

## MEMORANDUM FOR RECORD

APPLICATION: NWS-2008-260 Pacific International Holdings LLC (PIH) (previously Pacific International Terminals, LLC)

SUBJECT: Gateway Pacific Terminal Project and Lummi Nation's Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County

A. EXHIBITS– SEE ENCLOSURES<sup>1</sup>

B. CHRONOLOGY OF REFERENCED SUBMITTALS

1. By letter dated 5 January 2015, the Lummi Nation of the Lummi Reservation (Lummi) submitted a request to Seattle District U.S. Army Corps of Engineers (Corps) to deny the Gateway Pacific Terminal (GPT) Section 404/10 permit application because of a greater than *de minimis* impact on their usual and accustomed (U&A) treaty fishing rights at Cherry Point, Whatcom County, Washington. With that request, the Lummi submitted (1) resolution #2014-154; (2) selections from the Vessel Traffic and Risk Assessment Study prepared by Glosten Associates dated 4 Nov 2014 (Glosten Vessel Traffic Study) and; (3) Lummi Fishermen's Declarations. (Exhibits 4, 6, and 7).

2. By letter dated on 3 February 2015, the Corps requested additional information from the Lummi to assist with evaluating the impact to their treaty fishing right. To evaluate impacts on treaty fishing rights, the Corps conducts a *de minimis* determination to determine whether the impacts to treaty fishing rights are of legal significant. If it is legally significant, then Congressional authorization would be required to allow the impact. The process includes request for specific information in the form of declarations regarding the Lummi's fishing and crabbing activities at or near the proposed project. (Exhibit 5)

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<sup>1</sup> The references cited do not represent the entire administrative record for the NWS-2008-260 application.

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3. By letter dated 5 March 2015, the Lummi submitted additional fishermen declarations and maps, in addition to a declaration from the Lummi's Fisheries Harvest Manager, Benjamin Starkhouse, explaining the fishing and crabbing productivity at Cherry Point. On 13 March 2015, the Lummi submitted one additional declaration inadvertently omitted from the 5 March 2015 submittal. (Exhibits 6-7)

4. By letter dated 10 April 2015, the Corps provided the Lummi information to the applicant, PIH, for a response. (Exhibit 9). On 5 May 2015, PIH requested an extension for submission of a response, and on 28 May 2015, the Corps granted a 60 day time extension.

5. By letter dated 21 July 2015, Ben Starkhouse, Lummi Fisheries Harvest Managers, sent stating that tribal fishers only keep catch data by the management areas 7A and 20A, and "the Lummi Natural Resources Department does not collect [more precise harvest location of fish and shellfish]." (Exhibit 10)

6. By letter dated 27 July 2015, PIH submitted a response to the Lummi information. The response included summaries of the Lummi declarations, declarations from previously litigated treaty fishing right court cases, documents from other permits with treaty fishing issues, information about vessel traffic rules, information regarding gear loss, a crab technical information report, a salmon technical information report, Cherry Point pacific herring technical information report, herring spawning report, clams technical information report, halibut technical information report, geoduck technical information, and sea cucumber technical information report. (Exhibit 11)

7. The Corps provided the information PIH had submitted on 27 July 2015 to Lummi via letter dated 28 July 2015. (Exhibit 12)

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8. The Lummi replied by letter dated 27 August 2015 to PIH's submittal with materials from the Lummi Nation Fishing Gear Loss Forum, declarations used in *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996), Washington State Department of Fish and Wildlife (WDFW) trawl survey and report, derelict fishing gear reports, and a crab survey. (Exhibit 13)

9. The Corps provided the Lummi's 27 August 2015 response to PIH via letter dated 18 September 2015. (Exhibit 14)

10. By letter dated 5 October 2015, PIH submitted a reply to Lummi's 27 August 2015 submittal with a brief outlining its strengths and the Lummi's perceived weaknesses. Included in the submittal were additional technical reports regarding PIH's allegation of limited crab and herring at the proposed site and only occasional fishing by the Lummi at the proposed site. (Exhibit 15)

11. The Corps provided this 5 October 2015 response to the Lummi via letter dated 8 October 2015. (Exhibit 16)

12. By letter dated 21 October 2015, the Lummi submitted a brief reply to PIH's submittal briefly stating that the applicant had "not provided any meaningful new evidence or argument" in its last submittal. (Exhibit 17)

13. PIH submitted a Joint Aquatic Resources Permit Application (JARPA) to the Corps on 22 December 2015 including an operations plan to address potential impact to tribal fishing at the site.<sup>2</sup> (Exhibit 18). The JARPA was modified on 15 January 2016 with corrections made to

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<sup>2</sup> The application had been withdrawn by PIT/GPT due to timing issues with WQC one year presumed waiver, and NEPA EIS process; however the Corps continued with the NEPA process in accordance with 33 CFR 325 App B. Revised applications were received 22 December 2015, 15 January 2016, and 18 March 2016.

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the drawings in response to comments from the Corps. (Exhibit 19). A second revised JARPA was submitted on 18 March 2016 updating the applicant information (revised applicant name) and providing the CZM form. (Exhibit 24). The application was deemed to be completed on 18 March 2016.

14. The Corps provided the 15 January 2016 modified JARPA and attachments to the Lummi on 11 February 2016. (Exhibit 20)

15. The Lummi provided a response to the new PIH application on 12 February 2016 stating that after review of the PIH submittal and application, no new information was necessary from their perspective. (Exhibit 21)

16. PIH submitted additional information responding to the Lummi's allegations on 19 February 2016, which included information obtained from WDFW and the operations plan originally submitted with the JARPA. This information was provided to the Lummi via letter on the same day. (Exhibit 22)

17. The Lummi provided a response to the PIH information on 1 March 2016 indicating after review of the PIH's December 22, 2015 and January 15, 2016 submittals, no new information was necessary from their perspective and that PIH's proposed mitigation was not acceptable to address the perceived impacts to the treaty fishing right. (Exhibit 23)

18. On March 18, 2016, PIH submitted a JARPA with a correct Coastal Zone Management form, thereby, making the JARPA technically complete. (Exhibit 24). The Corps provided the updated JARPA to the Lummi on 29 March 2016. (Exhibit 25)

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C. FACTS

1. In February 2011, the Corps and PIH began the pre-application processing (NWS-2008-260) for GPT, a multimodal marine terminal for export of multiple dry bulk commodities, including a deep-draft wharf with access trestle and other associated upland facilities. GPT would be developed at Cherry Point in Whatcom County on approximately 283 acres of the 1,520-acre project site and would consist of a three-berth, deep-water wharf, rail facilities commodity storage areas, material handling equipment, and other required bulk handling infrastructure. Cherry Point is a geographic location north of Sandy Point and south of Birch Bay. The new wharf is proposed to be 3,000 feet long and 107 feet wide built on 730 48-inch steel piling, with access provided by a 1,285-foot long by 50-foot wide trestle built on 64 steel piles, 24 to 30 inches in diameter.<sup>3</sup> The trestle and wharf will extend out to a depth of -85 feet Mean Lower Low Water (MLLW) (NAVD 88 datum). Upland facilities would include open and closed commodity storage areas, each serviced by a rail loop. Each area would contain support facilities, such as roads, maintenance buildings and stormwater treatment systems. A shared services area would connect the storage areas to the access trestle and wharf and would contain a roadway, conveyors, and service buildings. Commodities would be delivered to the PIH project site by rail via the existing BNSF Railway Custer Spur line to the Bellingham subdivision main line. GPT's initial targeted commodity is coal from Powder River Basin sources for export to Asian markets. Other bulk commodities include, but are not limited to, grains, potash, calcined

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<sup>3</sup> The March 18, 2016 JARPA changed the wharf configuration from a 2,980 foot long by 105 foot wide wharf to a 3,000 foot long and 107 feet wide wharf. The trestle changed from a 1,100 foot long and 50 foot wide trestle to a 1,285 long by 50 foot wide trestle.

