

**Jamestown S’Klallam Tribe
Chronological Summary of USFWS Dungeness Refuge related events and
communication re: permitting JST Dungeness Bay Oyster Farm**

This document/timeline was provided by Jamestown S’Klallam Tribe to USFWS. Font in blue identifies USFWS additions/clarifications.

1990 – Jamestown’s S’Klallam Tribe purchased assets of D.C. Oyster Farms (in operation since ~1963) and acquired lease of DNR covered tideland in Dungeness Bay. DNWR provides letter to DNR stating no objection to renewing the tideland lease (at current size and operations).

USFWS: A 1990 letter from Refuge Manager Curry to WADNR, prior to lease execution, identified the area as important to wintering and migrating waterfowl and requested oyster culture be conducted outside of eelgrass beds, be conducted to minimize interference with waterfowl and public use of Dungeness Bay, be by hand-picking or shallow dredge. The Tribe shared a draft environmental assessment of the potential lease with the Refuge manager which stated, “there is no eel grass” within the lease area, “the U.S. Fish and Wildlife Service...would object to an increase in scale of operation in Dungeness Bay”, and that “project modifications were considered and agreed to as requested by the U.S. Department of Fish and Wildlife.” The resulting 10-year lease approved: “25 acres will be used for long line culture, and approximately 5 acres will be used for bottom culture.” “Cultch will be set using remote setting techniques, overwintered, and then planted the following spring.”

Late 1990’s – elevated fecal coliform results indicate possible shellfish area downgrades. JST mobilizes community outreach, monitoring and remedial activities to improve water quality.

1994 and 1997 access restriction instituted: In 1994, Compatibility Determinations for public use within the Use Easement established a no-wake requirement for boating and restricted access from October 1 – May 14, to reduce disturbance impacts to migratory birds. The 1997 Environmental Assessment for the Management of Public Use for Dungeness National Wildlife Refuge re-affirmed the 1994 timing and no-wake regulations and added a year-round closure of the Bay-side of Dungeness spit (past the first ½ mile), all of Graveyard Spit, and the tidelands within 100-yards of the shoreline, to ensure compatibility with Refuge purposes.

2005 – Tribe ceased operations due to DOH growing area closures but maintains the DNR lease with intent to resume commercial operation upon water quality improvements.

USFWS: The 1990 lease expired in 2000. It is unclear what farm activities were permitted from the end of the prior lease period in 2000 to 2005. WADNR Aquatic Lands District Manager has stated that lease No. 20-013012 (lease period 1990 – 2000) and

lease No. 20-A13012 (lease period 2007 – 2017) are the only leases on file (S. Carlson, WADNR, pers. comm.)

2007 – Dungeness Bay site becomes “covered tideland” under US vs. Washington, making lease area legally designed for the purpose of shellfish aquaculture. US Dept of Interior signatory of the settlement.

USFWS: Per 7/13/21 SOL memo, the shellfish aquaculture lease at the Refuge is covered by a Settlement Agreement approved by the court in 2007. *United States v. Washington*, 20 F.Supp.3d 828, 849 (W.D.Wash. 2007) (table including lease no. 20013012). The Settlement Agreement provides a process to address identified existing shellfish leases, including tribal assumption of the leases in certain circumstances. But all of the identified leases—including the lease at issue here—are defined as “covered tidelands” which “are deemed as of the date of this Settlement Agreement to be ‘staked or cultivated by citizens’ for the purpose of implementing” the Treaty of Point No Point. While the Settlement Agreement includes certain provisions regarding how the tribes may assume existing aquaculture leases, the treaty-reserved shellfishing rights do not apply to those areas.

October 24, 2007 - Tribe signed a new lease agreement with DNR while area *fallow*. Activity includes limited experimental cultivation to assess water quality, ecosystem health and shellfish productivity in Dungeness Bay. This lease acknowledges the recent downgrades and economic impact to the Tribe’s commercial operations requiring the site to go fallow. Access to site is identify by water via motorized boats.

