

BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of the Petition of

QUINAULT INDIAN NATION

For a Declaratory Order Re: Jurisdiction
Over

WESTWAY TERMINAL COMPANY and
IMPERIUM TERMINAL SERVICES

IMPERIUM'S REPLY IN SUPPORT OF
OBJECTION TO QUINAULT INDIAN
NATION'S PETITION FOR
DECLARATORY ORDER

I. INTRODUCTION

Imperium Terminal Services, Inc., (“Imperium”) and Westway Terminal Company (“Westway”) have both objected to the Quinault Indian Nation’s (“QIN”) petition for agency declaratory order. Because they are both necessary parties whose rights would be substantially prejudiced, the Council may not proceed with QIN’s request.¹ In its Response QIN concedes that Imperium and Westway are necessary parties, but challenges whether QIN’s request would create “substantial prejudice.” Contrary to QIN’s bare assertions, which are not supported by any case law or other persuasive authority, QIN’s request will cause delay, increase cost and create extra process, which are precisely the kind of substantial prejudice that justifies a necessary party’s refusal of consent.

¹ Pursuant to RCW 34.05.240(7), an agency “may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.”

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More generally, QIN's misleading suggesting that Imperium seeks to evade agency scrutiny is patently false. As stated in Imperium's objection, Imperium's proposal is already subject to a rigorous and through ongoing environmental review conducted by Ecology and Hoquiam. Imperium seeks to complete that environmental review in the appropriate forum. Imperium objects to QIN's request because it is a litigation tactic designed to add further project delays and unnecessarily increase costs.

II. ARGUMENT

A. Examples of Agency Actions and Case Law Support Imperium's Objection on the Grounds of "Substantial Prejudice"

QIN has provided absolutely no case law or examples of agency decisions supporting their strict interpretation of "substantial prejudice" or their assertions that their request would not create substantial prejudice. Their entire response brief consists of unsupported, bare assertions regarding QIN's preferred legal interpretation.

As indicated in Imperium's Objection, examples of other agency decisions and case law support Imperium's position that the rights of a project applicant will be substantially prejudiced by an agency declaratory order related to that project. Other agencies interpreting RCW 34.05.240(7) have required a minimal showing of "substantial prejudice," with some agencies simply assuming, without relying on any factual showing at all, that a necessary party to a petition would be substantially prejudiced unless they consent.² QIN does not attempt to distinguish or even address these examples of agency

² Letter from Ecology to Center for Environmental Law and Policy dated Jan. 8, 2009 regarding "Petition for Declaratory Order on Stock Watering Purposes Exemption," available at http://www.ecy.wa.gov/programs/wr/wrac/images/pdf/010909celp_swresponse.pdf; *Noreen.*, SHB No. 03-

actions on petitions for agency declaratory orders. As noted in Imperium’s Objection, these examples of agency decisions are persuasive authority and should guide EFSEC’s interpretation of the statutory provision.³ None of those examples of agency action require the high bar that QIN asserts is required for a necessary party to refuse consent.

B. QIN Does Not Address All Aspects of the Substantial Prejudice Asserted by Imperium

QIN’s motion responds almost exclusively to only one aspect of Imperium’s objection; QIN suggests that “most” of Westway’s and Imperium’s arguments “are variants of a timeliness objection” and then responds only to that characterization. QIN Response at 2. As noted in Section C, below, QIN’s tardy filing of this petition for declaratory order is an element of the substantial prejudice caused by the request and is sufficient to support Imperium’s objection. However, QIN only addresses that one factor and ignores the full range of the substantial prejudice that would result.

Independent of the timeliness of QIN’s petition, the duplicative, unnecessary process itself, including the time delay and extra cost, constitutes substantial prejudice. By way of example, in the context of preemption, courts have recognized that

006, Order of Dismissal (Mar. 18, 2003), 2003 WL 1441309 at *1; *The Boeing Company v. Ecology*, PCHB No. 11-050, Order of Dismissal (Aug. 5, 2011), 2011 WL 3546624 at *3. See also *In re Petition of Bert Loomis for a Declaratory Ruling*, WWGMHB No. 06-2-0006, Decision on Petition for Declaratory Ruling (Mar. 28, 2006), 2006 WL 1370954; *In re Petition of Washington State Council of County and City Employees for a Declaratory Order Involving: Chelan County*, PERC No. 17411-D-03-123, Order of Dismissal (June 10, 2003), 2003 WL 21658683; *In re Petition of Washington Independent Telephone Association For a Declaratory Order on the Use of Virtual NPA/NXX Calling Patterns*, WUTC No. UT-020667, Order Declining to Enter Declaratory Order (Aug. 1, 2002), 2002 WL 31970282.

³ See, e.g., *The Boeing Company v. Ecology*, PCHB No. 11-050, Order of Dismissal (Aug. 5, 2011), 2011 WL 3546624 at *3 (relying on interpretation of RCW 34.05.240(7) by other administrative boards in concluding that consent of the regulated entity is required before accepting a petition for declaratory order).

administrative process itself is a hardship, even if it the applicant could prevail on the merits:

The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue.

