Supreme Court No. 97682-1

Court of Appeals No. 51677-2-II

IN THE SUPREME COURT
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' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Northwest Alloys, Inc. ("NWA") and Millennium Bulk Terminals-Longview, LLC ("MBT-Longview") (collectively, "Petitioners"), Respondents/Cross-Appellants below, seek review as outlined below.

II. COURT OF APPEALS DECISION

Petitioners seek review of the Court of Appeals' published decision in *Northwest Alloys, Inc., et al. v. State of Washington Department of Natural Resources, et al.*, No. 51677-2-II, __ Wn. App. ___, P.3d ____, 2019 WL 3927428 (2019) ("*NWA*"), filed by the Court of Appeals on August 20, 2019. A copy of the decision is included in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Where the Department of Natural Resources (the "Department") enters into an aquatics lands lease, is the agency's conduct under the lease bound by Washington contract law as if it were a private party, or do the agency's statutory mandates modify how the contract is interpreted and enforced?

2. What is the standard for determining whether the Department unreasonably denied consent to sublease under an aquatics lands lease, which states that the Department's consent "shall not be unreasonably denied or withheld," and what is the appropriate remedy for an unreasonable denial?

3. Under RCW 79.02.030, what is the appropriate standard of review to be applied (1) by a superior court reviewing a decision the Department made pursuant to a specific provision in an aquatics lands lease; and (2) by an appellate court reviewing the decision of the superior court?

4. Does substantial evidence support the trial court's finding that the Department unreasonably denied consent for NWA to sublease aquatic lands to MBT-Longview?

IV. STATEMENT OF THE CASE

A. The Aquatic Lands Lease.

In 2008, the Department and NWA entered into a 30-year renewal of NWA's long-standing lease of state-owned aquatic lands adjacent to NWA's 540-acre upland industrial property in Longview, Washington (the "Lease"). AR001525; AR005832; AR005905. Since the 1960s, NWA and its predecessor, Reynolds Metals Company, used a dock on the leased aquatic lands to transship materials needed for their aluminum smelting businesses. AR000151.

Section 9 of the Lease authorizes NWA to sublease the aquatic lands with the Department's prior written consent. AR001546. In considering whether to consent, the Lease provides that the Department "may consider, among other things, the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the Property, and such other factors as may reasonably bear upon the suitability of the transferee

as a tenant of the Property." *Id.* NWA and the Department agreed in Section 9 that the Department's consent to a sublease "shall not be unreasonably conditioned or withheld." *Id.*

B. Procedural Background.

On October 28, 2010, NWA requested permission to sublease the aquatic lands to MBT-Longview. AR005787–88. MBT-Longview operated a bulk materials transfer facility on NWA's upland property (including for alumina used in the Wenatchee smelter owned by NWA's parent company, Alcoa). AR000149; AR000139; AR000134. MBT-Longview also proposed expanding its operations by building a coal export facility on the NWA property and was seeking permits for such a facility. AR005787–88. The Department opposed the coal terminal project in a separate environmental review process. AR001407.

Six years later, following protracted negotiations and detailed responses by NWA and MBT-Longview to numerous Department requests for financial and other information about MBT-Longview and its proposed use of the aquatic lands, the Commissioner of Public Lands notified NWA by letter on January 5, 2017 that the Department had denied NWA's request to sublease to MBT-Longview. AR001509–11. Despite years of agency process, the Commissioner professed to not have sufficient information to evaluate the sublease request, explaining that "DNR's decision is based on Northwest Alloys' failure to provide requested information regarding the financial condition and business of [MBT-Longview] as well as other factors that bear on the suitability of [MBT-

Longview] as a subtenant." AR001509. The Commissioner pointed only to the Department's most recent information requests seeking MBT-Longview's audited financial statements and the ground lease between NWA and MBT-Longview for NWA's upland property, a site which DNR does not own or control. AR001509–10.

The Commissioner contended that the Department's request for this information was reasonable, because (1) one of MBT-Longview's prior owners, Arch Coal, had recently filed for bankruptcy; (2) MBT-Longview had financial obligations to NWA under the ground lease; (3) market conditions in the coal industry were poor; (4) NWA's prior subtenant, Chinook Ventures, had defaulted on its lease obligations; and (5) MBT-Longview did not have a lengthy track record on which to judge performance. AR001511. The Commissioner, however, did not state that any of these factors themselves were the basis for denying consent to the sublease. AR001509–11.

NWA and MBT-Longview timely appealed DNR's decision to the Cowlitz County Superior Court under RCW 79.02.030, on the ground that DNR had unreasonably withheld its consent in violation of the Lease. CP 1. Columbia Riverkeeper, Washington Environmental Council, and Sierra Club (collectively, "Riverkeeper") intervened. CP 14465–67. RCW 79.02.030 states that "hearing and trial of said appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers [certified by the Department], but the court may order the pleadings to be amended, or new and further pleadings to be filed." The certified

agency record contained over 14,000 pages of documents, which the Department compiled during its six-year review of NWA's request. CP 87–14295.

On October 27, 2017, after receiving briefing from the parties, the trial court held a hearing on the merits of the appeal. At the hearing, the court ruled that, notwithstanding the plain language of RCW 79.02.030, its review of the Commissioner's decision was not de novo, but limited to considering whether the decision was arbitrary and capricious. CP 17689, ¶ 4. The court found that the Department's denial of consent was arbitrary and capricious, because the Department denied consent based on NWA's failure to provide documents that were irrelevant to the Department's stated concerns. CP 17689–693. The court's ruling is memorialized in the November 29, 2017 Order on the Merits. CP 17687–97. The court reserved its ruling on the appropriate remedy, CP 17693, ¶ 16, but later entered an order directing the Department to undertake further consideration of the sublease request and to file a new or amended pleading within 60 days with the court indicating whether it had granted or denied the request. CP 17814–17. The Department and Riverkeeper appealed the court's decision on the merits and the remedy order. CP 17743–56, CP 17761–74, CP 17818–24, CP 17830–36. Petitioners cross-appealed. CP 17784–97, CP 17843–49.

The Court of Appeals reversed the trial court's ruling on the merits. *NWA*, 2019 WL 3927428, at *11. The Court of Appeals agreed with the trial court that, in denying the sublease request, DNR was

exercising discretion in its administrative capacity, and so its decision should be reviewed under an arbitrary and capricious standard. *Id.* at *7. The Court of Appeals held that, notwithstanding the parties' use of a contractual term of art in Section 9 of the lease, DNR "cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust." *Id.* Rather than a decision controlled by its covenants to NWA, DNR's denial of consent "was a uniquely administrative decision left to DNR by virtue of the Washington State Constitution and the aquatic lands statutes." *Id.*, at *7–8.

