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**APPENDIX R**

**Comments on the Draft EIS and Responses**

**(continued)**

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**COW CREEK BAND OF UMPQUA TRIBE OF INDIANS****GOVERNMENT OFFICES**2371 NE STEPHENS STREET, SUITE 100  
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July 2, 2019

Kimberly D. Bose, Secretary  
Nathaniel J. Davis, Sr., Deputy Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426Re: Comments on Draft Environmental Impact Statement for the Jordan Cove Energy Project  
Docket Nos. CP17-494-000 and CP17-495-000

Dear Ms. Bose,

I write on behalf of the Cow Creek Band of Umpqua Tribe of Indians ("Tribe") to provide comments on the Draft Environmental Impact Statement ("DEIS") for the Jordan Cove Energy Project ("Project"), Docket Nos. CP17-494-000 and CP17-495-000, consisting of the Jordan Cove LNG Project ("LNG Terminal") and the Pacific Connector Gas Pipeline Project ("Pipeline").

The LNG Terminal would be located in Coos County, Oregon, and would be capable of liquefying up to 1.04 billion cubic feet of natural gas per day for export. The Pipeline would be approximately 229 miles long, with a 36-inch diameter gas pipeline that will run from Malin, Oregon to Coos Bay, Oregon.

Currently, the projected path of the Pipeline will cross over 122 miles of the Tribe's Ancestral Territory. See 25 U.S.C. § 712e. The Tribe considers all of its Ancestral Territory sacred. Every mountain, tree and turn of the river has traditional, religious and cultural significance to the Tribe. These areas are our homelands and, as such, we consider ourselves stewards of these lands. Any impacts to these lands concern the Tribe, as we seek to protect and enhance the land for current and future generations.

Overall the Project will have long-term and permanent impacts on the Tribe's historic and current uses of its lands, cultural resource sites, archeological sites, and environmental resources, both aquatic and terrestrial. Below, please find an overview of the Tribe's concerns about the Project.

**I. Meaningful Consultation**

As an initial matter, it is important to recognize that the Federal Energy Regulatory Commission ("Commission") has a duty to engage the Tribe in meaningful consultation.

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Executive Order 13175 (“Order”) directs federal agencies to engage in “regular and meaningful consultation and collaboration with tribal officials” in the development of Federal policies that have tribal implications. The Order provides that consultation must ensure tribal officials have the opportunity to provide “meaningful and timely” input.

The Commission has recognized the “unique relationship between the United States and Indian tribes” acknowledging that Indian tribes have “sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources.” 18 C.F.R. § 2.1c. Pursuant to this unique relationship, the Commission recognized the need to “consult with federally-recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes” stating that “this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.” *Id.*

Further, the Commission understands that it has “a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes.” *Id.* The Commission has stated that “pursuant to the Commission’s trust responsibility” the Commission “will endeavor to work with Indian tribes on a government-to-government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation.” *Id.*

A federal agency’s requirement to consult is not fulfilled merely by an agency’s invitation to a tribe to participate in public meetings. *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 755 F.Supp.2d 1104, 1119 (S.D. Cal. 2010). In *Quechan*, the court noted that “[w]hile public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don’t amount to the type of ‘government-to-government’ consultation contemplated by the regulations.” *Id.* The court stated that “[t]his is particularly true because the Tribe’s government’s requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.” *Id.* Ultimately, the court concluded that the tribe was likely to prevail on its claim that it was not adequately consulted and granted the tribe’s motion for a preliminary injunction. *Id.* at 1122.

For the Project, the Tribe has repeatedly requested a private meeting with the Commission to engage in government-to-government consultation. However, the Commission has repeatedly rebuffed these requests, insisting that any meeting be public. In its meetings with the Commission, the Project Proponent was allowed to attend. This severely limited the Tribe’s ability to provide meaningful input and engage in meaningful consultation. The Tribe submits these comments, in an effort to convey its concerns to the Commission. Accordingly, the Commission should seriously consider the Tribe’s concerns and ensure that its input is incorporated into the Final Environmental Impact Statement (“FEIS”).

## II. Incomplete Documents

This letter was drafted based on the information provided in the DEIS. However, several documents referenced in the DEIS are still not complete. This includes, but is not limited to, the

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TR4-1 FERC is not part of the Executive Branch of the United States government. FERC is an independent federal regulatory agency, specifically excluded from following EO 13175 under Section 1(c) of that Order. Nevertheless, as stated in section 4.11.1.2 of the draft EIS, the Commission has enacted a “Policy Statement on Consultations with Indian Tribes” in FERC Order 637. In accordance with that Policy, we have conducted government-to-government consultations with the Cow Creek Tribe, including notices, emails, telephone calls, letters, and meetings. Quenchan is not applicable to the Jordan Cove Project, because in this case FERC has been responsive to the Tribe’s requests for information and meetings. As disclosed in table L-4 of appendix L of the DEIS, FERC staff met in-person with representatives of the Cow Creek Tribe on June 28, 2017 and June 17, 2019, at the tribal office in Roseburg, Oregon to discuss the Projects. In accordance with Commission practice under our ex-parte rules, those meetings were noticed and open to the public. Because the Cow Creek Tribe is an intervenor in this proceeding, FERC staff cannot conduct private, off-the-record, meetings.

TR4-2 We acknowledged in the draft EIS that some plans, such as the HPMP and UDP, have not yet been finalized. While some information was still pending at the time of the issuance of the draft EIS, the lack of final plans does not deprive the Cow Creek Tribe of a meaningful opportunity to comment on draft plans. The courts have held that final plans are not required at the NEPA stage (see *Robertson v Methow Valley Citizens Council*). The route of the pipeline is known and disclosed on maps provided in appendix C of the draft EIS.

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Historic Properties Management Plan, the Inadvertent Discovery Plan, the Compensatory Wetland Mitigation Plan, and the Fish Salvage Plan. In addition, the final route for the Pipeline has not yet been determined. It is impossible for the Tribe to provide comprehensive comments on the DEIS when several key documents are still incomplete or are in draft form and the final route of the Pipeline is still in question. The Tribe will be reviewing these items when completed and reserves the right to submit comments about these documents on the record.

TR4-2  
cont.

### III. Description of the Proposed Action

#### A. Section 2.6.2, FERC Environmental Compliance Monitoring

On page 2-67, the DEIS states that during construction Environmental Inspectors will ensure that the Project Proponent is compliant with the environmental regulations. It is important that these environmental inspectors are hired from a company that is independent from the Project Proponent, in order to maintain impartiality in enforcing environmental regulations. Further, it is important that tribal monitors be present, in order to ensure that the concerns of the Tribe are adequately represented, and the Tribe's resources protected. Tribes have unique interests and perspective and tribal entities should have the ability to participate in the monitoring process. The Tribe should be consulted with and given the opportunity to monitor the Project Proponent's activities throughout the Ancestral Territory of the Tribe.

TR4-3

### IV. Water Resources and Wetlands

#### A. Section 4.3.2.2, Pacific Connector Pipeline Project

On page 4-103, the DEIS states that the Pipeline will require the construction of 10 Temporary Access Roads ("TARs") and 27 Permanent Access Roads. Additionally, 23 Existing Access Roads that are within 200 feet of Coho salmon bearing streams will be improved by widening, resurfacing, and/or have the brush removed. Gravel roads lead to runoff and sediments entering water bodies occupied by listed species even if Best Management Practices ("BMPs") are followed. In an area where the forests are already saturated with roads, additional gravel roads will compound this existing water quality issue.

On page 4-103, the DEIS it states that all TARs will be restored to preconstruction conditions. This will be impossible if mature trees are cut down to create a road. For TARs that are near or cross streams, cutting down trees will reduce shade and increase water temperatures. This is especially important for small streams. These impacts need to be addressed in the FEIS.

TR4-4

On page 4-103, the DEIS suggests that only roads within 200 feet of a stream can contribute sediment to a stream system. A literature review by the USFS suggests that while this 200 foot rule may be true in some areas, this distance is highly dependent on the geology of an area. In order to fully comprehend the impacts of sediments from roads, an analysis of the different types of geology along the pipeline route would be necessary. The GRAIP method would be an appropriate analytical tool to access the sediment inputs to streams

On page 4-109, the DEIS states, that 31 to 65 million gallons of water would be required to test the Pipeline during hydrostatic testing. Further on page 4-111, the DEIS states that "If hydrostatic test source water cannot be returned to the same water basin from where it was

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TR4-3 If the Projects are authorized, construction would be monitored by EIs hired by the company; as stated in the DEIS. However, FERC, would also employ third-party environmental monitors to inspect construction; and those monitors would be independent of the company and report solely to FERC staff (see section 2.6.2 of the DEIS). the BLM and USFS may also have independent monitors on federally managed lands. We agree that it would be helpful to have additional monitors representing the Cow Creek Tribe also inspecting construction of the pipeline through their ancestral lands. We have suggested that the company enter into an agreement with the Cow Creek Tribe to provide for tribal monitors during construction; similar to the CRPA that the company executed with the CTCLUSI (see page 4-640 of the DEIS).

TR4-4 The effects of riparian and stream side vegetation loss on stream temperatures are addressed in sections 4.3 and 4.5 of the EIS. As disclosed in these sections, the effects are not considered to be high enough to have significant biological effects, and no mitigation was determined to be necessary.

The geological conditions in the project area are addressed in section 4.1; soil erosion is addressed in section 4.2 and 4.3. The effects of screening water intakes is addressed in section 4.6. The effects of the Project on groundwater is addressed in section 4.3.

The NMFS recommendation is not a requirement in the EIS. However, the NMFS may require this as part of their Biological Opinion on the Project.

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withdrawn, Pacific Connector would disinfect the water that would be transferred across water basin boundaries.” Therefore, there is potential for basins to lose water quantity and this takes away beneficial uses for multiple purposes, in particular aquatic life requirements. There is no information regarding the use of screens when pumping water for the testing. NMFS criteria screens should be used to prevent the entrainment of any species of concern. However, the screening that NMFS requires does not take into account Lamprey ammocoetes which when they emerge are the size of an eyelash. Lamprey are a highly sensitive fish species that are culturally significant to the Tribe. Any impacts to lamprey should be mitigated for as much as possible due to their population numbers decreasing across the State.

The two main water quality parameters of concern are temperature and sedimentation. The Pipeline will cross six streams within the Umpqua Basin that are on the State’s 303D list for temperature. The Pipeline will have a 95-foot permanent right of way that must remain cleared of vegetation. For the Pipeline, there will be 429 acres of riparian habitat removed along rivers and streams. This has the potential to increase temperature and sedimentation. The DEIS does not address how these impacts would be reduced, mitigated or what long term monitoring would be done to show there will be no significant long-term impacts. There needs to be quantitative analysis such as appropriate modeling to make the assumptions listed in the cumulative impacts section on water quality.

The DEIS is dismissive of cumulative effects of increased water temperatures due to decreased shading of streams and rivers from clearing in the ROW. On page 4-114, it is stated that an analysis of 15 stream crossing was completed using the Stream Segment Temperature Model. However, this model is not meant to analyze cumulative effects across a watershed; it is only meant to measure segments of a stream. Further, this is a low sample number in comparison to the at least 300 crossings anticipated by the Project. The FEIS needs to include an analysis on additional stream crossings for temperature sensitivity. An alternative model to use would be BasinTemp that was developed to analyze water temperatures for every reach segment and take into account the cumulative downstream temperature effects of the projects.

On page 4-117, the DEIS indicates that the National Marine Fisheries Service (“NMFS”) has expressed concern about fertilizer application and recommends no applications within 150 feet water bodies. However, the DEIS states that there will be no applications within 100 feet of water bodies. This is inconsistent with NMFS recommendations.

Based on the DEIS, it is unclear how the Pipeline’s construction and operation may impact the aquifer and groundwater resources within the Tribe’s Ancestral Territory. Further analysis is required to adequately assess the impacts to groundwater resources. The FEIS should include a detailed analysis.

#### **B. Section 4.3.3.2, Pacific Connector Pipeline Project**

On page 4-128, the DEIS states that a criterion was used to access wetlands function and values. There is no mention of what method was utilized, and it would be recommended that Oregon Wetland Assessment Protocol be used as well as the Stream Function Assessment Method.

TR4-4  
cont.

TR4-5

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TR4-5 As noted in Appendix E of the *Compensatory Wetland Mitigation Plan* prepared for the Project (and filed with the FERC in January 2019), the Oregon Wetland Assessment Protocol was used to assess wetland functions and values. The COE and ODSL are currently working with the applicant on wetland mitigation requirements. Per the requirements of the Clean Water Act, the applicant would have to demonstrate that all impacts to wetlands are avoided or minimized to the extent practical as part of the 404 and 401 permitting process. These agencies can then require mitigation to compensate for any permanent impacts. Additionally, as noted in the *Compensatory Wetland Mitigation Project*, permanent impacts to wetlands from the Pipeline total less than one acre and these impacts would occur across eight fifth-field watersheds and most of the impacts within the affected watersheds amounting to less than 0.1 acre. Permanent wetland impacts would exceed 0.2 acre in only one watershed (Olalla Creek - Lookingglass Creek Watershed). Previously, Pacific Connector proposed to mitigate for wetland impacts at the Cow Hollow Mitigation Bank which is within the Olalla Creek – Lookingglass Creek Watershed, where the largest conversion impact (0.37 acre) would occur. However, the ODSL had concerns that this mitigation bank was not a viable option due to the lack of available credits. Based on ODSL’s reservations concerning the Phase II proposal and because there were no other mitigation bank service areas that overlapped the pipeline, Pacific Connector dropped the use of mitigation banks from further consideration and chose to consolidate mitigation in a single location that would have a high likelihood of success and that would be co-located with the Jordan Cove LNG Terminal’s compensatory mitigation obligations at the Kentuck project in Coos Bay, Oregon. Further, the Pipeline’s permanent wetland impacts consist of small, individual impacts spread over a large geographic area, and, therefore, it is impractical to conduct wetland mitigation at multiple, small sites in various watersheds crossed by the Pipeline.

