



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

JUL 22 2008

CENWD-PDS

MEMORANDUM FOR: Commander, Portland District

SUBJECT: Decision on Appeal of the Permit Denial for the Port of Arlington, NWP File
No. 2006-16

1. Enclosed is a copy of my Administrative Appeal Decision for the Port of Arlington. I have determined the subject appeal to have merit and am remanding the decision for reconsideration. The decision is being remanded on three main points.

a. The District did not follow the correct procedure to exclude items protected under the National Historic Preservation Act (NHPA) from release to the appellant. The District is directed to properly go through the process outlined in Section 304 of NHPA, if the District determines that any or all of those documents should not be disclosed, and to verify that those documents are appropriate to be withheld under Section 304. The specific Section 304 process is described under the discussion for Reason for Appeal 2.

b. The Environmental Assessment (EA) and Statement of Findings (SOF) did not address the extent to which the permit revocation adversely affected plans, investments, and actions the permittee has reasonably made in reliance on the suspended/revoked permit. The District is directed to supplement the EA/SOF to address this point, and revisit the final decision, if appropriate. This issue is described under the discussion for Reason for Appeal 5.

c. The legal basis for the conclusion that a treaty fishing site moved with the shoreline when the John Day Dam was constructed was not explained in the EA/SOF. It appears this was addressed in privileged documents withheld from the appellant under attorney-client privilege. The district is directed to supplement the EA/SOF to consider this question, and revisit the final decision, if appropriate. This issue is described under the discussion for Reasons for Appeal 8, 9, and 10.

2. My regulatory and legal staff are available for any assistance or further clarification that you may require. Please address the points listed above and provide the Port of Arlington your final decision within thirty days.

3. Questions regarding this matter may be directed to Mr. Dave Gesl, the NWD Appeals Review Officer at (503) 808-3825.

Encl


WILLIAM E. RAPP, P.E.
BG, USA
Commanding



DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

Program Support Division

JUL 22 2008

Mr. Paul Conable
Tonkin Torp LLP
1600 Pioneer Tower
88 SW Fifth Avenue
Portland, Oregon 97204

Dear Mr. Conable:

I have completed my review of your Request for Appeal, submitted on behalf of the Port of Arlington, regarding a permit denial by the Portland District. The proposed work is a port facility located in Gilliam County, Oregon, on the Columbia River near Willow Creek. The file number is NWP-2006-16.

After evaluating the information provided in the Request for Appeal (RFA), the District's administrative record and the information obtained during the appeal meeting and site visit, I have determined that your appeal has merit under several of the reasons you stated in the RFA. Enclosed is a copy of the Administrative Appeal Decision, which provides the details of my findings.

The final Summary of the Appeal Meeting and Site Visit for Port of Arlington, dated July 9, 2008, is included in the Decision package.

Copies of both documents are being furnished to the U.S. Army Corps of Engineers, Portland District. If you have any questions about the appeal decision, you may contact my Administrative Appeal Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

A handwritten signature in black ink, appearing to read "William Rapp".

William E. Rapp, P.E.
Brigadier General, US Army
Division Commander

Enclosure

ADMINISTRATIVE APPEAL DECISION

**PORT OF ARLINGTON
FILE NO. NWP-2006-16
PORTLAND DISTRICT**

DATE: JUL 22 2008

AUTHORITY: Section 10 of the Rivers and Harbor Act and 404 of the Clean Water Act

Review Officer (RO): David W. Gesl; U.S. Army Corps of Engineers; Northwestern Division; Portland, Oregon.

Appellant: The Port of Arlington, Arlington, Oregon (the Port), represented by Paul W. Conable, Tonkin Torp LLP, 1600 Pioneer Tower, 88 SW Fifth Avenue, Portland, Oregon 97204.

Receipt of Request for Appeal (RFA): June 2, 2008 (Encl 1).

Responses and additional information:

The Portland District (The District) submitted *Response to Port of Arlington's Reasons for Appeal or Objections* on June 17, 2008 (Encl 2).

The Port's legal counsel submitted a letter dated June 24, 2008, which it characterized as a "reply to the Portland District's Response to Port of Arlington's Reasons for Appeal or Objections

Appeal Conference and Site Visit Date: The conference/visit was held on June 25, 2008. The Memorandum to File documenting the conference/visit is attached (Encl 3).

