COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGON

MAKAH INDIAN TRIBE,

Plaintiff/Appellant,

v.

COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in her official capacity), WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and the WASHINGTON STATE BOARD OF NATURAL RESOURCES

Defendant/Appellee

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

REPLY BRIEF OF MAKAH TRIBE

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I. INTRODUCTION

The Makah Indian Tribe ("Tribe") replies to the response brief of the Department of Natural Resources ("DNR"). This matter concerns DNR's approval of the Peninsula Land Exchange ("Exchange") without the review required under the State Environmental Policy Act ("SEPA") and other procedural requirements. The Exchange entails transferring 1,001 acres of public land that members of the Makah Tribe have used for thousands of years into private ownership. This is a major proposal with intense impacts. DNR's decision dictates that lands of critical public importance will suddenly be held by a private company, subject to its control. The lack of SEPA review means both that DNR did not fully consider the impacts of its decision and did not provide any measures to reduce or mitigate those impacts.

DNR argues that the Exchange does not require any SEPA review at all, based on a cramped and illogical interpretation of a regulatory exemption.

DNR is wrong. With the passage of SEPA, the Legislature recognized that "a human being depends on biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well," RCW 43.21C.020(1), and accordingly mandated that every State agency "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making," RCW 43.21C.030(2)(b). The impacts to the Tribe and its members—permanent harm to subsistence, recreation, and culturally significant practices—are exactly the sort that SEPA

was designed to consider. This case strikes at the heart of SEPA's purpose and requirements.

The regulatory categorical exemption relied upon by DNR, WAC 197-11-800(5)(b), does not apply because the exchange falls under an exception from that exemption. SEPA is required for loss of lands that are "subject to a specifically designated and authorized public use established by the public landowner and used by the public for that purpose." WAC 197-11-800(5)(b). DNR concedes that the lands in the Exchange are actually used by the public, and that the agency permits such uses. Indeed, the lands are specifically defined as "public lands" at RCW 79.02.010(12), specifically designated and authorized for multiple public uses at RCW 79.10.120, DNR has affirmatively provided in its recreation regulations that it "encourages responsible public use" on the lands at WAC 332-52-001, and in its governing Policy for Sustainable Forests DNR has established a policy of authorizing multiple uses on the lands unless expressly restricted by the agency.

In response briefing, DNR never explains why these layers of specific designation and authorization for public use, accompanied by acknowledgment of actual public use, are insufficient to trigger SEPA. DNR instead contends without basis that there must be redundant, written authorization of public use on a parcel by parcel basis. This position betrays the plain text of the regulation and the statutory mandate, is illogical, and would arbitrarily prioritize certain discrete public uses (those involving kiosks

and signage) over the dispersed subsistence and cultural uses carried out by the Tribe.

The statutory and regulatory authority are clear that SEPA is required. But if there is ambiguity, the court may turn to the regulatory history. In 2014, when the Department of Ecology published the revised rule, it noted that "SEPA review is required for real property transactions that may result in change of public use because of the related impacts to recreation, transportation, cultural and historic resources, housing etc." This is exactly the transaction envisioned for SEPA review when Ecology published the rule. DNR violated SEPA when it skirted the law and regulations to avoid environmental review.

In related claims, the Tribe explains why DNR's admission on appeal that it has already planned three timber sales in the Exchange lands to be acquired independently triggers SEPA, and why the trial court's denial of judicial review was in error.

II. RESTATEMENT OF FACTS

The relevant facts are largely undisputed: the public lands proposed to be transferred into private hands are designated for multiple uses, and DNR permits hunting and other public uses on the parcels. CP 230-31. According to Tribal Council member Patrick DePoe, "Hunters access the lands to hunt game, primarily deer and elk. Some Tribal members gather edible plants and mushrooms, some gather ferns and other plants for teas and medicines, and

some gather cedar strips and other plant materials for basket-weaving and other uses. The sites and locations of these activities are of great cultural and spiritual significance to the Tribe and its members." CP 138. If the Exchange is completed, the public, including Tribal members, faces loss of access.

