



# Swinomish Indian Tribal Community

Office of the Tribal Attorney

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A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 5123

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Submitted via electronic mail to:

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Roberts Bank Terminal 2 Project Secretariat  
Canadian Environmental Assessment Agency  
160 Elgin Street, 22<sup>nd</sup> Floor  
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CANADA

RE: Swinomish Indian Tribal Community Closing Remarks

The Swinomish Indian Tribal Community (“Swinomish”) presents these Closing Remarks concerning the environmental assessment of the Roberts Bank Terminal 2 Project (the “Project”). Swinomish is one of the U.S. Tribes that previously joined with the Suquamish and Tulalip Tribes in presenting *Further Comments on Sufficiency of Information* concerning the Project, submitted on February 8, 2019.<sup>1</sup> These Closing Remarks are based upon and addressed more fully in the *Further Comments*. Footnotes citing Exhibits are citations to exhibits attached to those comments, unless otherwise indicated. Swinomish also presented testimony at the oral tradition hearing, which is also referenced within.<sup>2</sup>

In summary, the information submitted by the Project proponent, Vancouver Fraser Port Authority (VFPA”), is incomplete and does not allow for a full and fair assessment of the Project because it omits entirely a major component of the environmental impacts that will be generated by the Project. VFPA fails to acknowledge the presence and concerns of Swinomish and other U.S. tribes who live and fish just south of the Canadian-U.S. border.<sup>3</sup> Without information from

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<sup>1</sup> Registry No. 1549.

<sup>2</sup> Review Panel Public Hearing, Roberts Bank Terminal 2 Project, May 25, 2019.

<sup>3</sup> See, e.g., IR7-31 (U.S. Tribes view not represented on Marine Biophysical Components – Mitigation Measures/Offsetting); Appendix IR10-01-C3, Table 10 at pg. 17 (local assessment area does not extend across the U.S. border); IR13-2 (did not consult with U.S. Tribes on current use for traditional purposes).

the applicant on the Project's impacts on Swinomish and other U.S. tribes, the CEAA cannot fulfill its obligation to consider the impacts of the proposed Project.

The Project will generate significant harm and risk to Swinomish by impairing its ability to enjoy and preserve its traditional way of life, which is dependent upon the harvest of fishery resources from the Salish Sea. These resources, and the activities associated with their harvest, are central to the Tribe's spiritual and cultural identity. Preserving and protecting Salish Sea marine resources is essential to the Swinomish economy, subsistence and ceremonial harvests.

VFPA's failure to consult with Swinomish and other U.S. tribes or to consider the effects of the proposed Project on them renders the information submitted on the Project patently insufficient. Evidence of the likelihood of specific environmental harm was submitted by Swinomish and other U.S. tribes into the record, but VFPA failed to analyze that evidence. No environmental assessment can be complete without gathering such information and without analysis of the evidence of likely harm.

#### I. SWINOMISH HOLDS TREATY FISHING RIGHTS THAT ARE THE MAINSAY AND LIFEBLOOD OF THE TRIBE.

Swinomish is an Indian tribe organized under U.S. federal law and recognized as such by the U.S. government. The Swinomish Reservation is located on Fidalgo Island in the U.S. waters of the Salish Sea.<sup>4</sup> Swinomish, along with some 20 other U.S. tribes, holds treaty fishing rights under one of the "Stevens treaties" entered into with the U.S. in 1854 and 1855. The treaty Swinomish signed, like all other Stevens treaties, reserves for Swinomish the right to fish at all of its "usual and accustomed fishing grounds and stations" ("U&As").<sup>5</sup> The Swinomish marine U&As extend from just north of Seattle to the Canadian border. Swinomish shares various portions this fishing area with several other U.S. tribes.<sup>6</sup> Swinomish fishing rights are not created by the treaty. They are part of the aboriginal title held by Swinomish, and they were reserved, or perpetuated, by the treaty.<sup>7</sup>

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<sup>4</sup> Exhibit I: Declaration of Lorraine Loomis (May 25, 2015), ¶¶1-2.

<sup>5</sup> Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927.

<sup>6</sup> Exhibit I: Declaration of Lorraine Loomis (May 27, 2015), ¶¶10-11, 13.

<sup>7</sup> *United States v. Winans*, 198 U.S. 371, 380-81 (1905).