The Court of Appeals disagreed, however, with the trial court's finding that DNR's denial of consent to sublease was arbitrary and capricious. *Id.* at *8–10. The Court of Appeals reversed the trial court's order on the merits, vacated the remedy order, and directed the trial court to issue an order affirming the Department's denial. *Id.* at *11.

V. ARGUMENT IN FAVOR OF REVIEW

The Court of Appeals' ruling conflicts with Supreme Court and Court of Appeals precedent, and involves issues of substantial public interest, and therefore the Court should accept discretionary review under RAP 13.4(b)(1), (2) and (4). The decision conflicts with this Court's longstanding precedent holding that public agencies are treated the same as private parties in enforcing the terms of written contracts, and conflicts with precedent regarding the appropriate standard of review. Similarly, the decision conflicts with the majority view, adopted by the Court of Appeals, that the contract term "not unreasonably withheld" is weighed

against an objective standard. The decision also involves issues of substantial public interest concerning the appropriate remedy for a breach of such a provision. In addition, lower courts and the public would benefit from this Court's guidance as to the mechanics of appeals pursuant to RCW 79.02.030, a statute that is unclear in several significant respects.

A. By creating one standard for the Department and another for private parties in contract enforcement, the Court of Appeals ignored this Court's longstanding precedent.

Although this case is procedurally an appeal from the Commissioner's decision, in substance it is an action by NWA to enforce its contract with the Department. Its resolution should have followed this Court's consistent command that contracting *agencies* are treated on the same footing as contracting private *parties*. Instead, the Court of Appeals established a new doctrine for interpreting proprietary government contracts with private parties. Under this new doctrine, where a government agency enters into a contract in its proprietary capacity, a reviewing court must interpret and enforce that contract in a manner that is deferential to the agency's statutory mandates and inconsistent with the terms of the contract.

This new doctrine not only conflicts with longstanding precedent of this Court, it undermines the fundamental purpose of the law of contracts: to protect society's reliance interest in the performance of promises. *Alejandre v. Bull*, 159 Wn. 2d 674, 682, 153 P.3d 864 (2007) ("[C]ontract law is concerned with society's interest in performance of

promises. . .") (internal citations omitted). The Court of Appeals' decision not only impacts NWA, but also creates uncertainty for all tenants on state-owned aquatic lands about how standard contractual terms, such as a provision stating that consent shall not be unreasonably withheld, will be interpreted and enforced. The Court of Appeals has effectively re-written all of those leases, thereby changing the bargains made by existing tenants with the Department.

For over a century, this Court has consistently held that where the state is a party to a contract in its proprietary capacity, it is treated the same as any other private party. Long ago this Court declared that, when it comes to contracts, "[t]here is not one law for the sovereign and another for the subject." *State ex rel. Gillette v. Clausen*, 44 Wn. 437, 441, 87 P. 498 (1906) (internal quotation marks omitted). Thus, "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." *Id.* (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 more favorable treatment than is fair between men.").

This Court has specifically applied this principle to the Department when it enters into contracts related to state-owned aquatic lands, as the Department did with NWA in this case. *See Metro. Park Dist. of Tacoma v. Dep't of Nat. Res.*, 85 Wn.2d 821, 539 P.2d 854 (1975). In

Metropolitan Park, the Court held that "when the State undertakes to dispose of public lands, either by lease or sale, it then acts in its proprietary capacity," and, when so acting, "it will receive no better treatment than any two private individuals who bring their dispute before the courts for final resolution." *Id.* at 827–28. Thus, in that case, the Department could not escape the application of equitable estoppel merely because it was the government. *Id.*

This line of precedent is consistent with a fundamental purpose of contract law: to protect reasonable expectations induced by a promise:

> Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated. These advantages would be threatened by any rule which limited legal protection to the reliance interest.

1 Corbin on Contracts § 1.1 (2019).

The Court should accept review to correct the Court of Appeals' departure from well-settled precedent and reaffirm the fundamental purpose of contract law. Contracts simply cannot work without protecting the parties' bargained-for expectations. *See id.* Otherwise parties may question the utility of entering into an aquatic lands lease with the Department, or any contract with any agency, if an agency's statutory mandates can serve to impart new meaning to contract terms many years after agreement was reached by the parties.

B. The Court of Appeals improperly created unique standards for determining the reasonableness of conduct by the Department.

The Court of Appeals' decision calls into question not only the standards for interpreting and enforcing contracts with the Department, but also the standards by which Washington courts will review the Department's decisions pursuant to a contract.

First, a lease provision stating that the landlord shall not "unreasonably" withhold consent is a contract term of art with legal meaning upon which NWA could reasonably rely in negotiating that term. While this Court has not squarely addressed it, the Court of Appeals follows the "majority of jurisdictions" in holding that:

> a lease term preventing a landlord from 'unreasonably' withholding consent requires a reviewing court to examine whether a reasonably prudent person in the landlord's position would have withheld consent to the assignment, not whether the landlord acted arbitrarily.

Ernst Home Ctr., Inc. v. Sato, 80 Wn. App. 473, 483–84, 910 P.2d 486 (1996). This is an objective standard that leaves no room for a landlord's subjective discretion. *See id.* at 486 (any of the landlord's subjective concerns must also be "objectively reasonable"). This is the standard the Department and NWA agreed to in the Lease by including the provision in Section 9.1 stating that DNR's consent "shall not be unreasonably conditioned or withheld." As *Ernst* recognizes, *id.* at 484, the Department and NWA were free to negotiate a different standard. They did not.

The Court of Appeals' decision effectively strikes out the reasonableness clause that NWA agreed to when it executed the Lease in

2008. Notwithstanding the plain terms of Section 9.1, the Department is no longer held to an objectively reasonable standard; instead, the Department's decision whether to deny consent is a "uniquely administrative decision" that the Department "cannot contract itself out of" and is reviewed under an "arbitrary and capricious" standard. *See NWA*, 2019 WL 3927428, at *7–8.

The Court of Appeals' decision thus commits the very error that a century of Supreme Court precedent has condemned: it has created one law for the sovereign, and one for the subject, with the sovereign enjoying preferential treatment. Henceforth, a reasonableness clause means one thing in a lease between private parties, and means something very different in a lease from the Department. That outcome cannot be squared with *Metropolitan Park*, 85 Wn.2d at 821, *State ex rel. Gillette*, 44 Wn. at 441; or *State ex rel. Wash. Paving Co.*, 90 Wn. at 452. Indeed, the Court of Appeals did not even address any of that precedent.

Second, the Court of Appeals' holding that its standard of review on appeal was de novo conflicts with this Court's precedent for several reasons. The determination of whether a landlord unreasonably withholds consent to the assignment of a lease is a question of fact that cannot be disturbed on appeal if it is supported by substantial evidence. *Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 513, 515, 413 P.2d 820 (1966). In applying a de novo review to that precise question under NWA's aquatic lands lease, the Court of Appeals has once again created a special set of

rules for the Department that simply would not apply if a private landlord was the defendant.

