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**State of Washington**

**GROWTH PLANNING HEARINGS BOARD  
FOR EASTERN WASHINGTON**

**SAVE OUR BUTTE SAVE OUR BASIN SOCIETY, )**

Petitioner )

)

**ICICLE CANYON COALITION, Petitioner )**

)

**N. CENTRAL WASHINGTON AUDUBON SOCIETY, )**

Petitioner )

)

**SUZANNE SABERHAGEN, Petitioner )**

)

**SAVE CHELAN ALLIANCE, Petitioner )**

)

**LEAF ADOPT-A-FOREST, Petitioner )**

)

**YAKAMA INDIAN NATION, Petitioner )**

)

**CITIZENS FOR RURAL ENVIRONMENT AND )**

**AGRICULTURAL LAND, Petitioner ) CASE NO. 94-1-0015**

)

**CHELAN-DOUGLAS LAND TRUST, Petitioner ) FINAL DECISION**

**) AND ORDER**

**CHELAN COUNTY CONSERVATION DISTRICT, )**

Petitioner )

)

**1000 FRIENDS OF WASHINGTON, Petitioner )**

)

**NORTH CASCADES CONSERVATION COUNCIL )**

**AND WASHINGTON ENVIRONMENTAL COUNCIL, )**

Petitioner )

)

**STATE OF WASHINGTON**, Petitioner )

)

vs. )

)

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**CHELAN COUNTY**, Respondent )

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### **Procedural History of the Case**

On January 28, 1994, Save Our Butte Save Our Basin Society, by and through its President Beth Gordon, Icicle Canyon Coalition, by and through its President Buford Howell, North Central Washington Audubon Society, by and through its President Suzanne Saber Hagen, Suzanne Saberhagen, individually, and Save Chelan Alliance, by and through its President Phyllis Murra filed Petitions for Review with the Growth Planning Hearings Board for Eastern Washington.

Between January 31, 1994 and February 8, 1994, LEAF Audubon Adopt-A-forest, by and through its President Pat Rasmussen; the Confederated Tribes and Bands of the Yakama Indian Nation, represented by Tim Weaver; the Citizens for Rural Environment and Agricultural Land, by and through its President Rudolf Prey Jr.; the Chelan-Douglas Land Trust, by and through its President Don Fager; the Chelan County Conservation District, by and through its Chairman Fred Lacey III; 1000 Friends of Washington, represented by Eleanore Baxendale, Executive Director; the North Cascades Conservation Council and the Washington Environmental Council, represented by Stephen C. Volker of the Sierra Club Legal Defense Fund, filed Petitions of Review with the Board.

On February 8, 1994, the State of Washington, by and through Gene Canque Liddell, Director of the Department of Community Development, on behalf of Jennifer Belcher, Commissioner of Public Lands, Department of Natural Resources, Robert Turner, Director of the Department of Fisheries and Patricia McLain, Interim Director of the Department of Wildlife by and through their attorneys of record Christine Gregoire, Attorney General, and Tommy Prud'homme, James R. Schwartz, and Fronda Woods, Assistant Attorneys General, filed a Petition for Review with the Board.

A Notice of Appearance in all cases was filed by Susan Hinkle, Chelan County Deputy Prosecutor.

On March 2, 1994, pursuant to WAC 242-02-522(10) the Presiding Officer consolidated the several cases under Case No. 94-1-00015.

On March 9, 1994, the Board held a prehearing conference. Chelan County withdrew its initial motion contesting the standing of several parties.

On March 29, 1994, the State of Washington filed a Motion to Supplement the Record.

On March 30, 1994 Petitioners 1000 Friends of Washington, Icicle Canyon Coalition, Citizens for Rural Environment and Agricultural Land and the Chelan County Conservation District filed a Motion to Supplement the Record.

On March 30, 1994 the North Cascades Conservation Council, the Washington Environmental Council the North Central Washington Audubon Society, the Save Chelan Alliance, and the Save Our Butte/Save Our Basin Society submitted a Motion to Supplement the Record.

On March 30, 1994 the Yakama Indian Nation filed a Motion to Supplement the Record.

On April 6, 1994 Respondent Chelan County stipulated to supplementing the record as requested by all petitioners with the exception of one item whereupon petitioner withdrew its request for said item.

Subsequently the Hearing on Motion to Supplement the Record on April 14, 1994 was canceled and the Board entered its Order to Supplement the Record and Designate the Record on April 21, 1994.

On April 27, 1994 State of Washington filed a Dispositiave Motion to dispose of legal issue 2 (c) concerning the adequacy of Chelan County mineral resource lands protection under Growth Management Act. The Board held a hearing on May 17, 1994 and denied the motion saying the Board would hear argument at the hearing on the merits.

## FINDINGS OF FACT

1. The Growth Management Act required local governments, including Chelan County, to designate and protect resource lands and critical areas by September 1, 1991.
2. Chelan County, on November 30, 1993, adopted Resolution 93-158 to designate and protect these resource lands and critical areas.

3. Excerpt from Exhibit 486, Acres Designated as Agricultural following the adoption of Resolution

93-158:

TOTAL AGRICULTURAL REGION AG.	ACRES OUTLINED BY ADV. CMTE	ACRES REMAINING AFTER 93-158	ACRES REMOVED AFTER 93-158	PERCENT REMOVED AFTER 93-158
Total Chelan Area	15,923	9,806	6,117	38%
Total Entiat Valley	7,888	0	7,888	100%
Total Wenatchee Valley	14,618	5,813	8,805	60%
Total Malaga	11,725	11,290	435	4%
Total Chelan County	50,154	26,909	23,245	46%

AG ADV CMTE UNIQUE/ TOTAL UNIQUE PRIME SOILS /PRIME SOILS FROM AG DESIG AFTER 93-158	UNIQUE/ PRIME SOILS REMOVED FROM AG DESIGN AFTER 93-158	TOTAL ACRES REMOVED SOILS IN CHELAN COUNTY	TOTAL ACRES PRIME UNIQUE SOILS IN CHELAN COUNTY
Total Chelan Area	6,217	1,903	31%
Total Entiat Valley	875	875	100%
Total Wenatchee Valley	9,277	6,365	69%
Total Malaga	3,748	223	6%
Total Chelan County	20,117	9,366	47%
		24,490	31,367

4. The Board finds that there are 115,566 acres of land in farms in Chelan County. [Exhibit 489.]

5. A significant modification to Resolution 93-158, mainly the reduction in designated agricultural lands, was made without the opportunity for subsequent public comment.

