IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

International Shellfish, a Washington Limited Liability Company, Appellant, v. STATE OF WASHINGTON, Dept. of Natural Resources, AQUATIC RESOURCES DIVISION, Respondent.	No. 41428-7-II UNPUBLISHED OPINION

Hunt, J. — International Shellfish appeals summary judgment in favor of the Washington State Department of Natural Resources, Aquatic Resources Division (DNR), concerning an agreement for harvesting geoduck clams from two tracts of state-owned aquatic land within specified time frames. International Shellfish argues that the superior court erred in ruling that (1) the parties' Agreement term, "lost harvest days,"[1] was not ambiguous; and (2) DNR properly calculated International Shellfish's refund amount to compensate for 18 "lost harvest days." We affirm.

[1] Clerk's Papers (CP) at 66.

FACTS

I. Geoduck Harvesting Agreement

At a public auction on December 3, 2008, International Shellfish was one of ten winning auction bidders that each purchased an opportunity to harvest geoduck clams from two tracts of state-owned aquatic land: the Point Beals South tract in King County and the Wyckoff North tract in Pierce County.[2] International Shellfish paid DNR $167,101 for its harvest opportunity and entered into a standardized "Geoduck Harvesting Agreement" (Agreement) with DNR. Clerk's Papers (CP) at 60. An International Shellfish representative signed the Agreement on December 22, 2008, and a DNR representative signed the Agreement on December 31. Section 28 of the Agreement included an integration clause stating that the Agreement constituted the "final expression" of the parties' agreement and that the parties had no "understandings, Agreements, or representations, expressed or implied, that [were] not specified in [the Agreement]." CP at 77.

A. General Provisions

This Agreement gave International Shellfish (1) a nonexclusive right to harvest up to 41,000 pounds of geoducks from the "Property," defined as "the Harvest Area(s)"[3] in the Agreement's Exhibit A, comprising Point Beals and Wyckoff; and (2) 48 days of geoduck harvesting opportunity on the Property on "legal harvest days," between January 5, 2009, and

[2] We refer to the Point Beals South tract as "Point Beals" and the Wyckoff North tract as "Wyckoff" in this opinion.

[3] Subsection 3(a) of the Agreement referred to the Property as the "bedlands" listed in Exhibit A. CP at 61.

March 13, 2009.[4] The Agreement anticipated that, between these dates, Point Beals would be open for 33 days, and Wyckoff would be open for 15 days. But the Agreement did not guarantee a specific number of "legal harvest days" or that harvesting would be allowed on any specific dates for either tract. Nor did the Agreement guarantee that International Shellfish would be able to harvest any specific quantity of geoduck, such as its 41,000-pound quota. On the contrary, DNR specifically disclaimed any warranty as to the volume, quality, or grade of geoducks available for harvest and the accuracy of any pre-bid volume estimates for each tract.

Instead of guarantees, the Agreement provided International Shellfish with an *opportunity* to harvest up to 28,000 pounds of geoduck from Point Beals and up to 13,000 pounds from Wyckoff on days that the tracts were open during the contract period or until International Shellfish reached its geoduck quota for a particular tract. Once International Shellfish reached its quota for a particular tract, it could no longer harvest geoducks from that tract[5]; but it could, however, harvest geoducks from the second tract of land on days that tract was open, until it met the second tract's quota.

The Agreement gave DNR the right to close temporarily all or portions of the tracts during the contract period. Section 2 of the Agreement, for example, (1) expressly reserved to DNR the right to "change the harvest dates or duration of [the] harvest" at either tract and the

[4] The nine other successful auction bidders entered into similar harvesting agreements with DNR, which granted each other bidder a nonexclusive right to harvest geoducks from Point Beals and Wyckoff for the same period as International Shellfish.

[5] Other successful public auction bidders, however, could continue to harvest on the tract if they had not yet met their individual quotas for that tract.

right to "increase or decrease the [h]arvest [quota]" for either tract at any time during the contract period; and (2) provided that if DNR "reduce[d] the *total number of harvest days* . . . by more than twenty-five percent," International Shellfish would be entitled to a partial refund as provided in section 11 of the Agreement. CP at 61 (emphasis added). And Section 11 of the Agreement, entitled "Temporary Closures," provided International Shellfish with notice that temporary closures of the two tracts were possible if the health department discovered health risks. CP at 65. Subsection 11(b) further provided DNR with "discretion" to close temporarily "all or a portion of the Property" during the contract period to protect public resources. CP at 65.

