

The Honorable Karen L. Strombom

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiff(s),

vs.

STATE OF WASHINGTON, et al,

Defendant(s).

Case No. C70-9213

Subproceeding: 89-03-10
(Squaxin v. C. Scott Grout / Gold
Coast Oyster)

GOLD COAST OYSTER LLC'S
AND SCOTT GROUT'S
MEMORANDUM IN
RESPONSE TO SQUAXIN
ISLAND TRIBE'S PETITION
FOR CONTEMPT

COME NOW the Respondents Gold Coast Oyster, LLC ("Gold Coast")
and Scott Grout, by and through their attorneys, Michael W. Johns and Roberts
Johns & Hemphill, PLLC, and submit this memorandum in response to the
Petition of the Squaxin Island Tribe (the "Tribe") for Contempt.

I. BACKGROUND

The Tribe asserts that the Respondents should be held in civil contempt
for violating the terms of the Consent Decree and Settlement Agreement

GOLD COAST OYSTER LLC'S AND
SCOTT GROUT'S RESPONSE TO
SQUAXIN ISLAND TRIBE'S
PETITION FOR CONTEMPT

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2 (“Consent Decree”) entered on November 18, 2013, because the Tribe and
3 Gold Coast mutually negotiated the terms of a Tribal survey of the Midles
4 parcel and the Tribe alleges that Mr. Grout created unsafe conditions for the
5 survey. The Tribe further alleges that the Respondents may have conducted
6 commercial harvests on the Midles parcel and seeks an order allowing it to
7 conduct discovery to substantiate its allegations.
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9 The Consent Decree did not provide that the Tribe could conduct
10 surveys without reasonable conditions, and the Tribe voluntarily entered into
11 and participated in negotiations with the Respondents regarding the conditions
12 to be set for the Midles survey, accepting some of the Respondent’s requested
13 conditions and rejecting others, and the Respondents allowed the survey to
14 proceed despite the rejection of some of their proposed conditions. And while
15 the Tribe asserts that Mr. Grout created unsafe conditions of the survey, he
16 did not threaten or interfere with the Tribal employees conducting the survey.
17 Instead, the Tribe brought an armed Tribal police officer onto the Midles’
18 property without authorization and over the clearly stated objections of the
19 Respondents, creating the non-violent confrontation that occurred on the site.
20 Finally, both the Respondents and the owners of the Midles’ property have
21 categorically denied under oath that any commercial harvest of shellfish has
22 taken place on the Midles parcel. Accordingly, the Court should deny the
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2 Tribe's Petition for Contempt.

3 **II. STATEMENT OF FACTS**

4 The Consent Decree provides that Gold Coast will accommodate and
5 not interfere with the Tribe's opportunity to inspect tidelands under its control
6 before it undertakes any harvesting activity. The Consent Decree does not
7 provide that the Tribe may conduct its surveys without conditions. Nor does
8 the Consent Decree in any way prohibit Gold Coast from proposing conditions
9 that will govern any survey to be conducted by the Tribe.
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11 As set forth in the documentation submitted by the Tribe in support of its
12 Petition, the Tribe informed Gold Coast in December 2014 that it wanted to
13 conduct a survey of the Midles parcel. After communications back and forth
14 between the Tribe and Gold Coast, on December 20, 2014 the Tribe's counsel
15 sent an email to Gold Coast's counsel (Exhibit 11 to Declaration of Eric
16 Sparkman), in which she addressed a dispute that had arisen regarding the
17 scope and methodology of the survey to be performed. Neither the Consent
18 Decree nor the Revised Shellfish Implementation Plan (the "SIP") contain
19 provisions proscribing methods for surveys. Gold Coast wanted the Tribe's
20 survey to include the entire parcel, and the Tribe wanted its survey to cover
21 only what it determined to be the clam or oyster "band". As Mr. Grout and third
22 party Scott Gellatly have explained in their declarations submitted herewith, the
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2 Tribe's survey methodology is flawed and likely to lead to significant statistical
3 error greatly favoring the interests of the Tribe.

