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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 (Shellfish) STIPULATION AND ORDER AMENDING SHELLFISH IMPLEMENTATION PLAN

In an amended opinion filed September 25, 1998, at 157 F.3d 630, the Ninth Circuit Court of Appeals remanded three issues to the District Court for further proceedings: (1) determination of the minimum density of shellfish necessary to establish the existence of a natural bed, (2) the manner of implementing the Tribes' allocation of shellfish from Growers' beds, and (3) the manner of resolving disputes to be included in the Shellfish Implementation Plan, (the "Plan"), 898 F Supp. 1453, 1463 *et seq.*

To address issues (1) and (2), the Tribes, the Growers, and the State of Washington have stipulated to revisions of sections six and eight of the Plan. The Tribes and the Growers therefore

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Kanji & Katzen, PLLC
720 Third Avenue, Suite 1500
Seattle, WA 98104
206-344-8100
WSBA # 7835

cc: 9213 only ER

withdraw their competing proposals to revise the Plan that were filed on or about March 11, 2002. To address issue (3), all parties have stipulated to revisions of section 9 of the Plan.

In addition, the parties have stipulated to minor wording changes in other sections of the Plan to conform the language of the Plan to be consistent with the revisions to section 9

For the convenience of the Court and the parties, Attachment A to this Stipulation and Order is a complete restatement of the Plan, including all revisions stipulated to by the parties.

STIPULATION

1. Plaintiff Indian Tribes, Puget Sound Shellfish Growers, and the State of Washington, stipulate that the revisions to sections six and eight of the Shellfish Implementation Plan, as incorporated into the restatement of those sections in Attachment A, resolve issues (1) and (2) remanded from the Ninth Circuit Court of Appeals, as described above, such that Attachment A should be entered as an Order of the Court amending the Shellfish Implementation Plan found at 898 F.Supp. 1453, 1463 *et seq.*

2. All parties stipulate that the revision of section 9, as incorporated into the restatement of that section in Attachment A, resolves issue (3) remanded from the Ninth Circuit Court of Appeals, as described above, such that Attachment A should be entered as an Order of the Court amending the Shellfish Implementation Plan found at 898 F.Supp 1453, 1463 *et seq*

Kanji & Katzen, PLLC
720 Third Avenue, Suite 1500
Seattle, WA 98104
206-344-8100
WSBA # 7835

ORDER

IT IS HEREBY ORDERED:

The Shellfish Implementation Plan, 898 F.Supp. 1453, 1463 *et seq.*, is hereby amended to read as stated in Attachment A to this Stipulation and Order.

DONE this 8th day of April, 2002.

Honorable Edward Rafeedie
United States District Judge

Presented by:

THE UNITED STATES OF AMERICA, Plaintiff

By: _____ (per authorization)
Peter C. Monson
Assistant Chief, Indian Resources Section
United States Department of Justice

PLAINTIFF-INTERVENOR TRIBES

By: _____
Phillip E. Katzen, WSBA #7835, Coordinating Counsel
Kanji & Katzen, PLLC

By: _____ (per authorization)
Mason D. Morisset, WSBA #273, Coordinating Counsel
Morisset Schlosser Ayer et al.

Kanji & Katzen, PLLC
720 Third Avenue, Suite 1500
Seattle, WA 98104
206-344-8100

THE STATE OF WASHINGTON, Defendant

By. Matthew A. Love (per authorization)
Matthew A. Love, WSBA #25281
Assistant Attorney General
Washington Attorney General's Office

PUGET SOUND SHELLFISH GROWERS, Defendant-Intervenors

By: Michael Himes (per authorization)
Michael Himes, WSBA #19423
Perkins Coie

ALEXANDER, et al., Defendant-Intervenors

By: Howard Goodfriend (per authorization)
Howard Goodfriend, WSBA #14355
Edwards, Sieh, Smith & Goodfriend

ADKINS, et al., Defendant-Intervenors

By: Eric Richter (per authorization)
Eric Richter, WSBA #6978
Henke & Richter

Kanji & Katzen, PLLC
720 Third Avenue, Suite 1500
Seattle, WA 98104
206-344-8100
WSBA # 7835

ATTACHMENT A TO STIPULATION AND ORDER AMENDING SHELLFISH IMPLEMENTATION PLAN

REVISED SHELLFISH IMPLEMENTATION PLAN

1. INTRODUCTION

1.1 Objectives of Plan.

The primary objective of this Implementation Plan is to provide a framework, principles, and course of action for effective cooperative management of the shellfish resources subject to Treaty harvest under the Court's decision of December 20, 1994. In effectuating the rights of the Tribes to take shellfish under the Treaties, this Order also recognizes the State's responsibilities for conservation of public shellfish resources, subject to the Treaty right to take fish at usual and accustomed places.

1.2 Goals and Procedures.

The Implementation Plan calls for interim and then long term management plans. The management plans are to provide both Treaty and non-Treaty shellfishers, subject to their respective regulatory authorities, the opportunity to harvest their respective shares in an orderly manner, consistent with resource protection. The Plan also provides specific procedures for tribal and non-tribal harvest on State and private lands and waters. To the extent specific procedures in section 6 (applicable to commercial Shellfish Growers) and 7 (applicable to Private Property Owners) conflict with general provisions of the Plan, the relevant specific provisions apply to the Growers and Owners, respectively.

1.3 Application of Law.

All provisions of this Plan and all management plans that are developed from it must comply with the Court's December 20, 1994 decision. No part of this plan is intended to repeal any prior decision in *United States v Washington.*

1 4 Requirement of Coordination Among Tribes.

The Tribes will be responsible for coordination with all affected Tribes in the development of management plans or compliance with the interim plan, below. This requirement, however, shall not relieve any party of the obligation to give any notice required herein to any affected party.

1.5 Tribes Bound.

The Tribes bound by this implementation plan are. Lummi, Nooksack, Upper Skagit, Swinomish, Tulalip, Muckleshoot, Suquamish, Puyallup, Nisqually, Squaxin Island, Skokomish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha S'Klallam, Makah, Hoh, Stillaguamish, Sauk Suiattle and Quileute. Other Tribes may become signatories to this Plan by the agreement of all parties to the Plan or by order of the Court

1.6 Shellfish Sanitation Consent Decree.

The Consent Decree Regarding Shellfish Sanitation Issues, entered by the Court on May 4, 1994, specifies those public health requirements to be applied to Treaty shellfishing activities and establishes an intergovernmental, cooperative system for monitoring, enforcement, and dispute resolution. This Implementation Plan, along with all management plans and agreements reached pursuant to it, shall be developed, applied and interpreted in a manner consistent with that Consent Decree

1.7 Status of Headings.

The headings in this Implementation Plan are for the convenience of the reader and are not intended to change the substance of the Plan.

2. PRINCIPLES OF SHARING THE SHELLFISH RESOURCE.

2.1 Effective Date of Allocation; Mandating Equitable Adjustments.

The effective date of this Implementation Plan for purposes of calculating allocation of shellfish between tribal and nontribal harvest shall be the date of this Order, unless otherwise agreed between the State and Tribes. With respect to shellfish on the Growers' and Owners' property, the allocation between tribal and non-tribal harvest shall commence on the date a Tribe gives notice pursuant to Plan sections 6.1 and 7.1, respectively.

