

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. DISCUSSION	1
A. <u>Bedlands Leasing Restrictions are Mandatory.</u>	1
B. <u>The Aquaculture Statute Cannot, and Does Not, Nullify the Tidelands Protection Statute.</u>	7
C. <u>Legislative History Does Not Support Leasing Bedlands to “Any Person” for Aquaculture.</u>	9
D. <u>Herring Net Pens Are Not Aquaculture.</u>	11
III. CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005)	9
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987)	4
<i>Faunce v. Carter</i> , 26 Wn.2d 211, 173 P.2d 526 (1946)	6
<i>French v. Edwards</i> , 80 U.S. 506, 20 L.Ed. 702 (1871)	4
<i>Hartman v. State Game Commission</i> , 85 Wn.2d 176, 532 P.2d 614 (1975)	10
<i>Hess Collection Winery v. California Agricultural Labor Relations Board</i> , 140 Cal.App.4th 1584 (2006)	5, 6
<i>Rock Island County Supervisors v. United States</i> , 71 U.S. 435, 18 L.Ed. 419 (1866)	4
<i>Spokane County ex. rel. Sullivan v. Glover</i> , 2 Wn.2d 162, 97 P.2d 628 (1940)	6
<i>State v. North Shore Boom & Driving Co.</i> , 55 Wn. 1, 103 P. 426 (1909)	3
<i>Wash. State Liquor Control Board v. Wash. State Personnel Board</i> , 88 Wn.2d 368, 561 P.2d 195 (1977)	6
<i>Waste Management of Seattle, Inc. v. Utilities and Transportation Commission</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994)	7

Statutes

RCW 79.30.110 3

RCW 79.130.010 1-10

RCW 79.130.010(1) and (2) 2

RCW 79.130.010(2) 2

RCW 79.135.110 7, 8

Regulations

WAC 332-30-106 11

WAC 332-30-106(3) 11

Other Authorities

3 SUTHERLAND STATUTORY CONSTRUCTION § 57:14 (6TH ed.) . 3

Laws of 1899, ch. 136 10

Laws of 1953, ch. 164, §5 10

I. INTRODUCTION

Respondent State Department of Natural Resources (“the Department”) argues that the restrictions on bedlands leasing contained in RCW 79.130.010 are “not a prohibition” and therefore were rightfully ignored in this case. Response Brief at 15. This interpretation of the statute’s restrictions as merely permissive, rather than peremptory, conflicts with time-honored principles of statutory construction. A plain reading of RCW 79.130.010 limits DNR’s authority to lease bedlands to owners or lessees of adjacent tidelands.

Further, the proposed herring storage facility is not aquaculture. DNR’s insistence that the mere storage and starvation of fish for two weeks meets a common sense definition of “processing” is not plausible and entitled to no deference.

II. DISCUSSION

A. Bedlands Leasing Restrictions are Mandatory.

Stating that RCW 79.130.010 is merely “an authorization to lease, not a prohibition” (Response Brief at 15) is another way of saying that the statute is permissive rather than mandatory. Under the Department’s interpretation, RCW 79.130.010 merely authorizes the Department to lease bedlands to the

owners of abutting shorelands if it chooses to do so, as if its discretion is unbounded. The Department’s reading of the statute utterly fails to protect the rights of those who own shorelands adjacent to state-controlled bedlands, ignoring both legislative intent and basic rules of statutory construction.

The plain language of RCW 79.130.010 makes clear that the statute is a mandate to restrict bedlands leasing to those who own abutting residential or commercial tidelands, and not a mere “authorization” to protect those owners at the Department’s discretion. The statute says in relevant part:

[T]he department may lease to the abutting tidelands or shorelands owner or lessee, the beds of navigable waters . . .

