

NO. 35396-2-II

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**COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

NELSON ALASKA SEAFOODS, INC.,

Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF APPELLANT NELSON ALASKA SEAFOODS, INC.

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I. INTRODUCTION

This appeal requires the Court to construe the meaning of the enhanced food fish tax statute, RCW 82.27, et seq. (hereinafter “food fish tax” or “fish tax”), which was amended by the Legislature in 1985 by removing certain language defining the taxable event. However, despite the amendment, the Washington State Department of Revenue (“DOR”) continued to collect the fish tax as if the statute had not been amended. The taxing statute originally imposed the tax on the “owner” that was the “first commercial possessor” of the food fish in Washington “after the food fish have been landed”. The 1985 amendments removed the “after the food fish have been landed” language from the definition of the taxable event under the statute. After the amendment, the taxable event was defined simply as “the first [commercial] possession in Washington by an owner.”

Nelson Alaska Seafoods, Inc. (“Nelson Alaska”) purchased geoducks from the State of Washington Department of Natural Resources (“DNR”) via commercial sales contracts and harvesting agreements and harvested the geoducks from State-owned tidelands pursuant to these sales contracts with DNR. Therefore, as a purchaser of the geoducks located in Washington from a previous owner of the geoducks, i.e., DNR, via

commercial sales contracts, Nelson Alaska could not be the “owner” that is the “first commercial possessor” of the geoducks under the amended statute. That “owner” and “first commercial possessor” under the clear language and plain meaning of the amended statute is DNR.

When DOR realized the amended statute did not support its interpretation and application of the taxing statute after the 1985 amendment, in 2002 DOR requested that the Legislature “clarify” the statute by adding back the “after the food fish have been landed” language that it had removed 17 years earlier. For five (5) years prior to that statutory change, DOR collected the fish tax from Nelson Alaska for its geoduck purchases from DNR. Nelson Alaska claimed a refund of the fish tax it paid because it was not the “owner” that was the “first commercial possessor” of the geoducks in Washington. DOR denied the refund claim, and Nelson Alaska appealed that denial by initiating this refund suit in Thurston County Superior Court.

Nelson Alaska argued the amended statute is clear and unambiguous, and that the plain meaning of the amended statute imposed the tax on the “owner” that was the “first commercial possessor” of the geoducks. That “owner” was not Nelson Alaska. DOR argued that, despite removing the “after the food fish have been landed” language from the statute, the change was “inadvertent”; the Legislature really meant the

tax was still imposed on the first owner “after the food fish have been landed” even though that language had been removed from the statute; the position of Nelson Alaska would impose the tax on DNR producing an “absurd result”; and the Legislature later “clarified” the amended statute (at DOR’s request) by adding the “after the food fish have been landed” language back into the statute.

The trial court accepted the arguments of DOR and granted summary judgment in its favor denying Nelson Alaska’s refund claim. The trial court found that because the parties had both presented reasonable arguments, that meant there was an ambiguity in the amended statute as to the meaning of “owner”, which allowed the court to consider more than just the language of the statute itself to determine legislative intent. By looking at factors beyond merely the statute’s language, the trial court concluded that the Legislature still intended to impose the tax on the first “owner” of the geoducks *after* they have been landed, even though the Legislature had removed that language from the definition of the taxable event, changing the incidence of the tax. The trial court’s determination in effect judicially legislated the “after the food fish have been landed” language back into the statute even during the period that the Legislature had unanimously voted to remove it as a factor in determining the taxable event for imposition of the fish tax.

The trial court erred in its determination that there is an ambiguity in the food fish tax statute. The trial court misapplied well-established rules of statutory construction in granting DOR's summary judgment motion and denying the motion of Nelson Alaska. The trial court's action creating judicial legislation putting back into the statute what the Legislature had removed substituted the court's language and judgment regarding the incidence of the food fish tax for that of the Legislature. That is improper and erroneous. This Court should reverse the trial court's order and award Nelson Alaska a refund of the food fish tax it paid to DOR during the periods it was not liable for the tax because it was not the "owner" that was the "first commercial possessor" in Washington of the geoducks it purchased from DNR within the plain meaning and unambiguous language of RCW 82.27.020(1) in effect during those periods. That "owner" and "first commercial possessor" was DNR.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED FOR REVIEW

A. Assignments Of Error

1. The trial court erred in granting DOR's summary judgment motion and denying Nelson Alaska's summary judgment motion, resulting in disallowance of Nelson Alaska's claim for refund of the enhanced food fish tax imposed by RCW 82.27, et seq., it paid to DOR

during the periods January 1, 1998 through June 30, 2001. CP 291-293; RP 52.

2. The trial court erred in concluding that there is an ambiguity in the language of RCW 82.27.020(1), as amended by the Legislature in 1985, requiring or permitting the trial court to look beyond the plain meaning and language of the statute to determine legislative intent. RP 46-47, 48-49, 52.

3. The trial court erred by focusing its analysis of the statute on whether DNR could be an “owner” liable for the food fish tax under RCW 82.27.020(1), as amended by the Legislature in 1985, rather than determining whether Nelson Alaska is liable for the fish tax under the language of the amended statute regardless of whether the amended statute imposes liability for the tax on DNR. RP 45-53.

4. The trial court erred in determining of the word “owner” in RCW 82.27.020(1) is ambiguous, and that the term cannot include DNR. RP 48; 50-52.

5. The trial court erred in determining that Nelson Alaska’s position “as applied to DNR as first commercial possessor is an absurd result.” RP 48.

B. Issues Presented For Review

1. Is Nelson Alaska the “owner” that was the “first commercial possessor” of the geoducks purchased from DNR and harvested by Nelson Alaska, within the meaning of RCW 82.27.020(1) as amended in 1985, such that Nelson Alaska is liable for the enhanced food fish tax imposed by RCW 82.27, et seq.? (Assignments of Error Nos. 1, 3 & 4)

2. Is the language of RCW 82.27.020(1) as amended in 1985, providing, “The taxable event [for imposition of the enhanced food fish tax] is the first possession in Washington by an owner”, plain and unambiguous? (Assignments of Error Nos. 1, 2, 3, 4 & 5)

3. Can the term “owner” as used in RCW 82.27.020(1) include DNR? (Assignments of Error No. 3, 4 & 5).

III. STATEMENT OF THE CASE

A. Facts Relevant To The Issues Presented For Review

The facts relevant to the issues presented for review are not in dispute and were not in dispute in the trial court proceedings. RP 46.

