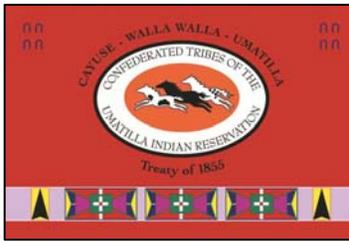


Confederated Tribes *of the*
Umatilla Indian Reservation

Department of Natural Resources
Administration



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org ericquaempts@ctuir.org
Phone 541-276-3165 Fax: 541-276-3095

November 29, 2016

Millennium Bulk Terminals—Longview, LLC,
Coal Export Project (NWS-2010-1225) NEPA EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104

Washington Department of Ecology
Attn: Federal Permit Coordinator
PO Box 47600
Olympia, WA 98504-7600
millennium.wqc@ecy.wa.gov
<http://www.millenniumbulkeiswa.gov/submit-comments.html>

Ms. Maia Bellon
Director, Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
maib461@ecy.wa.gov

Sally Toteff
Regional Director, Southwest and Olympic Office
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
STOT461@ecy.wa.gov
sally.toteff@ecy.wa.gov

RE: Proposed Millennium Bulk Coal Terminal

Dear Director Bellon, Ms. Toteff, and others:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) provides the following comments on the proposed Millennium Bulk Terminal. These comments are in regard to:

- 1) The U.S. Army Corps of Engineers' Draft Environmental Impact Statement (DEIS) under the National Environmental Policy Act (NEPA);
- 2) The Corps' draft Clean Water Act §404 Dredge/Fill/Rivers and Harbors Act §10 permit;
and
- 3) The State of Washington's draft Clean Water Act §401 Certification.

The CTUIR is a federally recognized tribal government with rights and interests in the Columbia River Basin secured under the Treaty of 1855. That Treaty, between the Cayuse, Umatilla and Walla Walla peoples, reserved the preexisting rights of the Tribes to fish, hunt, gather, and graze in our ancestral territory in exchange for ceding millions of acres of land in what are now the states of Oregon and Washington.

Tribal Treaty Rights are potentially threatened by the development of Millennium Bulk Terminal as well as other proposed fossil fuel projects proposed across the Northwest. Increased rail traffic has the potential to increase air pollution from dust and train exhaust, cause greater risk of derailments and spills, and magnify dangers to tribal members accessing fishing site along the river. Increased vessel traffic along the Columbia River have the potential to increase spills to the river, endangering aquatic wildlife as well as impair air quality from ships.

The CTUIR has previously commented on the Millennium Bulk Coal Terminal, as well as many other projects that have been proposed throughout the State and region in recent years. As noted earlier in our previous comments, the Corps, in association with the other federal and state agencies with shared jurisdiction over these projects, must comprehensively evaluate in a programmatic manner the impacts of the dramatic, region-wide increase in fossil fuel (coal, crude oil, natural gas and others) development and transport. Absent any comprehensive analysis of their effects on the region's citizens, environment and economy, each discrete individual proposal will continue to evade cumulative impacts review and the potential impacts to tribal Treaty Rights will remain unaddressed.

Attached you will find three letters that bear on the concerns regarding potential impacts to Treaty Rights of the CTUIR. The first letter is from November 18, 2013 from the CTUIR DNR to ICT International regarding scoping comments for Millennium Bulk Terminal. In those comments DNR recommended consideration of impacts of additional train and vessel traffic, impacts that were not analyzed in the DEIS. The second letter is from March 28, 2014 regarding a similar project, the Tesoro-Savage Vancouver Energy Distribution Terminal. In that letter, the CTUIR Board of Trustees raised concerns regarding potential threats to treaty rights, including increased rail traffic impacts on tribal fishers and the increased risk of train accidents along the Columbia River. Finally, the third letter is from May 11, 2016 regarding the proposal of Union Pacific Railroad to develop 5 miles of second mainline in Mosier, Oregon. In that letter, the CTUIR Fish and Wildlife Commission raised concerns regarding the threats posed by the increase in rail traffic along the Columbia River and the potential impacts to the exercise of tribal Treaty Rights, among other concerns. Each of these letters contains relevant information that should be reviewed for regarding the potential impacts of the Millennium Bulk Terminal.

Draft Environmental Impact Statement; Clean Water Act §404/Rivers and Harbors Act §10 Permit(s)

The scope of the DEIS is too narrow to fully examine the potential effects that will result from permitting this facility. This narrow scope eliminates consideration of the impacts of train and vessel traffic from the coal mine to the ocean and fails to assess the impact of burning 44 million

tons of coal on global climate change. Without the appropriate analytical scope, the DEIS is incapable of adequately evaluating the potential impacts of this project on the rights of the CTUIR pursuant to the Treaty of 1855.

On the sixth page of the DEIS, a central failure of the document is apparent:

When considered in accordance with applicable laws and regulations, many of the activities of concern to the public, such as rail traffic, coal mining, shipping coal overseas, and burning exported coal in other countries, are outside the Corps' control and responsibility.

This statement disclaims any and all responsibility for the results of authorizing the project based on a lack of authority by the Corps to regulate many of the associated—and inescapable—project activities. This misses the point of the National Environmental Policy Act—to consider the direct, indirect and cumulative effects of the action and likely potential consequences. The Corps improperly maintains that its regulations allow review of project impacts only to the extent of its regulatory authority over the activities producing those impacts, notwithstanding the outcome—as here—that the project would undergo limited, deficient, and unduly circumscribed analysis as a consequence.

The Millennium Bulk Coal Terminal will result in up to 16 more trains per day (8 full trains arriving, and 8 empty trains departing) and up to 70 ships loaded a month. Those ships will generate 1,680 transits (840 empty ships and 840 fully loaded ships) of the Columbia River and estuary. Approximately 44 million tons of coal will be burned, contributing approximately 80 million metric tons of carbon dioxide into the atmosphere. None of these effects are considered. Failure to evaluate these impacts along the train and vessel routes as well as the climate impacts of the burning of coal renders the analysis contained in the DEIS critically defective—inadequate in determining effects on the Treaty Rights of the CTUIR and other tribes, and inadequate to fully and fairly examine effects on resources in the Columbia Basin and the wider environment.

