

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

Board of Trustees & General Council



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September 2, 2016

Wasco County Planning and Development Office  
2705 East Second St.  
The Dalles, OR 97058

Submitted electronically to: [angieb@co.wasco.or.us](mailto:angieb@co.wasco.or.us)

Dear Wasco County Planning Commission:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is deeply concerned about increased shipment of fossil fuels through the Columbia River Gorge. The transportation of dangerous fossil fuels in Oregon has increased dramatically over the last few years with little or no federal, state or local oversight. The double-tracking at Mosier will result in increased train traffic and potentially increase train speeds. More train traffic will endanger tribal fishers who access the river throughout the Columbia River Basin as well as increase the likelihood of derailments and spills in the Gorge like the one we all witnessed on June 3, 2016. Unless and until a comprehensive, regional environmental review is done that addresses the numerous proposals to ship highly flammable Bakken crude oil and other dangerous commodities and the associated safety concerns, no new infrastructure expansion should be approved to facilitate additional rail shipment.

The CTUIR has watched crude-by-rail traffic increase substantially in recent years. Oil shipments increased by 250% in 2013 alone. Analysts expect crude-by-rail shipments to increase when oil prices improve, particularly from the tar sands region of Alberta, Canada. A spill of crude oil along the Columbia River would have disastrous consequences for the people, the communities, and the resources of the Gorge.

The risks from crude-by-rail shipments have not been fully analyzed due to the regulatory patchwork over the railroads and docks subject in part to the antiquated federal Rivers and Harbors Act. This minimal, haphazard regulatory approach has been exploited by companies that have begun shipping massive amounts of crude oil little to no public input. Instead, there needs to be a regional Environmental Impact Statement pursuant to the National Environmental Policy Act to analyze the cumulative impacts and risks posed by increased fossil fuel transport. Unless and until that is done, no additional projects should be approved.

The CTUIR believes that increased shipments of crude oil will create many additional threats to the communities in the Gorge and the citizens who live and travel through it, as well as tribal members and tribal fishers. The risks of transporting such inherently dangerous commodities warrant a reconsideration of the appropriate train speeds through the Gorge. The characteristics of tar sands oil itself justify further consideration of its risks. Without knowing the cumulative impacts of all these projects, their potential risks cannot be fully understood, addressed, or mitigated will not be addressed.

This year the CTUIR commissioned a report by Hill and Associates that discusses the risks of derailments in the Columbia River Basin. The report identifies the types of incidents we've already seen with crude oil trains causing significant property damage and loss of life. Derailments have become so common and consistent, new regulations have been developed specifically for Bakken crude oil trains. The report concludes that the risks from crude oil trains are significant. There are numerous projects that currently ship crude oil through the Gorge. Still more are proposed due to drilling in the Bakken Region of North Dakota and the tar sands region of Alberta, Canada. If nothing more is done, these incidents will continue to occur.

The derailment that we all witnessed on June 3, 2016 was a stark reminder of the risks we face from crude-by-rail shipments through the Columbia River Gorge. The CUTIR is thankful that the accident didn't result in the loss of life or more significant property damage. However this derailment should be a wakeup call to the region. Currently, all crude-by-rail shipments into the Northwest travel through the Columbia River Gorge. On June 3, tribal members were on the Columbia River and witnessed the damage caused by the spill.<sup>1</sup> The derailment could have been much worse and impacted the resources of the Gorge we all depend upon for decades.

Before another project that results in more crude-by-rail shipments, the CTUIR would like to see a study done to analyze the impacts trains have on tribal fishing. It should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge—both recent and those projected to occur in the future. There are many uncontrolled crossings along the Columbia River both within and outside the Gorge. Funding must be identified and set aside to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured in our Treaty of 1855.

Thank you for your consideration of our comments.

Sincerely

  
Gary Burke  
Chairman, Board of Trustees

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<sup>1</sup> See testimony of Randy Settler in the Washington Energy Facility Site Evaluation Council, available on-line at: <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/TSVEPadj.shtml#Transcripts> pages 3979-3995/



## Wasco County Planning Department

*"Service, Sustainability & Solutions"*

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### WASCO COUNTY PLANNING COMMISSION

#### Notice of Rescheduled Quasi-Judicial Public Hearing for September 6, 2016 Notice of Amended Agenda for July 5, 2016

Date of This Notice: June 23, 2016

**Please Note:** The quasi-judicial hearing for PLASAR-15-01-004 has been rescheduled to September 6, 2016. The July 5, 2016 work session will only include a Planning Commission work session for Commissioner training and an update on the status of long-range planning projects.

Date & Time: NOTICE IS HEREBY GIVEN that the WASCO COUNTY PLANNING COMMISSION will meet Tuesday, July 5, 2016 to host a Planning Commission work session and Tuesday, September 6, 2016 to hold a quasi-judicial hearing for the UPRR proposal. Both events will begin at 3:00pm.

Location: The July 5, 2016 work session will be held at the Wasco County Planning Department Conference Room, located at 2705 East Second Street, The Dalles, OR. The September 6, 2016 quasi-judicial hearing will be held at the Columbia Gorge Discovery Center, located at 5000 Discovery Drive, The Dalles, OR 97058. Both meeting facilities are handicapped accessible, and language interpreters are available with one week notice. If you need special accommodations to attend, please call (541) 506-2560 to make a request.

Hearings before the Wasco County Planning Commission are governed by ORS 197.763 and ORS 215.402 to 215.431, Section 2.100(B) of the Wasco County National Scenic Area Land Use and Development Ordinance, and the Rules of Procedure of the Wasco County Planning Commission. The meeting agenda include:

July 5, 2016 Work Session Details: Commissioner training may include Robert's Rules and Oregon State Ethics training. Staff will also provide an update on the status of long-range planning projects and work plans.

September 6, 2016, 2016 Hearing Details: File # PLASAR-15-01-004. The Wasco County Planning Department has received an application from Union Pacific Railroad and their land use consultants, CH2M Hill, to expand an existing railroad siding on either side of Mosier, Oregon for 4.02 miles of new second mainline track and realigned existing track; place five new equipment shelters; install drainage structures, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; and construct temporary and permanent access roads. The request also includes off-site wetland mitigation east of the primary project site.

