JAMESTOWN S'KLALLAM TRIBE
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October 1, 2021

Hugh Morrison
Acting Regional Director
National Wildlife Refuge System, U.S. Fish and Wildlife Service (USFWS)
Interior Region 9 and Interior Region 12 (formerly Region 1)
911 NE 11th Avenue, 4E
Portland, OR 97232

Sent via Email: hugh_morrison@fws.gov

Re: Jamestown S'Klallam Tribe's Statement of Objection and Statement with respect to the Tribe's Dungeness Oyster Farm

Mr. Morrison:

I write on behalf of our Tribe. Our staff informs me that USFWS is concluding a Compatibility Determination for *access* to the Tribe's leased tideland area with the possibility it finds it not compatible (per communication with Christine Ogura on September 16, 2021). On October 15, 2021, the farm was slated to begin operations, given that all permits have been issued and a lease executed with Washington State Dept. of Natural Resources (DNR). Anything that gets in the way of that start date will have huge financial impact on our Tribe.

Our Tribe has experienced so much frustration with USFWS that it is hard to know where to begin. The Tribe was told it needed to take no additional actions to avoid a 'significant impact' on the environment, allowing for the federal Individual Permit for the Dungeness Bay Shellfish farm to be issued on July 27, 2021. But now the Tribe suddenly lacks the Refuge's agreement, and they want to assert authority over access to our lease area suggesting that even though our farm is not going to have negative environmental impacts, our access to the farm will have some sort of material interference with the purpose of the Refuge. None of this has been explained to the Tribe in writing or otherwise.

In addition, and to make matters worse, there are several irregularities in this whole process that I would like to highlight. The Tribe feels strongly that there has been clear bias against the Tribe on the part of the Refuge Manager making this decision. We would like to understand why the compatibility determination was conducted by the same person who had letters struck from the record because of inaccuracies and misrepresentations! I would like to call your attention to the May 22, 2019 letter that misrepresented the Tribe's operational plan; was highly speculative; overstated and misrepresented scientific conclusions from scientific papers; omitted a large body of scientific literature; and did not consider actual Dungeness National Wildlife Refuge

("DNWR") bird survey data. Recall, all compatibility determinations must be made with "sound professional judgment," which this Refuge Manager has shown that they lack.[1] Further, there is a cultural arrogance to the idea that a Refuge Manager can tell the S'Klallam where they can go or not go in their ancestral lands. That right is not held by the Refuge—nor was our Treaty abrogated when the Refuge was created.

Considering the length of time that the Tribe has been pursuing the appropriate permits (never mind the years that we operated the farm), our Tribe is deeply disturbed that your agency's first communication about this new *access* compatibility requirement was June 10, 2021. Plus, an access compatibility requirement is directly contrary to previous communication and mutual understanding. When the Tribe expressed its opinion that the access compatibility determination was unnecessary, we were provided notice that the Solicitor's office was reviewing the matter. We asked for, but did not receive, the basis of the Solicitor's opinion. We asked for any contact information so we could better understand this opinion but were told by the Acting Regional Chief that she had passed on our request. Keeping the Tribe in the dark on this issue is unacceptable and results in a breach of the trust responsibility to the Tribe.

Not only were we not provided notice of the Solicitor's opinion, nor a contact number for the Solicitor, we were not given any information in writing to understand your new policy decision to conduct the compatibility access analysis.[2] In fact, a recent letter from your office, dated June 25, 2021 (communication to USACE), is in direct contradiction to this, clearly identifying that only a gear monitoring and retrieval determination would be conducted. So, what should the Tribe believe? Why is a compatibility determination for access being insisted upon *now* (and not in 2007, for example)? Further, the Refuge Manager is acting inconsistently, compared with other compatibility determinations by other managers, which indicate that while boating itself is not wildlife dependent, many wildlife-dependent activities, such as fishing, fulfill the purpose of providing opportunities for wildlife-dependent priority public uses and contribute to fulfilling the purpose of the National Wildlife Refuge Act.

Recall, an agency's mandate is to take even-handed actions, consistent with prior decisions. Instead, we appear to be getting inconsistent opinions regarding the required steps along with clear attempts to block the Tribe's aquatic farm, rather than recognize that the Tribe's access right is part and parcel of the lease right—a right reserved by DNR. The current position is unacceptable and arbitrary on its face, and it costs the Tribe time and money. It clearly appears as though other applicants simply are not given the 'run around' that we seem to be getting. After over 7 years of working out these issues, this matter should be well addressed. We firmly feel we have fully and responsibly addressed these unfounded concerns. This beyond the '11th hour' tactic by USFWS to find a new way to obstruct our project is unacceptable.

