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

DENNIS MATHESON,

Appellant,

v.

CITY OF HOQUIAM and ITS AGENTS or ASSIGNS,

Respondent,

and

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,
Respondent/Intervenor.

JOINT RESPONSE BRIEF OF RESPONDENTS

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I. INTRODUCTION

Dennis Matheson (“Mr. Matheson”) appealed orders applying the State Derelict Vessel Act, RCW 79.100, to his vessel, the *Northern Retriever*. Rather than identifying error in any of the orders, Mr. Matheson argues that the State Derelict Vessel Act is inconsistent with federal jurisprudence addressing maritime liens in an attempt to void the decisions made in the three years of proceedings below.

Mr. Matheson ignores two fundamental principles of federal maritime law: 1) it does not apply to “dead ships” (vessels that are no longer active in navigation or commerce); and 2) states have authority to act in many areas that concern maritime activities concurrently with the federal government. Mr. Matheson’s vessel had holes in her hull, lacked propulsion or steering, was grounded over state-owned aquatic lands for nearly 15 years, and had not been subject to maritime law for many years by the time he initiated this litigation.

The Derelict Vessel Act does not conflict with federal jurisprudence because it governs the safety and environmental quality of state waters. Further, Mr. Matheson fails to identify any error or provide any argument regarding the orders applying the Act. The Department of Natural Resources (“DNR”) and the City of Hoquiam respectfully request that this Court uphold the decisions of the superior court below.

II. RESTATEMENT OF ISSUES

1. Was the *Northern Retriever*, which was in an extreme state of disrepair, lacked operable engines, and had not been engaged in navigation for 15 years, a “dead ship” to which maritime law did not apply?

2. Even if maritime law could be applied to the *Northern Retriever*, may the State Derelict Vessel Act, which addresses safety and environmental protection within state waters, and operates in harmony with federal maritime law pertaining to maritime liens, be enforced nonetheless?

3. Is a dilapidated vessel that has not moved for 15 years an abandoned or derelict vessel under RCW 79.100.010, and did DNR acquire custody when Mr. Matheson failed to move the vessel after being given years to do so?

4. Does RCW 79.100.060 permit the court to award DNR its disposal costs when Mr. Matheson submitted no evidence to the court refuting the costs?

5. Were Mr. Matheson’s motions to dismiss his case for lack of jurisdiction properly denied when the court was consistently asked to apply state law?

III. RESTATEMENT OF THE CASE

A. **DNR Took Custody of the *Northern Retriever* and Arranged for Disposal After the Superior Court Confirmed She Was a Derelict or Abandoned Vessel Under State Law.**

The *Northern Retriever* was built in 1943 as a war tug. Clerk's Papers ("CP") 119. She was anchored over state-owned aquatic lands in Grays Harbor near Rennie Island for approximately 15 years. CP 95 ¶ 7, 107; Report of Proceedings ("RP") 10, ll. 9-11. "State-owned aquatic lands" are certain waterways owned by the State and managed by DNR or a port district. RCW 79.105.060(20); *see also* CP 87. She was not engaged in navigation during that 15-year time period. *See* CP 143.

In 2004, the vessel spilled oil into the harbor, and DNR informed Mr. Matheson that the *Northern Retriever's* anchored location was a trespass over state-owned aquatic lands and he needed to move her. CP 103, 107. Despite several years of notice from DNR, Mr. Matheson did not move her until after he initiated this litigation. CP 140-41, 143-44, 149-50, 152-53.

In September 2008, DNR hired a marine surveyor to inspect the *Northern Retriever* and render an opinion about the vessel's seaworthiness and potential resale or salvage value. The report found that she was not seaworthy because: her hull was leaking; she had no means of navigation as she had "inoperative propulsion engines, incomplete steering system

and absence of bow anchor gear”; “[s]he represents a major source of potential pollution even if all fuel tanks are empty.”; and “[h]er current location is perilously near the shipping channel and she would be a hazard to navigation if she were to break free of her moorings and sink in the channel” or “be blown against bridges or docks in the area.” CP 78-79, 128-29; Trial Exhibit (“Ex.”) 1B; RP 18-19. The report concluded:

The vessel is of a dated design that was intended for wartime use as a medium sized oceangoing tug. The total absence of system updating and upgrading, and deterioration of accommodations and machinery indicate the only potential value would be in the hull. The deterioration of the hull below waterline appears to be significant, critical and unworthy of rehabilitation. We are unaware of any potential commercial value for this vessel as a working ship, tug or unpowered barge. Her residual value appears to be the equivalent of approximately 1,000 tons of scrap steel.

Based on our inspection of F/V NORTHERN RETREIVER [sic], it is our opinion the vessel presents a significant danger to the environment, surrounding infrastructure and to herself, and she should be removed from the water as soon as possible.

Ex.1B at 10-11 (emphasis added); CP 128-29. Because her only identified value was as scrap, DNR then initiated disposal of the *Northern Retriever*, awarding a demolition contract to the lowest responsible bidder. Ex. 16; CP 96 ¶¶ 10-12; RP 19. In order to dispose of the vessel in an environmentally sound manner consistent with RCW 70.95, DNR had to

incur costs to move the vessel to appropriate moorage, and repair her hull to prevent catastrophic failure. Exs. 2, 5A, 6, 7, 23; RP 28-30.

B. Procedural History.

Mr. Matheson filed his action against the City of Hoquiam in July 2008, after the City posted notice of intent to obtain custody on three of his vessels. See CP 56-63; RCW 79.100.040. In September 2008, the court granted intervention to DNR. CP 64-65.

In November 2008, the superior court granted DNR's request for summary judgment. CP 74-177. The court's order declared the *Northern Retriever* was "in an extreme state of disrepair, and its seaworthiness is in question"; confirmed DNR's custody of the *Northern Retriever*; confirmed DNR had authority under RCW 79.100.030 and .050 to dispose of the vessel; and ordered Mr. Matheson liable for the disposal costs, treble damages for trespass,¹ and attorney fees. CP 6-10.

In May 2010, after disposal was complete and DNR compiled its costs, DNR requested that the superior court award judgment for those costs, pursuant to the November 2008 summary judgment order and the Derelict Vessel Act. CP 186-90; RCW 79.100.060(1). Mr. Matheson disputed the costs, and the superior court ordered a trial. CP 191-94.

¹ DNR chose not to pursue these additional claims against Mr. Matheson, but if this Court remands as Mr. Matheson requests, DNR may pursue additional judgment for trespass (\$294,810; CP 203-204) and attorney fees. CP 9 ¶ 4, 150.

The trial on DNR's disposal costs was held in August 2010. *See* CP 195-213. DNR presented one witness, DNR's Derelict Vessel Removal Program Manager, who provided the documentation and explanation for each of the costs. RP 6-35; Exs. 1-26. Mr. Matheson cross-examined DNR's witness and presented two witnesses, both of whom testified about the condition of the *Northern Retriever*, but not to whether DNR's disposal costs were reasonable. RP 36-60. At the conclusion of trial, the superior court awarded DNR \$804,643.95 in disposal costs.² CP 20-24; RP 63-66.

After DNR's initial request for judgment and again after the trial, Mr. Matheson filed motions to dismiss his own case. CP 41-55, 261-73. The superior court denied the motions. CP 25-26, 279-80. Now, Mr. Matheson appears to be appealing the summary judgment order, the judgment awarding DNR's disposal costs, and the denials of his motions to dismiss. CP 27-55; *see* Section IV.F., below at pages 47-48.

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² The court entered judgment on August 13 (CP 11-18), but the order contained clerical mistakes (CP 33-35) which were corrected in the order filed on August 23. CP 20-24.

