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Date:
Time:
The Honorable Anne Hirsch

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10 **STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

11 TAYLOR UNITED, INC., a
12 Washington corporation, and TAYLOR
13 RESOURCES, INC., a Washington
14 corporation; and HELEN G. SENFF, a
15 widow,

14 Plaintiffs,

15 v.

16 STATE OF WASHINGTON,
17 DEPARTMENT OF NATURAL
18 RESOURCES,

18 Defendant,

19 and

20 LAURA HENDRICKS, a married
21 woman; COALITION TO PROTECT
22 PUGET SOUND HABITAT, a
23 Washington non-profit corporation; and
24 ASSOCIATION FOR THE
25 PROTECTION OF HAMMERLY,
26 ELD & TOTTEN INLETS, a
Washington non-profit corporation,

Interested Parties.

NO. 09-2-00431-2

**DEPARTMENT OF NATURAL
RESOURCES' ANSWER AND
COUNTERCLAIMS**

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1 Defendant State of Washington, Department of Natural Resources (“DNR”), hereby
2 responds to Plaintiffs’ Complaint. Under Civil Rule (CR) 8, DNR generally denies each and
3 every allegation of the Complaint not expressly admitted. DNR also expressly denies some
4 allegations without affecting its general denial of other allegations. DNR will not respond to
5 allegations that present purely legal arguments. If an answer to any such allegation is required,
6 DNR denies each such allegation that is not expressly admitted.

7 In addition to the above general responses, DNR offers the following responses to the
8 specific allegations set forth in Plaintiffs’ Complaint. The section headings and paragraph
9 numbering in this Answer correspond to the headings and paragraph numbering of the Complaint.
10 DNR admits, denies and alleges as follows:

11 **I. PARTIES**

12 1.1 DNR admits that Taylor United, Inc. (“Taylor United”) appears to be a
13 registered corporation in Washington State. DNR admits that Taylor United appears to own
14 and lease tidelands in Thurston County, Washington. DNR lacks knowledge or information
15 sufficient to form a belief as to the truth of the remaining allegations in this paragraph and
16 therefore denies the same.

17 1.2 DNR admits that Taylor Resources, Inc. (“Taylor Resources”) appears to be a
18 registered corporation in Washington State. DNR admits that Taylor Resources appears to
19 have leased tidelands owned by Ms. Helen G. Senff in Totten Inlet. DNR lacks knowledge or
20 information sufficient to form a belief as to the truth of the remaining allegations in this
21 paragraph and therefore denies the same.

22 1.3 DNR lacks knowledge or information sufficient to form a belief as to the truth
23 of the allegations about the history of the Taylor family or the number of employees the
24 Taylor companies employ and therefore denies the same.

25 1.4 DNR admits that Ms. Helen G. Senff appears to own certain tidelands and
26 uplands on Totten Inlet according to Thurston County records. DNR possesses a copy of a

1 document whereby Ms. Senff appears to have leased tidelands to Taylor Resources and
2 therefore admits the same.

3 1.5 DNR admits that Washington State owns the tidelands described in Exhibit A
4 to the Complaint, which tidelands are managed under the statutory authority of DNR. Deny
5 that the acreage calculations offered are accurate. For purposes of the remainder of this
6 Answer, DNR will refer to these lands as the "Taylor Trespass Area" for those state lands in
7 front of Taylor's oyster tract, and the "Senff Trespass Area" for those state lands in front of
8 the Senff oyster tract. Collectively referred to as the "the Trespass Areas".

9 1.6 Admit. Although some of Ms. Hendricks' application materials could be
10 interpreted as seeking to lease the oyster tract owned by Taylor United, DNR interpreted the
11 application as actually seeking to lease the state-owned tidelands immediately adjacent to and
12 waterward of the Taylor oyster tract.

13 1.7 Admit.

14 1.8 Admit.

15 II. JURISDICTION AND VENUE

16 2.1 – 2.3 These paragraphs state legal conclusions for which no response is
17 necessary.

18 III. FACTS

19 3.1 DNR's admissions and denials to allegations in sections I & II are incorporated
20 herein.

21 3.2 DNR admits that the Bush and Callow Acts were enacted by Laws of 1895,
22 chapters 24 and 25, which Acts initially provided for sale of state-owned tidelands for the sole
23 purpose of cultivating just oysters but not other shellfish. DNR admits that both Acts
24 included differing reversionary clauses reverting the lands to the State if the lands were used
25 contrary to the terms of the Acts. The language within the Bush and Callow Acts is clear and
26 unambiguous, and DNR denies Plaintiffs' characterization of the purpose of the Acts.

1 3.3 Admit that the State issued a deed in 1905 to one H.R. Weatherall for what was
2 reported as 72.58 acres in Totten Inlet, which deed was issued under the Bush Act and which
3 required that the lands be used for oyster purposes.

4 3.4 Deny that the State or Weatherall intended the oyster tract to extend to extreme
5 low tide. Deny that Olympia oysters survive only on lower intertidal reaches of the beach.
6 Deny that tidelands conveyed under the Bush Act were generally located very low on the
7 beach.

8 3.5 Upon information and belief, DNR admits that H.R. Weatherall may have
9 conducted oyster cultivation on his oyster tract. Deny that Weatherall conducted oyster
10 farming on the Trespass Areas.

11 3.6 Admit that the 72-acre oyster tract deeded to Weatherall appears to have been
12 segmented and sold to different individuals. Deny that said land or its segments were
13 understood by DNR to include the Trespass Areas. The Trespass Areas have never been
14 included within any of the legal descriptions of the multiple sales of the Weatherall tract
15 segments known to DNR.

16 3.7 Deny that no survey of the Trespass Areas or abutting privately owned
17 tidelands was conducted between 1953 and 2008. Deny that DNR had a shared belief that the
18 Trespass Areas were included in the 1905 Weatherall deed, because the Trespass Areas are
19 irrefutably outside the scope of the legal description provided in the 1905 deed. Admit that
20 DNR issued successive leases, covering an area that extends beyond the geographic limits of
21 the Trespass Areas, for a strip of bedlands, below the extreme low tide line, for purposes of
22 installing pilings to use as a "wave break," but deny that any such leases explicitly or
23 implicitly addressed the specific location of the waterward boundary of the tenants' adjacent
24 private oyster tracts. Deny that any DNR inspections noted the presence of shellfish culture
25 occurring on the Trespass Areas.

1 3.8 DNR possesses a copy of a 1953 deed purporting to convey tidelands to Carl
2 and Beda Adams and therefore admits the fact of a sale. (For ease of readability, DNR will
3 hereinafter collectively refer to Mr. and Mrs. Adams as “Adams” instead of the “Adamses”).
4 DNR has no knowledge about Adams’ belief of the extent of their ownership, and no
5 knowledge about whether or where Adams farmed oysters on the beach, and therefore denies
6 the same. The Trespass Areas are irrefutably excluded from the scope of the legal description
7 in the 1953 deed conveying land to Adams. The lands outlined by the legal description within
8 the deed do not extend down to the extreme low tide line.