B. Refund Provisions

To account for the possibility that International Shellfish could lose harvesting opportunities when DNR closed tracts, section 11 of the Agreement included a refund provision: Under subsection 11(d), "Purchaser's Right to Refund," DNR would provide International Shellfish with a partial refund of the amount it had paid at auction if International Shellfish was "prohibit[ed]" by governmental action from harvesting on "legal harvest days" under the Agreement. CP at 66. Subsection 11(d) specified the method for calculating such refund. Subsection 11(e), "Maximum Refund Total," provided a formula for limiting the maximum refund amount available to International Shellfish under the Agreement; and it required International Shellfish to return any excess refunds received to DNR within 30 days. CP at 66.

Subsection 11(d) also provided, however, that International Shellfish would not receive refunds if it harvested for less than a full day during "partial" closures, which partial days would nevertheless count as days harvested under the Agreement if International Shellfish elected to

harvest for such days or if the closure did not exceed four hours of otherwise legal harvest time.[6] Subsection 11(a) authorized DNR to "recall" any geoducks harvested at the time of a health department closure and required DNR to compensate International Shellfish for such recalled geoducks. CP at 65.

II. Performance under the Agreement

A. Point Beals Temporary Closure; Refund for Recalled Geoducks

International Shellfish began harvesting geoducks from Point Beals on January 5, 2009, the first day of its contract period. Concerned about paralytic shellfish poisoning, the health department temporarily closed Point Beals to geoduck harvesting at some point on January 5 and reopened it on February 20,[7] 23, and 24. International Shellfish harvested geoducks at Point Beals all three reopened days.

International Shellfish also began harvesting at Point Beals on February 25, before the health department again closed the tract temporarily for health reasons. CP at 58. When the health department reopened Point Beals from March 9 to March 13, International Shellfish harvested geoducks from the tract on March 10, 11, and 13. CP at 58, 83. By March 13, the end of the contract period under the Agreement, International Shellfish had harvested geoducks from Point Beals on six of the eight days that it had been open. DNR recalled the 710 pounds of geoduck that International Shellfish had harvested from Point Beals on January 5 and February 25

[6] *See* CP at 66: "A harvest closure for a *partial* day shall not be counted as a *lost harvest day* if [International Shellfish] *elects* to harvest for the partial day, or if the lost harvest does not exceed four (4) hours that day." (Emphasis added.)

[7] Under the Agreement, Point Beals was not open for geoduck harvesting on weekends; therefore, there was no harvesting allowed on February 21 and 22, Saturday and Sunday.

before the health department closure and paid International Shellfish $4.08 per pound for the recalled geoduck, or $2,896.80 total.

B. Wycoff Harvesting Opportunity To Offset Point Beals' Closure

To offset the temporary full-day closures of Point Beals, DNR allowed International Shellfish and the other auction bidders to harvest geoducks early at Wyckoff, beginning January 6, the second day of the contract period, continuing for the full 15 days initially allotted for that tract's harvesting period under the Agreement. After the fifteenth day, January 27,[8] DNR "extended" Wyckoff's harvesting period, under section 2 of the Agreement, allowing International Shellfish and the other auction bidders to harvest geoducks from the tract until February 20, the date that Point Beals initially reopened after its first closure. CP at 57. DNR also offered International Shellfish and the other auction bidders an opportunity to purchase the right to harvest up to 900 additional pounds of geoduck to add to their Wyckoff tract quotas.

Taking advantage of this opportunity, International Shellfish and the other auction bidders purchased additional quotas and harvested additional days at the Wyckoff tract. When International Shellfish completed its initial Agreement quota for the Wyckoff tract on February 2, it used this additional opportunity to harvest another 729 pounds of geoduck at Wyckoff on February 9 and 10.

