

NO. 41428-7-II

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

INTERNATIONAL SHELLFISH, LLC,
a Washington Limited Liability Company,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,

Appellee.

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
DIVISION II

**RESPONSE BRIEF OF STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES**

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I. COUNTER STATEMENT OF THE ISSUES

A. Did the superior court err when it ruled that Section 11(d) of the Parties' geoduck harvest agreement, which provides for a partial refund to Appellant for "lost harvest days" during the term of the contract if the actions of a governmental agency "prohibit harvesting," is unambiguous so that no refund is available for days on which Appellant harvested or had the opportunity to harvest from a geoduck tract identified in the contract?

B. Did the superior court err when it ruled as a matter of law that Appellee Washington State Department of Natural Resources ("DNR") properly calculated the refund owed to Appellant based on the harvest days that Appellant did not harvest or have the opportunity to harvest geoduck from either geoduck tract identified in the contract?

II. STATEMENT OF THE CASE

A. Factual Background.

In periodic public auctions, DNR sells the right to harvest geoduck clams from state-owned submerged lands in the inland marine waters of Washington State.¹ Following an auction, winning bidders are offered standardized harvest agreements which authorize divers to remove up to

¹ CP at 54-55 (Declaration of Mike Chevalier in Support of Defendant Department of Natural Resources' Motion for Summary Judgment ("Chevalier Decl."), ¶ 2.)

an established quota of geoduck from the seafloor at depths below the line of extreme low tide where the clams grow naturally in commercial quantities.²

Appellant International Shellfish, LLC (“International”) was the high bidder for the opportunity to harvest one of ten quotas of geoduck offered at auction by DNR.³ As a result, the parties entered into a geoduck harvesting agreement that authorized International to harvest its quota of geoduck from two tracts of state-owned submerged lands: the Wyckoff North tract (“Wyckoff”) and Point Beals South tract (“Point Beals”).⁴ International’s harvest contract, like those for all ten quotas, offered harvesting opportunity on the tracts from January 5, 2009, to March 13, 2009.⁵ A contractor must discontinue harvest on a tract if he or she reaches the quota on the tract before the end of the contract period,⁶ but other contractors who have not met their quota may continue to harvest that tract.

² *Id.*

³ CP at 55 (Chevalier Decl., ¶ 3).

⁴ CP at 60 (Harvest Agreement); CP at 81 (Exhibit A to Harvest Agreement).

⁵ CP at 63.

⁶ CP at 61 (Harvest Agreement § 2 “Harvest Ceiling”); CP at 81 (Exhibit A to Harvest Agreement).

Because harvesting is not allowed on weekends or holidays,⁷ there were 48 days in the contract period.⁸ Originally, the harvest agreements provided for the Point Beals tract to be harvested first and the Wyckoff tract to be harvested second.⁹ Point Beals was to be open for 33 days between January 5, 2009, and February 20, 2009, and Wyckoff was to be open 15 days from February 23, 2009, to March 13, 2009.¹⁰

Geoduck harvesting is regulated by the Washington State Department of Health (DOH).¹¹ DOH ensures that geoduck do not pose a human health risk by testing samples of geoduck from the tracts where harvesting occurs under DNR agreements on a regular basis before harvest begins.¹² If there is a health risk, DOH temporarily closes the tract.¹³ Section 11(a) of the harvest agreement provides for DNR to recall

⁷ CP at 68 (Harvest Agreement, ¶ 13).

⁸ Martin Luther King, Jr., Day was Monday, January 19, 2009, and President's Day was Monday, February 16, 2009.

⁹ CP at 81 (Harvest Agreement, Exhibit A).

¹⁰ CP at 81 (Harvest Agreement, Exhibit A).

¹¹ CP at 56 (Chevalier Decl., ¶ 5).

¹² *Id.* Chapter 69.30 RCW directs the State Board of Health to adopt rules governing the sanitation of shellfish and shellfish growing areas in order to protect public health. Chapter 246-282 WAC, Sanitary Control of Shellfish, establishes minimum performance standards for, inter alia, the growing and harvesting shellfish. See WAC 246-282-005. These rules adopt the requirements of the 2007 National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish, published by the United States Department of Health and Human Services, Public Health Service, Food and Drug Administration.