2.2 Cooperative Management.

Where data is not available to determine the total allowable harvest for purposes of allocation between the Tribes and State, the Tribes and State shall develop a cooperative approach to management with the goal of maximizing harvest and equalizing allocation, consistent with conservation of the resource. This shall apply for both interim and permanent management plans and agreements.

2.3 Sustainable Harvest Biomass.

"Sustainable harvest biomass" means the 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 For certain species, such as crab and shrimp, the sustainable harvest biomass may be achieved by agreed restrictions on the size or sex taken, and/or quantity or location by limiting the type of gear used for the fishery, ensuring that a portion of the biomass remains unharvested.[22]

2.4 Management Objectives.

"Management Objectives" means the objectives of each party to meet their respective goals using their share of the harvestable surplus of the resource and the biological goals for the continued long term health of the resource.

2 5 Sharing Provisions.

Each Tribe may take, from natural beds, up to fifty percent of the sustainable harvest biomass of any shellfish species within the usual and accustomed areas for that Tribe. The sharing shall be achieved by coordinated management plans Such sharing shall be subject to the following provisions:

a. Sharing Sustainable Harvest Biomass. The sustainable harvest biomass of a shellfish bed or shellfish resource subject to the Treaty right shall be determined on an annualized basis or other agreed periodic basis. The sharing of shellfish shall take into account all commercial and non- commercial harvests from the sustainable biomass of shellfish. For

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[22] This definition corresponds with the relief provided for tribal harvest of anadromous fish: the court defined the harvestable number of fish in terms of that amount that would not impair the amount of fish needed to maintain the run at existing levels. *See generally Washington I*, 384 F.Supp. at 405-407, 409, 417.

This definition, however, is intended to apply to the order sharing shellfish harvests, not to change existing standards regarding the limited application of state laws to treaty Indians exercising treaty fishing rights.

intertidal areas, the sustainable harvest biomass shall be shared on a bed by bed basis,[23] or on other established boundaries of a public land[24] parcel for sharing the shellfish. Where the sustainable harvest biomass cannot be calculated for a species or area, the harvestable amount to be shared shall be determined using the best fishery management information and practices that ensure conservation and maintain production of shellfish in the area harvested.

b. Adjusting Imbalances. Unless otherwise agreed, all management plans adopted pursuant to this Implementation Plan shall include provisions for addressing imbalances in harvest where a party was not afforded the opportunity to attain its share The means for addressing imbalances may vary depending upon the species, the management techniques used for specific fisheries, and management imprecisions.

c. Independent Management Discretion The State and affected Tribe(s) shall have discretion to decide their respective management objectives for the harvest of their respective shares, whether commercial, recreational, ceremonial, or subsistence use.

d. Overlapping Usual And Accustomed Areas. Where two or more Tribes have overlapping usual and accustomed areas, then the combination of tribal harvesting shall not exceed fifty percent of the sustainable harvest biomass, leaving at least fifty percent of the sustainable harvest biomass for non-Indian management.

e. Intertribal Allocation. Allocating the tribal share among affected Tribes shall be determined by the affected Tribes, with the intertribal agreement as appropriate provided to the State. Lack of an intertribal sharing agreement shall not entitle a combination of Tribes to take more than fifty percent of the sustainable harvest biomass of shellfish in a given area.

f. Equal Opportunity. In sharing the opportunity for harvest of a shellfish resource, the State and Tribe may also consider the time of fishing, quality of the shellfish, ease of harvesting, and catch per unit effort for the shellfish involved to ensure that there is equal sharing of the harvest opportunity.

g. Polluted Shellfish And Shellfish Not Available. In allocating the sustainable harvest biomass between the State and affected Tribe(s), shellfish beds that are not presently harvestable due to pollution, development, or other physical causes shall not be counted in the biomass of shellfish beds which can be harvested. This shall not prevent a relay harvest of polluted shellfish in accordance with the Consent Decree Regarding Shellfish Sanitation Issues. Any such relay harvest from a polluted shellfish bed shall be accounted for and allocated separately from sharing of shellfish beds that are approved under Consent Decree.

h Planted Oyster Beds. Oysters planted on public lands, such as on certain State Parks, that would not exist but for the State having planted those oysters are not subject to a tribal share. The Treaties did not reserve any right to such artificial oyster beds.

i. Beds Staked And Cultivated To the extent that any shellfish bed on public land is within the definition of "any beds staked or cultivated by citizens" in the Court's relief applicable

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[23] Where a shellfish bed straddles publicly and privately owned land, the provisions of this section apply to the shellfish on public land only.

[24] For purposes of this Implementation Plan, "public land(s)" means any land owned by the State, or any of its subdivisions or agencies, unless such land is being leased to a Shellfish Grower.

to commercial Shellfish Growers, then such shellfish beds on public lands are not subject to tribal sharing.

Further, the provisions of section 6.3, related to the creation of new artificial beds, are applicable if the State proposes to create any new artificial beds on public land.

3. LONG-TERM AND INTERIM MANAGEMENT PLANS FOR THE SHARING OF SHELLFISH RESOURCES ON PUBLIC LANDS OR IN PUBLIC WATERS.

3 1 Management Plans.

Ultimately, tribal and non-tribal harvests of shellfish on public lands and from public waters[25] will take place pursuant to management plans.[26] Those management plans will be developed between the Tribes and State on a government-to-government basis Once agreed by the parties to the plan, each such management plan shall be effective without further approval of the Court and shall have the same force and effect as this Order.[27]

3.2 Harvests Included.

All tribal harvests of shellfish by Tribes participating in this Implementation Plan, and all non-tribal harvests in areas included within the collective usual and accustomed grounds and stations of the Tribes participating in this Implementation Plan, will be subject to management plans adopted pursuant to this Implementation Plan

3.3 Interim Plan Needed.

Because development of management plans is a long term process, an interim plan is needed to govern all shellfisheries pending adoption of permanent plans.

4. INTERIM PLAN FOR STATE AND TRIBAL HARVEST OF SHELLFISH ON PUBLIC LANDS OR FROM PUBLIC WATERS.

4.1 Scope of Interim Plan.

This interim plan shall govern shellfisheries from the date of entry of this Order until permanent or long term management plans are adopted for particular species of shellfish. The interim plan sets out procedures all persons and parties covered by this Implementation Plan shall follow until permanent or long term management plans are adopted.

4.2 Closure of Commercial Shellfisheries.

The State and Tribes shall close all commercial shellfisheries and prohibit the commercial landing of all shellfish on public lands or from public waters, within thirty days after

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[25] The relief provided in the above section applies to all shellfish species located on or in all public owned lands, (such as clams, oysters, geoduck clams, and mussels that are embedded in or attached to public owned lands), and to all mobile shellfish species that live in the waters of the State, (such as crab, shrimp, sea cucumber, sea urchin, squid, octopus, and others)

Separate provisions of the Implementation Plan define the State's role in tribal harvest of shellfish on private tidelands, or commercial Shellfish Grower lands.

