The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants.	NO. C70-9213-RSM Subproceeding 89-3-12 THE STATE OF WASHINGTON'S RESPONSE TO S'KLALLAM'S AMENDED PETITION FOR REVIEW (DKT. 150) OF THE DECISION BY MAGISTRATE JUDGE CHRISTEL (DKT. 142, 143)

Under § 9.1.4 of the Shellfish Implementation Plan (SIP), the procedures established in Fed. R. Civ. P. 72(b), and this Court's Minute Order of May 14, 2020 (Dkt. 148), the State of Washington responds as an Interested Party to the specific written objections in the Amended Petition for Review – Appeal from Magistrate Order to District Court (Dkt. 150) filed by Respondents Jamestown S'Klallam and Port Gamble S'Klallam Tribes (together, S'Klallam).

THE STATE RESTRICTS THE SCOPE OF THIS RESPONSE TO THE STATE'S INTERESTS IN THIS SUBPROCEEDING.

Upon the filing, 5 years ago, of the present Request for Dispute Resolution to resolve ongoing disputes between the Skokomish Tribe and Gold Coast Oyster LLC, the State appeared before this Court as an Interested Party. The State has since participated and submitted limited briefing focused on those aspects of the subproceeding potentially affecting the State's interests.

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The State does not play a direct role in tribal exercise of Treaty shellfish rights on privately-owned tidelands. Tribes carry out their Treaty shellfishing harvest rights on privately-owned tidelands by working directly with the owners or shellfish growers, without State involvement, under Sections 6 and 7 of the SIP. Accordingly, the State was not a participant in any of the interactions between Gold Coast and the Hood Canal Tribes at issue in the present dispute. The State therefore lacks direct, first-hand knowledge about the vast majority of the factual allegations.

The State does, however, support any tribe's right to seek relief under Section 9 of the SIP for alleged violations of either Sections 6 or 7 of the SIP, by either commercial shellfish harvesters or private tideland owners. More broadly, the State has an interest in seeing the SIP properly interpreted and implemented by all affected tribes, entities, and individuals.

Given, as ultimately found by Magistrate Judge Christel, the gross insufficiency of Gold Coast's § 6.3 Notices and the substantial evidence of continual, intentional obstruction of Treaty shellfish harvest rights by Gold Coast's owner on Gold Coast-controlled tidelands in Hood Canal, the State supported the moving Tribes and urged the Court to exercise its equitable powers to grant the Tribes' requested relief to compel SIP compliance by Gold Coast for all future operations. The State concurred with the Tribes in encouraging the Court to send a clear message that private shellfish companies must honor Treaty sharing provisions embodied in the SIP. Magistrate Judge Christel's April 20, 2020 Amended Order (Dkt. 142) and Permanent Injunction (Dkt. 143) achieve this. The Magistrate Judge's decisions appropriately tailored the injunctive relief to the specific equities before the Court; and also appropriately refrained from deciding broader interpretative disputes under the SIP that (1) did not need to be resolved to grant this relief, and which (2) would have affected tribes, growers, and private tideland owners who are not actively participating in this particular subproceeding.

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At this stage of the subproceeding, the State restricts this Response to: (1) stating the State's positions on the putative errors identified in S'Klallam's Petition for Review, to the extent S'Klallam's positions potentially affect the foregoing State interests; and (2) responding to those portions of S'Klallam's assertions or arguments concerning the State's limited regulatory authority over commercial aquaculture and personal shellfish harvest (matters that Judge Christel properly held were *not* before the Court).

The State reserves the right to request an opportunity to submit additional briefing to this Court, in the event the Honorable Ricardo S. Martinez decides to receive further evidence on this appeal; or to the Magistrate Court, in the event this Court decides to return the matter to the Honorable David W. Christel, Magistrate Judge. Fed. R. Civ. P. 72(b)(3). The State would limit any additional briefing to those matters potentially affecting the State's interests.

I. MAGRISTRATE JUDGE CHRISTEL DID NOT NEED TO DECIDE THE EXTENT TO WHICH THE SIP PROHIBITS NON-TRIBAL HARVEST PENDING TRIBAL AGREEMENT ON TREATY SHARING.

