

Superior Court Linda Myhre Enlow Thurston County Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON THURSTON COUNTY

SARA FRANEY; BRENT YOUNG; and MARK YOUNG,

Plaintiffs

No.

24-2-03957-34

COMPLAINT

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE; and KELLY SUSEWIND, in his official capacity as Director of the Washington Department of Fish and Wildlife,

Defendants.

16

17

18

19

2.0

21

22

23

24

3

4

5

6

7

8

(1)

11

13

13

14

15

Plaintiffs Sara Franey, Brent Young, and Mark Young are boat captains who are licensed by Washington State to fish for Coastal Dungeness Crab. They submit this Complaint for Permanent Injunctive and Declaratory Relief and for other relief to prohibit the Washington Department of Fish and Wildlife ("WDFW" or "Department") from continuing its Electronic Monitoring Program, through which the agency conducts unlawful and unconstitutional, industry-funded warrantless 24-hour Global Positioning System (GPS) surveillance of locations and movements of all state-licensed boats used for fishing Coastal Dungeness Crab. The Department implements this program through a final rule that it promulgated in October 2023. See WDFW, Rule-Making Order (Oct. 31, 2023), attached as Exhibit 1.

2526

27

Davis Wright Tremaine LLP LAW OFFICES 920 Fills Avenue, Suite 3300 Scattic, WA 98104-1610 206,622 3150 main - 206,757,7700 fax

INTRODUCTION

Plaintiffs are captains of Dungeness crab fishing boats that fish in the waters off the coast of Washington. They bring this suit on their own behalf and on behalf of all those similarly situated. Fishermen fish for Dungeness crab by dropping crab pots into the water at the beginning of their participation in the 9-month crab season. They leave those pots in the water for many months at a time, checking on them periodically to harvest crab that are caught, and then returning the pots to the water to catch more crab. This process repeats until the end of their participation in the crab fishing season.

Under the Electronic Monitoring Program, the Department forces each Plaintiff to pay for a GPS-tracking system that they must install on their boats at significant expense. Plaintiffs must further pay monthly service fees to companies that operate those systems. Plaintiffs are required to turn those GPS-tracking systems on and continuously transmit their coordinates to the Department during the months that they participate in crab fishing. This is so even when the Plaintiffs' boats are docked or being used for non-fishing purposes, such as personal transportation. The Department thus conducts GPS tracking of the locations and movements of Plaintiffs' boats 24 hours a day, seven days a week, which infringes upon Plaintiffs' constitutional rights and is not authorized by any statute. Such continuous GPS tracking imposes significant economic and privacy costs and yet confers virtually no benefit in the Department's ability to monitor crab stocks in the seas off the Washington coast compared to cheaper and less intrusive pre-existing methods. This exercise of administrative lawlessness must be stopped.

JURISDICTION & VENUE

- 1. This Court has jurisdiction pursuant to the Washington Constitution Article IV Section 6 and RCW §§ 2.08.010 and 35.05.514 (2024).
- 2. This Court may set aside or enjoin agency action or issue a declaratory judgment pursuant to RCW § 35.05.514. This Court may award damages and equitable or other relief pursuant to 42 U.S.C. § 1983.
 - 3. Venue is proper pursuant to RCW § 35.05.514 (2024).

