

HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA, et al.,

Case No. C70-9213

Plaintiffs,

Subproceeding No. 89-3-09 (Russ’ Shellfish)

vs.

SQUAXIN ISLAND TRIBE’S MOTION FOR
SUMMARY JUDGMENT RE: RUSSELL E.
NORRIS D/B/A RUSS’ SHELLFISH

STATE OF WASHINGTON, et al.

NOTE ON MOTION CALENDAR: November
21, 2014

Defendants.

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Defendant Russell E. Norris (“Norris”) has repeatedly violated the Squaxin Island Tribe’s (“Tribe”) right to harvest its Treaty share of naturally-occurring shellfish. The Tribe has consistently sought to implement its Treaty rights pursuant to Court-ordered procedures. Norris, however, has engaged in misconduct on seven privately owned beaches that he leased. (Tribe’s Ex. 1: Locator Map.) His misconduct has occurred at the direct expense of the Tribe’s Treaty shellfishing rights.

The requested order, if granted, provides both retrospective and prospective relief. As to retrospective relief, it allows the Tribe to recoup its lost opportunity to harvest 24,808 pounds of Manila clams on any tidelands owned or controlled by Norris within the Tribe’s usual and accustomed fishing places (“U&A”), which includes all of Southern Puget Sound south of

1 Tacoma Narrows.¹ Prospectively, the order protects the Tribe’s Treaty right against future
 2 interference by Norris, and prohibits Norris from engaging in commercial shellfish harvesting
 3 activity within the Tribe’s U&A until he has provided a means for the Tribe to recoup its lost
 4 poundage. The Tribe now moves for summary judgment.

5 II. FACTUAL AND PROCEDURAL BACKGROUND

6 A. Background: Relevant Law, Procedures and Permitting Requirements for Commercial Shellfish Businesses.

7 The 1854 Treaty of Medicine Creek reserved to the Tribe the “right of taking fish, at all
 8 usual and accustomed grounds and stations.” 10 Stat. 1132. The Tribe’s right to take fish
 9 includes the right to take up to 50% of all naturally-occurring shellfish populations; extends to
 10 both public and private tidelands; and applies to all species of shellfish whether or not a species
 11 was present at treaty times. *United States v. Washington*, 873 F.Supp, 1422 (W.D. Wash. 1994),
 12 *aff’d in relevant part*, 157 F.3d 630, 643-644, 646-47 (9th Cir. 1998). In order to implement the
 13 shellfish decisions, this Court adopted rules and procedures known as the Shellfish
 14 Implementation Plan (“Plan”). *United States v. Washington*, 898 F.Supp. 1453 (W.D. Wash.)
 15 (Tribe’s Ex. 37: current amended plan, dated April 8, 2002). The Plan’s rules and procedures
 16 have the force of federal law.

17 Commercial shellfish growers in Washington have legal obligations to Treaty tribes
 18 under the Plan. If a “Grower” plans to “enhance an existing natural bed or create a new artificial
 19 shellfish bed,” the Grower must notify the affected tribe(s) in writing of his or her intention.
 20 (Tribe’s Ex. 2: Plan § 6.3, p. 12). The Grower must provide this notice at least 60 days before
 21 the proposed enhancement or creation of the bed. *Id.* The Section 6.3 notification must include
 22 information that is aimed at helping the Tribe determine the existence and scope of its Treaty
 23 share, such as a brief history of shellfish cultivation and harvests on the property. *Id.* Once a
 24 Grower provides Section 6.3 notice, a Tribe can take certain steps that include: (1) conducting a

25 ¹ *United States v. Washington*, 384 F.Supp. 312, 378 (D.Wash. 1974).

1 baseline survey of the natural shellfish populations before the Grower begins cultivating; (2)
 2 determining the existence of a natural bed (i.e., agreeing or disagreeing with the Grower's
 3 assertion as to whether the minimum density for a particular species is met under the 2007
 4 Consent Decree and Settlement Agreement); and (3) when warranted, entering into a harvest
 5 plan that ensures the Tribe its share of naturally-occurring clams on an ongoing basis. *Id.* at p.
 6 13.

7 The State also imposes requirements on commercial shellfish businesses. The
 8 information that the businesses provide the State assists tribes in co-managing the resource and
 9 in determining tribal treaty shares. The Washington Department of Health ("DOH") requires a
 10 shellfish operation license and, for each tideland harvested, a harvest site certificate. RCW Ch.
 11 69.30. The Washington Department of Fish & Wildlife ("WDFW") requires an Emerging
 12 Commercial Fishery ("ECF") license to harvest wild stock shellfish, and a commercial fishery
 13 permit for each parcel where wild stock is harvested. WAC 220-88D-030. And, a business that
 14 plans to cultivate (e.g., seed) shellfish must obtain a separate Aquatic Farm Registration ("AFR")
 15 for each tract. WAC 220-76-015. Harvest poundage is tracked on shellfish receiving tickets for
 16 wild stock shellfish, and on aquaculture production reports for cultivated shellfish. WAC 220-
 88D-050.