The project area begins at rail MP 66.98, east of the Wasco County line, approximately 2 miles west of the City of Mosier, and ends at MP 72.35, approximately 3 miles east of Mosier. The subdivision roughly parallels the Columbia River and Interstate 84 for the length of the project. More specifically, the project crosses Township 3 North, Range 12 East, Sections 31 and 32; Township 3 North, Range 11 East, Section 36; and Township 2 North, Range 11 East, Sections 1, 2, and 3. One new signal building and two signal lights are also proposed at MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation is

# ATTACHMENT J

proposed on Wasco County Parcel 2N 13E Section 8 Lot 200 (Account # 1274). The project will be predominantly located on lands owned by Union Pacific Railroad. Portions of the project will also occur on lands owned by Oregon State Parks and Recreation Commission and Oregon Department of Transportation. Offsite wetland mitigation will occur on lands owned by Skylar and Kathleen Schacht.

Applicable Zoning: General Management Area Large-Scale and Small-Scale Agriculture (A-1 (40) and A-2 (80)), Open Space, and Water; Special Management Area Agriculture, Public Recreation, and Open Space.

Review Authority & Criteria: W LUDO, Chapter 1 – Introductory Provisions, Chapter 2 – Development Approval Procedures, Chapter 3 – Basic Provisions and Zoning, Chapter 4 – Supplemental Provisions, Chapter 5 - Conditional Use Review, Chapter 6 – Variances, Chapter 8 – Temporary Use Permit, Chapter 11 – Fire Safety Standards, Chapter 14 – Scenic Area Review, and Chapter 23 – Sign Provisions.

Portions of the proposed development will occur inside the City of Mosier and portions will occur outside the city, within the Columbia River Gorge National Scenic Area. Wasco County Planning has regulatory authority provided by the National Scenic Area Act outside of the Mosier Urban Area.

QUESTIONS/COMMENTS: Comments may be provided up until the date of the hearing. Comments may be submitted in writing to the Wasco County Planning and Development Office, at 2705 East Second St., The Dalles, Oregon 97058, by email to [angieb@co.wasco.or.us](mailto:angieb@co.wasco.or.us), or in person at the hearing. Written testimony submitted by Testimony and evidence must be directed toward the listed review criteria or other criteria in the plan or land use regulation which the person believes to apply to that decision. Questions about the application should be directed to: Angie Brewer, Planning Director, at 541-506-2560 or [angieb@co.wasco.or.us](mailto:angieb@co.wasco.or.us).

AVAILABILITY OF INFORMATION: Any staff report used at the hearing shall be available for inspection at no cost at least seven (7) days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Copies of the application(s) and all documents and evidence relied upon by the applicant(s), all applicable criteria, and any staff reports are available for inspection at no cost and will be provided at reasonable cost at 2705 East Second Street, The Dalles, OR 97058.

Documents will be available online at: [www.co.wasco.or.us/planning](http://www.co.wasco.or.us/planning), click on Pending Land Use Decisions. The actions table is sorted alphabetically by the name of the applicant/owner. The information will be available until the end of the appeal period.

APPEAL INFORMATION: Failure to raise an issue in the hearing, in person or by letter, accompanied by statements or evidence sufficient to afford the Planning Commission or other parties an opportunity to respond to the issue, precludes appeal to the Wasco County Court on such issue.

**PUBLICATION DATE: THURSDAY JUNE 26, 2016**

Statement of James E. Hall regarding crude oil train accident risk in relation to the proposed routing of crude oil trains through the Columbia River Basin

Accident experience has clearly demonstrated that the consequences of train derailments carrying large numbers of crude oil tank cars have been catastrophic. Even after industry attempts to improve the poor crashworthiness of DOT-111 tank cars by offering CPC-1232 tank cars with enhanced safety features, the failure of tank cars in accidents and the quantity of crude oil released is enormous.

To understand the scope of how serious a train derailment can be when carrying more than 3,000,000 gallons of crude oil in tank cars, it is paramount that we study and understand recent accident history, not rely upon normalized data that includes accidents from decades ago involving different equipment and operating conditions. The National Transportation Safety Board (NTSB) issued a special study on risk concepts in dangerous goods transportation regulation that identified an important concept that is applicable today: That it is not until accident experience begins to accumulate that the change in risk becomes evident.

Since 2006, there have been many accidents in the United States and Canada involving derailments of trains carrying large quantities of crude oil and ethanol that provide us a realistic picture of accident experience and consequences. In 24 of those accidents 442 tank cars derailed and 71% of them (314) were breached. About 6.5 million gallons of crude oil and ethanol were released, an average of 270,000 gallons per accident; the equivalent of 30 highway gasoline cargo tanks.

The poor crashworthiness of tank cars used to transport crude oil and ethanol is evident in these train derailments. For example:

- October 20, 2006 – New Brighton, Pennsylvania, 23 tank cars derailed and 20 tank cars breached (87%), 485,278 gallons of ethanol were released (the equivalent of 54 highway gasoline cargo tanks);
- June 19, 2011 – Cherry Valley, Illinois, 19 tank cars derailed and 15 tank cars breached (79%), 323,963 gallons of ethanol were released (the equivalent of 36 highway gasoline cargo tanks);

- February 6, 2011 – Arcadia, Ohio, all 31 tank cars derailed were breached, 834,840 gallons of ethanol were released (the equivalent of 93 highway gasoline cargo tanks);
- July 6, 2013 – Lac Megantic, Quebec, 63 tank cars derailed and 59 tank cars breached (93.6%), 1,580,000 gallons of crude oil were released (the equivalent of 175 highway gasoline cargo tanks);
- November 8, 2013 – Aliceville, Alabama, 26 tank cars derailed and 25 tank cars breached (96%), 630,000 gallons of crude oil were released (the equivalent of 70 highway gasoline cargo tanks);
- February 14, 2015 – Gogama, Ontario, 29 tank cars derailed and 19 tank cars breached (65.5%), 264,172 gallons of crude oil were released (the equivalent of 29 highway gasoline cargo tanks);
- February 16, 2015 – Mount Carbon, West Virginia, 27 tank cars derailed and 20 tank cars breached (74%), 378,034 gallons of crude oil were released (the equivalent of 42 highway gasoline cargo tanks); and
- March 7, 2015 – Gogama, Ontario, 39 tank cars derailed and 36 tank cars breached (92%), more than 500,000 gallons of crude oil were released (the equivalent of 83 highway cargo tanks).