C. Refunds

According to DNR, the ten auction bidders had varying degrees of success in harvesting

[8] Because the Agreement did not allow geoduck harvesting on state holidays, Point Beals and Wyckoff were likely closed on Martin Luther King, Jr. Day, a state holiday within this period.

their respective geoduck quotas from the Point Beals tract on the eight days that the tract was open. International Shellfish harvested 5,976 pounds of geoduck, or 21 percent of its quota for the tract under the Agreement. In contrast, Tri-State, another auction bidder, harvested 19,637 pounds of geoduck, or 70 percent of its quota for the tract. At the end of the contract period, DNR issued partial refunds to International Shellfish and to the other auction bidders to reimburse them for the contract days they had been "prohibited"[9] from harvesting as a result of the Point Beals temporary closure.

DNR calculated these refunds using the formula in subsection 11(d) of the Agreement.[10] The formula required DNR to divide International Shellfish's auction bid ($167,101) by the number of "legal harvest days" (48 days) in the contract term and then to multiply the resulting figure by the number of "lost harvest days." CP at 66. Although subsection 11(d) did not define "lost harvest days," DNR used "the number of days that [International Shellfish] *did not have an opportunity* to harvest on *an open tract*"[11] (Point Beals *or* Wyckoff), as opposed to the number of days that International Shellfish did not have an opportunity to harvest at Point Beals specifically.

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[9] CP at 66.

[10] Subsection 11(d) of the Agreement provided:

> If the *actions of a governmental agency*, beyond the control of [International Shellfish], its agents[,] or its employees, *prohibit harvesting* on legal harvest days during the term of this contract, [International Shellfish] shall be entitled to a refund of a portion of the [auction bid] equal to the amount of the [auction bid] divided by the number of legal harvest days included within the term of this contract multiplied by the number of lost harvest days.

CP at 66 (emphasis added).

[11] CP at 57 (emphasis added).

DNR calculated that International Shellfish had the opportunity to harvest on the Wyckoff tract for the 15 days originally allotted under the Agreement,[12] plus an additional 5 days[13] that International Shellfish had harvested when DNR extended Wyckoff's harvest period. Thus, DNR determined that International Shellfish had 20 days of "harvest opportunity" on the Wyckoff tract. CP at 57. DNR similarly determined that International Shellfish had 8 days of "harvest opportunity" on the Point Beals tract (February 20, 23, and 24, and March 9-13), during which International Shellfish had chosen to harvest on only 6 days and not to harvest on 2 days, March 9 and 12. CP at 58.

DNR added the Wyckoff and Point Beals "harvest opportunity" day totals together and concluded that there had been 28 harvest days without closures during which International Shellfish had the "opportunity" to harvest geoducks under the Agreement. CP at 58. To this "harvest opportunity" total DNR added the two partial days that International Shellfish had "elected" to harvest at Point Beals (January 5 and February 25) before the health department temporarily closed that tract,[14] for which DNR had compensated International Shellfish for the

[12] DNR included the date that it had opened Wyckoff early; thus, that tract's 15-day harvest term spanned January 6 to January 27, 2009, under the Agreement.

[13] After the Agreement's original harvesting period ended on January 27, International Shellfish harvested at the Wyckoff tract on the following five additional "opportunity" days: January 28-30, February 9, and February 10. CP at 57, 83.

[14] According to DNR, subsection 11(d) of the Agreement specifically stated that a "partial closure" would not count as a "lost harvest day" if International Shellfish "elected" to harvest on such partial days. CP at 58. Because International Shellfish had actually harvested geoduck at Point Beals before the health department temporarily closed the tract on January 5 and February 25, DNR determined that International Shellfish had "elected" to harvest partial days on January 5 and February 25; therefore, DNR did not count these two partial harvest days in its calculation of "lost harvest days." CP at 58. DNR did, however, compensate International Shellfish for the 710

recalled geoducks harvested before the closures. CP at 58. DNR calculated that International Shellfish had 30 days of harvest opportunity under the Agreement: 10 days at Point Beals, including the 2 partial days on January 5 and February 25; and 20 days at Wyckoff.

Because International Shellfish had *actually* harvested or had the *opportunity* to harvest geoducks on only 30 of the 48 total "legal harvest days" provided in the Agreement, DNR determined that International Shellfish was entitled to a refund for the 18 "lost harvest days" that it had been "prohibited" from harvesting at either tract when the health department closed the Point Beals tract. CP at 58. Consequently, DNR refunded International Shellfish $62,662.88: $3,481.27 for each of the 18 "lost harvest days." DNR added this $62,662.88 to the $2,896.80 that it had already paid International Shellfish for the 710 pounds of recalled geoduck harvested on January 5 and February 25 before the temporary closures. Thus, DNR calculated that International Shellfish was entitled to a total refund of $65,559.68 for the "lost harvest days" and recalled geoducks.