1. DNR sells state-owned geoducks to Nelson Alaska.

Nelson Alaska Seafoods, Inc. (“Nelson Alaska”), formerly known as Nelson Alaska Sea Products, Inc., is a Washington corporation that,

during the periods in issue, engaged in the harvest, purchase and resale of geoducks (large edible clams). CP 95. As part of its business, Nelson Alaska bid for and entered into contracts with the State of Washington Department of Natural Resources (“DNR”) under which Nelson Alaska obtained the right to harvest geoducks from state-owned aquatic tidelands and to purchase the harvested geoducks from DNR. CP 96, 99-246. DNR is authorized by statute to sell geoducks on specified tracts of state-owned aquatic tidelands and enter into harvesting agreements with purchasers for the non-exclusive right to harvest the geoducks from those specified tidelands. CP 20, 56, 99-246.

2. The DNR Sales Contracts¹ are commercial sales contracts.

When DNR accepts a purchaser’s bid, DNR and the purchaser enter into a contract entitled “Geoduck Harvesting Agreement and Contract of Sale”. CP 20, 56, 99-246. Between January 1, 1998 and December 31, 2001, Nelson Alaska entered into approximately 30 to 40 of these Sales Contracts with DNR, each entitled “Geoduck Harvesting Agreement and Contract of Sale”, for the purchase of geoducks, and purchased geoducks from DNR under these Sales Contracts. *Id.* The

¹ The Geoduck Harvesting Agreement and Contract of Sale are form contracts with virtually identical language (other than language relating to location, timing and duration of the Contract). CP 99-246. These contracts between DNR and Nelson Alaska will be collectively referred to as the “Sales Contracts”.

Sales Contracts between DNR and Nelson Alaska are substantially the same. CP 56; *Id.* Each Sale Contract has a specified contract price per pound of geoducks Nelson Alaska harvests under each contract. CP 20, 56, 99-246. The Sales Contracts refer to Nelson Alaska as “Purchaser”.

Id. The Sales Contracts also include the following provisions:

- “DNR agrees to **sell** to Purchaser, and Purchaser agrees to **purchase and remove** geoducks from the property described in Clause 3. [emphasis added]”
- “Purchaser shall pay DNR the contract price shown on Exhibit A for each pound of geoducks that Purchaser harvests from a Harvest Area.”
- “**Title to the geoducks** identified in Clause 2 and the risk of loss **passes to the Purchaser when the Purchaser severs the geoducks from the Property.** [emphasis added]”

CP 103-104, 124-125, 144-145, 167-168, 188-189, 209-210, 230-231; *Id.*

The Sales Contracts also include a number of warranty disclaimers commonly found in commercial sales contracts that mirror the various warranties found in Article 2 of the Uniform Commercial Code, which addresses the sales of goods. *See, e.g.,* RCW 62A.2-313 (express warranties), 62A.2-314 (merchantability); 62A.2-315 (fitness for particular purpose). CP 71, 104, 125, 145, 168, 189, 210, 231.

Nelson Alaska generally hired a boat and personnel to harvest geoducks on Nelson Alaska’s behalf. CP 7-22, 57. Nelson Alaska was required to advise DNR with whom it was contracting to harvest the

geoducks. *Id.* On the day of the harvest, Nelson Alaska's independent contractors arrived at the site with a boat, met with DNR personnel, and then dove into the water in the designated area to begin harvesting. *Id.* Nelson Alaska's workers dove with an air line attached to the boat and used a high-pressure water blower that removed geoducks from the sea bottom. *Id.* The divers then placed the geoducks into a basket which, once filled, was hoisted to the surface and placed on their boat. *Id.* The divers filled the basket as many times as possible during the harvest hours for that day. *Id.* When the divers finished harvesting for the day, a DNR representative within the designated harvest area weighed the geoducks and issued a fish ticket documenting the amount of geoducks harvested. *Id.* Only after this was complete did DNR permit Nelson Alaska's divers to leave the harvest area. *Id.*

Nelson Alaska transported the geoducks to its plant in Tacoma where it sorted the geoducks based on size and quality. *Id.* Nelson Alaska cleaned the geoducks, tagged and invoiced them, and prepared the required health certificates. *Id.* Nelson Alaska sold the geoducks to a Canadian company and either transported the geoducks to Canada itself, or arranged for the purchasing company to pick up the geoducks in Washington. *Id.* The time period from when the geoducks were harvested

to when they were placed on a truck for transport was anywhere between three and eight hours. *Id.*

3. Nelson Alaska paid the enhanced food fish tax on the geoducks it harvested.

During the time period from January 1, 1998 to July 1, 2001, Nelson Alaska paid to the DOR the enhanced food fish tax, pursuant to RCW 82.27, et seq., on geoducks purchased from DNR under Sales Contracts with DNR in the following amounts for the following periods:

1 st Quarter 1998	\$ 4,448.00
2 nd Quarter 1998	\$ 2,216.86
3 rd Quarter 1998	\$ 7,528.00
4 th Quarter 1998	\$ 6,334.00
1 st Quarter 1999	\$ 1,737.00
2 nd Quarter 1999	\$12,337.00
3 rd Quarter 1999	\$ 7,414.00
4 th Quarter 1999	\$ 711.00
1 st Quarter 2000	\$ 8,107.00
2 nd Quarter 2000	\$ 9,465.00
3 rd Quarter 2000	\$ 8,143.00
4 th Quarter 2000	\$ 2,986.00
1 st Quarter 2001	\$ 5,274.00
2 nd Quarter 2001	\$ 9,113.00
TOTAL	\$85,763.86

Id.