¹³ *Id.*

geoduck harvested at the time of a DOH closure.¹⁴ Section 11(d) provides a refund to harvesters for closed days.¹⁵ Section 2 of the harvest agreement permits DNR to change the harvest dates of each tract.¹⁶ Thus, if one tract is closed by DOH, DNR may allow harvesting on the other tract to prevent lost harvest days.¹⁷

International began to harvest the Point Beals tract on the first day of the contract period, January 5.¹⁸ However, because of concerns over paralytic shellfish poisoning (PSP), DOH temporarily closed Point Beals on that day.¹⁹ The DOH reopened the Point Beals tract for harvest on February 20, 23, and 24.²⁰ International was harvesting the tract on February 25 when DOH again closed the tract. Following the February 25 closure, DOH reopened the tract from March 9 to March 13, 2009.²¹ By the end of the contract period, March 13, 2009, Point Beals had been

¹⁴ CP at 58 (Chevalier Decl., ¶ 12; CP at 83 (International's Harvest totals by date and tract).

¹⁵

¹⁶ CP at 61.

¹⁷ CP at 56 (Chevalier Decl., ¶ 7).

¹⁸ CP at 58 (Chevalier Decl., ¶ 12; CP at 83 (International's Harvest totals by date and tract).

¹⁹ CP at 56 (Chevalier Decl., ¶ 5).

²⁰ CP at 58 (Chevalier Decl., ¶ 11).

²¹ *Id.*

closed on all but eight of the days.²² Of the eight full days when Point Beals was open, International harvested only six.²³

The harvest companies holding the ten quotas had varying degrees of success in harvesting their quotas on the Point Beals tract.²⁴ One contract holder, Tri-State, harvested 19,637 of the 28,000 pounds available under the harvest agreement for Point Beals – 70 percent of the quota – during the eight days the tract was open. At the other end of the spectrum, International’s harvest of 5,976 pounds on the eight full days the Point Beals tract was open was the third lowest total of the ten harvesters and amounted to only 21 percent of its quota for the tract.²⁵ One of the reasons for International’s low total was that the company elected not to harvest at all on two of the eight full days the Point Beals tract was open.²⁶

To offset the temporary closure of Point Beals, DNR allowed harvesting to begin on the Wyckoff tract on the second day of the contract period, January 6, 2009.²⁷ After opening Wyckoff on January 6, DNR

²² *Id.*

²³ *Id.*; CP at 83 (Chevalier Decl., Exhibit 4, International’s harvest totals by date and tract).

²⁴ CP at 56 (Chevalier Decl., ¶ 6).

²⁵ *Id.*; CP at 82 (Chevalier Decl., Exhibit 3, Harvest Totals). The average harvest from the Point Beals tract for the ten harvesters was 9,815 pounds, which amounts to 35 percent of the quota for the tract. *Id.*

²⁶ *Id.*; CP at 83 (Chevalier Decl., Exhibit 4, International’s harvest totals by date and tract).

²⁷ CP at 56-57 Chevalier Decl., ¶ 7); CP at 83 (International’s harvest totals by date and tract).

permitted harvesting to continue on the Wyckoff tract for the full 15 days initially allotted for the tract by the contract.²⁸ After the fifteenth day, which was January 27, 2009, DNR extended the harvesting period at Wyckoff.²⁹ DNR kept the Wyckoff tract open for a total of 20 days until February 20, 2009, the day DOH reopened the Point Beals tract.³⁰ In addition, DNR offered each harvester the opportunity to purchase up to an additional 900 pounds of geoduck to add to their quotas for the Wyckoff tract.³¹

All of the harvesters, including International, took advantage of the opportunities to harvest additional days and purchase additional pounds on the Wyckoff tract.³² International had the opportunity to harvest the first 15 days the Wyckoff tract was open and continued to harvest for an additional five days when DNR extended the harvest period at Wyckoff pursuant to Section 2 of the harvest agreement.³³ International completed harvest of its initial quota for the Wyckoff tract on February 9, 2009.³⁴

²⁸ CP at 57 (Chevalier Decl., ¶ 7).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² CP at 57 (Chevalier Decl., ¶ 8).

³³ CP at 57 Chevalier Decl., ¶ 8); CP at 83 (harvest totals by date).

³⁴ *Id.*

Then International continued to harvest, removing a total of 729 additional pounds of geoduck from the tract on February 9 and February 10.³⁵

Due to the temporary closure of the Point Beals tract, DNR calculated partial refunds for all the harvesters pursuant to Section 11(d) of the harvest agreements based on the number of days that the harvester had an opportunity to harvest on an open tract.³⁶ With respect to International, DNR calculated that International had the opportunity to harvest on the Wyckoff tract during the 15 contract days on which there were no closures and actually harvested five days in addition to the initial 15 during the period DNR extended the opening on Wyckoff.³⁷ Accordingly, in calculating the refund owed to International, DNR counted 20 days of harvest opportunity for International on the Wyckoff tract.³⁸ In addition, DNR counted eight days of harvest opportunity on the Point Beals tract.³⁹ Adding the Point Beals and the Wyckoff totals, DNR calculated 28 days without closures on which International had the opportunity to harvest under the contract.⁴⁰

