The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants.	Case No. 2:70-CV-09213 Subproceeding No. 89-3-12 (Shellfish) AMENDED PETITION FOR REVIEW - APPEAL FROM MAGISTRATE ORDER TO DISTRICT COURT

INTRODUCTION

Pursuant to the Stipulation and Order Amending Shellfish Implementation Plan, ¶ 9.1.4 (April 8, 2002), 19 F. Supp. 3d 1317, 1344 (W.D. Wash. 2000 (Order April 2002))("*SIP*") and Fed. R. Civ. P. 72(b), the Jamestown S'Klallam Tribe and Port Gamble S'Klallam Tribe (collectively "S'Klallam") hereby petition for review of the Amended Order, entered on April 20, 2020, (Dkts. 22187, 142), Order Denying Motion (Dkts. 22186, 141), and Permanent

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Injunction (Dkts. 22188, 143). This Petition supersedes the prior petition (Dkt. 125).[1] Section 9.1.4 of the *SIP* is the primary authority for this review, allowing 20 days to file from the date the Court lifted the stay in this proceeding; this amended petition is timely.

STATEMENT OF THE FACTS

This dispute arises from a loss of treaty fishing opportunity[2] in a case where the Grower, Gold Coast Oyster, LLC ("Gold Coast"), controlled numerous tidelands within the Tribes' U&A's, but did not provide adequate notices to the Tribes and actively impeded Tribal access to the tidelands through various means, resulting in it harvesting shellfish before the Tribes could even survey or obtain any measure of their treaty share. These actions violated the *SIP*.

On January 31, 2020, the Court issued its Order on Request for Dispute Resolution, finding that Gold Coast violated the *SIP*, and it enjoined them temporarily from engaging in shellfish activity "on every Hood Canal tideland currently under its control." Dkt. 122, pp. 30-31 (Rasmussen Decl., pp. 34-35). The S'Klallam petitioned for amendment of the Order, and on April 20, 2020, the Magistrate issued a slightly amended order, revising its interpretation of the law regarding upland access. Dkt. 142 (Second Rasmussen Decl., p. 5). It also entered a permanent injunction against Gold Coast. Dkt. 143 (Sec. Rasmussen Decl., p. 41).

Although the Court recognized Gold Coast's numerous violations of the *SIP* and that the Tribes suffered losses, including "loss of opportunity" for "several years," it denied the Tribes any repayment for these losses. Dkt. 142, pp. 8, 29-30 (Sec. Rasmussen Decl., pp. 17, 38-39);

[1] This Petition will also rely on previously filed declarations at Dkt. 125-1 (Rasmussen) and Dkt. 125-2 (Miller).

[2] These treaty rights are more than a "right to dip one's net into the water . . . and bring it out empty." *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

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Dkt. 143. The Magistrate denied repayment to the Tribes, finding that the Tribes had an obligation to recreate the amount or number of the shellfish Gold Coast had taken in order to be entitled to *any* repayment. Dkt. 142 p. 15:11-16, p. 29:1-2 ("Overall, the Tribes have not sufficiently connected Gold Coast's actions to evidence showing Gold Coast denied the Tribes their treaty share of shellfish.") (Sec. Rasmussen Decl. pp. 24, 38). Worse, it is now clear that Gold Coast falsified tags and did not submit landings data to the State which further interferes with the Tribes' ability to track losses. Dkt. 132-1, pp. 4, 7 (Sec. Rasmussen Decl. pp. 65, 68).