Background Information:

On June 26, 2006, a complete application was received from the Port of Arlington for the construction of a dock and mooring dolphins for the off-loading of barges. The proposed work included the construction of a barge dock on piling with fender piles along the waterward edge of the dock, ten mooring dolphins, a trestle and footing to connect the dock to the shoreline. A public notice was issued on November 29, 2006 soliciting comments on the proposed issuance of a Letter of Permission (LOP) for the project under Section 10 of the Rivers and Harbors Act (Sec 10). This public notice did not propose authorization for the discharge of fill material for the footing required under Section 404 of the Clean Water Act (Sec 404). On February 21, 2007, an LOP was issued to the Port

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of Arlington authorizing the construction of the dock, fender piles, dolphins, and trestle under Sec 10. A second public notice was issued on February 23, 2007 soliciting comments on the proposed issuance of an Individual Permit for the complete project under Sec 10 and Sec 404.

NOTE: An LOP is a type of individual permit issued in accordance with abbreviated procedures which include and a public interest evaluation, but without the publishing of an individual public notice. Letters of permission may be used in those cases subject to Sec 10 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. Activities requiring authorization under Sec 404 generally are not be authorized by LOP

The proposed location of the facility is along the Columbia River (John Day pool) shoreline, approximately 8 miles east of the City of Arlington. The site is approximately ¼ mile downstream (west) of the mouth of Willow Creek. There is an existing port facility within the city limits of Arlington (The Port of Arlington) that primarily services wheat shipments. A location map and aerial photos are attached for reference (Encl 4). The proposed final plan is also attached (Encl 5).

The Port's intent in constructing the proposed dock is, in part, to create an intermodal transportation facility. The primary cargo received at the facility would be solid waste shipped via barge from the Portland area and other existing or potential markets. There is an existing landfill located near the City of Arlington; solid waste would be received at the proposed facility and transferred by truck to the landfill.

The District suspended the Sec 10 permit it had issued on April 3, 2007. The District's appealable action, denial of the requested permit, took place on April 4, 2008. The RFA was received on June 2, 2008.

Summary of Decision: As discussed in Reasons 2, 3, 5, 8, and 9, I find the Appeal has merit in 5 of the 14 reasons for appeal stated by the appellant. The decision is being remanded to the District on 3 main points:

1. The District did not follow the correct procedure to exclude items protected under the National Historic Preservation Act (NHPA) from release to the appellant. The District is directed to properly go through the process outlined in Section 304 of NHPA, if the District determines that any or all of those documents should not be disclosed, and to verify that each of the four documents are appropriate to be withheld under Section 304.

2. The Environmental Assessment and Statement of Findings (EA/SOF, also referred to as the decision document), prepared by the Portland District did not address the extent to which the permit revocation adversely affected plans, investments, and actions the permittee has reasonably made in reliance on the suspended/revoked permit.

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The district is directed to supplement the EA/SOF to address this point, and revisit the final decision, if appropriate.

3. The legal basis for the conclusion that a treaty fishing site moved with the shoreline when the John Day Dam was constructed was not explained in the EA/SOF. It appears this was addressed in privileged documents withheld from the appellant under attorney-client privilege. The district is directed to supplement the EA/SOF to consider this question, and revisit the final decision, if appropriate.

Appeal Evaluation, Findings and Instructions to the Portland District Engineer (DE):

Reason 1: The Corps improperly denied the Port the opportunity for a hearing at which the Port could present evidence and witnesses and review and rebut the evidence on which the Corps based its decisions.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

In accordance with Corps regulations regarding modification, suspension, or revocation of permits, a hearing or meeting in association with actions to suspend and/or revoke a permit is possible.¹ The regulations are specific in prescribing that the District Engineer will take action "within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested."

On April 3, 2007, when the District suspended the Sec 10 permit which was issued on February 21, 2007, it advised the Port that it could request to meet with the Commander or his representative and/or request a public hearing to present information in the matter.² It was verified at the Appeal Conference that no such request was made.

According to the District's EA/SOF,³ no public hearing was requested anytime during the permit process. The District Engineer has the discretion to determine if there is a valid interest to be served by a hearing.⁴ The District Engineer has the opportunity to exercise that discretion, and have a hearing, regardless of whether a request for a hearing has been made.

In conclusion, the District Engineer acted within the bounds of his discretion in his decision not to conduct a public hearing and this reason for appeal has no merit.

¹ 33 C.F.R. § 325.7.

² AR Ex. 64.

³ AR Ex. 1, specifically Section 10.3.

⁴ 33 C.F.R. § 327.4(b).

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Reason 2: The Port was denied Due Process when the Corps revoked its permit without a hearing and without allowing the Port to review all the evidence on which the Corps based its decision.