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petroleum coke, and ores originating from sources in the Pacific Northwest. (Exhibit 18 at Paragraph A11).

2. The Lummi are signatories to the Point Elliott Treaty and have adjudicated U&A treaty fishing rights to include "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay..." *U.S. v Washington*, 384 F.Supp. 312, 360-61, (W.D.Wash.1974). The proposed GPT is located within the Lummi Tribe's adjudicated U&A Treaty fishing area.

3. The Lummi's adjudicated U&A treaty fishing rights in general, extends north from Puget Sound north to Point Roberts and west to the Haro Strait. (Exhibit 13 at 4 & 16; *see also United States v. State of Washington*, 384 F. Supp. 312, 360 (W.D. Wash. 1974)). In *United States v. State of Washington*, Barbara Lane, a heavily relied on expert in the case, noted the Lummi reef net grounds were located off Shaw Island, Orcas Island, Maldron Island, and off Cherry Point on the mainland. (Exhibit 26 at 24). GPT would be located at Cherry Point and within the Lummi's adjudicated U&A area. Cherry Point is approximately 12 miles from the Lummi's Reservation.

4. The Lummi is a fishing tribe with the largest fishing fleet of all the northwest tribes, and in the 1980s, the peak of the Lummi fishing industry, approximately 2,000 Lummi members where employed in the fishing industry. (Exhibit 13 at sub-exhibit B).

5. In general prior to taking fish or shellfish from waters within the jurisdiction of the State of Washington, persons are required to register and report catches to WDFW. *See* Washington Administrative Code (WAC) 220-20-010; WAC 220-56-175; and WAC 220-69-236. Cherry Point is within Salmon Management and Catch Reporting Area 7A. *See* WAC 220-

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22-030. Cherry Point is within Fish-Shellfish Management and Catch Report Area 20A

(includes both crab and herring). *See* WAC 220-22-400. As the Washington State Department of Fish and Wildlife explains the co-management: "A 1974 federal (*U.S. v. Washington*) court case (decided by U.S. District Court Judge George Boldt) re-affirmed the tribe's rights to harvest salmon and steelhead and established them as co-managers of Washington fisheries." WDFW also explains that as part of this co-management "Tribal and state biologists also cooperate in analyzing the size of fish runs as salmon and steelhead migrate back to their native rivers and hatcheries.<sup>4</sup> This so-called "in- season management" ensures sport, tribal, and non-Indian commercial fisheries are appropriate for the actual salmon returns and allow optimum numbers of fish to spawn."<sup>5</sup> WDFW explains that "Dealers participating in tribal fisheries send a fish ticket copy to WDFW and the Northwest Indian Fisheries Commission (NWIFC) to be entered into NWIFC's Tribal Online Catch Account System (TOCAS)."<sup>6</sup>

6. NWIFC also explains the co-management as "each tribe manages their own fisheries for salmon, other fin-fish and shellfish within guidelines jointly developed jointly with Washington Department of Fish and Wildlife (WDFW). Each tribe issues, and is responsible for enforcing, their own fishing regulations. . . .All catch is verified and recorded by the respective tribal fisheries management departments, and the data entered to a computer database jointly maintained by the tribes and WDFW."<sup>7</sup>

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<sup>4</sup> As of April 2016, Washington State and tribal fishery managers have failed to develop a joint plan for salmon fisheries in Puget Sound. <http://www.seattletimes.com/sports/state-and-tribes-still-at-impasse-on-salmon-fishing-seasons-all-of-puget-sound-closes-on-may-1/> , accessed April 28, 2016.

<sup>5</sup> <http://wdfw.wa.gov/conservation/salmon/co-management/>, accessed 15 April 2016.

<sup>6</sup> Washington Commercial Groundfish Fisheries Data Collection and Processing, 3, August 2015. <http://wdfw.wa.gov/publications/01754/wdfw01754.pdf> , accessed 15 April 2016.

<sup>7</sup> <http://access.nwifc.org/fishmgmt/salmonfisheries.asp> , accessed 21 March 2016.

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7. The Lummi's submittals included 14 declarations from enrolled members of the Lummi Nation. (Exhibits 4, 6, and 7). Table 1 below is a summary of the fishing techniques, types of fish caught, and whether the declarant associates a cultural significance to the Cherry Point area, as described in each declarations. In addition to the declarations, each declarant included an annotated Cherry Point site map showing the areas where the declarant harvest fish and shellfish. The declarants indicated that they fished both by purse seine as well as by gill net and that they fished at the proposed project location at Cherry Point.<sup>8</sup>

**TABLE 1**

<b>Name</b>	<b>Fishing Technique</b>	<b>Crabbing Technique</b>	<b>Types of Fish/Shellfish</b>	<b>Cultural Significance</b>
Richard Solomon	gill net	crab pots	herring, cod, salmon, clams, crabs	family/cultural heritage
Bernard Finkbonner	gill net, seine	not mentioned	salmon, crab	family/cultural heritage
Robert Finkbonner	gill net, reef netting, open skiff	not mentioned	herring, salmon, crab	family/cultural heritage
Cyril Andrew Morris	gill net, skiff, seine	crab pots	salmon, crab, halibut	family/cultural heritage

<sup>8</sup> A purse seine is a large wall of netting deployed around an entire area or school of fish. The seine has floats along the top line with a lead line threaded through rings along the bottom. Once a school of fish is located, a skiff encircles the school with the net. The lead line is then pulled in, "pursing" the net closed on the bottom, preventing fish from escaping by swimming downward. The catch is harvested by either hauling the net aboard or bringing it alongside the vessel. <http://www.nmfs.noaa.gov/pr/interactions/gear/purseseine.htm>, accessed 20 April 2016.