9 3.9 Admit DNR issued a wave break lease to Adams, but deny that DNR intended
10 the wave break to protect oysters grown on the Trespass Areas, and deny that any
11 correspondence between DNR and Adams reflected a DNR opinion as to the exact location of
12 the waterward boundary of Adams’ tidelands. Lease application materials submitted by
13 Adams demonstrate that they did not believe they owned down to the line of extreme low tide.

14 3.10 DNR denies that the DNR inspection records reveal any observation of oysters
15 being cultured on, or existing on, the Trespass Areas. DNR lacks information sufficient to
16 form a belief about the existence of natural sets of oysters in the 1950s and therefore denies
17 the same.

18 3.11 Deny that Adams ever represented to DNR that they owned the Trespass Areas
19 as part of their lease application, and deny that DNR ever conceded private ownership of the
20 Trespass Areas.

21 3.12 Admit that the Commissioner of Public Lands signed an order on
22 October 10, 1957, granting Adams a five-year lease for installation of a wave break. Admit
23 that the leasehold area described in the lease is a ten-foot wide swath of bedlands extending
24 from the line of extreme low tide waterward, but deny that this leasehold area was intended to
25 reflect the boundary between state-owned aquatic lands and the adjacent oyster land owned by
26 Adams. Deny that the lease was intended to protect oysters allegedly growing in the Trespass

1 Areas, and deny that oysters were actually growing in the Trespass Areas. Deny that all of the
2 pilings were installed below the line of extreme low tide as required by the lease. Admit that
3 some pilings that were used as part of the wave break still exist today, but some of those
4 pilings are below the present line of extreme low tide, while some are above it.

5 3.13 Deny that DNR's "aquatic plate" map covering the relevant location in Totten
6 Inlet actually shows, or was intended to show, the precise location of property boundaries.
7 Deny that the aquatic plate for Totten Inlet shows the Trespass Areas as being part of the
8 oyster tract that had been conveyed in the 1905 deed to Weatherall.

9 3.14 Admit that Adams applied to renew their wave break lease in 1962. Deny that
10 any materials in the 1962 lease file reveal a DNR belief or understanding that Adams'
11 segment of the Weatherall tract extended down to the extreme low tide line.

12 3.15 Admit that DNR renewed the Adams lease in 1962 for a ten-year term and that
13 an engineer's report recommended the granting of such renewal. Admit that the engineer's
14 report identifies Adams as owning the abutting tidelands, but deny that such report specifies
15 the exact location of the boundary between the Adams' property and the state-owned aquatic
16 lands.

17 3.16 Deny Plaintiffs' implied characterization of there being a separate aquatic plate
18 reflecting the 1962 wave break lease. The aquatic plate referenced by Plaintiffs in this
19 paragraph is the same aquatic plate addressed above in paragraph 3.13. DNR's denial in
20 paragraph 3.13 is hereby incorporated and reinstated here regarding the intended purposes of
21 the aquatic plates.

22 3.17 Deny that Lighthouse Oyster Company had any reasonable expectation that its
23 acquisition from Adams included the Trespass Areas because the Trespass Areas were clearly
24 excluded from the legal description contained in the deed. The land outlined by the legal
25 description within the deed does not extend down to the extreme low tide line.

1 3.18 Admit that an upland owner wrote DNR in 1967 asking to purchase abutting
2 tidelands. Admit that DNR responded by indicating that the State would own very little, if
3 any, tidelands in front of the three small parcels. Deny that this response was shared with
4 Adams, who DNR believed still owned the private oyster tracts at that time, and deny that
5 DNR's response indicates a belief that the 34 acres of Trespass Areas were owned by the
6 private oyster tract owners.

7 3.19 Admit that the Taylors and Okadas appear to have purchased a portion of
8 oyster lands adjacent to the Taylor Trespass Area in 1969. Deny that Taylors or Okadas had
9 any reasonable expectation that the oyster tract delineated in the legal description provided in
10 their deed included the Taylor Trespass Area. DNR lacks knowledge or information
11 sufficient to form a belief as to the truth of the assertion that either the Lighthouse Oyster
12 Company, Justin Taylor, or Masao Okada farmed the Taylor Trespass Area and therefore
13 denies the same.

14 3.20 Admit that Justin Taylor and Masao Okada renewed the wave break lease in
15 1972 for another ten years and that they identified themselves as the owners of the abutting
16 tidelands. Deny that any documentation regarding the 1972 lease renewal reveals DNR as
17 understanding Taylor's and Okada's ownership as extending down to the extreme low tide
18 line.

19 3.21 DNR lacks knowledge or information sufficient to form a belief as to the truth
20 of the allegations regarding Mr. Okada's death or assignment of his assets and therefore
21 denies the same. Admit that DNR approved assignment of the lease to Taylor United in 1980.

22 3.22 Admit that Taylor United applied for a re-lease in 1982, that the new ten-year
23 lease appears to have been signed on June 1, 1983, and that the lease expired on October 10,
24 1992. Deny the effective date indicated by the Plaintiffs. The effective date stated in the
25 lease is October 10, 1982.

26

1 3.23 Deny that DNR's 1997 letter expressed any DNR belief as to the exact location
2 of the boundary between state and private ownership in the vicinity of the Trespass Areas.
3 DNR's denial in paragraph 3.13 is hereby incorporated and reinstated here regarding the
4 intended purposes of the aquatic plates.

5 3.24 Admit that Adams appears to have conveyed a portion of their oyster lands to
6 Ernest and Helen G. Senff in 1960. Deny that the Senffs had any reasonable expectation that
7 the purchase included the Senff Trespass Area because the legal description contained in their
8 deed excludes the Senff Trespass Area. The legal description within the deed does not extend
9 down to the extreme low tide line. Deny that Adams successfully assigned a portion of the
10 wave break lease to the Senffs. DNR lacks knowledge or information sufficient to form a
11 belief as to the truth of the allegation that either Adams or the Senffs had farmed oysters in the
12 Senff Trespass Area and therefore denies the same.

13 3.25 DNR lacks knowledge or information sufficient to form a belief as to the truth
14 of the allegation that Taylor Resources entered into a product purchase agreement with Ms.
15 Senff and therefore denies the same.

16 3.26 DNR possesses a copy (with redactions) of a purported lease between
17 Ms. Senff and Taylor Resources and therefore admits the same. DNR lacks knowledge or
18 information sufficient to form a belief as to the truth of the allegation that Taylor Resources or
19 Ms. Senff understood the lease as including the Senff Trespass Area and therefore denies the
20 same. To the contrary, the land outlined by the legal description attached to the lease between
21 Ms. Senff and Taylor Resources does not extend down to the extreme low tide line.

22 3.27 Admit that Taylor Resources commenced geoduck aquaculture on the Senff
23 Trespass Area and that oysters and geoducks planted by Taylor Resources may exist on the
24 Area.