C. DNR Requested Reimbursement for Its Disposal Costs for the *Northern Retriever*.

After DNR's contractor completed the disposal of the *Northern Retriever*, DNR requested judgment for \$834,643.95.³ CP 196, 201-02; RP 31-34. The court awarded DNR \$804,643.95, deducting \$30,000 for the discrepancy between the vessel's listed weight in its Coast Guard documentation and the weight of the scrap steel removed by DNR's contractor during disposal. CP 20-24; RP 63-64.

Most of the disposal cost was the demolition of the *Northern Retriever*. DNR selected its demolition contractor through the competitive bid process as the lowest qualified bidder whose proposal met state legal requirements. See CP 200; RP 28-30; Exs. 15 and 16. DNR paid the contractor \$795,185.12 for seven bills submitted over five months. Exs. 17-22, 24. DNR's contractor credited \$78,533.11 for the scrap steel in its billings. CP 201; Exs. 21, 22, 24, and 25; RP 30, 33-34.

DNR's other disposal costs included survey of the vessel, towing and port fees while it solicited bids for the contractor, hull repair to transport the vessel to an environmentally appropriate area for demolition,

³ DNR's costs are summarized in its initial request for judgment, its trial brief, and in tabular format with its order and as a demonstrative exhibit. CP 17-18, 22-23, 186-90, 196-202; Ex. A. DNR also submitted extensive receipts and documentation, and further explained the costs in trial testimony. Exs. 1-26; RP 18-35.

and its charges to remove debris from the vessel. *See* CP 195-207; Exs. 1B, 2, 5A, 6-14, 23, and 26; RP 18-28, 35.

Mr. Matheson presented no documentary evidence or testimony at trial about DNR's disposal costs, nor did he cross-examine DNR's witness on those costs. *See* RP 37-60; CP 214-16. Instead, Mr. Matheson focused on the condition of the vessel before disposal occurred.

IV. ARGUMENT

Mr. Matheson argues that foreclosure of maritime liens against a vessel is within the exclusive admiralty jurisdiction of the federal courts. DNR does not argue with that premise. DNR argues that Mr. Matheson's argument is a diversion because DNR's custody of the *Northern Retriever* did not implicate federal lien law.

Further, to the extent Mr. Matheson's arguments touch on issues other than jurisdiction, DNR contends that this Court should disregard them because they are being raised in violation of the Rules of Appellate Procedure. Under RAP 2.5, a party may challenge trial court jurisdiction for the first time on appeal. Although couched in the parlance of "jurisdiction", Mr. Matheson's arguments actually address another topic altogether—preemption of the State Derelict Vessel Act by federal maritime law. Viewed in these terms, Mr. Matheson's argument comes too late and should be disregarded. Moreover, even if considered,

Mr. Matheson's arguments should be rejected. State law applies in this case and the superior court's jurisdiction under that law is clear. The superior court properly applied the State Derelict Vessel Act and its decisions should be affirmed.

A. The Standard of Review Varies Between *De Novo* and Abuse of Discretion.

Three different standards of review apply to the various aspects of the case.

1. The Court of Appeals Engages in *De Novo* Review of the Summary Judgment Order.

Mr. Matheson appealed the November 2008 order granting summary judgment although his brief contains no argument on this issue. CP 6-10. When the Court of Appeals reviews "an order granting summary judgment, [it] engage[s] in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 812, 239 P.3d 602 (2010) (citation omitted).

2. The Judgment Awarding DNR's Reasonable Disposal Costs is Reviewed for Substantial Evidence (Facts) and *De Novo* (Law).

Mr. Matheson also appealed the order awarding DNR disposal costs at the conclusion of the trial, although his brief also contains no argument on this issue. CP 20-24. The findings of fact are reviewed

under the substantial evidence rule. *King County v. Wash. State Boundary Review Bd. for King County*, 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise).

The appellate court does not reweigh the evidence or second guess the finder of fact. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The appellate court “must affirm a trial court’s findings of fact” when the findings are based on live testimony and supported by substantial evidence. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997) (citation omitted), *cert. denied*, 522 U.S. 1077 (1998). Uncontested findings are verities on appeal. *Wilson Son Ranch, LLC v. Hintz*, 162 Wn. App. 297, 305 ¶ 18, 253 P.3d 470 (2011) (citation omitted).

The application, construction, and meaning of the Derelict Vessel Act’s provision allowing an award of disposal costs is a question of law reviewed *de novo*. See *Wash. Pub. Ports Ass’n v. State Dep’t of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). This Court independently determines whether the findings of fact support the conclusions. *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

3. The Orders Denying Mr. Matheson's Motions to Dismiss His Own Case Are Reviewed for Abuse of Discretion.

Mr. Matheson also appears to be appealing the orders denying his motions under CR 60 to dismiss his own case, although these orders were not designated in his notice of appeal. *See* CP 27-55 (notice of appeal and attachments), 25-26 (August order), 279-80 (June order). CR 60 motions are generally reviewed for abuse of discretion. *Colacurcio v. Burger*, 110 Wn. App. 488, 494-95, 41 P.3d 506 (2002), *review denied*, 148 Wn.2d 1003 (2003). The appellate court overturns a decision only when there is a clear showing of manifestly unreasonable discretion, or discretion exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

4. Subject Matter Jurisdiction and Preemption Challenges Are Subject to *De Novo* Review.

Subject matter jurisdiction and federal preemption are both questions of law subject to *de novo* review. *See Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996) (citations omitted); *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 722, 30 P.3d 1 (2001).

B. Federal Admiralty Jurisdiction Did Not Apply to the *Northern Retriever* Because She Was a "Dead Ship".

Admiralty jurisdiction applies to vessels actively involved in navigation or only temporarily withdrawn. *Mammoet Shipping Co. v.*

Mark Twain, 610 F. Supp. 863, 866 (S.D.N.Y. 1985). It is not invoked where a vessel is a “dead ship.” See *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985); *The Hercules Co. v. Brigadier General Absolom Baird*, 214 F.2d 66, 68 (3d Cir. 1954) (if a floating object is a dead ship, there is no admiralty jurisdiction). A “dead ship” is a vessel that has been indefinitely withdrawn from commerce and navigation. *Frank B. Hall & Co., Inc. v. S.S. Seafreeze Atlantic*, 423 F. Supp. 1205, 1208 (S.D.N.Y. 1976); *Kilb v. Menke*, 121 F.2d 1013, 1014 (5th Cir. 1941) (admiralty jurisdiction exists only with respect to vessels engaged in navigation or commerce, and not over hulks, or vessels that have been permanently taken out of such use).

For purposes of admiralty jurisdiction, what constitutes a vessel, as opposed to a dead ship, is a fact-dependent determination. See *In re Wepfer Marine, Inc.*, 344 F. Supp. 2d 1120, 1124 (W.D.Tenn. 2004). To establish whether a vessel is a “dead ship,” courts consider the vessel’s condition as well as its pattern of use. See *Amoco Oil*, 766 F.2d at 477 (11th Cir. 1985) citing *Hanna v. The Meteor*, 92 F. Supp. 530, 531 (E.D.N.Y. 1950) (finding a vessel to be a dead ship where it is “in such condition that extensive repairs and proper documentation would [be] required to return it to navigation and commerce”); *Am. E. Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123, 125 (C.A.Fla. 1979); see also

Robert E. Blake, Inc. v. Excel Envtl., 104 F.3d 1158, 1161 (9th Cir. 1997) (finding the *Cape Bover* a dead ship, “most importantly [because] the ship lay dormant. This pattern of use is clearly inconsistent with regular maritime activity. . . . A ship that has been unused for several years and has been mothballed such that it needs to successfully complete sea trials and pass a Coast Guard inspection falls under the umbrella of the dead ship doctrine”); *S.S. Seafreeze*, 423 F. Supp. at 1209 (noting the lack of prospects that the ship would return to navigation in concluding that the *Seafreeze* was a “dead ship”).