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

RCW 79.130.010(1) and (2) (emphasis added). Thus, the Department “may” lease beds of navigable waters to “any person,” regardless of whether the person owns adjacent tidelands, only “in case” the abutting tidelands have no residential or commercial improvements.¹ This language plainly

¹ Even where a tideland or shoreland is devoid of any residential or commercial development, the lease of the adjacent water bed is limited to booming. RCW 79.130.010(2). In this case it is undisputed that the Echo Bay bedlands at issue are adjacent to tidelands with

demonstrates a legislative intent to protect owners or lessees of residential or commercial tidelands from incompatible uses of adjacent bedlands. It does so by making sure that the same people who control developed tidelands also control the adjacent bedlands. No other interpretation makes sense. Why mention the tidelands owners and lessees at all, if not to protect their interests?²

It is black-letter law that statutes such as RCW 79.130.010, which authorize an agency to act in the public interest or to protect the rights of private property owners, must be construed as mandatory. “Where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory. This is true irrespective of whether they are phrased in imperative or permissive terms.” 3 SUTHERLAND STATUTORY CONSTRUCTION § 57:14 (6TH ed.) (citing *State v. North Shore Boom & Driving Co.*, 55 Wn. 1,

residential or commercial uses. Therefore, under the plain language of RCW 79.130.010, the Department “may lease” the Echo Bay bedlands to the abutting tidelands owners or lessees, but may not lease them to “any person” for booming (let alone other purposes).

² In footnote 33 on page 10 of Respondent’s Brief they assert that under EBCA’s reading of RCW 79.30.110 tideland owners could control use of adjacent bedlands. This is precisely what the Legislature intended—that owners of tideland property should have some say in what goes on in adjacent waters. Under the logical reading of RCW 79.130.110, at least a local interest is required before a lease is appropriate. These waters would remain open, however, for free public use and enjoyment.

103 P. 426 (1909)) (string cite omitted). “Where power is given to public officers. . .-whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory.” *Id.* (quoting *Rock Island County Supervisors v. United States*, 71 U.S. 435, 18 L.Ed. 419 (1866)). “[W]hen the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which the rights might be and generally would be injuriously affected, they are not directory but mandatory.” *Id.* (quoting *French v. Edwards*, 80 U.S. 506, 20 L.Ed. 702 (1871)). Here, the bedlands leasing statute is mandatory because it calls for the Department to exercise authority “protecting private rights or in public interest” - ensuring that public bedlands are used compatibly with adjacent private tidelands.³ Therefore, the Department is wrong in arguing the statute is “not a prohibition” against

³ Even if RCW 79.130.010 was not intended to protect tideland owners and lessees from incompatible uses of adjacent bedlands, it still is “protecting private rights or public interest.” Under the public trust doctrine, the state is charged with protecting the public’s right of navigation and recreation in public waters, even where adjacent tidelands and shorelands are privately owned. *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987) (the state retains dominion over all tidelands and shorelands and “holds such dominion in trust for the public”). Consistent with this public trust doctrine, RCW 79.130.010 restricts the leasing of bedlands to those already subject to public-trust “dominion” - the private owners of developed tidelands and shorelands. In other words, public navigation and recreation is protected by limiting the leasing of bedlands only to adjacent tidelands owners who must comply with public-trust regulations. If a local tideland owner does not want to lease adjacent bedlands, then those waters remain open for use by the general population and cannot be locked up for private use by outside entities.

leasing bedlands to anyone, regardless of whether adjacent tidelands are developed.

Significantly, the Department itself refers to the statute's provisions as leasing "restrictions." Response Brief at 11, 12, 22. These "restrictions" would be illusory unless the statute is construed as mandatory.

Hess Collection Winery v. California Agricultural Labor Relations Board, 140 Cal.App.4th 1584 (2006), is instructive here because it involves a statute that is structurally similar to RCW 79.130.010. In that case, the question was whether a mediator making a collective bargaining agreement could simply disregard the criteria that a statute said the mediator "may" consider. The court said:

Hess assumes the word 'may' vests discretion with the mediator to disregard the criteria spelled out in regulation 20407 and in section 1164, subdivision (e). In other words, Hess argues that the mediator was really free to make up an agreement out of whole cloth, without any standards at all. We do not agree with Hess's view of things. The word 'may' may be either mandatory or permissive depending on all the circumstances. Where persons or the public have an interest in having an act done by a public body 'may' in a statute means 'must.'...

