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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTHWEST ALLOYS, INC., and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF
NATURAL RESOURCES, and THE HONORABLE HILARY S.
FRANZ, and COLUMBIA RIVERKEEPER, WASHINGTON
ENVIRONMENTAL COUNCIL, and SIERRA CLUB,

Appellants/Cross-Respondents.

RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF

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2018)5

I. INTRODUCTION

This case calls upon the Court to review the reasonableness of a decision by the Department of Natural Resources (“DNR”) to deny consent for a sublease of aquatic lands from Northwest Alloys, Inc. (“NWA”) to Millennium Bulk Terminals-Longview, LLC (“MBT-Longview”). The trial court correctly determined that DNR unreasonably denied consent. This Court should affirm that ruling, but remand to the Superior Court for entry of an appropriate judgment.

DNR’s and Intervenors’ arguments to reverse the ruling below misstate the applicable standard of review, ignore DNR’s contractual obligations to NWA, and rely on new reasons for denial that were not offered by the agency in its decision or reviewed by the trial court. Against 100 years of controlling authority to the contrary, DNR asks the Court to fashion new rules for interpreting DNR leases that give preferential treatment to DNR solely because of its status as an administrative agency. DNR’s proposed re-interpretation of the relevant Lease provisions conflicts with their plain language and would deny NWA the benefit of its bargain with DNR.

The record shows that DNR failed to comply with its covenant in the Lease to not unreasonably withhold its consent to sublease. As the trial court correctly held, DNR’s denial of consent was based on arbitrary and capricious justifications. Instead of addressing those flaws, DNR stands on its process rights to consider information about a prospective subtenant,

but offers no record-based explanation as to how its ultimate decision to deny consent was reasonable as the Lease requires.

The record establishes that any reasonable landlord would have readily approved NWA's request to sublease to MBT-Longview. DNR ignored information about MBT-Longview's suitability as a tenant because of its animus towards coal as a fuel source, and adopted a legal strategy concocted for DNR by environmental groups to deny consent to the sublease. That strategy foundered when the trial court correctly held that DNR acted unreasonably by relying on arbitrary and capricious justifications to deny consent.

The Court should affirm on the merits, but should not reward DNR for its arbitrary and capricious actions. Instead, the Court should remand for entry of an order declaring that NWA may proceed with a sublease to MBT-Longview pursuant to the terms of the lease.

II. ARGUMENT

A. The Appropriate Standard of Review and Scope of Review on Appeal was Established by the Legislature.

Under RCW 79.02.030, appellate review in this case is of the trial court's judgment "as in other civil cases." In other civil cases, this Court reviews the trial court's factual findings for substantial evidence, and the conclusions of law de novo. *See Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162 (2018). The fact that the trial court in this case made its decision based on a written record does not mean that the substantial evidence standard is inappropriate. As the

Supreme Court recognized in *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011), “substantial evidence is more appropriate, even if the credibility of witnesses is not specifically at issue, in cases such as this where the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings.”

In this case, the record before the trial court was voluminous, consisting of more than 14,000 pages. The trial court weighed the evidence in the record and resolved competing interpretations of that evidence and rendered written factual findings. The extent and complexity of the record in this case make the substantial evidence standard appropriate here. *See Dolan*, 172 Wn.2d at 311 (deference rationale of substantial evidence standard is also grounded in fact-finding expertise of trial court and conservation of judicial resources).

Contrary to DNR’s contention, the Industrial Insurance Act (“IIA”) cases cited in NWA and MBT-Longview’s Response Brief serve as appropriate guidance for the standard of review in this case given the similarity between the statutory language and procedures under the IIA and the limited case law regarding RCW 79.02.030. Under both statutory schemes, an aggrieved party can appeal a decision by the agency to the superior court, which conducts de novo review.¹ *Compare* RCW

¹ The two statutory schemes are not vastly different as intervenors Riverkeeper, et al. (“Riverkeeper”) claim. Here, like under the IIA, a decision is rendered by the agency based on the evidence before it, then that decision is appealed to the

79.02.030 (aggrieved person may appeal decision of the board or commissioner to the superior court and hearing and trial of appeal will be de novo), *with* RCW 51.52.110 (aggrieved person may appeal decision of the board to the superior court), *and* RCW 51.52.115 (hearing in the superior court shall be de novo).² In addition, under both statutes, the decision of the superior court may be appealed “as in other civil cases.” *Compare* RCW 79.02.030, *with* RCW 51.52.140. Washington courts have interpreted the phrase “as in other civil cases,” in RCW 51.52.140 to mean that the Court of Appeals’ role in such a case is different than in typical administrative appeals. *See Hendrickson*, 2 Wn. App. 2d at 351 (“Rather than sitting in the same position as the superior court, under the IIA, we review only ‘whether substantial evidence supports the trial court’s factual findings and then review, de novo, whether the trial court’s conclusions of law flow from the findings.’”).