**Discussion of the Issues and Conclusions**

There is no dispute that the agriculture industry is of absolute importance to the economic base of Chelan County (the "County"). [Testimony of Commissioner Green. Transcript of Board Of

County Commissioners hearing 11/30/93.] The timber industry is also important. There, also, is no dispute that Chelan County has and is experiencing rapid growth. [Testimony of Commissioner Myers. Board Of County Commissioners hearing 11/30/93.] Indeed, because of rapid growth, the County was required to plan under the Growth Management Act (the Act).

The Act encourages the protection and development of these natural resource industries while at the same time allowing economic growth. It, further, protects natural resources, including critical areas, to ensure "the high quality of life enjoyed by the citizens of this state." While achieving these goals is clearly possible, reconciling on-compatible land uses is never easy. The concerns and needs of real people, facing real problems, are involved.

To protect the health of the agricultural, forest, and mineral resource industries, the Growth Management Act requires protection of natural resource lands. This is accomplished through identification and "designation" of these lands in RCW 36.70A.170 coupled with their protection through the adoption of development regulations pursuant to RCW 36.70A.060. The required level of protection is compromised if either insufficient lands are "designated" or if development regulations fail to adequately protect these lands. Legal Issues No. 1(A) and 2(A) and 1(B) and 2(B), respectively, are interrelated. They are each essentially two sides of the same coin. The same would be true for mineral resource lands, however, the question of mineral resource land designation is not presently before the Board. [\[FN1\]](#)

Once resource land is designated and protected under the above sections, farmers using good practices are protected from outside non-compatible uses, similarly for foresters and mineral resource land owners. These are significant protections that further the legitimate expectations of those in these industries. The Act, however, in no way attempts to favor one group, the concerns of all must be considered in a valid process.

*Legal Issue No. 1(A)*

*Does Chelan County Resolution 93-158 designate agricultural lands of long-term commercial significance as required by RCW 36.70A.170(1) and (2)?*

This factual background is applicable both to this section and issue no. 2(A).

Under the Growth Management Act, Chelan County was required to designate and conserve agricultural lands of long-term commercial significance by March 1, 1992. [RCW 36.70A.060.]

To aid this process, the County appointed the Chelan County Agricultural Lands Advisory Committee which met to develop recommendations for designating and conserving agricultural resource lands. In developing its recommendations, the committee considered both WAC 365-

190, the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas, and the USDA Soil Conservation Service Criteria for Land Evaluation and Site Assessment. [Exhibit 178. Agricultural Lands Committee Final Recommendations]. In developing its recommendation for designating agricultural lands, the Committee took into consideration:

...local and regional characteristics of the county's orchard lands, and examined the relationship between existing land use policy, development trends, and existing service infrastructure. [Exhibit 178.]

The Committee recommended that the County designate 50,154 acres as agricultural lands of long-term commercial significance. [Exhibit 486.]. It also recommended a minimum agricultural lot size of 10 acres and a 100 foot setback from the boundary of designated agriculture lands. [Exhibit 421.] After receiving public comment and making minor modifications, the Committee presented its final recommendation to the Board of County Commissioners. This final recommendation retained its earlier 50,154 acre designation, contained a 10 acre minimum lot size and provided for a 100 foot setback.

Subsequently, the Board of County Commissioners issued its "Draft Chelan County Commercial Agricultural Lands Resolution" dated September 14, 1993, which eliminated the 10 acre minimum lot size, decreased the setbacks and added an exemption for short plats. (Exhibit 199) Significantly, the acreage designation was not modified.

On October 26, and November 1, 1993, the Board of County Commissioners held public hearings regarding this proposal. Citizens commented on both sides of the issue. Some wanted the County's compliance level to be the "bare minimum", while others requested stronger protections. Members of the Agricultural lands committee, among others, testified that removal of the minimum lot size and addition of the short plat provision removed protection from agricultural lands. [Transcript of Board of County Commissioners Hearing of 10/26/93.]

On November 30, 1993, the Board of County Commissioners presented and adopted Resolution 98-153, incorporating the previously proposed Chelan County Commercial Agricultural Lands Resolution. The resolution significantly reduced the agricultural land designation. Specifically, it reduced the designation from 50,154 acres to 26,909 acres, a total of 46 percent. For certain areas, the reduction was greater. For instance, fully 100 per cent of the previously proposed designation was removed from both the Entiat Valley and the Cashmere area. Similarly, 47 per cent of the prime and unique soils included in the proposed designation were removed. [Exhibit 486.] The Board has reviewed the transcript of this hearing and finds no explanation or evidence, scientific or otherwise, why the designation was reduced.

It is important to note that public comment was not permitted at this hearing. Thus while

Commissioner Green testified at the November 30, 1993 hearing, "(w)e made some significant changes to the agricultural maps which are being recommended for adoption along with the agricultural policy itself", the public was not given an opportunity to comment upon the changes. [Transcript of Board of County Commissioners 11/30/93 hearing at 1.]

### *Discussion*

The Growth Management Act requires that a county shall designate, where appropriate, agricultural lands that are not already characterized by urban growth and that have long-term commercial significance for the production of food and other agricultural products. To aid in making this designation, the Act directs that the county give consideration to WAC365-190, the Minimum Guidelines to Classify Agricultural, Forest, Mineral Lands and Critical Areas. [RCW36.70A.170.]

