



February 8, 2019

*Submitted via email and U.S. Mail*

Roberts Bank Terminal 2 Project Secretariat  
Canadian Environmental Assessment Agency  
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CANADA

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Re: Swinomish Indian Tribal Community, Suquamish Tribe, and Tulalip Tribes  
("U.S. Tribes"): Further Comments on Sufficiency of Information

Greetings:

Earthjustice jointly represents the Swinomish Indian Tribal Community, Suquamish Tribe, and Tulalip Tribes ("U.S. Tribes") in the Canadian Environmental Assessment Agency's environmental assessment of the proposed Roberts Bank Terminal 2 Project. We submit these comments in response to the Panel's December 4, 2018 request for comments on the sufficiency of the information prepared by the proponent, the Vancouver Fraser Port Authority ("VFPA") regarding Information Request packages 7 through 13. As explained more fully below and in comments previously submitted by the individual U.S. Tribes, the information needed to fully and fairly review the Project remains incomplete; Information Request packages 7 through 13 continue to neglect the U.S. Tribes presence and their concerns as they relate to this Project.<sup>1</sup>

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<sup>1</sup> See, e.g., IR7-31 (U.S. Tribes view not represented on Marine Biophysical Components – Mitigation Measures/Offsetting); Appendix IR10-01-C3, Semiahmoo First Nation: Issues, Views, and Concerns Related to the Proposed Project and Marine Shipping Associated with the Project, Table 10: Marine Fish – Valued Component, at pg. 17 (local assessment area does not extend across the U.S. border); IR13-25 (did not consult with U.S. Tribes on Current Use of Lands and Resources for Traditional Purposes – Quality of Current Use Experience, Cumulative Effects Assessment).

Insufficient information will lead to substantive error; the government simply cannot meet its legal obligation to carefully consider the impacts of the proposed Project with omitted information and evidence.

Because the Project will cause significant harms and risks to the U.S. Tribes' ability to preserve their time immemorial life ways—including continuing to harvest fishery resources for commercial, subsistence, and ceremonial uses, continuing cultural and spiritual customs, and preserving and protecting ecological resources in the Salish Sea—the failure to consult with or even consider the U.S. Tribes renders the information insufficient. The U.S. Tribes submit some evidence with these comments to support their concerns; however, the submitted evidence does not render the information or process to obtain information sufficient. Not only has VFPA failed to fully assess harms from increased vessel traffic through Treaty-reserved and protected fishing areas, marine pollution and noise impacts on salmon and endangered Southern Resident Killer Whales, and cumulative impacts of past, present, and future marine vessel shipping projects, these failures, and approval of this Project without addressing these failures, will violate international law duties.

**I. THE U.S. TRIBES HAVE TREATY-RESERVED RIGHTS AND CULTURAL HERITAGE IN THE SALISH SEA THAT ARE PUT AT RISK BY THE ROBERTS BANK TERMINAL 2 PROJECT.**

The three U.S. Tribes that have joined together to submit comments on the proposed Roberts Bank 2 Terminal are each separate sovereign nations, federally recognized by the U.S. government as tribal nations who (1) are governed by individual Constitutions and legal authorities, (2) occupy reservation lands, and (3) hold fishing, hunting, and gathering rights that are reserved by treaties with the U.S. government. In the United States, the U.S. Tribes regularly participate in proceedings similar to this one affecting their treaty-reserved resources. Tribal

fisheries managers interact and negotiate with other tribes, the state of Washington, the United States government, and international organizations about management of various fisheries, including the Pacific Salmon Commission, an international body that oversees harvest of Fraser River salmon in the U.S. and Canada.<sup>2</sup> Through treaties between the U.S. Tribes and the United States government, the U.S. Tribes are designated as co-managers with the state of Washington of fisheries resources within the state, including the affected area of the Project. In this capacity the U.S. Tribes have more than an express interest in protecting marine life; they have a legal duty.

The U.S. Tribes are part of the Coast Salish people, whose political, social, and economic linkages spanned the international border with Canada long before that border existed. Like many of their Coast Salish relatives, the U.S. Tribes have lived, fished, hunted, and gathered in this area since time immemorial. The U.S. Tribes continue to rely on land and resources in the Salish Sea and along its shorelines for subsistence, commercial, economic, and cultural and ceremonial purposes. Salmon and shellfish play a central role in the Tribes' subsistence, economy, culture, spiritual life, and day-to-day existence. These treaty-reserved resources and the ability to continue traditional activities require a healthy ecosystem in the Salish Sea on both sides of the U.S.-Canada border. The Roberts Bank Terminal 2 Project would increase vessel

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<sup>2</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶¶4-8 (Vice-Chair, Fraser Panel, U.S.-Canada Pacific Salmon Commission; Chair, Northwest Indian Fish Commission; Chair, Swinomish Tribe Fish Commission); Exhibit 2: Declaration of Robert Purser, Jr., (May 27, 2015), ¶6 (Commissioner, Northwest Indian Fish Commission and representative of the Suquamish Tribe on the U.S.-Canada Pacific Salmon Commission Fraser River Panel). The declarations attached to these comments were previously submitted in the Trans Mountain Pipeline NEB proceedings. The declarations are also relevant to this environmental assessment process. The Roberts Bank Terminal 2 Review Panel notified the U.S. Tribes that it would not consider links to websites or incorporate by reference any documents submitted in the Trans Mountain proceedings (Document #1338), so we have attached them here.

traffic through the U.S. Tribes territory and will directly interfere with the Tribes' ability to access and harvest treaty-reserved resources.

A. U.S. Tribes Are Sovereign Nations That Retain Treaty Protected Fishing Areas In The Salish Sea.

Although they are separate, distinct nations, the U.S. Tribes share a common legal history. In a series of treaties with the U.S. government in 1854 and 1855, the Indian tribes of what is now Puget Sound and the Washington State coast ceded their aboriginal lands to the United States and retained or reserved certain lands, sovereignty, as well as hunting, fishing, and gathering rights in their usual and accustomed places. A treaty in the United States is not a grant of rights to Indians but is a reservation of rights that existed before and at treaty time.<sup>3</sup> The treaties negotiated in Washington State by the U.S. negotiator and Washington Territorial Governor Isaac Stevens are collectively known as the Stevens Treaties.<sup>4</sup>

With increased European settlement of the area, conflicts arose over access to tribal fishing grounds. As early as the 1800s, the United States, on behalf of numerous U.S. tribes, filed lawsuits against non-Indians who were preventing Indian fishermen from accessing traditional fishing grounds. Several cases reached the U.S. Supreme Court, which found that “[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the existence of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians that the atmosphere they breathed.*”<sup>5</sup> (emphasis added).

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<sup>3</sup> *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

<sup>4</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶¶10-11.

<sup>5</sup> *Winans*, 198 U.S. at 381.

Still, the treaty-reserved fishing rights of the tribal nations were routinely ignored and violated for over 100 years. In 1974, a U.S. federal court decision commonly known as the Boldt decision (after the judge who decided the case) interpreted and applied the Stevens Treaties.<sup>6</sup> These cases laid down the basic legal framework addressing tribal treaty-reserve fisheries, which has been applied ever since. Under that framework, the federal courts retain jurisdiction over future disputes over the scope of the treaty right, including a recent a dispute where a federal court held that Washington State has a duty to protect salmon habitat as reserved by the treaties.<sup>7</sup>

Under U.S. law, treaties take precedence over conflicting state laws by reason of the Supremacy Clause of U.S. Constitution. Art. VI, Sect. 2.<sup>8</sup> Treaty reserved fishing at usual and accustomed places is a protected property right under the Fifth Amendment to the U.S. Constitution.<sup>9</sup> Impacts to these usual and accustomed fishing places are considered protected by the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, the major U.S. federal environmental review and analysis statute, as they involve impacts to habitat and treaty resources as well as important historical and cultural aspects of Native American heritage.<sup>10</sup>

As explained by Ms. Lorraine Loomis, Swinomish fisheries manager and direct descendant of two of the chiefs who signed the Stevens Treaty of Point Elliott, the individual tribes' treaty-protected fishing rights are based on an adjudicated and defined geographical area

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<sup>6</sup> *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>7</sup> *See U.S. v. Washington*, 2007 WL 2437166, (W.D. Wash. 2006) - No. 9213, Subproceeding 01-1 (“The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts...that hinder fish passage and thereby diminish the number of fish...”).

<sup>8</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>9</sup> *See, e.g., Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 411 (1968); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

<sup>10</sup> *See No Oilport! v. Carter*, 520 F. Supp. 334, 354 (W.D. Wash. 1981).

(which may overlap with other tribes), a mandate for conservation, an allocation of 50% of the harvestable fish, tribal self-regulation, and co-management of the fisheries with the state of Washington.<sup>11</sup> The U.S. Tribes represented in this case all have usual and accustomed fishing areas throughout the Salish Sea extending to the Fraser River of Canada that will be impacted by this Project.

Moreover, the U.S. Tribes' treaty-reserved rights predate both the establishment of the U.S.-Canadian border, and the establishment of international shipping lanes. The U.S. Tribes have a right to fish in the international shipping lanes, and they often exercise that right.<sup>12</sup> Robert Purser, Jr., Suquamish Tribe Director of the Fisheries Department, descendant of seven treaty chiefs, and former Suquamish Tribal Council member, explains the importance of fishing in and adjacent to the international shipping lanes:

A large portion of the fishery occurs in the area affected by the international shipping lane from Canada through the Strait of Juan de Fuca. The gillnet fishery occurs within the shipping lanes using 1800 foot long nets. When the nets are loaded with fish, it can take on average 10 hours and up to 20 hours to pull in the drift net and retrieve fish, depending on the circumstances. During that time, fishing boats drift in and out of the shipping lane while the web of the fishing net is still in the water. You cannot maneuver the net with any speed due to the volume of the loaded net. Fishing occurs at all hours of the day and night. The number of sets performed by a fisher depends on volume of fish intercepted. In other words, it could be that one set meets the fleet's target or it may require a number of sets by each fisher.

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Existing inbound and outbound shipping traffic (non-tribal) already causes interference with tribal fishing activities. The types of interferences with shipping traffic and tribal fishers occur when ship traffic pass through the Tribe's fishing grounds and damage tribal gill nets. This causes net damage and/or net loss and loss of fish, along with creating serious safety and health hazards on the water. I have first-hand experience of this increase in shipping traffic and its interference with tribal fishing fleet in the Tribe's [fishing areas]. These interferences cause economic hardship to tribal fishers due to loss of gear and loss of fish. This

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<sup>11</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶12.

<sup>12</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018), ¶4.

further impacts the Tribe's ability to carry on its time immemorial ceremonial, subsistence, and commercial practices.<sup>13</sup>

The increased vessel traffic induced by the Roberts Bank Terminal 2 Project will directly impact the territory and the resources that the U.S. Tribes have used and protected since time immemorial.

B. U.S. Tribal Commercial Fishing Practices Are Economically Significant.

The U.S. Tribes have significant economic interests in maintaining the environmental health of the Salish Sea and their access to usual and accustomed fishing areas, all of which are threatened by the Roberts Bank Terminal 2 Project and the vessel traffic it will impose. The attached declarations and testimony in prior proceedings provide evidence of their substantial interest in protecting the economic welfare of individual tribal members and the economic interests of tribal enterprises. These declarations describe a direct link between increased vessel traffic and harm to tribal interests. Moreover, in Oral Testimony before the Canadian National Energy Board ("NEB") regarding the Trans Mountain Pipeline, Swinomish Chairman Brian Cladoosby stated that "[the Swinomish] are the second-largest fishing fleet in the Puget Sound" and that they export \$6 million USD to \$10 million USD of salmon caviar alone.<sup>14</sup> Fishing activities are substantial cornerstones of tribes' economies. Data from the Tulalip Tribe indicates that in 2014 fishing activity amounted to a value of approximately \$5.6 million USD.<sup>15</sup>

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<sup>13</sup> Exhibit 2: Declaration of Robert Purser, Jr., (May 27, 2015), at ¶¶13-15.

