HONORABLE KAREN L. STROMBOM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al. Defendants.	Case No. C70-9213 Subproceeding No. 89-3-09 (Russ' Shellfish) SQUAXIN ISLAND TRIBE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: RUSSELL E. NORRIS D/B/A RUSS' SHELLFISH

I. ARGUMENT

A. Norris Violated Section 6.3 of the SIP by Failing to Notify the Tribe that He Planned to Seed the McNeal, Passmore and Beck Tidelands.

As described below, Norris has not demonstrated with admissible evidence that these tidelands were under cultivation by the time the Shellfish Implementation Plan ("SIP") was signed in 1995, or that they were under cultivation at any point before Great Northwest and Russ' Shellfish began leasing and seeding them. Thus there is no genuine issue that commercial cultivation did not take place before Great Northwest and Russ' Shellfish began leasing and seeding these beaches. It is undisputed that Norris never gave the Tribe notice of its intent to enhance or cultivate these beaches. The Tribe is therefore entitled to summary judgment that Norris violated Section 6.3 of the SIP.

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1. There is No Genuine Issue That Cultivation Did Not Begin Until Great Northwest and Russ' Shellfish Began Seeding, and That the Tribe Never Received a Section 6.3 Notice.

Once the SIP was signed on August 28, 1995, any tidelands not yet under cultivation could become cultivated, whether in the form of enhancing a natural bed or by creating a new artificial bed, only after notice to the relevant tribe(s) pursuant to Section 6.3. That notice allows a tribe to determine whether the area proposed for enhancement or cultivation contains a natural bed, a determination that is necessary to determine the scope of the tribes' rights to the sustainable natural population, if any. It is undisputed that no Section 6.3 notice was ever given to the Tribe before cultivation began on the McNeal, Passmore and Beck tidelands.

Moreover, there is no genuine issue that cultivation did not begin until Great Northwest and Russ' Shellfish began seeding these properties in 2007 and 2008. (*See* Motion at p. 5, citing Tribe's Exhs. 6-10, including Ex. 9: Norris Supp. Resp. at p. 15, line 6-22; Sparkman Dec at ¶ 2.) Norris argues that no Section 6.3 notice was required because "it was his belief that the beaches had been farmed in the past." Response at 16. The evidence for this belief is information he received from landowners, Norris Dec. at ¶ 12, which makes his statement inadmissible hearsay. Norris also asserts that at the time he took over the leases and inspected these beaches there were no measurable quantities of wild stock manila clams present. *Id.* Even if true, this does not establish that cultivation had taken place or that natural populations had not been harvested before his inspection.

For the McNeal tidelands, Norris also cites to his declaration at ¶ 33 and Exhibit K, but ¶ 33 only describes evidence of cultivation without specifying when those cultivation measures occurred so it does not support a claim of cultivation before Great Northwest and Norris began seeding in 2007.[1] Exhibit K says only that the property has been leased to a commercial shellfish

[1] Norris's statement that Great Northwest cultivated and harvested the McNeal parcel "from 2002" on is wrong, as DOH records show that Great Northwest acquired its certification in 2008. (Tribe's Ex. 7.)

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grower for 20 years; it does not say that that grower cultivated shellfish on that beach, as distinguished from harvesting natural stock.

For the Passmore tidelands, Norris asserts that they were cultivated "since the 1990s," Response at p. 6, citing the identical declarations of George and Patricia Passmore. Those declarations assert that shellfish farmers "have seeded and harvested" their tidelands "since purchasing the property." Passmore Decs. at ¶ 3. There is no supporting information, however, to explain in what years harvesting took place, or when seeding took place, or whether each occurred every year or just some years since they acquired their property, or how the Passmores have knowledge of when either one took place. If any cultivation did occur, it was done without an Aquatic Farm Registration, making it illegal and therefore irrelevant. Although the Passmores claim personal knowledge, ¶ 1, they do not explain how they have knowledge of the activities that they admit others engaged in. These unsupported statements are insufficient to establish a genuine issue of material fact as to the existence of cultivation on the Passmore tidelands before Russ' Shellfish and Great Northwest began seeding them.

