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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF CLARK

9 JUDITH ZIMMERLY, JERRY NUTTER, and
10 NUTTER CORPORATION,

No. 19-2-03321-06

11 Petitioners,

COURT'S MEMORANDUM OPINION
DENYING PETITIONERS' MOTION TO
STAY ENFORCEMENT PENDING
APPEAL

12 v.

13 COLUMBIA RIVER GORGE
14 COMMISSION,

15 and

16 CLARK COUNTY,

17 Respondents,

18 and

19 FRIENDS OF THE COLUMBIA GORGE,

20 and

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22
23 JODY AKERS, PAUL AKERS, DANNY
24 GAUDREN, KATHEE GAUDREN, RACHEL
25 GRICE, ZACHARY GRICE, GREG
26 MISARTI, EDMOND MURRELL,
27 KIMBERLY MURRELL, RICHARD J.
28 ROSS, KAREN STREETER, SEAN
29 STREETER, and ELEANOR WARREN,

Respondents.

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2 I. Background relevant to this motion
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4 On May 17, 2018 the Clark County Code Enforcement Coordinator and Director of
5 Community Development issued an Amended Notice and Order (“N&O”) to the petitioners
6 alleging violations of the Clark County Code (“CCC”). On May 25, 2018 the petitioners appealed
7 the N&O pursuant to the CCC and requested a hearing before an examiner. On August 4, 2018
8 the Hearings Examiner issued a decision concluding the petitioners were permitted to continue
9 mining but were not permitted to operate a rock crusher without obtaining a surface mining
10 conditional use permit from Clark County. On October 9, 2018 respondents Friends of the
11 Columbia Gorge (“Friends”) and Jody Akers, Paul Akers, Danny Gaudren, Kathee
12 Gaudren, Rachel Grice, Zachary Grice, Greg Misarti, Edmond Murrell, Kimberly Murrell,
13 Richard J. Ross, Karen Streeter, Sean Streeter, and Eleanor Warren (collectively referred
14 to as “Neighbors”) appealed the examiner's order to the Columbia River Gorge Commission (the
15 “Commission”).

16 On June 19, 2019 the petitioners filed a Petition for Judicial Review, Declaratory Relief, and
17 Writs of Mandamus and Prohibition in Clark County Case Number 19-2-01896-06. On July 5,
18 2019 the petitioners also filed a Motion for Stay of Proceedings in that case.

19 On August 13, 2019 the Commission issued an oral ruling affirming Clark County’s May 17,
20 2019 N&O and on October 16, 2019 entered a written Final Opinion and Order.

21 On October 19, 2019 Judge Gregory Gonzales of the Clark County Superior Court denied
22 the petitioners’ motion for a stay of the Commission’s appeal proceedings in case 19-2-01896-
23 06. The petitioners filed a Petition for Judicial Review of the Commission’s Final Opinion and
24 Order of October 16, 2019 on November 6, 2019 and the instant motion on that same date.

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26 II. Analysis
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28 1. Automatic stay pursuant to CCC 32.08.070(2)
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2 CCC 32.08.070(2) provides for an automatic stay of enforcement proceedings during the
3 pendency of an appeal under Title 32 of the CCC and the petitioners argue that this provision
4 applies to their appeal. However, the underlying appeal to the Commission was initiated under
5 The National Scenic Area Act, 16 U.S.C. 544m, not Title 32 of the CCC. The automatic stay
6 provisions of Title 32 of the CCC do not apply to the instant appeal.

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8 2. Applicability of remedies under the Washington Declaratory Judgments Act, RCW 7.24,
9 and the Washington Land Use Petition Act

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11 The petitioners argue that *Skamania County v. Woodall*, 104 Wash.App. 525, 16 P.3d 701
12 (2001) stands for the proposition that in giving “state courts almost exclusive jurisdiction over
13 appeals from Commission action” Congress did not limit the state courts’ inherent authorities or
14 restrict the state courts’ abilities to apply well-established case law. *Woodall* at 534. They filed a
15 Petition for Judicial Review of Final Opinion and Order of Columbia River Gorge Commission
16 under the National Scenic Area Act (16 U.S.C. section 544 and Land Use Petition Act (RCW
17 36.70C) on November 6, 2019.

18 However, the Commission’s appeal proceeding was a federal matter governed by federal
19 statutes and cases interpreting them. See 16 U.S.C. section 544m(a)(2); *Cuyler v. Adams*, 449
20 U.S. 433, 440 (1981); *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 113-14 (9th Cir.
21 1992). Additionally, the National Scenic Area Act provides the only remedies available against
22 the Commission. See *Broughton Lumber Co. v. Columbia River Gorge Comm’n*, 975 F.2d 616,
23 621 (9th Cir. 1992)(federal declaratory judgment action against the Gorge Commission
24 dismissed due to lack of district court jurisdiction under the federal court’s general jurisdiction
25 statute). As a result Washington’s Declaratory Judgments Act and LUPA are not applicable to
26 this motion.


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28 3. The applicability of LUPA to the Commission’s proceedings

1 RCW 36.70C.020(1)(a)(ii) indicates that LUPA does not apply to judicial review of “[I]and use
2 decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by
3 state law...”. “Local jurisdiction” is defined as a “county, city or unincorporated town.” RCW
4 36.70C.020(3). LUPA does not apply to the N&O in question here because the Examiner’s
5 decision was subject to review by the Commission, a quasi-judicial body created by state and
6 federal law. Additionally, LUPA does not apply here because the Commission is not a “county,
7 city, or unincorporated town.” See *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440,
8 453 n. 12, 54 P.3d 1194 (2002)(state agencies are not covered by the definition of “local
9 jurisdiction”).

11 III. Conclusion

13 The automatic stay provisions of CCC 32.08.070(2) do not apply to this motion, any
14 remedies under the Washington Declaratory Judgments Act, RCW 7.24, and the Washington
15 Land Use Petition Act do not apply to this motion, and LUPA does not apply to the
16 Commission’s proceedings. The petitioners’ Motion to Stay Enforcement Pending Appeal is
17 denied. Respondents are requested to prepare Findings of Fact, Conclusions of Law and an
18 Order consistent with this opinion and cite the matter in for entry unless the parties are able to
19 agree on the form of the order, in which case the order can be presented ex parte.

23 Dated this 14th day of January, 2020.

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27 John P. Fairgrieve
28 Superior Court Judge
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