

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,

Petitioner,

v.

CENTRAL PUGET SOUND REGIONAL
TRANSPORTATION AUTHORITY, CITY
OF LAKEWOOD, and TACOMA RAIL

Respondents.

DOCKET TR-081229
DOCKET TR-081230
DOCKET TR-081231
DOCKET TR-081232

COMMISSION STAFF
OPPOSITIONS TO CITY OF
LAKEWOOD'S MOTIONS TO
RESCIND FINAL ORDERS

1 On March 30, 2010, the City of Lakewood ("Lakewood") filed motions to rescind the following four orders that the Washington Utilities and Transportation Commission ("Commission" or "WUTC") entered on September 24, 2008:

Docket TR-081229 Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at Steilacoom Boulevard SW
Docket TR-081230 Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at 108th Street SW
Docket TR-081231 Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at Bridgeport Way SW
Docket TR-081232 Order Granting Petition, With Conditions, to Modify a Public Highway-Rail Grade Crossing at 100th Street SW

2 Lakewood's motions should be denied for the reasons described herein¹ and for those described in the Washington State Department of Transportation's "Response in Opposition to City of Lakewood's Motion to Rescind Final Order" ("WSDOT's Response").

¹ Commission Staff are filing a single brief in all four dockets.

BACKGROUND

3 The four crossings at issue lie along the route of the Point Defiance Bypass Project, which will reroute Amtrak passenger trains through Lakewood and DuPont. Between September 2006 and March 2010, the Commission granted ten petitions for modifications at five of the grade crossings associated with the Point Defiance Bypass Project, as shown in the table below. Lakewood now asks the Commission to set aside four of those orders.

Street (Jurisdiction)	UTC Docket No.	Petitioner	Status
Steilacoom Blvd. S.W. (City of Lakewood)	TR-061195	Sound Transit	Granted Sept. 22, 2006 Incorporated into TR-081229
	TR-081229	WSDOT	Granted Sept. 24, 2008 City of Lakewood Motion to Rescind filed March 30, 2010
100 th Street S.W. (City of Lakewood)	TR-061196	Sound Transit	Granted Sept. 22, 2006 Incorporated into TR-081232
	TR-081232	WSDOT	Granted Sept. 24, 2008 City of Lakewood Motion to Rescind filed March 30, 2010
108 th Street S.W. (City of Lakewood)	TR-061197	Sound Transit	Granted Sept. 22, 2006 Incorporated into TR-081230
	TR-081230	WSDOT	Granted Sept. 24, 2008 City of Lakewood Motion to Rescind filed March 30, 2010
Bridgeport Way S.W. (City of Lakewood)	TR-061198	Sound Transit	Granted Sept. 22, 2006 Incorporated into TR-081231
	TR-070114	City of Lakewood	Granted Feb. 13, 2007
	TR-081231	WSDOT	Granted Sept. 24, 2008 City of Lakewood Motion to Rescind filed March 30, 2010
41 st Division Drive (Joint Base Lewis- McChord)	TR-100130	WSDOT	Granted March 10, 2010

4 The modifications described in the ten orders include reconfiguration and reconstruction of the railroad tracks, new warning devices, and new sidewalks. In Docket TR-070114, the City of Lakewood sought, and was granted, approval to install sidewalks at

the Bridgeport Way crossing. The order in Docket TR-070114 refers to the WSDOT Point Defiance Bypass Project, as do the four 2008 orders that Lakewood now wants to set aside.

ARGUMENT

5 Lakewood's motions are analogous to a motion to set aside a final judgment under Rule 60(b) of the Washington Superior Court Civil Rules.² Washington Civil Rule 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

...

