

Superior Court of the State of Washington
For the County of King

SUSAN J. CRAIGHEAD
Judge

(206) 296-9211
King County Courthouse
Seattle, Washington 98104-2312
E-mail: susan.craighead@kingcounty.gov

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BRICKLIN NEWMAN DOLD, LLP

Jennifer A. Dold
David A. Bricklin
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154

Toby Thaler
Attorney at Law
P.O. Box 1188
Seattle, WA 98111-1188

Christa L. Thompson, AAG
Natural Resource Division
P.O. Box 40100
Olympia, WA 98504-0100

David S. Mann
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101

M.B. Newberry, AAG
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Elaine L. Spencer
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128

Arne O. Denny, Civil Deputy
William W. Honea
Jill M. Olson
Skagit County Prosecuting Attorneys
605 South Third Street, Courthouse Annex
Mount Vernon, WA 98273

Re: Chuckanut Conservancy, et al v. Washington Department of Natural Resources
No. 07-2-29723-5

Counsel,

Before me is a challenge to the Department of Natural Resources (DNR)'s determination of non-significance regarding its Proposed Strategies for Management of Blanchard Forest State Trust Lands. I apologize for the delay in entering a ruling on this matter, but I have taken the time to examine all 21 volumes of the record. I have considered carefully the issues of first impression raised in this case, mindful as I am of

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its importance to the parties and to the people of Skagit and Whatcom Counties. For the reasons set forth below, the determination of non-significance is reversed and the matter remanded to DNR for preparation of an Environmental Impact Statement (EIS).

Standard of Review: This court reviews an agency determination of non-significance (DNS) for clear error. Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 274-276 (1976). This standard allows the reviewing court to give substantial weight to the agency determination as required by RCW 43.21C.090 while considering the public policy contained in the act of the legislature authorizing the decision or order. Id. at 275. "A determination of no significant environmental impact can be held to be clearly erroneous if, despite supporting evidence, the reviewing court on the record can firmly conclude a mistake has been committed." Id., at 275 (citations omitted). Once DNR makes a prima facie showing of compliance with SEPA, the plaintiffs have the burden to establish that the agency's decision was clearly erroneous. Juanita Bay Vly Comm'ty Ass'n v. Kirkland, 9 Wn. App. 59 (1973).

Blanchard Forest: This case concerns the forest blanketing Blanchard Mountain, the southernmost mountain of the Chuckanut range. It is a unique place, both because of its proximity to rapidly growing urban areas in Skagit and Whatcom Counties and because it is the only place where the Cascade foothills come down to Puget Sound. As one comprehensive assessment of the forest concluded:

The Blanchard Mountain Assessment Area provides a unique combination of ecological, topographical, scenic and low-impact recreation values within Washington State. Key attributes of this area include: (1) a unique coastal mountain range with a relatively intact mature forest; (2) rare cave habitat; (3) a high diversity of fish, wildlife and invertebrates; (4) an intricate trail system; (5) a high public interest; (6) and panoramic views of a large island archipelago and sea level farm lands. These values combined with those conserved in adjoining Larrabee State Park help maintain many of the unique values and species assemblages found in the Chuckanut Mountain Range.

REC 3538. The forest is crisscrossed by a network of 20 miles of trails used by some 35,000 visitors each year. It is also habitat for a number of endangered and threatened species, from the marbled murrelet to the Townsend's big-eared bat and even a rare fungus fly. DNR manages 4827 acres, deeded to the State during the Great Depression when its owners forfeited their land for taxes. All but a small chunk of the forest had been clear cut in the early part of the 20th century. The State holds the land in trust for the benefit of Skagit County and some of its junior taxing districts. Unless the State otherwise compensates the beneficiaries of the trust, the trust land is to be managed by DNR to sustain timber yields.

