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April 11, 2011

Mr. Darryl Eastin, Project Manager
Snohomish County Planning and Development Services
3000 Rockefeller Ave. M/S 604
2nd Floor, Robert Drewel Building
Everett, WA 98201

Re: Point Wells Development (11-101457-000-00-LU)

Dear Mr. Eastin:

These comments are in response to the Urban Center Development application of BRSE Point Wells, LP concerning the development at Point Wells. These comments are as requested in your notice of March 4, 2011, with a due date of April 11, 2011. These comments are made on behalf of The Tulalip Tribes, a federally recognized Indian tribe.

The present-day Tribal entity known as the Tulalip Tribes of Washington is political successor in interest to certain tribes, bands, and groups of Indians who were parties to the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). *U.S. v. Washington*, 459 F. Supp. 1020, 1039 (1978).

The Tribe is recognized by the United States government as a currently functioning Indian tribe maintaining its tribal government on the Tulalip Indian Reservation in Snohomish County, Washington. *Id.* The Reservation was established pursuant to provisions of the Treaty of Point Elliott by Executive Order on December 23, 1873. *Id.* The tribe is organized pursuant to the Indian Reorganization Act of June 18, 1934. 25 U.S.C. 476. The Tribe is governed in accordance with its Constitution and By-Laws approved by the United States government on January 24, 1936.

The Point Wells development site is within the broader aboriginal territory of ancestors of the Tulalip Tribes (Snohomish, Skykomish and Snoqualmie).

In 1855, most of the Indian tribes in Western Washington signed a series of treaties with the United States commonly known as the Stevens Treaties. By those documents, the Indians ceded large portions of their tribal lands to the United States and received in return confirmation of their rights to certain reservation lands and protection of certain other pre-existing rights. Typical of the Stevens treaties is The Point Elliott Treaty which contains the following language:

ARTICLE V. 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, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

Treaty of Point Elliott of January 22, 1855 (12 Stat. 927), Article V, II Kappler 669.

The language quoted from Article V was the foundation for the central treaty rights case, *United States v. Washington*, which held that the Indian tribes of Washington State are entitled to share equally in the harvest of anadromous fish, that is, fish that spawn in fresh water but live their adult lives in the sea. See 384 F. Supp. 312 (D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *aff'd in relevant part Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1978).¹

This fishing right was one of the most important retained by the Tribes. “[F]ish constituted a major part of the Indian diet, was used for commercial purposes and indeed was traded in substantial volumes. *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 665 (1979) (*Fishing Vessel*). As the Supreme Court has noted: “it is perfectly clear . . . that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations, . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.” *Id.*, 443 U.S. at 667.

This treaty clause forms the basis for important tribal rights and interests. “The federal courts have affirmed the Tulalip Tribes’ exercise of treaty fishing rights in marine areas extending from the northern end of Vashon Island in south/central Puget Sound to the Canadian border and westward into the Strait of Juan de Fuca easterly of a line extending northwesterly from the northwest tip of Protection Island to Trial Island (in Canada).” *U.S. v. Washington*, 626 F. Supp. 1405, 1531 (1985). The extent of the Tulalips’ fishing grounds was affirmed in *U.S. v. Washington*, 841 F.2d 317 (9th Cir. 1988).

The Tribes have a right to fish on all harvestable fish passing through those areas as well as certain freshwater bodies located near the present day Tulalip Reservation. This includes marine areas adjacent to the proposed development. This right to fish includes not only fish which spawn in streams which empty into those marine areas but also fish which pass through Tulalip marine fishing areas but which spawn in streams, rivers and lakes outside those areas.