Riverkeeper’s reliance on *Lake Union Drydock Co. v. Department of Natural Resources*, 143 Wn. App. 644, 179 P.3d 844 (2008), and *Echo Bay Community Association v. Department of Natural Resources*, 139 Wn. App. 321, 160 P.3d 1083 (2007), do not demand a different result. First, *Lake Union Drydock Co.* was not filed under RCW 79.02.030, and therefore was not governed by the critical language in that statute that the

superior court, which reviews the record developed by the decision maker. Riverkeeper also fails to explain why identical language in the IIA and RCW 79.02.030 should be interpreted differently.

² Although the IIA also provides that the superior court may submit the case to a jury, a jury is not required. RCW 51.52.115.

appeal be “as in other civil cases.” *See* 143 Wn. App. at 649 (action for constitutional writ). Next, although *Echo Bay* was filed under RCW 79.02.030, the only issue in that case was a question of statutory interpretation, which the Court of Appeals reviews de novo regardless of the procedural posture of an appeal. 139 Wn. App. at 326. In reviewing that legal issue de novo, the court in *Echo Bay* did not hold that review of appeals under RCW 79.02.030 is always de novo.

B. DNR Is Not Entitled to Preferential Contract Interpretation.

On multiple issues, DNR asks the Court not to interpret or enforce the Lease³ like it would any other lease between private parties, but instead to take into account DNR’s status as a state agency with statutory mandates. For example, while DNR contends it is “not seeking special treatment,” DNR Reply Br. at 16, DNR insists that the Court “must construe the Lease terms liberally as to DNR and strictly as to NWA,” *id.* at 15, and must also consider DNR’s statutory responsibilities and the “public trust doctrine” “in determining whether DNR acted correctly under the Lease,” *id.* at 16. DNR has signed hundreds of aquatic land leases and easements with public and private parties.⁴ These parties and their subtenants have invested tens of millions of dollars in capital in reliance on the terms of the leases and easements they have negotiated

³ The “Lease” is Aquatic Lands Lease No. 20-B09222. AR001531-75.

⁴ *See, e.g.*, DNR, Leasing State Owned Aquatic Lands; What You Need to Know, *available at* https://www.dnr.wa.gov/publications/em_fs11_019_leasing_soal_0216.pdf?t23aht (last accessed Oct. 4, 2018).

with DNR. “When [DNR] authorizes uses on state-owned aquatic land, we are committing to a long-term business relationship with the applicant.”⁵ DNR now asks the Court to overturn all of those long-term contractual relationships, ignore agency guidance touting the same, and lay the first brick of the foundation for a new body of case law in Washington giving DNR the upper hand in all future disputes with tenants, subtenants and easement holders.

DNR cites no authority for its extraordinary demand that it receive preferential treatment in contract interpretation because there is none. The quoted language from the one case DNR cites (at 15), *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 262-63, 413 P.3d 549 (2018), involved public land grants, not contracts. Indeed, DNR’s argument conflicts with longstanding, well-settled authority.

Over 100 years ago the Washington Supreme Court recognized that: “There is not one law for the sovereign and another for the subject,” and that “whenever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons.” *State ex rel. Gillette v. Clausen*, 44 Wn. 437, 441, 87 P. 498 (1906) (internal quotation marks omitted); *see also State ex rel. Wash. Paving Co. v. Clausen*, 90 Wn. 450, 452, 156 P. 554 (1916) (“We have repeatedly held that in its business relations with individuals the state must not expect

⁵ *Id.* at 2.

more favorable treatment than is fair between men.”); *see, e.g., Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 522, 526–27, 598 P.2d 1372 (1979) (holding that Evergreen College, an “agency of the state,” was liable in contract like any private party; “by the act of entering into an authorized contract with a private party, the State... impliedly consents to the same responsibilities and liabilities as the private party”).

The Washington Supreme Court has applied these principles specifically to DNR leases of aquatic lands. *See Metro. Park Dist. of Tacoma v. Dep’t of Nat. Res.*, 85 Wn.2d 821, 828, 539 P.2d 854 (1975). In *Metropolitan Park*, the court recognized that DNR acts in a proprietary capacity when it leases aquatic lands, and in that context DNR “will receive no better treatment than any two private individuals who bring their dispute before the courts for final resolution.” *Id.*; *cf. City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012) (“As Tacoma was acting in a proprietary capacity, we examine the franchise agreements like any other contract...we employ the same tools of contractual interpretation that we would for contracts involving private parties.”).