The Strategies: Historically, DNR has managed Blanchard Forest to allow a significant amount of recreation while at the same time permitting limited timber sales in the forest. Much of the forest is now late successional growth and ready to be harvested. At the same time, the population in the vicinity of the mountain has been growing. Between 2000 and 2025 the population of Whatcom County is expected to grow by 48% and Skagit County by 60%. REC 4364. It is evident from the record that there has been notable conflict between DNR and some environmental groups about how Blanchard Forest should be managed in the future. In 2000, DNR explored the possibility of having the area designated a Natural Resources Conservation Area (NRCA). The agency concluded that although Blanchard Forest is a "cherished recreational site," its conservation value was insufficient to justify designation as a NRCA. REC 3583.

In May 2006, DNR convened a group of stakeholders as the Blanchard Forest Strategies Group. Although some members of the group used the forest recreationally, the plaintiff environmental organizations were not included in the Strategies Group. Through a series of public meetings, the Strategies Group developed a consensus set of management recommendations for the forest, which were later adopted by DNR. At issue in this case is the land management component of the Strategies. In essence, the Strategies call for a core zone of 1600 acres to be set aside from revenue producing timber producing lands and permanently protected. The remainder of the forest is to be logged in accordance with DNR's policies and rules and its commitments to the federal government to protect endangered species. Under this plan, DNR obtained a legislative appropriation of \$4 million to purchase replacement lands for the trust so that the core zone could be protected. The Strategies anticipate that approximately 2% of the remaining land per year would be subject to timber sales. This land is divided by the Strategies into several zones, including one that would be managed as an ecologically sensitive area subject to a Habitat Conservation Plan worked out with the federal government. Another zone is a "high visual sensitivity zone," to be managed to mitigate the visual impact of logging. A third zone is a general management area.

The SEPA Process: DNR prepared a non-project review form and an Environmental Checklist. Because DNR conceived of the adoption of the Strategies as merely a conceptual step, it approached the preparation of these documents from the standpoint that adoption of the strategies has no environmental impact. It postponed the environmental analysis to the stage where individual timber sales would be planned and imminent. In the non-project review, the agency explained "[i]mplementation of the proposal would not result in any change to the environment... The kinds and impacts of site-specific proposals are not known at this time and further analysis will be done for specific action requiring SEPA." REC 28. Similarly, in the Environmental Checklist, the agency answered the question "What kind and amount of vegetation will be removed or altered?" As follows:

This is a non-project proposal for a set of management strategies, therefore there are no activities in the proposal that would directly result in the removal or altering of vegetation. However, Blanchard Forest is a

working commercial forest and the management strategies as drafted support timber management for revenue to the trust beneficiaries in areas outside the core zone; and within the core zone, ecologically-based thinning is also supported by the proposal. In both cases the vegetation will be altered by the cutting and removal of trees. Future site-specific project actions that require SEPA environmental review will address work at the time the project is proposed.

REC 98. There are numerous other examples of similar answers throughout the checklist. The agency's subsequent determination of non-significance follows logically from the approach the agency took to preparing the Environmental Checklist and Non-Project review.

The larger key issues raised in this appeal: Fundamentally, this appeal turns on answers to big questions, not details of forest management. First, the parties differ about where to set the baseline for evaluating the significance of the Strategies. DNR and the intervenor, the American Forest Research Council (The Council), contends that because this is trust land, the baseline is logging (in a sustainable manner) and the Strategies actually provide an environmental benefit by protecting the core areas from logging. The plaintiffs, on the other hand, see the baseline as the status quo that has been maintained in the forest for the past 80 years (multiple uses, with limited logging) and contend that as long as the trust beneficiaries are compensated for the value of the timber on the land, the land does not have to be logged.