[26] As indicated in § 7, such interim and long-term management plans shall also contain provisions specifically applicable to harvest from non-commercial, privately owned tidelands.

[27] To the extent the parties have already entered interim agreements, those agreements have the same status as future management plans or agreements under this Plan.

entry of this Order, except where a signed interim agreement between the State and all affected Tribes is in place regarding a specific commercial shellfishery.

4 3 **Adjusting Non-commercial Fisheries.**

After entry of this Order, the State shall adjust non-commercial shellfisheries within forty-five days after any Tribe makes a written request to the Washington Department of Fish and Wildlife (WDFW) to do so, if necessary to ensure that no more than fifty percent of the harvestable amount will be taken by tribal or non-tribal fisheries, including commercial and non-commercial combined. A dispute over the necessity or extent of the adjustment to be made shall be subject to the dispute resolution procedure of sections 4.7 and 4 8.

4.4 **Shellfish Beds With Inadequate Data.**

For beaches where data is not available for determining the sustainable harvest biomass and allocation between the State and all affected Tribes, the affected Tribes and the State will:

a. manage the beach to allow for affected Tribes to take up to fifty percent of the jointly estimated shellfish harvest opportunity until more specific data is available.

b. jointly identify shellfish beds needing a survey and develop a prioritized list and time line to complete surveys and provide for more accurate management and sharing on these beaches, within efficient biological management.

4.5 **Opening A Fishery By Agreement.**

Where no interim agreement is in place thirty days after the entry of this Order, a shellfishery closed or adjusted pursuant to section 4.2 or 4.3 may only be opened or enlarged after compliance with the procedures in section 4.6. Shellfisheries may proceed at any time, however, if agreement is reached between the State and all affected Tribes, notwithstanding the procedures otherwise applicable under this section.

4.6 **Opening A Fishery Without Agreement.**

Where the State or a Tribe desires to open or enlarge a shellfishery that has been closed or adjusted pursuant to section 4.2 or 4.3, it shall comply with the following procedure (unless an interim agreement is in place):

a. Before proceeding, the State and all affected Tribes shall confer at least one time in an effort to reach agreement regarding the proposed fishery.

b. Failing agreement, the party (Tribe(s) or State) proposing to open the fishery shall provide to the other party a proposed regulation for the fishery, in writing, at least fourteen days before the fishery is scheduled to begin. The party proposing the harvest shall be able to provide a sound fisheries management basis for a determination that a harvestable surplus exists and that a fishery can be operated that will not interfere with the sharing principles ordered by this Court However, this is not intended to shift the burdens, described below, associated with contesting a fishery. The regulation (or other documents provided with the regulation) shall contain, at a minimum, the following information:

(1) The dates and hours the fishery will be open;

(2) The catch area(s) open for harvest;

(3) The type of fishery to be opened (commercial or non-commercial);

(4) The species to be taken, including an estimate of or upper limit on the amount to be taken and the basis of the estimate;

(5) The estimated effort;

(6) The gear to be allowed,

(7) Provisions for record keeping and harvest reporting, including a schedule to ensure a timely exchange of information; and

(8) Any other information necessary for a specific fishery (such as, for example, daily limits for non-commercial fisheries)

In addition, information regarding enforcement and monitoring plans for the fishery shall be available to the State or Tribes upon request.

4.7 **Contesting State or Tribal Regulations and Dispute Resolution.**

A Tribe or the State may object to a proposed regulation. The party objecting must state the objection in writing and serve it on the entity proposing the fishery not more than ten days after receipt of the regulation, and at least three working days before the fishery is scheduled to begin. The objection must be based on a well-founded assertion that the proposed regulation would result in:

(1) an overharvest on an allocation or conservation basis in violation of the standards set by the Court in *United States v Washington*, or other conservation standards agreed to by the State and affected Tribes; or

(2) otherwise violate this Implementation Plan or other applicable orders of the Court. The objection must state the reasons for the objection, the data on which it is based, and any other pertinent information available to the objecting party.

4 8 **Dispute Resolution During Interim Plan.**

No contested fishery shall begin unless a decision is rendered through the dispute resolution procedures of section 9 to allow the fishery. To the extent necessary, the Magistrate Judge (or Technical Advisor, if applicable, as provided for by § 9.1.2) may order the State or affected Tribe to comply with the allocation and sharing principles described by this order In addition, the following rules shall apply:

a. The objecting party shall arrange for a hearing to be held before the Magistrate Judge (or Technical Advisor, if applicable) no more than ten working days from the date of service of the objection (see Dispute Resolution, section 9).

b. The Magistrate Judge (or Technical Advisor, if applicable) shall render a decision no more than ten working days after the conclusion of the hearing. No fishery shall open until a decision is rendered by the Magistrate Judge (or Technical Advisor, if applicable) .

c. Where an emergency exists, (for example, where the proponent's opportunity to fish may be lost by delay), the Magistrate Judge (or Technical Advisor, if applicable) may change the above time limits if the party requesting a change in the time limits has acted in a diligent and timely manner.

4.9 **Obligation to Adjust Catch and Comply With Sharing Order.**

Where there is a shellfish harvest without agreement, the State or affected Tribe(s) shall either comply with this section as needed, or contest the regulation as provided above. When a Tribe authorizes the harvest of shellfish without agreement, then the State shall reduce or adjust State regulated harvests as necessary to allow for the proposed tribal harvest. State regulated harvests shall not take a tribal share of shellfish as defined by the sharing principles, above. Tribal or State fisheries opened under this subsection shall not exceed the tribal or State share authorized by this Court and shall be adjusted by the Magistrate Judge (or Technical Advisor, if applicable) , if necessary, to comply with and not exceed the tribal or State share.

4.10 **Tribal Ceremonial Shellfish Harvests.**

Notwithstanding the provisions of section 4.2 through 4.9, a Tribe may open a fishery for unanticipated ceremonial purposes by emergency regulation for a specific time period and for a specific allowable harvest amount.

5. DEVELOPMENT OF PERMANENT PLANS TO GOVERN STATE AND TRIBAL HARVESTS OF SHELLFISH FROM PUBLIC LANDS OR PUBLIC WATERS.

5.1 **Order to Develop Plans.**

Long term management plans shall be developed separately for each species of shellfish (or groups of related species, such as all crab species) for which fisheries are to take place on public lands or from public waters. Those management plans may be divided into sub-plans for specific geographic regions, for types of fisheries (commercial, non-commercial; subtidal, intertidal; etc.), or on any other agreed basis. Each management plan shall govern both tribal and State shellfisheries. Unless otherwise agreed, each management plan shall be subject to comprehensive review and agreement by the State and Tribes every five years

5.2 **Order to Share Information and Establish Planning Committees.**

The State and Tribes shall exchange all available information in either side's possession regarding the status of shellfish populations and fisheries taking place on those populations, in response to reasonable requests for the same, to assist in carrying out their management responsibilities.

5.3 **Joint Technical Working Committee.**

In addition, the State and Tribes shall establish a joint technical working committee to perform tasks, including the following:

a. Exchange and review new and existing information;

b Establish assessment methodologies;

c. Identify and prioritize management needs;

d. Develop annual or other periodic management plans.

