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No. 42738-9-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

WASHINGTON STATE DEPT. OF FISH AND WILDLIFE,

Respondent

v.

CURTIS W. JOHNSON,

Petitioner.

PETITION FOR REVIEW BY THE WASHINGTON SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Other Authorities

I. INTRODUCTION

This case is about whether a commercial fisher has a protected property interest in a fishing license issued by the Washington Department of Fish and Wildlife, and whether the statutes governing the limited licensing program for the commercial Dungeness crab coastal fishery provide constitutionally adequate notice to fishers of what is required to continue fishing and that the consequence of failing to renew a license in any given year would be the permanent loss of the license. A further issue is whether Division II of the Court of Appeals is following principles of statutory construction as laid out in the decisions by the Washington Supreme Court.

II. PETITIONER'S IDENTITY

Petitioner Curtis W. Johnson is the Respondent at the Court of Appeals, the Petitioner at the trial court, and the Petitioner at the administrative hearing.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review the Washington State Court of Appeals Published in Part Opinion in *Curtis Johnson, Respondent, v. Washington Dept. of Fish & Wildlife, Appellant*, No. 42738-9-II, Washington Court of Appeals, Division Two (July 30,

2013), herein the "Opinion." A copy of the Opinion is included in the **Appendix**.

IV. ISSUES PRESENTED FOR REVIEW

A. Conflict with Decisions by Washington Supreme Court.

1. This matter conflicts with decisions by the Washington Supreme Court because it fails to acknowledge the principle of statutory construction that, where the Legislature has used different language in similar statutes but not included language from the earlier statute in the later statute, the court cannot read the missing language back in to the later enacted statute.

B. Significant Questions of Law under the U.S. Constitution.

This matter raises a significant question of law under the U.S. Constitution because it:

1. concerns whether a commercial fisher has a protected property interest in a Washington commercial fishery license;

2. raises the issue of whether the statutes governing the limited entry commercial fishing license programs, and specifically the statutes governing the commercial Dungeness crab coastal fishery, are void for being impermissibly vague or are such that an ordinary person would not

understand what is required to renew and the consequences of failing to renew.

3. concerns whether the Washington statutes governing the commercial Dungeness crab coastal fishery provide notice adequate to satisfy procedural due process guarantees.

V. STATEMENT OF THE CASE

Petitioner, Mr. Curtis Johnson, has held a commercial Dungeness crab coastal fishery license since 1991.[1] In 1994, the Legislature added a new section to RCW chapter 75.30 (now codified at RCW 77.70.360) that limited new licenses for the Dungeness crab-coastal fishery. Limited licensing programs already existed, for example, for salmon charter licenses, where the relevant statute states, "A salmon charter license which is not renewed each year shall not be renewed further."[2] This provision in the salmon charter license statute 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:[3]

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[1] Clerk's Papers (CP) at 118 (FF 1).
[2] RCW 77.70.050(2) (emphasis added).
[3] SB 5124, 1993 Reg. Sess., Ch. 340, § 28, 1339, 1354; § 35, 1339, 1359; § 39, 1339, 1360.

- "A herring fishery license that is not renewed each year shall not be renewed further."[4]
- "A whiting-Puget Sound fishery license that is not renewed each year shall not be renewed further."[5]

In 1994, when the Legislature created the limited entry program for the commercial Dungeness crab coastal fishery, it did not use exactly the same language it had used for salmon charter licenses and then herring fishery licenses and whiting-Puget Sound fishery licenses. Specifically, the Legislature omitted from the Dungeness crab statute the language stating that a "license which is not renewed each year shall not be renewed further."[6]

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.[7] As part of this major overhaul of Titles 75 and 77 RCW, the Legislature retained the language

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[4] RCW 77.70.120(3) (emphasis added).
[5] RCW 77.70.130(4) (emphasis added).
[6] 2ESHB 1471, 1994 Reg. Sess., Ch. 260, § 13, 1551, 1557 (codified at RCW 75.30.440; recodified in 2000 at RCW 77.70.360).
[7] ESHB 2078, 2000 Reg. Sess., Ch. 107, § 1, 648, 649.

for the salmon charter licenses, herring fishery licenses, and whiting-Puget Sound fishery licenses including an express annual renewal requirement stating that a license which is not renewed each year shall not be renewed further.[8] No such parallel language was added to the parallel statute governing Dungeness crab coastal fishery licenses.[9] The Legislature, therefore, used and continues to use different language within the same chapter 77.70 RCW.

In 1995, after the legislature had adopted the limited entry licensing program for the coastal Dungeness crab commercial fishery, Mr. Johnson applied to the Washington Department of Fish and Wildlife ("DFW" or the "Department") for a license under the new rules.[10] On May 30, 1995, Robert Turner, then DFW's Director, issued a letter to Mr. Johnson stating that the Department would grant him a "permanent license" to participate in this fishery.[11] 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.[12]

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[8] RCW 77.70.050(2); RCW 77.70.120(3); and RCW 77.70.130(4).
[9] RCW 77.70.360.
[10] *Id.*
[11] CP 115, 118 (FF 1).
[12] CP 115.

The permanent License at issue in this matter was then granted to Mr. Johnson.[13] The license was renewed every year through 2006.[14] 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.[15] Mr. Johnson's license was not renewed during 2007.[16]

In the fall of each year, after the fishing season ends, DFW mails a license renewal reminder and an application form to all license holders of record who have not already renewed.[17]

Mr. Johnson testified that he did not receive a renewal notice from DFW in 2007 to renew the License.[18] Mr. Johnson provided affidavits regarding problems with the mail delivery in his neighborhood during the fall of 2007.[19] The Administrative Hearing Officer found it was possible that Mr. Johnson did not receive his annual renewal notice in 2007 because of problems with the mail.[20] The trial judge found that Mr. Johnson did not receive actual notice of his license's renewal date.[21]

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[13] CP 118 (FF 1).
[14] Id.
[15] *See* WAC 220-52-046(6).
[16] *Id.*
[17] CP 118-19 (FF 5-6).
[18] CP 118-19 (FF 5).
[19] CP 118-19 (FF 5).
[20] CP 118-19 (FF 5).
[21] 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

The form sent in late 2007 stated, "License will expire December 31st of issuance year," and "ATTENTION LIMITED LICENSE HOLDER THIS LICENSE MUST BE RENEWED BEFORE DECEMBER 31, 2007."[22] 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.[23]

Mr. Johnson had leased the License to a Mr. Greenfield in November 2005 for the 2005 fishing season.[24] Because of the lease, a new vessel, the *Smolt*, was designated for the License.[25] 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.[26]

Mr. Johnson was unable to reach Mr. Greenfield in 2007.[27] In the fall of 2007, Mr. Johnson found another fisherman interested in leasing the License for the 2007 season.[28] Mr. Johnson contacted DFW by phone to inquire about designating a new vessel for the License.[29]

P.2d 549 (1992). (Findings of fact are reviewed based on the substantial evidence standard.)

