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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PROTECT THE PENINSULA’S
FUTURE; COALITION TO PROTECT
PUGET SOUND HABITAT; and
BEYOND PESTICIDES,

Plaintiffs,

v.

DEB HAALAND, SECRETARY OF
THE INTERIOR; UNITED STATES
FISH AND WILDLIFE SERVICE;
MARTHA WILLIAMS, DIRECTOR OF
UNITED STATES FISH AND
WILDLIFE SERVICE; HUGH
MORRISON, REGIONAL DIRECTOR
OF THE PACIFIC REGION; and
JENNIFER BROWN SCOTT,
PROJECT LEADER, WASHIN,

Defendants.

CASE NO. CV23-5737-BHS

ORDER

I. INTRODUCTION

This matter is before the Court on Defendants’ motion to dismiss. Dkt. 13. The case centers on the Jamestown S’Klallam Tribe’s proposed oyster farm in part of their ancestral homelands in Dungeness Bay. The proposed 30-acre farm falls within the

1 Dungeness National Wildlife Refuge. The United States Fish and Wildlife Service (“the
2 Service”) regulates activity within the refuge pursuant to the Refuge Act.¹ The Service
3 cannot permit a new or expanded use within the refuge without first conducting a
4 “compatibility determination” to ensure that the proposed use is compatible with the
5 wildlife preservation mission of the refuge. 16 U.S.C. § 668dd(d)(3)(A)(i). Additionally,
6 commercial activity requires a special permit from the Service. 50 C.F.R. § 27.97.

7 The Service has not completed a compatibility determination for the proposed
8 oyster farm nor has it issued a special use permit. It argues that it is not legally required
9 to do either task because it did not make the decision to allow the Tribe to operate the
10 farm. Rather, the Washington State Department of Natural Resources granted an Aquatic
11 Lands Oyster Aquaculture Lease for the tidelands and the Army Corps of Engineers
12 granted a shellfish aquaculture operation pursuant to Section 10 of the Rivers and Harbor
13 Act, 33 U.S.C. § 403. Dkt. 15 at ¶36; *Id.* (Ex. C). The Service contends that the Refuge
14 Act’s requirement to complete a compatibility determination “does not attach to decisions
15 made by other sovereigns.” Dkt. 13 at 12.

16 Plaintiffs are varied groups of environmentalists. Dkt. 1 at 2–3. They argue that
17 the Service’s failure to complete a compatibility determination and require a special use
18 permit violates the Refuge Act and its implementing regulations. They ask the Court to
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21 ¹ The National Wildlife Refuge System Administration Act, as amended by the
22 National Wildlife Refuge System Improvement Act (collectively, “Refuge Act”), 16 U.S.C. §§
668dd–668ee.

1 compel the Service to conduct a compatibility determination and, if the proposed
2 commercial use is determined to be compatible, require a special use permit. Dkt. 1 at 10.

3 Because the Refuge Act does not provide a private right of action and the Service
4 enjoys sovereign immunity as a federal agency, the Court only has subject matter
5 jurisdiction if the claims meet the specifications of the Administrative Procedure Act
6 (APA), 5 U.S.C. § 701. Plaintiffs frame their claims as “failure to act” claims under APA
7 § 706(1), which enables a court to compel agency action “unlawfully withheld.” In the
8 alternative, Plaintiffs assert that the Court also has jurisdiction under § 706(2), which
9 enables a court to review final agency actions. They argue that a letter from Hugh
10 Morrison, the regional director of the Service, to Plaintiffs’ counsel explaining that the
11 Service will not complete a compatibility determination nor require a special use permit
12 is a final agency action.

13 The Service moves to dismiss Plaintiffs’ claims for lack of subject matter
14 jurisdiction or, in the alternative, for failure to state a claim. Dkt. 13. It argues that
15 because “other sovereigns” granted the Tribe permission for the farm, it does not need to
16 complete a compatibility determination nor require a permit. *Id.* at 12. It argues Plaintiffs
17 did not reference the Morrison letter in their complaint but that even if they had, it is not
18 a final agency action because no legal consequences flow from it. Dkt. 18 at 9–10.

19 The Court concludes that the Refuge Act requires the Service to complete a
20 compatibility determination and the Court therefore has jurisdiction over Count 1
21 pursuant to APA § 706(1). For Count 2, the Court concludes that plaintiffs fail to show
22 that issuance of a special use permit is a discrete agency action that the Refuge Act

1 requires the Service to take at this juncture. It therefore concludes that it lacks jurisdiction
2 over Count 2 under APA § 706(1). Finally, the Court concludes that plaintiffs failed to
3 state a plausible claim for relief from a “final agency action” under APA § 706(2).
4 Because plaintiffs could amend their complaint to state a plausible claim for final agency
5 action, the Court dismisses Count 2 without prejudice and with leave to amend.