For the Beck tidelands, Norris provides no additional evidence of cultivation before Great Northwest and Russ' Shellfish began seeding. Thus there is no admissible evidence to support the claim that any of these tidelands were cultivated before Great Northwest and Russ' Shellfish began leasing them or before August 28, 1995.

2. The Admissible Evidence Fails to Demonstrate a Lack of a Natural Bed on the McNeal, Passmore and Beck Tidelands.

Norris also argues that no Section 6.3 notice was required because no natural bed existed on any of these tidelands. Response at pp. 14, 16. This argument misses the point that the purpose of a Section 6.3 notice is to permit tribes to determine whether a natural bed exists *before* enhancement or cultivation takes place. Once planted shellfish are commingled with the natural stock, or the natural stock is first harvested, determining the existence of a natural bed is

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at a minimum much more difficult.[2] And, as described in subsection 1 above, Norris has not produced any admissible evidence that no natural populations existed before Great Northwest and Russ' Shellfish began seeding the property. In fact, the SIP places the burden on Norris to show that a natural bed did not exist on the property before he began cultivation,[3] especially where the Tribe was deprived of the opportunity to measure those populations by Norris's failure to give the Tribe the required Section 6.3 notice.

Norris argues that the Tribe's failure to send Section 7 notices of intent to survey and harvest these properties until 2013 is evidence that the Tribe knew that there were no natural populations on those beaches. Response at p. 17. To the contrary, if that fact is evidence of anything, it is that the Tribe understood there to be such populations. For years, the Tribe has harvested natural stock from nearby clam-laden beaches, with concentrations that far exceed minimum density of 0.14 pounds per square foot. (Tribe's Ex. 40: Sparkman Dep. Transcr. at p. 50, l. 7-10; Sparkman Declaration in Support of Reply at ¶ 1.) Moreover, Norris's argument fails from a purely practical standpoint: the Tribe's two biologists can annually survey only a tiny fraction of beaches within Squaxin's U&A, which contains over 13,000 shoreline parcels covering over 443 miles of shoreline. *Id.* at ¶ 2.

3. Compelling Evidence in the Record Shows that Natural Beds Existed.

In fact, compelling and unrefuted evidence shows that these beaches were not seeded and that only wild stock was commercially harvested before Great Northwest and Russ' Shellfish began leasing them. "Where the record taken as a whole could not lead a rational trier of fact to find for the summary judgment movant, there is no genuine issue for trial." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).[4] First, Oakland Seafoods, which leased and harvested these tidelands

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[2] Tribe's Ex. 40: Transcript of E. Sparkman Depo. at p. 43 l. 24-25, p. 44 l. 1-5, p. 46 l. 22-25, p. 47 l. 1-14, p. 49 l. 23-25, p. 51 l. 1-10.

[3] Section 6.3 establishes that the Grower has the burden of proof to show the presence or absence of a natural bed. (Tribe's Ex. 2 at p. 12.)

[4] The Court should disregard Norris's Citation of Additional Authority (Dkt. 40) that cites decades-old irrelevant breach of warranty decisions, as violating Local Rule 7.1(n) (allows relevant authority issued after party's last brief).

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from 1999 to 2008, never obtained any AFRs for these tidelands, the prerequisite to legally seeding and farming them. Motion at p. 4. Second, Oakland Seafoods's lease with the McNeals envisioned only wild stock harvesting and not seeding, in contrast to Norris's leases with these three landowners. (Tribe's Ex. 41.) Norris has not shown that Oakland Shellfish did not have similar leases with the Passmores and Becks.

B. The Tribe is Entitled to Remedy Norris' Violation of Section 6.3 by Recouping Norris' Taking of the Tribe's Share of Shellfish Harvested from the McNeal, Passmore and Beck Tidelands.