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On page 4-130, the DEIS states that “For areas where on-site delineation was not possible due to lack of landowner permission, Pacific Connector used USGS topographic maps, NRCS soil surveys, FWS NWI maps, and aerial photography to identify wetland type and boundaries.” The DEIS does not provide maps specifying which areas have not been delineated; this should be made clear in the FEIS. The concern is that the estimated number of acres that need to be mitigated for wetland loss will not be accurate if on the ground delineation was not completed for all potential wetlands. This needs to be addressed before the compensatory mitigation plan is approved.

On page 2-17, the DEIS states that “Jordan Cove and Pacific Connector propose to mitigate the loss of wetlands that would result from both the Jordan Cove LNG and Pacific Connector Pipeline Projects through the Kentuck project (i.e., wetland impacts include permanent and temporary impacts and loss of aquatic resource types, functions and values; see section 4.3).” Based on the high value wetlands affected by the Pipeline, detailed in Appendix H, on pages 8-9, there are three other watersheds with wetlands being impacted outside of the coos. There needs to be mitigation within these watersheds as well in order to replace the functions/values being lost with the construction of the Pipeline. It is difficult to completely assess the wetland impacts because the compensatory mitigation plan is not complete. On page 4-132, the DEIS states that 112.2 acres of wetlands would be impacted with the construction of the Pipeline, but only 4.9 acres would be permanently impacted. On page 4-133, the DEIS states that the U.S. Army Corps of Engineers may require additional compensatory mitigation for impacts on Aquatic Resources of Special Concern. Based on the DEIS, the acres of wetlands impacted is still being determined and it is too soon to reach a determination that only 4.9 acres will be permanently impacted.

TR4-5  
cont.

#### V. Wildlife and Aquatic Resources

The Pipeline has the potential to adversely affect the Tribe and its members. Any impact to wildlife and aquatic resources will be disproportionately felt by the Tribe. Tribal members rely on fishery resources and riparian areas for sustenance and cultural activities. Any negative impacts to fish populations or riparian areas decrease the opportunities for Tribal members to hunt, fish and gather. Further, it decreases the opportunities for cultural practices such as religious ceremonies, basketry and jewelry making. This disproportionate impact to the Tribe needs to be analyzed and reflected in the FEIS.

TR4-6

##### A. Section 4.5.2.3, Pacific Connector Pipeline Project

On page 4-295, the DEIS acknowledges that the NMFS has determined that the Pipeline’s LWD plan for the number of LWD pieces, locations and methods is inadequate. However, the Project Proponent has not addressed this concern and has not updated the proposed plan, citing consistency with ODF and ODFW guidelines from 1995. Those guidelines are over 20 years old and likely out of date. The FEIS needs to address the NMI’S’s concerns about the LWD plan.

TR4-7

On page 5-18, which provides the Commission’s recommended mitigation measures, the DEIS states:

**Prior to construction**, Pacific Connector shall file with the Secretary, for review and written approval by the Director of OEP, its final *Fish Salvage Plan*, that addresses methods suitable to collect and salvage all lamprey life stages, to the

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TR4-6 Impacts on wildlife and aquatic resources were addressed in section 4.5 of the DEIS while subsistence hunting and gathering is addressed in section 4.9. We have consider these comments while revising the text for the final EIS.

TR4-7 The addition of LWD to waterbodies as part of the company’s program to mitigate for habitat and wildlife species impacts is discussed in section 4.5.2.3 of the EIS.

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extent practical, together with documentation that the final *Fish Salvage Plan* was developed in consultations with interested tribes, ODFW, FWS and NMFS. The revised *Fish Salvage Plan* shall also incorporate the applicable measures of the Handling Guidelines for Klamath Basin Suckers. (section 4.5.2.3)

Accordingly, the Commission recommends that the lamprey and lamprey salvage methods be incorporated into the fish salvage plan. The Tribe has provided input on the fish salvage plan, but has not received any follow-up on the comments and has not been provided any final version of the fish salvage plan. The Commission should ensure that the Tribe is consulted prior to the finalization of the fish salvage plan, and, at a minimum ensure the Tribe's concerns are addressed in the final fish salvage plan.

TR4-8

#### B. Mitigation at Kentuck Project Site

The DEIS provides that the mitigation for impacts to water resources and wetlands from the Pipeline will occur at the Kentuck Project Site. This mitigation is not adequate to compensate for the impact of the Pipeline on multiple stream crossings within the Tribe's Ancestral Territory. The Pipeline will cross 122 miles of the Tribe's Ancestral Territory, essentially bisecting the Ancestral Territory. Currently there is no plan for mitigation within the Tribe's Ancestral Territory. All mitigation is focused at the Kentuck Site, which is out of basin for most of the Pipeline's route.

Mitigation for impacts to Coho salmon, a species listed under the Endangered Species Act and a culturally significant species to the Tribe, should be proposed within the same basin, watershed or stream as the impact will occur, in order to offset negative impacts to the species and its critical habitat. This includes mitigation for impacts from the Pipeline within the Tribe's Ancestral Territory. The Tribe should be consulted with on any proposed mitigation actions, not only for Coho, but for other species that occur within the Tribe's Ancestral Territory and may be impacted by the Pipeline.

TR4-9

The proposed mitigation at the Kentuck Project Site will provide benefits to *estuarine* habitats only that salmonids may utilize during juvenile out migration. However this out of basin mitigation does not take into account the impacts to *freshwater* life stages of aquatic species impacted by the Pipeline, including important spawning grounds of Coho, steelhead, chinook and pacific lamprey in the Rogue, Umpqua and Klamath River systems. Additionally, the restoration work at the Kentuck Project Site only addresses impacts to Oregon Coast ("OC") Coho Salmon and only within Kentuck Creek. OC Coho also utilize the Umpqua River and its tributaries and no mitigation is proposed within the Umpqua system. Impacts to other listed species, such as Southern Oregon Northern California Coast Coho, which are found in the Rogue River, do not benefit from this mitigation, nor do sensitive species identified by ODFW such as Bull Trout, Spring and Fall Chinook, Cutthroat Trout, Pacific Lamprey, other resident lamprey species, Oregon Chub, and Steelhead. Impacts to endemic species such as Umpqua pike minnow and Umpqua chub are likewise not mitigated for in the plan.

The mitigation for the Pipeline's impacts should not be limited to the Kentuck Project Site. Rather, mitigation should be proposed along the Pipeline's route. Mitigation should occur within the area that will be impacted by the Pipeline. Again, the Tribe is particularly concerned, as the

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TR4-8 Our recommendation addresses this issue, as it indicates that the plan must be developed in consultation with the interested tribes.

TR4-9 The scope and suitability of wetland mitigation is determined by the COE. Therefore, the Commission and the EIS defers this decision to the COE.

Pipeline runs through 122 miles of the Tribe's Ancestral Territory. Mitigation at the Kentuck Project Site does not compensate for impacts to the Tribe's Ancestral Territory. Further, the Tribe should have the opportunity to review any mitigation plans and should be consulted on any proposed mitigation.

TR4-9  
cont.

**VI. Recreation and Visual Resources**

**A. Section 4.8.2, Visual Resources**

The Commission defines culturally modified landscapes, for use in their analysis of impacts to visual resources, as including "farm and rangelands, small towns, and forest management activities including clear-cut timber harvesting." These are all modern activities. No attention, and therefore no analysis, has been given to generations of fire use that have created various open meadow systems created for resource utilization and diversity. Consideration to these open meadow systems should be considered for their visual aesthetics and for their resource and biodiversity.

The visual resources analysis made use of ten viewpoints, based on areas of perceived visual aesthetics. These "key observation points" were determined from BLM and NFS visual resource guidelines with no consultation with the Tribe. For a project of this scale, the number of viewpoints is low, and no viewpoints were conducted along the Umpqua/Rogue Divide, of which there are several important visual resources for the Tribe. Additionally, there is no mention for visual impacts to cultural sites where rock cairns are present. Cairns along ridgelines are typically associated with viewsheds. Attention needs to be given ridgelines for analysis of impacts to visual resources. Additional viewpoints along the divide are recommended as well. Other visual resources will be brought to light once the required ethnographic study is conducted with the Tribe.

TR4-10

**VII. Cultural Resources**

When considering the significance of an impact, the Commission must consider both the context and intensity. The Tribe believes the Commission has failed to analyze the impacts using an appropriate tribal context, as further discussed below. Furthermore, although the Commission classifies the intensity of an impact on individual resources, the Commission fails to consider the disproportionate impacts that the Project, as a whole, has on the Tribe and its culture.

The Ancestral Territory of the Tribe includes portions of Coos, Curry, Douglas, Jackson, Josephine, Klamath and Lane Counties. The Cow Creek people have lived in this area since time immemorial. The heritage of Cow Creek people is contained within the land and the ancient evidence of life on these lands is our connection to our ancestors and cultural traditions. The land and these resources are both sacred and irreplaceable.

TR4-11

At least 122 miles of the Pipeline will bisect the Tribe's Ancestral Territory resulting in impacts to both natural and cultural resources. These cultural resources include, but are not limited to, religious and sacred sites; customary hunting, fishing and gathering areas; traditional cultural properties; cultural landscapes, traditional plants; burial grounds; and various archaeological site types and objects. These resources are vital to the cultural continuity and survival of the Tribe. Therefore, any impacts to these resources must be avoided, as much as possible, and, in cases

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TR4-10 We acknowledge that for thousands of years previous, Native Americans used fire to create meadow habitat in forest breaks, and we have acknowledged this point in the revised text for Section 4.8.2 in the final EIS. The comments of the Cow Creek Tribe on our draft EIS represent consultations on our Visual Resource Analysis. The Tribe has not provided us with specific locations or KOP to include in our analysis.

TR4-11 We agree that the pipeline route would cross ancestral ceded land formerly used and occupied by the Cow Creek Tribe. In order to identify religious and sacred sites, customary hunting, fishing, and gathering areas, traditional cultural properties, and cultural landscapes important to the Tribe in the APE, we requested that the company produce a revised Ethnographic Study. We expect such a study to provide us with a tribal context for interpreting impacts on cultural resources. We acknowledged on page 4-632 of the draft EIS that "Indian tribes have pointed out that their definition of cultural resources is more expansive [than the definition in FERC's Guidelines] and may include natural resources or features."



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where they cannot be avoided, appropriate mitigation must be provided. Data recovery at archaeological sites is inadequate mitigation for these significant impacts.

#### A. Section 4.11, Cultural Resources

The Commission defines cultural resources as any prehistoric or historic archaeological site, district, object, cultural feature, building or structure, cultural landscape, or Traditional Cultural Property (“TCP”). In addition, the Commission should take into account the full gamut of resources that the Tribe views as cultural resources. The Tribe considers natural resources to be cultural resources. Therefore, any impacts to tribal lifeways by the Pipeline, including any impacts to the Tribe’s hunting, fishing and gathering rights, and any restrictions to access to traditional lifeways, will affect the Tribe for the life of the Pipeline.

#### B. Section 4.11.1, Consultations

The DEIS misrepresents that consultation that has occurred with the Tribe. Consultation under previous docket numbers does not meet the consultation requirements for this Project. Additionally, notifications sent regarding this Project do not constitute meaningful consultation. Therefore, the Commission has not initiated consultation with the Tribe under Section 106 of the National Historic Preservation Act (“NHPA”).

The Tribe has not been consulted regarding determinations of eligibility in the National Register of Historic Places (“NRHP”) and project effects, nor has the Tribe been consulted regarding the resolution of adverse effects. Cultural resource inventory and evaluation reports, as well as treatment plans filed under previous docket numbers, must be resubmitted to the Tribe for review and approval. The Tribe requests to be consulted under Section 106 of the NHPA to begin discussion NRHP edibility, determination of effects, and the resolution of adverse effects.

The Tribe concurs with the Commission that the Project Proponent must execute a Cultural Resource Protection Agreement (“CRPA”) with the Tribe to continue monitoring archaeological investigations. The Tribe also concurs with the Commission that the Project Proponent must provide future reports and treatment plans for the Tribe’s review and approval.

As previously stated, the Project will cross 122 miles of the Tribe’s Ancestral Territory. The Tribe has many concerns about the impact to the Tribe’s Ancestral Territory. These concerns are not limited to cultural resources, cultural resources, stream crossings, water quality and aquatic resources, as implied in the DEIS. The Tribe has provided its concerns in multiple pieces of correspondence, beyond the letter referenced in the DEIS. The Commission should acknowledge the Tribe’s other concerns. Meaningful consultation with the Tribe will also help further clarify the robustness of the Tribe’s concerns.

#### C. Section 4.11.3.1, Ethnographic Studies

The Tribe was not aware that the Project Proponent had conducted an ethnographic study and filed an associated report with the Commission. The Tribe has not been provided the opportunity to review this report. The Tribe concurs with the Commission that an ethnographic study is required under the NHPA to identify sites of religious and cultural significance. As the

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TR4-12 We disagree. We conducted government-to-government consultations with the Cow Creek Tribe, as documented in section 4.11.1.2 and appendix L of the draft EIS. 36 CFR 800.2(a)(4) states that an agency should “...use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.” We consulted with Indian Tribes using notices, emails, telephone calls, letters, and meetings; which are our standard procedures. We consider those actions to constitute government-to-government consultations. The Cow Creek Tribe was sent copies of all inventory and testing reports, which contained recommendations of NRHP eligibility and Project effects, for the Tribe’s review, and thus the Tribe was consulted on eligibility and effect in accordance with the regulations for implementing Section 106 of the NHPA at 36 CFR 800.