5.4 **Elements of permanent plans.**

In addition to complying with the allocation ordered by the Court or otherwise agreeing, certain basic elements should be included in all management plans between State and Tribe(s).

Those elements include.

a. Definitions of relevant terms.

b. Procedures for identification of the location of shellfish resources.

c. Procedures for assessing and estimating shellfish populations and the sustainable harvest biomass.

d. Identification of geographic boundaries to be used for management and allocation of shellfish harvests (management or allocation "units"), including procedures for how and when boundaries can be modified once adopted.

e. Identification of management periods and the duration of management plans.

f. Procedures for establishing the amount to be harvested from each management area.

g. Procedures for establishing how allocations will be measured for each management or allocation unit. In intertidal areas, unless otherwise agreed or determined by the Court, harvest management shall afford both Treaty and non-Treaty harvesters the opportunity to harvest fifty percent of the harvestable shellfish resource on each public beach, or tideland parcel having established or agreed boundaries, so long as consistent with public health and conservation requirements.

h. Procedures for enacting pre-season and in-season regulations. These will include the amount of notice to be given before a fishery begins and requirements for exchanges of information.

i Provisions regarding the content of regulations. At a minimum, these will include identification of the management plan under which the regulation is issued, the species to be harvested, the harvest areas, the purpose of the harvest, the gear to be used, the expected effort, the expected harvest, and the dates and times of opening and closing of the fisheries. Unless addressed in a Tribal Ordinance, the regulations will also identify the monitoring system to be used.

j. Provisions regarding law enforcement for Treaty and non-Treaty shellfishing.

k. Provisions for record keeping and harvest reporting shall include: commercial WDFW shellfish receiving tickets, Treaty Indian receiving tickets, agreed sport harvest estimates, and agreed Treaty Ceremonial and Subsistence estimates.

l Provisions for identification of tribally authorized harvesters taking shellfish and tribal representatives engaged in surveys, population estimates, and other management activities, including tribal fish managers, as well as tribal enforcement personnel.

m. Provisions for modifications of management plans.

6 COMMERCIAL SHELLFISH GROWERS.

The parties are bound by the definitions prescribed by the Court in this Order, the December 20, 1994 and August 28, 1995 Memorandum Decisions and Orders, and the Ninth Circuit decision, as amended September 25, 1998; and any other relevant order in *United States v. Washington* In addition, the parties will agree to a chart showing the minimum density of commercial shellfish species needed to establish the existence of a natural bed (i.e., able to support a commercial livelihood on a sustainable basis) of shellfish, referred to hereafter as Exhibit A. The values included in Exhibit A shall hereafter be referred to as the "natural bed thresholds". The species to be included in Exhibit A will be agreed to, but will include at least Manila clams, native littleneck clams, butter clams, horse clams, Pacific oysters, Olympia oysters, geoducks, eastern softshell clams and cockles. The natural bed threshold for each species will be determined by geographic regions as agreed by the parties, and by time intervals set forth in Exhibit A or otherwise agreed on by the parties The parties shall also agree on what constitutes a sustainable commercial harvest, including the appropriate time interval for harvesting to constitute a sustainable commercial harvest, for each species and region The parties shall have six months from the date of this Order to reach agreement on all these matters. Any disagreements remaining after six months regarding the species, geographic regions, time intervals, what constitutes a sustainable commercial harvest, or the natural bed threshold for any particular species, region and time interval, 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 Upon completion of Exhibit A, by agreement or dispute resolution, the time period set forth in §6.1.4 shall commence.

6.1. Determination Of Tribal Shellfish Allocation on Grower Beds.

Determination of the quantity of shellfish a Tribe is entitled to harvest from natural beds or enhanced natural beds (i.e., natural beds enhanced by Growers) on property owned or controlled by a Grower is triggered by notice to the Grower of the Tribe's interest in commencing harvest.

6 1 1 Any Tribe interested in commencing harvest on property owned or controlled by a Grower shall provide notice ("Harvest Notice") to every other affected Tribe and to the Grower. The notice shall specify the particular property owned or controlled by the Grower upon which harvest is requested to occur, and shall include the name, street and mailing address, and telephone number of a tribal representative. Each such notice, and all information received by the Tribe(s) pursuant to the below, shall be made subject to a nondisclosure agreement in a form to be agreed upon by the parties.

The Grower shall provide the information required by this § 6.1.1 Harvest Notice to the Tribes in writing within sixty days of the receipt of any such tribal notice.

In addition, the Tribes shall be given the opportunity to inspect the beds located on the land owned or controlled by the Growers. The Tribes shall give the Grower fourteen calendar days notice prior to the proposed date of inspection ("Inspection Notice"). The inspection shall occur as noticed by the Tribes and shall take place at a reasonable time. The Grower may accompany the tribal representatives during the inspection.

Upon receipt of a Harvest Notice the Grower shall provide the requesting Tribe with the following:

a. A description of how the Grower demarcates portions of the Grower's property for purpose of managing or keeping records of shellfishing activities. (Each separately demarcated area shall be referred to as a "management unit" for purposes of this Implementation Plan.)

b. The specific location of each management unit on the Grower's property.

c. For each commercial species listed in Exhibit A, on each management unit, the Grower shall determine if the sustainable yield density (i.e., the quantity of mature marketable shellfish per square foot that could be harvested on a sustainable basis) at the time enhancement began exceeded the natural bed threshold identified in Exhibit A for the corresponding time period and region. If it is established by agreement or dispute resolution that a shellfish bed had less than the natural bed threshold set forth in Exhibit A at the time that enhancement activities began, any such bed shall be deemed artificial The Grower shall specify the basis for his or her assertions, including all information used to determine whether a natural bed was present prior to the time enhancement began.

d. For beds asserted to be natural beds (i.e., exceeding the natural bed identified in Exhibit A), the Grower shall specify the quantity of shellfish that the Grower asserts could be harvested on a sustainable basis, absent the Grower's and prior Growers' current and historic enhancement/cultivation activities, and the basis for that assertion. The Grower's operations are not required to cease or be changed in any way while the sustainable harvest level is being determined.

e. Shellfish beds shall be presumed to be artificial (and accordingly not subject to tribal harvest) for all management units where the Grower certifies that the only shellfish beds present are the result of off-bottom or an equivalent form of cultivation

6.1.2 The Tribes shall review the Harvest Notice data provided by the Grower(s) in §6.1.1, and any certification under §6.1.1(e), and may conduct an inspection of the beds, if any, within one year of receipt of the Harvest Notice data. A Tribe may also request that the Grower provide all or some of the information described in subsections 6.1.2(a) through (d), if necessary for the Tribe(s) to determine whether to accept the Grower's assertions regarding the existence of a natural bed or the sustainable harvest that would exist absent the Grower's and prior Growers' current and historic enhancement/cultivation activities. That information shall be provided within 90 days of such a request Unless the Grower's submission under subsection 6.1.1 is disputed in writing by a Tribe within the one-year period after receipt of Harvest Notice data, during which one-year period the Tribes may evaluate any information provided and conduct any inspection upon a proper Inspection Notice, the Grower's submission provided under § 6.1.1 shall be final and conclusive.

a. The nature and extent of all enhancement activities undertaken by the Grower and prior Growers' since enhancement began, if any, along with all documentation of such enhancement activities in the possession of the Grower.

b. To the extent that any of the shellfish present on any management unit are the result of seeding or transplanting of shellfish from other locations, the Grower shall provide all documentation in the Grower's possession relating to the dates and quantities of all such seeding and transplantation. The source of the seed or transplanted shellfish shall also be identified, including specifically the management unit of that Grower's property if such property was the source of the seed or shellfish.

c. All harvest records in the Grower's possession for each management unit, by species. All harvest records that are not specific to particular management units shall also be provided, along with any information the Grower possesses regarding which management unit or units the shellfish were harvested from.

d All other information in the Grower's possession that is relevant to (a) each assertion under §6.1.1 that no natural bed of any species was present at a particular location when the Grower began cultivation or enhancement activities at that management unit, and (b) the sustainable yield of each natural bed of any species that would exist absent the Grower's and prior Growers' current and historic cultivation/enhancement activities at that management unit.