S'Klallam's Petition avers Magistrate Judge Christel erred when he "overruled the mandate for harvest plans to be in place prior to harvest." Pet., p. 5. In effect, S'Klallam maintains that the SIP obligates all commercial growers to refrain harvesting shellfish from their tidelines until Treaty sharing agreements have been negotiated and implemented. The State continues to disagree with S'Klallam on this point.[1]

The State disputes that language in Section 6 of the SIP necessarily supports S'Klallam's interpretation. Rather, the SIP contains several provisions that, taken together, are ambiguous on the question: while some seem to refute an "all-citizens' stand-down obligation," others could be read to support it. By way of example: (1) a sentence in § 6.1.1(d) allows growers to continue operating their existing farms while tribal sharing arrangements are worked out;[2] (2) different

[1] The State submitted briefing on this point to Magistrate Judge Christel. Dkt. 119, pp. 8-12.

[2] SIP § 6.1.1(d): "The Growers' operations are not required to cease or be changed in any way while the

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language in § 6.1.3 supports an inference that harvesters should not harvest before reaching agreement on tribal harvest levels;[3] and (3) there is additional language in § 6.3 on the question of a grower's right to continue "any enhancement or cultivation activities" pending dispute resolution.[4] Parties dispute whether conducting "enhancement or cultivation activities" includes harvest. Moreover, whereas Section 6 contains some ambiguous language addressing what activities growers may continue, Section 7 is completely silent on the question, and Section 7 does not even require harvest plans for tribal harvests on private tidelands not used for commercial shellfish growing.

Finally, resolution of the question may require addressing conflicting positions on whether (or which of) the foregoing provisions are generally applicable, or are instead limited to those licensed commercial growers who were operating in 1995 when Judge Rafeedie first adopted the SIP.[5] At the very least, other tribes and commercial shellfish growers, who likely have strong opinions on the interpretive issue raised by S'Klallam in this appeal, are not actively participating in this subproceeding. Because it is not necessary to resolve the ambiguity for purposes of awarding the Tribes with the injunctive relief sought in this subproceeding, the ambiguity should be left for resolution when all the impacted parties have a voice on the issue.[6]

The State recognizes the tribal concern that the more harvesting activity that occurs on private tidelands before tribal inspection or survey, the more difficult it becomes for the parties

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sustainable harvest is being determined."

[3] SIP § 6.1.3: "If the parties agree on the location of any natural or enhanced natural beds and the quantity of tribal harvest permitted form each such bed, harvest shall commence according to the provisions specified in §6.2."

[4] SIP § 6.3: "The Grower, pending the resolution of the matter by dispute resolution, will be permitted to continue with any enhancement or cultivation activities at his or her own risk…."

[5] *Compare* Dkt. 119, State of Washington's Post-Trial Brief, p. 9:7-20, *with* Dkt. 120, Squaxin Tribe's Post-Trial Brief, p. 8:8-11, p. 8 n. 5, and p. 9 n. 6.

[6] The State would have no objection to Judge Christel's order being slightly modified to remove the sentence suggesting that a grower can harvest without a harvest management plan in place. Removing that sentence preserves the ambiguity on the issue, and that sentence is not necessary for the ultimate relief granted.

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to determine natural population densities and resulting sustainable yields with accuracy. But at the same time, the State is concerned that reading into the SIP a mandatory "stand-down" obligation on all shellfish farmers and all private tideland owners to refrain from harvesting any shellfish pending tribal agreement on harvest sharing—when no plain language in Sections 6 or 7 contains such a restriction—upsets the "balance between the Tribes' Treaty shellfishing right and the Growers' and Owners' interest in the peaceful enjoyment and/or commercial development of their property." *U.S. v. Washington*, 898 F. Supp. 1453, 1457 (W.D. Wash. 1995), *aff'd in part, reversed in part,* 157 F.3d 630 (9th Cir. 1998).

The State believes that, under the balance struck by the SIP, and presuming the parties comply with the duty of good faith and fair dealing inherent in any agreement, best practices would include a grower, for its part, (1) refraining from commencing activities on new sites until after both notifying tribes under Section 6.3, and giving tribes a reasonable amount of time to respond and exercise their Treaty harvest rights; and further (2) documenting all of the grower's previous activities and sharing this with the tribes, so that the parties can come to an accurate assessment of the natural sustainable yield. The State further believes that effective and equitable balance requires tribes—if a grower ignores Treaty notice and the grower's harvest threatens the Treaty share—to exercise the right to swift and effective relief through the SIP's dispute resolution process. *See* SIP § 6.2 ("…If the Grower and affected Tribe(s) are unable to negotiate an acceptable harvest plan within a reasonable period of time, the matter may be submitted for dispute resolution pursuant to §9…."); *see also U.S. v. Washington*, 20 F. Supp. 3d 777, 784-89 (granting Suquamish Tribe's preliminary injunction request against a shellfish company that denied tribal access to survey).