Once DNR executes a lease, the common law of contracts applies, and a court must interpret and enforce the lease as it would any other lease between two private parties. *See Architectural Woods*, 92 Wn.2d at 526–27; *Metro. Park*, 85 Wn.2d at 828; *State ex rel. Gillette*, 44 Wn. at 441. DNR has not challenged the trial court’s finding that this case “is strictly

concerned about rights under a lease between parties to that lease.” CP 17688, ¶ 1. The Court should reject DNR’s baseless requests for preferential treatment in the interpretation of that lease.⁶

C. DNR’s Denial of Consent was Unreasonable under the Circumstances.

The trial court correctly determined that the reasons DNR articulated for denying the sublease request were arbitrary and capricious, and therefore, that DNR’s denial was unreasonable under the Lease. The first reason DNR articulated to deny the sublease was a lack of access to certain financial documents. The trial court correctly concluded that denial on that basis was arbitrary and capricious because those documents “would not be of any value of alleviating [DNR’s] expressed concerns,” and that “DNR did not make requests for the information that would address those concerns.” CP 17693, ¶ 13. The second reason DNR articulated to deny the sublease was a permitting issue that arose in 2010. The trial court correctly concluded that this was arbitrary and capricious because “DNR apparently came to the conclusion in February 2015 that it was satisfied with how that had worked out,” *id.* at ¶ 14 (citing AR001136–37), and “DNR cannot resurrect the historical permitting issue

⁶ The Lease states in Section 1.1(b) that “[t]his Lease is subject to...rights of the public under the Public Trust Doctrine or federal navigational servitude...,” AR001531. This is no trump card for DNR but merely recognition that the public has certain access rights to public lands that a lease cannot extinguish. Such rights would not affect the manner in which lease provisions are interpreted by courts under the common law of contracts. *See Metro. Park*, 85 Wn.2d at 827 (rejecting DNR’s invocation of the public trust doctrine to resist application of equitable estoppel). There is no mention of the public trust doctrine in Section 9, which sets out the factors that DNR may consider in relation to sublease requests.

as a concern in January 2017 when it was not just a short time before,” *id.* at ¶ 13.

DNR does not refute these conclusions. Tellingly, before this Court, DNR has never attempted to justify its denial on the historical permitting issue that DNR relied upon in its Decision Letter. As for its other stated reason for denying consent, DNR continues to ignore the fatal flaw the trial court identified in its Decision Letter: that the specific information DNR demanded had no probative value to address DNR’s stated concerns about the future viability of MBT-Longview’s proposed coal terminal. CP 17692–93, ¶ 13.

The trial court concluded that DNR should have asked how MBT-Longview planned to make its coal terminal project “pencil out” going forward, CP 17692, ¶ 12, but that the backward looking financial statements DNR requested would not have addressed that question, CP 17693, ¶ 13. DNR contends that financial statements would have revealed how MBT-Longview “spent the cash it received from Arch Coal and Lighthouse Resources.” DNR Reply Br. at 27–28. But once again, how MBT-Longview spent that cash in the past when there was no coal terminal would shed no light on how MBT-Longview intended for its coal terminal to be financially viable in the future. The financial statements would only have told DNR what it already knew: that as a start-up company MBT-Longview had insufficient revenues of its own to cover Lease obligations. Meanwhile, DNR unreasonably ignored the fact that

MBT-Longview had other committed sources of funding and that NWA remained liable for all obligations under the Lease.

DNR attempts in vain to demonstrate that its denial was reasonable by focusing on what information DNR was entitled to consider about a prospective subtenant under Section 9.1(a) of the Lease. DNR's contractual ability to *consider* "the proposed transferee's financial condition" is not the dispositive issue here.⁷ Although Section 9.1(a) allows DNR to consider such information, it does not authorize DNR to deny consent based solely on a purported lack of information about a prospective tenant. Whatever *information* DNR may wish to consider pursuant to Section 9.1(a), at bottom it is DNR's ultimate decision to *deny consent* that must be objectively reasonable pursuant to Section 9.1 based on all the circumstances. *See Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996). The question before the Court is not the reasonableness of DNR's information requests, but rather the