The U.S. Department of Transportation's Federal Railroad Administration (FRA) and Pipeline and Hazardous Materials Safety Administration (PHMSA) issued speed restriction for high hazard flammable trains (including crude oil trains) to 50 mph and to 40 mph in high-threat urban areas. The agencies recognized that greater tank car damage can be expected at high speeds.

But accident data shows that the tank car failures are significant and consequences are substantial in train derailments at speeds below 50 mph and below 40 mph. In all of the 24 accidents reviewed all but one, accidents occurred at train speed below these restrictions:

- New Brighton, Pennsylvania – 37 mph,
- Cherry Valley, Illinois – 36 mph,
- Arcadia, Ohio – 46 mph,
- Aliceville, Alabama – 39 mph,

- Gogama, Ontario (February 14) – 38 mph,
- Mount Carbon, West Virginia – 33 mph, and
- Gogama, Ontario (March 7) – 43 mph.

Even at lower speeds (23 mph, 19 mph and 10 mph), tank car failures and consequences have been significant:

- August 5, 2012 – Pleva, Montana, train speed 23 mph, 17 tank cars derailed and 12 tank cars breached (74%), 245,336 gallons of ethanol were released (the equivalent of 27 highway gasoline cargo tanks),
- August 22, 2008 – Luther, Oklahoma, train speed 19 mph, 8 tank cars derailed and 5 tank cars breached (62.5%), 80,746 gallons of crude oil were released (the equivalent of 9 highway gasoline cargo tanks), and
- September 19, 2015 – Bon Homme County, South Dakota, train speed 10 mph, 7 tank cars derailed and 3 tank cars breached (43%), 49,748 gallons of crude oil were released (the equivalent of 5 and ½ highway cargo tanks).

Fire resulting from train derailments and tank car breaches has been significant. Of the 24 train derailments reviewed with tank car breaches 20 resulted in a fire. The volatility of crude oil has significant safety implications and when it has been released from tank cars during derailments fire threats were substantial.

The FRA accident data for Class 1 railroads (Excluding AMTRAK) show 2,522 train derailments on main line track for the period 2008 through 2015. The data identifies broken rails attributed to detail fractures including shelling and head checks, irregular track alignment including track that has buckled, and wide gage including defective or missing crossties, spikes or other fasteners as leading causes of derailments assigned to track, roadbed and structure related causes. Although investigations of some of the 24 crude oil and ethanol train accidents are ongoing, a significant number of these accidents have been attributed to track conditions like broken rails.

The accumulation of data from these accidents clearly illustrate that the consequences of high hazard flammable train derailments are significant. Crude oil tank cars have increased in size over the years and now are built for a gross weight of 286,000 pounds. NTSB has investigated several accidents where rail head wear and rolling contact fatigue were attributed to rail failure. Following the New Brighton accident, NTSB recommended that the FRA require railroads to develop inspection and maintenance programs based on damage-tolerance principles that take

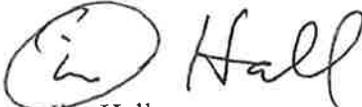
into account accumulated tonnage, track geometry, rail surface conditions, rail head wear and crack growth rates that can be affected by the frequency, size and weight of trains.

Although the U.S. Department of Transportation has mandated improvements for tank cars that carry crude oil – the new DOT-117 tank car – it is uncertain when enough of those tank cars will be available for all crude oil shipments. It will certainly be several years. Further, it is unknown how well they will perform in accidents until we accumulate accident history, like we have for DOT-111 and CPC-1232 tank cars. Tank cars are subject to strong forces during violent train derailments and subject to failure from punctures from broken rail and accident debris. Although the probability of any train derailment is portrayed by industry as low, we have seen many high hazard flammable train accidents since 2006 and the results have been high consequence and catastrophic.

Trains safely passed through the town of Lac Megantic, Quebec for years. But that was little comfort for the residents when one of them finally derailed on July 6, 2013. The resulting explosion and fire destroyed the downtown and killed 47 people. And consider the residents living near Gogama, Ontario, who suffered through a catastrophic derailment in February 2015. Despite industry claims about how rare such accidents are, the community was again visited by a similar disaster just three weeks later.

As tragic as industrial accidents can be (i.e., a refinery explosion), one can argue that a community has accepted certain risks for tangible benefits like employment and commerce. However, oil transportation industry statistics cannot be used to dismiss legitimate concerns of residents who bear all the risk of catastrophe with no tangible benefit simply because railroads have chosen their towns as convenient transit points.

It has been proposed that four crude oil trains a day, each carrying over 3,000,000 gallons of crude oil (the equivalent of 333 highway gasoline cargo tanks for each train), travel the Columbia River Basin. Because of the recent history of significant accidents with crude oil trains, the poor crashworthiness of tank cars and the significant number of those accidents that have resulted in fire, an extensive effort is essential to study the needs for the equipment, infrastructure and resources necessary to protect the people who live, fish and work along the Columbia River Basin.



Jim Hall  
Principal  
Hall & Associates LLC

May 10, 2016

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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 from 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.

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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 (9<sup>th</sup> 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 for 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 2014<sup>1</sup>, 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 through 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:

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<sup>1</sup> [http://www.oregonlive.com/environment/index.ssf/2014/07/everything\\_you\\_need\\_to\\_know\\_ab.html](http://www.oregonlive.com/environment/index.ssf/2014/07/everything_you_need_to_know_ab.html)

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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.<sup>2</sup> 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.