Moreover, the Court of Appeals' application of a de novo standard of review on appeal conflicts with this Court's decision in *Dolan v. King County*, 172 Wn.2d 299, 310–311, 258 P.3d 20 (2011). In *Dolan*, this Court held that even if a trial court's decision was based on a written record, a de novo standard of review on appeal is not appropriate in all instances. *Id.* Instead, this Court explained that the substantial evidence standard is more appropriate than a de novo standard "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." *Id.* at 311. In *Dolan*, the trial court reviewed an entirely written record of over 6,000 pages and had to resolve conflicting assertions. *Id.* This Court held that, under those circumstances, the substantial evidence standard was more appropriate than the de novo review standard. *Id.*

Here, the trial court reviewed a 14,000-plus page record, more than double the record in *Dolan*. As in *Dolan*, the trial court was required to resolve conflicting evidence and rendered extensive findings and conclusions.

Despite these facts, the Court of Appeals held that substantial evidence review was not required, because the trial court "did not weigh evidence or resolve evidentiary conflicts," and because the court was not

"statutorily required to enter written findings of fact." *NWA*, 2019 WL 3927428, at *6. Respectfully, those conclusions are incorrect. The trial court was required by Civil Rule 52 to prepare findings and conclusions. Moreover, the trial court did resolve conflicts in the evidence when, for example, it determined that the Department had abandoned its objection to MBT-Longview as a subtenant based on its 2010 permitting actions. *See* CP 17691, ¶ 8; CP 17693, ¶ 14. Indeed, the trial court was required to undertake these tasks in order to make a reasonableness determination, which in all other contract disputes is a question of fact. *See Roundup Tavern*, 68 Wn.2d at 515. To proceed otherwise again creates one rule for the sovereign and another for private parties.

The Court of Appeals' application of a de novo standard of review also conflicts with its own precedent in *Hendrickson v. Department of Labor & Industries*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162, *review denied*, 190 Wn.2d 1030 (2018). Under RCW 79.02.030, "[a]ny party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases." In *Hendrickson*, the Court of Appeals held that a statute providing for review by the appellate courts "as in other civil cases" meant that appellate courts should apply a substantial evidence standard of review. *Hendrickson*, 2 Wn. App. at 351. In *NWA*, the Court of Appeals held that the same statutory language requires de novo review. This Court should resolve this conflict, affirm its prior rulings by holding that a substantial evidence standard of appellate review is appropriate in

this case, and hold that substantial evidence supported the trial court's finding that the Department unreasonably denied consent to sublease.

Third, because the Court of Appeals did not find in favor of NWA and MBT-Longview, it did not address what remedy is appropriate when the Department unreasonably denies consent to the sublease of aquatic lands. Against well-settled authority, the trial court mistakenly ordered the Department to reconsider its decision. CP 17814–17.

The Court should accept review to elucidate that the procedural posture of a dispute over subleasing an aquatics lands lease does not change the remedy available to a wronged tenant under Washington law. Just as in breach of contract disputes between private parties, if a party in an appeal under RCW 79.02.030 establishes that the Department acted unreasonably pursuant to the terms of a lease, the legal effect of the Department's unreasonable denial of consent is to "reliev[e] the assignor of the consent requirement." *Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 296, 391 P.2d 713 (1964) ("Harbor's assignment of the amended agreement could become effective in one of two ways: (a) By Co-Ply giving its consent, or (b) by Co-Ply unreasonably withholding its consent."); *see also Roundup Tavern, Inc.*, 68 Wn.2d at 515 (affirming trial court's determination that consent to assignment of property was unreasonably withheld, and holding that the trial court's "order directing the lessor-defendants to acknowledge the plaintiff as the rightful lessee was properly entered"). Landlords do not get another bite at the apple

after unreasonably denying consent, *see id.*, and the trial court's remand order was therefore in error.

Accordingly, this case involves issues of substantial public interest that should be determined by this Court. State agencies like the Department routinely enter into contracts with private parties. The enforceability and interpretation of those contracts is now called into question by the Court of Appeals' decision. Until now, relying on longstanding case law, parties could assume that their contracts with the State would be interpreted like any other contract under Washington law. The Court of Appeals' decision adds a new gloss on standard contractual provisions that gives state agencies preferential treatment in how those provisions are interpreted, effectively creating a new body of case law in Washington for contracts with state agencies that differs from case law interpreting private contracts. Indeed, there is little value in a contract where the counterparty can exercise almost unlimited discretion in deciding whether to comply with its terms by pointing to broad statutory authority and "the public trust." The Supreme Court should resolve this issue to uphold the rule of law and provide clarity to State contracts.

C. The Court should clarify the requirements for review pursuant to RCW 79.02.030.

In addition to establishing a new body of law governing Department leases, the Court of Appeals also misapplied this Court's precedent when it determined that the Department's decision to deny

consent to a sublease pursuant to a lease is an "administrative" decision that cannot be reviewed de novo by a trial court.

NWA and MBT-Longview filed their action in the trial court under RCW 79.02.030, which allows

> Any applicant to purchase, or lease, any public lands of the state, or any valuable materials thereon, and any person whose property rights or interests will be affected by such sale or lease, feeling aggrieved by any order or decision of the board, or the commissioner, concerning the same, may appeal therefrom to the superior court of the county in which such lands or materials are situated...

The statute goes on to state that the "***hearing and trial of said appeal*** in the superior court ***shall be de novo*** before the court, without a jury, upon the pleadings and papers so certified, but the court may order the pleadings to be amended, or new and further pleadings to be filed." RCW 79.02.030 (emphasis added).

When a statute directs de novo review of an agency's decision, a court must review the decision de novo, unless the decision was "administrative" in nature. *Yaw v. Walla Walla School Dist. No. 140*, 106 Wn.2d 408, 413, 722 P.2d 803 (1986). If the agency action was administrative, then the superior court is limited to a consideration of whether the agency acted arbitrarily, capriciously, or contrary to law. *Id.* at 413–14. However, where the agency action is not administrative in nature, then de novo review is permissible. *Id.*

In *Yaw* this Court held that a breach of contract dispute between a school district and an employee was not an administrative action, and

therefore was entitled to de novo review. *Id.* at 414. As in this case, in *Yaw*, the agency had entered into a contract that governed its actions. There the contract was a collective bargaining agreement that required the school district to give preference to senior employees in promotions. *Yaw v. Walla Walla School Dist. No. 140*, 40 Wn. App. 36, 37, 696 P.2d 1250 (1985). When the school district promoted a junior employee over him, Mr. Yaw filed a breach of contract claim against the school district in superior court. 106 Wn.2d at 410.

