

No. 42738-9

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

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WASHINGTON STATE DEPT. OF FISH AND WILDLIFE,

*Appellant*

v.

CURTIS W. JOHNSON,

*Respondent*

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ON APPEAL FROM  
GRAYS HARBOR COUNTY SUPERIOR COURT  
(The Honorable Gordon L. Godfrey)

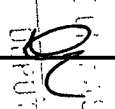
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CURTIS W. JOHNSON'S OPENING BRIEF

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STATE OF WASHINGTON  
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CURTIS W. JOHNSON'S  
OPENING BRIEF

ORIGINAL

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## I. INTRODUCTION

This state's Department of Fish and Wildlife (DFW) improperly revoked and terminated Respondent, Curtis W. Johnson's ("Johnson's" or the "Respondent's") permanent Commercial Dungeness Crab Coastal Fishing License (the "License") through mistaken administrative statutory construction. In the alternative, the statutory scheme regarding the License's renewal is unconstitutionally vague, and the average person could not understand that they would forfeit their permanent license if they did not fish in a given year and did not pay the fee for fishing in that particular year. Finally, the Department should be estopped from revoking Respondent's permanent License and treating it as an annual license after it represented the License was a permanent license. Under these circumstances this Court should properly construe the statutes and hold Respondent still holds his license and that it can be used in any year in which Respondent timely applies and pays a fee; find the statutory scheme unconstitutionally vague; or estop DFW from enforcing the statutory scheme against Respondent because it represented Respondent had a permanent license. Finally, this Court should award Respondent his attorney fees under RCW 4.84.350 for prevailing in this appeal and should award him damages for lost profits caused by the state's staying Judge Godfrey's Order reinstating Respondent's License.

## II. ASSIGNMENTS OF ERROR

1. DFW erred when it erroneously construed and interpreted the statutory and regulatory scheme regarding Respondent's License to effectively revoke Respondent's License in perpetuity, thereby causing a forfeiture, if Respondent did not fish in a given year and did not pay the annual fishing fee to use his License in that year.

2. The statutory and regulatory scheme regarding Respondent's License is unconstitutionally vague as applied to this case.

3. Mr. Johnson was denied procedural due process.

a. Mr. Johnson has a property interest in maintaining his permanent License, entitling him to procedural due process.

b. The State did not afford Mr. Johnson procedural due process in this case.

4. DFW erred in its Final Order's Finding of Fact 7, which is really a conclusion of law, when it found that "the economic consequences of failing to renew the license are much more significant because the failure to renew the license in one year precludes renewals thereafter." Finding of Fact 7.



5. DFW erred in its Final Order's Finding of Fact 11, which is really a conclusion of law, when it found that the belief that "there would be no problem renewing the license the following year" was a "*mistaken* belief." (emphasis added). Finding of Fact 11.

6. DFW erred in its Final Order's Finding when it concluded that RCW 77.70.360 means that when a commercial Dungeness crab-coastal fishery license is not renewed it is no longer capable of being renewed in the future. Conclusion of Law 4.

7. DFW erred when its Final Order concluded there was no legal significance to the Director having informed Mr. Johnson that he would be granted a "permanent" license. Conclusion of Law 5.

8. DFW erred when its Final Order concluded its Director's reference to a "permanent" license was meant to identify his decision to grant Petitioner a license that would not expire at the end of 1999 and which had the capacity to remain viable indefinitely under the provisions of the limited entry program. Conclusion of Law 5.

9. DFW erred when its Final Order concluded that a license is "permanent" only if the license holder complies with the annual renewal requirement of RCW 77.70.360. Conclusion of Law 5.

10. DFW erred when its Final Order concluded there were no grounds to estop it from arguing Respondent's License was an annual license as opposed to a permanent license.

11. DFW erred when its Final Order concluded that there was no basis for applying the equitable doctrine of promissory estoppel. Conclusions of Law 5, 10.

12. DFW erred when its Final Order concluded Respondent was mistaken when he concluded that there would be no consequence if his License was not renewed in 2007. Conclusion of Law 10.

13. DFW erred when its Final Order concluded that anyone paying attention to the statutory renewal requirement would have appreciated the consequence of failing to renew the license if it is not being used in a given year. Conclusion of Law 10.

14. DFW erred when its Final Order concluded that given the statutory provisions, it was not reasonable for Mr. Johnson to assume there would be no consequences if his license was not timely renewed in 2007. Conclusion of Law 11.

15. DFW erred when its Final Order rejected Respondent's equitable estoppel argument without having addressed that the Department's representation that he could not change the vessel

designation until 2008 caused him not to renew the license in 2007.

Conclusion of Law 12.

16. DFW erred when its Final Order concluded that RCW 77.65.030 and RCW 77.70.360 prevent DFW from renewing a commercial Dungeness crab-coastal fishery license where a prior year's license was not renewed. Conclusion of Law 12.

### III. ISSUES

1. Whether the statutory and regulatory scheme for renewal of a commercial Dungeness crab-coastal fishery license allows a fisherman to continue to hold and renew his or her license if they do not fish in a given year and do not pay the annual fee to fish in that year.

2. Whether the statutory and regulatory scheme for renewal of a commercial Dungeness crab-coastal fishery license is unconstitutionally vague because it is confusing and ambiguous to the point that it cannot be understood by persons of reasonable intelligence, including Judge Godfrey.

2. Whether the statutory and regulatory scheme for renewal of a commercial Dungeness crab-coastal fishery license as applied by the Department violates constitutional guarantees of procedural due process

when Mr. Johnson was deprived of a valuable crab fishing license without proper notice and a pre-deprivation hearing.

3. Whether the statutory and regulatory scheme for renewal of a commercial Dungeness crab-coastal fishery license as applied by the Department violates constitutional guarantees of substantive due process when Mr. Johnson was deprived of a valuable crab fishing license on which he relied for income and when other methods for managing the state's crab fishery in accordance with legislative intent are available.

4. Whether the Department acted arbitrarily and capriciously or *ultra vires* by incorrectly applying RCW 77.70.360 and RCW 77.65.030.

5. Whether the Department erred in concluding that the doctrine of equitable estoppel is inapplicable to Mr. Johnson's case.

#### IV. STATEMENT OF THE CASE

Mr. Johnson has held a Dungeness crab commercial license since 1991.<sup>1</sup> In 1995, after the legislature adopted a limited entry licensing program for the coastal Dungeness crab commercial fishery, Mr. Johnson applied for a Dungeness crab-coastal fishery license under the new rules.<sup>2</sup> On May 30, 1995, Robert Turner, then DFW's Director, issued a letter to

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<sup>1</sup> CP 118 (FF 1).

<sup>2</sup> *Id*

Mr. Johnson stating that the Department would grant him a “permanent license” to participate in this fishery.<sup>3</sup> The letter stated, in relevant part:

I find that you... should be granted a permanent license. A copy of the board’s recommendation is enclosed for your records. The License Division will place your application in line for processing and will mail your permanent Dungeness Crab Coastal Fishery license to you.<sup>4</sup>

The permanent License at issue in this matter was granted to Mr. Johnson.<sup>5</sup> The license was renewed every year through 2006.<sup>6</sup> The 2006 license allowed fishing throughout the calendar year. The 2006 fishing season starts, however, on December 1, 2006, and ends on September 15 the following year.<sup>7</sup> This means a person fishing who waits until the opening of the 2006 season to buy a 2006 license can fish for only one month out of the nine-month fishing season. The license was not renewed in 2007.<sup>8</sup>

To make matters more confusing, DFW mails a license renewal reminder and an application form to all license holders of record who have not already renewed their license in the fall of each year, after the fishing season ends.<sup>9</sup> This means a fisherman who bought a 2006 license

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<sup>3</sup> CP 115, 118 (FF 1)

<sup>4</sup> CP 115

<sup>5</sup> CP 118 (FF 1).

<sup>6</sup> *Id*

<sup>7</sup> *See* WAC 220-52-046(6).

<sup>8</sup> *Id*

<sup>9</sup> CP 118-19 (FF 5-6)

not only could not fish for 8 out of the 9 month 2006 fishing season, but also that DFW would not send that fisherman a renewal form until after the 2006 fishing season ended in September 2007. DFW's renewal reminder does not apprise the recipient that his or her license could never be renewed again, and thereby forfeited, if it was not renewed by December 31, 2007.

