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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

PUGET SOUND CRAB ASSOCIATION, a)	
Washington nonprofit corporation; BRIAN)	
E. ALLISON, a single person; JOHN)	
RANTZ, a married person; VINTON)	Case No.: 11-2-00578-7
WALDRON, a married person; KENNETH)	
CREWS, a married person, BRIAN)	PETITION
MELVIN, a married person, BRIAN)	
MACKEY, a married person,)	
)	
Plaintiffs,)	
vs.)	
)	
STATE OF WASHINGTON and)	
DEPARTMENT OF FISH AND)	
WILDLIFE, a State agency,)	
)	
Defendants.)	

INTRODUCTION

1. This is an action for judicial review of an agency action and failure to act brought under the Washington Administrative Act (APA), RCW 34.050.510 et seq. Plaintiffs are commercial crab fishers whose businesses are jeopardized and likely to be substantially destroyed, by recently-adopted regulations pertaining to recreational and commercial Puget Sound Dungeness crabbers. The new regulations expand access and the catch of the recreational crabbers at the expense of the commercial crabbers. WDFW is also failing to limit or control recreational crabbers' catch and illegal nonreported harvesting. RCW 77.04.012

1 requires the Washington Department of Fish and Wildlife (WDFW) manage this fishery to
2 preserve the crabs and “maintain the economic well-being and stability of the [commercial]
3 fishing industry.” The new regulations give priority to and enlarge the catch of recreational
4 harvesters at the expense of the commercial catch, violate this statute. Further the decision to
5 favor the recreational crabbers is arbitrary and capricious where the new regulations will -- by
6 WDFW’s own admission -- cause great reductions in the commercial fleet’s catch, revenues,
7 profits and stability. The result of the new regulations will be that some 175 commercial fishers
8 will go out of business next season or in a few seasons. Accordingly, the petitioners seek a
9 declaratory judgment invalidating the new regulations.
10

11 2. Plaintiffs also seek temporary and permanent injunctive relief compelling
12 WDFW to comply with statutory duties, and federal law duties to Tribal fishers, by ordering
13 WDFW to take steps to assure recreational fishers report their catch and to set a real quota on
14 the recreational catch, at a level allowing continued stability of the commercial fleet.

15 3. WDFW has admitted that its new regulations expand the recreational catch at the
16 expense of the commercial fleet and will cause the commercial catch to decline by 441,957
17 pounds in the first season alone, with revenues dropping some 16%. The actual likely declines
18 in revenue in the first season alone, are 31-38% -- followed by continued decline in subsequent
19 seasons. Cumulatively the new regulations will cause economic disaster. If left in place, the
20 new regulations, combined with WDFW’s failure to count, limit and control the recreational
21 catch, spells the end of the Puget Sound commercial crab fleet. Preliminary relief is needed to
22 preserve the fleet, and maintain its economic well being and stability as the statute requires. Its
23 economic well-being and stability cannot be maintained or remedied after most of the fleet is
24 destroyed by the new regulations.
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PARTIES, JURISDICTION, VENUE

1
2 4. Plaintiff Puget Sound Crab Association (PSCA) is a nonprofit corporation,
3 whose 75 members are licensed commercial Dungeness Crab fishers in Puget Sound (Neah Bay
4 to Bellingham, and southward). Each has a commercial Puget Sound crab license; each
5 operates a crab fishing business, providing jobs, taxes, and revenue; each adequately and
6 properly counts and reports their harvested crabs, as do most commercial fishers, because their
7 buyers must sign reports, too.

8
9 5. The commercially harvested crabs flow into an economic stream of commerce
10 that provides access to the crabs for the majority of the State population. Most people in the
11 State cannot be recreational fishers as most lack boats or waterfront property on Puget Sound.

12 6. PSCA members include about half the entire Puget Sound commercial crab fleet,
13 and PSCA exists to represent the members' interests. The annual revenue of this commercial
14 fishery is some \$8 million and the amount invested in licenses, boats, crab pots, and gear is tens
15 of millions of dollars. These investments will largely be lost due to the new regulations.

16 7. Individual plaintiffs each are commercial Puget Sound crab fishers. They cannot
17 readily convert their boats for other use. Each has a business investment of some \$ 200,000 or
18 more that is threatened and likely will be largely destroyed under the new regulations.
19

20 8. Brian Allison is president of PSCA and Vinton Waldron is vice president of
21 PSCA, and each resides in Island County, Washington; plaintiff John Rantz is a PSCA board
22 member residing in Whatcom County and was the prior president of PSCA, for 6 years;
23 Kenneth Crews, Brian Melvin, and Brian Mackey are PSCA board members residing in Skagit
24 County, Washington.