³⁵ *Id.*

³⁶ CP at 57 (Chevalier Decl., ¶ 9; CP at 83 (harvest agreement summary)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

In addition to the total 28 days without closures, International harvested two partial days on the Point Beals tract, January 5 and February 25, 2009, during which closures occurred.⁴¹ On each of those days, International elected to harvest before DOH provided notice regarding whether the Point Beals tract would be closed.⁴² When DOH closed the tract on January 5 and February 25, 2009, DNR recalled the geoduck International harvested pursuant to Section 11(a) of the harvest agreement.⁴³ Based on International's bid at auction for the right to harvest, DNR paid International \$4.08 per pound for the recalled geoduck.⁴⁴

Section 11(d) of the harvest agreement provides that "a harvest closure for a partial day shall not be counted as a lost harvest day if purchaser elects to harvest for the partial day."⁴⁵ Thus, based on Section 11(d), DNR did not count International's partial harvest days as "lost harvest days" in calculating the refund for International.⁴⁶

⁴¹ CP at 58 (Chevalier Decl., ¶ 12; CP at 83 (International's harvest totals by date and tract).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ International bid \$167,101 for the right to harvest a total of 41,000 pounds from the tracts. Accordingly, the bid price per pound that International paid was \$4.08. See CP at 82.

⁴⁵ CP at 58 (Chevalier Decl., ¶ 12; CP at 66 (Harvest Agreement, § 11(d)).

⁴⁶ CP at 58 (Chevalier Decl., ¶ 12).

In total, DNR calculated that International had 30 days of harvest opportunity under the contract: ten days at Point Beals, including the two partial days, and 20 days at Wyckoff.⁴⁷ As a result, DNR found that, of the 48 days in the contract period, International was entitled to a refund for 18 “lost harvest days” on which International was prohibited from harvesting because of closures.⁴⁸ DNR paid International a refund of \$62,662.86, or \$3,481.27 for each of the 18 days during the contract period that International did not harvest or have the opportunity to harvest.⁴⁹ This amount was added to the \$2,893.70 which DNR paid for the 710 pounds of recalled geoduck International harvested. In all, DNR paid International a total refund of \$65,556.58.⁵⁰ International applied the refund to its bid for a subsequent geoduck auction.⁵¹

International disputed DNR’s calculation of the refund in a May 8, 2009, letter.⁵² In the letter, International states that it should be entitled to a refund of 27 lost harvest days, or, in the alternative, for the contract

⁴⁷ *Id.*

⁴⁸ CP at 58-59.

⁴⁹ CP at 59 (Chevalier Decl., ¶ 13); CP at 82. Under Section 11(d) of the contract, DNR calculated the per-day refund rate by dividing the \$167,101 International paid for the right to harvest by the 48 days on which harvesting was to be permitted during the contract period.

⁵⁰ *Id.*

⁵¹ CP at 116 (Supplemental Declaration of Mike Chevalier (“Chevalier Supp. Decl.”), ¶ 5); CP at 117.

⁵² CP at 59 (Chevalier Decl., ¶ 14); CP at 85.

value of all of the geoduck in its quota for the Point Beals tract that it did not harvest.⁵³ As a result, International claims a refund of \$93,994.29 for 27 lost harvest days, or, in the alternative, \$89,857.92 for the pounds of geoduck in its quota that it did not harvest.⁵⁴

B. Proceedings Below.

On September 9, 2009, International filed its Complaint seeking payment of additional refund amounts from DNR. On DNR's motion for summary judgment, the Thurston County Superior Court dismissed International's Complaint. Judge Pomeroy ruled as a matter of law that DNR had properly calculated the refund due under the parties' harvesting agreement. On November 12, 2010, International filed the instant appeal to contest the superior court decision.

III. SUMMARY OF THE ARGUMENT

Resolution of this appeal depends solely on calculation of the refund owed to International under its harvest agreement with DNR. At the center of the dispute is how many days should be counted as "lost harvest days" for which a refund is available under the harvest agreement. International argues that it is entitled to a refund for every day DOH closed the Point Beals geoduck tract, regardless of whether International

⁵³ *Id.*

⁵⁴ *Id.*

actually harvested or had the opportunity to harvest for the day on the Wyckoff tract. DNR counters that the express language of the refund provision in the contract and the contract read as a whole compel the conclusion a refund is only due for those days on which International could not harvest at all on either the Wyckoff or Point Beals tracts.