The continued existence and vitality of these treaty-reserved fishing rights has been continually affirmed by U.S. courts.<sup>8</sup> The courts have held that the treaties reserved to the signatory tribes the right to harvest up to 50% of the available harvest within the U&As, participate with the State of Washington as co-managers of the fishery, and regulate the exercise of treaty fishing rights by tribal members.<sup>9</sup> Treaty fishing rights are property rights of the tribe that U.S. courts protect from diminishment or interference by state or federal actions.<sup>10</sup>

Swinomish, like all U.S. tribes with marine U&As in the U.S. waters of the Salish Sea, is a part of the Coast Salish people: one people in cultural expression, now divided by the U.S. – Canada border. “Their songs, their culture, their bloodlines are all intertwined throughout the beautiful Salish Sea.”<sup>11</sup> Like many of its Coast Salish relatives on both sides of the border, Swinomish has lived on the shores of and fished in the Salish Sea from time out of mind. And since time out of mind, and continuing to this very day, Swinomish relies heavily on the fishery resources of the Salish Sea. Then, as now, the harvest of salmon and shellfish continues to play a central role in the Swinomish economy, subsistence, culture, ceremonial and spiritual life, and the daily rounds of lifeways that shape and define a culture.

Swinomish has significant economic interests at stake in the Salish Sea fishery, which extends throughout its U&As right up to the doorstep of the Roberts Bank 2 Project. Approximately “20% of the Swinomish membership, one in 5 of every Swinomish man, woman and child, engages in some form of commercial fishing.”<sup>12</sup> Swinomish harvests all species of salmon, crab, shrimp, halibut, oysters, clams, sea cucumbers, sea urchins, and geoducks, which are marketed widely, including in Canada.<sup>13</sup> The shipping route for vessel traffic to and from the Project traverses within or on the border of Swinomish U&As, in an area in which Swinomish fishing is especially heavy.<sup>14</sup> In a typical recent year, Swinomish harvest in proximity to the shipping route exceeded 1½ tons per tribal member.<sup>15</sup> The Swinomish economy is thus threatened directly and significantly by the increase in vessel traffic generated by the Project,

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<sup>8</sup> See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979).

<sup>9</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015) ¶12.

<sup>10</sup> *United States v. Winans*, *supra* n. 5; *Muckleshoot Tribe v. Hall*, 698 F. Supp. 3d 1504 (W.D. Wash. 1988); *U.S. v. Washington*, 853 F.3d 946 (9<sup>th</sup> Cir. 2017).

<sup>11</sup> Transcript, Review Panel Public Hearing, May 25, 2019, Lekanoff testimony, p. 2445.

<sup>12</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶15.

<sup>13</sup> *Id.*, at ¶¶16, 17.

<sup>14</sup> *Id.*, at ¶18.

<sup>15</sup> *Id.*, at ¶23; Ex. A, Table 2.

both in harm to the fishery habitat and in interference with the ability of fishers to exercise the treaty right. Swinomish and other U.S. tribes provided all of this information and more to the CEAA panel (and thus to VFPA) in the form of sworn declarations of enrolled tribal members, many of whom are elected leaders at Swinomish.

But important as its commercial fishery is to Swinomish and its members, “[t]he economic impact ... is not the only value of our fishery nor, in the end, is it the most important one.”<sup>16</sup> Fishing for subsistence (that is, for family consumption, not sale) is also essential to Swinomish members, who eat significantly greater amounts of fish and shellfish as part of their daily diet as does the general population.<sup>17</sup> It is also essential to the ceremonial life of Swinomish culture – indeed of all Coast Salish culture:

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. . . . The ceremonies are an integral part of our culture, and the ceremonial food is essential to the ceremonies.<sup>18</sup>

The fishery thus constitutes the wellspring from which flows Swinomish culture and the larger Coast Salish culture of which it is a part. The fishery is crucial to Swinomish identity.

The act of fishing, the circulation of harvest within the community, the dietary reliance upon the harvest within the community, 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. The treaty fishing right was meant to preserve our culture and way of life revolving around fishing and the fish harvest. .... I am mindful of the need to preserve the fishery in order to preserve our identity as a tribe.<sup>19</sup>

As documented in the sworn Swinomish Declarations, the proposed Project will inevitably harm the Swinomish treaty fishery and directly impinge upon the fishery activities of its members, as well as members of other U.S. tribes. Existing levels of vessel traffic already generate considerable interference. Information on baseline vessel traffic interference was

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<sup>16</sup> *Id.*, at ¶27.