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

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

John Raby, *Oil-bearing train derailed 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>

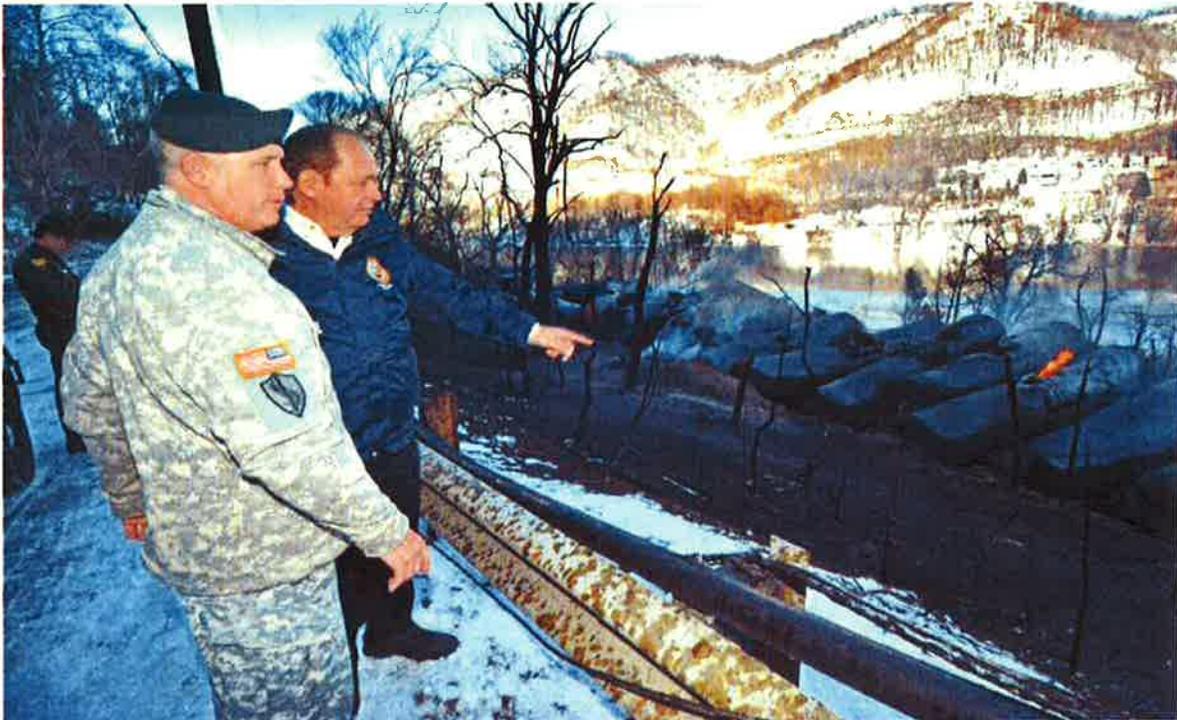


Photo caption: West Virginia Governor Earl Ray Tomblin surveyed the wreck site on February 17. "Many of the tanks had gaping holes in the tops where they had exploded," he tells Newsweek. Office of Governor Earl Ray Tomblin.

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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

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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.<sup>3</sup> 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

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

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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.<sup>4</sup> 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.**

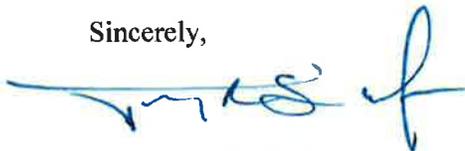
Finally, the Wasco County Planning Commission is currently reviewing the UPRR application under county rules that implement the Columbia River Gorge National Scenic Area Act (Scenic Area Act). Until this use is authorized under the county review process, with all limitations and conditions, Corps review 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

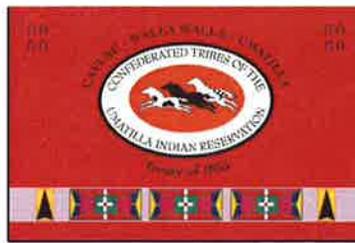
Cc: Wasco County  
Yakama Nation Fish and Wildlife Committee  
Warm Springs Fish and Wildlife Committee  
Nez Perce Tribe Fish and Wildlife Committee  
Paul Lumley, Executive Director, CRTIFC

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

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

Board of Trustees & General Council



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**Testimony of the Confederated Tribes of the Umatilla Indian Reservation  
Wasco County Planning Commission Hearing, September 6, 2016, 3:00 pm  
Columbia River Gorge Discovery Center**

The Confederated Tribes of the Umatilla Indian Reservation is deeply concerned about increased shipment of fossil fuels through the Columbia River Gorge.

For instance, transportation of dangerous fossil fuels in Oregon increased by 250% in 2013 with little or no federal, state or local oversight.

The double-tracking at Mosier will increase train traffic and speeds even more.

Increased train traffic will endanger tribal fishers who access the river throughout the Columbia River Basin, including the Columbia River Gorge.

Increased train traffic will also increase the likelihood of a spill.

Transporting crude oil by rail may also increase more if the tar sands region of Alberta, Canada, goes into full production if oil prices increase.

A spill of crude oil along the Columbia would have disastrous consequences for the people, the resources, and the communities in the Gorge.

In support of our testimony, the CTUIR offers a report by Hill and Associates that discusses the risks of derailments.

The CTUIR would like to see a study done that analyzes the impacts trains have on tribal fishing.

The study should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge—both recent, and those projected to occur in the future.

There are many uncontrolled crossings along the Columbia River both within and outside the Gorge.

Funding must be provided to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured in our Treaty of 1855.

Many projects that involve shipment of crude oil through the Gorge are already operating.

Still more are proposed to accommodate more drilling in the Bakken Region of North Dakota and the Canadian Tar Sands.

The CTUIR believes increased shipments of crude oil will pose many threats to the communities in the Gorge and the citizens who live and travel through it, as well as tribal members and tribal fishers.

The derailment that we all witnessed on June 3, 2016 was a stark reminder of the risks we face from crude-by-rail shipments through the Columbia River Gorge.

The CUTIR is thankful that the accident didn't result in the loss of life or more significant property damage.

However this derailment should be a wakeup call to the region.

Currently, all crude-by-rail shipments into the Northwest travel through the Columbia River Gorge.

On June 3, tribal members were on the Columbia River and witnessed the damage caused by the spill.

The derailment could have been much worse and impacted the resources of the Gorge we all depend upon for decades.

The risks of transporting such inherently dangerous commodities require reconsideration of appropriate train speeds through the Gorge.

A regional Environmental Impact Statement should also be produced, to analyze the cumulative impacts and risks associated with the dramatic increase in fossil fuel transport.

Unless and until that is done, no additional projects should be approved.

Without knowing the cumulative impacts of all these projects, their potential risks cannot be fully understood, addressed, or mitigated until it is too late.