B. Procedure Relevant To The Issues Presented For Review

1. Nelson Alaska applied for refund of its payments of the food fish tax.

On or about June 7, 2002, Nelson Alaska made timely application for refund of the food fish tax paid during the periods identified above. CP 82-84. DOR denied the refund request and Nelson Alaska timely appealed to DOR's Appeals Division. *Id.* After the appeal was denied, Nelson Alaska made timely application for reconsideration. *Id.*

2. Nelson Alaska appealed to the Superior Court from DOR's denial of its refund claim.

On December 18, 2003, Nelson Alaska timely appealed from denial of its reconsideration request by filing an Appeal From Denial of Refund Claim by Department of Revenue in the Thurston County Superior Court, Case No. 03-2-02511-6. CP 4-6. Both parties filed motions for summary judgment. CP 55-63, 67-78.

3. The trial court entered an Order on Summary Judgment Motions denying Nelson Alaska's refund claim.

On September 8, 2006, the Honorable Richard A. Strophy of the Thurston County Superior Court entered an Order on Summary Judgment Motions granting DOR's summary judgment motion and denying the summary judgment motion of Nelson Alaska. CP 291-293. On October

6, 2006, Nelson Alaska timely filed a Notice of Appeal to the Court of Appeals, Division II, appealing Judge Strophy's Order on Summary Judgment Motions. CP 294-295.

C. The Legislative History Of RCW 82.27.020(1)

1. The Legislature enacted the food fish tax in 1980.

In 1980, the Washington Legislature adopted RCW 82.27, et seq., establishing "an excise tax on the possession of food fish and shellfish for commercial purposes . . ." Washington Laws, 1980, Chapter 98, §2, p. 303; CP 265-266, 285-286. RCW 82.27.020(1), in its original enactment, initially provided:

In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the possession of food fish and shellfish for *commercial purposes* as provided in this chapter. The tax is levied upon and shall be collected from *the owner* of the food fish or shellfish whose *possession* constitutes the taxable event. The taxable event is the *first possession by an owner after the food fish or shellfish have been landed*. . . [emphasis added]

Id. That statute defined "possession" to mean "the control of food fish and shellfish by *the owner* and includes both actual and constructive possession. Constructive possession occurs when the person had *legal ownership* but not actual possession of the food fish or shellfish. [emphasis added]" RCW 82.27.010(3). The new tax statute did not include a definition of the term "owner" or "legal ownership".

2. The 1983 statutory amendments made the taxable event the first “commercial possession” by an “owner” “after the food fish have been landed”.

In 1983, the Legislature adopted Substitute House Bill No. 233, amending RCW 82.27.020(1) as follows:

In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the *commercial possession* of food fish, shellfish, and anadromous game fish as provided in this chapter. The tax is levied upon and shall be collected from *the owner* of the food fish, shellfish, or anadromous game fish whose *possession* constitutes the taxable event. The taxable event is the *first possession by an owner after the food fish, shellfish, or anadromous game fish have been landed*. . . [emphasis added]

Washington Laws, 1983, Chapter 284, Sec. 6. The amendments also added a definition of “commercial” to mean “related to or connected with buying, selling, bartering, or processing.” *Id.* The term “owner” remained undefined in the statute.

3. The 1985 amendments made the taxable event the first commercial possession in Washington by an “owner”, but removed the phrase “after the food fish have been landed” as a requirement of the taxable event imposing the food fish tax.

In 1985, effective July 27, 1985, the legislature adopted Substitute House Bill No. 1060 “[m]odifying provisions on the taxation of food fish and shellfish.” *Id.*; Washington Laws, 1985, Chapter 413. The 1985

amendments levied the tax on “enhanced food fish”². The amendments eliminated from the RCW 82.27.020(1) the phrase, “*after the food fish . . . have been landed*”, so that the “taxable event” for imposition of the food fish tax became “the first possession in Washington *by an owner*. [emphasis added]”³ *Id.* Substitute House Bill No. 1060 shows the phrase “after the food fish . . . have been landed” deliberately redlined out of the amended statute. *Id.*

As a result of the Legislature’s 1985 modifications to RCW 82.27, et seq., during the period July 27, 1985 until July 1, 2001, RCW 82.27.020(1) read as follows:

In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the *commercial possession* of enhanced food fish as provided in this chapter. The tax is levied upon and shall be collected from *the owner* of the enhanced food fish whose possession constitutes the taxable event. *The taxable event is the first possession in Washington by an owner.* [emphasis added]

Id. The definition of “possession” and “commercial” in the statute remained unchanged from the statute’s original enactment and the 1983 amendments. RCW 82.27.010(2) & (3). The amended statute still provided no definition of “owner”.

² “Enhanced food fish” was defined to include “all species of food fish, shellfish, and anadromous game fish . . .” Washington Laws, 1985, Chapter 413, Sec. 1.

³ The term “in Washington” was also added as part of the definition of the taxable event in the statute by the 1985 amendments. *Id.*

4. The 2001 amendments restored the phrase “after the food fish have been landed” as a requirement of the taxable event imposing the food fish tax.

In 2001, at the specific request of DOR, the Legislature again amended RCW 82.27.020(1) by enacting House Bill 1361, “An Act relating to simplifying excise tax application and administration”. CP 288-289. The 2001 amendment added back to the statute the language “after the enhanced food fish have been landed” to the definition of the “taxable event” for imposition of the food fish tax. *Id.* As a result of the 2001 amendments, after July 1, 2001, RCW 82.27.020(1) reads as follows:

In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the *commercial possession* of enhanced food fish as provided in this chapter. The tax is levied upon and shall be collected from *the owner* of the enhanced food fish whose possession constitutes the taxable event. *The taxable event is the first possession in Washington by an owner after the enhanced food fish have been landed.* . . . [emphasis added]

Id.; RCW 82.27.020(1).

