



JAMESTOWN S'KLALLAM TRIBE

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Jennifer BrownScott
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715 Holgerson Rd.
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(submitted electronically to jennifer_browns cott@fws.org)

RE: Dungeness National Wildlife Refuge Compatibility Determination – for Jamestown S'Klallam Tribe's possible off-lease activity on federally controlled refuge areas

Dear Jennifer,

Since 2016, Jamestown S'Klallam Tribe has been communicating with USFWS Dungeness National Wildlife Refuge (DNWR) regarding the Tribe's effort to resume commercial shellfish operations on its Washington State Department of Natural Resources (DNR) aquatic tidelands lease.

In August 2020, while the Tribe worked to secure its federal 404 permit, USFWS Region 1 Director invited the Tribe to work with DNWR to develop an aquaculture gear surveillance and retrieval plan, which would be relied upon during the Section 7 consultation. Director Thorson further requested that the Tribe work with DNWR for an associated compatibility determination (CD). The Tribe inquired directly to you on Aug 17, 2020 to initiate the CD. At that time, your position was that a CD would be conducted after Section 7 consultation was completed and that the CD would be limited to an analysis of off-lease activity on federally controlled (outside of Washington State underlying ownership) refuge areas. The Section 7 consultation was successfully concluded in October 2020. In March 2021, upon receiving USACE initial proffered permit NWS-2007-1213, the Tribe communicated with you again about the status of the CD. You indicated it had not yet been initiated, nor could it even be started until after the proffered permit is signed by all parties. You also affirmed that the determination would be for off-lease activity related to the gear surveillance and gear retrieval, and overall monitoring. The Tribe has since eliminated any off-lease avian monitoring activity, so the sole activity upon federally controlled refuge areas is the gear surveillance and retrieval plan.

As you know, the Tribe was recently in an impossible quandary whereby, USACE required a *statement of no objection related to the gear plan* from USFWS before issuing its permit and you found that you could not issue that statement as it would be pre-decisional of a CD.

Because of the impasse, the Tribe reached out to USFWS to better understand the process and next steps. On June 10, 2021, we learned from the Regional Chief that the CD may be conducted as a parallel process to permit acquisition, with a 15-day public notice period. The process is initiated by a letter of request from the Tribe to your attention.

We believe however, that a full compatibility determination and reopening of public notice is not required for the gear retrieval activities, as they would qualify for exemptions:

There are other circumstances under which the compatibility requirements may not be applicable. The most common exceptions involve property rights that are not vested in the Federal Government, such as reserved rights to explore and develop minerals or oil and gas beneath a refuge. In some cases, these exceptions may include water rights, easements, or navigable waters. 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. Where reserved rights or legal mandates provide that we must allow certain activities, we should not prepare a compatibility determination. In the case of reserved rights, the refuge manager should work with the owner of the property interest to develop stipulations in a special use permit or other agreement to alleviate or minimize adverse impacts to the refuge. (emphasis added) (<https://www.fws.gov/policy/603fw2.html>).

Given the above policy, we believe the special use permit is the appropriate process. Pursuant to the terms of the 1943 easement granted to the US for the purposes of a Refuge, DNR may grant additional authorizations for other uses on these 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. There are also reserved treaty rights and access to treaty resources. Further, unduly restricting or interfering with use and harvest of shellfish would be incompatible with the 'covered' status of the leased tidelands in the shellfish agreement¹, and USFWS is party to that agreement.

Jamestown Tribe agrees that a special use permit is warranted for possible ancillary aquaculture activity that may occur on primarily federal jurisdiction areas. As discussed above, this may occur if gear is lost onto shorelands. As you know, the Tribe has already worked with you to define the necessary stipulations to minimize adverse impacts as detailed in the gear surveillance and retrieval plan. To limit possible impacts, the gear surveillance and retrieval plan specifies specific time-periods for access to closed areas, as well as requires coordination

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See, *United States, et al. v. State of Washington, et al.*, No. C70-9213. June 20, 2007. (W.D. Wash.)

with DNWR so that appropriate site protocols can be determined: *“Onshore surveillance and/or retrieval of gear within closed areas will occur May 15 – July 31. The Refuge will be notified prior to access so that appropriate site access protocols can be determined (i.e., timing related to tides and weather, avoidance of nesting areas) to minimize disturbance.”*

Jamestown Tribe does not agree that a special use permit is warranted for ‘access’ over primary ownership of DNR aquatic lands within refuge boundaries. An ‘access’ assessment was first brought to our attention on June 10, 2021 and we consider it arbitrary and capricious. Jamestown Tribe has a lease with DNR for the purposes of commercial aquaculture which inherently includes ingress and egress. Further, the Tribe has leased tidelands of Dungeness Bay with the boundaries of DNWR since 1990 and has never before been required to have an assessment for ‘access’.

The Tribe finds it noteworthy that for decades, Pacific oyster cultivation occurred on the site of our WA DNR lease without objection from USFWS to the size or scale of the operations. The current proposed operations implement best farm management practices and site-specific conservation measures that are less disruptive compared to past shellfish operations; and were designed specifically to address concerns about possible impacts to wildlife, particularly migrating birds. As such, the operations plan limits aquaculture cultivation methods; and on-site activity to the extent practicable, during the most sensitive wildlife time periods.

We hope you agree that the special use permit is the correct process for ancillary activity related to gear retrieval; and that an ‘access’ special use permit is not required. However, if you disagree, we request that you complete the analyses you deem necessary without delay – in parallel to the permit process; so that we may initiate the farm operations in good standing as soon as possible. We have already expressed the frustration of lost opportunity because of prolonged process and unnecessary delays. Because of your deep familiarity with this project, we are optimistic that you can complete the analysis expeditiously. Thank you very much for your attention and engagement.

Sincerely,

Hansi Hals
Natural Resources Director