Increased rail traffic along the Columbia River will pose additional dangers to tribal members who fish in and along the Columbia River, yet this is not addressed. The conclusion that the coal intended for Millennium will reach the market whether or not this project is built carries no weight; if that was a reasonable argument then no project would ever be denied no matter how disastrous or adverse to environmental harms.

Clean Water Act §401 Certification

The Washington Department of Ecology (WDOE) should deny the Clean Water Act §401 Certification for the Millennium Bulk Coal Terminal unless the project can demonstrate that the project will meet water quality standards. The State has the authority—and the responsibility—to issue such a denial where conditions exist such as those here—where a project clearly cannot provide the necessary assurance that state water quality standards will be met. Water quality degradation is likely to occur, contrary to the State's policy. WDOE is not bound by any federal

agency determination of water quality issues or their choice to narrowly focus the scope of review for a project. It should rigorously take steps to protect the quality of State waters, and not issue permits where reliable assurance that standards will be achieved is lacking, and designated uses will be impaired.

Other commenters on this project have noted the potential for the project to create substantial water quality problems, such as the U.S. Fish and Wildlife Service's conclusion that it would "measurably increase toxic pollutant concentrations" in water. The Washington Department of Natural Resources stated that the DEIS's estimated coal dust deposition rate in the Columbia River was "unrealistic," said that "local acidification can result from coal dust entering water along the Columbia River," and questioned the failure to consider long-term effects of coal dust deposition such as bioaccumulation.

A §401 Certification for this project is not appropriate absent assurances of meeting those water quality standards. The project would not protect designated and existing uses, like salmon, aesthetics, and navigation. It would not comply with Washington's narrative and numeric water quality standards for toxic pollutants, turbidity, aesthetics, and other parameters. It would not satisfy the state's Antidegradation Policy.

There is little assurance that water quality will be protected, or that standards will be met; risks inordinately outweigh benefits; and tribal Treaty Rights will be unjustifiably subject to higher threats of damage, infringement, erosion, and curtailment.

Mitigation

No adequate mitigation plan or proposal has been developed to make up for the numerous harms and shortcomings identified above—to tribal rights and resources, to water quality, and to other resources—that the project is likely to cause. Limited mitigation ideas have been suggested, but as yet there is no certain or complete package, or reliable assurance that there exists long-term financial backing and support for it from the various entities that have come and gone over the history of this proposal. As we stated previously, "[i]n our experience, much harm to natural resources has been authorized in the past based on unduly optimistic, excessively rosy scenarios and proposals for mitigation that turned out to be woefully insufficient."

DNR understands that unavoidable significant impacts include increasing certain rail line segments beyond their capacity, potentially diminishing rail safety and increasing demand for more rail construction, increased noise along the rail line, additional delays at crossings and backups, increased greenhouse gas emissions, and increased risks of train and vessel spills in the Columbia River and the estuary. Again, these have been identified as "**unavoidable**," and—one would assume—thus "un-mitigate-able." Resource agencies have noted that mitigation "may" reduce impacts to tribal resources "**but would not eliminate them**."

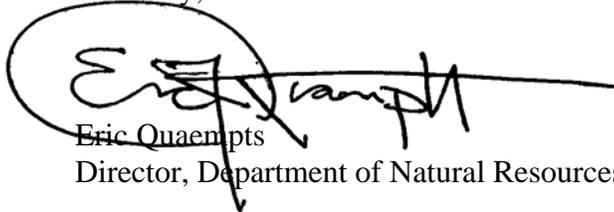
Conclusion

Millennium Bulk Terminal should not proceed unless and until a full and complete review of the environmental impacts of the project is conducted including a complete assessment of the potential impacts to the rights and resources of the CTUIR reserved under the Treaty of 1855. The information and materials that have been produced as part of the Millennium Bulk Terminal applications and permitting processes are flawed, inadequate, and insufficient to accurately depict the project and the full range of its potential impacts, particularly as they concern tribal rights, interests, and resources. Until a comprehensive analysis has been conducted, no permits for the facility should be issued.

This project, as well as many other fossil fuel projects for the transport, storage, processing, and/or further distribution of fossil fuels (coal, oil, and natural gas) create significant risks to the resources of the region while generating little or no benefits to this region.

The CTUIR DNR appreciates the opportunity to provide these comments and for your consideration. If you have any questions, please contact Audie Huber, Inter-Governmental Affairs Manager, at (541) 429-7228.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Quaempts", is written over a circular stamp. The signature is fluid and cursive, with a long horizontal line extending to the right.

Eric Quaempts
Director, Department of Natural Resources

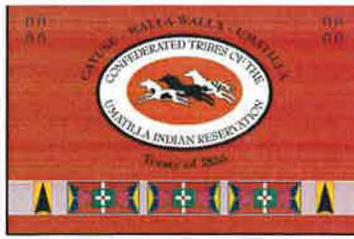
Cc: Columbia River Inter-Tribal Fish Commission

Attachments:

CTUIR DNR November 18, 2013 letter to ICT International re: Millennium Bulk Terminal.

CTUIR Board of Trustees March 28, 2014 letter to Col. Estok re: Tesoro Savage Terminal.

CTUIR Fish and Wildlife Commission May 11, 2016 letter to Col. Aguilar re: UPRR Mosier.



November 18, 2013

Millennium Bulk Terminals-Longview EIS
c/o ICF International
710 Second Avenue, Suite 550
Seattle, WA 98104

Subject: Scoping Comments on Proposed Millennium Bulk Terminals Longview Shipping Facility

Delivered Electronically to: comments@millenniumbulkeiswa.gov

To Whom It May Concern:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) appreciates the opportunity to comment on the proposed Millennium Bulk Terminals Longview Shipping Facility Project (Project). The CTUIR DNR is concerned that the Project may impact tribal treaty fisheries, traditional use areas, and the habitats and cultural resources necessary to support and sustain them. We have additional concerns regarding the cumulative impacts of the Project and others proposed in the region.

The Environmental Impact Statement (EIS) should include adequate information to make an informed judgment as to the impacts to tribal Treaty Rights, traditional use areas and the near- and long-term health and sustainability of tribal First Foods. The EIS should also address how the federal government would be fulfilling its Trust Responsibility to the CTUIR and other Indian Tribes if a federal agency was to ultimately authorize this Project.