For example, the Second Circuit held that *The Meteor* was a dead ship because “her pumps were deactivated, her engine was inoperable, and she lacked proper documentation.” *Robert E. Blake, Inc.*, 104 F.3d at 1160 (citations omitted). Likewise, the *Seafreeze*, a vessel built to catch, freeze, and package fish, was a “dead ship” because, despite her owners’ hopes of restoring her to commercial operation, she “had been lying idle in her berth for more than four years; a number of fishing seasons had come and gone without any commercial or navigational activity by the vessel, and there was no prospect . . . of the vessel’s return to commerce or navigation.” *S.S. Seafreeze*, 423 F. Supp. at 1208-09.

When Mr. Matheson initiated this litigation, the *Northern Retriever* was not a vessel within admiralty jurisdiction because she was a “dead

ship.” Although in her past the 1943 *Northern Retriever* was a vessel subject to admiralty jurisdiction, like *The Meteor* and the *Seafreeze*, at the time the litigation began, the *Northern Retriever* was not capable of navigation and no evidence exists in the record to demonstrate an imminent change in her status. See CP 133-34. To the contrary, a marine survey revealed that her only value was in scrap, she had severe holes in her hull, she was unable to move under her own power, she had not been engaged in navigation or commerce for the 15 years prior to this litigation, and she lacked the reasonable ability to return to such activities. See Ex. 1B at 10-11, Ex. 5C at 3-4 and 7-8; RP 31, 56 (Mr. Matheson’s witness testified he last operated her in 1996); CP 75, 128-29, 140-41, 143. Although Mr. Matheson now asserts that the *Northern Retriever* was chartered for a salvage mission, there are no facts in the record that support this contention. Opening Brief (“Op. Br.”) at 2. Mr. Matheson’s abstract and undocumented intent to return her to service did not make her an active vessel. See *S.S. Seafreeze*, 423 F. Supp. at 1208-09.

Mr. Matheson admitted that he could not move her without recertification by the United States Coast Guard. CP 46 ¶ 3, 180, ll. 13-15. After DNR’s custody was confirmed, the Coast Guard required DNR to develop a “dead ship tow plan” to move her through open water from the Port of Grays Harbor to Seattle for disposal. See CP 170-71. The

evidence in the record supports the fact that the *Northern Retriever* was a “dead ship” withdrawn from navigation, and therefore, she did not invoke admiralty jurisdiction.

C. The Superior Court Had Jurisdiction Over the *Northern Retriever* Under the State Derelict Vessel Act.

Even assuming *arguendo* that federal maritime law applied to the *Northern Retriever* in her dilapidated condition, Mr. Matheson’s jurisdictional arguments still fail because he fundamentally misconstrues the nature of the Derelict Vessel Act and DNR’s authority under it. The possibility that maritime law *might* be applied to a vessel does not preclude state and local authorities from exercising their police power to protect the environment and public health and safety pursuant to the Derelict Vessel Act, and does not negate the state court’s subject matter jurisdiction over the Act’s enforcement.

DNR’s actions in abating the public nuisance created by the *Northern Retriever* do not implicate exclusive federal court admiralty jurisdiction over *in rem* foreclosure of maritime liens for several reasons: (1) DNR’s action in abating a public nuisance relies on the state’s police power, not establishment of a maritime lien; (2) the superior court’s judgment is against Mr. Matheson *in personam*, not against the vessel *in rem*; and (3) even assuming the superior court acted *in rem*, the court had

jurisdiction to do so because any *in rem* action under the Derelict Vessel Act involves a forfeiture, not a foreclosure of a maritime lien.

1. The Derelict Vessel Act Is Based on the State's Police Power, Not Its Judicial Power to Enforce a Lien.

“[S]tates and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.” *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) (upholding state court conviction for violation of state pollution laws); *see also Askew v. Am. Waterways Operators, Inc., et al.*, 411 U.S. 325, 328-29, 93 S. Ct. 1590, L. Ed. 2d 280 (1973) (upholding application of Florida oil spill act). State concurrent authority includes traditional state police powers over navigation and moorage within state waters. *See Askew*, 411 U.S. at 342 (“A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that [preemption] principle. The state may treat it as it may treat a diseased animal or unwholesome food.”), quoting *Kelly v. Wash. ex rel. Foss Co.*, 302 U.S. 1, 15, 58 S. Ct. 87, 82 L. Ed. 3 (1937).

The U.S. Supreme Court, discussing an Alabama statute authorizing harbor improvements, described the extent of state police powers as follows:

[States] have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health and property of its people, would justify measures of this kind.

County of Mobile v. Kimball, 102 U.S. 691, 699, 12 Otto 691, 26 L. Ed. 238 (1880).

Generally, states are free to use their police powers in connection with maritime matters unless Congress has expressed a clear intent to supersede such state action. As the Washington Supreme Court has pointed out in determining whether state regulation may coexist with federal maritime regulation, “greater deference is given to state legislation where public health and safety are involved”. *Inlandboatmen’s Union of the Pacific v. Dep’t of Transp.*, 119 Wn.2d 697, 705, 836 P.2d 823 (1992). Accordingly, “the historic police powers of the state are not superseded unless there is a ‘clear and manifest purpose of Congress’”. *Id.* at 705, quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978) (analyzing Washington’s tanker regulations).

It is not disputed that the Derelict Vessel Act authorizes a traditional use of the State’s police power to abate a public nuisance. *See, e.g., Hagan v. City of Richmond*, 52 S.E. 385, 388 (Va. 1905) (upholding City’s concurrent authority to “blow up” a barge blocking navigation in

Charleston harbor). The valid exercise of police power requires only that the police powers “be reasonably necessary to protect the public health, safety, morals, and general welfare” and that its application is “substantially related” to those ends. *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 158, 579 P.2d 1331 (1978). By enacting the Derelict Vessel Act, Washington’s Legislature sought to address the growing environmental and public health and safety threat presented by increasing numbers of derelict and abandoned vessels in Washington’s waters. RCW 79.100.005. The Act declares derelict and abandoned vessels as public nuisances based on its findings that the vessels are “safety hazards as they often pose hazards to navigation, detract from the aesthetics of Washington’s waterways, and threaten the environment with the potential release of hazardous materials.” *Id.*

Because the Derelict Vessel Act authorizes governmental authorities to act pursuant to police powers to abate a nuisance created by the vessel without judicial action, the jurisdiction of the superior court to arrest a vessel and enforce a lien *in rem* is not implicated. The Derelict Vessel Act creates a statutory duty on all vessel owners to keep their vessels from becoming derelict or abandoned. *See* RCW 79.100.110. The Act allows a governmental entity to abate the nuisance created by a derelict or abandoned vessel after the owner of the vessel has failed to do

so following notice. *See* RCW 79.100.040. If the governmental entity has to abate the nuisance, the owner of the vessel forfeits all rights to it, except the right to appeal, and the governmental authority may “store, strip, use, auction, sell, salvage, scrap, or dispose of [the] abandoned or derelict vessel.” RCW 79.100.030; RCW 79.100.120. At no time does the derelict vessel process rely on the jurisdiction of the court to arrest a vessel and enforce a lien *in rem*.