The Minimum Guidelines state that in designating agricultural lands:

...counties and cities shall use the land-capability classification system of the United States Department of Agriculture Soil Conservation Service as defined in agriculture handbook no. 210....counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. [WAC 365-190-050(1)(2).].

Chelan County has approximately 115,566 acres of agricultural land. Horticultural crops represent the predominate agricultural products in the county, but there is, additionally, production of various grains, hay and livestock. [Exhibit 486.] In 1991, the Soil Conservation Service prepared a report, "Land Evaluation for Irrigated Orchard Areas of Chelan County", using the classification system prescribed by the "Minimum Guidelines". This report found that there were 55, 857 acres of prime and unique soils in Chelan County. Prime and unique soils are primarily used for the sustained production of high quality fruit as a specific high value crop using acceptable farming methods. The report using a variety of factors, i.e. slope group, soil potential index, predicts adjusted yields. It clearly identifies the vast majority of agricultural production in the county. [Exhibit 485.]

The Agricultural Lands Advisory Committee, using the prescribed classification system, the "Land Evaluation for Irrigated Orchard Areas of Chelan County" report and aerial photographs, developed maps of these orchard areas. The Committee then initiated a process of regional site assessment considering a variety of factors, including proximity to urban areas, availability of agricultural services and urban services.

At this point, their draft report was presented to the public. Modifications were incorporated, and their final recommendation was presented to the Board of County Commissioners. The

Committee recommended 50,154 acres for agricultural land designation. The total prime and unique soils in the recommendation equaled 20,117 acres. [Exhibits 178 and 486.]

The recommendation of the Agricultural Lands Advisory Committee provides a reasoned approach to designation. Against this evidence is the County's twelfth-hour deletion of 46 per cent of the Committee's recommendation without the opportunity for public comment or any justification in the record. It may be possible for the County to provide such a justification, but the record utterly fails to provide it.

Exhibit 483, mapping the prime and unique soils of the County, show both the Committee's recommended designation and the areas removed from the designation. The Board is unable to discern a logical pattern for these changes. For instance, all designated land was deleted from the Cashmere area, yet Scott McManus, a Cashmere area orchardist, requested, at the 10/26/93 Board of County Commissioners hearing, increased protections for his orchard. [\[FN2\]](#) [Transcript of Board of County Commissioners 10/26/93 hearing.] It would be against his self-interest to seek these protections if he did not view his orchard as commercial.

The concerns of many of the citizens who sought to be excluded from designation could have been addressed. In Exhibit 111, counsel argues that the Birchmont Orchard should be excluded because it is surrounded by urban development and there are no other orchards or natural buffers to shield it from these developments. While the Board notes that resource lands may be located within urban areas under certain circumstances, and that this exhibit only presents one side, this land arguably fails to qualify for designation. Exhibit 37 speaks of a small property that never has been used for production of agriculture, bordered by a railroad, a road, the river and housing on either end. This property would not appear to meet the test. Other similar examples exist. While the County must designate lands that meet the definition, they are under no obligation to designate lands that do not.

Unlike a dry land wheat area, for instance, where all the land in a particular area may be dedicated to a particular crop or use, the orchard area in Chelan County is both diverse and complex. The land classifications change rapidly and often in the extreme. Blocking off whole areas may be too blunt a designation tool. Using appropriate performance criteria as an alternative designation tool would provide flexibility to deal with non-qualifying lands.

The County argues that public opinion, in this case the opposition of many orchardists, was the reason for deleting a significant portion of the proposed designation. Public participation is a necessary and important element of the Act. "Public opinion cannot be used, however, to override a requirement of the Growth Management Act." [*English v. Columbia County*, EWGPHB No. 93-1-0002, at 13. Page number refers to the Board's Final Decision and Order and will henceforth be referred to as *English v. Columbia County*, page .....]

The County, further, argues that this provision should be void for vagueness. The Board does not concur. The County may use the definitions in the Act, the Minimum Guidelines, and the previous opinions of this Board, as well as referring to the ways other counties have addressed this issue. Designation is not an easy task, but other counties have shown that it can be done.

As this Board said in *English v. Columbia County*, page 8, while there is opportunity for the exercise of local judgment, the conclusions reached must be the product of a valid process. The record must show that the County considered the factors for determination of agricultural lands of long-term significance given in WAC365-190-050.

*Finding:*

The Board finds that by a preponderance of the evidence, Petitioners have shown that the County has failed to make an adequate agricultural lands designation under RCW 36.70A.170 and, therefore, is not in compliance with the requirements of the Act.

*Legal Issue No. 1(B)*

*Does Chelan County Resolution 93-158 designate forestlands of long-term commercial significance as required by RCW36.70A.170(1) and (2)?*

The dispute on this issue involves two components: 1) Whether the County incorrectly designated lands that are under federal ownership and 2) whether delineation of the designation was adequate.

This designation is made in one map entitled, "Interim Commercial Forest District North" and "Interim Commercial Forest District South", [Exhibit 477, Exhibits (Maps) B and C to Resolution 93-158.] The County argues that their designation does not include federal lands. From this map it is difficult to determine ownership of the land. Exhibit 406, Chelan County--Acreages Inside Commercial Forest--Interim Designation, however, indicates that U.S. Forest Service lands were designated.

This is not a significant point. While the Act derives its authority from the State of Washington and as such lacks authority over federal lands, nothing in the Act precludes such a designation for county purposes.

The Minimum Guidelines suggest mapping as a means of identifying designated resource lands. "Land use designations must provide landowners and public service providers with the information necessary to make decisions." [WAC 365-190-040.] The scale used on the above

map, 1: 100,000, makes precise determination of location difficult.[\[FN3\]](#) The record, however, fails to indicate a significant problem. Further, there has been no suggestion that the designated lands were improperly classified.

*Finding:*

The Board finds that Chelan County Resolution 93-158, designating forest lands of long-term commercial significance as required by RCW 36.70A.170(1) and (2) is in compliance with the requirements of the Act.