6 **II. BACKGROUND**

7 In 2021, The Jamestown S’Klallam Tribe leased a 50-acre tideland parcel pursuant
8 to a “Aquatic Lands Oyster Aquaculture Lease” from Washington State Department of
9 Natural Resources and obtained a shellfish aquaculture permit from the United States
10 Army Corps of Engineers to establish a commercial oyster in Dungeness Bay. Dkt. 1 at
11 ¶¶ 35–36; Dkt. 15 at 21 (Ex. C). The Refuge is located near Sequim, Washington, on the
12 north end of the Olympic Peninsula. *Id.* ¶ 34. The Tribe’s proposed oyster farm would
13 cultivate approximately 34 acres of non-native Pacific oysters within the Dungeness
14 National Wildlife Refuge. Dkt.1 at ¶ 36. The Dungeness Refuge is part of the National
15 Wildlife Refuge System administered by the Service pursuant to the Refuge Act. 16
16 U.S.C. §§ 668dd–668ee.

17 The National Refuge System’s mission is “to administer a national network of
18 lands and waters for the conservation, management, and where appropriate, restoration of
19 the fish, wildlife, and plant resources and their habitats within the United States[.]” 16
20 U.S.C. § 668dd(a)(2). Congress tasked the Service with the duty to “ensure that the
21 mission of the [Refuge] System . . . and the purposes of each refuge are carried out. 16
22

1 U.S.C. § 668dd(a)(4)(D). The Refuge Act is codified at 16 U.S.C. §§ 668dd–668ee and
2 its implementing regulations are 50 C.F.R. § 25.11 through § 38.17.

3 The Refuge is closed to the public unless the Service opens it in accordance with
4 the Refuge Act and its implementing regulations. 50 C.F.R. § 25.21. The Dungeness
5 Refuge in particular closes its tidelands within 100 yards of the shoreline year-round to
6 all public access. Dkt. 15 at 5–9 (Ex. B). Tidelands in Dungeness Harbor and Bay are
7 closed to the public from October 1 – May 14 to protect migratory birds. *Id.*

8 Two control mechanisms for public access to the Refuge are at issue in the present
9 case: a compatibility determination and special use permits. The Refuge Act allows the
10 Service to open the refuge for “any purpose, including but not limited to hunting, fishing,
11 [and] public recreation” but only after the Service “determines that such uses are
12 compatible with the major purposes for which such areas were established.” 16 U.S.C. §
13 668dd(d)(1)(a). Regulations guide the Service in how to conduct compatibility
14 determinations. *See* 50 CFR 26.41.; 50 C.F.R. § 25.21(b). A “compatible use” is one
15 which the Refuge Manager determines “will not materially interfere with or detract from
16 the fulfillment of the mission of the System or purposes of the refuge. 16 U.S.C. §
17 668ee(1). The Refuge Act is clear that compatibility determinations are mandatory. 16
18 U.S.C. § 668dd(d)(3)(A)(i) instructs that the Service “shall not initiate or permit a new
19 use of a refuge or expand, renew, or extend an existing use of a refuge, unless the
20 [Service] has determined that the use is a compatible use and that the use is not
21 inconsistent with public safety.” If the Service determines the use is compatible, it may
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1 open the area through any one of three mechanisms: (1) issue a regulation; (2) provide an
2 individual permit; or (3) provide a public notice. 50 C.F.R. § 25.21(a).

3 The requirement for special use permits springs from the Refuge Act's
4 implementing regulations. The regulations prohibit "conducting a commercial enterprise
5 on any national wildlife refuge except as may be authorized by special permit." 50 C.F.R.
6 § 27.97. Additionally, regulations generally prohibit collecting any plant or animal on
7 any national wildlife refuge "except by special permit." 50 C.F.R. § 27.51(a). The
8 regulations deputize the Service to issue special use permits and prohibit any activity that
9 lacks a necessary permit. *See* 50 C.F.R. § 25.41; 50 C.F.R. § 25.43.