While not determinative of the Tribe's claims, it is necessary for the Tribe to correct one glaring error in DNR's characterization of the facts. Throughout DNR's brief, the agency alleges that the Makah Tribe sought "a permanent, exclusive access easement to the state lands slated for conveyance in the land exchange." *See, e.g.*, DNR Resp. at 6. Even though this assertion is both misleading and irrelevant, DNR repeats it seven times in its brief for apparent rhetorical effect.

As detailed in declarations below, upon learning of the proposed Exchange, the Tribe initially approached DNR with two alternative requests. First, the Tribe requested that it be provided the opportunity to purchase lands near its Reservation prior to private companies, out of recognition of its customary use of those lands. In this context of acquisition, the Tribe was naturally focused on its own use. Second, the Tribe requested that if purchase was not possible then an easement or recognized access right be preserved to continue exercise of treaty rights. As clarified by Tribal Council member Patrick DePoe in response to DNR's similar claims in the proceedings below:

> the Tribe's initial discussions with DNR focused on whether DNR would sell the Tribe the parcels near Lake Ozette, rather than swap them with Merrill & Ring….

> When it became apparent that acquisition of the lands was not an option, we sought to mitigate impacts to the Tribe, its members, and our Treaty rights by preserving an access right. Our focus was not on exclusivity. My recollection, as well as the Tribe's contemporaneous notes and records do not support the idea that the Tribe was focused on an easement from DNR to the exclusion of other tribes. Rather, our records indicate that we raised the concern that loss of access would affect many tribes.

CP 295. DNR and the Tribe apparently have different recollections of their meeting. [1] Fortunately, the written record is plain. In a letter written to DNR in advance of the decision to approve the Exchange, the Tribe stated as follows:

> With respect to potential competing claims of different Tribes, we suggest that through the variety of mechanisms discussed above [an easement, covenant, or reservation of rights], DNR could impose continued access for exercise of Treaty rights without specifying a certain Tribe. Tribes could then determine for themselves how to navigate potential access conflicts. This approach would recognize Tribal sovereignty and respect the State's desire not to mediate inter-tribal disputes.

CP 195. In other words, the Tribe expressly disclaimed pursuit of a "permanent, exclusive access easement," and DNR's repeated claim to the contrary is demonstrably false.

What the Tribe has sought, both in conversations with the agency and in subsequent litigation, is careful consideration of impacts of the Exchange and measures to avoid, reduce, and mitigate those impacts in accordance with

[1] Before litigation, DNR understood the Tribe's position better. In a May 20, 2020 letter DNR wrote to the Tribe "[y]ou have asked DNR to grant the Makah Tribe, **or tribes more generally**, permanent access over the state lands slated for the exchange." CP 135 (emphasis added).

the government to government relationship between sovereigns and the statutory obligations of SEPA and the Public Lands Act.

III. STANDARD OF REVIEW

The main SEPA issue before the Court is a pure issue of law: the meaning of WAC 197-11-800(5)(b). Review of an agency's interpretation of a SEPA regulation is de novo. *Pub. Util. Dist. No. 1 v. Hearings Bd.*, 137 Wash. App. 150, 160, 151 P.3d 1067 (2007) ("Interpretation and application of the administrative code is a legal question that we review de novo."). DNR cites *Citizens v. City of Port Angeles*, 137 Wash. App. 214, 226, 151 P.3d 1079, 1085 (2007) for the principle that the decision to apply a categorical exemption to a given proposal is afforded "substantial weight." *See* DNR Resp. at 9-10. That contention has limited application here. The legal issue presented with respect to WAC 197-11-800(5)(b) is not the application of facts to the rule, but rather interpretation of the rule itself. Similarly, in *Glasser v. City of Seattle, Office of Hearing Exam'r*, 139 Wash. App. 728, 736, 162 P.3d 1134, 1137-38 (2007), the Court reviewed dismissal of a SEPA claim where the agency "never actually evaluated the adequacy of the EIS on this issue," but instead dismissed plaintiff's "arguments as a matter of law based on her interpretation of SEPA's phased review regulations." In this context of a purely legal interpretation of a regulation, the standard of review is de novo. *Id.*

IV. ARGUMENT

In the Tribe's opening brief, the Tribe explained that the SEPA statute, plain text of WAC 197-11-800(5)(b), and regulatory history require SEPA review for the loss of 1,001 acres of public land. SEPA review is additionally required because DNR has already planned several timber sales in the land to be acquired. The Tribe also established based on well-settled Washington Supreme Court precedent that the trial court erred in summarily rejecting the Tribe's request for a writ of constitutional certiorari at the threshold stage of judicial review. DNR's responses fail to overcome the Tribe's arguments, as detailed below.