Mr. Johnson testified that he did not receive a renewal notice from DFW in 2007 to renew the License.<sup>10</sup> Mr. Johnson provided affidavits regarding problems with the mail delivery in his neighborhood during the fall months of 2007.<sup>11</sup> The Administrative Hearing Officer made a finding that it was possible that Mr. Johnson did not receive his annual renewal notice in 2007 because of problems with the mail in his area.<sup>12</sup> The trial judge specifically found that Mr. Johnson did not receive actual notice of his license's renewal date.<sup>13</sup>

The form sent in late 2007 and which Mr. Johnson did not receive stated, "License will expire December 31<sup>st</sup> of issuance year," and "ATTENTION LIMITED LICENSE HOLDER THIS LICENSE MUST

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<sup>10</sup> CP 118-19 (FF 5).

<sup>11</sup> CP 118-19 (FF 5).

<sup>12</sup> CP 118-19 (FF 5).

<sup>13</sup> CP 182 (FF 6). Because this finding is supported by substantial evidence, it should be a verity on appeal. *Cowiche Canyon Conservancy v Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). (Findings of fact are reviewed based on the substantial evidence standard.)

BE RENEWED BEFORE DECEMBER 31, 2007.”<sup>14</sup> Nowhere was language included specifying that failure to renew by the deadline would result in the license being forfeited or revoked because it could not be renewed in all subsequent years.<sup>15</sup>

Mr. Johnson had leased the License to Kenneth Greenfield in November 2005 for the 2005 fishing season.<sup>16</sup> Because of the lease, a new vessel, the *Smolt*, was designated for the License.<sup>17</sup> Mr. Greenfield was also the operator listed for the License during the 2006 season, and Mr. Johnson believed that Greenfield was leasing the License for the 2006 season.<sup>18</sup>

Mr. Johnson was unable to reach Mr. Greenfield, by mail or phone, in 2007 about whether Mr. Greenfield wanted to continue leasing the License for the 2007 season.<sup>19</sup> Therefore, in October and November of 2007, Mr. Johnson entered into discussions with another fisherman who was interested in leasing the License for the 2007 season.<sup>20</sup> Mr. Johnson contacted DFW by phone, speaking with Ms. Carol Stedman, to inquire about designating a new vessel for the License.<sup>21</sup>

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<sup>14</sup> CP 85

<sup>15</sup> CP 121 (FF 10).

<sup>16</sup> CP 119 (FF 7).

<sup>17</sup> CP 119 (FF 7).

<sup>18</sup> *Id.* See also RP 21:14–28.

<sup>19</sup> CP 119 (FF 7).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The Administrative Hearing Officer found that “[Mr. Johnson] was told that designating a new vessel for License 60669 [sic] may not be possible because the Department was not permitted to change the vessel designations more than once during two consecutive seasons.”<sup>22</sup> Ms. Stedman was incorrect, however, because the *Smolt* had been the designated vessel for the License for both the 2005 season, which ended September 15, 2006; and the 2006 season, which ended September 15, 2007. Mr. Johnson, therefore, could have changed the vessel designation anytime after September 15, 2007.<sup>23</sup> Had he been correctly advised, then Mr. Johnson would have leased the License to a different operator, changed the vessel designation, and his License would have been renewed prior to the start of the 2007 season; and this issue would not have arisen. But, based on DFW’s incorrect representations, Mr. Johnson reasonably believed that he would have to wait until 2008 to designate a different vessel under the License.<sup>24</sup> Relying on Ms. Stedman’s incorrect statements, Mr. Johnson also reasonably believed the License could not yet be shifted from the *Smolt*, which meant it could not be used by another lessee or by Mr. Johnson himself.<sup>25</sup> These misstatements with Mr. Johnson having no reasonable way to understand he would somehow

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<sup>22</sup> *Id*

<sup>23</sup> RP 8-30-31; RCW 77 70.350(1)(b) and (c)

<sup>24</sup> RP 10-4-5.

<sup>25</sup> CP 119-20 (FF 7).



forever lose or forfeit his permanent License caused Mr. Johnson not to renew the License for 2007 and invest \$415 into a permit that would expire one month into the 9 month 2007 fishing season that neither he nor anyone other than the unreachable Mr. Greenfield could use.<sup>26</sup>

Upon learning he could not lease the License to a new operator, Mr. Johnson asked DFW if he could obtain a waiver to change the vessel designation on his License to lease it, or whether he could sell his License.<sup>27</sup> Mr. Johnson testified that Ms. Stedman told Mr. Johnson that she needed to know the documented length of Mr. Greenfield's vessel, the *Smolt*.<sup>28</sup> Mr. Johnson informed Ms. Stedman that he was unable to reach Mr. Greenfield and, therefore, he could not obtain the vessel's length.<sup>29</sup> Mr. Johnson testified that Ms. Stedman stated that she would inquire whether DFW would accept the length of the *Smolt* as listed on the application and then get back in touch with Mr. Johnson.<sup>30</sup> Mr. Johnson testified that neither Ms. Stedman nor anyone else at DFW got back in touch with Mr. Johnson in time for him to lease his License in 2007 or transfer his License that year.<sup>31</sup> Never during any of the conversations with DFW was Mr. Johnson informed that his failure to

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<sup>26</sup> CP 120-21 (FF 7-8).

<sup>27</sup> RP 30:10-32:3

<sup>28</sup> *Id*

<sup>29</sup> *Id*

<sup>30</sup> *Id*

<sup>31</sup> *Id*

renew his permanent License by December 31, 2007 would result in DFW effectively revoking, or Mr. Johnson effectively forfeiting, his permanent License.<sup>32</sup>

In early 2008, a buyer approached Mr. Johnson regarding the License.<sup>33</sup> Mr. Johnson again had several phone conversations with DFW.<sup>34</sup> This was the first time that DFW informed Mr. Johnson he could not transfer the License because he had not renewed it during 2007.<sup>35</sup>

Despite this, in March 2008, Mr. Johnson applied, paid the application fee, and was denied the 2007 license.<sup>36</sup> He administratively appealed the DFW's denial of his License.<sup>37</sup> The DFW hearing officer affirmed the DFW's denial of his license and held Mr. Johnson could never renew his License again in the future.<sup>38</sup>

Mr. Johnson has testified that the License is a transferable asset worth approximately \$50,000 to \$70,000.<sup>39</sup>

In September 2008, Mr. Johnson timely petitioned for judicial review.<sup>40</sup> A judicial review hearing was held before Judge Godfrey in the Grays Harbor County Superior Court on September 29, 2011. Judge

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<sup>32</sup> CP 121 (FF10); RP 10:6-32; RP 16:16-19

<sup>33</sup> RP 16:19-32.

<sup>34</sup> *Id*

<sup>35</sup> CP 120-21 (FF 8).

<sup>36</sup> CP 118 (FF 2-3)

<sup>37</sup> *Id*

<sup>38</sup> CP 127.

<sup>39</sup> CP 121 (FF 11)

<sup>40</sup> CP 1-25.

Godfrey found in favor of Curtis Johnson and entered his Findings of Fact and Conclusions of Law, along with a Judgment and Declaratory Order, on October 27, 2011 and declared and ordered Mr. Johnson's License reinstated.<sup>41</sup> The Department appealed Judge Godfrey's order.

## V. ARGUMENT

### A. Standard of Review

#### 1. APA Standards of Review Apply

This appeal, challenging a DFW decision, is governed by the Washington Administrative Procedures Act (APA), Ch. 34.05 RCW. Grays Harbor County Superior Court acted in an appellate capacity and based its review of the administrative hearing decision on the record created before DFW.<sup>42</sup> Although the record may be augmented under certain circumstances, Mr. Johnson did not seek to supplement the record of the administrative hearing.<sup>43</sup>

This Court sits in an appellate capacity, the same position as the superior court sits in appeals under the APA, to review appeals from an administrative hearing decision.<sup>44</sup> The party asserting the invalidity of

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<sup>41</sup> CP 181 – 88.

<sup>42</sup> RCW 34.05.558.

<sup>43</sup> CP 136.