<sup>14</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Chairman Brian Cladoosby (Oct. 22, 2014) (A63743), ¶¶ 4356, 4415. Additional Hearing Order citations reference declarations, documents, and testimony previously submitted to the NEB in both the original and reconsideration Trans Mountain Pipeline Proceedings.

<sup>15</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶ 4.

Approximately “20% of the Swinomish membership, one in five of every Swinomish man, woman, and child,” engages in some form of commercial fishing.<sup>16</sup> The Swinomish harvest—salmon (sockeye, pink, coho, chinook), steelhead, crab, shrimp, halibut, clams, oysters, sea cucumber, sea urchin, and geoduck—are marketed widely, including in Canada.<sup>17</sup> Swinomish fishing “is particularly heavy in the areas Strait of Juan de Fuca East and Haro Strait/Boundary Pass, areas directly affected by shipping traffic from Canada traveling to the ocean through the Strait of Juan de Fuca.”<sup>18</sup>

For the Tulalip Tribes, commercial fishing is also central to their economy:

Tribal fishers are engaged in the harvest of all commercially valuable species, including salmon, Dungeness crab, geoduck and spot prawns. Over the last five years the tribe harvested commercially 5,234,429 pounds of salmon, 2,699,740 pounds of Dungeness crab, and 845,828 pounds of geoduck clams—species that currently make up the bulk of the commercial catch. However, the Tribes have also harvested many other species (for example, clams, sea cucumber, shrimp, halibut, dogfish, lingcod, skates, black cod, and flounders) in the commercial fisheries in different proportions in different years. These fisheries are ever changing over time depending on stock conditions and markets.<sup>19</sup>

These significant economic interests are threatened by the Roberts Bank Terminal 2 Project due to the increase in vessel traffic and interference with the U.S. Tribes’ ability to access and harvest treaty-reserved resources in U.S. waters. The environmental assessment fails to consider the economic impacts the Project will have on these resources.

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<sup>16</sup> *Id.* at ¶15.

<sup>17</sup> *Id.* at ¶¶16-17.

<sup>18</sup> *Id.* at ¶18.

<sup>19</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶4. *See also id.* ¶¶5-6 (“a significant number of tribal members and their families derive some portion of their income from fishing activities...Each permit we issue means employment and income not just for that fisher and their families, but also for others who work with them.”).



C. Tribal Fishing Is A Cultural, Ceremonial, and Subsistence Right.

Salmon are at the center and beginning for the U.S. Tribes' culture and cosmology. As Tulalip Tribal member Patti Gobin stated, "I want to tell you that, long before I was human, I was King Salmon. That's where I come from. That's my grandfather. That's who I am."<sup>20</sup> "The economic impact of tribal treaty commercial fishing is very important to the tribes, including Swinomish, but it is not the only value of the fishery nor, in the end, is it the most important one."<sup>21</sup> Subsistence and ceremonial values are associated with U.S. tribal fishing rights; the tribes' members thrive as a community around the sharing of fish.

Feasting on the bounty of sea and river, and particularly on salmon, is a central feature of almost every Swinomish ceremony or gathering, as is true throughout the whole Coast Salish culture. Some of the ceremonies mark important events for an individual or family—birth, death, naming, marriage, and the like. They also feature prominently as the core of community events, such as the Coast Salish Gatherings, the Canoe Journey, and the First Salmon Ceremony. For example, at the first Salmon Ceremony recently held at Swinomish on May 14, the whole community, staff and invited guests feasted on salmon, clams, mussels, shrimp, crab, and other fruits of the sea. The ceremonies are an integral part of our culture, and the ceremonial food is essential to the ceremonies.<sup>22</sup>

The U.S. Tribes share this core expression of their tribal identity.

[I]t is not possible to overstate the central cultural importance of these activities. Although the economic benefits of fishing to the Tribe are very significant, it is critical to understand that their value is more than monetary—the loss of these resources cannot be mitigated through money or any other means. Fishing represents the continuation of our culture and way of life since time immemorial. While the rules and structures of fishing have changed in modern times, fishing is an integral part of our culture. For thousands of years, our people have lived on the marine waters of the Salish Sea harvesting salmon, many other fish species and shellfish. Fishing constituted our economic base prior to European contact, through both trade and sustenance, and continues to this day.<sup>23</sup>

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<sup>20</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Patti Gobin (Oct. 22, 2014), ¶ 4657.

<sup>21</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶27.

<sup>22</sup> *Id.* at ¶32.

<sup>23</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶8.

Tribal members eat significantly greater amounts of fish and shellfish as part of their daily diets than the general population.<sup>24</sup> Like all Coast Salish Tribes, the Suquamish Tribe “relies on salmon as a food staple. Suquamish tribal fishers harvest all species throughout its [treaty-protected fishing areas], including but not limited to steelhead, cod, flounder, perch, trout, herring, rock cod, Ling cod, black cod, sturgeon, skate, dogfish. The Tribe harvests shellfish, including but not limited to crabs, clams, cockles, mussels, barnacles, geoduck, oysters, scallops, shrimp, red and green sea urchins, sea cucumbers. These resources are harvested for subsistence, ceremonial, and commercial purposes.”<sup>25</sup> Historically tribal fishers also harvested dahl porpoise, seals and sea lions, octopus, china slippers, marine and freshwater birds (ducks), and other marine mammals. Indeed, tribal members often would like to eat more fish and shellfish, but are unable to do so for various reasons, including lack of access, declining resources, confirmed pollution, and fear of pollution.<sup>26</sup> “It’s devastating to think that our people will no longer have the foods that nourish our spirit and our bodies. They’re that important to us.”<sup>27</sup> The subsistence and dietary relationship between the people and the treaty fishing harvest and consumption is a strong strand of the tribal culture.

“The act of fishing, the circulation of harvest within the community, the dietary reliance upon the harvest, and the importance of salmon and other species to the Swinomish culture and spiritual life, give treaty fishing rights a value that far transcends the economic value as a

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<sup>24</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), 4, ¶30; *see also* Exhibit 6: *Swinomish Seafood Diet Survey 2004–2006*, 21.

<sup>25</sup> Exhibit 2: Declaration of Robert Purser, Jr., (May 27, 2015), ¶9.

<sup>26</sup> *Id.*; *see also* Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶4 (“A 2013 study by the United States Environmental Protection Agency documented fish consumption rates of Tulalip Tribal members that was 5 times higher than the average fish consumption rate of the general population in the United States.”).

<sup>27</sup> Exhibit 7: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 11 - Oral Testimony of Inez Bill (Oct. 23, 2014) (A63792), ¶ 4782.

commodity. The treaty fishing right was meant to preserve our culture and way of life revolving around fishing and the fish harvest. As a fisheries manager, I am mindful of the need to preserve the fishery in order to preserve our identity as a tribe.”<sup>28</sup> These cultural and subsistence resources are imperiled with the increase in vessel traffic resulting from the Roberts Bank Terminal 2 Project.

D. Southern Resident Killer Whales Are Inextricably Linked With U.S. Tribes’ Cultural Identity.

The U.S. Tribes are also concerned about how the increase in vessel traffic resulting from the Project will adversely impact Southern Resident Killer Whales (“Southern Residents,” “orca,” or “blackfish”). The Southern Residents are an iconic species and are at the heart of the U.S. Tribes’ spiritual and cultural identities. Chairman Forsman of the Suquamish Tribe testified to the strong spiritual relationship in an event where tribal artifacts transported on a state ferry were escorted by a pod of Southern Residents.<sup>29</sup> Suquamish Tribal Member Ms. Noelle Purser testified that the orcas are one of the Tribe’s closest allies.<sup>30</sup> Tulalip Chairwoman Zackuse testified that the Tulalip People “share a sacred cultural bond with the killer whale. They are the symbol of our Tribe and it is our responsibility to speak up for them.”<sup>31</sup> They are a visible, vibrant, and integral part of a healthy Salish Sea. They are equally integral to the culture and spiritual practices of the Tribes who have shared these waters with the Southern Residents since time immemorial. The Declaration of Suquamish Tribal Member Mr. Nigel Lawrence recounts an experience with Southern Residents in a tribal canoe and his belief that “these whales were

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<sup>28</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶33.

<sup>29</sup> Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration), Vol. 6 (Nov. 28, 2018) at ¶ 2854 (A96192-1).

<sup>30</sup> *Id.* at ¶ 2883.

<sup>31</sup> *Id.* at ¶ 2911.

sent by our ancestors as a sign that our ancestors see us, that they recognize the positive things we're doing for the people, and that they want us to keep up the good work.” Mr. Lawrence also explains that Southern Residents are “part of the very fabric of the Suquamish people’s culture” and an “irreplaceable part” of tribal canoe journeys that provide a way “to connect with our culture and way of life”.<sup>32</sup> Mr. Ray Fryberg, a Tulalip Tribes member, shared his encounter with a killer whale as “the most powerful spiritual experience I have had in my life.”<sup>33</sup> Mr. Robert Purser, Jr. describes the connection between Southern Residents and tribal salmon fishing.<sup>34</sup> The relationship the U.S. Tribes have with the Southern Residents is inextricably linked with their Tribal identity.

The U.S. Tribes have embarked on numerous efforts to aid in the survival and recovery of their blackfish relatives. For instance, the Suquamish Tribe has at times forgone having a fishery in order to allow the orcas to feed on one of the last wild runs of chum salmon.<sup>35</sup> Unfortunately, the current status of the Southern Residents remains dire. The population teeters on the brink of extinction, with only 75 members (not including Tokitae, a Southern Resident who lives in captivity).<sup>36</sup> In 2018, the news of Tahlequah, a Southern Resident who carried and mourned the death of her newborn calf for over 1,000 miles, shocked the region and the world. The U.S. Tribes have long acknowledged the relationship between a healthy Salish Sea and the

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<sup>32</sup> Exhibit 9: Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶¶ 10-11 and ¶ 14.

<sup>33</sup> Exhibit 10: Declaration of Ray Fryberg (Jan. 17, 2019) at ¶¶ 10-11.

<sup>34</sup> Exhibit 11: Declaration of Rob Purser, Jr. (Dec. 3, 2018) at ¶¶ 8-10.

<sup>35</sup> Exhibit 9: Hearing Order MH-052-2018, vol. 6, at ¶¶ 2855-56.

<sup>36</sup> The Center for Whale Research, a non-profit dedicated to monitoring Southern Residents, predicts this population number to drop with possible loss of two Southern Residents in 2019. Exhibit 12: Mapes, *2 More Puget Sound Orcas Predicted to Die in Critically Endangered Population*, available at <https://www.seattletimes.com/seattle-news/environment/i-am-worried-and-i-am-afraid-two-more-puget-sound-orcas-predicted-to-die-in-critically-endangered-population/> (last accessed Jan. 19, 2019).

Southern Resident population.<sup>37</sup> “The health of the whales tells us whether the rest of the Salish Sea is healthy. What happens to them happens to us.”<sup>38</sup>

## II. THE ENVIRONMENTAL ASSESSMENT IS INCOMPLETE.

Without consulting with the U.S. Tribes, whose homelands and Treaty-reserved waters will necessarily be affected by the Roberts Bank Terminal 2 Project, the full impacts of the Project have not been disclosed or analyzed. VFPA’s failure to consult with the U.S. Tribes necessarily means that its environmental assessment for the proposed Roberts Bank Terminal 2 Project lacks sufficient information to proceed to a public hearing.

### A. VFPA Failed To Consult With And Consider U.S. Tribal Fishing Interests

The declarations from the U.S. Tribes (previously submitted to the NEB in the Trans Mountain proceedings) make clear that the shipping lanes to be used by vessels destined for Roberts Bank Terminal 2 cut directly through the heart of the usual and accustomed fishing areas reserved to these tribes by the Treaty of Point Elliot.<sup>39</sup> The U.S. Tribes’ concerns about how the Project will impact tribal fishing, especially how it will impact the safety of tribal members, have yet to be addressed. “And you say, ‘Well, they can stay in the traffic lanes, in the shipping lanes.’ When you’re out fishing and you’re harvesting out in the deep water, the fish don’t know traffic lanes. They don’t know the borders, they sure as heck don’t know the traffic lanes. They don’t know where they shouldn’t be. And so fishermen have to harvest where the fish are, and

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<sup>37</sup> Exhibit 11: Declaration of Rob Purser, Jr. (Dec. 3, 2018) at ¶ 8 (the health of the Southern Resident indicates the health of the Salish Sea).