25 9. Plaintiff's mailing addresses are as follows: PSCA, P.O. Box 151, Anacortes,
26

1 WA 98221; Brian Allison, P.O. Box 2245, Oak Harbor, WA 98277; John Rantz, 511 Everglade
2 Rd., Bellingham, WA 98225; Kenneth Crews, 708 St. Mary's place, Anacortes, WA 98221;
3 Vinton Waldron, 3511 S.W. Balda Rd., Oak Harbor, WA 98277; Brian Melvin, 1904 Cay Way,
4 Anacortes, WA 98221; Brian Mackey, 1102 20th Street, Anacortes, WA 98221.

5 10. Each individual plaintiff and PSCA is aggrieved, adversely affected,
6 substantially prejudiced or likely to be prejudiced by the acts complained of within of RCW
7 34.05.570(1)(d) and RCW 34.05.530; their interests are those among those the agency was
8 required to consider and a judgment their favor would substantially redress or eliminate the
9 prejudice or likely prejudice, within RCW 34.05.530; each has legal rights or privileges that are
10 impaired, interfered with or threatened by the new regulations or their threatened application
11 within RCW 34.05.570(2)(b)(i); and each is a qualified party under RCW 4.84.340.

13 11. PSCA has standing; it is beneficially interested; its members would have
14 standing in their own right, preventing the harms complained of is germane to its purpose or
15 representing its members, and the claims/relief requested do not require individual participation
16 of members; there is injury in fact to PSCA and it is in the public's best interest for claims to be
17 adjudicated in a manner wherein the body of the fleet is represented via the PSCA.

19 12. This action has been timely filed pursuant to RCW 34.05.542 and Petitioners are
20 not required to exhaust administrative remedies pursuant to RCW 35.05.534. Any
21 administrative remedies at WDFW for plaintiffs are nonexistent or inadequate and futile or the
22 grave irreparable harm from the acts complained of clearly outweighs the public policy
23 requiring exhaustion of administrative remedies within the meaning of RCW 34.05.534.

24 13. Defendant the State of Washington is a state with a federal obligation to count
25 and properly co-manage Dungeness Crabs with, and for benefit of, various Treaty Tribes, who
26

1 under federal law own 50% of the crabs.

2 14. Defendant WDFW is a State of Washington agency that manages this fishery and
3 is charged with co-managing the resource and the name and mailing address of that agency is as
4 follows: WDFW; Phil Anderson, Director, Main Office, Natural Resources Building, 1111
5 Washington St. SE Olympia, WA 98501; Mailing Address 600 Capitol Way N., Olympia, WA
6 98501-1091.

7 15. This is an action under RCW 34.05.570(2) seeking a declaratory judgment that
8 newly adopted WAC 220-56-330 Crab Areas and Seasons, and Puget Sound Crab Fishery
9 Policy c-3609 dated October 1, 2010 (being implemented by the new regulations, and other
10 ongoing acts of WDFW now, and in coming months), are invalid. Copies of said regulations
11 and policy are attached as Exhibits A and B to the declaration of Brian E. Allison dated
12 February 28, 2011, a true and correct copy of which is attached to this petition, and the
13 allegations of which are incorporated herein by reference.
14

15 16. Venue is proper in this County under RCW 34.05.570(2)(b) (challenges to
16 agency rules to be brought in Thurston County superior court, and agency making the
17 challenged rule shall be named as a party).
18

19 17. This action is also under RCW 34.05.570(4) and seeks an order compelling
20 WDFW to comply with its duties. RCW 34.05.570(4) allows one challenging agency action or
21 inaction (other than adjudication or rule making) to file a petition seeking such an order,
22 providing, a “person whose rights are violated by an agency’s failure to perform a duty that is
23 required by law to be performed may file a petition for review pursuant to RCW 34.05.514,
24 seeking an order pursuant to this subsection [RCW 34.05.570(4)(b)] requiring performance.”
25 RCW 34.05.514 allows such an action in Thurston County or petitioner’s county of residence or
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1 principal place of business and venue is proper in this County. The inaction of WDFW that is
2 the basis of this challenge include the omissions and inactions described below including but
3 not limited to their failure to impose a meaningful system of reporting crabs caught by
4 recreational harvesters and a meaningful quota on their catch to leave an assured quota for the
5 commercial harvesters (within the State Share) and other inactions and acts described below.

