		x				
11290	BRYAN RD	35	0.000	0.320	0.320	5	09	GRV		x				
11310	WOLF CR RD	35	4.339	4.990	0.651	5	09	GRV						
11310	WOLF CR RD	35	4.990	7.450	2.460	5	09	GRD						
11310	WOLF CR RD	35	7.450	7.990	0.540	5	09	GRV						
11310	WOLF CR RD	35	7.990	8.917	0.927	5	09	GRV						
11310	WOLF CR RD	35	8.917	8.960	0.043	5	09	BST						
11450	LEFT FORK WOLF CR RD	35	0.000	0.300	0.300	5	09	GRV			x			
11450	LEFT FORK WOLF CR RD	35	0.300	1.030	0.730	5	09	GRV			x			
11510	KUMM RD	35	0.000	0.850	0.850	5	09	GRV		x				
11640	OLD GOAT CR RD	35	0.000	0.990	0.990	5	09	UNI		x			x	connects only to Hwy 20
11830	CASSAL RD	35	0.000	0.260	0.260	5	09	GRV		x				runs between +35 Twin Lakes Rd. and private
12230	RENDEZVOUS RD	35	0.000	0.058	0.058	5	09	BST	x					
12230	RENDEZVOUS RD	35	0.058	0.600	0.542	5	09	GRV	x					
12230	RENDEZVOUS RD	35	0.600	1.099	0.499	5	09	GRV	x					
12230	RENDEZVOUS RD	35	1.099	1.920	0.821	5	09	GRV	x				x	4.57 mi gravel section between +35 & Hwy 20
12230	RENDEZVOUS RD	35	1.920	3.500	1.580	5	09	GRV	x				x	
12230	RENDEZVOUS RD	35	3.500	4.050	0.550	5	09	GRV	x				x	
12230	RENDEZVOUS RD	35	4.050	5.000	0.950	5	09	GRV	x				x	
12230	RENDEZVOUS RD	35	5.000	5.420	0.420	5	09	GRV	x				x	

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12230	RENDEZVOUS RD	35	5.420	5.603	0.183	5	09	GRV	x					Gravel dead ends on private, FS Rd.
12330	GUNN RANCH RD	35	0.000	3.490	3.490	5	09	GRV	x					
12400	WALTER RD	35	0.000	0.600	0.600	5	09	GRV		x				between hwy 20 and private
12510	CUB CR RD	35	2.023	2.500	0.477	5	09	GRV		x				
15170	ALTA LK RD	35	0.000	1.850	1.850	5	08	BST			x			
15250	STARR RD	35	0.000	2.600	2.600	5	09	BST						
15250	STARR RD	35	2.600	3.688	1.088	5	09	BST						
15300	MAIN ST-METHOW	35	0.000	0.183	0.183	5	09	GRV		x				
15300	MAIN ST-METHOW	35	0.183	0.387	0.204	5	09	BST		x				
15350	BURMA RD	35	0.000	0.010	0.010	5	09	BST						
15350	BURMA RD	35	0.010	0.050	0.040	5	09	PCC						
15350	BURMA RD	35	0.050	0.100	0.050	5	09	BST						
15350	BURMA RD	35	0.100	0.880	0.780	5	09	GRV						
15350	BURMA RD	35	0.880	1.580	0.700	5	09	GRV						
15350	BURMA RD	35	1.580	2.995	1.415	5	09	GRV						
15430	TEXAS CR RD	35	0.633	4.770	4.137	5	09	GRV						
15430	TEXAS CR RD	35	4.770	5.280	0.510	5	09	GRV						
15430	TEXAS CR RD	35	5.280	5.500	0.220	5	09	GRV						connects to Hwy 153
15430	TEXAS CR RD	35	5.500	7.100	1.600	5	09	GRV						
15430	TEXAS CR RD	35	7.100	7.950	0.850	5	09	GRD						
15430	TEXAS CR RD	35	7.950	8.707	0.757	5	09	GRD						
15450	FRENCH CR RD	35	0.000	2.587	2.587	5	08	GRV						
15450	FRENCH CR RD	35	2.587	2.907	0.320	5	08	GRV					x	loops from and to Hwy 153
15450	FRENCH CR RD	35	2.907	3.340	0.433	5	09	GRD					x	
15520	VINTIN RD	35	0.000	0.830	0.830	5	09	GRV					x	
15520	VINTIN RD	35	0.830	2.069	1.239	5	09	GRV					x	
15550	ROSS RD	35	0.000	1.092	1.092	5	09	BST					x	
15610	TAYLOR RD	35	0.000	0.481	0.481	5	09	UNI					x	
15780	IRIS LANE	35	0.000	0.220	0.220	5	09	GRV						