[22] CP 85.

[23] CP 121 (FF 10).

[24] CP 119 (FF 7).

[25] CP 119 (FF 7).

[26] *Id. See also* RP 21:14–28.

[27] CP 119 (FF 7).

[28] *Id.*

[29] *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."[30] DFW 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.[31] 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.[32] Relying on DFW'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.[33] Under these beliefs, Mr. Johnson did not renew the License for 2007 and invest $415 into a permit that would expire one month into the 9 month 2007 fishing season that nobody other than the unreachable Mr. Greenfield could use.[34]

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[30] *Id.*
[31] RP 8:30-31; RCW 77.70.350(1)(b) and (c).
[32] RP 10:4-5.
[33] CP 119-20 (FF 7).
[34] CP 120-21 (FF 7-8).

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 it.[35] Mr. Johnson testified that DFW told him that it needed to know the documented length of Mr. Greenfield's vessel the *Smolt*.[36] Mr. Johnson informed DFW that he was unable to reach Mr. Greenfield and, therefore, he could not obtain that information.[37] Mr. Johnson testified that the DFW representative stated that she would inquire whether DFW would accept the length of the *Smolt* as on the application and then get back in touch.[38] Mr. Johnson testified that nobody at DFW got back in touch in time for him to lease his License in 2007 or transfer his License that year.[39] Never did DFW inform Mr. Johnson that his failure to renew his permanent License by December 31, 2007 would result in DFW effectively revoking his permanent License.[40]

In early 2008, a buyer approached Mr. Johnson regarding the License.[41] Mr. Johnson again had several phone conversations with

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[35] RP 30:10–32:3.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] CP 121 (FF10); RP 10:6–32; RP 16:16-19.
[41] RP 16:19-32.

DFW.[42] This time DFW informed him that he could not transfer the License because he had not renewed it during 2007.[43]

In March 2008, Mr. Johnson applied, paid the application fee, and was denied the 2007 license.[44] He then brought an administrative appeal.[45] The DFW hearing officer affirmed the denial of his license and held Mr. Johnson could never renew his License again in the future.[46] However, the hearing officer also made an express finding, entered in the August 27, 2008 Final Order, that Johnson has held his permanent license since 1991.[47]

Mr. Johnson has testified that the License is a transferable asset worth approximately $50,000 to $70,000.[48]

In September 2008, Mr. Johnson timely petitioned for judicial review.[49] A judicial review hearing was held before Judge Godfrey in the Grays Harbor County Superior Court on September 29, 2011. Judge Godfrey set aside DFW's order and entered Findings of Fact and Conclusions of Law, along with a Judgment and Declaratory Order, on October 27, 2011, declaring and ordering Mr. Johnson's License

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[42] *Id.*
[43] CP 120-21 (FF 8).
[44] CP 118 (FF 2-3)
[45] *Id.*
[46] CP 127.
[47] CP 124, Finding of Fact (FF) no. 1.
[48] CP 121 (FF 11).
[49] CP 1-25.

reinstated.[50] DFW appealed Judge Godfrey's order. The Court of Appeals, Div. Two, reversed the trial court's order and affirmed DFW.

VI. ARGUMENT

A. Standards of Review.

Issues pertaining to constitutional limitations and statutory authority are issues of law to be determined *de novo* by this court.[51] If a statute's language is subject to only one interpretation, this Court's inquiry ends because plain language does not require construction.[52]

B. The Court of Appeals by reading into a statute language that the Legislature omitted, did not follow principles of statutory construction in Washington Supreme Court decisions.

When interpreting a statute, this Court is required to assume the Legislature meant exactly what it said and apply the statute as written.[53] The Legislature is deemed to intend a different meaning when it uses different terms.[54]

Here, the Legislature included an express annual renewal requirement in the statutes governing salmon charter licenses, herring fishery licenses, and whiting-Puget Sound fishery licenses, stating that a license that "is not renewed each year shall not be renewed further."[55] No

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[50] CP 181 – 88.
[51] *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003).
[52] *In re Parentage of S.E.C.*, 154 Wn. App. 111, 114, 225 P.3d 327 (2010).
[53] *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).
[54] *Id.*
[55] RCW 77.70.050(2); RCW 77.70.120(3); and RCW 77.70.130(4).

such express annual renewal requirement was included in the relevant Dungeness crab coastal fishery license statute.[56] The Legislature must therefore be deemed to intend a different meaning, not requiring annual renewal for the Dungeness crab coastal fishery licenses. The Court of Appeals, however, by treating RCW 77.70.360 as though it includes an express annual renewal requirement, is reading into the statute language that is not there, in conflict with this Court's principles of statutory construction.

C. Significant questions of law under the U.S. Constitution.

1. There is a protected property interest in a commercial fishing license.

Mr. Johnson argued that he has a protected property interest in his Dungeness crab coastal fishery license, citing *Foss v. Nat'l. Marine Fisheries Serv.*, a case from the Ninth Circuit Court of Appeals.[57] The Opinion, at 5 n.5, states that "federal circuit court due process cases are not binding on this court," citing *State v. Manussier*.[58]

Manussier, however, addressed whether to expand Washington state due process beyond federal perimeters,[59] and is from a line of cases

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[56] RCW 77.70.360.
[57] 161 F.3d 584, 588 (9th Cir. 1998).
[58] 129 Wn.2d 652, 680, 921 P.2d 473 (1996).
[59] *Id.* at 679-80.

addressing the differences between the due process guarantees in the federal and Washington state constitutions.