6 18. The regulations challenged are arbitrary and capricious, exceed statutory
7 authority or were adopted contrary to statutory rule making procedures within the meaning of
8 RCW 34.05.570(2)(c); the failure to act and other wrongful acts challenged are ongoing and are
9 arbitrary and capricious, or outside statutory authority or authority conferred by provision of
10 law, within the meaning of RCW 34.05.570(4)(c); and this action is timely.

12 **FACTS AND LEGAL CLAIMS**

13 **New Regulations Violate Statutory Mandate to Protect Fishing Industry**

14 19. RCW 77.04.012 provides that, “Wildlife, fish, and shellfish are the property of
15 the state. The commission, director, and the department shall preserve, protect, perpetuate, and
16 manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.”
17 This statute then provides, “[t]he department shall conserve the wildlife and food fish, game
18 fish, and shellfish resources in a manner that does not impair the resource. In a manner
19 consistent with this goal, **the department shall seek to maintain the economic well-being and**
20 **stability of the fishing industry in the state.** The department shall promote orderly fisheries
21 and shall enhance and improve recreational and commercial fishing in this state.” (Emphasis
22 added.) This statute also provides for “maximize[ing] the public recreational game fishing and
23 hunting” but not maximizing recreational harvesting of shellfish.

24 20. The new regulations expand the access of recreational Puget Sound Dungeness crab
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1 harvesters, by enlarging their summer season from 4 to 5 days a week, adding a weekend day,
2 which will expand the recreational catch by more than 25%; and by creating and allowing them
3 a new 7 day a week winter fishery that will overlap with and compete with the commercial
4 season, which usually begins in October after the recreational summer season is over.

5 21. The new policy is being implemented by the new regulations, and by ongoing steps
6 by WDFW to promote the newly expanded recreational access, prepare brochures and get ready
7 for the summer recreational season.

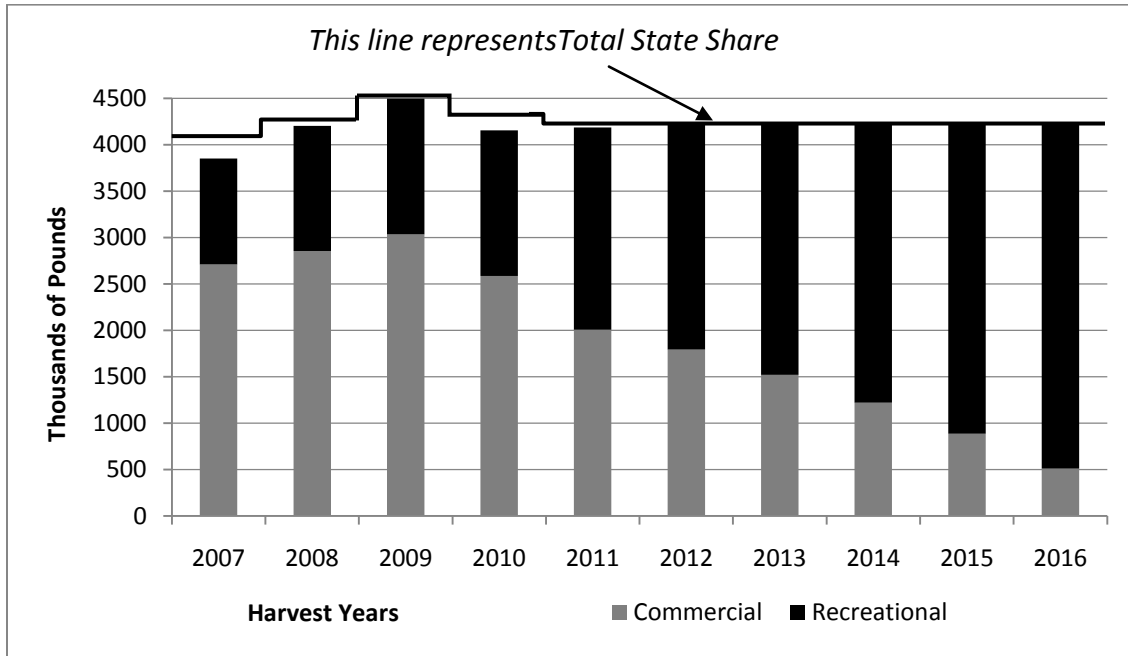
8 22. The new regulations expanding the recreational catch necessarily reduce the
9 commercial catch under an overall State share that is relatively stable; they are not intended to
10 maintain the economic well-being or stability of the fishing industry but to economically harm
11 the commercial fleet, drive most of the boats out of business, and create great instability, as
12 those are the natural and foreseeable results of expanding the recreational harvest and access.
13

