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DIVISION TWO

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

NO. 34883-7-II

ECHO BAY COMMUNITY ASSOCIATION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL
RESOURCES; RICHARD KAUPILLA; ANDY BLAIR;
RICKY BLAIR; and F/V PUGET LLC,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case challenges a decision by the Washington Department of Natural Resources (“DNR”) to approve an “aquatic lands lease” to respondents Andy Blair and Richard Kaupilla, dba F/V Puget LLC (hereafter “F/V Puget”). The lease at issue approves the installation of up to eight 25 foot by 50 foot herring holding pens in the middle of Echo Bay on the north side of Fox Island in Pierce County, Washington. The herring pens will be used to store and starve herring for up to two weeks until they are removed for processing and sale as bait. The herring pens, a commercial use, will be located in the middle of, and significantly interfere with, an active and fully developed recreational-use bay.

DNR’s decision approving the aquatic lands lease fails on at least two counts. First, DNR may lease navigable bedlands, such as those at issue, only to those persons who own or lease adjacent tidelands. Because F/V Puget does not own or lease adjacent tidelands, the aquatic lands lease directly violates state law and is an *ultra vires* action.

Second, even if, *arguendo*, DNR does have the authority to approve an aquatic lands lease to a person that does not own adjacent tidelands, the authority is limited to “aquaculture” uses. Because the temporary holding

and starving of herring for eventual off-site processing and sale is not “aquaculture” DNR’s action approving the present lease still fails.

II. ASSIGNMENT OF ERROR

The Superior Court erred by affirming the DNR lease decision.

Issues pertaining to the assignment of error are as follows:

1. Is DNR precluded by RCW 79.130.010 from leasing aquatic lands to individuals or companies that do not own or lease adjacent shore or tide lands?
2. Where herring are simply stored for starvation and not fed, raised or otherwise processed, do the proposed herring net pens qualify as “aquaculture” for the purposes of RCW 79.135.110?

III. RELEVANT FACTS

In late 2002, F/V Puget applied to DNR for an aquatic lands lease. AR 1-11.¹ F/V Puget proposed leasing state aquatic lands in Echo Bay, a small inlet on the north side of Fox Island in Pierce County, Washington. Echo Bay is located just south and west of the Fox Island Bridge and opens

¹ Citations to DNR’s agency record are annotated as “AR ____.” The page numbers refer to the pages marked in DNR’s Certificate of Record filed with the court on November 4, 2005.

to the north. F/V Puget proposed to install up to eight herring net pens. Each net pen was proposed to measure 50 feet by 25 feet for a total surface coverage of 10,000 square feet. AR 10; AR 446.² The pens will be approximately 15 feet deep and be anchored to the sea floor. AR 10.

According to the application, the lease would entail:

The holding of herring till they are ready to process then taken from the site by the buyer.

AR 8.

The Plan of Operations approved by DNR provides a little more detail. *See* AR 446-447. According to the approved plan, three people will crew a separate herring fishing vessel. Herring will be caught in open waters at night as they come to shallower depths. The fishing vessel will then transport the live herring to Echo Bay during nighttime hours and unload the fish into the pens. AR 447.³ According to the approved Plan of Operations:

² AR 446-450 is identified as Exhibit B to the Aquatic Lands Lease. Exhibit B is the “Plan of Operations and Maintenance” and sets forth the details of the proposed herring pens as ultimately approved by DNR.

³ The approved Plan of Operations erroneously states that Pierce County has restricted the hours of operation in the Shoreline Permit. While the County originally restricted the hours of operation to prevent boat traffic and unloading in the middle of the night, that restriction was subsequently lifted.

After the herring are caught, they are transferred into a holding pen where they are starved for two weeks. The fish are not killed during the starvation process; herring are starved so they freeze more easily. After starving, herring are removed from the pens, processed at an upland location and sold by the dozen as bait-fish to sport fishermen.

AR 447.

On May 25, 2004, DNR notified the applicants that it had accepted the application and that, in the event they obtained all required local, state and federal permits, DNR would be willing to lease the requested area. In December 2004, appellants Echo Bay Community Association⁴ wrote DNR officials and asked DNR to withdraw the May 25, 2004 acceptance letter because the proposed lease was not for “aquaculture” and violated state law. AR 300-304. DNR responded to the Echo Bay Community Association on March 10, 2005, disagreeing with its position. AR 311-313.