The S'Klallam had assumed that Gold Coast was not harvesting based on the available information, which Gold Coast controlled. Dkt. 110, Trial Tr. 9/18/19, p. 51. The State itself also had no reports of Gold Coast's harvest since 2011. *See* WAC 220-370-060 (3) (illegal to not have an AFR, renewal or reporting required); SK-141, p. 1 ("We hadn't received any reports since December 2011."); PGJ-8, p. 1 ("Neither Scott Grout, his wife, nor Gold Coast Oyster Company have any AFRs or ECFs, for any parcels anywhere"). In the notices that Gold Coast did send to the Tribes, its practice was to indicate that there was no minimum density of shellfish, even though evidence showed that Gold Coast went out to harvest many of these tidelands prior to serving 157 notices and without knowledge of the tideland's sustainable yield. Dkt. 125-1, Trial Tr. 9/18/19, p. 29 (Rasmussen Decl., p. 40); Dkt. 114, Post-Trial Br., pp. 27-40 (description of harvesting activities on the tidelands) (Sec. Rasmussen Decl., pp. 111-124); Dkt. 110, Trial Tr. 9/18/19, p. 43:9-20 (Hatch); SK-48, p. 1 (record of harvest on Barber and other parcels); Dkt. 125-1, PJG-21 (records of harvest on various parcels) (Rasmussen Decl., pp. 64-74); PGJ-4 (tribal objection to 157 notices).

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The Tribes cannot now recreate the true sustainable yield of these parcels. Dkt. 125-1, Trial Tr. 9/18/19, p. 28:23-25 ("They have to provide a certain amount of information to the Tribes regarding the history of harvest and cultivation on that tract."), p. 30:18-25 (Rasmussen Decl., pp. 39, 41). Despite the evidence presented regarding the failure of Gold Coast to properly discharge its burden, the Magistrate seemed to find fault with the Tribes for not entering into harvest plans, despite Gold Coast's refusal to sign such plans. Dkt. 142, p. 25 (Sec. Rasmussen Decl., p. 34); Dkt. 115, p. 7:8-10 (Sec. Rasmussen Decl., p. 140) (citing testimony at Dkt. 108, Trial Tr. 9/16/19, p. 160:3-5 (Paul), at Dkt. 109, Trial Tr. 9/17/19, p. 78:3-16 (Wolf) and at Dkt. 110, Trial Tr. 9/18/19, p. 51:1-7 (Hatch)); PGJ-25 (unsigned proposed harvest plan).

The injunction does not provide for *any* repayment of lost treaty share, but instead it orders that "[h]arvest quotas are limited to each Parties' allocation of shellfish (e.g., Treaty and non-Treaty shares) as set forth in the SIP." Dkt. 143, p. 6:1-2 (Sec. Rasmussen Decl., p. 46). The Magistrate Judicial Proceedings Court ("MJP Court") found that a harvest plan was *not* a requirement or pre-requisite to harvesting when in reality it is clearly set forth in the *SIP* as a requirement and placed the burden on the Tribes for not surveying tidelands where they had no records from Gold Coast regarding the tideland history and where Gold Coast obstructed their attempts to access the tidelands. Dkt. 142, p. 30 ("The parties have not cited to a provision in the *SIP* that expressly prohibits harvesting prior to entering a harvest plan."), p. 26 ("This evidence belies the Tribes contention that they were unable to survey tidelands because of Gold Coast's behavior.") (Sec. Rasmussen Decl., pp. 39, 35)

In the Department of Health ("DOH") administrative process that followed this case, DOH handed down a 2,544-month suspension of Gold Coast operators' license. Dkt. 132-1, p. 12 (Sec.

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Rasmussen Decl., p. 73, ¶ 3.8). What is important about these subsequent DOH proceedings is that it demonstrates that the business practices of Gold Coast were as the Tribes asserted to the MJP Court.[3] Dkt. 132-1, pp. 2-12 (Sec. Rasmussen Decl. pp. 63-72).

ISSUES FOR REVIEW

The MJP Court made three errors in its amended decisions (Dkts. 141, 142) and its permanent injunction (Dkt. 143), as follows: (1) misplaced the initial burden despite clear misconduct by Gold Coast; (2) overruled the mandate for harvest plans to be in place prior to harvest; and (3) provided no repayment for loss of treaty fishing opportunity. For the reasons set forth below, this Court should reverse the MJP Court with respect to the three alleged errors.