The second overarching issue is the level of granularity at which DNR is required to analyze the environmental impact of its decisions. DNR relies on several policies of very broad application (such as the Habitat Conservation Plan covering western Washington) that have been subject to the full EIS process to argue that because Blanchard Forest will be managed consistent with these policies, there is no need for a "landscape level" EIS for this forest. Each individual timber sale will be subject to the SEPA process, as they are now. Thus, DNR and the Council argue that there is no need to impose on DNR the burden of an EIS at the level of the Strategies. The plaintiffs contend that the impact of the Strategies cannot be accurately appreciated at either the 30,000 foot level of the broad policies (which do not even mention Blanchard Forest) or at the 100-acre level of the individual timber sale. Only an EIS of the Strategies would accurately assess the environmental impact of the Strategies on this unique place and allow alternatives to be considered, they contend.

Baseline for determining significance of environmental impact: DNR convened the Strategies group because it believed that it could no longer minimize logging in Blanchard Forest in deference to its heavy use by the community now that the forest had matured to the point that it was ready for harvest. DNR was aware that an expansion of logging would provoke public outcry, and thus sought to reach consensus about how to move forward. As a practical matter, the Strategies represent a change to the status quo.

As a legal matter, DNR and the Council argue that in fact logging of Blanchard Forest has always been a foregone conclusion because as far back as the 1930s, the State Forest Board determined that the land was "chiefly valuable for purpose of developing and growing timber." RCW 79.22.040. DNR is required to manage trust land with undivided loyalty to Skagit County and the other taxing districts; RCW 79.22.040, Skamania, 102 Wn.2d 127, 133-34 (1984). RCW 79.10.320 requires DNR to manage forests for sustained yield. DNR and the Council acknowledge that DNR is also required to manage the land for multiple uses, including recreation, hunting and fishing and other sports activities, wildlife activities and maintenance of scenic areas, provided that "if such additional uses are not compatible with the financial obligations in the management of trust land they may be permitted only if there is compensation for such uses satisfying the financial obligations." RCW 79.10.120.

Certainly in the 1930s, the future value of Blanchard Forest would have been measured in timber. But our economy, our population, and our values as a State have evolved since then. As the plaintiffs argue, the legislature adopted a multiple use policy that applies to all state lands, including trust land. DNR, the Council, and Skagit County candidly acknowledge that Blanchard Forest could be designated a park as long as the beneficiaries were appropriately compensated. As Trustee, DNR has an obligation to manage the trust lands prudently, to benefit the beneficiaries now and in the future. Skamania, 102 Wn.2d at 139. Our Supreme Court in Skamania struck down legislation intended to bail out timber companies that had entered into contracts to buy timber that were no longer favorable for the companies; this violated the State's obligations as Trustee because it favored private interests over those of the beneficiaries. There, the State's action was clearly contrary to the interests of the beneficiaries.

The dilemma posed here is much less stark. At present, citizens of Skagit County use Blanchard Forest. It is difficult to anticipate how their use of the forest will increase as the population rises, or how future generations will value the forest as undeveloped and pristine places become more rare. If Blanchard Forest were privately owned, then DNR would have to assume that all of the land would inevitably be harvested. Because this is trust land, some logging of Blanchard Forest may well be in the best interests of the beneficiaries. But the legislature has mandated DNR to manage its lands for multiple uses. As Trustee, DNR must consider not only what would benefit Skagit County and its junior taxing districts today, but what would benefit the County and the Districts in the future. This is a much more complex calculation than DNR, the Council, and the County wish to acknowledge. I cannot say that the baseline against which environmental impacts are to be measured is inevitably logging.

Level of analysis: This is the central issue in this case. DNR argues that it adequately addresses environmental impact of logging at two levels: the micro-level of individual timber sales (the record includes a number of examples, including the 2005 Westview Thin) and: the macro-level of broad policies designed to protect endangered species and ensure that modern techniques of timber harvesting are followed to minimize the negative impact of logging. The record includes all of these policies and the

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Environmental Impact Statements that were prepared for each. These include the Forest and Fish Rules of 2001, Forest Practice Rules (which govern, among other things, road building, water protection, and slope protection), the Habitat Conservation Plan (protecting the Northern Spotted Owl and the marbled murrelet), the Riparian Forest Restoration Strategy, and the Policy for Sustainable Forests. All of these policies cover either the entire State or Western Washington. None of them even mention Blanchard Forest.