TR4-13 The company should have sent the Cow Creek Tribe a copy of Deur (2018). We are surprised that the Tribe is unaware of the original Ethnographic Study, as the Tribe had multiple meetings with the company, and participated in the Working Group where the study was discussed. In the DEIS we recommended that the company produce a revised Ethnographic Study, in coordination with affected Indian Tribes.

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Project will cover 122 miles of the Tribe's Ancestral Territory, the Commission should require the Project Proponent to consult with the Tribe during the development of the ethnographic study, to ensure the ethnographic study includes an analysis of the Tribe's use and occupation of the area of potential effect. Further, the Tribe should be able to review and approve any ethnographic study that is developed.

TR4-13  
cont.

#### D. Section 4.11.3.3, Pacific Connector Pipeline Project

The Tribe has not been consulted or coordinated with regarding the viewshed analysis. The number and locations analyzed by the DEIS is inadequate. As there have been no adequate ethnographic studies conducted, the DEIS analysis of indirect effects from viewshed is moot. A thorough ethnographic study, conducted in coordination with the Tribe, will identify additional cultural resources that will be impacted both directly and indirectly by the Project, including impacts to viewsheds.

As previously stated, the Tribe has not been consulted with regarding the determinations of eligibility and, therefore, does not concur with these determinations. The Tribe requests to be consulted and have the opportunity to review and approve the determinations of eligibility related to cultural resources in the Tribe's Ancestral Territory.

The Tribe concurs that the Historic Properties Management Plan ("HPMP") is draft and requires further revision in consultation with the Tribe. The avoidance plans contained within the draft HPMP and any others to be added in subsequent revisions must be reviewed and approved by the Tribe.

The DEIS states that forty-three sites are unevaluated and will not be avoided requiring additional investigations. Over half of these sites are within the Tribe's Ancestral Territory, thus disproportionately affecting the Tribe. The Tribe requires that Tribal monitors be present during the investigation and that the Tribe has an opportunity to review the reports. The Tribe must also be provided the opportunity to review, comment, and approve determinations of eligibility as well as assessment of adverse effects. For cultural resources determined eligible for the NRHP that will be adversely affected, the Tribe requires that culturally appropriate mitigation be implemented in consultation with the Tribe. Archaeological data recovery is not sufficient mitigation for impacts to Tribal cultural resources.

TR4-14

The DEIS states that twenty sites to date have been determined eligible for listing on the NRHP and will not be avoided. Nineteen of the twenty sites are within the Tribe's Ancestral Territory, thus disproportionately affecting the Tribe. The Commission has recommended archaeological data recovery as mitigation for adverse effects. Conducting archaeological data recovery is not adequate mitigation for the adverse effects to the Tribe's significant cultural resources. Consultation must commence with the Tribe, as soon as possible, to discuss culturally appropriate mitigation, in addition to archaeological data recovery.

The DEIS states that the Project Proponent has "in most cases" prepared treatment plans for the eligible sites that will be adversely affected and that these were reviewed and accepted by appropriate interested Indian tribes. For the Project, no treatment plans have been reviewed and accepted by the Tribe. Treatment plans developed under previous docket numbers must be

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## TR4 continued, page 9 of 14

TR4-14 We agree that monitors representing the Cow Creek Tribe should participate in future cultural resources investigations, and that the company should send the Tribe copies of all cultural resources reports. Previously, the company sent the Cow Creek Tribe copies of treatment plans, so that the Tribe has had the opportunity to comment on the measures that may be appropriate to mitigate adverse effects on historic properties located within their ancestral lands that may be affected by the Project.

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reviewed anew and approved by the Tribe. Additionally, archaeological treatment plans associated with data recovery is not sufficient mitigation for impacts to the Tribe's cultural resources. The Tribe requests to review all treatment plans associated with the Project as well consultation to discuss adequate mitigation measures in addition to archaeological data recovery.

TR4-14  
cont.

#### E. Section 4.11.3.4, Federal Lands

To date, five Bureau of Land Management ("BLM") sites have been determined eligible for the NRHP and will not be avoided. All five sites are within the Tribe's Ancestral Territory. The DEIS states that data recovery is recommended to mitigate for adverse effects. The Tribe must review and approve all treatment plans. Additionally, archaeological data recovery is not enough to mitigate for adverse effects to the Tribe's significant cultural resources. The Tribe requests that consultation commence, as soon as possible, to discuss a full mitigation package, in addition to the proposed archaeological data recovery, that will adequately mitigate for adverse effects to the Tribe's significant cultural resources.

TR4-15

One site on Forest Service land is eligible for listing on the NRHP and will not be avoided. The Tribe requests that the proposed archaeological treatment plan be provided to the Tribe for review and approval. As with other proposed mitigation, it is not enough to mitigate for adverse effects through solely conducting archaeological data recovery. The Tribe requests to be consulted as soon as possible to discuss the full mitigation package for the resolution adverse effects.

The Commission states that "Pacific Connector's consultants have recommended that data recovery investigations be conducted to mitigate adverse effects at the unavoidable eligible sites." Along with the previous concerns about data recovery, there is no indication of federal agency concurrence with this recommendation. The Commission should include any federal agency concurrence about mitigation for Tribal review and comment.

#### F. Section 4.11.4, Unanticipated Discovery Plans

The Tribe provided comments on the inadequacy of the Unanticipated Discovery Plan ("UDP") correspondence to the Commission, dated April 11, 2018. The UDP has been revised since that date; however, the UDP is still unacceptable. The Tribe will not approve any document that references the UDP until the UDP adequately addresses the Tribe's concerns and is formally approved by the Tribe.

TR4-16

#### G. Section 4.11.5, Compliance with the NHPA

The Tribe concurs that the Commission has not completed the process of complying with the NHPA. Forty-three sites, over half of which are within the Tribe's Ancestral Territory, will not be avoided and require additional investigations. The Tribe requests the opportunity to consult on the research design, monitor investigations, review the findings, consult on the determination of effects, and consult on adequate mitigation strategies beyond data recovery.

TR4-17

The Tribe concurs that the ethnographic study requirement for the identification of traditional cultural resources is incomplete. As the Tribe was not consulted and did not have the opportunity to review the draft ethnographic study that was submitted to the Commission by the

## TR4 continued, page 10 of 14

TR4-15 Previously, the company sent the Cow Creek Tribe copies of treatment plans, so that the Tribe has had the opportunity to comment on the measures that may be appropriate to mitigate adverse effects on historic properties located on federal lands within their ancestral territory that may be affected by the Project. Table L-9 in appendix L of the draft EIS provided federal land management agency determinations for sites on federal lands that would be crossed by the proposed Pacific Connector pipeline route. The federal land managing agencies have reviewed and approved treatment plans for affected historic properties on BLM, NFS, and Reclamation lands. In the final EIS we would edit text to make this clear.

TR4-16 The Commission would not accept the UDP as final until the comments of the Cow Creek Tribe have been addressed.

TR4-17 The company previously provided the Cow Creek Tribe with copies of all cultural resources reports and treatment plans, so that the Tribe has had the opportunity to comment on research designs, recommendations of eligibility and effects, and mitigation measures. In the draft EIS we recommend that the revised Ethnographic Study to be produced by the company be researched in coordination with Indian Tribes, and that tribes should have an opportunity to review and comment on the study before it is finalized. As the draft EIS stated, we would formulate a draft agreement document to resolve adverse effects at all affected historic properties, in consultation with the consulting parties, including the Cow Creek Tribe. We would invite the Tribe to sign the final document as a concurring party.

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Project Proponent on April 4, 2018. The Tribe has grave concerns about being excluded from subsequent revisions. The Tribe formally requests to be a part of all facets of the ethnographic study and report revision. The Tribe must have the opportunity to inform the research design, investigations, interpretation of findings, and use in informing compliance activities including culturally appropriate mitigation.

To date, twenty historic properties will be adversely affected by the Project, all of which are within the Tribe's traditional homeland, except one. The Commission must produce a memorandum of agreement ("MOA") if the Project is approved to resolve adverse effects to historic properties. The MOA must include treatment plans that appropriately mitigate for adverse effects. These treatment plans must include more than archaeological data recovery. Consultation must begin as soon as possible to begin formulation of an adequate mitigation strategy. The Tribe must approve of all treatment plans and the MOA. The methodology associated with phased surveys and testing investigations must be done in consultation with the Tribe. At a minimum, this should provide a mechanism for the Tribe to participate in every facet of cultural resource compliance including mitigation strategies for newly documented eligible sites. The Tribe also requests to be an invited signatory to the MOA, as we are a consulting party whose resource are the subject of required mitigation. Additionally, the Tribe intends to play an active role in ensure that provisions provided for in the MOA are carried out appropriately.

TR4-17  
cont.

#### VIII. Cumulative Impacts

##### A. Section 4.14.1.9, Cultural Resources

The Commission states the Project's effects on cultural resource sites are localized. The example the Commission provides "a direct impact on an archaeological site would typically not affect other sites; therefore, the geographic scope for archaeological sites is limited to the area within which sites could be directly or indirectly affected by an action." However, this does not take into account a traditional cultural landscape. Cultural resources are a part of an interrelated whole, damage to one affects the whole. Adverse impacts to many cultural resources have significant cumulative impacts. The Commission must analyze the Project's cumulative impacts from this lens. Additional consultation with the Tribe must be conducted to ensure that an adequate cumulative effects analysis has been completed for all past, present, and reasonably foreseeable actions associated with the Project.

TR4-18

The Commission's approach to analyzing cumulative effects is fatally flawed. It is an error to consider past project impacts to resources as part of the environmental baseline. Further, confining reasonable and foreseeable impacts to federal projects in progress is short sighted. Also, dismissing cumulative impacts to resources as merely an adverse effect that the agencies must address is counter to the spirit of the law. By this logic, cumulative impacts will never be analyzed, let alone addressed because the only impacts that are being looked at are those that are happening concurrently with the Project.

##### B. Sediment Deposit

In the DEIS, the crossing methods both for the Pipeline and for equipment acknowledge that some sediment will get in the water, temporarily increasing turbidity and having a short-term

TR4-19

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TR4-18 Comment noted. Cumulative impacts on cultural resources are addressed in section 4.14.

TR4-19 As stated in section 4.14 of the EIS, a quantitative analysis cannot be completed.

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impact to the streams. However, given the number of waterbody crossings, all of these “small” inputs of sediment can have cumulative negative effects on stream ecosystems. The cumulative impact section of the DEIS states that these actions “could contribute to cumulative impacts” on resources, but do not provide any quantitative data in support or against the actions proposed. This should be addressed in the FEIS.

TR4-19  
cont.

#### IX. Conclusions of the Environmental Analysis

As previously stated, the Project will have adverse effects to cultural resources. More cultural resource investigations and an ethnographic study are required which will result in the documentation of additional cultural resources that will be adversely affected. With the required review process incomplete and the knowledge that more resources are yet to be analyzed, the Commission’s statement that cumulative impacts to cultural resources would not be significant is arbitrary and capricious. Meaningful consultation with the Tribe will be required once additional information is obtained to make a determination of the significance of the cumulative impacts associated with the Project.

The Tribe agrees with the Commission that constructing and operating the Project would result in significant environmental impacts. However, the Tribe does not agree that the majority of impacts would be less than significant due to the implementation of proposed and recommended mitigation measures. The Commission has not consulted with the Tribe regarding the resolution of adverse effects. The Commission’s proposed and recommended mitigation measures are not adequate, and consultation must be initiated with the Tribe as soon as possible to discuss culturally appropriate mitigation strategies.

##### A. Section 5.1.8.2, Visual Resources

The Tribe concurs with the Commission’s assessment that the operation of the Pipeline and maintenance of the easement would permanently affect the viewshed. However, the Tribe disagrees with the assessment that due to the remoteness of the project area and the presence of other linear infrastructure that the pipeline would not significantly affect visual resources. Visual values to the Tribe exist independently outside perception of remoteness. To assess visual disturbance, consultation with the Tribe must commence to identify visual resource locations and values in order to make a determination of significant affect.

TR4-20

##### B. Section 5.1.11, Cultural Resources

The DEIS states that a finalized ethnographic study is in the process of being completed. The Tribe reiterates that the Project Proponent has not coordinated with the Tribe on the development of this ethnographic study. In order to identify cultural resources of religious and cultural significance within the Tribe’s Ancestral Territory, which is bisected by the Project, the ethnographic study must include the involvement and approval of the Tribe. In addition to the information the Commission requested in its letter to the Project Proponent dated October 23, 2018, the Tribe formally requests that a thorough investigation of Cow Creek utilization of the lands and waters to be impacted by the Project.

## TR4 continued, page 12 of 14

TR4-20 The Cow Creek Tribe has not yet provided us with the location of visual resources important to the Tribe, or KOP that we can incorporate into our Visual Resources Analysis.

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The Tribe concurs that no construction activities shall commence prior to all studies and meaningful consultation required under the NHPA have been completed. As a required component of this compliance, resolution of adverse effects through an MOA must be implemented. Currently, the mitigation that has been proposed is inadequate. Data recovery alone is not sufficient mitigation for impacts to cultural resources. Meaningful consultation must commence to identify culturally appropriate mitigation strategies.