IV. ARGUMENT

A. Standard And Scope Of Review Of Summary Judgment Orders

This court applies a *de novo* standard of review to summary judgment orders. The appellate court undertakes the same inquiry as the trial court. *Smith v. Preston Gates Ellis, LLP*, 135 Wn.App. 859, 863,

147 P.3d 600 (2006). The appellate court will consider only the evidence and issues that were called to the attention of the trial court. RAP 9.12. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56. A material fact is one upon which the outcome of the litigation depends. *Smith, supra*, 135 Wn.App. at 863. All facts and inferences are considered in the light most favorable to the non-moving party. *Id.*

B. Rules Of Statutory Construction

“Where construction of a statute is concerned, the error of law standard applies. . . Under this standard, this court may substitute its interpretation of the law for the agency’s.” *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000); *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); *Adams v. Dep’t of Social & Health Services*, 38 Wn.App. 13,16, 683 P.2d 1133 (Div. II 1984)(“It is for the court to determine the purpose and meaning of statutes even when the court’s interpretation is contrary to that of the agency charged with carrying out the law.”) The meaning of a statute is a question of law reviewed *de novo*. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242-243, 88 P.2d 375 (2004); *Dep’t of Ecology v. Campbell & Gwinn L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3rd 4 (2002).

The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Id.* at 9-10. It is a well-established rule of statutory construction that, "Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005); *State v. Watson*, 146 Wn.2d 947, 954-956, 53 P.3d 66 (2002); *State v. Keller*, 143 Wn.2d 267, 276-277, 19 P.3d 1030 (2001); *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999); *Bravo v. The Dotsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995). "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20-21, 50 P.3d 638 (2002). As the Supreme Court recently reiterated:

This court does not subject an unambiguous statute to statutory construction and has "declined to add language to an unambiguous statute *even if it believes the Legislature intended something else but did not adequately express it.*" *Kilian*, 147 Wn2d at 20 . . . "Courts may not read into a statute matters that are not in it and may *not create legislation under the guise of interpreting a statute.*" *Kilian*, 147 Wn.2d at 21 . . . Thus, when a statute is not ambiguous, *only a plain language analysis of a statute is appropriate.* [emphasis added]

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

These rules of statutory construction have been consistently applied by the Supreme Court for many years:

It is a rule of statutory construction that, where the language of an amended or revised statute is clear, the prior act may not be referred to to create an ambiguity, and the courts cannot add anything to a statute, even though it may appear to have been unintentionally left out by the legislature (*State ex rel. Ewing v. Reeves*, 15 Wn.2d 75, 129 P.2d 805); and that, where a law is amended or revised and a material change is made in the wording or an important part is eliminated, it is presumed that the legislature intended a change in the law.

Alexander v. Highfill, 18 Wn.2d 733, 740, 140 P.2d 277 (1943). All of the language in the statute must be given effect so that no portion is rendered meaningless or superfluous. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. The courts are not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." [citations omitted]

State v. Keller, *supra*, at 276. nbb

Because this case involves a taxing statute, a special rule of construction applies. "If any doubt exists as to the meaning of a taxation

statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992); *Estate of Hemphill v. Dep’t of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005); *Dep’t of Revenue v. Hoppe*, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973).

The trial court erred in failing to follow these long-established rules of statutory construction in applying the provisions of RCW 82.27.020 to the refund claims of Nelson Alaska.

C. Nelson Alaska Is Not Responsible For The Food Fish Tax Because It Is Not The “First Commercial Possessor” Under The Plain Language Of The Statute

- 1. The plain meaning and clear language of the Legislature’s 1985 amendments to RCW 82.27.020(1) changed the incidence of tax from the first owner after landing the geoducks to the owner of the tidelands where the geoducks are located or the first owner to bring the geoducks into Washington for sale, barter, or processing.**

Nelson Alaska seeks refund of the amounts it paid as food fish tax under RCW 82.27, et seq., in effect during the periods January 1, 1998 through June 30, 2001. During those periods, RCW 82.27.020(1) read as set forth above following enactment of the 1985 statutory amendments. The language of the statute, as amended, is plain, ordinary, clear, and unambiguous. The 1985 version of the statute established the excise tax on the “commercial possession of enhanced food fish” and levied the food

fish tax on the “owner” of the food fish “whose possession constitutes the taxable event”. The “taxable event” is simply and clearly defined under the amended statute to be “the first possession in Washington by an owner”. The 1985 Legislature specifically eliminated the phrase “after the food fish have been landed” from the statutory definition of the “taxable event” that triggers imposition of the fish tax. The obvious and unequivocal impact of this statutory amendment was to eliminate “landing” of the food fish as a requirement of the “taxable event” triggering imposition of the fish tax on the “owner”. This is clearly a material change to the statute. The legislature deliberately eliminated an important part of the statute defining the critical event that determines where the incidence of the food fish tax will fall. As such, the Court must presume the legislature intended to make this change to the law. *Alexander v. Highfill, supra.*

The 1985 amendments are clear and unambiguous in making a change to the incidence of the food fish tax. Prior to the amendments, the incidence of the tax fell on the first “owner” to possess the food fish, such as geoducks, for commercial purposes *after* the geoducks had been landed. That “owner” could be: (1) the owner of the tidelands in Washington where the geoducks are located, if that “owner” landed the geoducks; or (2) the “owner” who purchased the geoducks and the right to harvest the

geoducks from the owner of the tidelands if that purchaser landed the geoducks and was the first “owner” to possess the geoducks after they were landed; or (3) the “owner” of the geoducks after they have been landed outside Washington tidelands who first transports the geoducks into Washington for commercial purposes. The incidence of the food fish tax prior to the 1985 amendments fell on the one who first owned the food fish *after* the geoducks had been landed, i.e., the first commercial possessor of the geoducks *after* they have been landed.

