



Warm Springs, Oregon 97761 / 541 553-1161

September 21, 2015

Steven V. King
Executive Director and Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park, S.W.
Olympia, WA 98504-7250

Re: Docket TR-151079

Dear Mr. King,

The CTWSRO urges the Washington Utilities and Transportation Commission (WUTC) to engage in rulemaking that will ensure the safety of our communities and address the risks to our waterways now and in the future. This tribe has engaged in fisheries harvests in the waters of the Columbia Basin since time immemorial. The Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSRO), a federally recognized tribe, possesses reserved treaty rights described in The Treaty With The Tribes of Middle Oregon, June 25, 1855 (12 Stat. 963).

A catastrophic event involving crude oil would irreparably harm our fishery for multiple generations. We cannot conceive of how such an event could be mitigated. Fisheries harvests are central to the economic, subsistence, religious and cultural vitality of the CTWSRO. Actions which militate against the ability of the CTWSRO to exercise its right to engage in fisheries harvests are disfavored by this tribe. We adamantly oppose developmental actions which have disrupt the habitat of anadromous species or interfere with the passage of such species to and from the Pacific Ocean.

We have numerous concerns with the proposed shipment of crude oil by rail within the State of Washington, including unacceptable impacts to federally protected fish species. In the Treaty described above, the CTWSRO reserved the right to fish at all usual and accustomed stations.

Provided, also, that the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them.

The courts have recognized that the right to take fish necessarily includes a right to the existence of a habitat, which will sustain such fish. In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir. 1985), the court ruled in favor of protection of fishery habitat in a case involving "...the collision of two interests: the Yakama Nation's interest in preservation of their fishing rights, and the Eastern Washington farmers' interest in preservation of water needed for crops in dry spring and summer." *Kittitas*, slip op. at 2. In *Kittitas*, a court appointed water master had asked the district court for guidance when it became clear that diverting water for for agricultural purposes would leave important salmon egg nests in spawning areas exposed, thus destroying those nests. The Ninth Circuit upheld the district court's directive to the water master to release more water to protect fish. It rejected the argument that the court had no jurisdiction to protect treaty fishing rights.

In *U.S. v Washington*, 506 F. Supp. 187 at 203 (1980), the court stated:

"...There can be no doubt that one of the paramount purposes of the treaties in question was to preserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally acceptable habitat is essential to the survival of the fish, without which the expressly, or -- reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause."

The CTWSRO recommends that "reasonable worst case spill" should be understood, for the purposes of preparing contingency plans, to be the largest foreseeable discharge of oil by a marine vessel, a rail car, a facility or a pipeline. Reasonable worst case spill formulas for facilities should consider linefill capacities, transfer rates and discovery and shut off time.

The CTWSRO recommends that a reasonable per-barrel cleanup and damage cost of spilled oil be assessed as the expenses incurred for investigating the source of the discharge; investigating the extent of the environmental damage caused by the discharge; conducting actions necessary to clean up the discharge; conducting predamage and damage assessment studies; and collecting for damages caused by a discharge.

The CTWSRO recommends that these elements should be included in the amendments to WAC 480-62 regarding the assignment of the damage cost of spilled oil.

- * There should not be a cap on the liability of an owner/transporter of oil. That is, the actual amount of liability should be the obligation of the owner/transporter.
- * There should be a format for reimbursement. In other words, there should be a template advising a permittee of what its responsibilities would be, in the event of a spill, to reimburse federal, state, tribal, and local governments for their respective costs incurred in responding to a spill.
- * There should be a natural resources damage assessment process which provides for the promulgation of regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a discharge of oil or release of a hazardous substance.

There are innumerable places where the access to a tribal fishing site is predicated upon the passage over a private rail crossing. The rail traffic being contemplated will mean, at public and private crossings, delayed traffic movement. Each 120-car unit train is approximately a mile-and-a-half long, and this proposal would significantly increase the daily number of trains along the rail route. These trains will bisect multiple communities along the route, leading to significant traffic delays and potential safety issues at grade-crossings. The delay of only a few minutes for an emergency response vehicle can mean the difference between life and death for citizens in these rural communities. The increased rail traffic, at private and public crossings, will increase the risk of death or severe injury to tribal members exercising their rights.

At every farm or private grade crossing of a railroad where no automatic grade crossing protective device is in place there should be installed, as a means of protecting the crossing, one or more stop signs unless, the installation of such sign or signs at a particular crossing would create a hazard or dangerous condition that would not otherwise exist.

We are concerned for the public health, safety and welfare of tribal members exercising their collective treaty rights throughout the Columbia Basin. We are here on behalf of the resource, including the waters of the Basin, the salmon, and the lamprey, handed down to us by the Creator, which have ensured our existence since time immemorial.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elmer Ward".

Elmer Ward, Policy Planner
Policy and Planning Department
Branch of Natural Resources
Confederated Tribes of the Warm Springs Reservation of Oregon

cc: Confederated Tribes of Warm Springs Reservation of Oregon Tribal Council
Glendon Smith, Secretary-Treasurer
Robert A. "Bobby" Brunoe, Branch of Natural Resources, General Manager