Manussier relies on *Rozner*, which in turn cites *Petstel* for the proposition that, "Although not controlling, federal decisions regarding due process are afforded great weight due to the similarity of the language."[60]

Petstel, however, does not say that "federal due process cases are not binding on this court." What *Petstel* says is:

> Plaintiff suggests, without citing any authority, that even if not invalid under the federal constitution, we might hold this resolution invalid under Const. art. 1, s 3. We note first that our constitutional provision, 'No person shall be deprived of life, liberty, or property, without due process of law', is the same as that in the federal constitution; and that the federal cases while not necessarily controlling should be given 'great weight' in construing our own due process provision. See *Herr v. Schwager*, 145 Wash. 101, 258 P. 1039 (1927).[61]

Thus *Petstel* is another case addressing whether the Washington due process clause affords greater protection than the federal due process clause. *Petstel* clearly stands for the principle that federal due process cases are not binding on Washington courts *when Washington courts are construing our own* Washington state constitution's due process

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[60] *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24, 29-30 (1991), citing *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 153, 459 P.2d 937 (1969).
[61] *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 153, 459 P.2d 937 (1969).

provision. *Petstel* does not say that the Ninth Circuit's cases regarding the *federal* due process provision are not binding on Washington courts.

Petstel relied on *Herr*,[62] which in turn relied on *State v. Buchanan*.[63] The language in *Buchanan* is somewhat less doctrinaire than the language in its progeny, stating merely, "*if* not binding upon this court, [*Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 43 L. Ed. 780] should have great weight, for the reason that the constitutional right which is claimed to have been infringed by this act is identical with the provision in the fourteenth amendment to the constitution of the United States."[64]

Johnson never argued that he was entitled to greater due process protection under the Washington constitution than under the federal constitution. Johnson never engaged in a *Gunwall* analysis,[65] but the *Manussier* court did.[66] The case on which *Manussier* relies, *Rozner*,[67] also cited *Gunwall*. Therefore *Manussier* is inapposite, and the Opinion has not shown why Johnson may not rely on *Foss*.

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[62] *Herr v. Schwager*, 145 Wash. 101, 258 P. 1039 (1927).
[63] 29 Wash. 602, 608-09, 70 P. 52 (1902).
[64] *Id.* at 608 (emphasis added).
[65] *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).
[66] *Manussier* at 679.
[67] *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24, 29-30 (1991).

2. The Dungeness crab coastal fishery license statutes are impermissibly vague and therefore do not give adequate notice.

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."[68] The Opinion concedes that Johnson has a protected liberty interest in continuing to fish and a "claim of entitlement," if not a protected property interest, in his fishing license. Procedural due process requires, at a bare minimum, notice and an opportunity to be heard.[69] The notice 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.[70]

The Opinion states at 6-7 that Johnson was given adequate pre-deprivation notice through the statutes. As stated above, the Dungeness crab-coastal statute, RCW 77.70.360, unlike other of the statutes governing limited licensing fisheries, does not give express notice that a failure to renew will result in a permanent loss of the license. Furthermore, persons of average intelligence could not be expected to understand from RCW 77.70.360 that they would be forfeiting permanently their crab license if they did not renew it in a given year.

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[68] U.S. Const. amend. 14, § 1.
[69] *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).
[70] *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)).

The constitutionality of a statute is an issue of law that is reviewed *de novo*.[71] The party challenging a statute's constitutionality has the burden to demonstrate its invalidity.[72] A statute is void for vagueness 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.[73] Such a statute violates the first essential of due process of law – notice.[74]

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."[75] 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.[76] Under the federal due process clause, citizens must be afforded fair warning of proscribed conduct.[77] The constitutional ban on vague laws is intended to invalidate statutory enactments that fail to

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[71] *Kitsap Cnty. v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).
[72] *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).
[73] *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).
[74] *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).
[75] U.S. Const. amend. 14, § 1.
[76] 17 WAPRAC § 4.7.
[77] *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).

provide adequate notice of their scope and sufficient guidelines for their application.[78]

Because both liberty and property are specifically protected by the fourteenth amendment against any state deprivation that does not meet due process standards, the void-for-vagueness doctrine is applicable to civil as well as criminal laws.[79] Under Washington constitutional authority, there is no distinction between the vagueness tests applicable to civil and criminal proceedings.[80]

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.[81] 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."[82]

Here the precise question is did the crab licensing statute impart unambiguous notice to Mr. Johnson that his crab fishing license would be effectively revoked, forfeited and lost for good if he did not renew it

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[78] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63, 92 S.Ct. 839, 31 L.Ed.2d 110 (1975).
[79] *Giaccio v. Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).
[80] *Mays*, 116 Wn. App. at 869.
[81] *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)).
[82] *Douglass*, 115 Wn.2d at 182-83.

within one year after it expired. The statute does not impart the constitutionally required notice. As a result, any implied license revocation or forfeiture is unconstitutional.

The Opinion states that an ordinary person would understand from RCW 77.70.360 that, to renew a license to fish in 2008, that person must have held a license to fish in 2007.[83] What is unclear, and impermissibly vague, is what the statute means to have "held" a license. The Opinion does not address that the Department's August 27, 2008 Final Order expressly found that Johnson has held his permanent license since 1991.[84] Neither party challenged this finding. The finding is, therefore, a verity on appeal.[85]

The Department itself apparently interpreted "held" or "hold" to mean two different things, first when it made its Finding of Fact no. 1 on August 27, 2008, that Johnson "has been the holder of a Dungeness crab commercial license since 1991"[86] and then when it made its Conclusion of Law no. 12 that Johnson did not meet the requirements of RCW 77.70.360 because he had not held a license in 2007.[87] Although the

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[83] "A person may renew an existing license only if the person held the license sought to be renewed during the previous year." RCW 77.70.360.
[84] CP 124, Finding of Fact (FF) no. 1.
[85] *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011) ("Unchallenged findings are verities on appeal.")
[86] CP 124.
[87] CP 10-11.

judges writing and concurring in the Opinion believe the statutory scheme to be clear regarding renewal requirements, at least one other judge, the Hon. Judge Gordon Godfrey of the Grays Harbor County Superior Court, disagreed. 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....[88]

Although the Court of Appeals 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 the statutes do not give persons of average intelligence adequate notice of the conduct the statutes proscribe. If a superior court judge is unsure of the meaning of the statute, then the average fisherman cannot be expected to discern from RCW 77.70.360 that he would lose his crab fishing license permanently if he failed to renew each and every year. This is especially so where DFW itself stated in 2008 in one place in its Final Order that Johnson had held his license since 1991 and in another place in its Final Order that Johnson was not entitled to renew it apparently because he had

[88] RP 22:19 – 23:6, Sept. 29, 2011.

not held it in 2007. RCW 77.70.360, at least, is therefore void for vagueness.