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

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September 13, 2016

## VIA ELECTRONIC MAIL AND U.S. MAIL

Angie Brewer  
Wasco County Planning and Development Office  
2705 East Second Street  
The Dalles, OR 97058  
[angieb@co.wasco.or.us](mailto:angieb@co.wasco.or.us)

**Re: Comments on Union Pacific Railroad's Application for Rail Extension  
Application Number: PLASAR-15-01-0004**

Dear Ms. Brewer:

On behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), I submit to the Wasco County Planning Commission ("Commission") the following comments regarding Union Pacific Railroad's ("Union Pacific") Application for Rail Extension, Application Number PLASAR-15-01-0004, for inclusion in the record.

The Application would allow Union Pacific to make significant expansions to its rail line. Union Pacific requested approval to expand an existing railroad siding on either side of Mosier, Oregon for 4.02 miles of new second mainline track and realign existing track; place five new equipment shelters; install drainage structures, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and make a property line adjustment. The request also includes off-site wetland mitigation east of the primary project site.

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, including:

- The proposed rail expansion may result in violations of the Yakama Nation's Treaty rights to hunt, fish, and gather traditional foods, and to maintain and continue their traditional, religious and cultural practices, including subsistence living and the provision of foods, through fishing, hunting, and gathering, to underserved individuals within the Yakama Nation community.
- The proposed rail expansion will increase train traffic, which already poses a risk to the safety of the Yakama Nation's People, including tribal fishers who regularly cross train tracks to access fishing sites. Further increasing rail traffic will only aggravate the risks the Yakama Nation People already bear with respect

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to rail traffic in and around their usual and accustomed areas and other lands upon which Yakama People retain usufructuary rights pursuant to the Treaty of 1855 with the Yakama Nation (“Treaty”) (June 9, 1855, 12 Stat. 951).

- The proposed rail expansion could result in irreparable harm to the Yakama Nation’s cultural and natural resources.
- The proposed rail expansion would increase the risk of derailments and spills.
- The proposed rail expansion would increase emissions, negatively impacting climate change.

Accordingly, because of the significant and irreparable impacts that the proposed rail expansion will have on the Yakama Nation and its People, the Yakama Nation urges the Commission to deny Union Pacific’s Application.<sup>1</sup>

## **I. Rail Expansion Negatively Impacts the Yakama Nation.**

### **1. Rail Expansion Interferes with Yakama Nation’s Treaty Rights.**

#### **i. Rail Expansion Limits Access to Usual and Accustomed Areas.**

The Yakama Nation is a federally recognized sovereign nation, a signatory to a Treaty with the United States. In the Treaty, the Yakama Nation explicitly reserved the right of its People to hunt, fish and gather, at their usual and accustomed places. Treaty, Art. 3. The Treaty provides:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The Yakama Nation’s Treaty rights are not granted to the Yakama Nation, but rather are “grants of rights from them—a reservation of those not granted.”<sup>2</sup> Treaties are the highest law of the land and create a special fiduciary duty and trust responsibility upon all agencies of the United States to protect Treaty rights, including fishing rights.<sup>3</sup> These Treaty rights cannot be abrogated except by explicit Congressional authorization. Courts have consistently required federal agencies and states to keep the Treaty promises upon which tribes relied when they ceded huge tracts of land.<sup>4</sup>

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<sup>1</sup> The Yakama Nation reserve any and all rights to supplement these comments with additional information to the fullest extent permitted by applicable laws, regulations, policies, and procedures.

<sup>2</sup> *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905).

<sup>3</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

<sup>4</sup> *See, e.g., U.S. v. Winans*, 198 U.S. 371 (1905); *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *U.S. v. Oregon*, 718 F.2d 299 (9th Cir.1983); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash.

Further, Treaty rights include a property right in adjacent lands “to the extent and for the purpose mentioned” in the treaties.<sup>5</sup> As part of these Treaty rights, courts have confirmed that the tribes of Washington have a right to half of the harvestable fish in state waters.<sup>6</sup>

Accordingly, the Yakama Nation, as a sovereign nation, has a profound interest in the preservation of its Treaty rights. The *United States v. Oregon* and Boldt Decision also established the Yakama Nation as a co-manager of the fisheries resource with the State of Washington.<sup>7</sup> The Yakama Nation actively regulates its fisheries; the Yakama Nation staffs the Yakama Nation Fisheries (“Fisheries”). The Fisheries focus on the protection of Treaty rights; the restoration of aquatic populations and their habitats; and ensuring the fish are honored, in a manner reflecting their paramount importance to the Yakama Nation’s People, diet and health. The Fisheries accomplish these goals using two primary methods: population and habitat management goals and actions and natural resource policies and regulatory mechanisms.

The Yakama Nation resides on central Washington’s plateau and along the Columbia River. While the Yakama Nation was officially recognized by the United States in 1855 by the Treaty, the People that comprise the Yakama Nation have lived in this area since the time immemorial. Historically, villages were located on or near waterways, in places where a variety of resources could be obtained. Currently, the People use vegetation and wildlife as both food resources and cultural resources. The People gather edible greens, roots and berries. The People hunt and fish, many earn their living fishing for salmon in the waters of the Columbia River and its tributaries. The proposed rail expansion has the potential to interfere with the Yakama Nation’s exercise of its Treaty rights, to hunt, fish, and gather in its usual and accustomed areas.

For example, the proposed rail traffic will directly interfere with fishing in the Columbia River. The Boldt Decision affirmed the Yakama Nation’s usual and accustomed fishing areas include the “Columbia River area” where “[a]pproximately four hundred tribal members fish commercially[.]”<sup>8</sup> The Yakama Nation jointly regulates the exercise of its members’ Treaty fishing rights on the Columbia River.<sup>9</sup> The court also noted that the Yakama Nation’s members utilize fish for both “ceremonial and personal” reasons and that they “have been and continue to

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1996); *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007). See also *Confederated Tribes & Bands of Yakama Nation v. U.S. Dep’t of Agric.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (entering an injunction barring the shipment of garbage, as a landfill was located in an area where the Yakama Nation’s members exercised their Treaty rights).

<sup>5</sup> *Winans*, 198 U.S. at 381 (finding the Yakama Nation retained the right to make use of the land surrounding the usual and accustomed sites, as required by its members, to exercise their Treaty rights).