⁷ NWA and MBT-Longview had provided voluminous responses to several prior information requests from DNR, *see* Resp. Br. at 8–9; CP 15540–50, but did not provide the requested financial statements in 2016 because, as the record makes clear, by that point DNR was not acting in good faith. Indeed, the record is devoid of any evidence that DNR ever evaluated the information that NWA and MBT-Longview provided to it in response to its numerous requests. DNR sat on the sublease request for six years. The parties finally reached agreement on the sublease, when DNR abruptly refused to execute the agreement, and soon thereafter issued public comments in opposition to MBT-Longview's coal terminal. *See* Resp. Br. at 6–11. MBT-Longview also discovered that DNR has never asked another prospective subtenant for similar amounts of information. *Id.* at 11. MBT-Longview concluded DNR was searching for a pretext to deny consent. Indeed, the record makes clear that DNR adopted a legal strategy concocted for it by environmental groups opposed to MBT-Longview's coal terminal. *Id.* at 10; *see* AR001234–39.

reasonableness of its decision to deny consent. As explained above, the trial court correctly concluded that DNR's stated reasons for denying consent were unreasonable and DNR has failed to prove otherwise.

Regardless, the record supports the conclusion that DNR's denial of consent to sublease was unreasonable because DNR was doubly assured of obtaining all the benefits it bargained for under the Lease. *See* Resp. Br. at 21–27 (citing, e.g., *Ernst*, 80 Wn. App. at 486 (“[W]here a lease prohibits a landlord from ‘unreasonably’ withholding consent...the court should evaluate whether a reasonably prudent person in the landlord’s position would have refused to consent.”); *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 210 (D.C. 1984) (a “landlord has no reasonable basis for withholding consent if the landlord remains assured of all the benefits bargained for in the prime lease”)). DNR does not dispute that this is the relevant standard against which to judge its conduct.

Under the proposed sublease, both NWA and MBT-Longview would be liable for all Lease obligations going forward. AR001547. Both companies would be required to post performance bonds of up to \$600,000 to provide double coverage for the financial obligations under the Lease.⁸ AR001552. A \$10 million letter of credit also secured MBT-

⁸ DNR's speculation that “it is unlikely that NWA and Millennium would have simply agreed to significant new bonding requirements, given their resistance to lease amendments” (DNR Reply Br. at 24) is refuted by the record. MBT-Longview acknowledged that DNR could require increased security under the Lease and indicated a willingness to meet that increased obligation. AR000181.

Longview's obligations to NWA, including for the prospective sublease of aquatic lands. *See* AR000172; AR000141-42; AR000197; AR000181. Altogether, this security provided over 18 times the amount required for the \$580,000 in rental payments remaining under remaining under the Lease through 2038. *See* AR001535.

In addition, both NWA and MBT-Longview were financially sound. It is undisputed that NWA is a subsidiary of Alcoa, a multi-billion dollar corporation. The NWA facility in Longview is critical to the supply chain of alumina for Alcoa's aluminum smelter in Wenatchee when operational. *See* AR001203; AR000138. MBT-Longview had a parent company investing tens of millions of dollars per year into MBT-Longview to revitalize industrial waterfront property and realize a long-term return on a coal export terminal once operational at the site. *See* AR013765-68; AR013794; AR013759. MBT-Longview had also demonstrated over a six year period that it was a responsible operator on the site and, with NWA, cleaned up the mess left behind by a prior subtenant. *See* AR011456; AR001163; AR001291; AR001426; AR000998-99; AR006221.

A reasonable landlord faced with this package of qualifications and security, dual obligees, a history of responsible operations at the site, and a prospective subtenant whose parent company is investing tens of millions of dollars over several years to develop the landlord's property to realize a long-term return on those investments, would readily consent to a sublease

because it would be even more assured of obtaining the benefits for which it bargained under the lease in the first instance. *See 1010 Potomac Assocs.*, 485 A.2d at 210; *see also Vranas & Assocs., Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 1004, 498 N.E.2d 333 (1986), *review denied*, 113 Ill.2d 586 (1987) (it was unreasonable for landlord to deny consent to an assignment to a start-up company where the company had provided a down payment and evidence of a loan).⁹ DNR unreasonably concluded that having only one party (NWA) on the hook for all Lease obligations was preferable to having two parties (both NWA and MBT-Longview) on the hook.

In light of the continuing liability of NWA under the Lease and all the other assurances DNR had that it would obtain the benefits of the Lease it bargained for, DNR's denial of consent was plainly unreasonable.