25 3.28 Deny that DNR has ever held a "mutual understanding" that the Taylor family
26 or Taylor United owned the Taylor Trespass Area. DNR lacks knowledge or information

1 sufficient to form a belief as to the truth of the allegation that Taylor Resources has
2 significantly increased the value of the land through improvements and therefore denies the
3 same.

4 3.29 Deny that DNR has ever held a “mutual understanding” with the Senffs, the
5 Taylor family or Taylor United, that the Senffs owned the Senff Trespass Area. DNR lacks
6 knowledge or information sufficient to form a belief as to the truth of the allegation that the
7 Senffs or Taylor Resources significantly increased the value of the land through
8 improvements and therefore denies the same.

9 3.30 Admit that aquaculture products planted by Taylor within the Trespass Areas
10 may have a commercial value, the precise valuation of which is unknown to DNR. Deny that
11 the value of the underlying land has been independently increased as a result of the
12 aquaculture operations.

13 3.31 DNR lacks knowledge or information sufficient to form a belief as to the truth
14 of the allegations regarding the productive nature of the Trespass Areas or the identities of any
15 individuals for whom Taylor allegedly hosted tours on the Trespass Areas and therefore
16 denies the same.

17 3.32 DNR has located only one current employee who participated on a purported
18 tour of the Trespass Areas with the then-Commissioner of Public Lands in 2002, and she
19 cannot recall whether the tour included the Trespass Areas, so DNR therefore denies the same.

20 3.33 Deny that DNR has repeatedly confirmed Taylor’s ownership down to the
21 extreme low tide line.

22 3.34 Deny that Laura Hendricks submitted a complaint that was filed with the State
23 Auditor in 2007. Upon information and belief, a group calling itself the Henderson Bay
24 Shoreline Association contacted the State Auditor’s Office in 2006. Admit that in 2007 as
25 DNR worked on responding to the issues raised with the State Auditor, DNR contacted Taylor
26

1 to express concern that Taylor's operations may have strayed onto state-owned aquatic lands
2 and that a survey needed to be conducted to locate the exact location of the dividing boundary.

3 3.35 DNR lacks knowledge or information sufficient to form a belief as to the truth
4 of the allegations regarding the practices of specific shellfish growers regarding whether they
5 obtained private surveys of their intertidal lands and therefore denies the same. DNR admits
6 that predecessors-in-interest to Taylor have obtained surveys.

7 3.36 DNR lacks knowledge or information sufficient to form a belief as to the truth
8 of the allegations regarding the total acreage farmed by the Taylors and therefore denies the
9 same.

10 3.37 Admit that a survey was conducted during favorable extreme low tide
11 conditions during daylight hours in 2008. Admit that the survey revealed that Taylor had
12 been conducting aquaculture on many more acres of state-owned aquatic lands than they
13 actually owned or leased. Deny that DNR understood or accepted that Taylor's oyster tract
14 extended down to extreme low tide. Admit that the 2008 survey confirmed that the legal
15 descriptions of Taylors' oyster tract, as well as the Senff oyster tract, did not extend down to
16 the extreme low tide line. Deny knowledge of any information to suggest that the higher
17 intertidal lands actually included within the Taylor and Senff oyster tracts are unsuitable for
18 oyster cultivation.

19 3.38 Admit that the 2008 survey submitted to DNR appears to identify just a few
20 minor encroachments by upland owners against the 20 acres of oyster tracts on the beach.
21 Deny that the existence of any such minor encumbrances on the shoreline bears any relevance
22 as to anyone's understanding of the waterward boundary of the private oyster tracts or creates
23 any supportable inference when compared to the significant size of the Trespass Areas.

24 3.39 DNR's calculations suggest that the Trespass Areas cover a combined
25 34.64 acres. Deny DNR had previously understood the Weatherall deed, to which Taylors
26 and Senff are successors-in-interest, as extending down to the extreme low tide line in the

1 location of the Trespass Areas. The legal descriptions of the Taylor and Senff tracts do not
2 extend down to the extreme low tide line. DNR is presently aware of no evidence bringing
3 the accuracy of the Holman survey into question, but DNR reserves the right to raise concerns
4 over the survey's accuracy should additional evidence be revealed through discovery or other
5 efforts.

6 3.40 Admit that Taylor and DNR worked cooperatively to address Taylor's trespass,
7 that Taylor submitted a lease application to cultivate shellfish within the Trespass Areas, and
8 that DNR received another lease application, but deny Taylor's characterizations of how these
9 events occurred.

10 3.41 Admit that DNR granted a short-term limited right of entry to Taylor
11 Resources. The contents of the right of entry speak for themselves, and DNR denies
12 Plaintiffs' characterization of the terms of the document.

13 3.42 Admit that DNR and Taylor entered into a contingent settlement agreement.
14 The contents of the settlement agreement speak for themselves, and DNR denies Plaintiffs'
15 characterization of selected quotations from the agreement. DNR reserves the right to object
16 to the admission of the settlement agreement as evidence pursuant to Evidence Rule
17 ("ER") 408.

18 3.43 Admit DNR sent a letter to the Squaxin Island Tribe. The contents of the letter
19 speak for themselves, and DNR denies Plaintiffs' characterization of selected quotations from
20 the letter.

21 3.44 The contents of the letter speak for themselves, and DNR denies Plaintiffs'
22 characterization of selected quotations from the letter. None of the statements in the letter
23 demonstrate any DNR intent or understanding that Taylor's oyster tract boundary extended
24 down to the line of extreme low tide.

25 3.45 Admit that DNR received and began processing Taylor's lease application in
26 2008 for portions of the Trespass Areas and that DNR staff and Taylor employees discussed

1 how to address Taylor's trespass in the context of settlement negotiations and, as such DNR
2 reserves the right to object to the admission of the contents of such statements pursuant to
3 ER 408.

4 3.46 Admit.

5 3.47 Admit that Dr. Peter Goldmark was sworn in as Commissioner of Public Lands
6 on January 14, 2009 two days after the settlement agreement was signed by Taylor. Deny
7 Plaintiffs' characterization of any remarks attributed to Commissioner Goldmark prior to his
8 taking office and note that Commissioner Goldmark was given no opportunity to review the
9 proposed settlement agreement before it was signed.

10 3.48 Admit that DNR delayed its SEPA (State Environmental Policy Act)
11 determination by withdrawing the draft MDNS (Mitigated Determination of Nonsignificance)
12 that was issued in December 2008. The contents of the notification speak for themselves, and
13 DNR denies Plaintiffs' characterization of selected quotations from the notification.

14 3.49 Admit that DNR issued a press release on or around February 5, 2009. The
15 contents of the release speak for themselves, and DNR denies Plaintiffs' characterization of
16 the release. Deny the press release represents a decision to deny the lease application.