<sup>17</sup> *Id.*, at ¶30. *See also* Exhibit G: Swinomish Seafood Diet Survey 2004-2006, pg. 21.

<sup>18</sup> *Id.*, at ¶32.

<sup>19</sup> *Id.*, at ¶33.

presented in the graphics accompanying the testimony of Suquamish Chairman Leonard Forsman at the public hearing.<sup>20</sup> To make things worse, the greatest disruption of Swinomish treaty fishing already occurs in the area affected by the Project, which is the tribe's most productive fishery.<sup>21</sup> The increase in vessel traffic emanating from the Project will only make things worse, adding to the displacement of tribal fishers, loss of gear, and loss of fishing opportunity.<sup>22</sup> In addition, the increase in vessel traffic will further degrade the marine habitat in the Salish Sea and thereby harm the fishery.<sup>23</sup>

The harm the Project will generate for the Swinomish culture and Coast Salish culture in general is a physical taking away and denial of available fishing area that is irreparable and cannot be mitigated. A Swinomish tribal leader and fisher struggling to express the harm put it this way: "[I]t's really hard to try to express the value, the tradition, the spiritual, the meaning of loss. I don't think there is anyone that could probably put into words what that would mean. That's our way of life, the Native people."<sup>24</sup>

Lorraine Loomis, the Swinomish Fisheries Manager whose declaration has been cited repeatedly in these Closing Remarks,<sup>25</sup> concluded that declaration with this assessment:

I think we may be reaching a tipping point, and the rush of new projects like Transmountain pipeline expansion is pushing against our treaty rights, taking away areas where we fish and killing the fish y destroying the habitat. I fear I will end my lifelong stewardship of the Swinomish fisheries resources by presiding over the dim and fading twilight of our fishing right and our culture.<sup>26</sup>

These are real and serious concerns of the Swinomish, and they are shared by other U.S. tribes. VFPA has altogether ignored these concerns and the information Swinomish and other U.S. tribes presented, has not consulted with the U.S. tribes, and has not provided any information or analysis regarding these concerns. The concerns do not end at the border. The

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<sup>20</sup> Transcript, Review Panel Public Hearing, May 15, 2019, Forsman testimony, pp. 2556-2557; 2586-2589.

<sup>21</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶¶36, 37.

<sup>22</sup> *Id.*, at ¶¶35-38.

<sup>23</sup> *Id.*, at ¶38, Ex. D *Treaty Rights at Risk* Statement of the Problem.

<sup>24</sup> Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration) Vol. 6 (Nov. 28, 2018) at ¶¶2801-2802.

<sup>25</sup> Loomis has been in the position for over 40 years and has chaired many state and tribal working groups, including the Northwest Indian Fish Commission and the Pacific Salmon Commission Fraser River Panel. On which she has served upon and chaired from time to time the U.S. Section. Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶¶4-8.

<sup>26</sup> Exhibit 1: Declaration of Lorraine Loomis (May 27, 2015), ¶44. *See also* Transcript, Review Panel Public Hearing, May 25, 2019, Lekanoff testimony, p. 2448.

effects on the Coast Salish peoples does not respect the border, any more than the Coast Salish culture is defined by that border. The effect of the Project on Swinomish and other U.S. tribes was given no consideration by the proponent, let alone full and fair consideration, and as the record stands it will never be given any consideration at all. If the Review Panel proceeds with an environmental assessment without VFPA performing its duty to address and analyze the issues by considering the effects upon Swinomish and other U.S. tribes, the Review Board will be unable to carry out its obligations under both domestic and international law, for the reasons summarized below.

## II. THE ENVIRONMENTAL ASSESSMENT IS INCOMPLETE AND INADEQUATE.

### A. The Environmental Assessment Does Not Consider Cumulative Impacts.

Swinomish has legitimate concerns about how the Project will impact its treaty fishing rights, the safety of its fishers, and the fish habitat of the Salish Sea. Yet VFPA has ignored the concerns of Swinomish and the other U.S. tribes related to the project.<sup>27</sup>