PARTIES

- 4. Plaintiff Captain Sara Franey, a resident of Westport, Washington, operates her vessel, F/V Edge Runner not only for purposes of Dungeness crab fishing, but also as a means of personal transportation and recreation. Captain Franey typically participates in the Dungeness crab season for approximately four months each year. When the Electronic Monitoring Program became effective in January 2024, Defendants began continuously tracking the locations and movements of her boat during the months that her crab pots are in the water, even when she is not using the vessel to fish. There is no prohibition on Defendants sharing this information with other agencies—law enforcement or otherwise—without a warrant.
- 5. Plaintiff Captain Brent Young is a resident of Mount Vernon, Washington, and owner of a vessel, F/V High Voltage, that he captains for Dungeness crab fishing. In addition, he captains the boat on private non-fishing trips, including chartered sight-seeing trips. Captain Brent Young typically participates in the Dungeness crab season for approximately three months each year. Under the Electronic Monitoring Program, Defendants continuously track the locations and movements of his boat during the months that his crab pots are in the water, even when he is not using the vessel to fish. There is no prohibition on Defendants sharing this information with other agencies—law enforcement or otherwise—without a warrant.
- 6. Plaintiff Captain Mark Young is a resident of Sitka, Alaska who frequently uses his vessel F/V Henleigh Faith to fish for Dungeness crab in Washington waters. Captain Mark Young typically participates in the Dungeness crab season for approximately three months each year. He also uses his vessel for non-crabbing activities including a long hunting trip and other recreational and fishing travel. Under the Electronic Monitoring Program, Defendants continuously track the locations and movements of his boat during the months that his crab pots are in the water, even when he is not using the vessel to fish. There is no prohibition on Defendants sharing this information with other agencies—law enforcement or otherwise—without a warrant.
- 7. Defendant Washington Department of Fish and Wildlife is an agency of the State of Washington. Under the Fish and Wildlife Code, the Department has the responsibility of

8

1415

16

17 18

19

2021

2223

24

25

2627

protecting fish and wildlife from infections and infestations.

8. Defendant Director Kelly Susewind is the Director of the Washington Department of Fish and Wildlife. He is sued in his official capacity.

CONSTITUTIONAL, STATUTORY, & REGULATORY BACKGROUND

The Dungeness Crab Industry

- 9. The Dungeness crab, or *cancer magister*, is a crab found everywhere from the "Aleutian Islands to Mexico." WDFW, Dungeness Crab (2024). In Washington, Dungeness crabs are found mainly in the Puget Sound "north of Seattle, in Hood Canal, and near the Pacific Coast." *Id.* The crab's preferred habitat tends to be "eelgrass beds" as well as "sandy or muddy substrates." *Id.*
- 10. The Washington coastal Dungeness crab fishery harvested 28.7 million pounds of Dungeness crab this season. WDFW, *Washington Coastal Dungeness Crab Fishery Newsletter*, 2d. Ed. 1, at 1 (2024) (hereinafter "Crab Fishery Newsletter").²
- 11. The Washington state commercial fishery had a per vessel value of \$64.2 million in 2022–23. *Supra, Crab Fishery Newsletter* at 2.
- 12. The Dungeness crab season lasts 9 months and usually starts in January or February. A fisherman conducts crab fishing by depositing pots that catch crab in specific places in the water. He returns to these locations periodically, usually at least once every ten days, and hauls the pots up to retrieve any crabs caught. He then returns the pots to the water to catch more crab. This process repeats until the fisherman's participation in the crab season ends.

The Fourth and Fifth Amendments to the U.S. Constitution

13. The Fourth Amendment protects the people against the government's "unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is incorporated against the States. *See Mapp v. Ohio*, 367 U.S. 643, 660, 81 S. Ct. 1684, 6 L. Ed. 2d

¹ https://wdfw.wa.gov/species-habitats/species/cancer-magister#desc-range (last visited Oct. 30, 2024).

² https://wdfw.wa.gov/sites/default/files/2024-01/newsletter-dungeness-crab-fishery-2023-24.pdf (last visited Oct. 30, 2024).

4

10

11 12

13 14

15 16

17

18

20

19

2122

23

24

2526

27

14. The government conducts an unreasonable search by trespassing, without a warrant, into a person's property to gain information about that person. *United States v. Jones*, 565 U.S. 400, 404–5, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

- 15. The Fourth Amendment further protects a person's right to privacy; warrantless searches that violate a person's reasonable expectation of privacy are unreasonable and unconstitutional. *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).
- 16. Warrantless access to the "detailed, encyclopedic, and effortlessly compiled" GPS information of a person's locations and movements violates the Fourth Amendment. *See Carpenter v. United States*, 585 U.S. 296, 309, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).
- 17. The Fourth Amendment protects a person's possessory rights, as it forbids the government from trespassing without a warrant.
- 18. The Fifth Amendment protects life, liberty, and property from deprivation by the Government without due process of law. U.S. Const. amend. V.
- 19. The Fifth Amendment further prohibits the government from taking private property for public use without just compensation to the owner.

