

☐ EXPEDITE
☒ Hearing is set:
Date: July 17, 2026
Time: 9:00 a.m.
Judge/Calendar: Judge Anne Egeler /
Dispositive Motions

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON**

SAVE THE DAVIS-MEEKER GARRY OAK,

Plaintiff,

vs.

LEATTA DAHLHOFF, in her capacity as
Mayor of Tumwater,

Defendant.

NO. 24-2-01895-34

**RESPONSE TO PLAINTIFFS'
SECOND MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
CROSS MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION / CROSS MOTION

Plaintiff seeks a second partial summary judgment, piecemealing their claims and focusing solely on a claim contained in their first amended complaint filed on the same day as their motion was filed. They seek declaratory and injunctive relief that the Mayor must obtain permits from the Department of Archeology and Historic Preservation (DAHP) that the City has already obtained. This is not a justiciable controversy and there is no invasion of any right that the statute protects. Rather, the City is in full compliance with the permit requirements of RCW 27.53.060.

Additionally, plaintiff's newly amended complaint continues to raise a claim under the Migratory Bird Treaty Act (MBTA), which they acknowledge does not provide any private right of civil enforcement. The amended complaint seeks to bypass the laws rejecting civil enforcement by

1 bootstrapping a claim under the federal Administrative Procedure Act. Because the APA does not apply
2 to a city, their claim fails as a matter of law. Moreover the MBTA does not forbid maintenance of trees,
3 so it fails to provide any basis for relief against the City. Defendant therefore cross moves for summary
4 judgment on both remaining claims: 1) that the Plaintiff is not entitled to relief under Ch. 27.53 RCW
5 because the City is in compliance with that statute and 2) that Plaintiffs do not state an actionable claim
6 under the MBTA via the federal Administrative Procedures Act as alleged in the Amended Complaint.
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8 This Response and Cross Motion is supported by the pleadings and files herein, including the
9 following declarations:

- 10 • Declaration of Alyssa Jones-Wood, dated 12/9/2025 (filed 12/12/2025)
- 11 • Declaration of Leatta Dahlhoff, dated 12/10/2025 (filed 12/12/2025)
- 12 • Declaration of Jeffrey S. Myers, dated 12/12/2025 (filed 12/12/2025), attaching
 - 13 ○ Declaration of Debbie Sullivan, dated 7/15/2024 (First Sullivan Decl.)
 - 14 ○ Declaration of Debbie Sullivan, dated 5/12/2025 (Second Sullivan Decl.)
- 15 • Second Declaration of Alyssa Jones-Wood, dated 3/23/2025 (filed 3/31/2025)
- 16 • Second Declaration of Leatta Dahlhoff, dated 5/21/2026 (filed herewith)
- 17

18 II. FACTS

19 Since June 2024, at the request of members of the public, the City of Tumwater has pursued
20 additional study and adopted plans to promote the health of the Davis Meeker Garry Oak (DMGO) through
21 preventative maintenance as embodied in a tree plan prepared by an arborist recommended by many
22 members of the plaintiff group. That recommendation will not destroy the DMGO but will promote its
23 health and minimize risks of future structural failures. The City has conducted its analysis and will
24 conduct its maintenance under permits issued by the DAHP. Plaintiffs' allegation in the Amended
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1 Complaint that the City is not obtaining such permits is categorically false as demonstrated by the
2 Declaration of Alyssa Jones-Wood and Mayor Leatta Dahlhoff.

3 The City stated its intention to obtain such permits in the Declaration of Alyssa Jones Wood, filed
4 in this matter on December 12, 2025. Decl. of Jones Wood, ¶6. In fact, the City has already obtained the
5 required permit from DAHP on January 8, 2026. Second Decl. of Jones Wood, ¶3, Exhibit 7. The City's
6 need for and intentions to obtain the necessary DAHP permits to do any modifications or maintenance is
7 acknowledged by Mayor Dahlhoff. Second Dahlhoff Decl., ¶2.