The Tribe also concurs that work cannot commence until the Project Proponent has provided the Commission with the remaining cultural resource inventories, site evaluations, HPMP, UDP, and tribal comments. The Tribe wishes to reiterate that the Project Proponent must coordinate with the Tribe to provide opportunities to monitor all investigations within the Ancestral Territory as well as provide the site evaluations, HPMP, and UDP for review and approval by the Tribe.

The Tribe agrees that all of the aforementioned documentation needs to be completed before any discussion can be given to the impacts to cultural resources. As this documentation has not been completely, the DEIS is also not complete in regard to cultural resources and should be revisited once this documentation has been completed.

#### X. Appendix L – Cultural Resources Appendix

The Native American Occupations in Southern Oregon context is woefully inaccurate and inadequate. The Tribe has a long and rich history related to this land that stretches back over 10,000 years. It is troubling that the context provided starts with Euro-American contact just centuries ago. Also disturbing is the title to this section contains “ethnohistoric” in the title, yet the Tribe was not contacted regarding the development of this context. As such there are many errors and perpetuating of Euro-centric misconceptions of Tribal use and occupation of the area.

A glaring omission from this context is a discussion of the Tribe. Often when utilizing information that pertains to the Tribe, it is misidentified as Upper Umpqua Indians. For example, the five bands listed in paragraph 3 of page L-8 are Cow Creek Umpqua, not Upper Umpqua. Furthermore, the Tribe’s traditional language is Takelma, not Athabaskan. Tribal people north of Myrtle Creek were Upper Umpqua, not Lower Umpqua who spoke Athabaskan and not Coos. Again, on page L-9 it appears that the Commission makes an inference that the two distinct language in which Gustavus Hines refers to is Coos and Athapaskan, when in fact its Athabaskan and Takelma.

The first paragraph on page L-10, in one of the rare instances that the Cow Creek Umpqua is actually referred to, states that the intent in both the Cow Creek Treaty and the Treaty with the Umpqua and Calapoosias was to relocate the Upper Umpqua to the Table Rock Reservation. This is not correct, as each of those treaties provided for their own separate reservations until a permanent one could be settled upon by the President of the United States. After the signing of the Treaty, the context does not provide any information about the Tribe, including the continued use and occupation of the land, even after the Rogue River Wars.

The Tribe recommends that the Commission consult with the Tribe on the development of a context that is both accurate and inclusive of the Tribe’s knowledge of their history. The Tribe

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TR4-21 We have considered these comments while revising the text in appendix L for the final EIS.

TR4-21

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can also provide the Commission with reputable resources to access this information. There are also many other errors related to the other referenced tribes that are outside of the scope of this discussion. The Tribe recommends that the Commission work with the other interested tribes to correct those mistakes.

TR4-21  
cont.

In reference to the tables in Appendix L that address documented cultural resource sites, the Tribe recommends that the Commission only include the Site Number and not the Site Name as to avoid disclosing sensitive and confidential cultural resource location information.

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Thank you for your time and consideration. If you need any further information, or if you have any questions, please feel free to contact the Tribe.

Sincerely,



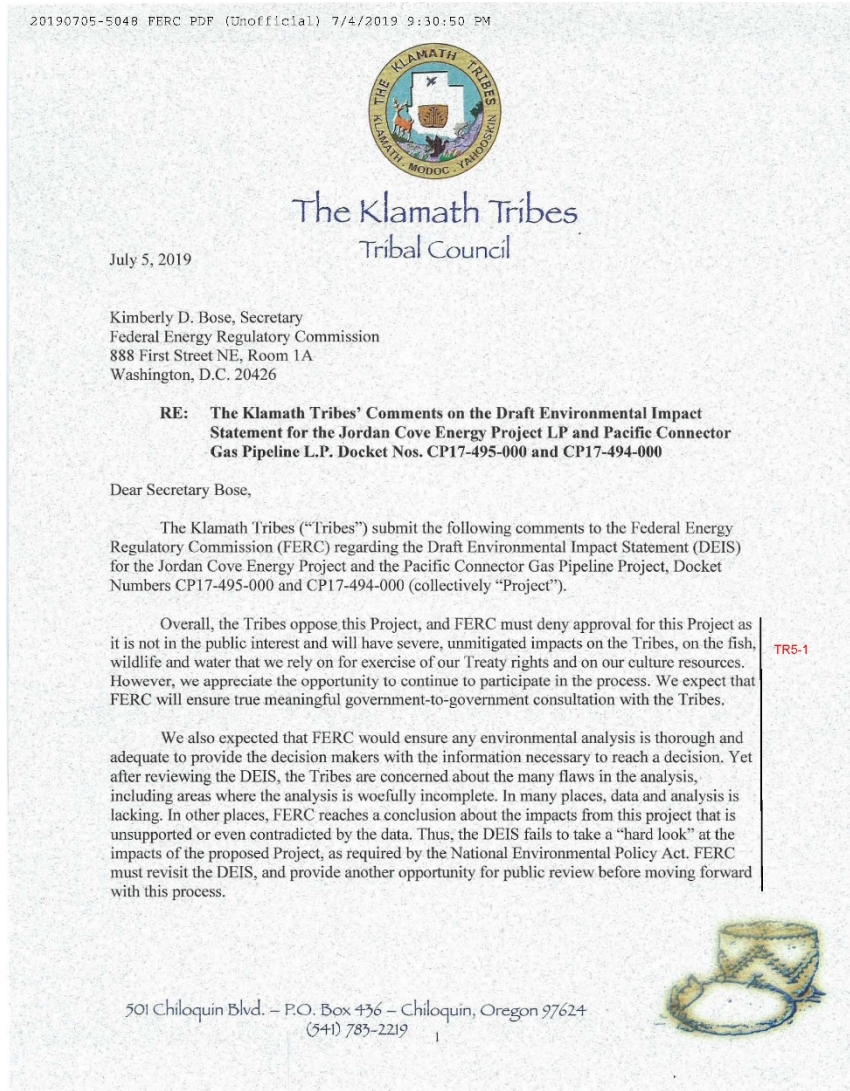
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Enclosures

CC: John Peconom  
Jennifer Findlay

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## TR5 The Klamath Tribes, D. Gentry, page 1 of 20

TR5-1 Comment noted. However, the draft EIS mentioned mitigation programs and efforts to reduce impacts on water, fish, and wildlife resulting from the Projects. The draft EIS is adequate under NEPA. If the Klamath Tribes can identify specific errors or omissions in the draft EIS, we would revise text in the final EIS.



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While preparing these comments, the Tribes have had the opportunity to review the comments submitted by a Coalition of environmental organizations.<sup>1</sup> The Tribes hereby adopt and incorporate those comments herein by reference. We provide these comments to address some of the specific concerns of the Tribes in addition to those provided by the Coalition.

## **I. Introduction**

### **A. About the Klamath Tribes**

The Klamath Tribes, consisting of the Klamath, Modoc and the Yahooskin Paiute, have a direct and personal interest in the Project and in reviewing the DEIS. The Klamath Tribes have lived and relied on the resources of the Klamath Basin from time beyond memory.

Today, as always, the mission of the Klamath Tribes is to protect, preserve and enhance the spiritual, cultural and physical values and resources of the Klamath, Modoc and Yahooskin Peoples by maintaining the customs and heritage of our ancestors. We aim to establish comprehensive unity by fostering the enhancement of spiritual and cultural values through a government whose function is to protect the human and cultural resources, treaty rights, and to provide for the development and delivery of social and economic opportunities for our People through effective leadership. Since Restoration (and even before), the Tribes have been active in administrative proceedings and in judicial litigation for the recognition, quantification, and enforcement of the Tribes' water rights to a wide variety of waterways—for the purpose of preserving and protecting our members' Treaty-reserved rights to fish and hunt. We are actively participating in the Klamath Basin Adjudication (KBA) and other court cases to protect those water rights. We have successfully sued the U.S. Forest Service for the protection of fish and wildlife habitat, and subsequently negotiated a wide-ranging Memorandum of Agreement for participating in management decisions on those lands. We provide a brief history of this litigation to demonstrate the importance of the Tribes' treaty rights, and why this Project would be detrimental to the Tribes.

The Tribes have resided in the Klamath Basin for millennia, relying upon the Basin's resources, including its water and water-dependent resources, to sustain themselves. In an 1864 Treaty with the United States,<sup>2</sup> the Tribes reserved the aboriginal right to hunt, fish, trap, and gather on their reservation, together with their aboriginal, time-immemorial rights to water to

<sup>1</sup> These comments were filed on behalf of the Western Environmental Law Center, Sierra Club, Greater Good Oregon, Pipeline Awareness Southern Oregon, Oregon Shores Conservation Coalition, Trout Unlimited, Center for Biological Diversity, Oregon Wild, Oregon Coast Alliance, Oregon Physicians for Social Responsibility, Umpqua Watersheds, Inc., OPAL Environmental Justice Oregon, Honor the Earth, 350 Corvallis, Columbia Riverkeeper, Friends of Living Oregon Waters (FLOW), Oregon Women's Land Trust, Earthworks, Hair on Fire Oregon, Rogue Climate, Oregon Women's Land Trust, Cascadia Wildlands, Snatlerake Hills, LLC, Waterkeeper Alliance, Great Old Broads for Wilderness, Cascade Volcanoes Chapter, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Rogue Riverkeeper, Beyond Toxics, and affected landowners Deb Evans and Ron Schaaf. "In the Matters of Jordan Cove Energy Project and Pacific Connector Gas Pipeline" (July 3, 2019) ("Coalition Comments").

<sup>2</sup> Treaty between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707, reprinted in 2 Charles J. Kappler, INDIAN AFFAIRS: LAWS AND TREATIES 865 (1904) (1864 Treaty).

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support the wildlife, fish, and plants that are protected by their treaty harvest right. Despite the ill-considered Klamath Termination Act (P. L. 587) in 1954, the federal courts subsequently and repeatedly affirmed our ongoing rights to hunt, fish, trap and gather on our reservation lands, and to be consulted in land management decisions when those decisions impacting our lands and waters, and the resources that rely upon them.<sup>3</sup> The existence, scope, and nature of the Tribes' reserved water rights were conclusively determined by the federal court in *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979) (*Adair I*), and affirmed by the Ninth Circuit in *Adair II*, but the federal courts left quantification of those rights to the state's general stream adjudication process, the KBA. *Adair II*, 723 F.2d at 1399.

Over the last several decades, both the Tribes and the United States, as the Tribes' trustee, have litigated in the KBA to protect and quantify the federally reserved treaty water rights. At the conclusion of the KBA's 38-year-long administrative phase in March 2013, the Oregon Water Resources Department (OWRD) issued the Findings of Fact and Order of Determination (FFOD) determining all water-right claims at issue in the KBA, including the Klamath Tribal water-right claims filed by the United States and the Klamath Tribes. On February 28, 2014, OWRD issued the Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) to address certain technical errors in the FFOD.<sup>4</sup>

The ACFFOD includes the Corrected Partial Orders of Determination for Water Right Claim 623 (Marsh POD)<sup>5</sup> and Water Right Claims 625-633 (Upper Williamson POD),<sup>6</sup> confirming and quantifying the Tribes' Marsh and Williamson River water rights, including those in the Upper Williamson. The Marsh POD and Upper Williamson POD set out the respective purpose of these rights as establishing minimum water levels (in the Marsh) and instream flows (in the Upper Williamson) "to establish and maintain a healthy and productive habitat to preserve and protect the Tribes' hunting, fishing, trapping and gathering rights on former reservation land." Marsh POD at 3; Upper Williamson POD at 15. The Tribes' water rights' priority dates are confirmed as "time immemorial." *Id.*

The Tribes' Treaty rights include not just a right to quantity, but also establish an environmental servitude to ensure sufficient habitat to protect the critical species.<sup>7</sup> The right to

<sup>3</sup> *Kimball v. Callahan* 493 F.2d 564 (9th Cir. 1974); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *United States v. Adair*, 723 F.2d 1394, 1410, 1414 (9th Cir. 1984) (*Adair II*).

<sup>4</sup> The ACFFOD is now undergoing judicial review in the Klamath County Circuit Court under ORS chapter 539, Oregon's general stream adjudication statute. Water rights determined in the ACFFOD are required to be enforced by OWRD while judicial review is pending. ORS 539.130(4); ORS 539.170.

<sup>5</sup> Corrected Partial Order of Determination, Water Right Claim 623 (Klamath Marsh), *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Klamath Cir. Ct. Feb. 28, 2014), available at [https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA\\_ACFFOD\\_04991.PDF](https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_04991.PDF) (last visited Jan. 28, 2019).

<sup>6</sup> Corrected Partial Order of Determination, Water Right Claims 625-640 (Williamson River and its tributaries), *In re Waters of the Klamath River Basin*, No. WA1300001 (Or. Klamath Cir. Ct. Feb. 28, 2014), available at [https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA\\_ACFFOD\\_05063.PDF](https://www.oregon.gov/OWRD/programs/WaterRights/Adjudications/KlamathAdj/KBA_ACFFOD_05063.PDF) (last visited Jan. 28, 2019).

<sup>7</sup> *Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at \*9 (D. Or. Oct. 2, 1996); *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), cert. granted, 138 S. Ct. 735, 199 L. Ed. 2d 602 (2018), *aff'd by an*

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an environmental servitude to protect the habitat upon which the exercise of treaty rights depend is well-established.<sup>8</sup> Thus, the Tribes are active in seeking to protect treaty fish and their habitat, and any risks to the Klamath River pose a threat to the Tribes' effort to rehabilitate the river's salmon runs, which are a Treaty resource and have filed claims in the KBA to provide for water levels necessary for this purpose. FERC must recognize that actions to construct the Project will destroy, damage, or otherwise alter a great deal of the habitat and water quality used by species of traditional importance to the Tribes and Tribal members, thus violating these well-established Treaty rights. The Project will also impact many important cultural and natural resources.