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[1] ***Sound professional judgment*** means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee), and other applicable laws.

[2] For a use to be "compatible" it must be "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the [Service], will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." *16 U.S.C. § 668ee(1)*.

The following points must be considered prior to engaging in an unnecessary compatibility determination for access to the Tribe's farm:

(1) Maintenance of existing refuge activities with access to the lease site does not require compatibility and even if it did, ingress and egress to the lease site does not impact the Refuge negatively and is part of the lease rights.

(2) Exceptions may apply when there are rights or interests imparted by a treaty or other legally binding agreement, where primary jurisdiction of refuge lands falls to an agency other than us, or where legal mandates supersede those requiring compatibility.[3] We have several legally binding agreements in play here (DNR lease, Treaty, Letter of Agreement, etc.). The Treaty of Point No Point was not abrogated by the Refuge. The Tribe retains all access rights.

(3) Concerns about Native Americans and their need for economic survival have long been recognized as being consistent with the Refuge Act. This policy should be respected, even though it is stated as applicable to Alaska Natives.[4]

All of these considerations should be given additional weight, as I will describe in more detail below.

First, crossing the Refuge to obtain access to the lease is *maintenance of an already existing activity*. The activity is permitted and pre-dates the Refuge's existence. Further, Tribes have the right to access this area independent of its status as a refuge; this is part of our Treaty rights and State lease rights. Our Tribe has an agreement with USFWS (e.g., Letter of Agreement dated February 22, 1983) that is an independent legal commitment specifically authorizing access. For example, access by boat and foot is specifically authorized in the agreement as well as the use of modern fishing techniques. Therefore, access by boat is clearly compatible and furthermore it is required by the Point-No-Point Treaty.

Second, our Tribe has a legal right of access to all of their usual and accustomed grounds and stations, such that they must be given reasonable access to all of their particular locations (See Shellfish Implementation Plan (Order of April 6, 2002); Letter of Agreement with USFWS).

Third, there is no increase to ingress and egress, nor does mere access to an already existing and permitted farm impact the Refuge or make the use incompatible. This is not unfettered public access, but time and spatially bound by our operations plan for a limited purpose (see Appendix A: Boat access path to the Tribe's lease area).

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[3] https://www.fws.gov/policy/603fw2.html

[4] 43 CFR § 2650.0-2 Objectives.

The program of the Secretary is to implement such provisions in keeping with the congressional declaration of policy that the settlement of the Natives' aboriginal land claims be fair and just and that it be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation and with maximum participation by Natives in decisions affecting their rights and property.

Lastly, the Refuge itself relies on ingress and egress. As you recall, per DNR's lease agreement with the Tribe, ingress and egress (i.e., access) are part and parcel of the right of leasing the tideland. The Refuge only holds an easement on the lease tidelands, not ownership, and may need to cross our leasehold at times for its access. DNR does not grant the Refuge, as an easement holder, any rights over ingress and egress activities where it has already determined the use is compatible (see DNR letter from DNR, January 10, 2019). Therefore, our Tribe is not in agreement that a compatibility determination is warranted for access over primary ownership of DNR aquatic lands within Refuge boundaries. Further, our Tribe has leased the tidelands of Dungeness Bay within the boundaries of DNWR since 1990 and has never before been required to have an assessment for 'access'. If this assessment was necessary, it would have been incorporated into existing comprehensive planning by DNWR.

My purpose now is twofold: Yes, I feel compelled to vent about how arbitrary, unfair and unprofessional your program's communications have been and I want to let you know that the Tribe firmly believes that the permitted aquaculture operations are not incompatible with Refuge purposes.

The Tribe was required to secure an Individual Permit under C.W.A. 404b because the project area lies within the boundaries of the Refuge. DNWR provided recommendations for Refuge-specific conservation measures to reduce possible impacts; nearly all of which were incorporated into the final oyster farm operations plan. My staff met with DNWR staff to discuss the single recommendation that was not feasible, which was to cultivate only Olympia and triploid Pacific oysters. They explained directly to DNWR why that was not feasible and that all other recommendations were acceptable. The USACE was compelled to conduct extra analysis to assure that the special aquatic site (DNWR) would not be materially impacted by their permit authorization.

We understand that the local Refuge manager would prefer that the commercial lease cease operations, but that position is not substantiated in the record and would violate the Department of Interior's Treaty and Trust commitment to the Tribe. Pursuant to the terms of the 1943 easement, DNR may grant additional authorizations for other uses on their tidelands so long as those uses are not in conflict with the purposes of the easement. This right to grant additional authorizations on the tidelands in Dungeness Bay, principally commercial aquaculture, has been exercised by DNR since at least 1963.