*Legal Issue No. 2(A)*

*Does Chelan County Resolution 93-158 assure the conservation of agricultural lands designated under RCW36.70A.170(1) and (2) as required by RCW36.70A.060(1)?*

The County is required under RCW 36.70A.060 to assure the conservation of agricultural lands of long-term commercial significance until such time as the comprehensive plan is completed. This Board further defining the meaning of this requirement has said:

The second edition of the Random House Dictionary of the English Language defines "conservation" as 1)"the act of conserving, prevention of injury, decay, waste or loss" and 4) "the careful utilization of a natural resource in order to prevent depletion". Thus,

conservation prevents the loss or degradation of the resource. Using this definition, we hold" conservation" as used in RCW 36.70A.060 is intended to maintain agricultural and forest resource lands.*[English v. Columbia County, page 9.]*

Three arguments are made that this resolution fails to assure conservation of these lands: (1) there is no minimum lot size, (2) short platting is permitted, and (3) it permits inadequate setbacks for development on adjacent lands. The first two assertions are closely related and concern on-compatible uses within designated lands, while the third concerns buffering resource lands from non-compatible uses on adjacent lands.

The absence of a minimum lot size in Resolution 93-158 allows development as prescribed by the underlying zoning. Section 11.16.030 of the Chelan County Zoning Code establishes the minimum lot size in the A-Agricultural district as one acre. The General Use Zone, which also includes significant agricultural resource lands, allows for lot sizes as small as 10,000 square feet. *[Chelan County Zoning Code, Section 11.36.030].*

Arthur C. Nelson, describing the effects of small acreage lot sizes in commercial agricultural

zones, said: "The effect of such zoning... is to remove farmland from production and allow non-farm development adjacent to viable farming operations everywhere." [Exhibit 394, "Economic Critique of U.S. Prime Farmland Preservation Policies", Journal of Rural Studies, Vol. 6, No. 2, 1990.] Allowing small acre development in agricultural resource lands fails to conserve these lands in two ways. First, the land used for the development is taken out of production, and second, the effects of non-compatible uses on existing farms weakens them. [Exhibit 394.]

The Agricultural Lands Advisory Committee recommended a ten acre minimum lot size, suggesting that this admittedly compromise number was intended to reduce further erosion of the county's agricultural base, while also reducing potential land use conflicts. [\[FN4\]](#) [Exhibit 178.] Commissioner Myers stated at the Commissioners' hearing on 11/30/93 that a ten acre orchard was less than an economic unit. [Transcript of Board of County Commissioners hearing of 11/30/93.] The Department of Community Development suggests that 15 acres is needed for an economic horticultural operation. [Exhibit 488. The Art and Science of Designating Urban Growth Areas, Part II, DCD (March 1992), page 25.] Horticulture, the predominant agriculture in the County, typically is intensely managed and is of high value, producing a smaller economic unit than less intensely managed crops, which may require much larger units for commercial production.

The subdivision provision, also not recommended by the Committee, fails to conserve agricultural lands by allowing designated lands to be removed from production.

Commissioner Myers stated:

"If we impose the 10 acre minimum lot size, it means that people are going to be forced to buy 10 acres to live in a rural setting. They may or may not have any inclination as to whether they want to farm or not farm. They may and they could take all of the trees out and graze horses. So there I think that does not necessarily guarantee that we are going to conserve or preserve agricultural land." [Transcript of Board of County Commissioners' Hearing of 11/30/93.]

The County cites the Nelson article to present the point that Commissioner Myers made. A minimum lot size, in and of itself, does not guarantee that agricultural land will be preserved. Some people want to live in a rural setting and if that requires buying 10 acres when what they really want is 2 to 5 acres, they will do it. If the only alternative is buying in an agricultural zone, this will remove agricultural lands. The Growth Management Act, however, specifically differentiates between agricultural resource lands and rural lands. Chelan County residents who desire a rural lifestyle should have the opportunity to purchase rural home sites in rural areas that do not have long-term commercial value as agricultural land. The record fails to show how many acres of rural non-resource private land exists in the County, but there is no indication of

insufficiency. If the Agricultural Lands committee recommendation had been adopted, there would still be over 65,000 acres of rural non-resource agricultural land alone. [\[FN5\]](#)[Exhibits 486 and 489.]

When small acreage rural lots are available in conjunction with larger minimum lot sizes in agricultural resource lands, the Nelson article, contrary to the County's assertion, states that agricultural lands are conserved.[Exhibit 384.]

At the Board of County Commissioners' hearing on 11/30/94. Commissioner Green, speaking of the agricultural lands component of Resolution 93-158, stated:

"The board has agreed following this adoption process to sit back down and address the lot size, which at a minimum, fits the mandate to conserve agricultural lands of long-term commercial significance." [Transcript of Board of County Commissioners hearing of 11/30/93.]

As Commissioner Green acknowledged, the resolution does not adequately conserve agricultural lands.

As to the question of setbacks, the Act provides that development regulations shall assure that adjacent uses shall not interfere with the continued use of the resource land.[RCW 36.70A.060 (1).] Thus the burden is placed on the adjacent land. The Commissioners' modification attempted to reduce the setback burden imposed on adjacent owners. Certainly, this is a legitimate concern, however, the Commissioners must also address the impact of this modification on the affected resource lands. The record fails to show that this was done. It may well be possible to both successfully protect the resource land and address the problem of diminished use on small adjacent parcels; this has yet to be done.

### *Finding.*

The Board finds that Chelan County Resolution 93-158 fails to assure the conservation of agricultural lands designated under RCW 36.70A.170(1) and (2) as required by RCW 36.70A.060 (1).

### *Legal Issue No. 2(B)*

*Does Chelan County Resolution 93-158 assure the conservation of forest lands designated under RCW 36.70A.170(1) and (2) as required by RCW 36.70A.060(1)?*

As with agricultural lands, the Act requires that the resolution assure the conservation of forest

resource lands. Petitioners have alleged that this resolution fails for two reasons: (1) the minimum lot size is insufficient, and (2) the developmental setback requirement on lands adjacent to designated lands is too small.