A. DNR Violated the State Environmental Policy Act by Failing to Conduct Any Environmental Review on an Agency Action with Severe Environmental Effects.

DNR contends that it receives deference for its interpretation of the Department of Ecology's WAC 197-11-800(5)(b) exemption, and that the exception for designated public uses does not apply. DNR further contends that even though it has planned three timber sales and previously argued that these timber sales are an integral part of the Exchange, that they are not connected actions for purposes of SEPA.

1. DNR does not receive deference for its interpretation of WAC 197-11-800(5)(b).

The Legislature specifically delegated the task of promulgating categorical exemptions of general applicability to Ecology. RCW 43.21C.110; *see also* WAC 332-41-020 (DNR regulation adopting WAC 197-

11-800 and other Ecology regulations by reference); *c.f.* WAC 197-11-830 (specific DNR exemptions). In the opening brief, Makah relied upon *Port of Seattle v. Pollution Control*, 151 Wash. 2d 568, 593-94, 90 P.3d 659 (2004), *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000), and *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wash. App. 17, 38, 252 P.3d 382 (2011) for the well-established and binding principle that the Department of Ecology receives deference for interpretation of its regulations, even when those regulations are applied by other agencies. Makah also cited *Short v. Clallam Cty.*, 22 Wash. App. 825, 832-33, 593 P.2d 821 (1979) for the related and supporting principle that deference to Ecology helps further consistent application of a regulation that applies Statewide across a variety of State and local agencies.

DNR wholly fails to respond to these four on-point cases, and in its silence, effectively concedes the point. DNR only argues in a footnote that it is afforded deference because the regulation discusses "public use established by the public land owner," and DNR asserts that it is the landowner. For one thing, DNR is not the landowner—all the lands at issue are owned by the State of Washington and managed by DNR. That is why the lands, termed "State lands" and "State forest lands," are "public lands" defined as "lands of the state of Washington administered by the department." RCW 79.02.010(12); RCW 79.02.010(14)-(15). DNR can arrange a land exchange, but only the Governor may sign the deeds. RCW 79.17.060

("The commissioner shall, with the advice and approval of the attorney general, execute such agreements, writings, or relinquishments and certify to the governor such deeds as are necessary or proper to complete an exchange.").

As the landowner, the State acts both through the Legislature and the Executive branch, including the DNR, WDFW, and other agencies. While WAC 197-11-800(5)(b) recognizes that the landowner can establish public uses, that does not support the contention that the landowner therefore receives deference to determine what constitutes a public use for purposes of the Ecology regulation.

DNR contends that it receives deference on its application of WAC 197-11-800(5)(b), primarily relying upon *Citizens v. City of Port Angeles*, 137 Wash. App. 214, 226, 151 P.3d 1079, 1085 (2007). As explained in the standard of review, *Citizens v. City of Port Angeles* is of little use here because the pertinent question before the Court is interpretation of WAC 197-11-800(5)(b).[2] Finally, DNR does not deserve deference because it has no consistent policy or position. While DNR points to an example in which it performed SEPA because there is a recorded easement for a trail on the parcel (the Bucklin Hills Exchange, *see* CP 102, 257), that example only proves the

[2] *Citizens v. City of Port Angeles* is further anomalous in that the agency conducted a SEPA review and determination of non-significance, based on which it later found a categorical exemption, and the court expressly limited analysis of categorical exemptions to the rule and administrative framework applied. 137 Wash. App. at 219 n. 4.

point: DNR maintains that there must be some sort of special additional designation for public use, which could include an easement, parking, kiosks, signage, or campgrounds, CP 15, but does not have any sort of written policy or explanation of why this non-exclusive list of "examples" triggers SEPA review but other fully permitted and acknowledged public uses enjoyed by Tribal members do not.[3] DNR does not deserve deference both because WAC 197-11-800 is an Ecology regulation, and because DNR seems to be making up the rules on an *ad hoc*, exchange by exchange basis.