The U.S. Army Corps of Engineers (Corps), the Washington Department of Ecology (WDOE) and Whatcom County have begun an environmental review for a similar coal export terminal (Gateway Pacific) in Whatcom County. WDOE and the County have indicated their intent to examine all of the impacts of that project, including indirect effects such as increased rail traffic, vessel traffic, additional mining, and greenhouse gas emissions of coal combustion. This comprehensive approach should be followed in the case of the Millennium facility as well.

Impacts from the Project will be felt far and wide. Rail impacts (traffic, emissions, and derailment risks) will extend from the Powder River Basin to the Project site. Ocean transport will cause increased emissions, collision risks, and near-shore effects from Longview, through the Columbia River estuary, and across the sea. Greenhouse gas emissions will rise from the eventual combustion of the mined and transported coal, resulting in increasing temperatures, ocean acidification and mercury deposition in the Northwest. The Millennium facility will add to environmental burdens that will result if the many other coal and oil transport projects in the region come to fruition. It should not be analyzed in isolation, but in conjunction with the other proposed projects.

CTUIR DNR Letter to ICF International
Re: Millennium Bulk Terminals—Longview: Scoping Comments
November 18, 2013
Page 2

Fish and Fishing Site Impacts

The CTUIR has a treaty-secured “right of taking fish . . . at all . . . usual and accustomed stations” along the Columbia River and its tributaries. In order for this right to have any meaning, there must be fish to take, they must be healthy and sustainable, and access must be available. The Project will potentially negatively impact these sites and the fish that migrate past them. The additional trains may also adversely affect the ability of tribal members to access treaty reserved fishing sites along the Columbia River and other tributaries due to the increased danger at crossings. The EIS should assess these potential impacts. Fish are but one of the many tribal First Foods, and they all should be considered when weighing the effects of the Project.

Cultural Resources

Rail transit and operations associated with the Project will affect traditional cultural properties governed by the National Historic Preservation Act. The transit corridor will pass through or otherwise affect tribal trust lands and traditional use areas. Information pertaining to changes in rail usage is necessary to assess the effects the proposed undertaking will have on those properties.

Air Quality

Air quality may deteriorate as a result of the Project, from additional diesel emissions, coal dust, and the burning of the coal itself. Mercury deposition should be specifically examined; the CTUIR is particularly concerned about the alarming evidence of toxic contaminants in fish, water and across the landscape where we commonly obtain our First Foods.

Government-to Government Consultation

These are just a few of the CTUIR’s many concerns; there are many more that cannot be fully detailed here. We request consultation on a government-to-government basis with the Corps on this Project. The EIS should include and incorporate adequate information for us and the region to make an informed decision regarding the merits and drawbacks of this and all the other projects that will have similar significant effects. Please contact Audie Huber, our Inter-Governmental Affairs Manager, at audiehuber@ctuir.org or (541) 429-7228.

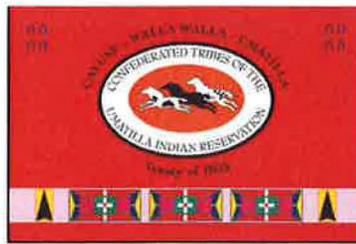
Sincerely,



 Eric Quaempts
Director, Department of Natural Resources

Confederated Tribes *of the*
Umatilla Indian Reservation

Board of Trustees & General Council



46411 Timine Way • Pendleton, OR 97801
(541) 429-7030 • fax (541) 276-3095
info@ctuir.org • www.umatilla.nsn.us

March 28, 2014

Col. Bruce A. Estok, District Engineer
US Army Engineer District, Seattle
4735 East Marginal Way South
Seattle, WA 98134-2385

Subject: CTUIR Comments on NWS-2013-0962, Proposed Tesoro-Savage Vancouver Energy Distribution Terminal

Dear Colonel Estok:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) has significant concerns regarding NWS-2013-0962, Proposed Tesoro-Savage Vancouver Energy Distribution Terminal. The facility will be a major undertaking that could have serious, profound, far-reaching and long-lasting effects on the rights and interests of the CTUIR and its members in the Columbia River Basin. The CTUIR objects to the issuance of a Nationwide Permit under the “maintenance” category because the proposed use would be a significant change from the currently permitted use. This change warrants reopening the permit to evaluate the impacts in a thorough and comprehensive manner. Specifically, the evaluation should include adequate information to make an informed judgment as to the impacts to tribal Treaty Rights, traditional use areas and the near- and long-term health and sustainability of tribal First Foods. The CTUIR formally requests government-to-government consultation on this project to answer the questions posed in this letter and to collaboratively address the potential impacts to Treaty Rights.

The Tesoro-Savage Vancouver Energy Distribution Terminal is being considered under the Corps’ Nationwide Permits 3 and 12. Under Nationwide Permit General Condition 17, “[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.” The CTUIR believes that this project may substantially risk impairing rights and resources of the CTUIR protected under the Treaty of 1855, 12 Stat. 945. The terminal will be located on the Columbia River, the migration corridor for the downstream and upstream passage of salmon, lamprey and other fish species in which we and other tribes have rights reserved in treaties with the United States. Rail traffic transporting highly volatile oil will also increase in the Columbia River Basin, passing along Zone 6 (the principal mainstem tribal fishing zone) and various Columbia River tributaries where tribal members continue to actively fish pursuant to the treaties and federal court orders interpreting them.

A Nationwide Permit for this activity is also inappropriate because this work is far beyond routine maintenance and is essentially restoration and reconfiguration of the existing structure to accommodate a greatly-expanded use. The significant redevelopment of the facility and use for an oil terminal to transfer 360,000 barrels of oil a day to ocean-going vessels is a sufficient departure from the existing permit and of sufficient public concern that the permit should be reopened under Corps authority contained in 33 CFR § 325.7 (Modification, suspension, or revocation of permits).

Because this project has the potential to impact Treaty Rights, it must not go forward until, at a minimum, government-to-government consultation requested by the CTUIR is completed. We welcome discussions with the Corps pursuant to your responsibilities as the trustee of natural resources the CTUIR reserved in the Treaty of 1855. In furtherance of this process, we have developed a technical analysis of the proposed work as the CTUIR currently understands it, which is attached. The document contains concerns and questions that will need to be reviewed and answered during consultation process. The CTUIR requests that an Environmental Impact Statement (EIS) be done regarding this project that addresses all direct, indirect and cumulative effects. The EIS should include and incorporate all the necessary information to enable the Corps and the region to make an informed decision regarding the merits and drawbacks of this project and other projects that will have similar and related effects.