Because the refund provision is unambiguous and the relevant facts are not in dispute, the superior court was correct to resolve the controversy over the refund amount on summary judgment. The refund amount is determined under Section 11(d) of the harvest agreement. Under Section 11(d), DNR refunds a portion of the amount International bid for the right to harvest geoduck for each “lost harvest day” on which the actions of a governmental entity, here DOH, prohibited harvesting. Based on the plain meaning of the language of Section 11(d), “lost harvest days” include only days on which harvesting was prohibited. Accordingly, International is not entitled to a refund for days on which International actually harvested or had the opportunity to harvest geoduck pursuant to the harvest agreement.

To help avoid “lost harvest days,” International’s harvest agreement identifies two tracts on which harvesting may occur during the contract period. To facilitate the use of an alternate tract in the event of a closure, the contract gives DNR the discretion to change the harvest dates

for each tract. In this way, when one tract is closed by DOH, DNR may authorize use of the other to avoid disruption to harvesting. Accordingly, so long as there is a tract that is open, and a harvester has geoduck left to harvest under its quota for the open tract, the harvester has no “lost harvest days” and is not harmed following a temporary closure of a tract by DOH.

Reading the parties’ harvest agreement as a whole compels the conclusion that Section 11(d) means just what it says: a refund is due only for those harvest days on which harvesting was prohibited. If International was able to harvest on a harvest day, no refund is available. Thus, if International was able to harvest on the Wyckoff tract when the Point Beals tract was closed by DOH, no refund is due. The harvest agreement does not guarantee that a particular tract will be available to International on a particular day.

The harvest agreement allows DNR to change the harvest dates for the Point Beals and Wyckoff tracts to maximize harvesting in the event DOH closes a tract. Section 2 of the harvest agreement expressly reserves DNR “the right to change the harvest dates or duration of harvest . . . at any time during the Harvest Agreement.” The flexibility provided by Section 2 allows DNR to mitigate the effect of a DOH closure of one tract by opening the alternate tract. Because Section 2 allows DNR to change harvest dates on either of the two tracts identified in the harvest agreement

at any time, calculation of the number of “lost harvest days” under Section 11 does not depend on whether a particular tract was closed on a particular day, as International argues, but on whether International was prohibited from harvesting on a particular day.

Because DNR has refunded a portion of International’s bid for each of the 18 harvest days on which International did not have the opportunity to harvest as a result of the temporary closure by DOH, DNR has paid International the refund it is due under the express language of the contract.

IV. ARGUMENT

A. Standard of Review.

On appeal, courts review a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010) (quoting CR 56(c)). The court must view the facts in the light most favorable to the non-moving party. *Id.* Interpretation of

an unambiguous contract is a question of law. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

B. The Harvest Agreement Is Unambiguous That a Refund Is Only Available for Days on Which Harvesting Was Prohibited.

The present dispute concerns the refund owed International under its harvest agreement with DNR. Accordingly, resolution of the dispute must focus on the refund language in the contract. In Washington, courts look to the intent of the parties to determine the meaning of a contract. *See Berg v. Hudesman*, 115 Wn.2d 657, 664, 801 P.2d 222 (1990). Generally, the court ascertains the intent of the parties from reading the contract as a whole and will not read an ambiguity into a contract that is otherwise clear and unambiguous. *See Mayer*, 80 Wn. App. at 420; *see also Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) (when using the context rule in *Berg*, courts should “generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”) “If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Mayer*, 80 Wn. App. at 420, quoting *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992).

In this case, the harvest agreement is unambiguous regarding the refund due International. The express language of Section 11(d) compels the conclusion that a refund is available only for those days in the contract period on which International was prohibited from harvesting by a governmental agency. The pertinent part of Section 11(d) provides as follows:

*If the actions of a governmental agency, beyond the control of Purchaser . . . , prohibit harvesting on legal harvest days during the term of this contract Purchaser shall be entitled to a refund of a portion of the Bonus Bid equal to the bonus bid divided by the number of legal harvest days included within the term of this contract multiplied by the number of lost harvest days.*⁵⁵ (emphasis added).

Based on the express language above, refunds are available under Section 11(d) only for days on which harvesting was prohibited by a governmental agency. Generally, the ordinary meaning of contract provision may be ascertained by reference to standard English dictionaries. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994). Here, by definition, days on which International actually harvested or had the opportunity to harvest cannot be days on which it was “prohibited” from harvesting. *See Webster's Third New International Dictionary* 1813 (1993) (“prohibit” means “to forbid by authority or command”). Accordingly, International is not

⁵⁵ CP at 65.

entitled to a refund for any days it harvested on the Wyckoff tract, regardless of whether DOH closed the Point Beals tract.