10 In the present case, the Service completed a draft compatibility determination
11 which concluded the Tribe's oyster farm is incompatible with the Refuge's purposes.
12 Dkt. 15 at 27 (Ex. D). A "key issue" was that the oyster farm would operate year-round
13 and would be located entirely within the area of the Refuge that is closed from October 1
14 – May 14 for use by tens of thousands of migrating and wintering waterfowl. *Id.* The
15 Service official responsible for managing the Dungeness Refuge, Jennifer Brown Scott,
16 opined to the Army Corps of Engineers that the Tribe's commercial oyster farm "will
17 cause an unacceptable level of impact" to the Refuge. Dkt. 15 at 32 (Ex. E). She
18 determined that "[i]n addition to unacceptable levels of human disturbance, Refuge
19 wildlife ... would also be negatively impacted by limited eelgrass regrowth within the
20 site" and that "[c]ascading impacts from these habitat changes would negatively impact
21 forage fish, Threatened salmonids, seabirds, and other Federal Trust Species." *Id.* at 33.
22 The regional director for the Service, Hugh Morrison, informed the Service Director in

1 May 2022 that “the Service cannot allow the proposed activity unless the entirety of the
2 commercial oyster farming operation within the Refuge boundary is found Compatible
3 with Refuge purposes.” Dkt. 15 at 27–28 (Ex. D).

4 Counsel for Plaintiffs wrote to the Service to inquire about the status of agency
5 action regarding the proposed oyster farm in March 2023. Dkt. 15 at 59 (Ex. I). The letter
6 advised the Service that “before filing a failure to act claim under the Administrative
7 Procedures Act, we are writing to confirm that no compatibility determination or special
8 use permit has been issued by USFWS for the project.” *Id.* Morrison responded in a
9 letter. Dkt. 15 at 62 (Ex. J). He explained why the Service would not take either action:

10 The U.S. Fish and Wildlife service has not completed a compatibility
11 determination or issued a special use permit for the Jamestown S’Klallam
12 Tribe’s proposal to resume aquaculture operations on the area it has leased
13 from the State of Washington.

14 The Dungeness National Wildlife Refuge holds an easement over the
15 tidelands area where the State issued lease is located; the State of
16 Washington retains the remaining property interests. Jamestown S’Klallam
17 Tribe has a long history of shellfishing and reserved treaty rights^[2] in
18 Dungeness Bay. Development of a compatibility determination is not
19 appropriate in this instance where these pre-existing property rights exist.

20 As a result, no further approvals are needed from the U.S. Fish and Wildlife
21 Service for the Jamestown S’Klallam Tribe to resume aquaculture
22 operation on the State-leased portions of Dungeness National Wildlife
Refuge. There are existing permits and leases with county, state, and
federal approvals that govern the project.

² The Service does not explain how this assertion squares with Morrison’s conclusion in his memorandum to the Service Director that “the Regional Office of the Solicitor analyzed the shellfish Settlement Agreement in *U.S. v. Washington* (2007) and it does not appear the Tribe has a treaty right for shell fishing in the lease area.” Dkt. 15 at 27 (Ex. D). This Order does not resolve this issue.

1 Dkt. 15 at 62 (Ex. J).

2 Plaintiffs sued and assert two claims. Dkt. 1. In Count 1, Plaintiffs contend that the
3 Service violated the Refuge Act³ and its implementing regulations by failing to complete
4 a compatibility determination for the proposed oyster farm. Dkt. 1 at 9. In Count 2,
5 Plaintiffs contend that the Service violated the Refuge Act and its regulations⁴ by failing
6 to require the tribe to obtain a special use permit. *Id.* at 10. Plaintiffs framed both claims
7 as “failure to act” claims pursuant to the APA 5 U.S.C. § 706(1). This section allows
8 claims where an agency failed to take a discrete agency action that it is required to take.
9 *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Plaintiffs ask the Court to
10 “Declare that Defendants are in violation of the Refuge Improvement Act and its
11 implementing regulations” and “[o]rder Defendants to conduct a compatibility
12 determination and, if the proposed commercial use is determined to be compatible,
13 require a special use permit.” Dkt. 1 at 10.

14 As an alternative to their “failure to act” framing, Plaintiffs argue that the Court
15 also has jurisdiction over their claims pursuant to the “final agency action” section of the
16 APA, 5 U.S.C. §706(2). This allows judicial review for final agency actions from which
17 “rights or obligations have been determined, or from which legal consequences will
18 flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations omitted).
19 Plaintiffs contend that the Service took a reviewable final agency action in authorizing

21 ³ 16 U.S.C. § 668dd(d)(1)(A).

22 ⁴ 50 C.F.R. § 27.97.

1 the proposed commercial use of the Refuge without conducting a compatibility
2 determination or requiring a special use permit. Dkt. 14 at 14. They argue that the
3 Morrison letter constitutes a final agency action. *Id.* at 20.

4 The Service moves to dismiss plaintiffs' claims for lack of subject matter
5 jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the alternative, for
6 failure to state a claim under Rule 12(b)(6). Dkt. 18 at 5. It contends Plaintiffs cannot
7 plausibly assert a § 706(1) failure to act claim because the Service is not "legally
8 compelled" to complete a compatibility assessment or to require a special use permit. *Id.*
9 at 6, 13. It argues that the need to complete a compatibility determination and require a
10 permit is only triggered when the Service itself decides to open the refuge to the public.
11 Dkt. 13 at 12. It argues a compatibility determination was not triggered here because the
12 State of Washington and the Army Corps of Engineers leased the land and granted
13 permission. *Id.* Alternatively, the Service argues that the Court can dismiss for failure to
14 state a claim because plaintiffs failed to plead "any factual allegations that the Service
15 undertook an affirmative action which requires a compatibility determination." *Id.* at 13.

16 The Service argues the Plaintiffs cannot state a claim for final agency action under
17 APA § 706(2) because they did not reference the letter nor any other final agency action
18 in their complaint. Dkt. 18 at 9. It argues that even if plaintiffs had provided sufficient
19 factual allegations, the letter does not qualify as a final agency action because it does not
20 cause legal consequences. *Id.* at 10.

III. APPLICABLE STANDARDS

A. 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the threshold question of whether the Court can adjudicate the claims. The plaintiff bears the burden of proof on questions of subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). The Court generally accepts as true well-pleaded allegations of material fact for 12(b)(1) attacks. *Savage v. Glendale Union High Sch.*, Dist. No. 205, 343 F.3d 1036, 1039 n. 1 (9th Cir.2003).

B. 12(b)(6)

Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable. *Id.* To survive, the complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When adjudicating a 12(b)(6) motion, the court must accept as true all of the factual allegations in the complaint and construe them in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). The Supreme Court instructs

1 | however that “the tenet that a court must accept as true all of the allegations contained in
2 | a complaint is inapplicable to legal conclusions,” and “[t]hreadbare recitals of the
3 | elements of a cause of action, supported by mere conclusory statements, do not suffice.”
4 | *Iqbal*, 556 U.S. at 678.

5 | In dismissals or failure to state a claim on a 12(b)(6) motion, “a district court
6 | should grant leave to amend even if no request to amend the pleading was made, unless it
7 | determines that the pleading could not possibly be cured by the allegation of other facts.”
8 | *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990).

9 | **IV. DISCUSSION**

10 | A plaintiff attempting to sue a federal agency must demonstrate that the claims
11 | are “covered by a specific statutory authorization to sue the United States” in order
12 | comport with the government and its agencies’ sovereign immunity from lawsuits. *Weber*
13 | *v. Department of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir.2008) (internal quotation
14 | marks omitted). The parties agree that Refuge Act does not provide a private right of
15 | action and that the APA is the only means of piercing the Service’s sovereign immunity.
16 | *See Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm’n*, 457 F.3d 941, 950 (9th Cir.
17 | 2006).

18 | Unless the claims meet the requirements of §701 of the APA, the Court lacks
19 | subject matter jurisdiction over the claims. *See Eason Land Co., LLC v. U.S. Dep’t of the*
20 | *Interior, Sec’y*, 703 F. App’x 498, 500 (9th Cir. 2017) (“Because [plaintiffs] do not
21 | challenge a failure to take or unreasonably delay a discrete agency action that is legally
22 | compelled, the district court did not have subject matter jurisdiction over their § 706(1)
claim.”); *see also Indep. Petroleum Ass’n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir.

1 2001) (“the requirement of a final agency action is considered jurisdictional. If the
2 agency action is not final, the court ... cannot reach the merits of the dispute.”).

3 Plaintiffs argue that two sections of the APA are each sufficient to allow the Court
4 jurisdiction to hear their claims. The first is § 706(1), which provides that a court may
5 compel agency action “unlawfully withheld or unreasonably delayed.” The second is §
6 706(2), which allows the court to “hold unlawful and set aside” final agency actions. The
7 court addresses each ground for jurisdiction in turn.

8 **A. Jurisdiction to compel a compatibility determination under APA § 701(1)**

9 The first issue is whether Plaintiffs have plausibly pled that a compatibility
10 determination is a discrete agency action that the Refuge Act and its implementing
11 regulations requires the Service to undertake. For the reasons explained below, Plaintiffs
12 succeed, and the Court therefore has jurisdiction under the “failure to act” section of the
13 APA, § 701(1) over Count 1.

14 To compel agency action pursuant to a failure to act claim, plaintiffs must show
15 the “withheld” act is both discrete and legally required. *SUWA*, 542 U.S. at 63–65.
16 Section 706(1) “empowers a court only to compel an agency ‘to perform a ministerial or
17 non-discretionary act’ or to take action upon a matter, without directing how it shall act.”
18 *Id.* at 64 (quoting Attorney General’s Manual on the Administrative Procedure Act 108
19 (1947)). “The agency action must be pursuant to a legal obligation ‘so clearly set forth
20 that it could traditionally have been enforced through a writ of mandamus.’” *Viet.*
21 *Veterans of Am. v. CIA*, 811 F.3d 1068, 1075–76 (9th Cir. 2016) (quoting *Hells Canyon*
22 *Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010)).