17 3.50 Admit that Commissioner Goldmark met with Bill Taylor on February 9, 2009.
18 Deny Plaintiffs' characterization of the press release regarding the purpose of the meeting.
19 Admit Commissioner Goldmark sent an internal memorandum after the meeting commenting
20 on the trespass situation. Deny that the internal memorandum denied Taylor's lease
21 application.

22 **IV. & V. PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION**

23 4.1 DNR reasserts and incorporates all prior admissions and denials.

24 4.2 – 5.2 These paragraphs assert legal arguments for which no response is
25 required. To the extent a response may be required, these paragraphs are denied. All factual
26 assertions within these paragraphs merely repeat or rephrase assertions previously admitted or

1 denied under Section III, and, to the extent any new factual assertions are inserted under this
2 cause of action section, they are improper and denied. Plaintiffs have asserted no facts
3 sufficient to support their claim of ownership of the Trespass Areas or request for ejectment;
4 Plaintiffs cannot rely on the legal theories set forth therein against the State of Washington.

5
6 **VI. PLAINTIFFS' THIRD CAUSE OF ACTION**

7 6.1 – 6.5 These paragraphs assert legal arguments for which no response is
8 required. To the extent a response may be required, these paragraphs are denied. Deny that
9 relief is available under the Uniform Declaratory Judgment Act.

10 **VII. & VIII. PLAINTIFFS' FIFTH AND SIXTH CAUSES OF ACTION¹**

11 7.1 DNR reasserts and incorporates all prior admissions and denials.

12 7.2 – 8.6 These paragraphs assert legal arguments for which no response is
13 required. To the extent a response may be required, these paragraphs are denied. All factual
14 assertions within these paragraphs merely repeat or rephrase assertions previously admitted or
15 denied under Section III, and, to the extent any new factual assertions are inserted under this
16 cause of action section, they are improper and denied. Deny that relief is available under
17 theories of inverse condemnation or quiet title to personal property.

18 **IX. PLAINTIFFS' SEVENTH CAUSE OF ACTION**

19 9.1. – 9.7 Asserts legal arguments for which no response is required. To the
20 extent a response may be required, these paragraphs are denied. All factual assertions within
21 these paragraphs merely repeat or rephrase assertions previously admitted or denied under
22 Section III, and to the extent any new factual assertions are inserted under this cause of action
23 section they are improper and denied. Plaintiffs cannot rely upon unjust enrichment due in
24 part to unclean hands: Plaintiffs were at minimum negligent in failing to ascertain the true

25 ¹ Plaintiffs' Complaint designates a third cause of action and then skips to a designated fifth cause of
26 action, so DNR's Answer does the same.

1 boundary of their private oyster lands, which negligence resulted in the trespass on state lands,
2 by which Plaintiffs wrongfully obtained for their private benefit a value that rightfully belongs
3 to the people of the State of Washington.

4 **X. PLAINTIFFS' EIGHTH CAUSE OF ACTION**

5 10.1 – 10.8 These paragraphs assert legal arguments for which no response is
6 required. To the extent a response may be required, these paragraphs are denied. All factual
7 assertions within these paragraphs merely repeat or rephrase assertions previously admitted or
8 denied under Section III, and, to the extent any new factual assertions are inserted under this
9 cause of action section, they are improper and denied.

10 **XI. & XII. PLAINTIFFS' EIGHTH AND NINTH CAUSES OF ACTION²**

11 11.1 – 12.3 Asserts legal arguments for which no response is required. To the
12 extent a response may be required, these paragraphs are denied. All factual assertions within
13 these paragraphs merely repeat or rephrase assertions previously admitted or denied under
14 Section III, and to the extent any new factual assertions are inserted under this cause of action
15 section they are improper and denied. Deny that the settlement agreement required DNR to
16 issue a lease to Taylor or that DNR has not processed the lease application pursuant to
17 applicable authorities. DNR reserves the right to object to the admission of the settlement
18 agreement pursuant to ER 408.

19 **XIII. PLAINTIFFS' REQUEST FOR RELIEF**

20 13.1 No response is necessary to Plaintiffs' requests for relief, but to the extent an
21 answer may be required, DNR denies all requests for relief. In direct response to Plaintiffs'
22 request that the court quiet title in the Trespass Areas to Plaintiffs, DNR requests that the
23 court rule quiet title of the Trespass Areas to the State of Washington, including any and all
24 improvements placed thereon without authority.

25 ² Plaintiffs' Complaint contains two separate sections designated as the Eighth Cause of Action, so
26 DNR's Answer does the same.

1 **XIV. AFFIRMATIVE DEFENSES**

2 14.1 Plaintiff Taylor United's claims for arbitrary and capricious denial of lease and
3 breach of contract are not ripe for judicial review.

4 14.2 Plaintiffs' Complaint fails to state a claim for relief that may be granted with
5 respect to all causes of action.

6 14.3 Plaintiffs' claim for relief under the Uniform Declaratory Judgment Act is not
7 ripe.

8 14.4 All claims by Taylor for damages, if successful, are subject to offset.

9 **XV. COUNTERSTATEMENT OF THE FACTS**

10 15.1 At the time of statehood and by virtue of its sovereignty, the State acquired
11 ownership of the beds and shores of all navigable waters within state boundaries to manage for
12 the citizens of the state. State ownership of the aquatic lands entitles the State to all the rights
13 and privileges of property ownership. DNR presently manages over 1,300 miles of state-
14 owned tidelands. The State owns the bed of Totten Inlet and has retained ownership of many
15 tidelands in Totten Inlet, which inlet borders Thurston and Mason Counties.

16 15.2 The Bush Act, enacted by the Laws of 1895, chapter 24, allowed citizens to
17 apply to the Commissioner of Public Lands to purchase lands to use for oyster cultivation.
18 Lands were sold by the State for below-market values, and the State retained a reversionary
19 interest that was triggered if the landowners used the oyster lands for purposes inconsistent
20 with oyster cultivation.

21 15.3 Under the Bush Act, the citizen would locate suitable oyster lands, have them
22 surveyed, and then apply to the Commissioner of Public Lands to purchase those lands. The
23 State would rely heavily upon the representations of the citizen in deciding whether to allow
24 the requested lands to be sold.

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26 ///

1 15.4 In 1900, an individual by the name of F.W. Walther (“Walther”) located
2 tidelands in Totten Inlet that he wished to purchase. Upon information and belief, Walther
3 hired a private surveyor to survey the lands and provide a survey map and legal description.

4 15.5 Walther filled out and submitted to the Commissioner of Public Lands an
5 application form for the purchase of the oyster lands. On this form, Walther provided the legal
6 description of the lands he wished to purchase. The legal description used the federal meander
7 line as the landward boundary of the proposed oyster tract. The waterward boundary extended
8 out no more than about 300 feet from the landward boundary at the widest point, and the width
9 of most of the tract was narrower than 300 feet. The sideline boundaries of the tract extended
10 far along the shore, creating a long and very narrow strip covering over 72 acres. Walther
11 provided the survey with his application materials.