⁴ The Echo Bay Community Association is a Washington non-profit corporation made up of individuals and families that own property on, reside on and use Echo Bay. Echo Bay currently hosts significant recreational activities including water skiing, canoeing, kayaking, row boating, sailing, diving, swimming and fishing. The net pens would occupy the center of Echo Bay and interfere with these uses. *Id.* Also, the transfer of fish at night would create noise during an otherwise extremely quiet time in Echo Bay.

None of the applicants, Andy Blair, Richard Kaupilla or F/V Puget LLC, own or lease tidelands or shorelands adjacent to the aquatic lands to be leased in Echo Bay. The tidelands and uplands surrounding Echo Bay are developed.

On September 9, 2005, DNR issued Aquatic Netpen Lease No. 20-075438 to Richard Kaupilla, Andy Blair and F/V Puget LLC. AR 318, 416-450. Echo Bay Community Association brought an action in Pierce County Superior Court under RCW 79.02.030, which allows persons affected by public lands leases to appeal lease decisions to Superior Court. (Cause No. 05-2-12681-2). In a written decision on May 1, 2006, Judge Linda C.J. Lee found that DNR had authority to lease beds of navigable waters to F/V Puget for aquaculture use even though F/V Puget did not own or lease abutting tidelands or shorelands. CP 56-57. The court also found that storing and starving herring in net pens constitutes aquaculture. CP 59. The appeal of the DNR lease decision was denied. CP 60. This appeal followed.

IV. ISSUES

1. Is DNR precluded by RCW 79.130.010 from leasing aquatic lands to individuals or companies that do not own or lease adjacent shore or tide lands?
2. Where herring are simply stored for starvation and not fed, raised or otherwise processed, do the proposed herring net pens qualify as “aquaculture” for the purposes of RCW 79.135.110?

V. DISCUSSION

A. Standard of Review

This matter comes before the Court under RCW 79.02.030, which governs appeals of DNR decisions to lease public lands. Under that statute, “any party feeling aggrieved by the judgment of the superior court may seek appellate review as in other civil cases.” RCW 79.02.030. The Court’s review of DNR’s action is *de novo* and based on the agency’s certified administrative record. *Id.*

There is no dispute in the material facts. This case instead involves issues of statutory interpretation. Statutory construction is a question of law that this court reviews *de novo* under an error of law standard. *Johnson Forestry Contracting, Inc. v. Wash. State Dept. Of Natural Resources*, 131

Wn. App. 13, 23, 126 P.3d 45 (Div. 2, 2005); *City of Pasco v. Public Employment Relations Comm'n.*, 119 Wn.2d 504, 507, 833 P.2d 314 (1992).

It is ultimately for the court to determine the purpose and meaning of a statute, even if the court's interpretation is contrary to that of an agency charged with carrying out the law. *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 554-55, 637 P.2d 652 (1981). It is "emphatically the province and duty of the judiciary to say what the law is." *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-36, 646 P.2d 113 (1982).

B. Background and Terminology

1. DNR's Management of Aquatic Lands

By way of brief background, Washington asserts and maintains ownership of the beds and shores of all navigable tidal waters - including, relevant to this appeal, Echo Bay. Wash. Const., art. XVII, § 1. Management of these valuable and finite lands is delegated to the DNR:

The legislature finds that state-owned aquatic lands are a finite resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the [DNR] the responsibility to manage these lands for the benefit of the public.

RCW 79.105.010. The legislature's delegation of management authority is sharply bounded by statute. RCW 79.105.030; *see generally*, Ch. 79.105 RCW, Ch. 79.115 RCW; Ch. 79.120 RCW; Ch. 79.125 RCW, Ch. 79.130 RCW, Ch. 79.135 RCW, Ch. 79.140 RCW. DNR is required to manage the aquatic lands and is required to "strive to provide a balance of public benefits for all citizens of the state." RCW 79.105.030. Recognized public benefits include (1) the encouragement of direct public use and access; (2) the fostering of water-dependent uses; (3) ensuring environmental protection; and (4) utilizing renewable resources. *Id.*

2. Terminology

The term "aquatic lands" is defined to mean "all tidelands, shorelands, harbor areas and the beds of all navigable waters." RCW 79.105.060(1). The herring pens at issue in this appeal are proposed for the "beds of navigable waters" within Echo Bay. RCW 79.105.060(2). The beds of navigable waters are generally described as the portion of state-owned aquatic lands lying waterward of the extreme low tide mark in navigable tidal waters. *Id.* The area between the ordinary high tide line and the extreme low tide mark is defined as "tidelands." RCW 79.105.060(4), .060(18), .060(22).

C. DNR's Decision Approving F/V Puget Sound's Aquatic Lands Lease in Echo Bay Was *Ultra Vires* and Violated State Law

1. RCW 79.130.010 precludes leasing state bedlands to persons that do not own or lease adjacent tidelands

DNR's authority to lease the "beds of navigable waters" is controlled by Chapter 79.130 RCW. RCW 79.130.010 provides:

the department of natural resources may lease to the **abutting tide or shore land owner or lessee**, the beds of navigable waters laying below the line of extreme low tide in waters where the tide ebbs and flows. . .

In case the abutting tide or shore lands or the abutting uplands are not improved or occupied for residential or commercial purposes, the department may lease such beds to any person for a period not exceeding ten years for booming purposes.

(Emphasis added). Under the plain language of this statute, DNR's authority to lease the beds of navigable waters, such as Echo Bay, is limited to leasing to abutting tide land owners or lessees where the adjacent property is developed, as in this case. If the adjacent properties are undeveloped, the bed lands may be leased only for booming purposes.

The plain statutory language is confirmed in DNR's Aquatic Resources Policy Implementation Manual (March, 2000)("Policy Manual").

AR 668-875. According to the “Intent” section of the Policy Manual, it is “intended to clearly express the overall goals and directions for state-owned aquatic lands, and to provide succinct guidance to staff regarding many common situations.” AR 673. The Policy Manual “offers greater detail and discussion than the laws and policies themselves, and outlines Executive Management’s expectation on how to apply these laws and policies to various situations when managing state-owned aquatic lands.” *Id.*

Further, according to the Policy Manual:

Managing aquatic resources properly and consistently across the state requires that the laws and policies affecting these resources are clearly understood and uniformly interpreted and implemented. This manual is designed to help department staff by outlining the standards that apply to all decisions, on both use authorization application and other land management efforts. These standards are derived directly from (in order of precedence):

1. Washington State Constitution
2. Washington State statutes
3. Department rules
4. Policies approved by the Board or Natural Resources
5. Direction from the Commissioner of Public lands.

This manual does not create or change laws or policies. However, **the guidance provided here may interpret existing laws and**

policies or may change past department practices when previous interpretations and practices have been found ineffective or insufficient for fulfilling the department's responsibilities.

AR673-674 (emphasis added).

DNR's Policy Manual includes a section on "bedlands." AR 709. The discussion is applicable to all uses of the term "beds of navigable waters" used in former chapters 79.90 RCW through 79.96 RCW.⁵ Under its discussion on bedlands, the DNR Policy Manual confirms:

With the exception of harbor areas, **bedlands may be leased only to the owner of abutting private tidelands or shorelands or to the lessee of abutting public tidelands or shorelands.** However, if the abutting tidelands, shorelands or uplands are not improved or occupied, then the department may lease the bedlands to any party for log booming for up to ten years."

Manual, p. 3b-1 (emphasis added).

Thus, there can be no dispute that under both RCW 79.130.010 and DNR's traditional interpretation of it, Echo Bay bedlands may only be leased to the owners or lessees of abutting tidelands. Because there is no dispute that the F/V Puget does not own or lease adjacent tidelands, DNR's decision

⁵ Chapter 79.90 RCW through 79.96 RCW were recodified in 2005 as Chapters 79.105 RCW to 79.135 RCW.

approving the aquatic lands lease was in direct violation of RCW 79.130.010. On this basis alone, DNR's lease must be deemed null and void as *ultra vires* action.

2. The Superior Court's reliance on RCW 79.135.110 is misplaced

Despite the express plain language of RCW 79.130.010, the Superior Court found that DNR could lease bedlands to non-adjacent owners or lessees due to RCW 79.135.110⁶, which generally allows the leasing of tidelands and bedlands for aquaculture. CP 56-57. This interpretation is unsound. Following accepted rules of statutory construction, RCW 79.135.110 can not, and does not, over-ride the express prohibition in RCW 79.130.010.

It is a fundamental rule of statutory construction that a legislative enactment must be read as a whole and effect given to each part. Whenever possible, a statutory construction which nullifies, voids or renders meaningless or superfluous any section or words must be avoided. *Nisqually Delta Assn. v. City of DuPont*, 95 Wn.2d 563, 627 P.2d 956 (1981); *City of Bellevue v. East Bellevue Community Council*, 138 Wn.2d 937, 983 P.2d 602 (1999); *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Further, a statute must be read in its entirety, not piecemeal. All provisions of an act

⁶ RCW 79.135.110 is a 2005 recodification of RCW 79.95.010.

must be considered in their relation to each other, and, if possible, harmonized to ensure proper construction. *Skamania County v. Columbia River Gorge Comm'n.*, 144 Wn.2d 30 (2001); *State v. Smith*, 80 Wn. App. 535, 910 P.2d 508 (1996).

