

NO. 62707-4-I (consolidated)

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHUCKANUT CONSERVANCY and NORTH CASCADES
CONSERVATION COUNCIL,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,
and WILLIAM WALLACE, Northwest Region Manager,

Petitioners,

and

AMERICAN FOREST RESOURCE COUNCIL, CARPENTERS
INDUSTRIAL COUNCIL, and SKAGIT COUNTY,

Petitioner-Intervenors,

and

CONSERVATION NORTHWEST,

Respondent-Intervenor.

**REPLY BRIEF OF PETITIONERS AND
PETITIONER-INTERVENOR SKAGIT COUNTY**

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I. INTRODUCTION

The Department of Natural Resources' (DNR) and Skagit County's opening brief demonstrates that this case is a challenge to one action under the State Environmental Policy Act (SEPA): DNR's decision to manage a core zone in Blanchard Forest for conservation and recreation and to seek compensation for the trust beneficiaries for that acreage. Chuckanut Conservancy and North Cascades Conservation Council (Chuckanut) have failed to demonstrate any error by DNR.

Chuckanut argues that an analysis of alternatives to the Blanchard Forest Strategies (the Strategies) is required by SEPA. This is incorrect. An alternatives analysis is required only in an Environmental Impact Statement (EIS). An EIS, in turn, is required only when an agency finds that its proposed activity will have probable, significant, adverse environmental impacts.¹ WAC 197-11-734. Here, DNR properly determined the Strategies would not have significant, adverse impacts, and Chuckanut fails to prove otherwise. Therefore, there is no legal requirement to analyze alternatives.

Chuckanut's arguments depend on a mistaken view that these trust lands are currently managed solely for recreation. It ignores the record

¹ SEPA impacts are qualified by the terms probable, significant, adverse, and environmental. RCW 43.21C.030(c). To avoid redundancy, the remainder of this brief uses the phrase "significant, adverse impacts", but this does not intend to diminish the requirement that the impacts must also be probable and environmental.

showing that the status quo and management baseline (with or without the Strategies) requires sustainable revenue generation from the state trust lands. As a result, Chuckanut wrongly attempts to challenge the management framework that DNR currently applies to the entire Blanchard Forest and improperly frames the issue as a “decision to log two-thirds of Blanchard Forest”. Chuckanut’s Corrected Response Brief (Chuckanut Br.) at 20.

The action at issue, DNR’s decision to *set aside* 1/3 of Blanchard Forest for conservation and recreation, does not have a significant, adverse impact compared to the existing use of the entire Forest: management under the current statutory, regulatory, and policy framework with no set aside. Accordingly, DNR properly issued a determination of non-significance (DNS), and Chuckanut’s claims should be dismissed.

II. ARGUMENT

Chuckanut does not dispute that a set aside of a core zone provides an environmental benefit, nor does it prove that there is a significant, adverse impact from the core zone itself. Chuckanut instead argues that further environmental analysis is needed because DNR did not set aside more land. This argument misapplies SEPA.

A. The Baseline for Impacts Under SEPA Is Existing Uses, and the Strategies Have No Significant, Adverse Impacts Because They Do Not Decrease Protections From the Existing Management Framework.

1. Without a Threshold Finding of Significant, Adverse Impacts, No Alternatives Are Evaluated Under SEPA.

Much of Chuckanut's argument is misdirected, challenging DNR's existing programmatic management framework, and overlooking the decision at issue in this case, the DNS. Chuckanut ignores the first and most essential step for judicial review of a challenge to a DNS: did the agency make the correct threshold decision when it issued the DNS? *Norway Hill Pres. and Prot. Ass'n v. King Cy. Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976); *Moss v. City of Bellingham*, 109 Wn. App. 6, 14–15, 31 P.3d 703 (2001); see Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 13 (2002); DNR and Skagit County's Opening Brief (DNR Opening Br.) at 13, 20–21.