2. The SEPA exemption does not apply because the Exchange lands are specifically designated and authorized for public use.

The exemption at WAC 197-11-800(5) does not apply because of the exception for lands "subject to a specifically designated and authorized public use established by the public landowner and used by the public for that purpose." Here, the phrase "specifically designated and authorized public use" refers to categories of lands that are designated and authorized for public use. For DNR, those categories encompass the State lands and State forest lands designated and authorized by both the Legislature and the agency for public use. These lands are expressly defined as "public lands," RCW 79.02.010(12), the Legislature has designated them for multiple uses, RCW 79.10.100, and those uses include hunting and road use, RCW 79.10.120(6, 13). DNR's regulations "recognize[] recreation on department-managed

[3] It is not clear that these uses, particularly kiosks and signage, all entail specific written authorization.

lands as an important component of the quality of life in Washington state," and "encourage responsible public use of roads and trails, land and water under its jurisdiction." WAC 332-52-001. DNR's Policy for Sustainable Forests further explains that DNR provides for multiple public uses unless deemed incompatible with management obligations. Policy at 18.[4]

Indeed, DNR concedes that "DNR manages these parcels under the multiple use statutes, meaning they are managed to provide for multiple simultaneous uses. Some of these uses include timber harvesting, removal of other valuable materials, hunting, and other public recreational opportunities such as hiking, biking, and bird watching." CP 230. The fact that the public uses the lands in question, such use is permitted by DNR, and the uses will be lost if the lands are transferred to private ownership, is dispositive evidence that the lands are "designated and authorized for public use." The loss of subsistence, recreation, and enjoyment of the natural world are precisely the impacts SEPA requires agencies to consider. RCW 43.21C.030(2)(c)(ii); RCW 43.21C.020(2)(b).

Makah's interpretation of WAC 197-11-800(5)(b), which would require SEPA review for the loss of lands that are in a category designated and authorized for public use, is true to the plain text of the regulation. It also accords with the statutory mandate that "to the fullest extent possible"

[4] Available here: https://www.dnr.wa.gov/publications/lm_psf_policy_sustainable_forests.pdf?vo2195 (last accessed Sept. 25, 2020).

regulations "shall be interpreted and administered in accordance with the policies set forth." RCW 43.21C.030. Those policies include the recognition that "a human being depends on biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well," RCW 43.21C.020(1), and the mandate that every State agency "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making," RCW 43.21C.030(2)(b). Makah's interpretation further harmonizes WAC 197-11-800(5)(b) with WAC 197-11-704(2)(a)(ii), which defines project actions subject to SEPA to expressly include an agency decision to "[p]urchase, sell, lease, transfer, or **exchange natural resources, including publicly owned land**, whether or not the environment is directly modified." (emphasis added).

DNR concedes that the lands in the Exchange are designated for multiple uses by the public, authorized for public use, and in fact used by the public, including members of the Tribe. CP 230. DNR also does not contest that some of its properties, such as office buildings and commercial leasing properties, are public but not designated and authorized for public use. This concession helps establish that there are classes of real property transactions to which WAC 197-11-800(5)(b) applies.

DNR's principal argument is that "the Exchange falls within the categorical exemption because DNR did not affirmatively give written or other official approval of the public use on the parcels in question." Resp. at

15. DNR's argument fails first because it lacks textual support. DNR's requirement for affirmative written approval or parcel-specific basis is found nowhere in the regulation. Moreover, such parcel specific authorization on the lands in the Exchange would be wholly redundant, because the lands in the Exchange are already specifically designated and authorized for public use unless the agency dictates otherwise.

To support its argument, DNR cites the dictionary definitions of the terms "specifically," and "authorized," as respectively meaning "in a definite and exact way," and "with legal or official approval." The problem with this approach is that DNR never explains why these definitions require affirmative written approval on a parcel-specific basis. Indeed, the Exchange lands are designated for public use "in a definite and exact way" and "with legal or official approval"—in statute, RCW 79.10.100, regulation, WAC 332-52-002(2)(b), and the agency's official policy document, the Policy for Sustainable Forests. DNR never explains why these repeated, specific designations and authorizations are insufficient to demonstrate public use.