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Rd_No	Road_Name	Speed	BMP	EMP	Length	Jur	FFC	Surface	To or thru WDFW	One mile or less	1-2 mile segment	Tunk Valley lek habitat	Other	Comments
15800	WAGNER RD	35	0.000	0.220	0.220	5	09	GRV		x				
15830	THURLOW RD	35	0.000	0.340	0.340	5	09	GRV		x				
15830	THURLOW RD	35	0.340	0.494	0.154	5	09	GRV		x				
15900	FINLEY CANYON RD	35	0.000	1.230	1.230	5	09	GRV						
15900	FINLEY CANYON RD	35	1.230	1.842	0.612	5	09	GRV						
15950	TWISP AIRPORT RD	35	0.000	0.540	0.540	5	09	BST			x			
15950	TWISP AIRPORT RD	35	0.540	1.369	0.829	5	09	BST			x			
15970	AYERS RD	35	0.000	0.140	0.140	5	09	GRV		x				
15980	EVANS RD	35	0.000	1.100	1.100	5	09	GRV			x			
16000	BALKY HILL RD	35	0.000	0.063	0.063	5	09	GRV	x					
16000	BALKY HILL RD	35	0.063	2.440	2.377	5	09	GRV	x					
16000	BALKY HILL RD	35	2.440	2.680	0.240	5	09	GRV	x					
16000	BALKY HILL RD	35	2.680	4.628	1.948	5	09	GRV	x					
16020	ASPEN LANE	35	0.000	0.190	0.190	5	09	GRV		x				
16050	DAVIS LK RD	35	0.000	1.465	1.465	5	09	BST	x		x			
16050	DAVIS LK RD	35	1.465	1.485	0.020	5	09	GRV	x		x			
16110	LOWER BEAR CR RD	35	0.000	0.640	0.640	5	09	BST		x				
16110	LOWER BEAR CR RD	35	0.640	0.810	0.170	5	09	BST		x				
16110	LOWER BEAR CR RD	35	0.810	0.923	0.113	5	09	GRD		x				connects only to Hwy 20
16160	LOWER BEAR CR ACC	35	0.000	0.409	0.409	5	09	BST		x				
16240	LESTER RD	35	0.000	3.300	3.300	5	09	GRV	x					dead ends at Hwy 20
16240	LESTER RD	35	3.300	5.680	2.380	5	09	GRV	x					connects to +35 E. County Rd.
16240	LESTER RD	35	5.680	6.080	0.400	5	09	GRV	x					
16250	BEAR CR GOLF COURSE RD	35	0.000	0.078	0.078	5	09	GRV		x				
16310	BEAR CR RD	35	1.770	3.150	1.380	5	08	GRV	x					
16310	BEAR CR RD	35	3.150	5.612	2.462	5	08	GRV	x					
16350	CAMPBELL LK RD	35	0.000	1.030	1.030	5	09	GRV	x					
16370	UPPER BEAVER CR RD	35	3.127	4.100	0.973	5	09	GRV	x					
16370	UPPER BEAVER CR RD	35	4.100	5.406	1.306	5	09	GRV	x					
37970	KEYSTONE RD	35	0.000	3.506	3.506	5	09	BST						
38080	CHEWILIKEN VALLEY RD	35	0.000	1.017	1.017	5	09	BST				x		
38080	CHEWILIKEN VALLEY RD	35	1.017	4.345	3.328	5	09	GRV				x		

