



USFWS INFORMATION MEMORANDUM



DATE: October 26, 2022

TO: Assistant Secretary, Fish and Wildlife and Parks
Assistant Secretary, Indian Affairs
Director, U.S. Fish and Wildlife Service

FROM: Acting Regional Director, Pacific Region 1

SUBJECT: BP036690: Oyster Farming Proposal by the Jamestown S’Klallam Tribe within the Boundary of Dungeness National Wildlife Refuge – An Update and Next Steps

I. STATEMENT OF ISSUE/KEY FACTS

Since 2015, the U.S. Fish and Wildlife Service (FWS) has been in discussions with the Jamestown S’Klallam Tribe (Tribe) regarding their desire to establish oyster farming within the Dungeness National Wildlife Refuge (Dungeness NWR). The FWS has been working with the Tribe to try 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.). The Tribe’s current proposal includes 80,000 oyster bags in 34 acres which require multiple visits each month throughout the year. However, the proposed use area 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 proposed use area is not owned in fee by the FWS but is an easement deed from the State of Washington. The Washington Department of Natural Resources has issued a lease to the Tribe for oyster farming in the proposed area. Additionally, the Tribe has acquired other permits from the county and the Army Corps of Engineers (ACOE) for this activity. The only remaining question is whether the FWS must authorize the use.

II. BACKGROUND AND FWS POSITION

The FWS, with the assistance of the Office of the Solicitor (SOL) has carefully examined the question of whether the FWS must authorize the Tribe’s proposed use. Several SOL memos have analyzed this question (6/15/16, 7/13/21, 1/13/22, 9/16/22) with the most recent memos reviewing FWS legal requirements within the context of Joint Secretarial Order 3403. Additionally, a 4/4/22 draft Options Memorandum examined options to consider for managing this proposed use through JSO 3403. All of these documents analyze treaty rights, property rights, FWS legal authorities, and discretion for decision-making. The collective analysis provided by these documents identifies that a decision to either require, or not require, FWS authorization involves legal risk. While the documents focus on considerations specific to Dungeness NWR, the Tribe, the Treaty of Point No Point, and the State of Washington, there is also a potential that this decision could establish a precedent for other refuges.

III. POSITION OF AFFECTED PARTIES/PUBLIC LANDS AFFECTED

Jamestown S’Klallam Tribe has been involved in the permitting process for this 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. The Tribe submitted a draft Letter of Agreement to the FWS in February 2022 outlining acknowledgement by both parties of treaty rights, obligations, and commitments to authorize the commercial oyster farming operation. The Tribe has expressed concern about the delays in a response from the FWS.

Clallam and Jefferson County residents and multiple non-governmental organizations (NGO) provided comment to the ACOE, Clallam County, and WA Department of Ecology 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 Dungeness NWR 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 Dungeness NWR.

The ACOE has fulfilled a FOIA request from an environmental organization for their administrative file. The FWS 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.

The Washington Department of Natural Resources (DNR) sent the FWS a letter on October 4, 2022, stating their position that the Tribe rightfully may access the portion of the Dungeness NWR that is part of the DNR leasehold throughout the year without restriction. Their interpretation is that the easement was authorized by the Washington State Legislature pursuant to Section 152, Chapter 255, Session Laws of 1927, and notably did not convey fee title ownership to the USFWS, but instead conveyed only an easement for "any public purpose."

IV. POTENTIAL ISSUES

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

Tribal representatives have suggested that the Tribe is reviewing its legal options if the FWS does not approve its proposal. They have also suggested that they may not wait for the FWS's determination and proceed with their proposed use.

Depending on the analysis and reasoning applied, if the use is allowed to proceed without formal authorization by the FWS, there may be implications for other activities at Dungeness NWR, and potentially for other refuges in National Wildlife Refuge System with regard to FWS regulatory authority within areas managed under easement.

V. NEXT STEPS

A meeting with the Tribe is set for 10/28/22 to discuss the FWS response to the Tribe's proposed use at the Refuge.

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

☒ **FYI** or ☐ **Requested by:** N/A

☒ **Prepared for a meeting:** 10/27/22 with FWS and DOI leadership (FWP and BIA)

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

If yes, please identify:

