

The Honorable Ricardo S. Martinez

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

UNITED STATES OF AMERICA, et al.,

Plaintiff(s),

v.

State of Washington, et al.,

Defendant(s).

No: C70-9213

Subproceeding 89-3-12
*(Skokomish Indian Tribe v. Gold
Coast Oyster LLC et al.)*

**INTERESTED PARTIES SQUAXIN
ISLAND AND NISQUALLY
INDIAN TRIBES' RESPONSE TO
S'KLALLAM TRIBES' AMENDED
PETITION FOR REVIEW**

Interested Parties Squaxin Island Tribe and Nisqually Indian Tribe (collectively Interested Parties”) hereby respond to Respondents Jamestown S’Klallam and Port Gamble S’Klallam Tribes’ (together, “S’Klallams”) Amended Petition for Review - Appeal from Magistrate Order to District Court (Dkt. 150).

The Court invited Interested Parties to respond to S’Klallams’ amended petition. See Dkt. 148. Interested Parties’ primary interest is in ensuring an accurate interpretation and application of the legal principles in the Shellfish Implementation Plan (“SIP”) and other *United States v. Washington* orders. Interested Parties thus respectfully urge that the Court, should it accept the S’Klallams’ amended petition, limit consideration of legal issues involving the SIP and other court orders to those that arose from the disputed

INTERESTED PARTIES SQUAXIN ISLAND AND
NISQUALLY INDIAN TRIBES’ RESPONSE TO
S’KLALLAM TRIBES’ AMENDED PETITION FOR
REVIEW - Page 1

United States of America, et al. v. State of Washington, et al.
No. C70-9213 / Subproceeding: 89-3-12

Squaxin Island Legal Department
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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, I electronically filed the aforementioned 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.

s/Sharon Haensly
Sharon Haensly
Squaxin Island Legal Department

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EXHIBIT 1

THE HONORABLE DAVID W. CHRISTEL

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

UNITED STATES OF AMERICA, et al.,

Plaintiff(s),

v.

State of Washington, et al.,

Defendant(s).

No: C70-9213, Subproc. 89-3-12
(Skokomish Indian Tribe v. Gold Coast Oyster LLC et al.)

INTERESTED PARTIES SQUAXIN ISLAND TRIBE’S AND NISQUALLY INDIAN TRIBE’S RESPONSE TO S’KLALLAM TRIBES’ MOTION TO ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL

Note date: March 13, 2020

I. Introduction

Interested Party Squaxin Island Tribe’s (“Squaxin”) hereby responds to the S’Klallam Tribes’ motion to alter or amend the judgment or for a new trial, Dkt. 131. In general, while the Shellfish Implementation Plan (“SIP”) contains some ambiguity, Squaxin has found that it – in conjunction with the 2011 Tribal-State notification procedures – provides measures to resolve most problems encountered. Squaxin comments on two issues raised by the S’Klallams: (1) whether the SIP imposes on Growers the duty to perform scientifically-supportable surveys to establish the

1 sustainable yield (“biological surveys”); and (2) whether the SIP should be equitably
2 interpreted to prohibit Growers from harvesting until harvest plans are signed.

3 **1. The SIP does not Impose a Duty on Shellfish Growers to Conduct Biological**
4 **Surveys to Establish the Sustainable Yield.**

5 The S’Klallams urge the Court to find that SIP § 2.3 and § 6.3 require Growers to
6 establish the sustainable yield by conducting surveys that meet biological standards. Dkt.
7 131 at p. 2, l. 8-10. The SIP, however, does not mandate this duty.

8 Neither § 2.3 nor § 6.3 expressly requires that Growers perform biological
9 surveys to “establish” the sustainable yield. *See* S’Klallam motion, Dkt. 131 at p. 3, l. 21;
10 at p. 6, l 5. Rather, § 6.3 expressly requires that a Grower’s notice of intent: (1) provide
11 the information listed in the first paragraph of § 6.3 (i.e., “the location and species of the
12 proposed bed and a summary of information known to the Grower regarding the history
13 of harvest and enhancement of any species of shellfish listed on Exhibit A”); (2) “explain
14 the basis” for its threshold determination; and (3) if the determination exceeds the natural
15 bed threshold, “explain the basis” for determining for “what the sustainable yield is.”

16 “Explain[ing] the basis” does not equate to a duty to perform a biological survey.
17 *See* § 6.3. The correct interpretation of the SIP is that the tribe has the opportunity of
18 performing a biological survey to establish the sustainable yield. In contrast, the
19 Grower’s duty is to make a good faith effort to determine the sustainable yield and
20 explain the basis therefore using the facts at hand. Of course, a Grower always has the
21 option to conduct a biological survey, and the affected tribe can always elect to rely upon
22 that survey.

1 It is then incumbent upon a tribe, within 30 days of receiving the Grower's
 2 complete § 6.3 notice, to agree or disagree and to schedule a biological survey if
 3 necessary. *See* Squaxin's Post-Trial Brief, Dkt. 120, at pp. 4 (l. 18-20) – 5 (l. 1-13)
 4 (explaining instances when a biological survey is and is not necessary). Within the 30
 5 days, Squaxin normally either schedules and conducts a survey (if tides and schedules
 6 allow) or at least schedules a survey, in both cases attempting to coordinate with the
 7 Grower's specific plans and assuming that a survey would be worthwhile in the first
 8 place. Declaration of Eric Sparkman at ¶ 2 (March 5, 2020).

9 To conclude, Squaxin disfavors an interpretation of the SIP whereby the Grower
 10 has a duty to explain the basis for sustainable yield via a biological survey.