STANDARD OF REVIEW

Disputes arising under the terms of the *SIP* are first reviewed by the Magistrate Judge per Magistrate Judge Proceedings ("MJP"). *SIP*, § 9.1. Under § 9.1.4, an appeal of the MJP "written decision" that "resolve[s] the dispute" may be made to the district court within twenty days. *SIP* § 9.1.4, 19 F. Supp. 3d at 1365. Per the *SIP*, this type of appeal is made to this Court, though it "shall be considered pursuant to . . . Federal Rule of Civil Procedure 72(b)." Review by this Court is *de novo.* 28 U.S.C. § 636(b)(1); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix Inc.*, 725 F.2d 537, 546 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984). And this *de novo* review is based on the record before the Magistrate Judge with additional evidence considered if the Court

[3] The Tribes had requested that DOH staff testify at trial, but the Attorney General's office indicated they had only a "small modicum" of relevant information on Gold Coast; the S'Klallam then withdrew their request. Dkt. 108, Trial Tr. 9/16/2019, p. 12:5-11. Given these findings, though, it now appears that DOH employees were dealing with the same problems with Gold Coast as the Tribes had experienced. *See* Sec. Rasmussen Decl., pp. 63-72.

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finds it appropriate. Fed. R. Civ. P. 72(b)(3); *North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1450 (9th Cir. 1986).

ARGUMENT

A. The Three Errors Must Be Reversed.

1. The Decision Reversed the Burden, Rewarding Obstruction.

The MJP decision, Dkt. 142, erred because it placed the entire burden of proof on the Tribes to show precise treaty losses, despite the fact that Gold Coast never discharged its initial burden under § 6.3 of the *SIP*. The MJP disregarded the Tribes' position and ruled that they had provided mere "speculative interpretations of circumstantial evidence," despite the fact that the limitation on the available evidence was the fault of Gold Coast. Dkt. 142, p. 15:11-12, (Sec. Rasmussen Decl., p. 24); Dkt. 125-1, Trial Tr. 9/17/2019, p. 134:5-25, (Rasmussen Decl., pp. 57, 61). However, establishing the burden of proof as mandating proof of precise treaty losses violates Article IV of the Treaty of Point No Point (12 Stat. 933(1855)), which promised the Tribes the right to "fish in common" with those who later settled this land. Tribal treaty rights attach to the tidelands within their U&A automatically, regardless of quantification or enforcement. Gold Coast's duty was to preserve those rights even when nobody was watching.

Here, the MJP Court effectively allowed the Grower to begin (and continue) to harvest on tidelands in Hood Canal after failing to scientifically establish the tideland's "sustainable harvest yield." *See* PGJ-4 (Letter notifying Mr. Grout); Dkt. 125-1, PGJ-21 (Rasmussen Dec., pp. 62-74). In effect, the MJP ruling disposed of the *SIP* requirements entirely because it shifted the burden to the Tribes to prove that more than 50% of the unknown yield was taken from them. Dkt. 142, pp. 5-30 (Sec. Rasmussen Decl., pp. 14-39).

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The Court's burden shifting is in error. The uncontradicted testimony of Mr. Hatch, a 40-year veteran fisheries manager, for example, provided that it is the Growers' burden to establish that there is no minimum density, and if there is, then the Grower must establish what the sustainable yield is on parcels where it operates. Dkt. 125-1, Rasmussen Decl. p. 40 (Hatch testimony). Likewise, Mr. Hatch testified that this determination cannot be done after harvest, nor can someone credibly assert they left the treaty share on a tideland without having first performed a quantitative analysis. Dkt. 125-1, pp. 40-41. He testified that he notified Gold Coast of these obligations in 2012, via a letter, admitted as PGJ-4. Dkt. 125-1, pp. 42-45. Further, Mr. Hatch testified that Gold Coast began by asserting incorrectly that there was no minimum density (i.e., no natural bed) on the parcels. Dkt. 125-1, pp. 43-44. Gold Coast then repeatedly harvested parcels where it claimed there was no natural bed, prior to serving the required § 6.3 notices. *See* Dkt. 114, Post-Trial Br., p. 27-40 (Sec. Rasmussen Decl., p. 111-124).