The contract viewed as a whole fully supports the conclusion that Section 11(d) means just what it says: refunds are available only for days when a governmental agency prohibits harvesting under the contract. To help limit the number of lost harvest days, the contract expressly provides DNR the flexibility to change the harvest days on each tract identified in the contract and, thereby, to permit harvesting to continue when a single tract is closed. Section 2 of the contract provides:

DNR reserves the right to change the harvest dates or duration of harvest . . . at any time during the harvest agreement. . . In the event that DNR reduces the *total number of harvest days* . . . by more than twenty-five percent . . . Purchaser's rights shall be limited to those specified in Clause 11⁵⁶

Because of DNR's authority to change the dates on which a tract is open for harvest under the terms of the contract, a temporary closure of a single tract by DOH, such as occurred at Point Beals, need not "prohibit" harvesting. In such circumstances, harvesting may continue on the other tract identified in the contract, as it did in this case on the Wyckoff tract.

When determining whether DNR's action in reducing harvest days pursuant to Section 2 of the contract results in a refund, the contract is

⁵⁶ CP at 61(emphasis added).

express that the *total number* of harvest days is used. International is entitled to a refund pursuant to Section 11 only if DNR's decision to change harvest dates on a tract results in more than a 25 percent reduction of the *total number* of harvest days available under the contract. There is simply no support in the harvest agreement for the argument advanced by International that a refund is due for *any day any* tract was closed, even if the company actually harvested on another tract.

International makes three arguments that Section 11(d) is ambiguous and should not be understood to mean what it says: (1) International argues that the court should employ the context rule to find the provision ambiguous based on International's subjective intent;⁵⁷ (2) International argues that "if it is true that a 'lost opportunity day' is only one when harvesting is prohibited then each of the companies [that harvested] should have the same number of lost opportunity days,"⁵⁸ and (3) International argues that the Court must interpret the agreement against DNR because DNR was the drafter.⁵⁹

International's efforts to read ambiguity into Section 11(d) must fail. Ambiguity exists in a contract provision only when, reading the contract as a whole, two or more reasonable interpretations are possible.

⁵⁷ Appellant's Opening Brief at p. 7.

⁵⁸ Opening Brief at 3.

⁵⁹ Opening Brief at 8.

See Wm. Dickson Co. v. Pierce County, 128 Wn. App. 488, 116 P.3d 409 (2005) (“An ambiguous provision is one fairly susceptible to two different, reasonable interpretations”); 25 *Washington Practice* § 5:5 (citing numerous cases). Courts will not read an ambiguity into a contract that is otherwise clear and unambiguous. *See Mayer*, 80 Wn. App. at 420. As explained below, International’s arguments fail to provide any reasonable basis why Section 11(d) should not be understood to mean just what it says: a refund is available for days on which harvesting was prohibited.

1. Refunds Are Available Under Section 11(d) for Days Harvesting Was Prohibited, Not Days on Which a Single Tract Was Closed.

International argues that by entering in the agreement it intended to receive a refund for each day any tract was closed.⁶⁰ International does not point to any language in the contract that supports giving a refund for each day any tract is closed. As fully explained above, the language of Section 11(d) and the contract read as a whole strongly support the conclusion that a refund is available only when harvesting was prohibited; in other words, no harvesting was available under the contract. In support of its argument, International submits its subjective valuation of the

⁶⁰ Opening Brief at 7.

harvest opportunity on the Wyckoff tract.⁶¹ International's subjective valuation does not change the meaning of the refund provision in Section 11(d) of the contract.

International argues the value of a refund for a lost harvest day on the Point Beals tract was worth more to it than the additional day of harvest opportunity on the Wyckoff tract.⁶² International's argument misses the mark. Generally, the subjective intent of the parties is not relevant to interpretation of a contract where, as here, the meaning of the contract can be determined from the language of the contract itself. *Hearst*, 154 Wn.2d at 503 (“the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.”). Here, the contract is unambiguous that refunds are available only for those days on which International was prohibited from harvesting. Accordingly, International's subjective valuation of the harvest opportunity on the Wyckoff tract and its subjective intent to obtain a refund for days on which it actually harvested the tract based on the closure of the other tract is not relevant.