A gillnet is a wall of netting that hangs in the water column, typically made of monofilament or multifilament nylon. Mesh sizes are designed to allow fish to get only their head through the netting, but not their body. The fish's gills then get caught in the mesh as the fish tries to back out of the net. As the fish struggles to free itself, it becomes more and more entangled. A variety of regulations and factors determine the mesh size, length, and height of commercial gillnets, including area fished and target species. There are two main types of gillnets:

- Set gillnets are attached to poles fixed in the substrate or an anchor system to prevent movement of the net
- Drift gillnets are kept afloat at the proper depth using a system of weights and buoys attached to the headrope, footrope, or <http://www.nmfs.noaa.gov/pr/interactions/gear/gillnet.htm>. <http://www.nmfs.noaa.gov/pr/interactions/gear/gillnet.htm> floatline, accessed 20 April 2016



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Name	Fishing Technique	Crabbing Technique	Types of Fish/Shellfish	Cultural Significance
Johnny Felix	gill net, skiff, seine	not mentioned	herring, salmon, clams, crabs, halibut	family/cultural heritage
Vernon Johnson	gill net, seine	not mentioned	salmon, crab	family/cultural heritage
Steven Solomon	gill net, seine	not mentioned	herring, salmon, geoduck, clams, crab	family/cultural heritage
Gordon Wilson	gill net, seine	crab pots	herring, salmon, crab	not mentioned
Brian Peters	gill net, seine	crab pots	salmon, crab	family/cultural heritage
Dana Wilson	gill net	crab pots	herring, salmon	family/cultural heritage
Elden Hillaire	gill net	crab pots	herring, salmon, crab	family/cultural heritage
Steven Toby	gill net, skiff	crab pots	salmon, crab	family/cultural heritage
Larry Kinley	gill net, seine	not mentioned	herring, salmon, crab	family/cultural heritage
Randy Kinley	gill net, seine	crab pots	herring, salmon, crab	family/cultural heritage

8. As explained by the Benjamin Starkhouse, the Fisheries Harvest Manager for the Lummi

Nation:

Lummi fishers primarily harvest salmon by purse seine and gill net. Purse seining typically involves a skiff and a larger boat deploying a wall of netting around a school of fish. The net typically has floats along the top and weights along the bottom, along with a lead line that can be pulled to “purse” the net closed on the bottom. The two ends of the net are brought together in order to encircle the school of fish. Gill netting involves hanging netting in the water straight up and down with a float line on the top and a lead line on the bottom. The size of the mesh on the gill net helps determine the size of the fish caught. Gill nets typically drift with the current, but can also be set in place with anchors or stakes.

Lummi fishers primarily harvest crab by pot fishing. Lummi fishers typically set 30 to 100 pots and utilize either a single line buoy or, by permit, a ground line. Ground lines typically contain 10 to 15 pots per line and consist of one buoy on each end of the line, and can vary significantly in length.

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The amount of time needed to process catch, whether fish or shellfish, depends on a number of factors and can vary significantly. Depending on the processing method, the amount caught, and the technique used, Lummi fishers may be unable to change positions on the water during the time needed to process the catch. Additional variables (e.g. weather, tides, etc.) may significantly influence the amount of space and time needed by Lummi fishers to effectively exercise their treaty right.

9. Bernard Finkbonner in his declaration explaining his concerns that "I have had many close calls in this area. You can only pick up your nets so fast. It takes about an hour. It is hard fishing at night because you have to stay awake because you don't want to get run over."

(Exhibit 4 at 78)

10. Also included in the Lummi's submittal dated 5 January 2015 was the Glosten Vessel Traffic Study.<sup>9</sup> The study addressed GPT's impact on the Cherry Point and the impact on the Lummi's fishing activities. (Exhibit 1). GPT has a proposed full operational capacity of 487 total annual vessel calls (318 Panamax ships and 169 Capesize ships). The study divided the area being analyzed into seven subareas and grouped those subareas into three larger groupings.<sup>10</sup> The Cherry Point subarea includes the southern waters of the Strait of Georgia, from Orcas Island in the south, north to the Canadian border, including Boundary Bay. The proposed GPT facility located at Cherry Point is within the Cherry Point subarea. The study found the Lummi Fishers spend 1/3 of their time in the Cherry Point subarea for fishing

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<sup>9</sup> "A settlement agreement was reached in 1999 between the above parties that resolved the appeals to the 1997 [Shoreline Substantial Development] permit issued [by Whatcom County]. An agreement made during the 1999 settlement required that the Washington Department of Ecology oversee an analysis by PIT of the additional ship traffic brought by the proposed GPT. In addition, during 2011 the Lummi Nation, which was not a party to the 1999 Settlement Agreement, identified additional topics that it wanted addressed as part of a vessel traffic analysis for the modified version of the GPT project proposed during 2011. Both Ecology and PIT agreed to include the topics identified by the Lummi Nation in the vessel traffic analysis." (Exhibit 1 at ,xxix).

<sup>10</sup> For additional detail regarding the subareas and groupings review the Glosten report's definitions. (Exhibit 1 at pg xx).

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activities, and predicted GPT would increase the Lummi fishing disruption by 76% in the Cherry Point subarea, and 19% in the Saddlebag subarea which is south of the Cherry Point subarea, when compared to the predicted baseline vessel traffic in 2019. (Exhibit 1 at 259). The report also concluded that for every 5% increase in vessel traffic, Lummi fishermen would expect to lose an additional two or three crab pots or traps. (Exhibit 1 at 269). The report also concluded "the facility disruption in Cherry Point is attributable to the physical area that the proposed GPT facility will occupy." (Exhibit 1 at 280).

11. As noted above in paragraph 5-6, the State of Washington has set up catch reporting areas for salmon and crab management. Salmon catch Area 7A includes the Cherry Point area and is from about Sandy Point north to the Canadian Border and west to into the Strait of Georgia to the Canadian Border. Crab management catch area 20A likewise includes the Cherry Point area but does not follow the same boundaries as the salmon catch area 7A; catch area 20A extends north to the Canadian border and south to Lummi Island. These catch areas are different than the subareas established in the Glostest vessel traffic study. However, all areas include Cherry Point and the footprint of the GPT project.

12. In the Lummi's 5 March 2015 submittal, Fisheries Harvest Manager for the Lummi Nation, Benjamin Starkhouse, submitted a declaration with a summary of fish and shellfish catch data from "fish tickets." (Exhibit 6). Using the Tribal Online Catch Accounting System (TOCAS) database, Starkhouse compiled catch data from Lummi fishermen for the period of 1975 to 2014. The data submitted showed that for the period of 1975 to 2014, the Lummi fishermen caught 10,739,762 chinook, chum, coho, pinks, and sockeye. In catch area 20A for

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the period of 1975 to 2014, Lummi fishermen caught 24,376,546 Dungeness crab. In catch area 20A for the period of 1975 to 1987, the Lummi fishermen caught 9,463,636 herring.

13. On 21 July 2015, Mr. Starkhouse provided an additional letter informing the parties precise harvest location of fish and shellfish is not required under the regulations, and therefore is not collected by the Lummi Natural Resources Department. (Exhibit 10)

14. On 27 July 2015, PIH submitted a response arguing the Lummi's declarations were inadequate and inaccurate and could not meet the *de minimis* threshold; the project area is not a productive U&A fishing site; the project area is a small percentage of the Lummi's U&A area; and mitigation efforts included with the proposal will offset impact to U&A fishing. (Exhibit 11). PIH's response argues the declarations are not specific in terms of when, what, and where Lummi fishermen caught fish or shellfish, and it argues the aggregate catch data from Mr. Starkhouse is too generalized to be used to infer the GPT footprint is a productive fishing site. (Exhibit 11 at 6). PIH argues the declarations provided in *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1998), and *Northwest Sea Farms, Inc. v. U.S.*, 931 F. Supp. 1515 (W.D. Wash. 1996), provide necessary details required to meet the *de minimis* threshold, while the Lummi declaration are formulaic and not useful for making a *de minimis* determination. (Exhibit 11 at 7-9). PIH also argues the Lummi declarations do not explain why the proposed mitigation efforts do not offset the Lummi concerns. (Exhibit 11 at 9-11).

