

From: [Inglis, Jr. L NWP](#)
To: [Eisenhauer, John W COL NWP](#)
Cc: [Mahar, James R NWP](#); [Brice, Kevin J NWP](#); [Zinszer, Shawn H NWP](#); [Gagnon, Steven K NWP](#); [Latcu, Misty M NWP](#); [Holm, Leanne NWP](#); [Craner, Douglas C NWP](#); [Turaski, Michael R NWP](#); [Cloutier, G Paul NWD](#)
Subject: RE: NEPA and treaty rights - Additional considerations (UNCLASSIFIED)
Date: Thursday, September 13, 2012 8:17:42 AM

Classification: UNCLASSIFIED
Caveats: NONE

FYSA Sir,

I talked to Georgeie Reynolds stand in (HQ Archeologist John Mullen) today who said that Georgeie had been involved in some of the discussions @ HQ ref the coal proposals. Unfortunately she's out 'til next week.

Paul Cloutier and I think that if HQ still seems to discount the direct & in~ effects to Tribal Treaty rights & Cultural impacts or having trouble understanding the seriousness of Tribal intent & the risk of ignoring that, then another relevant example that HQ needs to look at is the lessons learned from the Port of Arlington litigation.

Hope that helps,
JR
X4508

-----Original Message-----

From: Eisenhauer, John W COL NWP
Sent: Wednesday, September 12, 2012 5:31 PM
To: Turaski, Michael R NWP
Cc: Mahar, James R NWP; Brice, Kevin J NWP; Zinszer, Shawn H NWP; Gagnon, Steven K NWP; Latcu, Misty M NWP; Holm, Leanne NWP; Craner, Douglas C NWP; Inglis, Jr. L NWP
Subject: RE: NEPA and treaty rights - Additional considerations (UNCLASSIFIED)

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Great background data, Mike. Thanks.

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Commander and District Engineer
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-----Original Message-----

From: Turaski, Michael R NWP
Sent: Wednesday, September 12, 2012 4:04 PM
To: Eisenhauer, John W COL NWP
Cc: Mahar, James R NWP; Brice, Kevin J NWP; Zinszer, Shawn H NWP; Gagnon, Steven K NWP; Latcu, Misty M NWP; Holm, Leanne NWP; Craner, Douglas C NWP; Inglis, Jr. L NWP
Subject: NEPA and treaty rights - Additional considerations (UNCLASSIFIED)

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Sir -

Two additional considerations regarding our approach to addressing impacts to treaty rights:

1. Mitigating Impacts to Treaty Fishing. The applicant has not proposed any mitigation measures that would address these impacts, but is "willing to consider some type of monitoring and reporting of such interactions [with fishers] as part of their operations." Based upon the District's previous experience with proposed projects that impact treaty fishing rights, it is highly uncertain that the impacts can be mitigated. If an impact cannot be mitigated to no significance, then the agency cannot arrive at a Finding of No Significant Impact and an EIS is required. An EIS is the best tool for taking the requisite hard look at these, and the other effects of this project.

Additionally, consultation with the multiple tribes affected by this project is going to take a significant amount of time. If as a result of that lengthy Consultation, the Corps cannot find no significant impacts and must start an EIS process, this will delay to the permitting process.

2. Hawaiian Waste Systems Litigation. This is an issue that COL Miles worked on. I provide a summary below, and you can also see this article:

<http://www.cbulletin.com/396071.aspx>

Although the Corps was not party to the litigation between the Yakama Nation and USDA, and we haven't had time to dig up all the facts about how the case concluded (it may have been dismissed or settled), from this recent case we can see that an affected tribe may resort to litigation and raise NEPA allegations (arguing that an EIS is required). Seattle District has experience with cases brought by affected tribes (e.g., Muckleshoot v. Hall, 1988).

Please advise if you'd like additional follow up.

v/r

Mike

supplemental Hawaiian Waste info

In early 2010 the Portland District received an urgent third party request to temporarily access government owned lands from Hawaiian Waste Systems, LLC.. The purpose was to use Corps property above John Day Dam on the Washington side of the Columbia River to transfer containerized waste.

Specifically, Hawaiian Waste Systems, LLC, needed a license to offload up to two barge loads of containerized, baled and wrapped waste at a temporary site at Roosevelt, Washington. The temporary offloading site was adjacent to the Roosevelt Regional Landfill Intermodal Facility along the Columbia River.

Offloading operations would require no shoreline modifications or improvements; the necessary infrastructure was either currently in place or entirely mobile and temporary.

Portland District was considering the company's request for a real estate license for up to two uses of the area during a two month period; each use would not exceed 72 hours of offloading activity. An environmental assessment and Finding of No Significant Impact were prepared for the project as an ongoing activity in 2006. The land area where offloading and transport to the Roosevelt facility would occur had been heavily disturbed, containing existing roads and infrastructure, and had been used for similar activities in the past.

The District initiated government-to-government consultation with four federally recognized tribes to identify tribal issues and/or concerns with respect to the proposed action.

The tribes raised several concerns regarding impacts to cultural and natural resources. Issues included: invasive species impacts on treaty reserved harvesting of first foods (roots, berries, etc.), barge traffic impacts on treaty reserved fishing activity, and impacts to submerged cultural resources. The tribes also raised concerns over the adequacy of the EA and FONSI since there was little if any recognition of the tribes and their treaty reserved rights within either document.

Ultimately, the Portland District did not issue a the requested license. The applicant did not afford adequate time to work through the issues nor meet the government's section 106 obligations under the NHPA.

Later that year, Hawaiian Waste Systems, LLC began to barge the trash into Longview, Washington where it was being offloaded onto trucks for transport to the Roosevelt Regional Landfill. The company had three different EA's (a 2006 site specific EA for off loading at the Roosevelt site, a 2008 programmatic EA for continuation of garbage shipping, and a 2009 EA which was a long term proposal to off loading in Longview, WA).

The Yakama Nation immediately filed a law suit against USDA's APHIS. The Yakama alleged that they were not consulted and that the EA was inadequate because it did not address the tribe's issues/concerns. The USDA immediately withdrew the permit allowing the activity.

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