1 The Court is persuaded that a compatibility determination qualifies as a “discrete
2 act.” To its credit, the Service makes no argument to the contrary. The contested issue is
3 whether the Service is legally required to complete a compatibility determination.
4 Plaintiffs contend that the Refuge Act unequivocally requires the Service to complete a
5 compatibility determination for the proposed oyster farm. Dkt. 14 at 15. They point to 16
6 U.S.C. § 668dd(d)(3)(A)(i): the Service “shall not initiate or permit a new use of a refuge
7 or expand, renew, or extend an existing use of a refuge, unless the [Service] has
8 determined that the use is a compatible use and that the use is not inconsistent with public
9 safety.” They argue that “when a person or entity initiates or expands a use within a
10 refuge area, the Service *shall not allow that use* to continue unless and until the [Service]
11 has determined that it is compatible with the with the major purposes for which the
12 refuge area was established.” Dkt. 14 10–11 (citing 16 U.S.C. § 668dd(d)(1)(A) and 16
13 U.S.C. § 668dd(d)(3)(A)(i)).

14 The Service argues that it is not “legally required” to complete a compatibility
15 determination because it did not open the refuge to the public or authorize the oyster
16 farm, but rather “other sovereigns” granted permission to the Tribe. Dkt. 13 at 12. It
17 asserts that “nothing in the Refuge Act or its implementing regulations compel the
18 Service to undertake a compatibility determination in the absence of a decision to open
19 the Refuge to a new or expanded use” and the “complaint makes no allegation that the
20 Service has done *anything* to ‘open’ refuge areas or even that it plans to do so.” Dkt. 13 at
21 7. It contends that “[a]n authorization from the State to the Tribe does not create a legal
22 requirement for the *Service* to undertake a compatibility determination” but rather a

1 “compatibility determination serves only as a step in the Service’s decision-making
2 process; the requirement does not attach to decisions made by other sovereigns.” *Id.* at
3 12. It confines its 12(b)(6) argument to one sentence: “Alternatively, the allegations
4 contained in Count 1 do not move the claim from possible to plausible because Plaintiffs
5 have failed to plead any factual allegations that the Service undertook an affirmative
6 action which requires a compatibility determination.” *Id.* at 13.

7 The Service argues further that nothing requires it to stop the oyster farm from
8 operating: “neither [16 U.S.C. §668dd(d)(1)(A) nor 16 U.S.C. § 668dd(d)(3)(A)(i)]
9 suggests that the Service is obligated to stop an unpermitted use. Such an enforcement
10 action is committed to the agency’s discretion by law.” Dkt. 18 at 7 (citing *Heckler v.*
11 *Chaney*, 470 U.S. 821, 831–32 (1985)). Even if enforcement were warranted, the Service
12 contends because the oyster farm is not yet operating, it cannot yet enforce the permit
13 requirement. *Id.* In sum, the Service argues that “[b]ecause a compatibility determination
14 only exists to support a decision by the Service to permit (or not permit) a proposed use,”
15 as opposed to a decision by the State, “Plaintiffs are effectively seeking an order from the
16 Court compelling the Service to first assert authority over the proposed project and then
17 subsequently either grant or deny the project a permit.” Dkt. 18 at 7–8.

18 Although the Service’s arguments may be appropriate for consideration on the
19 merits, at the motion to dismiss stage the Court is satisfied both that it has jurisdiction
20 over Count 1 and that the complaint contains sufficient factual matter, which accepted as
21 true, states plausible claim that the compatibility determination is a discrete agency act
22 that the Service is required to take.

1 Plain language in multiple provisions of the Refuge Act and its implementing
2 regulations command this result. The Refuge Act mandates that the Service “*shall* not
3 initiate *or permit* a new use of a refuge or expand, renew, or extend an existing use of a
4 refuge, *unless* the [Service] has determined that the use is a compatible use and that the
5 use is not inconsistent with public safety.” 16 U.S.C. § 668dd(d)(3)(A)(i) (emphasis
6 added). The Service concedes that this provision “prohibits the Service from initiating or
7 permitting a new or expanded use without first determining whether the use is
8 compatible.” Dkt. 18 at 7. On this record, the proposed oyster farm qualifies as a “new or
9 expanded use” of the refuge. The Service makes no argument to the contrary. The
10 statute’s use of “shall” renders the Service’s responsibility to conduct a compatibility
11 determination mandatory. *See Firebaugh Canal Co.*, 203 F.3d at 573–74 (9th Cir. 2000).
12 Indeed, the Court here reaches the same conclusion as Morrison in his 2022
13 memorandum to the Service Director that “provisions of the National Wildlife Refuge
14 Improvement Act require a Refuge Manager determination of whether proposed uses are
15 compatible with the purposes of the Refuge (i.e., Compatibility Determination).” Dkt. 15
16 at 27 (Ex. D). Furthermore, 50 C.F.R. § 26.41(d) requires that if the Service determines
17 that an existing use is not compatible, it will “expeditiously terminate or modify the use
18 to make it compatible.”