<sup>6</sup> *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the “Boldt Decision”), *aff’d*, 520 F.2d 676 (9th Cir.1975).

<sup>7</sup> *U.S. v. Washington*, 384 F. Supp. at 403. The Yakama Nation was also a party to the *United States v. Oregon* proceeding, a federal case. The Yakama Nation participated in that long-running case in order to protect their Treaty fishing interest and to “exercise their sovereign powers in a coordinated and systematic manner to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both Treat Indian and non-treaty fisheries.” 2008-2017 *United States v. Oregon*, Management Agreement, p. 1; *United States v. Oregon*, No. 68-513 (D. Or. Aug. 12, 2008) (Management Agreement adopted as an Order of the Court).

<sup>8</sup> *Id.* at 382.

<sup>9</sup> *Id.*

be very dependent on anadromous fish to sustain their way of life.” The court found that “[a]nadromous fish are vital” to the Yakama Nation’s members’ diets.<sup>10</sup>

As the Boldt Decision observed, many of the Yakama Nation’s usual and accustomed fishing areas lie along the Columbia River. Along the Columbia River, there are train tracks. The proposed rail expansion would be in Mosier, Washington, which is situated along the Columbia River. The proposed rail expansion raises two significant issues, in regards to the exercise of the Yakama Nation’s Treaty rights. Increased train traffic would limit both access to the Yakama Nation’s usual and accustomed fishing areas and would increase the risk of injury or death to tribal fishers.

In regards to access to fishing sites, there is the obvious impact that increasing train traffic will make it more difficult to cross the train tracks, limiting access to those sites that lie alongside train tracks. These significant impacts must be addressed in any proper analysis of the Application at issue here. Further, as discussed in detail below, increased train traffic results in an increased risk of trains derailing and spilling. Historically, the Yakama Nation has endured the loss of many traditional fishing places due to the development of the Columbia River and spills. The loss of more fishing sites due to a train derailment, or any resulting oil spill, would place an unacceptable cumulative burden of loss on the Yakama Nation. Again, these significant impacts must likewise be addressed in any adequate analysis on the Application.

#### **ii. Rail Expansion Increases Risk of Injury and Death.**

The biggest risk to the safety of tribal fishers when accessing fishing sites is the proximity of the train tracks to fishing sites. Many fishing sites can *only* be accessed by crossing train tracks. In order to access fishing sites, tribal fishers have to cross the train tracks, by foot or in vehicles. The crossings, especially in remote locations, do not always have signal and safety measures. Every time a tribal fisher crosses a train track they are exposing themselves to a significant risk of injury or death. Over the years, the Yakama Nation has suffered fatalities and injuries due to train strikes. Any increase in the train traffic would both make it more difficult for tribal fishers to access Treaty-protected fishing sites and would increase the safety risks faced by tribal fishers.

The Yakama Nation’s Treaty rights allow its People to maintain their customary way of life. The Treaty rights include the right to hunt, fish, and gather at all usual and accustomed places and throughout the Yakama Nation’s Ceded Lands, including those usual and accustomed places along the Columbia River at issue here. The proposed rail expansion would have a direct adverse impact to the Yakama Nation, its People, and its Treaty-reserved rights and Treaty-protected resources.

The Yakama Nation considers these impacts to the Yakama Nation’s Treaty rights unacceptable.

Further, in regards to mitigation, to put it simply, there is no mitigation adequate to address the diminishment or destruction of the Yakama Nations’ Treaty-reserved rights and Treaty-protected resources. There is no adequate mitigation that will compensate the Yakama Nation, or its People, for the continued degradation of our sacred places, and the incremental, but constant

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<sup>10</sup>*Id.*

damage to our natural resources that sustain our culture and the constant threat to the livelihood and cultural practices of the Yakama People.

## **2. Rail Expansion Threatens Cultural Resources.**

There are numerous cultural resources that would be at risk from increased train traffic. As previously stated, historically, the Yakama Nation situated its villages near waterways, in places where a variety of resources could be obtained. As a result, many of its cultural resources are located along the Columbia River. There are thousands of cultural and archeological sites up and down the Columbia River. For example, in Wasco County, close to where Mosier is located, is “She Who Watches.” She Who Watches is one of the most famous petroglyphs in North America. She Who Watches is located approximately 120 feet from railroad tracks, near the Columbia Hills State Park, along the Columbia River.

She Who Watches, and other important cultural archeological resources would be at risk from increased rail traffic. These sites are at risk to oil spills and burning trains. Oil spills and fires can be damaging to archeological resources. In fact, current railroad operations are impacting cultural resource sites along the Columbia River, due to grading and other operations.

The significance of these cultural and archeological resources to the Yakama Nation cannot be overstated. Cultural resources represent the concrete, physical evidence of the Yakama Nation’s presence and its relationship to the ancestors. The sites are a cultural record of the Yakama Nation’s presence, since time immemorial. The sites are a physical connection to the Yakama Nation’s past and the Yakama People’s ancestors. These cultural resources are unique, priceless and irreplaceable. They cannot be restored in the event that a site is excavated or damaged and destroyed, as has happened before with routine rail operations.<sup>11</sup> The proposed rail expansion poses significant risks of adverse if not destructive impacts to these cultural resources.

## **3. Rail Expansion Threatens Fish and Wildlife.**

As discussed above, the Yakama Nation has a significant interest in fish and wildlife restoration as the Yakama Nation considers it a part of its duties as co-manager of the fisheries. The Yakama Nation benefits from its fisheries management, as it allows them to preserve their cultural practices, including fishing and the use of fish in cultural ceremonies.

The Yakama Nation has made considerable investments into fish and wildlife restoration efforts. In 1996, the Yakama Nation has adopted the Wy-Kan-Ush-Mi Wa-Kish-Wit, or Spirit of the Salmon Plan; the Plan was updated in 2014. Accordingly, the Columbia River Basin is now engaged in one of the largest fish and wildlife restoration efforts in the world, more than \$300 million is being invested annually in this effort.