VII. **Conclusion**

Because the Opinion conflicts with rulings of the Supreme Court, and because it raises significant issues under the U.S. Constitution, review should be accepted.

DATED this 28th day of August, 2013.

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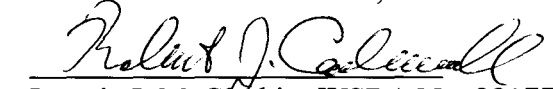

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CERTIFICATE OF SERVICE

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 Petition for Review to the following:

Office of the Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	____ Facsimile __X__ FedEx ____ U.S. Mail ____ Email
Michael Young 1125 Washington Street SE P.O. Box 40100 Olympia WA 98504 michaely@atg.wa.gov	____ Facsimile __X__ FedEx U.S. Mail __X__ Email

Signed this 29th day of August, 2013 Seattle, Washington.

Matt Bray
Firm Administrator

Appendix

West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.70. License Limitation Programs (Refs & Annos)

West's RCWA 77.70.360

77.70.360. Dungeness crab-coastal fishery licenses--Limitation on new licenses--Requirements for renewal

Currentness

Except as provided under *RCW 77.70.380, the 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. Where the person failed to obtain the license during the previous year because of a license suspension, the person may qualify for a license by establishing that the person held such a license during the last year in which the license was not suspended.

Credits
[2000 c 107 § 81; 1994 c 260 § 13. Formerly RCW 75.30.440.]

<(Formerly: Game and Game Fish)>

West's RCWA 77.70.360, WA ST 77.70.360
Current with 2013 Legislation effective through August 1, 2013

End of Document

West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.70. License Limitation Programs (Refs & Annos)

West's RCWA 77.70.050

77.70.050. Salmon charter boats--Limitation on issuance of licenses--Renewal--Transfer

Currentness

(1) After May 28, 1977, the director shall issue no new salmon charter licenses. A person may renew an existing salmon charter 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.

(2) Salmon charter licenses may be renewed each year. A salmon charter license which is not renewed each year shall not be renewed further.

(3) Subject to the restrictions in RCW 77.65.020, salmon charter licenses are transferrable from one license holder to another.

Credits

[2000 c 107 § 59; 1993 c 340 § 28; 1983 1st ex.s. c 46 § 141; 1981 c 202 § 1; 1979 c 101 § 7; 1977 ex.s. c 106 § 2. Formerly RCW 75.30.065, 75.30.020.]

<(Formerly: Game and Game Fish)>

West's RCWA 77.70.050, WA ST 77.70.050
Current with 2013 Legislation effective through August 1, 2013

End of Document

West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.70. License Limitation Programs (Refs & Annos)

West's RCWA 77.70.120

77.70.120. Herring fishery license--Limitations on issuance

Currentness

(1) A person shall not fish commercially for herring in state waters without a herring fishery license. As used in this section, "herring fishery license" means any of the following commercial fishery licenses issued under RCW 77.65.200: Herring dip bag net; herring drag seine; herring gill net; herring lampara; herring purse seine.

(2) Except as provided in this section, a herring fishery license may be issued only to a person who 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.

(3) Herring fishery licenses may be renewed each year. A herring fishery license that is not renewed each year shall not be renewed further.

(4) The director may issue additional herring fishery licenses if the stocks of herring will not be jeopardized by granting additional licenses.

(5) Subject to the restrictions of RCW 77.65.020, herring fishery licenses are transferable from one license holder to another.

Credits

[2000 c 107 § 66; 1998 c 190 § 102; 1993 c 340 § 35; 1983 1st ex.s. c 46 § 148; 1974 ex.s. c 104 § 1; 1973 1st ex.s. c 173 § 4. Formerly RCW 75.30.140, 75.28.420.]

<(Formerly: Game and Game Fish)>

West's RCWA 77.70.120, WA ST 77.70.120
Current with 2013 Legislation effective through August 1, 2013

End of Document

West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.70. License Limitation Programs (Refs & Annos)

West's RCWA 77.70.130

77.70.130. Whiting-Puget Sound fishery license--Limitation on issuance

Currentness

(1) A person shall not commercially take whiting from areas that the department designates within the waters described in RCW 77.65.160(5)(a) without a whiting-Puget Sound fishery license.

(2) A whiting-Puget Sound fishery license may be issued only to an individual who:

(a) Delivered at least fifty thousand pounds of whiting during the period from January 1, 1981, through February 22, 1985, as verified by fish delivery tickets;

(b) Possessed, on January 1, 1986, all equipment necessary to fish for whiting; and

(c) Held a whiting-Puget Sound fishery license during the previous year or acquired such a license by transfer from someone who held it during the previous year.

(3) After January 1, 1995, the director shall issue no new whiting-Puget Sound fishery licenses. After January 1, 1995, only an individual who meets the following qualifications may renew an existing license: The individual shall have 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 shall not have subsequently transferred the license to another person.

(4) Whiting-Puget Sound fishery licenses may be renewed each year. A whiting-Puget Sound fishery license that is not renewed each year shall not be renewed further.

Credits
[2000 c 107 § 67; 1993 c 340 § 39; 1986 c 198 § 5. Formerly RCW 75.30.170.]

<(Formerly: Game and Game Fish)>

West's RCWA 77.70.130, WA ST 77.70.130
Current with 2013 Legislation effective through August 1, 2013

End of Document

West's Revised Code of Washington Annotated
Title 77. Fish and Wildlife (Refs & Annos)
Chapter 77.70. License Limitation Programs (Refs & Annos)

West's RCWA 77.70.350

77.70.350. Restrictions on vessel designations and substitutions on Dungeness crab-coastal fishery licenses

Effective: June 10, 2010
Currentness

(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.

