



USFWS INFORMATION MEMORANDUM



DATE: May 20, 2022

TO: Martha Williams, Director, U.S. Fish and Wildlife Service

FROM: Hugh Morrison, Acting Regional Director, Pacific Region 1

SUBJECT: BP036550: Commercial Oyster Farming Proposal by the Jamestown S’Klallam Tribe within the Boundary of Dungeness National Wildlife Refuge

I. STATEMENT OF ISSUE/KEY FACTS

Since 2015, the Jamestown S’Klallam Tribe (Tribe) has been working to establish commercial oyster farming within the Dungeness National Wildlife Refuge (Refuge). The desired area (50 acres of tidelands) for this commercial operation is closed from October 1 to May 14 for use by tens of thousands of migrating and wintering waterfowl of local, regional, and international importance. The key issue with the Tribe’s proposal is access to the site during the closed period. Service policy and the provisions of the National Wildlife Refuge Improvement Act require a Refuge Manager determination of whether proposed uses are compatible with the purposes of the Refuge (i.e., Compatibility Determination). Based on the Tribe’s current proposal, the Refuge Manager has completed a draft finding that access for the commercial operation is not a Compatible use.

II. BACKGROUND AND FWS POSITION

Since 2015, the Service has been working with the Tribe to adapt the proposed operations to minimize wildlife impacts (e.g., different times of the year, different methods that require less intensive management, different locations, etc.). Other Service programs have also been involved as part of the permit process required by other agencies (i.e., Ecological Services conducted Section 7 consultation and Migratory Birds helped develop a monitoring plan with the Refuge). The Tribe has secured a permit from the U.S. Army Corps of Engineers (ACOE) and a lease from the Washington Department of Natural Resources (WDNR) for use of the 50 acres, which includes access during the closed period. The State owns the land for the identified area; however, the Service has an easement with the State which provides jurisdiction to the Service for determining compatibility of uses of the property.

Upon Solicitor advice, the Refuge completed a draft Compatibility Determination for access to the oyster lease and found access incompatible with Refuge purposes. In February 2022, a working group consisting of Solicitor, NWRS Headquarters, and Regional Refuge program representatives was convened to draft an Options Memorandum analyzing the validity of a range of approval approaches, including any new mechanisms potentially created by joint Secretarial Order 3403. Additionally, the Regional Office of the Solicitor analyzed the shellfish Settlement Agreement in *U.S. v. Washington (2007)* and it does not appear the Tribe has a treaty right for shell fishing in the lease area. This was conveyed to the Tribe’s attorney in 2021. Based on the

Options Memorandum and prior Solicitor advice, it was concluded that the Service cannot allow the proposed activity unless the entirety of the commercial oyster farming operation within the Refuge boundary is found Compatible with Refuge purposes. While engaging with the Tribe, the Refuge has consistently communicated the proposed use would likely be found incompatible and offered multiple opportunities for continued dialogue to find a path forward together.

III. POSITION OF AFFECTED PARTIES/PUBLIC LANDS AFFECTED

Jamestown S'Klallam Tribe has been involved in the permitting process for this commercial operation since 2015. The Tribe believes they have a treaty right for the proposed cultivation and harvest of shellfish, that no compatibility determination is necessary, and that wildlife impacts associated with access to their lease and operations will be limited. Prior to 2015, the Tribe was permitted for cultivation activities that were found compatible on the Refuge. The Service formerly found these activities compatible given access was restricted to times that would minimize wildlife impacts, the techniques used were less intensive, and the area of use was on a smaller footprint. The current proposal for cultivation activities would shift the Tribe's operation to one that would be year-round, more intensively managed, and would impact a larger area of the Refuge. The Tribe submitted a draft Letter of Agreement to the Service in February 2022 outlining acknowledgement by both parties of treaty rights, obligations, and commitments to authorize the commercial oyster farming operation. Chairman Ron Allen has also contacted the DOI Deputy Solicitors office.