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<sup>11</sup> Recently, a railroad bulldozed a known (to the railroad) Yakama Nation burial ground while the railroad was conducting so-called routine frontage road maintenance. The railroad’s bulldozer scattered the remains of at least two Yakama ancestors in a wide swath of excavated materials. Only through the actions of a concerned landowner were the molested remains discovered and, partially, recovered for reburial. Unfortunately, this is not an isolated incident and is representative of railroad corporations’ general apathy towards Yakama People and their culture and sacred places.

A wide variety of fish species that are significant and important to the Yakama Nation live in the Columbia River. The Columbia River contains chinook, sockeye, steelhead, coho and chum salmon. There are twelve different stocks of salmon and steelhead in the Columbia River Basin that are listed under the Endangered Species Act (“ESA”). The Columbia River also contains sturgeon, lamprey and smelt, all of which hold significant cultural value to the Yakama Nation.

The Yakama Nation’s substantial investment in restoring fish and wildlife populations, and their habitats, impacts both cultural and natural resources. These efforts, and the subject fish and wildlife, are threatened by the proposed rail expansion. As discussed below, the increased train traffic may result in a train derailment or spill, which would be devastating to the local fish and wildlife.

### **i. Rail Expansion Increases Risk of Derailment and Spills.**

The proposed rail expansion would result in increased train traffic; this, in turn, would increase the likelihood of a train derailment and increase the possibility of a spill. Oil is frequently transported along the rail lines that border the Columbia River. A number of scientific studies have demonstrated the negative impact of an oil spill on fish:

- After a crude oil spill a period of acute mortalities is often observed; these acute mortalities can affect the entire foodweb from phytoplankton to apex predators.<sup>12</sup> Acute exposure is also very damaging to organisms during early development, such as invertebrate and fish larvae.<sup>13</sup>
- Chronic long-term exposure of salmon to small amounts of residual oil, particularly multi-ringed polycyclic aromatic hydrocarbons (PAHs), has been associated with reductions in salmon survival.<sup>14</sup> Studies after the Exxon Valdez spill indicated that populations of pink salmon demonstrated elevated mortality for at least 4 years after the spill; mark and recapture studies demonstrated that pink salmon exposed to PAHs had elevated rates of post-release mortality, with an average reduction in adult survival of 35%.<sup>15</sup>
- There are complex food web interactions that may be negatively and indirectly affected by an oil spill, which are generally effects that are not immediately obvious; in considering oil spill effects, it is important to consider indirect effects

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<sup>12</sup> Charles H. Peterson, et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, SCIENCE, Dec. 19, 2003.

<sup>13</sup> J.P. Incardona, et al., *Deepwater Horizon Crude Oil is Cardiotoxic to the Developing Hearts of Large Pelagic Fish*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 111(15): E1510-E1518 (2014).

<sup>14</sup> A.M. Blanc, et al., *Anthropogenically Sourced Low Concentration PAHS: In Situ Bioavailability to Juvenile Pacific Salmon*, ECOTOXICOLOGY AND ENVIRONMENTAL SAFETY, 73(5): 849-857 (2010).

<sup>15</sup> Corinne E. Hicken, et al., *Sublethal Exposure to Crude Oil During Embryonic Development Alters Cardiac Morphology and Reduces Aerobic Capacity in Adult Fish*, Proceedings of the National Academy of Sciences 108(17): 7086-7090 (2011).

that occur throughout the food web.<sup>16</sup> Scientists from NOAA have developed food web understandings for the Columbia River Estuary.<sup>17</sup>

The studies indicate that oil can be difficult to remove from the environment and that oil can remain in an environment long after the spill has occurred. In making its decision, the Commission should consider the potential long-term impact of an oil spill.

For tribal fishers, there are many ways an oil spill will impact a fishing site. The most immediate effect would be the closure of an area, making the area inaccessible for fishing. Also, any residual oil at a fishing site may make it so the fish avoid the area; this would negatively impact the catch rate at the fishing site. Further, among tribal fishers a spill may result in stigmatism; many tribal fishers are leery of fishing in an area where there has been a spill. In sum, an oil spill may impact both the catch rates and the fishing efforts at a fishing site.

In addition to the protection of its restoration activities, the Yakama Nation also has a vested interest in the prevention of oil spills, as it is actively involved in spill response and clean up. The Yakama Nation has its own spill response team, called the Hazmat Team. The Hazmat Team typically responds to ten to twelve spills a month, and coordinates its efforts with the Washington State Department of Ecology, the Oregon State Department of Environmental Quality, and the Environmental Protection Agency. The Yakama Nation is also on the Northwest Area Committee, Region 10 Response Team. The Yakama Nation has been forced to respond to and clean up a variety of spills, as a direct result of train accidents and derailments, including the recent train derailment at Mosier, Washington.

The Yakama Nation's Hazmat Team spent two weeks at Mosier. There, a train derailment resulted in an oil spill and fire. The Hazmat Team were particularly concerned about salmon and lamprey populations, as oil was reaching the adjacent Columbia River through an outflow pipe of a wastewater treatment plant. Further, the train derailment at Mosier resulted in the closure of multiple tribal fishing operations.

Overall, the Yakama Nation will bear the costs associated with an oil spill. In addition to the risk to fishing sites and cultural and natural resources, the Yakama Nation will have to expend a significant amount of resources in dealing with the consequences of the proposed rail expansion. The increased risk of oil spills will have a direct impact on the Yakama Nation. It is important that the Commission consider these risks as part of a comprehensive analysis when making a decision on Union Pacific's Application.

#### **4. Rail Expansion Increases Emissions, Negatively Impacting Climate Change.**

The proposed rail expansion, and the resulting increase in train traffic, would increase the amount of greenhouse gases emitted. It is widely recognized that the emission of greenhouse

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<sup>16</sup> Charles H. Peterson, et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, SCIENCE, Dec. 19, 2003.

