



MUCKLESHOOT INDIAN TRIBE

Office of the Tribal Attorney

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August 19, 2016

U.S. Army Corps of Engineers
Regulatory Branch
ATTN: Karen Urelus
P.O. Box 3755
Seattle, Washington 98124-3755

Dear Ms. Urelus:

Enclosed please find an edited iteration of Condition 6 of the Proposed Regional General Conditions (hereafter Rule). This language is submitted by the Muckleshoot Indian Tribe, the Lower Elwha Klallam Tribe, and Port Gamble S'Klallam Tribe to assist the Corps in developing a stream crossing rule that will be consistent with Indian Treaty fishing rights as interpreted by the recent Ninth Circuit in its affirmance of the District Court Injunction in *United States v Washington* (2-70-ev-09-00213) (June 2016) (District Court Injunction is Document 20384 in the District Court record).

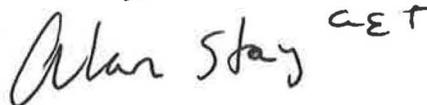
First, we would like to thank the Corps for its work in developing Condition 6. The comments included in the enclosed draft used that Rule as a base. Our goal in commenting was to ensure that the Rule and Court Injunction be consistent, and the Rule accurately reflect the duties set out in the Injunction. The Rule as crafted by the Corps omitted certain important aspects of the Injunction. The lack of clarity that could follow from inconsistencies in the Rule and Injunction are likely to lead to future controversies and additional litigation, a result that both the Corps and tribes hope to avoid.

As you know, the United States and tribes joined forces in 2001 to bring an action against the State of Washington challenging the standards and process used to permit culvert design and construction in salmon bearing streams. That united effort resulted in a District Court Order in 2007 and an Injunction in 2013 setting down the standards to be applied in the design and construction of stream crossing culverts. Those decisions marked a watershed victory for the United States and tribes and showed what could be accomplished when they worked together. Both the United States and Tribes in that litigation concluded that implementation of that decision and Injunction would go far in assuring the protection of Treaty Indian fishing rights. Conversely, a failure to implement the decision and Injunction would have the exact opposite effect.

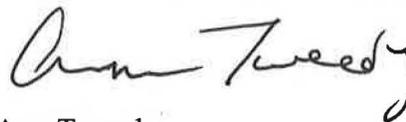
It is critical to the implementation of the decision and Injunction that the Corps rule be aligned with the Injunction. The Corps plays a central role in assuring that salmon resources are protected and Treaty rights protected. Should the Rule deviate in any way from the Injunction, it will only invite those that do not hold the same commitment to protection of the resource to find a way around the standards in the Injunction, or worse, to drive a wedge between the United States and tribes. This we must avoid at all costs.

Therefore, we provide this draft for your consideration. We also request the opportunity to consult on the language. As you know the Corps has a special duty to assure Treaty rights are protected and a separate and unique duty to consult with Tribes. As we jointly work to incorporate the language of the Injunction, we are confident that we can arrive at an appropriate result.

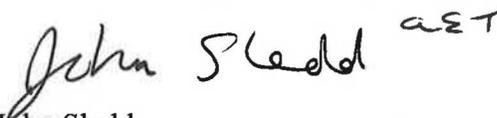
Sincerely,



Alan Stay
Counsel for Muckleshoot Indian Tribe



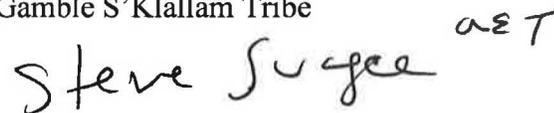
Ann Tweedy
Counsel for Muckleshoot Indian Tribe



John Sledd
Counsel for Lower Elwha Klallam Tribe and Port
Gamble S'Klallam and Coordinating Counsel for
Culvert Case



Jane Steadman
Counsel for Lower Elwha Klallam Tribe and Port
Gamble S'Klallam Tribe



Steve Suagee
Counsel for Lower Elwha Klallam Tribe

6. Crossings of Waters of the United States

For any project including installing, replacing, or modifying crossings of waters of the United States, such as culverts or bridges, a PCN must be submitted to the Corps of Engineers in accordance with Regional General Condition 1 and General Condition 32 (Pre-Construction Notification).

If a culvert crossing is proposed to crossover waters of the U.S. where salmonid species are present or could be present, the applicant shall design and build fish passage in order to pass all species of salmon at all life stages at all flows where the fish would naturally seek passage. The applicant shall achieve fish passage, in order of preference, by (a) avoiding the necessity for the roadway to cross the stream; (b) use of a full span bridge; or (c) where a culvert cannot be avoided, the project applicant shall apply the stream simulation design method from the Washington Department of Fish and Wildlife located in the Water Crossing Design Guidelines (2013), or a design method which achieves equivalent stream simulation results or better greater fish passage and fisheries habitat benefits than the designs required under this paragraph.

In rare circumstances, an applicant may deviate from the standards for stream crossing set out above if the applicant provides sufficient information to support a finding that the use of the standards are not feasible because of ~~if the stream simulation design method is not applied for a culvert where salmonid species are present or could be present, the project proponent shall provide information in the PCN sufficient to establish~~ one of the following:

1. An emergency involving an immediate threat to one of the following: life, the public, or property, or of environmental degradation, and a correction using the required design standards set out above for which application of the stream simulation design method cannot be implemented in time to forestall that threat. Culverts installed due to emergency conditions will require evaluation to meet the stream simulation design method after-the-fact.
2. The existence of extraordinary site conditions.

Where the applicant deviates from the preferred design methods due to emergency or extraordinary site conditions, the applicant shall mitigate for the impacts of deviating from the standards so that the resulting correction plus any mitigation provides at least the same net benefit to the affected salmon resource as would have occurred had the correction applied the standards required above. ~~3. How the proposed design will provide equivalent or better fish passage and fisheries habitat benefits than the stream simulation design method.~~

As part of the PCN, project proponents must provide a monitoring plan that specifies how the proposed culvert will be periodically re-assessed to ensure its effectiveness in providing passage for all species of salmon at all life stages at all flows where the salmonid species would naturally seek passage. Project proponents must also provide a maintenance plan that describes how the culvert will be maintained to prevent development of fish barriers.