No. 100896-1

SUPREME COURT OF THE STATE OF WASHINGTON

COOKE AQUACULTURE PACIFIC, LLC,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES and COMMISSIONER OF PUBLIC LANDS HILARY FRANZ,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After a catastrophic failure at Cooke Aquaculture Pacific, LLC's, Cypress Island facility resulted in the release of thousands of non-native Atlantic salmon into the habitat of threatened Washington salmon, the Washington State Department of Natural Resources and Commissioner of Public Lands Hilary Franz (DNR) reviewed Cooke's other leaseholds to ensure that such a disaster would not occur again. What DNR discovered at Cooke's Port Angeles facility were several serious violations of Cooke's lease. These numerous violations, occurring within six months of Cooke's failure to timely pay rent, included broken and disconnected anchor chains, un-encapsulated foam material, and anchors outside of the leasehold boundary. Accordingly, DNR terminated the lease in compliance with its plain terms in order to protect the State's aquatic lands.

The Court of Appeals did not break any new legal ground in this case; it merely applied established Washington precedent

that a statute providing for "de novo" review requires an arbitrary and capricious standard, unless an agency is acting in a quasi-judicial manner. DNR's aquatic lands leasing decisions are administrative, not quasi-judicial, and under the explicit terms of Section 14 of Cooke's lease, DNR was entitled to terminate based on the facts. There is no conflict justifying review under RAP 13.4(b)(1) and RAP 13.4(b)(2), and the unique facts of this case do not present a matter of substantial public interest under RAP 13.4(b)(4). The Court should therefore deny review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals correctly apply established precedent in concluding that the applicable standard of review for DNR's aquatic lands leasing decisions under RCW 79.02.030 is arbitrary and capricious?

2. Did the Court of Appeals correctly uphold DNR's termination of Cooke's lease as based on the law and facts, in compliance with DNR's statutory and constitutional obligations, and therefore not arbitrary and capricious?

3. Did the Court of Appeals properly construe the plain language of the lease in affirming the superior court and concluding that DNR's termination of Cooke's lease was correct?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

The aquatic lands at issue in this case are located in Port Angeles Harbor and have been used for finfish aquaculture since the mid 1980's by various lessees.[1] *See* REC-2081.[2] In 2015, Icicle Acquisition Subsidiary, LLC (Icicle), the lessee at the time, operating as American Gold Seafoods, negotiated a new

[1] For a timeline of the prior tenants and acquisitions, *see* Clerk's Papers (CP) at 626.

[2] Citations to the Clerk's Papers are designated "CP," and citations to the Administrative Record (the Record) are designated "REC-." When referring to the Administrative Record, zeros as placeholders have been omitted for ease of reference, i.e., REC-0000001 becomes REC-1.

lease with DNR at the existing net pen site in Port Angeles. REC-2353-60.

In a memorandum seeking permission to enter into the new lease, DNR staff described the issues that came up during negotiations, and how these issues were resolved:

> Additional obligations were added to Exhibit B. They pertain to . . . ensuring that all improvements are located on the Property. The improvements in question are anchoring systems that may be outside of the current Lease area. The contract provides one year from Commencement for Tenant to confirm that all improvements are located on Property.

REC-497-98, 4849-50, 1876. DNR then presented a lease offer to Icicle. REC-499, 4850. The lease offer listed anchors as existing "Improvements." REC-566. The lease offer included the condition that "by October 1, 2016, Tenant will ensure that all improvements are located entirely on the Property." REC-593.

In 2015, DNR issued Icicle a new lease. REC-2415. In 2016, Glenn Cooke AGS Holding, Inc. purchased Icicle and changed the name of the business to Cooke Aquaculture Pacific,

LLC. REC-2457, 2468; *see* CP at 240. Icicle assigned the lease to Cooke. *Id*.

1. Lease Provisions

The term "Property" is a defined term of the lease and refers to the area of land described in Exhibit A. REC-2416. Tenant, which became Cooke after Icicle assigned the lease, prepared Exhibit A, and warranted it was a true and accurate description of the lease boundaries and the improvements to be constructed or already existing in the lease area. REC-2416. "Improvements" are defined as "additions within, upon, or attached to the land," and include thirty-eight Danforth-style anchors. REC-2421.