In this way, the power granted to state governmental authorities by the Derelict Vessel Act is similar to the authority given the United States Army Corps of Engineers (the “Corps”) to remove and dispose of sunken vessels and obstructions to navigation under the portion of the Federal Rivers and Harbors Act of 1899 known as the “Wreck Act”. *See* 33 U.S.C. §§ 409-415; *see also, Hagan*, 52 S.E. at 388 (finding local ordinance not superseded by the Wreck Act). Under the Wreck Act, the Corps has the authority to take possession of a vessel obstructing navigation and remove or destroy it, if the owner of the vessel fails to do so promptly. *See* 33 U.S.C. § 415(a). The Wreck Act creates a statutory duty for the owner of a vessel creating an obstruction to immediately commence and diligently prosecute removal. *Id.*; *see also Wyandotte Transp. Co. v. U.S.*, 389 U.S. 191, 206-07, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967). An owner’s failure to do so creates an abandonment of the

owner's interest in the vessel with respect to the United States. *Id.* Abandonment allows the United States to remove and destroy the vessel without incurring liability to the owner. *Id.* After removing the vessel, the United States may seek to recover its costs either against the vessel owner *in personam*, or against the vessel *in rem*, or both. *Id.* at 207. However, the initial decision whether to remove and destroy a vessel pursuant to the Wreck Act is within the discretion of the Corps, which needs not resort to the jurisdiction of the federal court to foreclose a maritime lien to do so. *See Wolder v. U.S.*, 613 F. Supp. 1139, 1150 (D. Hawai'i 1985), *aff'd*, 807 F.2d 1506 (9th Cir. 1987) (determination of whether a wreck poses an obstacle to navigation authorizing Corps to remove vessel rests with Corps and will be overturned only if arbitrary or capricious).

Just as the owner of a sunken vessel in federal waters abandons his ownership interest in the vessel pursuant to the Wreck Act by failing to remove the wreck, so too an owner of a derelict or abandoned vessel loses his ownership interest in the vessel in State waters by failing to comply with the notices provided by a state governmental authority pursuant to RCW 79.100.040. As with the Wreck Act, nothing in the Derelict Vessel Act relies on the jurisdiction of a court to arrest a vessel and foreclose a

maritime lien.⁴ *See e.g.*, 46 C.F.R. 67.91 (recognizing change of title pursuant to state law). The only jurisdiction exercised by the superior court in Derelict Vessel Act cases is to review the actions of the governmental authority in taking custody of a derelict or abandoned vessel or the amounts owed by the vessel's owner, and the court only becomes involved if a vessel owner files an appeal. *See* RCW 79.100.120. The superior court reviews the exercise of police power authorized under state law rather than ordering the arrest of a vessel and enforcing a lien *in rem*. Therefore, the superior court has subject matter jurisdiction.

The Washington Supreme Court addressed subject matter jurisdiction for vessels long before the Derelict Vessel Act was passed, explaining that, "The foundation of jurisdiction *in rem* is the taking of the vessel into the custody of the court and the characteristic virtue of a proceeding *in rem* is that it operates directly upon the *res* as the titular respondent in the suit". *Pasternack v. Lubetich*, 11 Wn. App. 265, 267-68, 522 P.2d 867 (1974) (quotation citation omitted) (holding trial court had jurisdiction over action to determine title to a vessel and right of

⁴ Under RCW 79.100.120, if the vessel owner appeals, the court reviews the action of a local authorized public entity in taking custody. However, nothing in the Act requires an authorized public entity to seek court approval *before* taking custody of a vessel and using or disposing of it as set forth in RCW 79.100.030. If the Act required the approval of a court prior to exercising authority, the emergency provisions of RCW 79.100.040(3), authorizing public entities to take possession of vessels that pose immediate danger, would become unworkable.

possession because suit was action *in personam* and not a proceeding *in rem* in the admiralty sense). The superior court's application of the Derelict Vessel Act in this matter relied on neither the foundation of jurisdiction *in rem*, nor the characteristic feature of an *in rem* proceeding, when it affirmed DNR's determination that the *Northern Retriever* was a derelict or abandoned vessel and that DNR's disposal costs were reasonable.

The Derelict Vessel Act authorizes state and local governmental entities to use their police power to abate the public nuisance created by derelict and abandoned vessels by awarding custody of the vessels to the governmental entity. RCW 79.100.040. At no point does the Act authorize "the taking of the vessel into the custody of the court," as would occur in an *in rem* action. Moreover, the characteristic feature of a proceeding *in rem* is absent because the *owner* of the vessel, not the vessel itself, is the defendant in any action to recover costs. RCW 79.100.060. Accordingly, the elements of an *in rem* proceeding are not presented under the facts of this case.

2. The Superior Court's Judgment Is Against the Vessel's Owner *In Personam*, Not Against the Vessel *In Rem*.

Under the Derelict Vessel Act, a vessel owner's failure to abate the nuisance created by his derelict or abandoned vessel creates personal

liability in the owner for the costs associated with the government's abatement of the nuisance. RCW 79.100.060. Nowhere does the Act claim to create such liability in the vessel itself. Nothing better demonstrates the nature of this proceeding than the fact that the judgment entered by the superior court is against Mr. Matheson personally, not against the *Northern Retriever in rem*. CP 20, 24 ¶ 5.

When federal courts invoke their exclusive admiralty jurisdiction, it is limited to "causes of action begun and carried on as a proceeding *in rem*, that is where a vessel or thing itself is treated as the offender and made the defendant by name or description in order to enforce a lien." *Madruga v. Superior Ct. of Cal.*, 346 U.S. 556, 560, 74 S. Ct. 298, 98 L. Ed. 290 (1954) (holding California state court had jurisdiction to order partition sale of ship owned jointly). Where the vessel owner rather than the vessel itself is made the defendant, the court exercises jurisdiction *in personam*, and acts only upon the interests of the parties over whom it has jurisdiction. *Id.* In such *in personam* cases, state courts enjoy concurrent jurisdiction with federal courts sitting in admiralty. *Id.*

Mr. Matheson argues that the Derelict Vessel Act is functionally an *in rem* action, relying on *Farwest Steel Corp. v. S.A. DeSantis*, 102 Wn.2d 487, 687 P.2d 207 (1984), decided well before the Act was passed. Mr. Matheson misrepresents the fact pattern in *Farwest* to reach

this conclusion. In *Farwest*, the plaintiff, a steel supplier, was unsuccessful using the federal maritime lien process against a vessel for unpaid debts because the debtor was not an agent of the owner of the vessel. The plaintiff subsequently sought a state lien against the owners. *Id.* at 489. The court held that federal maritime lien law preempted application of state liens on vessels. *Id.* at 493-94.

In this case, DNR's counterclaims are against Mr. Matheson *in personam*, not the *Northern Retriever in rem*. CP 70-73. Further, DNR is not seeking a lien against the *Northern Retriever*. The Derelict Vessel Act's statutory scheme makes the vessel owner, not the vessel, responsible for the costs of removing or disposing of the owner's derelict or abandoned vessel. RCW 79.100.060(1). If the owner of the vessel fails to pay removal and disposal costs within 30 days after being notified of the obligation, the State may commence a legal action to recover its costs. RCW 79.100.060(3). Because the liability for the cost of removal of the vessel attaches to the owner rather than the vessel, the liability imposed by the Act is *in personam*. *Farwest* is not inconsistent. Accordingly, the superior court did not lack jurisdiction to enter judgment against Mr. Matheson for the costs of removal and disposal of the *Northern Retriever* in this case.

3. Even Assuming the Superior Court Acted *In Rem*, the Court Had Jurisdiction Because the Remedy Under the Derelict Vessel Act Is Forfeiture, Not a Foreclosure of a Maritime Lien.