FINDING: This reason for Appeal has merit

ACTION: Further action is needed by the District

DISCUSSION:

See the response to Reason 1, above, for a discussion of the District Engineer's discretion to determine if a hearing is necessary.

The creation of the Administrative Record (AR) is solely within the discretion of the agency. The record should reflect those items that the agency used in its decision making process, although these may be withheld from disclosure. The appellant argues that material the agency used to base its decision was not disclosed, thereby denying the Port the opportunity to review all the evidence on which the Corps based its denial.

During the Appeal Conference, it was clarified that the phrase "review all the evidence on which the Corps based its decision" referred specifically to the items which the District excluded from the AR, as opposed to the documents that were contained in the AR that the District released for the Appeal. A list of the items excluded from the record, prepared by the District is attached for reference (Encl 6). The basis of the exclusions included Attorney-Client Privilege, Attorney Work-Product Privilege, Deliberative Process Privilege, and NHPA Section 304. Because of the clarification during the Appeal Conference, the examination of this reason for appeal is limited to items which were excluded from the record.

Mr. Conable requested that the Record be supplemented with the documents that the District excluded under Section 304 of NHPA⁵ in a letter dated June 18, 2008 (Encl 7). He specifically requested that the Record be supplemented with four specific documents that the District withheld pursuant to Section 304: (1) National Register Registration Form, dated 2/29/08; (2) E-mail regarding evidence needed for legal opinion on usual and accustomed fishing sites, dated 12/12/07; (3) archaeological boundary and site location document, dated 2002; and, (4) the Lane Report on Traditional Fisheries, dated April 1979.

Section 304 of the NHPA states that an agency, "after consultation with the Secretary [of the Interior], shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may: (1) cause a significant invasion of privacy; (2) risk harm to the

⁵ 16 U.S.C. § 470w-3.

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historic resource; or, (3) impede the use of traditional religious site by practitioners.”⁶ Historic resources are defined as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register.”⁷

Sites of traditional religious and cultural importance to a tribe may be eligible for the inclusion on the National Register.⁸ It is well established that the location and nature of such sites is sensitive to the tribes and that agencies often strive to keep such information confidential.⁹ This is often accomplished through NHPA, but also through ARPA and various provisions in the Freedom of Information Act. That said, the District relied on Section 304 which plainly and unambiguously requires consultation with the Secretary of the Interior.¹⁰ The regulations for Section 106 confirm this requirement.¹¹ The District failed to follow this process.

It is not clear from the record and the Statement of Findings that the withheld documents were critical to the permit denial. It appears the primary reason for the denial was the existence of an usual and accustomed fishing site and that the presence of historic properties eligible for the National Register were merely peripheral to the decision. If that is the case, the four withheld documents may not even be critical documents for the decision. However, if these documents did inform the District’s decision or simply were a “non releasable” part of the administrative record decision, then they should either be included or excluded after going through the process described in the statute. A memorandum describing the rationale for withholding the documents attached to the proposed documents are forwarded to the Keeper, who will review and make recommendations. If necessary, the Keeper will also coordinate with the Advisory Council on Historic Preservation.

As part of the administrative appeals process, the RO and Division Engineer may not mandate that the Record be supplemented. However, the Division Engineer will remand the issue to the District where a decision was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or *plainly contrary to a requirement of law*, regulation, and Executive Order or officially promulgated Corps policy guidance.”¹² The District Engineer may have legitimate concerns over releasing information regarding the location or character of historic properties, but the decision to withhold that information is “plainly contrary to a requirement of law.”

In conclusion, for this reason, the matter is remanded to the District Engineer to properly go through the process outlined in Section 304, if the District determines that any or all of

⁶ 16 U.S.C. § 470w-3(a).

⁷ 16 U.S.C. § 470w(5).

⁸ 16 U.S.C. § 470a(d)(6)(A).

⁹ See, e.g., *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1496 (D. Ariz. 1990); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995); see also NATIONAL PARK SERVICE, NATIONAL REGISTER BULL. 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 19 (1998).

¹⁰ 16 U.S.C. § 470w-3(a).

¹¹ 36 C.F.R. § 800.11(c)(1). The Keeper of the National Register has been delegated this responsibility.

¹² 33 C.F.R. § 331.9(b) (emphasis added).

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those documents should not be disclosed, and to verify that each of the four documents are appropriate to be withheld under Section 304.