17 **B. Norris's Businesses Include Russ' Shellfish and Great Northwest Oyster Co. LLC.**

18 Over the last decades, Russell E. Norris has owned and operated numerous commercial
 19 shellfish businesses in Washington.² The two relevant ones here are Russ' Shellfish and Great
 20 Northwest Oyster Co. LLC ("Great Northwest"). (Tribe's Ex. 3: Dept. of Revenue & Sec. of
 21 State printouts.) Norris operated Russ' Shellfish before, during and after Great Northwest's
 22 existence. (Tribe's Ex. 4: Norris Resp. to Tribe's 2nd Discovery at p. 10 l. 7-20; Tribe's Ex. 5:
 23 T. Morris Dep. at p. 10 l. 16-24.)

24
 25 ² Other commercial shellfish businesses that Mr. Norris has owned and operated over the years are R&R Shellfish,
 K&R Shellfish, and Great Northwest Oyster LLP. (Tribe's Ex. 3: Dept. of Revenue printouts.)

1 Russ' Shellfish is solely owned by Russell Norris and has few employees. (Tribe's Ex. 6:
2 Norris Dep. at p. 34 l. 1-13, 23-24; p. 35 l. 1-15.) Norris started the company in 1992. Tribe's
3 Ex. 3: Dept. of Revenue & Sec. of State printouts.)

4 Norris and co-member Troy Morris registered Great Northwest in 2004. *Id.* At Great
5 Northwest, Norris's roles included maintaining the checkbook log, paying landowners and
6 harvesters, and handling clam operations (Troy Morris handled oyster operations). (Tribe's Ex.
7 5: T. Morris Dep. at p. 10 l. 18-25, p. 11 l. 1-7.) Great Northwest was administratively
8 dissolved on September 1, 2010. (Tribe's Ex. 3: Dept. of Revenue & Sec. of State printouts.)

9 **C. Norris's Activities on Seven Tidelands.**

10 Seven privately-owned tidelands in South Puget Sound are at issue in this subproceeding.
11 Three – the McNeal, Passmore and Beck tidelands – are located in Sunset Beach in Oakland
12 Bay, near Shelton, Washington. (Tribe's Ex. 1: Locator Map.) Four – the Durand, Verlinde,
13 King and Moore tidelands – are located in Hammersley Inlet, a narrow passage that leads to
14 Oakland Bay: *Id.* All seven tidelands are located within the Tribe's U&A. *United States v.*
Washington, 384 F.Supp. 312, 378 (W.D. Wash. 1974).

15 **1. The McNeal, Passmore and Beck Tidelands (Sunset Beach, Oakland**
16 **Bay).**

17 From 1999 to 2008, prior to Russ' Shellfish's and Great Northwest's involvement,
18 Oakland Seafoods leased and commercially harvested tidelands owned by McNeals, Passmores
19 and Becks. (Tribe's Ex. 7: DOH Harvest Site Certificates.) Oakland Seafoods did not obtain
20 AFRs for these tracts, so it was not allowed to commercially seed and otherwise cultivate them
21 and could only harvest wild stock shellfish. Declaration of Eric Sparkman at ¶ 2 (Oct. 30, 2014)
22 ("Sparkman Dec."). Accordingly, the Tribe received no Section 6.3 notices of intent to cultivate
23 these tracts from Oakland Seafoods. *Id.* at ¶ 3.

24 In 2007, Great Northwest began leasing the McNeal tidelands, and in 2008 the Passmore
25 and Beck tidelands. (Tribe's Ex. 8: Great Northwest leases.) Norris made the initial contact
with these landowners and remained their primary contact. (Tribe's Ex. 5: T. Morris Dep. at p.

1 16 l. 25, p. 17 l. 1-6.) Troy Morris attested to little to no contact with these three landowners. *Id.*
2 at p. 16 l. 9-24, p. 17. l. 7-9, *see also* p. 16 l. 24 (Norris “handled these parcels.”). Each lease
3 anticipated seeding, and Norris did seed (and harvest) these tidelands. (Tribe’s Ex. 8: Great
4 Northwest leases; Tribe’s Ex. 9: Norris’s Suppl. Responses at p. 15 l. 6-22.) The Tribe received
5 no Section 6.3 notices of intent to cultivate these tracts. Sparkman Dec. at ¶ 3.

6 In 2011, after Great Northwest dissolved, Russ’ Shellfish re-entered leases with these
7 landowners. (Tribe’s Ex. 10: Russ’ Shellfish leases.) Again, each lease anticipated seeding. *Id.*
8 Norris never sent Section 6.3 notices to the Tribe before cultivating these tidelands. Sparkman
9 Dec. at ¶ 3. Norris kept seeding and harvesting these tidelands. (Tribe’s Ex. 6: Norris Dep. at p.
10 47 l. 16-20; p. 51 l. 9-12.)

11 In 2013, the Tribe sent a “Section 7” notice to these landowners, as it (erroneously)
12 believed that their tidelands were not being commercially farmed.³ (Tribe’s Ex. 11: Tribe’s
13 Section 7 ltrs.) The landowners then informed the Tribe that Norris for years had been
14 commercially cultivating and harvesting these tidelands. Declaration of Rana Brown (Oct. 30,
15 2014) (“Brown Dec.”) at ¶ 2.

