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Washington State
Court of Appeals
Division Two

July 17, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MAKAH INDIAN TRIBE, Appellant, v. COMMISSIONER OF PUBLIC LANDS HILARY FRANZ (in her official capacity), the WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, and the WASHINGTON STATE BOARD OF NAUTRAL RESOURCES, Respondents.	No. 54945-0-II RULING DENYING MOTION TO STAY AND ACCELERATING REVIEW

The Makah Indian Tribe (Tribe) filed an emergency motion to stay an exchange of land managed by the Department of Natural Resources (DNR) pending appeal. RAP 8.3; RAP 17.4(b). This court denies the motion. It accelerates review under RAP 18.12.

BACKGROUND

The superior court denied the Tribe's request to stay the trade of 1,001 acres of forested state trust lands managed by DNR for 1,395 acres of forested private lands owned by a timber company (the land exchange). The Tribe argued that the land exchange required State Environmental Policy (SEPA) review, RCW 43.21C. The

superior court disagreed. It also denied the Tribe's petition for a writ of certiorari. The Tribe appealed and moved for a stay.

ANALYSIS

The Tribe moves under RAP 8.3.[1] "RAP 8.3 permits an appellate court to issue orders and grant injunctive or other relief to ensure effective and equitable review. 'The purpose of [these rules] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal.'" *Cronin v. Cent. Valley Sch. Dist.*, 12 Wn. App. 2d 123, 456 P.3d 857 (2020) (quoting *Wash. Fed'n of State Emp. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983)).

In evaluating whether to stay enforcement of a superior court decision, the court considers whether the issue presented by the appeal is debatable, and whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation. *See Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985) (the equities may require maintenance of the status quo to preserve the fruits of a successful appeal), *cert. dismissed*, 478 U.S. 1029 (1986).

> In actual application of this theory, courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit. *See Shamley v. Olympia*, 47 Wn.2d 124, 286 P.2d 702 (1955).

Boeing Co. v. Sierracin Corp., 43 Wn. App. 288, 291, 716 P.2d 956 (1986) (alleged trade secret violation).

[1] Although the superior court's decision allowed the land exchange to go forward, the parties agree that RAP 8.1(b)(2) does not apply.

Debatable Issue

The parties dispute whether an exemption to SEPA review in WAC 197-11-800(5)(b) applies or whether an exception to the exemption applies, requiring SEPA review. This subsection states:

> The following real property transactions by an agency shall be exempt [from SEPA review]:
>
> . . . .
>
> (b) The sale, transfer or exchange of any publicly owned real property*, but only if the property is not 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) (emphasis added.) This court reviews agency regulations de novo as if they were statutes. *Wash. Cedar & Supply Co. v. Dep't of Labor and Indus*., 137 Wn. App. 592, 598, 154 P.3d 287 (2007). "[W]here a regulation is clear and unambiguous, words in a regulation are given their plain and ordinary meaning unless a contrary intent appears." *Silverstreak, Inc. v. Dep't of Labor and Indus.*, 159 Wn.2d 868, 881, 154 P.3d 891 (2007). But if it is ambiguous, this court "may resort to statutory construction, legislative history, and relevant case law in order to resolve the ambiguity." *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52, 239 P.3d 1095 (2010).

This court also gives "substantial weight to an agency's interpretation within its area of expertise and uphold that interpretation if it reflects a plausible construction of the regulation and is not contrary to legislative intent." *J&S Servs., Inc. v. Dep't of Labor and Indus.*, 142 Wn. App. 502, 506, 174 P.3d 1190 (2007) (citing *Roller v. Dep't of Labor and Indus.*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005)). That said, this court still retains the "ultimate responsibility for interpreting a regulation." *J&S Servs.*, 142 Wn. App. at 506

(citing *Children's Hosp. and Med. Ctr. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999), *review denied*, 139 Wn.2d 1021 (2000)).

DNR reads the exception to the SEPA exemption to require SEPA review of transfers of publicly owned land only if the land has a specifically designated public use. The Tribe reads it to require SEPA review for transfers of all publicly owned land designated for any public use.

So the main issue here is whether the public land subject to the exchange had a "specifically designated and authorized public use." WAC 197-11-800(5)(b). If so, SEPA applies. The record before the superior court supported that this land is subject to multiple simultaneous uses, including timber harvesting, hunting, and public recreational activities. Court Spindle, Declaration of Mona Griswold at 2 (June 15, 2020); *see* RCW 79.10.100 *et seq.* (Multiple Use Act).

The Tribe's argument that these multiple public uses[2] amount to a "specifically designated and authorized public use" would essentially render WAC language meaningless by transforming public lands that default to multiple public uses under RCW 79.10.100 *et seq.*, into lands designated for a specific public use. Put differently, this interpretation would require this court to ignore plain language[3] triggering SEPA review for a transfer of public land that has "a specifically designated and authorized" public use

[2] The Multiple Use Act directs DNR to manage state lands this way. RCW 79.10.100.

[3] This court notes that the regulation's adoption history cited by the Tribe likely supports the Tribe's contention that the drafter's intended SEPA to apply to a transfer of any publicly owned and publicly used land, but this court relies on the regulation's plain language.

and instead require SEPA review for any transfer of public land when the property is "subject to [any] . . . public use." WAC 197-11-800(5)(b) (alterations added).

The Tribe also argues that much of the current DNR land subject to the exchange is close to the Makah Reservation and is subject to federal treaty rights. This argument is compelling but there is no clear precedent to support the Tribe's argument that its treaty rights are a "specifically designated and authorized public use" under WAC 197-11-800(5)(b).