The CTUIR appreciates your attention to our comments and concerns. Please have your staff contact Audie Huber, Inter-Governmental Affairs Manager, at audiehuber@ctuir.org or (541) 429-7228 if you have any questions or to schedule the government-to-government consultation.

Sincerely,



Gary Burke
Chairman, Board of Trustees

GB: ah

Attachment: Initial Technical Comments on NWS-2013-0962,

Cc: Steve Manlow, Project Manager, U.S. Army Corps of Engineers, Seattle District
The Honorable Senator Ron Wyden
The Honorable Senator Jeff Merkley
The Honorable Senator Maria Cantwell
The Honorable Senator Patty Murray

Initial Technical Comments on NWS-2013-0962 Proposed Tesoro-Savage Vancouver Energy Distribution Terminal

Introduction

On March 3, 2014, the CTUIR Department of Natural Resources (DNR) received a notice from the Corps of Engineers (Corps) regarding a proposed Nationwide Permit for maintenance work at the Port of Vancouver, in Vancouver, Washington. The CTUIR was given 10 days to comment on this proposal and DNR requested an additional 15 days. NWS-2013-0962, the Tesoro-Savage Vancouver Energy Distribution Terminal, is being considered under the Corps' Nationwide Permits 3 and 12.

Nationwide Permits are inappropriate and would be insufficient to meet the Corps' public interest review obligations in this instance. First, under Nationwide Permit General Condition 17, "[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." This project will impact reserved rights and resources of the CTUIR protected under the Treaty of 1855, 12 Stat. 945. Second, Nationwide Permits are inappropriate because the proposed work is far beyond the scope covered by either of the suggested Nationwide Permits. The work is not routine maintenance, but rather a restoration and reconfiguration of the existing dock structure to accommodate greatly-expanded uses. For these and the other reasons discussed below, the CTUIR DNR requests that the Corps conduct a full public interest review and not use the Nationwide Permits and their abbreviated review processes.

Discussion

The Northwest is currently under siege by a series of proposals to rapidly expand the transport of various fossil fuel products (oil, coal and natural gas) through enlarged or entirely new means and mechanisms of transportation. Based on the limited information available so far on this and the other proposals, many serious questions and concerns regarding resulting impacts remain unanswered.

The Tesoro-Savage terminal will be located on the Columbia River, the migration corridor for the downstream and upstream passage of salmon, lamprey and other fish species which the CTUIR and other tribes have rights to harvest that were reserved in treaties with the United States. Rail traffic will also increase along the Columbia River corridor, passing through Zone 6, the principal mainstem fishing area where large numbers of tribal members make their living exercising the Treaty-reserved rights.¹ The Tesoro-Savage facility will detrimentally impact tribal First Foods and the exercise of our Treaty Rights based on them, as well as other natural

¹ The proposed restoration and modification of the dock will enable the operation of a complex that will transfer 360,000 gallons of crude oil per day to ocean-going ships. The oil will be shipped to Vancouver by rail. Approximately 262 tankers of crude oil (assuming 500,000 bbls/vessel and 360,000 barrels per day) will traverse the estuary per year, and 8 to 10 trains per day will cross the Columbia River Basin in addition to current rail traffic. This increase is significant, particularly when there appears to be no upper limit on the number of trains that can transport fossil fuels or upper limit on the amount of fossil fuels transported.

and cultural resources. The Corps' review of this project raises issues of tribal sovereignty, co-management authority, and trust obligations.

The CTUIR's Treaty-secured "right of taking fish" extends to all "usual and accustomed stations" along the Columbia River and its tributaries. In order for this right to have any meaning, there must be fish to take, they must be healthy and sustainable, and access must be available. The project may negatively impact tribal fishing sites and the fish that migrate past them. Additional trains may also adversely affect the ability of tribal members to access tribal fishing sites due to increased obstruction of foot and vehicle traffic at crossings. More train traffic may also result in derailments and spills of oil and other pollutants into the rivers. Furthermore, the Corps cannot and should not make any dispositive decisions regarding permitting of the project until all necessary coordination and consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service have been completed.

The Lower Columbia River Estuary is particularly important to salmon life history and development. The tribes and many federal and state agencies have spent enormous time and resources over many decades in efforts to protect and restore salmon in the Pacific Northwest. A healthy estuary has been identified as key to successful recovery. The Tesoro-Savage project and others like it could undermine much of the progress and improvements that have been made. The river, its water and its fish would be subject to significant risks from construction and operation of the facility and the entire range of activities associated with it. They are likely to degrade the immediate environment (for example, from increased emissions) and will exacerbate broader climate change effects, which are already occurring, and to which our people and our culture are particularly vulnerable.

In addition, rail transit and operations associated with the project will affect traditional cultural properties governed by the National Historic Preservation Act (NHPA). The transit corridor will pass through or otherwise affect tribal trust lands and traditional use areas. Information pertaining to changes in rail usage is needed to assess the effects the proposed undertaking will have on those properties. The dock itself and the upland area are within an Archaeological District that has been determined eligible for the National Register of Historic Places under the National Historic Preservation Act (NHPA). This action has the potential to adversely impact the Archaeological District and must therefore involve consultation with tribes and the Washington Department of Archaeology and Historic Preservation. It is unclear whether a traditional use study has been done to determine whether it is a historic property of religious and cultural significance to an Indian tribe. Such an analysis is necessary to determine tribal use of the area. Finally, the National Park Service has commented specifically on the potential impacts to adjacent and nearby historic properties, which the CTUIR incorporates herein by reference.²

Instead of the circumscribed analysis accompanying Nationwide Permits, the Corps should conduct an Environmental Impact Statement for the proposed project, which is linked to other proposed projects subject to permit actions in the Columbia River corridor. The EIS should not

² See <http://www.efsec.wa.gov/Tesoro%20Savage/Agency%20scoping%20comments/Agency%20SEPA%20Scoping%20Comment%20004.pdf>

analyze Tesoro-Savage in isolation, but in conjunction with those other regional fossil fuel transport proposals. Both individually and collectively, the projects raise issues related to the environment, economics, aesthetics, air quality, wetlands, historic and cultural properties, fish, wildlife, plants, water quality, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, energy needs and production, public safety, food production, and property use and ownership, for both Indian and non-Indian communities.