16 Had Norris provided the Tribe notice under Section 6.3, the Tribe would have:
17 (1) considered the history of harvest and enhancement on the tidelands; (2) conducted a pre-
18 cultivation baseline survey of the natural shellfish populations; (3) determined whether a natural
19 bed existed (i.e., agreeing or disagreeing with the Grower’s assertion as to whether the minimum
20 density for a particular species was met under the 2007 Consent Decree and Settlement
21 Agreement); and (4) entered into a harvest plan with the Grower and landowner to ensure the
22 Tribe’s share of naturally-occurring clams on an ongoing basis. The lack of a timely Section 6.3
23 notice meant that the Tribe lost the opportunity to harvest its Treaty shares.

24 ³ The Tribe invoked Section 7, instead of Section 6, because Section 7 establishes procedures for implementing the
25 Tribal right on privately-owned tidelands that are not being used for commercial shellfish production (in contrast
with Section 6, which addresses implementation of the Tribal right on private commercial tidelands where
cultivation is planned). (Tribe’s Ex. 2: Plan § 7, pp. 14-15.)

1 The Tribe calculates its lost Treaty share of Manila clams from these three tidelands as
 2 follows. It first located nearby beaches with representative local Manila clam population that
 3 were free of recent harvest or enhancement activity; i.e., the natural shellfish bed. Sparkman
 4 Dec. at ¶ 4. Two Sunset Beach tidelands owned by the Royals and Campbells met that criteria.
 5 *Id.* The Tribe's 2013 survey of the Royal tidelands indicated a density of 0.67 pounds of Manila
 6 clams per square foot, and a prior grower's harvest on the Campbell tidelands indicated 1.0
 7 pounds per square foot. *Id.* The Tribe then averaged the baseline natural clam density of these
 8 tracts, for a clam density of 0.84 pounds per square foot. *Id.*

9 Under the Shellfish Minimum Density consent decree⁴, a "natural bed" of Manila clams
 10 that is subject to Tribal Treaty harvest must meet or exceed the minimum commercial density of
 11 0.14 pounds of Manila clams per square foot. (Tribe's Ex. 37: Minimum density consent
 12 decree.) The Tribe's share is 50% of the initial biomass. *Id.* The allocation period is three
 13 years, which means that the Tribe is entitled to either one-third of 50% of the natural Manila
 14 clam production each year, or the entire 50% of the natural production once every three years.
 15 *See id.* The principle is that the pre-harvest and -enhancement density of the bed is expected to
 16 recover to the original density in three years. *See id.* Accordingly, the Tribal share from that bed
 17 is 50% of the pre-harvest and -enhancement population of Manila clams every three years, or
 18 $1/6^{\text{th}}$ of the initial population each year. *See id.*

19 For the McNeal tidelands, the clam bed area is 7,672 square feet as determined by a
 20 Tribal survey. Sparkman Dec. at ¶ 5. The baseline Manila clam population is thus $7,672 \text{ ft}^2 \times$
 21 $0.84 \text{ lbs/ft}^2 = 6,444$ pounds. *Id.* The annual Tribal share is $1/6^{\text{th}}$ of that: i.e., $6,444 \text{ pounds} \div 6 =$
 22 $1,074$ pounds per year. *Id.* Accordingly, from December 2007 through December 2014 (seven
 23 years), the Tribe lost the opportunity to harvest the following: $1,074 \text{ pounds} \times 7 \text{ years} = \mathbf{7,518}$
 24 **pounds.** *Id.*

25 ⁴ Tribe's Ex. 37: *United States v. Washington*, No. C70-9213, Subproceeding 89-3: (1) Consent Decree and Settlement Agreement re Manila Clams, Native Littleneck Clams, and Pacific Oysters (Dkt. No. 18848) (Order approving is Dkt. No. 18859).

1 For the Passmore tidelands, the clam bed area is 15,020 square feet as determined by a
 2 Tribal survey. Sparkman Dec. at ¶ 6. The baseline Manila clam population is thus 15,020 ft² x
 3 0.84 lbs/ft² = 12,617 pounds. *Id.* The annual Tribal share is 1/6th of that: i.e., 12,617 ÷ 6 =
 4 2,103 pounds per year. *Id.* Accordingly, from November 2008 through November 2014 (six
 5 years), the Tribe lost the opportunity to harvest the following: (2,103 pounds x 6 years) – 2,129
 6 pounds from a Tribal harvest = **10,489 pounds.** *Id.*

7 For the Beck tidelands, the clam bed area is 7,213 square feet as determined by a Tribal
 8 survey. Sparkman Dec. at ¶ 7. The baseline Manila clam population is thus 7,213 ft² x 0.84
 9 lbs/ft² = 6,059 pounds. *Id.* The annual Tribal share is 1/6th of that: i.e., 6,059 ÷ 6 = 1,010
 10 pounds per year. *Id.* Accordingly, from November 2008 through November 2014 (six years),
 11 the Tribe lost the opportunity to harvest the following: 1,010 pounds x 6 years = **6,060 pounds.**
Id.

12 To summarize, the lack of a timely Section 6.3 notice meant that the Tribe lost the
 13 opportunity to harvest total poundage on the three Sunset Beach tidelands in the amount of 7,518
 14 + 10,489 + 6,060 = **16,549 pounds of Manila clams.** *Id.* at ¶ 8.