Cooke is required to maintain the Property in good order and repair, and in a clean, attractive, and safe condition. REC-2437. The lease also provides that the waiver of any default under any lease term is not a waiver of the term. REC-2442. Further, any waiver of any default is not a waiver of any subsequent default of that same term or any other term.

REC-2442. Time is of the essence as to each and every provision. *Id.*

Under Section 14, a "default" occurs when Cooke fails to timely pay rent or other expenses, or fails to comply with any other lease provision. REC-2439-40, 2420. Generally, Cooke has 60 days to cure a default, unless the lease otherwise provides a different timeline. REC-2439. But, upon an Event of Default, DNR can terminate the lease without providing Cooke an opportunity to cure. REC-2439.

A default becomes an "Event of Default" in two ways. REC-2439. First, a default constitutes an Event of Default if Cooke fails to cure a default within the cure period after receiving notice from DNR. REC-2439. Second, DNR may, in its discretion, deem a default to be an Event of Default "if the default occurs within six (6) months after a default by [Cooke] for which [DNR] has provided notice and opportunity to cure and regardless of whether the first and subsequent defaults are of the same nature." REC-2439. If DNR elects to deem a default an

Event of Default, DNR is not required to provide Cooke an opportunity to cure. *See* REC-2439.

The lease required Cooke to replace the un-encapsulated floatation materials on the wooden float by December 1, 2015; and to replace the un-encapsulated floatation material on the concrete float by December 1, 2016. REC-2447; *see* REC-555. Cooke was also required to "ensure that all Improvements are located entirely on the Property," which included the anchors, among other things, by October 1, 2016. REC-2448, 2421.

On February 10, 2017, DNR asked Cooke to confirm that it complied with the lease's additional obligations. REC-1467. Specifically, DNR inquired about the status of the obligations to replace un-encapsulated floatation materials on the concrete float by December 1, 2016; and the obligation to ensure that all Improvements, including anchors, are contained within the leasehold Property. REC-1467. On February 13, 2017, Cooke responded to DNR, saying: "[t]he repairs were made to the concrete barge that sealed up the broken areas and exposed

Styrofoam. And all the improvements are located within the property." REC-1468.

2. Termination

In August 2017, a net pen at Cooke's Cypress Island commercial fish farm collapsed, releasing thousands of Atlantic salmon. REC-1513, 5026. Following the net pen collapse, DNR began investigating the causes, and inspecting Cooke's other salmon farms for compliance with its maintenance obligations and general lease terms. REC-1556, 4193. Meanwhile, in October 2017, Cooke failed to timely pay the required Annual Rent on the Port Angeles leasehold. REC-1533-34. DNR sent Cooke a Notice of Default providing Cooke 60 days to cure. REC-1533-34.

DNR hired a marine engineering firm, Mott MacDonald, which contracted with Collins Engineers, to investigate the cause of the net pen collapse, and inspect and report on all of Cooke's remaining net pen sites. REC-4238, 4246, 4371, 1556. Mott MacDonald provided DNR its preliminary findings, which

were expanded upon in subsequent reports.[3] Mott MacDonald noted that its inspection revealed areas of "major concern," critical conditions, serious deficiencies, and severe damage, although the net pen facilities were otherwise in "fair condition." REC-4225, 4218, 4394. Specifically, the inspection revealed un-encapsulated flotation material on the concrete float. REC-4279, 4267, 4269. The report identified critical conditions affecting the mooring lines and the distribution of anchor loads, including two disconnected anchor chains, and a third anchor chain with an open link. REC-4218-19, 4221, 4261-62, 4400. The site had "numerous errant/abandoned anchor line ropes" and "the anchor lines running between the two [net pen] systems crossed at numerous locations and crab pot lines were frequently wrapped around the anchor lines." REC-1724. Further, the report noted that the secondary pen's mooring system was "a significant concern." REC-4400. Mott MacDonald also determined that

[3] *See* REC-4168, 1723, 4195, 4238, and 4371.

anchors on both the primary and secondary net pen were located outside of the leasehold boundary, and documented several other concerns. REC-4225-26, 4269, 4401, 4400.

Based on these reports, DNR determined that Cooke was in default of the lease due to three failures to comply with the terms set forth in Exhibit B and in Section 11.2. REC-1719. Specifically, (1) Cooke's failure to encapsulate flotation material on the concrete float by December 1, 2016 violated Exhibit B, paragraph 2B's requirement to do so; (2) Cooke's failure to ensure all anchors were located within the leasehold boundaries violated Exhibit B paragraph 2K's requirement to ensure that all Improvements were located entirely on the Property; and (3) the disconnected anchor chains and anchor chain with an open link violated Section 11.2's requirement to maintain the Property and Improvements in good order and repair, in a safe, clean, and attractive condition. REC-1719-20; *see* REC-2447-48, 2437; *see also* 4218-19, 4221, 4226, 4279.

On December 15, 2017, after receiving and reviewing Mott MacDonald's preliminary findings, DNR deemed Cooke's default for failure to comply with Section 11.2 an Event of Default. REC-1720, 1723, 1731, 1536, 2439. DNR then terminated the lease under Sections 14.2(c) and 14.3(a). REC-1719-20, 1536, 2439. [4]

B. Proceedings Below

Cooke timely appealed DNR's decision to terminate the lease to the superior court under RCW 79.02.030. CP at 238. Cooke also sought a declaratory judgment that it was not in default of the lease and that DNR did not have a basis to terminate the lease, and further alleged that DNR breached the duty of good faith and fair dealing when it terminated the lease. CP at 251-52. The superior court severed Cooke's RCW 79.02.030 appeal ("the administrative appeal") from its

[4] Section 14.2(c) was triggered when Cooke's subsequent defaults occurred within six months of its failure to timely pay rent in October 2017. REC-1720, 1536, 2439.

other claims, ruling that the administrative appeal would be heard first. CP at 353-54.

The superior court reviewed the Administrative Record, which includes the lease. CP at 709-10; REC-2415 (lease). The superior court rejected Cooke's claim that DNR's decision to terminate was quasi-judicial, and therefore concluded that the appropriate standard of review was arbitrary and capricious under *Northwest Alloys v. Department of Natural Resources*, 10 Wn. App. 2d 169, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d 1019, 455 P.3d 138 (2020). CP at 710. The superior court ruled that DNR's decision to terminate the lease was factually supported, and was not arbitrary and capricious. CP at 710-11. The court also concluded that DNR did not waive the lease provisions requiring timely payment of rent, and further stated that "[u]nder the circumstances of this case, waiver cannot apply to avoid compliance with the Lease provisions with DNR, a public entity." CP at 710. Cooke timely appealed the superior

court's decision, but did not assign error to the court's waiver conclusions. CP at 713-15; Cooke Opening Br. at 3-4.

In affirming the superior court, the Court of Appeals, in an unpublished opinion, held that DNR's decision to terminate Cooke's lease was administrative, and therefore the proper standard of review is arbitrary and capricious. *Cooke Aquaculture Pacific, LLC v. Wash. State Dep't of Nat. Res. & Hilary Franz*, No. 54564-1-II, slip op. at 1-2 (Dec. 14, 2021). The Court concluded that DNR did not act in an arbitrary and capricious manner, but rather "DNR's decision to terminate the lease was based on facts and supported by substantial evidence, pursuant to the plain terms of the contract, was well reasoned and made with due regard to the facts and circumstances." *Cooke*, slip op. at 15.