<sup>38</sup> Exhibit 10: Declaration of Ray Fryberg (Jan. 17, 2019) at ¶ 8.

<sup>39</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶7; Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶¶13-18.

oftentimes it will be in traffic lanes.”<sup>40</sup> Yet because VFPA refused to discuss issues and impacts with the U.S. Tribes, that information simply failed to appear in any analysis.

Increases in vessel traffic in and near fishing areas often result in damage to, and loss of, fishing gear. This is especially true in areas where large vessels like container ships will travel, where static gear such as crab traps, shrimp traps, and salmon gillnets is very common. A 2014 study of the impacts of increased marine vessel traffic suggests that each tribal fisherman loses between 40 and 50 crab pots each year.<sup>41</sup> Increased vessel traffic will increase this economic damage to tribal fishing.

At the same time, lost gear can damage valuable resources. Derelict gear in Puget Sound has been known to kill marine mammals (Good, et al., 2010<sup>42</sup>). U.S. authorities have invested over \$7 million in removing lost fishing gear during the past 13 years (Northwest Straits Marine Conservation Initiative, 2014). Insurance alone cannot mitigate the issue of derelict gear. “Gear loss is of particular concern, because it harms the fisher directly and deprives the fisher of present and future fishing. Gear loss due to vessel traffic occurs throughout the fishery. The worst places, however, include locations near the shipping lanes in Haro Strait and the high traffic vessel anchoring and bunkering areas in the vicinity of Vendovi Island, areas that will be affected by traffic increase due to the pipeline expansion.”<sup>43</sup> As Mr. Purser explained, “[e]xisting inbound and outbound shipping traffic (non-tribal) already causes interference with

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<sup>40</sup> Exhibit 7: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 11 – Oral Testimony of Glen Gobin (Oct. 23, 2014) (A63792), ¶4736.

<sup>41</sup> *Gateway Pacific Terminal: Vessel Traffic and Risk Assessment Study*, Glostén Associates (Nov. 4, 2014) (submitted to the NEB as documents A4L7G3 and A4L7G4, available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2784742>), § 2.6.

<sup>42</sup> Good, T., J. June, M. Etnier, G. Broadhurst, 2009. Derelict fishing nets in Puget Sound and the Northwest Straits: Patterns and threats to marine fauna. *Marine Pollution Bulletin* 60 (2010) 39–50.

<sup>43</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶37.

tribal fishing activities. The types of interferences with shipping traffic and tribal fishers occur when ship traffic pass through the Tribe’s fishing grounds and damage tribal gill nets. This causes net damage and/or net loss and loss of fish, along with creating serious safety and health hazards on the water. I have first-hand experience of this increase in shipping traffic and its interference with tribal fishing fleet in the Tribe’s U&A. These interferences cause economic hardship to tribal fishers due to loss of gear and loss of fish. This further impacts the Tribe’s ability to carry on its time immemorial ceremonial, subsistence, and commercial practices.”<sup>44</sup>

B. VFPA Failed to Address Cumulative Impacts Of Baseline And Proposed Projects.

The failure to consult with U.S. Tribes and consider impacts to U.S. waters also highlights a significant omission: the failure to adequately consider the cumulative impacts the Project will have on the Salish Sea. The U.S. Tribes have demonstrated how their tribal histories and lineages know no international border, neither do the salmon, and neither do the Southern Residents, nor will the harms associated with the proposed Roberts Bank Terminal 2.<sup>45</sup> There are also several projects proposed on both sides of the border that will have impacts on the Salish Sea. The increase in vessel traffic through the Salish Sea that is a direct result from the Project will not occur in a vacuum. Several First Nations have raised similar concerns, as the VFPA has acknowledged that “Indigenous groups have said that any additional effects on their Current Use, whether as a result of the Project and/or marine shipping associated with the Project, would

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<sup>44</sup> Exhibit 2: Declaration of Robert Purser, Jr., (May 27, 2015), ¶15.

<sup>45</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶2 (“For thousands of years, our homeland contained no international boundaries; what is now designated the Canadian portion of the Salish Sea, to us, remains part of our homeland, shared with other U.S. Tribes with Treaty-reserved fishing rights and our relatives from First Nations in present day British Columbia.”).

further degrade already unacceptable conditions.”<sup>46</sup> This Project, coupled with increased vessel traffic and increased risk of oil spills will threaten the U.S. Tribes’ way of life.<sup>47</sup>

The consequences of the proposed terminal on the shared waters of the Salish Sea, salmon, and whales must be considered along with cumulative impacts from other, similar projects that will increase marine vessel traffic and noise in the Salish Sea. Projects that should be considered cumulatively are being proposed on the Canadian side of the border, and the U.S. side.<sup>48</sup> The Trans Mountain Pipeline Expansion would result in approximately 348 more oil tankers calling at the nearby Westridge Marine Terminal.<sup>49</sup> That equates to 696 vessel transits through treaty fishing grounds, including in-bound and out-bound. The Andeavor (formerly Tesoro) Xylene Project would also bring additional petroleum chemical tankers into the same shipping lanes.<sup>50</sup> All of these projects would share the same waterways as Roberts Bank Terminal 2, and will also have an impact on Tribal U&A’s: “The cumulative effects felt by [U.S. Tribes] from all of these projects will be staggering.”<sup>51</sup>

The U.S. Tribes already feel the effects of increased tanker traffic, even without the Project in operation. In a recent proceeding before the NEB, the U.S. Tribes extensively testified that the Salish Sea was experiencing the detrimental effects of seemingly “small” impacts, such

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<sup>46</sup> IR13-25 at pg. 3

<sup>47</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 6.

<sup>48</sup> See Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 8.

<sup>49</sup> A77045-1 NEB - Report - Trans Mountain - Expansion Project - OH-001-2014 at pg. 2 (“The application, if approved, will see an increase from 5 tankers a month to 34 Aframax tankers a month exporting a cargo of diluted bitumen.”).

<sup>50</sup> See Andeavor, Anacortes Upgrades Environmental Impact Statement, *available at* <http://anacortesupgradeproject.com/eis> (last accessed Jan. 20, 2019); see also Anacortes Upgrades FAQ, <http://anacortesupgradeproject.com/faq> (last accessed Jan. 20, 2019) (“[A]t this time, we estimate between one to five additional ships per month.”).

<sup>51</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 8.



as small oil spills and increased vessel traffic.<sup>52</sup> Other cumulative impacts from an increase in vessel traffic must also be considered – such as increased bunkering of shipping vessels,<sup>53</sup> noise impacts to marine mammals, and concerns about safety from Tribal members exercising their Treaty-reserved rights in the Salish Sea.<sup>54</sup> The U.S. Tribes testified extensively that tribal members routinely fear for their safety while fishing in the Salish Sea due to tanker vessel traffic.<sup>55</sup>

The U.S. Tribes’ concern about safety have not been addressed in other Canadian environmental assessments for projects that will increase vessel traffic in transboundary waters, and these concerns were also ignored as part of this process. Indeed, in the Trans Mountain Reconsideration process, the National Energy Board implicitly admitted that there is insufficient information for review of projects such as this with respect to cumulative impacts. Draft recommendations for the Governor in Council in that proceeding call for developing and implementing a regional cumulative effects management plan for the Salish Sea, a plan that would address impacts to salmon, harm from increased vessel traffic, and reducing underwater noise (Recommendation 1).<sup>56</sup> The National Energy Board’s recommendation to begin a regional

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<sup>52</sup> See Exhibit 9: Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶ 16 (the Salish Sea and Southern Residents are experiencing “death by a thousand cuts”).

<sup>53</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 9-10 (bunkering has increased in the Salish Sea and oil spills associated with bunkering are among the leading causes of oil spills in the area).

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Exhibit 9: Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶ 15 (“Traveling in a human powered dugout canoe, we see several oil tankers and other large commercial vessels and it gets very difficult to stay out of their way while we cross major bodies of water like the Strait of Juan de Fuca and the Georgia Strait. We are always afraid that even if they do see us, they’d think we were seagulls on a log of driftwood.”); Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 4 (“We experience a substantial amount of lost gear and danger in areas outside the shipping lanes and separation zones.”).

<sup>56</sup> NEB Procedural Direction No. 4 (Jan. 10, 2019) at Appendix 3, available at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3745838>.

cumulative impact plan illustrates that such a cumulative impact review does not yet exist. Without a cumulative impacts review of past, present, and future projects on both sides of the border, there is insufficient information to proceed with this Project.

The VFPA made no effort to document or analyze the existing baseline impacts to U.S. tribal fishing interests, let alone analyze the combined impacts of other planned projects to those interests. This Project, in addition to other proposed projects on the Salish Sea, will only exacerbate these effects. The VFPA's refused to do a cumulative impacts assessment on the Current Use of Lands and Resources for Traditional Purposes based on its "views on the effectiveness of mitigation measures proposed or suggested" and its "view that there will be no residual effects on Current Use for any Indigenous group with the implementation of the proposed or suggested measures."<sup>57</sup> VFPA's views ignore the lived experiences and knowledge of the U.S. Tribes. A full analysis of the Project's impacts must include the cumulative effects of the Project.

C. The Harm Arising From The Project To The U.S. Tribes' Way Of Life Cannot Be Mitigated.

The U.S. Tribes' loss of access to fishing areas and the loss of subsistence and cultural resources, including their relationship with the Southern Residents, cannot be mitigated. The environmental assessment fails to address the core of the U.S. Tribes' concerns, which is that loss of fishing and loss of the Southern Residents is also a direct loss of their tribal ways of life. Swinomish Tribal Assistant Fisheries Manager Tandy Wilbur noted that looking at the impacts of the Project are not enough: "That would be so not only heartbreaking, devastating, detrimental, catastrophic, whatever term it is you want to use, to the Native culture, the people on

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<sup>57</sup> IR13-25 at pg. 3.

the Salish Sea, up and down the coast. We -- it's really hard for me to have to try to express the value, the traditions, the spiritual, the meaning of loss. I don't think there's anyone that could probably put it into words what that would mean. That's our way of life, the Native people.”<sup>58</sup> There is no mitigation measure that would address this existential concern.

While VFPA repeatedly stated that it would consult with Aboriginal people throughout the process, it expressly excluded the U.S. Coast Salish Tribes. VFPA has made clear that it does not intend to address or even acknowledge the U.S. Tribes’ concerns if it is allowed to proceed with the proposed Project. In meetings with the Semiahmoo First Nation, VFPA stated that it “has not engaged with any Indigenous groups across the border” and that it “is following the CEA Agency guidelines, which has no direction to engage with U.S. groups.”<sup>59</sup> This is despite the fact that the environmental assessment found that the Project will further stress the Southern Residents through increased marine traffic and associated underwater noise,<sup>60</sup> and that the Project will result in a loss of productivity of adult Chinook salmon.<sup>61</sup> VFPA contends that it will consider traditional Indigenous knowledge when developing its offsetting plan for the

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<sup>58</sup> Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration), Vol. 6 (Nov. 28, 2018) at ¶¶ 2801-2801.

<sup>59</sup> Appendix IR10-01-C3, Semiahmoo First Nation: Issues, Views, and Concerns Related to the Proposed Project and Marine Shipping Associated with the Project, Table 18: Potential or Established Aboriginal and Treaty Rights and Related Interests, including Current Use of Lands and Resources for Traditional Purposes, at pg. 33.

<sup>60</sup> Roberts Bank Terminal 2 Environmental Assessment, Marine Shipping Addendum, Section 8.2.6.2 (“Underwater noise from shipping associated with the Project could potentially result in effects to SRKW and the acoustic environment within critical habitat when needed for essential life functions.”).

<sup>61</sup> “Adult Chinook salmon (5.08%)...will see decreases in productivity (after mitigation and offsetting).” IR7-30.