15 In mid-August 2014, Norris cancelled the leases for all three tidelands. (Tribe's Ex. 12:
 16 Norris lease cancellation ltr.) Norris did not afford the Tribe advance notice of the cancellation,
 17 and the Tribe did not learn of it until September 16, 2014. (Tribe's Ex. 13: Email from D.
 18 Reynolds.) Norris did not provide the Tribe with an opportunity to recoup its Treaty shares of
 19 Manila clams before cancelling the leases. Sparkman Dec. at ¶ 9.

20 **2. Durand Tidelands (Hammersley Inlet).**

21 In 2005, Norris entered into a lease with landowner Diane Durand that anticipated
 22 seeding, and obtained a beach-specific AFR for the Durand tidelands to farm them. (Tribe's Ex.
 23 14: Durand lease; Tribe's Ex. 15: Durand AFR.) Norris planted both oyster and clam seed.
 24 (Tribe's Ex. 9: Norris's Supp. Resp. at p. 13 l. 1, p. 15 l. 14-22.) From 2005 to 2009, Norris
 25 harvested at least 8,247 pounds of Manila clams from the Durand parcel. (Tribe's Ex. 16:
 WDFW printout 2005-2007; Tribe's Ex. 17: AFR prod. Reports (AFR No. 8718-04).) Norris

1 did not notify the Tribe before cultivating as is required under Section 6.3. Sparkman Dec. at ¶
2 10. Nor did Norris provide the Tribe with information about past cultivation on the parcel, or the
3 opportunity to survey before Norris began cultivating and harvesting, or the chance to develop a
4 harvest plan. (*See* Tribe's Ex. 2: Plan § 6.3.)

5 In 2011, Norris completed a Section 6.3 form. (Tribe's Ex. 18: Durand § 6.3.) The
6 Tribe calculated, based on a survey, that its 50% Treaty share of the natural population was 450
7 pounds per year. (Tribe's Ex. 19: Durand harvest plan.) In October 2011, Norris and the Tribe
8 executed a harvest plan in which the parties agreed that Tribal harvests would be conducted
9 every three years. *Id.* The plan also required that Norris conduct harvests in a manner that
10 would not prevent the Tribe from harvesting its allocated share by coordinating harvest cycles
11 with the Tribe, and by communicating information that could affect the amount and location of
12 biomass available for Tribal harvest. *Id.*

13 During the period from October 2011 through 2013, Norris harvested 2,765 clams from
14 the Durand tidelands but did not share with the Tribe any information relating to the timing,
15 location or amount of his harvests. (Tribe's Ex. 17: AFR prod. reports; Sparkman Dep. at ¶ 10.)
16 Norris did not coordinate his harvest cycles with the Tribe, or communicate information that
17 could affect the amount and location of biomass available for Tribal harvest. (*Id.*; Tribe's Ex.
18 19: Durand harvest plan.). During that same period the Tribe conducted two harvests on the
19 Durand tidelands but fell 476 pounds short. (Sparkman Dep. at ¶ 10; Tribe's Ex. 20: Tribal
20 harvest table.) In November 2013, the Tribe send Norris a letter that informed him of the
21 shortfall and asked whether it could roll the 476 pounds over to 2014 and harvest it with the 450
22 pounds for that year's share (totaling 926 pounds). (Tribe's Ex. 21: Tribe's letter; Sparkman
23 Dec. at ¶ 10) Norris did not respond. *Id.*

24 In mid-August 2014, Norris cancelled the Durand lease. (Tribe's Ex. 12: Norris lease
25 cancellation letter.) Norris did not provide the Tribe with advance notice of the lease
26 cancellation, and the Tribe did not learn about it until September 16, 2014. (Tribe's Ex. 13:
27 Email from D. Reynolds; Sparkman Dec. at ¶ 10.) Norris did not afford the Tribe an opportunity

1 to harvest its share of pounds of Manila clams under the harvest plan before cancelling the lease.
2 Sparkman Dec. at ¶ 10.

3 Based on the natural density as determined by the Tribal survey, Norris deprived the
4 Tribe of the opportunity to harvest the following amount of Manila clams on the Durand parcel
5 as follows:

6 Calendar years 2005-2010: 450 pounds/year x 6 years = 2,700 pounds

7 Calendar years 2011-2014: 926 pounds

8 **Total = 3,626 pounds**

9 Sparkman Dec. at ¶ 11.

10 **3. Verlinde tidelands (Hammersley Inlet).**

11 In June 2011, Norris and the Tribe executed a harvest plan that established the Tribal
12 Treaty share based on a survey, and stated in part:

13 The Tribe shall be entitled to harvest **1,261 lbs.** per year, commencing in year 2012 (clam
14 year from June to June). (emphasis in original) . . . Harvests will occur on a three
15 (calendar) year cycle unless otherwise requested by Russ' Shellfish, to which the Tribe
16 will agree as long as it [sic] the alternate cycle does not compromise its Treaty share. . . .

17 In order to accommodate subsequent harvests, Russ' Shellfish agrees to conduct harvests
18 in a manner that will not prevent the Tribe from harvesting its allocated share by
19 coordinating harvest cycles with the Tribe, and communicating information that could
20 affect the amount and location of biomass available for Tribal harvest. . . .