<sup>44</sup> RCW 34.05 570.

agency action continues to bear the burden of showing invalidity before this Court.<sup>45</sup>

APA judicial review standards provide:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

or

(i) The order is arbitrary or capricious.<sup>46</sup>

Most of the claims brought by Mr. Johnson will be decided pursuant to subsections (3)(a) (constitutionality), (3)(d) (error of law), and (3)(i) (arbitrary and capricious), or a combination thereof.

DFW was required to interpret and apply the Revised Code of Washington to a number of issues when rendering its Final Order. Under the “error of law” standard, this Court may substitute its judgment for

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<sup>45</sup> RCW 34.05 570(1)(a). *See also* Div. II General Order 2010-1. RCW 34.05.570(3).  
RCW 34.05.570(3).

that of the agency.<sup>47</sup> When the inquiry requires construction of a statute, review is *de novo*.<sup>48</sup> Courts have the ultimate authority to interpret a statute and do not defer to an agency where no ambiguity exists in the statute.<sup>49</sup> The DFW also made some findings of fact, though very few are in dispute. The APA's substantial evidence standard applies to findings of fact. The court reviews findings of fact for substantial evidence in light of the whole record. An agency finding of fact will be upheld if supported by "evidence that is substantial when viewed in light of the whole record before the court."<sup>50</sup>

**2. Doubts as to the meaning of statutes should be resolved in favor of Mr. Johnson.**

Any doubt as to the meaning of a statute should be resolved in favor of the type of claimant for whose benefit it was passed.<sup>51</sup> The courts have the ultimate responsibility to see that the rules are applied consistently with the policy underlying the statute.<sup>52</sup> In rewriting the crab licensing requirements in 1994, the Legislature's purpose was to protect Washington crab fishers "who have historically and continuously

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<sup>47</sup> *Skagit County Public Hosp Dist No 1 v State, Dept of Revenue*, 158 Wn. App. 426, 434, 242 P.3d 909 (2010).

<sup>48</sup> *Advanced Silicon Materials, LLC v Grant County*, 156 Wash 2d 84, 89, 124 P 3d 294 (2005)

<sup>49</sup> *Nelson v Appleway Chevrolet, Inc* , 129 Wn App. 927, 946, 47-48, 121 P.3d 95 (2005).

<sup>50</sup> RCW 34.05.570(3)(d)-(e), *Silverstreak, Inc v. Washington State Dept of Labor and Industries*, 159 Wn.2d 868, 880, 154 P 3d 891 (2007).

<sup>51</sup> *Towle v Washington State Dept of Fish and Wildlife*, 94 Wn App. 196, 207, 971 P.2d 591 (1999).

<sup>52</sup> *Id*

participated in the coastal crab fishery.”<sup>53</sup> There is no question that Mr. Johnson is within the class of persons that the Legislature sought to protect when it reformed the crab licensing system and instituted the limited entry program: Mr. Johnson’s license 60069 was issued in connection with the new crab licensing system.<sup>54</sup> Therefore, any doubts as to the meaning or interpretation of statutes should be resolved in Mr. Johnson’s favor, and not in favor of the Department.

**B. The Department has Erroneously Interpreted and Applied RCW 77.70.360.**

1. The Department has Erroneously Interpreted RCW 77.70.360 to Provide that a Dungeness Crab-Coastal Fishery License that is not Renewed Each Year Shall not be Renewed Further When, Unlike Other Statutes in Chapter 77.70 RCW, the Statute Contains no Such Express Provision.

The first and dispositive issue in this appeal is reversing DFW’s Final Order because it determined Mr. Johnson can never crab fish again because he did not timely renew his License in 2007.<sup>55</sup> DFW’s Final Order interpreted the crab license statute to prohibit all further crab license renewals if the license had not been renewed the prior year. Other limited license statutes specifically state failure to renew results in no

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<sup>53</sup> *Towle*, 94 Wn App. at 196, citing Laws of 1994, ch. 260, § 1. *See also* CP 129

<sup>54</sup> CP 123-24.

<sup>55</sup> CP 120, Final Order, Pg. 4: In. 11-14 (Finding of Fact No. 7, which is really a conclusion of law) “In fact, the economic consequences of failing to renew the license are much more significant because the failure to renew in one year precludes renewals thereafter.”

further renewal, but the crab license statute does not say the same thing; rather, it requires the person seeking renewal only to have “held” the license the prior year as opposed to having had “renewed” the license the prior year. DFW’s Final Order found Mr. Johnson continued to hold his License at the time the Final Order was entered in August 2008.<sup>56</sup> DFW, therefore, misinterpreted, misconstrued and misapplied the crab licensing statute, and that misapplication has effectively resulted in DFW revoking Mr. Johnson’s License. Judge Godfrey correctly declared Mr. Johnson has all rights to renew his License and restored “all rights and privileges that Petitioner would have enjoyed as a Dungeness crab-coastal commercial license holder...”<sup>57</sup>

To determine the plain meaning of a statute, this Court looks to the text, as well as the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.<sup>58</sup> Even though this Court looks to the broader statutory context, this Court does not add words where the legislature has not included them.<sup>59</sup> Where

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<sup>56</sup> CP 118, Findings of Fact No. 1, Final Order.

<sup>57</sup> Judgment and Declaratory Order, ¶2, CP 187.

<sup>58</sup> *State v Bertrand*, 165 Wn. App. 393, 414, 267 P.3d 511 (2011) (internal quotation marks and citation omitted)

<sup>59</sup> *Olympic Tug & Barge, Inc v Wash Dept of Revenue*, 163 Wn App 298, 306, 259 P.3d 338 (2011).

different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended.<sup>60</sup>

DFW's decision relies entirely upon its erroneous interpretation and construction of RCW 77.70.360. DFW's Final Order expressly and erroneously concludes that a Dungeness crab-coastal fishery license that is not renewed each year can never be renewed again, thereby causing the license to be forfeited by the holder.<sup>61</sup> RCW 77.70.360 however, contains no such provision:

[T]he director shall issue no new Dungeness crab-coastal fishery licenses after December 31, 1995. A person may renew an existing license only if the person *held* the license sought to be renewed during the previous year or acquired the license by transfer from someone who held it during the previous year, and if the person has not subsequently transferred the license to another person. (Emphasis added)

DFW interpreted and construed the word "held" to be synonymous with the word "renewed." DFW's construction was that Mr. Johnson could only renew his License if he had *renewed* it the prior year.<sup>62</sup>

DFW's construction and interpretation is erroneous and misapplies RCW 77.70.360 because it fails to ascribe a different meaning to the word "held" from the word "renew," which is also used in other license limitation statutes within the same chapter. Chapter 77.70 RCW

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<sup>60</sup> *Service Employees Intern Union, Local 6 v Superintendent of Pub Instruction*, 104 Wn.2d 344, 349, 705 P.2d 776 (1985)

<sup>61</sup> *See* Final Order, Pg. 11, ln 14-16. "That necessarily means that no renewal of license number 60669 may be issued in the future." CP 127.

<sup>62</sup> Conclusion of Law Nos. 3, 4, and 12; CP 122-24, 126-27.



governs License Limitation Programs and its statutory scheme must be looked to as a whole. Three statutes within Chapter 77.70 RCW, limiting salmon charter, herring fishery, and whiting-Puget Sound fishery licenses, expressly use different language when they intend to provide that a license that is not renewed each year shall not be renewed further:

- “A salmon charter license which is not renewed each year shall not be renewed further.”<sup>63</sup>
- “A herring fishery license that is not renewed each year shall not be renewed further.”<sup>64</sup>
- “A whiting-Puget Sound fishery license that is not renewed each year shall not be renewed further.”<sup>65</sup>

RCW 77.70.360, governing Dungeness crab-coastal fishery licenses, uses completely different language: “A person may renew an existing license only if the person held the license sought to be renewed during the previous year...” DFW’s Final Order ascribed the same meaning to the word “held” in RCW 77.70.360 as the word “renewed” in the other license limitation provisions in RCW ch 77.70. This is erroneous.

In addition, the Legislature utilized different wording in RCW 77.70.360 after the other license limitations provisions had already been

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<sup>63</sup> RCW 77 70.050(2) (emphasis added).

<sup>64</sup> RCW 77.70.120(3) (emphasis added).

<sup>65</sup> RCW 77 70.130(4) (emphasis added).

enacted. The provision in the salmon charter license statute that a “license which is not renewed each year shall not be renewed further” existed prior to 1993. That same year, the Legislature added parallel provisions to the herring fishery license statute and to the whiting-Puget Sound fishery license statute and utilized the same language.<sup>66</sup> In 1994, the Legislature added a new section to RCW ch. 75.30 (now codified at RCW 77.70.360) that limited new licenses for the Dungeness crab-coastal fishery. The Legislature, however, did not use the same language it had used for salmon and then herring and whiting. It used the word “held” instead of the word “renewed.”<sup>67</sup> If the Legislature had intended RCW 77.70.360 to have the same effect as the other limited license statutes, then it would have used the same unequivocal language. Despite this, DFW gave the different language in the crab licensing statute the same effect and treated Mr. Johnson’s “*permanent*” crab license the same as an *annual* salmon charter, herring or whiting license. This caused Mr. Johnson to forfeit his permanent crab license because he did not renew it, although he still held it.<sup>68</sup>

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<sup>66</sup> SB 5124, 1993 Reg. Sess., Ch. 340, § 28, 1339, 1354; § 35, 1339, 1359; § 39, 1339, 1360.

<sup>67</sup> 2ESHB 1471, 1994 Reg. Sess., Ch. 260, § 13, 1551, 1557 (codified at RCW 75.30 440; recodified in 2000 at RCW 77.70.360)

<sup>68</sup> See Final Order, Finding No. 1 entered August 27, 2008. “Petitioner has been the holder of a Dungeness crab commercial license since 1991.” CP 118.

To be sure, the Legislature retained the differences in language when it recodified Titles 75 and 77 RCW in 2000 and consolidated the respective license limitation statutes under one chapter. In 2000, the Legislature passed ESHB 2078 and consolidated the license limitation provisions formerly contained in Titles 75 and 77 RCW into Title 77 RCW when the departments of wildlife and fisheries merged.<sup>69</sup> As part of this major overhaul of Titles 75 and 77 RCW, the Legislature retained the difference in language between the annual salmon charter licenses, herring fishery licenses, and whiting-Puget Sound fishery licenses that still used the word “renewed” and the Dungeness crab-coastal fishery licenses that continued to use the word “held.” The Legislature, therefore, used different language within the same RCW ch. 77.70. Based on this different language, this Court must presume the Legislature intended a different meaning in the different parts of the same statutory scheme.

2. The Department Erroneously Interpreted and Applied RCW 77.70.360 to Mr. Johnson When it Stated that he did not Hold his License in 2007 When in Fact He has Always Been the Holder of his License, Just as RCW 77.70.360 Requires.

In any question of statutory construction, the court looks to ascertain the legislature’s intent by first examining the statute’s plain meaning.<sup>70</sup> If the statute’s meaning is plain on its face, then the court

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<sup>69</sup> ESHB 2078, 2000 Reg. Sess., Ch. 107, § 1, 648, 649.

<sup>70</sup> *In re Pierce*, 173 Wn.2d 372, 268 P.3d 907, 910 (2011) (citation omitted).

must give effect to that plain meaning as an expression of legislative intent.<sup>71</sup> The court discerns a statute’s plain meaning from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.<sup>72</sup>

RCW 77.70.360 provides in pertinent part,

[T]he director shall issue no new Dungeness crab-coastal fishery licenses after December 31, 1995. A person may renew an existing license only if the person *held* the license sought to be renewed during the previous year or acquired the license by transfer from someone who held it during the previous year, and if the person has not subsequently transferred the license to another person.

(emphasis added). The statute does not define what it means for “an existing license” to be “held.”

In context however, the statute contrasts “existing” Dungeness crab-coastal fishery licenses with “new” licenses. New licenses have not been issuable since prior to December 31, 1995. Therefore the “existing” licenses must mean those licenses issued prior to December 31, 1995. Here, Mr. Johnson was issued his permanent license in 1995 and, therefore, held an existing license. The Legislature did not preface the word “license” with the phrase “that was renewed in the prior year.” If

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<sup>71</sup> *Id*

<sup>72</sup> *Id* (citation and internal quotation marks omitted).

the Legislature had intended “existing license” to mean a license that was renewed in the prior year, then it would have and should have said so.

Regarding an “existing license,” the statute says a person may renew such a license if two conditions are met. First, a person may renew an existing license “if the person *held* the license sought to be renewed during the previous year or acquired the license by transfer from someone who *held* it during the previous year” (emphasis added). The statute does not define what it means to have “held” a license during the previous year. The plain meaning of to “hold” something is nothing more than to own or possess it.<sup>73</sup> As stated above, if a statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. In 2008 DFW’s own Final Order found Mr. Johnson “has been the holder or a Dungeness crab commercial license since 1991.”<sup>74</sup>

Because Mr. Johnson was granted a permanent license in 1995 and has not transferred it, he holds it until this day. He is, therefore, entitled to renew it each and every year until he transfers it. If the Legislature had intended to limit renewal to persons who renewed their license the prior year, then it would have said so – like it did in the

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<sup>73</sup> *Black’s Law Dictionary* 749 (8th Ed. 2004) (defining “hold” to mean, “To possess by lawful title.”).

<sup>74</sup> Findings of Fact No. 1, Final Order, CP 118.

salmon charter, herring and whiting license limiting statutes. The statutes' stated policy is to protect people like Mr. Johnson from new entrants into the crab fishing industry.<sup>75</sup> It is *not* to trap existing license holders into unwittingly forfeiting the ability to renew their licenses.

The second condition for renewal of an existing license is that “the person has not subsequently transferred the license to another person.” Read in its entirety, RCW 77.70.360 simply restricts the number of transfers permissible prior to a license being renewed, and requires that the current holder be the person to renew it.

**C. RCW 77.65.030, 77.65.070, and 77.70.360 are unconstitutionally vague and therefore void, both individually and collectively.**

A second and also dispositive basis to affirm the trial court is the statute is unconstitutionally vague. Persons of average intelligence could not be expected to understand that they would be forfeiting their crab license if they did not renew it in a given year.

The constitutionality of a statute is an issue of law that is reviewed *de novo*.<sup>76</sup> The party challenging a statute's constitutionality has the burden to demonstrate its invalidity.<sup>77</sup> A statute is void for vagueness

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<sup>75</sup> *Towle*, 94 Wn. App at 196, citing Laws of 1994, ch. 260, § 1. *See also* CP 129.

<sup>76</sup> *Kitsap Cnty. v Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005)

<sup>77</sup> *Mays v. State*, 116 Wn. App 864, 869, 68 P.3d 1114 (2003), *citing Bellevue v State*, 92 Wn.2d 717, 719, 600 P.2d 1268 (1979); *State v Thorne*, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.<sup>78</sup> Such a statute violates the first essential of due process of law – notice.<sup>79</sup>

The due process clause of the fourteenth amendment of the federal constitution says, “No state shall... deprive any person of life, liberty, or property, without due process of law.”<sup>80</sup> On the borderline between procedural and substantive due process is “vagueness,” the constitutional requirement that a statute or ordinance must not be so vague that it fails to give persons subject to it reasonable notice of what it demands of them.<sup>81</sup> Under the federal due process clause, citizens must be afforded fair warning of proscribed conduct.<sup>82</sup> The constitutional ban on vague laws is intended to invalidate statutory enactments that fail to provide adequate notice of their scope and sufficient guidelines for their application.<sup>83</sup>

Because both liberty and property are specifically protected by the fourteenth amendment against any state deprivation that does not meet

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<sup>78</sup> *Mays v State*, 116 Wn. App. 864, 868-69, 68 P.3d 1114 (2003), quoting *Haley v Med Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991)

<sup>79</sup> *American Legion Post #149 v Washington State Dept of Health*, 164 Wn.2d 570, 612, 192 P.3d 306 (2008), quoting *Roberts v United States Jaycees*, 468 U.S. 609, 629, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

<sup>80</sup> U.S. Const. amend. 14, § 1.

<sup>81</sup> 17 WAPRAC § 4.7.

<sup>82</sup> *City of Spokane v Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990), citing *Rose v Locke*, 423 U.S. 48, 49, 96 S.Ct. 243, 244, 46 L. Ed.2d 185 (1975).

<sup>83</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63, 92 S.Ct. 839, 31 L.Ed.2d 110 (1975).

due process standards, the void-for-vagueness doctrine is applicable to civil as well as criminal laws.<sup>84</sup> Under Washington constitutional authority, there is no distinction between the vagueness tests applicable to civil and criminal proceedings.<sup>85</sup>

A vagueness challenge to a statute not involving First Amendment rights is evaluated as applied to the challenger using the facts of the particular case.<sup>86</sup> The challenged law “is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope.”<sup>87</sup>

Here the precise question is did the crab licensing statute impart unambiguous notice to crab fishermen that their crab fishing license would be effectively revoked, forfeited and lost for good if they did not renew their license within one year after it expired. Neither the statutes cited by DFW nor the statutory scheme impart the constitutionally required notice. As a result, any implied license revocation or forfeiture is unconstitutional.

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<sup>84</sup> *Giaccio v Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966)

<sup>85</sup> *Mays*, 116 Wn. App. at 869.

<sup>86</sup> *City of Spokane v Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990) (citing *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)).

<sup>87</sup> *Douglass*, 115 Wn.2d at 182-83.



- 1. RCW 77.65.030 states merely that the department shall accept no license applications after December 31<sup>st</sup> of the calendar year for which a permit is sought and gives no notice that a license may not be sought in the subsequent calendar year.**

RCW 77.65.030, entitled “Application deadline,” does not say anything about the consequences for failing to apply by the deadline. It provides in pertinent part,

The application deadline for a commercial license or permit established in this chapter is December 31<sup>st</sup> of the calendar year for which the license or permit is sought. The department shall accept no license or permit applications after December 31<sup>st</sup> of the calendar year for which the license or permit is sought.

This statute gives no notice that failure to renew in one year will preclude renewal in any subsequent years. All this statute says is that anyone desiring a crab fishing license for a particular year must submit their application prior to December 31, 2007, and that the Department shall accept no applications for 2007 licenses after December 31, 2007.

- 2. RCW 77.65.070 states merely that licenses may be renewed annually but fails to provide notice of the consequences of failing to renew annually.**

Similarly, RCW 77.65.070, entitled “Expiration and Renewal of Licenses,” does not indicate that failure to renew a license in one year prohibits a permanent license holder from applying and renewing their license in subsequent years.

[C]ommercial licenses and permits issued under this chapter expire at midnight on December 31st of the calendar year for which they are issued. In accordance with this title, licenses may be renewed annually upon application and payment of the prescribed license fees.<sup>88</sup>

There is nothing in this statute that notifies a person that DFW is prohibited from renewing a license that has been expired for more than one year. The statute expressly says that a license “may be renewed annually.” It contains no language describing under what circumstances a license may *not* be renewed. This statute certainly gave no notice to Mr. Johnson that he would never be able to renew a license that had been expired for more than a year. Because persons of common intelligence must guess at that meaning, and would necessarily differ as to its application, this statute is unconstitutionally void for vagueness.

Even DFW does not take the position that Mr. Johnson lost his License when it expired on December 31, 2006 because he failed to timely renew it or that he could not renew an expired license. Instead, DFW takes the odd position that the statutory scheme forbade it from renewing a crab license if it was not renewed within one year after it expired. Here, Johnson’s License expired at midnight on Dec. 31, 2006.<sup>89</sup> DFW’s position is that once the License expired Johnson continued to hold the expired License, but he had to renew the expired License within

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<sup>88</sup> RCW 77 65 070(3).

<sup>89</sup> Conclusion of Law No. 2, CP 122

one year or else he would lose the right to renew it in perpetuity.<sup>90</sup> That is not spelled out in this statute or in the entire statutory scheme.

**3. If the Department did Read and Interpret RCW 77.70.360 Correctly, Then it is Subject to Two Meanings and Is Void for Vagueness.**

Finally, RCW 77.70.360 provides in pertinent part,

[T]he director shall issue no new Dungeness crab-coastal fishery licenses after December 31, 1995. A person may renew an existing license only if the person *held* the license sought to be renewed during the previous year or acquired the license by transfer from someone who held it during the previous year, and if the person has not subsequently transferred the license to another person. (emphasis added).

As discussed above, DFW found Mr. Johnson to still be a license holder as recently as August 2008 — 20 months after his License expired.<sup>91</sup> For a statute to constitutionally deprive Mr. Johnson of his property right to renew and use his crab license, it must give a person of ordinary intelligence adequate notice of the conduct it proscribes. The only way for DFW’s Final Order to be supported is if this Court can fairly read this statute’s use of the phrase “held” an “existing license” to mean having held a license that has been expired for less than one year. The statute does not say this even when read with the other statutes. These statutes do not make it clear that if a license holder fails to renew

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<sup>90</sup> Conclusion of Law Nos. 3, 4, and 12, CP 122-24, 126-27.

<sup>91</sup> Finding of Fact No. 1, CP 118.

his or her crab license within one year after it expires, then they will lose the right to renew their license forever.

Here, Mr. Johnson's understanding of the statutes is equally, if not more, reasonable than DFW's understanding of the statutes. Mr. Johnson understood he was renewing his "existing" permanent License that he held. His License was not a new license; it was issued in 1995, and he was merely attempting to renew his existing License. Mr. Johnson can also be understood as having "held" the license "during the previous year." He had leased the license to Kenneth Greenfield in 2006 and been unable to lease it again in 2007. Mr. Johnson never sold the license, so during all relevant years, he should be considered to have been the person who "held" that license, as the statute requires. Even if this Court were to accept DFW's statutory construction, Mr. Johnson still held his existing License throughout 2007. DFW concedes Mr. Johnson continued to hold his expired license through 2007 and had the ability to renew it. In 2008, he held his expired License the year prior to the year the Final Order was entered and it was error for DFW to conclude that the statutes prohibited DFW from renewing his License in 2008 and subsequent years.

DFW reads the statute differently. It reads "held" an "existing license" to mean having a license that has been expired for less than one year. Because persons of common intelligence must guess at which

reading is correct, and would necessarily differ as to this statute's application, the statute is unconstitutionally vague.

**4. Even if RCW 77.65.030, 77.65.070, and 77.70.360 are not void for vagueness individually, collectively they create a scheme opaque to persons of average intelligence that can be arbitrarily used to deny renewal of a permit.**

Even if each statute individually is found not to be void for vagueness, the requirement that all three must be read together for a fisherman to understand the consequences of failing to renew his or her license within one year after it expired creates a scheme of regulations that is opaque to persons of average intelligence. To arrive at DFW's conclusion one must read RCW 77.70.360's reference to "held" to mean not merely possessing the license by lawful title, but also that the license must be expired for less than one year. Because this additional requirement is not expressed in the statutes, the statutory scheme is not merely opaque, but subject to multiple interpretations, and those subject to it must guess its meaning. It is therefore void for vagueness.

Judge Godfrey, a seasoned and learned trial judge in Gray's Harbor County, could not discern DFW's interpretation after extensively examining the statutes: At the judicial review hearing of DFW's administrative decision he stated:

You know, I have read these things a half a dozen times...  
and I do not mean to diminish the intelligence level of

probably the average crab fisherman, but I can assure you, if it's confusing to me, it's confusing to them. And I do believe, when you read this entire schematic, it is ambiguous. I find it to be ambiguous....<sup>92</sup>

Although this Court applies the APA standards to the record before the agency, and sits in the same position as the superior court, Judge Godfrey's finding of ambiguity shows that these statutes do not give persons of average intelligence adequate notice of the conduct the statutes proscribe. The statutes are, therefore, void for vagueness.

**D. The punishment of permanent loss of a fishing license worth between \$50,000 and \$70,000 without proper notice and an opportunity to be heard is excessive, unduly oppressive, and unconstitutional under both the federal and Washington State Constitutions, violating constitutional guarantees of both procedural and substantive due process.**

**1. DFW violated Johnson's procedural due process rights.**

The Washington State Constitution guarantees, "No person shall be deprived of life, liberty, or property, without due process of law."<sup>93</sup> Similarly, the Fourteenth Amendment to the U.S. Constitution guarantees, "No State shall... deprive any person of life, liberty, or property, without due process of law."<sup>94</sup> At a bare minimum, procedural due process requires notice and an opportunity to be heard.<sup>95</sup> The notice

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<sup>92</sup> RP 22:19 – 23:6, Sept. 29, 2011.

<sup>93</sup> Wash Const. art. I, § 3.