8 On July 3, 2024, the City issued a Request for Proposals and Statement of Qualifications to select
9 an independent arborist to conduct the second opinion. Sullivan Decl. I, at ¶3. Todd Prager & Associates
10 (Prager) was selected and prepared a scope of work in August 2024. Myers Dec., Exhibit 6 (Sullivan Dec.
11 II at ¶4). On August 22, 2024, the City wrote to the Department of Archeology and Historic Preservation
12 (DAHP) to request emergency permits for the investigation, if such permits were considered necessary.
13 *Id.*; Second Dahlhoff Decl., ¶2. On August 23, 2024, DAHP responded that permits were needed for
14 invasive investigations, but not for non-invasive evaluation such as sonic tomography or visual
15 inspections. *Id.* The City commissioned Prager to proceed with non-invasive investigations while it
16 applied for the required DAHP permits for the remaining activities. *Id.* at ¶5. An archeologist was
17 retained and an application was submitted to DAHP on October 24, 2024. *Id.* On December 2, 2024,
18 DAHP granted the permits for the remaining work needed to complete the investigation. *Id.*; Dec. of
19 Jones Wood, Exhibit 6.

20 Prager completed its investigation and on February 7, 2025 issued a report recommending
21 mitigation and maintenance instead of removal. Sullivan Dec. II, at ¶6; Dec. of Jones Wood, Exhibit 2.
22 Specifically, the report recommended Option B which includes:
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- Tree retention;
- Reduction pruning to reduce risk of branch failure;
- Installing supplemental support to further reduce risk of branch failure and reduce the likelihood of target impacts;
- Root zone management to improve soil and root zone conditions; and
- Ongoing monitoring on a five year or less interval to proactively address ongoing risks.

This recommendation was presented to the Mayor who convened a City Council work session to review the report and its recommendations. Sullivan Dec. II at ¶7. After careful consideration of the second opinion, the Mayor chose to follow the recommendation of Prager to retain the tree, pursuing a strategy of mitigation and maintenance instead of removal. *Id.* This is the current position of the City in how the tree should be managed to retain it in a safe condition. The City will do so in conformity with permits issued by DAHP. Second Dahlhoff Decl., ¶3. There is no intention to remove the tree. *Id.*

To implement the new recommendations, the Mayor requested an appropriation to financially support the ongoing costs of tree mitigation and maintenance. The Council then adopted Resolution 2025-009 which provided the necessary preliminary? funding and under which the Mayor is “authorized to take any and all actions necessary and proper to carry out measures including mitigation and maintenance activities to retain the tree in a safe condition.” Decl. of Jones-Wood, Exhibit 1, §2 (emphasis added). The Mayor will be periodically reporting to the Council on the tree’s condition and make additional recommendations on the long-term funding, mitigation, and maintenance of the DMGO. *Id.*, Sec. 3.

The City notified plaintiff’s counsel of these developments in early 2025 and moved for dismissal of the case as moot. Myers Dec. at ¶5. As part of its filing, on May 12, 2025, Mayor Sullivan filed a declaration to the Court of Appeals stating:

Consistent with our approach to obtaining permits for the investigation, the City will seek permits from DAHP for the necessary maintenance in order to preserve the tree.

Second Sullivan Decl., ¶9 (emphasis added).

1 Thus, the City has been committed to obtaining DAHP permits since May 2025, before the Court
2 of Appeals decision and before the plaintiffs filed any claims alleging violation of RCW 27.53.060.
3 Plaintiff knew this and ignored the City's stated commitment to obtain permits, preferring litigation over
4 the need for the DAHP permits that the City was already obtaining.

5
6 Since the issuance of the Court of Appeals opinion in July 2025, the arborist hired by the city (who
7 plaintiff recommended) has developed plans to implement mitigation measures, beginning a multi-year
8 mitigation and treatment program with root zone management of soil surrounding the tree in year one,
9 followed by reduction pruning, if necessary, in years two and three. Decl. of Jones Wood, Exhibit 5.
10 Possible supplemental support or cabling to add support for the tree is also possible, depending on the
11 results of the other mitigation measures. *Id.*

12
13 Mayor Sullivan's term expired on December 31, 2025. Her successor, Mayor-elect Leatta
14 Dahlhoff, confirms that there are no plans to remove the tree and that the City will implement the
15 mitigation recommendations and treatment plan authored by Todd Prager & Associates. Dec. of Dahlhoff.
16 ¶3-4. The City acknowledged that the Court of Appeals decision requires the city to obtain approval from
17 the Historic Preservation Commission prior to removal of trees on the historic register, specifically the
18 Davis Meeker Garry Oak. On March 12, 2026, the City obtained unanimous approval of the Tree Plan
19 from the City's Historic Commission. Second Decl. of Jones Wood, ¶4, **Exhibit 8, 9.**

20
21 Following entry of this court's order in December 2025, the City also has obtained a further permit
22 for the maintenance activity contemplated by the Tree Plan from DAHP, which was issued to the City on
23 January 8, 2026. Second Decl. of Jones Wood, ¶3, Exhibit 7.