For the foregoing reasons, the State believes Magistrate Judge Christel properly refrained from holding, on the specific evidence before him, that growers or private tideland owners violate the SIP "as a matter of law" by failing to enter into harvest plans with tribes prior to

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harvesting. At the same time, the State continues to support Judge Christel's decision to mandate that Gold Coast, *inter alia*, (1) comply with all record-keeping and information-sharing provisions of the SIP, the main parties' 2017 Partial Settlement Agreement (Dkt. 63), and the Permanent Injunction (Dkt. 143), (2) hire qualified experts to conduct surveys to determine sustainable yields, and (3) enter into harvest agreements with the Hood Canal Tribes—all before Gold Coast may directly or indirectly engage in commercial shellfish growing or production on any tideland.[7] The State believes such injunctive relief is appropriately tailored to address the evidence of Gold Coast's past misconduct—*i.e.,* cultivating and harvesting shellfish from well over 100 private tidelands without adhering to Section 6's notice provisions, while offering only inadequate information-sharing and inadequate opportunities for the Tribes to inspect or survey tidelands under Gold Coast's control, thereby violating the SIP, and effectively impeding the Tribes' abilities to exercise their Treaty harvest rights.

II. ON THE FACTS BEFORE THIS COURT, MAGISTRATE JUDGE CHRISTEL PROPERLY DENIED CLAIMS FOR COMPENSATORY DAMAGES, BY DECLINING TO DEPART FROM THE FEDERAL RULES OF EVIDENCE, THE RULES OF CIVIL PROCEDURE, OR THE SIP

S'Klallam objects to Magistrate Judge Christel's decision not to endorse the Tribes' argument that the SIP places the "initial burden" of proving the amount of a Tribe's loss of fishing opportunity on the defendant. S'Klallam further objects on the ground that Magistrate Judge Christel's decision improperly deprived the Hood Canal Tribes of any compensatory damages for loss of treaty fishing opportunity. S'Klallam classifies these assertions into two separate objections, but from the State's position, S'Klallam's assertions form a unitary issue, and the State responds to them together. In stating its position, the State has no desire to shield Gold Coast from its prior bad conduct, but the State must address the legal principle advocated

[7] The State Department of Health issued an administrative order suspending Gold Coast's shellfish license for 2,544 months (212 years) and imposing $126,000 in civil penalties, which order is under appeal. Unless the suspension is modified on appeal, future shellfish harvest by Gold Coast would be illegal.

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by S'Klallam because, if adopted wholesale, it could be used against private tideland owners, other shellfish companies, and even against the State, in future proceedings over Treaty rights.

The Magistrate Court, after hearing and weighing all the evidence before it, properly declined to award relief in the form of compensatory damages. This decision correctly refrained from subverting the normal rules, which place the burdens to prove a plaintiff's allegations, and to persuade the trier-of-fact of those allegations, on the plaintiff—not the defendant.

To the extent the allocation of burdens advocated by S'Klallam would actually amount (in terms used by the rules of evidence) to a legal presumption, neither the plain language of the SIP nor the law of case of *U.S. v. Washington* provides for any such rule. *See* Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.") By contrast, the SIP expressly contemplates the application of the civil rules of procedure to Section 9 dispute resolution. *See* SIP § 6 (first paragraph, second-to-last sentence) ("Any disagreements remaining after six months [from adoption of the SIP]…shall be resolved by the dispute resolution procedure of § 9, except that the parties will be permitted a full opportunity to engage in all discovery permitted by the Federal Rules of Civil Procedure as well as to present expert testimony.")

Assuming *arguendo* the SIP's invocation of the Fed. R. Civ. P. were construed to be limited to the civil discovery rules (the State does not admit this), at least part of the thrust of S'Klallam's objections is that Gold Coast should not enjoy a windfall from having "controlled and manipulated the evidence." Pet., p. 10: 2-3. To the extent this assertion complains of willful discovery misconduct by Gold Coast (the "responding party"), and so long as the discovery was fairly propounded, the civil discovery rules provided the Hood Canal Tribes (the "propounding parties") with a procedure to seek relief from discovery misconduct from a comprehensive range

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of compelling sanctions. Specifically, if a propounding party (1) suspects a responding party (or the responding party's officer, director, or managing agent) of withholding a required disclosure, failing to provide an adequate discovery response, or providing only evasive or incomplete discovery responses; (2) successfully moves the presiding court to order the responding party to provide or permit discovery; and (3) establishes that the responding party failed to obey the court's order; (4) then the court may issue sanctions including:

> [] directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> [] prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
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> [] striking pleadings in whole or in part;
>
> [] staying further proceedings until the order is obeyed;
>
> [] dismissing the action or proceeding in whole or in part;
>
> [] rendering a default judgment against the disobedient party; or
>
> [] treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A) (brackets added).