These broad policies are extremely detailed about such things as how to design a logging road to minimize erosion, runoff and slope instability; how to preserve forest cover near streams to keep the water temperature optimal for salmonids. They are not at all specific, however, about geography. To take one example, the Habitat Conservation Plan (HCP) covers 1.6 million acres of State forest lands, divided into nine planning units (Blanchard Forest falls in the North Puget Sound unit, covering King, Snohomish, Skagit, and Whatcom counties). These broad policies do not say anything about how a specific forest will be managed – this is “operational detail” outside their scopes. By adopting the state and region-wide policies, DNR was conceiving of itself a large landowner balancing competing priorities – especially the need to generate timber revenue against the federal demand to protect owl and murrelet habitat. It balances these priorities by managing all of its lands for revenue, recreation, and habitat restoration on a macro-level. As DNR’s Northwest Region Manager William Wallace wrote in 2003 to someone objecting to the Westview Thin:

[T]he Department’s strategy for contributing to mid-late successional forest habitat was formulated in the context of other forest landowner’s expected management. As a result of this strategy, large contiguous acreages of late successional forest on Department lands meant to be contributed to spotted owl and other late successional forest dependent species are located near National Forest Land where these lands will provide the most benefit to existing wildlife populations by providing additional habitat to expand their range.

Since Blanchard Mountain is not located in an area where it can contribute as much to late successional forest habitat as other Department lands, it is currently being managed for meeting the Department’s objectives of revenue production for the trust, providing habitat for early forest successional wildlife species, and recreational opportunities.

REC 9245.

The policy dilemmas outlined by Mr. Wallace underscore why DNR opposes environmental analysis on the level of a single forest. DNR subjects individual timber sales to the SEPA process, and does not proceed with any that would have significant environmental impacts; as the plaintiffs point out no timber sale has ever been the subject of an EIS. The Council argues that sustainable forestry would be strangled if the

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Department had to formulate an EIS for every forest in the State. These are valid concerns. Reading the record in this case demonstrated the complexity of the policy choices and the operational issues facing DNR.

Although analysis at the macro-level has a great deal of utility for some purposes, it is insufficiently detailed to satisfy SEPA's demands at the level of Blanchard Forest. As our Supreme Court held in King County v. Washington State Boundary Review Board, 122 Wn.2d 648, 664 (1993), "a proposed land use related action is not insulated from full environmental review simply because there are no...immediate land use changes which will flow from the proposed action." In Boundary Review Board, the proposed annexation of properties to Black Diamond would inevitably lead to their development, just as the implementation of the Strategies here will inevitably lead to logging of much of Blanchard Forest. The Supreme Court held that in these circumstances a threshold determination of non-significance was inconsistent with SEPA's purpose

to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences... Decision making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land use changes would occur as a direct result of proposed government action... [T]he risk of postponing environmental review is a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.

Id. 663-664 (citations and internal quotations omitted). The Court emphasized the many ways in which the EIS process would benefit the process of making the annexation decision. "The point of an EIS is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with *making* those decisions." Id. at 666 (emphasis in the original, citations omitted).

In a factual scenario closer to the one at hand, the Court of Appeals criticized a modified determination of non-significance of a watershed analysis on similar grounds in Alpine Lakes Protection Society v. DNR, 102 Wn. App. 1 (1999). "[T]he fact that an action will not cause an immediate land use change or the facts that there is no specific proposal 'on the table' does not automatically mean that no EIS is required." Id. at 15. In Alpine Lakes, as here, DNR argued that the adoption of geotechnical prescriptions, in and of themselves, would have no probable significant adverse environmental impact. Yet because logging would almost inevitably follow the preparation of the watershed analysis, DNR could not avoid analyzing the watershed analysis' environmental impacts before any specific plans for logging had been proposed.