14 **Recreational Catch Is Uncounted and Unchecked**

15 23. In prior years the recreational catch had targets of 350,000 pounds in Region 2E
16 (East of Whidbey) and 360,000 pounds in Region 1 (San Juan Islands). Each year from 2007
17 through 2009 to the last season in 2010, the recreationals exceeded this target and did so in ever
18 increasing amounts. By 2010 their catch was up to some 585,000 pounds in Region 2E and
19 some 567,000 pounds in Region 1. Allison decl. ¶¶ 112. WDFW has taken no action to limit the
20 recreationals to their target numbers but instead the new regulations and policy remove any
21 target, fail to set any limit and will give the recreationals continued growth. Their growing
22 share in each region will extinguish or substantially reduce the commercial share (of the overall
23 total State share) in the key regions and overall. Allison decl. ¶¶ 50-97.
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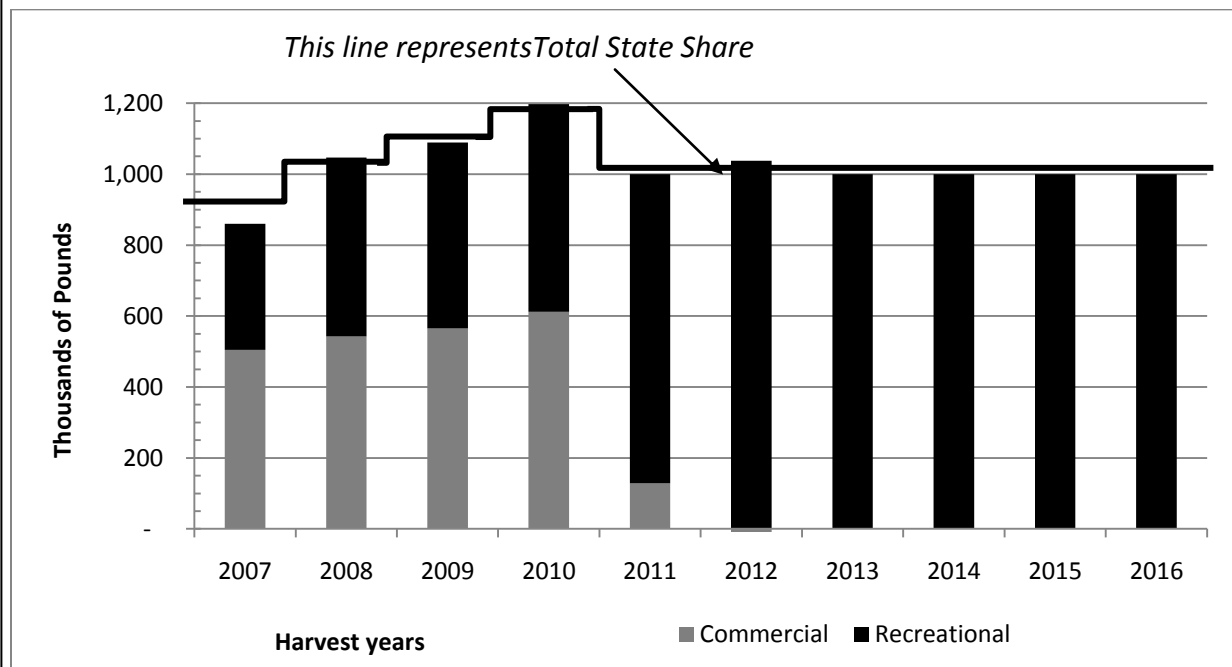
25 24. The new regulations and system and failure to limit the recreational catch assure the
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decline and reduction of the Puget Sound crab commercial catch and fleet, as follows:

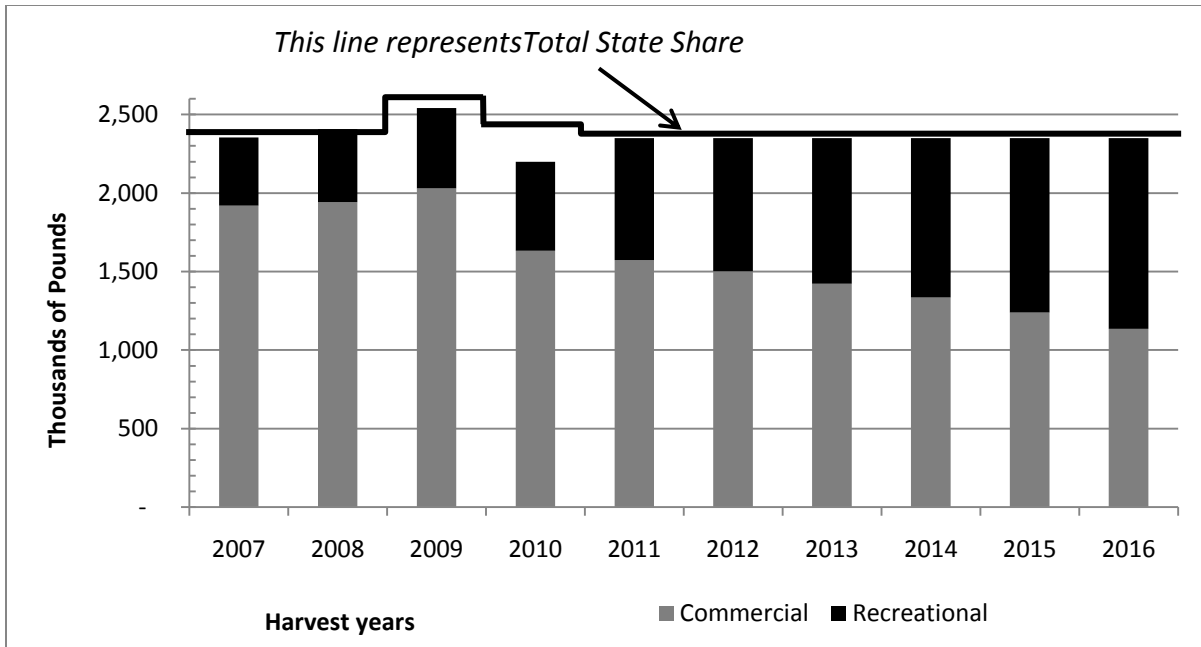


Allison declaration ¶63. This is an 80% decline in pounds caught (Allison ¶ 69) in six seasons causing devastation and ruin for many or most boats, in the next few seasons.

25. In the key area called Region 2E, East of Whidbey, the decline is as follows:



Allison declaration ¶87. In region 1 (San Juans) the decline is as follows:



Allison declaration ¶97. The magnitude and likelihood of these declines are so great there is already great economic harm to the fleet and great instability.

Reversal of the New Regulations, Setting a Quota on Recreationals and Proper Counting Are Required to Preserve the Fishery

26. A real or enforceable quota or limit (dividing the State share between recreational and commercial fishers) is needed, to comply with the statutory duty to seek to maintain the economic well-being and stability of the fishing industry, and the statutory duty to operate an orderly fishery.

27. WDFW has known that many or up to half the recreationals taking crab licenses and catch record cards **fail to report** their catch each season. The State Auditor noted this in saying the recreationals are a threat to the crab resource. (Allison declaration ¶6).

28. WDFW’s actions expanding recreational access and catches will increase the nonreported illegal harvesting of the crabs.

29. WDFW’s actions expanding recreational access and catches reward illegal

1 harvesting, and this harms the Tribes contrary to WDFW's federal obligations; this also harms
2 the economic well-being and stability of the commercial fleet.

3 30. The known problems of the recreationalists' failing to report their catch were
4 identified in a State Auditor report dated January 15, 2010, which stated that the recreationalists'
5 failure to report and rules violations, were a threat to the crab resource. The new regulations
6 and failure to control these problems magnifies that threat. This expansion of threats to the
7 crabs is contrary to the statutory command to preserve and protect the crabs.

8 31. WDFW officially stated in connection with adoption of these regulations that the
9 new regulations and expansion of recreational access will reduce the commercial catch by
10 441,957 pounds and reduce their revenues by over a million dollars, in the first season alone.
11

12 32. This was stated by Rich Childers on January 8, 2010 when the Commission
13 considered and passed the new regulations.