An agency prepares an EIS, which develops and evaluates alternatives *only* after determining there are significant, adverse impacts

from its proposal.² *San Juan Cy. v. Dep't of Natural Resources*, 28 Wn. App. 796, 801, 626 P.2d 995 (1981) (when the checklist and evidence support the DNS, there is “no need to discuss alternatives”); *Brown v. City of Tacoma*, 30 Wn. App. 762, 766, 637 P.2d 1005 (1981) (an agency does not need to prepare a “mini-EIS”); *Settle*, §§ 7.01, 8.01, at 8–11; WAC 197-11-360, -400, -734. Chuckanut’s argument on the need for alternatives is not relevant in this case where the Court is reviewing DNR’s threshold determination and the critical question is whether the proposal to set aside 1/3 of Blanchard Forest has significant, adverse impacts. Chuckanut Br. at 37–39, 55–57, 66–67; *see Settle*, § 13.01[1] nn.32, 35–48.

Further, Chuckanut confuses requirements for compliance with federal law with state law. Chuckanut Br. at 29, 33, 38, 51–53 n.16. NEPA is the federal version of SEPA. *See Alpine Lakes Prot. Soc. v. Dep't of Ecology*, 135 Wn. App. 376, 394 n.24, 144 P.3d 385 (2006). Unlike SEPA, NEPA requires an analysis of alternatives at the checklist stage. 40 C.F.R. § 1508.9(b). Under SEPA, without a finding of probable, significant, adverse environmental impacts, DNR did not have to

² Chuckanut’s misunderstanding of SEPA’s alternatives requirement is exemplified in its omission of a critical qualifying word in its block quote on page 28 of its brief: “it is important that an [EIS] be prepared in all *appropriate* cases.” *Norway Hill*, 87 Wn.2d at 273 (emphasis added on omitted word). In the superior court below, Chuckanut also omitted the critical qualifier “appropriate”. CP 285, ll. 5–9.

complete an EIS, nor analyze alternatives. *King Cy. v. Boundary Review Bd.*, 122 Wn.2d 648, 665–66, 860 P.2d 1024 (1993) (citation omitted).

2. Chuckanut Challenged the Strategies, Not the Existing Management Framework, and Therefore Misapplies the Baseline.

Chuckanut challenged DNR’s decision issuing a DNS for the Strategies after DNR completed an environmental checklist and found no significant, adverse impacts. CP 3–18; REC 28, 42, 92–107; DNR Opening Br. at 28. Chuckanut’s current action is a challenge to the Strategies, not the existing management framework established through previous programmatic policy decisions.³ DNR Opening Br. at 22, 24–25. In hindsight, Chuckanut may wish it had challenged the previous decisions that led to DNR’s current management framework. However, it cannot collaterally attack those previous decisions in this proceeding. “Allowing opponents to use a project EIS to collaterally attack previous programmatic policy decisions would disrupt the finality of the decision and eliminate any benefits of phased review.” *Glasser v. City of Seattle, Office of Hearing Exam’r*, 139 Wn. App. 728, 738–39, 162 P.3d 1134 (2007).

³ Chuckanut’s focus on the unaffected 2/3 of Blanchard Forest can only be viewed as a back door effort to challenge DNR’s programmatic management framework. This recurs throughout the response brief, with misdirected argument such as “*existing rules and policies* provide precious little protection”. Chuckanut Br. at 60 (emphasis added) and 4 (Issues 3, 4).

Contrary to Chuckanut’s argument, the determination whether the Strategies result in significant, adverse impacts requires a comparison to the status quo where *all* of Blanchard Forest is currently managed for sustainable harvest, not a hypothetical situation where DNR has the choice to discontinue sustainable harvest for the entire Forest. CP 68–69 ¶¶ 2–6; *see* Settle, § 13.01[1] nn.26, 26a (evaluating an action for significant impacts requires an analysis whether the impacts are “not produced by *existing activities* in the area”) (emphasis added); REC 8621 (1.2.1), REC 9083 (Purpose). Similarly, the SEPA rules promulgated by the Department of Ecology confirm that the “starting point” for environmental analysis is the status quo at the time of a proposed action. *See* WAC 197-11-448; *Narrowview Pres. Ass’n v. City of Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974) (Two relevant factors apply to a determination of significant impacts, “(1) the extent to which the action will cause adverse environmental effects *in excess of those created by existing uses in the area*, and (2) . . . the cumulative harm that results from its contribution *to existing adverse conditions or uses in the affected area*.” (Emphasis added)).