1. DNR Overstates the Effects of its Ability to Consider Financial Information Under the Lease.

DNR observes that a "lease may impose conditions that the tenant must meet to transfer an interest in the leasehold, regardless of whether those conditions are later deemed objectively reasonable." DNR Reply Br. at 9 (citing *Ernst*, 80 Wn. App. at 487). After staking that ground, however, DNR abandons the field; DNR nowhere contends that the Lease

⁹ DNR argues, without elaborating, that *Vranas* "has no application here." DNR Reply Br. at 20 n.3. *Vranas* demonstrates, however, that denying consent is unreasonable where, as here, the landlord has been presented with a commercially suitable transferee, supported by evidence that the transferee is ready, willing, and able to take over the lease.

at issue here contains any such conditions. DNR's point is thus irrelevant.

To the extent DNR is arguing that the Lease required NWA to provide particular information about MBT-Longview before DNR was required to consent, that argument is foreclosed by the plain language of the Lease. Section 9.1 provides that NWA shall not sublet the aquatic lands without DNR's prior consent. AR001546. As for *what* information NWA was required to provide in requesting consent to sublease, the Lease merely states that NWA "shall submit information regarding any proposed transferee to State at least thirty (30) days prior to the date of the proposed transfer." AR001546-47. The Lease does not require NWA to submit any particular information. Thus, although the Lease allows DNR to consider certain criteria, and to refuse consent for a sublease to multiple prospective tenants,¹⁰ the Lease does not allow DNR to refuse consent for any failure to provide information to DNR. DNR's argument that denial was reasonable because of a purported failure to provide particular information to DNR is not supported by the terms of the Lease and should be rejected. *See Ernst*, 80 Wn. App. at 494 n.11 (rejecting the landlord's argument that the tenant "failed to provide sufficient information about [subtenant] to enable the landlord to make a reasoned decision as to whether to approve the assignment" in part because, as here, "the lease does not require

¹⁰ Section 9.1(a) of the Lease provides that DNR "may consider" various criteria about the proposed subtenant, and that the "State may refuse its consent...if said transfer will result in [sic] or more sub-Tenants, partial assignees, or sub-divided interest holders." AR001546-47(emphasis added).

[tenant] to provide any particular type of information”).

2. DNR Had Sufficient Financial Information About MBT-Longview.

DNR contends that NWA and MBT-Longview “can point to no authority or evidence in the record” demonstrating their financial soundness. DNR Reply Br. at 20. DNR simply ignores the record evidence. DNR was aware that MBT-Longview was a single-purpose entity that required weekly cash infusions from its parent companies of several hundreds of thousands of dollars. *See* AR00141; AR013766; AR013758–59; AR013620; AR013795. DNR also knew that the parent companies had always covered these obligations. *See* AR013766–67 (noting that Lighthouse initially covered Arch Coal’s capital calls for MBT-Longview prior to buying out Arch Coal’s stake). DNR further knew that Lighthouse, MBT-Longview’s sole owner as of the date DNR denied consent, had survived the coal market headwinds that forced other coal companies into bankruptcy, and had elected to increase its investment in MBT-Longview by buying out a prior co-owner because it was convinced that the long-term economics of a coal terminal in Longview were favorable. *See id.*; *see also* AR013759; AR013794–95.

A reasonable landlord would be encouraged by investors wanting to invest millions of dollars to improve the landlord’s property so that they could realize long-term returns on their investments. Riverkeeper’s lobbying and DNR’s animus of coal as a fuel source blinded DNR to this reality. *See* AR001234–39; AR001407.

DNR complains that Lighthouse's investments are irrelevant because Lighthouse had no legal obligation to "meet [MBT-Longview's] lease obligations beyond what it had already contributed to the company." DNR Reply Br. at 28–29. This is illogical. By not covering the Lease obligations of approximately \$2,300 per month, AR001535, Lighthouse would risk stranding the tens of millions it invested at the site and jeopardize its future returns. DNR unreasonably ignored Lighthouse's investment-backed expectations.

DNR focuses exclusively on irrelevant financial statements, while ignoring all the positive indicators of a successful subtenancy and the other ways DNR would be assured of the benefits of the Lease for which it bargained. While DNR may not have received all the information it requested, it obviously had sufficient information to make a decision on the sublease, particularly where, as here, NWA would also be liable for all Lease obligations. *See, e.g., Caplan v. Latter & Blum, Inc.*, 468 So.2d 1188, 1191 (La. 1985) (proposed subtenant's "financial status was immaterial because [tenant] would have remained bound for the rental"); Resp. Br. at 23–24.