The propounding Tribes did not seek these judicial protections against Gold Coast under the civil discovery rules. Moreover, as held by Magistrate Judge Christel, the Tribes "did not provide sufficient evidence (for example, by live testimony or depositions) showing Gold Coast harvested shellfish and did not report the harvests" (Dkt. 142, p. 13); did not "adequately explain[] what evidence shows Gold Coast has failed to provide records" (p. 24); did not provide "evidence showing Gold Coast failed to provide business records to the Tribes" (p. 13); "did not subpoena a representative of Gold Coast to testify regarding Gold Coast's business records" (p. 18); did not submit "a Rule 30(b)(6) deposition of Gold Coast that could confirm the business

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records were complete, explain the business records, or confirm that an unreported harvest occurred" (p. 13); and did not have any tideland owner testify at trial (p. 18).

As a result of this record, and "the Tribes' failure to adequately explain the evidence **and link** the evidence to the alleged violations and damages, the Court [had to] attempt[] to piece together the evidence." Dkt. 142, p. 15 (bold added). In a detailed recitation of finding of facts, Magistrate Judge Christel ultimately found the evidence to be "inconsistent and inconclusive." *Id.* "In sum," the Court held, "the evidence the Tribes provided to the Court"—Gold Coast's business records—"was speculative regarding the number of shellfish harvested by Gold Coast on any particular tideland in Hood Canal." Dkt. 142, p. 23. More specifically, the Court held, the produced Gold Coast business records were "insufficient to show the number of shellfish on particular tidelands and the number of shellfish harvested on each tideland," and as such, "did not adequately allow the Court to determine if Gold Coast harvested the Tribes' treaty share of shellfish." *Id.* Finally, the Tribes' "limited number of surveys completed on Gold Coast controlled tidelands" did not provide the missing necessary linkage. Dkt. 142, p. 17. The Court could not conclude, based on this evidence, that the Tribes were entitled to their claim "to half of Gold Coast's yearly sales." *Id.*, citing Dkt. 109, p. 94.

In conclusion, the State opposes the S'Klallam argument that Treaty shellfishing rights carry some kind of presumption of damages against shellfish companies, without requiring a tribe to prove how many shellfish were previously taken from a beach and what portion of that harvest constituted the tribe's Treaty share.

III. THERE IS ONLY A VERY LIMITED CONNECTION BETWEEN STATE REGULATORY PROGRAMS AND IMPLEMENTATION OF TREATY HARVEST UNDER SECTIONS 6 AND 7 OF THE S.I.P.

Finally, S'Klallam's Petition mentions the State's regulatory programs over commercial aquaculture and private personal harvest, in support of different assertions. Pet., p. 3 (citing to certain records from the files of the State Department of Fish and Wildlife relating to Gold Coast

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or its owners—ostensibly to rebut Magistrate Judge Christel's findings on the insufficiency evidence); pp. 3-4 (citing to a State Department of Health administrative enforcement order, entered after Magistrate Judge Christel's decision, suspending Gold Coast operator's license for 2,544 months and imposing $126,000 in civil penalties—ostensibly to "demonstrate[] that the business practices of Gold Coast were as the Tribes asserted to the MJP Court"); p. 15 n. 8 (citing a concern that the same Department of Health administrative enforcement order against Gold Coast may prevent Gold Coast from complying meaningfully with the Permanent Injunction).

These assertions are partly a vestige line of argument S'Klallam attempted to pursue at Trial. S'Klallam's argument—absent from the Request for Dispute Resolution—centered on Gold Coast's licensure compliance with state permits overseen by the Department of Health (DOH) and the Department of Fish and Wildlife (DFW). The thrust of S'Klallam's theories was that a shellfish company's alleged non-compliance with state regulatory permits interferes with and impedes tribes from exercising Treaty harvest rights on private tidelands. The State expressly opposed those arguments on the grounds they ignored the plain language of Sections 6 and 7 of the SIP, and moreover, were unnecessary for the Tribes to establish their entitlement to injunctive relief against Gold Coast. To the extent Magistrate Judge Christel considered those theories by S'Klallam, the final judgment properly omitted them. Dkt. 142, p. 5 n. 4 ("Licensing matters regarding Gold Coast and the State of Washington are not before this Court.").