21 (Tribe's Ex. 22: Verlinde harvest plan.)

22 In July 2014, Norris twice harvested from the Verlinde tidelands, totaling 1,425 pounds.

23 (Tribe's Ex. 23: Time to Temp. records.) The Tribe only learned of these harvests in September
24 2014 when it obtained the records of Norris's bookkeeper. Sparkman Dec. at ¶ 12. Norris did
25 not coordinate his harvest with the Tribe, or communicate information that could affect the
amount and location of biomass available for Tribal harvest. *Id.*

In mid-August 2014, Norris cancelled the Verlinde lease. (Tribe's Ex. 12: Norris
cancellation ltr.) Norris did not provide the Tribe advance notice of his lease cancellation, and
the Tribe did not learn of it until September 16, 2014. (*Id.*; Tribe's Ex.13: Email from D.

1 Reynolds.) Norris did not provide the Tribe an opportunity to harvest its share of 3,783 pounds
2 of Manila clams (1,261 pounds x 3 clam years, through June 2015) under the harvest plan before
3 Norris cancelled the lease. Sparkman Dec. at ¶ 13. Accordingly, the Tribe lost the opportunity
4 to harvest **3,783 pounds** of Manila clams from the Verlinde tidelands. *Id.*

5 **4. King tidelands (Hammersley Inlet).**

6 In March 2012, the Tribe and Norris signed a harvest plan for the tidelands owned by Jeff
7 and Rachel King that established the Treaty share based on surveys, and that states in part:

8 Russ' Shellfish agrees to only harvest shellfish only every three years (i.e., 2012, 2015
9 etc.) in coordination with the Tribe, and only after the Tribe has conducted a population
assessment to determine the population of naturally occurring shellfish on these tidelands.

10 In order to accommodate subsequent harvests, Russ' Shellfish agrees to conduct harvests
11 in a manner that will not prevent the Tribe from harvesting its share by coordinating
potential harvest cycles with the Tribe, and by communicating information that could
affect the amount and location of biomass available for harvest.

12 (Tribe's Ex. 24: King harvest plan.)

13 On or about July 31, 2014, the Tribe learned from a third party that Norris appeared to be
14 harvesting the King tidelands. (Declaration of Rana Brown at ¶ 3 (Oct. 30, 2014) ("Brown
15 Dec.") In mid-August 2014, the Tribe confirmed that Norris had in fact harvested 850 pounds of
16 Manila clams. (Tribe's Ex. 25: Invoice showing King harvest; Sparkman Dec. at ¶ 14.) The
17 Tribe had not yet conducted a population assessment. *Id.* Norris did not coordinate or
18 communicate with the Tribe in advance of his harvest. (Tribe's Ex. 26: Norris's Answers to
19 Tribe's 3rd discovery request at p. 10 l. 18; Sparkman Dec. at ¶ 14.)

20 In mid-August of 2014, Norris cancelled the King leases. (Tribe's Ex. 12: Norris lease
21 cancellation ltr.) Norris did not provide the Tribe an opportunity to harvest **850 pounds** before
22 cancelling the lease. Sparkman Dec. at ¶ 14.

23 **5. Moore tidelands (Hammersley Inlet).**

24 In March 2011, Norris entered into a lease with the Moores that, among other things,
25 anticipated seeding. (Tribe's Ex. 27: Moore lease.) On April 14, 2011, the Tribe's shellfish

1 biologist informed Norris's representative that Norris should contact her before conducting
2 commercial activities on the Moore tidelands; that the Tribe first needed to conduct a baseline
3 survey to determine the natural population; and that, if warranted, the parties needed to sign a
4 harvest plan. (Brown Dec. at ¶ 4, with attached phone notes) Norris, however, twice harvested
5 Manila clams from the Moore tidelands (1000 and 772 pounds) before the Tribe could conduct a
6 baseline survey. (Tribe's Ex. 28: Nov. 29, 2012 ltr. from Tribe.)

7 In May 2011, the Tribe, Norris and the Moores signed a harvest plan that established the
8 Tribe's initial share of Manila clams at 7,131 pounds, and subsequent shares at 2,377 pounds.
9 (Tribe's Ex. 29: Moore harvest plan.) In August of 2012, the Tribe attempted to harvest its
10 subsequent share of 2,377 pounds, but was only able to harvest a portion (1,467 pounds) due to
11 extreme weather. (Tribe's Ex. 30: Tribe's Oct. 8, 2012 ltr.) The Tribe scheduled a harvest on
12 November 2, 2012 to make up the 910 pounds shortfall. *Id.* During the November Tribal dig,
13 Tribal members were unable to obtain the Tribal share on one portion of the beach and needed to
14 expand the harvest area. (Tribe's Ex. 31: Squaxin Police Report.) Mr. Norris became hostile
15 and denied Tribal members access to the rest of the Moore beach. *Id.* The harvest plan,
16 however, did not restrict the Tribe's harvest to a portion of the beach. *See* Tribe's Ex. 29:
17 Moore harvest plan.) The Tribe was forced to leave the beach even though it had only dug 559
18 pounds, with a shortfall of 351 pounds. (Tribe's Ex. 28: Tribe's Nov. 29, 2012 ltr.)