USFWS: WADNR issued Aquatic Land Lease No 20-A13012 to JST on October 24, 2007. To reduce impacts to waterfowl, Exhibit B of the lease required the Tribe to plan onsite work from May 15 – July 30 and confer with the Service if it was necessary to work outside that window, conditions in line with refuge purpose (closures). Within the footprint of the ~50 acre lease area, JST was allowed a 100x100ft plot: “60 aquapurses. The size, location, and culture methods used to grow oysters will be discussed and approved by DNR and USFW prior to establishment. The Tribe will strive to recognize and plan work in the Bay from May 15 through July 30 when cultivation activities will be least disruptive to use of the Bay by Brant and other waterfowl. The Tribe will confer with USFW before conducting activities on the lease outside this window.” Additionally, the payment schedule stated, “oyster and geoduck production will be experimental”, and “It is expected that a very small portion of the leased area will be encumbered at any time with anticipated low yields and limited quantities of oysters or geoduck.” The Overview of Operations in Exhibit B. stated, “the goal of continued cultivation of shellfish for the near future on this lease will be to assist in assessment and monitoring of the health and productivity of Dungeness Bay.” No known commercial oyster activities have occurred within Dungeness Bay, since at least 2005 (possibly 2000, see previous bullet).

2015 – In response to improved water quality, Tribe begins process to resume commercial operations. New regulations require Tribe to secure local and federal

Updated 09/21/21 – JST Natural Resources

permits that were not needed when the Tribe acquired the lease and began operations in 1990. Pre-application communication with USACE & USFWS. JARPA [Joint Aquatic Resources Permit Application] submitted November 2015; resubmitted January 2016 (updated form)

September 17, 2015 - Refuge Supervisor Sylvia Pelizza, Project Leader Jennifer Brown-Scott (JBS) and Native American Liaison Nathan Dexter; JST Councilman Kurt Grinnell, Scott Chitwood (NR Director), Kelly Toy, and Ralph Riccio (Aquaculture Lease Lead); DNR; and WDFW met. Discussed the process the Refuge would take to determine compatibility. Type of process and its complexity would be determined once an official proposal was received from the Tribe.

October 2015 - Steady water quality improvements since 2005 result in the reclassification of Dungeness shellfish growing areas. WA Dept of Health upgraded over 700 acres of Dungeness Bay for commercial shellfish harvesting.

November 6, 2015 - JBS emailed JST Natural Resources Director Scott Chitwood to request a follow-up discussion regarding re-initiation of aquaculture on Dungeness NWR tidelands. Scott Chitwood responded that they would be willing to talk, however, “this issue has now been elevated to the Government to Government level. Chairman Allen has written Regional Director Thorson to express the Tribe’s policy views directly to her.”

November 25, 2015 - Letter from Director Thorson to Chairman Allen expressing desire to continue conversation regarding aquaculture. Responsive to interests while meeting Refuge obligations to protect aquatic resources and migratory birds and their breeding and wintering habitats.

January 12, 2016 – PL JBS met with Ralph Riccio to discuss options to place the lease elsewhere, that we would use the same process as with any applicant and described the CD and Appropriateness process. Asked for detail of planned operations (gave examples).

March 9, 2016 - Meeting with FWS Sylvia Pelizza, Kevin Foerster, and PL JBS; JST Vice Chair, Kurt Grinnell (Councilman, Chairman Natural Resource Committee), Scott Chitwood (Natural Resources Program), Ralph Riccio (Permitting Lead), Kelly Toy (Shellfish Program Lead) to discuss compatibility.

April 1, 2016 – Multiagency meeting (NOAA, USACE, USFWS, DNR, & Clallam County staff in attendance) hosted by the Jamestown S’Klallam Tribe to discuss permitting requirements to resume operations, jurisdictional roles and federal lead for ESA and section 7 consultation. USACE will process NWP 48.

USFWS: We explained how we would be evaluating the project for compatibility with the Refuge mission/purposes, notably for any conflicts with migratory birds. As a result of

this evaluation, additional avoidance measures may be considered. FWS provided compatibility guidance and questions regarding project details. The Tribe will respond to the compatibility questions from FWS and include their responses with their application.

April 4, 2016 – PL JBS email to Ralph Riccio: work windows meeting the current lease requirements (May 15 - July 30) would allow consideration to accommodate the request.

2016-2019 – Throughout this entire time period, USFWS was in constant communication with JST about their overall permitting process with other agencies, helping to answer questions, specifying USFWS role, and what USFWS was providing other agencies for their permit process. A document outlining these emails, phone calls, and meetings is available.