Appendix A - Annotated List of Roads

Rd_No	Road_Name	Speed	BMP	EMP	Length	Jur	FFC	Surface	To or thru WDFW	One mile or less	1-2 mile segment	Tunk Valley lek habitat	Other	Comments
38170	KNOX RD	35	0.000	1.590	1.590	5	09	GRV				x		
38190	KNOX RD EXT.	35	0.000	1.029	1.029	5	09	GRD				x		
38220	ED FIGLENSKI RD	35	0.000	1.827	1.827	5	09	GRV						
38270	HOSHEIT RD	35	0.000	1.530	1.530	5	09	GRV				x		
38270	HOSHEIT RD	35	1.530	1.690	0.160	5	09	GRV				x		dead ends at golf course
38270	HOSHEIT RD	35	1.690	2.483	0.793	5	09	GRV				x		
38450	ANDERSON RD	35	0.000	0.510	0.510	5	09	GRV				x		
38450	ANDERSON RD	35	0.510	0.648	0.138	5	09	GRV				x		
38490	FRITZ RD	35	0.000	1.782	1.782	5	09	GRV				x		
38820	WARWICK RD	35	0.000	0.839	0.839	5	09	GRV						
38910	S JANIS RD	35	0.000	0.460	0.460	5	09	BST						
39230	LONGANECKER RD	35	0.000	0.931	0.931	5	09	BST						
39510	UPPER CHEWILIKEN VALLEY	35	0.000	0.289	0.289	5	09	GRD				x		
46620	SWANSON MILL RD	35	11.190	11.323	0.133	5	09	GRV						
91140	TWISP RIVER RD	35	0.500	0.697	0.197	5	07	BST		x				
91370	EASTSIDE CHEWUCH RD	35	0.702	0.915	0.213	5	07	BST		x				
									END					

APPENDIX C

OKANOGAN COUNTY
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Staff Report
SEPA Appeal Hearing
All-Terrain Vehicle (ATV) DNS
June 16, 2014

Author: Perry D. Huston, Director

Purpose of Hearing

The purpose of this hearing is to consider an appeal brought against a Final Determination of Non-significance issued by the SEPA Responsible Official on May 14, 2014. The appeal was brought by the Methow Valley Citizens Council and Conservation Northwest. The appellants are represented by David S. Mann of Gendler and Mann L.L.P. The proposal under environmental review is an ordinance which if adopted would open approximately 597 miles of county roads to travel by properly licensed ATV's. The roads under consideration are all county roads with a posted speed limit of 35 mph or less (see attachment A) not already opened to ATV use.

Standing

The SEPA Responsible Official stipulates that both the Methow Valley Citizens Council and Conservation Northwest offered written comments during the SEPA comment period and filed a timely appeal. The appeal issues raised are generally consistent with the comments submitted.

Citations

Revised Code of Washington 46.09.455 (c) (i) A person may not operate a wheeled all-terrain vehicle on a public roadway within the boundaries of a county, not including non-highway roads and trails, with a population of fifteen thousand or more unless the county by ordinance has approved the operation of wheeled all-terrain vehicles on county roadways, not including non-highway roads and trails, and **Okanogan County Code 10.10** authorizes the operation of off road vehicles on county roads designated for that purpose.

OCC 14.04.220 Appeals....Okanogan County establishes...administrative appeal provisions pursuant to RCW 43.21C.075 and WAC 197-11-680.

RCW 43.21C.075 (6c) Appeals.....Judicial review under this chapter shall without exception be of the government action together with its accompanying environmental determinations.