Case records do not include any correspondence from U.S. Fish and Wildlife Service to DNR indicating that past or present commercial aquaculture activities have been or are currently in conflict with the easement. The lease area is established as a "covered tideland" under *U.S. vs. Washington,* providing legal designation for the purpose of shellfish aquaculture and recognizing that the use pre-dated the Refuge; that is, was in existence as a "staked and cultivated" tideland at the time of the Treaty in 1855. Our Tribe leased this property to reclaim its historical and cultural territory. The U.S. Department of Interior was signatory to the settlement. In the Dungeness Bay timeline, the Refuge is a latecomer – established in 1915, and the lease was not signed until

1943. Since its creation, the Refuge has included aquaculture. Definitively, it is not a new use, nor is it an incompatible one.

The Tribe initiated the shellfish farm at the request of tribal elders who wished to preserve cultural identity and secure future generations an opportunity to harvest seafood from Dungeness Bay. For this reason, farming aquaculture has a dual purpose: it is part of our cultural and Treaty right. It also is exercising that right in utilizing progressive harvesting practices utilized in the 20th and 21st centuries.

Our Tribe is largely motivated by cultural identity and is always mindful of new revenue sources, jobs and environmental conservation. For the S'Klallam people, maintaining the balance between economic survival and environmental stewardship has always been a key tenet. For this reason, we've gladly exceeded minimum conservation measures. Considering the mandated shellfish operations designation, I would like to believe that the Refuge would welcome the Tribe within our historical fishing grounds and stations, and would accept its agency trust responsibilities, as well as the Department of Interior's intent to recognize tribal nations. Per the federal effort to conserve 30% of lands by 2030 (ABR), Tribes deserve an outsized role in stewarding their homelands and waters. I would like to believe that the Refuge respects our cultural and indigenous legacy, which predates its existence, and is the subject of the Treaty and court order.

Further, there are clear examples in the DNWR comprehensive plan where access, without timing constraints, is found to be compatible despite potential for disturbance. These compatibility determinations (i.e., research, scientific collection, and surveys) find *"that wildlife species which could be disturbed during the use will find sufficient food resources and resting places so their abundance and use will not be measurably lessened on the Refuge"* and (i.e., Tribal fishing) "*disturbance is expected to be intermittent and limited in time and space. There are more than adequate amounts of undisturbed habitat available to the majority of wildlife for escape and cover*." Given that access to the DNR lease will be limited in time and space, intersecting with less than 1% of the Refuge managed lands/tidelands (see Appendix A), it is perplexing that access to the Tribe's farm could in anyway be incompatible with the purpose of the Refuge. We urge you to agree and cease this recent obstruction of our approved shellfish operation.

I understand that your staff recently requested that Jamestown work directly with DNWR to revise our (already permitted) operations plan. I can tell you that's not something we feel fulfills our effort to resume farm operations. We strived for over 7 YEARS to secure our permits. The permits are contingent on the specifics of the operations plan. The plan implements conservation measures to protect shorebirds and waterfowl. We will perform monitoring of avian and aquaculture interactions. The Tribe welcomes any companion monitoring by the DNWR.

The Tribe urges you to reverse your current position considering any course of action which would deny the pre-existing use of the farm, interfering with DNR's rights to lease the property by blocking access, and fails to respect DNR's ownership and authority of regulation of the underlying resources and land. Attempts to block ingress and egress

to DNR leased lands is clearly at odds with Interior's agreement to the Shellfish Settlement of 2007.

In our estimation, you have failed to properly consult, cooperate, and respect the Jamestown S'Klallam Tribe's rights, need for cultural survival, and Treaty use of resources. We will appeal any determination that prevents us from being in our ancestral waters to harvest shellfish, a traditional Tribal practice that has always included commerce. We urge you to reverse your new position and restore your previous position that there is no material interference with the Refuge's purpose by allowing the Tribe to access the tidelands to operate its permitted farm pursuant to a DNR lease, court order, and settlement.

We firmly believe that your initial determination that compatibility is only applicable for the gear retrieval portion of the project, such that our operations can begin on October 15, 2021. Please confirm that there will be no interference with our ability to initiate permitted activities. The timing of this October start date is extremely important for the Tribe's economic and cultural goals.

We remain available to respond to USFWS and expect a timely response as the continued delay will be extremely costly as we have already lost at least 3 seasons of operations costing us millions.

Sincerely,

W. Ron Allen

W. Ron Allen, Tribal Chair, CEO

Cc: USFWS Interim Director
DOI Solicitor Bob Anderson
DOI Secretary Deb Haaland
DOI/ASIA Bryan Newland
Congressman Derek Kilmer

Attachment: Boat access path

Appendix A: Boat access path to the Tribe's lease area.