### *Minimum lot size*

The Forest Resource Lands Advisory Committee, after reviewing the scientific literature and holding public hearings, recommended both a 40 acre minimum tract size and a 200 foot setback for structures within and adjacent to designated forest lands. [Exhibit 169.] Comparing 20 and 40 acre minimum tract sizes, the Committee concluded that a 40 acre minimum was better at meeting the intent of the Growth Management Act, reasoning that the larger tract would reduce encroachment of development and yield economies of scale thus retaining the economic viability of the forest.

The record strongly supports the 40 acre minimum tract provision. For instance, the Wikstrom and Alley report indicates, forest tract size is the most critical variable affecting forest management costs. [Exhibit 500, Wikstrom at 4]. The Cabbage report, reviewing existing studies on the economics of tract size, indicates that commercial forestland tracts should be at least 20 acres to allow a positive return on investment and that forest management costs increase substantially with parcels less than 40 acres. [Exhibit 499 at 14.]

The County has put forth no evidence refuting the scientific evidence that parcel size is critical to conserving forest lands. The resolution, however, allows forest lands to be subdivided into one acre units or less in some circumstances.

Division of forest lands into parcels too small to be efficiently managed for commercial timber production removes these lands from forest production. Additionally, as an incompatible adjacent use, it hinders ongoing commercial timber production on adjacent unconverted lands.

The reason for not establishing a commercially viable tract size was given by Commissioner Green as "I think that if people want to raise their family in a rural setting they should not be forced to buy 40 acres." [Transcript of Board of County Commissioners' hearing of 11/30/93.]

This reasoning is inconsistent with the Growth Management Act. By encouraging residential use in forest resource lands, it fails to protect these resources. Additionally, imposition of this protection does not keep families from living in a rural setting. The Act specifically provides for this on rural non-resource lands.

### *Setback Requirements*

The record supports the Committee's recommendation of a 200 foot setback. The Washington Forest Protection Association recommended a minimum setback of 200 feet for development within and on adjacent lands. [Exhibit 501] After review, the Committee adopted the 200 foot recommendation, subject to criteria to protect owners of small tracts. [Exhibit 169.]

In *English v. Columbia County*, page 8, the Board held that conclusions reached by the county must be the product of a valid process. The record must show that the county considered the appropriate factors. In this case, the record fails to show any consideration the impact of lowering the recommended 200 foot setback to 100 feet would have on the protection of forest lands. The only discussion by Chelan County in the record concerns making designated forest lands available for home sites. [Transcript of Board of County Commissioners' hearing of 11/30/93.]

The purpose of this regulation is to conserve forestlands. Perhaps a showing can be made that would support this reduction, but the record fails to show it, or even that this question was addressed. The record must show that the County considered the appropriate factors; this has not been done.

*Finding:*

The Board finds that Resolution 93-158 fails to assure the conservation of forest lands designated under RCW 36.70A.170(1) and (2) as required by RCW 36.70A.060(1).

*Legal Issue No. 2(C)*

*Does Chelan County Resolution 93-158 constitute a development regulation to assure the conservation of mineral resource lands designated under RCW 36.70A.170(1) and (2) as required by RCW 36.70A.060(1)?*

In its Order on Dispositive Motion of May 24, 1994, the Board found that the regulating policies in Chelan County's Commercial Mineral Resource Lands Resolution do not assure the conservation of resource mineral lands and as such are inadequate. Because this resolution also stated: "These policies are intended to supplement existing development regulations codified in the Chelan County Zoning Resolution.", the Board denied the motion and gave the County an opportunity to make its case at the hearing on the merits.

Although, the County's brief is extensive on this issue, it fails to point to a single specific section of the existing zoning code which meets the requirement to conserve mineral resource lands. Substantively, the County has not met its test.

The thrust of Resolution 93-158's regulating policies is to protect adjacent lands from the mineral

resource lands. The Act requires the opposite, protection of the resource lands from encroachment from adjacent uses. [RCW36.70A.060(1).]

Additionally, if the County chooses to rely on other ordinances to meet this requirement, they must be specifically referenced in the resolution. [*English v. Columbia County*, page 10.]

*Finding:*

The Board finds that Chelan County Resolution 93-158 fails to assure the conservation of mineral resource lands designated under RCW 36.70A.170(1) and (2) as required by RCW36.70A.060(1).

*Legal Issue No. 3*

*Does Chelan County Resolution 93-158 designate critical areas, including aquifer recharge areas, wetlands, fish and wildlife habitat conservation areas as required by RCW 36.70A.170(1) (d) and (2)?*

*Designation and Identification.*

RCW 36.70A.170 requires that each county and each city "designate critical areas" where appropriate and further provides that in making these designations counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050. These guidelines, the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas, provide the meaning of "designate".

"Designation" establishes the "...general distribution, location, and extent" of critical areas. [WAC 365-190-040(1)] "Land use designations must provide landowners and public service providers with the information necessary to make decisions." [WAC 365-190-040(2) (g)] Their purpose is to identify the designated areas so the government or any affected citizen knows where they are. The effectiveness and fairness of this process is wholly dependent upon a users ability to adequately identify designated areas.

While inventories and maps may be used to identify these areas, the guidelines state:

"[i]n the circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization." [WAC365-190-040(1)]

Whether by use of mapping or through performance standards, the requirement is to provide

sufficient specificity to adequately identify designated critical areas.

The County argued for a lower standard, citing the sentence immediately following the preceding quotation, "[d]esignation means, at least, formal adoption of a policy statement, and may include further legislative action." *Id.* The Board does not agree. It must be noted that these guidelines apply to the cities as well as counties. Many small communities encompass a limited number of critical areas. For these communities a formal policy statement may be sufficient. Chelan County, possessed as it is with a full array of critical areas, is a far different case. [Exhibits 484 and 490.] Designated critical areas must be readily identifiable.