#### B. About the Project

This Project was originally proposed in 2004 as a facility to import natural gas. In 2011, the Project shifted to a facility to export Liquefied Natural Gas (LNG). On March 11, 2016, FERC issued an order denying applications for certificate and Section 3 NGA authorization.<sup>9</sup> In April 2016, Jordan Cove appealed FERC's decision. On December 9, 2016, FERC upheld its decision to deny the certificate for the Project.<sup>10</sup>

This most recent round of the Project began in January 2017, when Jordan Cove submitted a pre-filing request to FERC for approval of the Jordan Cove Energy Project ("Terminal") and Pacific Connector Gas Pipeline ("PCGP" or "Pipeline"). In June 2017, FERC initiated the scoping period under the National Environmental Policy Act (NEPA) for the Project. On March 29, 2019, FERC published its Notice of Availability of the DEIS and started this comment period.

The Tribes remain opposed to the project. The PCGP would be located in an area that has been used since time immemorial by the Klamath and Modoc people. Many of our members continue to live on the reservation and throughout the region and the State, and our letter focuses primarily on the impacts and risks of construction and operation of the PCGP. However, the Tribes are also concerned with the potential adverse effects and possible catastrophic events that may occur from construction and operation of the PCGP as it proceeds west through ancestral lands and through the coastal range, and the also the construction and operation of the Terminal

TR5-2

*equally divided court, Washington v. United States*, 138 S. Ct. 1832, 1833, 201 L. Ed. 2d 200 (2018).

<sup>8</sup> *The Klamath Tribes v. United States*, 1996 WL 924509 (D. OR 1996); *United States v. Washington*, 853 F.3d 946 (9th Cir. 2016) aff'd by an equally divided court, *Washington v. U.S.*, 584 U. S. \_\_\_, 138 S. Ct. 1832 (2018).

<sup>9</sup> On May 20, 2015, FERC sent a third data request to Pacific Connector, stating that: The Commission's Certificate Policy Statement requires the Commission to balance the public benefits of a pipeline proposal against its potential adverse impacts, and that Pacific Connector must show that the public benefits of its proposal outweigh the Project's adverse impacts. U.S. Federal Energy Regulatory Commission, ORDER DENYING APPLICATIONS FOR CERTIFICATE AND SECTION 3 AUTHORIZATION, Docket Nos. CP13-483-000 and CP13-492-000, 154 FERC ¶ 61,190, 8, (March 11, 2016) available at <https://www.ferc.gov/CalendarFiles/20160311154932-CP13-483-000.pdf> ("FERC March Order").

<sup>10</sup> U.S. Federal Energy Regulatory Commission, ORDER DENYING REHEARING, Docket Nos. CP13-483-001 and CP13-492-001, 157 FERC ¶ 61,194, (Dec. 9, 2016) available at <https://www.ferc.gov/CalendarFiles/20161209152707-CP13-483-001.pdf>

## TR5 continued, page 4 of 20

TR5-2 Comment noted. The draft EIS acknowledged (in appendix L) that the Klamath and Modoc people have occupied and used the Klamath Basin for many thousands of years. The draft EIS indicated that would there would not be catastrophic events if the Pacific Connector pipeline was to be built across ancestral lands (see section 4.13.2). The impacts that would occur as a result of the proposed Project as well as the measures that would be required to avoid or minimize these impacts are addressed in sections 4 and 5 of the EIS.

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in Coos Bay.<sup>11</sup>

The Applicants have offered no feasible measures to mitigate the damages, nor, due to the nature of the Project, can they. By design, this pipeline will require extensive disruption and degradation of environmental and cultural resources that are critically important to the Klamath Tribes. The euphemistic descriptions of the Project aside, this Project involves tearing a huge hole through the heart of the Klamath Tribes' homelands.

TR5-2  
cont

The Tribes have participated throughout the regulatory process. In particular, the Klamath Tribes have previously submitted comments to FERC on September 1, 2017, during Scoping for an Environmental Impact Statement. The Tribes also intervened in the FERC proceedings. The Tribes filed comments on the Clean Water Act Section 404 removal-fill permit and to the State of Oregon Department of State Lands on a removal-fill permit application. These comments are incorporated by reference. The Tribes and many tribal members also provided testimony to FERC.

## II. General Concerns about the Draft EIS

The preparation of a DEIS is part of the process required by the regulations implementing the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321, *et seq.* To fulfill its obligations under NEPA, FERC must take a "hard look" at an action's environmental impacts, consider a reasonable range of alternatives and consider whether there are reasonable mitigation measures to address adverse environmental impacts.<sup>12</sup> Further, when preparing an environmental impact statement, FERC must follow and fulfill the requirements in the statute, regulations and guidance from the Council on Environmental Quality (CEQ),<sup>13</sup> as well as any FERC directives. As a condition of permit issuance, FERC regulations require identification of potential impacts and a determination of appropriate mitigation.<sup>14</sup>

These comments are intended to offer direction to FERC on this DEIS. The current DEIS is deficient because it fails to identify an adequate range of reasonable alternatives, it glosses over many significant impacts and ignores many others, and precludes meaningful analysis of the Project.<sup>15</sup> The Tribes address some of these deficiencies below.

### A. The Draft EIS Fails to Identify a Sufficient Purpose and Need for the Project

The statement of purpose and need is central to a proper EIS because it provides the guideposts for the analysis of actions, alternatives, and effects. "The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the

TR5-3

<sup>11</sup> See, Coalition Comments at Section II.

<sup>12</sup> See 40 CFR § 1502.14; 40 CFR § 1502.16(4); 18 CFR Part 380; *Save the Peaks Coalition v. USFS*, 669 F3d 1025 (9th Cir. 2012).

<sup>13</sup> 40 CFR Part 1502.

<sup>14</sup> See *Id.*; 18 CFR Part 380.

<sup>15</sup> See 40 CFR § 1502.9(a).

## TR5 continued, page 5 of 20

TR5-3 The CEQ's regulations for implementing NEPA, at 40 CFR 1502.13, only requires that an EIS briefly summarize the purpose and need for a project; which we have done. As described in section 1 of the DEIS, FERC environmental staff do not make a final determination regarding the Project's need. The decision regarding the Project's need is made by the Commission in the Project Order.

Section 3 of the EIS addresses alternatives and discusses why connecting to the GTN and Ruby pipelines in Malin was selected as the preferred option.

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alternatives including the proposed action.<sup>16</sup> It is fundamental that agencies do not avoid NEPA's requirements by unreasonably restricting the statement of purpose.<sup>17</sup>

Here, the Applicants have stated that the purpose is to export natural gas from existing interstate natural gas transmission systems to export to Asia.<sup>18</sup> Yet, the Applicants have not shown there is a need for this project. There are no binding purchase contracts in place for the natural gas, and the market analysis shows it may be unlikely that this project will be necessary, given other natural gas projects that are being permitted and studied.<sup>19</sup>

Further, the second stated purpose is to connect existing transmission systems of GTN and Ruby with the proposed terminal.<sup>20</sup> This stated purpose seriously limits the project to one location, precluding a true analysis of alternatives.

#### B. FERC Fails to Include and Analyze a Reasonable Range of Alternatives

The development of Alternatives to the Proposed Action "is the heart of the environmental impact statement."<sup>21</sup> The regulations further state this section should "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."<sup>22</sup> The agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.

<sup>16</sup> 40 C.F.R. § 1502.13.

<sup>17</sup> *Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997) ("One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence).") See also, *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (stating that "[a]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action").

<sup>18</sup> DEIS at Section 1.2.

<sup>19</sup> See, e.g., Dennis Webb, "Energy consultant doubts Jordan Cove economics", *The Daily Sentinel* (Jun 2, 2019) available at [https://www.gjsentinel.com/news/western\\_colorado/energy-consultant-doubts-jordan-cove-economics/article\\_6124f150-84f5-11e9-870b-20677ce85d90.html](https://www.gjsentinel.com/news/western_colorado/energy-consultant-doubts-jordan-cove-economics/article_6124f150-84f5-11e9-870b-20677ce85d90.html) (last visited June 29, 2019).

<sup>20</sup> DEIS at Section 1.2.

<sup>21</sup> 40 CFR § 1502.14.

<sup>22</sup> *Id.*; *Westlands Water Dist. v. United States DOI*, 376 F.3d 853, 872 (9th Cir 2004) ("The 'touchstone' for courts reviewing challenges to an EIS under NEPA 'is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.'") (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir 1982)).

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TR5-4 The EIS includes a robust analysis of alternatives in section 3, including the No Action Alternative; System Alternatives; and Route Alternatives. With regards to evaluation of alternative waterbody crossing methods, see response to comment CO28-235.

TR5-3  
cont.

TR5-4

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All reasonable ways to meet the underlying need should be analyzed.<sup>23</sup> Federal courts have routinely found that NEPA does not allow federal agencies to effectively reduce the discussion of environmentally sound alternatives to a binary choice between granting and denying an application.<sup>24</sup> The Ninth Circuit has rejected this type of avoidance approach by agencies in the past.<sup>25</sup>

Many of the “alternatives” referenced in the DEIS are located in different states, and thus do not accomplish the purpose or meet the requirements for setting out alternatives in an EIS.<sup>26</sup> In addition, throughout the DEIS, there are choices made by the Applicants that have not been adequately analyzed. For example, the Applicants present the preferred method for many of the stream crossings. Yet, these methods should be analyzed by FERC to determine if another method may be better suited for the terrain or if another method may decrease environmental impacts.<sup>27</sup>

Without a more detailed analysis of the Alternatives considered for this Project, the DEIS must be redone.

#### C. FERC Fails to Fully Describe, Discuss and Analyze the No Action Alternative

Next, throughout the DEIS, there is no real discussion of the No Action Alternative. The CEQ guidelines require that the document “devote substantial treatment to each alternative considered in detail including the proposed action so that reviews may evaluate their comparative merits.”<sup>28</sup> This includes the no action alternative.

Given the significant unavoidable, irreversible adverse effects on the Tribes and the environment from this project, and the lack of a clear need, the No Action Alternative deserves further consideration and analysis in the DEIS. Ultimately, the No Action Alternative should be selected for the Project.

#### D. FERC Fails to Provide Enough Information to Analyze the Alternatives

<sup>23</sup> See, *City of New York v. U.S. Department of Transportation*, 715 F.2d 732 (2d Cir. 1983) (barging is not alternative to meet underlying need for highway safety); *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (DC Cir. 1972) (several alternatives to offshore leasing to meet underlying need stemming from energy crisis); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974) (range of alternatives adequate to meet need for flood control and irrigation water).

<sup>24</sup> See, e.g., *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006).

<sup>25</sup> See, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (per curiam) (concluding that the EIS violated NEPA when the two action alternatives considered in detail were “virtually identical”).

<sup>26</sup> DEIS at 3.2 (System Alternatives), 3.3 (Terminal locations). See Coalition Comments at Section VII.

<sup>27</sup> Coalition Comments at Section VII.C

<sup>28</sup> 40 CFR 1502.14(b); Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 FR 18026-01 (“‘No action’ in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.”)

## TR5 continued, page 7 of 20

TR5-5 The No Action alternative is addressed in section 3 of the EIS.

TR5-4  
cont

TR5-5

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"NEPA's public comment procedures are at the heart of the NEPA review process."<sup>29</sup> The ability of the public to comment meaningfully on an agency's NEPA analysis is an essential part of NEPA's public participation mandate.<sup>30</sup> Yet there are deficiencies throughout the DEIS, that hinder meaningful participation by the Tribes and the public.

In many places, the DEIS refers to documents that are not complete. The DEIS provides an extensive list of incomplete or unavailable information for the DEIS.<sup>31</sup> In discussing endangered species, there are references to the documents that would be developed with the required Section 7 Consultation with the U.S. Fish and Wildlife Service, yet consultation is pending and not yet completed.<sup>32</sup> Thus, the document and the recommendations are not available, and the analysis in the DEIS on the impacts to these species is incomplete and legally inadequate.<sup>33</sup>

For cultural resources, as discussed below, there are several documents not yet available to assist in reviewing the DEIS. The Tribes is also concerned that the cultural surveys and reports attached to the application are incomplete. There are areas where the Applicants have not surveyed for cultural resources either because the Applicants were denied access, or Tribal members who were attempting to do cultural resources survey work were specifically denied access because of their membership in the Tribes.

Each of these incomplete or outdated components makes it incredibly hard to review the DEIS and ensure FERC has taken the requisite "hard look."

#### E. Accessibility

Despite the missing analysis, this DEIS is very long, and includes many Appendices. The documents are often hard to follow and some of the analysis in the appendices is outdated. This already makes review of the document difficult.

Review of the DEIS is further complicated since FERC has provided limited access to the documents. By making it only available online, FERC has limited the ability of tribal members to participate in the process, as members may lack internet access. Those that have internet access may lack the requisite bandwidth and speeds needed to download the documents. The Tribes hope going forward FERC can better address this important issue.

### III. Impacts to Specific Resources

The Project includes 229 miles of pipeline going through the heart of the Klamath Tribes'

<sup>29</sup> *State of Cal. v. Block*, 690 F.2d 753, 770 (9th Cir. 1982).

<sup>30</sup> See 40 C.F.R. §§ 1500.1(b), 1503.1, 1506.6.