14 33. This degree of economic harm alone is inconsistent with maintaining the economic
15 well being of the fishing industry or its stability, and amounts to a deliberate plan to
16 economically reduce, or devastate, the fishing industry in this fishery.

17 34. The likely and reasonably known economic harm under the new regulations will be
18 a 24% decline in pounds caught, and a 31-38% drop in revenues the first season alone, Allison
19 decl. ¶¶24, 34, 17-34; even greater declines in profits, id. ¶¶ 35-46; and a cumulative decline of
20 80% in pounds caught in six years, Allison decl. ¶ 69. This is commercial ruin for most boats.

21 35. As explained therein, (a) the true likely decline in pounds caught in the first season
22 alone, is some 730,000 pounds not just 441,957 pounds (Childers made an untenable math
23 error); (b) the resulting gross revenue decline in the first season is 31-38% not just 16%
24 (Childers used an average seasonal price of \$2.69/pound where the lost pounds will come at
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1 the end of the season so the higher end of season price should be used or \$3.75 to \$4.25 per
2 pound); (c) the percentage decline in profit is even greater (most costs are for the boats, and are
3 fixed costs); (d) as in any economic projection, one must look beyond the first year, and doing
4 so means the revenue losses are cumulative and massive causing the substantial decline or near
5 elimination of the commercial fleet in part in just a few seasons. Allison decl. ¶¶13-69.

6 36. At present, one cannot sell a Puget Sound Dungeness Crab license because of the
7 new regulations; such licenses are sale proof, where last season some sold in the range of
8 \$60,000 to \$80,000; the complete cessation of the market in commercial licenses is current
9 economic harm affecting all license holders, indicating the new regulations are already causing
10 and have already caused great economic destruction and instability.

12 **The Commission Acted Arbitrarily and Capriciously**

13 37. It was arbitrary and capricious to rely on Childers' economic estimate given his
14 error in calculations, his use of the average price, his refusal to look at profits and his refusal to
15 do an analysis showing the impact in later years.

16 38. WDFW enacted the regulations despite the fact that it admitted that the regulations
17 would cause revenue decline of approximately \$5,000 per license holder.

18 39. Most commercial license holders achieve gross revenue that is less than \$58,000 per
19 year.

20 40. A first year revenue loss of \$5,000 each on average is substantial economic harm
21 and instability; many will have greater losses than the average, and this is not maintaining the
22 economic well being or stability of this fleet.

23 41. As shown by Allison, the likely overall impacts include in Region 2E (East of
24 Whidbey Island) a decline of 79% of the catch in the first season alone and its elimination in
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1 just two seasons (Allison ¶85); the resulting shift of 40 boats to Region 1 (San Juans) where
2 they will create instability and increase the economic declines for the present 120 boats fishing
3 in Region 1, Allison decl. ¶¶ 75, 86, 96, causing more boats to chase fewer crabs.

4 42. Declines of 16%, \$5,000 each, or 79% or 80% whether in one season or six, even a
5 shift of 40 boats from region 2E to region 1, are each enough economic harm or destruction of
6 part of the fleet and instability to violate the duty to maintain economic well-being and stability.

7 **New Regulations and WDFW's Failure to Count Violate the Statutory Mandate**

8 43. The new regulations create economic harm and instability today, in violation of the
9 statutory duty to maintain the well-being and stability of the industry.

10 44. The new regulations and acts of WDFW in not having a proper quota system for
11 recreational fishers and in not assuring they adequately count their catches, violate the statute
12 and are outside the statutory authority of the WDFW; and are arbitrary and capricious.

13 45. The new regulations and ongoing failure to limit and adequately count the
14 recreational catch causes expansion of the unreported catch taken by recreational. This
15 unreported catch is currently about 1.1 million pounds a year. Allison decl. ¶105. The value of
16 this unreported catch is over \$3 million a year. This unreported catch represents ongoing
17 revenue loss to commercial and Tribal fishers of millions of dollars a year. Allison ¶¶ 98-108.
18 The new regulations worsen this loss, and if WDFW properly counted the nonreported catch,
19 Tribal fishers would harvest half of it and commercial fishers would catch more crabs also.

20 46. Instead of limiting this illegal harvesting the new regulations expanding access will
21 make it worse, violating the duty of the WDFW to count the crabs and properly manage this
22 fishery.