18 On November 29, 2012, the Tribe sent Norris a letter requesting that Norris describe all
19 of his harvesting activities on the Moore parcel and attach: (1) his AFR production reports to
20 WDFW (which would indicate the poundage he had obtained from the Moore beach); (2) reports
21 and check stubs to or from the Moores (for the same reason); and (3) an estimate of the
22 remaining clam resource on the entire Moore tidelands. *Id.* The Tribe also asked that Norris
23 cease all harvesting on the Moore beach until the Tribe had harvested its shortfall, which it
24 anticipated doing in the spring of 2013 but said that it would need more time if the tidelands had
25 insufficiently recovered. *Id.* The Tribe received no responsive documents from Norris.

Sparkman Dec. at ¶ 15.

1 Norris became increasingly difficult for the Tribe to reach and communicate with by,
 2 among other things, refusing to accept phone calls. *Id.*; Tribe's Ex. 32: Emails with Moores. In
 3 January 2013, the Tribe informed Norris and the Moores that it would proceed to federal court
 4 unless they agreed to cease all harvesting activities and provided the Tribe with unobstructed
 5 access to the tidelands, until the Tribe had informed them that it had obtained 2,728 pounds of
 6 Manila clams (351 lbs. owed from 2012 and the 2013 Tribal share of 2,377 lbs.). (Tribe's Ex.
 7 33: Tribe's Jan. 28, 2013 ltr.)

8 On March 6, 2013, the Moores signed a lease cancellation that they asked Norris to sign.
 9 (Tribe's Ex. 34: Moore lease cancellation.) On that same day, they also verbally informed
 10 Norris that they were cancelling the lease and notified DOH as such. (Tribe's Ex. 35: Emails
 11 with Moores.) At the end of March 2013, the Tribe, still unable to reach Norris, entered into an
 12 agreement with the Moores that superseded the harvest plan with Norris and prevented the
 13 Moores from allowing commercial harvests on their tidelands until the Tribe had recouped the
 14 2,377 pounds described above. (Tribe's Ex. 39: Agreement.)

15 In late March 2013, after the Moores had cancelled their lease with Norris, informed
 16 Norris that they were cancelling his lease, and signed the agreement with the Tribe, the Tribe
 17 learned from a third party that Norris was back on the Moore beach digging for clams. (Tribe's
 18 Ex. 36: Emails with Moores.) The Tribe later learned, during discovery, that Norris had
 19 harvested 1,100 pounds of Manila clams – once in late March 2013 and twice in May 2013.
 20 (Tribe's Ex. 38: Time & temp. record.) Norris never reported these harvests to the Tribe.
 21 Sparkman Dec. at ¶ 16. In July 2014, the Tribe obtained the remaining poundage from the
 22 Moore beach under its separate agreement with the Moores. *Id.*

23 **III. THE TRIBE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS**
 24 **NO GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO NORRIS'S**
 25 **VIOLATION OF THE TRIBE'S TREATY RIGHTS**
ON THE SEVEN TIDELANDS

Summary judgment is appropriate where there is no genuine issue of material fact and the
 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party

1 bears the initial burden of pointing to portions of the pleadings, admissions, answers to
 2 interrogatories, depositions, and affidavits to demonstrate the absence of a genuine issue of
 3 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Kennedy v. Allied Mut. Ins.*
 4 *Co.*, 952 F.2d 262, 265 (9th Cir. 1991). Once the moving party has met this burden, the
 5 opposing party must show that there is a genuine issue of fact for trial. *Matsushita Elec. Indus.*
 6 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

7 The Tribe is entitled to summary judgment because the material facts relevant to this
 8 proceeding are undisputed. First, the disputed tidelands are located within the Tribe's U&A.
 9 *United States v. Washington*, 384 F.Supp. at 378. Second, the share of Manila clams that the
 10 Tribe seeks to harvest is calculated as 50% of the naturally-occurring shellfish population that
 11 would have occurred prior to Norris' seeding efforts. Third, the Tribe properly sought to
 12 implement its treaty rights under the Plan and, in the case of the Moore, Kings, Verlinde and
 13 Durand tidelands, in accordance with executed harvest plans. Finally, Norris violated the Tribe's
 14 Treaty rights, Section 6.3 of the Plan, and harvest plans.

14 IV. ARGUMENT

15 A. Norris Unlawfully Deprived the Tribe of the Opportunity to Harvest Manila Clams 16 By Violating Executed Harvest Plans for the Durand, Verlinde, King and Moore 17 Tidelands.

18 Norris violated four harvest plans that he and the Tribe signed. Sections II.C.2-5, *supra*.
 19 For the Durand, Verlinde and King plans, Norris harvested without coordinating his harvest
 20 cycle with the Tribe or communicating information that could affect the amount and location of
 21 biomass available for Tribal harvest – all at the Tribe's expense. *Id.* Then, before the Tribe had
 22 a chance to harvest its respective Treaty shares on those tidelands, Norris promptly cancelled the
 23 leases – without advance notice to the Tribe. *Id.* Additionally, Norris violated the King harvest
 24 plan by harvesting prior to the Tribe's population assessment. Section II.C.4, *supra*. Finally,
 25 Norris violated the Moore harvest plan by prohibiting the Tribe from obtaining its full share
 during the November 2012 Tribal dig, despite a lack of language in the harvest plan that

1 restricted the Tribe to a particular portion of the beach. Section _ above. Section II.C.5, *supra*.