To determine the baseline, the Court must consider what management principles would guide DNR on Blanchard Forest without adoption of the Strategies. Without the Strategies, DNR would continue

to manage the entire Blanchard Forest for multiple uses, including harvest, recreation, and conservation, but absent a “core zone” devoted exclusively to conservation and recreation.⁴ REC 29–32 (4.a., existing regulatory framework).

3. DNR Properly Determined the Strategies Do Not Have Significant, Adverse Impacts Because the Strategies Do Not Decrease the Environmental Protections in the Existing Management Framework.

Contrary to Chuckanut’s arguments, the record confirms that the four actions in the Strategies do not alter the existing management framework that applies to DNR’s management of state forest trust lands. REC 44–45,⁵ 162 (the Strategies do “not introduce any new environmental impacts above and beyond those already analyzed through the non-project programs” identified.). The Court gives the agency’s threshold determination “substantial weight”, and “recognizes and defers to the expertise of the administrative agency.” RCW 43.21C.090; WAC 197-11-920 (identifies categories of agency

⁴ If Petitioners and Petitioner-Intervenors misunderstand case law interpreting the baseline as the status quo, the remedy is invalidation of the agency action and remand to the agency. *Levine v. Jefferson Cy.*, 116 Wn.2d 575, 582, 807 P.2d 363 (1991); *State v. Grays Harbor Cy.*, 122 Wn.2d 244, 256 n.12, 857 P.2d 1039 (1993); DNR Opening Br. at 35–36. However, minor violations of SEPA, such as error that is harmless or not prejudicial, are inconsequential and do not justify a remedy. *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 54, 52 P.3d 522 (2002); *Moss*, 109 Wn. App. at 25.

⁵ The Strategies’ four actions can be simplified to: I. Manage Blanchard Forest in four zones and two overlays; II. *Support* working forests and secure a sustainable timber supply; III. *Compensate* the Skagit County trust; IV. *Ensure durability* of the Strategies. REC 44–45; DNR Opening Br. at 11–12.

expertise); *Pease Hill v. Spokane Cy.*, 62 Wn. App. 800, 809, 816 P.2d 37 (1991); DNR Opening Br. at 18–19; American Forest Resource Council and Carpenters Industrial Council’s Opening Brief (AFRC Opening Br.) at 31–32.

The checklist completed for the Strategies revealed that the four actions do not cause significant, adverse impacts because they do not decrease the existing protections from the management framework that will continue to apply to the Blanchard Forest. REC 92–107; DNR Opening Br. at 27–28. In addition, to have an impact, the proposal must *degrade* the *existing condition* of the environment. *Thornton Creek*, 113 Wn. App. at 58–59. The Strategies do not modify the existing management framework, and thus, do not result in significant, adverse impacts.

4. Setting Aside 1/3 of Blanchard Forest in a Core Zone Does Not Adversely Impact Elements of the Environment.

The SEPA environmental checklist requires a project proponent to analyze the probable, significant, adverse environmental impacts of its proposal on 16 environmental elements. WAC 197-11-960(B). Chuckanut focuses its broad allegations of impact on four: wildlife, water, aesthetics, and recreation. DNR’s checklist and the SEPA record prove that these allegations are unfounded. REC 22–107.

The record demonstrates that wildlife is not significantly or adversely impacted by a decision to eliminate harvest and dedicate 1/3 of Blanchard Forest to conservation and recreation. REC 99. Chuckanut argues that the marbled murrelet is negatively impacted by citing a letter written to DNR by a member of the public *before* the Strategies were adopted. Chuckanut Br. at 8, citing REC 9246. This is insufficient to meet Chuckanut's burden of proof. DNR Opening Br. at 28–29. Nevertheless, DNR's response at the time demonstrated that its management framework protects murrelets and their habitat. REC 9432. The Strategies do not change those protections. REC 33 (5.a.), 171–72 (DNR's HCP prohibits harvest of murrelet habitat of five acres or more). Additionally, and most notably, there are *no* known threatened and endangered species on site. REC 98 (4.c.), 3528 (“Marbled murrelet nesting has not been documented in [Blanchard Forest]”).