DNR argues that because its policies and rules regarding protection of the marbled murrelet and salmon as well as its forest practices have all undergone full EIS analysis, there is no need for an EIS at the level of an individual landscape. Essentially,

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DNR contends that environmental analysis of logging practices can be detached from the place that will be logged. But there is no authority for this position, and it would appear to contradict some of the most basic purposes of SEPA. DNR points to Kettle Range Conservation Group v. DNR, 120 Wn. App. 434 (2003), where DNR issued a modified determination of non-significance for a watershed analysis of 1577 acres of timber land belonging to Stimson Lumber Company. This decision was challenged on the grounds that an EIS was required to address the effect of Stimson's plans to log the area in the future. Division II held that as long as Stimson adhered to the watershed analysis' prescriptions, there was no need for further SEPA review of its future harvests on the land covered by the watershed. Division II allowed Stimson to rely on an EIS it had prepared for larger area of land (2240 acres) largely because both the EIS and the watershed analysis assumed that eventually Stimson would harvest all of its land. DNR argues that by this reasoning, it may rely on rules and policies governing all of its lands across the State or Western Washington without preparing an EIS contemplating future timber harvest in Blanchard Forest.

DNR's reliance on Kettle Range is misplaced. The EIS upon which Stimson relied covered 2240 acres; the watershed analysis covered 1577 acres. Blanchard Forest is more than 4000 acres. The rules and policies that DNR urges this court to rely on cover 1.6 million acres of state forest lands. The watershed analysis Stimson prepared was extremely detailed and addressed a specific piece of land; nonetheless, Division II remanded the case to the Forest Board to address issues concerning soil erosion, omitted roads, and sediment calculation. There is absolutely no comparable level of analysis here; the environmental checklist prepared for the Strategies contains almost no specific information about Blanchard Forest, and the EISs upon which DNR relies do not even mention Blanchard Forest. Kettle Range does not support DNR's position that there is no need to analyze environmental impacts at the level of a landscape.

DNR and the Council argue that requiring an EIS for every individual forest will cripple DNR's management of state forest lands and hamper the timber industry. They insist that nothing distinguishes Blanchard Forest from any other state trust land forest. I share their concerns about routinely requiring preparation of an EIS at the level of individual forests. Blanchard Forest, however, presents characteristics that distinguish it from other forests managed by DNR.

While it may be true that Blanchard Forest is not as ecologically unique as plaintiffs paint it to be, the forest is nonetheless highly unusual. It is the only place where the Cascades meet Puget Sound. Whether or not it remains a nesting spot for the marbled murrelet, it is home to many diverse species. Blanchard Mountain is the most prominent geologic feature in the area. Most important, Blanchard Forest represents a slice of near-wilderness in the middle of a rapidly urbanizing area. Some 35,000 people currently use the forest for recreation annually, and that number can only be expected to grow as the area's population increases and wild places become harder to find. Blanchard Forest is distinguished by this extremely intense interface between the forest and the communities that surround it. As one DNR assessment put it, Blanchard Mountain is "locally

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significant in many ways... The mountain's worth and uniqueness can be assessed locally as combination of all its attributes as a cherished recreational site that affords exceptional views of the San Juan Islands and the North Cascades and as a conveniently located educational site." REC 3583. Without careful planning on a landscape level, the cumulative impact of road building and clear-cutting could create extremely negative environmental impacts for people who use the forest. It has taken this forest the better part of 80 years to recover from the first wave of logging. Future generations will live with the results of the decision to implement the Strategies.

After reviewing the record and considering the purposes of SEPA as reflected in the case law, I am left with the definite and firm conviction that a mistake has been made. The Department's determination of non-significance for the implementation of the Strategies was clearly erroneous. The determination of non-significance is reversed and the matter is remanded to DNR for preparation of an Environmental Impact Statement.

Sincerely,


Susan J. Craighead, Judge