<sup>31</sup> DEIS at 4-384.

<sup>32</sup> Federal Permitting Dashboard, "Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline", <https://www.permits.performance.gov/permitting-projects/jordan-cove-lng-terminal-and-pacific-connector-gas-pipeline> (last visited June 29, 2019).

<sup>33</sup> See Coalition comments at VIII.

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TR5-6 The draft EIS discussed our public participation program for these proceedings in section 1.4. We acknowledged in the draft EIS that some plans have not yet been finalized. While some information was still pending at the time of the issuance of the draft EIS, the lack of final plans does not deprive the Klamath Tribes of a meaningful opportunity to comment on draft plans. The courts have held that final plans are not required at the NEPA stage (see *Robertson v Methow Valley Citizens Council*). The draft EIS included a recommendation that the Commission Order contain an environmental condition that cultural resources investigations should be completed, including the opportunity for Indian Tribes to comment on reports, prior to construction.

TR5-7 Comment noted. Yes, the draft EIS was a lengthy document; however, we believe 90 days is an adequate amount of time to review and comment on the draft EIS. This is the third EIS FERC has produced in the past ten years for essentially the same footprint for the Projects. The current draft EIS for Docket Nos. CP17-494 and 495 is available through the Internet in electronic format. FERC as well as other federal agencies are moving away from providing paper copies of EIS as outlined in the Paperwork Reduction Act. In addition, the company produced printed copies of the draft EIS that it placed in local libraries (see appendix A of the EIS).

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ancestral territory, impacting Tribal members, and other landowners throughout southern Oregon. It will have major impacts to the environment and cultural resources of the region. Yet, the DEIS fails to adequately disclose and analyze these impacts. In other places, FERC includes conclusory statements, such as findings of “not likely to impact,” that are contrary to the information provided. The Tribes highlight a few specific areas of concern.

**A. Cultural Resources**

The Tribes strongly oppose the Project because a significant portion of the proposed construction of the pipeline would take place on lands that are within the Tribes aboriginal territory, where many significant cultural resources and waters of current and historical and spiritual importance to the Tribes are located. Many cultural resources located along the Pipeline’s 229-mile route are in traditional lands that were ceded by the Treaty of 1864, which were traditionally occupied by ancestors of Klamath Tribal members; still, these are lands upon which numerous Tribal cultural resources are located, and which include numerous sites of ongoing cultural and spiritual significance to the Tribes and its members.

TR5-8

The Project would irreparably damage certain cultural, historic and archeological sites, many of which are not yet known or disclosed in the DEIS. These sites will include gravesites and buried villages, including a historic village site on the Klamath River.

Further, it is important to acknowledge that culture is not just these historic places. The Tribes are concerned about the risks to the Klamath River itself, and risks to the Tribes’ effort to rehabilitate the river’s salmon run, risks to wildlife, and generally, the perils the pipeline in particular poses for our reservation and our aboriginal territory. The Tribes would also be impacted by the construction, and the approximately 95-foot right of way, which would be visible as our members continue to take part in traditional, cultural and spiritual practices, and by the construction noise. This Project will also impact traditional cultural plants, animals, and fish.

*1. National Historic Preservation Act and deficiencies in the DEIS*

In addition to NEPA, FERC is required to comply with Section 106 of the National Historic Preservation Act (NHPA), and the regulations by the Advisory Council on Historic Preservation (ACHP).<sup>34</sup> This is often done through a coordinated or integrated effort during the NEPA process to consider and analyze the impacts to the many historic properties and cultural resources that would be destroyed or impacted by the construction and operation of the Project.<sup>35</sup>

TR5-9

Section 106 applies to the Project overall as it requires a federal agency (in this case FERC and others), prior to any undertaking, to take into account the effect of the undertaking that is included on or eligible for inclusion in the National Register. FERC should work with the Tribes through government-to-government consultation regarding these issues. FERC must also work with the State Historic Preservation Office (SHPO) regarding these impacts to cultural or

<sup>34</sup> 54 U.S.C. 306108; 36 CFR Part 800; 18 CFR 380.14.

<sup>35</sup> Council on Environmental Quality and ACHP, “NEPA and NHPA: A Handbook for Integrating NEPA and Section 106,” March 2013.

**TR5 continued, page 9 of 20**

TR5-8 We agree that the proposed Pacific Connector pipeline route would cross through the ancestral and ceded lands of the Klamath Tribes, and may impact cultural resources important to the Tribes. However, at this time no graves or village sites have been found along the pipeline route. Archaeological sites identified at the Klamath River crossing would be avoided by an HDD. This HDD would also avoid impacting salmon in the river. The DEIS recommended that the Commission Order include an environmental condition that the company must produce a revised Ethnographic Study, for the review by FERC staff and Indian Tribes, prior to construction. That study should identify plants, animals, and fish traditionally used by the Tribes, so that we can conduct an assessment of impacts on those resources. The Tribes have not yet provided to FERC the locations of cultural or religious places from which the pipeline route may be visible, so we are unable to conduct a visual impact analysis for those locations or KOP.

TR5-9 The draft EIS (in sections 4.11 and appendix L) documented the status of our compliance with the NHPA, in accordance with the regulations for implementing Section 106 of the Act at 36 CFR 800. The draft EIS also documented our efforts regarding government-to-government consultations with the Klamath Tribes, and our consultations with the Oregon SHPO. The company’s proposed mitigation measures for historic properties were outlined in treatment plans that were made available for review by the SHPO and Indian Tribes. In accordance with the legal decisions related to the Grapevine project, we do not have to complete the 106 process at the NEPA stage. We have recommended that the Commission include an environmental condition that the Section 106 process be completed prior to construction. The courts have supported the concept of a conditioned Order.



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archeological resources. The Tribes are concerned that necessary consultation is not occurring under Section 106, which will impact the project. For example, the DEIS lists action by the Advisory Council on Historic Preservation and the Oregon SHPO as “Pending”.<sup>36</sup>

FERC acknowledges these deficiencies, to reach the following conclusion:

We have not yet completed the process of complying with Sections 101 and 106 of the NHPA. Additional cultural resource inventories, evaluations, and associated reports are to be completed, as are a final ethnographic study, HPMP (Historic Properties Management Plan), and [Unanticipated Discovery Plan] UDP. Consultations with tribes, SHPO, and applicable federal land-managing agencies have also not been concluded. As such, the Project would result in an adverse effect under Section 106 of the NHPA and a significant impact under NEPA.<sup>37</sup>

FERC is correct with this conclusion – there will be an adverse effect and significant impacts. These impacts cannot be mitigated, nor can FERC even propose or suggest the means by which they could be mitigated. Yet, FERC is moving the process forward, even though these important studies have not been completed. There are still sites where the Applicants have been denied access to conduct surveys.<sup>38</sup> The ethnographic studies have not been completed. Further, the UDP is an important component to understand how a new discovery would be handled. A draft has been submitted, but there is no final plan for review.<sup>39</sup> This missing information is necessary for understanding the potential impacts in evaluating the DEIS.

FERC has proposed that many of these important tasks, including a Memorandum of Agreement, that should be completed and can occur after the project is approved and before construction.<sup>40</sup> However, as FERC recognizes that the Project will have a significant impact, FERC must not move forward until this information is available to analyze through consultation and a revised DEIS.

## 2. *Specific Impacts not Adequately Addressed*

In reviewing the DEIS, FERC has asked the Tribes to explain the damage, as words like “permanent loss” and “Significant Impact to cultural resources” do not adequately convey the

<sup>36</sup> DEIS at Table 1.5.1-1, 1-22. In addition, the Federal Permitting Dashboard says consultation is “Paused.” Federal Permitting Dashboard, “Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline”, <https://www.permits.performance.gov/permitting-projects/jordan-cove-lng-terminal-and-pacific-connector-gas-pipeline> (last visited June 29, 2019). It is important to note that Oregon law prohibits the excavation, injury, destruction, or alteration of an archeological site or object or removal of archeological objects from public and private lands without an archeological permit issued by the State Historic Preservation Office (SHPO). ORS 358.920. Oregon law also protect archaeological Indian burial sites and associated objects. ORS 97.740-97.760.

<sup>37</sup> DEIS at 4-655 (emphasis added).

<sup>38</sup> *Id.* at 4-651.

<sup>39</sup> *Id.* at 4-653.

<sup>40</sup> *Id.* at 4-655.

TR5-9  
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magnitude of the impacts to the Tribes. However, it is still impossible to adequately convey the impacts to the Tribes from the loss (and risk of loss) of these cultural resources.<sup>41</sup> For this reason, the Tribes' policy is that all cultural and traditional sites are sacred, and therefore any risk of disturbance to human remains and cultural sites is unacceptable. This clear statement should indicate to FERC just how important the Tribes considers these sites, and any resulting harm or risk of harm.

The construction and removal-fill activities are likely to disrupt a large area of land along the pipeline route, including the 95-foot wide right-of-way. This construction would go through areas where villages once existed and where human remains would most certainly be disturbed. This concern is validated by the fact that graves with human remains have been found in these areas through previous ground disturbing activities. FERC also acknowledges that the HDD proposed for the Klamath River is likely to impact buried cultural resources.<sup>42</sup>

The DEIS is where FERC should identify the impacts, and identify and analyze the proposed mitigation measures. Yet, as noted above, much of the needed analysis for specific sites is missing. In other cases, the mitigation proposed is inappropriate. For example, the DEIS provides:

Forty-three sites are unevaluated and cannot be avoided, so they need additional investigations, either survey or testing. The unevaluated sites requiring additional work are listed in in appendix L.<sup>43</sup>

Twenty sites, listed in appendix L, have been determined to be eligible for or listed on the [National Register of Historic Places] NRHP and cannot be avoided. Data recovery excavations are recommended as mitigation for these sites.<sup>44</sup>

Yet this "mitigation" is likely inappropriate. The ACHP advises that archaeological sites destined for data recovery should not possess special significance, or have long-term preservation value, such as traditional cultural and religious importance to an Indian tribe.<sup>45</sup>

Further, the DEIS must analyze the cumulative impacts to the region and to the Klamath

<sup>41</sup> "The 95-foot-wide gash through the tribes' ancestral territory that pipeline construction would require would be likely to unearth long-buried ancestors and pulverize sites of cultural importance." Don Gentry and Emma Marris, "The Next Standing Rock? A Pipeline Battle Looms in Oregon", NY Times, Opinion (March 8, 2018) available at <https://www.nytimes.com/2018/03/08/opinion/standing-rock-pipeline-oregon.html> (last visited June 29, 2019).

<sup>42</sup> *Id.* at 4-651. This analysis includes HDD if it goes as planned. As discussed below, the DEIS does not adequately address the impact of HDD failure.

<sup>43</sup> *Id.* at 4-652.

<sup>44</sup> *Id.*

<sup>45</sup> ACHP's "Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites," dated May 7, 1999, updated September 30, 2010. The guidance specifically states: the archaeological site should not have long-term preservation value, such as traditional cultural and religious importance to an Indian tribe or a Native Hawaiian organization." It also states "the archaeological site [slated for data recovery] should not possess special significance to another ethnic group or community that historically ascribes cultural or symbolic value to the site and would object to the site's excavation and removal of its contents."

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TR5-10 Comment noted. The HDD under the Klamath River would avoid impacts on cultural resources along its banks. The company's proposed mitigation measures for historic properties were outlined in treatment plans that were made available for review by the SHPO and Indian Tribes. The draft EIS acknowledged that cultural resources investigations have not been finished at the NEPA stage. As noted above, we recommend that the Commission condition the Order approving the Projects so that those studies must be completed prior to construction. Cumulative impacts on cultural resources are discussed in section 4.14 of the draft EIS.

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Tribes and cultural resources. In this analysis, FERC must also include the impacts the Tribes will incur with the construction of the Swan Lake Hydro Project, and other potential projects in the region.

TR5-10  
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Ultimately, the document is insufficient to adequately evaluate the impacts to cultural resources. Given the current assertion of significant impacts to cultural resources, FERC has not realistically considered the No Action Alternative, which would avoid destruction of these important historic, archaeological and cultural resources for the Klamath Tribes.

**B. Impacts to Water Quality and Quantity**

Construction of the 229-mile pipeline would impact wetlands and waterways at a minimum of 485 individual locations and would impact 30,778-feet (5.83 miles) of wetlands.<sup>46</sup> At each place where the pipeline crosses streams and rivers, the construction will degrade fish habitat and water quality. In fact, this Project would likely do immense damage to water quality in Oregon, including degrading the water quality in the Klamath Basin (where the Tribes possess time immemorial water rights to support their Treaty resources). The proposed Project will likely impair designated beneficial uses, threatening drinking water supplies and fish habitat. It will also likely further degrade stream segments that are already water quality impaired for temperature, dissolved oxygen, pH, turbidity, mercury, and sedimentation. It is very likely that the proposed Project would violate statewide water quality standards.

TR5-11

The construction the PCGP would require blasting and clearcutting a 75 to 95-foot right-of-way across steep terrain and through soils with high potential for erosion and landslides. It would remove trees and streamside vegetation, leading to warmed waters and increasing the risk of Harmful Algae Blooms (HAB). In addition, access roads will need to be constructed, and there will be Temporary Extra Work Areas (TEWA). Removing streamside vegetation and damming, dredging, or diverting waterways will likely increase pollution by increasing stream temperature, turbidity (murkiness), and impairing healthy aquatic habitat for fish. These and other water quality impacts will diminish the quality of habitat for fish, which could impact the Tribes and our members who fish in many places throughout the region. The Project proposes to continually clear all vegetation along the pipeline path, which means the effects on water temperatures will continue.