On appeal from a dismissal of his case, the Court of Appeals reversed and held that review in the superior court should be de novo, as opposed to arbitrary and capricious, because the case was a contract dispute and, in determining Mr. Yaw's rights under the contract, the school district was not acting in an administrative capacity. *Id.* at 410. When the school district appealed that ruling, this Court agreed with the Court of Appeals that the district was not exercising an administrative function when it determined whether the contract required it to promote Mr. Yaw and, therefore, that decision was not entitled to the deferential, arbitrary and capricious standard of review. *Id.* at 414–17.

The Court of Appeals' holding that the Department is acting in an administrative capacity when it decides whether, pursuant to a contract, it can withhold its consent to a sublease, is in direct conflict with *Yaw*. Such a holding is also in conflict with the principles outlined above, which demand that the state not receive different treatment when it is a contracting party. If a private landlord denied consent to a sublease, its

decision would be reviewed de novo and without any deference. Under *NWA*, however, the Court of Appeals has created a separate set of rules for the Department in which decisions it makes pursuant to a lease are given deference. That is not the law established by this Court.

There is also substantial public interest in the mechanics of RCW 79.02.030. Under that statute, the trial court should review DNR's decision de novo, without deference to DNR, and an appellate court reviewing the trial court's decision should only determine whether that decision is supported by substantial evidence. Review of DNR's decision should not be under a do novo standard at all levels of appellate review.

In enacting RCW 79.02.030, the Legislature provided citizens with a mechanism to challenge certain DNR decisions concerning the sale or lease of public lands, but portions of the statute are unclear and there is little case law interpreting it. The trial court struggled in determining the role that it is supposed to perform and with the standard and scope of its review. CP 17688, ¶ 2. The public and the lower courts would benefit from guidance by this Court on the mechanics for review under RCW 79.02.030.

VI. CONCLUSION

The decision below conflicts with fundamental tenets of contract law long established by this Court and involves issues of substantial public importance. Accordingly, Petitioners respectfully request that this Court grant discretionary review pursuant to RAP 13.4(b)(1), (b)(2) and (b)(4).

Respectfully submitted this 18th day of September, 2019.

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DECLARATION OF SERVICE

Ileen Osorio declares as follows:

1. I am over the age of 18 and am competent to testify herein.

2. I am a practice assistant at the law firm of NOSSAMAN LP.

3. On September 18, 2019, 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:

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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 18th day of September, 2019 at Seattle, Washington.

Ileen Osorio, Legal Secretary

Filed
Washington State
Court of Appeals
Division Two

August 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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.	No. 51677-2-II PUBLISHED OPINION

SUTTON, J. — The Department of Natural Resources and the Commissioner of Public Lands Hilary S. Franz (collectively DNR), and Columbia Riverkeeper, Washington Environmental Council, and Sierra Club (collectively Intervenors) appeal the superior court's order concluding that DNR acted arbitrarily and capriciously by denying Northwest Alloys, Inc.'s (NWA) consent to sublease state-owned aquatic lands to Millennium Bulk Terminals-Longview, LLC (Millennium). DNR and Intervenors argue that DNR's decision to deny consent to sublease was not arbitrary and capricious due to NWA's refusal to provide requested financial information about Millennium and DNR's legitimate concerns about Millennium's financial condition and business reputation.

NWA and Millennium cross-appeal and argue that the superior court applied the incorrect standard of review. NWA and Millennium contend that under RCW 79.02.030, the superior court should review de novo DNR's denial of consent to sublease by applying the "reasonably prudent person" test.

We agree with DNR and Intervenors, and reverse and vacate the superior court's orders, and order the superior court to issue a new order affirming DNR's denial.[1]

FACTS

I. HISTORY OF THE SITE

Reynolds Metals Company, which was owned by Alcoa Corporation, owned property adjacent to the Columbia River navigation channel in Longview. In 2004, Chinook Ventures, Inc. purchased a smelter located on the property and entered into a long-term ground lease with Reynolds. In 2005, Alcoa transferred the property from Reynolds to another of its subsidiaries, NWA.

Alcoa—most recently through NWA—leased the state-owned aquatic lands adjacent to the property from DNR. NWA used the dock and associated infrastructure on the aquatic lands for shipping alumina to Alcoa's Wenatchee Works smelter in eastern Washington.

In 2008, DNR renewed its aquatic lands lease with NWA for an additional 30-year term. Under the terms of the lease, NWA could not sublease the property without the written consent of DNR, which DNR could not unreasonably withhold. The lease provided that in considering

[1] NWA and Millennium also cross-appeal the superior court's remedy order, which remanded the sublease decision back to DNR for further consideration. Because we reverse the superior court's order on the merits, we do not address the superior court's remedy order other than to vacate it.

whether to consent to a sublease, DNR could consider, among other items, "the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the [p]roperty, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the [p]roperty." Clerk's Papers (CP) 16890.

After renewing its lease with DNR, NWA subleased the aquatic lands to Chinook with DNR's consent. Chinook imported alumina as an operator for NWA, and also used the property to store petroleum coke and transfer it onto ships at the dock. During its subtenancy, Chinook failed to obtain the required state and local regulatory permits for its petroleum coke business and failed to provide adequate environmental controls. Chinook built improvements such as a remodeled ship loader and overwater conveyor system without obtaining the required permits or authorization under the lease. Chinook amassed a significant number of environmental violations issued by the Department of Ecology, received a stop work order from Cowlitz County, received a notice of violation from the U.S. Army Corps of Engineers, exacerbated environmental concerns at the site, and put NWA in default of its lease with DNR.

II. MILLENNIUM

In the fall of 2010, while still in default of the lease, NWA sought DNR's consent to sublease the property to Millennium. Millennium was a limited liability company organized in 2010 for the purpose of acquiring Chinook's assets, leasing the smelter property, and subleasing the aquatic lands. Millennium's purported plan was to continue the alumina handling operations at the site using the existing equipment and planned upgrades. Millennium's undisclosed long-term objective, however, was to construct a large coal export terminal on the site.

According to the original permit application from Millennium's corporate parent, a subsidiary of Ambre Energy Inc. (Ambre), the terminal project would allow coal handling and exportation of 5.2 million metric tons of coal per year. A State Environmental Policy Act (SEPA)[2] determination for the original permit application resulted in a mitigated determination of nonsignificance finding, meaning that a full environmental impact study was not required. However, internal Ambre documents later revealed that Millennium intentionally concealed the extent of its plans for the coal export facility in order to avoid full environmental review. After Millennium's deception made national and local news, Millennium withdrew its terminal proposal.

In early 2012, Millennium filed a revised permit application, this time disclosing the full scope of its plans for facilities on the property. Millennium sought to build, operate, and maintain the largest coal export terminal on the west coast, exporting 44 million metric tons of coal per year. Millennium planned to add two large docks to the property. Operating the docks would have required significant new dredging of the aquatic lands within and outside of the geographical areas covered by the lease.