As explained above, the actions of the State in disposing of the *Northern Retriever* are based on its police power to abate a public nuisance. RCW 79.100. Because the State's actions do not depend on the jurisdiction of the superior court, Mr. Matheson's arguments that the court lacks jurisdiction to foreclose a lien *in rem* have no application here. Nonetheless, assuming for purposes of argument that the court acted *in rem*, its jurisdiction to do so is established under the facts of this case.

The jurisdiction of state courts over forfeiture proceedings commenced against vessels *in rem* for violation of state laws was confirmed by the Supreme Court over 150 years ago and re-affirmed by the modern Court. *C.J. Hendry v. Moore*, 318 U.S. 133, 153, 63 S. Ct. 499, 87 L. Ed. 663 (1943) (affirming the continuing vitality of *Smith v. Maryland*, 59 U.S. 71, 18 How. 71, 15 L. Ed. 269 (1855)). Mr. Matheson relies on *The Bessie Mac*, 21 F. Supp. 220 (D.C. Wash. 1937), for the proposition that state courts lack jurisdiction. *The Bessie Mac* was decided five years before the United States Supreme Court decided *Hendry*. Accordingly, to the extent *The Bessie Mac* is inconsistent with *Hendry's* holding that state courts have jurisdiction over *in rem* forfeitures

actions against vessels, it is over ruled. *See Hendry*, 318 U.S. at 153 (“the states were left free to provide such a remedy in forfeiture cases where the articles are seized upon navigable waters of the state for violation of state law”). Under the rule confirmed in *Hendry*, state courts have jurisdiction to seize, condemn, and forfeit vessels or equipment employed in maritime activity for violation of local law where authorized to do so by local law. *See id.*; *State of Alaska v. F/V Baranof*, 677 P.2d 1245, 1254 (Al. 1984) (state court has jurisdiction over forfeiture proceeding brought *in rem* against fishing vessel for fishing violations); E. Jhrad, A. Sann & B. Chase, *Benedict on Admiralty* § 1-124 at 8–14 (7th ed. Rev. 2010; *see, e.g.*, RCW 77.15.070 (authorizing seizure and forfeiture of boats used in violation of RCW Title 77)).

To the extent that the Derelict Vessel Act requires a governmental entity to rely on the jurisdiction of the superior court acting *in rem*, it does so in the context of a forfeiture proceeding. Generally, a forfeiture is a “loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of a duty”. *Black’s Law Dictionary* 722 (9th ed. 2009); *see, e.g.*, RCW 7.48.090 (authorizing forfeiture of personal property declared to be a moral nuisance). The result of forfeiture is that an owner’s title to property is instantaneously transferred to another, such as the government. *See id.* Forfeiture under Washington law is a purely

statutory remedy. *State v. Alaway*, 64 Wn. App. 796, 800, 828 P.2d 591 (1992).

In the instant case, the Derelict Vessel Act authorizes forfeiture of an owner's interest in a derelict or abandoned vessel. If the owner of the vessel fails to abate the public nuisance created by the vessel pursuant to notice under RCW 79.100.040, the owner forfeits all rights to the vessel.⁵ See CP 60. Following the notice period, an authorized governmental entity may "store, strip, use, auction, sell, salvage, scrap, or dispose of" the vessel. RCW 79.100.030. If the governmental authority elects to sell the vessel, the proceeds from the sale are used to pay for the costs of abatement and to pay lien holders. RCW 79.100.050. Even if the proceeds of sale exceed the cost of abatement and the amount of any existing liens, the owner is not compensated. *Id.* The excess proceeds are placed in the State's derelict vessel removal account. RCW 79.100.050. As such, the Derelict Vessel Act establishes a statutory forfeiture process that does not create a lien, wherein a vessel owner who fails to abate a

⁵ Mr. Matheson is correct that there was a simple solution to this matter. See Op. Br. at 24. Here, although the litigation originally involved three vessels, Mr. Matheson moved two of the vessels, leaving only the *Northern Retriever*. CP 7 ¶ 3. Had Mr. Matheson moved her during the four years DNR asked him to do so, neither DNR's disposal costs nor this litigation would have been necessary.

public nuisance created by his vessel forfeits ownership by operation of law and the nuisance is abated through seizure of the vessel.⁶

In this case, DNR abated the public nuisance created by the *Northern Retriever* using the state's police powers as authorized by the Derelict Vessel Act. DNR did not rely on the jurisdiction of the superior court to arrest the *Northern Retriever* and foreclose a maritime lien. To the extent the court acted *in rem*, the jurisdiction of the court is exercised to enforce a statutory forfeiture for violation of state law. It is well-established under *Smith v. Maryland* and its progeny that state courts may exercise such jurisdiction with respect to vessels *in rem*. DNR's custody did not implicate exclusive federal admiralty jurisdiction, and this Court should affirm the decisions of the superior court.

D. Mr. Matheson's Preemption Arguments Come Too Late. If Considered by the Court, However, the Arguments Fail. The Derelict Vessel Act Is Not Preempted by Law Pertaining to Maritime Liens.

Although couched as a jurisdictional argument, Mr. Matheson really asks this Court to find that the federal maritime lien subchapter preempts the Derelict Vessel Act. An argument based on preemption of

⁶ It is beyond the scope of this brief to explain the state lien process since it was not an issue in this litigation, but lienholders file notice of liens pursuant to statutory authority. *See, e.g.* RCW Title 60. That the Derelict Vessel Act, located in RCW 79.100, does not follow the statutory processes for creating a lien found in RCW Title 60, provides further confirmation that the seizure process under the Act was not intended and does not operate to create a lien.

state law by federal law is distinct from an argument challenging trial court jurisdiction. Preemption is determined through a three-prong test. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) (reaffirming the maritime preemption test in *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 61 L. Ed. 1086 (1917), *holding superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, *as recognized in Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor v. Perini North River Assoc.*, 459 U.S. 297, 103 S. Ct. 634 (1983)). State law is preempted by federal maritime law if it: (1) "contravene[s] an act of Congress", (2) "works material prejudice to the characteristic features of the general maritime law," or (3) "interferes with the proper harmony and uniformity of [the general maritime] law in its international and interstate relations." *Jensen*, 244 U.S. at 216.

Since the issues of "material prejudice" and "uniformity" asserted by Mr. Matheson implicate preemption rather than subject matter jurisdiction, this Court need not consider their merits. Mr. Matheson did not clearly raise the issue of preemption in the superior court, nor did he raise it in the assignments of error. Issues not raised in the trial court will not be considered on appeal unless they fall within one of the exceptions

set forth in RAP 2.5(a).⁷ *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002) quoting *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1995). Mr. Matheson’s efforts to raise this argument at the appellate level are inappropriate because, “[t]he preemptive effect of federal law is not an issue that satisfies any of the exceptions to the general rule” that issues not raised below are not considered on appeal. *Wingert*, 146 Wn.2d at 853.

Nevertheless, an analysis of the Derelict Vessel Act under the *Jensen* test shows that federal maritime law regarding maritime liens does not preempt the state Derelict Vessel Act.

1. The State Derelict Vessel Act Is Not Preempted Because It Does Not Contravene an Act of Congress.

“The doctrine of federal preemption is rooted in the supremacy clause of the United States Constitution.” *All-Pure Chem. Co. v. White*, 127 Wn.2d 1, 5, 896 P.2d 697 (1995).

[S]tate legislation may be preempted by federal law in more than one way. First, Congress may preempt state law by stating so in express terms. Second, Congress may preempt state law where a scheme of federal regulation is sufficiently comprehensive to allow a reasonable inference that Congress “left no room” for supplementary state regulation. Third, where Congress has “left room” for supplementary state regulation, federal law may preempt state law to the extent it actually conflicts with federal law.