6 1 3 If the parties agree on the location of any natural or enhanced natural beds and the quantity of tribal harvest permitted from each such bed, harvest shall commence according to the provisions specified in §6.2. Harvest shall also commence to the extent that there is agreement as to any bed or group of beds, meaning that the parties need not be in full agreement with respect to all beds prior to beginning any harvest. The quantity of tribal harvest permitted from each enhanced natural bed shall be fifty percent of the sustainable shellfish production (yield) from such beds that would exist absent the Grower's and prior Grower's current and historic enhancement/cultivation activities. For example, if ten clams per square foot were a sustainable yield sufficient to support a commercial livelihood at the time that enhancement began, and if a 100 square foot Grower's bed yielded ten clams per square foot on a sustainable basis absent the Grower's efforts to enhance the output (1000 clams), and that same bed produces fifty clams per square foot as a result of the Grower's labor (5000 clams), the Tribes would be entitled to fifty percent of the 1000 clams or 500 clams The sustainable harvestable level shall not include shellfish found in areas that are closed to shellfishing due to pollution.

To the extent of any disagreement which the parties are unable to work out themselves, the parties shall submit the issue to the dispute resolution procedure of § 9. The burden of proof whether a bed is artificial, and the amount of sustainable shellfish production that would exist absent a Grower's and prior Growers' current and historic enhancement/cultivation activities, shall be on the Growers.

6.1 4 Times When The Tribes May Give Notice Under §6.1.1.

Tribes initially have one year after the completion of Exhibit A to give a harvest notice pursuant to § 6.1.1 to Growers subject to the Implementation Plan. After that one-year period, a Grower may operate free of additional notices of tribal claims for a three-year period. At the end of such three-year period, the Tribes shall have a ninety-day period during which they may provide notice pursuant to § 6.1. above. At the end of the ninety-

day period, the Grower shall again have a three-year period free from additional tribal notices or claims The ninety-day open period for giving notice under § 6.1 shall continue to alternate thereafter with a three-year period during which no such notice may be given

During the ninety-day period available for Tribes to give a Harvest Notice pursuant to § 6 1 1 either a Tribe or a Grower may also give notice requesting a change in the previously agreed or established tribal harvest allocation. Such notice of a requested change must be based upon a change in circumstances affecting the harvestable quantity of shellfish that would be present absent the Grower's and prior Growers' current and historic enhancement/cultivation activities. The party asserting the change of circumstances will have the burden of proof to establish the change in circumstances and the burden of proof to establish the new amount of the allocation.

6.2 **Harvest Plans.**

Not later than thirty days after a final determination has been made of the location of one or more natural beds or enhanced natural beds and the sustainable harvestable quantity of shellfish that could be taken from such natural beds or enhanced natural beds absent the Grower's and prior Growers' current and historic enhancement/cultivation activities, whether by agreement or through dispute resolution, the Grower and affected Tribe(s) shall coordinate the development of a harvest plan.

The harvest plan shall contain, at a minimum, the following: (1) the times for tribal harvest; (2) the species and amount of shellfish and the location from which they are to be harvested, (3) the number of tribal harvesters that can safely be present on a bed to conduct a harvest; (4) the appropriate method of access that will avoid damage to the Grower's crops; (5) the method of harvest, e.g., blanket or spot digging; (6) a process for notification and change of harvest plan due to unusual circumstances and/or catastrophic mortalities.

The Tribe(s) must complete its harvest of allotted shellfish during the time period prescribed in the harvest plan and shall not be permitted to make up any shortfall in future harvest periods except to the extent otherwise permitted in the harvest plan itself.

The harvest plan shall be compatible with the Grower's farming operations and protect the Grower's crops while respecting the tribal treaty right to harvest from natural beds. The harvest plan shall not impose any more restrictions on the Tribe(s) than are necessary to protect the Grower's operations and crops from harm. To minimize impact to a Grower's beds, a Grower and the Tribe(s) may agree that the tribal allocation from a particular Management Unit be taken from any alternative Management Unit under that Grower's control, provided it is within the affected Tribe(s) usual and accustomed harvest areas and the density, quality and accessibility is equal or better than the Management Unit where the natural bed is located. Where the harvest of the natural bed would cause irreparable harm to a Grower's artificial or enhanced natural bed to the point that the Grower in good faith will not harvest the natural bed, the harvest plan need not provide for tribal harvest from that natural bed. The following are illustrative of such circumstances

a. An artificial bed of Manila clams cultivated over natural beds of butter or horse clams. Where typically there are multiple year classes of Manila clams in a bed at any one time and the Grower harvests only the mature clams periodically and leaves

young clams behind to mature, the harvest of deep horse or butter clams would cause severe damage to the shallow Manila clams on top

b A natural bed of Manila clams under an artificial bed of Olympia oysters. Olympia oyster beds are continually culled and only adult oysters are harvested The bed is never completely barren of Olympia oysters and thus there can be no access to clams underneath such oysters without risk of severe damage to the oysters.

c. When a Grower in good faith does not harvest his or her artificial or enhanced natural bed while awaiting changes in market conditions and harvest of the underlying natural bed would cause severe damage to the artificial or enhanced natural bed.

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.

The Tribes will be responsible for coordination of the development and implementation of harvest plans with all Tribes with a right to harvest shellfish from a particular Grower(s) If, during any harvest, the Tribe takes shellfish from beyond the agreed upon boundaries or causes any damage to the Grower's property, the parties shall attempt to resolve the matter informally. If there is no resolution, the parties shall submit the matter to dispute resolution pursuant to § 9. Growers shall have no duty of care for tribal members on their property nor shall they be held liable for any nonintentional tort (e.g negligence) should a tribal harvester sustain an injury while on a Grower's property.

No Grower may, instead of providing a Tribe the opportunity to harvest, insist that the Tribe take a money payment or take shellfish harvested by the Grower, as the tribal right is a right to take the shellfish by a tribal harvest Nothing in this Plan, however, shall be interpreted to foreclose the parties from voluntarily negotiating such an agreement; the Grower simply may not force such an agreement on any Tribe.