III. FINANCIAL CONCERNS

During a severe coal market downturn in late 2014, Ambre sold its North American assets—including a 62 percent ownership stake in Millennium—to a creditor, Lighthouse Resources.

[2] Ch. 43.21C RCW.

In late 2015, Alcoa announced it would curtail production at Wenatchee Works. Wenatchee Works had used the Longview dock leased by NWA to import alumina. Following the suspension of production at Wenatchee Works, the dock was not in use.

Due to continued poor coal market conditions, several United States coal producers filed for bankruptcy in 2016. Arch Coal, Inc., which owned 38 percent of Millennium, declared bankruptcy in early 2016. As part of its bankruptcy, Arch Coal sold its interest in Millennium to Lighthouse Resources, Millennium's only remaining corporate parent. In return for its interest in Millennium, Arch Coal received only a release of its obligation to provide capital support of Millennium's projects. Arch Coal stated that the capital contributions Millennium needed from Arch Coal to stay afloat were so significant that Arch Coal's entire ownership share in Millennium, which it valued at nearly $38 million, would have been completely drawn down in a matter of weeks.

IV. NEGOTIATIONS & DNR'S REQUESTS FOR INFORMATION

On November 18, 2010, shortly after NWA sought DNR's consent to sublease to Millennium, DNR requested information about Millennium from NWA, including at a minimum:

> 1. The financial condition of Millennium Bulk Logistics, Inc., including the extent of its assets, to help DNR determine whether it has the financial wherewithal to comply with the terms of the lease—especially in terms of abiding by requirements related to authorized improvements.
>
> 2. The business reputation and experience of Millennium Bulk Logistics, Inc., and if this Incorporation has been formed just to operate this site, the business reputation of any of its affiliates, owners, or partners. DNR would like to understand the history of this company and any of its individual owners in terms of the conduct of their business(es) and whether they have any history of causing environmental damage or failing to comply with applicable law and regulatory requirements. As a steward of state-owned aquatic lands and responsible for this site, DNR would like to understand that the new proposed sublessee will be able to perform its

> obligations under the lease that relate to site stewardship and otherwise. Please inform us of each of the owners of the Incorporation and their experience with site uses such as the one proposed for the sublease.
>
> 3. Any information that you can provide that will inform us of site operating protocols that will protect state-owned aquatic lands from the release of hazardous substances and that will provide environmental protection. If Millennium or any of its partners has experience with the types of systems that would be put in use at the Longview site, please describe what controls are in place to prevent harm to the aquatic environment in which the facility would exist, and how upland operations may affect state-owned aquatic lands.

CP at 17023.

Four days later, Millennium responded to DNR and explained that Millennium was a LLC organized for the sole purpose of the Longview site project and was a wholly owned subsidiary of Ambre. Millennium directed DNR to Ambre's website to review Ambre's annual reports and noted that, at closing, Millennium planned to post a $10 million irrevocable standby letter of credit to NWA to provide security for Millennium's lease commitments. Millennium also provided a follow-up letter summarizing the assets devoted to the project.

On November 29, 2010, DNR clarified that the information Millennium had provided did not fully satisfy DNR's requests. Millennium resisted DNR's requests, stating that "the thought that Millennium has to demonstrate financial capability to DNR is misplaced. Certainly, DNR can make reasonable inquiry into the sublease and its plans. However, the obligations of Millennium flow to Northwest Alloys, Inc., the tenant." CP at 337.

After Millennium's full plan for the coal terminal came to light in early 2011, DNR informed Millennium and NWA that it would not make a decision on the request for consent to sublease until the related shoreline permit and SEPA processes were resolved and until the companies obtained the permits required for any and all planned improvements. DNR explained

that NWA's and Millennium's inconsistencies regarding the scope of the proposed coal project made evaluating the proposed sublease difficult.

By late 2015, DNR's, NWA's, and Millennium's negotiations appeared to be in their final stages. On December 14, 2015, DNR suggested two revisions to the consent to sublease, which NWA and Millennium accepted. NWA and Millennium replied, "From our standpoint, we believe these document[s] now to be final, and that all we need to do is 'accept' the changes in both and route for signature." CP at 1512.

However, after Arch Coal's bankruptcy in January, DNR sent a letter dated February 3, 2016, to NWA explaining that DNR needed additional information to complete its review of the request for consent to sublease. DNR emphasized its concern about Arch Coal's bankruptcy and the potential impact on Millennium's financial capability.

> The financial capability of Millennium to perform is critical. As the conditions on the leased property and adjoining uplands resulting from the operations of [NWA's] previous subtenant Chinook Ventures demonstrate, when a subtenant in possession of the property lacks the wherewithal to maintain the property and comply with other lease requirements, it may cause significant damage to the property and improvements that takes substantial amounts of time and resources to address.

CP at 1539.

DNR also questioned Alcoa's recent decision to shutter the Wenatchee Works operation and how that would impact NWA's and Millennium's plans for using the Longview property. DNR requested that NWA provide audited financial statements from Millennium, all documents related to Millennium filed in Arch Coal's bankruptcy case, a statement indicating whether Arch Coal would make any disclosures in its bankruptcy proceeding related to the sublease between NWA and Millennium, and a statement from Millennium regarding its plans for using the existing

dock on the property. Millennium responded that the financial statements DNR sought were confidential.

After the bankruptcy court approved the sale of Arch Coal's ownership interest in Millennium in June 2016, DNR sent another letter to Alcoa, expressing concerns about Millennium's obligations to NWA. DNR noted that as a result of Arch Coal's sale, Lighthouse Resources had become the sole owner of Millennium. DNR explained, "Given the difficult market conditions in the coal industry and the fact that [Lighthouse Resources] now has the sole financial responsibility for Millennium, DNR seeks assurance that Millennium has the financial capability to meet its significant ongoing financial obligations and comply with the requirements of [NWA's] lease with DNR." CP at 1741.

To assist its evaluation of Millennium's financial condition, DNR requested:

> A balance sheet, income statement, and cash flow statement, prepared in accordance with GAAP Accounting Standards[] that accurately states the current assets, liabilities, and capital of [Millennium] and its income and cash flow for the year ending June 30, 2016.
>
> A copy of the January 1, 2011 Lease between [NWA] and [Millennium] for the uplands adjacent to [NWA] leasehold under its lease with DNR and the June 5, 2104 amendment to the lease.
>
> A copy of Millennium's business plan for the existing dock on [NWA's] leasehold that identifies the income that Millennium expects to receive from operations on the existing dock and the sources of income.
>
> Any additional information which [NWA] can provide to shed light on the financial condition of Millennium.

CP at 1742. NWA did not respond to this request.