Other items were also excluded from the Record due to attorney-client, attorney work product, or deliberative process privilege. These are all standard privileges within the civil discovery and disclosure arenas. The deliberative process privilege protects the "decision making processes of government agencies."¹³ The privilege attaches where the communication is both predecisional (prior to the adoption of an agency policy or decision) and deliberative (makes recommendations or expresses opinions on legal or policy matters).¹⁴ The attorney work product privilege protects documents prepared by an attorney in contemplation of litigation.¹⁵ The concept of "litigation" extends to administrative proceedings as well as to civil or criminal proceedings.¹⁶ Finally, the attorney client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice."¹⁷ The documents that the District withheld all seem to fall squarely within the cited privileges. Therefore, the District Engineer's decision to withhold the documents invoking the deliberative process, attorney work product, or attorney client privilege was reasonable.

Reason 3: The Corps improperly denied the Port the opportunity to review all the evidence on which the Corps based its denial. The administrative record must include all documents, correspondence and materials on which the Corps based its decision.

FINDING: This reason for Appeal has merit

ACTION: Further action is needed by the District

DISCUSSION:

See the response to Reason 2, above, for a discussion of the content of the administrative record and the Port's appeal with respect to being allowed to review evidence. As determined in my decision regarding reason 2, the matter is remanded to the District Engineer to properly go through the process outlined in Section 304, if the District determines that any or all of those documents should not be disclosed, and to verify that each of the four documents are appropriate to be withheld under Section 304.

Reason 4: The Corps misunderstood its role in these permit proceedings when it identified itself as a "fiduciary" of the Confederated Tribes of the Umatilla Indian

¹³ *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975); *see also, e.g., National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1120-21 (9th Cir. 1988) (protecting draft environmental impact statements and forest management plans).

¹⁴ *E.g., Mapother v. United States Dept. of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993).

¹⁵ *See Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947); Fed. R. Civ. P. 26(b)(3).

¹⁶ *E.g., Environmental Protection Services v. Environmental Protection Agency*, 364 F. Supp. 2d 575, 586 (N.D. W. Va 2005) (EPA administrative enforcement proceeding).

¹⁷ *Mead Data Center v. U.S. Department of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977).

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Reservation (the "Tribes"). Rather than acting as a neutral arbiter in the permitting process, the Corps erroneously concluded that it was required to act on behalf of one interested party, the Tribes, and thereby denied the Port its right to an unbiased decision-maker.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

Courts have long recognized an existence of a general trust relationship between the United States government and Indian tribes.¹⁸ This unique relationship is viewed as a source of federal responsibility to Indians. It the government's responsibility, in carrying out its fiduciary duty, to "ensure that Indian treaty rights are given full effect."¹⁹ In Northwest Sea Farms, the District Court of Washington specifically found that the Corps has a responsibility to protect the Lummi's treaty fishing rights in making permitting decisions.²⁰ As discussed under reason 6, below, the District Engineer was reasonable in finding the existence of a usual and accustomed treaty fishing site. Likewise, the District Engineer was reasonable in identifying itself as a fiduciary in ensuring that treaty right was given full effect.

Reason 5: The Corps' Permit Denial and Statement of Findings addresses only the denial of the Section 404 permit, but fails to address the revocation of the already-granted Section 10 permit. Accordingly, the Statement of Findings does not make required findings and determinations for revocation of a Section 10 permit, in particular failing to consider the impact of the revocation on the Port, which had already spent millions of dollars in reasonable reliance on the permit. *See* 33 C.F.R. § 325.7.

FINDING: This reason for Appeal has merit

ACTION: Further action by the District is needed.

DISCUSSION:

The decision under appeal clearly included an evaluation of the total project, including activities requiring authorization under Sec 404 (the fill activities) as well as those requiring only Sec 10 authorization (specifically, those activities that were originally authorized by the LOP that was subsequently suspended).

¹⁸ *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁹ *Northwest Sea Farms, v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

²⁰ *Id.* at 1520-21.