24 The Tree Plan adopted by the City and approved by DAHP and the Historic Commission itself
25 notes that due to the historic status of the DMGO, engagement with DAHP is required prior to any
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1 treatment. Jones Wood Decl., Exhibit 5 at 3. This ensures that any invasive treatment which could modify
2 or destroy the tree will be subject to permitting by DAHP.

3 The City has no plans to remove the tree or alter it without a DAHP permit. It is evident from the
4 actions of Mayor Sullivan who hired Prager to provide a second opinion, who then obtained DAHP
5 permits needed to evaluate mitigation options for retention of the tree. It is evidenced by selection of the
6 maintenance option recommended by the Prager & Associates February 2025 report. It is evidenced by
7 the passage of Resolution 2025-009 and funding for the mitigation plans for the tree. It is evidenced by
8 the development of the November 12, 2025 Treatment Plan as approved by the City Historic Commission.
9 This is evidenced by the Declaration of Mayor Dahlhoff. As if there could be any doubt, it is confirmed
10 by the City's actions in obtaining the amended permit to begin such work on January 8, 2026.
11

12 III. ARGUMENT

13 A. THE CITY IS IN FULL COMPLIANCE WITH RCW 27.53.060 AND HAS OBTAINED 14 THE NECESSARY DAHP PERMITS TO IMPLEMENT THE TREE PLAN.

15 Plaintiff alleges that the City intends to and is violating RCW 27.53.060. This allegation is
16 demonstrably false, as the City has repeatedly committed to obtaining such permits, and has in fact
17 obtained such permits before doing work on the DMGO. Plaintiff has known of this since the permit to
18 investigate the tree was obtained in December 2024, was informed of that fact in declarations filed by
19 former Mayor Sullivan in May 2025 and again in declarations filed by the City Sustainability Manager
20 who is responsible for overseeing the arborist's maintenance plans in December 2025 and March 2026.
21

22 In order to succeed on their claims for declaratory and injunctive relief, there must be a present
23 threat of an invasion of a legal right. Washington courts have established that a justiciable controversy
24 under the UDJA requires "(1) an actual, present, and existing dispute, or the mature seeds of one, as
25 distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between
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1 parties having genuine and opposing interests, (3) which involves interests that must be direct and
2 substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of
3 which will be final and conclusive". *Alim v. City of Seattle*, 14 Wn.App.2d 838 (2020). The Court's
4 authority is limited to resolving justiciable controversies because, otherwise, it will "step into the
5 prohibited area of advisory opinions." *Pasado's Safe Haven v. State*, 162 Wn.App. 746, 760, 259 P.3d 280
6 (2011).
7

8 Plaintiff here seeks an advisory opinion as to whether permits are required. The City does not
9 dispute that they are and there has not been any actual present and existing dispute about the need for
10 permits since summer of 2024. A dispute two years ago is not an actual, present and existing dispute.
11

12 Plaintiff will doubtless point to briefing in the Court of Appeals arguing that the DMGO is not an
13 archeological object. This fall-back argument was made if the court decided to address the hypothetical
14 issue which the City contended, as a primary argument, was not properly before the court, as it had not
15 been raised in any pleading and the City had not had an opportunity to brief during the chaotic TRO
16 proceedings. Plaintiff will doubtless point to the exchange of correspondence between legal counsel about
17 whether the DMGO is an archeological object, a point over which lawyers can differ. What plaintiff asks
18 this court is to ignore the actual conduct of the city and its unwavering compliance with permit
19 requirements. When investigation of the condition of the tree was needed, the City hired an archeologist
20 and applied for a permit from DAHP. Since that time, all work concerning the tree has been conducted
21 under a DAHP permit and the City will do so in the future. This is confirmed by Mayor Dahlhoff in her
22 second declaration.
23

24 Plaintiff seeks an advisory opinion where there is no violation of the statute and no intent to
25 proceed in the absence of permits from DAHP. The requirement is that the controversy be "actual and
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1 not hypothetical". *Biggers v. City of Bainbridge Island*, 124 Wn.App. 858 (2004); *Superior Asphalt &*
2 *Concrete Co. v. Dep't of Labor & Indus.*, 121 Wn.App. 601, 605, 89 P.3d 316 (2004). Here, Plaintiffs
3 postulate hypotheticals about what the City might do. Such speculation ignores the actual actions of the
4 City, the compliance demonstrated by obtaining DAHP permits and its current position which has been
5 followed for the past two years.