(3)d Shall provide that procedural determinations made by the responsible official

shall be entitled to substantial weight.
Saldin Sec v Snohomish 80.Wn. App. 522 A party may not seek judicial review of a threshold procedural determination under the State Environmental Policy Act.....until the decision making agency has taken final steps to approve or disapprove the development proposal.
Cheney v Mountlake Terrace 87 Wn.2d 338 .....responsible governmental agency or body need not consider speculative or remote environmental consequences. Whether a consequence is remote, speculative, or probable is determined by the application of the rule of reason.
SWAP v Okanogan County 66 Wn. App 439 (6) The level of detail adequate to address mitigation measures in an environmental impact statement does not have to include a worst case scenario; it need only discuss mitigation for all significant impacts of the project.
Asarco v Pollution Quality Coalition 92 Wn 2 685...a determination that a project is not a major action significantly affecting the quality of the environment is reviewed by determining whether the decision is clearly erroneous in view of the entire record and the public policy contained in the statute authorizing the decision.
Okanogan County Code 14.12 Critical Areas
Okanogan County Shorelines Master Program
Revised Code of Washington 43.21c State Environmental Policy Act
Washington Administrative Code 197-11 SEPA Rules

Proposal
The proposal if adopted would open additional, existing county roads to use by properly licensed and equipped wheeled All-Terrain Vehicles. The RCW as cited above directs the process by which counties with over 15,000 populations may open roads that meet the criteria to ATV use. RCW 46.09 further defines the license and equipment requirements for the ATV's. This proposal if adopted does not repeal or otherwise minimize any regulation regarding the operation of ATV's on land owned or under the jurisdiction of the Colville Confederated Tribes, Washington State Fish and Wildlife, Department of Natural Resources, or any other land management agency. The proposal would only open existing county roads to qualified ATV's and operators. This proposal was reviewed for environmental impacts consistent with RCW 43.21c, WAC 197-11, and OCC 14.04. A Final Determination of Non-Significance was published on May 14, 2014 after review of comments received during the SEPA comment period

Legislative intent
The proposal noted above is consistent with the authority granted County's in Engrossed Substitute House Bill 1632. The bill states the legislature finds that off-road vehicle users have been overwhelmed with varied confusing rules, regulations, and ordinances from federal, state, county, and city land managers throughout the state to the extent standardization statewide is needed to maintain public safety and

good order. It further states it is the intent of the legislature to : (a) Increase opportunities for safe, legal, and environmentally acceptable motorized recreation; (b) decrease the amount of unlawful or environmentally harmful motorized recreation; (c) generate funds for use in maintenance, signage, education, and enforcement of motorized recreation opportunities; (d) advance a culture of self-policing and abuse intolerance among motorized recreationists; (e) cause no change in the policies of any governmental agency with respect to public land; (f) not change any current ORV usage routes as authorized in chapter 213, Laws of 2005; (g) stimulate rural economies by opening certain roadways to use by motorized recreationists which will in turn stimulate economic activity through expenditures on gasoline, lodging, food and drink, and other entertainment purposes; (h) and require all wheeled all-terrain vehicles to obtain a metal tag, and

Purpose of SEPA (State Environmental Policy Act) Review
The State Environmental Policy Act (SEPA) establishes a process for review of programs and projects for environmental impacts. The statute directs that where SEPA review is initiated by another application, in this case a proposal to open existing county roads to ATV use, any judicial appeal of a SEPA determination must be tied to the final decision of the decision maker approving or disapproving the project/proposal. In the case of Okanogan County an administrative appeal process is provided by OCC 14.04.220.

A SEPA review need not consider impacts that are speculative or remote but must consider impacts that are probable, significant, and adverse. The determination of what impacts are considered and the level of analysis conducted are informed by the project/proposal description, environmental checklist, and the comments received. For a SEPA to be considered complete it must provide a reasonably thorough discussion of any probable, significant, and adverse impacts so the decision makers can make informed decisions.

The use of the environmental checklist is required to ensure that specific areas and issues of the environment are considered in the review of a project or in this case a legislative proposal. The environmental checklist used is the same for all projects and proposals. There is no bright line standard for completing the checklist as the details of each project or proposal are different. The requirement is that each area enumerated in the checklist be completed and considered in light of the details and location of the project or proposal, the entire record, and the public policy contained in the statute authorizing the decision.