This omission of consultation with Swinomish and consideration of its concerns by VFPA is error enough, but this also highlights another significant omission: failure to address how the Project will add to the cumulative impacts upon the Salish Sea from existing and anticipated vessel traffic. There are several projects on the drawing board on both sides of the border that will affect the Salish Sea, including the Trans Mountain Pipeline expansion in Canada, which will add some 696 transits of the Salish Sea by oil tankers,<sup>28</sup> and the Marathon (f/k/a Tesoro and Andeavor) Xylene Project in the U.S.<sup>29</sup> These and other projects share or overlap the same route in the Salish Sea as the Project, and will all impact Swinomish fishing and fisheries. “The cumulative effects felt by Swinomish from all of these projects will be staggering.”<sup>30</sup>

The concerns of Swinomish and others about the cumulative effects of increases in transboundary shipping have not been addressed in the review of any of these projects and have been ignored thus far in this Project as well. Without determination of a baseline and an analysis

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<sup>27</sup> See, e.g., IR7-31 (U.S. tribes’ views ignored); Appendix IR 10-01-C3 (local assessment area does not extend into U.S.); IR13-25 (no consultation with U.S. tribes on cultural use); Transcript, Review Panel Public Hearing, May 25, 2019, Ehrlichman testimony, pp. 2469-271 (no mention of Swinomish or U.S. tribes in VFPA submissions).

<sup>28</sup> A77045-1 NEB-Report-Expansion Project-OH-001-2014 at pg. 2.

<sup>29</sup> See Andeavor, Anacortes Upgrades EIS, available at <http://anacortsupgradeproject.com/eis> last accessed Jan. 20, 2019).

<sup>30</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018) at 98.

of the cumulative effect of the increase in shipping to be generated by all of these proposed projects in the Salish Sea, the CEAA lacks sufficient information to proceed with this Project.

VFPA has made no attempt to analyze the baseline of impacts upon treaty fishing and fishing habitat in the U.S. from existing vessel traffic. Without a baseline, it could not and did not analyze the impact its Project would add to the impacts of existing levels of vessel traffic. VFPA refused to do a cumulative impacts assessment in its cursory analysis of the *Current Use of Lands and Resources for Traditional Purposes* (which excluded U.S. tribes). The applicant's complete lack of engagement on the critical issue of cumulative impacts was indicated in its glib and disingenuous "view on the effectiveness of mitigation measures." Without analysis, VFPA offered a conclusory "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>31</sup> This is undoubtedly false as to many First Nations, but it is ludicrous as applied to the U.S. tribes like Swinomish who were totally excluded from the conclusory "analysis", and yet have submitted substantial information to the contrary. VFPA's "view" flies in the face of the knowledge and lived experience of Swinomish and other U.S. tribes. It ignores the specific and verifiable evidence of existing, baseline impacts contained in the Swinomish sworn Declarations and in testimony before the Review Panel.<sup>32</sup> A full analysis of the Project's impacts must include the cumulative impacts of projects, including how the proposed increase in vessel traffic will add to the existing adverse effects upon Swinomish and other U.S. tribes.

B. The Scope of the VFPA's Environmental Assessment is Artificially Constricted.

The serious interests and concerns of Swinomish and other U.S. tribes, and the information they presented substantiating those interests and concerns, fall within the revised scope of reference for the Project's environmental assessment; the revised scope requires consideration of the full impacts of the Project, including the impacts of marine shipping in the Salish Sea upon Swinomish and other U.S. tribes. But the Review Panel cannot address these issues because the proponent of the Project has not presented anything concerning them. As previously discussed, increased vessel traffic generated by the Project threatens tribal members' access to and use of the traditional fishing grounds that constitute their U&As. "The shipping zones ... for both the U.S. and Canada within our U&A are not exclusion zones. We have a right

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<sup>31</sup> IR13-25, pg. 3.

<sup>32</sup> See, e.g., Transcript, Review Panel Public Hearing, May 25, 1019, Forsman testimony, pp. 2556-2557; 2586-2588.

to fish in those areas, and we do.”<sup>33</sup> In addition, the shipping activity will further degrade fish and habitat resources, thereby reducing Swinomish treaty fishing harvests that have sustained the tribe since time immemorial.

The Project cannot be analyzed properly by confining the analysis of impacts, as VFPA has, to the ecosystem and fishery resource as though impacts will scrupulously heed the border and remain in Canadian waters. The shipping lanes to and from Vancouver through the San Juan Islands area and the Strait of Juan de Fuca lie within both countries; they are shared by vessels traveling to and from ports on the Salish Sea in both countries, and the impacts from that vessel traffic are visited upon both countries. Since the project ships will ply U.S. as well as Canadian waters, there can be few cases that more clearly illustrate the need for assessment of cross-border impacts.