The MJP should have recognized that Gold Coast never discharged its initial burden as provided in the *SIP*, and that the "Grower shall have the burden of proof." *SIP*, 19 F. Supp. 3d at 1359. The MJP did hold that "the Court finds Gold Coast's decision to hold itself out as a commercial Grower for several years caused a loss of opportunity for the Tribes." Dkt. 142, p. 8:5-6 (Sec. Rasmussen Decl., p. 17).[4] Given Gold Coast's actions, though, it is inequitable that the MJP Court required the Tribes to prove precisely what number of shellfish was taken from the tidelands controlled and operated *by the Grower*. Dkt. 142, p. 8:13-14, 19-22, p. 9:1-22, p. 10:1-5 (Sec. Rasmussen Decl., pp. 17-19); Dkt. 110, 9/18/19 Trial Tr., p. 51:1-7 (Hatch); Dkt.

[4] This "loss of opportunity" is irreparable harm in and of itself, which is incapable of precise quantification.

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125-1, PGJ-21, 22, 23 (amounts harvested without a plan) (Rasmussen Decl., pp. 64-74, 77, 79); Dkt. 114, Post Trial Brief, pp. 27-30 (Sec. Rasmussen Decl. pp. 111-114).

In essence, the MJP Court improperly shifted the initial burden. *See* 19 F. Supp. 3d at 1344, 1359; Dkt. 142. Pursuant to 9th Circuit case law, *U.S. v. Washington*, 157 F.3d 630, 653 (9th Cir. 1998), the Circuit has clearly established that a Grower is in the best position to make this determination:

> **We place the burden of proving pre-enhancement harvest versus post-enhancement harvest on the Growers – for the Growers are best able to prove such a calculation. (footnote omitted).**

157 F.3d at 653 (emphasis added). Lastly, the MJP Court's burden shifting is even more erroneous in light of the evidence that Gold Coast created "unreasonable requirements" on the Tribes when they attempted to perform their duties, such as scheduling surveys required by the *SIP*. Dkt. 142, p. 8:13-14 (Sec. Rasmussen Decl., p. 17).

Now that DOH has found Gold Coast also falsified records, there is even more reason why this Court should reconsider the MJP's conclusions. Dkt. 132-1, pp. 2-12 (Sec. Rasmussen Dec., pp. 63-73 (DOH Findings)). The S'Klallam presented evidence of Gold Coast's harvests of private tidelands without complying with § 6.3, without establishing the sustainable yield, and without entering into a harvest plan. Dkt. 125-1, Rasmussen Decl., pp. 64-74. For example, the S'Klallam provided evidence of the Barbers' tideland, where Gold Coast had an agreement for "exclusive" use of that tideland to harvest "commercial quantities of marketable shellfish." *See* SK-100, p. 19. Gold Coast agreed to pay the Barbers what it called a "royalty" payment. *Id*. The Tribes' provided evidence that this "royalty" payment to the Barbers was, in fact, payments for the shellfish Gold Coast *harvested* off their tidelands. Dkt. 142, p. 20:13,

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(Sec. Rasmussen Decl., p. 29). Mr. Miller, the expert presented by the Tribes, concluded that based on his evaluation of these checks and combined with the invoices [SK-56, p. 110 (invoices); SK-48, p. 1 (sales records)] and his knowledge of the industry as well as experience dealing with Gold Coast, even though a check entry indicates "sale," given Gold Coast's operations and reputation and the quantities involved, it was a "purchase":

> James and Marlene Barber, Bernstein, Betty Quatier, Anderson, numerous names in there that made me think that, well, these are likely to be private tideland owners. Why would a private tideland owner be buying 325 dozen oysters, why would this other one be buying 480 dozen oysters. Those are rather large quantities.

Dkt. 125-1, Trial Tr. 9/17/19, p. 130:16-21 (Rasmussen Decl., p. 47). Gold Coast held the harvest site certificate and had "exclusive" harvest rights for these tidelands. *See, e.g.,* SK-100, p. 19 (Barber license agreement). There was no challenge to the repayment amount set forth in the S'Klallam exhibit PGJ-22; yet, the Magistrate still denied repayment of the past Tribal share. 125-1, pp. 75-80. Gold Coast, as a result, got away with what it had done.