In a letter dated April 16, 2009, DNR explained to International Shellfish the methodology it (DNR) had used in calculating this $65,559.68[15] net refund amount to which it was entitled. The letter referred to three factors: (1) 18 "Days of Lost Opportunity," which the letter also described as "days that you [International Shellfish] were *not physically on tract*"; (2) 710 pounds of geoduck recalled based on health department concerns; and (3) the "Maximum Refund Total," referenced in subsection 11(e) of the Agreement. CP at 84 (emphasis added). In a May 8 letter,

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pounds of unsalable geoduck harvested on those days.

[15] DNR's April 16 letter appears to have erroneously stated that International Shellfish's refund was $65,556.58, not the $65,559.68 stated elsewhere in the record. The parties, however, do not dispute that International Shellfish received a total refund of $65,559.68 from DNR.

International Shellfish disputed DNR's calculation, claiming it was entitled to a

refund of either $93,994.29 for "27 lost harvest days"[16] or $89,857.92 for the contract value of the geoduck quota that it did not harvest from the Point Beals tract.[17] CP at 85. In response, DNR sent International Shellfish a second letter, dated May 20, stating that DNR had correctly calculated International Shellfish's refund amount in its April 16 letter and that DNR did not owe International Shellfish additional money.

III. Lawsuit

International Shellfish sued DNR for breach of contract, alleging that DNR had failed to pay the refund amount owed under the Agreement. International Shellfish sought approximately $25,000 in breach of contract damages or the amount proven at trial, prejudgment interest, and reasonable attorney fees and costs under the Agreement. DNR answered that it did not owe International Shellfish an additional refund.

DNR also moved for summary judgment, arguing that it had paid International Shellfish the correct refund amount under the Agreement when it compensated International Shellfish for 18 "lost harvest days." The superior court granted DNR's summary judgment motion and dismissed International Shellfish's complaint with prejudice. International Shellfish appeals.

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[16] International Shellfish provided the following formula: "Actual Harvest Days Lost (x) Avg. Price per Contract Harvest Day"—i.e., 27 lost days (x) $3,481.27/day = $93,994.29. CP at 85. But International Shellfish did not explain how it calculated that it was entitled to a refund for "27 lost harvest days." CP at 85. During oral argument, however, International Shellfish noted it was seeking a refund for only 23 days total—or 5 additional days beyond the days for which it had already received DNR refunds—not the 27 days that it had previously alleged.

[17] International Shellfish provided the following formula: "(Contract lbs (less) Harvest lbs) (x) Contract $/lb"—i.e., (28,000 lbs (less) 5,976 lbs) (x) $4.08/lb = $89,857.92. CP at 85.

ANALYSIS

I. Agreement Refund Provision Not Ambiguous

International Shellfish argues that (1) subsection 11(d) of the Agreement was ambiguous because it did not specifically define the term "lost opportunity days"[18]; (2) "International Shellfish intended to obtain a refund for the days not harvested based on closed tracts, here due to [paralytic shellfish poisoning]"[19]; and (3) therefore, because there was a genuine issue of material fact concerning the parties' intent for refunds for "lost opportunity days," the superior court erred in granting DNR summary judgment.[20] Br. of Appellant at 5. DNR responds that the language of subsection 11(d) is not ambiguous when read in the context of the entire Agreement and that DNR properly calculated International Shellfish's refund under the express terms of the Agreement. We agree with DNR.

A. Standard of Review

We review summary judgment orders de novo, performing the same inquiry as the trial

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[18] We note that, although International Shellfish uses the term "lost opportunity days" in its brief, the Agreement does not use this term. Br. of Appellant at 5. Instead, the Agreement uses the term "lost harvest days." CP at 66.

[19] Br. of Appellant at 7.