A likely reason that Sections 6 and 7 are almost silent as to the State is that the handful of state permits applying to shellfish cultivation and harvest do not constrain grower or tideland owner harvests in a manner that relates to Tribes exercising their Treaty rights on private tidelands. Rather, the State's limited regulatory programs over private harvest of shellfish from private tidelands focus narrowly on public health and shellfish disease control. DOH's authority focuses on public health. Chapter 69.30 RCW. DFW's authority over private sector commercial aquaculture, tightly constrained by the Legislature, is limited to disease control. RCW

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77.115.010(2). DFW has limited rulemaking authority over personal recreational harvests from private tidelands. RCW 77.12.047(2). Beyond concerns of public health and shellfish disease control, the state regulatory programs do not govern the time, place or manner of private harvests in any way connected to Treaty shellfish rights protected by Sections 6 and 7 of the SIP. Put another way: A shellfish harvester could be in full compliance with all state permits, but still violate every sharing provision in Sections 6 or 7 of the SIP. Likewise, a shellfish harvester could hypothetically comply fully with Treaty harvest rights and sharing under Section 6 or 7 of the SIP, but still operate in violation of every state regulatory permit.

To be clear, the State concedes S'Klallam raises legitimate questions about whether Gold Coast has maintained good compliance with state permitting and reporting requirements. However, the State continues to maintain its position that resolving those questions is not necessary to finding that Gold Coast directly violated Treaty shellfishing rights by not complying with Sections 6 and 7 of the SIP. Gold Coast's conduct with the Tribes, as documented during the Trial and as thoroughly reviewed in the Magistrate Judge's findings of fact, fully warrants the injunctive relief ultimately granted irrespective of any state permit compliance issues.

Last, as to the question raised at the May 14, 2020 status conference, and re-raised in S'Klallam's Petition, whether DOH's administrative order against Gold Coast somehow jeopardizes the Tribes' injunctive relief, the answer is no. If the concern is that the DOH order, by suspending Gold Coast's shellfish license, thereby precludes Gold Coast from entering into agreements with tribes to facilitate tribal Treaty harvest under the terms set forth in the Permanent Injunction, this fear is unfounded. As the State has already explained to opposing counsel, no provision of the Permanent Injunction necessitates that Gold Coast engage in conduct that would violate the DOH order. Dkt. 151, 2d Rasmussen Decl., Ex. E. (May 22, 2020 email from Assistant Attorney General Janis Snoey to counsel for Skokomish, S'Klallam, and

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Gold Coast).[8] And though the DOH order is under appeal, the Permanent Injunction will still have value regardless of the outcome: if the DOH order is overturned, then the Permanent Injunction provides the means and terms for future harvests by Gold Coast; if the DOH order is affirmed, the State's regulatory process will foreclose future harvest by Gold Coast, but Gold Coast can still enter into the agreements necessary to facilitate tribal Treaty harvest under the terms of the Permanent Injunction.

CONCLUSION

As it did before the Magistrate Court, the State would like to draw attention to the similarity between the misconduct found here, and the misconduct by Gold Coast impacting the Squaxin Island Tribe's U&A that formed the basis for holding Gold Coast in contempt of court in Subproceeding 89-3-10 in 2016.[9] Here again, equity impelled the Court to issue stringent injunctive relief in favor of tribes and against Gold Coast. But the reasons impelling this tailored relief, being unique to Gold Coast, at the same time compelled the Court to refrain from deciding equitable or legal principles of general applicability, when less than all tribes and none of the private growers or tideland owners who would be subject to those principles are actively participating in this particular subproceeding. The State respectfully submits that Magistrate Judge Christel issued a sound decision properly implementing the balance of equities in the SIP. For the foregoing reasons, the State of Washington respectfully requests the Court deny S'Klallam's Petition for Review.

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[8] "...The Department of Health's state regulatory action against Mr. Grout is to ensure compliance with state laws enacted for the purpose of protecting public health. This action is distinct from the questions of property interests that the parties are seeking to resolve in the Gold Coast subproceeding. I and my AAG colleagues have reviewed the Shellfish Implementation Plan, the Partial Settlement Agreement, and the Permanent Injunction and find no provision that necessitates Mr. Grout to engage in conduct that would violate the Department's order. Because the State's regulatory actions are independent of the litigation brought by the Tribes and because we see nothing that prohibits Mr. Grout from entering into agreements solely to facilitate tribal harvest, there is no need to amend the Permanent Injunction as far as the State is concerned…."

[9] Subproceeding 89-3-10, Dkt. 36 (copy of order included in SK-165).

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DATED this 23rd day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

Dated this 23rd day of June, 2020, at University Place, Washington.

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