Similarly, Chuckanut misdirects the Court by citing the listing of the northern spotted owl as threatened in the federal register in 1990. Chuckanut Br., App. B. DNR's SEPA record clearly states “Owls *not present* [in Blanchard Forest] are the spotted owl”. REC 3528 (emphasis added). Just as for the murrelet, DNR's existing management framework protects all threatened and endangered species, occupied habitat, and old growth. DNR Opening Br. at 5–9. A proposal which does not modify the

existing protections for wildlife species is not a significant, adverse impact.

Chuckanut makes generalized challenges to other elements of the environment by attacking harvest and road building as *per se* impacts to water quality. The record does not support Chuckanut's allegations. Chuckanut cites an analysis of the former forest practices rules to demonstrate impacts of the Strategies. Chuckanut Br. at 11–13. However, those rules are no longer in effect. REC 7774. Furthermore, an EIS was completed when the current, more environmentally-protective and stringent forest practices rules were adopted.⁶ REC 5158, 7774, 8832. Chuckanut's allegations of impacts from harvest and road building as a result of the former rules ceased to be relevant in 2001, when the new rules were adopted. More significantly, Chuckanut disregards the fact that the Strategies do not propose any harvest or road building. REC 44–45; AFRC Opening Br. at 19–28.

Additionally, Chuckanut's portrayal of future harvest on Blanchard Forest in "great swaths" as an impact mischaracterizes the record⁷ and is legally irrelevant. It is legally irrelevant because the Strategies propose

⁶ This brief does not provide a comparison of the current rules (adopted in 2001) and former rules (adopted in 1974 and modified numerous times thereafter) because this litigation is not a rule challenge. However, the Court may find background on the rules at CP 274–76; REC 5158, 7774, and 8832 useful.

⁷ Even if Chuckanut's facts were legally relevant, many are not supported by the record. *See* AFRC's Reply Brief for additional examples.

setting aside 1/3 of the Forest and do not alter the existing management framework for the remainder. Thus, the remainder of the Forest is managed under the framework with or without the Strategies in place. The relevant consideration for this Court is whether the decision to eliminate harvest in 1/3 of the Forest by setting it aside for conservation and recreation has a significant, adverse impact.

Regardless, DNR manages all its forest lands, including Blanchard Forest, sustainably, as required by law. RCW 79.10.310, .320; DNR Opening Br. at 10. DNR's average harvest unit is 25–40 acres, and DNR's management plan proposes harvest of three to four units per year on the 4,827 acres of Blanchard Forest. REC 4320.⁸ DNR's existing management framework does not permit units over 100 acres. REC 9117. Additionally, proposed sales will not include any old-growth, but only second and third rotation trees. REC 83; DNR Opening Br. at 5; AFRC Opening Br. at 12–13. DNR's existing management framework protects old-growth, the Strategies do not change that framework, and DNR will continue implementing its policies encouraging development of more old-growth on its managed lands. REC 176, 9114–15, 9127. DNR properly found there is no significant, adverse impact to water quality

⁸ The sustainable harvest volume applied to Blanchard Forest estimates that “the annual area harvested on Blanchard Forest will average approximately 2% of the entire ownership (currently 4827 acres)”. REC 49; RCW 79.10.300, .340. Two percent of 4,827 acres is 96.5 acres.

from the Strategies' proposal to manage the core zone for conservation and recreation.

Chuckanut's final allegation of impact from the Strategies is to aesthetics and recreation. In contrast to Chuckanut's unsupported claims, recreation is also not a *per se* conflict with DNR's current programmatic management framework. REC 48, 188–92. If it were, the Multiple Use Act, *see* below at II.B., would be superfluous, because DNR could not combine uses. If that were the case, compensation would be required whenever an interest group wanted to recreate on state forest trust lands. *See Reid v. Dalton*, 124 Wn. App. 113, 123, 100 P.3d 349 (2004) (“We interpret statutes to avoid absurd results.”) (citation omitted).