2 **B. Norris Unlawfully Deprived the Tribe of the Opportunity to Harvest Manila Clams**
3 **By Failing to Provide Timely Section 6.3 Notices for the McNeal, Passmore, Beck**
4 **and Durand Tidelands.**

5 Section 6.3 requires that “[i]f a Grower plans to enhance an existing natural bed or create
6 a new artificial bed, the Grower shall give written notice to the affected Tribe(s) of his or her
7 intention.” (Tribe’s Ex. 2: Plan § 6.3.) Norris seeded and harvested the McNeal, Passmore,
8 Beck and Durand tidelands between 2005 and 2008 without providing the Tribe advance notice
9 under Section 6.3. Sections II.C.1-2, *supra*.

10 Had Norris provided the requisite notice under Section 6.3, the Tribe would have:
11 (1) considered the history of harvest and enhancement on the tidelands; (2) conducted a pre-
12 cultivation baseline survey of the natural shellfish populations; (3) determined whether a natural
13 bed existed (i.e., agreeing or disagreeing with the Grower’s assertion as to whether the minimum
14 density for a particular species was met under the minimum density agreement); and (4) entered
15 into a harvest plan with the Grower and landowner to guarantee the Tribe’s share of naturally-
16 occurring clams on an ongoing basis. (*See* Tribe’s Ex. 2: Plan § 6.3) Norris’s violation of
17 Section 6.3 deprived the Tribe of the opportunity to harvest its Treaty share.

18 **C. The Tribe is Entitled to Relief that Consists of Recouping Its Lost Opportunity to**
19 **Harvest Manila Clams From Tidelands that Norris Controls Within Squaxin’s**
20 **U&A.**

21 The Tribe seeks to recoup from Norris its lost opportunity to harvest Manila clams from
22 tidelands within the Tribe’s U&A. Norris’s decision to cancel the leases for all of the tidelands
23 discussed herein forecloses the Tribe from conducting recoupment harvests on those tidelands.
24 Accordingly, the Court should prohibit Norris from benefiting from commercial shellfish
25 harvesting activities within the Tribe’s U&A until he provides the Tribe with the opportunity to
recoup 24,808 pounds of Manila clams (*see bolded* totals in Sections II.C.2-5, *supra*) within the
Tribe’s U&A.

The Court has recognized that monetary damages is often an inappropriate remedy for

1 tribes that are deprived of their Treaty rights:

2 [A]lthough from a purely economic standpoint, monetary relief might be virtually
3 interchangeable with injunctive relief, the evidence clearly indicates that the Tribes'
4 shellfishing rights are not purely economic. Rather, the Tribes have historically fished
5 for religious and ceremonial-as well as subsistence-purposes; thus, their right is not
6 adequately vindicated by monetary relief. Moreover, the Tribes argued persuasively that
7 intangible benefits will inure to their members from exercising the right to fish, such as
8 the cultural value of participating in a traditional activity and the self-esteem of being
9 gainfully employed. These benefits would be lost were the Court to substitute monetary
10 relief for the right to fish.

11 *United States v. Washington*, 898 F.Supp. 1453, 1458-59 (W.D. Wash. 1995). Similarly, Section
12 6.2 of the Plan provides:

13 No Grower may, instead of providing a Tribe the opportunity to harvest, insist that the
14 Tribe take a money payment or take shellfish harvested by the Grower, as the tribal right
15 is a right to take the shellfish by a tribal harvest. Nothing in this Plan, however, shall be
16 interpreted to foreclose the parties from voluntarily negotiating such an agreement; the
17 Grower simply may not force such an agreement on any Tribe.

18 The Court, by ordering such relief, will send a clear message that a grower cannot
19 insulate himself from relief after having engaged in misconduct on numerous beaches, for years,
20 at the direct expense of Tribal Treaty rights.

21 **D. Norris is Personally Liable for Depriving the Tribe of the Opportunity to Take Shellfish.**

22 Russell Norris is personally liable for his misconduct leading to liability while acting
23 through his sole proprietorship Russ' Shellfish. A sole proprietor is personally liable for the
24 debts and obligations of the business. *Bankston v. Pierce Cnty.*, 174 Wash. App. 932, 937, 301
25 P.3d 495, 497 (2013). Thus, Russell Norris is liable for all actions attributable to Russ Shellfish.

Additionally, Norris is personally liable for the wrongful acts that he committed between
2007 and 2010 on the McNeal, Passmore and Beck tidelands while he was a member of Great
Northwest. Members of a limited liability company are personally liable for any act, debt,
obligation, or liability of the LLC to the extent that shareholders of a Washington business
corporation would be liable in analogous circumstances. RCW 25.15.060. In this case, Norris
would be liable under, at minimum, the responsible corporate officer doctrine, and the successor

1 liability doctrine. Under the former doctrine, if a corporate officer participates in the wrongful
 2 conduct, or knowingly approves of the conduct, then the officer (and the corporation) is liable for
 3 the penalties. *See, e.g., State Dept. of Ecology v. Lundgren*, 94 Wn.App. 236, 791 P.2d 948
 4 (1999) (shareholder held personally liable who controlled facility with knowledge of facility’s
 5 discharge of pollutants without a permit). The defendant must have, by reason of his position in
 6 the corporation, the responsibility and authority either to prevent in the first instance, or promptly
 7 to correct, the violation complained of, and failed to do so. *Id.*, *see also* A. Budge Rothrock & F.
 8 Lennon, *Have You Heard About the Responsible Corporate Officer Doctrine?: When Piercing*
the Corporate Veil is Unnecessary, Washington State Bar News at pp. 16-21 (Nov. 2012).