Cooke filed a Motion for Reconsideration, which the Court of Appeals denied on March 31, 2022. Cooke now petitions this Court for review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Cooke argues that the Court of Appeals' decision conflicts with precedent, and involves a matter of substantial public interest supporting review under RAP 13.4(b)(1), 13.4(b)(2), and 13.4(b)(4). As explained below, the decision does neither. The Court of Appeals applied long-standing precedent in determining the appropriate standard of review under RCW 79.02.030, and in subsequently evaluating DNR's decision to terminate Cooke's lease under that standard. DNR, in administering the provisions of Cooke's lease, acted in an administrative, and not quasi-judicial, capacity. Therefore, arbitrary and capricious is the correct standard in this case.

The Court of Appeals did not break from precedent, and contrary to the assertions of Cooke, the only "debate" over the correct standard of review under RCW 79.02.030 appears to come from companies that do not want to be bound by the terms of the aquatic lands leases they sign. Cooke knew that it was required to locate its improvements within the leasehold

boundaries, and to maintain its facility in good order and repair, and in a safe condition. It failed to do so, and such failures, coming within six months of its failure to timely pay rent, justified termination under the unambiguous terms of Section 14 of its lease. These unique facts, coupled with the well-established legal precedent the Court of Appeals applied, do not warrant review under RAP 13.4.

A. The Court of Appeals' Decision Does Not Conflict with Precedent and Therefore Does Not Warrant Review Under RAP 13.4(b)(1) and 13.4(b)(2)

The Court of Appeals' decision does not conflict with either the precedent of this Court or other appellate precedent. Cooke appealed DNR's decision to terminate its lease under RCW 79.02.030. That statute provides for "de novo" review of DNR's leasing decisions based on the agency's record, and, as discussed below, the Court of Appeals correctly evaluated the lease termination under the standard of review of RCW 79.02.030, and the applicable case law interpreting similar "de novo" review language.

1. The Court of Appeals Applied Long-Standing Precedent in Upholding DNR's Termination of Cooke's Lease

The Court of Appeals correctly applied an arbitrary and capricious standard directly to DNR's record. The appropriate standard of review under RCW 79.02.030 depends upon whether or not the agency is acting in an administrative or a quasi-judicial capacity. *Nw. Alloys*, 10 Wn. App. 2d at 184*; see also Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 570-71, 269 P.2d 563 (1954). If the agency is acting in an administrative capacity, then the standard of review is arbitrary and capricious. *See Francisco v. Bd. of Dirs.*, 85 Wn.2d 575, 578-79, 537 P.2d 789 (1975) (listing factors to determine whether agency action is quasi-judicial).

Although RCW 79.02.030 provides for "de novo" review on the agency record, when courts have examined similar statutes, they have construed such "de novo" review language to mean "arbitrary, capricious, or contrary to law." *Household Fin. Corp. v. State*, 40 Wn.2d 451, 454-58, 244 P.2d 260 (1952)

(statute granting court de novo trial on denial of license). Based on constitutional principles of separation of powers, courts will not substitute their own judgment for that of an administrative agency exercising legislative or executive functions, and the Legislature cannot impose non-judicial functions on the court. *Id.* at 455-57 (holding unconstitutional a statute granting the court de novo trial and review over banking supervisor's denial of a business license).