Specific questions to be answered in an Environmental Impact Statement review of this project include, but are not limited to, the following:

- How many trains, and of what length, will convey the oil to the facility per day, week, and month?
- Is there a maximum or upper limit on the amount of oil and/or the number of trains and/or ships that will be used?
- What route(s) will the trains take?
- What type of auxiliary in-water services will be required (e.g., tugboats)?
- Will any dredging, or increased/altered maintenance dredging, be required? If so, how often?
- What are the capabilities of the U.S. Coast Guard in the event of an oil spill at the facility? In the estuary? Along the Columbia River upstream, in the event of an accident or spill or that reaches the River?
- What is the source and ultimate destination of the oil? Is it Bakken shale crude oil which has recently been the subject of a United States Department of Transportation emergency restriction?³
- Have the potential characteristics and impacts of spills been examined for the fuel proposed to be shipped through the Port of Vancouver?
- For what purpose was the dock originally constructed?
- What are the potential impacts to threatened and endangered species from operation of the oil terminal and dock?
- What are the oil spill risks and impacts along the rail route, at the terminal, in the Columbia River, and in the Pacific Ocean?
- How much will rail and ship traffic increase?
- What will be the impacts to streams, wetlands, fish and fishing areas?
- What will be the air quality and respiratory impacts?
- Rail tank car safety
- Impacts of the terminal on local businesses (including tribal)
- Types of oil shipped (including their health risks), spill clean-up plans and contingencies
- Climate change impacts
- Impacts on historic and cultural resources and properties
- Effects on the Columbia River Gorge National Scenic Area

³ [http://www.dot.gov/sites/dot.gov/files/docs/Emergency%20Restriction%20-%20Prohibition%20Order%20\(Docket%20DOT-OST-2014-0025\).pdf](http://www.dot.gov/sites/dot.gov/files/docs/Emergency%20Restriction%20-%20Prohibition%20Order%20(Docket%20DOT-OST-2014-0025).pdf)

Finally, the Corps has the authority to reopen permit NWS-93-25 issued to the Port of Vancouver. The regulations for processing Department of the Army permits provide for authority to reopen a permit in order to modify, suspend or terminate permits when the public interest necessitates it under 33 CFR § 325.7(a).⁴ Due to the nature of the potential impacts of the proposed dock operations, the CTUIR believes it is in the public interest to reopen the permit and conduct an EIS to evaluate the impacts of these operations. Impacts have the potential to be significant, particularly when there appears to be no upper limit on the numbers of trains or ships to transport fossil fuels to or from the dock. Recently in scoping by Washington State regarding the location of the Tesoro Savage facility, over 30,000 comments were received as well as a 1100 page scoping report.⁵

Conclusion

The CTUIR DNR requests that the Corps not use Nationwide Permits for this project, and instead develop an Environmental Impact Statement. The potential direct, indirect and cumulative impacts are significant and more substantial than those contemplated under the Nationwide Permit review.

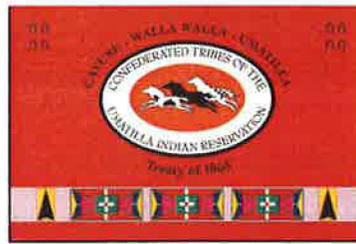
⁴ 33 CFR § 325.7 Modification, suspension, or revocation of permits.

(a) General. The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this section.

⁵ <http://www.efsec.wa.gov/Tesoro%20Savage/Scoping%20Report/Scoping%20report%202-24-14.shtml>

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Board of Trustees & General Council



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(541) 429-7030 • fax (541) 276-3095
info@ctuir.org • www.umatilla.nsn.us

May 11, 2016

Shawn Zinszer, Regulatory Chief
Army Corps of Engineers, Portland District
P.O. Box 2947
Portland, OR 97208-2946

Re: UPRR Joint Permit Application No. 2014-364, Construction of 4.02 miles of track creating a 5.37 miles second mainline track near Mosier, OR

Dear Mr. Olmstead:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR or Umatilla Tribe) Fish and Wildlife Commission (FWC) appreciates the opportunity to provide input on the proposed track construction near Mosier, Oregon that will result in 4.02 miles of new track and a new 5.37 mile second mainline track. The CTUIR FWC has serious concerns regarding this project as it entails significant construction over two tributaries to the Columbia River and numerous wetlands, will increase rail traffic on the Columbia River and also allow for increased train speed and length. Additionally, the citizens of the CTUIR and other tribes access the river across railroad tracks, often at unmarked crossings to access the Columbia River to exercise their constitutionally-protected Treaty reserved right to fish. Increased rail traffic increases safety risks to tribal members crossing the tracks. Further, because the project potentially impacts Treaty rights, both directly and indirectly, the use of a Nationwide permit for this project is inappropriate. The CTUIR requests that the Corps of Engineers remove this project review form the Nationwide process and put it on an individual permit review process. Such a move will allow the Corps to conduct the required analyses to ensure there is little to no impacts to Treaty rights and the resources on which they depend.

The Umatilla Tribe's Constitutionally-Protected Treaty Fishing Rights

The Supreme Court of the United States has repeatedly recognized the significance of the treaty right to fish at off-reservation usual and accustomed places, holding that the right is “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Washington v. Washington State Comm'l Pass. Fishing Vessel*, 443 U.S. 658, 680, 99 S. Ct. 3055, 3071-3072 (1978), quoting *United States v. Winans*, 198 U.S. 371, 380 (1905). This treaty right to fish is a property right, protected by the Fifth Amendment to the Constitution of the United States. See *Muckleshoot Indian Tribe v. United States Corps of Engineers*, 698 F.Supp. 1504, 1510 (W.D. Wash. 1988), citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-412, 88 S.Ct. 1705, 1710-1711 (1968). The right to take fish includes a right to cross private property to access those areas, “imposing a servitude” upon the land. *Winans*, 198 U.S. at 381. Since 1968, the Umatilla Tribe has also protected these treaty rights as a plaintiff in *United States v. Oregon*, CV 68-513-KI, in the U.S. District Court for the District of Oregon.

The treaty fishing right carries with it an inherent right to protect the resource from despoliation from man-made acts. “[A] fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.” *United States v. Washington*, 506 F.Supp. 187, 203 (W.D. Wash.