In this case, RCW 79.130.010 enacts a blanket ban on leasing navigable bedlands to non-adjacent tideland owners or lessees. RCW 79.135.110, however, generally allows the leasing of bedlands for oyster, clam and other aquacultural uses. An interpretation where RCW 79.135.110's allowance for aquaculture leases overrides RCW 79.130.010's prohibition on bedland leases to non-adjacent owners or lessors renders that prohibition in RCW 79.95.010 superfluous. In order to read these two sections of the same bill together – without rendering either section meaningless – they should be read so that RCW 79.135.110 allows bedland leases to be issued for oyster, clam or aquacultural uses, so long as the lessee is an adjacent tideland owner or lessee. Under this interpretation, both statutes are given effect.

The Superior Court, however, found that “such an interpretation is contrary to the plain language of RCW 79.135.110” because that statute says that the “beds of all navigable waters in the state. . .shall be subject to lease

for the purposes of. . . aquaculture use.” CP 57. The court further reasoned that leasing such beds only to abutting tideland and shoreland owners or lessees would render RCW 79.135.110 superfluous. CP 56-57. This is patently wrong. Despite acknowledging that the statutes must be harmonized, the superior court gave effect to one at the expense of the other. In concluding that DNR can lease bedlands for aquaculture to “any person,” the court rendered superfluous the entire text of RCW 79.130.010. If “any person” can lease bedlands and tidelands for aquacultural purposes, then the prohibition in RCW 79.130.010 restricting bedland leases only to adjacent shoreland or tideland owners or lessees is meaningless.

It is not necessary to render either statute meaningless. Again, by reading the two statutes together, it is clear that “any person” owning adjacent shorelands or tidelands may lease publicly owned shorelands and tidelands. “[S]tatutes relating to the same subject ‘are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes.’” *Estate of Kerr v. Bennett*, 134 Wn.2d 328, 337, 949 P.2d 440 (1993), quoting *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm’n.*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). In this case, because the two statute can be

harmonized, there is no need to resort to eliminating one statute at the expense of the other.

It is also a basic rule of statutory interpretation that the legislature must be presumed to know how to exempt a particular use from a statutory requirement. In this case, if the Legislature had wanted to exempt the lease of bedlands for oysters, clams and aquaculture from the prohibition in RCW 79.130.010, it could have written the statute to do so. RCW could have been written to state:

Except as provided in RCW 79.135.110, the department of natural resources may lease to the abutting tide or shore land owner or lessee, the beds of navigable waters lying below the line of extreme low tide ...

Indeed, this is precisely what the Legislature did in 1987. In 1987 the Legislature faced the U.S. Navy's proposal to construct the Everett Home Port. In order to assist the Navy's decision to build the Home Port in Washington, the Legislature determined that it was necessary to allow the Navy to lease bed lands in Port Gardner Bay for the disposal of dredge spoils. The Navy did not own or lease adjacent tidelands and was thus prohibited from leasing bedlands in Port Gardner Bay. In response, the Legislature adopted ESSB 5604 (Laws, 1987, c. 271). ESSB 5604 specifically adopted

RCW 79.130.050 and 79.130.060⁷ authorizing DNR to issue a bedland lease to the Navy. Since the Navy was obviously not an owner or lessee of tidelands adjacent to Port Gardner Bay, the Legislature, Section 3 of ESSB 5604,⁸ amended RCW 79.130.010⁹ to specifically allow this particular bed land lease.

D. Temporarily Storing and Starving Herring is Not “Aquaculture”

Even if, *arguendo*, DNR is allowed to lease the beds of navigable waters to persons that do not own or lease adjacent tidelands, DNR’s authority is limited to leasing for the purpose of “planting and cultivating oyster beds, or for the purpose of cultivating clams or other edible shellfish, or for other aquaculture use...” RCW 79.135.110. Obviously F/V Puget is not seeking to cultivate oysters, clams or other edible shellfish. Thus, the lease is only allowed if the proposal to temporarily store and starve herring is qualifies as an “other aquaculture use.”

The term “aquaculture use” is not defined within DNR’s controlling statutes. The legislature has, however, defined the term as it relates to

⁷ Formerly RCW 79.95.050 and 79.95.060.