DNR's reading is so narrow and contrived that it would exempt the sale or exchange of even one million acres of public land, so long as it does not contain a kiosk. DNR's interpretation is not soundly based in the plain text, and does not reflect the regulatory and statutory context, and therefore is incorrect. *See Grays Harbor Energy, LLC v. Grays Harbor Cty.*, 175 Wn.

App. 578, 584, 307 P.3d 754, 757 (2013) (citing *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)).

DNR next cites its regulations set forth in Chapter 332-52 WAC to argue that the term "authorized," which entails written permission, should be applied to Ecology regulations. This attempt also fails, as the express purpose of the 2014 revisions to the Ecology regulations was to standardize the categorical exemption across agencies. Ecology explained "[t]here is not a definition of public use and some agencies have applied this differently. Ecology has suggested a definition to help lead agencies apply this exemption more effectively and consistently." CP 319.

However, while DNR's recreation regulations do not inform the definitions of terms used in WAC 197-11-800(5)(b), they are useful to demonstrate that the categories of lands involved in the Exchange are designated and authorized for public use unless dictated otherwise by DNR. In WAC 332-52-001, "[t]he department of natural resources recognizes recreation on department-managed lands as an important component of the quality of life in Washington state." The regulation elaborates that "the department also manages forest roads primarily designed and maintained for forest management purposes that provide considerable access for dispersed recreation activities," and that "[i]t is the practice of the department of natural resources to encourage responsible public use of roads and trails, land and water under its jurisdiction." *Id.*

Next, DNR regulations provide that the categories of lands at issue in the Exchange, State lands and State forest lands, are specifically subject to the rules designating and authorizing public use. WAC 332-52-002(2)(b). These lands, including those in the Exchange, are designated and authorized for public use as the default condition but can be limited from public use if DNR determines certain criteria are met. WAC 332-52-100. Notably, other categories of real property managed by DNR, such as commercial real estate, are not included in the lands specifically designated and authorized for public use in WAC 332-52-002.

With respect to specific public uses, the regulations confirm that the public may conduct dispersed camping unless prohibited, WAC 332-52-300(14), use roads for recreational purposes unless closed, WAC 332-52-415, and park vehicles near such roads unless prohibited, WAC 332-52-400(1). Read together, DNR regulations confirm that the lands in the Exchange are of a category specifically designated and authorized for public use unless otherwise limited by DNR. The regulations not only designate and authorize public use, they "encourage" the sort of dispersed, subsistence uses in a natural setting practiced by Tribal members.

Finally, DNR argues that the many indicia of designated and authorized public use on the Exchange lands—public forest roads, the issuance of Discover Passes and administration of a program for Tribal access, and the agency's cooperation with the Washington Department of Fish and

Wildlife to authorize hunting seasons—are insufficiently specific to trigger SEPA review. DNR Resp. at 15-17. DNR's response misses the point, which is that the lands at issue are indeed subject to a variety of agency sanctioned public uses, and that those public uses will be lost as a result of the Exchange. Road access and hunting access would be eliminated.

With respect to roads on the parcels in particular, DNR argues that "[t]he mere existence of logging roads on state trust lands is not indicative of a specifically designated and authorized public use." DNR Resp. at 15. As with the other public uses described by the Tribe, the roads do not need written, parcel-specific designation as public because they are already specifically designated as public as a matter of law, unless DNR limits them otherwise. WAC 332-52-001 ("the department also manages forest roads primarily designed and maintained for forest management purposes that provide considerable access for dispersed recreation activities."); Policy for Sustainable Forests at 47 ("DNR's road system also provides a variety of social benefits, including recreational access and access to private forestlands and residences."); Policy for Sustainable Forests at 43 ("Forest roads can also enable Tribal elders to more easily access traditional use areas.").[5] The presence of roads on the parcels, which Tribal members attest

[5] DNR argues that the specific parcels are islands within private property and inaccessible by car. DNR's argument ignores the fact that the parcels are accessible by foot or bike, and that timber companies frequently allow non-motorized passage across their lands to access interior parcels. DNR acknowledges actual public use.

to using, is one of several designated, authorized, public uses. Under the plain language of WAC 197-11-800(5)(b), SEPA review is required.