In a related argument, both parties also dispute whether *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 230 P.3d 190, *review denied*, 170 Wn.2d 1003 (2010), applies. The Tribe argues that under *Magnolia Neighborhood*, the SEPA exemption applies only to a "bare real estate transaction" with no collateral consequences. Reply to Resp. to Mot. to Stay at 2. It contends because DNR acknowledges that the transaction will diminish the Tribe's rights, the exemption does not apply. But DNR contends *Magnolia Neighborhood* is inapplicable because that case addressed an earlier version of the WAC and DNR has designated no particular public use for the land at issue.

In *Magnolia Neighborhood*, Division One held, "[w]hen the City of Seattle (City) approves a plan for a specific construction project in a defined geographic area that involves a decision to purchase, sell, lease, or transfer publicly owned land, this undertaking is a 'project action' subject to review under the State Environmental Policy Act (SEPA), chapter 43.21C RCW." *Magnolia Neighborhood*, 155 Wn. App. at 308. The court determined that a decision made as part of a longer-term redevelopment plan for

housing on public land[4] was a "project action"[5] under WAC 197-11-704(2)(a) because it was "a decision on a specific construction project." *Magnolia Neighborhood*, 155 Wn. App. at 314.

It also declined to apply an exception to SEPA review for a "'sale, transfer, or exchange of any publicly owned real property' that 'is not subject to an authorized public use,' under [former] WAC 197-11-800(5)(b)." *Magnolia Neighborhood*, 155 Wn. App. at 318. It again highlighted that "the City's approval of the [redevelopment plan] is not simply the acquisition of real property." *Magnolia Neighborhood*, 155 Wn. App. at 318.

This court finds *Magnolia Neighborhood* of little use here. There, the City had a specific development plan in the works when it made its decisions. Here, in contrast, DNR is exchanging undeveloped land for undeveloped land. That the exchanged land might be subject to anticipated timber harvesting does not make the exchange part of a

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[4] This involved a transfer of federal land at Fort Lawton to the City under the "Fort Lawton Redevelopment Plan" (FLRP) for construction of a housing community that included "a new mixed-income neighborhood" with "between 108 and 125 market-rate units; a 55-unit building for homeless seniors; 30 units for homeless families; and six self-help ownership units to be developed by Habitat for Humanity." *Magnolia Neighborhood*, 155 Wn. App. at 310 (internal quotation omitted). The plan added that the "income source for the project will be the sale of single family and duplex townhome lots to market-rate developers." *Magnolia Neighborhood*, 155 Wn. App. at 310.

[5] Under WAC 197-11-704(2)(a), a project action is

> a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
>
> (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
>
> (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

"specific construction project," particularly when the exchanged public lands are already subject to timber harvesting.

In sum, this court cannot conclude that the Tribe is likely to prevail on the merits, a preliminary injunction requirement. But the RAP 8.3 standard is not that strict. It requires only that the issue be debateable. Here, because the interpretation of the present SEPA exemption (and its exception) is an issue of first impression, the Tribe satisfies this requirement. *Shamley*, 47 Wn.2d at 127 ("The question presented is one of first impression in our court and we find that a debatable issue is presented by the appeal.").

Equities

Under *Purser*, this court must also determine whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation. *See Purser*, 104 Wn.2d at 177 (requiring benefits payments to elderly and indigent while appeal was pending).

The Tribe argues that the equities favor it. It contends that the land exchange will impair tribal treaty rights and tribe members could be prosecuted for continuing to access the land after the exchange. It also highlights that DNR could argue that its appeal is moot if the transfer occurs. DNR responds that multiple tribal interests are involved in this complex land exchange, and at least eight other tribes favor it. It will give the Makah tribal members access to more land, not less. And the exchange will consolidate "significant state lands," allowing them to be better managed. Resp. to Mot. to Stay at 15. The exchange contract also expires August 3, 2020, and there is a risk that private party involved in the exchange would just walk away if this court enters a stay. It does

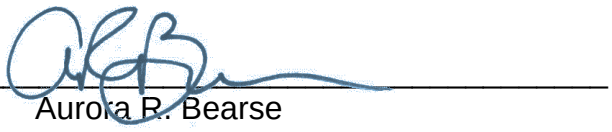
address prosecution concerns and does not brief whether the land exchange would moot the Tribe's appeal.

But at oral argument, respondent conceded that the Tribe's appeal would not be moot because if this court concludes it should have complied with SEPA, it would have to void the exchange and subject it to proper review.[6] Given this, this court concludes that an injunction is not required to preserve the fruits of this appeal. And the remaining equities do not favor one party over another. Accordingly, it is hereby

ORDERED that the Tribe's motion for stay is denied under RAP 8.3. It is further

ORDERED that because this matter involves the Tribe's use of public land and the transfer of a significant amount of public land into private hands, this court accelerates review. RAP 18.12. It is further

ORDERED that the parties are to submit a joint proposed accelerated perfection schedule within 10 days, which this court will then review. The clerk of court will then issue a perfection notice and when the briefing is complete, this appeal will be set for consideration by a panel of this court.



Aurora R. Bearse
Court Commissioner

cc: Wyatt F. Golding
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[6] The Tribe also does not allege that the exchanged public land will be irreversibly transformed by the private acquirer. *Cf. Shamley*, 47 Wn.2d at 127 (planned timber harvest would change the nature of former watershed land). DNR already allowed timber harvesting on its land.