Moreover, because the value of a day of harvest is expressed in the contract and is the same for the Point Beals and Wyckoff tracts,

⁶¹ *Id.*

⁶² *Id.*

International's subjective valuation of the harvest opportunity on the Wyckoff tract is not relevant. The formula set forth in Section 11(d) requires any refund to be calculated by dividing the amount bid at auction by the "number of legal harvest days included within the term of this contract" to arrive at a refund amount for each lost harvest day. Because the formula requires the use of all days included within the contract term, every day of lost harvest has the same refund value. This is true whether the lost harvest day is attributed to a closure of the Wyckoff or Point Beals tract. If the parties had intended that a day of harvest opportunity at Point Beals was worth more than a day of harvest opportunity on the Wyckoff tract, the parties would have provided for different values for lost harvest days on each tract. Because the contract is express regarding the value of the "lost harvest days," International's subjective valuation of the harvest opportunity at Wyckoff is irrelevant.

The actions of the other companies harvesting at Wyckoff also belie International's assertion regarding the value of the harvest opportunity on the Wyckoff tract. Each company took advantage of DNR's extension of the opening at Wyckoff.⁶³ DNR counted the extra days harvested at Wyckoff for purposes of calculating the refunds issued to all the companies under

⁶³ CP at 57; CP at 82.

Section 11(d).⁶⁴ Yet, aside from International, none of the companies have challenged DNR's calculation of the refund due.⁶⁵

Just as International's subjective interpretation of the harvest agreement is contrary to the express language of Section 11(d), it is also contrary to the contract read as a whole. The language of Section 2 makes clear the contract does not guarantee specific harvest dates or a specific number of harvest days on each tract. Section 2 specifically provides that DNR may change the harvest days or reduce their number. When interpreting a contract, the court reads the contract as a whole so as to give effect to all its provisions. *See Mayer*, 80 Wn. App. at 423. Reading Section 2 in conjunction with the refund provisions of Section 11(d), the relevant calculation for the court is the number of days International did not have the opportunity to harvest on an open tract, rather than, as International would have it, how many days a particular tract was closed. On days on which International could harvest from an open tract, harvesting was not "prohibited," and no refund will issue under the contract. Thus, in this case, for those days on which the Wyckoff tract was open and International was harvesting on the tract, harvesting was not "prohibited" by the temporary closure of the Point Beals tract.

⁶⁴ *See* Chevalier Decl., Exhibit 4 (column entitled "Days Wyckoff Fished").

⁶⁵ CP at 116 (Chevalier Supp. Decl., ¶ 6).

Pursuant to Section 2, either tract could be opened by DNR at any time during the contract period. There was no right to harvest on a specific day on a certain tract. Accordingly, the question to be asked for purposes of determining whether a day is a “lost harvest day” is whether International had an opportunity to harvest, not, as International argues, whether a particular tract was closed.

2. Harvesting Is Prohibited When There Is No Open Tract From Which a Harvester May Harvest.

International contends that, if Section 11(d) only permits a refund for days on which harvesting was prohibited, as argued by DNR, all ten winning bidders would have had the same number of “lost harvest days.” International offers no explanation for its argument. As explained below, the argument misconstrues the harvesting agreement.

Under the harvest agreement, a governmental closure of a tract prohibits harvesting if the closure prevents a harvester from harvesting geoduck on a legal harvest day identified in its harvest agreement.⁶⁶ The harvest agreement sets a quota establishing the limit of geoduck that may be harvested from each tract.⁶⁷ Once a harvester has taken the limit from a

⁶⁶ CP at 66 (Section 11(d)).

⁶⁷ CP at 61 (Harvest Agreement § 2); CP at 81 (Exhibit A to Harvest Agreement).

tract, it may no longer harvest geoduck on the tract.⁶⁸ Accordingly, closure of a tract may affect harvest companies differently depending on whether the companies have any geoduck left to harvest on any tracts that are opened by DNR following the closure. If a company has harvested its limit on the open tract, the closure of the other tract, where the company has not harvested its limit, has the effect of prohibiting harvesting because the company cannot harvest, although it has geoduck left to harvest from the closed tract.⁶⁹

In this case, DOH closure of the Point Beals tract would have “prohibited” harvesting when the Wyckoff tract was open if International had already harvested its limit on the Wyckoff tract. Because different companies harvested at different rates, the closure of the Point Beals tract affected the harvesters differently and resulted in different numbers of “lost harvest days.” International harvested 20 days on Wyckoff,⁷⁰ but other companies took fewer days to harvest their limit on the Wyckoff

⁶⁸ *Id.*

⁶⁹ If the company had harvested its limit on all tracts, it would not be entitled to a refund under Section 11(d). Section 11(e) of the contract sets the maximum refund a company can receive at the contract value of the geoduck available but not harvested under the terms of the agreement. CP at 66.

⁷⁰ One reason International took longer to harvest its quota on Wyckoff than some other harvesters was that the company failed to harvest at all on three days during the initial 15-day period when the tract was open. International failed to harvest any geoduck on the Wyckoff tract on January 22, 23, and 26, although the tract was open and International had geoduck under its quota to harvest. CP at 83; CP at 116 (Chevalier Decl., ¶ 5). No harvesting occurred on January 19, 2009, because the date was a holiday.

tract.⁷¹ The companies which harvested the limit on the Wyckoff tract more quickly harvested fewer days under the contract, and, therefore, had more “lost harvest days” because of the closure of the Point Beals tract. Because International harvested more days under the contract, International had fewer “lost harvest days.”

3. Because the Meaning of the Harvest Agreement Is Readily Discernable From the Contract Itself, There Is No Need to Resort to Rules of Construction.

International argues that Section 11(d) of the contract should be interpreted against DNR because DNR drafted the contract. Because the contract is unambiguous, International’s argument fails. The rule of construction under which courts interpret ambiguous contractual provisions against the drafter only applies if the contract is ambiguous. Because Section 11(d) is clear that a refund is due only when harvesting is prohibited, there is no need to apply the rule of construction. Moreover, the rule of construction is to be used only as a last resort where the parties’ intent cannot be determined. In this case, the intent of the parties is apparent when the contract is viewed as a whole, as explained above. Accordingly, there is no need to resort to interpreting the contract against DNR. *See Forest Marketing Enterprises, Inc. v. Dep’t of Natural Resources*, 125 Wn. App. 126, 132-33, 104 P.3d 40 (2005) (“Here,

⁷¹ CP at 82 (see column “Days Wyckoff Fished”).

viewing the contract as a whole and in context, we can determine the parties' intent. Thus, we need not construe the contract against DNR.”); *see also Roberts, Jackson & Assocs. v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (rule that ambiguity be resolved against the drafter applies only where intent of parties cannot be otherwise determined).

C. DNR Properly Calculated the Refund Based on the Days International Was Prohibited From Harvesting.

For each of the “lost harvest days,” when International was prohibited from harvesting, Section 11(d) of the harvest agreement provides that International is eligible for a refund of a pro rata portion of the amount International bid at auction for the right to harvest. It is undisputed that the harvest agreement initially contemplated there would be 48 harvest days during the term of the contract.⁷² As explained below, counting the days on which International had the opportunity to harvest during the term of the contract yields 30 days of harvest opportunity. Accordingly, under Section 11(d) of the contract, International is entitled to a refund of a pro rata portion of the \$167,101 it bid⁷³ for each of the 18 days on which it was prohibited from harvesting by DOH.

⁷² CP at 55 (Chevalier Decl., ¶ 4); CP at 63 (harvest agreement, § 5); CP at 81 (harvest agreement, Exhibit A).

⁷³ CP at 59 (Chevalier Decl., ¶ 13); CP at 66 (harvest agreement, § 11(d)); CP at 82 (see column “Bonus Bid Amount”).

International had the opportunity to harvest on all 15 days the Wyckoff tract was open in accordance with the contract.⁷⁴ In addition, International actually harvested on five additional days on which DNR extended the opening on the Wyckoff tract pursuant to Section 2 of the harvest agreement. Accordingly, International harvested or had the opportunity to harvest at Wyckoff for a total of 20 harvest days.

It is undisputed that the Point Beals tract was open for eight days during the contract term without any closures by DOH.⁷⁵ Thus, International had the opportunity to harvest on the eight days the tract was open. In addition, International actually harvested at Point Beals on two additional days before the tract was closed by DOH.⁷⁶ Accordingly, International harvested or had the opportunity to harvest ten days on the Point Beals tract.

Adding the days International harvested or had the opportunity to harvest at Point Beals to the days International harvested or could have harvested at Wyckoff yields 30 days of harvest opportunity pursuant to the

⁷⁴ International chose not to harvest on two of the 15 days, although the tract was open. *See* Chevalier Decl., ¶ 9.

⁷⁵ CP at 58 (Chevalier Decl., ¶ 11); CP at 82 (see column “Days Point Beals Open”).

⁷⁶ The geoduck harvested on those days, February 5 and February 25, 2009, was recalled and paid for by DNR. As explained below, International’s partial harvest days are excluded from the definition of lost harvest days under the express language of Section 11(d). The Section provides “a harvest closure for a partial day shall not be counted as a lost harvest day if Purchaser elects to harvest for the partial day”

harvest agreement. Because the harvest agreement provided for 48 possible harvest days but only 30 harvest days were available, International had a total of 18 “lost harvest days” under Section 11(d) of the contract.

