

HONORABLE RICARDO 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.: C70-9213

Subproceeding No. 89-3-01
(Shellfish Minimum Density)

CONSENT DECREE AND
SETTLEMENT AGREEMENT
RE MANILA CLAMS, NATIVE
LITTLENECK CLAMS AND
PACIFIC OYSTERS

The Tribes listed in section 1 below (“Tribes”), the Intervenor-Defendant Puget Sound Shellfish Growers (“Growers”), and the State of Washington, by and through their undersigned counsel of record, hereby submit this Consent Decree and Settlement Agreement to this Court for its approval.

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WHEREAS the Tribes have asserted treaty right claims to take shellfish from tidal and sub-tidal lands owned within the case area in Washington State, which claims have resulted in the following decisions and orders:

1. *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994).
2. *United States v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995)

(establishing a Shellfish Implementation Plan - hereinafter the "Shellfish Implementation Plan").

3. *United States v. Washington*, 909 F. Supp. 787 (W.D. Wash. 1995).
4. *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998).
5. A Stipulation And Order Amending Shellfish Implementation Plan, dated April 8, 2002) (hereinafter the "Revised Shellfish Implementation Plan");

WHEREAS the Revised Shellfish Implementation Plan envisions the development of "Exhibit A," a table of shellfish density values for several species of shellfish, in several regions, and for multiple time periods, the purpose of which is to implement the "staked or cultivated" proviso of the various Stevens Treaties (the "Shellfish Proviso") as further articulated in the opinions and orders under *United States v. Washington*;

WHEREAS the parties are currently engaged in a dispute resolution sub-proceeding to establish density values in Exhibit A for four species of shellfish (*i.e.*, geoduck, pacific oysters, manila clams and native littleneck clams); and

WHEREAS the parties have reached a separate Consent Decree and Settlement to address the density values for geoduck; and

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WHEREAS previously the parties also have agreed to a Settlement Agreement that would resolve the Tribes' claims to take shellfish on qualifying Growers' properties held as of August 28, 1995, subject to the fulfillment of certain contingencies spelled out in section 9A of that Settlement Agreement (hereinafter "Shellfish Settlement Agreement"); and

WHEREAS the Tribes, the Growers and the State of Washington are interested in resolving any and all disputes between and among them regarding both the appropriate density value to be applied under Exhibit A to aquaculture proposals for manila clams, native littleneck clams and pacific oysters since August 28, 1995 and into the future, and the appropriate allocation of the natural production of those same species if a natural bed is determined to exist.

Now Therefore, in the interest and spirit of cooperation, the parties hereby enter into this Consent Decree and Settlement Agreement and agree to the following:

CONSENT DECREE AND SETTLEMENT AGREEMENT

1. TRIBES.

The Tribes bound by this Consent Decree and Settlement Agreement are the Tulalip, Stillaguamish, Sauk Suiattle, Puyallup, Squaxin Island, Makah, Muckleshoot, Upper Skagit, Nooksack, Nisqually, Skokomish, Port Gamble S'Klallam, Lower Elwha Klallam, Jamestown S'Klallam, and Suquamish Tribes, the Lummi Nation, and the Swinomish Indian Tribal Community (collectively hereinafter "Tribes") and any other tribe that may be added by agreement or by subsequent order of this Court. The Tribes are parties to the following treaties: Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132); Treaty of Point

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Elliot, January 26, 1855 (12 Stat. 927); Treaty of Point No Point, January 26, 1855 (12 Stat. 933); Treaty with the Makah, January 31, 1855 (12 Stat. 939) (hereafter "the treaties").

2. CONTINGENT NATURE OF THIS AGREEMENT.

This Consent Decree and Settlement Agreement is contingent upon the successful fulfillment of all contingencies stated in Section 9A of the Shellfish Settlement Agreement between the Tribes, the Growers, the State of Washington and the United States Department of the Interior regarding the Tribes' claims of rights to take shellfish from tidelands covered by that Settlement Agreement. In the event that any contingency stated in Section 9A of that Settlement Agreement fails to be fulfilled this Consent Decree and Settlement Agreement shall be null and void without further action by the Parties or Order of the Court. In the event that this Consent Decree and Settlement Agreement becomes null and void the parties shall comply with the existing order regarding the trial schedule for this subproceeding.

This Consent Decree and Settlement Agreement shall not be filed with the Court for approval unless and until all aforementioned contingencies stated in Section 9A of the Shellfish Settlement Agreement are fulfilled. Once all contingencies stated in Section 9A of the Shellfish Settlement Agreement are fulfilled, and the Court has approved this Consent Decree and Settlement Agreement, this Consent Decree and Settlement Agreement shall become final and binding as of the date of the Court's approval.

3. DURATION OF THIS AGREEMENT.

The minimum densities established in sections 6 and 7 of this Consent Decree and Settlement Agreement, and the other provisions of this Consent Decree and Settlement Agreement that provide for the application of those density levels to new aquaculture

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activities, shall apply as of August 28, 1995, and continue from that date forward until 25 years from the effective date of this Consent Decree and Settlement Agreement, unless extended by mutual agreement of the parties or by the terms of this section. At the expiration of 25 years this Consent Decree and Settlement Agreement shall continue in effect unless and until (a) a party gives at least one year's notice of intent to terminate this Consent Decree and Settlement Agreement with respect to one or more species covered by this Consent Decree and Settlement Agreement, and (b) initiates litigation to establish different minimum densities for that or those species. In the event that a party gives notice of intent to terminate this Consent Decree and Settlement Agreement, and if no new agreement is reached by the date specified in the notice to terminate, this Consent Decree and Settlement Agreement will continue in force until the Court issues a decision establishing new minimum densities. If litigation is initiated to change the minimum density with respect to only some species or some regions, this Consent Decree and Settlement Agreement shall continue in force and effect with respect to all species and all areas not subject to the litigation initiated to establish new minimum densities.