6.3 Creation of New Artificial Beds or Enhancement of Existing Natural Beds.

Nothing in this Plan shall be construed to limit a Grower's ability to enhance an existing natural bed or create a new artificial bed. If a Grower plans to enhance an existing natural bed or create a new artificial bed, the Grower shall give written notice to the affected Tribe(s) of his or her intention. The notice shall be provided at least sixty days prior to the proposed enhancement or creation of the bed and shall include the following: the location and species of the proposed bed and a summary of information known to the Grower regarding the history of harvest and enhancement of any species of shellfish listed in Exhibit A on the property. In addition, the notice shall explain the basis for the Grower's determination that the sustainable yield of shellfish is below the natural bed threshold in Exhibit A or if it is above the threshold, what the sustainable harvest yield is.

If the sustainable yield density (i.e., the quantity of mature marketable shellfish per square foot that could be harvested on a sustainable basis) of the species proposed for cultivation is below the natural bed threshold in Exhibit A the Grower shall be entitled to one hundred percent of the harvest of that species in the future.

If the sustainable yield density exceeds the natural bed threshold from Exhibit A for the species proposed to be enhanced, the Grower may enhance that natural bed, however, a harvest plan must be developed to provide the tribes with fifty percent of the

sustainable harvest that would exist absent the Grower's proposed enhancement activities.

If a Tribe contests the Grower's conclusion that there is no natural bed (i.e. the Grower's statement that the species proposed for enhancement or cultivation is below the natural bed threshold set forth in Exhibit A) in the location of the proposed enhanced or artificial bed, the Tribe shall so notify the Grower within thirty days of receiving the notice. The Tribe shall explain the basis for its position In addition, the Tribe shall be given the opportunity to inspect the location of the proposed bed upon fourteen days notice to the Grower The inspection shall then occur as noticed by the Tribe at a reasonable time. The Grower may have a representative accompany the Tribe during the inspection.

Where shellfish not proposed for cultivation are identified at levels which exceed the defined natural bed threshold in Exhibit A in the location where the artificial bed is planned, a harvest plan will be developed to provide the Tribes with fifty percent of the sustainable harvest of such natural bed. The tribal harvest level will not increase should the cultivation efforts for the proposed artificial bed species incidentally enhance yields of the natural bed species. If in redesigning his or her beds to create a new artificial bed, a natural bed is to be destroyed, the Grower shall only do so in good faith if it is deemed by the Grower to be necessary for their operations. A Grower will not destroy natural beds in bad faith

In the event that an unanticipated species of shellfish establishes a new artificial bed as a result of a Grower's efforts to create a new artificial bed for another species, the Grower shall be entitled to one hundred percent of the harvest of that unanticipated species An example of this would be cockles settling in geoduck predator exclusion tubes and surviving in an area where there was no natural bed of cockles previously and cockles were not the notified species for artificial bed creation.

If the parties are not able to agree on the presence or absence of a natural bed or the sustainable harvest that would exist absent the Grower's proposed enhancement/cultivation activities from a natural bed, it will be subject to dispute resolution. The Grower shall have the burden of proof. 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: that is, the Grower may proceed with his or her plans at the risk that the dispute resolution could hold that the proposed area contains a natural bed that will require the development of a harvest plan with the affected Tribe(s)

6.4 No General Regulation of Grower's activities.

Nothing in this Plan shall be interpreted as interfering in any way with the right of a Grower to engage in predator control activities or in any other activities designed to manage or benefit the Grower's land. Moreover, nothing in this Plan shall constitute a limit on a Grower's right to redesign his or her tidelands, even if such redesign results in the destruction of a natural bed (e.g., constructing a dike for Olympia Oysters which causes the substrate to change and eliminates a clam bed).

7. PRIVATE PROPERTY NOT USED FOR COMMERCIAL SHELLFISH GROWING.

Determination of the location of shellfish populations, population estimates, and regulations governing the harvest of shellfish from privately owned tidelands not being used for commercial shellfish production shall be subject to both interim and permanent management plans adopted by the Tribes and the State. Included within those plans, however, shall be additional measures applicable to harvests from privately owned tidelands, as described below.

7.1 Population Surveys And Population Estimates.

Tribes shall survey privately owned tidelands to determine the existence of shellfish populations prior to commencing harvest on a particular tideland.

The Tribes' surveys and population estimates shall be made consistent with the following rules, unless otherwise agreed between a Tribe and a Property Owner:

7.1 1 A survey to determine whether shellfish are present shall occur on each privately owned beach no more than once every three years. The cost of the survey is to be paid for by the Tribe. The manner and method of any survey must be of the type currently in use by the State of Washington.

7.1.2 An on-site population estimate shall occur no more than once per year. The cost of any estimate shall be paid by the Tribe.

7.1.3 Shellfish population information and data regarding a privately owned beach shall be shared with WDFW and the Property Owner.

7.1.4 Surveys and population estimates shall be done at reasonable times during daylight hours whenever feasible. Night surveys shall occur only when necessary.

7.1.5 Notice of a survey or population estimate shall be provided to the Property Owner no less than one month in advance of the survey or estimate. The notice shall include the name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the survey or population estimate.

7.1.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes may chose the type of service The Private Property Owner shall provide the address or phone number to the Tribe where that Owner will accept service of the notice. If such information is not provided by the Private Property Owner to the Tribe, notice need only be by publication In addition, survey schedules will be made available on a telephone hotline operated by the Tribe, if the Tribe has the means to provide such a hotline.

7.1.7 The Property Owner and the State may have representatives present during the survey and population estimate.

7.1 8 The Tribes need not conduct a comprehensive survey or population assessment of all properties potentially subject to tribal harvesting before being permitted to exercise Treaty harvest rights. However, as to a particular property, a survey or population assessment must be done prior to any tribal harvest.

7 1 9 Nothing in this Plan shall prevent a Private Property Owner from conducting his or her own survey or population assessment. The Private Property Owner may then, if the results of such a survey or estimate differs from the results of the tribal survey or estimate, contact the Tribes in writing and inform them of any discrepancy. If the parties are unable to resolve the matter, it shall be submitted to the dispute resolution procedures of § 9 according to the procedure set forth in this Plan.

7.2 Tribal Harvest.

In addition to the rules governing tribal harvests that are contained in management plans developed with the State, tribal harvests from private tidelands shall also be governed by the following requirements:

7.2.1 A tribal regulation opening private property for shellfish harvesting shall take into consideration the density of shellfish present and the size of the area to be harvested and limit the number of persons who may harvest accordingly.

7.2.2 The regulation opening private property for shellfish harvesting shall provide for monitoring and enforcement of the harvest. The regulation shall also ensure that proper sanitation procedures will be followed by all tribal harvesters.

7.2.3 The regulation opening private property for shellfish harvesting shall indicate the quantity of shellfish that may be taken, limits that apply to individual harvesters, if any, the purpose of the harvest (commercial, subsistence, ceremonial, or a combination), and the dates and times when harvest may take place.

Harvests may occur at night only if necessary. All harvests of properties less than 200 feet in width shall be limited to five days per calendar year. If a property is 200 feet or wider along the beach front, the number shall be increased by one additional harvest day per calendar year for every additional fifty feet of property.