(2) For the purposes of this section, "hull length" means the length overall of a vessel's hull as shown by marine survey or by manufacturer's specifications.

(3) By December 31, 2010, the department must, in cooperation with the coastal crab fishing industry, evaluate the effectiveness of this section and, if necessary, recommend any statutory changes to the appropriate committees of the senate and house of representatives.

Credits

[2010 c 193 § 13, eff. June 10, 2010; 2006 c 159 § 1, eff. June 7, 2006; 1994 c 260 § 10. Formerly RCW 75.30.430.]

<(Formerly: Game and Game Fish)>

West's RCWA 77.70.350, WA ST 77.70.350
Current with 2013 Legislation effective through August 1, 2013

End of Document

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CURTIS JOHNSON, Respondent, v. WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, Appellant.	No. 42738-9-II PUBLISHED IN PART OPINION

PENOYAR, J. — Curtis Johnson applied two months late to renew his 2007 Dungeness crab coastal fishery license. The Department of Fish and Wildlife (Department) denied his renewal application and informed him that his failure to timely renew meant he was barred from renewing his license in subsequent years. Johnson appealed this decision to a hearings officer, who affirmed the Department. Johnson then appealed to Grays Harbor Superior Court, which reversed the Department and ordered it to reinstate Johnson's license. The Department appealed the superior court's decision to this court.[1] Johnson argues that the Department violated his procedural due process rights and that RCW 77.70.360 violates substantive due process. We hold that the Department did not violate Johnson's due process rights because he was afforded notice and a hearing and that RCW 77.70.360 is rationally related to protecting the fishery.

In the unpublished portion of the opinion, we address Johnson's additional arguments that (1) the Department erroneously interpreted and applied RCW 77.70.360 when it determined that his failure to timely renew his license in 2007 barred him from renewing it in subsequent years; (2) the statutes the Department relied on are unconstitutionally vague; (3) the Department

[1] Although the Department is the appellant, under Division II rules, the party filing an appeal under the Administrative Procedure Act (APA) in superior court is responsible for the opening and reply briefs before this court. Therefore, Johnson is treated as the appellant in this case.

is equitably estopped from denying his renewal application; and (4) he is entitled to attorney fees. We hold that the Department did not err in applying RCW 77.70.360 because it requires an applicant to have held a license in the previous year and Johnson's failure to renew his license in 2007 meant he did not hold a license in 2007. Additionally, the statutes are not unconstitutionally vague; equitable estoppel does not apply here because Johnson failed to prove that the Department made inconsistent statements; and we do not award Johnson attorney fees because he did not prevail. We reverse the trial court's order setting aside the Department's order and affirm the Department.

FACTS

Johnson failed to renew his Dungeness crab coastal fishery license in 2007, which resulted in his license permanently expiring. Johnson had held a Dungeness crab commercial fishing license since 1991. In 1995, the legislature limited entry into the Dungeness crab coastal fishery, providing that "the director shall issue no new Dungeness crab-coastal fishery licenses after December 31, 1995," and that "[a] person may renew an existing license only if the person held the license sought to be renewed during the previous year." RCW 77.70.360. The Department granted Johnson a "permanent" coastal fishery license in 1995. Clerk's Papers (CP) at 118. Johnson renewed this license every year until 2007.

Under RCW 77.65.030, the deadline to renew a commercial license is December 31 of the calendar year for which the license is sought. For example, a license holder has until December 31, 2013, to renew his 2013 license. Johnson did not attempt to renew his 2007 license until March 4, 2008, because he believed that he could not fish under his license that

year. Johnson had leased his license to Kenneth Greenfield starting in the 2005-06 season[2] but had difficulty contacting Greenfield thereafter. In the fall of 2007, Johnson found another fisher interested in leasing his license, so he called the Department to ask about changing the vessel designation for the license. Johnson testified that the Department told him he could not change the vessel designation for the license twice within two consecutive years and that he would have to wait until after 2007 to designate another vessel.[3] Since he believed the designation restraints prevented him from using the license himself or leasing to another fisher, Johnson decided that it would be a waste of the permit fee to renew his license for 2007. Johnson said that during his conversations with the Department about vessel designations, the Department never reminded him that he needed to renew his license or that failure to do so would cause his license to permanently expire.

The Department usually mails renewal reminders in the fall, but Johnson testified that he did not receive one in 2007, likely because of mail delivery issues in his neighborhood. The reminders include the license's expiration date—December 31—but they do not indicate the consequences of failing to renew.

In early 2008, Johnson again tried to change the vessel designation for his license. The Department then informed him that he had not renewed his license in 2007, which meant that he could not renew it for 2008 or any subsequent year. Nevertheless, Johnson attempted to apply

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[2] The fishery is open on a seasonal basis spanning two calendar years, but the license renewal system operates by calendar year.

[3] A Department representative testified at the hearing that this information was incorrect. The Department does not allow two vessel redesignations within two *seasons*, but a season is different than a calendar year, and two seasons had passed since Johnson had last changed the vessel designation. Therefore, he would have been able to designate a new vessel in the fall of 2007.

for renewal, and the Department denied his renewal application, stating that it was prohibited by statute from accepting applications after the December 31 deadline.

Johnson appealed to an administrative hearings officer. The hearings officer affirmed the permit denial and concluded that Johnson's failure to timely renew his license resulted in the license permanently expiring. The hearings officer concluded that RCW 77.65.030 required Johnson to renew his license by December 31, 2007, which he did not do, and that RCW 77.70.360, which states that a person may renew an existing license only if that person held the license sought to be renewed during the previous year, "means that when a . . . license is not renewed it is no longer capable of being renewed in the future." CP at 123. Johnson appealed to the superior court, which reversed the Department and ordered it to renew Johnson's license. The Department appeals.

ANALYSIS

I. STANDARD OF REVIEW

Under the Washington Administrative Procedures Act (APA),[4] we sit in the same position as the superior court and apply the APA directly to the agency's administrative record. *Burnham v. Dep't of Soc. & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)). The party challenging the agency action bears the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). A court shall grant relief from an agency's order if the order violates constitutional provisions, the agency has erroneously interpreted or applied the law, or the order is not supported by substantial evidence. RCW 34.05.570(3)(a), (d), (e). Whether an agency's

[4] Chapter 34.05 RCW

order violates the constitution and whether it has erroneously applied the law are questions of law that we review de novo. *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011); *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). An agency order is supported by substantial evidence if there is "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Hardee*, 172 Wn.2d at 7 (quoting *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008)).