December 2017 – Decided that USACE will be the federal lead for ESA/Section 7. USFWS will evaluate for compatibility with Refuge mission/purposes.

USFWS: As the permitting process continued (2018 – 2019), USFWS consistently provided JST our comments to permitting agencies prior to our submission so they were aware.

March 29, 2018 – USACE determines Individual Standard Permit is required based on designation as a “Special Aquatic Site” since lease area falls within boundary of Dungeness National Wildlife Refuge.

April 4, 2018 – DNWR submits comment letter to Clallam County DCD stating concerns about “operations size and location and potential impacts to the Refuge, wildlife, habitat and public use...” and provides recommendations for Refuge-specific conservation measures to reduce impacts. **NOTE: Almost all DNWR recommended measures were incorporated into JST farm operations plan. JST staff met with DNWR staff to discuss the single exception (shellfish cultivation stocks).**

USFWS: Clarification - the Refuge’s timing recommendation was not met. The method selected by the Tribe required year-round site access.

May 12, 2018 – Tribe submits letter to USFWS Region 1 Director, Robyn Thorson, requesting “support and participation as a Federal Trustee” in completion of the Individual Permit process.

May 30, 2018 – USFWS responds to Jamestown’s May 12th letter stating, “jurisdiction in this matter is narrow, with regulatory oversight and permitting being in purview of the State of Washington, U.S. Army Corps of Engineers and Clallam County.” The agency point of contact for consultation and participation is Refuge Manager, Jennifer Brown-Scott.

USFWS: 2018 worked with JST to address marine debris removal.

December 10, 2018 – USACE/ECY Public Notice is issued and received public comment through February 27, 2019 (79 days) following request for extension by DNWR manager.

February 27, 2019 - DNWR submitted comment letter stating the Tribe's proposal to return to its oyster farm in Dungeness Bay would "cause an unacceptable level of impact".

Note: This assessment is made without providing adequate scientific basis, and despite amendment to operational activities and implementation of nearly all Refuge-specific conservation measures in the April 4, 2018 letter.

USFWS: Clarification - the Refuge's timing recommendation was not met. The method selected by the Tribe continued to require year-round site access.

March 18, 2019 – Tribe submits letter to USFWS Region 1 Director, Robyn Thorson, questioning the scientific-basis of the statement that the proposed operations will cause an unacceptable level of impact despite years of consultation, previous record of no objection and implementation of farm management practices that are less disruptive than past operations. Letter also requested a government-to-government meeting to discuss issues further.

USFWS: Clarification - "Previous Record of no objection": the Refuge did not object to the previous lease (2007) because activities were only allowed onsite from May 15 – July 30, without additional Refuge approval. Additionally, 2007 letter signed by WADNR, JST and WMTNWR states, "The DNR and the Tribes are aware that USFWS would prefer not to have aquaculture in the Refuge." It was also a much smaller operation (60 aqua purses on 100x100ft area). "Less disruptive": This activity is much more disruptive than the operations allowed under the 2007 lease.

May 1, 2019 – In person G2G meeting with Jamestown leadership and staff, and USFWS leadership and DNWR manager to discuss proposed operations and the basis of comment letters provided by DNWR manager.

USFWS: Regional Director Robyn, DRD Mary Abrams, Refuge Chief KF, and acting the Tribal Liaison Jeanne Spaur attended.

May 22, 2019 – Follow up DNWR communication clarified that the USFWS role was not as a permitting authority and provided a limited literature review of aquaculture and avian interactions.

USFWS: Clarification - The May 22, 2019, follow-up comment letter to ACE and Clallam County was written to address JST concerns that the February 27 comment letter had asserted the Service as a decision maker in the current permit processes and that the Refuge concerns had not been backed by science.

June 6, 2019 – PL JBS met with JST NR Director Hansi Hals to discuss JST concerns with FWS comment letter.

June 29, 2019 – Jamestown submitted an official letter of objection to USFWS, including a point-by-point response finding that DNWR communication misrepresented the Tribe's operational plan; was highly speculative; overstated and misrepresented scientific conclusions from several scientific papers; omitted a large body of scientific literature; and did not consider actual DNWR bird survey data for which Jamestown staff compiled, reviewed and provided back to DNWR for consideration.