⁷ The reason appellate courts will not entertain issues raised for the first time on appeal is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Wilson Son Ranch, LLC*, 162 Wn. App. at 303 ¶ 13.

Such a conflict exists where compliance with both state and federal law is impossible, or where state law presents an obstacle to the accomplishment and execution of federal purposes and objectives.

Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wn. App. 268, 278-79, 970 P.2d 828 (1999) (federal maritime law does not preempt state civil rights laws).

Preemption can be either express or implied. *All-Pure Chem.*, 27 Wn.2d at 6-7. However, preemption will only be implied when there is no express preemption provision or the preemption provision does not reliably indicate congressional intent. *Id.* at 7 (citation omitted). Here, Mr. Matheson identified one federal provision, the subchapter of the United States Code addressing maritime liens. Op. Br. at 21, citing 46 U.S.C. §§ 31301(4), (5) and 31341-31343. On its face, the subchapter does not expressly preempt state law.

When addressing a preemption argument, a court should never lightly assume that Congress preempted state law, but rather should address preemption claims with the presumption that Congress did not intend to supplant state law. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995). The court must also identify the domain actually preempted by federal law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470,

484-85, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). In determining congressional intent, the court should look not only at the express exemption language, but also at the structure and purpose of the statute as a whole. *Id.* at 486.

Since there is no express preemption or comprehensive federal regulation over disposal of derelict vessels identified, Mr. Matheson is asking this Court to determine that it is impossible to comply with the filing of a maritime lien in federal court and the custody and disposal of a derelict vessel in state court.

The United States Supreme Court and the Ninth Circuit have provided guidance as to the scope of state authority to enact regulations concerning navigation—an area where the federal interest has historically been well-established. *See Ray v. Atlantic Richfield Company*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978) (examining Washington’s Tanker Law, adopted to regulate the design, size, and movement of oil tankers in Puget Sound); *U.S. v. Locke*, 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000) (examining Washington’s regulations concerning “best achievable protection” from oil spill damages); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486 (9th Cir. 1984) (the Clean Water Act is “convincing evidence of Congress’ intent that, within three miles of shore, the protection of the marine environment should be a collaborative

federal/state effort rather than an exclusively federal one”). The established authority is that a state may regulate its ports and waterways to protect the marine environment as long as the regulation does not conflict with federal law. Preemption only occurs when the federal government’s interest in establishing uniformity is frustrated by concurrent state regulation. *Ray*, 435 U.S. at 165-66; *Locke*, 529 U.S. at 91.

The Supreme Court has twice held that Congress preserved state authority to regulate local waters, as long as the regulations do not conflict with existing federal law. *Locke*, 529 U.S. at 91; *Ray*, 435 U.S. at 171-72. Other maritime cases have reached similar holdings. See *Murphy v. Fla. State Dep’t of Natural Res.*, 837 F. Supp. 1217, 1224 (S.D. Fla. 1993) (state has authority to regulate anchorage and moorage over state-owned submerged lands, and state can remove floating homes).

The federal maritime lien subchapter identified by Mr. Matheson that gives the district court jurisdiction over lien claims does not conflict with the State Derelict Vessel Act. The legislative objective of the Act is to abate public nuisances and safety hazards that pose hazards to navigation, detract from the aesthetics of Washington’s waterways, and threaten the environment with the potential release of hazardous materials. RCW 79.100.005, RCW 79.120.010 (public waterways are established by DNR as public highways for watercraft).

The subchapter of the United States Code identified by Mr. Matheson creates an optional filing system for liens on vessels, 46 U.S.C. § 31343, which permits a person to bring a civil action *in rem* to enforce a lien after it has been documented or filed. 46 U.S.C. § 31342(a)(2). Recording is optional. 46 U.S.C. § 31343(a) (“a person claiming a lien on a vessel . . . *may* record with the Secretary”). A recorded lien expires after three years. 46 U.S.C. § 31343(e). This lien process serves an entirely different purpose than the Derelict Vessel Act’s focus on waterway safety and environmental health.

Further, the record here does not support Mr. Matheson’s claim that the Derelict Vessel Act interferes with a maritime lien claim. There is no evidence in the record regarding any liens filed against the *Northern Retriever* in the three years prior to initiation of this litigation. However, even if Mr. Matheson’s vessel was subject to maritime liens, the State Derelict Vessel Act does not remove the jurisdiction of the federal district courts under a civil action in Admiralty to determine whether or not the vessel is subject to a claimed lien. If Congress intended to preempt Washington’s control of its own waterways or disposal of derelict or abandoned vessels, it did not do so expressly or impliedly through its subchapter on Maritime Liens, nor is there conflict between the two.

2. The Derelict Vessel Act Does Not Work Material Prejudice to the Characteristic Features of Maritime Lien Law.

Mr. Matheson asserts that the Derelict Vessel Act works material prejudice against maritime law by depriving maritime lienholders of notice of foreclosure and of the opportunity to assert their claims against a vessel. However, as explained above in Section IV.C.3. at pages 25-28, the Derelict Vessel Act does not create a maritime lien, and no foreclosure is made against the vessel. Therefore, the State's actions under the Derelict Vessel Act do not implicate the federal maritime lien foreclosure process.

For federal law to preempt state law under the "material prejudice" prong of the *Jensen* test, Mr. Matheson must show that federal law concerning maritime liens (1) originated in admiralty or has exclusive application there, and (2) the Derelict Vessel Act places the substantive maritime law governing maritime liens at risk. See *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on September 22, 1993*, 121 F.3d 1421, 1426 (11th Cir. 1997); *Am. Dredging Co.*, 510 U.S. at 450 (defining "characteristic features" of the general maritime law as having "originated in" or having "exclusive application in admiralty" as distinguished from laws of general applicability). DNR does not dispute that maritime liens and the body of law governing them originated in admiralty and have

exclusive application there. The question is whether the Derelict Vessel Act places the substantive maritime law concerning maritime liens at risk. It does not.

Mr. Matheson's argument might be more persuasive if maritime liens remained intact and untouched unless the federal foreclosure process is initiated against the vessel. But Mr. Matheson again ignores a fundamental principle of maritime law: maritime liens are extinguished when a vessel is destroyed. *See PNC Bank of Del. v. F/V Miss Laura*, 381 F.3d 183, 186-87 (3d Cir. 2004). Destruction can happen in myriad ways—for example, by natural forces, crew member error, lack of seaworthiness, operation of law, or even by the hand of the vessel owner. None of these processes requires use of the federal foreclosure process so that the lienholder may preserve his or her right in the vessel before it meets its demise.

Further, the Derelict Vessel Act does not affect maritime lienholders any more or any differently than a parallel action by the Corps under the Wreck Act. Under the Wreck Act, the Corps has the authority to remove obstructions to navigation, which include “any sunken vessel, boat, water craft, raft, or other similar obstruction,” and to break up, remove, sell, or otherwise dispose of the obstruction. 33 U.S.C. § 414. While the triggers for removal may differ slightly under the Wreck Act

and the Derelict Vessel Act, the result to maritime lienholders under the two acts is the same.

The state's authority to dispose of a vessel under the Derelict Vessel Act does not place the law regarding maritime liens at risk because it operates outside the maritime lien process and does not add any burdens to it. Further, any burden to the rights of maritime lienholders under the general maritime law that may have been made by granting authority to a governmental entity to dispose of a vessel were made by the U.S. Congress when it enacted § 414 of the Wreck Act or were legitimized by the United States Supreme Court in *Hendry*. Other U.S. Supreme Court decisions also support this interpretation. *See e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-89, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974) (holding that an innocent owner can lose his interest in a vessel under state forfeiture laws and noting the positive effects such a policy has on others with an interest in a vessel, such as lessors, bailors, and secured creditors). The Derelict Vessel Act does not “work material prejudice” against the law governing maritime liens, and therefore is not preempted by it.