Information and analysis addressing transboundary issues are necessary for consideration of the full environmental impacts associated with and caused by the Project. That review would include direct, indirect and cumulative impacts to fisheries, navigation, vessel traffic, and imperiled species.<sup>34</sup> VFPA’s decision to ignore these factors in addressing whether the Project is likely to cause significant adverse environmental effects assures an incomplete picture of the devastating effects the Project will have.

The broader scope of assessing impacts advanced here is supported by *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, which held that excluding project-related shipping from consideration “resulted in successive deficiencies” and was improper.<sup>35</sup> Here, the failure to consider vessel traffic impacts of the Project on the environment and on indigenous communities like Swinomish on both sides of the border is a similar deficiency.

### III. THE REVIEW PANEL MUST CONSIDER APPLICABLE INTERNATIONAL LAW.

Any project that generates vessel traffic along the international border in the Salish Sea is a project with consequences that do not respect the border. Swinomish and other U.S. tribes have clearly demonstrated interests that are tied to the Salish Sea as a whole, regardless of which side of the border spawns or invites the vessel traffic. As discussed above, the Project will impair and impede Swinomish fishing and use of fishery resources that are central to the

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<sup>33</sup> Exhibit 4: Declaration of Brian Cladoosby (Dec. 4, 2018), ¶4.

<sup>34</sup> Exhibit 22: U.S. Tribes’ Letter of Support for Living Oceans/Rainforest, Tsleil-Waututh Nation Notice of Motion.

<sup>35</sup> *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at ¶470.



preservation of Swinomish economy, culture and identity. The Project poses an existential threat to the tribe.

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 Swinomish’s main concerns, as its culture and economy centers on the environmental health of the renewable resources of the Salish Sea. In addition, Indigenous international law recognizes the importance of land, culture and resources as essential to the survival and self-determination of Indigenous peoples. The Project implicates both of these international law concerns.

These international law obligations are discussed at some length in the *Further Comments on Sufficiency of Information* concerning the Project, submitted on February 8, 2019 by the U.S. Tribes, including Swinomish. We merely summarize some of the most salient points here, and request that the Review Panel apply the applicable international norms and principles.

A. UNDRIP.

Canada endorses without qualification the United Nations Declaration of the Rights of Indigenous Peoples (“UNDRIP”),<sup>36</sup> which 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 relationships 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 that regard.<sup>37</sup>

UNDRIP also provides that indigenous peoples have these rights:

- > Not to be subjected to the destruction of their culture;<sup>38</sup>
- > To practice and revitalize their cultural traditions and customs, which includes maintaining, protecting and developing their cultures;<sup>39</sup>
- > To practice and develop their spiritual and religious traditions, customs and ceremonies, and to maintain and access in privacy their religious and cultural sites;<sup>40</sup>

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<sup>36</sup> Available at [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>37</sup> UNDRIP, *supra*, Article 25.

<sup>38</sup> UNDRIP, Article 8.

<sup>39</sup> UNDRIP, Article 11.

- > To revitalize, use, develop and transmit to future generations their histories, languages, oral traditions and philosophies;<sup>41</sup> and
- > To maintain and develop their traditional knowledge, and cultural heritage and expressions, and the manifestations of their cultures, including oral traditions.<sup>42</sup>

In addition, UNDRIP recognizes transboundary issues and problems of indigenous peoples and that indigenous peoples have a right to maintain cultural, spiritual, political and economic ties with members of the group and other peoples across a border.<sup>43</sup> Further, the U.N. Special Rapporteur on the rights of indigenous peoples specifically advised Canada to address issues affecting tribal cultures spanning the U.S. – Canada border.<sup>44</sup> This report indicates that Canada has fallen short in addressing the types of transboundary issues raised by Swinomish concerning this Project.

B. Customary International Law.

Canada has an obligation under international law to prevent its territory from being used so as to cause harm outside its jurisdiction. This is one of the most fundamental and widely recognized international customary law norms.<sup>45</sup>

C. Law of the Sea.

Canada has ratified the United Nations Convention on the Law of the Sea (“UNCLOS”), which requires Canada to “take all measures necessary to ensure the activities under [its] jurisdiction or control are so conducted as to not cause damage by pollution to other states and their environment.”<sup>46</sup> While the Law of the Sea provides for “innocent passage” by one country through another’s coastal waters, the exercise of that right is permitted only if it is in compliance with other applicable international law and “not prejudicial to the peace, good order or security

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<sup>40</sup> UNDRIP, Article 12

<sup>41</sup> UNDRIP, Article 13.