The MJP court's evidentiary burden here also sends the wrong message to the shellfish industry. In the A & K Trust proceeding the Court sent the opposite message:

> The Trust shall document, by species and date, the quantities (if any) of shellfish that have been harvested from the Erlands Point property, and the quantities and value of each species of shellfish (if any) that have been sold from such harvest.

Order Granting Preliminary Injunction, 20 F. Supp. 3d 777, 784 (Subproc. 89-3-03, W.D. Wash. May 18, 2004). The law of the case supports the S'Klallam position that *the Grower* must be able to provide accurate information about the actual amount of harvest taken from the tideland, and any lack of clear documentation should create a negative inference of overharvest, if anything. *See* Dkt. 125-1, PGJ-21, PGJ-22, PGJ-23 (Rasmussen Decl., pp. 64-81). The MJP

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ruling instead required the Tribes produce "narrowly-tailored evidence," despite the fact that the Grower controlled and manipulated the evidence. Dkt. 142, p. 28: 18-19, p. 29:8-9, (Sec. Rasmussen Decl. pp. 37-38).

2. This Decision Overrules the Harvest Plan Mandate.

The MJP decision also erroneously ignored the Grower's failure to discharge their burden to establish the sustainable yield *before* harvesting and failed to require that this yield be set forth in a plan *before* the actual harvest. Dkt. 142, p. 17, 26 (Sec. Rasmussen Decl., pp. 26, 35). The MJP specifically found that the "parties have not cited to a provision in the *SIP* that expressly prohibits harvesting prior to entering into a harvest plan." Dkt. 142, p. 26:18-19 (Sec. Rasmussen Decl. p. 35). But the provisions of the *SIP* absolutely require a harvest plan to contain the sustainable yield, and the only logical conclusion is that this determination must be made prior to harvest by either party. *SIP*, 19 F. Supp. 3d at 1345, 1356, 1359 (e.g., §6.2: "[T]he Grower and affected Tribes(s) shall coordinate the development of a harvest plan" and §6.3: "[A] harvest plan must be developed . . ."). The "equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and nontreaty shares." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685, 99 S. Ct. 3055 (1979). The *SIP* is a court order which establishes how these treaty rights are to be implemented with respect to shellfish. The 9th Circuit's Shellfish decision applied this "all fish count" rule to shellfish. *United States v. Washington*, 157 F.3d at 652. However, the MJP decision here, Dkt. 142, throws out the harvest plan requirement and with it, the protection of the treaty share. *See* Dkt. 114, Post Trial Br., pp. 17-18 (Sec. Rasmussen Decl., pp. 101-102). This is a reversible error.

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a. The Division of Resources Starts with Determining the Sustainable Harvest.

Section 6.3 of the *SIP* requires a Grower to provide analysis of the tidelands under its control (i.e., determine the "sustainable yield") *prior* to harvesting or enhancing a tideland and be able to produce records of all of its activities on the tidelands. § 6.3 (e.g., "*If* a Grower plans to enhance an existing natural bed or create a new . . . *shall* give written notice to the affected Tribes . . ." and "notice shall explain the basis for the Grower's determination . . . sustainable yield . . .") (emphasis added).[5] The language in § 2.3 also outlines what it means to be sustainable:

> [T]he approximate portion of a shellfish resource that can be harvested from a shellfish population on an annual basis in perpetuity. It is analogous to the "sustained yield" or "harvestable surplus" that biologists, using sound and accepted management methods, determine can be harvested from a shellfish bed, or mobile shellfish population, while preserving the ability of the remaining shellfish population to maintain annual production of the sustainable harvest biomass in perpetuity.

See also United States v. Washington, 898 F. Supp. 1453, 1463 (W.D. Wash. 1995). This Court should clarify that it is not acceptable that Gold Coast harvested without even *knowing* the sustainable yield. The current result is inconsistent with sustainable shellfish management.

b. The *SIP* Effectuates In-Common Sharing by Requiring Harvest Plans.