11 **2. Growers Should not Harvest without a Harvest Plan in Place, Provided that**
 12 **Tribes Diligently Work to Survey and Negotiate Harvest Plans.**

13 The Court is correct that § 6.3 does not expressly bar a Grower from harvesting
 14 until a harvest plan is in place. *See* Order, Dkt. 22148 at p. 26, l. 18-19. For the reasons
 15 below, however, an appropriate equitable interpretation of the SIP is that a Grower must
 16 refrain from harvesting without a harvest plan in place, as long as the affected tribe
 17 diligently works to schedule a survey and negotiate a harvest plan to minimize
 18 interference with the Grower's operations. This interpretation is also predicated on the
 19 assumption that a Grower is also acting in good faith and is not subverting the Treaty
 20 shellfishing right.

21 The SIP can be interpreted in this way because it represents an equitable approach
 22 to implementing the Tribal Treaty shellfishing right; i.e., the court's attempt to balance

1 the often-competing interests of Tribes, Growers and landowners.¹ *See United States v.*
 2 *Washington*, 898 F.Supp. 1453, 1457-1458 (W.D. Wash. 1995) (*Shellfish II*) (“There is
 3 ample authority for this Court to invoke its equitable powers in implementing a plan
 4 under which the Tribe may exercise their Treaty right” and “It is the Court’s view,
 5 therefore, that in the instant controversy, the Court not only has the authority, but the
 6 duty, to fashion an implementation plan in accordance with principles of equity”). As
 7 such, the SIP contains certain sharing principles and sets up equitable terms for
 8 implementing those rights. *See id.* It also requires the parties to follow certain
 9 procedural steps so that shellfishing occurs in an orderly fashion and in a manner
 10 consistent with each party’s rights and interests. *See generally id.* In the SIP, the Court
 11 recognized the goals of accommodating both: (1) the tribes’ “absolute right” to take 50%
 12 of the shellfish from natural beds within their respective U&As; and (2) the Growers’ and
 13 property owners’ “interest in the peaceful enjoyment and/or commercial development of
 14 their property.” *Id.* at 1457.

15 The Ninth Circuit reaffirmed that equitable principles are at play in the SIP. *See*
 16 *United States v. Washington*, 157 F.3d 630, 638, 655 (9th Cir. 1998) (confirming the
 17 district court’s “ability to use equity in *implementing* its Treaty interpretation”, and that
 18 the SIP’s “time, place and manner restrictions present a proper use of the court’s
 19 equitable powers” and “safeguard the Tribes’ right of access to the ancient fisheries, but
 20 also protect the interests of the Growers and Private Owners”).

21 _____
 22 ¹ The Ninth Circuit has held that equity can be (and was) used to implement the tribes’ treaty right, but not
 to determine its scope or extent. *United States v. Washington*, 157 F.3d 630, 638, 651 (9th Cir. 1998).

1 As Squaxin’s post-trial brief noted, there are typically five² main events, which in
 2 sequential order are: (1) Grower § 6.3 notice; (2) Tribal survey; (3) harvest plan
 3 execution; (4) scheduling the initial Tribal harvest; and occasionally, (5) dispute
 4 resolution and its outcome. Dkt. 120 at p. 7, l. 10-14. The Grower should not be able to
 5 start harvesting (or cultivating or enhancement) at least until (1) through (4) have
 6 occurred, since exploiting the natural populations should not occur until the Tribe’s rights
 7 are resolved. *Id.* at l. 14-20, citing SIP § 2.5, § 6.2, § 6.3. Again, this interpretation
 8 assumes that a tribe is diligently working in good faith to schedule a survey and negotiate
 9 a harvest plan, and that the Grower is also operating in good faith. *Id.*

10 Certainly if a Grower harvests before a Tribal survey without reporting its
 11 harvest, the survey data will erroneously indicate that natural shellfish densities and
 12 biomass are lower than they are in reality, which can forever jeopardize a tribe’s Treaty
 13 right to take shellfish on that parcel. A Grower who harvests before the parties determine
 14 and agree upon the natural shellfish density and Tribal share in a harvest plan (or before
 15 the Tribe’s initial harvest) risks illegally harvesting into the 50% Tribal share. The SIP
 16 and other shellfish orders prohibit this outcome. *See* SIP § 2.5, § 6.3; *United States v.*
 17 *Washington*, 157 F.3d at 653.

18 As the Court correctly points out, dispute resolution under § 9 of the SIP and a
 19 motion to enjoin is always available to resolve disputes between tribes and Growers,
 20 including those relating to harvest plan execution. Dkt. 22148 at n. 13, l. 24 (“And, the
 21 _____

22 ² Squaxin’s brief incorrectly stated that there were four main events. Further, an additional event between
 (1) and (2) may include a site visit to determine if a survey is necessary.

1 Court notes that if a Grower and affected Tribe(s) submitted a harvest plan matter for
2 dispute resolution, a party could seek a temporary injunction, if necessary, to cease
3 harvesting on the tideland.”). Additionally, SIP § 6.3 allows the Grower, pending the
4 outcome of dispute resolution, to “continue with any enhancement or cultivation
5 activities at his or her own risk. . . .”, but does not authorize harvesting. In Squaxin’s
6 view, if the Grower were to harvest during the dispute resolution process, it must at
7 minimum fully and promptly disclose the amounts of its harvests. Additionally, a Tribe
8 may seek an injunction and claim recoupment if the Grower has improperly harvested
9 some or all of the Tribal share.

10 Respectfully submitted this 9th day of March, 2020.

11 Attorneys for the Squaxin Island Tribe

Attorneys for Nisqually Indian Tribe

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I electronically filed the aforementioned, 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.

s/Kevin Lyon
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