6
7 Plaintiff also seeks an injunction arguing that there is a threatened invasion of their rights.
8 Accepting for arguments sake that RCW 27.53.060 creates "rights" that plaintiffs can enforce, there is no
9 invasion of such rights where the City has obtained the very permits that the plaintiff contends is required.
10 There is no invasion, threatened or actual, of the plaintiffs' rights.

11
12 Plaintiffs do not have any such rights. Instead, the law here commits the enforcement and
13 administration of the historic preservation statute to DAHP, which has been working with the City to
14 ensure compliance. DAHP, in its amicus brief to the Court of Appeals, pointed out that the issue was not
15 properly before the trial court and that DAHP had exclusive authority to administer and enforce the permit
16 requirements. The Department's amicus brief stated:

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18 SDMGO argued below, and now argues to this Court, that RCW 27.53 should serve as a
19 basis for *SDMGO* to obtain such relief. Although *SDMGO* correctly identifies the Tree as
20 an archaeological site, *the Department* is the only entity within Washington State
21 empowered to permit archaeological site disturbance under RCW 27.53. The Legislature
22 granted authority over permitting sites like the Tree to the Department. SDMGO has no
23 right to enforce the Department's interest in archaeological permitting related to the Tree.

24 Amicus Brief at 16-17 (emphasis in original).

25
26 Plaintiff's claims seek to have the Court, not DAHP, administer the permit program under RCW
27.53. That is not the proper role of the court, which must decide real cases based on real conduct. As
such, if the court even considers plaintiff's hypothetical allegations, it should decline plaintiff's invitation
to usurp DAHP's statutory permitting authority and dismiss this non-justiciable claim.

1 **B. THERE IS NO RIGHT OF ACTION UNDER THE MIGRATORY BIRD TREATY ACT.**

2 **1. The City of Tumwater is not a federal agency against whom suit can be filed pursuant**
3 **to the federal APA.**

4 Plaintiffs allege a violation of the Migratory Bird Treaty Act (MBTA) and claim a right to
5 injunctive relief. Amended Complaint at 4-6 (¶12-15, 31[sic]). Their amended complaint concedes that
6 the statute provides only criminal enforcement remedies, and does not provide a private right of action.
7 Amended Complaint at ¶14. This is correct as courts have held that the MBTA is a criminal statute that
8 does not authorize a private civil right of action. *Turtle Island Restoration Network v. U.S. Dept. of*
9 *Commerce*, 438 F.3d 937 (9th Cir. 2006). Plaintiff seeks to overcome this by bootstrapping a claim under
10 the Federal Administrative Procedures Act. *Id.*, n. 7, 8, *citing* 5 U.S.C. § 702 . However, on its face, the
11 amended complaint fails to state an actionable claim against the City because the federal APA does apply
12 to the City of Tumwater which is not a federal “agency” subject to the Act. Thus the cases cited in footnote
13 8 in the Amended Complaint are not applicable and Plaintiff fails to state a viable claim. See Amended
14 Complaint at 5, n.8.

15 Plaintiffs Amended Complaint cites *Humane Society v. Glickman* 217 F.3d 882, 886 (D.C. Cir.
16 2000) which involved a suit against federal officials and the implementation of a management plan by
17 Department of Agriculture which called for the killing of Canada Geese. The Court held that the MBTA
18 applied to federal agencies who could be sued under the federal Administrative Procedures Act, citing 5
19 U.S.C. §702. 217 F.3d at 886, n.5. Plaintiff makes the same contention in the Amended Complaint.

20 The APA applies only to federal agencies, not cities and political subdivisions of the State of
21 Washington. The federal APA defines "agency" as "each authority of the Government of the United
22 States, whether or not it is within or subject to review by another agency" 5 U.S.C. §701(b) . There is no
23 cause of action against a city, a nonfederal entity, under Administrative Procedure Act (APA), upon which
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26

1 the plaintiff can bootstrap a MBTA claim. *Stewart v. Potts*, 983 F.Supp. 678 (S.D.Tex.1997). A city is
2 not a “federal agency” as defined in the federal APA. *Gibson & Perin Co. v. City of Cincinnati*, 480 F.2d
3 936 (6th Cir. 1973), certiorari denied 94 S.Ct. 577, 414 U.S. 1068, 38 L.Ed.2d 473; see also *City of Rohnert*
4 *Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir. 1979) (Section 701 of APA does not create a right of action
5 against the city agency because it is not an ‘authority of the Government of the United States’). Thus,
6 plaintiffs fail to state an actionable claim for private enforcement of the MBTA.
7