<sup>42</sup> UNDRIP, Article 31.

<sup>43</sup> UNDRIP, Article 36(1).

<sup>44</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), pp. 40-50.

<sup>45</sup> See David Hunter, James Salzman & Durward Zaelke, *International Law and Policy*, pp. 472-475 (4<sup>th</sup> ed. 2010).

<sup>46</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 in force Nov. 16, 1994).

of the coastal state.”<sup>47</sup> The evidence submitted by Swinomish and other U.S. Tribes in this proceeding demonstrate that the Project proposal will harm U.S. treaty fishing and this norm.

D. Other International Law.

In addition to UNDRIP, international law generally, through a number of covenants, declarations, and other international law instruments, recognizes the special ties that indigenous peoples have to their territory, resources and the environment and the concomitant duties of states to not impair and protect those ties.<sup>48</sup>

If the Project is approved without VFPA’s consultation with or consideration of its effects upon Swinomish and other U.S. tribes, the many and increasingly robust protections in international law for indigenous peoples and against adverse transboundary effects that harm the environment, degrade and impair Swinomish property, culture, economy, and survival as a people. The Review Panel has a moral and legal obligation to prevent that from occurring.

IV. THE PROJECT WILL HAVE DISASTROUS EFFECTS UPON THE ENDANGERED SOUTHERN RESIDENT KILLER WHALES.

Swinomish joins the other U.S. tribes and a number of other commenters in urging the Review Panel to reject the Project because of its effect on the Southern Resident Killer Whales (“SRKW”) who hunt and live along the shipping route for the vessel traffic that the Project will generate. Vessel traffic through the SRKW habitat interferes with their ability to communicate and hunt salmon hinders their movement, and drives them from their accustomed haunts.<sup>49</sup> The SRKW are in dire straits, having dwindled to just a few dozen members, and they are listed as an endangered species in the U.S.<sup>50</sup> Killer whales are closely linked to the cultural identity of the Coast Salish peoples, including Swinomish.<sup>51</sup> The Review Panel should consider the

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<sup>47</sup> *Id.*, Section 3, art. 19, para. 1. Further, under art. 21 any innocent passage must adhere to the laws and regulations adopted by the coastal state for “the prevention of the infringement of the fisheries laws and regulations.” The Treaty of Point Elliot of 1855 ensuring Swinomish access to its U&A is one such law.

<sup>48</sup> *See, e.g.*,

- UN Committee on Economic, Social and Cultural Rights – General Comment No. 21, Para. 1, UN Doc. E/C.12/GC/21 (December 21, 2009) (right of everyone to take part in cultural life, citing Art. 15(1)(a), of the International Covenant on Economic, Social and Cultural Rights);
- Permanent Council of the OAS, Record of Current Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser/L/V/II/LXVI/Doc. 334/08 rev. 6 art XVIII (1) (January 20, 2011).

*See* Further Comments on Sufficiency of Information concerning the Project submitted on Feb. 8, 2019, pp. 40-50.

<sup>49</sup> Exhibit 13: Washington State SRKW Task Force Report and Recommendations (Nov. 16, 2018), pp. 27-28.

<sup>50</sup> Exhibit 23: Killer Whale overview, National Oceanic and Atmospheric Administration (NOAA) Fisheries.

<sup>51</sup> Exhibit 8: NEB Hearing Order MH-052-2018 (Trans Mountain Pipeline Reconsideration) at ¶2854 (A-96192-1).

considerable information from the U.S. concerning the SRKW and reject the Project because of its grave threat to the survival of the SRKW.

## CONCLUSION

The Project must be rejected. The proponent VFPA has not presented sufficient information on the full scope of the impacts of the Project. The Project will generate substantial risk and harm to Swinomish and other U.S. tribes, yet VFPA has neither consulted nor presented any information on these transboundary effects that must be considered under current law. The treaty fishing rights, culture and identity of the Swinomish and other U.S. tribes cannot be ignored, and the patent failure to address these impacts renders insufficient the information proffered by VFPA.

Date submitted: August 26, 2019

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