II. PROCEDURAL DUE PROCESS

Johnson first argues that the Department violated his procedural due process rights. Because Johnson received notice of the Department's actions and an administrative hearing in which he was able to present evidence and to examine the Department's witnesses, his argument fails.

The due process clause of the Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property without due process of law. U.S. CONST. amend. XIV. Assuming, without deciding, that Johnson has a claim of entitlement to a license even though his right to renew expired, we address whether the Department provided adequate process.[5]

At a minimum, due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Notice must be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. *State v. Dolson*, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). The opportunity to be heard must be

[5] Johnson argues that he has a protected property interest, citing *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998). However, federal circuit court due process cases are not binding on this court. *State v. Manussier*, 129 Wn.2d 652, 680, 921 P.2d 473 (1996) (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991) (federal decisions regarding due process are afforded great weight, but they are not controlling).

meaningful in time and manner. *Morrison v. Dep't of Labor & Indus.*, 168 Wn. App. 269, 273, 277 P.3d 675, *review denied*, 175 Wn.2d 1012 (2012) (quoting *Downey v. Pierce County*, 165 Wn. App. 152, 165, 267 P.3d 445 (2011)). To determine how much process is due, we balance the private interest involved; the risk of erroneous deprivation through the procedures involved and the value of additional procedures; and the government's interest, including the burdens that accompany additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Due process is a flexible concept and the procedures required depend on the circumstances of a particular situation. *Mathews*, 424 U.S. at 334.

Here, Johnson received adequate notice that the Department was rejecting his renewal application. The Department sent him a letter dated March 14, 2008, containing the reasons for the denial and informing Johnson that he could request an administrative hearing to contest the denial. Johnson also received an opportunity to be heard. He had an administrative hearing before a hearings officer where he was represented by counsel and where he submitted evidence, gave his testimony, and questioned the Department's representative.

Johnson argues that this process was inadequate because he should have received pre-deprivation notice and opportunity for a hearing. His argument fails because, under the *Mathews* factors, the Department's procedures were adequate.

The first factor—the private interest involved—favors Johnson. The loss of his license inhibits his ability to engage in commercial crab fishing. The next two factors favor the Department. Regarding the second factor, the risk of erroneous deprivation and the value of additional procedures are slight. Johnson had pre-deprivation notice through the statutes, which set out when a license expires, when it must be renewed, and the qualifications for renewal—

including a valid license from the previous year—and through the Department's renewal reminders. *See* RCW 77.65.030, 77.65.070(3), 77.70.360. Further, the Department based its decision on a readily ascertainable and undisputed fact: that Johnson missed the December 31, 2007, deadline for renewing his license for 2007.

As for the third factor—the Department's interest in maintaining its licensing procedures—it would be impossible for the Department to provide individuals in Johnson's situation a pre-deprivation hearing. Under the statute, Johnson had until December 31, 2007, to renew his license. RCW 77.65.030. Until that deadline passed, the Department had no reason to deny Johnson's application. Given the low risk of erroneous deprivation and the impossibility of holding a pre-deprivation hearing, the Department's procedures in this case were adequate.

III. SUBSTANTIVE DUE PROCESS

Johnson next argues that RCW 77.70.360 violates substantive due process. Because the statute is rationally related to fishery management, we hold that it does not violate 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 constitutionally adequate procedures." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). As with a procedural due process claim, a plaintiff must first show that the state deprived him of a constitutionally protected liberty or property interest. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 641, 127 P.3d 713 (2005). Johnson asserts that he has a protected property interest in his commercial crabbing license because "once issued, professional and motor vehicle licenses create interests requiring due process protection." Opening Br. at 39 (citing *Amunrud*, 158 Wn.2d at 219). Additionally, both the United States Supreme Court and the Washington Supreme Court have

held that the right to pursue a particular profession is a protected liberty interest. *Conn v. Gabbert*, 256 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed 2d 399 (1999); *Amunrud*, 158 Wn.2d at 220. Arguably, Johnson has a protected liberty interest in continuing to fish for crab.

Once a party has identified a protected interest, we must determine what level of review to apply. The level of review we apply to a substantive due process challenge depends on the nature of the right affected. *Amunrud*, 158 Wn.2d at 219. If a right can be characterized as fundamental, strict scrutiny applies. *Amunrud*, 158 Wn.2d at 220. The right to pursue a profession, which is what is at issue here, is a protected interest but not a fundamental right. *Amunrud*, 158 Wn.2d at 220-21. Therefore, rational basis review applies. *Amunrud*, 158 Wn.2d at 220. To survive rational basis review, the Department's action must be rationally related to a legitimate state interest. *Amunrud*, 158 Wn.2d at 222.

We hold that RCW 77.70.360 is rationally related to a legitimate state interest. As Johnson concedes, management of the coastal crab fishery is a legitimate state interest. RCW 77.70.360 is rationally related to fishery management: it reduces the number of fishers and licenses while protecting those who continually participate in the fishery.

Johnson argues that we should review his claim using the three-prong test Washington courts apply when considering whether a statute violates due process: (1) whether the statute is aimed at achieving a legitimate public purpose, (2) whether it uses means that are reasonably necessary to achieve that purpose, and (3) whether it is unduly oppressive on individuals. He contends that, under this test, RCW 77.70.360 violates substantive due process because it is not reasonably necessary to achieve fishery management and it is unduly oppressive. But our Supreme Court in *Amunrud*, another licensing case, declined to engage in the three-prong

analysis and unambiguously stated that rational basis review applies in situations that involve a non-fundamental right, such as the right to pursue a profession. 158 Wn.2d at 226.