Norris argues that even if he violated Section 6.3 there can be no remedy. First, he argues that no remedy exists because Section 6.3 contains no remedy within its terms. Response at p. 17, n. 11. But Section 9 of the SIP provides a remedy for any dispute regarding a violation of any of its terms. And where the Section 9 procedures are not successful in resolving a dispute, this Court has equitable jurisdiction to enforce the terms of its Order.[5] There is no requirement that every section of the SIP contain a separate remedy in order for Section 9 and the Court's equitable jurisdiction to apply to a violation of the Court's order.

Norris also argues that the Court lacks jurisdiction to order a remedy because he no longer leases the properties and therefore has no access to their shellfish populations. Response at pp. 4, 12-13. This misapprehends the relief sought by the Tribe. The Tribe did not seek access to beaches that Norris no longer owns or controls; rather, it seeks repayment only from those beaches that Norris does own or control within the Tribe's U&A.[6] Motion at pp. 17-18.

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[5] *CGI Technologies & Solutions Inc. v. Rose*, 683 F.3d 1113, 1124 (9th Cir. 2012) (history omitted), *citing Swann v. Charlotte–Mecklenburg Bd. of Educ*., 402 U.S. 1, 12 (1971) ("[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"). The Court should also disregard Norris's request that, as to prospective relief, it "at most [ ] declare the law and affirm no other remedy" since the Tribe has not demonstrated a pattern of bad behavior. Response at p. 21. The Tribe has demonstrated a pattern of Norris's bad behavior that justifies the relief requested.

[6] For the same reason, Norris's argument that the property owners are necessary and indispensable parties under Rule 19 parties is equally meritless. Response at pp. 4, 13. The proposed relief, if granted, is fashioned to only impact Norris, not the landowners and not any of the seven beaches at issue here. Tribe's Motion at 14. Norris's brief is devoid of analysis as to how the Tribe's proposed relief implicates the landowners' property or rights, or how the relief sought falls under Rule 19's ambit.

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Norris next argues that there is no showing that his violation resulted in any loss of shellfish and that the Tribe's calculations of the amounts owed are "meaningless without supporting evidence of the actual amount of natural beds/wild stock present on the beaches in question." Response at p. 17. Of course, the "actual amount" of natural stock present on those properties was what would have been determined if Section 6.3 had been complied with. In other words, Norris is attempting to take advantage of information missing as a result of his violations of the Court's order.

Because Norris failed to give the required Section 6.3 notice, the Tribe employed a valid scientific method to estimate the natural populations that would have been available had the notice been given. The Tribe's shellfish biologist, Eric Sparkman, averaged: (1) 2013 Tribal survey results from a nearby Sunset Beach tideland that was free of recent harvest or enhancement activity[7]; and (2) a grower's pre-enhancement harvest from a nearby Sunset Beach tideland. Motion at pp. 6-7; Sparkman Dec. at ¶¶ 4-8. Mr. Sparkman was unable to perform an accurate baseline survey on the three beaches because Norris had not notified the Tribe under Section 6.3 before beginning to cultivate and harvest.[8] The scientific soundness of Mr. Sparkman's methodology is confirmed by WDFW's shellfish biologist Camille Speck. Declaration of C. Speck at ¶¶ 2, 5.

Norris has not submitted any evidence of populations different than the estimates made by the Tribe. Nonetheless, Norris asserts the existence of a disputed fact as to the calculation of the Treaty share of Manila clams pounds, Response at pp. 5, 21-22, but he does not point to any evidence, let alone any that would raise a genuine dispute as to the Tribe's figures. Norris submits a declaration by Andrew Woolliscroft (which is not cited in the brief) who graduated

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[7] The Tribe uses a survey method of the type that the State uses, but more stringent because the Tribe typically surveys beaches that are smaller than state lands. Where the State uses 14 samples per acre, the Tribe uses at least 30; where the state uses a two-dimensional sampling ring or square, the Tribe uses a three-dimensional sampling frame. Sparkman Dec. re Reply at ¶ 3.