1980). *See also, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (Tribes with Treaty reserved fishing rights are entitled to something more tangible than “merely the chance...occasionally to dip their nets into the territorial waters.”) The ecosystem necessary to sustain the fish cannot be diminished, degraded or contaminated such that either the fish cannot survive, or that consuming the fish threatens human health. *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. Mar. 29, 2013)(State “impermissibly infringed” tribes’ treaty based fishing right in Washington by constructing culverts that “reduced the quantity of quality salmon habitat, prevented access to spawning ground, reduced salmon production...and diminished the number of salmon available for harvest.”) *See also, e.g., Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034-35 (9th Cir. 1985)(Tribe’s fishing right can be protected by enjoining ground water withdrawals that would destroy eggs before they could hatch). This project, both in its immediate construction impacts, and its resultant long-term increase in rail traffic and speed, carry impermissible potential impacts to both the access of the treaty fishing right, and degradation of the ecosystem on which those treaty resources depend.

According to the JARPA permit document, the proposed project will construct approximately four miles of new double-track rail line, which includes two new bridges over tributaries to the Columbia River and going through multiple wetlands and adjacent lakes, many of which are spawning habitat for salmonid species listed on the Endangered Species Act. The proposal would also construct two new signal cabins, which are curiously omitted from the permit plans based on the applicant’s conclusory statement that “there are no waters fo the United States what will be affected” (Project No. 2014-364 JARPA at pp 6-7.) The project also calls for over 1.5 acres of fill to open waters and wetlands. Further, the project includes a new paved area that directs any runoff from the increased train traffic to bare ground, possibly adjacent to wetlands, for “infiltration” into the ground. Given that the runoff will largely come from train traffic, and given the 250% increase in rail traffic between 2013 and 2014¹, it is likely that some type of contaminants would pollute this runoff. Any runoff that infiltrates into the bare ground will then go into the groundwater, which is often hydraulically connected to the Columbia River trough the Gorge. The potential for the project to contaminate the Columbia River and adjacent wetlands, in which listed salmonids – treaty resources that the Corps has a trust duty to protect - is a potential effect the Corps must analyze, and is another reason a Nationwide Permit should not be used. Similarly, the potential impacts from the construction of bridges, cabins and tracks over sensitive wetlands and lake ecosystems in which listed species spawn and travel through requires the Corps abandon the use of the Nationwide process.

The Project will Likely Harm the Umatilla Tribe’s Treaty Resources and Interests

This proposal will increase rail traffic in the Columbia River Gorge. In a one page document prepared by Union Pacific Railroad entitled “Union Pacific to Enhance Infrastructure in Mosier” submitted in their public outreach effort, UPRR stated:

¹ http://www.oregonlive.com/environment/index.ssf/2014/07/everything_you_need_to_know_ab.html

The Federal Railroad Administration speed limit on the new track will be 35 mph. Union Pacific currently moves about 25 to 30 trains per day through Mosier. The new double track will allow us to move 5 to 7 more trains per day through Mosier.

This statement reveals several things. First, double-tracking this area will increase the railroad speed. The current speed limit in Mosier is 30 miles per hour.² Second, UPRR estimates that this project will increase traffic through in the area by approximately 25%. Also, the Columbia River Gorge is essentially a closed system for trains. If seven more trains go through Mosier, seven more trains go through Rufus, Biggs, The Dalles, Celilo, Hood River, Cascade Locks, etc. Increased traffic in Mosier generates impacts up and down the Columbia in the form of additional trains, pollution, noise and risks of derailment. Finally, while train traffic in Mosier is currently limited to 30 miles an hour, trains up river, between The Dalles and Boardman, travel up to 70 miles an hour.

The increased railroad traffic all along the Columbia River, particularly in Zone 6 between Bonneville and McNary Dams, will impair the Tribe's interests in the following ways: damage to treaty resources and the ecosystems they depend on, eradication of tribal fishing areas, impeded access to tribal fishing areas and increased risks to tribal member safety, and damage and access to cultural resources.

The ecosystem and treaty resources will suffer catastrophic damage from accidents and spills.

The Project would result in an increase in shipment of tank cars, many of which may carry crude oil or similarly dangerous products, traveling in the Columbia River Gorge and adjacent to the Columbia River, where many tribal fishing areas are located. Train derailments, shipping spills, and fire and explosions from those derailments are a certainty. This is evident from the cascade of derailments across the United States and Canada reported in the media. For example, on February 17, 2015, a town in West Virginia suffered the derailment of a unit train of more than 100 oil tank cars carrying Bakken crude. Fourteen of the tankers ignited in an explosion, and at least one went into the Kanawha River. Hundreds of families were evacuated, and two downstream water treatment plants were closed. Photos of the explosion and subsequent tour of the scene as reported by the Boston Globe and Newsweek are below.

² <http://www.fogchart.com/Down/Beta/PORTLAND.pdf>

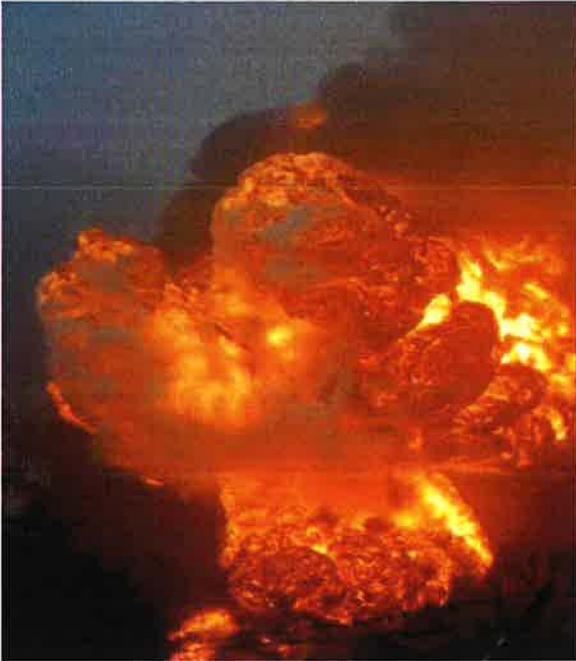


Photo caption: "Steve Keenan/The Register-Herald via Associated Press."

