

BEFORE THE STATE OF WASHINGTON  
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of:	)	CASE NO. 15-001
Application No. 2013-01	)	
TESORO SAVAGE, LLC	)	COLUMBIA RIVERKEEPER, <i>ET AL.</i>
	)	and TRIBAL PARTIES'
VANCOUVER ENERGY DISTRIBUTION	)	PRE-HEARING BRIEF
TERMINAL	)	
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INTRODUCTION

Columbia Riverkeeper, Climate Solutions, Friends of the Columbia Gorge, Fruit Valley Neighborhood Association, Sierra Club, Spokane Riverkeeper, Stand,<sup>1</sup> and Washington Environmental Council (collectively “CRK”) intervened in this proceeding over a year ago in opposition to the proposed Tesoro-Savage Vancouver Energy Distribution Terminal. The Columbia River Inter-Tribal Fish Commission, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes and Bands of the Yakama Nation (collectively “Tribal Parties”) also intervened, attesting to their cultural, subsistence, and economic interests in the Columbia River since time immemorial. Ultimately, a diverse array of interests became parties to the Tesoro-Savage terminal adjudication, including the cities of Vancouver, Washougal, and Spokane; Clark County; Columbia Waterfront LLC, a proposed development near the terminal site; International Longshore and Warehouse Union Local #4; and the Washington Department of Natural Resources, as well as the statutorily appointed Counsel for the Environment.

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<sup>1</sup> ForestEthics changed its name to “Stand” in April 2016.

Tesoro-Savage proposes to construct an oil shipping facility on the Columbia River at the Port of Vancouver that would accept an average of 360,000 barrels of crude oil from four to five oil-bearing trains each day, with the crude oil being stored on-site and then shipped from the terminal via a daily tanker or oil barge. It would be the largest crude-by-rail oil shipping terminal in North America. The crude would be stored in six 400,000-barrel (16.8 million gallons) storage tanks, awaiting transfer to marine oil tankers and barges. Once loaded, the tankers would travel, as they must, down the Columbia River over the Columbia River Bar to the Pacific Ocean.

The evidence expected to be presented by all the parties will show that these daily rail and marine vessel journeys, as well as multiple oil transfer points, present a high risk of an oil spill from a train, storage tank, or marine vessel. The testimony of numerous witnesses will demonstrate that this risk includes a potentially “catastrophic” level oil spill in the Columbia River (defined by the state of Washington as at least one million gallons), a vibrant aquatic ecosystem home to a wide variety of wildlife, including commercially and culturally important salmon species, as well as imperiled fish and wildlife protected under the federal Endangered Species Act. Proposed for a seismically active region, witnesses will also show that the high likelihood of a large earthquake during the lifetime of the facility magnifies the probability of an oil spill.

In addition, the evidence, again from multiple witnesses on behalf of multiple parties, will show that the cities and towns most affected by the project are simply not equipped to respond to an emergency situation caused by the proposal. The project would cause a number of serious human health impacts stemming from increased air pollution and noise pollution. And more broadly, the oil terminal would cause increased emissions of greenhouse gases, affecting

climate change on a global scale.

Testimony on behalf of the Confederated Tribes of the Umatilla Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation will show that tribes and members of the tribes would be adversely affected by the oil terminal due to its harm to the Columbia River and salmon, white sturgeon, lamprey, and other aquatic species. Witnesses will address how the Tesoro-Savage project and operations associated with it would interfere with the Tribes' Treaty-reserved fishing rights, access to long-established fishing spots, and co-management duties for Columbia River fisheries with the regional co-managers including Washington State.

Finally, testimony from expert economists coupled with the evidence from the project proponents will demonstrate that the state of Washington does not have an economic need for the energy produced by this proposed project's oil, and that the project does not intend to serve Washington's energy needs.

## LEGAL STANDARDS

### I. THE LEGISLATURE COMMANDED EFSEC TO BALANCE THE NEED FOR ENERGY IN WASHINGTON AGAINST RISKS AND HARMS TO THE ENVIRONMENT AND THE PUBLIC INTEREST.

The Washington State legislature created EFSEC in recognition of the need to “balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public.” RCW 80.50.010. This balancing of energy needs in the state with the public's right to a clean, healthy, and safe environment is the heart of EFSEC's review of any proposed energy facility. The Council has repeatedly recognized the key role it plays in this balancing exercise, noting that it must determine “whether [the proposed] energy facility at [this] particular site will produce a net benefit after balancing the legislative directive to provide abundant energy at a reasonable cost with the impact to the environment and the broad interests

of the public.” *Desert Claim Wind Power Project*, EFSEC Order 843 at 23 (Nov. 16, 2009); *see also BP Cherry Point Cogeneration Project*, EFSEC Order 803 at 12 (Oct. 26, 2004) (“The Council has a comprehensive mandate to balance the need for abundant energy at a reasonable cost with the broad interest of the public.”); *Creston Generating Station*, EFSEC Order 645 at 51-61 (Dec. 13, 1982) (carefully evaluating the forecasted energy needs and potential deficits in Washington, weighing those needs against alternatives to the project, and concluding it was in the public’s interest to supply the energy because no preferable alternative existed).

EFSEC was born out of Washington’s mid-twentieth century conviction that it needed additional sources of energy, that nuclear energy would play a role in that energy growth, and that the state would encounter difficulties when selecting sites for nuclear energy facilities.

Joseph L. McCarthy, *Symposium – The Location of Energy-Generating Facilities: Introduction - The Evolution of Washington Siting Legislation*, 47 Wash. L. Rev. 1, 2-3 (1971). Indeed, the original bill creating EFSEC addressed only nuclear power plants before it was broadened to all thermal power plants due to concerns that the word “nuclear” would alarm the public and recognition that similar environmental and public interest harms plagued coal and oil-fired power plants. *Id.* at 6. EFSEC’s very creation is premised on the need to select locations for new Washington power plants in an era when public dangers from power plants were at the forefront of citizens’ minds.<sup>2</sup>

Today, danger to the larger public from crude-by-rail shipping has rapidly grabbed the public’s attention, with each recent event like the Mosier, Oregon accident and oil spill

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<sup>2</sup> Although EFSEC has undergone meaningful changes throughout its existence with regards to its scope and, to a lesser degree, its methods, the Council’s governing statute “has undergone little substantive change.” Margaret H. Hornbaker & William H. Rodgers, Jr., *The Evolution of the Energy Facility Site Evaluation Council*, 7 Hastings W.-N.W. J. Envtl. L. & Pol’y 253, 268 (2001).

heightening awareness of this new threat. The evidence in this case will demonstrate and highlight a major difference between the power plant fears fueling EFSEC's creation and the current crude-by-rail risks; the evidence will show that crude-by-rail shipping is not needed to ensure energy security, either in Washington or outside the state.

For this case, under the applicable standard, the Council must (1) assess risks and harms from a proposed project; (2) determine whether the project would provide energy at reasonable cost to Washington; and (3) determine whether the project is in the public interest.

A. EFSEC's Governing Statute and Regulations Mandate Broad Review of Environmental, Public Health, Recreational, Esthetic, Cultural, and Community Harms and Risks.

When presented with an application for an energy project under its jurisdiction, EFSEC's duty is to make a recommendation to the Governor regarding the permitting of the project.

EFSEC's task is not one of mere box-checking. WAC 463-30-345. This ultimate decision is apart from and in addition to the Council's independent duty to ensure any application follows EFSEC guidelines. *See* RCW 80.50.040(8).

In general, the Energy Facilities Site Locations Act states that any actions taken by EFSEC must be able "to preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment." RCW 80.50.010(2). This broad charge calls on the Council to fully account for all harms and risks to the environment and human health. EFSEC's regulations further detail this charge, requiring that the Council "ensur[e] ... minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life." WAC 463-14-020(1). The Council must also "enhance[e] the public's opportunity to enjoy the esthetic and

recreational benefits or the air, water and land resources, WAC 463-14-020(2), as well as “provid[e] abundant power at reasonable cost.” WAC 463-14-020(3).

To meet these overarching environmental and public interest protection mandates, EFSEC must consider specific environmental impacts, such as impacts to land, water, and air, as well as socio-economic impacts. WAC 463-30-300(5)-(8). *See also* WAC 463-60-332, -342(5), -362(3), -535(4)(e) (requiring consideration of impacts on aesthetics, habitat, wildlife, and socioeconomic factors). The Council also has an “overriding policy ... to avoid or mitigate adverse environmental impacts which may result from the council’s decisions.” WAC 463-47-110(1)(a). Recognizing that proposed energy facilities will be permitted for decades of operation, the Council must act as a trustee of the environment not just for current Washingtonians, but also for future generations:

The council shall use all practicable means, consistent with other considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

- (i) Fulfill the responsibilities of each general as trustee of the environment for succeeding generations;
- (ii) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (iv) Preserve important historic, cultural, and natural aspects of our national heritage;
- (v) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (vi) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life’s amenities; and
- (vii) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

WAS 463-47-110(1)(b). The Council must also “ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision-making

along with economic and technical considerations,” WAC 463-47-110(1)(d), as well as “protect state and local governmental or community interests affected by the construction or operation of the energy facility.” WAC 463-64-020.

B. EFSEC’s Balance Must Assess the Need for the Proposed Project.

The Council must “recognize the pressing need for increased energy facilities,” RCW 80.50.010; WAC 463-14-020, yet the balancing inquiry demanded by the statute requires the Council to look at the issue of need for a particular facility; that is, whether the facility would provide Washington with energy at a reasonable cost. WAC 463-14-020(3). The Council cannot simply assume a proposed project will provide the state with energy. *See Chehalis Generation Facility*, EFSEC Order 688 at 3-4 (Aug. 4, 1995) (rejecting an argument by the applicant that EFSEC could not consider whether Washington had a need for the power plant’s energy, and finding that “the Council must consider need for additional power in order to balance properly the need for a project with the broad public interest.”).

Over thirty years ago, the Council recommended a denial of an application to build a crude-oil pipeline (as here, an energy conduit facility as opposed to an energy production facility). *Northern Tier Pipeline Company*, EFSEC Order 636 (Jan. 27, 1982). The Council recommended denial of the proposed pipeline from the Washington coast to Minnesota because not only did it carry grave environmental and safety risks, but it also would not serve Washington’s energy needs. EFSEC’s recommendation explained that the three alleged benefits to Washington citizens from the pipeline failed to stand up to scrutiny. On the issues of jobs and tax revenues created, the Council found that “[t]hese economic benefits, while valuable, would be limited in amount and over time, in comparison to the economic resources placed at risk through construction and operation of the proposed facility.” *Id.* at 476. The Council rejected the second

projected benefit of reducing oil spills in Puget Sound because evidence showed that an oil spill at Port Angeles would likely travel east into the Sound, hook-up facilities to the Puget Sound refineries never materialized, and the applicant did not present adequate information about underwater spill risks. *Id.* at 476-77. The third supposed benefit of sending oil to Eastern Washington also collapsed, as no oil refinery in that part of the state was proposed and “no supply-induced shortages of petroleum in eastern Washington have been shown.” *Id.* at 477.

As it did in *Northern Tier* and has done in review of other projects, EFSEC must consider the need for additional energy and whether a proposed project will even deliver energy to the state. “Implicit in the charge by the legislature to the Council to balance demand against the public interest, and the legislative grant of power to the Council to recommend a position of acceptance or rejection of an application, is the recognition that the demand for a particular facility, while it exists, may not be great enough to outweigh the facility’s net detrimental effects on the broad interests of the public. *Id.* at 477.

C. EFSEC Must Determine Whether the Proposed Project Is in the Public Interest.

Finally, EFSEC must determine whether the proposed project is in the public interest. This determination relies on much of the same evidence of risks, harms, and need for this particular project discussed above. Protection of the public’s interest requires the Council to consider risks and harms to the entire state; it also requires a strict look at allowing a private project to impact the public interest, for “[p]rivate markets are not a proper forum for determination of the public interest.” *Id.* at 484.

II. THE TRIBES HOLD TREATY-RESERVED FISHING RIGHTS IN THE COLUMBIA RIVER; THEY ARE REGIONAL CO-MANAGERS OF FISHERIES WITH WASHINGTON STATE; AND THEY ARE SOVEREIGN NATIONS ENTITLED TO GOVERNMENT-TO-GOVERNMENT RELATIONS WITH THE COUNCIL.

The Confederated Tribes and Bands of the Yakama Nation and the Confederated Tribes

of the Umatilla Indian Reservation are federally recognized sovereign nations; both are signatories to treaties with the United States. Treaty with the Yakama Nation (“Yakama Nation Treaty”), June 9, 1855, 12 Stat. 951; Treaty with the Walla Walla, Cayuse and Umatilla Tribes (“Umatilla Treaty”), June 9 1855, 12 Stat. 945. In both treaties, the Tribes explicitly reserved the right to take fish at their “usual and accustomed” places and the privilege of hunting and gathering, among other rights, in exchange for ceding lands they historically roamed freely. Yakama Nation Treaty, Art. 3; Umatilla Treaty, Art. 1.

Treaty rights are not granted to the Tribes, but rather are “grants of rights from them—a reservation of those not granted.” *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905). Treaties are the highest law of the land and create a special fiduciary duty and trust responsibility upon all agencies of the United States to protect treaty rights, including fishing rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). These treaty rights cannot be abrogated except by explicit Congressional authorization. Courts have consistently required federal agencies and states to keep the treaty promises upon which the Tribes relied when they ceded huge tracts of land. *See, e.g., U.S. v. Winans*, 198 U.S. 371 (1905); *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *U.S. v. Oregon*, 718 F.2d 299 (9th Cir.1983); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007). *See also Confederated Tribes & Bands of Yakama Nation v. U.S. Dep’t of Agric.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (entering an injunction barring the shipment of garbage, as a landfill was located in an area where the Yakama Nation’s members exercised their treaty rights).

Further, treaty rights include a property right in adjacent lands “to the extent and for the

purpose mentioned” in the treaties. *U.S. v. Winans*, 198 U.S. at 381 (Yakama Nation retained the right to cross and make use of the land surrounding usual and accustomed places, as the treaty “imposed a servitude upon every piece of land as though described therein.”) As part of these treaty rights, courts have confirmed that the Tribes have a right to half of the harvestable fish in state waters. *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the “Boldt Decision”).

Specific to the Yakama Nation, the Boldt Decision affirmed the Yakama Nation’s usual and accustomed fishing areas include the “Columbia River area” where “[a]pproximately four hundred tribal members fish commercially[.]” *Id.* at 382. The Yakama Nation jointly regulates the exercise of its members’ treaty fishing rights on the Columbia River. *Id.* The court also noted that the Yakama Nation’s members utilize fish for both “ceremonial and personal” reasons and that they “have been and continue to be very dependent on anadromous fish to sustain their way of life.” The court found that “[a]nadromous fish are vital” to the Yakama Nation’s members’ diets. *Id.*

The Umatilla Tribe is one of the larger tribal landowners in the State of Washington, holding almost 10,000 acres in either fee or trust. Members of the Tribe regularly exercise Treaty rights to fish, hunt, and gather in Washington, including but not limited to those areas along the Columbia river and its tributaries. The Umatilla Tribe has usual and accustomed fishing areas throughout the Columbia River Basin. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969); *see also U.S. v. Oregon*, 718 F.2d 299 (9th Cir. 1983).

The treaty fishing right carries with it an inherent right to protect the resource from despoliation from man-made acts. “[A] fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.” *U.S. v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980). *See also Washington v. Washington State Commercial Passenger Fishing Vessel*

*Ass'n*, 443 U.S. 658, 679 (1979) (Tribes with Treaty reserved fishing rights are entitled to something more tangible than “merely the chance ... occasionally to dip their nets into the territorial waters.”). The ecosystem necessary to sustain the fish cannot be diminished, degraded, or contaminated such that either the fish cannot survive, or that consuming the fish threatens human health. *U.S. v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. March 29, 2013) (State “impermissibly infringed” tribes’ treaty-based fishing right in Washington by constructing culverts that “reduced the quantity of quality salmon habitat, prevented access to spawning grounds, reduced salmon production ... and diminished the number of salmon available for harvest.”). See also *Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist.*, 763 F.2d 1032, 1034-35 (9th Cir. 1985).

Accordingly, both the Yakama Nation and the Umatilla Tribe, as sovereign nations, have a profound interest in the preservation of their treaty rights. The *United States v. Oregon* and Boldt Decisions also established the Tribes as co-managers of the fisheries resource with the state of Washington. *U.S. v. Washington*, 384 F. Supp. at 403.<sup>3</sup> The Yakama Nation and Umatilla Tribe have fully staffed fisheries management departments that regulate their fisheries. The fisheries departments focus on the protection of treaty rights, the restoration of aquatic populations and their habitats, and ensuring the fish are honored, in a manner reflecting their paramount importance to the Tribes’ people, diet, and health. The fisheries departments

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<sup>3</sup> Both Tribes are also parties to the *United States v. Oregon* proceeding in federal district court for the District of Oregon (a case that includes five Tribes, three states, and three federal agencies). Both Tribes participate in that long-running federal court case in order to protect their treaty fishing interest and to “exercise their sovereign powers in a coordinated and systematic manner to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both Treat Indian and non-treaty fisheries.” 2008-2017 *United States v. Oregon*, Management Agreement, p. 1; *U.S. v. Oregon*, No. 68-513 (D. Or. Aug. 12, 2008) (Management Agreement adopted as an order of the Court).

accomplish these goals using two primary methods: population and habitat management goals and actions and natural resource policies/regulatory mechanisms. The Columbia River Inter-Tribal Fish Commission (“CRITFC”), which includes both the Yakama Nation and the Umatilla Tribe, was established to assist in the exercise and preservation of these treaty fishing rights. It is of no surprise to anyone familiar with the history of the Tribes’ treaty rights and the geography of the Columbia River area that tribal access to the river is deeply engrained in tribal culture and tribal fishing. “The right to resort to the fishing places ... were not much less necessary to the existence of the Indians than the atmosphere they breathed.” *U.S. v. Winans*, 198 U.S. at 361.

The State of Washington has recognized both the Tribes’ status as sovereign nations and the requirement to facilitate its government-to-government relationships. In 1989, the State and its neighboring Tribes signed the Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington, August 4, 1989.<sup>4</sup> The Centennial Accord “respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.” *Id.* at Art. III. The Accord provides: “The parties recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern.” *Id.* at Art.IV. In short, the State recognized the need for meaningful tribal consultation regarding state decisions with tribal implications.

Ten years later, the State and the Tribes signed the Millennium Agreement, institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium, November 3, 1999. In the Millennium Agreement, the sovereigns pledged “[c]ontinuing cooperation” through the development of “enduring channels of communication

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<sup>4</sup> Available at <http://www.goia.wa.gov/government-to-government/data/centennialaccord.htm>.

and institutionaliz[ed] government-to-government processes that will promote timely and effective resolution of issues of mutual concern[.]” *Id.* The Millennium Agreement also mandates the development of a state-tribal “consultation process, protocols and action plan.” *Id.*

Since the signing of the Centennial Accord and the Millennium Agreement, the State’s agencies have promulgated regulations, policies, protocols, and action plans that require consultation with the Tribes. For example, the Washington State Department of Ecology has a Centennial Accord Implementation Plan, which requires “early notification and an open invitation for consultation on all decisions that may affect tribal rights and interests[;]” the Washington State Department of Archaeology & Historic Preservation follows the Advisory Council on Historic Preservation’s Tribal Consultation Handbook, which requires agencies to “consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency’s undertakings,” and the Washington Department of Fish and Wildlife has entered into cooperative agreements and memorandums of agreement or understanding with a number of tribes.

Washington courts have consistently recognized the duty of the State’s agencies to consult with Tribes. *See Kennewick Pub. Hosp. Dist. v. Pollution Control Hearings Bd.*, No. Nos. 22741–3–III, 22742–1–III, 22758–8–III, 2005 WL 697224 (Wash. App. Mar. 17, 2005) (finding Department of Ecology failed to adequately consult with CRITFC and its member tribes regarding applications for surface water rights in the Columbia River). Accordingly, it is important that the Council consider the Tribes’ unique status as sovereign nations, including the State’s recognition of the importance of maintaining government-to-government relations through consultation.

## ARGUMENT

### I. TESORO-SAVAGE'S PROPOSED CRUDE-BY-RAIL TERMINAL CARRIES SIGNIFICANT ENVIRONMENTAL AND PUBLIC HEALTH RISKS THAT CANNOT FULLY BE MITIGATED OR MINIMIZED.

The evidence presented at the adjudication will demonstrate that Tesoro-Savage's crude-by-rail shipping terminal is not in the "broad interests of the public." RCW 80.50.010. The witnesses will demonstrate that EFSEC cannot "ensur[e] through available and reasonable methods that the location and operation of such facilities will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life; [e]nhanc[e] the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; and [p]rovid[e] abundant power at reasonable cost." WAC 463-14-020. CRK, the Tribal Nations and CRITFC, and the City of Vancouver among others, will argue that based upon the evidence discussed here in and in companion opening briefs, EFSEC should recommend that the Governor deny the application for site certification.

#### A. Rail Safety Risks

Crude by Rail safety expert Fred Millar will offer testimony about the safety risks within the current regulatory environment (or lack thereof) of transporting crude oil via rail. Mr. Millar's testimony will first identify the many risks and concerns with transporting crude by rail from inadequate tank car standards to inadequate speed controls to inadequate emergency response capacity. Mr. Millar will, using as examples crude by rail derailments and accidents that have occurred over the last several years, outline how repeated government investigations have revealed that the standard tank car for crude oil service (the "DOT-111") has been repeatedly found to be unsafe for this purpose. Mr. Millar will also note that even the newer model CPC-1232 tank cars are unsafe and have punctured and caught fire in prior accidents. Mr.

Millar will also testify to controls on train speeds as an issue in accidents and how the Mosier accident occurred within allowed speed limits. Mr. Millar will include evidence that in fact the recent derailment and fire in Mosier, Oregon involved the derailment of CPC-1232 tank cars. Mr. Millar will also testify to how current regulatory responses fall far short of what is needed or recommended for crude by rail to address these concerns. Finally, Mr. Millar will address the failure of the project proponent witnesses to fully analyze and assess the risks associated with the terminal and shipping crude by rail, particularly because the proponent witnesses completely fail to include a critical component of risk analysis—the consequences of an event, regardless of the probability of that event.

The subjects of Mr. Millar's testimony will be echoed and further detailed by witnesses for the City of Vancouver and City of Spokane. Rail safety consultant Robert Chipkevich and hazardous materials emergency planning and response expert Michael Hildebrand will testify about the specific risks and safety concerns associated with Tesoro-Savage's crude-by-rail transportation plans. They will provide data on tank car derailments, tank car design, and the challenges of responding to a fire and/or explosion caused by a crude train derailment, among other things. Mr. Chipkevich will highlight that because crude-by-rail shipping did not begin in earnest until about 2006, the anticipated level of risk from Tesoro-Savage's terminal must be based on accident data from 2006 forward, not a longer time period that includes times when crude was not regularly being shipped in rail cars. Mr. Hildebrand will further explain that when derailments and breaches of crude cars occur, there is a risk of a "flash fire," "pool fire," or a fireball. Insurance and risk expert Robert Blackburn will further testify about the estimated 5 to 6 billion dollar maximum foreseeable loss associated with a catastrophic accident from this project, as well as the applicant's inability to obtain insurance for most of this amount.

B. Emergency Response Risks

Witnesses for CRK as well as the City of Vancouver will provide detailed testimony regarding emergency response difficulties, costs, and abilities both related to the terminal but also as to the rail routes. Mr. Millar will explain how communities in Washington are unprepared for a spill involving crude oil from rail and that emergency response preparedness and ability—including costs associated with emergency response—lag far behind the actual need should an accident occur.

Mr. Hildebrand will also offer testimony about his specific concerns regarding the effective evacuation of people in the event of a derailment fire emergency and the limitations with emergency and evacuation access to areas cutoff by the rail line.

Several city staff, water managers, and fire response personnel will testify about the affected cities' inabilities to effectively combat a fire, explosion, or other emergency situation at the proposed facility or along the rail route. Michael Lester, the Assistant Police Chief for the City of Vancouver also will express concerns about the ability of the city's police force to effectively respond to the kinds of emergency situations presented by the proposed facility. Evidence from fire fighters and other city personnel with emergency response responsibilities will reveal concerns about the limitations of available firefighting equipment in a crude train fire, secondary fires from flammable vapors, limitations of the Vancouver Fire Department's fireboat, insufficient information regarding emergency response planning, deficiencies in the available emergency notification systems and evacuation plans, and deficiencies in available water pressure in the case of a fire, among other things. Indeed, some of these concerns were on full display earlier this month in Mosier, Oregon, and Mosier Fire Chief Jim Appleton will testify about his direct involvement in that oil train derailment and fire. Columbia Riverkeeper

executive director Brett VandenHuevel will also testify about his first-hand observations of the Mosier accident.

Residents of the Fruit Valley Neighborhood are also concerned about an emergency situation. Linda Garcia, a long-time Fruit Valley Neighborhood resident and secretary of the Fruit Valley Neighborhood Association, will testify about the neighborhood's concerns regarding the risk of fires and explosions using a map showing the neighborhood's significant vulnerability to a derailment and fire or explosion.<sup>5</sup>

Jared Smith, a representative of the International Longshore and Warehouse Union Local #4, will explain to the Council why his union chose to intervene in these proceedings, despite a lack of funds to fully participate. Mr. Smith will share the union's concerns with the Council, and the impacts the union fears will come from the proposal.

Finally, Mr. Chuck Atkins, Clark County Sheriff, and Mr. Richard Bishop, Chief Corrections Deputy for Clark County's sheriff's office, will testify about the particular problems an emergency at the terminal could cause at the Clark County Jail Work Center and Clark County Jail, also located extremely near the terminal and tracks. Specifically, they will discuss the fact that an explosion or fire at the terminal could lead to injury or death, as well as concerns that the sheriff's office lacks the training and equipment to respond to an emergency at the terminal. Moreover, if an evacuation of the work center and/or jail is needed, it would require secure transport of inmates to acceptable alternative housing and the deployment of most or all available deputies, which would affect their ability to provide ordinary law enforcement services in the community at the same time. Dr. Eric Peterson, a chemical engineer, will further testify

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<sup>5</sup> Ms. Garcia will also provide testimony regarding environmental justice concerns for the neighborhood, *see* Section F.1. *infra*.

on behalf of the County about the specific hazards and risks posed to Jail Work Center employees, visitors, and inmates, with evaluations of likely hazardous scenarios.

C. Seismic Risks, Landslides, and Wildfires

The Port of Vancouver, like all of the western portion of Washington and Oregon, is a seismically active region, and an earthquake could result in an oil spill at the project site. Dr. Joseph Wartman, an associate professor in the Department of Civil and Environmental Engineering at the University of Washington, will offer testimony about the anticipated geologic hazards of constructing the proposed crude-by-rail shipping terminal. Dr. Wartman will testify that the proposed project is located in a seismically active region with a high likelihood of a large earthquake during the life of the terminal. This risk includes an approximately 15% chance of a Great Cascadia subduction earthquake of a Magnitude 8 or greater within the next fifty years. Dr. Wartman will explain that such a major seismic event could cause storage tanks, connectors, and pipelines to fail, resulting in an oil spill. He will also explain that the project site is highly susceptible to soil liquefaction that could also cause oil containment failures. Tesoro-Savage's seismic mitigation plan contains critical deficiencies, and even if the plan is improved, there are no mitigation measures that would completely mitigate the geologic risks associated with the proposed facility.

The testimony from Robert Johnson, Division Manager for the Wildfire Division of the Washington State Department of Natural Resources, will additionally demonstrate an increased risk of wildfire ignition along the entire length of the rail route. Moreover, with regards to crude oil rail car fires, the evidence will show that the Department of Natural Resources is not adequately prepared to aid in the firefighting response.

Lastly, engineering geologist Timothy Walsh (in testimony presented by the Washington

Department of Natural Resources) will testify that Washington has a propensity for landslides, and that Tesoro-Savage's landslide hazard analysis is both insufficient and misleading.

D. Land Use Impacts

The evidence will show that the terminal would conflict with existing and future land uses in this part of the City of Vancouver. Mr. David Wechner, a certified land use planner with 23 years of experience in the fields of environmental and land use planning, will testify about the terminal's anticipated land use impacts. Mr. Wechner will discuss Vancouver's long-term vision for future growth as codified in the city's comprehensive plan; the character and future growth and development of local neighborhoods, including the city center and waterfront areas (as codified in the city's subarea plans); and existing and future recreation facilities as described in the joint Vancouver/Clark County Regional Trail & Bikeway Systems Plan. In each instance, Mr. Wechner will explain how the terminal's land use impacts will spread far beyond the narrow confines of the industrially-zoned Port of Vancouver. For example, he will explain how the terminal's increased rail traffic and attendant hazards will dominate the downtown core and other neighborhoods adjacent to the rail lines. Mr. Wechner will demonstrate that the city's planning documents represent a particular vision in the city's development priorities and recognize the importance neighborhood viability and sustainability—a vision that is in stark contrast to a heavy industrial oil shipping terminal.

E. Damages to Natural Resources

1. *Water*

The testimony of Ms. Susan Harvey, a petroleum and environmental engineer and consultant, will demonstrate that Tesoro-Savage's proposal would result in a high risk of an oil spill to the Columbia River and/or the Pacific Ocean. The testimony will show that Tesoro-

Savage's proposal necessarily involves and causes high risk navigation through narrow portions of the river, and oil-laden vessels will also need to navigate the highly hazardous Columbia River Bar. Her testimony will also highlight the risk of storing large amounts of oil in storage tanks on the banks of the river, especially in light of the fact that this area could be affected by a volcanic eruptions and earthquakes.

With regards to oil spill containment, Ms. Harvey will testify that the high velocity currents in the Columbia River can inhibit or prevent effective booming, a technique used to contain oil spills in water. Moreover, Ms. Harvey will testify that if a spill occurs in the river, between 40% and 68% of the spilled oil will be left after mechanical recovery and evaporation, depending on the type of oil that is spilled, and that remaining oil could sink, wash ashore, or travel downstream out to the Pacific. She will discuss how spills of diluted bitumen, one of the types of crude anticipated to be handled at the terminal, would create heightened challenges for cleanup. Bakken crude, another type of crude that will certainly be handled at the terminal, has high levels of polycyclic aromatic hydrocarbons, which tend to dissolve in the water column and which are extremely toxic to aquatic life.

## 2. *Air*

Air quality expert Dr. Ranajit Sahu will testify about the anticipated air emissions from normal terminal activities, including the types of air pollutants expected to be emitted from terminal operations. Dr. Sahu will also testify to his opinion, based upon his calculations and research, that the terminal is a major source of criteria pollution, in particular Volatile Organic Compounds ("VOCs") and as such is required to apply for and obtain a Prevention of Significant Deterioration ("PSD") permit under the Clean Air Act before it may commence construction. Dr. Sahu's testimony will identify the various sources of VOC air pollutants—from train

unloading to storage tanks to fugitive emissions to barge loading. Dr. Sahu will demonstrate how Tesoro-Savage has under-calculated the amount of VOC pollutant emissions that would occur at the terminal in two very important respects. First, Dr. Sahu will testify to how the project proponents have underestimated VOC pollutant emissions from the storage tanks (by at least 5%) by relying on calculations that are proven incorrect and outdated by research from the last five to ten years. Second, Dr. Sahu will demonstrate that the project proponents have failed to address what could be significant emissions from barge loading. Dr. Sahu will testify that here, Tesoro-Savage has not demonstrated any enforceable mechanism to ensure that 100% of the VOC emissions from barge loading are captured and treated. Dr. Sahu will further testify that if there is even a 2-3 % drop in the capture of barge loading VOC emissions, the terminal will emit over 100 tons per year of VOCs making it a major source subject to PSD permitting.

Finally, Dr. Sahu's testimony will address greenhouse gas emissions both from the terminal, but also as a component of the overall project impact on the environment. As Dr. Sahu will explain, the proposed project will emit greenhouse gases ("GHG"), such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), and refrigerants. In general, Dr. Sahu will testify that here as well, the project proponent has underestimated and/or undercounted GHG emissions attributable to the project. Dr. Sahu will point out that consideration of effect on the citizens and environmental of Washington State requires identification and assessment of GHG emissions associated with this project beyond the boundaries of the terminal itself. Dr. Sahu will testify that this includes emissions as a result of the rail transport, but also emissions from vessels and refining as the purpose and operation of the terminal is not as an end point; the crude shipped through the terminal will be refined and burned with the terminal making that more likely. Dr. Sahu will testify that approximately 272,000 metric tons of CO<sub>2</sub> per year should be added to the

totals already considered, just from the rail shipping from North Dakota to the terminal alone. And Dr. Sahu will point out that this is one-way; additional CO2 must be considered for the rail return trip to the oil fields. Dr. Sahu will opine that the project proponent's conclusions that GHG impacts from and induced by the project are insignificant are "simply wrong."

F. Public Health Impacts

1. *Air Pollution*

Dr. Elinor Fanning is an expert in environmental health, toxicology and health risk assessments with a focus on air toxics. Dr. Fanning will provide testimony regarding the types of air pollutants that are of public health concern from just normal operation of the terminal, the health effects from those air pollutants and the sources of those air pollutants from terminal operations.<sup>6</sup>

Dr. Fanning will identify numerous pollutants that are of public health concern including a number of criteria pollutants such as particulate matter (especially small particles or PM2.5), nitrogen oxides (NO<sub>x</sub>), and VOCs, and toxic air pollutants such as arsenic, benzene, cadmium, hexavalent chromium, 7,12 dimethylbenz(a)anthracene and VOCs.<sup>7</sup> Dr. Fanning will describe the varied adverse health impacts from these pollutants ranging from many of them being characterized as human carcinogens (many of the hazardous air pollutants) to cardiovascular effects and disease, increased respiratory morbidity and effects such as asthma and chronic obstructive pulmonary disease (COPD).

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<sup>6</sup> Dr. Frank James, a medical doctor, will also offer testimony regarding the adverse health impacts associated with exposure to diesel particulate matter from train equipment and vessels, confirming that these effects include impaired pulmonary development in adolescents, increased cardiopulmonary mortality and pulmonary inflammation, increased asthma attacks, increased heart attacks, and increased risk of cancer.

<sup>7</sup> Under the Clean Air Act, VOCs are both criteria pollutants and many of their constituents are hazardous air pollutants.

Dr. Fanning will identify sources of these pollutants both from the terminal and from the mobile sources such as trucks, trains and marine vessels that will cause significant increases of this pollution in the area. Dr. Fanning will outline how diesel engines are a huge sources of unhealthy pollutants form the operation of the terminal whether from operation of the boiler or from mobile sources. Dr. Fanning will confirm that articulate matter (“PM”) is expected to be especially high from Area 600 boilers and from marine vessels while they are docked and loading. Trains, vehicles, and off-road diesel equipment will also emit diesel exhaust particulate. In addition to the particulate matter, tugboats, locomotives, and docked vessels will emit nitrogen oxides. Moreover, Dr. Fanning will testify that the terminal facility itself will emit carbon monoxide and sulfur dioxide.

Dr. Fanning, in conjunction with witnesses for the City of Vancouver and Clark County and Ms. Linda Garcia, will testify that the greatest health impacts will be born by employees of the Port of Vancouver, employees and inmates of the Clark County Jail Work Center, and residents of the Fruit Valley Neighborhood. In particular, Ms. Garcia will provide evidence, using the U.S. Environmental Protection Agency’s EJScreen mapping tool and data, that the Fruit Valley neighborhood, bounded by rail on two sides and immediately adjacent to the project area, meets EPA’s definition of a community where environmental justice concerns and considerations must be taken into account. Ms. Garcia will use maps and the tool to show that EPA’s environmental justice markers are present for the Fruit Valley neighborhood in that the neighborhood has an average income lower than much of the state with a higher percentage of residents in poverty; has a high number of children and elderly and a higher percentage of minority citizens and/or non-English speakers as compared to other neighborhoods and the state

in general. Ms. Garcia and Dr. Fanning will testify that this community will be disproportionately, negatively affected by the air pollution from the terminal and its operations.

## 2. *Noise Pollution*

Dr. Frank James will offer testimony about anticipated health impacts caused by noise pollution from the proposed facility. Specifically, Dr. James will explain that noise pollution can cause increased risk of cardiovascular disease, including increased blood pressure, arrhythmia, stroke, and ischemic heart disease; cognitive impairment in children; and sleep disturbance and resultant fatigue causing an increased rate of work time accidents. The expected increase in noise pollution from the proposed facility will be significant, and the Dr. James' testimony will show that the limited mitigation measures proposed are insufficient to protect the public from this exposure.

## 3. *Rail Crossing Delays*

The testimony from Dr. Frank James will also demonstrate that increased rail crossing delays will have human health impacts in the form of decreased emergency vehicle response times. These impacts could disproportionately impact minority and low-income communities, given the Fruit Valley neighborhood's location and demographics. Mr. Eric Holmes, city manager for Vancouver, will also testify regarding these delays in the specific context of the City of Vancouver and its emergency response capabilities, and Mr. Ryan Lopossa, a transportation manager for the City of Vancouver's Department of Public Works will discuss safety concerns associated with the project's impacts on at-grade rail crossings.

### A. Impacts to Native American Tribes and Fishing

The Yakama Nation, the Umatilla Tribe, and CRITFC will present a number of witnesses who will testify about the proposed project's impact on the exercise of the Tribes' treaty-

protected fishing rights; the proposed project's impact on aquatic species; and the proposed project's impact on local estuaries.

Paul Lumley, the Executive Director of CRITFC, will provide testimony outlining the importance of the Columbia River and its fishery resources to the Tribes. Tribal fishers, from both the Yakama Nation and the Umatilla Tribe, will testify about the negative impact of the proposed project on the exercise of their treaty rights. The witnesses will include Roger Dick, Jr., a Harvest Coordinator with the Yakama Nation Fisheries. Mr. Dick has served in this position for 16 years, in addition to growing up in a fishing family along the Columbia River. Mr. Dick is deeply entrenched and connected with the tribal fishers and is intimately familiar with the issues faced by tribal fishers, as he is a fisher himself. Mr. Dick, and the other tribal fishers, will testify about the impact of increased rail traffic, including an increased risk of injury or fatality for the tribal fishers and interference with access to fishing sites. Mitchell Hicks, Chief of Enforcement at CRITFC, and Michael Broncheau, a Manager at CRITFC, will testify about the lack of tribal first-responders along the Columbia River in the event of injury, fatality, or derailment. Mr. Hicks currently administers police and dispatch services for CRITFC; he has 23 years of law enforcement experience.

The Tribal Parties will also provide testimony from a variety of witnesses regarding the devastating impact of derailments and spills on both the fishing sites and the tribal fishers. The witnesses will provide testimony showing that an oil spill could reduce the viability of fishing sites, interfere with fishing, and negatively impact the quality of the fish. Further, witnesses from the Yakama Nation will provide testimony regarding the recent oil train derailment in Mosier, Oregon. The witnesses were present at the derailment site and will present evidence documenting the impact of that oil train derailment, illustrating why the Tribes' are concerned

about increased oil train traffic.

Multiple witnesses will present testimony regarding the proposed project's impact on aquatic species. Zachary L. Penney, the Fishery Science Department Manager for CRITFC, will provide testimony that identifies the salmon species present in the Columbia River Basin that could be impacted by the proposed project. Blaine Parker, the Sturgeon Project Lead for CRITFC, will provide testimony regarding the proposed project's impact on aquatic species, such as the white sturgeon and pacific lamprey. Stuart R. Ellis, a Fisheries Scientist with CRITFC, will testify that the increased rail traffic and the potential impact of an oil spill would produce negative biological impacts to fish and reduce the marketability of commercially caught fish. Dr. Stanley Rice will testify about the potential acute and delayed effects of oil contamination on fish, including salmon. Dr. Rice is a world renowned former Fishery Scientist with NOAA Fisheries, with extensive experience with oil spills, including assessing the damage from the Ixtoc, Exxon Valdez, Kuroshima, Selendang Ayu, and Deepwater Horizon oil spill events. Dr. Rice has published more than 130 peer reviewed scientific papers and has consulted with the U.S. Department of Justice on the Deepwater Horizon spill.

Dr. Rice will also provide testimony regarding the estimated impact of the proposed project on the environment. As Dr. Rice will explain, the impact of the proposed project is severely underestimated. Among its failings, the estimate assumes a low spill event risk, uses poor projections of down stream oil movement, relies on acute toxicity mechanisms as the measure of effects (which results in an inaccurate prediction of adverse effects, as it fails to consider sublethal effects), and avoids a discussion of important modern literature, which demonstrates that the impacts of oil spills may be more far reaching the previously thought.

Taylor Aalvick, the Director of the Cowlitz Indian Tribe's Natural Resources

Department, and Rudy Salakory, the Aquatic Habitat Restoration Program Manager of the Cowlitz Indian Tribe's Natural Resources Department, will testify regarding the impacts of large ships on the estuaries along the Columbia River and the efforts currently being made to restore the estuaries.

B. Economic Impacts

Economist Jerry Johnson will explain that the net economic impact of the proposed facility could be negative because the terminal would provide relatively few jobs and mainly benefit the sources of crude and refineries (and their investors), while the terminal would negatively impact property values for current development and planned projects such as the Columbia Waterfront Development, would lead to increased transportation congestion and accidents, and would prevent other profitable uses of the port's site.

1. *Recreational and Commercial Fishing*

Natural Resources Economist Eric English (presented by the Counsel for the Environment) will offer testimony about the economic impacts to commercial and recreational fishing in the event of an oil spill in the lower Columbia River. He has calculated that if eight million gallons of Bakken crude are spilled, there would be a six month closure of both commercial and recreational fishing. These closures would result in a loss of 4.7 million dollars in reduced revenue from commercial landings, 14.4 million dollars in reduced expenditures from recreational anglers, and a 17.8 million dollar decline in the value of recreational fishing.

2. *Cost to Restore Habitats and Ecological Services*

James Holmes, a natural resources damages expert, (also presented by the Counsel for the Environment) estimated the damages from an effective worst case oil spill from a tanker grounding in the Columbia River near Vancouver, and from a crude trail derailment near

Bonneville Dam. Mr. Holmes' testimony will show that both spills will lead to oil slicks on the river, as well as oil in sediment, on banks, and in floodplains, and polycyclic aromatic hydrocarbons in the water column. This oil will adversely affect birds, fish, and sea mammals. Mr. Holmes will testify that the cost to restore full habitat and ecosystem services after an effective worst case tanker spill in the Columbia is 171.3 million dollars, not including impacts to the Pacific Ocean or the Willamette River. He will also testify that the cost to restore habitats after an effective worse case derailment near Bonneville Dam is 84.9 million dollars.

II. TESORO-SAVAGE'S APPLICATION SHOULD BE DENIED BECAUSE THERE IS NOT EVIDENCE THE TERMINAL WILL SERVE THE BROAD INTERESTS OF THE PUBLIC AND THE EVIDENCE DEMONSTRATES THE TERMINAL IS NOT NEEDED TO PROVIDE WASHINGTON WITH ENERGY.

As detailed above, the evidence will show that EFSEC is faced with an application for a dangerous terminal which will pose many risks for citizens of the state and the state's precious resources. On the other side of the statutory equation, the evidence will also demonstrate that the Terminal will not serve the energy needs of Washington—in fact, evidence of a benefit or need in the state, served by this terminal, will be sorely lacking. EFSEC's regulatory balancing is therefore completely lopsided—there is nothing against which EFSEC can balance the undisputable environmental harms this terminal would bring. The terminal would serve as a mere conduit of oil for refineries on the Pacific coast, yet the citizens of Washington would bear the risk of oil spills to their waterways, air emissions, and a variety of severe public health impacts, including the risk of fires and explosions.

Economic consultant Ian Goodman will offer extensive testimony about the lack of an economic need for the proposed project's energy. He will explain why Washington has no need for the energy ultimately produced by the oil that would pass through the facility, and why the

facility is also not needed to replace declining crude production from Alaska's North Slope and California, or to offset foreign imports. As Mr. Goodman will explain, the proposed facility would be a mere conduit for oil produced elsewhere, destined primarily (if not entirely) for refineries outside of Washington. Furthermore, Washington's energy needs are already being more than fully satisfied. Economist Jerry Johnson will also testify that he also has seen no evidence that this proposed terminal would help meet Washington's energy needs or benefit Washington consumers. This evidence will demonstrate that Washington has no energy need which would be met by the proposed facility.<sup>8</sup>

Even if Tesoro-Savage could prove it has minimized the environmental and public risks to the fullest extent possible, more fundamentally, this project does not serve EFSEC's basic purpose of ensuring Washington's energy needs are met. EFSEC's purpose is not to site national energy outlets, and the Council's duty to ensure a protected environment and public while providing for Washington's energy needs simply cannot be squared with such a project.

#### CONCLUSION

EFSEC's statutory and regulatory duties mandate that the Council balance the risk and harms presented by the Tesoro-Savage terminal against the need for this particular project and the broad public interest of the current and future citizens of Washington. EFSEC must also engage with the Yakama Nation and Umatilla Tribe on a government-to-government level. The evidence presented at the adjudication will show that the proposed Tesoro-Savage terminal poses great risks and harms to the environment and people of the region, that Tesoro-Savage cannot demonstrate a need for this energy facility, and that the public interest is not served by this

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<sup>8</sup> It is unsurprising that in the prior EFSEC adjudication of an oil shipping terminal and pipeline, EFSEC recommended denial of the application. *Northern Tier Pipeline Company*, EFSEC Order 636.

proposal. RCW 80.50.010. CRK and the Tribal Parties respectfully submit that the evidence will show that EFSEC must recommend denial of Tesoro-Savage's application for site certification.

Respectfully submitted this 20th day of June, 2016.

*s/ Kristen L. Boyles*

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