Johnson argues that his situation is similar to the plaintiffs' in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). In *Guimont*, mobile home park owners challenged the constitutionality of the Mobile Home Relocation Assistance Act, chapter 59.21 RCW, which required them to pay a portion of their residents' relocation fees. 121 Wn.2d at 592-93. To determine whether the Act violated the owners' substantive due process rights, the court applied the three-prong test. *Guimont*, 121 Wn.2d at 609. The court held that the Act violated substantive due process, stating that providing relocation assistance was reasonably necessary to achieve the Act's purpose but that requiring park owners to bear the costs was unduly oppressive. *Guimont*, 121 Wn.2d at 610, 613. The court opined that a less oppressive solution would be to require society as a whole to share the costs. *Guimont*, 121 Wn.2d 611.

More recently, our Supreme Court has rejected the three-prong analysis in a situation factually similar to Johnson's. In *Amunrud*, the court considered whether a statute suspending a taxi driver's commercial license for failing to pay child support violated his substantive due process rights. 158 Wn.2d at 214-15 The court determined that the right to pursue a profession was a non-fundamental right; accordingly, it applied rational basis review. *Amunrud*, 158 Wn.2d at 220. Under this standard, the court found that there was a rational relationship between license suspension and the state's interest in enforcing child support orders. *Amunrud*, 158 Wn.2d at 224. The court held that, as long as the statute was subject to rational basis review, it would not consider whether the statute was unduly oppressive, reiterating that the proper test was whether "the law bears a reasonable relationship to a legitimate state interest." *Amunrud*, 158 Wn.2d at 226. The court explained that the unduly oppressive prong, most often applied in land

use cases, has limited applicability even in those cases and is not appropriately considered in cases where the statute "'regulates only the activity which is directly responsible for the harm.'" *Amunrud*, 158 Wn.2d at 226 n.5 (quoting *Weden v. San Juan County*, 135 Wn.2d 678, 707, 958 P.2d 273 (1998)). Significantly, the court took an expansive view of whether the regulated activity is responsible for the harm, since driving a taxi does not cause the evils of delinquent child support. Instead, the Supreme Court's focus was on whether the statute would provide an incentive to remedy the problems that Amunrud had a hand in creating.

This case is governed by *Amunrud*. If the unduly burdensome test does not apply even with the tenuous connection between taxi driving and child support in *Amunrud*, then it will not apply to the much more direct connection here. In this case, the legislature limited entry into the coastal crab fishery because it found "that the commercial crab fishery in coastal . . . waters is overcapitalized," and RCW 77.70.360 regulates only those parties directly responsible for the overcapitalization—commercial crab fishermen. LAWS OF 1994 ch. 260, § 1. Therefore, we do not engage in the unduly oppressive analysis because the statute does not "require an individual 'to shoulder an economic burden, which in justice and fairness the public should rightfully bear.'" *Weden*, 135 Wn.2d at 706 (quoting *Orion Corp. v. State*, 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)).

Johnson argues that even if the unduly oppressive prong does not apply, RCW 77.70.360 still violates substantive due process because it is not reasonably necessary to achieve fishery management goals. "[I]n determining whether a particular statute is reasonable, we must conclude only that there is a rational connection between the purpose of the statute and the method the statute uses to accomplish that purpose." *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 506, 816 P.2d 725 (1991). Johnson contends that RCW 79.70.360 uses means that

are not reasonably necessary to achieve fishery management. But as we discussed above, all that is required is present here: a rational connection between the purpose of the statute—coastal crab fishery management—and the method—limiting entry into the fishery.

We reject Johnson's argument that the three-prong test applies in this instance. We hold that rational basis review applies and that RCW 77.70.360 is rationally related to fishery management. Accordingly, Johnson's due process claim fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I. STATUTORY CONSTRUCTION

Johnson next argues that the Department erroneously interpreted RCW 77.70.360 to provide that his failure to timely renew his license in 2007 resulted in his license permanently expiring. The Department did not err because RCW 77.70.360 requires a person to have "held" a license in the previous year in order to be eligible for renewal, and Johnson did not hold a license in 2007.

We review a question of statutory interpretation de novo. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009). In doing so, we give effect to the statute's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). We discern plain meaning from the ordinary meaning of the language at issue. *Campbell & Gwinn*, 146 Wn.2d at 11. If a term is undefined in the statute, we look to the statute's purpose, context, and subject matter. *Retail Store Emps. Union, Local 1001 v. Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 898, 558 P.2d 215 (1976). We may also use

the dictionary to discern the plain meaning of an undefined term. *Estate of Haselwood*, 166 Wn.2d at 498.

RCW 77.70.360 states that the Department "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, . . . and if the person has not subsequently transferred the license to another person." (Emphasis added). The Department's interpretation is that a person may renew his license only if he possessed a valid, unexpired license issued for the previous year; therefore, Johnson could not renew his license in 2008 because he did not hold a valid license in 2007. In contrast, Johnson contends that his license was permanent and that a person may hold a license even if it is expired.

Here, the statute's plain meaning and the word "held" is consistent with the Department's "renew-it-or-lose-it" interpretation. Response Br. at 18. The statute allows a person to renew his license only if he "held" the license in the previous year. "Hold" means "to retain in one's keeping" or to "have" or "possess." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1078 (2002). Johnson did not hold a license in 2007. A license is "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002). "A commercial license issued under this chapter permits the license holder to engage in the activity for which the license is issued," in this case, coastal crab fishing. RCW 77.65.070(1). By Johnson's own admission, his failure to renew his license in 2007 meant that he did not hold the right to fish for Dungeness crab during that year; he merely held the right to apply for renewal during 2007. This right is not

the same as an existing license. Therefore, Johnson did not hold a license in 2007, and he did not meet the renewal requirements under RCW 77.70.360 for 2008 or any subsequent year.

The Department's construction is consistent with the legislature's stated purpose. When the legislature limited entry to the Dungeness crab coastal fishery and enacted what is now RCW 77.70.360, it stated that its purpose in doing so was to "protect the livelihood of Washington crab fishers who have historically and continuously participated in the coastal crab fishery." LAWS OF 1994, ch. 260, § 1. To that end, the legislature sought, among other things, "to reduce the number of fishers taking crab in coastal waters . . . [and] to limit the number of future licenses." LAWS OF 1994, ch. 260, § 1. The Department's construction of RCW 77.70.360 furthers this purpose by limiting Dungeness crab coastal licenses to those fishers who annually renew their licenses. This protects those who have "historically and *continuously*" participated in the coastal crab fishery by reducing the number of fishers: those who do not continuously renew and use their licenses lose them. LAWS OF 1994, ch. 260, § 1 (emphasis added).

Additionally, Johnson's construction of the statute is not consistent with the statutory scheme. RCW 77.70.360 and RCW 77.70.020 provide exceptions to the requirement that a person can renew a license only if he held the license in the previous year. These statutes allow a person to renew his license if he did not hold one in the previous year because of a suspension or because there was no harvest opportunity. RCW 77.70.360; RCW 77.70.020. If a person could renew an expired license at any time, as Johnson suggests, these provisions would be unnecessary.

Further, Johnson's argument that his license was permanent and, therefore, he was not required to renew it, is not persuasive in the context of the statutory scheme. In its letter informing Johnson that he qualified for a coastal crab license, the Department referred to his license as "permanent." RCW 77.70.280, the statute limiting licenses for the coastal crab fishery, lists two types of licenses: Dungeness crab-coastal fishery licenses and Dungeness crab-coastal class B fishery licenses, which expired on December 31, 1999, and could not be renewed thereafter. In this context, the word "permanent" distinguishes between permits that may be annually renewed and class B permits that expired automatically on December 31, 1999. There is no evidence that the Department used "permanent" to mean that the license did not have to be renewed. In fact, annual renewal is necessary under RCW 77.65.070, which states that commercial licenses expire on December 31 of the year for which they are issued. Further, Johnson was aware of the necessity of renewing his license because the Department mailed annual renewal reminders and he renewed it annually from 1995 until 2007.

II. VAGUENESS

Johnson next argues that RCW 77.65.030, 77.65.070, and 77.70.360 are all both individually and collectively unconstitutionally vague because they do not provide unambiguous notice to license holders that their licenses could be permanently revoked if they fail to renew them. These statutes are not unconstitutionally vague because an ordinary person would understand from the statutes when a license expires and that a valid license is required for renewal under RCW 77.70.360.

We review a statute's constitutionality de novo. *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 978, 216 P.3d 374 (2009). We presume that statutes are constitutional, and one who challenges a statute as unconstitutionally vague must prove vagueness beyond a reasonable

doubt. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). For statutes not involving First Amendment rights, we evaluate the vagueness challenge by examining the statute as applied under the particular facts of the case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). A statute is unconstitutionally vague if its terms are "so vague that persons of common intelligence must guess at its meaning and differ as to its application." *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). This does not require impossible standards of specificity or absolute agreement. *Douglass*, 115 Wn.2d at 179.

RCW 77.65.030, 77.65.070, and 77.70.360 are not unconstitutionally vague either individually or collectively. RCW 77.65.070(3) states "commercial licenses and permits issued under this chapter expire at midnight on December 31st of the calendar year for which they are issued." An ordinary person in Johnson's situation would understand this to mean that a 2006 license expires on December 31, 2006. RCW 77.65.030 states, "The application deadline for a commercial license or permit established in this chapter is December 31st of the calendar year for which the license or permit is sought." An ordinary person in Johnson's situation would understand this to mean that he has until December 31, 2007, to renew a 2007 license. RCW 77.70.360 states, "A person may renew an existing license only if the person held the license sought to be renewed during the previous year." An ordinary person would understand this to mean that, in order to renew a license in 2008, that person must have held a license to fish in 2007. As we discussed above, a license is the right to take crab from the coastal fishery. A person is allowed to do this only if they applied for renewal. An ordinary person reading these statutes together would understand that a person who failed to timely renew a license in 2007 would not have held a license in 2007 and would not be eligible to apply for renewal in 2008 under RCW 77.70.360.

III. EQUITABLE ESTOPPEL

Finally, Johnson argues that the Department was equitably estopped from denying his license renewal application. Johnson's claim is based on three of the Department's actions: (1) a 1995 letter from the Department informing him that he qualified for a "permanent" Dungeness crab coastal fishery license, (2) a 2007 phone conversation with the Department regarding vessel designations, and (3) the Department's license renewal reminders. CP at 115. Because the Department did not make any statements inconsistent with its interpretation of RCW 77.70.360, this argument fails.

A party asserting equitable estoppel against the government must prove five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the government that is inconsistent with its later claims; (2) the asserting party's reliance on the government's statements or acts; (3) injury to the asserting party if the government 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. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007). Inaction alone does not constitute an inconsistent statement, admission, or act. *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 761, 695 P.2d 996 (1985).

Johnson first argues that the Department "misrepresented" his license when it told him that it was granting him a "permanent" license. Opening Br. at 43. In a 1995 letter informing Johnson that he qualified for a limited entry Dungeness crab coastal fishery license, the Department twice referred to his license as "permanent." CP at 115. But, the Department did not use "permanent" to mean Johnson never had to renew his license. The Department used this term to distinguish Johnson's license from class B licenses, which expired on December 31,

1999, and could not be renewed thereafter. RCW 77.70.280(4). Thus, nothing in the letter was inconsistent with the Department's position that licenses must be renewed annually or they would expire.

Johnson next argues that the Department gave him incorrect information during phone calls regarding vessel designation. In the fall of 2007, Johnson called the Department to ask about designating a different vessel under his license. He does not present any evidence that the conversation included a discussion on license renewal or the consequences of failing to renew on time. Because he failed to prove that the Department made inconsistent statements regarding license renewal, equitable estoppel does not apply to this action.

Lastly, Johnson argues that the Department is equitably estopped from denying his license because he did not receive a 2007 renewal reminder and, even if he had, the reminder did not state the consequences of failing to timely renew his license. This argument fails because Johnson must show that the Department made *inconsistent* statements, and all he is arguing here is that the Department failed to make *any* statements in the reminder regarding the consequences of failing to renew. Because Johnson failed to provide evidence of inconsistent statements, his equitable estoppel argument fails.

IV. ATTORNEY FEES

Johnson argues that he is entitled to attorney fees and costs under RCW 4.84.350 and RAP 18.1. RCW 4.84.350 requires us to award attorney fees and costs to a party that prevails in a judicial review of an agency action. Johnson does not prevail; therefore, he is not entitled to attorney fees.

We reverse the trial court's order setting aside the Department's order and affirm the Department.

Penoyar, J.

We concur:

Worswick, C.J.

Bjorgen, J.