Sayles Hydro Associates v. Maughan, 985 F.2d 451, 456 (9th Cir. 1993).

In this case, Imperium has already achieved several milestones in the ongoing process before the City and Ecology since February, 2013.⁴ The shoreline application is complete. The EIS scoping is complete and the associated scoping comment period closed almost seven months ago. The Co-Leads and their consultant have been drafting the EIS all that time and, given the amount of time since scoping was completed, should be nearing completion of a draft EIS. In that context, QIN asks Imperium to submit to an extra round of briefing and oral argument before the Council on the merits of QIN's petition (on which Imperium believes it will prevail) with an ultimate goal of halting the ongoing permitting process before Ecology and Hoquiam and starting an entirely new process from the start with the Council. As the Council is aware, that EFSEC process requires several formal steps including: 1) filing an application for site certification,

⁴ QIN asserts that many of these months were spent on an appeal process in which they prevailed on several issues, such that the Council should disregard that time spent prior to the conclusion of the appeal. QIN Response at 5. QIN's position is overly simplistic. Imperium and Westway prevailed on several issues which will continue to guide environmental review. Additionally, the application process prior to the SHB appeal are part of the ongoing permitting process for this project. Nevertheless, even if the Council were to disregard everything that predates the SHB's decision in QIN's appeal, a full year has transpired during which the permitting and environmental review have proceeded in earnest.

consistent with EFSEC's statutory requirements (ASC); 2) notice; 3) initial public hearings; 4) a land use consistency determination; and 5) environmental review conducted by EFSEC as the lead. Also it ignores the cost of the briefing process before the Council related to the declaratory order. All these steps would need to be conducted in duplication and/or replacement of the process already initiated by the Co-Leads for the Shoreline Permit. This added process creates prejudice and to which Imperium, as a necessary party, should not be subjected.

QIN seeks to minimize the impact of this added process by arguing that the costs and the time already spent with Ecology and Hoquiam would not be "wasted" based on QIN's optimistic assumption that EFSEC would simply assume the work already completed by Ecology, Hoquiam and their consultant. To be certain, if EFSEC assumed permitting authority the applicants would urge the Council to utilize whatever components of the rigorous and thorough environmental review that had already completed by Ecology and Hoquiam; however, it is grossly optimistic to assume the transition would occur seamlessly and without any duplicative effort or cost. Even if the Council were to assume Ecology's and Hoquiam's environmental review without delay and duplication, it completely ignores the time required to address the Council's application process and Council and staff's review of the permit application. The applicants would be starting anew, after initiating a permit application a year and a half ago. Even assuming some efficiencies, this lost time to start an entirely new process with new milestones and requirements is, itself, substantial prejudice.

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C. QIN Mischaracterizes Imperium's Right That Will Be Prejudiced

Using a straw man tactic, QIN argues that Imperium has “no right to a permit from the incorrect jurisdiction” or a “right to avoid the appropriate EFSEC jurisdiction because they would prefer a different decision-maker.” QIN Response at 4. The right at issue is not, as QIN suggests, a right to the successful resolution of the declaratory order process, were it to proceed. Rather, for purposes of the declaratory order analysis, the right at issue is Imperium's interest in its development project on land it leases from the Port. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn. 2d 947, 962, 954 P.2d 250, 257 (1998) (“Mission Springs had a constitutionally cognizable property right in the grading permit it sought. The right to use and enjoy land is a property right.”) Imperium has a due process right to have that application processed in a timely and efficient manner with predictability and certainty. *Id.* When looking at Imperium's interest in pursuing its project on land it has leased, the additional duplicative permitting process and environmental review substantially prejudices those rights.

Moreover, QIN's circular argument assumes QIN's success on the merits of its petition (in other words, it assumes that EFSEC is the proper permitting authority) which Imperium contests. Under QIN's interpretation of the use of the term “right” in the relevant statute, no necessary party in any of the examples of other agency decisions provided by Imperium would ever be able to exercise their right to deny consent. QIN's characterization of the term “right” as used in the relevant statute would effectively render the provision meaningless.

Imperium, as an applicant for a proposal has a right that would be substantially impaired by the additional process, costs and delays and that substantial prejudice that is sufficient to deny consent without the more detailed demonstration required by Quinault.

D. QIN's Failure to Assert Its Claim in a Timely Manner Exacerbates the Substantial Prejudice

As argued in its Objection, QIN's failure to assert its claims in a timely manner exacerbates the prejudice. Imperium's project and application have not changed in any material way since QIN first asserted EFSEC had permitting authority over the project in the spring of 2013. QIN did not take any action in response to EFSEC staff's rejection of QIN's position. Additionally, when QIN appealed the Shoreline Permit to the Shorelines Hearings Board in the summer of 2013, QIN could have challenged the permit on grounds that it should have been processed by the Council, and not Ecology or Hoquiam. QIN did not raise this challenge to the permit, thereby conceding to the shoreline permitting process.