23 47. Instead of controlling, limiting or properly addressing the uncounted recreational
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1 catch, WDFW is rewarding and expanding the uncounted recreational catch by expanding their
2 access, which is arbitrary and capricious and outside WDFW statutory duties and duties
3 conferred on it by provision of law.

4 48. WDFW is obligated to assure adequate counting, and to set a real quota or limit to
5 the recreational catch. Adequate counting and a real quota are required to maintain the
6 economic well-being and stability of the commercial fleet, and an orderly fishery, and to avoid
7 violating federal law obligations to the Treaty Tribes. Any adequate system requires adequate
8 penalties or payback mechanisms at an individual or group level. Instead of putting that in
9 place, WDFW is rewarding recreationalists' past actions in nonreporting their catch and in
10 exceeding past targets set by WDFW.
11

12 49. The new regulations and policy and ongoing acts of WDFW to implement and
13 publicize same will cause further economic harm to the fishing industry, more instability, and
14 will expand the disorderly part of this fishery, contrary to statute and other laws.

15 50. The new regulations expanding uncounted harvesting without adequate controls,
16 will cause great harm to the Tribes who own half the crabs in the water; this also causes
17 economic harm and instability for the commercials as it creates a risk that sudden proper
18 counting would make the State share subject to "payback" for State overharvesting one day.
19

20 51. The lack of proper reporting by recreationalists, the new system and regulations
21 expanding their access, and the lack of a proper quota on their catch, threaten the Puget Sound
22 Dungeness crabs' sustainability. This threat to the overall resource also threatens the economic
23 well-being and stability of the fishing industry and creates a disorderly fishery.

24 52. The new regulations also violate the duty conferred by federal law on the WDFW to
25 run a proper fishery in which non-reporting fishers are punished, not rewarded with expanded
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1 opportunity to take unreported crabs.

2 53. The implementation actions being taken today and in coming months including
3 publicizing the new expanded season and access for recreationals are unlawful for the same
4 reasons.

5 **Summary**

6 54. The acts and omissions of WDFW in failing to create a proper system for assuring
7 the recreational harvest is reported, and in failing to limit their catch with a proper quota, and in
8 enacting new regulations expanding recreational catches at the expense of the commercial catch,
9 violate the statutory duty to seek to maintain the economic well being of the fishing industry
10 and its stability, and to promote an orderly fishery. Intentionally accelerating recreational
11 growth under a relatively stable State share of the total means the Puget Sound Dungeness Crab
12 commercial fleet is not sustainable. The resulting destruction or substantial reduction of the
13 fleet violates the clear intent of the statute. The State Legislature intended to bar this outcome
14 when it enacted the statute, telling WDFW to maintain the economic well being of the industry
15 and its stability. Declaratory and injunctive relief is needed to compel WDFW to comply with
16 the Legislative intent in the statute.
17
18

19 **PRAYER FOR RELIEF**

20 NOW, THEREFORE, plaintiffs pray for the following relief:

- 21 1. For a decree invalidating the revisions to the WAC relating to Puget Sound
22 Dungeness Crab adopted February 4, 2011 by the WDFW commission;
- 23 2. For a temporary and permanent injunction precluding any action by WDFW to
24 implement said regulations or its new policy of priority or expanded access for recreational
25 harvesters of Puget Sound Dungeness Crab, in the upcoming summer and winter season;
26

1 3. For temporary and permanent injunctions requiring WDFW to maintain the prior
2 rules, or otherwise assure no decline in the percentage of the State Share that is the commercial
3 catch, compared to the average of the last three seasons, in the upcoming season; and requiring
4 WDFW (a) to implement a proper system assuring proper reporting of the recreational catch,
5 including that the recreations now report online at least weekly or monthly; and (b) to
6 implement a proper quota on the recreational catch, at a level assuring the commercial fleet no
7 less than the average percentage of the State share the last three seasons, to assure economic
8 well-being and stability of the industry, in compliance with statute;

9
10 4. For judgment awarding costs and attorney's fees and expert witness costs of this
11 action under the Equal Access to Justice Act, RCW 4.84.350;

12 5. For an award of damages to PSCA or its members, should PSCA or its members
13 file a notice of claim with the State then amend this action to seek tort damages; and

14 6. For such other relief as the Court may deem equitable and proper.

15
16 DATED this 7 day of March, 2011.

17 CLEVELAND STOCKMEYER PLLC

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