15. PIH, in its 27 July 2015 response argues the GPT's impacts are of inconsequential effect because the trestle, wharf, three ships at birth, and new vessel approach lane only occupy 122 acres within the 910,890 acres of the total Lummi U&A area. (Exhibit 11 at 9-10). Moreover, PIH alleges the 122 acres is not a productive U&A fishing area. PIH alleges that 93%

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of the Lummi's 7A fishing effort occurs at Point Roberts, not Cherry Point. (Exhibit 11 at 19-20). PIH evidences their argument by comparing 7A areas to other catch areas and using derelict gear data to draw an inference of where fishermen actually fish. Similarly, PIH alleges crabbing in Cherry Point is not productive or regularly crabbed, and PIH relies, in part, on derelict gear data from Northwest Straits Initiative and video surveillance of the project site. PIH also notes that the Cherry Point herring are a subpopulation of the Georgia Strait meta-population of Pacific Herring, and have experienced a long-term decline since the 1970's. PIH notes the fishery does not presently exist at the project site and maintains its restoration is speculative. PIH concludes the building of GPT will not prevent or limit re-colonization. (Exhibit 11 at 25). PIH also argues clams, halibut, geoduck, and cucumbers populations at Cherry Point are limited. (Exhibit 11 at 26).

16. PIH argues the impacts from increased vessel traffic and the project footprint can be avoided, minimized, or mitigated. PIH's mitigation measures are primarily managing the flow of tug and tanker traffic transitioning from the shipping lanes into the Cherry Point area and to the GPT wharf. PIH would also implement a program to increase communication with the Lummi fishers to keep them informed of transiting vessels' positions and intentions. Fishing would also generally be allowed shoreward of the wharf. (Exhibit 11 at 10-11).

17. On 27 August 2015, Lummi replied to PIH's 27 July 2015 submittal. The reply stated additional concerns regarding the ballast water being transferred by the GPT destined ships and the increased vessel traffic due to increase bunker fuel needed for the increased bulk carriers coming into Cherry Point. The VTRAS predicts barrels of bunker oil to increase between 122% and 243%. (Exhibit 13).

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18. The 27 August 2015 Lummi submittal included a 2008 Gear Loss Forum summary by Merle Jefferson, a Lummi member. (Exhibit 13 at sub-exhibit B). In that summary, it is highlighted 40-50 crab pots per fisherman are lost annually at Cherry Point. The summary asserts the economic ramification is approximately \$750 per pot, not including lost opportunity costs. The summary asserts that tug/barge traffic (460 barges at Cherry Point), and tanker traffic (445 tankers at Cherry Point), as the primary cause of loss gear. The gear loss was attributed to existing traffic; additional gear loss would occur with additional traffic.

19. In reply to the PIH's allegation that Cherry Point is not productive crabbing area, the Lummi submitted a WDFW 2001 trawl survey of the southern Strait of Georgia, San Juan Archipelago and adjacent waters, which included Cherry Point. (Exhibit 13 at sub-exhibit D). The survey found Dungeness crabs greatest station density was at Bellingham Bay, south of Lummi Island, off Cherry Point, Point Roberts Reef, Birch Bay, Padilla Bay, and East Lopez Sound. (Exhibit 13 at Exhibit D). The Lummi also submitted a day survey conducted on 18 Aug 2015 during a 24-hour tribal crab fishery to evidence the Lummi fishermen crab at Cherry Point. (Exhibit 13 at sub-exhibit F).

20. In reply to PIH's allegation that a lack of derelict fishing gear at the Cherry Point area indicates little U&A fishing at the project site, the Lummi submitted the Northwest Strait Initiative Department of Defense Diver Training Derelict Fishing Gear Removal Project report dated 31 October 2008, and argue that this report did not extensively scan the Cherry Point area. (Exhibit 13 at sub-exhibit E). According to Joan Drinkwin, director of Northwest Straits Foundation, the Foundation surveyed only areas at the depths where current divers can retrieve

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derelict fishing gear, which is why the foundation does not thoroughly survey the Cherry Point area. (Exhibit 13 at sub-exhibit E).

21. The Lummi also discuss the cultural significance of the Cherry Point as a site and U&A fishing as “inextricably linked to the Lummi *Schelangen* (“Way of Life”). (Exhibit 13 at 1). The Lummi also acknowledge the serious decline of the herring stock, and, as evidenced in their declarations, assert that they would fish for herring should the stocks ever rebound.

22. On 5 October 2015, PIH submitted a response to the Lummi's 27 August 2015 submittal. (Exhibit 15). In PIH's response, it emphasizes tug and barge traffic at GPT will not occur and thus, will not contribute to gear loss, and the proposed mitigation factors adequately address the Lummi's U&A concerns. PIH again emphasizes the GPT project's footprint and operation is proportionally a very small area of Cherry Point and consequently the impact of the project is *de minimis*. PIH highlights the Glosten Vessel Traffic Study concluded the percent of total Lummi fishing “vessel days-area” affected will only be an absolute increase from 0.11% to 0.19% noting the absolute increase in disruption is only 0.08% ( $0.19 - 0.11 = 0.08$ ). (Exhibit 15, at 5). In general, the Glosten study calculated “vessel days-areas” by using vessel traffic days combined with the area the vessel traffic occupies in nautical miles.

23. The 5 October 2015, PIH submittal also argued the Lummi currently avoid vessel traffic lanes and therefore additional traffic in these lanes should not interfere with current Lummi fishing practices. Similarly, PIH argued the wharf will not block access to fishing areas because the wharf's design will allow the Lummi to fish next to the wharf, and the operation of the facility's tugs and tankers will be managed so the Lummi can effectively fish in the occupied area. (Exhibit 15 at 4-6). PIH also argues that “while not being able to set drift nets within the

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perimeter of the wharf itself may be considered exclusionary by the Lummi, there is no evidence that fishing directly adjacent to the wharf is not effective, recognizing that Fraser River salmon migrate through the area but are not resident there.” (Exhibit 15 at 8).

24. The 5 October 2015, PIH submittal also supplements its argument that the Lummi evidence does not show the Lummi regularly fish or crab at the Cherry Point area. To support this assertion, PIH highlights the information provided is not specific to the Cherry Point area and other catch areas are fished more frequently than Cherry Point. In particular, PIH asserts Point Roberts, Boundary Bay, Birch Point, Point Whitehorn, and Sandy Point, respectfully, are where the Lummi regularly fish and where 80% of their salmon catch is from. PIH again emphasizes derelict gear is not found at Cherry Point, which evidences the Lummi do not fish or crab in the area on more than an occasional basis.

25. Regarding the Cherry Point herring, PIH states there is no herring fishery at this time and there has not been for many years. PIH also states that any issues regarding access to any future fishing for herring can be addressed in the future. (Exhibit 15 at 20).