7 2.4 There shall be no upland access to the private tidelands. The Tribes may access the private tidelands by water, across public lands, or by public rights of way only. Nothing in this Plan, however, shall prevent a Private Property Owner from voluntarily agreeing to upland access, although no Tribe has a right to insist on such access from the Tideland Owner.

7 2.5 Notice of a tribal harvest on private property shall be provided to the Property Owner and WDFW no less than one month in advance of the harvest. The notice shall include the name, street and mailing addresses, and telephone number of a tribal representative responsible for the administration of the harvest.

7 2.6 Notice shall be provided by certified mail, fax, or personal service. The Tribes shall chose the method of service. The Private Property Owner shall provide the address or phone number at which such notice will be received. If no address is provided, notice may be by publication.

7.2.7 If during any harvest, the Tribe damages the property of a Tideland Owner or in any way fails to harvest as stated in the notice provided to the Owner, the Owner may submit the issue to the dispute resolution procedures of § 9 as set forth in this Plan.

7.3 Dispute Resolution.

A Private Property Owner may challenge a proposed tribal harvest of shellfish from their property through the dispute resolution procedure of section 9 by complying with the following requirements:

7.3.1 An objection to a proposed tribal harvest must be made in writing to the Tribe's fishery department, stating the nature of the objection, the reasons for the objection, any data upon which the objection is based, and identifying any documents upon which the objection is based.

7.3.2 An objection must be based on a claim that the Tribe's plan for harvest is not consistent with the Court's orders in this case, an applicable management plan developed pursuant to this Implementation Plan, or other applicable law.

7 3.3 An objection to a proposed tribal harvest must be received by the Tribe not less than five working days before the harvest is scheduled to begin.

7.3 4 If the Property Owner posts a bond in the amount of $10 per lineal feet of waterfront of the property at issue, the Tribe may not harvest pending the outcome of the dispute resolution

7.3.5 The Magistrate Judge (or Technical Advisor, if applicable) shall have discretion as to whether a decision will be made based upon the written submissions of the parties or after a live hearing.

7.4 Rights of Private Property Owners

Nothing in this Plan shall be interpreted to limit in any way the rights of a Private Property Owner to build docks or other structures on their property.

8. MISCELLANEOUS PROVISIONS.

8.1 Proposals To Establish New Artificial Shellfish Beds.

8.1 1 The State shall exercise powers granted under State law regarding permits needed for shellfish enhancement (shellfish transfer permit, import permit, Hydraulic Project Approval). A person seeking to plant shellfish seed, place gravel or other substances, or otherwise enhance natural shellfish populations through additions to the natural environment in or beneath state waters, shall comply with these requirements. When an application is received to undertake such an activity, the authorizing Department shall within five working days notify the Tribes by mailing a copy of the application to each affected Tribe's fishery department.

8.1.2 Before granting such a permit application, the appropriate State Department may ascertain the status of existing shellfish populations, if any, where the activity is proposed to occur, to determine whether a natural shellfish bed exists. Where a Department of the State performs the assessment of existing shellfish populations, the Department shall establish procedures whereby the Tribes shall be afforded the opportunity to participate in the assessment of the status of the existing shellfish populations. Where the State chooses not to perform the assessment, the Tribes may perform an assessment.

8.1.3 Whenever the State proposes to grant a permit under section 8.1.1, it shall notify the Tribes at least twenty working days before issuance of a permit The State shall maintain copies of all documents that establish the basis for the granting of the permit and make them freely available to the Tribes at any Tribe's request. A decision to issue a permit, and the State's

conclusion, if any, regarding the presence of a natural shellfish bed, may be challenged by a Tribe and is subject to the dispute resolution procedure if agreement is not otherwise reached

8 1.4 Any person to whom a permit is issued to enhance shellfish production for commercial purposes shall be subject to any applicable provisions of this plan and the Court's orders to the extent of tribal Treaty rights.

8.2 **Proposals To Lease Tidelands Or Bedlands For Purposes Of Commercial Shellfish Growing.**

The purpose of this section is to address state leasing of tidelands and bedlands for shellfish harvest and production and to insure any Treaty right to harvest shellfish from such leased premises is addressed prior to leasing. Public lands under lease shall be considered the same as property owned by the lessee during any lease, and are subject to this court's provisions for private property or Growers' property. The following additional provisions apply for all new or renewal leases for shellfish harvest or cultivation.

8.2.1 **State Notice to Tribes.**

Whenever the State proposes to lease tidelands or bedlands for purposes of a commercial shellfish operation, then the State shall give affected Tribes notice of the lease application and provide a date certain when the Tribes can communicate to the State regarding the assertion of a Treaty harvesting right to shellfish on the property, in accordance with this section. Notice to the affected Tribes shall include a description of the use to be authorized by the lease. The State shall evaluate the land to be leased to determine whether a natural bed exists. For leases where no enhancement activity has occurred recently enough to affect the density of shellfish beds, the determination of the existence of a natural bed shall be based upon whether the sustainable yield density exceeds the natural bed threshold identified in Exhibit A for the corresponding species, region and time period. For leases where past or present enhancement activity has affected the current density of shellfish beds, the determination of the existence of a natural bed shall be based upon a determination of whether the sustainable yield density at the time enhancement began exceeded the natural bed threshold identified in Exhibit A for the corresponding species, time period and region. The Tribes shall be afforded the opportunity to participate in the State's assessment of whether a natural bed exists on the land. The results of any state evaluation shall be communicated to the Tribes at least thirty calendar days before a lease is issued and shall specify the date that the state proposes to enter into a lease. The underlying data and documents shall be made available to the Tribes.

8.2.2 **Tribal Assertion of Treaty Right on Leased Land.**

If an affected Tribe(s) contends that there is a natural bed subject to Treaty harvest by the Tribe on property to be leased, the affected Tribe may notify the Washington Department of Natural Resources (DNR) in writing within thirty days after the state evaluation is provided to that tribe, or ten days before the proposed date of leasing, whichever is earlier in time. The notice shall describe the shellfish to which the Tribe asserts a Treaty right, the basis for that information, and the area and shellfish involved. Upon timely receipt of such notice, DNR shall not lease the property until compliance with paragraph 8.2.3. or 8 2 4, below. If a Tribe does not provide notice under this paragraph to DNR after DNR has complied with paragraph 8.2.1, then the Tribe shall not take shellfish from the leased property for the initial term of that lease, or ten years, whichever is shorter

8.2.3 **State and Tribal Agreement.**

If a Tribe has provided notice under paragraph 8.2.2, the State and Tribe and/or prospective lessee may agree to a plan where the Tribe's Treaty right to take shellfish from the

land to be leased is addressed before issuance of the lease. Any such agreement in writing shall be binding on the State, Tribe, and other persons who enter it for the term of the agreement

8.2.4 **Dispute Resolution.**

Absent an agreement between the State and Tribe and/or proposed lessee for tribal harvest from the bed to be leased, a Tribe or the State may seek dispute resolution. The dispute shall be heard by the Magistrate Judge pursuant to section 9, and the lease shall not be issued until the dispute resolution procedure has been completed. At such dispute resolution, the Magistrate Judge shall determine whether or not the leased activity authorizes the taking of shellfish subject to Treaty harvest. If the lease does not, then the lease may be issued. If the land to be leased contains shellfish subject to Treaty harvest, then the Magistrate Judge shall determine the tribal harvest of a Treaty share of such shellfish consistent with the sharing principles within paragraph 6 1.3, or allow the State and Tribe to reconsider agreement regarding tribal harvest.