Similarly, if the County chooses to rely on other ordinances, maps or inventories to designate critical areas, as it may well do, it should reference the items upon which it relies in its resolution. An effective designation can only be known by referencing the ordinances or items upon which there is reliance. [*English v. Columbia County*, page 10.]

### *Alleged Inadequacies.*

Petitioners have alleged that Resolution 93-158 is inadequate for the following reasons: (1) it fails to adequately designate fish and wildlife habitat conservation areas, (2) it fails to adequately designate wetlands, and (3) it fails to adequately designate aquifer recharge areas.

### *Fish and Wildlife Habitat Conservation Areas.*

"Fish and Wildlife Habitat Conservation Areas" are designated in Resolution 93-158 in Section 520 which provides:

"Nesting and roosting sites, winter range areas, critical winter range, riparian zones and the migration corridors are classified and designated as Fish and Wildlife Habitat Conservation Areas."

Except for "Fish and Wildlife Habitat Conservation Areas," the resolution defines none of the terms used in Section 520. Section 510, policy statements, says that "Chelan County recognizes the current Washington State Department Of Wildlife Priority Habitat Species map which identifies riparian areas, winter range and critical winter range habitat and migration corridors." It, additionally, lists other items that the County recognizes, and upon which the County argues it relied.

Reading Section 520 and reviewing the Fish and Wildlife Conservation Areas map, incorporated into the resolution as Exhibit A, [\[FN6\]](#) which together appear to be the designation, it is not possible to adequately tell where the critical areas are. It could be argued that the County's

recognition of the Washington State Department Of Wildlife Priority Habitat Species map under Section 510 effectively incorporated it into the designation and thus as to this map the County's designation was adequate. This, however, can not be the case. This map lists critical migration corridors in the Navarre and Knapp Coulees and the Squilchuck area which were removed from the designation. [Exhibit 477 at section 520.] The record supports the importance of these migration corridors, while summer range is plentiful, deer populations moving into lower winter feeding areas pass through restricted corridors, blockage of which can be highly detrimental. [Critical Areas Committee Exhibit List (Revised) (CACI) 19 at 2.] Because the record fails to justify their omission, the County can not be said to have relied upon this map or to have incorporated it into the designation. The record simply fails to show why these corridors were omitted, or for that matter, if there were strong reasons for their removal or whether mitigation was considered.

The minimum guidelines define specific elements within" fish and wildlife habitat conservation areas."

Fish and wildlife habitat conservation areas include:

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- (i) Areas with which endangered, threatened, and sensitive species have a primary association;
- (ii) Habitats and species of local importance;
- .....
- (v) Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
- (vi) Waters of the state;
- (vii) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity...

[WAC 365-190-080(5)(a). ] The County was aware of endangered and threatened species that occur within the County, yet these were not specified. [Exhibits 496 and 497] Similarly it was aware of the areas with which these species have a primary association, yet in spite of the guidelines recommendation it failed to specify these areas. [WAC365-190-080(5) (a) (i) and (c) (i).] [ See CACI 31-2.] The County had information which allowed it to specifically identify the designation for most of the above mentioned groupings, but it chose not to do so. This need not be an elaborate process. Referencing the Washington State Department of Natural Resources maps for riparian areas and the Washington State Department of Wildlife 's Priority Habitat Species inventory, which the County said it relied upon, would be a good start.

### *Wetlands.*

This concern was two-fold, 1) that the designation failed to be specific enough to be understood by a person affected by it and 2) that the County did not have staff sufficiently versed in the subject to make valid judgments in permitting situations. As to the first concern, the Board does not find the designation inadequate. The second part, is a valid concern, but it is outside the question of designation.

### *Aquifer Recharge Areas.*

The County has not adequately designated aquifer recharge areas. A reading of the designation section does not provide sufficient information to know where even in limited terms the recharge areas are. Perhaps, this is because of the starting premise given by the County in their brief that practically the whole county could be a recharge area.. The "susceptibility index" is an interesting tool and no doubt will help prevent aquifer contamination, but supply is, also, a concern which is not addressed. [\[FN7\]](#) The Board believes this item has a proportionality aspect to it--The County should make a good faith effort to identify these areas, but the Board recognizes that the information necessary to fully complete this task may be insufficient.

### *Finding.*

The Board finds that Chelan County Resolution 93-158 fails to adequately designate critical areas, including aquifer recharge areas, wetlands, fish and wildlife habitat conservation areas, as required by RCW 36.70A.170(1)(d) and (2).

### *Legal Issue No. 4*

*Does Chelan County Resolution 93-158 protect Fish and Wildlife Habitat Conservation Areas, including breeding habitats, winter range, riparian areas, nesting and roosting sites, critical winter range and movement corridors, as required by RCW 36.70A.020(9) and RCW 36.70A.060(2)?*

Under RCW 36.70A.060(2), each county "shall adopt development regulations that protect critical areas," including fish and wildlife habitat conservation areas. The standard of protection previously enunciated by this Board is "prevent adverse impacts" or at the very minimum "mitigate adverse impacts." [*English v. Columbia County*, page 11.] RCW 36.70A.020(9) concerns conservation of fish and wildlife habitat areas and for the purpose of this issue parallels RCW 36.70A.060(2). Petitioners argue that Resolution 93-158 does not protect fish and wildlife habitat conservation areas under this standard.

Petitioners' briefing raised three main concerns: (1) the adequacy of the 25 foot riparian buffer, (2) the adequacy of the nesting and roosting buffer for certain avian species, and (3) the adequacy of density and fencing restrictions in the winter and critical winter range areas.