[8] The Tribe's Motion at p. 7 erroneously states that a total of 16,549 pounds were lost on these three beaches. The calculation omits 7,518 pounds on the McNeal tidelands, which brings the total to 24,067 pounds.

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from college in 2014, claims no experience with shellfish biology, did no investigation of the properties at issue or those used for Mr. Sparkman's analysis, provides no alternative methodology that Mr. Sparkman should have used, and does not dispute the amount of pounds lost. He opines only that in general shellfish biomass differs throughout a specific area, that extrapolating data from one site to another cannot be performed with precision,[9] and that it is scientifically unsound and unreliable to trend such data back multiple years. *See id*. at ¶¶ 5-8. This "evidence" should be disregarded because Mr. Woolliscroft is not qualified to be an expert and because his opinions are nothing more than speculations and assumptions that have not been shown to apply to the properties involved. The Woolliscroft declaration does not create any genuine issue of material fact; the estimates provided by Mr. Sparkman are undisputed by any credible evidence and are sufficient for purposes of summary judgment.

C. Section 6.1 Does Not Exempt Norris From His Duty to Notify the Tribe Under Section 6.3.

The Court should reject Norris's theory that he had a "safe harbor" to harvest because the Tribe had not issued a "Harvest Notice" under Section 6.1 of the SIP. Response at pp. 3, 18-19. The SIP contains no language supporting such an exemption. Moreover, Section 6.1 is inapplicable. Judge Martinez held:

> Paragraph 6.1 of the Plan applies to shellfish beds on tidelands controlled by a grower who was licensed by the State of Washington as of August 28, 1995, the effective date of the original SIP. . . . Shellfish beds which were not controlled by a licensed grower as of August 28, 1995 are addressed in ¶ 6.3 of the Plan.

Suquamish Tribe v. A&K Shellfish, No. CV 9213, Subproc. 89-305, Order Granting Suquamish Tribe's Motion for Summary Judgment at p. 3 (filed June 13, 2008) (Dkt. 43). Norris has not provided admissible evidence that these tidelands were under cultivation as of August 28, 1995.

[9] The Tribe's methodology, and all other methodologies, can only provide an estimate and not a precise count of every clam. Sparkman Dec. at ¶ 4.

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D. Russell Norris is Personally Liable for Violating Section 6.3 of the SIP on the McNeal, Passmore and Beck Parcels During Great Northwest LLC's Existence.

Norris ignores both Washington legal doctrines asserted by the Tribe – successor liability doctrine and responsible officer doctrine – that render him personally liable for failing to notify the Tribe under Section 6.3 from 2007 to 2011 during Great Northwest's operation.[10] *See* Tribe's Motion at pp. 15-16. Nor does Norris dispute any facts that support these two doctrines, which allows the Court to consider them undisputed. *Id.* at pp. 4-5; Fed. R. Civ. P. 56(e). Instead, Norris raises the "alter ego doctrine," Response at pp. 22-24, which the Tribe did not assert.

Norris is liable under the successor liability doctrine, which is an exception to the general rule that a corporation purchasing the assets of another corporation does not become liable for the liabilities of the selling corporation. 16A Wash. Prac., Tort Law and Practice § 17.7 (4th ed., updated Nov. 2013); *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc*., 166 Wash.2d 475, 481-82 (2009). The test is whether the second business is a "mere continuation" of the first, and courts consider factors that include the continuity of individuals in control of the business, and whether the purchasing business represents "merely a new hat" for the seller. *See id*. at 482.

Russ' Shellfish was a mere continuation of Great Northwest. Russell Norris held the helm at both companies, and controlled the shellfish seeding and harvesting operations on the McNeal, Passmore and Beck tidelands. Motion at pp. 4-5. When Great Northwest dissolved in 2010, Russell Norris seamlessly re-entered the three leases under Russ' Shellfish for additional five year periods, and continued the very same business as Great Northwest of commercially seeding, harvesting and selling shellfish. *Id*. In short, Russ' Shellfish was merely a "new hat" for Great Northwest, and thus assumed Great Northwest's debts and liabilities. *See Cambridge Townhomes*, 166 Wash.2d at 481-82.