USFWS: Clarification - The Refuge did use bird survey data (e.g., calculation of high use areas). It is unclear how the data was analyzed by the Tribe, but the conclusions drawn by the Tribe were inaccurate. A Refuge review of the Jamestown S'Klallam Tribe Shellfish Aquaculture and Bird Interactions report (Confluence Environmental Company), identified the report's conclusions relied on outdated information (instead of refuge-specific wildlife use data), invalid comparisons, mischaracterizations and factual errors.

USFWS: Chairman Allen communicated with Director Thorson concern over USFWS comment letters to ACOE.

August 6, 2019 – USFWS withdrew the two previous letters of record (February 27 & May 22, 2019) acknowledging that the scientific literature is inconclusive and that there is little site-specific information to understand possible impacts from on-bottom bag aquaculture to bird species found on the Refuge. The letter expressed concern about possible impacts to Refuge resources and recommended operations and monitoring activities occur outside of migrating periods for shorebirds and waterfowl.

USFWS: This is JST's interpretation of this action.

January 10, 2020: JST receives County permits - Shoreline Substantial Development Permit (SSDP) and a Shoreline Conditional Use Permit (SCUP) for Phase 1 development. Requirements are an Avian Monitoring MOU with USFWS or Audubon as permit outlines if impacts to the area are determined, additional conditions may be imposed or the proposal may be voided.

August 2020 – USFWS invited Tribe to work with ESA compliance office for review of aquaculture gear surveillance and retrieval plan (developed in conjunction with DNWR) & Jennifer Brown-Scott, DNWR Project Lead, on compatibility determination (CD)

August 17, 2020 – Jamestown staff contacts DNWR manager, Jennifer Brown-Scott, to initiate the CD. Ms. Brown-Scott responds with position that a CD would be conducted after completion of Section 7 consultation. Section 7 consultation proceeds with ESA consultation and conservation planning office.

October 20, 2020 – Section 7 consultation for the Tribe’s gear surveillance and retrieval plan completed. USFWS letter of ESA concurrence provided.

March 24, 2021 - Tribe requests update on USFWS DNWR compatibility determination. DNWR indicates that instead of completing following the Sect 7 consultation, will conduct after USACE 404 permit is authorized.

USFWS: Clarification -The Refuge was unable to proceed with their analysis until the permit was issued, identifying the full scope of the activity (including the ACE approved gear management plan). March 29, 2020, the Refuge discussed with JST Natural Resources staff that it would be best to identify all potential access needed for surveys and monitoring so it could be addressed in one Compatibility process.

April 2021 – Tribe initiates coordination with USFWS staff in the development of the Avian Monitoring Plan per USACE requirement. 4 meetings occur between April 5th and May 10th.

USFWS: Regional Migratory Birds Office, Inventory and Monitoring Program, WMTNWRC, and USGS were involved in these discussions.

April 1, 2021 – DNWR manager confirms via email that Compatibility Determination will be specific to the off-lease area which includes review of the gear monitoring and retrieval plan and monitoring activities. Process could be completed within 90 days if there is minimal impact from monitoring activities.

May 17, 2021 – Coordination with USFWS on Avian Monitoring plan ends. USFWS additional requests are beyond the scope of on-site operational monitoring. Jamestown welcomes companion monitoring.

USFWS: Regional Migratory Birds Office and Inventory and Monitoring Program, and DNWR provided joint recommendations/comments to JST natural resources staff re: the draft Avian Monitoring Plan for Jamestown’s Dungeness Bay. The recommendation provided a survey approach to meet the need for statistically-supported evaluation of impacts, as identified in the Tribe’s Mitigation and Monitoring plan (County permit stipulation #5).

May 19, 2021 - Jamestown requested a statement of no objection from DNWR specific to the gear surveillance and avian monitoring, per request of USACE

USFWS: Clarification USACE never requested a statement of no objection from the Refuge.

May 24, 2021 – DNWR declined any statement of no objection. DNWR affirms shall conduct a compatibility determination for gear retrieval, including public comment, after a permit is issued.