12 15.6 Meander lines were lines established by the federal government for purposes of
13 measuring the acreage of government lots abutting bodies of water. Meander lines generally
14 approximate the line of ordinary high water. Because the legal description of the proposed
15 oyster tract submitted by Walther used the meander line as the landward boundary of the tract,
16 Walther had to understand that the proposed tract identified by his purchase application
17 materials started on the upper edge of the beach and extended waterward from there.

18 15.7 In the preprinted purchase application form supplied by the Commissioner of
19 Public Lands, Walther had to solemnly swear the truth of several matters. Among other things,
20 Walther swore that he was a United States Citizen, that the lands sought for purchase were not
21 within two miles of a city, that the lands were not a state oyster bed reserve, and that the lands
22 were suitable for oyster purposes. Walther also swore that the lands sought for purchase were
23 located below the meander line and above the line of ordinary low tide. The line of ordinary
24 low tide as used in this form is equivalent to the mean low tide line, which line constituted the
25 waterward boundary of second-class tidelands as defined in statutes existing as of 1900.

1 15.8 In 1901, the Commissioner of Public Lands issued a four-year sales contract to
2 Mary Walther for the 72-acre tract. Upon information and belief, Mary Walther was the wife
3 of F.W. Walther. DNR possesses no evidence suggesting when or whether the Walthers ever
4 cultivated any oysters on their tract, but if they did cultivate oysters, they would have
5 presumptively farmed within the boundaries of the legal description that they had obtained
6 from a private surveyor.

7 15.9 An individual named H.R. Weatherall (“Weatherall”) obtained a court judgment
8 in Mason County Superior Court against Mr. and Mrs. Walther. Weatherall had a Thurston
9 County sheriff execute the judgment against the Walthers’ sales contract for the oyster tract.
10 Weatherall was the highest bidder at the sheriff’s auction for the oyster tract in 1904. He
11 subsequently paid off the sales contract and received a deed from the State for the land in 1905
12 (hereinafter referred to as the “Weatherall Tract”).

13 15.10 Upon information and belief, Weatherall did cultivate oysters on the tract, but
14 he would have been presumed to operate within the legal boundaries of the tract that he
15 acquired through the sheriff’s sale. The legal description of the tract as provided in the
16 sheriff’s notice of sale continued to use the meander line as the landward boundary of the tract,
17 placing Weatherall on notice that the oyster tract started on the upper beach and extended
18 waterward from there.

19 15.11 The use of the meander line as the landward boundary of the Weatherall Tract
20 was not uncommon. Many oyster land sales under both the Bush and Callow Acts in the
21 Thurston and Mason Counties areas utilized the meander line as the landward boundary of
22 such tracts. By nature of utilizing the meander line as the landward boundary, these tracts in
23 most cases necessarily included the upper intertidal sections of beach. Upper sections of the
24 beach could be used for oyster cultivation. Oyster growers would commonly take steps to
25 enhance the suitability of upper intertidal lands for oyster cultivation, including such practices
26 as constructing dikes to retain tidewaters on the upper sections of the beach.

1 15.12 In 1911, the Legislature changed the definition of tidelands. Whereas the
2 previous statutory definition included tidally influenced lands between the ordinary high tide
3 line and the mean or ordinary low tide line, the new 1911 definition going forward included
4 such lands between the ordinary high tide line and the extreme low tide line.

5 15.13 Over the course of time, the 72-acre Weatherall Tract was segmented into
6 multiple parcels and sold to various owners.

7 15.14 In 1930, an unknown individual hired a licensed surveyor to delineate the
8 boundaries of the 72-acre Weatherall Tract. This 1930 survey, which was not recorded with
9 the county, agreed with the original 1901 survey in following the meander line as the landward
10 boundary. The waterward boundary of the tract in the vicinity of the Trespass Areas is shown
11 on the 1930 survey as extending as far as about 300 feet waterward from the landward
12 boundary at its widest point. The 1930 survey also discloses that the surveyor was able to
13 locate at least two previously installed meander corner posts marking the landward boundary
14 of the Weatherall Tract.

15 15.15 In 1934, an individual by the name of J.C. Crombie ("Crombie") recognized
16 that some tidelands existed waterward of one segment of the Weatherall tract in Section 8,
17 Township 19 North, Range 2 West, Willamette Meridian, so he obtained a legal survey and
18 submitted a purchase application to the Commissioner of Public Lands. The sale was approved
19 and Crombie obtained a deed for just over 9 acres of oyster lands, at a price of just \$1.25 per
20 acre, for a total of \$11.69. The cost of publishing the notice of the sale cost \$15.00, more than
21 even the purchase price of the land. The Crombie Tract is located a short distance to the south
22 along the beach from the Trespass Areas. While much of the Weatherall Tract does not extend
23 down to the extreme low tide line, the waterward edge of the Crombie Tract does extend down
24 to, and closely track, the extreme low tide line.

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26 ///

1 15.16 In 1935, the Legislature repealed both the Bush and Callow Acts, thereby
2 ending the practice and policy of allowing the below-market sale of oyster lands to private
3 ownership.

4 15.17 The Trespass Areas in this case lie waterward of and are adjacent to two
5 segments of the original 72-acre Weatherall Tract, which two segments cover about 20 acres.
6 These two segments are presently owned by Taylor United and Ms. Helen Senff. For purposes
7 of consistency, these two segments will hereinafter be called the "Taylor Tract" and "Senff
8 Tract" even when identifying historic facts that occurred prior to Taylor's and Senff's
9 purchases.

10 15.18 The waterward boundary of the Taylor and Senff Tracts extends down the beach
11 from the meander line no further than approximately 300 feet at its widest location, while the
12 extreme low tide line extends out as far as 400 feet beyond that in some locations. As a result,
13 the State owns over 34 acres of tidelands below the Taylor and Senff Tracts. These 34 acres of
14 state-owned tidelands are what DNR refers to as the Disputed Areas.

15 15.19 In 1953, Adams obtained ownership of both the Taylor Tract and the Senff
16 Tract. Adams also obtained ownership of the Crombie Tract further to the south. Adams also
17 owned a waterfront upland parcel adjacent to the south edge of the Taylor Tract. The lands
18 outlined by the legal descriptions of the Taylor and Senff Tracts as described in the 1953 deed
19 to Adams do not include the Trespass Areas.

20 15.20 In 1956, Adams desired to install a "wave break" or "boom sticks" in the water
21 beyond their oyster land. The proposed structure consisted of vertical pilings spaced apart,
22 between which floating logs were chained so as to diffuse the energy of the waves heading
23 towards the shore. Adams first applied to the United States Army Corps of Engineers
24 ("Army Corps") to obtain a regulatory permit allowing the installation of the pilings.