<sup>94</sup> U.S. Const. amend. 14, § 1.

<sup>95</sup> *Soundgarden v Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

must be reasonably calculated to inform the affected party of the pending action, the basis of any adverse action, and of the opportunity to object.<sup>96</sup>

To determine whether a procedure violates due process, a court engages in a two-step analysis.<sup>97</sup> First, the court must determine whether a liberty or property interest exists entitling a party to due process protections.<sup>98</sup> Second, if such a constitutionally protected interest exists, courts employ a balancing test to determine the degree of process due.<sup>99</sup> The U.S. Supreme Court set out the balancing test in *Mathews*; to determine whether Mr. Johnson received all the process that he was due, this Court must weigh (1) Mr. Johnson's private property interest, (2) the risk of an erroneous deprivation of such interest through the procedures used, as well as the value of additional safeguards, and (3) the Government's interest in maintaining its procedures, including the burdens of additional procedural requirements.<sup>100</sup>

**a. Mr. Johnson has a property interest in his Dungeness crab-coastal fishery license that is subject to due process protections.**

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<sup>96</sup> *State v Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999) (superseded on other grounds by statute as stated in *City of Redmond v Arroyo-Murillo*, 149 Wn.2d 607, 614-16, 70 P.3d 947 (2003)).

<sup>97</sup> *Foss v Nat'l Marine Fisheries Serv*, 161 F.3d 584, 588 (9th Cir. 1998), *citing Mathews*, 424 U.S. at 334-35.

<sup>98</sup> *Foss*, 161 F.3d at 588.

<sup>99</sup> *Foss*, 161 F.3d at 589.

<sup>100</sup> *Foss*, 161 F.3d at 589, *citing Mathews v Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L. Ed.2d 18 (1976).

The Ninth Circuit has long held that applicants have a property interest protectable under the Due Process Clause where the regulations establishing entitlement to the benefits are, as here, mandatory in nature.<sup>101</sup> Here, there can be no doubt that a Dungeness crab-coastal commercial fishery license is property with procedural due process protections, because it is subject to sale, transfer, lease, inheritance, and Washington community property laws.<sup>102</sup>

The State did not simply suspend Mr. Johnson's crab license, but *permanently* revoked it and caused it to be forfeited without notice that it would be forfeited if it was not renewed within one year after it expired. As in *Foss* where the fisherman had a federal fishing (IFQ) permit,<sup>103</sup> Mr. Johnson had a protected property interest in his crab license and his license should not have been taken away absent the procedural due process required by the Washington and U.S. Constitutions *prior* to revocation. Refusal to accept a renewal application ever again, as DFW's final order unequivocally states,<sup>104</sup> is a license ;revocation for all time.

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<sup>101</sup> See mandatory language in RCW 77.70.280(2) and (3) limiting the Department's discretion in issuing Dungeness crab-coastal fishery licenses, and *Foss*, 161 F.3d at 588 (“There can be no doubt that the I[n]dividual F[ishing] Q[uota] permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution.”)

<sup>102</sup> See RCW 77.70.310, RCW 77.65.020(3); and *Foss*, 161 F.3d at 588

<sup>103</sup> *Foss*, 161 F.3d at 588.

<sup>104</sup> See Final Order, Pg. 11, ln 14-16 “That necessarily means that no renewal of license number 60669 may be issued in the future.” CP 127.



The state's argument is apparently that Mr. Johnson should have been familiar with the statutory scheme.<sup>105</sup> However, RCW 77.65.030's statement that "The department shall accept no license or permit applications after December 31st of the calendar year for which the license or permit is sought" does not preclude skipping a full year and then having DFW accept a permit application before December 31st of a later year for a later season. RCW 77.70.360 is unclear when it states, "A person may renew an existing license only if the person held the license sought to be renewed during the previous year or acquired the license by transfer from someone who held it during the previous year, and if the person has not subsequently transferred the license to another person."

As discussed above, the plain meaning of having "held" a license is to have possessed it by lawful title. The statute does not preclude someone from holding an expired license for more than one year. To be sure, DFW found Mr. Johnson still held his License in August 2008 – 20 months after it had expired.<sup>106</sup> Because the statutes do not expressly state that failure to renew in any given year will result in permanent loss of the right to renew a license, the statutes are inadequate notice under due process guarantees. Here, Mr. Johnson has been deprived of his property

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<sup>105</sup> CP 126 ("Given the clear statutory renewal provisions, it was not reasonable for Mr. Johnson [not to timely renew in 2007].").

<sup>106</sup> Finding of Fact No.1, CP 118

right to renew his License in perpetuity without meaningful notice as required by due process.

**b. Mr. Johnson was not afforded the procedural process he was due.**

As to the first *Mathews* factor, the parties do not dispute that Mr. Johnson's interest in his Dungeness crab-coastal fishery license is a substantial private property interest, although DFW argues that this property interest ceased on December 31, 2007.<sup>107</sup>

Coming to the second *Mathews* factor, the notification procedures were inadequate, and the risk of erroneous deprivation great. Neither the statutes nor the notices DFW mailed made sufficiently clear that the consequence of failure to renew by the December 31 deadline the year after a crab license expired would result in the DFW revoking the license. Unwitting crab fishers risk losing their license and livelihood through this inadequate notice.

**c. To satisfy due process requirements, both notice and the opportunity to be heard must be meaningful.**

The irreducible core of procedural due process includes not just notice but *meaningful* notice.<sup>108</sup> DFW notified Mr. Johnson that his late-

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<sup>107</sup> CP 160, wherein the Department states, "In this case, [Johnson] held a property interest in his Dungeness crab-coastal license, subject to and contingent upon the conditions and limitations discussed above."

<sup>108</sup> *City of Redmond v Arroyo-Murillo*, 149 Wn.2d 607, 620, 70 P.3d 947 (2003) (Chambers, J., concurring)

filed application had been denied and it did hold an administrative hearing several months later, in July of 2008. This post-deprivation notice and hearing, however, was useless to Mr. Johnson if one also accepts the Department's argument that any possibility of reinstating Mr. Johnson's License was permanently extinguished by statute after December 31, 2007 had passed.

Neither the statutes nor the license renewal notices, even if the renewal notices clearly stated the renewal deadline, and even if Mr. Johnson had received the renewal notices, give notice of the *consequences* of a failure to renew by the deadline. That consequence is not merely a suspension of commercial crab fishing activities until the license is renewed, but revoking the permanent fishing license and the attendant loss of livelihood. Under DFW's argument, a Dungeness crab-coastal commercial fishing license can be permanently lost with no clear pre-deprivation notice that such loss will occur. DFW further argues that the only post-deprivation notice to which the commercial crab fisher is entitled is simply the resulting license denial. This cannot be the "meaningful notice" guaranteed by the U.S. Constitution. DFW has admitted that while the License was in effect, Mr. Johnson had a property

interest in it.<sup>109</sup> Meaningful notice is pre-deprivation notice of the *full consequences* of a failure to timely renew. This lack of notice was a violation of Mr. Johnson’s right to procedural due process.

As stated above, due process requires *meaningful* notice. Due process also requires that the opportunity to be heard must also be meaningful.<sup>110</sup> The hearing must be “at a meaningful time and in a meaningful manner.”<sup>111</sup> The opportunity to be heard must not be merely cosmetic. Here, a *post-deprivation* hearing in the summer of 2008 did not afford the required procedural due process because it was merely cosmetic and not meaningful. This is so because under the Department’s reading of RCW 77.65.030 and RCW 77.70.360, by the time of the hearing the license renewal deadline had already been missed and there was no possible outcome in favor of Mr. Johnson. A hearing is meaningful only if it affords an opportunity to argue for renewal for good cause before the right to the license is extinguished permanently.

## **2. DFW violated Johnson’s substantive due process rights**

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to

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<sup>109</sup> CP 160 (“In this case, [Johnson] held a property interest in his Dungeness crab-coastal license, subject to and contingent upon the conditions and limitations discussed above.”)

<sup>110</sup> *Mathews v Eldridge*, 424 U.S. 319, 333, 96 S.Ct 893, 47 L.Ed 2d 18 (1976), *Brady v Gebbie*, 859 F.2d 1543, 1554 (9th Cir 1988); *Wenatchee Reclamation Dist v Mustell*, 35 Wn. App 113, 117, 665 P.2d 909 (1983).