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The District's EA/SOF defines the scope of the evaluation as the activities requiring authorization under both Sec 10 and Sec 404 in the introduction.²¹ The EA also states "This decision Document contains our evaluation of the Port's application for a permit for the complete project under both Sec 10 and 404."²² In the project description contained in the EA/SOF, the activities that were formerly authorized by the revoked permit were described, as well as the work requiring Sec 404 authorization.²³

The EA/SOF does not include a consideration of the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit, as specifically required by the modification, suspension, or revocation of permits section of the Corps regulations.²⁴ This evaluation should be a part of the overall public interest weighing and balancing process described in the Corps general regulatory policies.²⁵

It is not reasonable to consider the evaluation of the activities initially authorized by the Sec 10 only LOP as not being subject to appeal simply because the District's final action had the affect of revoking that permit. I recognize that permit revocations are not defined as appealable actions in the Administrative Appeals Process regulations.²⁶ However, the evaluation eventually leading to the permit denial included both the Sec 10 activities, initially permitted by LOP, and the previously unaddressed fill activities that required Sec 404 authorization. Those initially permitted activities requiring only Sec 10 authorization where simply a subset of the overall suite of activities associated with the proposal under consideration. The Sec 10 only features could not reasonably be constructed and used independently of the total project; therefore they can not be evaluated separately.

According to the District Engineer's denial letter, the project would adversely impact treaty fishing rights.²⁷ This is overriding in significance. Consideration of the affect on the Port's plans, investments, and actions may in the end, be somewhat peripheral to the overall decision, however, their consideration is required by regulation, and should be reflected in the EA/SOF.

I therefore remand the matter to the District Engineer to address the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit, in the overall public interest balancing process in a revised EA/SOF.

²¹ AR at 3, ¶ 1.1 (Authority).

²² AR at 4.

²³ AR at 5.

²⁴ 33 C.F.R. § 325.7(a).

²⁵ 33 C.F.R. § 320.4(a).

²⁶ 33 C.F.R. § 331.2.

²⁷ AR ex 1

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Reason 6: The Corps' conclusion that the Port's dock pilings are located on the site of one of the Tribes' "usual and accustomed stations" for fishing under the terms of the Treaty of June 9, 1855 was arbitrary and capricious, contrary to law, and plainly erroneous in light of the evidence in the record.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

The District Engineer reached the conclusion that the project site is a usual and accustomed fishing place based upon a variety of evidence:

- a. the anthropological report with historical documentation that identifies usual and accustomed fishing sites at the mouth of Willow Creek and just downstream of Willow Creek;²⁸
- b. the mobile character and manner of traditional Indian fishing on the Columbia River;²⁹
- c. the fact that Willow Creek was delineated as the western boundary of the Tribe's ceded territory and;³⁰
- d. the recent history of fishing in the area as attested to by Tribal members.³¹

In light of this substantial explanation and documentation of the District Engineer's basis for concluding that the Tribes have a usual and accustomed fishing station at the dock site, I cannot say that the District's finding on that point was arbitrary, capricious, and abuse of discretion, not supported by substantial evidence in the record, or plainly contrary to a requirement of law. The District Engineer's determination was supported by substantial evidence in the administrative record and was within the zone of discretion delegated to him by Corps' regulations.

Reason 7: The Corps exceeded its jurisdiction and authority when it concluded that the Tribes had a usual and accustomed fishing station at the dock site in 1855. The Corps has never been delegated the authority to adjudicate the existence or location of the Tribes' "usual and accustomed stations" under the 1855 Treaty.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

²⁸ AR at 113, 286-311.

²⁹ AR at 114-285.

³⁰ Hearings of Indian Claims Comm., AR at 864-1021.

³¹ AR at 383-394, 404-410.

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Neither the Corps of Engineers' regulatory public interest review³² nor its fiduciary duty to Indians³³ should be confused with an adjudication of treaty rights. It is well established that the Corps of Engineers is *required* to assure, as best it can, that treaty rights are not impaired or limited by its regulatory actions.³⁴ This obligation requires the District Engineer to make inquiries and draw conclusions about the nature and extent of treaty rights that might be affected by a regulatory decision. The burden of seeking an adjudication of treaty rights, however, does not rest on the Corps of Engineers as a result of its regulatory responsibilities. It was reasonable for the District Commander to draw the fiduciary duty conclusions that he did, and it was necessary for him to rely on those conclusions in making his regulatory decision. Therefore, this reason has no merit.

Reason 8: The Corps' Statement of Findings fails to identify the location of the supposed "usual and accustomed station" with sufficient particularity to make meaningful review or mitigation possible. "Usual and accustomed stations" are "fixed locations such as the site of a fish weir or fishing platform or some other narrowly limited area." *U.S. v. Washington*, 384 F. Supp. 312, 332 (D. Wash. 1974). In its Statement of Findings, the Corps does not identify the "fixed location" of this supposed site, except to state that it is in the approximate location of the Port's dock pilings.