[20] International Shellfish also contends that, if subsection 11(d) provided a refund only when it was "prohibited" from harvesting on either tract, then all the auction bidders should have had the "same" number of "lost opportunity days" because each had signed an agreement for 48 total harvest days. Br. of Appellant at 3. International Shellfish does not, however, develop or support this contention on appeal with argument in its Brief of Appellant, contrary to RAP 10.3(a)(6). Therefore, we do not further address this contention. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

court.[21] 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."[22] A material fact is one on which the outcome of the litigation depends.[23] We consider all facts in the light most favorable to the nonmoving party.[24]

Summary judgment is proper if reasonable persons could reach but one conclusion after reviewing all of the evidence.[25] In the contract interpretation context, "'[s]ummary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two or more reasonable but competing meanings.'"[26] But "'[i]f a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.'"[27] Here, we must decide whether subsection 11(d) of the Agreement is unambiguous or whether it is subject to two or more reasonable interpretations.

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[21] *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).
[22] CR 56(c); *see also Retired Pub. Employees Council v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003).

[23] *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

[24] *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

[25] *Vallandigham*, 154 Wn.2d at 26.

[26] *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245 (2003) (internal quotation marks omitted) (quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997)).

[27] *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995) (quoting *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P.2d 105 (1992)).

B. Rules of Contract Interpretation

The goal of interpreting a written contract is to ascertain the parties' mutual intent.[28] Washington follows the "objective manifestation" theory of contracts. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, we determine the parties' intent by focusing on the objective manifestations expressed in their contract rather than on the parties' unexpressed subjective intentions. *Hearst*, 154 Wn.2d at 503. We impute to the parties an intention that corresponds with the reasonable meaning of the words used in their contract. *Hearst*, 154 Wn.2d at 503. We also give undefined words their ordinary, usual, and popular meaning unless the entirety of the contract clearly demonstrates a contrary intent. *Hearst*, 154 Wn.2d at 504; *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). And we harmonize clauses that seem to conflict in an attempt to interpret the contract in a manner that gives effect to all of the contract's provisions. *Nishikawa*, 138 Wn. App. at 849.

Under the "context rule" announced in *Berg*,[29] a court may admit extrinsic evidence to show the parties' situation and the circumstances under which the parties executed a written contract, for purposes of both ascertaining the parties' intent and construing the contract. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). The context rule applies regardless of whether a contract term is ambiguous or unambiguous. *Berg*, 115 Wn.2d at 669. Since *Berg*, however, the Washington Supreme Court has further explained that surrounding circumstances

[28] *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996).

[29] *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

and other extrinsic evidence are admissible only "'to determine the meaning of *specific words and terms used*'" in a contract and not to "'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Hearst*, 154 Wn.2d at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)). Therefore, if extrinsic evidence is relevant to determining the parties' mutual intent (as opposed to one party's unexpressed subjective intent about the meaning of a contract term), such extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the parties' subsequent acts and conduct, and (4) the reasonableness of the parties' respective interpretations. *Hearst*, 154 Wn.2d at 502.

When construing a written contract, we apply the following principles: (1) The parties' intent controls, (2) we ascertain their intent from reading the contract as a whole, and (3) we will not read ambiguity into a contract that is otherwise clear and unambiguous. *Mayer*, 80 Wn. App. at 420. A contract provision is ambiguous "if its terms are uncertain or they are subject to more than one meaning." *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). A contract provision, however, is not ambiguous simply because the parties suggest opposing meanings; and we will not read ambiguity "'into a contract where it can reasonably be avoided.'" *Mayer*, 80 Wn. App. at 421 (quoting *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983)). We also avoid interpreting a contract in a manner that would lead to absurd results. *Forest Mktg. Enters., Inc. v. State of Wash., Dep't of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005).

C. Subsection 11(d) Refund Provision

International Shellfish asserts that (1) when it entered the Agreement, it understood subsection 11(d) would provide a partial refund for *any* day that tract closures occurred; and (2) it understood that the five additional days it had harvested at Wyckoff after DNR extended that tract's harvest period were "optional," and, thus, they "would not count against its lost opportunity days on Point Beals." Br. of Appellant at 4. International Shellfish also suggests that, because it viewed the quality of harvesting opportunity at Point Beals greater than that at Wyckoff, it would not have harvested those five additional days at Wyckoff had it known they would reduce its total refund amount. Br. of Appellant at 4. International Shellfish, however, does not base these assertions on any express language in the Agreement or on any evidence in the record indicating the parties' *mutual* intent. Thus, these assertions reflect International Shellfish's unexpressed subjective intentions, which are not relevant to contract interpretation under the "objective manifestation" theory. Again, "the subjective intent of the parties is generally irrelevant if the [parties'] intent can be determined from the actual words used" in their contract.[30] *Hearst*, 154 Wn.2d at 504.