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3. The Derelict Vessel Act Does Not Interfere With the Harmony and Uniformity of Maritime Law in Its International and Interstate Relations Such That It Would Be Preempted.

“[T]he Supreme Court . . . no longer construes the Admiralty Clause as requiring ‘rigid national uniformity in maritime legislation.’” *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 628 (1st Cir. 1994) quoting *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988). Instead, “[w]here . . . the state remedy is aimed at a matter of great and legitimate concern, a court must act with caution” to find it “potentially so disruptive as to be unconstitutional.” *Ballard Shipping*, 32 F.3d at 630.

States are permitted “to supplement remedies available to enforce federal rights and to legislate over matters affecting land and sea, which Congress has either expressly or impliedly left for the states to govern.” *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 201 (S.D. Fla. 1981). Whether application of the state law is preempted “turns on a balancing of the federal interest in uniformity and the state’s interest in enforcing its legislation.” *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 258, 70 P.3d 158 (2003) citing *Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 418, 24 P.3d 447 (2001). Where “[a]pplication of the [state] statute will not disrupt . . ., or influence

maritime actors as they make management decisions,” it is not preempted. *Paul*, 106 Wn. App. at 419 citing *Am. Dredging*, 510 U.S. at 454.

DNR does not dispute that the federal government has a strong interest in the uniformity of maritime law to support maritime commerce, but argues that the federal interest is not implicated in this situation where an inoperable vessel has not moved for 15 years. The purpose of the general maritime law is to “provide a uniform source of law and an unbiased forum for seafaring vessels which cannot be expected to familiarize themselves with the local laws of every state they happen to pass into by way of navigable waters.” *Dockside Dev. Corp. v. Illinois Intern. Port Dist.*, 479 F. Supp. 2d 842, 846-47 (N.D. Ill. 2007) (emphasis added) citing *Proleride Transp. Sys., Inc. v. Union Carbide Corp.*, 498 F. Supp. 680, 682 (D.Mass. 1980); *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14, 28, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004). “Where a vessel becomes more like a permanent resident than a passing traveler, it cannot be said there is a need for uniform law to prevent prejudice or surprise.” *Dockside Dev.*, 479 F. Supp. 2d at 847.

Further, the federal government has not shown an intent to displace states from using their police powers to protect their submerged lands and

territorial waters.⁸ If anything, the authority given to the Corps to remove and dispose of a vessel under the Wreck Act demonstrates that the federal and state interests in this area are consistent. The State's strong interest in protecting its aquatic lands from public nuisances created by derelict and abandoned vessels does not interfere with the federal interest in the uniformity of maritime law.

In summary, the Derelict Vessel Act does not impermissibly interfere with maritime law pertaining to maritime liens. Because the *Northern Retriever* is a "dead ship", maritime law does not apply to her. Regardless, to the extent that federal interests are implicated, they are in concert with the State's interest in protecting its submerged lands and territorial waters. DNR respectfully requests that this Court find that the State Derelict Vessel Act is not preempted.

E. The Superior Court Correctly Interpreted and Applied the State Derelict Vessel Act and Its Decisions Should Be Affirmed.

Although Mr. Matheson's opening brief is entirely focused on federal law and contains no argument related to the orders issued by the superior court, the remaining sections are provided in the event this Court

⁸ See e.g., Submerged Lands Act, 43 U.S.C. § 1301 *et. seq.*, § 1311 (confirming the states' title to their submerged lands and the right to "manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable State law"); *Murphy v. Fla. State Dep't of Natural Res.*, 837 F. Supp. 1217, 1224 (S.D. Fla. 1993); *Haw. Navigable Waters Pres. Soc. v. State of Haw.*, 823 F. Supp. 766, 774 (D. Hawai'i 1993) (finding no evidence that Congress intended to occupy the entire field of navigation, and that state regulation of moorage fees is not preempted by federal law).

reaches those issues and interprets the State Derelict Vessel Act. The court's confirmation of custody of the *Northern Retriever* was proper and its award of disposal costs was supported by uncontested evidence.

1. Uncontested Facts Demonstrated the *Northern Retriever* Was a Derelict or Abandoned Vessel Under the Statutory Definition.

The Derelict Vessel Act gives DNR and other governmental entities authority to take custody of abandoned and derelict vessels and dispose of them in an environmentally sound manner. RCW 79.100.040; .050(1); *see above* at Section IV.C.1., pages 18-19.

Mr. Matheson has never disputed that he was the owner of the *Northern Retriever* or that she was a "vessel" under the Act. *See* RCW 79.100.010(6), (7); CP 48, 191, 178 ("I am the owner of record of the . . . vessel[] . . . *Northern Retriever* . . . referred to in this action."). It is also uncontested the *Northern Retriever* was anchored over state-owned aquatic lands without permission since 1993 with a leaking hull at risk of causing pollution or impeding the shipway in Grays Harbor. CP 95 ¶ 6, 99, 101-05.

In its motion for summary judgment, DNR provided evidence that the *Northern Retriever* was a derelict or abandoned vessel under the statutory definitions. CP 74-177. She was anchored in trespass over state-owned aquatic lands, rested on the bed of the river during low tide

with holes in her hull, risked obstruction of the waterway, and risked endangering life or property with another pollution event. RCW 79.100.010(5); CP 95 ¶ 6, 99, 101-05. Mr. Matheson's response to summary judgment supported the fact that the *Northern Retriever* was a derelict vessel. In his affidavit, Mr. Matheson stated that for 15 years, the *Northern Retriever* was moored off of Rennie Island and the U.S. Coast Guard would not allow him to move her. CP 180.

Where rebutting evidence is insufficient to identify a factual dispute, summary judgment is properly granted. *See Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 669-70, 975 P.2d 950 (1999). Further, unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002); CP 7-9. There were no disputed facts presented during summary judgment, and the superior court properly confirmed custody to DNR.

2. DNR's Disposal Costs Were Supported by Substantial Evidence and Were Uncontested During Trial.

Because Mr. Matheson failed to identify any error with the court's award of disposal costs, this issue is not properly before this Court. However, if this Court considers the argument, RCW 79.100.060 makes the owner of a derelict vessel responsible for reimbursing the public entity disposing of the vessel for all costs associated with the removal and

disposal of the vessel. Mr. Matheson disputed the disposal costs requested by DNR, necessitating a trial. CP 191-92. However, during trial the evidence supporting DNR's disposal costs was uncontested.

During the trial, the superior court considered documentary evidence submitted by DNR and the testimony of three witnesses. Exs. 1-26. DNR presented evidence that the *Northern Retriever* was a dilapidated steel vessel by the time DNR took possession of her. According to Mr. Matheson's witness, "I thought it was a piece of crap". RP 51, 1. 9. The marine survey of the 1943 vessel revealed her main engines, steering, and generators were "inoperable", "partially disassembled", "removed" (steering), "deteriorated", "corroded from an apparently relatively recent flooding", and "beyond reasonable repair". Ex. 1B at 4.

Given the vessel's history of pollution events, DNR's disposal costs included the steps it took to ensure that once it had custody, no further environmental damage would occur. CP 95 ¶ 6, 101-05. In addition to the costs of the initial marine survey, DNR incurred costs towing her to the Port of Grays Harbor where she was docked while DNR solicited competitive bids for her disposal, and paid for a dive survey to determine the extent of her hull damages. Exs. 1A, 2, 5A, 5B, 5C, 8, 12, and 13; RP 25-26.