The threshold determination is made by the SEPA Responsible Official after review and evaluation of the project or proposal and the environmental checklist. In the event the Responsible Official believes there is a likelihood that probable, significant, AND adverse impacts will occur as a result of the proposal than a Determination of

Significance (DS) is issued and issue scoping for an environmental impact statement is conducted. In the case the project or proposal seems unlikely to cause probable, significant, and adverse impacts than a Determination of Non-Significance (DNS) is issued. A Mitigated Determination of Non-Significance (MDNS) may be issued when impacts are known and can be mitigated by conditions to render them no longer probable, significant and adverse. Okanogan County does not use the alternate DNS process. In each case that a DNS is issued a notice is published and a public comment period is used to gather additional information to inform the decision of the Responsible Official.

The SEPA rules adopted in WAC 197-11 allow for a withdrawal of a threshold determination and the issue of a new determination when information gathered during the review process warrants it. The rule also authorizes the Responsible Official to consider existing regulation where the regulation is crafted to protect the environment from impact.

The information generated during the SEPA review is not the only information the decision maker must consider. Other regulatory requirements and provisions are still applied. Information generated during the public hearing process is considered as well. The SEPA review period is to ensure that certain areas of environmental concern are considered. The SEPA process in and of itself does not approve or deny a project. A project or proposal that has generated a DNS may still be denied on other grounds and conversely a project or proposal that is likely to create probable, significant, and adverse impacts may still be approved with conditions/mitigations.

The environmental review of any project/proposal must be conducted within the context of the project/proposal. The impacts identified and any mitigations proposed must be proportionate to the scope of the project/proposal.

Issues

The following section of this report will summarize the issues raised by the appellants.

The County failed to satisfy the necessary "standard of review" by failing to issue a Determination of Significance and prepare an Environmental Impact Statement.

The County failed to analyze the likelihood of significant impacts to sensitive lands and waters due to illegal ATV use.

The Checklist and DNS failed to consider the impacts of traffic from ATV's traveling on roads with speed limits over 35 mph either because of confusion over where ATV's are and are not allowed or because the operator wants to cross a segment with a higher speed limit or access an isolated segment.

Response

Most of the issues raised by the appellants rely on the assumption that illegal ATV operation will result from the approval of this proposal which opens existing roads to ATV use. The appellants rely on this assumption to then assert the County failed to consider the likelihood that widespread damage to the environment would result from illegal ATV use. The appellants than rely on this assumption to assert that the County did not conduct an adequate review under SEPA because it failed to issue a DS and prepare an Environmental Impact Statement to identify and mitigate probable, significant, and adverse impacts brought about by illegal ATV use.

The proposal submitted by the County for environmental review would open only existing roadways with a speed limit of 35 mph or less to use by licensed operators of licensed ATV's. No other restrictions are repealed or other privileges granted. Based on this proposal the environmental checklist was prepared and considered. The DNS under appeal was issued based on review of this information and a public comment period was conducted to gain additional information for further review.

Information submitted during the SEPA comment period did not identify any environmental issues that were not considered or any probable, significant, and adverse impacts that would be caused by the proposal.

Some of the comments received during the comment period that are relevant to the question are summarized in the following. All comments received were considered and are made part of the record.

The Okanogan County Sheriff submitted a comment stating he had no concerns with the proposal.

Washington State Fish and Wildlife personnel offered a comment stating they had concerns about increased enforcement costs brought about by increased illegal ATV use. The comment offered no specifics other than there was an "increase" in illegal ATV use.

A past manager of WDFW offered a comment that when the roads were previously opened last summer there was more illegal ATV use than in the "previous three years". Neither activity level was quantified.

The Confederated tribes of the Colville Reservation offered a comment that the reservation was closed to ATV use by non-tribal members and illegal use would result in damage to the environment and tribal resources. No information regarding the number or frequency of the incidents of illegal ATV use was provided.

The Methow Valley Citizens Council offered a comment that illegal ATV use would result in environmental impacts but offered no information in terms of the number or frequency of the incidents to which they refer.

There were other comments offered in a tone similar to those noted above. None of the commenters offered specific statistics or other analysis quantifying the concerns.

No information obtained through the public review process effectively quantifies the number of additional ATV riders anticipated in Okanogan County at any time that would result from the adoption of this proposal. Both proponents and opponents of the proposal suggest that there may be many but no specific information has been offered.