3. The Arch Coal Bankruptcy Enhanced the Financial Soundness of MBT-Longview as a Subtenant.

DNR contends that Arch Coal's bankruptcy made it "more likely ... that Lighthouse would abandon its investment in [MBT-Longview]." DNR Reply Br. at 29. This contention is also irrational. Lighthouse knew the extent of MBT-Longview's capital needs; it had been funding 62

percent of those needs for years. AR013620; AR013765–66. When Arch Coal declared bankruptcy, Lighthouse doubled down and voluntarily decided to take on funding 100 percent of MBT-Longview’s capital needs going forward. AR013766–77; AR013794; AR013759. To any reasonable observer, a company choosing to invest significantly more resources in a project is a sign of commitment to that project, not a sign of abandonment.

After Arch Coal’s bankruptcy, MBT-Longview was on sound footing. It had a single, solvent owner who had just committed additional resources to the project because it had confidence in long-term trends in the Asian coal markets it intended to serve. *See id.* The sale of Arch Coal’s stake in MBT-Longview also protected the \$10 million letter of credit by reducing the likelihood of a draw on that letter to cover MBT-Longview’s obligations. AR013770. All of these facts bolstered MBT-Longview’s financial footing and suitability as a tenant. DNR instead unreasonably saw only negatives.

4. Approval of the Sublease Would Not Have Expanded the “Permitted Use” Allowed under the Lease.

DNR contends that “this is not a case in which approving a sublease would simply give DNR the ‘benefit of the bargain’ it struck when the lease was signed,” because “Millennium’s planned facility is far larger than anything contemplated by the Lease and would significantly alter the use of the property.” DNR Reply Br. at 23. This contention is flawed for several reasons.

DNR did not deny consent to sublease on grounds that MBT-Longview's proposed coal terminal was "larger than anything contemplated by the Lease." *See* AR001509–11. DNR has waived this post hoc justification because it failed to appeal the trial court's ruling that review is limited to the stated reasons for denial in the Decision Letter.

DNR's argument also fundamentally misapprehends the nature of a sublease. It is "axiomatic that a person cannot convey a greater interest in real estate than she owns." *See v. Hennigar*, 151 Wn. App. 669, 674, 213 P.3d 941 (2009), *review denied*, 168 Wn.2d 1012 (2010) (recognizing that this principle also applies to leaseholds); *Bennion v. Comstock Inv. Corp.*, 18 Wn. App. 266, 272 n.6, 566 P.2d 1289 (1977), *review denied*, 89 Wn.2d 1016 (1978) ("A sublessee's rights are no greater than those of his sublessor, and the sublessee is charged with notice and bound by the terms and conditions of the original lease."). It would have been legally impossible for MBT-Longview to expand the Permitted Use set forth in Section 2.1 and Exhibit B of the Lease. To the extent this concern motivated DNR's denial of consent, that concern is rooted in legal error and is therefore patently unreasonable.¹¹

Moreover, DNR was well aware that granting the sublease would not have resulted in construction of MBT-Longview's coal terminal

¹¹ NWA and MBT-Longview contend that the Permitted Use under the Lease expressly allows for a coal export terminal. The trial court, in dicta, agreed that DNR's arguments to the contrary were baseless in light of the plain language of the Lease. CP 17692, ¶12. However, that issue was not properly before the trial court and this Court need not address it. *See* Section II(D), *infra*.

because numerous other permits and approvals were required, including from DNR itself. *See* DNR Op. Br. at 39 n.4 (referencing DNR’s denial without prejudice of MBT-Longview’s plans and specifications for constructing proposed docks and asserting that “further authorization from DNR would be needed to build them”).¹²

D. The Court Should Not Consider the Merits of DNR’s Argument Regarding the Scope of the Lease.

The parties agree that the issue of whether MBT-Longview’s plans to construct a coal terminal fell within a “Permitted Use” under the Lease was not before the trial court. Nevertheless, DNR assigns error to the merits of the trial court’s decision on that issue. DNR Op. Br. at 5.¹³ The Court should reject DNR’s invitation to consider the merits of an issue that was indisputably not properly before the trial court and, at most, should vacate that finding without reaching the merits of DNR’s arguments.

E. Remand to DNR Was the Wrong Remedy.

DNR’s argument that the trial court was required to remand the decision back to DNR conflicts with the plain language of RCW 79.02.030 and applicable case law. As NWA and MBT-Longview explained in their Response Brief (at 38–41), under Washington law, the

¹² DNR asserts additional bases for denying consent that it did not express in its Decision Letter. *See, e.g.*, DNR Reply Br. at 18–22 (referencing the financial capacity of NWA, NWA’s alleged use of subtenants to perform clean up work at the site, and speculation about NWA’s willingness to sell property). NWA and MBT-Longview dispute these bases, but they are not before the Court and so are irrelevant here.