Project,<sup>62</sup> but it will continue to ignore the voices of the Suquamish, Swinomish, and Tulalip Tribes who have known these waters, and the salmon and the orca that live in them, since time immemorial.<sup>63</sup> Perhaps the VFPA does not want to hear that the only action that would address the U.S. Tribes' fundamental burden is a recommendation to deny the Project.

III. MARINE SHIPPING IMPACTS IN BOTH U.S. AND CANADIAN WATERS SHOULD BE CONSIDERED AS A FACTOR FOR PURPOSES OF WHETHER THE PROJECT IS LIKELY TO CAUSE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS.

Under the Panel's current scoping of the Roberts Bank Terminal 2 Project, the Panel will not assess the environmental effects of marine shipping as environmental effects of the Project pursuant to the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012"). The EIS Guidelines and the Terms of Reference state that marine shipping "beyond the care and control of the proponent" will be "taken into account" pursuant to s. 19 (1)(j) of *CEAA 2012*. The Terms of Reference clarify that "factors taken into account under 19(1)(j) of *CEAA 2012* are not environmental effects of the project for purposes of the Minister's decision on whether the project is likely to cause significant adverse environmental effects and will not be subject to conditions to the proponent in any decision statement issued by the Minister under *CEAA 2012*." The Panel should revise its scope and Terms of Reference for the environmental assessment to account for the full impacts of the Project and include both marine shipping and impacts to U.S. Tribes.

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<sup>62</sup> See Preamble to Offsetting-related Information Requests (IR7-24 to -27, IR7-30, IR10-10, IR11-13 to -19, IR11-21) – RBT2 Offsetting Approach at pg. 8 ("It is the VFPA's intention to...continue engaging and consulting with regulators, Indigenous groups, and key stakeholders in developing and implementing the final Offsetting Plan for the RBT2 Project.")

<sup>63</sup> The VFPA asserts that it relied on Aboriginal traditional knowledge in assessing marine shipping impacts to the Southern Residents, but VFPA failed to consult with the U.S. Tribes and consider their traditional knowledge. Marine Shipping Addendum Section 8.2.4.

A. Increased Vessel Traffic Will Negatively Impact The U.S. Tribes' Access To Treaty-Reserved Fishing Areas.

The U.S. Tribes are sovereign nations recognized by the United States government. As sovereign nations, and as Indigenous peoples who have lived on the Salish Sea since time immemorial, the U.S. Tribes have rights reserved by Treaties to fish in their “usual and accustomed grounds,” and have inherent rights to culture. The Tribes’ inherent rights existed prior to 1855 when the Treaty of Point Elliot was signed, and the treaty simply reserved those preexisting rights. Project-related marine shipping will threaten tribal members’ ability to access their Treaty-reserved right to fish, and could contaminate and harm any fish or cultural or ecological resources that are and have been harvested in their ancestral lands and waters since time immemorial.

Tribal usual and accustomed fishing areas (also known as “U&A’s”) are areas with protected rights that pre-date the creation of shipping lanes and the creation of both Canada and the United States.<sup>64</sup> These usual and accustomed fishing grounds and the shipping often overlap: “The shipping lanes and separation zones identified by the Coast Guards for both the U.S. and Canada within our U and A are not exclusion zones. We have a right to fish in those areas, and we do.”<sup>65</sup> The U.S. Tribes U&As often overlap with international shipping lanes, which can cause international shipping vessels to interfere with tribal fishing by causing safety concerns, fishing gear loss, and dissuading tribal fisherman from access to this portion of their U&A.<sup>66</sup> The tribal concerns are not limited to vessels straying from the lanes. The avoidance of fishing due to safety concerns or fishing gear loss is an interference with the Treaty-protected right the

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<sup>64</sup> See Exhibit 11: Declaration of Rob Purser, Jr. (Dec. 3, 2018) at ¶ 12 (Treaty of Point Elliot predates the establishment of international shipping lanes).

<sup>65</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 4.

<sup>66</sup> Exhibit 11: Declaration of Rob Purser, Jr. (Dec. 3, 2018) at ¶¶ 11-12.

U.S. Tribes have to fish in the Salish Sea, including in the shipping lanes: “Each additional transit through our Treaty-reserved fishing areas increases the loss of access to our fishing areas and creates additional risk of loss of life and gear.”<sup>67</sup> The proposed Project’s adverse effects on these U.S. tribal treaty rights were not addressed in the environmental assessment.<sup>68</sup>

B. Increased Vessel Traffic Will Have Disastrous Effects On The Southern Resident Killer Whales.

The U.S. Tribes are also concerned about the impacts that increased vessel traffic and associated noise will have on orcas. Vessel traffic through the Southern Residents’ habitat interferes with their ability to communicate and hunt salmon, can hinder their movements, and drives them from habitat.<sup>69</sup> Studies have found that vessel noise interferes with up to 97 percent of killer whale communication calls.<sup>70</sup> Vessel traffic also “may present obstacles to whale passage, causing the whales to swim further and change direction more often, which potentially increases energy expenditure for whales and impacts foraging behavior.”<sup>71</sup>

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<sup>67</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at ¶ 5.

<sup>68</sup> The U.S. Tribes’ concern for safety or gear loss exist because of the amount of vessel traffic transiting through the Salish Sea. Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration), Vol. 6 (Nov. 28, 2018) at ¶¶ 2770 – 2782 (describing increase in vessel traffic and near collision with shipping vessel). Any condition simply requiring marine shipping vessels to respect international shipping lanes cannot alleviate the U.S. Tribes’ concerns. As an initial matter, ships should be respecting shipping lanes as a matter of practice. Additionally, U&A’s overlap with and pre-exist shipping lanes. The U.S. Tribes have a right to fish where the fish are actually located, which may be in shipping lanes.

<sup>69</sup> Exhibit 13: Washington State Southern Resident Killer Whale Task Force Report and Recommendations (Nov. 16, 2018) at 27-28. *See also* Exhibit 10: Declaration of Ray Fryberg (Jan. 17, 2019) at ¶¶ 14-15; Exhibit 9: Declaration of Nigel Lawrence (Dec. 4, 2018) at ¶¶ 15-16.

<sup>70</sup> Exhibit 14: Veirs et al., *Ship noise extends to frequencies used for echolocation by endangered killer whales*, 4 PeerJ e1657 (2016), accessible at <https://peerj.com/articles/1657/> (last accessed Dec. 4, 2018).

<sup>71</sup> Exhibit 15: *Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale*, National Oceanic and Atmospheric Administration, 71 Federal Register 69,054, 69,063 (Nov. 29, 2006).

The harm caused by vessel noise is so severe that the Task Force report concludes that “reducing human-created noise and disturbance from vessels – accompanied with a moderate increase in prey availability – should jointly hasten the recovery of Southern Residents.”<sup>72</sup> Not only would reducing vessel noise have a considerable benefit to the Southern Residents, it is also possible to achieve relatively quickly, and the benefits can be immediate.<sup>73</sup> Approving the Project -- and consequently increasing the number of tankers transiting the Salish Sea by an order of magnitude -- is in direct contradiction of the Task Force report’s findings and recommendations with respect to reducing noise from vessel traffic.

Swinomish Indian Tribal Community Senator Jeremiah Wilbur, a diver who dives for urchins and sea cucumbers, among other species described being underwater with a tanker or a ferry going by “four or five miles away, you can hear underwater, whoop, whoop, whoop, whoop, whoop, and not just hear it, you can feel it in your body. You can feel it like somebody’s -- if you’ve ever been next to a loud speaker with a big -- you know, a kid with the bass drum going in a car, you know, next to you, that’s what it feels like, boom, boom, boom, boom, boom. And you just feel it in your body.”<sup>74</sup> That first-hand experience can only testify to a fraction of how disruptive vessel traffic is for orcas, who depend on noise-free waters in order to hunt and feed.

The U.S. Tribes are not alone in recognizing the need for action in order to save the Southern Residents. The U.S. government, acting through the National Marine Fisheries Service (“NMFS”), protected the Southern Resident Killer Whale population as endangered under the

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<sup>72</sup> Exhibit 13: Washington State Southern Resident Killer Whale Task Force Report and Recommendations (Nov. 16, 2018) at 28.

<sup>73</sup> *Id.*

<sup>74</sup> Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration), Vol. 6 (Nov. 28, 2018) at ¶¶ 2789-92.

Endangered Species Act (“ESA”) in 2005 and designated critical habitat and issued a recovery plan in 2006.<sup>75</sup> The decision to list the Southern Residents as endangered was made, in part, because the presence of vessels had an impact on their behavior and may have affected foraging abilities and because the presence of oil shipped through the Salish Sea raised concerns on how a spill would affect them.<sup>76</sup> NMFS later designated a critical habitat for the Southern Residents, as required under the ESA.<sup>77</sup> NMFS designated Haro Strait, Puget Sound, and the Strait of Juan de Fuca (essentially the entire Salish Sea) as critical habitat.<sup>78</sup> Since the time of listing, NMFS has conducted and released research-based reports in order to aid Southern Resident recovery.<sup>79</sup> NMFS has characterized the Southern Resident Population as so critical, that “the loss of a single

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<sup>75</sup> NMFS is a U.S. federal agency charged with responsible stewardship of the nation’s ocean resources and habitat and is within the broader National Oceanic and Atmospheric Association (“NOAA”). NMFS is also sometimes known as “NOAA Fisheries.” See Exhibit 15: *Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale*, National Oceanic and Atmospheric Administration, 71 Federal Register 69,054 (Nov. 29, 2006).; Exhibit 16: *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, National Oceanic and Atmospheric Administration, 70 Federal Register 69,903 (Nov. 18, 2005); and Exhibit 17: *Endangered and Threatened Species; Recovery Plans; Proposed Recovery Plan for Southern Resident Killer Whales*, National Oceanic and Atmospheric Administration, 71 Federal Register 69,101 (Nov. 29, 2006).

<sup>76</sup> Exhibit 16: *Endangered and Threatened Wildlife and Plants: Endangered Status for Southern Resident Killer Whales*, National Oceanic and Atmospheric Administration, 70 Federal Register 69,903 (Nov. 18, 2005). See also Exhibit 14: Veirs et al., *Ship noise extends to frequencies used for echolocation by endangered killer whales*, 4 PeerJ e1657 (2016), accessible at <https://peerj.com/articles/1657/> (last accessed Dec. 4, 2018), and Exhibit 18: Veirs et al., *A key to quieter seas: half of ship noise comes from 15% of the fleet*, 6 PeerJ Preprints e26525v1 (2018), accessible at <https://peerj.com/preprints/26525/> (last accessed Dec. 4, 2018).

<sup>77</sup> 16 U.S.C. § 1533(a)(3).

<sup>78</sup> Exhibit 15: *Endangered and Threatened Species; Designation of Critical Habitat for Southern Resident Killer Whale*, National Oceanic and Atmospheric Administration, 71 Federal Register 69,054 (Nov. 29, 2006).

<sup>79</sup> Exhibit 19: National Oceanic and Atmospheric Administration, *Southern Resident Killer Whales: 10 Years of Research and Conservation* (June 2014), accessible at <https://www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/documents/bigreport10814.pdf> (last accessed Dec. 4, 2018); Exhibit 20: National Marine Fisheries Service, *Southern Resident Killer Whales – 5-Year Review: Summary and Evaluation* (2016), accessible at <https://repository.library.noaa.gov/view/noaa/17031> (last accessed Dec. 5, 2018).



individual, or the decrease in reproductive capacity of a single individual, is likely to reduce appreciably the likelihood of survival and recovery of the [Southern Residents].”<sup>80</sup>

Although Southern Residents have been federally protected in the U.S. for over 10 years, recent news of their declining salmon food supply has raised alarms over whale protection and recovery. Washington State, which hosts the Southern Residents for part of the year, recently assembled a Southern Resident Killer Whale Task Force to identify threats to Southern Residents and create an action plan to aid in recovery.<sup>81</sup> In November 2018, the Task Force released a report highlighting the urgent need to act to protect the orca population, which is at its lowest number in more than 30 years, and issuing recommendations supporting orca survival and recovery.<sup>82</sup> The report identified key threats to orca survival including lack of prey, vessel traffic and resulting noise, pollutants in the marine environment, and climate change. To address these threats, the Task Force issued recommendations to increase chinook abundance, decrease disturbance of and risk to orcas from vessels and related noise, and reduce exposure of contaminants.