FINDING: This reason for Appeal has merit

ACTION: Further action is needed by the District

DISCUSSION:

It is not possible to identify the "usual and accustomed station" protected by the 1855 Treaty with the same particularity that one would find in a property description of another sort. The court in *United States v. Washington*³⁵ addressed the situation where fish change their location due to the installation of traps so that Tribal fishermen, like any fishermen, would move to the best fishing: "Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a sufficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous." (While it's true that the *United States v. Washington* court was discussing "grounds" rather than "stations," the later decision in *Confederated Tribes of the Umatilla Reservation v. Alexander*³⁶ found that "the term 'stations' in ... [the Treaty with the Umatilla] was intended to designate the same kinds of fishing locations as the phrase 'grounds and stations' in the other Northwest Indian treaties."). In the *Umatilla Reservation* case the court recognized that "The passage of time and the

³² 33 C.F.R. § 320.4(a) and (e).

³³ *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996).

³⁴ *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

³⁵ 520 F.2d 676, 691-92 (9th Cir. 1975).

³⁶ 440 F. Supp. 553, 555 (D. Or. 1977).

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changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties....”³⁷ Furthermore, the right to fish includes “an easement ...of ingress to and egress from such usual and accustomed places.”³⁸ Thus, the District Engineer’s finding that the project site is a usual and accustomed station appears reasonable, given the deference afforded to treaty rights by the federal courts. Nevertheless, I agree with the Appellant’s Counsel that the District Engineer does not provide the explicit legal basis in the Statement of Findings for his legal conclusion that the treaty site moved with the shoreline when the John Day Dam was constructed. This legal rationale may well be explained in privileged documents withheld from the Appellant under attorney/client privilege, but it should be explained clearly to the Appellant in the Statement of Findings because it is critical to the permit decision. For that reason, the decision must be remanded to the District Engineer for supplementation of the Statement of Findings on this point.

Reason 9: The Corps' conclusion that as of 1855 the Tribes had a "usual and accustomed station" at the dock site is contrary to the un rebutted evidence in the record that, prior to the 1968 construction of the John Day Dam, the dock site was on dry land, approximately 295 feet from the bank of the Columbia River.

FINDING: This reason for Appeal has merit

ACTION: Further action is needed by the District.

DISCUSSION:

See the response to Reasons 6 and 8, above, for a discussion of the broad interpretation of the Treaty terms under the controlling court precedent. This broad interpretation is mandated by a long line of cases going back at least as far as *United States v. Winans* in 1905.³⁹ The Treaty was not a grant of right to the Indians, but from them. It is to be construed as it would have been understood by the Indians in 1855. The District’s Statement of Findings recognizes that there is a relatively low standard of proof required to support a finding of usual and accustomed fishing place.⁴⁰ Nevertheless, as explained in response 8, above, the Statement of Findings does not explicitly set out the legal basis for finding that the site moved to the new, higher shoreline, and it must be remanded for supplementation on this point.

Reason 10: The Corps' Statement of Findings does not accurately or fully set out the basis for the denial and revocation of the Port's permits. The Statement of Findings asserts that the Tribes had a "usual and accustomed station" for fishing in the area of the Port's dock pilings at the time of the 1855 treaty. This is physically impossible, because

³⁷ *Umatilla Reservation* at 555, citing *United States v. Washington* at 401.

³⁸ *United States v. Brookfield Fisheries*, 24 F. Supp. 712, 713 (D. Or. 1969).

³⁹ 198 U.S. 371, 381 (1905); accord *Sohappy v. Smith*, 302 F. Supp. 899, 905 (D. Or. 1969).

⁴⁰ AR at 23-24; citing *United States v. Washington*, 730 F.2d at 1316-1317 and *United States v. Lummi Tribe*, 841 F.2d 317, 318 (9th Cir. 1988).

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the dock pilings are located on a place that was dry land, approximately 295 feet from the bank of the Columbia River, in 1855. In correspondence with the Port, Corps Assistant District Counsel Misty Latcu has acknowledged that the present dock site was not a "usual and accustomed station" in 1855, but asserts that the location of the Tribes' station changed following the 1968 construction of the John Day Dam. *See* Exhibit 1, attached. The Corps has no authority to change the location of traditional fishing stations after the construction of a dam. When traditional sites have been inundated by the Columbia River dams, Congress has provided for the construction of "in lieu" sites to replace those destroyed. *See* P.L. 100-581 (Nov. 1, 1998); 25 C.F.R. § 248.1-248.10. The Corps' decision to unilaterally relocate the Tribes' supposed site to the location of the Port's dock was arbitrary, capricious, and contrary to law. Further, that decision is not reflected anywhere in the Corps' Statement of Findings or the administrative record.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