Again, Chuckanut's argument is legally irrelevant because the Strategies do not alter the existing recreation in the Forest. Nevertheless, the record demonstrates that 35,000–50,000 visitors a year use Blanchard Forest trails for hiking, horseback riding, mountain biking, bird watching, camping, and scenic viewing; as scenic vistas; and the Forest provides a launch point for hang gliders and access to rock climbing. DNR Opening Br. at 11. Most profoundly, the record shows that Blanchard Forest is currently used for recreation while being managed concurrently as a working forest. REC 104, 1397, 1446, 4312.

Chuckanut's alleged impact relating to aesthetics⁹ and recreation is that it wants *more* of the Forest to be dedicated to recreation. The portion of the record focused specifically on Blanchard Forest¹⁰ describes two campgrounds, two trailheads, and twenty miles of "heavily used trails", all being used coextensive with commercial forestry under the existing management framework. REC 1379–544, 4312. Chuckanut's dislike of the appearance of harvest¹¹ and preference for more recreation is not a significant, adverse impact caused by the Strategies.

DNR properly evaluated the impact of the Strategies on recreation and aesthetics in the checklist, as it did the other environmental elements. It found no probable, significant, adverse environmental impacts because the Strategies eliminate harvest in the portion of the Forest with the most recreation resources, and the Strategies do not increase harvest or decrease or impair recreation in the Forest. REC 42, 48, 188–92. DNR did not err in issuing a DNS.

⁹ The management policy that addresses aesthetics and continues to apply to Blanchard Forest with or without the Strategies is called the *Policy for Sustainable Forests*. REC 9122–23.

¹⁰ While alleging that DNR failed to evaluate Blanchard Forest specific information, Chuckanut concedes there is information at the level of "granularity" it needs by citing the Blanchard-specific documents relied on by DNR in its SEPA record. Chuckanut Br. at 4, 5, 6, 7, 14, 15, 23, and 56.

¹¹ In Blanchard Forest, other users *benefit* from harvest. Hang gliders began to use Samish Overlook after harvest because it created the conditions necessary for a launch site, REC 3509, 4313, and the harvest activities directly resulted in spectacular views. REC 1429.

B. The Strategies Are Not Contrary to the Multiple Use Act, and DNR Has No Other Authority to Dedicate the Entire Blanchard Forest for Recreation.

Chuckanut's alternative challenge to the Strategies under the Multiple Use Act, Chapter 79.10 RCW, is not yet before this Court.¹² The superior court separated non-SEPA claims for later review. CP 258, 324, ¶¶ 3–4. The court limited its order certifying discretionary review to the SEPA challenge. CP 323–25.

Despite this separation at the superior court level, Chuckanut argues that Blanchard Forest can be set aside for recreation under the Multiple Use Act. Chuckanut Br. at 43–47. This argument overlooks the requirement that multiple uses are only permitted on state lands if the uses are compatible with DNR's primary objective, generation of revenue for the trust beneficiaries. RCW 79.10.120; REC 8637, 9094–96. If multiple uses and revenue generation are not compatible, then DNR may only allow multiple uses "if there is compensation from such uses satisfying the financial obligations" to the trust beneficiaries. RCW 79.10.120; REC 165, 188, 9098; AFRC Opening Br. at 36. Chuckanut argues that because the Legislature is *capable* of compensating the trust beneficiaries for multiple uses in certain prescribed situations, DNR must sacrifice

¹² CP 257 ¶¶ 5, 6; CP 226–27 (record is for SEPA only); CP 263–64 ("the complaint [CP 3–18] is less than clear on [multiple uses]").

financial return in order to promote recreation on Blanchard Forest. This is a logical fallacy and contradicts the law.

Chuckanut argues DNR improperly failed to evaluate the “alternative” under the Multiple Use Act of setting aside the entire Forest for recreation. This argument is based on the mistaken premise that DNR has the discretionary authority to make management decisions that do not produce revenue for the trust beneficiaries. As a creature of statute, DNR’s authority is limited to the “powers either expressly granted or necessarily implied by the legislature.” *See, e.g., Johnson Forestry Contracting, Inc. v. Dep’t of Natural Resources*, 131 Wn. App. 13, 26, 126 P.3d 45 (2005) (discussing authority of different administrative agency) (citation omitted); Chapter 43.30 RCW; REC 4959.