### *Riparian Areas.*

Section 520 of the Resolution designates riparian zones as fish and wildlife conservation areas under RCW36.70A.170(1) (d). Section 531, Riparian Buffers, is a development regulation under RCW 36.70A.060(2):

"Buffers shall consist of a undisturbed area of native vegetation. The function of the buffer is to provide canopy cover for fish; to provide soil stability to minimize soil erosion and sedimentation of streams; and to provide habitat for small species that are part of the ecosystem of the stream and the riparian zone."  
"Required buffers in riparian zones on streams classified by the Washington State Department of Natural Resources (DNR) in WAC 222-16-030 "Water Typing System," as Class I, II, or III shall be 25 feet from the ordinary high water mark, landward each side of the body of water. The required buffer shall be measured as a horizontal distance."

Section 502 says a buffer "protects the...river or stream from adverse impacts to the functions and values."

Substantial evidence in the record shows that a riparian buffer of 25 feet is insufficient to prevent or mitigate adverse impacts to fish and their habitats. [Exhibits 117,119-3, 136, 144-4, 161, 190, 277, CACI 40, and CACI 49.]Exhibit 190 extensively discusses relevant technical literature including the danger of inadequate buffering to salmon. Nothing in the record suggests that a 25 foot buffer is adequate.[\[FN8\]](#)

The County did not rebut Petitioners' showing that the 25foot riparian buffer in the Critical Areas portion of Resolution 93-158 is inadequate to protect fish habitat.

A preponderance of the evidence shows the County has not complied with RCW 36.70A.060(2).

### *Nesting and Roosting Sites.*

This issue concerns the adequacy of buffers for the County's heron, loon and eagle nest buffers. In each of these cases the record indicates greater buffer zones than those provided

by the resolution. [Exhibits 144-4, 161 and CACI38.] The County does not rebut the size of these proposed buffers, but rather suggests that another species, Osprey, requires a smaller buffer and that the number of heron and loon in the county are very few. [\[FN9\]](#)

A preponderance of the evidence shows the County has not complied with RCW 36.70A.060(2).

*Winter Range, Critical Winter Range and Migration Corridors.*

This issue was not extensively briefed. Petitioners have put forth evidence indicating the danger of development in these areas and corridors. The record is unclear regarding the possibilities of mitigation to both protect relevant wildlife and address the concerns of the property owners in these areas. The Board remands this issue to the County for further consideration.

*Finding.*

The Board finds that Chelan County Resolution 93-158 does not adequately protect Fish and Wildlife Habitat Conservation Areas, including breeding habitats, winter range, riparian areas, nesting and roosting sites, critical winter range and movement corridors, as required by RCW 36.70A.020(9) and RCW36.70A.060(2).

*Legal Issue No. 5*

*Does Chelan County Resolution 93-158 protect wetlands, aquifer recharge areas, and/or frequently flooded areas as required by RCW 36.70A.060(2)?*

This issue is similar to Issue No. 4, except that it concerns wetlands, aquifer recharge areas, and frequently flooded areas. Each of these is included within the Act's definition of "critical areas". [RCW 36.70A.030(5)]Petitioners assert that as to these items the Critical Areas portion of Resolution 93-158 fails to provide the minimum standard of protection required by the Act.

*Wetlands.*

Two concerns were presented in this regard. First, that the buffers established by Section 832 of the critical area portion of the resolution were insufficient, and second that the definition for artificial wetland in Section 802 should be modified to conform to the definition in the Act.

In Section 832, buffer widths are determined from a matrix, considering on the left side the category or quality of the wetland in question and on the top the level of intensity of the abutting use. In all categories, however, the minimum buffer allowed is 25 feet, except for category IV, low intensity uses, which are exempt.

The evidence in the record establishes that this minimum buffer width is inadequate for the higher quality wetlands. The Model Wetlands Protection Ordinance suggests 200 and 100foot buffers for low intensity use category I and II wetlands, respectively. [Exhibit 491.] "Minimum wetland buffers of 25 feet will not be effective for any but the simplest Category IV wetlands." [Letter of 10/22/93critiquing the Critical Areas portion of the Resolution by Ted A. Clausing, Washington Department of Wildlife.] [See, also, Exhibits 115, 119 and "Wetland Buffers: Use and Effectiveness", Washington Department of Ecology, Feb.1992, Exhibit 492.]

The Board found no evidence in the record supporting the County's minimum buffer sizes. The County did not rebut this point.

The Board finds that the Critical Areas portion of the resolution is inadequate because its wetland buffer widths are insufficient.

The second wetlands question involves the definition of artificial wetland in Section 802 of the resolution, which states in relevant part:

"Artificial Wetland means a wetland intentionally, *or unintentionally* created from a non- wetland area, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds and landscape amenities. Artificial wetlands do not include wetlands intentionally created from non-wetland areas to mitigate conversion of wetlands." [emphasis added]

WAC 365-190-080(1) requires that "In designating wetlands for regulatory purposes, counties...shall use the definition of wetlands set forth in RCW 36.70A.030(17). The resolution properly uses that definition in section 811,correctly defining an "artificial wetland." However, in section 802, the resolution states" artificial wetland means a wetland intentionally or unintentionally created..." RCW 36.70A.030(17) contains no "unintentional" wetlands definition.

While it is difficult to determine how the County would implement this section of the resolution, it is in violation of the requirements of WAC 365-190-080(1) and RCW36.70A.030(17). The County does not rebut this point. This is a technical area. It

simplifies the understanding of all interested users to employ the common definition.

The Board finds that the County should modify the definition of artificial wetland in section 802 to that in RCW 36.70A.030(17).

*Aquifer Recharge Areas.*

Petitioner has made an initial showing that these areas lack protection, however, this argument is not extensively developed. The Board remands this question to the County for further consideration.

*Frequently Flooded Areas.*

There was little consideration of this question in the record. The Board remands this question to the County for further consideration.

*Finding.*

The Board finds that Chelan County Resolution 93-158 does not adequately protect wetlands, aquifer recharge areas and/or frequently flooded areas as required by RCW36.70A.060(2).