May 24, 2021: The Refuge began drafting a CD for access to complete loose aquaculture gear surveillance and retrieval. Currently at the Regional Planning Office. The CD used the aforementioned plan as a basis for identifying a compatible approach.

June 1, 2021 – Tribal Chair communication to Regional Director regarding impasse: USACE required a *statement of no objection related to the gear plan* from USFWS before issuing its permit, but USFWS would not make that statement pre-decisional of a CD – and would not begin the CD analysis until after the permit signed.

USFWS: Clarification USACE never requested a statement of no objection from the Refuge.

June 10, 2021 – USFWS NWRS Regional Chief Kevin Foerster telephones Tribal Chair to say that USFWS compatibility determination can be performed as a parallel process to permit acquisition; with a 14-day public notice period. Kevin Foerster also calls Tribal NR Director stating that compatibility determination can begin right away by writing letter to DNWR. Kevin emphasizes that USFWS position is that two compatibility determinations required. One for possible gear retrieval activity; and first communication that a compatibility determination required for access.

USFWS: It was unknown if a CD would be required for access until after a permit and lease were provided. It was possible that permitted activities could preclude the need for a compatibility determination.

June 11, 2021 – USACE submits letter to USFWS requesting any additional comment on the Avian Monitoring Plan.

June 15, 2021 – Tribe submits letter to DNWR manager stating position that the project should qualify for exemptions from the CD requirement and a special use permit is the correct process for off-lease activity related to gear retrieval; and that an ‘access’ special use permit is not required. Also states request to “complete the analyses you deem necessary without delay”

June 17, 2021 – DNWR confirms receipt of JST letter and states being reviewed.

June 23, 2021 - USFWS indicates intent to respond to USACE stating no need for additional coordination with the Service prior to issuance of the 404 permit. Acknowledged receipt of Tribe’s June 15 letter and stated working with the Office of the Solicitor to review the letter.

June 24, 2021 – USFWS NWRS Regional Chief notifies that SOL reviewing JST June 15 letter and USFWS working to expedite review.

June 25, 2021 – USFWS responds to USACE June 11 letter, saying “no further comment” on the Avian Monitoring Plan, and will “continue to coordinate with the Tribe

of any required Compatibility Determination and Special Use Permit necessary for gear monitoring and retrieval.”

July 27, 2021: Tribe receives ACOE Standard Individual Permit (Rivers and Harbor Act of 1899, Section 10):

“1. Due to the location of the proposed project within the vicinity of areas in the Dungeness National Wildlife Refuge (Refuge) closed to access to protect Refuge wildlife and vegetation communities, the following conservation measure from the Programmatic Biological Opinions for Shellfish Activities in Washington State Inland Marine Waters (U.S. Fish and Wildlife Service (USFWS) Reference Number 01EV\F\W00-2016-F-0121, National Marine Fisheries Service (NMFS) Reference Number WCR-2014-1502) shall not occur within the boundaries of the Refuge [Measure 22]...”

“2. You shall implement the Jamestown S’Klallam Tribe Gear Monitoring and Retrieval Plan to Satisfy Conservation Measure #22 dated August 28, 2020, within the boundaries of the Dungeness National Wildlife Refuge.”

“Further Information: 2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, State, or local authorization required by law.”

Department of the Army EA and Statement of Findings for the Standard Individual Permit Application Memo: The USFWS “has the responsibility of completing the evaluation of whether siting a commercial shellfish aquaculture within the NWR is compatible with the Refuge management and consistent with their related federal laws and executive orders, Service policies and treaties.”

August 4, 2021: Refuge begins drafting compatibility determination for aquaculture access.

August 19, 2021: Tribe receives WADNR Lease 20-B13012. Unlike the 2007 lease, this lease does not include stipulations restricting access during the Oct 1 – May 14 closed season.

September 16, 2021 – JST NR Director receives a courtesy call from USFWS Acting Regional Chief, National Wildlife Refuge System that a compatibility determination in process by DNWR manager is finding access to the lease site to be incompatible with refuge functions/purpose and would like the Tribe to contact her to change operational activities to ensure compatibility.

September 20, 2021 - As follow up from JST NR Director asking for clarification, Acting NWRS Regional Chief confirmed that shellfish aquaculture was not exempt from compatibility policy per Solicitor review.