Further, because of the location of the pipeline route, construction of the pipeline may also harm drinking water supplies for more than 116,000 Oregonians, including many members of our Tribes.

The DEIS states that effects on water quality would be temporary and that mitigation measures would make them insignificant. This conclusion is inconsistent with the facts and is unsupported. The Oregon Department of Environmental Quality (DEQ) has denied the State's certification under Section 401 of the Clean Water Act because the DEQ does not have a

<sup>46</sup> The DEIS states 352 waterbodies, not counting wetlands. DEIS at 2-60. This number includes 326 perennial and/or intermittent waterways, seven lakes and/or ponds, two estuarine waters, and 150 wetlands. U.S. Army Corps of Engineers. Public Notice Application for Permit and to Alter Federally Authorized Projects. 60-day notice. NWP-2017-41. 22 May 2018. p. 7.

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TR5-11 Impact to water quality and resources, including the effects of hydrostatic testing, are addressed in section 4.3 and 4.5 of the EIS. It is not the role or scope of the federal EIS to assess the Project's compliance with State regulations or OARs. We assume that the State would determine if the Project is in compliance with the State requirements and OARs during their review of the applicant's State permit applications.

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reasonable assurance that the construction and operation of the Project would comply with applicable state water quality standards. The applicants had not demonstrated that the state's waters (which include the Tribal water rights within these waters) will be protected.<sup>47</sup> FERC must redo the water quality analysis in light of Oregon DEQ's finding and concerns. FERC must take a close look at the impacts and dangers posed to these important waterways and fisheries by the construction and operation of the pipeline, including these access roads. The DEIS must evaluate the full impacts of the Project on water quality for each water body, stream and wetland impacted. The DEIS must also analyze any proposed BMPs to protect sources of water, rather than assuming BMPs will be used and will be adequate.

Further, impacts to water quantity also concern the Tribes. Allocation of water in the Klamath Basin is already stressed by drought conditions and over-appropriation, and has been subject to litigation to protect the Tribes' senior instream water rights. Those instream rights are specifically for the protection and enhancement of the Tribes' fisheries, as well as for plants and wildlife – all of which form the basis of the Tribes Treaty-reserved rights to hunt, fish, trap and gather on its reservation lands and former reservation lands.

The impacts on water quantity include testing of the pipeline to determine if it will hold gas. This testing would utilize enormous quantities of fresh water in areas that are designated as drought affected. For example, the Klamath Tribes and other water users in the Klamath Basin already experience and strain on water resources. Testing could require over 60 million gallons of fresh water. If the project re-uses water to test multiple segments of pipe, it would still consume at least 16 million gallons of water.<sup>48</sup> Discharged test water would be contaminated with materials used to construct the pipeline. This impact has not been adequately analyzed.

#### C. Stream Crossings and Use of Horizontal Directional Drilling (HDD)

The Tribes are very concerned about the construction of the pipeline overall. Of particular concern is that the pipeline route would go under the Klamath River and the Rogue River (and other waterbodies) using Horizontal Directional Drilling (HDD), and cross many streams and water bodies, which since time immemorial have been and continue to be important sources of fish and our traditional way of life.<sup>49</sup>

The DEIS should comprehensively review each stream crossing, particularly for those crossings identified as moderate or high risk. Further, the DEIS should require a topographic survey, longitudinal survey of the stream profile, top and bottom of banks, and the top and bottom floodplain slopes for each stream crossing. FERC must evaluate the potential for the release of sediments and chemicals during the trenching. This work and analysis has not been

<sup>47</sup>Oregon, DEQ, Evaluation and Findings Report: Section 401 Water Quality Certification for the Jordan Cove Energy Project, § 1.4 (May 2019) available at <https://www.oregon.gov/deq/FilterDocs/jcvalreport.pdf> (submitted by DEQ as part of the Docket) ("DEQ Findings"); Oregon DEQ letter to Mr. Vowels, Mr. Krug and Ms. Bose, "Jordan Cove 401 Water Quality Certification Decision, Cover Letter", May 6, 2019 available at <https://www.oregon.gov/deq/FilterDocs/jcdeceletter.pdf> ("DEQ Cover Letter").

<sup>48</sup> DEIS at 2-56.

<sup>49</sup> See, Coalition Comments at Section II(K) (Rogue River) and II(L) (Klamath River).

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TR5-12 As described in section 4.3.2.2 of the EIS, "To prevent an inadvertent release or address impacts should one occur, Pacific Connector developed its Drilling Fluid Contingency Plan for Horizontal Directional Drilling Operations". The plans in place to reduce the risk of frac out and actions to be taken to eliminate or reduce impacts are summarized in in section 4.5.2. A more specific discussion of HDD drilling and the potential for frac-out incidents is also included in this section including assessment of potential impacts to aquatic resources from frac-outs. The Applicant would employ EIs to ensure compliance with specifications during construction and restoration. In accordance with our Plan, the EIs would have the authority to stop work and order corrective actions for activities that violate the environmental conditions of the Commission's Certificate and other permit authorizations. We assume that the State would determine if the Project is in compliance with the State requirements and OARS during their review of applicant's State permit applications. If the State chooses it could make the requested requirements contingent for permit approval. Concerning streams with moderate to high risk evaluation at crossing see response to Comment CO28-166 concerning methods that would be employed at sites to eliminate or reduce potential impacts.

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done.

With HDD, the Tribes are very worried about the likelihood of catastrophic events during the construction and operation of the pipeline. HDD crossings, even when successful, have impacts in areas adjacent to waters where staging and construction areas occur. HDD also requires the disposal of materials extracted from the drill hole. HDD attempts frequently fail, causing drastic impacts to water quality and fish habitat. The DEIS fails to disclose and analyze the likelihood and frequency of frac-out events or other similar impacts.

Further, HDD makes it much harder to detect if the pipeline is leaking, which would have catastrophic impacts to the river, the ecosystem and the people that rely on it.

Instead of relying on conclusory statements about the relative safety of HDD, FERC must further assess how such releases during construction and operation would impact downstream basins. Additionally, the DEIS must include a comprehensive review of the direct, indirect, and cumulative impacts to groundwater and surface water from HDD. These impacts must be analyzed on a site-specific basis.<sup>50</sup>

**D. Fish and Aquatic Life**

The DEIS must thoroughly analyze impacts to species and habitat to meet the “hard look” requirement. It does not do so. As described above, removing riparian vegetation will increase water temperature by decreasing shade in numerous streams. Many of these streams have been identified as having salmon and steelhead spawning use, having core cold water habitat use, having salmon and trout rearing and migration use, or having migration corridor use. In its analysis of impacts to fish and aquatic life, the DEIS should require specific information about baseline temperatures in streams where riparian vegetation would be removed. The DEIS should comprehensively evaluate the direct, indirect, and cumulative effects of removing riparian vegetation for pipeline construction and operation, particularly for waterways that are already impaired for pollutants such as temperature, sediment, and dissolved oxygen. The DEIS should also require information about baseline temperatures in streams that would suffer removal of riparian vegetation and stream shading.

The Klamath River, Spencer Creek, and Clover Creek are all listed as water quality impaired for temperature. Any temperature increases in these streams as a result of the proposed activities would exacerbate existing violations of state water quality standards. The Ninth Circuit Court of Appeals recently made clear that new dischargers may not add a pollutant into a water body that is water quality limited.<sup>51</sup>

The Upper Klamath watershed supports habitat for the following threatened and

<sup>50</sup> In addressing the scope of the completed project, the Tribes are also concerned about the feasibility of the HDD proposed for Coos Bay, and the serious risks to the ecosystem and community if an accident were to occur. Coalition comments at 129-135.

<sup>51</sup> See *Friends of Pinto Creek v. United States Environmental Protection Agency*, No. 05-70785, (9th Cir. Oct. 4, 2007).

TR5-12  
cont

TR5-13

**TR5 continued, page 14 of 20**

TR5-13 The effects of riparian and stream side vegetation loss on stream temperatures are addressed in sections 4.3 and 4.5 of the EIS. Modeled temperatures assuming no vegetation shading, found very small changes, most of which would be functionally not measurable and showed rapid recovery of temperature below the open crossing area. As disclosed in these sections, the effects are not considered to be high enough to have significant biological effects. Fish passage was addressed in section 4.5.2. Some impedance is unavoidable during construction but these would be short term. The Applicant would need to acquire State administered permits for proposed stream crossing actions. These permits could provide specific requirements addressing this issue if deemed necessary by the State. A Fish Salvage Plan would need to be completed prior to any stream crossing construction would occur. As indicated in section 4.5.2 these plans would be incorporated recommendations by the Tribes.

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endangered species listed under the ESA that are sensitive to temperature: shortnose sucker, Lost River sucker, Bull trout, and Redband/Rainbow trout. The impacted fisheries are of critical importance to the Klamath Tribes; they provide the resources upon which exercise of the Tribes' Treaty-reserved rights depend. Degradation of the fisheries is a legally impermissible degradation of the Tribes' Treaty rights.

Both the shortnose sucker and Lost River sucker are of particular importance to the Tribes.<sup>52</sup> The DEIS reaches conclusions about impacts saying that the Project is "likely to adversely affect" both species,<sup>53</sup> which is not only concerning to the Tribes; it is a violation of our Treaty rights. It also finds the species' critical habitat is "not likely to be adversely affected" but offers little explanation on the potential issues with HDD (instead stating that the impacts are "so unlikely as to be discountable"). FERC then defers much of the analysis until consultation with U.S. Fish and Wildlife Service is complete and a biological assessment (BA) is issued.<sup>54</sup> The Tribes contend that to be able to fully evaluate the impacts to the species, and whether the proposed mitigation will be sufficient, the DEIS must present more detailed analysis of the impacts.

Further, the construction of the pipeline and construction of access roads will disturb many streams and waterways in the inaccessible backcountry that are critical habitat to several endangered fish, such as Coho Salmon and the Lost River Sucker, and other fish species that comprise the Treaty-protected resources of the Klamath Tribes.

Fish passage is an important issue. The DEIS must include a complete evaluation of whether the Project provides properly for fish passage of native migratory fish, particularly during construction. According to earlier comments by the Oregon Department of Fish and Wildlife (ODFW), the Fish Passage Law (ORS 509.580 - 509.645) would apply to the Project. ODFW has stated that it is Oregon's policy to provide upstream and downstream passage for native migratory fish, as described in ORS 509.580 through 509.910 and corresponding Administrative Rules OAR 635-412-005 through 0040. Fish passage is required in all waters of Oregon in which native migratory fish are currently or were historically present. The fish populations that would be impacted also migrate into the waters of the Reservation created by the Treaty of 1864, where the Tribes still exercise hunting and fishing rights. Thus, fish passage is another aspect of the Pipeline construction plans that must be closely evaluated by FERC.

Further, FERC proposes that the Fish Salvage Plan must be revised to adequately address concerns salvage of lamprey during construction. The DEIS provides that this revision "should

<sup>52</sup> See, e.g., Holly Dilleuth, "Saving the sucker species", Herald and News (Nov 18, 2018) [https://www.heraldandnews.com/news/local\\_news/saving-the-sucker-species/article\\_0cb4d437-aeb7-51a5-b77c-2c4b3253190e.html](https://www.heraldandnews.com/news/local_news/saving-the-sucker-species/article_0cb4d437-aeb7-51a5-b77c-2c4b3253190e.html) (last visited June 29, 2019); Jes Burns, "Tribes Drop Endangered Species Lawsuit In Klamath Basin", OPB (Nov 8 2018), <https://www.opb.org/news/article/klamath-tribes-endangered-species-lawsuit-klamath-basin/>.

<sup>53</sup> See, e.g. DEIS at 4-340, 4-341 to 342.

<sup>54</sup> See, Federal Permitting Dashboard, "Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline", <https://www.permits.performance.gov/permitting-projects/jordan-cove-lng-terminal-and-pacific-connector-gas-pipeline> (last visited June 29, 2019).

TR5-13  
cont.

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also incorporate the applicable measures of the Handling Guidelines for Klamath Basin Suckers.<sup>55</sup> Again, this is a revision that should be completed in advance to allow the Tribes the opportunity to properly analyze as part of the DEIS.

TR5-13  
cont.

**F. Mitigation**

Overall, the Project will have severe and irreparable impacts on water, soil, plants, wildlife, fish and cultural resources that are of great significance to the Tribes, and the Tribes' Treaty Rights protect many of these from such degradation. The DEIS places unrealistic and unsupported reliance on purported mitigation. At times, the mitigation proposed is inappropriate, as with cultural resources described above. Further, there is often an assumption that the mitigation will be implemented voluntarily. There is also often a failure to demonstrate that proposed methods of construction would prevent significant damage.<sup>56</sup> Because of the impacts to the Tribes, the DEIS should fully evaluate whether the proposed mitigation is appropriate, and how to make the mitigation required if the Project moves forward.

TR5-14

**IV. Risks of Catastrophe**

The Tribes are concerned about the risks from a potential catastrophe. Pipelines leak and rupture, facilities and tankers can explode, and infrastructure ages. Any catastrophic occurrence along the pipeline or at the Terminal has the potential to impact wetlands and waterways, aquatic resources, wildlife, people, infrastructure, public health and safety across a large portion of the state.

There are the natural hazards that FERC must disclose and analyze. In particular, the PCGP will be constructed across steep terrain. While the PCGP may be engineered to withstand an earthquake, it is a rare pipeline that will withstand a substantial, precipitous upwelling, depression or lateral slip earthquake, which can definitely occur on many of the faults that the PCGP will have to cross. There is also the potential for landslides in the Project area, which will result in potential sediment pollution, in violation of state water quality standards<sup>57</sup> and could directly damage the pipeline.