19 Nothing in the language of § 668dd(d)(3)(A)(i) or 50 C.F.R. § 26.41(d) supports
20 the Service’s argument that a compatibility determination is only triggered when the
21 Service itself deigns to authorize a new or expanded use of the refuge. The Service
22 provides no authority for its argument that it is absolved of its responsibility to conduct a

1 compatibility determination when the State authorizes a new or expanded use.
2 Additionally, this argument is directly contradicted in the Service’s own memorandum
3 authored by Morrison to the Secretary of the Service in May 2022 which states that “[t]he
4 State owns the land for the identified area; however the Service has an easement with the
5 State which provides jurisdiction to the Service for determining compatibility of uses of
6 the property” and that “the Service cannot allow the proposed activity unless the entirety
7 of the commercial oyster farming operation within the Refuge boundary is found
8 Compatible with Refuge purposes.” Dkt. 15 at 27–28 (Ex. D). In any event, under the
9 plain language of the Refuge Act, the Service’s obligation to conduct a compatibility
10 assessment is triggered by a proposed new use of the refuge, not “an affirmative action by
11 the Service”⁵ to open the refuge.

12 To conclude otherwise would lead to absurd results. It would require the Court to
13 ignore the clear instructions in the Refuge Act and its regulations that deputize the
14 Service to regulate activity within the Refuge. Indulging the Service’s position would
15 also require ignoring the points in the Refuge Act that carefully instruct the Service on
16 how to navigate conflicting or concurrent authority within a refuge. For example, §
17 668dd(d)(4)(B) requires that even if a different federal agency has primary jurisdiction
18 over a portion of a refuge, the Service still must have a “memorandum of understanding”
19 between it and that agency “governing the use of the refuge.” Similarly, § 668dd(d)(2)
20 dictates strict restrictions surrounding when the Service can grant easements to “any

21
22 ⁵ Dkt. 13 at 12.

1 Federal, State, or local agency or to any private individual or organization.” The
2 Service’s argument that it can ignore a proposed commercial use of the refuge simply
3 because the State authorized it is contrary to the plain language of 16 U.S.C. §
4 668dd(d)(3)(A)(i) and inconsistent with § 668dd(d) generally. Granting relief would not
5 require the Service to “assert authority” over the oyster farm. Dkt. 18 at 8. It already
6 bears that authority under 16 U.S.C. § 668dd(d)(3)(A)(i) because the tribe proposed an
7 expanded use of a national wildlife refuge. And a compatibility determination does not
8 “only exist[] to support a decision by the Service to permit (or not permit) a proposed
9 use.” *Id.* It is also a necessary step to enable the Service to “expeditiously terminate or
10 modify [a] use to make it compatible.” 50 C.F.R. § 26.41(d). It bears repeating that the
11 Service already acknowledged that it “cannot allow the proposed activity unless the
12 entirety of the commercial oyster farming operation within the Refuge boundary is found
13 Compatible with the Refuge purposes.” Dkt. 15 at 28 (Ex. D).

14 The Court notes that the lack of clarity in the briefing regarding potentially
15 competing authority of the State of Washington over the state-owned tidelands or the
16 Tribe’s treaty rights within the refuge complicates its analysis. The Service does not
17 explain how or whether the property interests and authority of the State or Tribe change
18 its duties under the Refuge Act and its implementing regulations. It dispenses with the
19 issue in conclusory terms in both the Morrison letter and its briefing. Morrison asserts
20 that “[a]s a result” of the Tribe’s lease of the tidelands and its permit from the Army
21 Corps of Engineers, “no further approvals are needed from the U.S. Fish and Wildlife
22 Service” and that there are “existing permits and leases with county, state, and federal

1 | approvals that govern the project.” Dkt. 15 at 62 (Ex. J). The Service provides no legal
2 | authority for this position in the letter or its briefing. Instead, in its briefing the Service
3 | leaves the issue for later in litigation: “Should this case proceed to summary judgment,
4 | the question before the Court would be the scope of the Service’s authority over the
5 | State-owned parcel in question and whether a permit from the Service is required for the
6 | proposed activity on these lands.” Dkt. 18 at 12.