26. On 21 October 2015, the Lummi's responded to PIH's 5 October 2015, submittal with a three page letter. (Exhibit 17). The letter did not provide additional information, but re-emphasized the Lummi's position in its previous submittals.

27. The 22 December 2015 JARPA submittal contained a report “*Port Operations and Safety Plan to Facilitate Tribal Fishing*” (the Plan) dated 21 December 2015. (Exhibit 18). The Plan memorialized and provided more detail regarding the methods by which PIH proposes to avoid and/or minimize impacts to Lummi fishing. The Plan explains deep draft bulk carriers would be expected to arrive or depart the wharf, on average, every 18 hours throughout the year.



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Tugs would be present to assist vessels, but no barges would be present and no bunkering would occur on site. PIH proposes mitigation for these impacts by the establishment of an Inshore Traffic Zone, providing advance notification to tribal fishers of vessel position and movement, allowing crab fishing along the shoreward face and operating side of the wharf and underneath the trestle (using ground-lines), and installing a pendant on the last piling on both the north and south ends of the wharf for attachment points for gill nets. For crabbing on the operating side of the wharf, fishers would be encouraged to fish primarily during periods when a vessel is not present at berth and will be temporarily restricted when vessels are maneuvering. An Operational Safety Zone temporarily limiting fishers in the direct proximity of vessels during approach, moorage, and departing maneuvers would also be established.

28. On 12 February 2016, the Lummi's responded to PIH's JARPA submittal with a one page letter. (Exhibit 21). The letter did not provide additional information, and stated "no additional information is warranted" to process the *de minimis* determination.

29. On 19 February 2019, PIH provided a 3<sup>rd</sup> submittal of information. (Exhibit 22). Besides including the Plan submitted with the JARPA, PIH provided additional analysis based on information gathered from WDFW. PIH used information from WDFW's aerial overflights, on-board observers, reports of derelict crab and salmon fishing gear, and enforcement investigations, to claim the GPT site is not regularly fished by anyone. The information shows there were more observations of fishing in 2002-2004 than within the last few years. (Exhibit 22 at 9).

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30. On 1 March 2016, the Lummi's responded to PIH's 3rd submittal with a one page letter. (Exhibit 23). The letter did not provide additional information, but re-emphasized the Lummi's position in its previous submittals.

31. A second revised JARPA was submitted on 18 March 2016 updating the applicant information and providing the CZM form. (Exhibit 24). The application was deemed to be completed on 18 March 2016, and it was forward to the Lummi on 29 March 2016. (Exhibit 25).

32. While the above documents discuss vessel traffic impacts, the primary focus of the Corps analysis is on the physical impacts on tribal treaty rights caused by the proposed GPT wharf and trestle.

#### D. OVERVIEW OF INDIAN TREATY LAW

A treaty is a binding agreement or contract between independent nations or sovereigns. Between 1778 and 1871, the United States entered into about 400 treaties with various Indian nations on a government-to-government basis. Under the United States Constitution, treaties are accorded precedence equal to federal law. Treaty rights are binding on all federal and state agencies, and take precedence over State constitutions, laws and judicial decisions. Treaty terms, and the rights arising from them, cannot be rescinded or cancelled without explicit Congressional consent. States cannot spontaneously regulate the exercise of treaty rights, but Congress does have the authority to provide federal regulation or authorize state regulation placing reasonable restrictions to achieve conservation purposes (for example, time, place or manner restrictions) on the exercise of treaty rights. *U.S. v. State of Washington*, 384 F.Supp. 312, 333-334 (W.D. WA 1974).

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The rights defined in Indian treaties were not a grant of rights from the United States to the tribes, but were instead a reservation of rights held by the tribe as a sovereign people from time immemorial. Indian treaty rights are property rights which may not be taken without an act of Congress.

The Lummi Nation is a signatory to the Treaty of Point Elliot. This treaty was negotiated and signed by Governor of the Washington Territory, Isaac I. Stevens, in 1855. The Stevens treaties, including the Treaty of Point Elliot, contain a standard clause regarding the tribe's reserved right to fish:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory... Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.”

In *U.S. v. Washington (Boldt I)*, 384 F. Supp. 312, 360-61 (W.D. Wash. 1974), Senior Judge Boldt adjudicated the nature and extent of the Tribes' off-reservation fishing rights with respect to anadromous fish. This decision established the locations of the Tribes' U&A grounds and stations and found the Tribes were entitled to take fifty percent of the harvestable fish from those grounds and stations. The Lummi have adjudicated U&A grounds and stations in the Puget Sound, in particular, within, near and around the Cherry Point area. *Id.* Productive fishing locations change over time as fish populations and environmental conditions change. The tribes have the right to follow the fish to any place within the *Boldt I* boundaries. Therefore, any place within the boundaries set forth by *Boldt I* where tribal members have fished in the past, currently fish, or may fish in the future, is a “usual and accustomed” place. A tribe's treaty right to fish at its U&A fishing grounds necessarily includes a right of access to those grounds, which is at issue with the GPT project.

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Further explanation of the analysis of U&A treaty fishing rights is found in *Northwest Sea Farms*, 931 F.Supp.1515 (W.D. Wash. 1996). In that case the court, affirmed the Corps fiduciary duty to take treaty rights into consideration in making its permit decisions. The court also held the right of access to fish and the right of taking a certain number of fish were mutually exclusive protections, and could not be balanced against each other; each must be considered independently.

The courts have also looked at what degree of impacts must be considered when looking at U&A treaty fishing rights. In *Lummi v. Cunningham* (Exhibit 27), the court acknowledged that in considering treaty rights, one need not look at *de minimis* impacts stating:

To accept the plaintiff's contention that a *de minimis* interference with treaty rights is always a treaty violation is to accept a legal theory which would conceptually support such irrational ruling as, for example, injunctive relief against pleasure boats crossing usual and accustomed fishing areas like the disposal site at issue in this case. Such a theory would be neither reasonable nor legal.

The plaintiff is correct in asserting that "determination of the violation of a treaty fishing right is not a balancing test." However, before the bright line test can be asserted, the interference with the treaty right must reach a level of legal significance. . . This conclusion can also be based on the plaintiff's own formulation of an appropriate test as to whether treaty fishing rights have been violated: "[H]as the access right been impaired, limited, or eliminated?"

Thus the *de minimis* review, whether the impacts rise to the level of legal significance, applies to both Lummi's U&A treaty right to access as well as their right to take fish. If the impact to either is greater than *de minimis*, in other words the impact is legally significant, the Corps would be required to deny the permit because only Congress can abrogate a treaty right.

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E. FINDINGS: GPT WOULD HAVE A GREATER THAN *DE MINIMIS* IMPACT ON THE LUMMI'S U&A TREATY RIGHTS.

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There is no dispute about whether Cherry Point or the proposal's footprint is within Lummi's U&A treaty fishing area, rather only whether the effects of the proposal will have a greater than *de minimis* impact on the Lummi's treaty fishing rights. PIH contends (1) there is not enough evidence in the record to show a greater than *de minimis* impact; (2) GPT's project area is not a productive area and is not fished or crabbed by the Lummi on more than an extraordinary basis; (3) GPT's impact is proportionally insignificant compared to the total Lummi U&A areas; (4) potential future impacts to a potentially restored herring fishery should not be considered; (5) fishing and crabbing can occur effectively around the wharf, and the proposed mitigation reduces the impacts to a *de minimis* level. Each of these issues have been thoroughly evaluated and considered by the Seattle District.