3. Regulatory history supports requiring SEPA review.

Prior to 2014, the exception in WAC 197-11-800(5)(b) required SEPA review where there is an "authorized public use." In the 2014 revisions, Ecology states that "SEPA review is required for real property transactions that may result in change of public use because of the related impacts to recreation, transportation, cultural and historic resources, housing etc." *Id.* The Peninsula Land Exchange is an example of exactly what Ecology had in mind—a real property transaction that would result in loss of public use, with significant related impacts.

In response, DNR argues that "[t]he Legislature transparently explained that it wanted to preserve and expand the scope of SEPA's rule-based exemptions," and accordingly that every change to the rules must be read to have broadened the exemption and lessened environmental review. DNR Resp. at 18. This argument is incorrect—while the Legislature may have had general goals, it is axiomatic in legal analysis that the specific trumps the general. Here, for the rule in question Ecology expressly stated that the "[t]he proposed language is a clarification" with no environmental impacts—which means that the exemption was not broadened. DNR also argues that the Ecology statements are not probative because they do not include exactly the definition that was eventually made into rule. This is incorrect—Ecology

clearly explained its intent, and only slightly modified to proposed language based on later feedback. The statement of intent is still strong evidence of the purpose of the rule revision and meaning of the rule.

If there is any doubt as to Ecology's intent, the Court may consider DNR's own contemporaneous understanding of that intent. CP 99. DNR's attorney wrote at the time: "Ecology's proposed language is tied to a public use being 'designated' as such for recreational and general public use, which DNR agrees make sense from the perspective of **the point of the exemption, i.e., to examine impacts when land is being transferred out of public ownership that is actively used by the public**." *Id.* (emphasis added). This history leaves no doubt that the rule was intended to apply "when land is being transferred out of public ownership that is actively used by the public," which is exactly why the Exchange requires SEPA review.

4. Makah's interpretation harmonizes SEPA's mandates and other applicable regulations, and is consistent with analogous NEPA precedent.

Makah argues that its interpretation, unlike DNR's, is consistent with SEPA and harmonizes other applicable regulatory authority. DNR misconstrues that position entirely in its response, stating that Makah argues "that categorically exempt actions require separate environmental review." Resp. at 20. Makah never argued as much, and DNR's response to this strawman does not merit a reply.

As explained *supra*, Makah argues the well-established principle that regulations should be read to harmonize with statutory and regulatory authority on the same subject. Here, the statute mandates that "to the fullest extent possible" regulations "shall be interpreted and administered in accordance with the policies set forth." RCW 43.21C.030. This SEPA mandate strengthens the regulatory directive to conduct SEPA review for the Exchange. In the analogous NEPA context, the Supreme Court has opined that the NEPA provision requiring environmental review "to the fullest extent possible," "is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). The same approach is mandated here. In *Kucera v. DOT*, 140 Wn.2d 200, 215 n.10, 995 P.2d 63, 71 (2000), the Washington Supreme Court explained that "[w]e have previously held 'while NEPA and SEPA are substantially similar in intent and effect, . . . the public policy behind SEPA is considerably stronger than that behind *NEPA.' Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 709, 601 P.2d 501 (1979). Thus, it is reasonable to presume an 'action' subject to NEPA may also be subject to SEPA." Notably, federal exchanges of public land are regularly subject to full NEPA review. *See, e.g.*, *Ctr. for Biological Diversity v. United States DOI*, 623 F.3d 633 (9th Cir. 2010); *Partners in Forestry Coop. v. United States Forest Serv.*,

638 Fed. Appx. 456 (6th Cir.); *RESTORE: The N. Woods v. United States Dep't of Agric.*, 968 F. Supp. 168, 171-72 (D. Vt. 1997).

With respect to harmonizing regulatory authority, Makah notes that Ecology regulations specifically require SEPA review for an agency decision to "**exchange natural resources, including publicly owned land, whether or not the environment is directly modified."** WAC 197-11-704(2)(a)(ii) (emphasis added). This definition specifically identifies exchange of "publicly owned land" as covered by SEPA and thus clearly encompasses the Exchange. To avoid conflict between regulations, it is imperative to construe WAC 197-11-800(5)(b) as exempting real property transactions where there is not authorized public use, but provide an exception for designated and authorized use of public land. The repeated use of "land" in WAC 197-11-704(2)(a)(ii) and the WAC 197-11-800(5)(b) exception supports the principle that loss of public land triggers SEPA.