The plain language of the 1985 amendments changed the incidence of the tax simply by removing from the statutory language defining the taxable event the phrase “after the food fish have been landed”. This change is clear and unambiguous. Landing the food fish was no longer a condition of the taxable event imposing the food fish tax.⁴ Liability for the tax no longer necessarily fell on the “owner” that first possesses the food fish *after* landing. Without the landing requirement, the statute

⁴ Although the 1985 amendments eliminated “landing” as a factor in determining when the food fish tax was imposed, i.e., the “taxable event”, and as a factor in determining who was responsible for the tax, i.e., the incidence of the tax, it did not eliminate “landing” as a factor in the determination of the amount of the tax due, i.e., the measure of the tax. In fact, at the same time the Legislature removed the “after the food fish have been landed” language as a factor for the taxable event defined in the statute under RCW 82.27.020(1), it added a definition of “landed” at RCW 82.27.010(5) where no definition of the term was previously in the statute. The only use of the term in the statute after the 1985 amendments was in determining the “measure of the tax” as provided in RCW 82.27.020(3). The 1985 amendments simplified the statutory language describing the measure of the tax to read: “The measure of the tax is the value of the enhanced food fish at the point of landing.” RCW 82.27.020(3). “Landing” was referenced nowhere else in the amended statute. Thereafter, the basis for computing the food fish tax was the value of the food fish at the point of landing.

shifted the incidence of fish tax to the “owner” with “commercial possession” of the food fish in Washington even if that ownership occurs *before* the food fish have been landed. Under the plain, unambiguous language of the amended statute and its plain meaning, the “first commercial possessor” of necessity must be either (1) the “owner” of the tidelands in Washington where the geoducks (or other food fish) are located who seeks to commercially exploit the geoducks by “selling, bartering or processing” them or (2) the owner of the geoducks that first brings them into Washington for commercial purposes, i.e., for sale, barter, or processing.

Under the amended statute, applying long-established rules of statutory construction, the incidence of the food fish tax during the periods in issue could not have fallen on Nelson Alaska because Nelson Alaska neither owned the tidelands from which it harvested geoducks purchased from DNR nor did Nelson Alaska transport the geoducks into Washington from outside the state. It merely purchased those geoducks in a commercial sales transaction from the “owner” of the tidelands located in Washington, and thus from the “owner” of the geoducks in Washington *before* they have been landed, i.e., the “first commercial possessor” of the geoducks. This sale was the first act of “commercial possession” of the geoducks by an “owner”, and constitutes the taxable event triggering

imposition of the food fish tax as provided in the 1985 amended statute. That “owner” was DNR, not Nelson Alaska.

Under the 1985 version of RCW 82.27.020(1), Nelson Alaska is not the “first commercial possessor” of the geoducks it purchased from DNR. Therefore, Nelson Alaska cannot be liable for the enhanced food fish tax during the periods in issue and should be refunded the tax payments it made during those periods.

2. The “first commercial possessor” of the geoducks under the 1985 version of RCW 82.27.020(1) is DNR, not Nelson Alaska.

Under RCW 82.27.020(1) as amended, the “taxable event” that triggers application of the food fish tax is “first possession in Washington by an owner”. In determining the statute’s legality and constitutionality, the Supreme Court stated:

In this case, the fish tax is not imposed merely by reason of ownership or possession of the fish. RCW 82.27.020(1) refers to the tax imposed as an excise tax with the first possession by an owner as the taxable event. This "owner" becomes liable for the fish tax by exercising control over the fish for commercial purposes . . . The tax is imposed upon an owner's exercising control over fish for purposes of disposing of them for profit.

High Tide Seafoods v. State, 106 Wn.2d 695, 700, 725 P.2d 411 (1986).

In this case, the language of the statute is clear in its application. That “owner” is DNR, not Nelson Alaska. DNR was the first “owner” to

exercise control over and possession of the geoducks by selling them to Nelson Alaska “for the purposes of disposing of them for profit”.

The definitions provided in RCW 82.27, et seq., clearly establish the incidence of the food fish tax falls on the first owner to possess the geoducks for commercial purposes, i.e., to sell, barter, or process the geoducks. DNR, as the initial owner of the geoducks, is that “first commercial possessor”. “Possession” is defined to mean control of the food fish by the owner, whether actual or constructive. RCW 82.27.010(3). Constructive possession only requires legal ownership. *Id.* That first legal ownership in Washington is with DNR, not Nelson Alaska. “Commercial” is defined as related to or connected with buying, selling, bartering, or processing the food fish. RCW 82.27.010(2). DNR was clearly exercising its control over the geoducks located on state-owned tidelands for commercial purposes when it contracted to sell the geoducks to Nelson Alaska seeking to exploit the geoducks it owned for profit. Thus, DNR was the “first commercial possessor” of the geoducks within the plain meaning of the statute as amended by the 1985 Legislature, not Nelson Alaska.

In the lower court proceedings, DOR argued DNR cannot be the “owner” liable for the tax because “this would lead to an absurd result”. DOR argued that geoduck larvae would have no value when they

propagate, and this is inconsistent with the statutory provisions making the measure of the tax “landing” the food fish.⁵ *See*, RCW 82.27.020(3); footnote 4 above. CP 250. This reasoning was erroneously embraced and adopted by the trial court in denying Nelson Alaska’s refund claim. RP 47-48. However, this reasoning is unnecessary to determine the issues in this case and misinterprets the taxable event triggering imposition of the tax provided in the statute.

First, the issue in this case is whether Nelson Alaska is liable for the food fish tax on the geoducks it purchased from DNR while the 1985 amendments were in place. The plain language of the statute shows it is not liable. It is not an issue before the Court and not necessary for the Court to decide whether DNR is liable for the food fish tax. Therefore, the question of how the tax would be measured or collected from DNR if it is liable for the tax is irrelevant to the issues the Court must decide in this appeal.

However, even if the Court decides it must address the issue of DNR’s liability for the food fish tax, DOR’s arguments and the trial

⁵ This argument undermines the integrity of the existing structure for the manufacturing tax statute, which uses the value of products (usually the selling price at wholesale or retail) as the measure of the tax. *See*, RCW 82.04.240. The taxable measure is not the value of the products before sale; it is the value of the products at the time of sale. If it is absurd to use DNR’s selling price as the measure in this case, then the same can be said about the manufacturing tax measure.

court's agreement with those arguments are misplaced. The 1983 amendments to RCW 82.27.020(1) made the required "possession" by an "owner" to be "commercial possession", and added the definition of "commercial" to mean "related to or connected with buying, selling, bartering, or processing." Thus, the taxable event, at least for DNR, would be acts related to selling the geoducks, e.g., such as entering into Sales Contracts with Nelson Alaska. In order to determine the "measure of the tax", even if the incidence of the tax fell on DNR, "landing" of the geoducks would occur essentially contemporaneously with the execution of the Sales Contracts and the measure of the tax could be easily calculated. Thus, the plain language of the 1985 amendments to RCW 82.27.020(1) does not produce an "absurd result".