John Raby, *Oil-bearing train derails in West Virginia, setting off explosion*, The Boston Globe, February 17, 2015, at <http://www.bostonglobe.com/news/nation/2015/02/17/west-virginia-train-derailment-causes-oil-spill-and-fires/opo6XRXLUV0URv8EiDSYQJ/story.html>

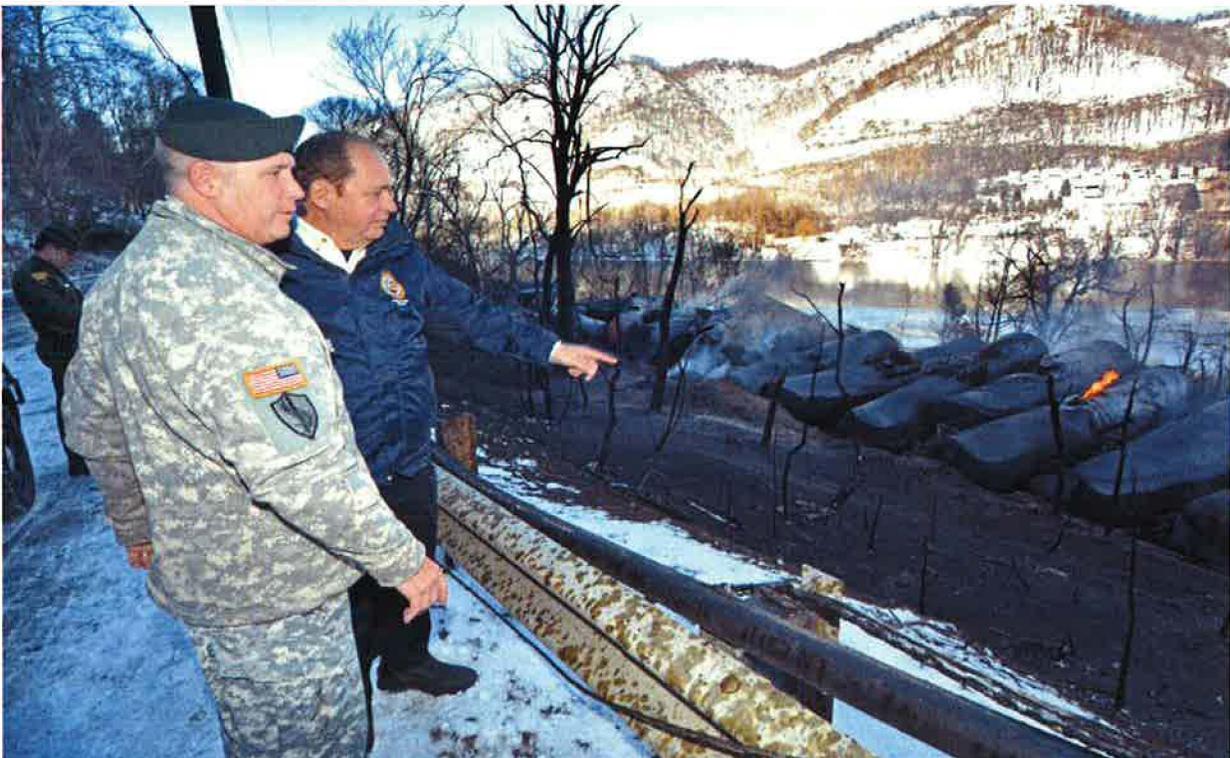


Photo caption: West Virginia Governor Earl Ray Tomblin surveyed the wreck site on February 17. "Many of the tanks had gaping holes in the tops where they had exploded," he tells Newsweek. Office of Governor Earl Ray Tomblin.

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Max Kutner, *West Virginia Begins Investigating Massive Train Derailment*, Newsweek, February 20, 2015, at <http://www.newsweek.com/west-virginia-begins-investigating-massive-train-derailment-308428>.

The day before, February 16, witnessed the derailment and spill of more than 260,000 gallons of crude oil near Timmons, Ontario. The photograph below, from the Transportation Safety Board of Canada, shows workers fighting the oil spill fire.



Photo caption: “In this Feb. 16, 2015, file photo, provided by the Transportation Safety Board of Canada, workers fight a fire after a crude oil train derailment south of Timmons, Ontario. The train derailment this month suggests new safety requirements for tank cars carrying flammable liquids are inadequate, Canada’s transport safety board (sic) announced Monday, Feb. 23, 2105.”

Rob Gillies, *Canada safety board says latest oil train derailment shows new safety standards are inadequate*, U.S. News, February 23, 2105, at <http://www.usnews.com/news/world/articles/2015/02/23/canada-oil-train-accident-shows-new-safety-rules-inadequate>.

While the U.S. Department of Transportation is considering new standards for rail cars, newly built tanks cars do not appear to reduce the risk of accidents and spills as “both the West Virginia accident and the oil train derailment and fire in Ontario involved recently built tank cars that

were supposed to be an improvement,” but the Canadian Transportation Safety Board said these new cars still “performed similarly” to the older models. *Id.* It is an unfortunate reality that “[t]he number of gallons spilled in the United States in [2013], federal records show, far outpaced the total amount spilled by railroads from 1975 to 2012.” Clifford Kraus and Jad Mouawad, *Accidents Surge as Oil Industry Takes the Train*, N.Y. Times, Jan. 26, 2014, at A1, and <http://www.nytimes.com/2014/01/26/business/energy-environment/accidents-surge-as-oil-industry-takes-the-train.html>. If the Project goes forward, it is only a matter of time before a similar accident brings ecological catastrophe to the Columbia River, devastating the fishery and other resources the Umatilla Tribe depends on and has worked so hard to protect and restore. A derailment and spill along the Columbia River will not only be tragic for the resource, it will also work immeasurable hardships on the many tribal members that depend on the Columbia River and its riches for their living. It will likely eradicate productive fishing areas in the immediate area of the spill, and the consequences will be along the entire River, as a spill could wipe out stocks of salmon and steelhead that are already listed under the Endangered Species Act, erasing the many years and billions of dollars of effort that has gone into restoring the resource.

Increased rail traffic will inhibit access to fishing areas and endanger tribal members.

On both sides of the Columbia River, tribal members cross train tracks multiple times on a daily basis to exercise their treaty fishing rights. There is a great deal of scaffold fishing up stream and downstream of the project area that is visible from satellite images on Google Earth. This fishing is most often restricted by the crossing of the railroad tracks.