DNR then had to pay for repair of her multiple hull penetrations and fractures before she could be towed to Seattle, since Grays Harbor does not have a drydock facility, as required by the Washington State Department of Ecology for ship dismantling. *See* CP 200-01; Ex. 5C and 6; RP 28-29. Without repairing the hull fractures, the *Northern Retriever* was at risk of sinking while being towed between the Port of Grays Harbor and Seattle. RP 25, ll. 4-5. DNR also removed the loose items and debris stored on her before the contractor began demolition, to reduce DNR's contractor's disposal costs, and DNR separately disposed of the attached raft. Exs. 7, 9, 10, 11, 14, 23, and 26; RP 35.

DNR solicited for competitive bids for the disposal work, and awarded its contracts only to the lowest responsible bidders that were qualified. Ex. 15. DNR produced evidence documenting that the credits it received for the scrap (about \$90/ton) was the price commercially paid at the time of demolition. Ex. 25; *see also* Exs. 21, 22, and 24; RP 30. DNR's contract with the demolition company required remittance of any sale of any part of the vessel, including scrap, to DNR. Ex. 16 at 3 (¶ 2.01(6)); *see also* CP 201.

Although DNR's disposal costs for the *Northern Retriever* were high, they were reasonable under the circumstances. A reasonable cost is a reimbursement for a usual and customary charge for labor and materials

of a vendor that is economically and efficiently operated.⁹ *See also* CP 205. During the trial, Mr. Matheson presented no evidence or testimony to show DNR's disposal costs were not reasonable. Nor did he provide any argument in his opening brief before this Court to support that assertion. Although Mr. Matheson's witness testified she was worth \$4.1 million in scrap, there was no supporting evidence provided for that bald assertion. RP 60, ll. 19-20. When findings of fact, such as the reasonableness of the disposal costs, are based on live testimony, the appellate court does not second guess the finder of fact. *See* Section IV.A.2. above at page 10.

It is costly to dispose of a vessel like the *Northern Retriever*, a large, decaying steel vessel with little salvage value other than scrap metal. The superior court did not err in awarding DNR judgment for its uncontested disposal costs.

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⁹ *See Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990) (an undefined statutory term is given its common law meaning); *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602, *pet. for review denied*, 130 Wn.2d 1023 (1996) (an agency's interpretation of a statute it administers is given deference); *see also Black's Law Dictionary* 1272 (7th ed. 1999) ("1. Fair, proper, or moderate under the circumstances <reasonable pay>. 2. According to reason").

3. The Superior Court Did Not Abuse Its Discretion When It Denied Mr. Matheson's CR 60 Motions to Dismiss.

In the summer of 2010, Mr. Matheson twice filed motions to dismiss his own case for lack of jurisdiction. CP 45-55, 261-73. The court denied Mr. Matheson's requests. CP 25-26, 279-80.

Because Mr. Matheson failed to identify any error specifically addressed in these orders, this issue is not properly before this Court. However, if this Court considers the argument, a trial court's decision to deny a motion for dismissal is not disturbed unless a review of the entire record makes it appear plainly that there has been an abuse of discretion. *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2d 544, 548, 647 P.2d 30 (1982). Mere allegations and conclusions that a judgment should be vacated are insufficient justifications to overturn a court's discretionary power. *Comm'l Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 104, 533 P.2d 852 (1975).

The superior court properly denied Mr. Matheson's CR 60 motions because he did not meet the rule's procedural requirements. A CR 60 motion must be based on allegations of factual error supported by an affidavit indicating the grounds justifying vacation of the judgment. *In re Marriage of Tang*, 57 Wn. App. 648, 653-54, 789 P.2d 118 (1990). Although Mr. Matheson listed six exhibits in his motion, none were

affidavits. A motion to vacate is properly denied when there is no affidavit in support of the motion. *State v. Gallagher*, 46 Wn.2d 570, 573, 283 P.2d 180 (1955).

Further, Mr. Matheson's motions did not identify an error of law but disagreement with the court's application of the law. Mr. Matheson's remedy for this disagreement was appeal to this Court, which he accomplished. *Hill v. Lowman*, 15 Wash. 503, 506, 46 P. 1042 (1896). The orders denying Mr. Matheson's CR 60 motions should be upheld.

F. Mr. Matheson's Challenge to the Superior Court's Orders Does Not Comport with the Rules of Appellate Procedure.

The appellate court reviews only those claimed errors that are included in an assignment of error or clearly disclosed in associated issues. RAP 10.3(g); *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (“[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.”). Mr. Matheson fails to identify any error in any of the orders he is appealing, nor is it clear which orders he appealed. *See* Op. Br. at 5.

Mr. Matheson's notice of appeal states that he is seeking review of three orders, but attaches two—the November 2008 summary judgment

order (CP 6-10) and the August 2010 award of disposal costs (CP 20-24)—and then attaches pleadings without accompanying orders. CP 27-55. Mr. Matheson’s opening brief, on the other hand, identifies six orders.¹⁰

Regardless of whether he is appealing two or six orders, Mr. Matheson fails to identify error in any of the orders beyond his jurisdictional argument. This Court is not obligated to consider arguments that are not developed in the pleadings and for which a party has not cited legal authority. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004); RAP 10.3(a).

G. DNR and the City of Hoquiam Are Entitled to Attorney Fees and Costs.

Respondents were the prevailing parties below for each of the orders appealed by Mr. Matheson, as they received judgment in their favor. *Mike’s Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68-69, 975 P.2d 532 (1999). DNR and the City of Hoquiam request an award of statutory attorney fees of \$200 each and their costs to designate supplementary clerk’s papers and transmit the trial record if this Court upholds the superior court’s decisions below. *See* RCW 4.84.080; RAP 18.1; RCW 79.100.120(2)(a).

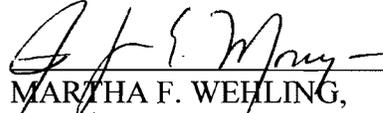
¹⁰ November 2008 summary judgment (CP 6-10), August 13, 2010 award of disposal costs (CP 11-18), August 23, 2010 corrected award of disposal costs (CP 20-24), September 2008 order granting preliminary injunction to DNR (CP 224-26), June 2010 denial of Mr. Matheson’s first motion for CR 60 (CP 279-80), and August 2010 denial of Mr. Matheson’s second motion for CR 60 (CP 281-82). *See* Op. Br. at 5.

V. CONCLUSION

For the reasons stated above, DNR respectfully requests that the Court affirm the orders issued by the superior court in this case.

RESPECTFULLY SUBMITTED this 5th day of October, 2011.

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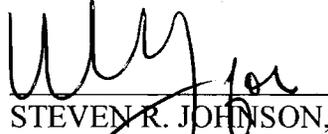
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NO. 41181-4-II

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

DENNIS MATHESON,

 Appellant,

 v.

 CITY OF HOQUIAM and IT'S
 AGENTS or ASSIGNS and the
 WASHINGTON STATE
 DEPARTMENT OF NATURAL
 RESOURCES,

 Respondents.

**CERTIFICATE OF
SERVICE**

I certify that I served a copy of the Joint Response Brief of Respondents on all parties or their counsel of record on the date below as follows:

| Party | Method of Service | |
|---|--|--|
| Eric Dickman E .Dickman Law Firm P.O. Box 66793 Seattle, WA 98166-0793 <i>Attorney for Appellant Dennis Matheson</i> | <input checked="" type="checkbox"/> US Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> ABC/Legal Messenger | <input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax <input type="checkbox"/> Hand delivered by: _____ |

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of October, 2011 at Olympia, Washington.


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