V. INVOLVEMENT OF ENVIRONMENTAL GROUPS

A group of environmental non-profit organizations contacted state and county regulatory agencies including DNR in October 2010, expressing their concerns about the development of a large coal terminal on the aquatic lands. The groups reiterated their concerns to DNR in November 2010, and requested a meeting with the Commissioner of Public Lands.

On March 16, 2011, the environmental groups sent a letter to the Commissioner regarding Millennium's business reputation based on Millennium's strategy to conceal their long-term plans for the property in an attempt to evade SEPA review. The groups attached several documents that they had obtained regarding Millennium. The letter urged DNR to consider Millennium's deceitful practices when evaluating Millennium's business reputation under the terms of the lease.

On January 25, 2016, as DNR, NWA, and Millennium were finalizing the documents for DNR's consent to sublease the aquatic lands, the environmental groups sent DNR a memo "to lay out some of the facts and legal considerations attendant to DNR's pending decision." CP at 1532. The memo urged DNR to deny consent to sublease based on Millennium's weak financial condition, the international coal market's dismal economics, and Millennium and its parent company's poor business reputation and lack of experience managing a coal terminal.

VI. DNR DENIES CONSENT TO SUBLEASE

On January 5, 2017, the Commissioner of Public Lands issued a letter denying DNR's consent to sublease the aquatic lands to Millennium. The letter explained, "DNR's decision is based on Northwest Alloys' failure to provide requested information regarding the financial condition and business of Millennium as well as other factors that bear on the suitability of Millennium as a subtenant." CP at 16855. The denial letter highlighted DNR's concern about

Millennium's financial condition given the bankruptcy of Arch Coal, Wenatchee Works' indefinite closure, coal's historically poor market conditions, and Millennium's commitments to NWA under the ground lease.

The denial letter noted, "As the steward of Washington's state-owned aquatic lands, the financial capacity of a subtenant to perform is important to DNR." CP at 16856. Referencing Chinook's damage to the property during its subtenancy, the letter explained, "The recent history under the lease supports the need for careful examination of the capacity of subtenants at the site to comply with lease obligations." CP at 16856.

The denial letter also referenced Millennium's "significant error" in failing to disclose in its original permit application its plans to significantly increase the amount of coal shipped from the facility. CP at 16857. "That Millennium does not have a lengthy track record on which to judge performance and in its short history has made a significant error with respect to its planned activities on the leased property supports the need for a thorough review of Millennium's potential suitability as a subtenant, including its financial condition." CP at 16857.

The denial letter concluded:

> [NWA] has failed to provide information reasonably requested by DNR as permitted under the lease for review of [NWA's] request for consent to sublease. As detailed above, DNR's requests for information are supported by the bankruptcy of Arch Coal; Millennium's commitments to [NWA]; market conditions facing Millennium's sole remaining owner, [Lighthouse Resources]; the history of subleasing under the lease; and the absence of a significant track record supporting Millennium. Accordingly, [NWA's] request for consent to sublease has been denied.

CP at 16857.

VII. SUPERIOR COURT PROCEEDINGS

NWA and Millennium appealed the Commissioner's letter denying DNR's consent to sublease to the superior court under RCW 79.02.030. The superior court granted Columbia Riverkeeper, Washington Environmental Council, and Sierra Club's motion to intervene.

After extensive briefing and argument, the superior court entered an order on the merits of whether DNR's decision to deny consent to sublease was unreasonable. The superior court concluded that in considering the request to sublease, DNR was performing an administrative proprietary function, not a quasi-judicial function. Accordingly, the superior court concluded that the proper standard of review in the matter was whether DNR's actions were arbitrary, capricious, or contrary to law.

Addressing the reasonableness of DNR's decision, the superior court concluded that it must consider the unique statutory mandates that apply to DNR and evaluate DNR's denial from the standpoint of a reasonable landlord in DNR's position. The superior court concluded that DNR's reasons for denying consent to sublease were not supported by facts and that DNR's denial was arbitrary and capricious. As a remedy, the superior court ordered DNR to "undertake further consideration" of NWA's request for consent to sublease to Millennium. CP at 17815.

DNR and Intervenors appeal and NWA and Millennium cross-appeal the superior court's orders.

ANALYSIS

I. STANDARD OF REVIEW

The parties disagree as to our standard of review. DNR and Intervenors contend that we sit in the same position as the trial court and conduct a de novo review of the agency record to

determine whether DNR's consent to sublease was unreasonable. NWA and Millennium argue that we should review the superior court's findings for substantial evidence and determine de novo whether the superior court's conclusions flow from those findings. We agree with DNR and Intervenors.

RCW 79.02.030 states:

> Any applicant to purchase, or lease, any public lands of the state . . . and any person whose property rights or interests will be affected by such sale or lease, feeling aggrieved by any order or decision of the . . . commissioner, concerning the same, may appeal therefrom to the superior court of the county in which such lands or materials are situated . . . . The hearing and trial of said appeal in the superior court shall be de novo before the court, without a jury, upon the pleadings and papers so certified . . . . Any party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases.

"Where the record at trial consists entirely of written documents and the trial court therefore was not required to 'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,' the appellate court reviews de novo." *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011) (internal quotation marks omitted) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)). "Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court." *Dolan*, 172 Wn.2d at 311. But substantial evidence may be the more appropriate standard in cases where the superior court reviewed "an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings." *Dolan*, 172 Wn.2d at 311.

Here, although the superior court reviewed a large agency record, it did not weigh evidence or resolve evidentiary conflicts. Nor was the superior court statutorily required to enter written findings of fact. Under RCW 79.02.030, the superior court defers to the factual findings of the commissioner and limits its review to the application of law to the admitted facts. *Polson Logging Co. v. Martin*, 195 Wash. 179, 184-85, 80 P.2d 767 (1938); *see also State v. Forrest*, 13 Wash. 268, 270-71, 43 P. 51 (1895).[3] Given that the superior court made no factual findings, leaving only its conclusions of law for our review, we hold that we review DNR's decision to deny consent to sublease de novo.[4]

[3] These cases rely on an early statute—Rem. Rev. Stat. §§ 7797-1 to 7797-201—which later became RCW 79.02. This does not change our analysis.

[4] NWA and Millennium argue that we should interpret RCW 79.02.030's use of the phrase "as in other civil cases" to mean that we review the superior court's findings for substantial evidence. NWA and Millennium argue that RCW 79.02.030's use of the phrase "as in other civil cases" should have the same meaning as in RCW 51.52.140, which has been interpreted as providing for substantial evidence review. *See Hendrickson v. Dep't of Labor & Indus.*, 2 Wn. App. 2d 343, 351, 409 P.3d 1162, *review denied*, 190 Wn.2d 1030 (2018). However, NWA and Millennium overstress the similarity of that particular phrase while ignoring key differences in the statutory schemes.

