



November 2, 2016

VIA ELECTRONIC MAIL AND U.S. MAIL

Angie Brewer
Wasco County Planning and Development Office
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Re: Comments on Wasco County Planning Commission's Decision to Approve Union Pacific Railroad's Application for Rail Extension (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 Board of Commissioners ("Board") the following comments regarding the Wasco County Planning Commission's ("Planning Commission") decision to approve Union Pacific Railroad's ("Union Pacific") Application for Rail Extension, Application Number PLASAR-15-01-0004, for inclusion in the record and as Yakama Nation's position on the appeal of the above-referenced matter.

I. The Proposed Rail Expansion Interferes with Yakama Nation's Treaty Rights.

The Yakama Nation previously submitted correspondence to the Wasco County Planning and Development Office detailing the adverse impacts of the proposed rail expansion on the Yakama Nation, including the impacts on our Treaty rights. The Yakama Nation submitted letters on September 13, 2016, and September 26, 2016; both are attached. Below, is an excerpt of the comment letters, demonstrating the impact on Yakama Nation's Treaty rights.

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."¹ 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.² 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.³

Further, Treaty rights include a property right in adjacent lands "to the extent and for the purpose mentioned" in the treaties.⁴ 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.⁵

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.⁶ 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

¹ *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905).

² *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

³ 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. 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).

⁴ *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).

⁵ *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the "Boldt Decision"), *aff'd*, 520 F.2d 676 (9th Cir.1975).

⁶ *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).

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[.]"⁷ The Yakama Nation jointly regulates the exercise of its members' Treaty fishing rights on the Columbia River.⁸ 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 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.⁹

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.

...

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

⁷ *Id.* at 382.

⁸ *Id.*

⁹ *Id.*

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

Further, and as outlined in detail in the Yakama Nation's prior correspondence, the Yakama Nation has other significant interests that will be impacted by the proposed rail expansion, including:

- The proposed rail expansion would result in irreparable harm to the Yakama Nation's cultural and natural resources.
- The proposed rail expansion would increase the risk of derailments, spills, explosions, and other avoidable catastrophic impacts resulting from the increase in rail traffic through our lands that will follow the proposed rail expansion.
- The proposed rail expansion would increase emissions, aggravating climate change.

The Planning Commission did not adequately protect the Yakama Nation's interests. As discussed below, the Planning Commission's decision is in direct violation of the applicable laws.

II. The Decision Violates the Applicable Laws, Which Prohibit Projects That Affect Or Modify Treaty Rights.

The National Scenic Area Act provides that nothing shall “affect or modify any treaty or other rights of any Indian tribe.”¹⁰ This requirement is recognized in the Management Plan for the Columbia River Gorge National Scenic Area (“Management Plan”), which expressly cites the National Scenic Area Act.¹¹ The Management Plan further provides that “Indian treaty rights **must be** observed by the Gorge Commission as well as local and state governments, federal agencies, and private citizens.”¹² The National Scenic Area Land Use Development Ordinance (“NSA Ordinance”) recognizes these requirements and provides that “Uses that would affect or modify such [treaty] rights shall be prohibited.”¹³

In recognition of these limitations, the Staff Recommendation & Conditions of Approval recommended the inclusion of two “Treaty Rights Conditions.”¹⁴ The recommended conditions provided:

20. The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

21. UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: one east of the project area, and one west of the project area. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the Umatilla Fish and Wildlife Commission. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the CTUIR. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.¹⁵

Further, the staff recommended that the following related condition be included:

15. UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.¹⁶

At the September 26, 2016 hearing, the Planning Commission discussed removing Condition 20. At the hearing, the Director of the Wasco County Planning Department informed the Commissioners that if the Planning Commission removed Condition 20, “we would be allowing something that has a potential adverse effect to treaty rights” which would be in violation of the

¹⁰ National Scenic Area Act, Section 17(a)(1).

¹¹ Management Plan, Part IV, Chapter 3.

¹² *Id.* (emphasis added).

¹³ NSA Ordinance, Section 14.800(D)(2).

¹⁴ Staff Recommendation & Conditions of Approval, p. PC1, SR-3-SR-4.

¹⁵ *Id.*

¹⁶ *Id.* at PC1 SR-3.

applicable laws.¹⁷ Further, Commissioners suggested that removing a limit on the number of trains allowed per day would make the decision violate the Planning Commission's ordinances and treaties with tribes.¹⁸ However, the Planning Commission dismissed the concerns of its owner Director, and removed the condition despite legal requirements to the contrary.¹⁹

Here, the Yakama Nation informed the Planning Commission that the proposed rail expansion would result in violations of the Yakama Nation's Treaty rights. Accordingly, the governing laws require the Planning Commission to ensure that the proposed rail expansion did not "affect or modify" treaty rights, as uses that affect or modify treaty rights "shall be prohibited."²⁰ By ignoring the staff recommendations, and warnings at the hearing, the Planning Commission violated its governing laws.

Further, even if Condition 20 was included, the proposed rail expansion would still adversely impact the Yakama Nation's Treaty rights. In the Yakama Nation's September 26, 2016 letter, it pointed out that Condition 20 was unenforceable by the County, and based on this, informed the Planning Commission that even with the recommended conditions, the proposed rail expansion would still have adverse impacts on Yakama Nation's Treaty rights. The Commissioners shared the Yakama Nation's concerns about enforceability of the conditions, as evidenced by their comments at the September 26, 2016 hearing.²¹ The Commissioners stated that a limitation on the number of trains per day "very well might not be something that's enforceable in the first place" and, in regards to the Treaty Rights Condition, "I don't know if it's something that's enforceable."²² Accordingly, because the proposed rail expansion will have an adverse impact on the Yakama Nation's Treaty rights, even if the decision is revised to include Condition 20, the Board should deny Union Pacific's application.

This conclusion is supported by the Planning Department's review of our application. The Planning Department concluded that the "Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied." Staff Response to Appeal PLAAPL-16-10-0003, p. 3. Here, the Planning Commission determined that the proposed condition could not be enforced. The Yakama Nation agrees. However, the Planning Commission's response to their conclusion should not have been removal of the condition. The application will negatively impact the Yakama Nation's Treaty rights. Accordingly, and as outlined by the Planning Department, the Board must deny the application.

III. Conclusion

The proposed rail expansion negatively impacts the Yakama Nation's Treaty rights. Accordingly, the Yakama Nation urges the Board to deny Union Pacific's Application for Rail Expansion.

¹⁷ Transcript, Wasco County Planning Commission, Application for Conditional Use, Union Pacific Case File PLASAR 15-01-0004, September 26, 2016 ("September 26 Transcript"), pp. 40-48.

¹⁸ *Id.* at 86-87.

¹⁹ Planning Commission Final Decision & Conditions of Approval, p 4.

²⁰ NSA Ordinance, Section 14.800(D)(2).

²¹ September 26 Transcript, p. 86-87.

²² *Id.*

Thank you for your time and consideration. The Yakama Nation stands prepared to help provide any information the Board 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.

Sincerely,

A handwritten signature in black ink, appearing to read "JoDe L. Goudy". The signature is fluid and cursive, with the first name "JoDe" and last name "Goudy" clearly distinguishable.

JoDe L. Goudy, Chairman
Yakama Nation Tribal Council