No. 93567-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONSERVATION NORTHWEST; and METHOW VALLEY CITIZENS' COUNCIL,

Appellants,

v.

OKANOGAN COUNTY,

Respondent.



# RESPONDENT OKANOGAN COUNTY'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW PURSUANT TO RAP 13.4 OF COURT OF APPEALS, DIVISION III DECISION IN No. 331946-III

Albert H. Lin, WSBA No. 28066
Chief Civil Deputy Prosecuting Attorney,
alin@co.okanogan.wa.us
237 Fourth Avenue N.
P.O. Box 1130
Okanogan, WA 98840-1130
Telephone: 509.422.7280
Facsimile: 509.422.7290
Alexander W. Mackie, WSBA No. 6404
amackie6404@gmail.com
Attorneys for Respondent
Okanogan County

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Pursuant to RAP 13.4, Okanogan County limits its reply to Conservation Northwest's attempt to change the issue before the court.

I. Conservation Northwest attempts to recharacterize the issue to allow superior courts unlimited jurisdiction in SEPA appeals including record reviews under RCW 43.21C.075.

Conservation Northwest identifies the issue before the Court as whether RCW 43.21C.075 (Exhibit A) grants Superior Court jurisdiction to hear and resolve all SEPA related issues including reviews which call upon the Court to weigh the sufficiency of the record in support of a SEPA decision upheld by an administrative appeal.

Conservation Northwest relies primarily on *Lands Council v. Washington State Parks and Recreation Comm'n*, 176 Wn.App 787, 309 P.3d 734 (2013), for its assertion that RCW 43.21C.075 enables a Superior Court to exercise jurisdiction over all SEPA questions including the appellate authority to weigh the merits of a record supporting the administrative denial of a SEPA appeal. That case involved two questions resolved as a matter of law on summary judgment: (1) plaintiffs' allegations of use provided

evidence of injury in fact sufficient to have standing to challenge SEPA compliance of the agency in changing the legal status of the lands in question without an EIS and (2) Whether the decision to change the status of a certain land was a "final decision" of the agency which required an EIS before the change of status and not simply before the project could be constructed.

The Case does not support Conservation Northwest's attempt to expand the issue in the present case, however, as at no time did the Court address the legal sufficiency of the environmental determination made by the agency, nor, was there an administrative appeal of the sufficiency of the SEPA decision which brought the record of that decision before the court.

II. Neither the Statute nor the Cases Cited Support the expanded jurisdiction claimed in Conservation Northwest's attempt to change the issue in this case.

The defect in the Conservation Northwest attempt to broaden the issue that RCW 43.21C.075, without more authorizes superior courts to engage in appellate review, is that the brief relies solely on cases which were decided as a matter of law. None of the cases referenced by Conservation Northwest required the Court to address the merits of a SEPA decision, weighing the record from

an administrative appeal on the merits of the decision made under the "clearly erroneous" standard.

The *Lands Council* case was resolved on two questions as a matter of law, and did not involve judging the merits of the record supporting SEPA decision itself-- which did call for an EIS before a final decision was to be made.[1]

The reference to *Harris v. Pierce Cty.*, 84 Wn.App. 222, 928 P.2d 1111 (1996), is similarly misleading and does not support Conservation Northwest's attempt to recharacterize the issue into one of plenary jurisdiction under RCW 43.21C.075. In that case, a writ was brought to challenge the adequacy of a SEPA document supporting a trail plan. The matter was rejected. The Court held the parties were not aggrieved as a matter of law (no standing), and that a mere writ (which would bring the record before them for appellate review) was insufficient to bring a legislative matter before the Court. Both defects were sufficient to keep the Court from

[1] The Brief notes reliance by the *Lands Council* decision on this Court's decision in *Raynes v. Leavenworth*, 118 Wash.2d 237, 244–45, 821 P.2d 1204 (1992), and the Court of Appeals decision in *Foster v. King Cty.*, 83 Wn.App. 339, 921 P.2d 552 (1996), brief at p 5. Both of those cases noted a jurisdictional defect to proceeding with a SEPA review (failure to bring the legislative matter before the Court in *Raynes* and premature request for review in *Foster)* and neither case provides any authority for the proposition that RCW 43.21C.075 enables a Superior Court to engage in the review of the adequacy of a SEPA record on appeal.

getting to the merits of the adequacy of the SEPA determination itself. The Court's reference to RCW 43.21C.075 stated:

> 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.
>
> 84 Wn.App. at 232

"Agency Compliance" to the timing of an agency action is very different from the appellate authority to review a record on the merits on appeal. At no time is it suggested in either case that RCW 43.21C.075 grants a superior court jurisdiction to conduct an appellate review of the adequacy of a SEPA record supporting a decision after an administrative appeal. Yet that is the issue Conservation Northwest is asking this court to uphold in order to accept the results of the Court of Appeals below in the present matter.