Exercising the discretion the Legislature vested in DNR to determine whether, and under what conditions, the use of state-owned aquatic lands should be authorized is an administrative function, and not a quasi-judicial function. *See Nw. Alloys*, 10 Wn. App. 2d at 184-85; *see also Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 305-08, 381 P.3d 95 (2016) (DNR's issuance of easement was not quasi-judicial for purposes of statutory writ of review).[5] The

[5] The Court has recognized this fact for well over a century. *See State v. Bd. of State Land Comm'rs*, 23 Wash. 700,

Court of Appeals was correct to apply an "arbitrary and capricious" standard under RCW 79.02.030, and this standard was entirely consistent with precedent. *See, e.g., Nw. Alloys*, 10 Wn. App. 2d at 184-85; *Malmo v. Case*, 28 Wn.2d 828, 836, 184 P.2d 40 (1947) ("[U]nder the contracts, the Commissioner . . . had the power to grant, or refuse to grant, extensions. His refusal to do so was in entire good faith. He did not act arbitrarily or capriciously.").[6]

2. Arbitrary and Capricious Is the Correct Standard of Review Under RCW 79.02.030. The Court of Appeals Correctly Determined That DNR's Actions Administering the Lease Were Not Quasi-Judicial

Cooke asserts that the Court of Appeals improperly applied *Northwest Alloys* to conclude that the correct standard of review for DNR's aquatic lands leasing decisions under

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705-06, 63 P. 532, 533-34 (1901) ("For the reason that in leasing the [harbor area] in question the board acts only in an administrative or executive capacity, we think the writ in this case was improperly issued, and must be set aside").

[6] *See also Francisco*, 85 Wn.2d at 579.

RCW 79.02.030 is arbitrary and capricious. Pet. at 12-13. However, *Northwest Alloys* specifically addressed the standard of review that applies to DNR's aquatic lands leasing decisions under RCW 79.02.030, and Cooke's arguments to the contrary are without merit.

In *Northwest Alloys*, an aquatic lands lessee appealed a DNR decision to deny a request to sublease state-owned aquatic lands for a coal terminal on the Columbia River near Longview. *Nw. Alloys*, 10 Wn. App. 2d at 171-74. The *Northwest Alloys* court was required to interpret specific provisions of an aquatic lands lease. *Id.* at 189. Similar to the arguments Cooke makes here, the lessee in *Northwest Alloys* asserted that, when acting under a contract, an agency is performing essentially a judicial function. *Id.* at 185-86. The court rejected these arguments, stating that DNR was acting in an administrative capacity when it made its aquatic lands leasing decisions under the specific provisions of Northwest Alloys' lease. *Id.* at 184-86.

The Court of Appeals correctly applied the arbitrary and capricious standard here, and contrary to Cooke's assertions, did not create confusion by applying differing standards. Pet. at 12. As the Court of Appeals notes in its decision, whether DNR had the legal right to terminate the lease is reviewed de novo, but the termination decision itself is reviewed under an arbitrary and capricious standard. *Cooke*, slip op. at 10-11. In other words, the underlying facts upon which DNR based its decision are reviewed under an arbitrary and capricious standard, but questions of law are reviewed de novo by the court. That courts will often review facts under a deferential standard, while reviewing questions of law de novo, is not a novel concept[7] and certainly does not warrant this Court's review.

While Cooke continues to argue its view of the record, this does not justify accepting review in this matter. "Agency action is arbitrary and capricious if it is willful, unreasoned, and taken

[7] *See, e.g., Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

without regard to the attending facts or circumstances. Where there is room for two opinions, agency action taken after due consideration is not arbitrary and capricious. . . .” *Cooke*, slip op. at 14 (citing *Nw. Alloys*, 10 Wn. App. 2d at 187).

Cooke does not, and indeed cannot, establish that DNR’s actions in terminating its lease were arbitrary or capricious.[8] Instead, Cooke continues to misstate the record, in an attempt to support its Petition.[9] Despite Cooke’s arguments to the contrary,

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[8] Cooke makes the erroneous statement that maintenance at Port Angeles was the reason its anchor chains were disconnected or broken, and that it informed DNR of this prior to the inspection. Pet. at 19. However, the record shows that DNR, prior to its site inspection, asked Cooke to address the issues at its leaseholds. REC-1611. By letter dated December 1, 2017, Cooke noted the conditions at Port Angeles, including anchors located outside the lease area. REC-1618. It was not until *after* the DNR inspection on December 4-5, 2017 that Cooke, in a letter dated December 28, 2017, stated it was performing maintenance at Port Angeles at the time of the inspection. REC-1895. It is unclear why Cooke did not explain in its December 1, 2017 letter that it was going to be performing maintenance at the time of DNR’s inspection, and why it would allow such a dangerous condition with the anchor chains to exist during that timeframe.