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[10] Norris does not, and cannot, dispute personal liability for misdeeds committed while acting through his sole proprietorship Russ' Shellfish.

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Norris is also liable under the corporate responsibility doctrine because, by reason of his position as co-member of Great Northwest, he: (1) personally participated in the decision not to notify the Tribe under Section 6.3; (2) had the responsibility and authority either to prevent the violation in the first instance or to promptly correct it; and (3) failed to do so. *See State Dept. of Ecology v. Lundgren*, 94 Wn.App. 236, 243, 791 P.2d 948 (1999). The undisputed facts are that Russell Norris personally located the McNeals, Passmores and Becks as clients; convinced them to sign leases; signed the leases himself; made the payments to them; remained their primary contact throughout; and continued his business relationship with these landowners after Great Northwest dissolved. Motion at pp. 4-5. Troy Morris attested to little to no contact with the three landowners. *Id.* at p. 5. Norris's conduct was wrongful and egregious, as he deprived the Tribe of its Treaty right to harvest a significant amount of Manila clams on these parcels.

E. Norris's Breaches of the Durand, Verlinde and King Harvest Plans Harmed the Tribe.

Norris incorrectly asserts that the Tribe pled no claim for breach of contract. Response at p. 3. The Tribe's Request for Dispute Resolution asserted that Norris violated the Moore plan by restricting access to part of the beach, and described patterns of improper behavior on the King and Durand beaches. Request at pp. 5-8. Moreover, Norris's violations of the Durand, Verlinde and King agreements did not occur until after the Tribe had filed its Request. Motion at pp. 7-10. And, as described below, Norris was made aware before the Tribe's summary judgment motion that the Tribe would contest these contractual violations. While it may be technically correct as to all but Moore that the original Request did not make contract claims regarding Durand, Verlinde and King, it should not matter. Norris has shown no prejudice, the issue is fully briefed, and it would be wasteful to require Tribe to start over again.

Norris next implies that the Tribe is not entitled to assert breach of the harvest plans because it has not sought consequential damages. Response at p. 3. Neither the harvest plans nor general contract law requires the Tribe to plead consequential damages. *Egbert v. Way*, 15 Wash.App. 76, 79 (1976) (equitable remedy only available if no adequate remedy available at

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law). The Tribe explained why money damages are inappropriate here (which Norris did not refute). Motion at pp. 14-15. Norris also asserts that he has no obligation to keep leasing the tidelands at issue, Response at p. 18, but the Tribe has not sought that relief.

Norris asserts, without support, that terminating the harvest plans absolved him of liability for his breaches that occurred while the plans were in effect. *Id.* The Tribe agrees that when the leases ended, Norris was no longer bound by the harvest plans. Norris, however, does not escape liability for those breaches committed while the harvest plans were in effect. Norris points to no language in the harvest plans that grants him that right, or to a supportive principle of contract law.

Norris has not disputed the material facts in the Tribe's Motion as to his breaches of the Durand, Verlinde and King plans: i.e., that his breaches harmed the Tribe, and the pounds that he owes the Tribe due to his breaches. *See* Motion at pp. 7-10. Instead, Norris generally asserts that he "did not do anything to prevent the Tribe from exercising its rights under the harvest plans", and that "[t]he onus is on the Tribe to initiate the harvest requests." Response at 18. These bald statements do not create a factual dispute.[11]

Norris admits that he breached the King harvest plan in July 2014. *See* Response at pp. 2, 20; Norris Dec. at ¶ 27. Moreover, eleven days after Norris's attorney confirmed that Norris had improperly harvested, Norris cancelled the lease. (Tribe's Ex. 12; Haensly Dec. at Ex. A) The Tribe, however, did not learn about the lease/harvest plan cancellation for another month and was thereby was misled into believing that it still had an opportunity to conduct a catch-up harvest for 850 pounds on the King property. *Id.* at Exhs. A, C.