25 15.21 In response to Adams' initial inquiry, the Army Corps requested that Adams
26 provide a drawing showing the proposed location. Adams had a surveyor draw a map dated

1 June 14, 1956, showing the boundaries of their oyster tracts and the proposed location of the
2 wave break pilings. A notation on the map suggests that the surveyor created the map based on
3 a legal description of Adams' deed, and not on a field survey. The outline of Adams' parcel in
4 this 1956 map is consistent with the most recent 2008 survey. The 1956 map indicates that the
5 landward boundary of Adams' oyster land is the meander line, and the shape of the oyster tract
6 is long and skinny, extending down the beach only a short distance beyond the mean lower low
7 tide line, or zero tide line. This map placed Adams on notice that their legal ownership began
8 at or near the top of the beach and extended waterward varying widths from approximately 100
9 to 300 feet as shown by the survey exhibit.

10 15.22 Adams submitted this surveyor-prepared map to the Army Corps, and the Army
11 Corps granted the permit. The Army Corps' file includes correspondence suggesting that
12 Adams successfully installed pilings in front of all of their oyster tracts, but that the pilings
13 were all reportedly washed out in a storm during 1957. Carl Adams requested two extensions
14 from the Army Corps to complete the reinstallation of the pilings in front of part of their oyster
15 tracts, but he indicated that he no longer desired to install pilings in front of his oyster lands in
16 front of Section 8.

17 15.23 In none of the documents submitted by Adams to the Army Corps did Adams
18 represent a belief that their oyster tract boundary extended down to the extreme low tide line,
19 nor did they indicate that they cultivated oysters all the way down to extreme low tide. To the
20 contrary, the map shows the waterward boundary of their oyster tract as being visibly separated
21 from the proposed location of the pilings.

22 15.24 Adams recognized that the State owned the aquatic tidelands waterward of their
23 oyster tract, so in addition to seeking the Army Corps' permit, they also applied for a lease
24 from DNR for the wave break. Adams provided to DNR the same surveyor-prepared map that
25 they had provided to the Army Corps, although the copy provided to DNR did not indicate any
26 tidal elevations on it other than the location of the pilings.

1 15.25 The surveyor-prepared map showed the wave break in 5.2 feet of water below
2 the mean lower low tide line. The mean lower low tide line is commonly referred to as a zero
3 tide, or sea level, and 5.2 feet below that would be referred to as minus 5.2 feet. While the
4 1956 map appears to accurately outline the Taylor Tract and Senff Tract, the map errs in the
5 placement of the minus 5.2 foot line. The 1956 map shows the minus 5.2 foot line as being
6 closer to shore than it actually is, as demonstrated by comparison to the 2008 survey of the
7 same area.

8 15.26 In addition to the map, Adams submitted to DNR a written lease application
9 form. In this form, where a part appears to have been filled out manually by a typewriter,
10 Adams described the proposed location of the pilings as being located in 5.2 feet of water
11 below mean low tide, instead of the mean lower low tide as had been indicated in the map.
12 Following this typewritten description, handwritten language then describes the proposed lease
13 area as extending from the line of extreme low tide out ten feet.

14 15.27 The location of the lease approved by DNR was from the extreme low tide line
15 extending waterward ten feet horizontally and stretching sideways along the shore in front of
16 the oyster tracts owned by Adams.

17 15.28 In none of the documents submitted by Adams to DNR did Adams represent a
18 belief that their oyster tract boundary extended down to the extreme low tide line, nor did they
19 indicate that their oyster beds extended down to extreme low tide.

20 15.29 In cases where bottom culture of oysters does occur on lower tidal elevations,
21 such operations are not necessarily conspicuous to DNR marine land inspectors, nor would
22 such operations be seen by a DNR inspector unless the inspections happened to coincide with a
23 daylight extreme low tide when such operations would be exposed, which is an infrequent
24 occurrence.

25 15.30 In none of the leasing documents or correspondence provided by DNR to
26 Adams did DNR express a belief that Adams' oyster tract boundary extended down to the

1 extreme low tide line, and no documents or correspondence contained in the lease files express
2 any belief or knowledge by DNR that Adams was cultivating oysters down to the extreme low
3 tide line.

4 15.31 DNR uses maps informally called “aquatic plates” to keep a record of all
5 aquatic land sales, leases, and other proprietary transactions. These plates are not used by
6 DNR to designate legally established boundaries, and such plates do not typically attempt to
7 show the location of any tidal elevations. The plates are not maintained by licensed surveyors.
8 Aquatic plates are used by DNR for internal recordkeeping purposes only and are not normally
9 provided to tenants or aquatic land purchasers in the general course of business.

10 15.32 The relevant aquatic plate for Totten Inlet shows the general location and
11 outline of the 72-acre oyster tract originally deeded to H.R. Weatherall. The relevant aquatic
12 plate contains written notations designating the Adams wave break lease, which notations are
13 written on the page immediately waterward from, and touching the edge of, the notations
14 regarding the Bush Act conveyance to Weatherall. DNR’s manner of notating the lease in no
15 way signifies an intent that the actual boundary between the leasehold and the abutting oyster
16 tract touch each other. Nothing in the aquatic plate supports an inference that DNR believed
17 the Weatherall Tract included the Trespass Areas. To the contrary, the shape of the waterward
18 boundary of the Weatherall Tract does not align at all with the line of extreme low tide.

19 15.33 Adams sold the Senff Tract to the Senffs in 1960. That tract covers about seven
20 acres. Despite the fact that a portion of the DNR wave break leasehold abutted the Senff Tract,
21 Adams continued to maintain the entire leasehold area, including the strip in front of the Senff
22 Tract, even after they sold the tract. The legal description of the Senff Tract contained in the
23 1960 deed does not include any of the land in the Senff Trespass Area.

24 15.34 Adams sold the Taylor Tract to the Lighthouse Oyster Company by way of a
25 1962 sales contract. The contract was paid, and a deed was signed in 1963. The legal
26 description in the 1963 deed again references and uses the meander line as the landward

1 boundary of the oyster tract, putting employees of the Lighthouse Oyster Company on notice
2 that their parcel began on the upper edge of the beach and extended waterward from there. The
3 deed conveys approximately 13 acres of oyster land. The legal description of both the 1962
4 sales contract and 1963 deed fails to include any of the land in the Taylor Trespass Area.

5 15.35 The 13-acre oyster tract sold by Adams did not completely follow the original
6 boundaries of the Weatherall Tract along this section of beach because Adams reserved to
7 themselves a portion of the upper beach adjacent to their upland property (hereinafter the
8 "Adams Cut-out"). This beach reservation is specifically detailed in the legal description of
9 the lands sold to the Lighthouse Oyster Company and likely would have needed the services of
10 a surveyor to delineate the reserved lands.

11 15.36 Adams renewed the DNR wave break lease in 1963. Shortly thereafter,
12 Carl Adams contacted DNR to inquire into the possibility of segregating the lease and
13 assigning portions of it to Ernest Senff and the Lighthouse Oyster Company. DNR sent Adams
14 the necessary paperwork to complete the assignment and lease segregation, but no final
15 documents appear in DNR's lease files, and the lease continued in Adams' name until they
16 assigned it to Justin Taylor and Masao Okada in 1972, despite the fact that Adams appears to
17 have sold off their oyster tracts in the vicinity of the leasehold as of 1963.