In industrial insurance appeals, the superior court or a jury may substitute its own findings and decision for the Board of Industrial Insurance Appeals if, after weighing the evidence, it finds by a preponderance of the evidence that the Board's findings and decision are incorrect. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 482, 40 P.3d 1221 (2002). Accordingly, in industrial insurance appeals, we review the superior court's decision for substantial evidence. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). In contrast, in appeals arising pursuant to RCW 79.02.030, as here, the superior court is *not* entitled to weigh evidence and must defer to the commissioner's factual findings. We disagree that RCW 79.02.030 is analogous to RCW 51.52.140.

II. DNR'S DENIAL OF CONSENT

A. ADMINISTRATIVE DECISION

The parties also disagree as to the degree of deference owed to DNR's decision denying consent to sublease. DNR argues that its decision was administrative and should be reviewed under an arbitrary and capricious standard. NWA and Millennium argue that DNR was not acting in an administrative capacity but instead made a quasi-judicial determination, and therefore, its decision should be reviewed de novo applying a "reasonably prudent person" test. We agree with DNR.

Although RCW 79.02.030 uses the language "de novo" review, such a review of an administrative agency's decision "is only permissible when the agency acts in a quasi-judicial manner." *Yaw v. Walla Walla School Dist. No. 140*, 106 Wn.2d 408, 413, 722 P.2d 803 (1986). In cases in which the agency acted in its administrative function, review is limited to whether the agency acted arbitrarily, capriciously, or contrary to law. *Yaw*, 106 Wn.2d at 413. "Allowing only limited appellate review over administrative decisions, rather than original or appellate jurisdiction as a matter of right, 'serves an important policy purpose in protecting the integrity of administrative decision-making.'" *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 295, 197 P.3d 1153 (2008) (quoting *King County v. Wash. State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993).

In *Francisco v. Bd. of Directors*, our Supreme Court identified four steps to determine if an agency's action was administrative or quasi-judicial. 85 Wn.2d 575, 579, 537 P.2d 789 (1975). They are whether (1) the court could have been charged in the first instance with the responsibility of making the decision; (2) the function of the agency is one that courts have historically

performed; (3) the agency performs functions of inquiry, investigation, declaration and enforcement of liabilities as they stand on present or past facts under existing laws; and (4) the agency's action is comparable to the ordinary business of courts. *Francisco*, 85 Wn.2d at 579.

Here, DNR acted in its administrative capacity when it decided whether to grant or deny consent to sublease. DNR holds state-owned aquatic lands in trust for the public by virtue of the Washington Constitution. *Pope Res. v. Dep't of Natural Res.*, 190 Wn.2d 744, 754, 418 P.3d 90 (2018). The public trust doctrine is rooted in article XVII, section 1 of the Washington Constitution[5] and protects "'public ownership interests in certain uses of navigable waters and underlying lands, including navigation, commerce, fisheries, recreation, and environmental quality.'" *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998 (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992).

Through the aquatic lands statutes, the State granted sovereign powers to DNR for protection of the State's interest in the trust. *Pope*, 190 Wn.2d at 755. As such, DNR is vested with the discretionary, administrative responsibility to reject a bid to lease state lands as the interests of the State or affected trust require. *See* RCW 79.105.020; RCW 79.02.280.

[5] Article XVII, section 1 states "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."

NWA and Millennium argue that "[w]hen acting pursuant to a contract, an agency is exercising an essentially judicial function."[6] Response to Appellants' Opening Br. (Response Br.) at 43. NWA and Millennium contend this is so because "[c]ontracts fix the parties' obligations to one another and eliminate the discretion inherent when an agency is exercising its regulatory authority." Response Br. at 44. It is undisputed that DNR is beholden to the terms of its lease with NWA and that, pursuant to the lease, DNR could not unreasonably withhold its consent. However, DNR cannot contract itself out of its statutorily mandated duty to exercise discretion in furtherance of the public trust.

Nothing in the lease purports to extinguish DNR's statutory authority to exercise its discretion to approve a sublease, so long as it does not unreasonably withhold consent. Indeed, RCW 79.105.210(4) states, "The power to lease state-owned aquatic lands is vested in the department, which has the authority to make leases upon terms, conditions, and length of time *in conformance with* the state Constitution and chapters 79.105 through 79.140 RCW." (Emphasis added).

It follows that the courts could not constitutionally make a sublease determination in the first instance. Nor have courts historically managed aquatic lands held in public trust because that is a function DNR performs. Here, DNR carefully reviewed NWA's request for consent to sublease and Millennium's suitability as a potential sublessee for the sensitive property. Determining whether Millennium had the financial soundness, environmental awareness, and

[6] NWA cites *Yaw*, 106 Wn.2d 408 in support of its argument. However, NWA overstates the holding in *Yaw*. The *Yaw* opinion did not hold that all agency decisions involving a contract are necessarily judicial actions. *Yaw* specifically dealt with a school board's hiring decision in light of a collective bargaining agreement.

business reputation to meet the obligations of the lease of state-owned aquatic lands held in public trust was a uniquely administrative decision left to DNR by virtue of the Washington State Constitution and the aquatic lands statutes. *See Malmo v. Case*, 28 Wn.2d 828, 836, 184 P.2d 40 (1947) (holding that the Commissioner of Public Land's decision refusing to grant extensions for contracts involving timber cutting was not arbitrary or capricious); *see also State ex rel. Thompson v. Babcock*, 147 Mont. 46, 51, 409 P.2d 808 (1966) (noting, under similar Montana law, that "[t]here is no doubt that the State Board of Land Commissioners has considerable discretionary power when dealing with the disposition of an interest in land they hold in trust for the people of this state").

Accordingly, we hold that DNR's decision to deny consent to sublease was an administrative decision. We apply a de novo review of the agency record to determine if DNR's decision to deny consent to sublease was arbitrary and capricious.

B. DENIAL NOT ARBITRARY AND CAPRICIOUS

Applying a de novo review of the agency record, we hold that DNR's decision to deny consent to sublease was not arbitrary and capricious.

Agency action is arbitrary and capricious if it is willful, unreasoned, and taken 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 even if a reviewing court may believe it to be erroneous. *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). Deference will be given to the specialized knowledge and expertise of the administrative agency. *Schuh v. Dep't of Ecology*, 100 Wn.2d 180, 187, 667 P.2d 64 (1983). The party who challenges

an agency action under this standard carries a heavy burden. *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

Section 9 of the lease conditions NWA's subletting of the aquatic lands on DNR's written approval. That approval cannot be unreasonably withheld. The lease expressly authorizes DNR to consider, among other things, "the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the [p]roperty, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the [p]roperty." CP at 16890. Because DNR reasonably considered the factors identified in the lease in light of attending facts and circumstances, its decision was not arbitrary and capricious.