The Washington Orca Task Force report represents a collaborate effort between state stakeholders and tribal entities to aid in orca survival and recovery. The report, which is supported by scientific research and studies, reaffirmed NMFS’s findings in its decision to list the Southern Residents as endangered. It also confirmed the U.S. Tribes’ longstanding concerns

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<sup>80</sup> Endangered Species Act Section 7(a)(2) Consultation Biological Opinion: Effects on the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (*orcinus orca*) Distinct Population Segment, National Marine Fisheries Service, Northwest Region, (May 5, 2009), 56, available at <https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/NWR-2009-2298?overrideUserGroup>, (last visited February 7, 2019).

<sup>81</sup> Exhibit 21: Washington State – Executive Order 18-02 (Mar. 28, 2018).

<sup>82</sup> Exhibit 13: Washington State Southern Resident Killer Whale Task Force Report and Recommendations.

that vessel traffic in the Salish Sea is having multiple, significant adverse effects on Southern Residents. Ships and vessels produce noise that interferes with orca communication and echolocation.<sup>83</sup> Even if the vessels were “quiet,” the presence of vessels alone can also trigger avoidance behaviors and a stress response among orcas.<sup>84</sup> The report also found that the number of vessels traversing the Salish Sea posed a risk to the Southern Residents by increasing the risk of an oil spill, which would decimate the Southern Resident population.<sup>85</sup> All of these threats are existing and will only be worsened by the proposed Project.

C. The Environmental Assessment’s Scope Is Inappropriately Limited And Fails To Capture The Full Impacts Of The Proposed Project.

Notwithstanding this failure to consult with U.S. Tribes, the appropriate analysis of the Project’s impacts was improperly narrowed to exclude U.S. waters. A scope of review that included vessel traffic through the entire Salish Sea and into international waters would allow for a review of the full environmental impacts associated with and caused by the proposed Roberts Bank Terminal 2 Project, including direct, indirect, and cumulative impacts to fisheries, navigation, vessel traffic, and imperiled species.<sup>86</sup> The Review Panel’s decision to separately examine Project-related shipping and not consider it as a factor for purposes of whether the Project is likely to cause significant adverse environmental effects results in an incomplete picture of the devastating impacts that this Terminal will have.

Moreover, limiting the scope of assessing marine shipping impacts to 12-nautical miles arbitrarily restricts any analysis of the full range of impacts the Project will have and is contrary

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<sup>83</sup> *Id.* at 27.

<sup>84</sup> *Id.* at 28.

<sup>85</sup> *Id.* at 29.

<sup>86</sup> Exhibit 22: U.S. Tribes’ Letter of Support for Living Oceans/Raincoast, Tseil-Waututh Nation Notice of Motion.

to the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19 s 52 at s 19, which requires the evaluation of effects “outside of Canada.”<sup>87</sup> Indeed, as the entire purpose of the Project is to increase the number of container ships calling on the Port, then it is absolutely certain that any export via marine vessels would go at least beyond the current 12-nautical mile territorial sea limit, and it is similarly certain that the marine vessel would travel out of the Salish Sea to reach international waters. Because of the limited scope of review, the VFPA failed to fully assess the impacts the Project will have on U.S. waters, and the U.S. Tribes’ cultural, historical, subsistence, commercial, and ecological dependence on those waters.<sup>88</sup>

The U.S. National Environmental Policy Act, a statute similar to the *CEAA* and serving the same purpose of ensuring that the environmental impacts of a project are fully disclosed to aid decision making and public education, requires an analysis to include all impacts that are reasonably foreseeable.<sup>89</sup> In this case, a proper analysis would include U.S. waters as part of the designated project. United States courts support this approach, including the Supreme Court of the United States. U.S. courts have held that environmental analysis requires consideration of environmental impacts that include foreseeable direct and indirect effects of a project.<sup>90</sup> Because not every impact can be foreseeable, federal courts have also acknowledged that the requirement will invariably require some amount of reasonable forecasting.<sup>91</sup> Here, even though the

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<sup>87</sup> *CEAA* s.5(1)(b)(iii).

<sup>88</sup> The U.S. Tribes’ commercial rights were affirmed by a U.S. federal court in *United States v. Washington*, 384 F. Supp. 312, 418 (W.D. Wash. 1974). The federal court held that states may not interfere with the Tribe’s treaty right to fish, and must not interfere with the Tribe’s commercial activity related to fish taken pursuant to such rights.

<sup>89</sup> 42 U.S.C. § 4321 *et seq.*

<sup>90</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>91</sup> *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d 1067, 1078-79 (9th Cir. 2011).

destination for vessels leaving the Terminal may vary or be unknown, it is certain that they must traverse United States' waters, through the Strait of Juan de Fuca, to reach international waters. To the extent that it is reasonably foreseeable that the container ships will travel through the Salish Sea, those full impacts should be included in any environmental analysis.

Limiting the scope of analysis, despite the real world evidence that the vessels will travel further than 12-nautical miles after leaving the Terminal, leads to an inadequate analysis of the Project's environmental impacts. Because VFPA failed to consult with the U.S. Tribes in developing this Project, and because the scope of the designated Project is unreasonably narrowed to 12-nautical miles from the Terminal, the resulting assessment is flawed and incomplete.

The Federal Court of Appeal's decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, supports a broader scope for assessing the real world impacts of the proposed Terminal. In *Tsleil-Watuth*, the Federal Court of Appeal found significant legal errors, such that it quashed the issuance of the Certificate of Public Convenience and Necessity for the Project. In fact, the Court found that excluding Project-related shipping from the designated Project "resulted in successive deficiencies such that the Board's report was not the kind of 'report' that would arm the Governor in Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification."<sup>92</sup> One of the "successive deficiencies" here is that, by failing to consider the marine shipping impacts as part of the Project, the VFPA ignores the full impacts the Project will have on the environment and Indigenous communities on both sides of the border.

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<sup>92</sup> *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at ¶ 470.

#### IV. APPROVAL OF THE PROJECT SHOULD NOT UNDERMINE U.S. LAW ON WILDLIFE PROTECTION.

The environmental assessment should interpret the *CEA Act, 2012* in a manner that is consistent with and does not frustrate U.S. government and U.S. Tribal efforts to sustain and recover salmon and whale populations in the Salish Sea. Endangered and threatened transboundary species will not survive and recover absent efforts on both sides of the border to ensure they are protected, including from acoustic harms. Three key reasons support the need to interpret and apply Canadian law in a manner which does not undermine U.S. efforts under the Endangered Species Act (“ESA”).

First, the ESA is fundamentally aimed at the same objectives as the Canadian *Species at Risk Act* (“SARA”). The ESA and *SARA* have the same overarching legislative purpose—in essence, they aim to conserve endangered and threatened species. *Compare SARA, s. 6 with ESA, § 2* (16 U.S.C. § 1531). These shared legislative purposes should lead to consistent conservation outcomes.

Second, beyond their purposes alone, the ESA and *SARA* employ similar statutory schemes. It would be baffling if, under statutes with similar schemes, activities causing harm to wildlife (for example, acoustic harms to Southern Resident Killer Whales) could be authorized under one legal regime but effectively precluded by the other regime, when both schemes are intended to ensure the recovery of the same whales. The following statutory elements are found in and mandated by both the ESA and *SARA* schemes:

- listing species as either endangered or threatened following scientific assessment;<sup>93</sup>
- mandatory prohibitions against harms to listed species;<sup>94</sup>

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<sup>93</sup> Section 4 of the ESA (16 U.S.C. § 1533); sections 14-31 of *SARA*.

<sup>94</sup> Section 9 of the ESA (16 U.S.C. § 1538), sections 32-36, 58, 60-61 of *SARA*.

- recovery planning that involves the identification of threats to listed species and designation of their critical habitat, leading to legal protections for that critical habitat;<sup>95</sup> and
- permitting mechanisms to review and, where permissible, to authorize impacts on listed species and their critical habitat.<sup>96</sup>

Third, the U.S. Tribes believe that it is relevant to consider the impacts of the proposed Project on U.S. efforts under the ESA, the Marine Mammal Protection Act, and other U.S. laws to conserve salmon and whale populations. Furthermore, Canada’s own *SARA* recovery strategies recognize that Canadian recovery efforts alone will be insufficient to recover these whales and acknowledge the need for transboundary cooperation.

For example, approval of the Project will undermine the U.S. Government’s and the U.S. Tribes’ strong interest in protecting and recovering imperiled Southern Resident Killer Whales in the Salish Sea.<sup>97</sup> The U.S. Tribes have a strong cultural connection to the Southern Resident Killer Whales.<sup>98</sup> A similar Canadian project that would increase vessel traffic, the Trans Mountain Expansion Project, conceded that it would have significant and unmitigatable impacts on orcas, describing the impacts as “negative, long-term, high magnitude, high probability and

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<sup>95</sup> Section 4 of the ESA (16 U.S.C. § 1533), sections 37-72 of *SARA*.

<sup>96</sup> Section 7-10 of the ESA, sections 73-79 of *SARA*.

<sup>97</sup> Orcas are listed as an endangered species under U.S. Federal law; a recovery plan was finalized in 2008. Exhibit 23: *Killer Whale* overview, National Oceanic Atmospheric Administration Fisheries.

<sup>98</sup> See Exhibit 7: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 11 – Oral Testimony of Glen Gobin (Oct. 23, 2014), ¶4753 (“the orca is the emblem of our tribe”); *id.* ¶¶ 4754-55 (discussing role of orcas in Tulalip oral tradition).

significant.”<sup>99</sup> The Roberts Bank Terminal 2 Project will increase vessel traffic in the Salish Sea in numbers that dwarf the marine tankers associated with the Trans Mountain Project.<sup>100</sup> Indeed, a similar finding is warranted here.

Given the similarities in purpose and in scheme between the ESA and *SARA*, the impacts of the proposed Project on the shared waters of the Salish Sea, salmon, and whales, and the practical need for cooperation and collaboration for the recovery of these species, the U.S. Tribes contend that the Review Panel must not approve projects that would threaten these species or their habitats. Moreover, the Review Panel should consider U.S. information relevant to cumulative impacts and mitigation.

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<sup>99</sup> Exhibit 24: Trans Mountain Application, Vol. 8A (December 17, 2013) (submitted to the NEB as document A3S4Y3, accessible at <https://apps.neb.one.gc.ca/REGDOCS/Item/View/2393783>) (“the potential effect of sensory disturbance on southern resident killer whale based on the existing status of that species” is an exception to TransMountain’s assertion of no significant adverse environmental effects). TransMountain shrugged off its admission that “underwater noise effects may be significant” by stating (1) the marine system already exists; (2) the shipping lanes are well-established; and (3) a great deal of international trade occurs already. The VFPA made similar assertions regarding Roberts Bank Terminal 2, stating that “the Project, in combination with past projects and activities that have been carried out, and certain and reasonably foreseeable projects that will be carried out, will result in a continued significant cumulative effect to [the Southern Residents],” while also maintaining that “[p]roject-related adverse residual effects to SRKW (and all toothed whales) are expected to be not significant.” Appendix IR10-01-C1, Tsawwassen First Nation: Issues, Views, and Concerns Related to the Proposed Project and Marine Shipping Associated with the Project, Table 18: Marine Mammals – Valued Component, pg. 92 (citing EIS Appendix 7.2-B).

<sup>100</sup> VFPA estimated that “by 2030 there would be an increase of 172 large vessels movements per year at the Roberts Bank terminals compared to 2012, in addition to the 520 movements from the proposed Project.” IR7-38. By contrast, the Trans Mountain Expansion would result in “an increase from 5 tankers a month to 34 Aframax tankers a month,” or approximately 348 tankers per year. A77045-1 NEB - Report - Trans Mountain - Expansion Project - OH-001-2014 at pg. 2.