<sup>111</sup> *Armstrong v Manzo*, 380 U.S. 545, 552, 85 S Ct 1187, 1191, 14 L Ed.2d 62 (1965).

constitutionally adequate procedures.<sup>112</sup> It is well established that, once issued, professional and motor vehicle licenses create interests requiring due process protection.<sup>113</sup>

The Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law...”<sup>114</sup> To determine whether a regulation violates substantive due process, Washington courts have used a classic three-prong due process test; a law or regulation satisfies substantive due process requirements only when it is (1) aimed at achieving a legitimate public purpose, (2) uses means that are reasonably necessary to achieve that purpose, and (3) is not unduly oppressive on individuals.<sup>115</sup>

However, in *Amunrud*, the majority rejected the third, “not unduly oppressive on individuals” prong of the substantive due process test in a case about the loss of a commercial driver’s license.<sup>116</sup> The dissent in *Amunrud* disagreed, stating that the “unduly oppressive” third prong did

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<sup>112</sup> *Amunrud v Board of Appeals*, 158 Wn.2d 208, 218-19, 143 P 3d 571 (2006), citing *Halverson v Skagit County*, 42 F 3d 1257, 1261 (9th Cir.1994).

<sup>113</sup> *Amunrud*, 158 Wn.2d at 219

<sup>114</sup> U.S. Const. amend. 14, § 1.

<sup>115</sup> *Tiffany Family Trust Corp v City of Kent*, 155 Wn.2d 225, 252, 119 P 3d 325 (2005); *ASARCO Inc v Dep’t of Ecology*, 145 Wn.2d 750, 762, 43 P 3d 471 (2002); *Guimont v Clarke*, 121 Wn.2d 586, 609, 854 P.2d 1 (1993); *Sintra Inc v City of Seattle*, 119 Wn.2d 1, 21, 829 P 2d 765 (1992); *Robinson v City of Seattle*, 119 Wn 2d 34, 830 P.2d 318 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990); *Orion Corp v State*, 109 Wn.2d 621, 646-47, 747 P.2d 1062 (1987).

<sup>116</sup> *Amunrud v Board of Appeals*, 158 Wn.2d 208, 226 n.5, 143 P.3d 571 (2006)

apply in a case about the loss of a commercial driver’s license.<sup>117</sup> The dissent traced the three-prong test to *Lawton v Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894), stating, “We have long relied on the three prong due process test articulated in *Lawton v. Steele*.”<sup>118</sup>

Whether or not the third “unduly oppressive” prong applies to cases involving commercial fishing licenses, there is still the second prong to the rational basis test, that a law or regulation “uses means that are reasonably necessary to achieve” the intended legitimate public purpose. The majority in *Amunrud* rejected only the third prong.<sup>119</sup>

Mr. Johnson agrees that managing Washington’s Dungeness crab-coastal fishery is a legitimate public purpose. Petitioner argues that permanently depriving a crab fisherman of his fishing license and thus his livelihood is not reasonably necessary to achieve the purpose of effective fishery management. Other methods, such as catch limits, vessel size limits, pot limits, and issuing no new licenses can and are being used. To interpret the statutes as the department interprets them, such that a single

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<sup>117</sup> *Amunrud*, 158 Wn.2d at 231 (Sanders, J., dissenting).

<sup>118</sup> 158 Wn.2d at 231 (Sanders, J., dissenting).

<sup>119</sup> 158 Wn.2d at 226 (“the dissent attempts to modify the rational basis test by adding an additional requirement. The dissent erroneously claims this court must also evaluate whether the challenged law is ‘unduly oppressive on individuals’ ”). The *Amunrud* court stated the standard is “whether the law bears a reasonable relationship to a legitimate state interest.” 158 Wn.2d at 226. The first two prongs under *Steele* are that a law or regulation must (1) be aimed at achieving a legitimate public purpose, (2) use means that are reasonably necessary to achieve that purpose. *Amunrud*, 158 Wn.2d at 231 (Sanders, J., dissenting).

failure to renew by the annual deadline is to forfeit the license in perpetuity, is to arbitrarily divest the exact class the statutory scheme was seeking to protect, Washington crab fishers “who have historically and continuously participated in the state’s coastal crab fishery

In *Guimont*, mobile home park owners challenged a statute requiring them to pay a portion of their tenants’ relocation costs when owners convert their park to another use.<sup>120</sup> Regarding the first prong (legitimate public purpose), the court determined that providing relocation assistance to mobile home owners when a mobile home park closes is a legitimate state interest. Regarding the second prong, however, the court determined that requiring society as a whole to shoulder the cost of relocating persons was a far less oppressive solution than forcing individual property owners to bear the entire burden.<sup>121</sup> Turning to the third prong, the *Guimont* court found that the amount of money park owners were required to pay for relocation of tenants ranged from “substantial” to “staggering.”<sup>122</sup> The court concluded that the law was unduly oppressive and violated due process.<sup>123</sup>

Here, although management of Washington’s Dungeness crab fishing industry is a legitimate public purpose, permanently depriving a

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<sup>120</sup> 121 Wn.2d at 593.

<sup>121</sup> *Id.* at 611.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 613.

crab fisherman of his fishing license and thus his livelihood because of a late renewal is not reasonably necessary to achieve that purpose. Less oppressive means are available. For example, limits on vessel size or catch limits, or a temporary period of license suspension could be imposed following a late renewal. It is not necessary for an individual to permanently lose a license for Washington to manage its crab fisheries.

If this Court reaches the third prong of the substantive due process analysis, it should be clear that forever stripping an individual of his livelihood because he filed an application to renew a permit just two and a half months late is unduly oppressive on him. The Dungeness crab-coastal fishery license at issue in this case is valued at between \$50,000 and \$70,000. For an individual fisherman, that loss could easily range between the “substantial” and “staggering” amounts that the *Guimont* court found constitutionally unacceptable. If RCW 77.70.360 together with RCW 77.65.030 create the penalty of forever losing such a valuable license because of one late renewal, these statutes should be struck down as unconstitutional for violating substantive due process rights.

**E. DFW erred in concluding that the doctrine of equitable estoppel is inapplicable to Mr. Johnson’s case and that he was not entitled to relief.**

Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would



result to a party who has justifiably and in good faith relied.<sup>124</sup> When equitable estoppel is asserted against the government, the asserting party must establish five elements:

(1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is “necessary to prevent a manifest injustice,” and (5) estoppel will not impair governmental functions.<sup>125</sup>

A “manifest injustice” is one that is “obvious, directly observable, overt, not obscure.”<sup>126</sup>

1. DFW misrepresented Mr. Johnson’s License when it said it was permanent.

In 1995 the DFW director wrote Mr. Johnson stating DFW was issuing Mr. Johnson a permanent crab fishing license. Now DFW treats Mr. Johnson’s license as an annual license. A permanent license is one held permanently or forever. An annual license is one held year to year. An annual license is one held for one year and if it is not renewed, then you no longer hold it. A permanent license is one that you hold forever, but you renew or activate it when you want to use it. Here, DFW said Mr. Johnson’s License was a permanent license, but then treated it as an

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<sup>124</sup> *Silverstreak, Inc v Washington Department of Labor and Industries*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007).

<sup>125</sup> *Id.*

<sup>126</sup> *State v Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

annual license. Mr. Johnson relied on having a permanent license and not an annual license when he chose not to renew his License in 2007. If his License was truly a permanent license, then he would have continued to hold his License even if it had expired for more than one year.

2. Because DFW gave Mr. Johnson incorrect information regarding the permissibility of a vessel change designation, DFW is equitably estopped from rejecting Mr. Johnson's license renewal application.

In October and November of 2007, DFW incorrectly informed Mr. Johnson that he could not lease his license in 2007 because vessel designations could not be changed more than once during two consecutive *years*. Washington law actually restricts vessel designation changes to once during two consecutive *seasons*, not two consecutive years.<sup>127</sup> The crab fishing season typically runs from December of one year to September of the following year. The License's vessel designation had been changed to Mr. Greenfield's *Smolt* for the 2005-2006 season, thus the designation could not have been changed for the 2006-2007 season, which was a consecutive season. However, Mr. Johnson could have leased his license and changed the vessel designation for the 2007-2008 season, which was the season in question when Mr. Johnson was in touch with DFW during October and November of 2007.