DNR consists of the Board of Natural Resources (BNR), an administrator, and a supervisor. RCW 43.30.030. The Commissioner of Public Lands is the administrator of DNR. RCW 43.30.105; Chapter 43.12 RCW. The *BNR* establishes land management policies. RCW 43.30.215(2). The Commissioner and *DNR* staff implement those policies, but cannot modify them. DNR Opening Br. at 6–9.

The Commissioner approved the Strategies, not the BNR. CP 255 ¶ 9. Thus, the Strategies were designed to implement the existing land management policies established by the BNR, not modify them.

REC 29–32. The Commissioner’s and DNR staff’s authority to manage the trust lands is limited to implementing the policies adopted by the BNR, which are likewise limited by the Legislature’s statutory directives. Those policies were not challenged by Chuckanut, nor are they altered by the Strategies.

DNR’s primary obligation as the land manager of the state forest trust lands is to generate revenue for the trust beneficiaries. RCW 79.22.010, .040; *Skamania Cy. v. State*, 102 Wn.2d 127, 133–34, 685 P.2d 576 (1984); REC 4959, 8621, 9083; DNR Opening Br. at 10. DNR must comply with the fiduciary principles that apply to all trusts, including the principle of management on a sustained yield basis. RCW 79.10.310, .320; DNR Opening Br. at 5. DNR has no authority to set aside an entire forest for recreation absent compensation to the beneficiaries of that land base. *See Skamania*, 102 Wn.2d at 134 (DNR cannot sacrifice its fiduciary responsibilities, “no matter how laudable those [other] objectives may be”).

Chuckanut would have a different case if the Legislature had appropriated the \$36 million that it would take to compensate the beneficiaries to set aside the entire Blanchard Forest from sustainable

revenue generation.¹³ Under RCW 79.10.120, DNR may permit multiple uses of trust lands *only if* the uses are “compatible with the financial obligations”, *or* if compensation to the beneficiaries is provided. The 2007 Legislature appropriated \$4 million to compensate the trust for approximately 500 acres. Construing RCW 79.10.120 according to its plain words, DNR presently has no authority to set aside more of the Blanchard Forest.

Regardless, Chuckanut asks if the beneficiaries received compensation from the Legislature for 1/12 of the Forest, “why not more?” Chuckanut Br. at 48. The answer is simple: because there isn’t appropriated compensation. Chuckanut admits the applicability of statute and trust law requiring that the beneficiaries receive compensation in order for DNR to remove land from management. Chuckanut Br. at 2, 17, 24, 40, 41, 42, 48, and 49. Chuckanut must address its argument for more

¹³ In 2007, the Legislature appropriated \$4 million, which compensated the trust beneficiaries for approximately 500 acres. CP 69 ¶ 5. Twelve million dollars is the net present value of the core zone. CP 156 ¶ 13. The core is 1/3 of the entire Forest. Four million dollars compensates the beneficiaries for 1/3 of the core, which is 1/12 of the entire Forest. CP 339–40. Thus, the approximate value of all of Blanchard Forest is \$36–40 million. DNR Opening Br. at 34.

compensation to the Legislature.¹⁴ DNR took a collaborative approach to address the competing interests on Blanchard Forest by facilitating the Strategies group, adopting the Strategies, designating the core zone, and requesting the legislative appropriation with the other group members. CP 69 §§ 4–5; CP 154–56 §§ 7–8, 12; CP 254 §§ 3–5. DNR has reached the limit of its authority to alter current management on Blanchard Forest while still complying with its trust obligations.

C. Chuckanut’s Other Arguments Lack Merit.

1. SEPA Decisions Do Not Require External Personnel.

Chuckanut makes a new argument that separate agency personnel should be required for SEPA decisions. Chuckanut Br. at 33–34. SEPA requires that the government agency involved in a proposed action designate itself as “lead” and have primary responsibility for compliance with the threshold determination.¹⁵ WAC 197-11-050, -922, -926; Settle, § 10.01[1].