7 | Contrary to the Service’s argument that the issue can be left until later, “the scope
8 | of the Service’s authority” and “whether a permit from the Service is required for the
9 | proposed activity on these lands” are threshold issues for jurisdiction under the APA. If
10 | the Refuge Act and its implementing regulations clearly require the Service to complete a
11 | compatibility determination and require a permit for the proposed activity in the Refuge,
12 | then the Court has jurisdiction under § 706(1). The plain language of the Refuge Act and
13 | its implementing regulations mandate the Service to complete a compatibility
14 | determination whenever there is a new or expanded use of the refuge.

15 | Accordingly, the Service’s motion to dismiss Count 1 under Federal Rules of
16 | Civil Procedure 12(b)(1) and 12(b)(6) is **DENIED**.

17 | **B. Jurisdiction over Count 2 to compel the Service to require a Special Use**
18 | **Permit under APA § 701(1)**

19 | The next issue is whether Plaintiffs have plausibly pled that issuing a special use
20 | permit is a discrete agency action that the Refuge Act and its implementing regulations
21 | requires the Service to take. The requested agency action is contingent on too many
22 |

1 variables and the Court therefore lacks jurisdiction under the “failure to act” section of
2 the APA, § 701(1) over Count 2.

3 Plaintiffs argue that the Service cannot allow the oyster farm “to continue without
4 a special use permit.” Dkt. 14 at 17–18. They argue that requiring a permit is a non-
5 discretionary discrete agency action primarily because 50 C.F.R. § 27.97 dictates that
6 “conducting a commercial enterprise on any national wildlife refuge is prohibited except
7 as may be authorized by special permit.” Plaintiffs point to the fact that 50 C.F.R. § 25.42
8 requires anyone within the Refuge to show a permit “authorizing their presence and
9 activity” upon request as further support that the Service can and must require special use
10 permits. Dkt. 14 at 18.

11 The Service argues that the Court lacks jurisdiction under § 706(1) for Count 2
12 because no statute or regulation “unequivocally compels” the Service to require the Tribe
13 to obtain a special use permit for the proposed oyster farm. Dkt. 13 at 13 (quoting *Viet.*
14 *Veterans of Am.*, 811 F.3d at 1081). It argues that “the regulation Plaintiffs rely on (50
15 C.F.R. § 27.97) is a prohibition that regulates *the public*, not a requirement for the
16 Service to ‘require’ such permits.” *Id.* The Service points to its own regulations that
17 instruct “part 27 govern[s] those acts *by the public* which are prohibited at all times
18 except as permitted in this part, part 26, and part 25, subpart D—Permits.” Dkt. 13 at 13
19 (quoting 50 C.F.R. § 27.11).

20 The Service additionally argues that a decision to penalize the Tribe for failure to
21 obtain a special use permit is an enforcement action entirely within its discretion. It
22 asserts that if someone “conduct[s] a commercial enterprise on any national wildlife

1 refuge' without first obtaining a special use permit, the Service's only available option
2 under the regulations is to take an enforcement action" and that "an agency's decision on
3 whether to take an enforcement action is committed to the agency's discretion." Dkt. 13
4 at 14 (quoting 50 C.F.R. § 27.97) (citing *Heckler*, 470 U.S. at 831–32; 5 U.S.C. §
5 701(a)(2)).

6 The Court concludes that plaintiffs have not yet shown that the Court can compel
7 the Service to issue a permit or penalize the Tribe for lacking one before the oyster farm
8 is operating. Consequently, § 706(1) cannot provide the Court jurisdiction over Count 2.
9 Although Plaintiffs argue persuasively that it is hardly consistent with the Refuge Act for
10 the Service to simply ignore a proposed commercial use within the Refuge that lacks a
11 special use permit, the Service's obligation to enforce the permit requirement for a
12 proposed future use is not "so clearly set forth that it could traditionally have been
13 enforced through a writ of mandamus." *Viet. Veterans of Am.*, 811 F.3d at 1075–76
14 (quoting *Hells Canyon*, 593 F.3d at 932). Plaintiffs' complaint asks the Court to "[o]rder
15 Defendants to conduct a compatibility determination and, *if* the proposed commercial use
16 is determined to be compatible, require a special use permit." Dkt. 1 at 10 (emphasis
17 added). Relief is therefore contingent on a preceding agency action or on the Tribe itself
18 either seeking a permit or operating the farm without one. Consequently, the agency
19 action that plaintiffs seek to compel is too hypothetical to qualify under § 706(1).⁶ Unlike
20 the regulations requiring the Service itself to conduct a compatibility assessment before a

21
22 ⁶ The briefing is anemic on the impact of the State's and the Army Corps of Engineers'
authorizations on the Service's obligations under the Refuge Act.

1 proposed expanded use begins, 50 C.F.R. § 27.97 does not mandate a discrete agency
2 action that the Court could compel before the oyster farm begins operating.