4 Nonetheless Gold Coast ultimately agreed to the Tribe's proposed
5 scope for the survey in order to resolve the dispute outlined in the December
6 20, 2014 email. Thereafter the Tribe's counsel, with Gold Coast's counsel's
7 permission, communicated directly with Mr. Grout to negotiate the remaining
8 conditions for the survey. At no time during those communications did the
9 Tribe's counsel inform Mr. Grout that the Tribe considered his proposing
10 conditions of the survey to be a violation of the Consent Decree. Instead, the
11 Tribe accepted some of Gold Coast's conditions and rejected others. Despite
12 the fact that the Tribe had not agreed to all the conditions proposed by Gold
13 Coast, the Respondents allowed the scheduled survey to proceed as
14 requested by the Tribe.
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17 However, the Respondents had made it clear to the Tribe that it would
18 not agree to allow a Squaxin Tribal Police officer to accompany the survey crew
19 onsite. The Tribe's counsel first informed the Respondents that the surveyors
20 might be accompanied by a Squaxin Tribal Police officer by letter dated
21 January 21, 2015 (Exhibit 20 to Declaration of Eric Sparkman). Mr. Grout
22 immediately responded by email (Exhibit 19 to Declaration of Eric Sparkman),
23 informing the tribe that Gold Coast would allow "[n]o officer(s) on site, period."
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2 His email further informed the Tribe that any security detail it desired could
3 remain in the Tribe's vessel, but could not enter the site, and that if the Tribe
4 truly wanted an armed guard present he would arrange for a Washington
5 Department of Fish and Wildlife officer to be present.

6 The Tribe's survey took place as scheduled on February 6, 2015. Mr.
7 Grout was present to monitor the survey process. Though the Tribe has
8 submitted unauthenticated and unsworn witness statements (Exhibit 23 to
9 Declaration of Eric Sparkman) in which various persons make conclusory
10 assertions that Mr. Grout "became agitated and was escalating", the Tribe has
11 failed to produce any testimony substantiating its claim that Mr. Grout created
12 an unsafe environment for the survey crew. The only factual allegations made
13 in the unsworn witness statements are that Mr. Grout denied that he had done
14 any digging, he argued with Mr. Sparkman about the survey methodology and
15 he refused to mark the property boundaries.

16 As both Mr. Grout and Mr. Gellatly have testified in their declaration
17 submitted herewith, it was Mr. Sparkman, not Mr. Grout, who initially became
18 agitated due to his belief that Gold Coast was responsible for the digging
19 evident on the beach. Mr. Grout did nothing to threaten the Tribal staff
20 members performing the survey or to cause them to fear for their safety.
21 Instead, and despite Mr. Grout's clear statement in his January 21, 2015 email
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2 that no tribal police officers would be allowed on the Midles' property, Tribal
3 staff summoned an armed Tribal officer, who had no authority off of the Squaxin
4 reservation and no right to enter the Midles property, to come onto the Midles
5 property. Only then did Mr. Grout actually become agitated and he demanded
6 that the officer leave the property. The officer refused and Mr. Gellatly
7 ultimately had to call the police. In response a Department of Fish and Wildlife
8 officer and a Thurston County Deputy Sheriff arrived at the scene and defused
9 the situation caused by the Tribe's actions, allowing the survey to proceed
10 peacefully.
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12 Six months later, despite the survey having long since been completed
13 and no further issues having arisen between the Tribe and Gold Coast, the
14 Tribe's counsel belatedly sent Gold Coast's counsel the Tribe's Notice of
15 Dispute (Exhibit 35 to Declaration of Eric Sparkman). Over the next two
16 months the parties exchanged settlement communications. As those were not
17 successful, Gold Coast's counsel on September 8, 2015 sent a letter to the
18 Tribe's counsel proposing the parties meet to try to resolve the dispute. On
19 September 11, 2015 the Tribe's counsel responded, informing Gold Coast that
20 the Tribe did not want to meet unless Gold Coast agreed in advance to
21 modifications to the Consent Decree that would restrict Mr. Grout from being
22 present during future site surveys and that would allow the Tribe to bring armed
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2 officers onto private property controlled by Gold Coast. As Gold Coast would
3 not agree to those unjustified conditions, no meeting ultimately took place to
4 try to resolve the situation without Court intervention.

5 **III. LEGAL ARGUMENT**

6 Civil contempt consists of a party's disobedience to a specific and
7 definite court order by failure to take all reasonable steps within the party's
8 power to comply. A person should not be held in contempt if his action
9 "appears to be based on a good faith and reasonable interpretation of the
10 [court's order]." *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d
11 885, 889 (9th Cir.1982) (quoting *Rinehart v. Brewer*, 483 F.Supp. 165, 171
12 (S.D.Iowa 1980).
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15 "Substantial compliance" with the court order is a defense to civil
16 contempt, and is not vitiated by "a few technical violations" where every
17 reasonable effort has been made to comply. *General Signal Corp. v. Donallco,*
18 *Inc.*, 787 F.2d 1376, 1378–79 (9th Cir.1986). The party alleging civil contempt
19 must demonstrate that the alleged contemnor violated the court's order by
20 "clear and convincing evidence," not merely a preponderance of the evidence.
21 *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695
22 (9th Cir.1993).
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2 1. Gold Coast Did Not Fail To Accommodate The Tribe's Right to
3 Access Tideland and Survey By Negotiating Conditions For The
4 Survey.