Because a permissive use of the word 'may' in regulation 20407 and in section 1164,

subdivision (e), could render illusory the criteria in the regulation and the statute, we conclude that, in this context...‘may’ means ‘must.’

140 Cal.App.4th at 1606-07 (internal citations omitted).

Just as the mediator in *Hess* could not ignore the collective bargaining criteria that the Legislature spelled out in order to protect parties in labor disputes, in this case the Department is not free to ignore the criteria for bedlands leases that were adopted to protect adjacent tideland users. To allow the Department to make up lease agreements “out of whole cloth” is to render illusory the restrictions contained in RCW 79.130.010.

Hess is consistent with Washington case law. *See, e.g., Spokane County ex. rel. Sullivan v. Glover*, 2 Wn.2d 162, 170, 97 P.2d 628 (1940) (“where the provisions affect the public interest or are intended to protect a private citizen against loss or injury to his property, they are held to be mandatory rather than directory”); *Faunce v. Carter*, 26 Wn.2d 211, 215, 173 P.2d 526 (1946) (the words “may” and “shall” are “to be given that effect which is necessary to carry out the intention of the Legislature as determined by the ordinary rules of statutory construction”); *Wash. State Liquor Control Board v. Wash. State Personnel Board*, 88 Wn.2d 368, 561 P.2d 195 (1977)

(a word “is to be treated as mandatory or permissive, depending upon the intent of the legislature”).

In sum, the plain language of RCW 79.130.010, and the time-honored principle that “may” means “must” when an agency is charged with protecting private rights or the public interest, compel the conclusion that the bedlands of Echo Bay may be leased only to owners or lessees of the adjacent, developed tidelands.

B. The Aquaculture Statute Cannot, and Does Not, Nullify the Tidelands Protection Statute.

The Department incorrectly relies on RCW 79.135.110 to justify its lease of Echo Bay bedlands to the proponents of a herring net pen who neither own nor lease the adjacent developed tidelands. Response Brief at 8-11. This is erroneous because RCW 79.135.110, which generally authorizes anyone to apply for a bedlands lease for aquaculture, must be harmonized with the bedlands leasing restrictions in RCW 79.130.010. *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (statutes relating to the same subject must be read together as a whole such that a harmonious scheme evolves). The only way to harmonize the two statutes is to restrict all bedlands leasing, including leasing for aquaculture, to owners or lessees of

adjacent tidelands where such tidelands are developed for residential or commercial purposes.

The Department acknowledges this harmonizing requirement but urges a misapplication of it. Specifically, the Department argues that “RCW 79.135.110 simply makes the right to lease bedlands for aquaculture a right tideland owners share with any person.” Response Brief at 11. But that interpretation defeats a harmonious scheme. The tideland owner’s “right to lease bedlands for aquaculture” simply cannot be shared with “any person,” as the Department contends, because RCW 79.130.010 authorizes the leasing of bedlands to “any person” only for booming purposes – not for aquaculture. Even then, leases may be issued to “any person” only where adjacent tidelands are not developed.

The Department argues that leasing only to adjacent tideland owners or lessees would rule out competitive bidding as allowed by RCW 79.135.110. Response Brief at 14. The Department ignores that competitive bidding is only one of two methods for setting lease prices. RCW 79.135.110 allows also for negotiation. Indeed, in this case there is no evidence that Department engaged in competitive bidding despite there being multiple adjacent owners and lessees of tidelands.

Nothing in the two statutes suggests that the Legislature intended for the Department to implement one (allowing aquaculture) at the expense of the other (limiting bedlands leases in developed areas to adjacent tidelands users). In sum, the statutes must be harmonized the only way possible, by leasing bedlands in developed areas only to adjacent tidelands owners or lessees, regardless of whether the bedlands leases are for aquaculture or other purposes.

C. Legislative History Does Not Support Leasing Bedlands to “Any Person” for Aquaculture.

Where a statute is not ambiguous, the court may not look beyond its language or consider its legislative history, but must glean the legislative intent from the language itself. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Here, RCW 79.130.010 is not ambiguous but plainly restricts bedlands leasing to adjacent tideland owners and lessees where the tidelands are developed. Therefore, it is not appropriate to consider legislative history in construing RCW 79.130.010.