Without citing any supporting authority, QIN simply asserts that it should not have to raise its objections in those proceedings or that its delay is not relevant to the inquiry. As noted in Imperium's briefing, QIN's delay and failure to raise the issue is sufficient to bar their arguments under several grounds including laches, equitable estoppel, collateral estoppel and res judicata.⁵ Should this matter proceed to the merits, Imperium would provide briefing on those grounds.

⁵ Without citing any authority, QIN simply asserts that those doctrines "do not apply to a petition for declaratory order." QIN Response at 5, n.2. Contrary to that baseless assertion, administrative agencies have implied authority "to do everything lawful and necessary" to effectuate their statutory purpose,

For the purposes of this briefing on Imperium’s right to deny consent, QIN’s delay in bringing its claim is relevant to the Council’s inquiry on substantial prejudice. As argued in Imperium’s objection, in other contexts, courts have viewed delay in bringing a claim as sufficient to support a finding of “substantial prejudice.” Quinault fails to adequately address case law in Imperium’s objection that interprets the phrase “substantial prejudice” in that APA context. Specifically, in *State ex rel. Peninsula Neighborhood Ass’n v. Washington State Dep’t of Transp.*, 142 Wn. 2d 328, 340, 12 P.3d 134, 141 (2000), the court concluded that a dilatory lawsuit filed by a plaintiff that could have challenged the action sooner created “substantial prejudice” sufficient to bar the complaint under the doctrine of laches, especially where the other parties relied on and proceeded on those actions in the meantime. In a conclusory, single sentence in a footnote QIN suggests that the Council should disregard the case and its holding because it did not address agency declaratory orders. QIN Response at 5, n.2. Contrary to their conclusory assertion, the case is informative and reinforces the decisions of the agencies interpreting

including the application of equitable doctrines such as res judicata, collateral estoppel, laches, and equitable estoppel. *See, e.g., Irondale Community Action Neighbors v. Western Washington Growth Management Hearings Board*, 163 Wn.App. 513, 526-28 262 P.3d 81 (2011) (application of res judicata and collateral estoppel are within the growth board’s authority to resolve GMA petitions expeditiously and efficiently; res judicata may apply where claim could have been raised in a prior action); *Motley-Motley, Inc. v. Pollution Control Hearings Board*, 127 Wn.App. 62, 73-75, 110 P.3d 812 (2005) (PHCB has implied authority to hear equitable defenses, including equitable estoppel, and failure to raise such defense before the agency precludes subsequent assertion in superior court). Moreover, decisions of administrative tribunals can have preclusive effects in other forums under Washington law. *See, e.g., Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987); *Motley-Motley*, 127 Wn.App. at 75. These doctrines are applicable and would bar QIN from further pursuing their claims, both now (if the Council were to consider briefing on the merits) and later in a proceeding before the Shorelines Hearings Board

the APA provision in question. Specifically, the Court’s interpretation of the phrase “substantial prejudice” for purposes of the equitable doctrine of laches is informative of the use of that phrase in the context of agency declaratory orders. Where QIN’s dilatory pursuit of an administrative remedy would inflict substantial prejudice sufficient to bar prosecution of their claim under a theory of laches, the same prejudice should certainly be sufficient to require Imperium’s consent pursuant to RCW 34.05.240. Like in *Peninsula Neighborhood Ass’n*, the delay and lost time that would result if EFSEC were to now assume authority to review this project would substantially prejudice Imperium.

E. QIN’s New Request for Agency Rulemaking is Beyond the Scope of QIN’s Petition for Declaratory Order

QIN concludes its response by urging the Council to take action to set standards and definitions for crude by rail proposals. This action is, in essence, a request for agency rulemaking, which is inappropriate in the context of QIN’s petition for declaratory order. The APA includes a separate process for requesting agency rulemaking. RCW 34.05.330. QIN can pursue its request for additional agency standards through that process.

III. CONCLUSION

Imperium is a necessary party whose rights would be substantially prejudiced. Because Imperium does not consent to QIN’s request for declaratory order, the Council may not proceed with QIN’s request.

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RESPECTFULLY SUBMITTED this 22nd day of December, 2014.

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CERTIFICATE OF FILING AND SERVICE

I, Jessica Roper, declare as follows:

1. I am resident of the State of Washington, over the age of eighteen years, and not a party to the within action.
2. I am employed by the firm Van Ness Feldman LLP, 719 Second Avenue, Suite 1150, Seattle, WA 98104.
3. On the date indicated below, I caused a true and correct copy of the following documents:

- Imperium Terminal Services' Reply in Support of Objection to Quinault Indian Nation's Petition for Declaratory Order

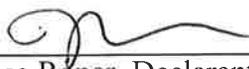
to be filed with EFSEC via ABC Legal Messenger and email and to be served by electronic mail to the following parties:

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

EXECUTED at Seattle, Washington on this 22nd day of December, 2014.



Jessica Roper, Declarant

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