Contrary to the arguments of DOR and the conclusions of the trial court, the plain meaning of the amended statute that removed the "after the food fish have been landed" language as part of the taxable event provides a clear, logical, consistent change in the incidence of the tax from the owner that was "first commercial possessor" of the food fish *after* they have been landed to the "first commercial possessor" of the food fish in Washington even if that commercial possession occurs *before* the food fish have been landed. Since the legislative amendments provide a clear, unambiguous, logical change in the statute and the incidence of the tax,

and a reasonable method for measuring that tax, it is not appropriate for the trial court to substitute its own view of the statute's meaning that is inconsistent with the plain meaning of the statute's amended language, even if the omission of the language from the statute is inadvertent or is contrary to the interpretation given the statute by DOR. *Agrilink Foods, Inc. v. Dep't of Revenue, supra*; *State v. Watson, supra*; *State v. Keller, supra*; *State v. Tili, supra*; *Bravo v. Dotsen Cos., supra*; *Alexander v. Highfill, supra*; *Davis v. Dep't of Licensing, supra*.

The trial court's failure to properly apply established rules of statutory construction in interpreting the amended provisions of RCW 82.27.020(1) requires reversal of the trial court's ruling and allowance of Nelson Alaska's refund claim.

3. Geoducks are part of the real property belonging to the owner of the tidelands on which they are located.

Washington law provides that "sedentary shellfish constitute part of the real property and are subject to ownership and control of the property owner or lessee." *State v. Longshore*, 141 Wn.2d 414, 422-423, 5 P.3d 1256 (2000). The Supreme Court reasoned:

Clams ordinarily live in the soil under the waters, and not within the waters . . . They, therefore, in a very material sense, belong with the land. When taken they must be wrenched from their beds, made well down in the soil itself. It must follow therefore that, if the state has

authority to invest one with the private ownership of the tidelands, such investiture must carry with it the right to exercise dominion and ownership over what is upon the land, and especially over things so closely related to the soil as clams.

Id. at 422-23, citing *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 P. 922 (1908). The *Longshore* Court concluded that, “[t]herefore, naturally occurring shellfish are the property of the land owner.” *Id.* at 426.

Under this rule, the geoducks purchased by Nelson Alaska were property “owned” by DNR prior to their sale to Nelson Alaska. Since DNR had legal ownership of the geoducks at the time it exercised control over the geoducks for commercial purposes, it was in “constructive possession” of the geoducks under the definition provided in RCW 82.27.020(3). Moreover, through the Sales Contracts with Nelson Alaska, DNR had the first “commercial possession” of the geoducks within the meaning of the statute’s definition of the “taxable event” for purposes of imposition of the food fish tax. Therefore, the incidence of the tax cannot fall on Nelson Alaska.

4. Geoducks are valuable materials belonging to the State protected by statute.

During the periods in issue, RCW 79.96.080⁶, relating to the harvesting of geoducks on public lands, provides that “geoducks shall be sold as valuable materials . . .” RCW 79.96.080(1). Wrongfully taking “valuable materials” from public lands is considered larceny. RCW 79.01.748.⁷ RCW 79.96.130(1)-(2)⁸ establishes a civil remedy for wrongful conversion of shellfish from public lands, which is “supplemental to the state’s power to prosecute any person for theft of shellfish . . . or for violation of the regulations of the department of fish and wildlife.” RCW 79.96.130(5).

This statutory scheme lends further support and evidence that the DNR both “owned” and “controlled” the geoducks immediately prior to their sale to Nelson Alaska, and for purposes of the food fish tax during the periods in issue DNR is the “first commercial possessor” of the geoducks. Therefore, with respect to the Sales Contracts between DNR

⁶ In 2005, RCW 79.96.080 was recodified as RCW 79.135.210 pursuant to 2005 c 155 § 1010.

⁷ RCW 79.01.748 was repealed in 2003 and was replaced by the current RCW 79.02.310, which provides that “[e]very person who willfully commits any trespass upon any public lands of the state and . . . takes or removes . . . any valuable materials, is guilty of theft under chapter 9A.56 RCW.”

⁸ In 2005, RCW 79.96.130 was recodified as RCW 79.135.030 pursuant to 2005 c 155 § 1010.

and Nelson Alaska, the 1985 version of the RCW 82.27, et seq., clearly did not place the incidence of the food fish tax on Nelson Alaska.

5. DOR's own interpretation of the statute recognizes the plain and unambiguous language of the 1985 amendments to RCW 82.27.020(1) does not impose the food fish tax on Nelson Alaska.

In addressing the effect of removing the “after the food fish have been landed” language of the 1985 version of RCW 82.27.020(1), the Interpretation and Appeals Section of DOR has recognized and acknowledged that the plain, natural, unambiguous, literal interpretation of the 1985 version of RCW 82.27.020(1) does not place the burden of the food fish tax on Nelson Alaska:

However, after the law was amended effective July, 1985, RCW 82.27.020(1) reads such that the first possessor/owner in Washington is responsible for the tax without regard to whether or not the fish have been landed. *If one interpreted the new amended language literally*, the effect would be that the persons who caught the fish, ***not buyers like the taxpayers, would be primarily liable for the tax*** because most often, it is presumed, they would transfer their catches to fish buyers in waters situated within three miles of the Washington coast.

Frankly, one is forced to strain, grope and scramble to avoid the most likely consequence of this inartfully drafted replacement legislation. [emphasis added]

CP 92; DOR Det. No. 87-147, 3 WTD 111 (1987).