There is a geographical component to Treaty Rights. Governmental agencies may not interfere with, nor grant permits to others which block access to treaty reserved fishing grounds. Tribal treaty fishing rights encompass the rights of taking fish and shellfish at traditional areas, and access to such areas. See *United States v. Oregon*, 718 F.2d 299, 303 (1983), *United States v. Washington*, No. 96-35014, 1998 WL 28223 (9th Cir., Jan. 28, 1998) (affirming shellfishing

rights). The treaty right may not be abrogated without specific and express Congressional authority, and federal agencies may not approve development that interferes with tribal fishing rights, including access to use such rights. *See, e.g., Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1988) (U.S. Army Corps of Engineers could not authorize a marina that would bar access to treaty-protected usual and accustomed fishing places), *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) (upheld denial of a fish farm permit in Puget Sound that would have interfered with access to a tribe's usual and accustomed fishing places).

Treaty Rights Include Rights to Shellfish and access to shorelines lands. The importance of Tulalip shellfish rights in the area were reaffirmed by the Ninth Circuit Court of Appeals. On January 28, 1998, the Ninth Circuit announced its opinion in *United States v. Washington*, Cause No. 96-35014. In this decision, comprising the appeal from an earlier district court decision, the Ninth Circuit confirmed that the tribes "have a right to take shellfish of every species found anywhere within the tribe's usual and accustomed fishing areas. . . ." *United States v. Washington*, 1998 WL 28223 (9th Cir. 1998). In its opinion, the Ninth Circuit noted that "the tribes' usual and accustomed grounds for shellfish are coextensive with the tribes' usual and accustomed fishing grounds which have been previously decided by the courts." *Id.* at 9. The Tribe's usual and accustomed grounds include the subject area. *United States v. Washington*, 841 F.2d 317 (9th Cir. 1988). Finally, the Ninth Circuit reaffirmed that the "district court correctly determined that the tribes have a right to harvest shellfish on private tidelands." *Id.* at 13.

Our preliminary comments fall into three categories as follows:

1. Archaeological and Cultural Resources

Preliminary information indicates the presence of historic and prehistoric artifacts on or near the site including possible human remains. Although much of the proposed project area has been greatly disturbed through the prior refinery and terminal development, recent projects at Port Angeles and Mukilteo demonstrate that significant cultural resources may remain intact under the developed portions of the site. It is therefore essential that a complete archaeological and anthropological survey of this site be done pursuant to acceptable scientific standards. In that regard, The Tulalip Tribes request a government-to-government consultation concerning the scope and nature of the study, the need for tribal consultants and advisors to be involved, and the assurance that no permitting nor site disturbance will be done until such studies are completed and necessary measures taken to preserve archaeological and cultural resources.

The project site is in near proximity to two Snohomish aboriginal village sites: Pt. Edwards (pt. q̣ʷdwašds) and Pt. Wells (pt. ẉəlls). Thus the likelihood that there are artifacts of interest to The Tulalip Tribes is very high.

Further, the cultural significance of this site because of the proximity of the Snohomish Village and because this area is near to the Point Elliott Treaty signing area are high.

2. Effect of the Project on Habitat and other Environmental Concerns

This is a request that a complete environmental impact statement be done under applicable state and federal laws, due to the nature and extent of this project. The possible effect on the shoreline and tidelands are considerable. Shoreline and tide line development is subject to the Tribes' shell fishing rights as determined by the federal court. Access to shorelines, even if held in private ownership, is subject to those Treaty rights. Additionally, development of structures including docks, causeways, and marina structures which may physically affect tidelands or bedlands adjacent to shorelines are subject to those rights. The possible effects of this project on the environmental conditions in those areas appear to be considerable. For example, 1) the proposed conceptual stream and pocket estuary restoration is not typical of Puget Sound shoreline (use of a lot of rock/boulder) and is limited in size; 2) the proposed marine walkway does not allow for overhanging vegetation over the upper beach which is important for surf smelt spawning (provides shade to prevent egg desiccation); 3) the proposal mentions reduced intertidal shading which in the conceptual plan is limited (e.g. removal of spans to pier from 3 to 1), but then negates that reduction by addition of a marina; 4) the proposed conceptual marina may be over eelgrass beds; 5) the proposed marina and potential passenger ferry add to area boating congestion and interfere with fish and fishing operations in the area; and 6) from the conceptual designs it looks like a lot of excavation would take place which has ramifications but also cultural resource ramifications as noted above.