If this court decides it is appropriate to examine legislative history, however, it should reject the interpretation of that history urged by the Department. The Department’s argument relies on Section 5 of the 1953 Bedlands Leasing Act. Response Brief at 19. That section said that “nothing

in this act is intended to modify or repeal **any existing statutes** providing for the leasing of beds of navigable waters...for oyster cultivation or extraction of minerals or petroleum or gas.” Laws of 1953, ch. 164, §5 (emphasis added). The relevant statute existing prior to the 1953 law was the 1899 Deep Water Oyster Act, which authorized leasing of bedlands for oyster cultivation, but not for herring net pens or aquaculture generally. Laws of 1899, ch. 136. Thus, the fact that the 1953 Legislature did not modify the 1899 act is irrelevant. At most, Section 5 merely expressed the Legislature’s intent in 1953 not to interfere with oyster cultivation as it existed in 1953. It has no bearing on today’s “aquaculture statute,” contrary to the Department’s argument. Response Brief at 19.

Furthermore, a prefatory intent statement, even where codified, is without operative force. *Hartman v. State Game Commission*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975). Here, the 1953 statement that the Department relies upon is no longer even codified. The Legislature did not renew Section 5 of the 1953 bedlands leasing act when it re-enacted and updated all of the leasing statutes in 1982. An uncodified intent section cannot render meaningless a clear, codified provision of law – RCW 79.130.010’s restriction on bedlands leasing to adjacent tideland owners or lessees. In

short, the legislative history does not support the Department's argument that any person may lease bedlands for aquaculture.

D. Herring Net Pens Are Not Aquaculture.

The Department argues at length that its definition of aquaculture, codified as WAC 332-30-106(3), is entitled to deference. Response Brief at 25. That is beside the point because the adequacy of the Department's definition is not at issue here. The point is that the herring net pens in this case do not fit that definition.

The Department insists that the net pens constitute aquaculture because "the Lessees will use net pens to process herring." Response Brief at 26. It is true that aquaculture includes the "processing" of aquatic animals **"in fresh water, brackish water or salt water areas."** WAC 332-30-106 (emphasis added). However, the lease at issue does not envision such processing in the water. Rather, the Plan of Operations for the net pens says the herring will be "processed at an upland location" after removal from the pens. AR 447. Processing on land is not aquaculture.

According to the plan approved by the Department, the only activity to take place in the water is this: "After the herring are caught, they are transferred into a holding pen where they are starved for two weeks."

AR 447. It is quite a stretch to say that simply holding fish in a pen constitutes “processing.” Neither the Legislature nor the Department has defined “processing” in the context of aquaculture. But the Department’s Aquatic Resource Policy Implementation Manual makes clear that processing is akin to cultivating. The part of the manual addressing fin fish such as herring says that aquaculture is “raising fin fish in floating net pens.” AR 667. “Raising” fish is the opposite of starving them to death.

Based on the lessee’s written plan to “process” the herring out of the water, and in light of the Department’s policy manual describing aquaculture as “raising” fish in net pens, it is indefensible to assert that the net pens in this case fit the definition of aquaculture.

III. CONCLUSION

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

Dated this 16th day of November, 2006.

Respectfully submitted,

GENDLER & MANN, LLP

By:



David S. Mann

WSBA No. 21068

Katherine A. George

WSBA No. 36288

Attorneys for Appellant

\\Echo Bay (Den)\34883-7-II\App Reply Brief FINAL.11 16 06.wpd

Terrence A. Pruitt
Assistant Attorney General
Natural Resources Division
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504-0100

By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express
Mail

Thomas H. Oldfield
Sloan Bobrick Oldfield &
Helsdon, P.S.
7610-40th Street West
University Place, WA 98466-3834

By United States Mail
 By Legal Messenger
 By Facsimile
 By Federal Express/Express
Mail

DATED this 16th day of November, 2006, at Seattle,
Washington.


SARAH GRANT

\\Echo Bay(Den)\34883-7-1\Dec serv