9 Under the second doctrine, personal liability attaches if the subsequent business is a
 10 “mere continuation” of the first business. *Cambridge Townhomes, LLC v. Pacific Star Roofing,*
 11 *Inc.*, 166 Wash.2d 475, 481-82 (2009). Courts consider factors that include the continuity of
 12 individuals in control of the business, and whether the purchasing business represents “merely a
 13 new hat” for the seller. *See id.*

14 **E. The Tribe is Entitled to Prospective Relief Against Norris.**

15 In addition to recoupment, the Tribe seeks prospective relief against Norris to ensure that
 16 his future commercial shellfish activities within Squaxin U&A do not interfere with the Tribe’s
 17 Treaty rights. Over the years, Norris has demonstrated a persistent pattern of violating Section
 18 6.3 of the Plan by: (1) seeding and harvesting before providing a Section 6.3 notice to the Tribe;
 19 (2) depriving the Tribe of the opportunity to conduct accurate surveys to determine the Treaty
 20 share; (3) delaying and/or refusing to negotiate harvests plans; (4) not sharing harvest
 21 information with the Tribe; (5) blocking the Tribe’s access to a beach; (6) violating executed
 22 harvest plans; and (7) generally refusing to communicate with the Tribe. Section II, *supra*.

23 Norris’s acts and omissions have burdened the Tribe by: (1) depriving it of its Treaty
 24 share of shellfish; (2) depriving it of the information needed to determine the Tribal share in a
 25 timely and accurate manner; (3) causing the Tribe to invest significant resources and unnecessary

1 costs and other expenses in tracking down Russ' Shellfish's activities after the-fact; and (4)
2 having to undertake extra efforts to ensure its members the Treaty share of the shellfish resource.

3 Accordingly, the Tribe seeks an order granting the following relief:

4 1. Norris shall be prohibited from directly or indirectly engaging in and/or profiting
5 from any commercial shellfish harvesting activity until: (a) Norris has provided the Tribe with
6 access to tidelands within the Tribe's U&A to allow the Tribe to recoup 24,808 pounds of
7 Manila clams; and (b) the Tribe has notified this Court and Norris that it has achieved this
8 poundage. "Norris" as described in this paragraph and the two paragraphs below, shall mean
9 Russ' Shellfish and any other business in which Norris has any degree of direct or indirect
10 involvement or privity.

11 2. Once No. 1 is satisfied, then Norris shall not engage in any commercial shellfish
12 activities on tidelands within the Tribe's U&A until such time as one of the following first
13 occurs: (1) Norris and the Tribe have entered into a harvest plan that provides for the
14 implementation of the Tribe's treaty right to take up to 50% of the naturally-occurring shellfish
15 on the tidelands; (2) the Tribe has agreed in writing, or the United States District Court has
16 determined, that the tidelands proposed and used for cultivation do not contain a natural shellfish
17 bed; or (3) the Tribe has indicated in writing that it does not intend to exercise its treaty right to
18 take shellfish on the tidelands. This requirement does not affect the rights of other affected
19 Treaty tribes.

20 3. Norris shall not refuse to accept mail, phone calls or other forms of
21 communication from the Tribe, and shall respond to the Tribe's written and verbal inquiries
22 within ten (10) business days of Norris' receipt (except where a different time period is
23 prescribed by law or contract).

24 V. CONCLUSION

25 For the reasons described herein, the Court should find that there is no genuine issue of
material fact and the Tribe is entitled to judgment as a matter of law. The Tribe respectfully
requests an order that: (1) allows the Tribe to recoup its lost opportunity to harvest 24,808

1 pounds of Manila clams on any tidelands owned or controlled by Norris within the Tribe's U&A;
2 and (2) protects the Tribe's Treaty right against future interference by Norris; and (3) prohibits
3 Norris from engaging in commercial shellfish harvesting activity within the Tribe's U&A until
4 he has provided a means for the Tribe to recoup its lost poundage.

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6
7 Respectfully submitted this 30th day of October, 2014.

8 THE SQUAXIN ISLAND LEGAL DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2014, I electronically filed the following with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the persons required to be served in this subproceeding whose names appear on the Master Service List: (1) Squaxin Island Tribe's Motion for Summary Judgment Re: Russell E. Norris d/b/a/ Russ' Shellfish; (2) Declaration of Eric Sparkman, with Exhibits 1-38; (3) Declaration of Rana Brown, with Attachment A; and (4) [Proposed] Order on Summary Judgment. I have also arranged to send a courtesy paper copy of the above to the Judge Strombom.

s/Sharon Haensly
Sharon Haensly