To avoid conflict and mismanagement of the shellfish resource, a harvest plan is necessary, which includes calculation of the Tribal share after the sustainable yield is

[5] The *SIP* contains no allowance for harvests without these critical steps. In § 4.8, for example, for other shellfish fisheries the *SIP* provides that "no contested fishery" is to allowed to move forward without dispute resolution and the party proposing a fishery without agreement must demonstrate "a sound fisheries management basis for the contention that a harvestable surplus exists" and that it will not "interfere with the sharing principles." This provision §4.8 mirrors §6.3 in both result and purpose, recognizing that disputes about harvest shares must be resolved *prior to* an actual harvest by either party. Section 4.8 provides that it is a sufficient basis to object to a fishery when it violates the *SIP*.

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determined. This harvest plan provision is in the *SIP* at § 6.2, § 6.3, and § 2.3. For example, § 6.3 of the SIP requires that a "harvest plan . . . be developed that provides the Tribes with fifty percent [50%] of the sustainable harvest . . . ." *SIP*, 19 F. Supp. 3d at 1358. No such harvest plans were entered into with Gold Coast. In the past, harvest plans were proposed, but Gold Coast refused to sign them. Dkt. 115, p. 7:8-10 (Sec. Rasmussen Decl., p. 140) (citing testimony at Dkt. 108, Trial Tr. 9/16/19, p. 160:3-5 (Paul), at Dkt. 109, Trial Tr. 9/17/19, p. 78:3-16 (Wolf), and at Dkt. 110, Trial Tr. 9/18/19, p. 51:1-7 (Hatch)); *see, e.g.,* PGJ-25 (unsigned proposed harvest plan). The only exception to the harvest plan requirement is for "**enhancement or cultivation activities**," which can continue without such a plan. *SIP*, § 6.3 (emphasis added).

The S'Klallam believe that management of shellfish in Hood Canal will be irreparably harmed if the current decision, Dkt. 142, stands because other Growers will now no longer be mandated to enter into harvest plans with the Tribes or determine what the sustainable yield is for a tideland *prior* to harvesting, eliminating what is a necessary and "critical step" in the creation of a harvest plan before any harvest. Dkt. 125-2, Decl. Miller, pp. 3-4 ("A critical step used to support the goals in all of these court mandated management plans is the establishment of agreed-to harvest shares *before* the beginning of the harvest management cycle"). The main concern is "the current ruling appears to indicate that it is the Court's position that shellfish harvest by either a shellfish company or the Tribes can proceed on private tidelands in the absence of a management plan and before sustainable harvest yields and/or harvest shares are established." Dkt. 125-2, Decl. Miller, p. 5. This could "severely disrupt the management goal of orderly, sustainable harvest not only on privately owned tidelands but for all publicly co-managed shellfish species in Puget Sound." *Id*. The S'Klallam urge this Court to reverse this

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error in the Order (Dkt. 142) and uphold the plain language of the *SIP*. This portion of the injunction can remain, because the Magistrate required harvest plans for both parties prior to future harvesting. Dkt. 143, p. 5 (Sec. Rasmussen Decl., p. 45).

3. A Violated Right Mandates a Meaningful Remedy.

The *SIP* was thwarted and treaty rights were violated, resulting in the Tribes losing years of fishing in Hood Canal. Even now, Gold Coast, as a legal entity, may disappear and leave the Tribes with uncertain remedies. But there is no reason to deny recoupment for these past losses. Treaty rights are not erased by the passage of time.[6] The ruling is even more perplexing given that payback on all parcels was specifically agreed to in the PSA. Dkt. 125-1, SK-90 (PSA), p. 3 (Rasmussen Decl., p. 85). Yet, the MJP Court declined to order any recoupment of the treaty share, finding that the Tribes did not establish that any "fish" were taken from them or that the evidence was too speculative for the court to enter any such remedy or recoupment. Dkt. 142, pp. 29-30 (no compensatory damages, no recoupment of treaty-share) (Sec. Rasmussen Decl. pp. 38-39). The injunction merely requires Gold Coast share only 50% of what is left on these tidelands, after two harvest cycles have passed. Dkt. 143, p. 6 (limiting the Tribes to the Treaty share on the tideland) (Sec. Rasmussen Decl., p. 46). While precise calculation of harm may not

[6] The passage of time does not lessen or act to defeat the Tribes' claims to the eight lost years of fishing on these Hood Canal tidelands, as the doctrine of laches does not defeat treaty rights. *See, e.g., United States v. Washington*, 864 F.3d 1017, 1021 (9th Cir. 2017) ("There is an established line of cases holding that the United States cannot, based on laches or estoppel, render unenforceable otherwise valid Indian treaty rights.")