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. . . . A motion under this section (b) does not affect the finality of the judgment or suspend its operation

Federal Rule of Civil Procedure 60(b) contains substantially similar language.³

6 As described in Lakewood's motions, the City of Lakewood consented to entry of the September 2008 orders that it now seeks to set aside. Lakewood suggests that it did so because it believed that only "Sounder" commuter trains, not Amtrak trains, would be using the crossings at issue. According to Lakewood, the City is surprised now to learn that the orders will benefit Amtrak, despite the fact that the orders specifically mention Amtrak. Surprise can be a basis for a motion to set aside a judgment under CR 60(b)(1), but such a motion must be brought within one year after the judgment. To the extent Lakewood's motions are based on

² The Commission may refer to the Washington superior court rules for civil proceedings as guidelines for handling motions. WAC 480-07-375(2).

³ Though federal decisions interpreting the federal counterparts of Washington rules are not binding on Washington courts, Washington courts treat them as persuasive authority. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); see *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (looking to federal courts' application of Fed. R. Civ. P. 60 in applying CR 60).

surprise, they are untimely because it is now 18 months since the orders were entered.

7 Though motions under CR 60(b)(11) are not subject to the one-year time limit, Lakewood's motions fail under that rule as well. To obtain relief under CR 60(b)(11), the moving party must show that "extraordinary circumstances" justify relief.⁴ Federal courts apply the same standard under Fed. R. Civ. P. 60(b)(6), the counterpart to Washington CR 60(b)(11).⁵ The federal rule is applied sparingly to prevent manifest injustice.⁶

8 In the materials filed with its motions, the City of Lakewood explains that it has changed its mind since it waived its right to a hearing in 2008. Accepting a judgment and changing one's mind later is not an extraordinary circumstance that justifies reopening the judgment.⁷

9 By contrast, third parties will be harmed if the Commission sets aside the orders in question. As described in WSDOT's Response, contracts are in place and construction is already occurring on the modifications authorized in the orders that Lakewood now wants to set aside. The public has an interest in the finality and certainty of judgments, especially where, as here, interests of those other than the litigants are at stake.⁸ In the federal courts, the potential for disruption and injury to existing rights is a basis for denying a Rule 60(b)(6) motion.⁹ Such factors are present here and weigh against the relief Lakewood seeks.

⁴ See *In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003).

⁵ *United States v. Washington*, 593 F.3d 790, 799 (9th Cir. 2010) (*en banc*) ("Samish"); see *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988)

⁶ *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996).

⁷ See *id.* at 1163-64 (upholding denial of Indian groups' Rule 60(b) motion to set aside judgment that they lacked treaty fishing rights, in part because groups had requested that judge who entered the judgment be allowed to decide their case).

⁸ See *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 100, 113 S. Ct. 1967, 1977, 124 L.Ed.2d 1, 17 (1993) (public interest in finality of patent litigation).

⁹ *Samish*, 593 F.3d at 800 (9th Cir. 2010) (upholding denial of Samish Tribe's Rule 60(b) motion to set aside judgment that it lacked treaty fishing rights, in part because of potential disruption to existing state-tribal and

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The City of Lakewood had an opportunity to oppose and seek judicial review of the orders it now seeks to set aside.¹⁰ A Rule 60 motion is not a substitute for an appeal.¹¹ Nor is a motion to rescind under WAC 480-07-085 a substitute for an appeal.

CONCLUSION

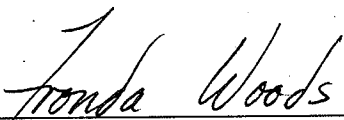
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The Commission should deny Lakewood's motions. Should the Commission grant them, however, Commission Staff do not oppose consolidation with Dockets TR-100127, TR-100128, TR-100129, and TR-100131.

DATED this 6th day of April 2010.

Respectfully submitted,

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intertribal fishery management regimes should the motion be granted).

¹⁰ See RCW 81.53.170; RCW 34.05.530.

¹¹ See *Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209, 95 L.Ed. 207 (1950) (litigant's choice not to appeal because of perceived financial sacrifice not enough under Fed. R. Civ. P. 60(b)(6)).