(1) The evidence in the record supports the finding of a greater than *de minimis* impact.

PIH contends the Lummi's evidence is inadequate to establish GPT's impacts would have greater than a *de minimis* impact on the Lummi's U&A treaty rights, and also contends whether the Lummi actually exercise tribal treaty fishing rights at the site on greater than an extraordinary basis. The parties are not contesting whether the Cherry Point area is within the Lummi's U&A territory.

The Lummi have provided 14 tribal declarations stating tribal members exercise their fishing treaty rights in the Cherry Point area. The declarations describe the methods on how tribal members fish; this includes gill netting, seine net fishing, and skiff net fishing with nets as long as 330 fathoms (1,980 feet). In general, these types of methods requires a fishing net to be deployed and either dragged or left drifting through the water to capture fish. Additionally, the declarations describe the method on how tribal members crab; this includes the deployment of

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crab pots (up to 100 pots) on a buoyed line with different spacing ranging from 10 fathoms to 100 fathoms (60 feet to 600 feet). Accompanying the declarations are maps marked by the declarant showing where they have fished and/or where they currently fish for herring, cod, salmon, and halibut. Similarly, the maps also show where the tribe set crab pots. On the map is the footprint of GPT, and all the maps show fishing or crabbing within or near the footprint of GPT. Nine declarations describe past participation in the herring fisheries and two maps were provided showing herring fishing in the immediate vicinity of GPT.

In addition to the tribal members' declarations, Benjamin Starkhouse, Fisheries Harvest Manager for the Lummi, provided a declaration and data establishing catch areas 7A and 20A, which are inclusive of Cherry Point and the GPT footprint, have resulted in millions of fish and shellfish catches by Lummi fishermen. In catch area 7A for the period of 1975 to 2014, the Lummi fishermen caught 10,739,762 chinook, chum, coho, pinks, and sockeye. In catch area 20A for the period of 1975 to 2014, Lummi fishermen caught 24,376,546 Dungeness crab. In catch area 20A for the period of 1975 to 1987, the Lummi fishermen caught 9,463,636 herring. More precise location data for fish or shellfish caught at Cherry Point, in particular the location of the proposed GPT project, is not available because it is not required to be kept by WDFW and is not kept by the Lummi's Fisheries. (Exhibit 10).

The Glosten Vessel Traffic Study found the Lummi spend at least 1/3 of their time in the Cherry Point subarea for various fishing and crabbing activities. The remainder of the time is spent the other six subareas identified by the Glosten report. The Glosten report goes on to conclude that if GPT is built and at full operation then Lummi fishing disruption will increase by 76% at Cherry Point. (Exhibit 1 at xlix). PIH admits that at full build out, GPT footprint and

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the new vessel approach lanes would occupy approximately 122 acres of physical space at Cherry Point. (Exhibit 11 at 13). At full operation, the GPT facility would handle at least 487 total annual tanker calls. (Exhibit 1 at 279). PIH argues that the Glosten Vessel Traffic Study concluded the percent of total Lummi fishing "vessel days-area" affected will only be an absolute increase from 0.11% to 0.19%. (Exhibit 15 at 5). In general, "vessel days-areas" are calculated using vessel traffic days combined with the area the vessel traffic occupies in nautical miles. Glosten recognizes the "vessel days-area" metric may not provide the clearest implications of the case results and, again, states there will be a 76% increase in vessel traffic disruption. (Exhibit 1 at 280-81).

PIH argues the Lummi declarations and maps are formulaic, general, and conclusory and attaches declarations used in *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1998), to provide an example of the information that should be provided to the Corps for a *de minimis* determination. PIH argues the *Muckleshoot* declarations provide a level of information and detail not found in the Lummi declarations. A comparison of the two cases is not necessary or required as I have found the information provided by the Lummi is adequate for purpose of my decision.

However, after a comparison of the two different sets of declarations, it is my opinion the Lummi declarations are equal to if not more detailed than *Muckleshoot* declarations. In regards to location, the *Muckleshoot* declarations identify a U&A treaty area as between two points, Four Mile Rock and Pier 91. The Lummi declarations are more specific and identify an area with a map showing where tribal members fish and crab in the immediate vicinity of the proposed in-water structure. The *Muckleshoot* and Lummi declarations both speak to concerns of increased

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vessel traffic increasing fishing cost because of lost gear and reducing fishing efficiency. Similar to the *Muckleshoot* litigation, the Lummi submitted a declarations from the tribe's Fisheries Manager explaining the productivity of the fishing area and the potential of a greater than *de minimis* impact. The Lummi's fisheries manager went further and provided aggregate fish ticket data showing the productivity of the catch area 7A and 20A, while in comparison, the *Muckleshoot* declarations did not mention specific quantities in catch area 10 or 10A, which are the areas disputed in *Muckleshoot*. Neither the *Muckleshoot* declarations nor Lummi declarations provided site specific GPS catch data, primarily, because catch data is recorded by catch areas designated by the state of Washington. In this case, the project is located in catch areas 7A and 20A. The *Muckleshoot* declarations include in PIH's 27 July 2015 submittal do not provide any maps showing where tribal members fished, and the *Muckleshoot* declarations were not as detailed as the Lummi declarations on how fishing methods would be disrupted by the project site or the increased vessel traffic. Finally, PIH argues the Lummi declarations were not specific enough on how often members fish the Cherry Point region or whether the fishing was a past or current practice, while the *Muckleshoot* declarations attempted to quantify time spent fishing in the U&A area in question. However, the Glosten report is credible technical report that surveyed Lummi tribal members and concluded Lummi tribal members spend 1/3 of their time fishing the Cherry Point area. While the Cherry Point area is larger than the GPT site, this report, commissioned by the applicant, nonetheless confirms the larger area is heavily fished. Taken together with the declarations that state tribal fishing occurs at the GPT site, the evidence becomes substantial. The Glosten report coupled with the Lummi's declarations provide adequate evidence supporting the Lummi's allegations.



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Based on the above explanation and the exhibits listed in Paragraph A, I find the information the Lummi have presented is sufficient to support a finding that the construction of GPT would have greater than a *de minimis* impact on Lummi U&A treaty fishing rights.

(2) The area need not be the most “productive area” to be relevant, and the Lummi have shown they fish/crab the area on more than an extraordinary basis

PIH argues an area must be productive U&A fishing area in order for the Lummi to make a claim there is a greater than *de minimis* effect on a U&A fishing area. This is legally and factually incorrect. In *Northwest Sea Farms*, 931 F. Supp at 1521-1522, lack of productivity of the area was put forth as an argument, and the court held:

The site in question need not be the primary or most productive one for fishing. Instead, the correctness of the Corps' determination that the proposed site should presently be afforded treaty protection depends upon whether the record supports the conclusion that the site is fished by members of the Lummi Nation on more than an extraordinary basis.