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<sup>127</sup> RCW 77.70.350(1)(b) and (c).

Furthermore, DFW never informed Mr. Johnson that, in unusual circumstances, the law provides for emergency exceptions to the general rule on vessel change designations. RCW 77.70.350(1) states,

(1) The following restrictions apply to vessel designations and substitutions on Dungeness crab-coastal fishery licenses:

(a) The holder of the license may not:

(i) Designate on the license a vessel the hull length of which exceeds ninety-nine feet; or

(ii) Change vessel designation if the hull length of the vessel proposed to be designated exceeds the hull length designated on the license on June 7, 2006, by more than ten feet. However, if such vessel designation is the result of an emergency transfer, the applicable vessel length would be the most recent permanent vessel designation on the license prior to June 7, 2006;

(b) If the hull length of the vessel proposed to be designated is comparable to or exceeds by up to one foot the hull length of the currently designated vessel, the department may change the vessel designation no more than once in any one-year period, measured from September 15th to September 15th of the following year, unless the currently designated vessel is lost or in disrepair such that it does not safely operate, in which case the department may allow a change in vessel designation;

(c) If the hull length of the vessel proposed to be designated exceeds by between one and ten feet the hull length of the designated vessel on June 7, 2006, the department may change the vessel designation no more than once on or after June 7, 2006, unless a request is made by the license holder during a Washington state coastal crab season for an emergency change in vessel designation. If such an emergency request is made, the director may allow a temporary change in designation to another vessel, if the hull length of the other

vessel does not exceed by more than ten feet the hull length of the currently designated vessel.

Unfortunately, Mr. Johnson acted in reliance on the information from DFW regarding the restriction on a vessel designation change in the fall of 2007. Such restriction would mean that not only was Mr. Johnson unable to change the designation from the *Smolt* to a different lessee's vessel, Mr. Johnson was also unable to change the designation to his own vessel. Mr. Johnson therefore knew of no reason to invest \$415 into a license that DFW had informed him could not legally be used either by himself or by a lessee, and he acted without any notice that the failure to renew in that year would result in a permanent loss of license.

By early 2008, when Mr. Johnson believed the restriction on vessel designation change no longer applied, the December 31, 2007 application renewal deadline had passed. Mr. Johnson's reliance was reasonable given that DFW is the state agency responsible for issuing Dungeness coastal-crab fishery licenses and other fishery licenses and can be expected to be familiar with state laws and requirements.

By allowing DFW to repudiate its misinterpretation or misstatement to Mr. Johnson, injury will result to Mr. Johnson through permanent loss of the License. Estoppel is necessary to prevent such manifest injustice. Government functions will not be impaired through

issuing a license renewal that would have been issued anyway had Mr. Johnson not relied on DFW's statements.

3. Because Johnson did not receive a license renewal reminder in late 2007, and because the reminders from previous years included no warning about the permanent loss of the license for failure to timely renew, DFW is equitably estopped from rejecting Mr. Johnson's license renewal application.

The Department sends crab license renewal reminders toward the end of each year.<sup>128</sup> Mr. Johnson testified that he did not receive a renewal reminder in 2007 and, taking into account affidavits regarding problems with mail delivery in the area at that time, a finding of fact was made that it was possible Mr. Johnson did not receive the 2007 notice.<sup>129</sup> Because notices had been sent in apparently all previous years, Mr. Johnson had come to rely on the notices. He thus acted, or in this case failed to act, based on that reliance.

As a further note, even if the notice had been received, it was undisputed at the administrative hearing that the DFW licensing forms contain no notice that if the license ever lapses for failure to renew timely, it can never be reinstated.<sup>130</sup> The form sent in late 2007 and which Mr. Johnson did not receive simply stated, "License will expire December 31<sup>st</sup> of issuance year," and "ATTENTION LIMITED

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<sup>128</sup> CP 119 (FF 6).

<sup>129</sup> CP 118-19 (FF 5).

<sup>130</sup> RP 11:27-12:5

LICENSE HOLDER THIS LICENSE MUST BE RENEWED BEFORE DECEMBER 31, 2007.”<sup>131</sup> The administrative hearing officer stated, “Okay, but it doesn’t say why it must be renewed does it? I mean, if I were to look at this I’d say yeah, my license is going to run out.”<sup>132</sup> She further asked, “why would you not say ‘or you would lose your license?’ I mean if it expires I understand the license expires, but that doesn’t mean you can’t renew an expired license.”<sup>133</sup> However, even the inadequate warning quoted above was not present on forms sent in earlier years; DFW testified at the administrative hearing that such warning as the 2007 form had was new that year, and not even standard on all forms.<sup>134</sup>

The warning notices on the form sent in late 2007 are themselves confusing. Ms. Stedman testified that the forms were sent only to those who had not yet renewed during 2007.<sup>135</sup> In other words, forms were sent to holders of licenses that were issued during 2006, that had expired on December 31, 2006, and that had not yet been renewed in 2007. Yet the warning notice stated, “License will expire December 31<sup>st</sup> of issuance year.” It should have stated that the license had already expired on December 31<sup>st</sup> of the issuance year, i.e. December 31, 2006, and that a

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<sup>131</sup> CP 85.

<sup>132</sup> RP 12 4–5

<sup>133</sup> RP 12:21-23.

<sup>134</sup> RP 11:11 –12:20. *See also* CP 35.

<sup>135</sup> RP 6:5-21.

failure to renew by December 31, 2007 (within a year after it had expired) would result in permanent loss of the license. Also, notification about renewing the license prior to December 31, 2007, is directed to “Attention Limited License Holder.” Nothing in the license renewal application indicates which licenses are “limited.” To the contrary, Ex. L, DFW’s 1995 letter, told Mr. Johnson that he had a “permanent license.” The warning to “Attention Limited License Holder” would not reasonably apprise Johnson that he had to renew by December 31, 2007.

**F. Mr. Johnson is Entitled to Attorney Fees and Costs**

If Mr. Johnson prevails in this appeal, as a qualified party that prevails in a judicial review of an agency action, he should be awarded his fees and other expenses, including reasonable appellate attorney fees, under RCW 4.84.350 and RAP 18.1

**VI. Conclusion**

DFW issued Mr. Johnson a “permanent” license for commercial Dungeness crab-coastal fishing in 1995. The statutory scheme does not state a person holding a permanent license will lose the right to renew the license if it is expired for more than one year. The statutory scheme states that these licenses may be renewed annually, and that the deadline to renew is December 31 of the calendar year for which the license is sought. Other limited licensing statutes that intend for licenses to be not

renewed permanently are clear and use different language than the crab fishing license statutes. The only reasonable interpretation of the statutory scheme must be that the right to fish in a specific year may be denied for non-renewal, but not that non-renewal in a specific year would not result in loss of the license in all subsequent years. An interpretation that results in a permanent loss of the right to renew the License would be void for vagueness and violate due process because it does not clearly provide a person of reasonable intelligence notice of proscribed conduct. Finally, DFW is estopped from contending Mr. Johnson's license is an annual license because in 1995 it represented the License was a permanent license and because it gave Mr. Johnson inaccurate information about releasing his license in 2007.

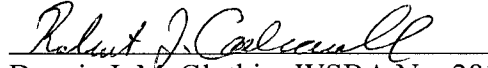
Therefore, this Court should enter an order affirming Judge Godfrey's Judgment and Declaratory Order and vacating DFW's Final Order denying Mr. Johnson the right to renew his License in perpetuity.

Mr. Johnson further requests that this court order DFW to issue Mr. Johnson a current Dungeness crab-coastal fishing license upon application and restore all the rights and privileges that Mr. Johnson has as a commercial crab license holder. Finally, Mr. Johnson requests that this court award him all costs and attorneys' fees associated with this appeal pursuant to RCW 4.84.350 and RAP 18.1.



DATED this 27 day of April, 2012.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

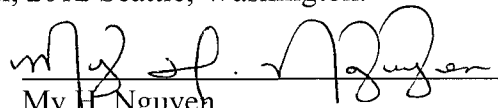
On the below written date, I caused delivery of a true copy of Curtis Johnson's Opening Brief to the following individuals via U.S. Mail:

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DEPOSIT

Signed this 27th day of April, 2012 Seattle, Washington.

  
My H. Nguyen  
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