8.2.5 **State Renewals.**

Whenever the State proposes to renew a lease of tidelands or bedlands for purposes of a commercial shellfish operation, if the presence or absence of a natural bed has not previously been determined, the procedures of part 8.2.1 shall be followed as if a new lease is being proposed. If an affected Tribe has previously not objected to leasing of the property after notice pursuant to Section 8.2.1, then the State need only provide such Tribe notice of its intent to renew the lease. If the lease only allows the lessee to grow and harvest a species known not to reproduce naturally in the lease location (such as Pacific Oyster beds outside areas of Hood Canal), or to grow and harvest shellfish cultivated by an off-bottom or equivalent method and there has been no natural bed identified on the site during past leases, then the State may satisfy paragraph 8.2 1 by informing the affected Tribe of the nature of the proposed lessee use. The Tribe, however, may inspect such property or assert a claim under 8.2.2, if there is a natural bed subject to a Treaty harvest.

9. DISPUTE RESOLUTION

9.1 *Magistrate Judge Proceedings*

Any dispute arising under the implementation plan shall be brought before the Honorable **Ricardo S. Martinez**, United States District Court Magistrate Judge for the Western District of Washington, at 1010 Fifth Avenue, Suite 304, Seattle, WA 98104 ("Magistrate Judge") or a successor Magistrate Judge appointed by the Court.

9.1.1 Unless the dispute is initially heard by a Technical Advisor as provided for by paragraphs 9.1.2 and 9.1.3 of this stipulation, the Magistrate Judge will hear and determine disputes arising under the implementation plan.

9 1.2 For a dispute that raises technical questions of fishery management and/or allocation, the parties may file a joint request with the Magistrate Judge that such dispute be heard by a Technical Advisor. Based upon such request, the dispute will be heard, as soon as possible, by the Technical Advisor selected by the Court after nominations by the parties. If the parties do not agree that a Technical Advisor is necessary, the dispute will be heard by the Magistrate

Judge who has the authority to decide the issues himself, appoint experts, and/or refer the matter to the Technical Advisor.

9.1.3 If the dispute is heard by the Technical Advisor, the Technical Advisor will establish procedures consistent with procedures described in paragraph 9.2 of the implementation plan The written decision of the Technical Advisor shall resolve the dispute unless a party to the case files a petition for review of that decision before the Magistrate Judge within twenty days of the filing of the original decision. Such petition shall state the basis for seeking review, identify the alleged error in the decision, and identify the relief sought. Upon a timely petition, the Magistrate Judge shall conduct a de novo review and shall consider additional briefing, proceedings, evidence, and argument offered by the parties, if any. During the consideration of any petition filed under this subsection, the written decision of the Technical Advisor remains in effect and shall govern the parties' conduct unless and until the Magistrate Judge overturns the written decision or expressly stays its enforcement.

9.1.4 For disputes where a written decision by the Technical Advisor does not resolve the dispute, a written decision of the Magistrate Judge shall resolve the dispute unless a party to the case files a petition for review of that decision before the Honorable Robert S. Lasnik, United States District Judge, 1010 Fifth Avenue, Suite 911, Seattle, WA 98104, within twenty days of the filing of the original decision. Such petition shall be considered pursuant to the procedures established in Federal Rule of Civil Procedure 72(b), except for the time permitted to file the petition for review, as stated above. During the consideration of any petition filed under this subsection, the written decision of the Magistrate Judge remains in effect and shall govern the parties' conduct unless and until the Court overturns the written decision or expressly stays its enforcement

9.2 **Procedure For Hearings Before the Magistrate Judge .**

The Magistrate Judge will establish the procedures to be used in hearing disputes; those procedures may be informal, but shall include the following, except where specified otherwise in this implementation plan:

9 2 1 An opportunity for all parties to a dispute to present their evidence and arguments in writing and orally

9.2.2 An opportunity for all parties to a dispute to respond to or challenge the evidence and arguments presented by other parties.

9.2.3 The opportunity for all parties to the dispute to compel the production of persons or documents from other parties that are necessary for full consideration of the matter in dispute.

9.2.4 In addition to considering evidence presented by experts called by a party to the dispute, the Magistrate Judge may consult with persons with technical expertise as necessary to the resolution of disputes. The persons consulted shall not be associated with the Tribes, any agency of the State of Washington (other than academic institutions) or any other person affected by the outcome of the dispute, absent agreement of all parties to

the dispute. Advice received from a technical expert shall be shared with all parties to the dispute.

9.2.5 The Magistrate Judge shall issue a written opinion stating the decision and the reasons for the decision within ten working days of the conclusion of the hearing or the submission of evidence by the parties to the dispute, whichever is later, unless agreed otherwise by the parties and the Magistrate Judge In fashioning resolution to a dispute, the Magistrate Judge shall have no authority to eliminate the Treaty fishing rights of an entire Tribe. The Magistrate Judge may, however, order that the Tribe pay damages or may implement some other appropriate remedy.

9.2.6 The Magistrate Judge shall not be required to hear or consider disputes in the order in which they are presented. The Magistrate Judge shall consider a dispute on an emergency or expedited basis when a delay would make the dispute moot due to the closure of a fishing season or other equivalent circumstance.

Exhibit A

Minimum density of commercial shellfish species necessary to constitute a natural bed (e.g., able to support a commercial livelihood on a sustainable basis) at the time cultivation of a bed began.

	Manila clams			Pacific oysters			Native littlenecks			Butter clams		
Time Period	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal
2016 - 2020												
2011 - 2015												
2006 - 2010												
2001 - 2005												
1996 - 2000												
1991 - 1995												
1986 - 1990												
1981 - 1985												
1976 - 1980												
1971 - 1975												
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1911 - 1915												
1906 - 1910												
1901 - 1905												
1896 - 1900												
1891 - 1995												
1886 - 1890												
1881 - 1885												
1876 - 1880												
1871 - 1875												
1866 - 1870												
1861 - 1865												
1856 - 1860												
1851 - 1855												

	Cockles			Geoduck			Olympia oysters			Horse clams		
Time Period	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal	North Sound	South Sound	Hood Canal
2016 - 2020												
2011 - 2015												
2006 - 2010												
2001 - 2005												
1996 - 2000												
1991 - 1995												
1986 - 1990												
1981 - 1985												
1976 - 1980												
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1876 - 1880												
1871 - 1875												
1866 - 1870												
1861 - 1865												
1856 - 1860												
1851 - 1855												

	Eastern softshell clams		
Time Period	North Sound	South Sound	Hood Canal
2016 - 2020			
2011 - 2015			
2006 - 2010			
2001 - 2005			
1996 - 2000			
1991 - 1995			
1986 - 1990			
1981 - 1985			
1976 - 1980			
1971 - 1975			
1966 - 1970			
1961 - 1965			
1956 - 1960			
1951 - 1955			
1946 - 1950			
1941 - 1945			
1936 - 1940			
1931 - 1935			
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