The increase in the number of trains, and possibly the length of such trains, will delay tribal members’ ability to cross the tracks to access fishing areas. Such delays become acute during adverse or impending weather, when members must sometimes get to their nets in the water as quickly as possible.

The increase in rail traffic and the speed of that traffic will also increase the incidence of tribal members stuck by rail cars. Tribal members are at risk of rail-strikes when crossing the tracks to access fishing sites, In-Lieu sites, Treaty Fishing Access Sites, homes and markets for the sale of harvested fish. Recently, on February 21, 2015, a man was killed by train strike near Kalama, WA. <http://www.khq.com/story/28168097/railroad-man-on-track-dies-after-being-struck-by-train>. According to railroad statistics, 27 people were killed by train strikes across Washington State in 2014.³ In Oregon, 11 were killed in 2015. *Id.* The likelihood of train-strike fatalities, injuries and property damage will increase from the increase in rail traffic and speed that would result from the Project.

Increased rail traffic will damage cultural and religious tribal interests.

The increased rail traffic will affect properties and items governed and protected by the National Historic Preservation Act, the Archaeological Resources Protection Act, the Native American

³ <http://safetydata.fra.dot.gov/Officeofsafety/publicsite/Query/TenYearAccidentIncidentOverview.aspx>

Graves Protection and Repatriation Act and other laws. The transit corridor passes through tribal trust and traditional use areas. There are ancestral human remains, traditional cultural properties, historic properties of religious and cultural significance to Indian Tribes, and archaeological resources and sites in these areas. Any accidents, spills, explosions and related fires can damage these properties and items, and cause irreversible loss. Similarly, the increased traffic could result in increased risks of earthquake, liquefaction, or landslide, rail caused fires (without derailment), contaminant leakage onto tracks and sites, all of which could damage cultural and religious resources.

All of the potential impacts discussed above counsel for removal of the project review from the abbreviated Nationwide process, and the conduct of a robust review under the individual permit process. Moreover, it appears the Corps does not have accurate and complete information about the project before it on which to make a decision.

The permit application contains inaccurate, inconsistent and incomplete information.

There are inaccuracies and inconsistencies in the application as well. For instance, in the November, 2014 Project Purpose and Need and Alternative Analysis, it stated that trains along this route can range up to 12,000 feet and that the siding in Mosier siding is the shortest in the 206 mile subdivision. In conversations with UPRR it was clarified that UPRR does not run 12,000 foot trains, though there is nothing preventing them from doing so. The average length of train in the Gorge is 6,200 feet, half the length referenced in the report prepared by CH2M Hill. Also, Mosier is not the shortest siding in the Portland subdivision. From our information, the Mosier siding is 6,751 feet. The Bridal Veil siding is 6,360. The report contends that “[s]tandard trains currently operating on the route can range in length up to 12,000 feet, and many of these standard-length trains are unable to use the Mosier Siding for passing.” However, most of the sidings between Troutdale and The Dalles, are less than 12,000 feet including Sandy (10,617 feet), Bridal Veil (6,360 feet), Dodson (10,617 feet), Cascade Locks (6,751 feet), and Meno (9,916 feet). A chart of the siding length and locations is attached. Further, in response to cultural resource concerns by Catherine Dickson, the contractor stated that “the total number of trains per day is anticipated to remain similar to existing levels. The existing main line track speed limit would not be increased as a result of the project.” A potential increase of 28% of train traffic is not similar to existing levels. Further, as noted above, in one pager, “Union Pacific to Enhance Infrastructure in Mosier,” the speed limit will increase from 30 mph to 35 mph. The point of all of these inconsistencies is that the information before the Corps at this time is inaccurate. The project needs an individual permit review process, not the abbreviated whitewashing of the Nationwide process.

At a staff meeting with the Corps of Engineers regarding this permit on April 15, 2016, Corps staff expressed the opinion that the increased rail traffic of this project would be an indirect effect of this project. However, the Corps also did not know whether they could deny a permit if the indirect effects of the project had more than a de minimus impact on tribal treaty rights. This is a critical issue. The CTUIR believes that any impact by Corps authorized projects on treaty rights is unacceptable. Further, whether the impacts of this project are direct or indirect, the results will increase rail traffic and that will affect tribal fishers. The CTUIR would like a formal response to the question of whether or not the increased rail traffic and the threats that increase pose to tribal fishers and potential impacts on Treaty rights are direct or indirect effects of this project?

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Project elements have changed.

UPRR has proposed the transfer of 2.82 acres of land from the Oregon Parks and Recreation Commission (OPRC) on September 23, 2015 in order to construct the second mainline construction.⁴ On April 27, 2016, the OPRC unanimously rejected the proposal by UPRR to secure the lands from OPRC for the expansion. This denial will affect the project proposal. Since the project can no longer as designed, how will the Corps address mid-review changes?

The project is currently under county review.

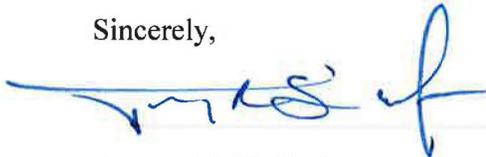
Finally, the Wasco County Planning Commission is currently reviewing the UPRR application under county rules that implement the Columbia River Gorge National Scenic Area Act (Scenic Area Act). Until this use is authorized under the county review process, with all limitations and conditions, Corps review of the project under a Nationwide permit is premature. The Scenic Area Act is federal law, and county ordinances implementing that law are federal in nature. Therefore limitations on state and local authority over railroads are inapplicable to county actions under the Scenic Area Act.

Conclusion:

Until these questions are answered, it remains unclear whether the Corps is willing or able to address treaty impacts of this project. Please provide the answers to these questions to Brent Hall, Tribal Attorney at 541-429-7200.

We look forward to consulting with the Corps on this issue further to address potential impacts to treaty rights.

Sincerely,



Jeremy Wolf, Chair
Fish and Wildlife Commission
Confederated Tribes of the Umatilla Indian Reservation

Cc: Wasco County
Yakama Nation Fish and Wildlife Committee
Warm Springs Fish and Wildlife Committee
Nez Perce Tribe Fish and Wildlife Committee
Paul Lumley, Executive Director, CRTIFC

⁴ <http://www.oregon.gov/oprd/Documents/Commission/2016.4-Salem/April6.pdf>