Article I Sections 7 and 16 of the Washington Constitution

- 20. Article I Section 7 of the Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Article I, section 7, is explicitly broader than that of the Fourth Amendment as it clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." *State v. Ladson*, 138 Wn. 2d 343, 348 (1999) (cleaned up).
- 21. Because "citizens of [Washington] have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen's vehicle[,] ... under article I, section 7 a warrant is required for installation of these devices." *State v. Jackson*, 150 Wn. 2d 251, 264 (2003).
 - 22. Article I Section 16 states: "No private property shall be taken or damaged for

public or private use without just compensation having been first made[.]"

2

3

5

6 7

8

10

11 12

13

14

15

16 17

18

19

20

21 22

23

24

25

26

27

The Fish and Wildlife Code of the State of Washington

- 23. The Washington Fish and Wildlife Code created the Washington Department of Fish and Wildlife and empowered the Department "to take reasonable, preventative measures to protect" "fish, wildlife, shellfish, and seaweed resources[.]" RCW § 77.145.010 (2024). In doing so, the Code instructs the Department "to maintain the economic well-being and stability of the fishing industry in the state." *Id.* § 77.04.012.
- 24. With respect to crabs, the Department may promulgate rules specifying times and locations when fishing of shellfish is permitted and specifying gear or methods "that may be used to take wildlife, fish, or shellfish." *Id.* § 77.12.047. Violation of rules specifying gear that may be used to take shellfish is a gross misdemeanor. *Id.* § 77.15.522.
- 25. GPS-tracking devices that the Electronic Monitoring Program mandates are not used to take wildlife, fish or shellfish.

The Washington Administrative Procedure Act

- 26. The Washington Administrative Procedure Act (APA) sets forth the process for Washington administrative agency rulemaking and was enacted "to achieve greater consistency with other states and the federal government in administrative procedure[.]" RCW § 34.05.001 (2024).
- 27. The APA requires Washington agencies to use "all authority necessary to comply with the requirements of [the APA] through the issuance of rules or otherwise." *Id.* § 34.05.020. Moreover, the APA prohibits the diminution or violation of "the constitutional rights of any person[.]" Id.
- 28. The APA provides for judicial review of agency rules and authorizes a reviewing court to set aside or enjoin a rule if: "The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rulemaking procedures; or the rule is arbitrary and capricious." *Id.* § 34.05.507(2)(c), 574(1).
 - 29. The APA prohibits agencies from promulgating rules in reliance solely on the

statutory declaration of intent, "the enabling provisions of the statute establishing the agency," or a combination of the two, as "statutory authority to adopt the rule." RCW § 34.05.322 (2024).

The Electronic Monitoring Program

- 30. The Washington coastal crab fishery "grounds extend from the Columbia River to Cape Flattery near Neah Bay and include the estuary of the Columbia River, Grays Harbor, and Willapa Bay." WDFW, *About the coastal commercial crab fishery* (2024).³
- 31. The Department promulgated rules detailing time, places, and methods deemed unlawful for commercial crab fishing pursuant to its authority under the Fish and Wildlife Code of Washington. *See* RCW § 77.12.047(1). As part of its rule promulgation on unlawful acts, the Department promulgated in October 2023 the Electronic Monitoring Program, which requires fishing boats to carry "a vessel monitoring system that automatically determines a vessel's position ..., and transmits this information to an EM system service provider." Wash. Admin. Code § 220-340-420(12). The service provider must grant the Department automatic access to the tracking data from GPS devices owned and paid for by Plaintiffs. *Id.* The location data must be recorded "at least once every minute" and transmitted "at least once every hour." *Id.* (12)(a)(i)(A), (B).
- 32. The mandated system must also activate and record hydraulic pressure readings whenever the boat is hauling crab pots up from the water. *Id.* (12)(b)(i)(C), (D). The hydraulic pressure data is also transmitted to the service provider and made accessible to the Department. *Id.* 12(b)(i)(B).
- 33. The Department's compliance guide provided detailed information on the implementation of the Electronic Monitoring Program. WDFW, *Electronic Monitoring Program Compliance Guide*, 1 (2023) ("Compliance Guide").⁴ It states that the vessel monitoring system must "automatically determine[] a vessel's position using global positioning system (GPS) coordinates." *Id.* Additionally, the Compliance Guide tells licensed fisherman that: "if you have

³ https://wdfw.wa.gov/fishing/commercial/crab/coastal/about (last visited Oct. 30, 2024).