TR5-15

In addition, landslides, earthquakes, and tsunamis could have drastic impacts on this infrastructure, leading to substantial harms. For example, recently, a landslide in Marshall County, West Virginia, caused the Columbia pipeline to rupture and explode.<sup>58</sup> While an earthquake and resultant tsunami off the coast would be devastating to the Terminal, it would also likely damage the pipeline with attendant environmental harms. Further, the sedimentation will result from these occurrences will further harm Oregon's waters.

<sup>55</sup> DEIS at 4-296.

<sup>56</sup> See, Coalition Comments at Section II(JJ).

<sup>57</sup> See generally, Oregon DEQ Findings.

<sup>58</sup> This incident was highlighted by the Fourth Circuit Court of Appeals in finding the U.S. Forest Service "approved the pipeline without information [regarding landslide risk] it previously determined was necessary to making its decision, and it did so without acknowledging, much less explaining, its change in position." *Cowpasture River Preservation Association v. Forest Service*, No. 18-1144, 44-45 (4th Cir. 2018)

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TR5-14 The EIS currently assesses whether the mitigation proposed by the applicant or required by the applicable agencies is appropriate. When these measures are determined not to be appropriate or adequate, the FERC staff make recommendations for additional measures that should be implemented. If the Project is authorized by the Commission, these recommendations would become conditions in the Commission's Order. The Tribes have not identified specific instances where they consider any particular mitigation measures to be insufficient.

TR5-15 The engineering design of the pipeline, as well as an assessment of the effects of potential natural disasters (e.g., earthquakes, tsunamis, fire) on the Project are addressed in section 4.1 and 4.13 of the EIS. As the draft EIS indicated, it is unlikely that a catastrophic incident would occur (see section 4.13).

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In considering the potential for catastrophe, the Tribes are concerned about the lack of analysis of the risks inherent with the type of pipe selected. Using weaker Pipeline Safety standards for rural areas could put tribal members and rural Oregonians in greater danger than people in urban areas.

In addition, southern Oregon has been greatly impacted by wildfires. The Applicants propose construction during the wildfire season. Some areas may be in drought conditions. FERC has not adequately addressed each of these hazards in the DEIS.

Finally, given these harms, the Tribes are concerned about the ownership and ability to mitigate any major catastrophe. The Project was applied for by the Jordan Cove Energy Project, L.P., and the Pacific Connector Gas Pipeline L.P. (PCGP or Pacific Connector). The parent company to both entities is Pembina Pipeline Corporation, a Canadian company. Yet this is just the latest iteration of the ownership of this Project. Further, this Project has transformed over the years from an LNG import terminal to the current form as an export terminal. As such, the Tribes are concerned about the organization's stability in constructing, managing, operating, and decommissioning the Project, or in dealing with the harms if a catastrophe occurs.

#### V. **Climate Change**

FERC must consider climate change in its analysis. There is a great deal of evidence that emissions of greenhouse gases are the chief cause of climate change, which is the raising of the average temperatures in the atmosphere in Oregon and the Pacific Northwest. If built, the Project would transport fracked gas that is primarily from Canada, through Oregon, to Asia. It would be the biggest source of carbon emissions in the State of Oregon.

Further, the Project would use a large number of vehicles for the construction which would emit a great deal of carbon and other air pollutants, and ~~would~~ the PCGP would be operated using compression stations which will continually discharge air pollutants that will contribute to global warming. The Project involves energy intensive processes to liquefy and ship natural gas, which will exacerbate the problem.

Wetlands and forests have generally been found at carbon sinks, which can sequester atmospheric carbon. The changes in these habitats caused by construction of this Project will exacerbate the problem.

Climate change also has the potential to greatly impact the Project. The location of the Project directly places it in line of harm due to climate changes. As sea level rises, the facility at Coos Bay may be inundated, particularly if there is a high tide during a large storm surge.

Ultimately, this Project will exacerbate climate change. FERC has not sufficiently considered these impacts in the DEIS.

#### VII. **Government-to-Government Consultation Requirements**

The United Nations Declaration of the Rights of Indigenous Peoples includes the right to

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TR5-16 Climate change is discussed in section 4.14 of the draft EIS.

TR5-15  
cont.

TR5-16



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“obtain free, prior and informed consent before initiating a program or project that directly and tangibly affects tribes, tribal rights, tribal lands and sacred sites.”<sup>59</sup> The State of Washington has recently adopted this approach. FERC should adopt this approach to government-to-government consultation, and heed the Tribes’ calls to stop this project.

The United States has a trust responsibility to the Klamath Tribes. The trust responsibility is a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes.<sup>60</sup> Executive Order 13175 reaffirms the Federal government’s commitment to tribal sovereignty, self-determination, and self-government. Its purpose is to ensure that all Executive departments and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities. Further, as discussed above, because of the impacts to cultural resources, consultation is also required under the NHPA.

FERC recognizes its responsibility to promote a government-to-government relationship with federally recognized Indian tribes. In 2003, FERC published a Policy Statement on Consultation with Indian Tribes in Commission Proceedings (“Consultation Policy”). The Consultation Policy states the Commission will “seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission’s trust responsibility.”<sup>61</sup> However, a recent U.S. Government Accountability Office suggested FERC could do a better job at documenting its policy and how tribal input would be considered in agency decisions.<sup>62</sup>

We request that FERC ensure meaningful consultation with the Tribes, and that our input is accurately considered. This will require revisiting the DEIS to include and fully evaluate the concerns of the Tribes.

#### VII. Environmental Justice

Federal agencies must include environmental justice analysis in their NEPA reviews.<sup>63</sup> Executive Order 12898 directs each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” The Executive Order

<sup>59</sup> The concept of free, prior, and informed consent (“FPIC”) is described in Articles 10, 19, 28 and 29 of the UNDRIP.

<sup>60</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

<sup>61</sup> 18 CFR 2.1c(c)

<sup>62</sup> U.S. Government Accountability Office, “Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects”, Recommendation 13, 58, GAO-19-22 (March 2019) available at <https://www.gao.gov/products/GAO-19-22>.

<sup>63</sup> Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 Fed. Reg. 7629 (Feb. 16, 1994); Council on Environmental Quality, Environmental Justice Guidance Under the National Environmental Policy Act (Dec. 10, 1997) available at [https://www.epa.gov/sites/production/files/2015-02/documents/ej\\_guidance\\_nepa\\_ceq1297.pdf](https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf).

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TR5-17 As an independent federal regulatory agency, not part of the Executive branch of the U.S. government, FERC is explicitly excluded from following EO 13175 under Section 1(c) of that Order. Nevertheless, as stated in section 4.11.1.2 of the DEIS, the Commission has enacted a “Policy Statement on Consultations with Indian Tribes” in FERC Order 637. That Order states that the FERC recognizes it has trust responsibilities to Indian Tribes. In accordance with that Policy, we have conducted government-to-government consultations with the Klamath Tribes. Those consultation efforts continue.

TR5-18 Environmental justice was addressed in section 4.9 of the DEIS. Again, as an independent federal regulatory agency FERC is excluded from following EO 12898. However, we follow the spirit of the EO.

The draft EIS addresses impacts to crime and housing in sections 4.9.1.1 and 4.9.1.2 (for the LNG Terminal) and sections 4.9.2.1 and 4.9.2.2 (for the Pipeline). The discussion of crime in section 4.9.1.1 highlights a number of articles that have focused on links between semi-permanent worker camps and negative impacts on female Native American populations. As noted in section 4.9.1.1 of the draft EIS, attempts to estimate increases in crime based on the available literature and anticipated temporary population increases would be speculative. Potential impacts to public services including law enforcement are assessed in sections 4.9.1.6 (LNG Terminal) and 4.9.2.6 (Pipeline).

The Tribe’s concerns regarding informal man-camps along the pipeline route are noted in the final EIS (sections 4.9.2.1 and 4.9.2.2). A discussion of potential on-site protests has been added to section 4.9.2.1. We asked Pacific Connector about potential pipeline construction worker camps in a July 22, 2019 environmental information request and their response filed August 6, 2019 was as follows:

“In regard to community concerns about “impromptu” worker camps, PCGP would not provide temporary housing accommodations for pipeline construction workers similar to those proposed for the LNG Terminal construction workers at the South Dunes site near Coos Bay, and land use ordinances and building codes in the four counties crossed by the pipeline limit the duration of occupancy of temporary dwelling units, such as travel trailers and RVs. PCGP, therefore, does not propose nor anticipate the creation or occurrence of “impromptu” worker camps.”

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applies to equally to Federally Recognized Tribes.<sup>64</sup> The DEIS includes some analysis at 4.9.1.9 (Terminal) and 4.9.2.9 (Pipeline). The discussion fails to adequately address and acknowledge the issue of Environmental Justice for tribes.

The Tribes are concerned that public safety is an environmental justice issue, and it is not adequately addressed. There is data that shows the serious risks of harm to indigenous women, in particular, in other regions of the United States and in Canada.<sup>65</sup> The DEIS considers but does not adequately evaluate the impacts of the “official” man camp proposed in Coos Bay.<sup>66</sup> Yet the DEIS fails to address the impacts related to crime and housing from construction of the Pipeline.

While the Applicants may not have an official camp in Klamath County or other counties along the route, there will be an influx of workers, and they will have to stay somewhere. The Tribes have learned from the experience of the construction of the Ruby pipeline. This influx of workers, who are predominately male, will lead to high occupancy at local hotels during construction. Often, they will set up camps on a local landowners’ property. With the influx of people, a similar pattern of crime and related harms to the local communities will occur. These communities are not able to deal with the influx of people, and the health and safety issues that result. While there may be less research done on these smaller influxes of workers, FERC must analyze these impacts of the Project in the DEIS.

In addition, FERC has not discussed the potential of on-site protests that are likely to occur if the Project is permitted and allowed to be constructed. Given the strong opposition to the Project, it is necessary to assume that protests similar to what occurred at Standing Rock will occur.<sup>67</sup> This raises significant public safety and additional environmental concerns that will likely be beyond local control. This influx will challenge local enforcement and other resources

TR5-18  
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<sup>64</sup> U.S. Environmental Protection Agency “EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples,” (July 24, 2014) available at <https://www.epa.gov/sites/production/files/2017-10/documents/ej-indigenous-policy.pdf>.

<sup>65</sup> See, e.g., Alaska Native Women’s Resource Center, et al., “Violence Against American Indian and Alaska Native Women in the United States”, Briefing Paper for Thematic Hearing held during the Inter-American Commission on Human Rights, 10, (October 5, 2018) available at [https://indianlaw.org/sites/default/files/ILRC\\_IACHR-Briefing-Paper.pdf](https://indianlaw.org/sites/default/files/ILRC_IACHR-Briefing-Paper.pdf); Mary Kathryn Nagle and Gloria Steinem, Op-Ed., “Sexual Assault on the Pipeline”, Boston Globe (September 29, 2016). <https://www.bostonglobe.com/opinion/2016/09/29/sexual-assault-pipeline/3QscLWRcmD12efeRQTNsl/story.html> (last visited June 29, 2019); Levi Rickert, “UN Special Rapporteur: Oil, Gas & Mining Operations Brings Increased Sexual Violence”, (Jan. 21, 2014) <http://nativenewsonline.net/currents/un-special-rapporteur-oil-gas-mining-operations-brings-increased-sexual-violence/> (last visited June 29, 2019); U.S. Department of Justice, Press release, “Associate Attorney General West announces \$3 million in grants to address violence against women in rural and tribal communities in the Bakken Region” (August 26, 2014) <http://www.justice.gov/opa/pr/associate-attorney-general-west-announces-3-million-grants-address-violence-against-women> (last visited June 29, 2019); Honor the Earth, “Man Camps Fact Sheet”, [http://www.honorearth.org/man\\_camps\\_fact\\_sheet](http://www.honorearth.org/man_camps_fact_sheet) (last visited June 29, 2019).

<sup>66</sup> The Coalition provides good comments on the flaws in the analysis for the man camp for construction of the Terminal, and many of the details can be applied to the Pipeline construction. Coalition Comments at Section II(F)(5). The Tribes refer FERC to comments submitted by Oregon Physicians for Social Responsibility, at 63-67 (July 1, 2019).

<sup>67</sup> See, e.g., Justin Worland, Time, “What to Know About the Dakota Access Pipeline Protests” (Oct. 28, 2016) available at <https://time.com/4548566/dakota-access-pipeline-standing-rock-sioux/>

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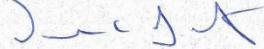
and result in negative social, economic and environment impacts.

**VIII. Conclusion**

Thank you for the opportunity to provide comments on the DEIS for the Project. The Klamath Tribes continues to oppose this Project, and have many concerns that the DEIS is inadequate to meet the requirements under NEPA to provide a full and fair discussion of significant environmental impacts. We expect that FERC will strive to address all of the comments we are submitting. After completing a thorough review of all the environmental impacts and costs that would result from this Project, we strongly urge FERC to complete a revised DEIS to address these issues before moving forward. Further, we urge FERC to adopt the No Action Alternative and to deny the Project.

We are prepared to meet with FERC staff who will be working on the EIS in a government-to-government setting. If you have any questions regarding these comments, you may call me at (541) 783-2219, or contact the Tribes' Culture and Heritage Director, Perry Chocktoot, at (541) 783-2764.

Respectfully,



Donald C. Gentry, Chairman  
The Klamath Tribes

Attached: Comments to Army Corps re: Clean Water Act Section 404  
Comments to Oregon Dept. of State Lands on a removal-fill permit application