For the Verlinde beach, the harvest plan guaranteed to the Tribe 1,261 pounds per year on a three year cycle commencing in "clam year" June 2012. (Tribe's Ex. 43.) The plan obligated Norris to "accommodate" the Tribe's subsequent harvests by "coordinating" his "harvest cycle" with the Tribe, while "communicating information that could affect the amount and location of

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biomass available for Tribal harvest." *Id.* Instead, in July 2014 Norris twice harvested 1,425 pounds without communicating any information to the Tribe. Motion at p. 9. The Tribe did not learn of his harvests until September 4, 2014, when it obtained records of Norris's bookkeeper. (Tribe's Ex. 23; Haensly Dec. Ex. B.) The Tribe tried to schedule a harvest, which Norris's attorney resisted. *Id.* at Ex. B. By then, however, Norris had already cancelled the Verlinde lease without informing the Tribe, thereby depriving the Tribe of the opportunity to harvest its subsequent shares on the Verlinde beach. (Tribe's Ex. 12.)

For the Durand tidelands, Norris does not dispute that the Tribe had a 476 pound shortfall in November 2013 following Norris's earlier harvests of 2,765 pounds. *See* Motion at p. 8. Nor does Norris dispute that his subsequent failure to communicate harvest information led to further loss of the Tribal share, when he: (1) refused to consent to the Tribe's request to add the 476 pound shortfall to the Tribe's 2014 450 pound allocation; and (2) then cancelled the lease (and thus the harvest plan). *Id.* The Tribe did not know until September 2014 that it no longer had an opportunity to obtain its shortfall and annual allocation on the Durand beach. *See id.*

F. <u>There are No Material Disputed Facts as to the Moore Tidelands</u>.

The Tribe included the Moore tidelands to support its request for prospective relief. Motion at p. 17. To that effect, Norris does not dispute that he: (1) harvested before the Tribe could survey and a harvest plan was in place; (2) eventually signed a harvest plan that did not restrict the Tribe's subsequent harvests to any one area; (3) nevertheless did restrict the Tribe's harvest area in November 2012; (4) ignored the Tribe's requests for information about the time, location and amount of his harvests; (5) ignored the Tribe's request to make up its shortfall; (6) harvested after the Tribe sought to make up its shortfall; and (7) harvested and sold 1,100 pounds of Manila clams after the Moores had cancelled his lease. *See* Motion at pp. 10-12; *see generally* Response at pp. 8-11.

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[11] *Smith v. Mack Trucks*, 505 F.2d 1248, 1249 (9th Cir.1974) (arguments and statements of counsel are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment).

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Norris asserts that the November 2012 Tribal dig ended prematurely and with a shortfall only because of one Tribal member's comments to other members, and not because Norris denied Tribal members access to portions of the Moore beach. Response at p. 9. Norris, however, does not create a disputed material fact. He fails to describe what the Tribal member said and only speculates that all of the Tribal members stopped digging and left only because of the Tribal member's statements. Moreover, Norris's speculation does not overcome Squaxin Police's Officer Rollins's report which stated, "I observed Russ tell Rana we (Tribal Members) were not going to dig anywhere else until they dug up every square inch of the beach that the Tribal Members were on." (Tribe's Ex. 31 at p. 2.)

Norris makes numerous additional assertions about events in relation to the Moore beach (and to the other beaches) that the Tribe disputes. The Tribe does not address these assertions here because they are irrelevant and immaterial to the Tribe's summary judgment motion.

II. CONCLUSION

For the reasons stated herein, the Court should grant the Tribe's motion for summary judgment and issue the requested order.

Respectfully submitted this 12th day of December, 2014.

THE SQUAXIN ISLAND LEGAL DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 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 Reply in Support of Motion for Summary Judgment Re: Russell E. Norris d/b/a Russ' Shellfish; (2) Declaration of Eric Sparkman, with Exhibits 40-43; (3) Declaration of Camille Speck; and (4) Declaration of Sharon Haensly with Exhibits A-C.

s/Sharon Haensly
Sharon Haensly

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