5 Nothing in the Consent Decree provides any guidelines as to how
6 surveys are to be conducted. Nor does the Consent Decree in any way provide
7 that Gold Coast is prohibited from requesting that the Tribe comply with certain
8 standards when conducting its surveys. Instead, the Consent Decree simply
9 provides that Gold Coast will accommodate the Tribe's right to access
10 tidelands and conduct its surveys.

11 Gold Coast fully complied with the Consent Decree. Upon receiving
12 notification of the Tribe's request to access and survey the Midles' tidelands
13 Gold Coast agreed to a scheduled date and time for the survey. Thereafter it
14 marked the boundaries of the bed it intended to cultivate and made the
15 tidelands available for the Tribe's staff to visit and conduct their survey.
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17 Prior to the date of the survey Gold Coast did propose conditions for the
18 survey to the Tribe – but again, nothing in the Consent Decree prohibits Gold
19 Coast from doing so. Had the Tribe wanted to force Gold Coast to allow it to
20 conduct surveys without any conditions other than those desired by the Tribe
21 it could and should have sought to include such provisions into the Consent
22 Decree – though Gold Coast would never have entered into the Consent
23 Decree with such provisions.
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2 The Tribe nonetheless alleges in its motion that Gold Coast violated the
3 Consent Decree by “demanding unreasonable preconditions” for the Tribe’s
4 survey of the Midles’ property. But significantly the Tribe did not take that
5 position in response to Gold Coast’s requests. In her December 20, 2014
6 email to Gold Coast’s counsel the Tribe’s counsel did not assert that Gold
7 Coast was in violation of the Consent Decree by proposing any conditions for
8 the survey. Nor did she later make such an assertion prior to the survey
9 occurring.
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11 Instead, the Tribe through its counsel engaged in negotiations with Gold
12 Coast regarding the conditions that would govern the survey. The Tribe
13 ultimately agreed to some of the conditions proposed by Gold Coast and
14 refused others and the survey then took place despite the Tribe’s refusal of
15 some of the terms requested by Gold Coast. Clearly Gold Coast did not
16 interfere with or “fail to accommodate” the Tribe’s access to or survey of the
17 Midles’ tidelands.
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19 2. Gold Coast Did Not Fail To Accommodate The Tribe’s Right to
20 Access Tideland and Survey By Creating Unsafe Conditions.

21 The Tribe alleges that Mr. Grout threatened and intimidated Tribal staff
22 both before and after the Midles survey. The Respondents will address below
23 the Tribe’s allegations about events occurring after the survey, but obviously
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2 events occurring after the survey could not have had any impact on the Tribe's
3 ability to conduct its February 6th survey of the Midles' tidelands.

4 Nor has the Tribe provided any evidence to support its allegations that
5 Mr. Grout threatened or intimidated Tribal staff either before or during the
6 survey. It certainly makes numerous conclusory allegations in its
7 memorandum, such as that Mr. Grout "created an unsafe work environment
8 for Tribal biologists" and "he directed threatening and insulting racist and
9 sexual comments at Tribal staff".
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11 But neither Rana Brown nor Eric Sparkman, the Tribal staff members
12 who conducted the survey, have provided any testimony whatsoever in their
13 declarations submitted in support of the Tribe's motion to substantiate the
14 Tribe's allegations. Ms. Brown simply identified a cell phone video she made
15 of Mr. Grout's interactions with Tribal officer Blankenship. Mr. Sparkman
16 provides assertions regarding his interaction with Mr. Grout at a conference
17 that took place a month after the survey of the Midles' beach, but provides
18 absolutely no testimony asserting that Mr. Grout engaged in any threatening
19 behavior before or during the survey.
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22 Instead, the Tribe has submitted an unauthenticated document
23 purporting to be a Squaxin Island Police Report, Exhibit 23 to the Declaration
24 of Eric Sparkman, attached to which are unattested witness statements. Even
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2 in these unsworn statements neither Mr. Sparkman nor Ms. Brown provided
3 any facts to support the Tribe's allegations that Mr. Grout threatened or
4 intimidated them. Indeed, their statements conflict with each other as to what
5 occurred on the beach prior to the intervention by the Tribal officers.