18 15.37 In 1969, the Lighthouse Oyster Company conveyed the Taylor Tract by
19 statutory warranty deed to Taylor United, Justin Taylor, Masao Okada, and their wives. Three
20 months after this deed was issued, Taylor United signed a quit claim deed surrendering any
21 interest in the land to the Taylors and Okadas. The legal descriptions in both of these deeds
22 again utilize the meander line as the landward boundary of the Taylor Tract, except for a short
23 segment along the Adams Cut-Out where Adams continued to own a portion of the beach
24 extending below the meander line. This use of the meander line placed the Taylors and
25 Okadas on notice that their boundary began at the top of the beach and extended waterward
26

1 from there. No portion of the Taylor Trespass Area is included within the legal description of
2 the two 1969 deeds.

3 15.38 In 1979, by way of sales contract, Masao Okada's widow conveyed her interest
4 in the Taylor Tract to Taylor United. The legal description of the sales contract again utilized
5 the meander line as the landward boundary of the tract and excluded all of the Trespass Areas.

6 15.39 In 1980, DNR approved the assignment of the DNR wave break lease from the
7 Taylors and Okadas to Taylor United. In 1992, Taylor United declined to apply for another
8 lease for the wave break so the lease expired. DNR wrote Taylor United requesting that Taylor
9 remove the pilings that had been authorized under the lease.

10 15.40 Up until the time of its expiration in 1992, the DNR leasehold had continued to
11 extend not only in front of the Taylor Tract but also in front of the Senff Tract to the north and
12 the Crombie Tract, which was a short distance south from the Taylor Tract. Upon information
13 and belief, no pilings have existed in front of the Crombie Tract or the Senff Tract for decades,
14 if at all.

15 15.41 At no time during the 35 years of the leases did Adams, the Lighthouse Oyster
16 Company, the Taylors, the Okadas, or Taylor United, submit to DNR any written
17 correspondence or documentation suggesting a belief that their private oyster tracts extended
18 all the way down to the extreme low tide line. No documentation in the lease jackets reveals or
19 suggests that the successive tenants actually cultivated oysters down to the extreme low tide
20 line. No documentation in the lease jackets indicates that DNR inspectors observed the
21 presence of oyster cultivation occurring in the Trespass Areas down to the extreme low tide
22 line.

23 15.42 After Adams had sold their interest in the oyster tracts, they continued to own
24 an upland waterfront parcel identified as Thurston County Parcel Number 12905430300, which
25 parcel lies at the southern edge of the Taylor Tract in front of the Adams Cut-Out. Upon
26

1 information and belief, Adams sold their upland interests, including the Adams Cut-Out on the
2 beach, to James Stein in 1987.

3 15.43 Upon information and belief, James Stein obtained a survey of the uplands and
4 the Adams Cut-Out in 1988. Upon information and belief, James Stein obtained another
5 survey of just the Adams Cut-Out in 1998. The 1998 survey indicated that some markers were
6 placed along the edge of the Adams Cut-Out separating Stein's ownership from Taylor's
7 ownership of the Taylor Tract.

8 15.44 Upon information and belief, Taylor employees added markers in the beach
9 along the line separating Taylor's ownership from Stein's ownership of the Adams Cut-Out.
10 This suggests Taylor knew that its ownership in this area did not extend to the extreme low tide
11 line or into the Trespass Areas in the vicinity of these markers.

12 15.45 In 2007, DNR became aware of a complaint to the State Auditor's Office
13 submitted by a group calling itself the Henderson Bay Shoreline Association. The complaint
14 made numerous allegations regarding expanding geoduck aquaculture operations in the
15 Thurston County area. One complaint in the letter alleged that Taylor's aquaculture operations
16 on the Taylor Tract were encroaching on adjacent state-owned aquatic lands.

17 15.46 DNR investigated the complaint and was unable to determine from an internal
18 records review the exact location of Taylor's aquaculture activities in relation to the boundary
19 between the Taylor Tract and the adjacent state-owned aquatic lands. DNR contacted Taylor
20 and requested that Taylor obtain a legal survey to rule out the possibility of an encroachment.

21 15.47 Although DNR's survey request and the possibility of a boundary encroachment
22 was communicated to Taylor in late 2007, upon information and belief, Taylor continued to
23 conduct aquaculture harvest and planting on the Trespass Areas.

24 15.48 Taylor obtained a survey of the Taylor Tract, the Senff Tract, and the Trespass
25 Areas in July 2008, when extreme low tides during daylight hours facilitated the necessary
26 survey work. The survey work showed that some of Taylor's oyster and clam cultivation was

1 occurring on the Taylor Tract, but more of the oyster cultivation, and nearly all of the geoduck
2 cultivation, were occupying and encroaching on approximately 17 acres of state-owned
3 tidelands within the Trespass Areas. This is a substantial area, the equivalent of over
4 15 football fields.

5 15.49 The Holman survey also contrasts the shape of the waterward boundary of the
6 Taylor and Senff Tracts with the location and shape of the extreme low tide line. The outer
7 boundary line of the Taylor and Senff Tracts is relatively linear, with just a few slight angle
8 changes, whereas the extreme low tide line bulges out in a broad arc. At the widest point of
9 the encroachment, the extreme low tide line extends more than 400 feet across state-owned
10 tidelands from the true waterward boundary of the Taylor Tract, and along much of Taylor and
11 Senff's boundary the encroachment extends between 200 to 300 feet from the edge of Taylor's
12 and Senff's actual waterward boundaries.

13 15.50 The Holman survey also confirms what was relatively apparent from prior legal
14 descriptions of the Taylor and Senff Tracts: The widest point of beach ownership contained
15 within the legal descriptions of the oyster tracts is approximately 300 feet, and the width of the
16 oyster tracts are narrower than 300 feet along most of both tracts. The aquaculture beds
17 planted by Taylor have extended as far as 600 feet at the widest point from Taylor's landward
18 boundary.

19 15.51 Due to the fact that Adams had reserved a significant portion of the upper beach
20 for their upland residence, the remnant width of the Taylor Tract in front of the Adams Cut-
21 Out varies from about 25 feet to about 100 feet from the shore towards the water. Taylor
22 planted oysters as far as about 400 feet directly waterward from the edge of the Adams Cut-
23 Out.

24 15.52 In contrast to the significant encroachments of as much as 400 feet by Taylor
25 against the abutting state-owned tidelands, the few encroachments by upland owners as against
26

1 the Taylor Tract extend varying distances from just two feet to one boat ramp extending 34 feet
2 into Taylor's oyster tract.

3 15.53 The Holman survey indicates that the field surveyor was able to locate
4 numerous markers along the meander line that had been set by prior surveys, demonstrating the
5 ability of such boundary markers to survive in the tidally-influenced environment.