¹³ Stating issue on appeal as “[w]hether Millennium’s proposed coal terminal expansion...is beyond the scope of what is allowed under the Lease.”

effect of a landlord's unreasonable denial of consent is that the tenant is relieved of the duty to obtain consent and the sublease may take effect by operation of law. Once again, DNR seeks preferential treatment. DNR seeks a different remedy for itself than the one that applies to every other landlord in Washington. As discussed above in Section II(B), however, DNR is treated like a private party in these circumstances, and therefore the same remedy must be applied to DNR. That is the remedy the parties chose when they agreed to a reasonableness clause in the Lease. *See Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 296, 391 P.2d 713 (1964).

DNR contends that remand was required because there is a constitutional prohibition on judicial use of administrative discretion, citing *Swinomish Indian Tribal Community v. Island County*, 87 Wn. App. 552, 942 P.2d 1034 (1997). This case is about "rights under a lease between parties to that lease." CP 17688, ¶ 1. *Swinomish* has no application here, and certainly does not entitle DNR to a second bite at the apple in deciding *whether* to consent to the sublease.

To the extent *Swinomish* has any relevance here, the case does not support DNR's argument that remand is required. In *Swinomish*, the Court of Appeals held that "[w]hile a court may order a municipality to fulfill a [statutory] duty, it may not order that it do so in a specific manner." 87 Wn. App. at 562. Under that holding, the trial court in this case had the authority to declare that the sublease may proceed because doing so would

not have required the trial court to order DNR to adopt any specific sublease provisions. NWA and MBT-Longview never asked the trial court to fix the terms of a sublease; the Lease itself already provided the terms for subleases at Section 9.3(b). NWA and MBT-Longview merely requested a judgment declaring that NWA was entitled to sublease the aquatic lands to MBT-Longview in light of DNR's unreasonable denial of consent. CP 17708 (requesting a "judgment in favor of Appellants declaring that NWA is entitled to sublease the aquatic lands to MBT-Longview subject to the Terms of Sublease set forth in § 9.3(b) of the Lease").

Moreover, there is no separation of powers issue in ordering an administrative body to take certain actions in situations, like this one, where remand would be pointless because there is only one possible outcome on remand. *See Nagatani Brothers, Inc. v. Skagit Cty. Bd. of Comm'rs*, 108 Wn.2d 477, 483, 739 P.2d 696 (1987) (remanding to county with instructions to approve the plat application at issue); *Levine v. Jefferson Cty.*, 116 Wn.2d 575, 582, 807 P.2d 363 (1991) (remand not required for issuance of building permit because the record did not support the challenged attachment of conditions to the permit).

Remand is not always the only appropriate remedy when an agency is party to an action, particularly not in an action like this one involving a straightforward contract violation where case law dictates the remedy. *See Resp. Br.* at 38–41. Allowing DNR to reconsider the sublease

request on remand would wrongly give preferential treatment to DNR that no other landlord enjoys. *See* Section II(B), *supra*. Remand would be pointless, inconsistent with the parties' expectations under the common law of contracts, and would deny MBT-Longview effective relief for DNR's unreasonable denial of consent to sublease.

F. The Trial Court Applied the Wrong Standard of Review and Legal Test.

As NWA and MBT-Longview explained in their Response Brief (at 42–50), the trial court reached the correct conclusion on the merits, but erred in applying the incorrect standard of review and legal test in so doing. This Court need only reach those two errors if it reverses the trial court's decision on the merits.

1. The Trial Court Should Have Reviewed DNR's Decision De Novo.

The trial court erred in reviewing DNR's decision under an arbitrary and capricious standard because DNR was acting pursuant to a contract, and thus acting in a quasi-judicial capacity. *See* Resp. Br. at 43–47. DNR offers no contrary authority. Relying yet again on *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 381 P.3d 95 (2016), DNR misconstrues the holding of that case to argue that DNR's actions pursuant to a contract are administrative in nature. *Hood Canal* is distinguishable and does not stand for DNR's cited proposition.

In *Hood Canal*, a landowner of property that abutted State bedlands filed an action against DNR seeking a declaratory judgment that

DNR lacked authority to grant a restrictive easement to the Navy, the terms of which blocked the landowner's proposed pier project. *Hood Canal*, 195 Wn. App. at 289. Unlike this case, there was no contract dispute in *Hood Canal*. The issue was whether DNR had statutory authority to issue an easement to a third party, not whether DNR had violated the terms of an existing contract. DNR's argument that *Hood Canal* "involved a contract (an easement issued by DNR), and the rights under that contract," Resp. Br. at 5–6, grossly mischaracterizes the facts of that case. For that reason alone, *Hood Canal* is inapposite.