Moreover, International Shellfish's subjective views about the disparate qualities of harvesting opportunities at Point Beals and Wyckoff are contradicted by the express terms of the Agreement, which valued "lost harvest days" the same regardless of whether they occurred at

[30] To the extent that we may look at extrinsic evidence to ascertain the parties' mutual intent, we further note that International Shellfish and the other auction bidders each took advantage of the opportunity to purchase additional quotas and to harvest additional days at the Wyckoff tract; this fact is also evidence that the parties mutually intended the Agreement's refund provision to pertain to the number of days that a particular tract of land was closed.

Point Beals or Wyckoff.[31] Contrary to International Shellfish's unexpressed subjective intentions, the express language of subsection 11(d) did not entitle International Shellfish to a refund for every day in the contract term that tract closures occurred. On the contrary, the relevant portion of subsection 11(d) stated:

> If the *actions of a governmental agency*, beyond the control of [International Shellfish], its agents[,] or its employees, *prohibit harvesting* on legal harvest days during the term of this contract, [International Shellfish] shall be entitled to a refund of a portion of the [auction bid] equal to the amount of the [auction bid] divided by the number of legal harvest days included within the term of this contract *multiplied by the number of lost harvest days.*

CP at 66 (emphasis added). Under this provision, (1) International Shellfish was entitled to a refund only for the contract period days that a governmental agency "prohibit[ed]" International Shellfish from "harvesting"; and (2) DNR would calculate such refund by ascertaining the number of "lost" harvest days. CP at 66. A plain reading of the dictionary definitions of "prohibited"[32] and "lost"[33] shows that International Shellfish was not "prohibited" from harvesting geoducks on the days that it either actually harvested or had the opportunity to harvest (but did not actually harvest) on either tract.

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[31] All "lost harvest days" have the same refund value under the Agreement because the formula treats them all the same: Subsection 11(d) required DNR to calculate International Shellfish's refund by dividing its auction bid ($167,101) by the total number of days included within the contract (48) to arrive at the a refund amount for "lost harvest days." CP at 66.

[32] Webster's Dictionary defines "prohibit" as: "to prevent from doing or accomplishing something" or "to make impossible." Webster's Third New International Dictionary 1813 (2002).

[33] "Lost" is the past participle of "lose"; the dictionary defines "lose" as "to suffer deprivation of." Webster's at 1338. Webster's Dictionary defines the term "lost" as: "taken away or beyond reach or attainment." Webster's at 1338.

International Shellfish, however, suggests that the Agreement conferred on it a right, even an expectation, that it would harvest a particular number of days on each tract of land until

it reached its harvest quota for that tract.[34] The Agreement's plain language does not support this contention. On the contrary, nothing in subsection 11(d) modified the term "harvesting" to suggest that it applied to specific tracts of land. CP at 66. This reading is also consistent with the express language in section 2[35] and subsection 3(a)[36] of the Agreement, which defined the term "Property" on which International Shellfish could harvest geoducks as including *both* Point Beals

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[34] Although DNR's harvesting agreements set individual quotas that a particular bidder could harvest from each tract, as mentioned above, these agreements neither stated nor guaranteed a bidder a specific number of harvest days on each tract. Neither did these agreements create an expectation that "lost harvest days" would be calculated by the number of days that a particular tract of land was closed. Once a bidder reached its quota for an individual tract, the bidder could no longer harvest geoduck on that tract, even if the bidder had remaining geoduck quota available to harvest from the second tract of land identified in the Agreement. In such situations, the bidder was effectively "prohibited" from harvesting under the Agreement, and it began accruing "lost harvest days."

The Point Beals closure, thus, affected bidders differently and yielded a different number of "lost harvest days," depending on how quickly each bidder harvested its quota from the Wyckoff tract. Contrary to International Shellfish's suggestion that DNR did not uniformly apply its refund formula or base such formula on the days that the bidders were "prohibited" from harvesting, the bidders' various speeds in harvesting their Wyckoff quotas alone account for their disparate "lost harvest days" and refund amounts. International Shellfish made no showing why DNR's disparate "lost harvest day" calculations created a factual issue for trial.