Magnolia Neighborhood Planning Council v. City of Seattle, 155 Wn. App. 305, 230 P.2d 190 (2010) and *Marino Prop. Co. v. Port of Seattle*, 88 Wn.2d 822, 567 P.2d 1125 (1977) are helpful in that the two cases demonstrate how the court has previously resolved the tension between earlier iterations of the two regulations that refer to the exchange of public land. These cases show that SEPA is required where there is authorized public use, as is the case with a park, but not where public land is not designated or authorized for the general public, as is the case with national defense or commercial uses. These cases

are instructive because they demonstrate how to give a full and meaningful reading to WAC 197-11-800(5)(b). The correct reading that accords with the statutory and regulatory context of SEPA, as well as analogous federal case law, is to mandate SEPA review of the Exchange because it would cause loss of designated and authorized public uses, but not to require SEPA in instances where public real property is used for used not authorized for the public.

5. SEPA also applies because the Exchange is part of a series of actions that are physically and functionally related.

In briefing on the Tribe's Motion for Emergency Stay, DNR disclosed for the first time that the agency has already planned three timber sales as part of the Peninsula Land Exchange, which would follow directly on the heels of the Exchange. This is exactly the sort of information that would have been disclosed to the public if DNR had conducted SEPA on the Exchange as required, as part of the consideration of the direct, indirect, and cumulative impacts of the proposal. *See, e.g.*, *King Cnty. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993).

The planned timber sales are subject to SEPA. This means that even if the Exchange standing alone was categorically exempt, under WAC 197-11-305(1)(b)(i), the exemption would not apply because the proposal consists of "[a] series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not." DNR argues that "to fall under section 305, the Exchange and the timber sales must qualify as a single 'proposal.'" Resp. at 30. This is a circular argument—the

whole purpose of the regulation is to clarify that "a series of actions, physically or functionally related" actions must be considered as one proposal. There is no question that the Exchange is an action, and the three timber sales are actions. WAC 197-11-704(2)(a). The only pertinent question is whether these actions are "physically or functionally related."

To resolve that question, the Court need only look to DNR's prior briefing on the Tribe's motion to stay, when the agency was attempting to secure a more than $1 million bond. Then, the State attested that "DNR was planning several timber sales that would have been acquired by DNR through the Peninsula Land Exchange. Specifically, three timber sales were planned between now and the 2022 fiscal year: Alder Variable Retention Harvest (VRH), Christmas Creek VRH, and Trees a Crowd Variable Density Thinning (VDT)." Second Decl. of Griswold at ¶ 5. The sales were closely related to and contingent on the Exchange: DNR detailed that it would begin preparing the first of those timber sales for auction "[a]s soon as the Exchange closes." *Id.* at ¶ 6. The second, larger sale was planned for auction in "calendar year 2020." *Id.* at ¶ 7. For this sale, DNR provides that the layout is already planned, values are assessed, and the trees are already painted to identify which ones to log and which to retain. *Id.* The third sale is planned for fiscal year 2021. *Id.* at ¶ 8.

In briefing on the motion to stay, DNR argued that the timber sales were an integral part of the Exchange, so much so that the Tribe should pay more than $100,000 (with 12 percent interest accruing) based on delay of the Exchange. DNR Resp. to Emergency Motion at 19-20. By describing the timber sales as explicitly dependent on the Exchange, and identifying the already planned name, date, location, and value of the sales, DNR effectively conceded that these sales are "physically and functionally related" to the Exchange. Accordingly, WAC 197-11-305 applies and SEPA is required.