6 15.54 While Taylor and Senff truly own about 20 acres of oyster lands, the footprint
7 of the encroaching shellfish beds cover an approximate additional 17 acres of state-owned
8 tidelands, and Taylor and Senff are now claiming title to 17 further acres of state-owned
9 tidelands that are not planted with any aquaculture product. In sum, Taylor and Senff seek to
10 expand their 20 acres to approximately 54 acres.

11 15.55 When entities desire to utilize state-owned aquatic lands for purposes of
12 shellfish aquaculture, they are required by statute to obtain a use authorization from DNR for
13 the activity.

14 15.56 For aquaculture leases, DNR charges varying lease rates based primarily upon
15 the volume of shellfish production from the site. Other factors impacting the rate charged
16 include whether the lands leased already contained naturally occurring shellfish beds and what
17 species of shellfish are being cultivated. DNR's geoduck aquaculture lease rates may take into
18 account both production value and per-acre land value.

19 15.57 DNR's damages for Taylor's unauthorized use of the state-owned tidelands in
20 the Trespass Areas would include but not be limited to the market value associated with
21 Taylor's unauthorized use of the land.

22 **XVI. COUNTERCLAIMS**

23 16.1 Defendant DNR re-alleges its admissions and denials to Plaintiffs' Complaint
24 and incorporates the same herein by this reference as if fully set forth. DNR further re-alleges
25 its Counterstatement of Facts and incorporates them herein as if fully set forth. By way of
26

1 further answer and counterclaim against Plaintiffs, DNR sets forth the following
2 counterclaims:

3 **XVII. TRESPASS ON PUBLIC LANDS – RCW 79.02.300**

4 17.1 By way of its first counterclaim, DNR re-alleges the Counterstatement of Facts
5 in Section XV.

6 17.2 The Trespass Areas are state-owned aquatic lands owned by the State since
7 statehood as a virtue of its sovereignty under the Equal Footing Doctrine. State-owned
8 aquatic lands are considered public lands, to which the State holds all rights and privileges of
9 ownership.

10 17.3 Taylor harvested and cultivated shellfish on the state-owned aquatic lands
11 without any authorization from DNR to conduct such activities.

12 17.4 The Taylor companies are reputed to be the largest commercial shellfish
13 operation in the state, such that company owners and employees would be presumed to have
14 intimate familiarity with legal descriptions of aquatic lands and the significance of the use of
15 the meander line in such legal descriptions. Taylor knew or should have known that its
16 activity on the state-owned aquatic lands lacked authorization, and any belief that those state-
17 owned aquatic lands were included within Taylor's oyster land deed is unreasonable for
18 numerous reasons.

19 17.4.1 No evidence shows that F.W. Walther as the original applicant, or
20 H.R. Weatherall as the first deed holder, believed that the oyster tract chosen and outlined by
21 F.W. Walther extended down to the extreme low tide line. At the time of the application and
22 at the time the deed was issued, tidelands were statutorily defined as extending only to the
23 mean low tide line, and Walther had sworn on his application that the lands sought for
24 purchase extended down only to the ordinary low tide line, which is equivalent to the mean
25 low tide line.

1 17.4.2 Every deed known to DNR that conveyed the oyster lands landward of the
2 Trespass Areas included clear and unambiguous legal descriptions that did not include the
3 Trespass Areas within their scope. This is true for the 1905 deed to Weatherall, the 1953 deed
4 to Adams, the 1960 deed to the Senffs, the 1963 deed to the Lighthouse Oyster Company, the
5 1969 deeds to the Taylors and Okadas, and the 1979 deed to Taylor United. Furthermore,
6 most, if not all, of these deeds described and relied upon the meander line as the landward
7 boundary of the tracts, putting the purchasers on notice that the oyster tracts started at the
8 upper edge of the beach and extended waterward from there.

9 17.4.3 At least as of 1998 when James Stein had the Adams Cut-Out surveyed and
10 marked, Taylor had absolute notice as to the location of its true oyster boundaries. Taylor's
11 waterward boundary extended only 25 to 100 feet from the edge of the Adams Cut-Out, yet
12 Taylor's shellfish plantings actually extended over 400 feet directly out from the Adams Cut-
13 Out. Taylor ignored this clear evidence and continued to farm on state-owned tidelands. By
14 failing to obtain a survey before planting a significant amount of shellfish on a substantial area
15 of state-owned tidelands, Taylor acted recklessly and negligently in its operations and should
16 not be rewarded with damages for its aggressive misuse of public resources.

17 17.5 Taylor's use of public lands without authorization from DNR constitutes
18 knowing trespass under RCW 79.02.300, subjecting Taylor to treble damages, costs, and
19 attorneys' fees. In the alternative, if the court finds that Taylor sustains its burden of proof to
20 avoid imposition of treble damages, Taylor would nonetheless be subject to single damages.

21 **XVIII. WRONGFUL TAKING OF SHELLFISH – RCW 79.135.030**

22 18.1 By way of its second counterclaim, DNR re-alleges the Counterstatement of
23 Facts in Section XV and re-alleges the allegations contained in paragraphs 16.1 to 17.5.

24 18.2 Taylor's harvest of shellfish from state-owned aquatic lands without
25 authorization constitutes a wrongful taking of shellfish under RCW 79.135.030, subjecting
26 Taylor to double or treble the fair market retail value of shellfish removed.

1 **XIX. QUIET TITLE**

2 19.1 By way of its third counterclaim, DNR re-alleges the Counterstatement of
3 Facts in Section XV and re-alleges the allegations contained in paragraphs 16.1 to 18.2.

4 19.2 The Trespass Areas became state-owned aquatic lands as of statehood, and the
5 State has never sold the Trespass Areas in any conveyance, nor has Taylor alleged such
6 conveyance.

7 19.3 Because the State still retains ownership of the Trespass Areas, the State
8 requests the court to quiet the State's title in the land as against Taylor's meritless claims.

9 **XX. EJECTMENT**

10 20.1 By way of its fourth counterclaim, DNR re-alleges the Counterstatement of
11 Facts in Section XV and re-alleges the allegations contained in paragraphs 16.1 to 19.3.

12 20.2 To the extent Plaintiffs argue, and the court may find, that Plaintiffs continue to
13 be in possession of the Trespass Areas, DNR is entitled to possession and control over the
14 state-owned aquatic lands referred to as the Trespass Areas and all improvements and
15 shellfish remaining thereon.

16 WHEREFORE, DNR prays for the following relief:

17 1. Damages associated with Plaintiffs' trespass on the Trespass Areas, including
18 treble damages as provided in RCW 79.02.300. Such damages include, at minimum, the fair
19 market value of the use of the lands, the value of any damage to the lands, administrative
20 costs, and attorneys' fees.

21 2. Damages associated with any wrongful taking of shellfish established under
22 RCW 79.135.030.

23 3. An order quieting title of the Trespass Areas to the State.

24 4. An order ejecting Plaintiffs from the Trespass Areas, to the extent the court
25 may construe Plaintiffs as being in possession of the lands.