Factually, there is adequate evidence presented by the Lummi to show Cherry Point to include the location of the proposed dock, is fished on more than an extraordinary basis. It is recognized the catch data covers a much broader physical area than the Cherry Point/location of the proposed GPT project. However, the documented catch numbers coupled with the declarations submitted by the Lummi support a finding that the area is fished on more than an extraordinary basis. Mr. Starkhouse's declaration and aggregate catch data show approximately 45 million shellfish and fish have been harvested in or around the Cherry Point area to include the location of the proposed dock. The Lummi have provided 14 tribal declarations stating fishermen and their families have been fishing the area, to include the location of the proposed dock, for decades. PIT submits circumstantial evidence (derelict fishing gear reports, species technical reports, catch per unit of effort analysis, etc.) that requires an inference to determine

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that the exact location of the GPT wharf and trestle is not productive or regularly fished, but the Lummi's direct evidence, tribal declarations and catch data, evidence the site is productive and regularly fished. Furthermore, the Barbara Lane in U.S. v. Washington found the Lummi use the Cherry Point area, to include the GPT site, was fished by the Lummi. (Exhibit 26 at 24). I find the Lummi's evidence on this issue more persuasive than PIH's evidence. The declarations provide details of how, when, and where the tribe have fished at Cherry Point to include the area of the proposed dock. PIH itself concludes the Lummi fish the area on an occasional basis, which is more than on an extraordinary basis. (Exhibit 11 at 12). While there may not be the volume of derelict crabs pots found in more frequently fished areas, there are derelict pots still found at Cherry Point.

It is also important to note the Cherry Point area is known to the Lummi as Xwe'chi'eXen, which is part of a larger traditional cultural property. (Exhibit 4,6, & 7 at declarations) . Fishing in this area is important to the Lummi *Schelangen* (Way of Life), in addition to being a part of the Lummi's U&A relied on for commercial or subsistence fishing. *Id.* Based upon the declarations, the facts support a finding the area is fished on more than an extraordinary basis, for commercial, subsistence, and spiritual purposes.

(3) GPT's impact is proportionally insignificant compared to the total Lummi U&A areas is not an argument that is supported by case law.

PIH argues the impact is *de minimis* when the project area is compared to the entire Lummi U&A fishing area. However, PIH's argument incorrectly moves the issue from the Lummi's right to access its U&A fishing area at Cherry Point to an issue of ratio impact to the Lummi's total U&A fishing area in the Puget Sound. This argument was put forth in *Muckleshoot*, 698 F. Supp. at 1514-15, and rejected. The Lummi have a right to access their

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U&A treaty fishing areas at Cherry Point to include the site or the proposed GPT project. It is irrelevant whether the portion eliminated is small when compared to the total U&A area. The trestle/wharf will have a physical over-water impact of at a minimum 122 acres. I consider this size of an impact to be greater than *de minimis*.

(4) Potential future impacts to a potentially restored herring fishery should be considered in the *de minimis* analysis.

PIH argues potential future impacts to a potentially restored herring fishery should not be considered because there currently is not an active herring fishery. I disagree. As discussed in Paragraph D above, the *Boldt I* decision requires analysis of tribal treaty rights to include those areas where the tribes may fish in the future. Therefore, any analysis of potential impacts to U&A areas must including potential future fishing and be completed at the time a proposal is being reviewed, prior to construction. I acknowledge that herring fishing has not been allowed at Cherry Point since 1996. *See* 2012 Washington State Herring Stock Status Report, WDFW (July 2014). Furthermore, WDFW states the current condition of the Cherry Point herring is less than 1,000 tons in 2010 (average of 2,800 tons from 1986-2010) and a minimum spawning biomass of 3,200 tons is needed before harvest is considered. The Puget Sound Partnership has a goal of increasing the amount of spawning herring at Cherry Point to 5,000 tons by 2020 (see [psp.wa.gov](http://psp.wa.gov), accessed 20 April 2016). In nine declarations the Lummi documented past fishing of herring in the immediate vicinity of GPT and a desire to fish for herring again in the future. Considering the ongoing recovery effort and the stated intent of the Lummi in the event the fishery is restored, the Corps does not need to disregard the Lummi's statements regarding fishing for herring in the future.

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(5) Fishing and crabbing will be impaired/eliminated if the wharf/trestle is constructed, and the proposed mitigation does not reduce impact to *de minimis* level.

PIH argues fishing and crabbing can occur effectively around the wharf and with the increased vessel traffic. Only an act of Congress can eliminate a part of the Lummi's U&A fishing grounds. Regulation on the time and manner of the Lummi's fishing in its U&A fishing grounds has only been found appropriate when needed to protect the fishery resource or sanctioned by an act of Congress. PIH's suggested limitations on fishing and crabbing are not for the purpose of conservation.

At full build out, the over-water impacts of the project will include a trestle, wharf, three ship berths, and new vessel approach lane covering 122 acres and handling 487 total annual vessel calls, one vessel arrival or departure every 18 hours. This does not include the incidental vessel traffic needed to operate a deep water export facility of this magnitude. Therefore, at minimum, 122 acres of the Lummi's U&A fishing grounds will be impacted by the proposed project by eliminating the Lummi's access to their U&A fishing grounds. PIH's solution to the area occupied by the trestle, wharf, or berthed tankers is a directive on when and how the Lummi should fish and crab. On pages 7-8 of PIH's 5 Oct 2015 submittal, PIH argued crabbing will not be impacted because the crabbing techniques do not require the pot to be placed where the wharf and trestle sit in order to be effective. PIH explains pots attract crab from 300 feet away; therefore, the Lummi can place pots near the wharf and trestle and still effectively crab the area under the wharf and trestle. The Lummi declarations state they, in part, currently crab by placing crab pots where the project's construction footprint would be located. On pages 7-8 of PIH's 5 Oct 2015 submittal, PIH argues fishing will not be impacted because the Lummi can effectively fish around the wharf and trestle. PIH acknowledges the Lummi cannot set drift nets within the

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perimeter of the wharf and trestle, but conclude it is not necessary to effectively fish the area.

The Lummi declarations state they, in part, currently set or drift their nets where the project's construction footprint would be located. Essentially, PIH's solution to the Lummi's impact concerns is to have the Lummi exercise their crab and fish techniques in a manner different than what is currently being used.

The Lummi declarations establish the Lummi fishermen fishes where GPT will be physical located. The fishing techniques described by the Lummi declarations require unobstructed water for fishing nets to successfully drift or for their nets not be interfered with by moving vessels. The wharf, trestle, and additional vessel traffic eliminates the Lummi from being able to successfully executing their fishing techniques; at minimum, GPT will cause the Lummi's current fishing or crabbing techniques to not be as effective.