Faced with the legal consequence of its arguments, DNR now reverses course, arguing that the "the Exchange is a wholly independent proposal," Resp. at 29, and that the agency's "tentative" and "rough timber sale plans" "are not definite enough to enable a meaningful environmental review." Resp. at 33. DNR's new claims belie the plain facts presented, and lack credibility given its sworn statement and characterization in briefing. The State has already argued that the Exchange and the timber sales are closely related in seeking to establish a prohibitively expensive bond. That same relationship dictates that SEPA review is required.[6]

B. The Trial Court Erred by Denying the Motion for Writ of Constitutional Certiorari and Thereby Foreclosing Review.

[6] DNR also includes discussion of its understanding of its fiduciary obligations. These issues are not at issue in this case and are the subject of unrelated ongoing litigation in Thurston County Superior Court. The Tribe maintains that DNR has at least the discretion to take into account impacts to the Tribe and its members and to secure access for tribes to exercise their Treaty rights. *See* CP 130; *see also* Wash. Const. Art. XVI, Sect. 1 "All the public lands granted to the state are held in trust for all the people."

In its complaint, the Tribe asserted violations of SEPA, the Public Lands Act, and that DNR's actions were otherwise arbitrary and capricious. Resolution of those claims is fact-dependent and requires review of an administrative record. For example, the Tribe alleged, *inter alia*, that DNR did not "address" its cultural resources concerns as required by the Public Lands Act, in part because there was no evidence that DNR attempted to mitigate impacts to the Tribe. CP 6, ¶ 7. DNR arbitrarily and capriciously asserted that providing mitigation would diminish value of the land, but provided no evidence that it had ever evaluated that value. CP 7, ¶ 9. Similarly, the Tribe alleged that DNR arbitrarily and capriciously asserted before the Board of Natural Resources that the Makah Tribe lacks treaty hunting and gathering rights on the lands to be exchanged. CP 20-21, ¶¶ 71-73. "Agency action is arbitrary and capricious if there is no support *in the record* for the action." *Fed. Way. Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769 n.14, 261 P.3d 145 (2011) (emphasis added). Accordingly, these allegations and others "if verified, would establish that the lower tribunal's decision was … arbitrary and capricious," *Saldin Sec. v. Snohomish Cty.*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998), and adequately alleged unlawful decision making, *Pierce County Sheriff v. Civil Serv. Com*, 98 Wn.2d 690, 694, 659 P.2d 648 (1983).

The trial court erred in treating Makah's motion for a writ of constitutional certiorari as a substitute for the merits issues presented by the

writ. The Court effectively ruled on summary judgment against the Tribe without the benefit of an administrative record. This procedural mechanism constitutes legal error. Makah met the threshold for securing a writ through its factual and legal obligations, which established unlawful and arbitrary and capricious decision making. That is all that is required. *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 626-27 (2011).

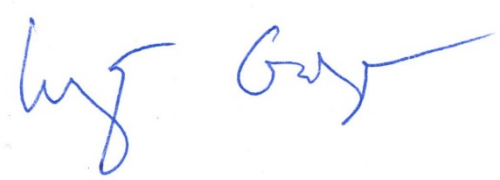
DNR asserts that the motion for writ of certiorari was limited to violations of SEPA and the Public Lands Act. That is incorrect. The motion references the complaint's allegations that DNR acted in an arbitrary and capricious manner. CP 179. DNR attempts to characterize the trial court's decision as discretionary. But the trial court here did not make a discretionary decision to deny review. Rather, the trial court made a legal procedural error subject to de novo review. Accordingly, this Court should reverse the trial court's denial of Makah's motion for writ of constitutional certiorari and remand for preparation of an administrative record.

V. CONCLUSION

For the foregoing reasons, the Court should invalidate the Exchange, order DNR to vacate or reverse any steps it has taken toward finalization of the Exchange, and remand to the trial court for preparation of an administrative record and further proceedings.

Respectfully submitted this 25th day of September, 2020.

ZIONTZ CHESTNUT



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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I served the foregoing Reply Brief of the Makah Tribe to the Commissioner of Public Lands Hilary Franz, the Washington State Department of Natural Resources and the Washington State Board of Natural Resources (collectively, Defendants/Appellees), and the Hoh Tribe, the Quileute Tribe, and the Quinault Indian Nation (collectively, Amici) via email at the addresses below.

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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 25th day of September, 2020 at Vashon, WA

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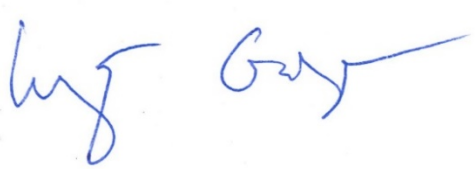

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