3. Critical Areas Report (CAR) and SEPA

The Critical Areas Report (CAR) and SEPA submitted with the development application make substantial claims about the negligible impacts from the construction of the development and the ecological and environmental benefits from its restoration aspects, however very little quantitative information is provided in the reports to substantiate this. Relevant research and site specific information about the site is noticeably absent in the CAR, e.g. Intertidal Habitat Inventory: Point Wells to Port Susan, and no pre-and post-monitoring plan is mentioned or proposed to substantiate the environmental benefits of the development in the CAR and SEPA. There are several aspects of the proposed restoration designs which do not reflect natural conditions and potentially limit their functional use by salmon, e.g. boulder/cobble streams are known to impede upstream fry migration. One specific area of concern is the proposed use of groins at the site. No information is provided on why the groins would be necessary or that any other alternatives were considered. Given the concerns listed above it is crucial that a more thorough investigation be conducted to determine the impacts for the proposed development. Thus it is clear that there is a need for much more information.

4. Treaty Fishing and Shellfish Gathering Operations

As noted above, the project site is within Tulalip usual and accustomed fishing and shell fishing grounds and stations as determined by the federal court. Shoreline development which blocks access to potential shellfish operations would not be acceptable to The Tulalip Tribes without proper mitigation. Note that access is to be maintained even if a particular area is not suitable for shellfish at the present time due to environmental or other physical conditions.

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Also as noted above, marine waters adjacent to the site are within the usual and accustomed fishing places of the Tulalip Tribes. Structures such as docks, breakwaters, marina structures, etc. may interfere with fishing operations. Further, boat traffic from marinas often interferes with tribal fishing operations. The federal courts have held that over water structures which interfere with fishing in tribal usual and accustomed grounds and stations are not permitted. *See, e.g., Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1988) (U.S. Army Corps of Engineers could not authorize a marina that would bar access to treaty-protected usual and accustomed fishing places); *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) (upheld denial of a fish farm permit in Puget Sound that would have interfered with access to a tribe's usual and accustomed fishing places).

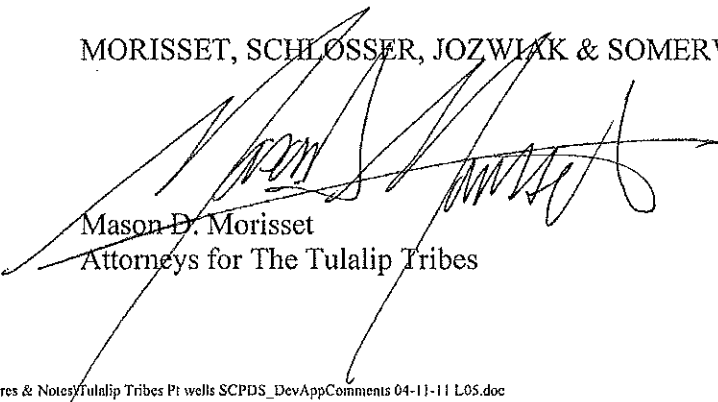
Thus, at a minimum, we seek more information about the proposed development of docks, break waters, and marina structures in order to comment on this development and, if necessary, propose mitigation or modification of the proposal to protect Tulalip Treaty rights and cultural resources.

These comments are preliminary. It is clear that substantial additional information is needed before final comments and concerns can be formulated. When additional information as noted in these comments, is made available, The Tulalip Tribes will undoubtedly offer further detailed comments. Additionally, please take this letter as a request for a government-to-government consultation between the government of The Tulalip Tribes and governmental officials of Snohomish County concerning this project and its possible effect upon The Tulalip Tribes.

Thank you for this opportunity to comment on the proposal to the extent that details of the project are known today. We also understand that you will accept additional comments past the April 11th date. Tulalip reserves the right to do so in a timely manner. We repeat that it is necessary for there to be a government-to-government consultation concerning protection of Treaty rights and archaeological and cultural resources before this project is permitted or allowed to go forward.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



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