6 Mr. Sparkman states that after being greeted at the beach by Mr. Grout
7 and Mr. Gellatly, he and Mr. Grout engaged in discussion regarding the
8 evidence of digging on the beach. He then states that "[a]s I prepared to survey
9 the beach I ask (sic) Rana to request that our enforcement come in where they
10 could help if something happened." He reports no threatening or intimidating
11 actions of Mr. Grout whatsoever before he requested Ms. Brown to summon
12 the Tribal officers to the beach.
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15 Ms. Brown, by contrast, asserts that Mr. Grout immediately "began a
16 barrage of complaints and negative commentary, from which she concluded
17 that "[i]t was clear he was trying to antagonize us." She then asserts that Mr.
18 Grout "became agitated and was escalating" so she asked the Tribal officers
19 to come to the beach.
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21 Even taking Ms. Brown's statements at face value, she fails to identify
22 any facts to support her conclusory statement that Mr. Grout was "escalating",
23 much less provide the Court with any information to assess how Mr. Grout's
24 supposedly "escalating" could have constituted a threat to Tribal staff. But her
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2 statement that she called for assistance from the Tribal officers due to her
3 assessment of Mr. Grout's "escalating" contradicts Mr. Sparkman's statement
4 that he actually directed Ms. Brown to call the officers to the beach just so they
5 could help if something happened. Nor do Mr. Sparkman's statements provide
6 any support for Ms. Brown's assertion that Mr. Grout intended to antagonize
7 tribal staff or was "escalating".
8

9 It is clear that Tribal staff decided in advance of the site visit that they
10 wanted Tribal officers to accompany them to the beach and they proceeded to
11 direct the officers to come onto the beach without any provocation from Mr.
12 Grout. Only after the Tribal officer had entered the beach, in direct
13 contravention of Gold Coast's written statement that no Tribal officers would
14 be allowed onsite, and without citation for any authority for them to enter
15 private property outside of the reservation, did a conflict actually occur onsite.
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17 However, even after the Tribe's unjustified actions caused the conflict,
18 Mr. Grout did nothing to threaten tribal staff. Instead, after he could not
19 convince officer Blankenship to leave the beach, he directed Mr. Gellatly to call
20 911 to summon officers who actually had authority to resolve the situation. As
21 a direct result of that call the situation was ultimately defused and the survey
22 proceeded peacefully.
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2 The Tribe has provided no authority for the proposition that Tribal police
3 had authority to come onto the Midles' private property without authorization.
4 It is clear that the Tribe fully intended to have its officers enter the property
5 despite having been told in advance, and in writing, that its officers would not
6 be allowed on the property. The Tribe thus chose to introduce armed
7 personnel who had no right to be on the beach, and now seeks to use its own
8 unjustified actions to seek sanctions against Gold Coast and Mr. Grout
9 because they did not acquiesce in the Tribe's actions.
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11 Finally, Mr. Sparkman alleges that at a conference a month after the
12 Midles' survey Mr. Grout made derogatory and racist statements about officer
13 Blankenship. Even if true, nothing in the Consent Decree can possibly be read
14 as an attempt to limit Mr. Grout's freedom of speech, or even his right to be a
15 boor. Mr. Grout disputes Mr. Sparkman's assertion that he made a threat
16 against officer Blankenship, and Mr. Sparkman provides no testimony that Mr.
17 Grout made any statements that indicated he would interfere with any future
18 Tribal surveys or harvests.
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20 There is no merit to the Tribe's request for sanctions against Gold Coast
21 and Mr. Grout. Nor is there any basis for the Court to amend the Consent
22 Decree, much less to impose restrictions on Mr. Grout's freedom of movement
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2 or his right to be present on property that his company controls when Tribal
3 surveys or harvests may occur.

4 3. There is No Basis For Allowing The Tribe To Conduct Discovery.

5 The Tribe asks the Court to allow the Tribe to seek discovery against
6 Mr. Grout and Gold Coast regarding commercial harvests it alleges took place
7 on the Midles' property. Yet the Tribe provided no authority for its request, or
8 even addressed its request in the Legal Argument section of its brief.
9

10 The Tribe has no evidence to support its staff's alleged suspicions that
11 Gold Coast conducted a commercial harvest on the Midles' property. Mr.
12 Grout has in his declaration categorically denied that any such harvest took
13 place. Both Dwight Midles and Lisa Midles, the owners of the property, have
14 also denied that any such harvest took place and have stated that such a
15 harvest could not have occurred without their knowledge as they live at the
16 property.
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2 There is therefore no basis for requiring Gold Coast to open any of its
3 business records to the Tribe, or for requiring Mr. Grout to submit to
4 examination. The Tribe's request should be denied.
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6 DATED this 11th day of January, 2016.

7 ROBERTS JOHNS & HEMPHILL, PLLC

8
9 /s/ Michael W. Johns

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17 Certificate of Service

18 The undersigned states that on January 12, 2016 the document to
19 which this certificate is attached was electronically filed with the above-entitled
20 Court using the CM/ECF system and all parties were notified via ECF
21 notification.
22

23 /s/ Michael W. Johns

24 Michael W. Johns, WSBA#22054
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26 GOLD COAST OYSTER LLC'S AND
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