The appellants assert that a large influx of riders will come to the Okanogan County and a substantial portion of them will operate their ATV'S in unlawful areas. Further the appellants assert that a significant portion of the unlawful use will take place in environmentally sensitive areas. There is no information contained in the proposal or gathered during the public comment period that would support a conclusion that the proposal will likely result in an increase in illegal ATV use or that the illegal use will result in probable, significant, and adverse impacts to the environment. As noted previously in this report the assertions made by the appellants' are dependent on these two speculative assumptions. Further, to reach the conclusion asserted by the appellant's one would have to assume that the illegal ATV operation would take place in a significant amount of environmentally sensitive areas such as wetlands or nesting sites, etc.

In addition to the speculative nature of the comments the comments received are in conflict. The Okanogan County Sheriff, chief law enforcement officer for the County, submitted a comment stating he had no concerns with the proposal. Others as noted offered concerns but no specific information. Given the general nature of the comments the assertion that illegal ATV use will significantly increase as a result of opening existing roads to ATV's is speculative. As this assertion is speculative the assertion that illegal ATV use will result in probable, significant, and adverse impacts to the environment is speculative as well.

In addition to the speculative nature of the issues raised by the appellants any assessment of environmental impacts that takes the approach that any protective regulation or conditions of approval will be ignored therefore probable, significant, and adverse impacts will occur is problematic. Such an approach would render moot any effort to mitigate environmental impacts or reliance on existing regulation to protect the environment and promote public health and safety. If a party need only assert that no one will obey the law or conditions of approval in the course of a project/proposal review than it leaves the only alternative the denial or unreasonable

curtailment of the project/proposal. The use of SEPA in such a manner would render a thoughtful environmental review and subsequent conditioning of a project/proposal difficult at best if not impossible to conduct.

As noted in Arthur Gresh v. Okanogan County and Mazama Properties L.L.C Okanogan County Superior Court No 11-2-00491-2 the court stated "the court will not speculate that public agencies will not do their duty or that property owners will necessarily ignore the plat limits" in response to the assertion by the plaintiff that negative impacts will result because the (plat) conditions will not be followed and/or will not be adequately enforced. In the Amicus brief filed by the Department of Ecology for this same case the footnote on page 14 states Ecology agrees.... The Superior Court was correct in pronouncing....that courts "may not speculate that public agencies will not do their duty or that property owners will not necessarily ignore the plat limits....

The discussion by the court in "Gresh" is "on point" here as well. The law prohibits unlawful ATV operation and protects critical areas. An appeal brought on the premise that these laws will be ignored, but apparently the laws that currently close the roads is respected, is problematic on its face.

The proposal if adopted would allow the operation of properly licensed/equipped ATV's by properly licensed operators on qualified county roads. The concern that the same operators who observe the existing road closures would not observe other regulation if the road closures were removed is at any rate not an environmental impact to be further analyzed or mitigated.

Conclusion

The SEPA process is required to provide a reasonably thorough discussion of probable, significant, and adverse impacts brought about by a project/proposal. The SEPA review considered the areas of concern enumerated on the environmental checklist and the impacts suggested during the public comment periods.

The final decision regarding the proposal has not been made. The comments made by the agencies and members of the public are part of the record to be considered by the Board of County Commissioners prior to approving, amending, or denying the proposal.

The appellants in their request for relief ask that a DS be issued and an Environmental Impact Statement be prepared. They assert the responsible Official was clearly erroneous in the decision to issue a final DNS for the proposal. The appellants are correct that the standard for review is a "clearly erroneous" standard and the definition they provide of the meaning of that phrase is accurate as well. However, the conclusion that the decision of the SEPA responsible Official is clearly

erroneous can only be made in view of the entire record and the public policy contained in the statute authorizing the decision. As noted earlier the purpose of the legislation authorizing counties to adopt ordinances such as the one under review was to promote public safety and reduce confusion. The appellant's assertion that in implementing the decision authorized by law; a decision authorized for the purpose of enhancing public safety, reducing confusion, and enhancing a self-policing approach to ATV operation will in fact accomplish the exact opposite is completely contrary to the public policy contained in the statute.