4. NATURAL BED STATUS TO BE DETERMINED BY DENSITY.

The existence of a natural bed of manila clams, native littleneck clams, or pacific oysters, for purposes of Exhibit A and section 6 of the Revised Shellfish Implementation Plan, will be decided on the basis of whether it meets or exceeds the minimum density specified in this Consent Decree and Settlement Agreement, without regard to how long it may take a particular bed to return to a minimum density after harvest. However, the determination of whether a natural bed exists is subject to whether or not the bed is of

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sufficient size or has a sufficient number of shellfish to constitute a natural bed. Whether a bed of a particular size or containing a particular quantity of shellfish is or is not a natural bed remains an open issue to be resolved through agreement or by dispute resolution on a bed-by-bed basis.

5. DEFINITION OF AREAS.

In lieu of the geographic areas specified in Exhibit A to the Revised Shellfish Implementation Plan, the following areas, as defined below, shall control for purposes of this Consent Decree and Settlement Agreement:

- a. Area 1 is defined as all waters west of a line from Johnson Point to Devils Head.
- b. Area 2 is defined as all waters south of the Tacoma Narrows Bridge to the Johnson Point/Devils Head line.
- c. Area 3 is defined as all waters of Hood Canal south of the Hood Canal Bridge.
- d. Area 4 is defined as all remaining waters east of the west end of the Strait of Juan de Fuca not included within Areas 1, 2 or 3.

6. MINIMUM DENSITIES FOR MANILA CLAMS AND NATIVE LITTLENECK CLAMS.

For each year during which this Consent Decree and Settlement Agreement is in effect, the minimum density for both mature, marketable manila clams and mature, marketable native littleneck clams is as follows:

- a. For Area 1, 0.14 pounds per square foot.
- b. For Area 2, 0.10 pounds per square foot.

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c. For Area 3, 0.11 pounds per square foot.

d. For Area 4, 0.07 pounds per square foot.

While the minimum density is the same for both manila and native littleneck clams, each species is to be measured separately.

7. MINIMUM DENSITY FOR PACIFIC OYSTERS.

For each year during which this Consent Decree and Settlement Agreement is in effect, the minimum density for pacific oysters is 0.33 mature, marketable pacific oysters per square foot. This minimum density applies only in Hood Canal, defined for purposes of this section as the waters south of a line from Olele Point to Foulweather Bluff. If a Tribe contends that sustainable natural production of oysters occurs outside of Hood Canal, a Tribe that is party to this Agreement may, pursuant to the terms of Section 11 below, seek application of the minimum density set forth in this Section for those areas.

8. NATURAL PRODUCTION.

Where a natural bed on a Grower's property has been established by the existence of a density equal to or greater than the minimum density specified for that species in sections 4, 5, 6 and/or 7 above, the natural production of that bed shall be shared with Tribes according to the relevant allocation period as specified below in section 9 or 10. The natural production to be shared shall be the quantity of the mature, marketable shellfish of the relevant species determined to be present on the bed for purposes of the measurement of density used to determine the existence of the natural bed.

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9. ALLOCATION PERIOD FOR MANILA CLAMS AND NATIVE LITTLENECK CLAMS.

The allocation period for manila clams and native littleneck clams is three years. In other words, where a natural bed of manila clams or native littleneck clams exists on a Grower's property, the Tribes will be entitled to either one-third of 50% of the natural production of mature harvestable manila or littleneck clams each year, or the entire 50% of the natural production once every three years, at the Grower's option, or such other equivalent arrangement as the parties may agree, provided that the Tribes shall be permitted to harvest manila clams and native littleneck clams within one year of the initial determination that a natural bed exists, unless the parties agree otherwise. The grower shall elect the allocation arrangement within the first year after the determination that a natural bed exists and that arrangement shall control future harvest allocation and timing unless the parties agree otherwise.

10. ALLOCATION PERIOD FOR PACIFIC OYSTERS.

The allocation period for pacific oysters is four years. In other words, where a natural bed of pacific oysters exists on a Grower's property, the Tribes' will be entitled to either one-fourth of 50% of the natural production of mature harvestable pacific oysters each year, or the entire 50% of the natural production once every four years, at the Grower's option, or such other equivalent arrangement as the parties may agree, provided that the Tribes shall be permitted to harvest pacific oysters within one year of the initial determination that a natural bed exists, unless the parties agree otherwise. The grower shall elect the allocation arrangement within the first year after the determination that a natural bed exists and that

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arrangement shall control future harvest allocation and timing unless the parties agree otherwise.

11. MODIFICATION OF ALLOCATION PERIODS.

The allocation periods established by sections 9 and 10 above, and the amount of the natural production to be allocated, shall continue in force for the term of this Consent Decree and Settlement Agreement, unless either a Grower or a Tribe shows that natural production has changed pursuant to section 6.1.4 of the Revised Shellfish Implementation Plan.

Respectfully submitted this 29th day of June, 2007.

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THE STATE OF WASHINGTON, Defendant

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THE HONORABLE RICARDO S. MARTINEZ

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ORDER APPROVING CONSENT
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AGREEMENT RE MANILA CLAMS,
NATIVE LITTLENECK CLAMS AND
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IT IS HEREBY ORDERED:

The Court, having considered the Joint Motion For Order Approving Consent Decree and Settlement Agreement Re Manila Clams, Native Littleneck Clams and Pacific Oysters, finds that the Consent Decree and Settlement Agreement is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in

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the public interest. The Consent Decree and Settlement Agreement is hereby entered and approved.

DONE this 11th day of July, 2007.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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