¹⁴ DNR’s purpose is distinguishable from the state agency that *does* manage state land for recreation, the State Parks and Recreation Commission. Chapter 79A.05 RCW. DNR manages *public lands*, RCW Title 79, not *public recreational lands*. RCW Title 79A. If DNR had the ability to simply set aside individual parcels from revenue generation as Chuckanut suggests, the Multiple Use Act and the ability to designate Natural Resources Conservation Areas and Natural Area Preserves (with compensation) would be unnecessary. AFRC Opening Br. at 15–16.

¹⁵ “The fact that the lead agency is responsible for SEPA review of its own proposal does not in itself violate the appearance of fairness doctrine or other conflict of interest laws.” Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 10.01[1] (2002) (citations omitted).

Within the lead agency, the specific accountability for compliance with SEPA's procedural requirements is assigned to the "responsible official", who is designated pursuant to SEPA procedures. WAC 197-11-910, 332-41-910; Settle, § 10.01[2]. William Wallace, DNR's Northwest Region Manager, was the designated responsible official for the Strategies. REC 23; CP 254-55 ¶¶ 2, 6. Chuckanut's argument that a different responsible official should have been designated does not comply with SEPA's procedural requirements, which require the responsible official to be an employee of the lead agency. Where there is only one agency involved in a proposal, the responsible official would naturally be an employee of that agency.

2. The SEPA Record Is Adequate.

Contrary to Chuckanut's second new argument that the SEPA record is not adequate, Chuckanut Br. at 16 and 56, a sufficient record for reviewing a DNS includes the DNS itself, the environmental checklist leading to the DNS, and the other documents on which the DNS was based. *King Cy. v. Boundary Review Bd.*, 122 Wn.2d 648, 660-61, 860 P.2d 1024 (1993).

In *King County*, the Supreme Court stated that minutes of a city council's hearing were not required to be included in the record where the challengers never sought inclusion and failed to assert any supporting

legal authority. *King Cy.*, 122 Wn.2d at 660–61. Similarly, here, the SEPA record includes the DNS (REC 156), the environmental checklist (REC 92–107), and the analysis in documents which the DNS referred to. *See* REC 33–35. Chuckanut’s comments did not request designation of any other documents. RCW 43.21C.075(6)(b); REC 129–42. DNR’s SEPA record is adequate to support its DNS.

III. CONCLUSION

DNR asks the Court to reverse the superior court’s invalidation of DNR’s DNS. The DNS action is a decision to set aside 1/3 of Blanchard Forest for conservation and recreation. The decision does not otherwise

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alter the existing management framework. The record supports DNR's determination that this action will have no probable, significant, adverse environmental impacts.

RESPECTFULLY SUBMITTED this 19th day of August, 2009.

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NO. 62707-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CHUCKANUT CONSERVANCY and
NORTH CASCADES
CONSERVATION COUNCIL,

Plaintiffs,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL
RESOURCES and WILLIAM
WALLACE, Northwest Region
Manager,

Defendants,

and

AMERICAN FOREST RESOURCE
COUNCIL, CARPENTERS
INDUSTRIAL COUNCIL, and
SKAGIT COUNTY,

Petitioner-Intervenors,

and

CONSERVATION NORTHWEST,

Respondent-Intervenor.

CERTIFICATE OF
SERVICE

FILED
CLERK OF COURT
STATE OF WASHINGTON
2009 AUG 20 PM 3:15

I, Robert Rice, certify that on August 19, 2009, I caused to be served copies of the REPLY BRIEF OF PETITIONERS AND PETITIONER-INTERVENOR SKAGIT COUNTY and this

CERTIFICATE OF SERVICE on the parties or their counsel of record as follows:

<p>DAVID A. BRICKLIN BRICKLIN & NEWMAN LLP 1001 Fourth Avenue, Suite 3303 Seattle, WA 98154</p> <p><i>Attorney for Plaintiffs</i></p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> Next Day Air <input type="checkbox"/> Fax:</p>
<p>TOBY THALER ATTORNEY AT LAW 4212 BAKER AVENUE NW PO BOX 1188 SEATTLE, WA 98111-1188</p> <p><i>Attorney for Plaintiffs</i></p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> Next Day Air <input type="checkbox"/> Fax:</p>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of August, 2009, at Olympia, Washington.



ROBERT RICE
Legal Assistant
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