[9] For example, Cooke maintains that DNR’s engineering report concluded that its facility was in safe and fair condition

the Court of Appeals correctly determined that DNR's actions were not arbitrary, and were instead "based on facts supported by substantial evidence. . . ." *Cooke*, slip op. at 15. The Court of Appeals' decision was based on applicable precedent, and the unique facts of this case. The Court should deny Cooke's Petition.

B. This Case Does Not Present a Matter of Substantial Public Interest Under RAP 13.4(b)(4)

Cooke asserts that this case implicates the ability of private parties to rely on contracts with the State, and as such, is a matter of substantial public interest. Pet. at 14-15. What Cooke is advocating is a rule that would eviscerate the language of any aquatic lands lease with DNR, allowing private entities to violate with impunity contractual terms designed to prevent damage to

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given its age. Pet. at 4. What Mott MacDonald actually found was that the facility had serious deficiencies, including broken and disconnected anchors, and mooring lines wrapped around other lines. *See Cooke*, slip op. at 6 (citing REC- 4218). *See also Cooke*, slip op. at 13, "Cooke ignores other portions of the Mott McDonald report which clearly described that two of the anchor lines were disconnected from their anchors and that one had an open link."

the State's aquatic lands. Simply put, this case is not about ensuring the public's reliance on contracts with the State; it is about not letting one commercial tenant of the State ignore unambiguous contractual language that is there to protect the State's aquatic lands. *See Pope Res. v. Dep't of Nat. Res*., 190 Wn.2d 744, 755, 418 P.3d 90 (2018) (DNR "executes its leasing authority with a view towards the State's duty to protect the public trust."). Cooke's refusal to comply with the terms of its lease is therefore not of such broad-reaching public concern to necessitate the Court's review under RAP 13.4(b)(4).

1. The Context Rule of *Berg* Does Not Allow a Court to Ignore the Specific Words of the Contract

Cooke asserts that the Court of Appeals did not properly consider the context of the lease with DNR. Pet. at 9-11. Relying on *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), Cooke argues that the Court erred by relying on the plain language of the lease. Pet. at 18-19. However, *Berg* does not stand for the proposition that a court can ignore the explicit

language of a contract under the guise of the context rule, and it was not error for the Court of Appeals to rely on the plain language of the lease in upholding the termination.

Under *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), it is clear that the context rule of *Berg cannot* be used to vary, contradict, or modify the written words of a contract. Indeed, extrinsic evidence is to "be used 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Id.* at 502-03 (emphasis in original).

The *Hearst* court addressed the potential confusion created by *Berg*'s context rule appearing to allow the unrestricted use of extrinsic evidence in contract interpretation. *Id*. (citing *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 693, 974 P.2d 836 (1999)). In clarifying the limits on *Berg*, the court in *Hearst* stated, "when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the

actual words used. . . . We do not interpret what was intended to be written but what was written." *Hearst*, 154 Wn.2d at 503-04.