*Legal Issue No. 6*

*Did the adoption of Chelan County Resolution 93-58 with respect to designation of agricultural lands and the designation of wildlife habitat comply with the public participation requirements of RCW 36.70A.020(11) and RCW36.70A.140?*

Public participation is a guiding concept of the Growth Management Act. Under RCW 36.70A.140, "each county...shall establish procedures for early and continuous public participation.... The procedures shall provide...public meetings after effective notice, provision for open discussion...and consideration and response to public comments." It is through a viable, open public process the a county develops its plan.

In this case, a new greatly reduced agricultural lands designation was brought forward for the first time at the hearing which adopted the designation, a hearing which by its structure did not allow public comment. Indeed, Commissioner Green stated that this reduced designation was a significant change. [Transcript of Board of County Commissioners' hearing of 11/30/94 at 1.] In consideration of this change, the Board of County

Commissioners made no "provision for open discussion", rather they precluded discussion. Similarly, they did not "consider and respond to public comment" as required by RCW 36.70A.140. The record should show why the changes were made; it does not. It may be that some of the lands removed from the designation, in fact, should not have been so classified, but this is not in the record.

This is a legislative process. The County Commissioners are free to communicate with constituents in ways normally associated with the legislative process, and be guided by the opinions formed as a result of these public and private contacts. This does not mean, however, that the County is free from constraints imposed by the GMA. The Act sets minimum requirements that may not be overridden, and it requires that actions taken be consistent with the record. Local governments may choose from a wide array of alternatives, provided they employ a valid public process and the record substantively supports their decision.

*Finding.*

The Board finds that adoption of Chelan County Resolution 93-158 did not comply with the public participation requirements of RCW 36.70A.020(11) and .140.

*Legal Issue No. 7*

*Does the adoption of Chelan County Resolution 93-158 require an environmental impact statement under RCW 43.21C.031 pursuant to RCW 36.70A.280?*

This issue was not briefed by Petitioner and is considered withdrawn.

*Legal Issue No. 8*

*Does the Growth Planning Hearing Board of Eastern Washington have jurisdiction to grant relief other than the authority specifically granted in the Growth Management Act? If so, in adopting Chelan County Resolution 93-158 did the County exceed its authority under GMA by purporting to divest the public of judicial remedies?*

This issue was not briefed by Petitioner and is considered withdrawn.

*Legal Issue No. 9*

*Does Chelan County Resolution 93-158 include within its interim urban growth areas unincorporated lands that are contrary to RCW 36.70A.110(1)?*

This issue was not briefed by Petitioner and is considered withdrawn.

*Legal Issue No. 10*

*Are the planning goals in RCW 36.70A.020 part of the compliance requirements of the Act? If so, in adopting Resolution 93-158, did the Board of County Commissioners violate the following sections of RCW 36.70A.020 which delineates planning goals under the Growth Management Act:*

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- 1) Urban Growth,
- 2) Reduced Sprawl,
- 6) Property Rights,
- 8) Natural Resource Industries,
- 9) Open Space and Recreation,
- 10) Environment,
- 11) Citizen Participation and Coordination, and
- 13) Historic Preservation.

This Board has previously held that the planning goals are part of the compliance requirements of the Act and apply to development regulations under RCW 36.70A.060. [*Ridgev. Kittitas County*, EWGPHB Case No. 94-1-0017 at 10.]

The natural resource lands protective development regulations are directed to planning goal No. 8, which states:

"Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and agricultural lands, and discourage incompatible uses."

The overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated. Such a showing has not been made.

The lack of minimum lot sizes in both the designated agricultural and forest resource lands fails to discourage incompatible uses as required by planning goal No. 8.

*Finding.*

The Board finds that the planning goals in RCW36.70A.020 are part of the compliance requirements of the Act. Further, the Board finds that Chelan County Resolution 93-158 is not in compliance with planning goal number 8.

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NOW, THEREFORE, having reviewed the file and exhibits in this case, considered the briefs submitted by the parties, and having entered the foregoing Findings of Fact and Conclusions, the Board makes the following:

**Final Decision and Order**

The Board finds that Chelan County Resolution No. 93-158 is not in compliance with the following sections of the Growth Management Act, RCW 36.70A.020, RCW 36.70A.060, and RCW 36.70A.170.

The Board therefore remands Resolution No. 93-158 to Chelan County for further consideration and revision to bring it into compliance with the Growth Management Act and the principles of this opinion.

Chelan County shall bring Resolution 93-158 into compliance with the Growth Management Act by December 8, 1994.

**SO ORDERED** this 8th day of August, 1994.

**EASTERN WASHINGTON  
GROWTH PLANNING HEARINGS BOARD**

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Tom Williams, Presiding Officer

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Judy Wall, Board Member

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Graham Tollefson, Board Member

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[FN1](#)

The question of adequate mineral resource land designation was brought up at the hearing on the merits. It is not considered in this opinion because the issue was not included in the list of issues agree upon at the prehearing conference.

[FN2](#)

This testimony related to increasing the minimum lot size and removal of the short plat exemption. The designation change was not yet on the table.

[FN3](#)

A smaller scale would aid use.

[FN4](#)

The Committee, after extensive discussion, was unable to agree on a better approach.

[FN5](#)

This fact is for illustrative purposes. The Board is not making a judgment on proper designation.

[FN6](#)

The Board notes that this map is hard to read. There are circumscribed areas within larger areas, making determination of the extent of coverage difficult. Admittedly, the Board is viewing a copy, but shading or coloring would be helpful.

#### [FN7](#)

The Board notes that Petitioner Save Our Butte Save Our Basin Society has disputed the depth criteria for this index. Without commenting on the validity of this question, the Board will not address it as it finds that it was inadequately developed.

#### [FN8](#)

Petitioner Saberhagen argues persuasively that there are other important benefits to buffering than solely protection fish and wildlife. Buffers protect orchardists from potential regulation and cost by cleansing runoff. Also see Exhibit 159 for the dangers of inadequate buffering.

#### [FN9](#)

The limited number of heron and loon within the county may point out the need to protect those that remain.

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