The appellant's assert that issues enumerated in the environmental checklist were not analyzed. Their assertion is incorrect. The issues were not analyzed to their satisfaction but the appellant's did not identify any issues that were not considered. Their assertion that an EIS must be prepared to consider issues not dealt with in the environmental review is without merit.

To prepare an environmental impact statement as requested by the appellant's three assumptions would have to be made and those assumptions quantified in some manner. The necessary assumptions would be:

1) That a significant increase in the number of ATV's and the intensity of their use would result from adoption of the proposal.
2) That a significant number of the ATV's would be operated in an unlawful manner.
3) That a significant number of unlawful ATV operators would leave the roadway and operate the ATV's in a significant number of environmentally sensitive areas.

Preparing an EIS based on the unsubstantiated assertion that the above listed speculative occurrences are likely is not required by law. In fact the SEPA statutes contain language directed to the specific objective of preventing the SEPA process from considering speculative impacts in an effort to prevent SEPA from becoming a tool of the obstructionist. The preparation of an EIS that attempts to quantify this sort of speculative impacts would be a daunting if not impossible task and would clearly be for the purpose of rendering the review so cumbersome and/or expensive that the proponent would simply abandon the project/proposal as untenable. In the end the EIS would impose conditions or cite existing regulation that mitigates the feared environmental impacts which brings us back to the appellant's "point of beginning". Attacking the adequacy of an environmental review on the basis that no one will honor the law or conditions imposed is without merit and contrary to the law.

In the case of this proposal and subsequent environmental review the preparation of an EIS would not add materially to the discussion. The issue that unknown impacts have not been identified has not been raised. In fact, the issues involved are clearly identified and understood. The issues involved have been discussed and the

information generated has become part of the record. The lack of an EIS has not impaired anybody's ability to participate in the process or compromised an understanding of the consequences the opponents of the proposal fear. The lack of an EIS has not compromised the appellant's ability to enter their concerns and any information that supports their view into the record.

The appellant's assertion that the environmental checklist was inadequate and/or inaccurate is premised on their assertion that the speculative impacts identified are likely. This assertion is premised on the assumption that ATV operators will ignore all or most regulation. The challenges with this issue have been previously discussed and I will not repeat those points here. As their first premise is invalid there is no reason to believe the checklist is either inaccurate or inadequate.

The appellant's assertion that ATV operators may have to cross roadways with a speed limit greater than 35 mph is accurate but the environmental impact they fear it creates is unclear. Any motor vehicle operator; or non-motorized vehicle operator for that matter, that operate on the road system must cross roadways with greater or lesser speed limits than the one they are on. The "rules of the road" adopted in statute are adopted to govern that type of vehicle operator interaction. In fact the statute that authorizes the proposal under review specifically contemplates that such a scenario will occur and provides direction on how to deal with it.

The appellant's request that all paved roads be removed from the proposal would seem contrary to their stated desire to reduce environmental impacts. The discussion provided by this staff report is applicable to this issue so I will not repeat them here.

All process requirements for environmental review were followed. This is not disputed by the appellants.

The appeal brought by the MVCC and CNW fails to provide any compelling evidence that would lead a reasonable person to conclude the SEPA Responsible Official made a "clearly erroneous" mistake in conducting the SEPA review. The appellant's have failed to demonstrate that any mistake made was an "egregious error" in terms of compromising the public's ability to participate in the process or in preventing the "reasonable thorough discussion" of environmental impacts to occur.

The appellant's have failed to overcome the deference given by law to the decision of the SEPA Responsible Official that an EIS was not necessary for this proposal and that a Final DNS was appropriate.

The appeal should accordingly be denied.

No. 331946-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST, and METHOW VALLEY CITIZENS' COUNCIL,

Appellants,

v.

OKANOGAN COUNTY,

Respondent.

RESPONDENT OKANOGAN COUNTY'S CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served Brief of Respondent Okanogan County to counsel as follows:

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☒ Via hand delivery
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Dated this 22nd of June, 2015 at Seattle, Washington

Cheryl Robertson