8 **2. Maintenance of the DMGO does not violate the MBTA.**

9 Even if a city could be sued under the federal APA, *City of Sausalito v. O’Neill*, 386 F.3d 1186
10 (9th Cir. 2004), cited by the Amended Complaint at 5, n.8, undercuts Plaintiff’s claim because it held that
11 cutting down a tree was not prohibited by the MBTA. The Court held:

12 The Migratory Bird Treaty Act (“MBTA”) provides that without authorization from the
13 Secretary of the Interior it is unlawful to “pursue, hunt, take, capture, kill, attempt to take,
14 capture, or kill” any migratory bird or “any part, nest, or egg of any such bird....” 16 U.S.C.
15 § 703. Sausalito asserts that implementation of the Fort Baker Plan will violate the MBTA
16 because migratory birds’ nesting trees will be cut down, thereby disturbing both birds and
17 their nests. The FEIS makes clear that the Park Service has not sought, and does not intend
18 to seek, authorization from the Secretary.

19 In *Seattle Audubon Society v. Evans*, we explained that the definition of an unlawful
20 “taking” under the MBTA “describes physical conduct of the sort engaged in by hunters
21 and poachers, conduct which was undoubtedly a concern at the time of the statute’s
22 enactment in 1918.” 952 F.2d at 302. There we held that unlike under the ESA, an unlawful
23 “taking” under the MBTA did not occur through “habitat destruction,” even that which
24 “le[d] indirectly to bird deaths.” *Id.* at 303. Because Sausalito alleges only that migratory
25 birds and their nests will be disturbed through habitat modification, we hold that the Park
26 Service does not need to seek authorization from the Secretary.

27 *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) .

28 Thus, there is no violation of the MBTA from maintaining a tree, even if there is a nest as alleged
29 here. See also, *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); *Newton Cnty. Wildlife*
30 *Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). Since this case seeks to apply the MBTA to
31 similar facts as presented in *O’Neill*, *Seattle Audubon Society* and *Newton Cnty. Wildlife Ass’n*, if the

1 court considers the substance of this claim, it should follow these precedents in rejecting the same claim
2 advanced by plaintiff here and granting summary judgment to the City on this issue.¹

3 IV. CONCLUSION

4 The time has come to stop wasting public resources on litigating nonjusticiable claims and devote
5 those limited resources to the arborist's plan to maintain the DMGO. The Court should find the City is
6 fully complying with the permit requirements of RCW 27.53 and that there is no threatened invasion of
7 any right of plaintiff. There has not been such a threat for two years. The request for declaratory and
8 injunctive relief is not justiciable and should be denied. The Court should further find that there is no
9 remedy available under the MBTA and dismiss that final claim. This would resolve the remaining issues
10 in the case and allow the City to take the necessary remedial actions, under its DAHP permits, working
11 together to address the community's wishes to salvage the DMGO.
12

13 Dated this 1st day of June, 2026.
14

15 LAW, LYMAN, DANIEL, KAMERRER
16 & BOGDANOVICH, P.S.

17 

18 Jeffrey S. Myers, WSBA No. 16390
19 Attorney for Defendant
20 P.O. Box 11880, Olympia, WA 98508-1880
21 Telephone: 360-754-3480 Fax: 360-754-3511
22 Email: jmyers@lldkb.com

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25 ¹ The Prager Treatment Plan acknowledges the presence of a cavity used by kestrels. Jones Wood Exhibit 5 at 11.
26 The work contemplated by the City's DAHP permit is expected to occur in Fall of 2026. Second Dahlhoff Decl., ¶2. This is well after the nesting season for kestrels.

1 **CERTIFICATE OF FILING AND SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington that on this
3 date, I caused to be electronically filed the foregoing document, and this Certificate of Filing & Service, and
4 have mailed a copy of this filing to the following parties via email per service agreement:
5

6 **Plaintiff's Attorneys:**

7 Ronda Larson Kramer
8 LARSON LAW, PLLC
9 P.O. Box 7337
10 Olympia, WA 98507-7337
11 ronda@larsonlawpllc.com

12 Bryan J. Telegin
13 Telegin Law PLLC
14 175 Parfitt Way SW, Ste. N270
15 Bainbridge Island, WA 98110
16 bryan@teleginlaw.com

17 DATED this 1st day of June, 2026, at Tumwater, WA.

18 /s/ Tam Truong
19 Tam Truong, Legal Assistant
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