This Court should likewise not “strain, grope, and scramble” to avoid the plain, natural, unambiguous language of the 1985 amended statute as the expression of legislative intent and determine that Nelson Alaska is not liable for the food fish tax during the periods the 1985 amended statute was in effect.

6. Nelson Alaska cannot be the “owner” that is the “first commercial possessor” in Washington of the geoducks it purchased from DOR within the plain meaning of RCW 82.27.020(1).

As even DOR has recognized, the plain meaning of the statute after the 1985 amendments does not lend itself to the interpretation promoted by DOR and adopted by the trial court in denying Nelson Alaska’s refund claim. The plain meaning of the statute cannot result in Nelson Alaska being the “first commercial possessor” under the statute unless this Court continues to “strain, grope, and scramble” to justify a contrary result. This Court should not continue this erroneous analysis, interpretation, and application of rules of construction by the trial court and should reverse the trial court’s order.

However, even if it is an appropriate conclusion by DOR and the trial court that imposing the tax on DNR produces an “absurd result”, which the Court cannot allow to occur, it does not follow from this conclusion that Nelson Alaska must be found liable for the fish tax. For

all the reasons outlined above, the statute is plain, clear, and unambiguous in excluding Nelson Alaska from liability for the food fish tax. Under the statutory language in effect from 1985 until July 1, 2002, based on the fact that Nelson Alaska purchased its geoducks from an “owner” of those geoducks in Washington, Nelson Alaska cannot be the “first commercial possessor” of the geoducks in Washington within the plain meaning of the statute. For these reasons and by applying the rule of construction that taxing statutes must be construed in favor of taxpayers and against the taxing authority, Nelson Alaska cannot be liable for the food fish tax, and the payments of the tax it has made to DOR should be refunded.

D. The Trial Court Addressed The Wrong Issue And Misapplied Established Rules Of Statutory Construction In Concluding There Is An Ambiguity In The Amended RCW 82.27.020(1)

The trial court reached three (3) critical conclusions that provided the basis and justification for its order denying Nelson Alaska’s refund claim, each of which is erroneous, as follows:

- “I conclude that there is an ambiguity in the statute as to whether or not ‘owner’ applies to the state as first commercial possessor or the entity harvesting and becoming the first owner after harvest or landing, depending upon how you view those terms in the context of the statute and the facts of this case.” RP 48-49.
- “It’s clear to me that the intent of the statutory scheme was that the first harvester of the enhanced food fish be the entity who should pay the excise tax. The best I can explain my rationale

beyond saying that I adopt the argument and rationale of the Department of Revenue, which I do, is that the ambiguous use of the word 'owner' in the context of the statutory scheme would not apply to the taxing authority as owner but would apply to the first owner after severance of the food fish or landing of the food fish. And that would be Nelson Alaska." RP 50.

- "The ambiguous phrase containing the term "owner", I conclude, was simply not intended to apply to the taxing authority or the State of Washington, given the legislative history." RP 51.

The effect of these conclusions is that by judicial action, the phrase "after the food fish have been landed", which had been removed from the statute's definition of the taxable event triggering imposition of the food fish tax by the Legislature in 1985, was added back to the statute as if the Legislature had never amended the statute. It is not appropriate for the trial court to substitute its judgment of what the statute should say and how it should apply for the clear statutory language enacted by the Legislature. "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson, supra*, at 21. That is exactly what the trial court did in reaching the ruling it made. The trial court's order should be reversed.

1. The trial court addressed the wrong issue by focusing its construction and interpretation of the amended statute on whether DNR can be an “owner” liable for the fish tax.

In making its ruling and order, the trial court’s analysis and construction of the food fish tax statute, its legislative history and intent, focused almost exclusively on why the amended statute cannot impose the tax on DNR as an “owner” of the geoducks. RP 45-53. Just as DOR predicted, the trial court had to “strain, grope, and scramble” to get to that result, adopting the flawed reasoning presented by DOR to support its argument. However, that was not the issue before the court.

The issue in this case is not whether DNR is liable for the food fish tax under the 1985 amendments to RCW 82.27.020(1). The issue is whether Nelson Alaska is liable for the tax during the time that the statute did not include the language “after the food fish have been landed”, i.e., whether the amended statute placed the incidence of tax on Nelson Alaska when Nelson Alaska was not the first to own and possess the geoducks in Washington for commercial purposes. It does not necessarily follow that if the DNR is not liable for the tax under the amended statute that Nelson Alaska is. Regardless of what the outcome of that issue may be, it is not an issue the Court must decide in this appeal.

The trial court's reasoning and rationale for its ruling is therefore fundamentally flawed by focusing on the wrong issue. To determine the correct issue – whether or not Nelson Alaska owed the food fish tax during the period the statute did not include the “after the food fish have been landed” language – the focus must be first and foremost on the statutory language the Legislature adopted in amending RCW 82.27.020(1) in 1985. *Agrilink Foods, Inc. v. Dep't of Revenue, supra*; *State v. Watson, supra*; *State v. Keller, supra*; *State v. Tili, supra*; *Bravo v. Dotsen Cos., supra*; *Alexander v. Highfill, supra*; *Davis v. Dep't of Licensing, supra*.

The amended statute made the “first commercial possession” by an “owner” of the geoducks as the taxable event that triggered imposition of the tax. The statute's amended language is simple, ordinary, plain language that is clear and unambiguous. The sole issue for the court to decide is whether Nelson Alaska is the “owner” that was the “first commercial possessor” of the geoducks in Washington. The amended statute's clear language shows that it is not that owner, and therefore cannot be liable for the food fish tax under the 1985 amendments, regardless of who else may be liable. As courts have repeatedly held, “if a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.” *Shoop v. Kittitas County*, 149 Wn.2d 29, 65

P.2d 1194 (2003), quoting *Berger v. Sonneland*, 144 Wn.2d 91, 104-105, 26 P.3d 257 (2001).