⁴ https://wdfw.wa.gov/sites/default/files/2023-11/final-em-compliance-guideversion-1_0.pdf (last visited Oct. 30, 2024).

... crab gear in the water you are ... required to have an operational EM system activated 24 hours a day." *Id.* Because crab fishermen have their crab pots continuously in the water for the entire season during which they are fishing for crabs, this amount to continuous 24-hour GPS tracking for up to the entire 9-month crab season, even when they are using their boats for non-fishing activities, such as personal transportation or for sightseeing.

- 34. According to WDFW, Electronic Monitoring "enables [the collection of] more accurate and timely fishing information thereby improving WDFW's ability to ensure fishing is not occurring within closed areas, confirm that participants are not fishing prior to the opening of the [crab] season, confirm adherence to license-based or seasonal pot limits, and gather additional information that may aid in identifying instances of gear tampering." WDFW, Rule-Making Order (Oct. 31, 2023).
 - 35. The Electronic Monitoring Program became effective beginning January 1, 2024.
- 36. The owners of vessels must not only purchase and install the GPS-tracking devices, Compliance Guide at 2–3, but also pay monthly fees to the service providers, *id.* at 4.
- 37. During the months during which each Plaintiff is participating in the crabbing season, the GPS-tracking device must be turned on and transmitting data whenever the vessel is in use, even for personal, non-fishing purposes. The service provider shares GPS data with the Department, which in turn may share the data with other agencies—law enforcement or otherwise—without a warrant.
- 38. This 24-hour GPS tracking requirement replaces a prior requirement that licensed fishermen maintain and make available for inspection logbooks that record fishing activity.
- 39. WDFW did not specify how logbooks were deficient, untimely, or otherwise inaccurate. Nor did it explain why WDFW needed to continuously track the movements and locations of vessels on a 24-hour basis even where they are not being used for fishing.
- 40. WDFW did not consider the pecuniary cost to licensees in purchasing, installing, and paying for the monthly service of GPS-tracking companies. Nor did the agency consider the privacy burden on regulated fisherman.

41. WDFW, separate from the Electronic Monitoring Program, requires "fish tickets" that are electronic and have required such electronic fish tickets ("EFT") since before the Electronic Monitoring Program went into effect. When a crabber sells his crabs an electronic fish ticket is generated and sent to the Department. Prior to electronic fish tickets, there were paper tickets with carbon copies. The crab buyer would keep a copy, the crabber selling the crab would get a copy, and then the buyer would mail another copy to WDFW.

- 42. Currently and when the Electronic Monitoring Program was going into effect, all of these transactions transpire in "real time" electronically through a WDFW app. The electronic fish ticket includes the name of the boat, name of the captain, total weight of the crab caught, number of pots, license number, catch area, where the crab was caught, whether the crab were caught inside or outside of 3 miles state limit, how many days fished and the date. If a boat fishes in multiple areas then the percentage of crab caught in each is recorded. All the information is entered in to the system automatically. WDFW therefore has the information regarding where and when crabs are taken in "real time" through their app.
- 43. None of the foregoing was taken into account in implementing the Electronic Monitoring Program.
- 44. Noncompliance with the Electronic Monitoring Program is considering using unlawful gear or methods to take shellfish and is punishable as a "gross misdemeanor punishable under RCW 77.15.520 Commercial fishing—Unlawful gear or methods—Penalty." WAC § 220-340-420(13). Gross misdemeanors have a maximum sentence of 364 days or a \$5,000 fine. RCW § 9.92.020.

CLASS ACTION ALLEGATIONS

45. Plaintiffs and each of them bring this action as representative of a class pursuant to the Federal Rules of Civil Procedure 23(a) and (b)(2) on behalf of all vessel owners and operators who are permitted to partake in Dungeness crab fishing by the Department and purchased, maintained ,or were tracked by devices required under the Electronic Monitoring Program from January 1, 2024 to present. *See* WAC § 220-340-420.