As it did before the Court of Appeals, Cooke is once again asking this Court to ignore the explicit language of the lease, and grant review based on an alleged conflict and substantial public interest that simply do not exist. Pet. at 9-10. Cooke has not disputed the underlying conditions at its Port Angeles leasehold that led to DNR terminating its lease. *See* Opening Br. at 42-49. Rather, Cooke continues to offer excuses as to why it should not be bound by the plain terms of the lease that it signed.[10]

Cooke cites to a course of conduct between the parties to essentially try and re-argue waiver based on Cooke's ongoing disregard of various lease requirements, such as its failure to

[10] Cooke appears to assert, without citation to authority, that RCW 79.105.130 somehow limits DNR's enforcement of the termination provisions of a lease, and that DNR should only be entitled to deference if it is recalling a lease under the provisions of that statute. Pet. at 16. This interpretation is contrary to the holding of *Northwest Alloys* and does not recognize DNR's unique role in carrying out the State's public trust obligations.

confine its use of state-owned aquatic lands to the area within its leasehold boundaries. Pet. at 18-19. Importantly, Cooke never assigned error to the superior court's conclusion that "waiver cannot apply to avoid compliance with the Lease provisions with DNR." CP at 710. Regardless, Cooke's ongoing violations of its lease did not require DNR to turn a blind-eye to this conduct. The Court of Appeals correctly recognized this, stating "to the extent Cooke is asking us to disregard the plain language of the lease . . . we decline to do so." *Cooke*, slip op. at 12. This is an accurate statement of the law, and supported by *Hearst*. There is no conflict or substantial public interest justifying review.

2. The Court of Appeals Correctly Looked at DNR's Statutory and Constitutional Obligations in Evaluating the Termination

Because DNR has legal responsibilities to consider environmental values in its leasing decisions,[11] the Court of Appeals correctly looked at those responsibilities in determining whether DNR acted properly under the lease. *See Cooke,*

[11] *See Pope*, 190 Wn.2d at 755.

slip op. at 10 ("DNR clearly holds a unique, constitutionally mandated position vis a vis its management of navigable waters and underlying lands.").

While Cooke argues that the Court of Appeals held DNR to different standards, this is not the case. Pet. at 9. Indeed, DNR "cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust." *Nw. Alloys*, 10 Wn. App. 2d at 185-86. Cooke's assertions also ignore one simple fact: the lease itself is explicitly subject to the public trust doctrine under Section 1.1(b). *See* REC-2416 ("This Lease is subject to all . . . rights of the public under the Public Trust Doctrine.").

Metropolitan Park[12] and similar cases cited by Cooke are distinguishable because none of those cases involved DNR carrying out its management discretion in terminating a lease on state-owned aquatic lands. Pet. at 10, 13-14. *See Metro. Park*,

[12] *Metro. Park Dist. of Tacoma v. DNR*, 85 Wn.2d 821, 539 P.2d 854 (1975).

85 Wn.2d at 825-27 (State transfer of use deed was not ultra vires, and equitable estoppel could apply to prevent cancellation of deed); *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 438-43, 87 P. 498 (1906) (Mandamus action against state official to compel issuance of a warrant for payment); *Architectural Woods Inc., v. State*, 92 Wn.2d 521, 529, 598 P.2d 1372 (1979) (Action by contractor's assignee against college to recover funds for construction of furnishings in a dormitory); and *State ex rel. Wash. Paving Co. v. Clausen*, 90 Wash. 450, 451, 156 P. 554 (1916) (Mandamus action for payment of highway construction costs).

DNR, in administering Cooke's lease, terminated the lease based on Cooke's repeated failure to comply with the lease terms. REC-1719-20. These facts are different from the facts of the cases cited by Cooke and do not create any conflict or substantial public interest that would support review under RAP 13.4(b)(1), 13.4(b)(2), or 13.4(b)(4).

V. CONCLUSION

The decision of the Court of Appeals does not conflict with precedent or involve a matter of substantial public interest warranting review under RAP 13.4(b)(1), 13.4(b)(2), or 13.4(b)(4). Accordingly, DNR and Commissioner Franz respectfully request this Court deny the Petition.

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This document contains 4,797 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 31st day of May 2022.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on May 31, 2022, as follows:

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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 31st day of May 2022, at Olympia, Washington.

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Appellate Court Case Number:	100,896-1
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Superior Court Case Number:	18-2-01367-1

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