3 **C. Jurisdiction over a “final agency action” pursuant to APA § 706(2)**

4 The final issue is whether the complaint states a plausible claim for review of final
5 agency action under APA § 706(2). “As a general matter, two conditions must be
6 satisfied for agency action to be final: First, the action must mark the consummation of
7 the agency’s decisionmaking process-it must not be of a merely tentative or interlocutory
8 nature. And second, the action must be one by which rights or obligations have been
9 determined, or from which legal consequences will flow.” *Fairbanks North Star Borough*
10 *v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir.2008) (quoting *Bennett v. Spear*,
11 520 U.S. 154, 177–78, (1997)).

12 Plaintiffs assert that “the Service took final agency action when it decided that it
13 will not issue a compatibility determination or require a special use permit.” Dkt. 14 at
14 19. They argue that the Morrison letter is a final agency action. *Id.* Consequently, they
15 assert that § 706(2) provides alternate grounds for jurisdiction for the Court to adjudicate
16 their claims.

17 The Service argues that the “complaint simply does not meet the basic pleading
18 requirements to permit this Court to review the letter as a ‘final agency action.’” Dkt. 18
19 at 10. It observes that the “letter is referenced nowhere in their complaint” and that
20 “neither of the claims for relief request judicial review of this letter; nor do any of the
21 requests for relief relate to this letter.” *Id.* at 9. It contends that the “complaint is devoid
22 of any final agency action for the Court to review.” *Id.* Consequently, it argues the

1 complaint does not “raise sufficient factual allegations, accepted as true, to ‘state a claim
2 to relief that is plausible on its face.’” *Id.* (citing *Miranda v. Selig*, 860 F.3d 1237, 1239
3 (9th Cir. 2017) (quoting *Twombly*, 550 U.S. at 570). It argues that even if the complaint
4 were properly pled, the letter does not qualify as a final agency action because “no legal
5 consequences flow” from it. *Id.* at 10.

6 The Court agrees that the complaint does not state a plausible claim for relief
7 based on final agency action as required for § 701(2) jurisdiction. The closest that the
8 complaint comes to referencing the letter is where it alleges “[t]he Service has informed
9 plaintiffs that the Service does not intend to complete a compatibility determination or
10 require a special use permit for the Tribe’s proposal at any time in the future.” Dkt. 1 at ¶
11 11. Even accepting this allegation as true and construing it in a light most favorable to
12 plaintiffs, there is not enough factual content showing a final agency action to “raise a
13 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. The complaint is
14 devoid of facts showing that the person who communicated the agency’s position had
15 authority to do so or facts showing that the decision was final. At best, the complaint
16 contains only “conclusory statements” that the Service reached a final decision. *Iqbal*,
17 556 U.S. at 678. This is not sufficient to state a plausible claim for relief for final agency
18 action. *Id.*

19 Based on the current record, the Court determines it is possible that the plaintiffs
20 can amend their complaint to provide additional factual allegations to render a claim for
21 final agency action under §701(2) plausible. For example, Plaintiff’s briefing succeeds
22 where the complaint fails to explain the context and content of the alleged final agency

1 action. This includes but is not limited to facts explaining how Morrison informed
2 Plaintiffs that the Service would not complete a compatibility determination or issue a
3 special use permit because it concluded “that existing permits and leases with county,
4 state, and federal approvals” “govern” the project. Dkt. 14 at 20; Dkt. 15 at 62 (Ex. J).
5 The record also includes the fact that the letter came in response to an inquiry from
6 Plaintiffs’ counsel where plaintiffs made clear that they intended to sue if the Service
7 failed to complete a compatibility determination and/or require a special use permit. Dkt.
8 15 at 59 (Ex. I). These facts and more make it possible that plaintiffs could amend their
9 complaint to cure deficiencies to state a claim under §701(2). *Cook.*, 911 F.2d at 247.

10 Accordingly, the Court **DISMISSES** Count 2 **without prejudice** and **with leave**
11 **to amend.**

12 V. ORDER

13 Therefore, it is hereby **ORDERED** that defendant’s motion to dismiss, Dkt.13, is
14 **GRANTED in part** and **DENIED in part.**

15 The motion is **GRANTED** insofar as Count 2 is **dismissed without prejudice** and
16 **with leave to amend.**

17 The motion’s attempt to dismiss Count 1 is **DENIED.**

18 Should Plaintiffs decide to file an amended complaint, they are hereby ordered to
19 do so **within twenty-one days**. Any response is due fourteen days after the filing of an
20 amended complaint. *See* Local Rules, W.D. Wash. LCR 12.

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1 Dated this 17th day of July, 2024.

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4 BENJAMIN H. SETTLE
5 United States District Judge
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