III. Okanogan County asks the Court to focus on the more limited issue requiring Courts to have express appellate jurisdiction under a proper statutory authority before engaging in appellate review of the adequacy of a record on an administrative SEPA appeal.

Okanogan County petitions for discretionary review the more limited issue and not the one directly addressed by Conservation Northwest's response:

Whether the matter below should have been dismissed as a matter of law for failure to invoke the appellate authority of a trial court under one of the appellate statutes addressed above.

In so ruling the Court would reject the proposition stated by Conservation Northwest that RCW 43.21C.075, standing alone, or in concert with a request for declaratory judgment as was the case below, grants a superior court jurisdiction to weigh the adequacy and sufficiency of the record supporting the decision in an administrative appeal upholding a determination of nonsignificance, and appealed by Conservation Northwest "on the record" under the conditions of RCW 43.21C.075(6).

That issue is properly before this Court because the legislature specifically provided for administrative appeals of SEPA decisions in RCW 43.21C.075(3) and judicial review of those appeals under RCW 43.21C.075(5) and further that any judicial appeal of such decisions be on the record.[2]

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[2] (6)(a) 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) emphasis supplied.

RCW 43.21C.075 made no specific provisions for an appellate review of a record by a superior court and in context the phrase "consistent with other applicable law" for review of can only be read to incorporate statutory provisions where the legislature has spelled out where, when, and under what circumstances a Superior Court may exercise appellate authority.

The legislature specifically provided that appeals of administrative decisions on the adequacy of SEPA were to be heard "on the record, consistent with other applicable law." RCW 43.21C.075. The reference to the "other applicable law," where a Superior Court must exercise appellate responsibility to review the merits of a decision on the record is a direct reference to those laws which provides specific guidance as to when, how, and under what criteria such appellate cases are to be heard and the criteria by which such decisions are to be made. See the statutory guidance provided in the Administrative Procedure Act, RCW 34.05.554, 558, 570(3)(4); Land Use Petition Act, RCW 36.70C.130(1-4); or the Statutory Writ RCW 7.16.120. Copies of which are included in the appendix.

Okanogan County does not contest that RCW 43.21C.075 grants standing to parties aggrieved by a decision to contest whether SEPA was properly followed by an agency in the adoption of a final action. That is the holding of the *Lands Council* decision and the reference to that statute in *Harris*, both of which addressed issues outside the record of the SEPA decision itself and addressed only with the jurisdictional questions, timing, standing, and joinder of SEPA and legislative appeals (as did the *Raynes* and *Foster* cases noted above).

## IV. Summary and Conclusion

Okanogan County believes the Conservation Northwest Brief seeks to sidestep the important difference between the right to challenge an agency's compliance with SEPA as a matter of law, and the limitations on resolving a judicial appeal of an administrative decision under RCW 43.21C.075(6) by seeking to bring both under the jurisdiction of a Superior Court without reference to one or more of the statutes necessary to grant superior courts appellate authority and process. But that assertion is without regard to the phrase "consistent with other applicable law" in subsection (6)(a) which would be rendered surplusage by their

interpretation. This the Courts may not do. The review of administrative records, where the trial court is asked to weigh and evaluate evidence under the clearly erroneous standard have been historically limited to cases invoking the appellate jurisdiction of the courts under the appellate statutes cited above. Nothing in RCW 43.21C.075 or the decisions of this Court or any of the Appellate Courts support eliminating that requirement as suggested by the issue as argued in the Conservation Northwest Brief.

The Court should accept review and allow the matter to proceed.

Respectfully submitted

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|---|---|
| Dated: November 16, 2016 | **OKANOGAN COUNTY PROSECUTING ATTORNEY**<br><br>By: _____<br>Albert H. Lin, WSBA No. 28066<br>Chief Civil Deputy Prosecuting Attorney<br>alin@co.okanogan.wa.us<br><br>237 Fourth Avenue N.<br>P.O. Box 1130<br>Okanogan, WA 98840-1130<br>Telephone: 509.422.7280<br>Facsimile: 509.422.7290<br><br>By: _____<br>Alexander W. Mackie, WSBA No. 6404<br>Special Deputy Prosecuting Attorney<br>amackie6404@gmail.com,<br><br>Attorneys for Respondent Okanogan County |

# EXHIBIT A

**RCW 43.21c.075**

**Appeals.**

(1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall allow no more than one agency appeal proceeding on each procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement);

(b) Shall consolidate an appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) with a hearing or appeal on the underlying governmental action by providing for a single simultaneous hearing before one hearing officer or body to consider the agency decision or recommendation on a proposal and any environmental determinations made under this chapter, with the exception of:

(i) An appeal of a determination of significance;

(ii) An appeal of a procedural determination made by an agency when the agency is a project proponent, or is funding a project, and chooses to conduct its review under this chapter, including any appeals of its procedural determinations, prior to submitting an application for a project permit;

(iii) An appeal of a procedural determination made by an agency on a nonproject action; or

(iv) An appeal to the local legislative authority under RCW **43.21C.060** or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this subsection; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use

approvals (the "underlying governmental action"). RCW **43.21C.080** establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. This subsection does not modify any such time periods. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within such time period. The agency shall give official notice stating the date and place for commencing an appeal.