[35] Section 2 of the Agreement provided:

> DNR agrees to sell to [International Shellfish], and [International Shellfish] agrees to purchase and remove geoducks from the Property described in Clause 3. The Property consists of *one or more area(s) in which harvesting may take place*.

CP at 61 (emphasis added).

[36] Subsection 3(a), entitled "Property," also stated:

> DNR agrees to grant to [International Shellfish] a nonexclusive right to commercially harvest geoducks from [the] *bedlands* owned by the State of Washington in the County(ies) listed in Exhibit A. An approximate description of the *bedlands* is set forth in Exhibit B.

CP at 61 (emphasis added); *see* CP at 81 (Ex. A listing the "Property" as Point Beals and Wyckoff).

and Wyckoff. Consistent with these express sections, the Agreement as a whole treated the two tracts of land as interchangeable resources, which DNR could substitute to meet various public needs.[37] In addition, section 2 expressly provided that International Shellfish was entitled to a refund under section 11 if DNR's decision to change the harvest dates reduced the "total" number of harvest days under the Agreement by more than 25 percent. CP at 61.

International Shellfish does not dispute that (1) Point Beals was open for 8 full days under the Agreement; (2) it harvested at Point Beals for only 6 of the 8 days; (3) it harvested 2 partial days at Point Beals on January 5 and February 25; or (4) it harvested 5 additional days at Wyckoff beyond the 15 days originally allotted for the tract under the Agreement, after DNR "extended" the tract's harvest period. But International Shellfish asserts it understood that the 5 additional days at Wyckoff were "optional" and would not count against its "lost opportunity days" at Point Beals. Br. of Appellant at 4. At oral argument, International Shellfish reiterated this argument and added that it should be entitled to a refund for these five days. This argument fails.

It would be "absurd"[38] to read the refund provision as entitling International Shellfish to a refund for five additional "lost harvest days" at Wyckoff, during DNR's extension of the tract's harvest period, because International Shellfish both *actually* harvested and *retained* the geoducks that it harvested on these five additional days, presumably selling these geoducks for profit. A refund for these days would effectively allow International Shellfish to have harvested geoducks

[37] *See* Section 2 of the Agreement, giving DNR the right to "change the harvest dates or [the] duration of [the] harvest" and the right to "increase or decrease the [h]arvest [quota]" for either tract of land during the contract term. CP at 61.

[38] *See Forest Mktg. Enters., Inc.*, 125 Wn. App. at 132.

free for five days, thus, giving International Shellfish a windfall from public funds that the Agreement did not provide.[39] Applying the rules of contract interpretation, we hold that subsection 11(d) is not ambiguous when read in relation to the entire Agreement or under the "context rule"[40] and that the Agreement did not give International Shellfish a right, an expectation, or a guarantee that it would harvest geoduck for a particular number of days on either tract.

II. Refund Calculation

We also hold that the superior court did not err in ruling that DNR properly calculated International Shellfish's refund amount under the Agreement. As we have already explained, DNR properly determined that International Shellfish lost 18 harvest days under the Agreement, which, when inserted into the formula, provided a refund of $62,662.88. Adding the $2,896.80 that DNR paid International Shellfish for recalled geoduck harvested on January 5 and February 25, yielded a total refund of $65,559.68 to which International Shellfish was entitled under the Agreement, an amount International Shellfish does not dispute that it has already received from DNR. Thus, the superior court did not err in ruling that DNR did not owe International

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[39] Article VIII, section 5 of the Washington Constitution provides: "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." As our Supreme Court has stated, this provision "'prevent[s] state funds from being used to benefit private interests where the public interest is not primarily served.'" *CLEAN v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996) (quoting *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977)). Thus, it does not appear that DNR could legally provide such additional "refunds" to International Shellfish outside the Agreement.

[40] Because we hold that subsection 11(d) is unambiguous when read in the context of the entire Agreement, we do not address International Shellfish's argument that we must construe any ambiguity in subsection 11(d) against DNR.

Shellfish an additional refund amount and in granting summary judgment to DNR.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.