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BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

IN RE APPLICATION NO. 96-1)
)
OLYMPIC PIPE LINE COMPANY:)
CROSS CASCADE PIPELINE PROJECT)
)
_____)

EXHIBIT _____ (MSK-T)

PREFILED REBUTTAL TESTIMONY OF MICHAEL S. KELLY

ISSUE: IMPACTS TO CULTURAL RESOURCES OF YAKAMA INDIAN NATION

SPONSOR: OLYMPIC PIPE LINE COMPANY

1 **Q. Please provide your name and business address to the Council.**

2 **A.** My name is Michael S. Kelly. I am a Senior Archaeologist at Dames & Moore,
3 700 NE Multnomah, Suite 1000, Portland, Oregon 97232.

4
5 **Q. What is the subject of your rebuttal testimony?**

6 **A.** My rebuttal testimony concerns the potential impacts to cultural issues and
7 traditional cultural properties associated with the Yakama Indian Nation (“YIN”)
8 as they relate to Olympic Pipe Line Company’s proposed Cross Cascade pipeline.
9 This rebuttal testimony is directed to the prefiled testimony of Morris Uebelacker,
10 sponsored by YIN. I have previously submitted prefiled rebuttal testimony in this
11 matter relating to cultural resources. However, YIN requested and obtained an
12 extension to submit prefiled testimony due to the sudden death of its expert
13 witness. (*See* Prehearing Order No. 22; Council Order No. 723). Thus, my earlier
14 testimony did not consider or specifically address issues raised by YIN. That said,
15 some of the issues raised by Dr. Uebelacker are similar to those raised by other
16 respondents. Accordingly, I will incorporate my earlier rebuttal testimony by
17 reference here and limit this testimony to new issues raised by YIN’s expert, Dr.
18 Uebelacker.

19
20 **Q. Please summarize your qualifications and experience.**

21 **A.** I hold an M.A. in Anthropology, with a specialty in historical archaeology, from
22 the University of Nevada, Las Vegas (1986), as well as a B.A. in Anthropology
23 from the University of California, Santa Barbara (1978). I described my
24 experience and qualifications in detail in my earlier rebuttal testimony. In the
25 interest of brevity, I will not repeat that information here.

1 **Q. Are you familiar with the prefiled testimony submitted by Morris L.**
2 **Uebelacker on behalf of the Yakama Indian Nation?**

3 **A.** Yes. I have reviewed his prefiled testimony and his exhibits.

4 **Q. Can you define a “Traditional Cultural Property”?**

5 **A.** Yes. Traditional Cultural Properties are defined in National Register Bulletin 38:
6 Guidelines for Evaluating and Documenting Traditional Cultural Properties.
7 According to National Register of Historic Places criteria outlined in that bulletin,
8 Traditional Cultural Properties (TCPs) are properties that possess traditional
9 cultural significance, including beliefs, customs, and practices of a living
10 community that have been passed down through the generations, usually orally or
11 through practice. In other words, the traditional cultural significance of a
12 property is derived from the role the property plays in a community’s historic
13 beliefs, customs, and practices. A traditional cultural property is generally
14 eligible for inclusion in the National Register because of its association with
15 cultural practices of beliefs of a living community that are rooted in that
16 community’s history and are important in maintaining the continuing cultural
17 identity of the community. A TCP must be a tangible property, however, such as
18 a district, site, building, structure, or object. While TCPs can be identified by
19 various communities, most of the TCPs that might be found along the pipeline
20 would be associated with Native American communities. Some examples of
21 TCPs include places where subsistence activities, such as root digging, have been
22 traditionally conducted and places where ceremonies have been traditionally
23 performed, among others. To be NRHP-eligible, a TCP needs to be 50 years old
24 or else of exceptional significance.
25

1 **Q. Do you recognize that traditional cultural properties may exist along the**
2 **pipeline corridor within the ceded lands of the Yakama and other Native**
3 **American peoples?**

4 **A.** Yes. The HRA/D&M study team recognizes that TCPs may exist along the
5 corridor.

6 **Q. Did the project team attempt to identify and record potential TCPs during**
7 **the course of the cultural resources inventory of the pipeline corridor?**

8 **A.** We did not as such. For the same reasons explained in Dr. Uebelacker's
9 testimony, we recognize that it was not appropriate for our study team to attempt
10 to identify and record all of these property types. TCPs are most appropriately
11 identified by members of the traditional communities that have ties to these
12 resources. In the current situation, this includes the Yakama and other Indian
13 peoples through whose traditional territories the proposed pipeline passes. That
14 said, the survey that was conducted by archeologists and biologists collected
15 information that can assist in the identification of TCPs. During the course of the
16 inventory, some resources were identified and recorded which may qualify as
17 TCPs, including two recently stripped cedar trees and a number of rock cairns.
18 The importance and purpose of these features is most appropriately identified by
19 Native Americans with traditional ties to the project area. The recent trees may be
20 TCPs but are likely not eligible for the NRHP if they are modern.

21 **Q. What steps has OPL taken toward the identification of TCPs?**

22 **A.** A Native American consultation process was initiated by HRA at the outset of this
23 project, including contact via letter and telephone, and a series of meetings with
24 tribal representatives. In addition, OPL is currently working with the Yakama
25 Tribe to fund an inventory of TCPs, which will include both oral interviews and

1 field surveys. This study will be conducted by Yakama tribal personnel. OPL
2 personnel are involved in the consultation process because of a recognition that
3 the tribes generally want to speak with a project's owners or decision-makers.
4

5 **Q. What steps will OPL take toward avoidance or protection of TCPs?**

6 **A.** Following completion of the Yakama TCP study, OPL will treat identified
7 resources in a manner similar to historical and archaeological resources. OPL has
8 committed to avoid resources identified during inventory efforts. Properties that
9 cannot be avoided will be evaluated as appropriate according to the provisions of
10 an approved Programmatic Agreement.
11

12 **Q. What is a "Programmatic Agreement."?**

13 **A.** A Programmatic Agreement, or "PA," is a document that can be used by a
14 Federal agency to fulfill its Section 106 responsibilities for a large or complex
15 project (36 CFR 800.13[a]). This document states how the agency will fulfill the
16 responsibilities. It is reviewed and signed by the agency and the State Historic
17 Preservation Officer. Other signatory or concurring parties can include the
18 Advisory Council on Historic Preservation, other Federal or state land or resource
19 management agencies, and Indian tribal organizations.
20

21 **Q. Will Olympic prepare a Programmatic Agreement for the Cross Cascade
Project?**

22 **A.** Yes. Appendix D of the cultural resources technical report, which already is part
23 of the record, includes a PA in draft form. Olympic will work with the US Forest
24 Service to continue to refine the draft PA, which will be subject to review by the
25

1 appropriate parties, including the Yakama Indian Nation. A final PA would then
2 be approved and adopted by all signatory parties.

3
4 **Q. What will be included in the PA for the Cross Cascade Project?**

5 **A.** The PA for the Project contains stipulations that set out how the rest of the
6 cultural resources work will be conducted and reviewed by oversight agencies.
7 One stipulation deals with continuing consultation with the agencies and affected
8 Indian tribal organizations, while other stipulations treat additional identification
9 and National Register-evaluation of cultural resources, assessment of Project
10 effects on eligible resources (which are called historic properties), and the
11 treatment of adverse effects. The stipulations provide for the preparation and
12 review of a Treatment Plan to mitigate adverse effects on historic properties, a
13 Monitoring Plan to control monitoring during construction and operation, and an
14 Emergency Plan to treat situations such as leaks or fires. A stipulation deals with
15 the development of a plan to treat human burials and associated remains.
16 Additional stipulations provide for the professional qualifications and research
17 standards to be met in the work, for reporting of the work, and for the curation of
18 materials and records that result from the work.

19
20 **Q. Does the cultural resources technical report or draft PA address development
21 of monitoring plans, discovery plans, and other important impact
22 management documents that would relate to the concerns raised by YIN?**

23 **A.** The cultural resources technical report specifically references development of a
24 construction monitoring plan, as well as a cultural resources treatment plan;
25 specific data recovery plans, as necessary; a Native American Graves Protection
and Repatriation Act plan; and an emergency plan. All such plans will be

1 developed and reviewed by oversight agencies prior to initiation of ground-
2 disturbing activities. A discovery plan will also be developed to specifically
3 address discovery of previously unidentified or buried cultural materials.
4

5 **Q. What about impacts to traditional resources outside of the pipeline corridor?**

6 **A.** Indirect impacts will be addressed in a PA through a variety of measures.
7 Specifically, OPL will be directed to minimize use of any roads strictly under
8 their control, to limit access to previously inaccessible portions of the corridor.
9 Monitoring during construction will be stipulated for sensitive areas, and a worker
10 education program will be conducted prior to initiation of construction. Erosion
11 control measures will be included within the construction plan as a standard
12 practice. If appropriate, selective cover, seeding, or other techniques may also be
13 required to protect cultural resources.

14 **Q. Are there any limitations on the potential number and distribution of TCPs**
15 **within the project's Area of Potential Effects?**

16 **A.** Yes. My understanding is that areas that have received considerable previous
17 disturbance by Euroamerican occupants may lack the integrity needed for Native
18 American use and particularly sacred use. For example, the pipeline route follows
19 lengthy portions of the historic Milwaukee Road rail line and these areas have fill
20 over the native soil, do not presently support native vegetation, and receive
21 considerable contemporary recreation use. I understand that such altered places
22 may not provide the native plants and animals or sacred experiences important to
23 Native Americans. Mr. Uebalacker's testimony appears to support this same
24 conclusion.
25

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
2 testimony is true and correct to the best of my knowledge and belief.

3 DATED this _____ day of April, 1999.

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6 Michael S. Kelly
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