V. THE ENVIRONMENTAL ASSESSMENT FAILS TO ASSESS OBLIGATIONS UNDER INTERNATIONAL LAW.

VFPA's failure to consult and coordinate with U.S. tribal interests will harm the U.S. Tribes' internationally recognized rights to culture and subsistence. Although the Project is physically located in Canada, U.S. Tribes have express and unique interests in opposing the Project that are tied to whole of the Salish Sea, spanning the international border and waters in both the United States and Canada. Project approval will destroy tribal resources and practices central to their ability to protect their culture and ensure it continues to future generations. It will also interfere with U.S. Tribes' welfare and means of subsistence. These cultural and subsistence concerns are unique and cannot be mitigated from harm resulting from the Project. Regardless of whether the harm originates in Canada or the United States, U.S. Tribes will be impacted by it.

Because project approval will cause harm and risk outside the borders of Canada, principles of international law apply. International law requires governments to prevent serious transboundary environmental harm—one of the main concerns of U.S. Tribes—as their culture and economies center on environmental health, wildlife, and renewable resources of the Salish Sea. Indigenous international law recognizes the importance of land, culture, and resources as essential to the survival and self-determination of Indigenous peoples, both of which are threatened by Roberts Bank Terminal 2.

A. U.S. Tribes Are Uniquely Tied To The International Impacts Of The Project Through Harms To Their Culture and Internationally Shared Marine Resources.

The Canadian Environmental Assessment Agency must consider the transboundary connections and concerns of the U.S. Tribes in its environmental assessment for the proposed Project. Although the Swinomish, Suquamish, and Tulalip Tribes are currently located within



the United States, the natural resources upon which they depend, their cultural practices, and their traditional economies are interwoven with the tribes and resources of the Canadian portion of the Salish Sea. “In times long ago our people always got together in the winter months. It was nothing new 10 years ago when we started. We have always been getting together in the customs of our people.”<sup>101</sup> “We [the Suquamish] went as far north as the Fraser River to get enough salmon to provide for ourselves.”<sup>102</sup> “Our Elders told us that we travelled far and wide with the canoes up and down the Coast Salish Sea, well into Canada...”<sup>103</sup> There are intimate family ties between U.S. Tribes and aboriginal First Nations on the Salish Sea. Tulalip Tribal Councilwoman Deborah Parker orally testified that her children are also part of the Tsleil-Waututh and Squamish Nations in British Columbia.<sup>104</sup> These cultural and social connections existed long before the border between the United States and Canada.

Treaty reserved fishing by U.S. Coast Salish tribes includes substantial reliance on the Fraser River Sockeye run, and U.S. tribal leaders participate actively in the U.S.-Canadian Pacific Commission, including the Fraser Panel. The sockeye swim through both U.S. and Canadian waters of the Salish Sea. The Fraser River contributes the majority of fresh water flowing into Puget Sound, on the U.S. side of the border.

Indeed, the U.S. and Canada recognized the inherent complexities of establishing a new international border when they signed the Treaty of Amity, Commerce, and Navigation between

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<sup>101</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Ray Harris (Oct. 22, 2014), ¶ 4470.

<sup>102</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Chairman Leonard Forsman (Oct. 22, 2014), ¶ 4519.

<sup>103</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10- Oral Testimony of Glen Gobin (Oct. 22, 2014), ¶ 4757.

<sup>104</sup> Exhibit 7: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 11 - Oral Testimony of Deborah Parker (Oct. 23, 2014), ¶¶ 4801-2.

the United States and Great Britain (“the Jay Treaty”), in 1794. Article III of the Jay Treaty, relating to the right of “Indians” to cross the border, remains a Treaty in Force with the United States State Department<sup>105</sup> and has been codified in the United States Code.<sup>106</sup> The Jay Treaty openly acknowledged that tribes had transboundary rights and could pass freely between the borders.

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), which Canada has endorsed without qualification, also acknowledges that transboundary issues exist for indigenous populations and provides that indigenous peoples have the right to maintain social, cultural, spiritual, political, and economic contacts with both their own tribal members, as well as other indigenous peoples, across borders.<sup>107</sup> In a special report from the United Nations Special Rapporteur on the rights of indigenous peoples,<sup>108</sup> Canada was specifically advised to address issues affecting tribal nations spanning the border between the United States and Canada.<sup>109</sup> This special attention given to Canada, as well as the specific attention given to transboundary

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<sup>105</sup> Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 31, 2013, United States Department of State, *available at* <http://www.state.gov/documents/organization/218912.pdf>, p. 38 (last visited January 7, 2016).

<sup>106</sup> 8 U.S.C. § 1359.

<sup>107</sup> United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), Article 36(1), *available at* [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (last accessed January 7, 2016).

<sup>108</sup> The position of UN Special Rapporteur on the Rights of Indigenous Peoples is mandated by the UN Commission on Human Rights to promote good practices between indigenous peoples and states, gather information from governments and indigenous peoples regarding alleged violations on the rights of indigenous peoples, make recommendations to prevent or remedy violations of rights of indigenous peoples, and work with other organizations, including the UN Permanent Forum on Indigenous Issues to further the rights of indigenous peoples. UN HRC Res. 15/14, U.N. Doc. A/HRC/RES/15/14 (Jun 10, 2010), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/70/PDF/G1016670.pdf?OpenElement> (last visited January 7, 2015).

<sup>109</sup> Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, U.N. Doc. A/HRC/27/52/Add.2 (July 4, 2014), ¶ 50.

rights for Indigenous peoples, demonstrates the international concern that Canada has not sufficiently respected that right.

Much like the indigenous peoples of the Salish Sea, the cultural way of life and the marine resources on which it depends have no regard for the international border. Any effect on the Salish Sea will ultimately impact U.S. Tribes. All vessel traffic must necessarily travel through United States waters and the increased traffic and increased risk of oil spills will undoubtedly affect tribal fisheries.<sup>110</sup> As tribal leader Ray Harris testified, “the Salish leaderships tasked us, a few of us, to say, ‘Find a way to do this. Let the governments know that there is an environmental issue here that the border doesn’t recognize.’ Pollution doesn’t know there’s a border.”<sup>111</sup> “We come across this man-made border and the potential impacts that eventually will happen—we believe wholeheartedly will happen; it’s just a matter of when—those impacts will travel freely through the Coast Salish Sea.”<sup>112</sup> “The international border provides no protection from the risk of oil spill and devastation to the Tribe’s fishing grounds and treaty reserved resources.”<sup>113</sup>

The U.S. Tribes ask the Review Panel to apply international norms and principles endorsed by the Canadian Government and those described below. International law creates a duty for this Panel to recognize the unique international relationship that U.S. Tribes and other

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<sup>110</sup> Exhibit 25: *Kinder Morgan Trans Mountain Pipeline Expansion Project: Shipping, Navigation, and Fishing Review*, Marico Marine (May 22, 2015) (submitted to the NEB as document A4L7G2, accessible at <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2784742>).

<sup>111</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Ray Harris (Oct. 22, 2014), ¶ 4470.

<sup>112</sup> Exhibit 7: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 11 - Oral Testimony of Glen Gobin (Oct. 23, 2014), ¶ 4734.

<sup>113</sup> Exhibit 2: Declaration of Robert Purser, Jr. (May 27, 2015), 3, ¶ 20.

First Nations have to the Salish Sea and that any damage to the Salish Sea the U.S. Tribes (indeed all Coastal Salish peoples) will be subject to the consequences.

B. International Environmental Norms And Principles Impose Obligations On Canada To Avoid Transboundary Environmental Harm.

Independent of the special consideration for the rich cultural history and interconnectedness of the Coast Salish peoples, other elements of international law apply for effects felt across international borders. Customary international law requires Canada to prevent its territory from being used in a manner that causes harm outside of its jurisdiction. This obligation to avoid transboundary environmental harm is one of the most fundamental and widely recognized customary international law norms.

1. *Canada has an obligation to avoid transboundary harm.*

The duty to avoid transboundary harm obliges Canada to prevent its territory from being used in a manner that causes harm outside of its jurisdiction. This obligation is one of the most fundamental and widely recognized customary international law norms.<sup>114</sup> For over half a century, this principle has been recognized by international tribunals as limiting the way in which States may use their territory. In the 1938 *Trail Smelter Arbitration* between the United States and Canada, the U.S.–Canada International Joint Commission held that “under principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”<sup>115</sup> In the *Corfu Channel Case*, the

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<sup>114</sup> See David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 472-75 (4th ed. 2010).

<sup>115</sup> *Trail Smelter Arbitration* (U.S. v. Can.) (1941), 3 R.I.A.A. 1938, 1965 (1949).

International Court of Justice recognized the principle even more broadly as “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”<sup>116</sup> More recently, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice noted that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”<sup>117</sup>

Customary international law has also been affirmed in international agreements and conferences. For example, numerous widely accepted treaties and declarations over the past several decades, including the 1972 Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”), the 1992 Rio Declaration on Environment and Development (“Rio Declaration”), and the United Nations Framework Convention on Climate Change (“UNFCCC”) acknowledge that sovereignty over natural resources is conditioned on the responsibility of States “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

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<sup>116</sup> *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

<sup>117</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 241-42.

jurisdiction.”<sup>118</sup> Canada agreed to such language in those and several other international treaties, including the 1993 North American Agreement on Environmental Cooperation (the environmental side agreement to NAFTA), as well as the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (also known as the London Convention).<sup>119</sup>

There is also international law specific to marine species, which requires states to protect the habitats of depleted, threatened, or endangered marine species. Canada has ratified the United Nations Convention on the Law of the Sea (“UNCLOS”), which provides that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as to not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread

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<sup>118</sup> Declaration of the United Nations Conference on the Human Environment, G.A. Res. 2997, princ. 21, U.N. GAOR, 27th Sess., U.N. Doc. A/ Conf.48/14/Rev/1, 11 I.L.M. 1416 (June 16, 1972) (“Stockholm Declaration”); Rio Declaration on Environment and Development, U.N. ESCOR, princ. 2, U.N. Doc. A/CONF.151/26 (Vol. I) (1992) (“Rio Declaration”). The Heavy Metals Protocol to the Convention on Long-Range Transboundary Air Pollution, which Canada has ratified, echoes the Rio Declaration’s agreement that States must prevent transboundary harm. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, pmbl., June 24, 1998, U.N. Doc. E/ECE/EB.AIR/66/1999, U.N. Sales No. E.99.II.E.21 (1999) (“LRTAP Protocol on Heavy Metals”). U.N. Framework Convention on Climate Change, pmbl., May 9, 1992, 31 I.L.M. 849 (“Framework Convention”) (ratified by Canada on Dec. 4, 1992).

<sup>119</sup> North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., pmbl., Sept. 8, 1993, 32 I.L.M. 1480 (entered into force Jan. 1, 1994) (“[r]eaffirming...[States’] responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”); International Maritime Organization, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, pmbl., Dec. 29, 1972, 1046 U.N.T.S. 120 (ratified by Canada on Nov. 13, 1975) (“Recognizing that States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”).

beyond the areas where they exercise sovereign rights in accordance with this Convention.”<sup>120</sup> Article 194(5) emphasizes that this obligation includes a commitment to take measures “necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species.” UNCLOS further supports the proposition that VFPA must consider prevention of harm to transboundary endangered and threatened marine species and their habitats.

The effects of the proposed Project will cross the international boundary with the increased number of vessel traffic that must pass through U.S. waters to access Roberts Bank Terminal 2 and return to the Pacific Ocean.<sup>121</sup> In addition, the environmental harm caused by a potential spill will reach outside Canada’s jurisdiction and negatively affect the U.S. Tribes. Canada has an international responsibility to prevent activities within its jurisdiction from damaging the environment outside its borders.