More to the point, *Hood Canal* did not involve a statute prescribing de novo review of an agency decision. Nor did the Court of Appeals in that case decide whether a decision about an easement was quasi-judicial as a matter of law, as DNR implies. See DNR Reply Br. at 5. Far from concluding that issuance of an easement is an administrative function, the court in *Hood Canal* merely affirmed dismissal of the landowner's statutory writ claim—which is only available for review of decisions where the agency exercises judicial or quasi-judicial functions—because the landowner had failed to meet its burden on that issue. *Id.* at 305. *Hood Canal* has nothing to do with this case.

Once again, DNR has failed to cite *any* relevant legal authority to support its claim that its actions under an existing contract are administrative in nature, such that de novo review is inappropriate. Indeed, relevant authority is to the contrary. Washington courts have clearly

determined that “[t]he resolution of factual and legal disputes arising pursuant to contract is clearly a judicial function” and, therefore, should be reviewed de novo where such review is mandated by statute. *Yaw v. Walla Walla Sch. Dist. No. 140*, 40 Wn. App. 36, 39, 696 P.2d 1250 (1985), *aff’d*, 106 Wn.2d 408, 722 P.2d 803 (1986). This is a case involving a dispute under an existing contract. These types of disputes are routinely reviewed and decided by courts. The mere fact that a state agency is a party to the contract does not automatically render its actions administrative. *See Floyd v. Dep’t of Labor & Indus.*, 44 Wn.2d 560, 565, 269 P.2d 563 (1954) (rejecting the contention “that *all* administrative agencies exercise essentially legislative and administrative functions”) (emphasis in original). The trial court erred in applying the arbitrary and capricious standard of review to this contractual dispute.

2. The Trial Court Erred in Using a Subjective Test.

NWA and MBT-Longview explained in their Response Brief (at 47–50) that the trial court erred by converting an objective test for evaluating the reasonableness of landlord’s denial of consent to sublease into a subjective one by taking into account DNR’s “unique statutory mandates.” The Lease included a contractual term of art, requiring that DNR’s consent shall not be “unreasonably” withheld. That term required use of an objective test without regard to DNR’s unique mandates. DNR again seeks preferential treatment for the interpretation and enforcement of a contract to which it is a party. Well-established case law precludes

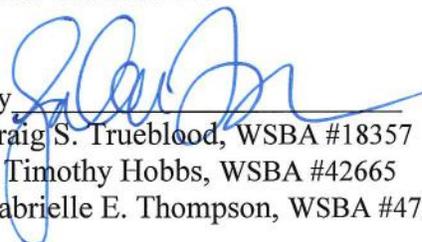
this result. *See* Section II(B), *supra*.

III. CONCLUSION

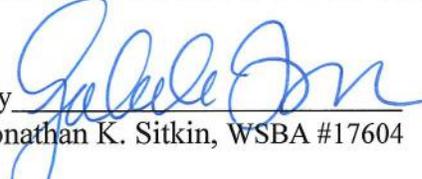
For the reasons set out above, the Court should affirm the trial court's Order on the Merits, and remand to the Superior Court for entry of a judgment declaring that NWA may sublease to MBT-Longview in accordance with Section 9.3(b) of the Lease.

Respectfully submitted this 4th day of October, 2018.

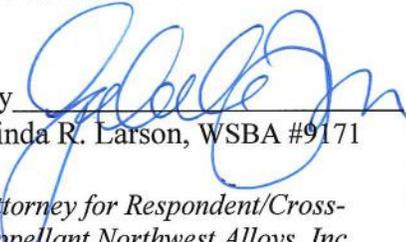
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DECLARATION OF SERVICE

Peggy Mitchell declares as follows:

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2. I am a senior practice assistant at the law firm of K&L GATES LLP.
3. On October 4, 2018, I caused the foregoing document to be filed electronically with the court and also to be served on the parties below through the Washington State Appellate Courts' eFiling Portal and by e-mail:

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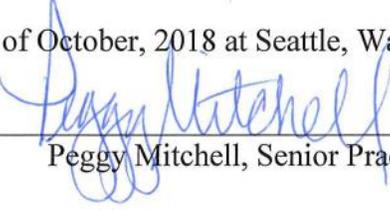
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of October, 2018 at Seattle, Washington.



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October 04, 2018 - 4:11 PM

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