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be always be possible for treaty violations, the Tribes are still entitled to more than the future opportunity to harvest the remaining shellfish.[7]

The Tribes provided an estimate of the minimum amount of shellfish that was taken in violation of the *SIP*, with details at exhibits PGJ-21 through 23. Dkt. 125-1, Trial Tr., 9/17/2019, pp. 130-145, (Rasmussen Decl., pp. 46-61). No Party countered this, and Gold Coast never presented any alternative quantification or objection to the S'Klallam's loss assessment:

> 256,817 dozen oysters and 13,040 pounds of clams in Hood Canal from 2012 to 2018 [PGJ-21, 22, 23] and failing to keep records of its harvest and failing to keep site-specific information on its harvests, prevent overharvest, and comply with State law.

Dkt. 115, ¶ 19.7 (Sec. Rasmussen Decl., p. 141); Dkt. 125-1, PGJ-22, (Rasmussen Decl., p. 77). This assessment included *only* harvests tied to particular Hood Canal tidelands as listed in PGJ-21. Dkt. 125-1, PGJ-21 (Rasmussen Decl., Ex. C, pp. 64-74). It would have been proper for the MJP Court to accept all the Tribes' expert conclusions and evidence as factual, but it declined. *See U.S. v. Ponce*, 51 F.3d 820, 828 (9th Cir. 1995) (district courts' adverse factual finding upheld when no contrary evidence is presented by the defendant).

CONCLUSION

For the foregoing reasons, the S'Klallam respectfully request this Court reverse the disposition set forth by the Orders (Dkts. 141, 142), as provided above. Also, the injunction

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[7] While the MJP "found Gold Coast violated the SIP" (Dkt. 142, p. 29:15) and that the court "has authority to fashion an equitable remedy," the ruling still denied any repayment of the lost opportunity or right to fish. Dkt. 142, pp. 29:16, 30 (Sec. Rasmussen Decl., pp. 38, 39)*; see United States v. Washington,* 2015 U.S. Dist. LEXIS 70252, *52, 2015 WL 3451316 (W.D. Wash. May 29, 2015) (Russ' Shellfish, Subproc. 89-3-09) (authority to fashion an equitable remedy); *United States v. Washington*, 898 F. Supp. 1453, 1458-59 (W.D. Wash. 1995), *aff'd in part, rev'd in part*, 157 F.3d 630, 651-53 (9th Cir. 1998).

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(Dkt. 143) should be modified to require Gold Coast to repay the Tribes for the loss of access for 8 years, either by parity, as requested (Dkt. 125-1, PGJ-21, 22), or an equal time period (8 years) of exclusive harvest opportunity.[8]

Date: June 3, 2020.

s/ Lauren P. Rasmussen
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[8] The issue the S'Klallam raised at the status conference regarding the implication of the loss of Gold Coast's license for over 2000 months and how to implement the injunction (Dkt. 143) has not been resolved, as it is unclear whether Gold Coast is able to meaningfully operate or control tidelands they once controlled. Dkt. 132-1, p. 12 (Sec. Rasmussen Decl., p. 73, ¶ 3.8), pp. 77-83 (disagreement regarding how to implement in absence of operational company). This issue needs reference to the Magistrate to resolve, but it should not impede reversal by this Court of the claimed errors. The legal errors should be resolved prior to remand to the Magistrate.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Amended Petition using the CM/ECF system, which will send notification of the filing to all parties in this matter who are registered with the Court's CM/ECF filing system.

DATED this 3rd day of June, 2020.

s/ Lauren P. Rasmussen
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