⁸ A copy of ESSB 5604 is attached.

⁹ Formerly RCW 79.95.010.

programs regulated by the Department of Agriculture. RCW 15.85.020

defines “aquaculture” as:

the process of growing, farming or cultivating private sector cultured aquatic products in marine or freshwater and includes management by an aquatic farmer.

Id. Obviously the temporary storage and starvation of herring is not “growing” herring, “farming” herring or “cultivating” herring. It is simply the storage and starvation of herring for processing off site.¹⁰

Obviously recognizing that the proposed herring pens do not meet the definition of aquaculture in RCW 15.85.020, DNR disputes the applicability of the definition. According to DNR, the statutory definition in RCW 15.85.020 should not apply to its activities because its “management

¹⁰ Again, according to the approved plan of operations:

After the herring are caught, they are transferred into a holding pen where they are starved for two weeks. The fish are not killed during the starvation process; herring are starved so they freeze more easily. After starving, herring are removed from the pens, processed at an upland location and sold by the dozen as bait-fish to sport fishermen.

AR 447.

authority and objectives are unique.” In DNR’s opinion, it should be treated differently because it is authorized to manage aquatic lands to “improve the production and harvesting of seaweeds and sealife.” DNR’s logic completely ignores that the purpose behind Chapter 15.85 RCW is to promote aquaculture production in the state. *See* RCW 15.85.010. Under this statute, the Department of Agriculture is authorized to create a specific marketing plan for aquaculture.

Regardless of whether the Legislature was addressing DNR’s authority to lease state lands for aquaculture or the Department of Agriculture’s authority to create a marketing plan for state aquacultural products, it was talking about the same thing: “aquaculture.” The Legislature’s definition of the term “aquaculture” should be given effect.

The question before the court is whether the legislature intended DNR’s authority to lease bedland for “other aquacultural uses” to include the storage and starvation of herring prior to processing. The plain meaning of the term aquaculture “is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute *and related statutes* which disclose legislative intent about

the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*,
146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

While “aquaculture” is not defined in a statute specifically applicable
to DNR, DNR has created a regulatory definition of “aquaculture.”

According to this definition:

“Aquaculture” means the culture and/or
farming of food fish, shell fish and other
aquatic plants and animals in fresh water,
brackish water or salt water areas.
Aquaculture practices may include, but are not
limited to hatching, seeding or planting,
cultivating, feeding, raising, harvesting of
planted crops or natural crops so as to
maintain optimum yield, and processing of
aquatic plants and animal.

WAC 332-30-106.

Again, temporarily storing and starving herring in closed net pens is
obviously not “culture or farming.” Nor can it be argued that temporary
storage and starvation of herring is equivalent to a common definition of
“hatching, seeding or planting, cultivating, feeding, raising or harvesting of
crops.” Indeed, DNR has not argued that it is. *See* AR 311, 313. Instead,
DNR argued - and the Superior Court agreed - that the storage and starvation
of herring is equivalent to “processing” of animals. AR 313. This argument
must fail for at least two reasons.

First, DNR's interpretation in this case contradicts its own established Aquatic Resource Policy Implementation Manual. The Policy Manual describes aquaculture as:

harvesting of existing shellfish, cultivating shellfish in artificial beds, cultivating shellfish on floating rafts and *raising* fin fish in floating net pens.

AR 667 (emphasis added). Obviously temporarily storing and starving herring is not "raising" fin fish – it is quite the opposite.

Second, while DNR may argue herein that the temporary storage and starvation of fish is "production," according to the application and approved plan of operations, the "processing" of the herring will take place away from the net pens. According to the approved Plan of Operations:

After the herring are caught, they are transferred into a holding pen where they are starved for two weeks. The fish are not killed during the starvation process; herring are starved so they freeze more easily. **After starving, herring are removed from the pens, processed at an upland location** and sold by the dozen as bait-fish to sport fishermen.

AR 447 (emphasis added). Plainly, DNR recognized and approved that the "processing" of the herring will take place at upland locations. DNR cannot

now argue that the processing is taking place within the passive storage and starvation in the net pens.

Because the application is not for the farming or cultivation of fish, and not for the processing of fish, it does not meet the definition of aquaculture. DNR's decision approving a lease under the aquaculture statute was erroneous.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse DNR's approval of the aquatic lands lease for the Echo Bay herring net pens.

Dated this 15th day of September, 2006.

Respectfully submitted,

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DATED this 15th day of September, 2006, at Seattle,

Washington.


DENISE BRANDENSTEIN

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