27

- 46. Dungeness crab fishers include individuals and companies who operate Dungeness crab fishing vessels and who hold at least one valid license to fish for Dungeness crab by the Department. This is the class that is affected by and is required to comply with the Electronic Monitoring Program.
- 47. The Plaintiffs are adequate representatives of the class because the Plaintiffs belong to the class as owners and operators who hold at least one valid state permit for Coastal Dungeness crab fishing. They are ready, willing and able to represent the interests of the class and have retained competent counsel.
- 48. The class is so numerous that joinder of all members is impractical. The class includes at least 248 owners and operators licensed in the state of Washington. *See* Wash. Dep't of Fish and Wildlife, *Commercial Dungeness Crab Fishery* (2024).⁵
- 49. All of these owners and operators are impacted by the Electronic Monitoring Program. Since the state government has records of all these individuals through their permit applications, the class is ascertainable, can be identified and can be adequately notified.
- 50. The questions of law and fact common to the Named Plaintiffs and the rest of the class include, but are not limited to:
 - a. whether warrantless GPS surveillance via the Electronic Monitoring Program violates the Fourth Amendment;
 - b. whether seizing data and proprietary information without warrant or even reasonable suspicion of wrongdoing violates Fourth and Fifth Amendments of the Constitution;
 - c. whether forced installations of unwanted GPS surveillance on class members' private vessels and collection of data from such devices by the government are uncompensated takings in violation of the Fifth Amendment;
 - d. whether the Fish and Wildlife Code or any other law authorizes industry-funded, 24hour GPS tracking under the Electronic Monitoring Program, with noncompliance being a criminal offense

⁵ https://wdfw.wa.gov/fishing/commercial/crab.

- 51. The claims brought by the Plaintiffs are typical of the class, and the Plaintiffs' representatives will fairly and adequately protect the interests of the class.
- 52. The relief sought is appropriate for the class as a whole, as the Plaintiffs are seeking declaratory relief finding the Electronic Monitoring Program to be unlawful and injunctive relief that would stop Defendants from enforcing the Program. This relief would equally impact the entire class.

CLAIMS FOR RELIEF

COUNT ONE 42 U.S.C. § **1983**

WARRANTLESS GPS SURVEILLANCE VIOLATES THE FOURTH AMENDMENT

- 53. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 54. The U.S. Constitution protects individuals from unreasonable searches and seizures by government actors. *See* U.S. Const. amend. IV. The Fourth Amendment is incorporated against the States. *See Mapp*, 367 U.S. at 660.
- 55. A Fourth Amendment search occurs when government action intrudes into an individual's reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). "[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [digital surveillance]." *Carpenter v. United States*, 585 U.S. at 310. Continuous 24/7 GPS tracking of a person's vessel for months at a time captures a record of the owner's movements and constitutes a Fourth Amendment search that must be reasonable and generally supported by a warrant showing probable cause of wrongdoing.
- 56. By forcing Plaintiffs and the class to transmit GPS data reflecting their movements and location histories to a government agency, the Electronic Monitoring Program results in unreasonable and warrantless searches in violation of the Fourth Amendment.
- 57. A Fourth Amendment search also occurs when the government "physically intrude[s] onto a constitutionally protected area ... for the express purpose of obtaining

information." *United States v. Dixon*, 984 F.3d 814, 820 (9th Cir. 2020) (citing *U.S. v. Jones*, 565 U.S. at 406 and *Florida v. Jardines*, 569 U.S. 1, 7, 11 (2013)).

- 58. Plaintiffs' and class members' vessels are constitutionally protected private property. Forced installation of a GPS-tracking device on their vehicles to obtain GPS data about their movements and location histories is therefore a search. These searches constitute clear Fourth Amendment violations because they are not supported by a warrant nor even reasonable suspicion of wrongdoing.
- 59. Title 42 of the United States Code, § 1983, provides a cause of action for any person whose Constitutional rights are violated by state action.
- 60. The Eleventh Amendment of the U.S. Constitution does not bar suits seeking prospective, declaratory, and injunctive relief against state officials' violation of federal law. *See Verizon Md., Inc. v. Pub. Serv. Com'n of Md.*, 535 U.S. 635, 645–46, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2022).
- 61. Accordingly, the Department's illegal and unconstitutional installation and use of GPS-tracking devices and associated data must be declared unlawful, enjoined and set aside. And any data already gathered by the Department based on that illegal search should be deleted.

