

# ATTACHMENT I

## Staff Response to Appeal PLAAPL-16-10-0003

**Appeal Number: PLAAPL-16-10-0003**

**Appellant: Confederated Tribes and Bands of the Yakama Nation**

Grounds for appeal provided by the applicant are listed below in **bold font**; Staff's response follows each ground in regular font. Staff added numbers to simplify references during discussion.

### **1. The decision violates the Yakama Nation's Treaty protected rights.**

Several conditions of approval were included in Staff's recommendation to the Planning Commission to ensure the protection of Treaty Rights and compliance with the NSALUDO. Staff's recommendations were based on written comments received prior to August 30, 2016 by the Confederated Tribes of the Umatilla Indian Reservation. The concerns focused on ecosystem health in the event of a disaster, elimination of fishing access, and damage to cultural resources. Impacts to the natural environment are discussed throughout this report. The conditions of approval responding to Treaty Rights concerns not already addressed by other conditions of approval included:

- "The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: one east of the project area, and one west of the project area within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes Umatilla Fish and Wildlife Commission. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the CTUIR the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings."

On September 26, 2016, the Planning Commission voted to remove the first condition due to the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs. They also voted to modify the second condition to ensure that all four treaty tribes were included in the process, not just the Umatilla. The modified conditions now appear as follows:

- ~~The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.~~
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: ~~one east of the project area, and one west of the project area~~ within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes ~~Umatilla Fish and Wildlife Commission~~. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline

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may be requested by the ~~CTUR~~ the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

The Yakama Nation provided written comment on September 13, 2016 and September 26, 2016. Neither of these comment letters were received in time to be included in the written Staff recommendation, which was published August 30, 2016. The September 13, 2016 letter was received during the open record, and was verbally discussed at the Planning Commission hearings. The September 26, 2016 letter was received after the Planning Commission's record had closed, and as new evidence, could not be considered for their decision. This letter was received prior to the Board's hearing however, and should be considered for the Board's Final Decision.

The September 13, 2016 letter (attached) states: "...The Yakama Nation stands opposed to the proposed rail expansion. As discussed in detail below, the Yakama Nation has significant interests that will be severely impacted and/or harmed by the proposed rail expansion..."

The September 26, 2016 letter (attached) states: "...to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by rail expansion – they do not."

These letters, as well as the letters received by the Confederated Tribes and Bands of the Umatilla Reservation, are attached for the Board's consideration.

Staff worked with the Umatilla Government Affairs staff and other partner agencies on the development of the recommended conditions of approval to ensure compliance with Treaty Rights and Chapter 14 – Scenic Area Review. The Planning Commission removed and modified several conditions, including those listed above, because of the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs.

Staff Conclusion: NSALUDO Section 14.800(D)(2) states: "The treaty rights protection process may conclude if the County determines that the proposed uses would not affect or modify treaty or other rights of any Indian tribe. Uses that would affect or modify such rights shall be prohibited."

Treaty rights concerns have been expressed by two of the four NSA Treaty tribes. Comments are specific to increased rail traffic and therefore increased risk to resources and access to those resources protected by Treaty Rights. Adding back the conditions of approval previously eliminated by the Planning Commission will ensure that existing rail traffic does not result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

The Yakama have voiced concerns similar to those of the Planning Commission regarding Staff's ability to enforce these conditions. If the Board share's these concerns, the options are (1) to include additional conditions of approval requiring regular reporting from Union Pacific Railroad and specifying that a violation would result in a failure to comply with a conditional use, thus requiring removal of the development, or (2) denial of the proposed development. In order to approve the proposed development in manner consistent with the NSALDUO, the Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied.

# ATTACHMENT I

## **2. The decision violates the National Scenic Area Land Use and Development Ordinance.**

The Planning Commission's Final Decision and Report assess the proposed development's ability to comply with the Wasco County National Scenic Area Land Use and Development Ordinance (NSALUDO). With the exception of the Treaty Rights findings, conclusions and conditions of approval, the proposed development, as conditioned, has been found to comply with the requirements and protections included in the NSALUDO. As noted above, in order to approve the proposed development in manner consistent with the NSALUDO, the Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied.