

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

The Tribes listed in section 1 ("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.

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).

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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 *U.S. 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 (geoduck, pacific oysters, manila clams and native littleneck clams); and

WHEREAS the Tribes, the Growers and the State of Washington are interested in resolving any and all disputes between and among them regarding the appropriate geoduck density value to be applied to aquaculture proposals, they agree as follows.

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, Lummi, Skokomish, Port Gamble S'Klallam, Lower Elwha Klallam, Jamestown S'Klallam, Suquamish, and the Swinomish Tribes (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 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. AQUATIC LANDS COVERED.

This Consent Decree and Settlement Agreement binds the State of Washington, the Growers and the Tribes with respect to intertidal and subtidal lands covered by Exhibit A to the Revised Shellfish Implementation Plan or any successor Shellfish Implementation Plan.

3. GEODUCK MINIMUM DENSITY VALUE ESTABLISHED

General Density Value for the Revised Shellfish Implementation Plan: For purposes of aquaculture of geoduck, the geoduck density for all regions and time periods in Exhibit A shall be set at 0.01 geoducks per square foot for the life of this agreement.

Geoduck Beds Identified as "Commercial Beds" in Tract Index Maps: Any subtidal geoduck bed that has been identified as a "commercial bed" in any Commercial Geoduck Tract Index Maps jointly developed by the Tribes and the Washington State Department of Fish and Wildlife, or that is so designated in the future, shall be treated as meeting the 0.01 threshold density of Exhibit A. In the event that intertidal beds of geoducks are added to the Commercial Geoduck Tract Index Maps and designated as a "commercial bed" they shall be treated as meeting the 0.01 threshold density of Exhibit A.

Geoduck Beds Actually Fished for Commercial Purposes: Any subtidal beds of geoducks that have previously been fished commercially pursuant to a state or tribal fishery that was opened pursuant to an agreed fishery plan, or a notice provided pursuant to Section 4.6 of the Revised Shellfish Implementation Plan, shall be treated as meeting the 0.01 threshold density of Exhibit A. Subtidal beds of geoduck clams fished commercially prior to August 28, 1995 pursuant to the State's Subtidal Geoduck Dive Fishery program shall also be treated as meeting the 0.01 threshold density of Exhibit A.

Where geoduck aquaculture is proposed on intertidal aquatic land that may have been fished commercially in the past, such land shall be assessed to determine whether it meets the 0.01 minimum density value for the purposes of this Consent Decree and Settlement Agreement.

If subtidal or intertidal aquatic lands have beds of geoduck clams that have assessed densities of less than 0.01 geoducks per square foot at the time future commercial fishing activity occurs, those beds shall not be treated as meeting the 0.01 threshold density of Exhibit A, unless the parties mutually agree otherwise.

4. TERMS APPLIED SOLELY FOR TREATY PURPOSES

The establishment of a geoduck minimum density value for Exhibit A in this agreement shall not be used to limit or expand any treaty rights to harvest shellfish, identify the existence or absence of natural populations of geoduck, or determine estimates of biomass available for harvest. Any use of the established geoduck minimum density value of Exhibit A shall be limited to the application of the shellfish treaty harvest principles enumerated in the Revised Shellfish Implementation Plan and the orders and decisions interpreting and applying the Shellfish Proviso.

5. PROTOCOLS FOR ASSESSING GEODUCK DENSITY LEVELS

The density value for a tract of land that is proposed for aquaculture will be computed as an average value across the area that is proposed for aquaculture cultivation, except to the extent that the proposed area exceeds the size limits stated below. In that case separate average density values will be established for each individual plot and the terms of the Revised Shellfish Implementation Plan will be applied to each plot individually. The computation of an average density value for intertidal tracts shall also be computed based upon the upper tidal elevation limit stated below.

The parties acknowledge that geoduck clams are not uniformly distributed when naturally set. To address the risk that commercially interesting conglomerations of clam may be obscured in the assessment of a tract proposed for aquaculture, and to establish a commercially rational and orderly basis for the assessment conducted pursuant to the Revised Shellfish Implementation Plan, the parties

agree to employ the following criteria and processes for the development of survey and/or assessment protocols for any proposed geoduck aquaculture activity:

a. For intertidal beaches: If the area proposed for cultivation exceeds one acre, the identified area will be segmented into separate plots of one acre or less, and the geoduck density value shall be established for each plot. This is not a limitation on the overall size of a proposed intertidal aquaculture tract, but instead a limit on the scale at which geoduck density values are established. Accordingly, each proposed intertidal aquaculture site in excess of one acre will have a separate geoduck density values reported and applied for that plot. The division of a designated aquaculture site into multiple plots shall be undertaken according to protocols agreed upon in accordance with subsection 5(c), below.

For intertidal beaches, geoduck density values will be established by an initial harvest of the entire wild stock on each identified plot, provided that such harvest of the entire wild stock is done pursuant to a written agreement between the State or Grower and affected Tribes, including who will conduct the harvest and how the harvested geoduck will be shared. Where a plot is determined to have a density below 0.01 geoduck per square foot, the Tribes' right to a share of geoduck from that plot will not continue beyond the initial harvest. Where a plot is determined to have a density at or above 0.01 geoduck per square foot, the Tribes' rights will continue as provided by this Settlement Agreement and the Revised Shellfish Implementation Plan.