See the response to Reason 6, 8 and 9 as to the geographic extent of the usual and accustomed station. Present use of the site by Tribal members is properly considered in determining extent of the site.⁴¹ As to the effect of the "in lieu" sites created by Public Law No. 100-581,⁴² section 401(f) of that Act provides: "Nothing in this Act shall be construed as repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established pursuant to treaty, statute, or Executive order pertaining to any Indian tribe, band, or community." In light of that provision, the District Engineer reasonably concluded that 1855 treaty rights were not destroyed by the 1988 Indian Reorganization Act Amendments. See the conclusion and remand rationale above on the legal basis for finding that the sites moved with the shoreline upon the construction of the John Day Dam.

Reason 11: The Corps improperly relied on expert reports presented to the Indian Claims Commission in its 1964 adjudication of the Tribes' land claims, 14 Ind. Cl. Comm. 14, as evidence on issues as to which the Indian Claims Commission specifically rejected those reports.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

⁴¹ *Northwest Sea Farms*, 931 F. Supp at 1520-21.

⁴² 102 Stat. 2938 (1988).

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See the response to Reason 7. Similarly, neither the Corps' public interest review nor its fiduciary duty as a regulatory agency should be confused with the purposes of the Indian Claims Commission. While the expert reports presented to the Commission may not have been sufficient to determine a land claim before the Commission, they still may be useful evidence for the Corps' purposes. It was therefore, reasonable for the District Engineer to rely on them to some degree for his purpose.

Reason 12: The Corps' decision cites to, but erroneously fails to acknowledge the result of that proceeding. At the Indian Claims Commission, the Tribes claimed title to land in the vicinity of Willow Creek, including the land on which the Port's disputed dock pilings are located. After losing that claim twice before the Indian Claims Commission, the Tribes entered into a settlement fully releasing any claim, right or title that they had to the land on which this dock is located, in exchange for a payment from the United States government. 16 Ind. Cl. Comm. 484 (1966). The Corps' decision does not acknowledge or justify its conclusion that the Tribes have an 1855 fishing right at a location that (a) was dry land in 1855 and (b) as to which the Tribes released any and all claims in the 1964 proceeding.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

See response to Reason 11. The treaty right to fish at usual and accustomed stations is not tied to title to the land. However, evidence introduced in land title disputes may be useful in making the regulatory decision entrusted to the Corps of Engineers. Therefore, it was not unreasonable for the District to cite to the 1964 Indian Claims Commission proceeding, as it did in the District's decision document.

Reason 13: The Corps' determination that the project site is the location of significant historical resources of the Tribes is contrary to the independent expert report prepared for the Corps by David B. Ellis and R. Todd Baker. The Corps' decision simply ignores its expert report and thus reaches a conclusion that is arbitrary and contrary to evidence in the record.

FINDING: This reason for Appeal has no merit

ACTION: No further action is needed by the District

DISCUSSION:

Based on information in the administrative record, the District commissioned two studies to identify and evaluate historic properties within the permit area. One study focused on archaeological sites, while the other focused on traditional cultural properties, both of

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which are potentially historic properties under the National Historic Preservation Act.⁴³ The study by David Ellis focused on the presence of archaeological sites and historic structures. No physical evidence of buried or submerged sites was located, although records indicated there was likely prehistoric or historic occupation along this area. An additional study was conducted by the Confederated Tribes of the Umatilla Indian Reservation. Oral histories and tribal records documented the permit area as a traditional cultural property (TCP) eligible for the National Register. There is no indication that the District Engineer ignored either report in making his decision.

Reason 14: The Corps' determination was not made pursuant to any identifiable standard or rule of law, but instead is based upon subjective, secret or unpublished criteria.

FINDING: This reason for Appeal has merit

ACTION: Further action is needed by the District

DISCUSSION:

The District Engineer stated in his April 2, 2008 letter informing the Port of his decision that the reason for the denial of the project was because the project would adversely impact treaty fishing rights.⁴⁴ The basis of the denial was addressed, in detail, in the EA/SOF under the discussion of Treaty Fishing Sites.⁴⁵ The following standards/conclusions were discussed in the EA/SOF:

1. The Corps has a **fiduciary responsibility** to the tribes to ensure that their treaty rights are given full effect absent an express abrogation from Congress. The District discussed *Umatilla Indian Reservation v. Alexander*, *Muckleshoot Indian Tribe v. Hall*, and *Northwest Sea Farms, Inc v. U.S. Army Corps of Engineers* to support this conclusion
2. The District utilized a **definition of "Usual and Accustomed" fishing place** for which they cited to *Northwest Sea Farms, Inc v. U.S. Army Corps of Engineers* and *U.S v. McGowan*.
3. The District concluded that there is a **lower evidentiary standard of proof to support a finding of a usual and accustomed** fishing station for which they cited to *U.S. v. Washington*, *U.S. v. Lummi Indian Tribe*, and *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*.
4. The District recognized there is a **usual and accustomed** fishing station present at the site. An Anthropological report by Robert B. Lane and Barbara Lane (1979), a finding of fact issued by the Indian Claims Commission in 1964, and affidavits by CTUIR tribal members Robert Brigham and Leo Stewart and by Donald Sampson, enrolled member and Executive Director of the CTUIR were considered.

⁴³ 16 U.S.C. § 470f; 36 C.F.R. pt. 800.

⁴⁴ AR ex 1.

⁴⁵ AR ex 1 at 6.33.1.

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5. The District utilized a **standard for interference** with the exercise of usual and accustomed fishing rights that an action “will have an effect” for which they relied upon *Northwest Sea Farms, Inc v. U.S. Army Corps of Engineers*, and *Muckleshoot Indian Tribe v. Hall*.
6. The District found that the installed **pilings have had an effect** on the ability to fish at the site. “Several letters from the CTUIR”, “affidavits of those tribal members who have on prior occasions or currently fished the site” and an affidavit by CTUIR tribal member Robert Brigham were listed as evidence to support this finding.

The administrative record, specifically the EA/SOF, shows the decision reflects a consideration of court actions and legal precedent(s), with respect to the above listed six items. Standards and rule(s) of law were identified and considered in the decision process in this case.

However, the appellant has correctly identified that an issue that must be considered is whether a location that was previously high and dry prior to the construction of the John Day Dam and the creation of the John Day pool can now be a usual and accustomed fishing station. This question is not considered in the EA/SOF, however it may be addressed in the *Legal Opinion re: treaty fishing rights and the Port Of Arlington Barge Dock Project*, dated March 31, 2008 that was excluded from the record for reason of Attorney-Client Privilege and Attorney Work-Product Privilege.

Nevertheless, as explained in response 8 and 9, above, the Statement of Findings does not explicitly set out the legal basis for finding that the site moved to the new, higher shoreline, and the decision is remanded to do so.

Information Received and it's Disposition During the Appeal Review:

June 17, 2008 - Portland District *Response to Port of Arlington's Reasons for Appeal or Objections*—This is clarifying information and is made a part of the appeal record as Enclosure 2 of this Decision Document.

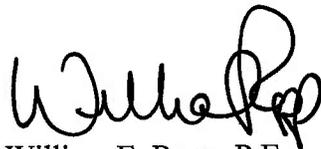
June 24, 2008 - A letter by Paul Conable replying to the Portland District's Response to Port of Arlington's Reasons for Appeal or Objections, dated June 18, 2008.—This is clarifying information and is made a part of the appeal record as Attachment 4 of the Appeal Conference/Site Visit Memorandum to File dated July 9, 2008.

June 26, 2008 – A courtesy copy of a letter from Timothy J. Wetherell (President, Port of Arlington) addressed to the Portland District Commander--The purpose of that letter was to offer what the Port believed was “new and significant evidence” for consideration. The evidence consisted of an aerial photograph of the Willow Creek Area taken in 1957, a letter and ground photo showing the site in 1964 or 1965, and a map showing the property in 1957. The letter states this “evidence shows that the Umatilla Tribe could not have fished at the dock site in 1855, because the Dock site was dry land, about 300 feet

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inland from the high water level of the Columbia River.” This letter is providing documentation that the fishing station in 1855 has been inundated by the John Day pool and that the site the District is considering a usual and accustomed site was once above the high water mark of the Columbia River. The fact there has been a significant physical change in the shoreline location is without dispute. This is clarifying information and is made a part of the Appeal Record as Enclosure 8 of this Administrative Appeal Decision Document.

Conclusion: After reviewing and evaluating information provided by the appellant, the District’s administrative record, and the information obtained during the Appeal Conference, I conclude that this Request for Appeal has merit as discussed above. The decision to deny a permit is remanded to the District to address the three (3) main points identified in the Summary of Decision Section on page 2.



William E. Rapp, P.E.
Brigadier General, US Army
Division Commander