PIH argues its proposed mitigation will avoid and minimize any adverse impact caused by GPT to less than a *de minimis* impact on the Lummi's exercise of its treaty rights. PIH describes its mitigation measures in detail in the "Port Operations and Safety Plan To Facilitate Tribal Fishing" report submitted with the JARPA and in their 3<sup>rd</sup> submittal. [Exhibit 24]. The main elements of the mitigation are (1) vessel traffic management, (2) vessel traffic communications, (3) limiting the vessel types calling at GPT, and (4) locations for, but limitations on, fishing at the wharf and trestle. All of these mitigation elements help to minimize the impacts to access caused by vessel traffic, but not the physical trestle and wharf. The dedicated traffic lanes help to minimize impacts as the Lummi fishermen would know where the vessels would be transiting. The communication plans help to minimize the impacts as the Lummi fishermen would be alerted to the position and movements of the vessels and could

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change their fishing plans to avoid impacts. Eliminating tug-and-barge tow operations does avoid one of the more impacting operations contributing to gear loss. Fishermen could be aided in fishing by being able to tie off to the north and south ends of the wharf. Crabbing would be allowed on both sides of the wharf and under the trestle. But even with the mitigation, it still continues to impair or limit the Lummi's access to its U&A fishing grounds.

The pier itself eliminates a geographic area where fishing and crabbing occurs, which I find to be greater than *de minimis*. That alone is sufficient to be a greater than *de minimis* impact on the Lummi's tribal treaty rights. The mitigation efforts proposed focus on mitigating impacts caused by the operation of the facility and the increased vessel traffic. The mitigation efforts do not address the physical impacts of wharf and trestle. Stated differently, even with the PIH's proposed mitigation, there would still be impediments to fishing because the physical presence of the wharf and trestle interferes with the Lummi's U&A fishing. Only two fishermen could tie up to the pendants at the north and south ends of the pier at a time. Crabbing would be limited to those times when vessels are either moored or are not at the wharf. Fishing would be restricted in the Operational Safety Zone during certain times when vessels were maneuvering. The elements of the proposed mitigation are regulations on the time and manner of when and how the Lummi should fish and crab with the project in place and operating; the proposed mitigation efforts regulate the time and manner on how the Lummi currently exercise its treaty rights to which the Lummi's have specifically rejected. The Lummi insist the proposed mitigation would not offset the commercial or subsistence impacts caused by a change in current fishing practices or the physical loss of U&A area at Cherry Point where the proposed GPT project is located. The Lummi also repeatedly insist that aside from the commercial impacts caused by the

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proposed project there are cultural and spiritual impacts that are not addressed by the proposed mitigation.

Based upon the foregoing, there remains impacts to the Lummi's exercise of fishing rights that I consider to be greater than *de minimis*. While the Corps can and did consider avoidance and minimization measures as factors in whether the impacts are greater than *de minimis*, the Corps determined the proposed mitigation does not reduce the impacts to the Lummi U&A treaty fishing right to a *de minimis* amount. Furthermore, this proposed regulation on the time and manner of fishing at the U&A fishing ground is an impairment or limitation that is only appropriate by an act of Congress or for the conservation of the fishery resource.

Additionally, should herring fishing return to the area, it too would be impacted in a greater than a *de minimis* manner restricting as noted above.

#### F. DETERMINATION

The work proposed in this application has been analyzed with respect to its effects on the treaty rights described above. Based upon the facts and findings, the Corps' determination is that the proposed overwater structure would have greater than a *de minimis* impact on the Lummi Tribe's access to its usual and accustomed fishing grounds for harvesting fish and shellfish.

Each of the following impacts resulting from the construction of the GPT facility would violate the Lummi's U&A treaty fishing rights by:

1. Impairing and eliminating part of their U&A treaty fishing and crabbing area (with or without the herring);
2. Impairing and eliminating the time and manner in which the Tribe can fish in their U&A; and

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3. Impairing and eliminating potential future herring fishing at the site.

Michelle Walker  
Chief, Regulatory Branch



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ENCLOSURES - EXHIBITS

1. Glostén Associates, 4 November 2014, Gateway Pacific Terminal Vessel Traffic and Risk Assessment Study
2. Memorandum, CENWS-OD-RG, 3 July 2013, subject: U.S. Army Corps of Engineers Scope of Analysis and Extent of Impact Evaluation for National Environmental Policy Act Environmental Impact Statement
3. Memorandum, CENWS-OD-RG 13 September 2013, subject: Corps of Engineers U&A Guidance
4. Letter, Lummi Tribal Chairman Ballew, 5 January 2015, subject: Lummi Nation Request for Denial of Permit for the Proposed Gateway Pacific Terminal Bulk Dry Goods Shipping Facility (Ref. No. NWS-2008-260)
5. Letter, Corps, 3 February 2015, subject: Request for additional information
6. Letter, Lummi Tribal Chairman Ballew, 5 March 2015, subject: NWS-2008-260
7. Letter, Lummi Tribal Chairman Ballew, 13 March 2015, Subject: NWS-2008-260
8. Letter, Corps, 9 April 2015, NWS-20008-260 Pacific International Terminal, Inc.
9. Letter, Corps, 10 April 2015, subject: forwarding Lummi information to PIT
10. Letter, Ben Starkhouse, Lummi Fisheries Harvest Manager, 21 July 2015, subject: NWS-2008-260, Pacific International Terminals, Inc.
11. Letter, PIT's Skip Sahlin, 27 July 2015, Subject: NWS-2008-260, Pacific International Terminals, Inc. Gateway Pacific Terminal – Response to Lummi Nation Request to Stop Environmental Review Process.
12. Letter, Corps, 28 July 2015, subject: forwarding PIT information to Lummi
13. Letter, Lummi Tribal Chairman Ballew, 27 August 2015, subject: NWS-2008-260, Pacific International Terminals, Inc.
14. Letter, Corps, 18 September 2015, subject: forwarded Lummi information to PIT
15. Letter, PIT's Skip Sahlin, 5 October 2015, subject: USACE Reference Number NWS-2008-260; Pacific International Terminals, Inc. – Gateway Pacific Terminal – Response to Lummi Nation Request to Stop Environmental Review Process (Second Submittal)

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16. Letter, Corps, 8 October 2015, subject: forwarded PIT 5 Oct 2015 information to Lummi
17. Letter, Lummi Tribal Chairman Ballew, 21 October 2015, Subject: NWS-2008-260, Pacific International Terminals, Inc.
18. Joint Aquatic Resources Permit Application, Pacific International Terminals, 22 December 2015
19. Joint Aquatic Resources Permit Application modification, Pacific International, 15 January 2016
20. Letter, Corps, 10 February 2016, reference: NWS-2008-260 Pacific International Terminals, Inc.
21. Letter, Lummi Tribal Chairman Ballew, 12 February 2016, Subject: NWS-2008-260, Pacific International Terminals, Inc.
22. Letter, PIT's Bob Watters, 19 February 2016, Subject: USACE Reference Number NWS-2008-260; Pacific International Terminals, Inc. – Gateway Pacific Terminal – Response to Lummi Nation Request to Stop Environmental Review Process (Third Submittal)
23. Letter, Lummi Tribal Chairman Ballew, 1 March 2016, Subject: NWS-2008-260, Pacific International Terminals, Inc.
24. Letter, PIT's Skip Sahlin, 18 March 2016, Subject: USACE Reference Number NWS-2008-260; Gateway Pacific Terminal, Revised Joint Aquatic Resources Permit Application (JARPA)
25. Email, Corps, 29 March 2016, Subject: forwarded PIT's updated JARPA
26. US v WA (Boldt Decision) Barbara Lane Lummi Report
27. *Lummi v. Cunningham* (W.D. WA 1992)