COUNT TWO WARRANTLESS GPS SURVEILLANCE VIOLATES ARTICLE I SECTION 7 OF THE WASHINGTON CONSTITUTION

- 62. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 63. Article I Section 7 of the Washington Constitution States: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Article I, section 7, is explicitly broader than that of the Fourth Amendment as it clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy." *Ladson*, 138 Wn. 2d at 348 (cleaned up).
- 64. Because "use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information about the

citizen" the Washington Supreme Court has made clear "that citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen's vehicle[.]" *Jackson*, 150 Wn. 2d at 264. Accordingly, "under article I, section 7 a warrant is required for installation of these devices." *Id*.

- 65. Plaintiffs' and class members' vessels are constitutionally protected. Forced installation of a GPS-tracking device on their vehicles to obtain GPS data about their movements and location histories is therefore a warrantless search in violation of Article I Section 7.
- 66. Accordingly, the Department's illegal and unconstitutional installation and use of GPS-tracking devices and associated data must be declared unlawful, enjoined and set aside. And any data already gathered by the Department based on that illegal search should be deleted.

COUNT THREE 42 U.S.C. § 1983 UNCOMPENSATED TAKING OF PROPERTY VIOLATES THE FIFTH AMENDMENT

- 67. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 68. The U.S. Constitution protects individuals from having their private property "taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause has been incorporated against the States.
- 69. A *per se* taking occurs when the government effects a "physical occupation of property," for public use even if the occupied space is small and there is "minimal economic impact." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149, 162, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (holding that temporary occupation is a per se taking). The "physical occupation" principle applies where the government occupies physical space on Plaintiffs' vessels.
- 70. Through the Electronic Monitoring Program, the Department has occupied space on hundreds of privately owned vessels without providing their owners with just compensation.

7

9

13

14

15

16

17 18

19 20

21

22

2324

25

26

27

The Program thus results in uncompensated takings of private property in violation of the Fifth Amendment.

- 71. The digital location data generated by GPS-tracking devices that Plaintiffs and class members must purchase and install are also private property that belongs to Plaintiffs and class members. Forcing Plaintiffs and class members to surrender such data to a government agency is another uncompensated taking of private property in violation of the Fifth Amendment.
- 72. Title 42 of the United States Code, § 1983, provides a cause of action for any person whose Constitutional rights are violated by state action.
- 73. The Eleventh Amendment of the U.S. Constitution does not bar suits seeking prospective, declaratory, and injunctive relief against state officials' violation of federal law. *See Verizon Md.*, 535 U.S. at 645–46.
- 74. Accordingly, the Department's uncompensated takings of space on Plaintiffs' and class members' vessels and of location data generated by GPS devices that Plaintiffs and class members own and pay for must be declared unlawful, enjoined, and set aside.

COUNT FOUR UNCOMPENSATED TAKING OF PROPERTY VIOLATES I SECTION 16 OF THE WASHINGTON CONSTITUTION

- 75. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 76. Article I Section 16 of the Washington Constitution states that: "No private property shall be taken or damaged for public or private use without just compensation having been first made[.]"
- 77. Under Article I Section 16, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine, and as a per se taking will categorically require the payment of compensation." *In re Prop. Located at 14255 53rd Ave., S., Tukwila, King Cnty., Washington*, 120 Wn. App. 737, 743 (2004) (quoting *Loretto*, 458 U.S. at 432).
 - 78. Through the Electronic Monitoring Program, the Department has occupied space

on hundreds of privately owned vessels without providing their owners with just compensation. The Program thus results in uncompensated takings of private property in violation of Article I Section 16.