The Tribe has received authorization (permit/lease) from the ACOE, Clallam County, WA Department of Ecology (WADOE), and WDNR for the commercial oyster farming operation.

Clallam and Jefferson County residents and multiple non-governmental organizations (NGO) provided comment to the ACOE, Clallam County, and WADOE permit processes. Most comments were in opposition to the commercial oyster farm. Many residents stated concern over the proposed location in a National Wildlife Refuge and importance of the area for migrating and wintering birds.

In October 2021, a local NGO organized a five-hour protest at the Refuge entrance that received media attention and featured a speaker formerly with the Smithsonian Institute. Participants were encouraged to email the Region to express opposition to authorizing the use on the Refuge.

The ACOE has fulfilled a FOIA request from an environmental organization for their administrative file. The Service is also responding to a FOIA request received in November 2021 from the Tribe to provide copies of all email, records, and correspondence related to the Tribe's Dungeness oyster farm proposal dating back to January 1, 2015.

IV. POTENTIAL ISSUES

Environmental non-profit organizations have indicated they will seek a legal remedy if the Tribe is permitted to conduct commercial oyster farming operations within the boundary of Dungeness NWR.

It is uncertain if the Bureau of Indian Affairs (BIA) has determined a position on this issue. A formal briefing to the Assistant Secretary for BIA may be warranted.

V. NEXT STEPS

The Acting Regional Director, Acting Regional Refuge Chief, and Refuge Manager will meet with the Tribe in person to convey efforts to consider options and to share the conclusion that a Compatibility Determination is necessary. This meeting is another opportunity to identify ways in which the Service and the Tribe can find a path forward together. We will ask the Tribe if they see any other options, including the potential modification of their proposed oystering operations.

Attachment(s)

Prepared by: Hugh Morrison, Acting Regional Director, Pacific Region 1

FYI or **Requested by:** N/A

Prepared for a meeting: Meeting Request will be submitted

Does this involve, directly or tangentially, any Director's Office recusals? **Yes** **No**

If yes, please identify:

Attachment:

Talking points for meeting with the Tribe:

- The Service takes our commitment to co-stewardship with the Tribe very seriously.
- The Service had a team review the range of options using the SO 3403 to determine possible approval of the request for access for the commercial oyster farming operation.
- We understand the Tribe asserts there is a treaty right that would preclude the need for a permit or a finding of compatibility, but it appears that there is no treaty right associated within the leased area based on legal settlements regarding shellfish rights.
- We are very interested in hearing if the Tribe sees options that the Service may have missed in our analysis.
- We much appreciate the Letter of Agreement (LOA) proposed by the Tribe. Though we cannot sign the LOA, as it is inconsistent with the National Wildlife Refuge Improvement Act and affirms treaty rights that do not appear to exist in the leased area, we welcome the intent of the LOA, which stresses how we can work together to support both the Tribe's interest and Refuge purpose to conserve and manage these cultural and natural resources together.
- The Refuge Manager, within their authority, has drafted a finding based on all currently available scientific information and what the Service understands about the Tribe's proposed access from the Permits issued to the Tribe. The Service isn't certain if the information obtained from these Permits about the Tribe's proposed use is accurate. Upon evaluation of all currently available information, access for the commercial oyster farming operation is not a compatible use of the Refuge. If the Service has used incorrect information about the Tribes proposed access, we welcome review for clarification and/or adjustment as needed to the proposal.
- We are specifically interested in any adjustments to their request about proposed times of the year, different methods that require less intensive management, and different locations for the use to occur on the Refuge.
- We share the Tribe's interest in moving forward. We welcome additional thoughts from the Tribe on options we may missed. If there is agreement that a Compatibility Determination is necessary, we would like to outline all the steps required to make a final decision to approve a commercial use on a National Wildlife Refuge. A request for an access permit is only the first step.