(b) If there is no time period for appealing the underlying governmental action, and a notice of action under RCW **43.21C.080** is used, appeals shall be commenced within the time period specified by RCW **43.21C.080**.

(6)(a) 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.

(b) A taped or written transcript may be used. If a taped transcript is to be reviewed, a record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review. A party may provide a written transcript of portions of the testimony at the party's own expense or apply to that court for an order requiring the party seeking review to pay for additional portions of the written transcript.

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court shall certify the final order of the shorelines hearings board and the certified final order may only be appealed to an appellate court. In the case of an appeal under this chapter regarding a project or other matter that is also the subject of an appeal to the shorelines hearings board under chapter **90.58** RCW, the shorelines hearings board shall have sole jurisdiction over both the appeal under this section and the appeal under chapter **90.58** RCW, shall consider them together, and shall issue a final order within one hundred eighty days as provided in RCW **90.58.180**.

(8) For purposes of this section and RCW **43.21C.080**, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW **43.21C.080**(2)). The word "action" in this section and RCW **43.21C.080** does not mean a procedural determination by itself made under this chapter. The word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. Except as provided in subsection (5) of this section, the word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorneys' fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis.

**[ 1997 c 429 § 49; 1995 c 347 § 204; 1994 c 253 § 4; 1983 c 117 § 4.]**

**NOTES:**

**Severability—1997 c 429:** See note following RCW **36.70A.3201**.

**Finding—Severability—Part headings and table of contents not law—1995 c 347:** See notes following RCW **36.70A.470**.

# APPENDIX

**RCW 34.05.554**

**Limitation on new issues.**

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

**[ 1988 c 288 § 512.]**

**RCW 34.05.558**

**Judicial review of facts confined to record.**

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

**[ 1988 c 288 § 513.]**

**RCW 34.05.570**

**Judicial review.**

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW **2.06.020**(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW **2.06.020**(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW **34.05.425** or **34.12.050** was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW **34.05.514**, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW **34.05.562**, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

**[ 2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13.** Formerly RCW **34.04.130**.]

**NOTES:**

**Findings—Short title—Intent—1995 c 403:** See note following RCW **34.05.328**.

**Effective date—1989 c 175:** See note following RCW **34.05.010**.

**RCW 36.70C.130**

**Standards for granting relief—Renewable resource projects within energy overlay zones.**

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW **36.70C.120**. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter **43.21C** RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter **36.70A** RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter **43.21C** RCW.

**[ 2009 c 419 § 2; 1995 c 347 § 714.]**

**RCW 7.16.120**

**Questions involving merits to be determined.**

The questions involving the merits to be determined by the court upon the hearing are:

(1) Whether the body or officer had jurisdiction of the subject matter of the determination under review.

(2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.

(3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.

(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.

(5) Whether the factual determinations were supported by substantial evidence.

[ **1989 c 7 § 1; 1957 c 51 § 6; 1895 c 65 § 12;** RRS § 1010.]

## CERTIFICATE OF SERVICE

I, Laura Field, do hereby certify under penalty of perjury that on the 16th day of November, 2016, I caused the **RESPONDENT OKANOGAN COUNTY'S REPLY TO APPELLANTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW PURSUANT TO RAP 13.4 OF COURT OF APPEALS, DIVISION III DECISION IN NO. 331946-III** and this **CERTIFICATE OF SERVICE** to be filed in the **SUPREME COURT OF THE STATE OF WASHINGTON** and a true copy of the same to be served on the following in the manner indicated below:

(x) Via Email (per agreement)

David A. Bricklin, WSBA # 7583
BRICKLIN & NEWMAN, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
206.264.8600/ Fax 206.264.9300
bricklin@bnd-law.com
miller@bnd-law.com Admin Box
cahill@bnd-law.com Assistant Peggy Cahill

(x) Via Email (per agreement)

Melanie J. Rowland, WSBA # 13055
Attorney at Law
10 Waxwing Lane
Twisp, WA 98856
509.997.6242
melanie@greatcat.com

Attorney and Co-Counsel for Appellants

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

(x) Via Email (per agreement)

Alex Thomason, WSBA# 35975
PO Box 307
Brewster, WA 98812
509.689.3471/Fax 509.689.3472
alex@thomasonlawandjustice.com
lindsay@thomasonlawandjustice.com
Assistant Lindsay Vallance

Amicus for Respondents

Laura Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

CERTIFICATE OF SERVICE