For intertidal beaches, the computation of an average geoduck density value of the tract of land that is proposed for aquaculture shall not include any portion of the tract that lies above the tidal elevation of +1.0 feet (MLLW).

b. For subtidal areas: If the area proposed for cultivation exceeds three acres, the identified area will be segmented into separate plots of three acres or less, and the geoduck density value shall be established for each plot. The three-acre maximum is not a limitation on the overall size of a subtidal aquaculture tract that may be proposed for lease, but instead a limit on the scale at which geoduck density values are established. Accordingly, proposed subtidal aquaculture sites in excess of three acres will have separate geoduck density values reported and applied for each

identified plot within the proposed lease site. The division of a designated aquaculture site into multiple plots shall be undertaken according to protocols agreed upon in accordance with subsection 5(c), below.

For subtidal beds, geoduck density values will be established by a survey of the wild stock on each identified plot.

c. The State, the Growers and the Tribes agree to work cooperatively to develop more specific protocols for surveys, for division into multiple plots of areas exceeding one and three acres, (for intertidal and subtidal beds, respectively), and for the role of show factors in calculating densities from surveys and harvests, to give effect to these provisions. If recreational geoduck catch estimates can reliably assist in the assessment of the geoduck density of State-owned aquatic lands that are proposed for geoduck aquaculture, that information will be factored into the density assessment.

6. TERM OF THIS AGREEMENT AND CONTINUED APPLICATION OF ITS PROVISIONS

Durability of Geoduck Density Threshold Determinations Made With Respect to Specific Aquaculture Proposals: For purposes of determining whether an area or plot proposed for geoduck aquaculture meets the density threshold of Exhibit A, the procedures of the Revised Shellfish Implementation Plan and the orders and decisions interpreting and applying the Shellfish Proviso to proposed aquaculture activity will be applied. This principle shall apply notwithstanding any other limitation on the duration of this Consent Decree and Settlement Agreement.

Continuing Ability to Apply the Agreed Geoduck Density Threshold: The parties agree that the minimum density established in Section 3 of this Consent Decree and Settlement Agreement, and the other provisions of this Consent Decree and Settlement Agreement that provide for the application of that density level to new geoduck aquaculture activities, shall apply for a period of 25 years from the effective date of this Consent Decree and Settlement Agreement unless renewed or revised by mutual agreement of the parties.

The parties agree to convene a meeting of State, Grower and Tribal representatives at least one year in advance of the expiration of these terms to consider the advisability of extending those terms of this agreement, or modifying the agreement to reflect conditions prevailing at that time.

Agreements to renew or Modify the Terms of this Consent Decree and Settlement

Agreement: Any renewal or modifications of this Consent Decree and Settlement Agreement may be undertaken by mutual written agreement between the State, the Growers and any affected Tribe(s) without further action by the court.

Procedures in the event of Non-Renewal: In the event that this Consent Decree and Settlement Agreement expires, the minimum density to be utilized for purposes of the revised Shellfish Implementation Plan shall be determined pursuant to the dispute resolution provisions of that Plan.

7. REVIEW COMMITTEE

The parties agree to form a committee of State, Grower and Tribal representatives to informally address and attempt to resolve specific issues that may arise from the implementation of this Consent Decree and Settlement Agreement.

8. RESOLUTION OF DISPUTES.

All disputes arising in the interpretation, implementation and enforcement of this Settlement Agreement and the Revised Shellfish Implementation Plan that are not resolved informally shall be resolved as set forth in the Revised Shellfish Implementation Plan entered April 8, 2002 (or as thereafter amended). This Court retains continuing jurisdiction for this purpose.

9. MINIMUM DENSITY FOR GEODUCK NOT A PRECEDENT FOR OTHER SPECIES.

The minimum density for geoduck established by this Consent Decree and Settlement Agreement is based upon a negotiated number that does not reflect the legal positions or factual contentions of either the State, the Growers or the Tribes; it is not based upon any particular method, formula or other calculation that could be used to determine the minimum density or sustainability for any other species or for geoduck in the absence of this agreement. The minimum density for geoduck established by this Consent Decree and Settlement Agreement should not be used or referred to in any

manner or for any purpose as part of the dispute resolution proceedings to determine the minimum density or sustainability of any species.

Respectfully submitted this 29th day of June, 2007.

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THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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UNITED STATES OF AMERICA, et al.,

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NO. C70-9213

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

ORDER APPROVING CONSENT
DECREE AND SETTLEMENT
AGREEMENT

IT IS HEREBY ORDERED:

The Court, having considered the Joint Motion For Order Approving Consent Decree and Settlement Agreement, which addresses the geoduck portion of this minimum density dispute resolution proceeding, finds that the Consent Decree and Settlement Agreement is fair and reasonable, both procedurally and substantively, consistent with

C70-9213, Subproceeding 89-3-01 (Shellfish Minimum
Density)

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applicable law, in good faith, and in 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