DNR's careful consideration of Millennium's financial condition and business reputation was especially reasonable given the circumstances surrounding the potential sublease. At the time DNR made its decision, coal market conditions were not promising, with U.S. coal production dropping. DNR had concerns because of the recent shuttering of Wenatchee Works, the primary importer of the alumina unloaded at the dock leased by NWA. Finally, additional financial concerns existed after Millennium's corporate parent, Ambre Energy, sold its interest in Millennium, and Millennium's other corporate parent, Arch Coal, filed bankruptcy.

DNR was also acutely aware of the damage a negligent subtenant could inflict on the sensitive aquatic lands, given its recent negative experience with NWA's prior subtenant, Chinook. Millennium had intentionally misrepresented the scope of its plans for the property in 2011. Millennium sought to build, operate, and maintain the largest coal export terminal on the west coast. Such a project posed significant financial demands and high environmental risks if

Millennium followed in the previous subtenant's footsteps with lax oversight from NWA. Accordingly, DNR had significant, well founded reasons for carefully considering the financial condition and business reputation of Millennium before consenting to sublease.[7]

NWA and Millennium do not dispute that a landlord has an interest in a subtenant's financial condition. However, NWA and Millennium make several arguments in support of their position that DNR's denial of consent was unreasonable. First, they argue that because NWA would remain liable under the lease for any default by Millennium, DNR was necessarily unreasonable in denying consent. We reject this argument.

Section 9.1 of the lease expressly authorizes DNR to consider a potential subtenant's financial consideration in determining whether to grant consent. Accepting NWA's argument would mean rendering section 9.1 meaningless. And we must construe contract language in a manner that gives effect to the words used and does not render the chosen language meaningless. *MacLean Townhomes, LLC v. Am. 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 831, 138 P.3d 155 (2006). Under NWA's argument, DNR's right to grant or deny consent to sublease would be reduced to mere ritual because under section 9.1(c) of the lease NWA would always remain liable under the lease in the event of a default by a subtenant.

[7] Even if we applied the "reasonably prudent person" test, we would conclude that DNR's decision to deny consent to sublease was not unreasonable. In Washington, a lease term that prohibits a landlord from "unreasonably" withholding consent requires a reviewing court to determine "whether a reasonably prudent person in the landlord's position would have refused consent." *Ernst Home Ctr., Inc. v. Sato*, 80 Wn. App. 473, 486, 910 P.2d 486 (1996); *see also 224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 721, 281 P.3d 693 (2012). Our analysis above also would apply under this test. It was not unreasonable for DNR to withhold consent when NWA refused to provide requested financial information, especially in light of DNR's legal responsibilities as manager of state-owned aquatic lands held in public trust.

The fact that the tenant remains liable under the lease is less significant where, as here, a subtenant's actions have the potential to significantly impact sensitive public lands. As seen in the situation with Chinook, the fact that NWA would remain liable for Millennium's default under the lease does not remove the risk of long-term damage to a sensitive public resource, which DNR has been charged with managing in the public trust. NWA's liability under the lease would not prevent such damage.

Second, NWA and Millennium argue that DNR's denial of consent was unreasonable because the financial documents DNR requested were irrelevant. NWA and Millennium explain that Millennium's financial statements would "only have shown what DNR already knew," namely that Millennium had no positive revenues to cover its operating expenses and that it relied on regular infusions of cash from its parent company. Response Br. at 28, 31. NWA and Millennium further argue that the ground lease between NWA and Millennium had no relevancy to DNR because DNR was not a party to that lease and Millennium's obligations to NWA were otherwise secured by a $10 million letter of credit.

But as noted above, the lease expressly stated that in considering whether to grant consent to sublease, DNR could consider "the proposed transferee's financial condition" as well as "such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the [p]roperty." CP at 16890. Therefore, the lease language supported DNR's requests for information.

In addition, the fact that Millennium's financial statements would have confirmed DNR's suspicions that Millennium's financial condition remained precarious does not render the financial statements irrelevant. Millennium's financial statements would have shown Millennium's assets,

liabilities, income, and cash flow, all of which were relevant, critical considerations in assessing Millennium's financial condition. Even if Millennium relied entirely on its parent company for operating income, the financial statements would have shown DNR how much the parent company was regularly investing and how Millennium used those investments. This information was especially relevant given the disclosures in Arch Coal's bankruptcy proceedings that its entire ownership share in Millennium, which it valued at nearly $38 million at the time of bankruptcy, would be eliminated within a matter of weeks.

Third, NWA and Millennium argue that, given what DNR already knew about Millennium, DNR should have requested information on Millennium's parent company's financial condition. But because Millennium's parent company would have no legal obligation to DNR, its financial condition was of little value in alleviating DNR's concerns about Millennium's ability to manage its obligations, particularly in light of the recent restructuring of its corporate ownership following Arch Coal's bankruptcy and Ambre Energy's sale of its ownership stake. And DNR's requests for information from Millennium were not so narrow as to preclude Millennium from providing financial information it believed would be helpful to DNR in understanding Millennium's financial condition. Millennium knew what DNR's concerns were; Millennium could have provided its parent company's information if it believed it would be helpful in answering DNR's inquiry. Instead, NWA refused to respond at all.

Fourth, NWA and Millennium suggest that DNR acted arbitrarily and capriciously by considering Millennium's earlier failure to disclose its long-term plans for the coal terminal in determining whether to consent to sublease. They argue that DNR's willingness to negotiate a nearly-finalized sublease agreement with Millennium in 2015 undercuts DNR's contention that

Millennium's failure to fully disclose its plans for the property was a contributing factor to its ultimate decision to deny consent. But the lease expressly authorized DNR to consider Millennium's business reputation in considering whether to grant consent to sublease.

Further, DNR's decision to not reject all consideration of a sublease agreement with Millennium after Millennium's deception came to light in 2011 did not prohibit DNR from weighing that deception as it evaluated Millennium's business reputation. Millennium's history remained part of the context in which DNR ultimately determined whether Millennium would be a suitable subtenant for the aquatic lands. Thus, considering Millennium's business reputation, as expressly permitted by the lease, was not arbitrary and capricious.

In conclusion, DNR's consideration of Millennium's financial condition and business reputation was expressly authorized under the lease. And the additional information DNR sought from Millennium, which Millennium failed to provide, was relevant to DNR's inquiry. Accordingly, we conclude that DNR's denial of consent to sublease was not arbitrary and capricious.

CONCLUSION

We reverse the superior court's order concluding that DNR acted arbitrarily and capriciously by denying NWA consent to sublease state-owned aquatic lands to Millennium, and we vacate the superior court's remedy order, and order the superior court to issue a new order affirming DNR's denial.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Melnick, J.

MELNICK, J.

NOSSAMAN PLLC

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