The undisputed facts show DNR has paid International the refund it is owed. Based on the above calculation, DNR refunded International for the 18 days on which the temporary closure of the Point Beals tract prohibited International from harvesting. DNR calculated the refund as directed by Section 11(d) of the harvest agreement: DNR divided the \$167,101 International bid at auction by the 48 harvest days in the contract to arrive at the per-day refund of \$3,481.27. DNR then multiplied the per-day amount by International’s 18 “lost harvest days” to calculate the refund of \$62,662.86, which DNR paid.

International has argued that it should be entitled to a refund for 27 days of lost harvest opportunity under Section 11(d) of the agreement. To reach that number, International counted several days on which it actively harvested or had the opportunity to harvest on the Wyckoff tract as “lost harvest days.” As fully explained above, the days International harvested, by definition, are not days it was prohibited from harvesting under Section 11(d).

Among the harvest days International erroneously counts as “lost harvest days” are two days on which it actually harvested on the Point Beals tract. On those two days, January 5, 2009, and February 25, 2009, International elected to begin harvesting before DOH provided notice whether the tract would be closed. In such circumstances, the harvest agreement assigns the risk that the tract will be closed to the harvester. Section 11(d) provides that “closure for a partial day shall not be counted as a lost harvest day if Purchaser elects to harvest for the partial day.” Accordingly, because International elected to harvest on January 5 and February 25, International is not entitled to count those days as “lost harvest days” for purposes of a refund.

Permitting International a refund for January 5 and February 25 would not only contradict the express language of Section 11(d), it would also lead to unreasonable and inequitable results. International has already been compensated for the geoduck that it harvested on the two days it elected to begin harvesting before DOH closed the Point Beals tract. International harvested a total of 710 pounds of geoduck from the Point Beals tract on January 5 and February 25. Because DOH closed the tract after International began harvesting, DNR recalled the harvested geoduck pursuant to Section 11(a) of the harvest agreement. DNR paid International \$4.08 per pound, a total of \$2,893.70, for the recalled

geoduck harvested by International.⁷⁷ Accordingly, as International has already been paid a refund for the geoduck it harvested on January 5 and February 25, International's refund request seeks double recovery for those days.

DNR paid International a refund of \$62,662.86 for the 18 "lost harvest days" on which International did not have the opportunity to harvest geoduck in accordance with the contract because of the closure of the Point Beals tract by DOH. In addition, DNR recalled and paid International \$2,893.70 for the geoduck International harvested on January 5 and February 25 before the Point Beals tract was closed by DOH. Accordingly, the \$65,556.58 DNR paid International is all the refund that is due under the harvest agreement.

V. CONCLUSION

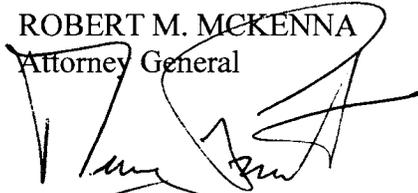
Under Section 11(d) of the harvest agreement, International is entitled to a refund of only the "lost harvest days" on which geoduck harvesting was prohibited by a governmental agency. Because DNR has refunded International for each of the 18 days the agreement unambiguously defines as "lost harvest days," International has received

⁷⁷ The \$4.08 per pound price was calculated by dividing the amount International bid at auction, \$167,101, by the total pounds of geoduck available under the harvest agreement at the Point Beals and Wyckoff tracts, 41,000.

the refund due under the contract. Accordingly, the ruling of the Thurston County Superior Court in this matter should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of March, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'Terence A. Pruit', is written over the printed name and title of the Assistant Attorney General.

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State of Washington, Department of
Natural Resources

COURT OF APPEALS
DIVISION II

NO. 41428-7-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
BY _____
DEPUTY

INTERNATIONAL SHELLFISH, LLC,
a Washington Limited Liability
Company,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES,

Appellee.

**CERTIFICATE OF
SERVICE**

I certify that on the 11th day of March, 2011, I caused a true and correct copy of **RESPONSE BRIEF OF STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,** and this **CERTIFICATE OF SERVICE** to be served upon the parties herein, in the above-entitled action, as indicated below:

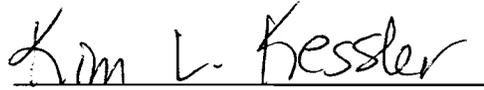
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Attorney for Appellant

- US Mail Postage Prepaid
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- ABC/Legal Messenger
- UPS Next Day Air
- Fax
- Hand Delivered

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

DATED this 11th day of March, 2011 at Olympia, Washington.

Handwritten signature of Kim L. Kessler in black ink, written over a horizontal line.

KIM L. KESSLER
Legal Assistant
Natural Resources Division