<sup>17</sup> H.L. Diefenderfer, *An Evidence-Based Assessment of the Cumulative Effects of Tidal Freshwater and Estuarine Ecosystem Restoration: Early Life-Stage Habitat Functions for Endangered Salmonids*, DRAFT REPORT FOR U.S. ARMY CORPS OF ENGINEERS: PORTLAND DISTRICT, 2012.

gases negatively impacts climate change. This issue is particularly important to the Yakama Nation, as climate change has, historically, had a disparate impact on indigenous peoples. As recognized by the United Nations Permanent Forum on Indigenous Issues:

Indigenous peoples are among the first to face the direct consequences of climate change, owing to their dependence upon, and close relationship with the environment and its resources. Climate change exacerbates the difficulties already faced by vulnerable indigenous communities, including political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment.<sup>18</sup>

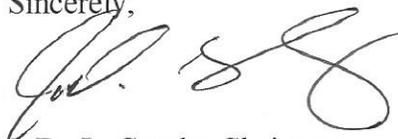
As previously stated, the People of the Yakama Nation have a very close relationship with the land and its natural resources. The People consistently gather vegetation to use as both food and cultural resources. Because of the Yakama Nation's symbiotic relationship with the lands and the natural resources on those lands, the proposed rail expansion's potential impact on climate change could have devastating, and disparate, impact on the Yakama Nation.

## II. Conclusion

The proposed rail expansion has the potential to negatively impact the Yakama Nation's, its People and its cultural and natural resources. In short, the consequences of the proposed rail expansion could devastate the Yakama Nation. Accordingly, the Yakama Nation urges the Commission to deny Union Pacific's Application for Rail Expansion.

Thank you for your time and consideration. The Yakama Nation stands prepared to help provide any information the Commission may need in making its decision. If you have any questions, please feel free to contact the Yakama Nation through our attorney, Joe Sexton, who may be reached directly at (509)910-8842 or [joe@galandabroadman.com](mailto:joe@galandabroadman.com).

Sincerely,



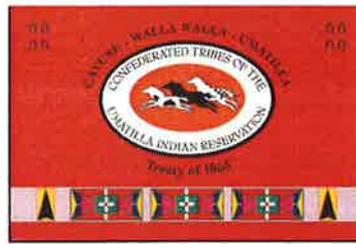
JoDe L. Goudy, Chairman  
Yakama Nation Tribal Council

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<sup>18</sup> United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous Peoples*, INDIGENOUS PEOPLES INDIGENOUS VOICES 1 (2015), [http://www.un.org/en/events/indigenousday/pdf/Backgrounder\\_ClimateChange\\_FINAL.pdf](http://www.un.org/en/events/indigenousday/pdf/Backgrounder_ClimateChange_FINAL.pdf).

**Confederated Tribes of the  
Umatilla Indian Reservation**

Board of Trustees & General Council



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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.

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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 (9<sup>th</sup> 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 2014<sup>1</sup>, 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:

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<sup>1</sup> [http://www.oregonlive.com/environment/index.ssf/2014/07/everything\\_you\\_need\\_to\\_know\\_ab.html](http://www.oregonlive.com/environment/index.ssf/2014/07/everything_you_need_to_know_ab.html)

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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.<sup>2</sup> 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.

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

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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

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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.<sup>3</sup> 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

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

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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.<sup>4</sup> 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.**

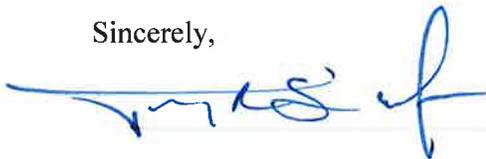
Finally, the Wasco County Planning Commission is currently reviewing the UPRR application under county rules that implement the Columbia River Gorge National Scenic Area Act (Scenic Area Act). Until this use is authorized under the county review process, with all limitations and conditions, Corps review 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

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



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

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September 26, 2016

**VIA ELECTRONIC MAIL AND U.S. MAIL**

Angie Brewer  
Wasco County Planning and Development Office  
2705 East Second Street  
The Dalles, OR 97058  
[angieb@co.wasco.or.us](mailto:angieb@co.wasco.or.us)

**Re: Supplemental Comments on Union Pacific Railroad's Application for Rail  
Extension Application Number: PLASAR-15-01-0004**

Dear Ms. Brewer:

This is intended to supplement the Confederated Tribes and Bands of the Yakama Nation's ("Yakama Nation") previous comments on the above-referenced matter, dated September 13, 2016 ("Comments").

We have been asked to specify whether Yakama Nation's Comments pertained to the Application only, or to both the Application and Wasco County Staff's Recommendation and Conditions of Approval ("Conditions of Approval"), and further to specify whether those Conditions of Approval mitigate the adverse impacts to Yakama Nation's Treaty rights that will result from the proposed rail expansion.

First, the Comments did address both the Application and the Conditions of Approval.

Second, Yakama Nation does not bargain its Treaty rights. We have no word for "mitigation" in our language, and see attempts to mitigate violations of our Treaty rights as the equivalent of bargaining away rights secured to our people by our ancestors 161 years ago, and leaving those who have yet to come with diminished rights. That is unacceptable.

That being said, to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by the rail expansion project—they do not. Specifically, for example, we understand one condition on the rail expansion project being considered is to limit the number of trains utilizing the expanded tracks to roughly the current number of trains presently running through that area on a daily basis. But Yakama Nation questions how this condition, among others, will be enforced, and whether it can be enforced. We understand that Union Pacific Railroad specifically denies that this condition can be enforced. Accordingly, because the Applicant has already signaled that this specific condition is unenforceable, the significant impacts to Yakama Nation's Treaty rights that will result from rail expansion and the potential for increased rail traffic—which is promised by a number of current

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and ongoing proposals to traffic fossil fuels through Yakama ancestral lands by rail, among other means of conveyance—are not reduced in any meaningful way. Accordingly, the proposed Conditions of Approval will not bring the project to a level where there are no adverse impacts to Yakama Nation’s Treaty rights. The Yakama Nation urges the Wasco County Planning Commission (“Commission”) to reject Union Pacific Railroad’s Application.

Thank you for your time and consideration. Unfortunately, Yakama Nation Tribal Leaders are otherwise committed today during the deliberation on this matter before the Commission. Notwithstanding, the Yakama Nation stands prepared to help provide any information the Commission may need in making its decision through its staff and attorney on this matter. If you have any questions, please contact Yakama Nation through our attorney, Joe Sexton who may be reached directly at [joe@galandabroadman.com](mailto:joe@galandabroadman.com), or our Environmental Manager, Elizabeth Sanchez at [esanchez@yakama.com](mailto:esanchez@yakama.com)

Sincerely,

  
JoDe L. Goudy, Chairman  
Yakama Nation Tribal Council