2. *Canada has an obligation to apply the precautionary principle.*

The precautionary principle obliges Canada to act cautiously in the face of scientific uncertainty. The Rio Declaration provides the most widely accepted articulation of this well-established principle of international law: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>122</sup> Canada reiterated its acceptance of the precautionary principle by incorporating

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<sup>120</sup> U.N. Convention on the Law of the Sea, art. 194, 1833 U.N.T.S. 3, reprinted at 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

<sup>121</sup> See Roberts Bank Terminal 2 Project Addendum to the Environmental Impact Statement, Marine Shipping Supplemental Report—Executive Summary (Oct. 2015) at pgs. 5-7.

<sup>122</sup> Rio Declaration, *supra* note 118, princ. 15.

it into the purpose of the *Canadian Environmental Protection Act, 1999*: “the Government of Canada is committed to implementing the precautionary principle,”<sup>123</sup> affirming it in Canadian caselaw,<sup>124</sup> and continuing the use of the precautionary principle in *CEAA 2012*. The U.S. Tribes submit that, in considering the Project’s environmental effects, the significance of those effects, and whether significant effects are justified, the Agency must take a precautionary approach consistent with the precautionary principle and *CEAA 2012*. The Agency must carry out its *CEAA 2012* obligations in a “careful and precautionary manner” that “protects the environment and human health and applies the precautionary principle,” as required by that statute. *CEAA 2012*, ss 4(1), (2).

The precautionary principle is especially important for the consideration of threatened and endangered salmon and whale species with populations that share United States and Canadian marine waters. Both Canada and the United States have federal legislation protecting endangered species. As discussed previously in Section 5, both Canada and the U.S. have statutory schemes protecting rare, endangered, and threatened species, such as the endangered Southern Resident Killer Whales. The United States ESA protects the same killer whale

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<sup>123</sup> Canadian Environmental Protection Act, 1999 SC, ch. 33 (Can.), pmbi. Although it is not as strong a commitment as the precautionary principle embraced in Canadian domestic law, Canada’s ratification of multilateral environmental agreements endorsing the precautionary approach also echoes Canada’s support for taking precautionary steps in the face of serious environmental threats. *See, e.g.*, Framework Convention, *supra* note 118, art. 3.3 (“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects”; “lack of full scientific certainty should not be used as a reason for postponing [cost-effective] measures” in the face of “threats of serious or irreversible damage”); LRTAP Protocol on Heavy Metals, *supra* note 118, pmbi, ¶¶ 2-3; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, arts. 5-6, Annex II, Aug. 4, 1995, 2167 U.N.T.S. 88 (ratified by Canada on Aug. 3, 1999).

<sup>124</sup> *See 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241.



population and several populations of Pacific salmon. It is worth emphasizing that all five whale species threatened by project activities have a poor conservation status. They are listed, under SARA, as endangered or threatened. By definition, an endangered species faces “imminent extirpation or extinction.” Not only does extinction constitute a serious harm, but extinction is irreparable and its possibility imminent. The United States National Marine Fisheries Service has referred to the Southern Resident Killer Whale population as so dire, that it considers “the loss of a single individual, or the decrease in reproductive capacity of a single individual, is likely to reduce appreciably the likelihood of survival and recovery of the [distinct population segment].”<sup>125</sup>

Approval of the Project—despite the threat of serious or irreversible damage posed by oil spills and increased vessel traffic—would demonstrate a failure to abide by the precautionary principle. The Review Panel should consider the effects that project approval will have on endangered and threatened species, and in a manner consistent with SARA and the precautionary principle in international law, so as to ensure the protection and conservation of these fish and whale species. There can be no doubt, on the record, of the potentially serious harms threatened to transboundary marine species by approval of this Project.

3. *Project approval would be inconsistent with the international law duty to prevent transboundary environmental harm.*

The U.S. Tribes submit that the Review Panel, if it approves activities that will unquestionably harm species listed as endangered under both United States and Canadian law,

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<sup>125</sup> Endangered Species Act Section 7(a)(2) Consultation Biological Opinion: Effects on the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (*orcinus orca*) Distinct Population Segment, National Marine Fisheries Service, Northwest Region, (May 5, 2009), 56, available at <https://pcts.nmfs.noaa.gov/pcts-web/dispatcher/trackable/NWR-2009-2298?overrideUserGroup>, (last visited February 7, 2019).

will fail to abide by both the precautionary principle and the duty to avoid transboundary harm. The risk to endangered marine species is eminent. The Marine Shipping Addendum for the Roberts Bank Terminal 2 Project revealed that the local assessment area of the Project overlaps with the majority of the identified critical habitat for Southern Resident Killer Whales.<sup>126</sup> In fact, the Marine Shipping Addendum notes that, in the local assessment areas of the Project, there are “[c]ommon and regular sightings [of Southern Residents], particularly during summer and fall, but some presence in all months.” These whales pass freely through Canadian and United States waters, and the U.S. Tribes request that the VFPA and Review Panel consider the threat that the Project will have on this vulnerable population. Failure to do so will be inconsistent with Canada’s obligations under UNCLOS Article 194(5) and customary international law.

Approval of the Project also poses a great risk to the transboundary environment of the Salish Sea. With the increase in marine traffic, there is also an increased risk of an oil spill. Project approval in light of the increased risk for an oil spill will be directly contrary to the international norms to apply the precautionary principle and the duty to not cause transboundary harm.

C. International Law Protects The Land And Resources Of Indigenous Peoples.

The Review Panel should respect the U.S. Tribes’ right to self-determination as defined by international law, which includes the right to pursue economic, cultural, and social development. For U.S. Tribes, this also includes protection of their environment as their cultural well-being and subsistence are based on the health of the Salish Sea. Both the Inter-American Commission on Human Rights and international law generally protect the special ties that many

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<sup>126</sup> Marine Shipping Addendum Section 8.2.5.2; Table 8.2-3.

indigenous people have to their environment.<sup>127</sup> This protection has become a norm of customary international law.<sup>128</sup> In addition, the Draft American Declaration of the Rights of Indigenous Peoples, Article XVIII(1), on which the negotiating parties have reached consensus, explicitly guarantees indigenous peoples the right to environmental protection: “Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, world view and to collective well-being.”<sup>129</sup> The construction of the proposed Roberts Bank Terminal 2 without consent of the U.S. Tribes would violate internationally protected rights to enjoy and transmit culture to future generations and affect the economic subsistence of tribes on resources from the Salish Sea.

*1. Project approval will interfere with U.S. Tribes’ internationally recognized right to culture.*

The human right to culture is recognised in many international instruments, and is an “integral part of human rights and, like other rights, [is] universal, indivisible and

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<sup>127</sup> See, e.g., *Case of Yanomami Indians v. Brazil*, Case 7615, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev. 1, ¶ 7 (1985) (“*Yanomami*”) (“[I]nternational law in its present state ... recognizes the right of ethnic groups to special protection ... for all those characteristics necessary for the preservation of their cultural identity.”).

<sup>128</sup> See *Case of Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, ¶¶ 97, 124 (2002) (“*Dann*”), ¶ 125 (citing Inter-Am. C.H.R., *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, Doc. 62 (2000), at 21-25); see also *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R. Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, ¶ 87 (2004) (“*Belize Maya*”), ¶ 95 (citing same).

<sup>129</sup> Permanent Council of the OAS, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples (Outcomes of the Thirteenth Meetings of Negotiations in the Quest for Points of Consensus), OEA/Ser.K/XVI/GT/DADIN/doc.334/08 rev. 6, art. XVIII(1), (Jan. 20, 2011) (“OAS, *Draft Declaration on the Rights of Indigenous Peoples* (2011)”).

interdependent.”<sup>130</sup> These instruments include the Universal Declaration on Human Rights (which protects the right “freely to participate in the cultural life of the community”),<sup>131</sup> the International Covenant on Civil and Political Rights (“ICCPR”) (which provides that members of minority groups “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language”),<sup>132</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) (which provides that “States Parties ... recognize the right of everyone [t]o take part in cultural life”).<sup>133</sup> Canada is a party to both covenants and is a signatory to the declaration.<sup>134</sup> Other major human rights instruments, including the American Declaration of the Rights and

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<sup>130</sup> UN Committee on Economic, Social and Cultural Rights (“ESCR Committee”), Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) – General Comment No. 21 (“General Comment 21”), UN Doc. E/C.12/GC/21 (December 21, 2009), ¶ 1, *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang%20=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang%20=en) (last visited January 7, 2016).

<sup>131</sup> Universal Declaration on Human Rights, Article 27(1) (proclaimed December 10, 1948), *available at* <http://www.un.org/en/universal-declaration-human-rights/index.html> (last visited January 7, 2015).

<sup>132</sup> International Covenant on Civil and Political Rights (“ICCPR”), Article 27(1), (entered into force March 23, 1966) *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited January 7, 2016).

<sup>133</sup> International Covenant on Economic, Social and Cultural Rights (“ICESCR”), Article 15(1)(a), (entered into force January 3, 1976) *available at* <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (last visited January 7, 2016).

<sup>134</sup> UN Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en); Yearbook of the United Nations: 1948-49, 535, *available at* <http://www2.ohchr.org/english/issues/education/training/docs/UNYearbook.pdf> (last visited Aug 27, 2015).

Duties of Man,<sup>135</sup> the Charter of the Organization of American States,<sup>136</sup> the American Convention on Human Rights,<sup>137</sup> protect cultural rights.

For many indigenous peoples, including the U.S. Tribes, the right to enjoy culture is linked to the natural environment of their traditional lands:

[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting.... The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.<sup>138</sup>

Interference with indigenous lands implicates the right to culture, because the use and enjoyment of traditional lands are integral components of the physical and cultural survival of indigenous peoples. The ESCR Committee has noted that:

Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.<sup>139</sup>

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<sup>135</sup> American Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003) (“American Declaration”), art. XIII. (“Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.”).

<sup>136</sup> Charter of the Organization of American States, arts. 2(f), 3(m), 30, 48, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 rev. 9 (Jan. 2003) (Member States are “individually and jointly bound to preserve and enrich the cultural heritage of the American peoples”).

<sup>137</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“American Convention”), art. 16 (“Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.”).

<sup>138</sup> UN Human Rights Committee, Office of the High Commissioner for Human Rights, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (“OHCHR, Gen. Comment No. 23”), ¶¶ 7 and 9.

<sup>139</sup> ESCR Committee, *General Comment 21*, *supra* note 130, ¶ 36.

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), which Canada endorsed in 2010, also specifically assures the cultural rights of indigenous peoples and links those rights to the natural environment and to future generations:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.<sup>140</sup>

UNDRIP also provides that indigenous peoples have the rights:

- not to be subjected to destruction of our culture;<sup>141</sup>
- to practice and revitalize our cultural traditions and customs, which includes maintaining, protecting and developing our culture;<sup>142</sup>
- to practice and develop our spiritual and religious traditions, customs and ceremonies, and to maintain and access in privacy our religious and cultural sites;<sup>143</sup>
- to revitalize, use, develop and transmit to future generations our histories, languages, oral traditions and philosophies;<sup>144</sup> and
- to maintain and develop our traditional knowledge, and cultural heritage and expressions, and the manifestations of our cultures, including oral traditions.<sup>145</sup>

Other international human rights bodies have recognized the special relationship that indigenous peoples have with their land and its connection to their right to culture.<sup>146</sup> For instance, the U.N. Human Rights Committee acknowledged the importance of natural resources to the right to the benefits of culture in *Bernard Ominayak and the Lubicon Lake Band v.*

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<sup>140</sup> UNDRIP, *supra* note 107, Article 25.

<sup>141</sup> *Id.*, Article 8.

<sup>142</sup> *Id.*, Article 11.

<sup>143</sup> *Id.*, Article 12.

<sup>144</sup> *Id.*, Article 13.

<sup>145</sup> *Id.*, Article 31.

<sup>146</sup> *See, e.g., Centre for Minority Rights Development v. Kenya*, Case 276/2003, Afr. Comm’n on Human and Peoples’ Rights, ¶ 156 (2009) (citing extensively the Inter-American Court’s jurisprudence in *Awás Tingni*, *Moiwana*, and *Saramaka* in observing that indigenous peoples’ “culture, religion, and traditional way of life are intimately intertwined with their ancestral lands [ ] and the surrounding area” and that “without access to their ancestral land, [they] are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.”).