- 79. The digital location data generated by GPS-tracking devices that Plaintiffs and class members must purchase and install are also private property that belongs to Plaintiffs and class members. Forcing Plaintiffs and class members to surrender such data to a government agency is another uncompensated taking of private property in violation of the Article I Section 16.
- 80. Accordingly, the Department's uncompensated takings of space on Plaintiffs' and class members' vessels and of location data generated by GPS devices that Plaintiffs and class members own and pay for must be declared unlawful, enjoined, and set aside.

COUNT FIVE THE WASHINGTON APA EXCESS OF STATUTORY AUTHORITY

- 81. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 82. The Electronic Monitoring Program is a rule within the meaning of the Washington APA because it is a regulation of general applicability the violation of which subjects a person to a penalty or administrative sanction. RCW § 34.05.010(16).
- 83. The Washington APA requires a reviewing court to declare a rule invalid and set it aside if "the rule exceeds the statutory authority of the agency." *Id.* § 34.05.570(2)(c).
- 84. The Department's powers are limited to those "expressly granted or necessarily implied" from its enabling statute. *Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 270 (2011) (quoting *Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.*, 89 Wn.2d 688, 694 (1978)). A rule exceeds the Department's statutory authority when the Department's enabling statute does not authorize the rule either "expressly or by necessary implication." *Id.* (quoting *Kabbae v. Dep't of Soc. & Health Srvs.*, 144 Wn. App. 432, 439 (2008)).
- 85. The Fish and Wildlife Code does not expressly or by necessarily implication grant the Department authority to subject owners of fishing vessels to 24/7 GPS surveillance whenever

they use their vessels, even when not using the vessel to fish. Nor does the Fish and Wildlife Code expressly or by necessary implication grant the Department authority to force owners of fishing vessels to pay the cost of such surveillance.

- 86. The Fish and Wildlife Code authorizes the Department to specify and define "the gear, appliances, or other equipment and methods that *may be used to take wildlife, fish, or shellfish.*" RCW § 77.12.047(1)(c) (emphasis added). But it does not authorize the Department to mandate the use of navigational gear or equipment that is not used to take wildlife, fish, or shellfish, such as a GPS-tracking device. Nor does the Code authorize criminal penalties for not having certain navigational equipment. *See id.* § 77.15.522.
- 87. The Electronic Monitoring Program exceeds statutory authority and must declared unlawful and set aside.

COUNT SIX THE WASHINGTON APA ARBITRARY AND CAPRICIOUS

- 88. Plaintiffs reallege and incorporate by reference the foregoing allegations as if fully set forth herein.
- 89. The Washington APA requires a reviewing court to declare a rule invalid and set it aside if "the rule is arbitrary and capricious." RCW § 34.05.570(2)(c). "An agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Puget Sound Harvesters Ass'n v. Dep't of Fish & Wildlife*, 157 Wn. App. 935, 945 (2010).
- 90. WDFW promulgated the Electronic Monitoring Rule without regard to economic and privacy costs.
- 91. WDFW promulgated the Electronic Monitoring Rule without regard to whether it was redundant and unnecessary to its EFT program.
- 92. WDFW promulgated the Electronic Monitoring Rule without any determination that preexisting logbooks were inaccurate, untimely, or otherwise failed to provide sufficient information for the agency's needs.

Award of appropriate damages for violation of Plaintiffs' and class members' civil

Award for all reasonable attorneys' fees and costs incurred herein and that Plaintiffs

I.

H.

rights;

25

26

27

1	may be entitle	ed to under law; and
2	J.	For such other relief as this Court deems just and proper.
3	DATE	ED this 13th day of November, 2024.
4		
5		By /s/ Harry J. F. Korrell
6		Harry J. F. Korrell, WSBA No. 23173 DAVIS WRIGHT TREMAINE LLP
7		920 Fifth Avenue, Suite 3300
8		Seattle, WA 98104-1610 Phone: 206.622.3150
9		Email: harrykorrell@dwt.com
10		John Vecchione, pro hac vice forthcoming
11		Sheng Li, <i>pro hac vice</i> forthcoming NEW CIVIL LIBERTIES ALLIANCE
		4250 N. Fairfax Dr., Ste. 300 Arlington, VA 22203
12		Phone: 202.869.5210
13		Email: john.vecchinone@ncla.legal Email: sheng.li@ncla.legal
14		
15		Attorneys for Plaintiffs
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		