2. The trial court erred in looking outside the statute's language itself to find an ambiguity in the statute.

What troubled the trial court and what the court concluded was ambiguous in the amended statute was the Legislature's use of the word "owner", but did not provide a specific statutory definition for the word. RP 48-52. The trial court simply could not accept that the Legislature intended to include DNR within the word's statutory scope for taxation purposes and looked beyond the language of the statute itself to conclude the amended statute was ambiguous. The trial court looked to and relied on the interpretation each of the parties gave the statute, its legislative history, and how the Legislature had made the statute read both before and after the 1985 amendments to conclude there is an ambiguity in the statute as to the scope and meaning of the term "owner". "Instead, the court exceeded the bounds of plain language analysis by considering [the agency's] interpretation to support its conclusion . . ." *Cerrillo v. Esparza, supra*. In essence, the trial court looked everywhere but the plain language of the statute itself to justify its conclusion the amended statute is ambiguous. That was the trial court's error. Instead, it should

have looked no further than a standard dictionary to find the meaning of this common, ordinary word the Legislature used in the statute.

“Legislative definitions included in a statute are controlling, but in the absence of a statutory definition this court will give the term the plain and ordinary meaning ascertained from a standard dictionary.” *State v. Watson, supra*, 146 Wn.2d at 954. The Legislature did not see a need to include a definition of “owner” in the food fish tax statute because it is a common, universally-used word with a plain and ordinary meaning.

Webster’s Dictionary defines “owner” as, “one that owns : one that has the legal and rightful title whether the possessor or not : proprietor.” Webster’s Third New International Dictionary of the English Language Unabridged, 1976. To “own” is defined as “to have or hold as property or appurtenance : have a rightful title to, whether legal or natural : possess.” *Id.* “Ownership” is defined as “the state, relation, or fact of being an owner.” *Id.* Black’s Law Dictionary provides similar definitions:

owner. One who has the right to possess, use, and convey something; a person in whom one or more interests are vested.

legal owner. One recognized by law as the owner of something; esp. one who holds legal title to property for the benefit of another.

ownership. The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey

it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control.

Black's Law Dictionary 1137-1138 (8th Ed. 2004).

The plain meaning and any common understanding of the word “owner” clearly includes the State through DNR as “owner” of the geoducks *before* they were purchased and harvested by Nelson Alaska, i.e., *before* they have been landed. Each of the Sales Contracts recognized title to the geoducks is vested in DNR and passed to Nelson Alaska “when the Purchaser severs the geoducks from the Property” i.e., *after* the geoducks have been landed. By selling the geoducks to Nelson Alaska, DNR became the “first commercial possessor” of the geoducks within the plain meaning and clear language of the statute. Therefore, Nelson Alaska could not be that “first commercial possessor” under the statute and the incidence of the tax under the amended statute could not fall on Nelson Alaska.

Since the plain language of the amended statute is clear and unambiguous, there is no basis for the trial court to look any further than the statute's amended language to determine legislative intent. The plain meaning of the words of the amended statute are controlling, regardless of the interpretation DOR gave to those words or that the consequences of using those words was not foreseen. Where the words are plain and

unambiguous, it is not appropriate for the trial court to attempt to correct a perceived legislative error by creating judicial legislation putting back into a statute the words the Legislature had previously removed. That is for the Legislature to correct, which is apparently what it did prospectively with the 2001 amendments. Before that occurred, it is an inescapable conclusion that Nelson Alaska was not an “owner” of the geoducks upon which the incidence of the food fish tax fell. Therefore, it is entitled to a refund of any food fish taxes it paid.

3. The trial court’s ruling had the effect of making the 2001 amendment adding the language “after the food fish have been landed” back into the statute retroactive when the Legislature expressed no intent to do so.

“A legislative enactment is presumed to apply prospectively only, and will not be held to apply retrospectively unless such legislative intent is clearly expressed or to be implied.” *Amburn v. Maxin*, 81 Wn.2d 241, 246, 501 P.2d 178 (1972). “Where a new enactment does not expressly provide for retroactive application, it should not be judicially implied.” *Everett v. State*, 99 Wn.2d 264, 270, 661 P.2d 588 (1983); *Anderson v. Pierce County*, 86 Wn.App. 290, 310, 936 P.2d 432 (Div. II 1997); see also, Singer, *Statutes and Statutory Construction*, Vol. 2, §41:1-4 (6th Ed. 2001); 2 C. Sands, *Statutory Construction*, §41.01 (4th ed. 1973).

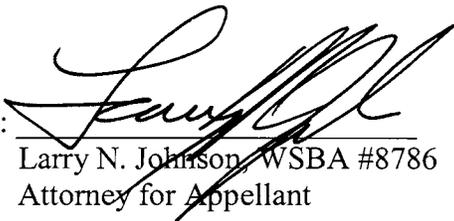
The trial court's ruling results in the judicial re-insertion of the "after the food fish have been landed" language back into the statute during the 17-year period the Legislature had removed it, thus giving retroactive effect to the Legislature's 2001 amendment putting that language back into the statute at the request of DOR. There is nothing expressed in the statute or otherwise to suggest the Legislature intended its 2001 amendments to be retroactive. It is neither legal nor appropriate for the trial court to judicially imply what the Legislature did not express or intend.

V. CONCLUSION

The Court should reverse the trial court's September 8, 2006 Order On Summary Judgment Motions granting the summary judgment motion of the Department of Revenue and denying the summary judgment motion of Nelson Alaska.

Respectfully submitted this 19th day of April 2007.

LAW OFFICE OF LARRY N.
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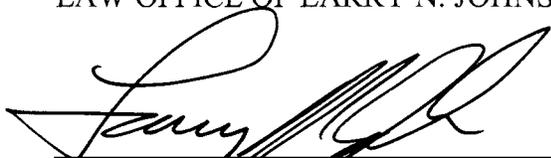
PROOF OF SERVICE

I hereby certify that I mailed a copy of the foregoing ~~Brief of~~ *dn*
Appellant Nelson Alaska Seafoods, Inc. by depositing it with the United
States Postal Service with postage prepaid and addressed to:

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DATED this 19^h day of April 2007 at Seattle, Washington.

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