*Canada*. In that case, which the Commission cited with approval in the *Belize Maya* decision,<sup>147</sup> the petitioners alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands.<sup>148</sup> The Human Rights Committee characterized the claim as being based on the right to enjoy culture under Article 27 of the ICCPR.<sup>149</sup> It found that oil and gas exploitation, in conjunction with historic inequities, threatened the way of life and culture of the Band and that Canada had thus violated Article 27.<sup>150</sup>

The threat to tribal culture is necessarily implicated in the Roberts Bank Terminal 2 Project through a number of factors: the increase in potential for oil spills that will cause catastrophic damage to the Salish Sea and the marine species that the U.S. Tribes depend on for cultural and economic subsistence; the inevitable increase in vessel traffic that poses a safety risk to tribal fishermen and can reduce tribal fishery access and harvest; and the overall increase in traffic and environmental degradation has a negative effect on tribal cultural practices.

The U.S. Tribes testimony, as discussed above, revolves around the importance of salmon to the cultural survival of the U.S. Tribes. Salmon is also the center of the tribes' cultural evolution. "Fishing represents the continuation of our culture and way of life since time immemorial. While the rules and structures of fishing have changed in modern times, fishing is

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<sup>147</sup> *Belize Maya*, *supra* note 128, ¶ 141.

<sup>148</sup> U.N. Human Rights Committee, *Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990) ("*Lubicon Lake Band*").

<sup>149</sup> *Id.*; *see also* U.N. Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, ¶ 9.5, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000) (noting that, according to general comment to Article 27, "especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them").

<sup>150</sup> *Lubicon Lake Band*, *supra* note 148, ¶ 33.

an integral part of our culture. For thousands of years, our people have lived on the marine waters of the Salish Sea harvesting salmon, many other fish species and shellfish.”<sup>151</sup> Salmon continues to be a part of the cultural fabric—“And salmon provides []—not only a food, but also what we might call medicine or our cultural strength to our people.”<sup>152</sup> The integration of salmon to the cultural lives of U.S. Tribes cannot be overstated.

The right to culture and the central importance of the health of the Salish Sea to the U.S. Tribes’ culture cannot be mitigated nor economically compensated. As U.S. tribal members have testified:

- “The act of fishing, the circulation of harvest within the community, the dietary reliance upon the harvest, and the importance of salmon and other species to the Swinomish culture and spiritual life, give treaty fishing rights a value that far transcends the economic value as a commodity.”<sup>153</sup>
- “While this declaration provides information about economic value of fishing resources to the Tribe, it is not possible to overstate the central cultural importance of these activities. Although the economic benefits of fishing to the Tribe are very significant, it is critical to understand that their value is more than monetary – the loss of these resources cannot be mitigated through money or any other means.”<sup>154</sup>

VFPA and the Review Panel must carefully consider the potentially devastating effect the proposed Roberts Bank Terminal 2 will have on cultural resources, an impact which is not compensable through monetary relief.

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<sup>151</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶ 8.

<sup>152</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Chairman Leonard Forsman, (Oct. 22, 2014), ¶ 4523.

<sup>153</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶ 33.

<sup>154</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), ¶ 8.



2. *Project approval will harm U.S. Tribes' internationally recognized right to subsistence.*

U.S. Tribes and Indigenous peoples' right to their own means of subsistence is well-established under international law. Canada has a duty not to degrade the environment of the Salish Sea such that it violates U.S. Tribes' right to their own means of subsistence.

For people who depend on natural resources for their livelihood, the right to their own means of subsistence is inherent in, and a necessary component of, the American Declaration's rights to property, health, life, and culture. The ICESCR and ICCPR both provide that all peoples "may freely dispose of their natural wealth and resources," but that "[i]n no case may a people be deprived of its own means of subsistence."<sup>155</sup> The UNDRIP provides the same assurance to indigenous peoples, for whom this right is particularly vital, adding that indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development."<sup>156</sup> The UNDRIP provides further recognition of cultural autonomy of Indigenous peoples through security "in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."<sup>157</sup>

In addition, the U.N. Committee on Economic and Social Rights in 2009 recognized in General Comment No. 21 that "[i]ndigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural

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<sup>155</sup> ICESCR, *supra* note 133, art. 1(2); ICCPR, *supra* note 132, art. 1(2).

<sup>156</sup> UNDRIP, *supra* note 107, art. 20.

<sup>157</sup> *Id.*, Article 20.

identity.”<sup>158</sup> Ultimately, the Inter-American Commission on Human Rights has recognized that indigenous peoples’ “special relationship [to their territories] is fundamental...for the[ir] material subsistence.”<sup>159</sup> Indeed, in the context of indigenous peoples, the right to one’s own means of subsistence has become a recognized principle of international human rights law.

Since the Salish Sea flows in and out of the international border, and its marine mammals, shellfish, and anadromous fish migrate across that border, Canadian decisions must take into account their effects across the border. By failing to sufficiently protect the Salish Sea, Canada will deprive the U.S. Tribes of the right to their own means of subsistence, in violation of international law.<sup>160</sup> The U.S. Tribes depend on the Salish Sea for their subsistence economy and traditional activities, including hunting, fishing, and gathering are “important factors in the maintenance of their cultures and in their economic self-reliance and development.”<sup>161</sup>

U.S. Tribes’ right to subsistence will be jeopardized by project approval through the increase of vessel traffic and the increased risk of an oil spill. Impacts to U.S. Tribes’ subsistence rights are implicated on the tribal community level and the individual tribal member

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<sup>158</sup> General Comment No. 21, *supra* note 130, Right of everyone to take part in cultural life, (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 36, E/C.12/GC/21 (Nov. 20, 2009) (citing International Labour Organisation, Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (“ILO, Conv. No. 169”), arts. 13-16. *See also* UNDRIP, *supra* note 107, arts. 20 and 33. The Committee added that “States parties must take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”

<sup>159</sup> Inter-Am. C.H.R. *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, doc. 56/09 ¶ 394 (Dec. 30, 2009), ¶ 56 (citing *Dann*, *supra* note 128, ¶ 128 (noting connection between subsistence and the right to property, stating that the American Convention’s right to property “refers ... [to] its capacity for providing the resources which sustain life”).

<sup>160</sup> *See* ICCPR, *supra* note 132, art. 1(2); ICESCR, *supra* note 133, art. 1(2); UNDRIP, *supra* note 107, art. 20.

<sup>161</sup> *See* UNDRIP, *supra* note 107, art. 23.1.

level. Ultimately, the increase in vessel traffic will expose individual tribal members to increased safety risks, will reduce their access to their treaty-reserved fishing areas, will threaten the longevity of the natural resources upon which they depend, will endanger individual tribal members' lifeways by interfering with consumption rates, and will interfere with economic subsistence. An oil spill combined with increased vessel traffic tied to the Project will severely cripple or decimate tribal communities and individual tribal members' ability to harvest and consume treaty-reserved resources for subsistence purposes for decades that in turn, will also severely cripple U.S. Tribes' economies and tribal life ways.

The U.S. Tribes also have a substantial interest in protecting the economic welfare of individual tribal members through fishing activities. Suquamish Chairman Leonard Forsman orally testified that most tribal members are "crabbers or salmon fisherman or both" and that maintaining the "clean water, good habitat, robust fisheries are good economics as well and provide a lot of jobs."<sup>162</sup> Although tribal communities vary in size, the written evidence further elucidates the importance and large presence of fishing in tribal members lives.

Inherent in the interest in fishing activities is also the interest in safety in pursuing those activities. Increased vessel traffic will impede U.S. Tribes' right to subsistence through impacts on their means of travel and harvesting, which in turn affects U.S. Tribes' access to land and natural resources. Because travel is an essential component of U.S. Tribes' subsistence harvest, the deprivation of safe and reliable means of travel also deprives U.S. Tribes of their means of subsistence. Oral testimony of Chairman Cladoosby told the story of a fisherman whose net was

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<sup>162</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Chairman Leonard Forsman (Oct. 22, 2014), ¶¶ 4534, 4605.

caught by a tanker.<sup>163</sup> Chairman Forsman also spoke of a near miss with a tanker while canoeing from Port Angeles to Songhees.<sup>164</sup> Vessel traffic is already impeding U.S. Tribes' rights to harvest fish. Project approval will inevitably worsen the scenario by increasing the amount of vessel traffic, consequently depriving U.S. Tribes from using the natural resources they need for subsistence.

The right to subsistence is strongly implicated by tribal consumption of fishing harvests. In addition to ceremonial usage, tribal members consume resources from the Salish Sea for subsistence. Both written evidence and oral testimony indicate that tribal member consumption of fish is higher than average consumption in the general population. "A 2013 study by the United States Environmental Protection Agency documented fish consumption rates of Tulalip Tribal members that was 5 times higher than the average fish consumption rate of the general population in the United States."<sup>165</sup> "The survey showed that the Swinomish people eat significantly more fish and shellfish—over twice as much than does the general population. In addition, it revealed that tribal members would like to eat even more, but are unable to do so for various reasons...Swinomish would not be Swinomish without this marine diet."<sup>166</sup> Suquamish tribal fish consumption is approximately 800 grams a day.<sup>167</sup> Any reduction in the tribal fish harvest, either due to an increase in vessel traffic or to environmental contamination, necessarily infringes on the subsistence diet of members of the U.S. Tribes.

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<sup>163</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony, Chairman Brian Cladoosby (Oct. 22, 2014) ¶¶ 4419-21.

<sup>164</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony, Chairman Leonard Forsman (Oct. 22, 2014), ¶ 4577.

<sup>165</sup> Exhibit 3: Declaration of Jason Gobin (May 27, 2015), 1, ¶ 4.

<sup>166</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), 7, ¶ 30.

<sup>167</sup> Exhibit 5: NEB Hearing Order OH-001-2014 (Trans Mountain Pipeline), Vol. 10 - Oral Testimony of Chairman Leonard Forsman (Oct. 22, 2014), ¶ 4541.

The U.S. Tribes' right to their own means of subsistence is protected under international law. Project approval will increase the impacts felt by U.S. Tribes on both the individual and tribal level. In addition, these impacts will be felt throughout all stages of the Project and cannot be mitigated since project approval will necessarily result in increased vessel traffic. Project approval will threaten the U.S. Tribes' subsistence way of life, including their traditional hunting and fishing activities, and will diminish U.S. Tribes' right to their own means of subsistence.

3. *Failure to consider the concerns of U.S. Tribes will violate their internationally protected rights.*

If the Roberts Bank Terminal 2 Project is approved, Canada will allow domestic polluters under its jurisdiction to impose the environmental costs of their pollution on the indigenous peoples of the North, both within and outside Canadian borders. Canada has a duty not to degrade or allow the degradation of the Salish Sea to an extent that infringes upon the U.S. Tribes' human right to enjoy the benefits of their culture or their means of subsistence. Although the U.S. Tribes are physically located in the United States, they are a concerned indigenous group and international party that will bear much of the risk and receive none of the benefit from project approval.

VFPA and the Review Panel should consider the impacts that Roberts Bank Terminal 2 will have on the U.S. Tribes' internationally recognized rights to culture and subsistence. The U.S. Tribes have extensively testified to the importance of the Salish Sea to the past, present, and future of their cultural survival. The Salish Sea is also an important base of their economic subsistence. Any effect on their right to culture or economic subsistence infringes on their internationally recognized human rights under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic,

Social, and Cultural Rights, and the United Nations Declaration on the Rights of Indigenous Peoples.

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The Review Panel must ensure sufficient information on the full scope of impacts caused by the Roberts Bank Terminal 2 Project. Because the Project will cause significant harms and risks to the U.S. Tribes—including harms from increased vessel traffic through Treaty-reserved and protected fishing areas, marine pollution and noise impacts on salmon and endangered Southern Resident Killer Whales, and cumulative impacts of past, present, and future marine vessel shipping projects—the failure to consult with or even consider the U.S. Tribes renders the information insufficient.

Date Submitted: February 8, 2019  
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