



COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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TESTIMONY OF
Columbia River Inter-Tribal Fish Commission
The Honorable Paul Lumley, Executive Director
Regarding S. 3222, the *Columbia River In-Lieu and Treaty Fishing Access Sites*
Improvement Act
Senate Committee on Indian Affairs
United States Senate
September 14, 2016

Chairman Barrasso and members of the Committee, the Columbia River Inter-Tribal Fish Commission (CRITFC) is pleased to share its view on Senate Bill 3222, the Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act. I am testifying in support of this legislation and on behalf of the four member tribes of the Columbia River Inter-Tribal Fish Commission wish to express our appreciation for the bold attention and unity of the Northwest Congressional delegation to assemble and introduce legislation, including S. 3222, to rectify wrongs stretching back nearly eighty years that were done to tribal communities along the river. My testimony will address the history and legal authority of CRITFC, a brief history of the In-Lieu and Treaty Fishing Access Sites and conclude with a current assessment of conditions and needs at the sites themselves. Though S. 3222 does not explicitly address law enforcement needs at the fishing sites my testimony will speak to this service's fundamental role in public safety.

Commission History and Legal Authorities

The combined ancestral homelands of our four tribes cover roughly one-third of the entire Columbia River Basin in Washington, Oregon, and Idaho. Our existence on the Columbia River stretches beyond 10,000 years to time immemorial. Salmon has always been a unifying force and we rely on its abundance for physical and cultural sustenance. Collectively, we gathered at places like Celilo Falls to share in the harvest, forging alliances that exist today. Our fishing practices were disciplined and designed to ensure that the salmon resource was protected, and even worshipped, so it would always flourish.

Salmon is so fundamental to our society that in 1855 when our four sovereign tribes¹ and the United States collaborated and negotiated treaties, our tribal leaders explicitly reserved—and the U.S. agreed to assure—our right to fish in perpetuity within our ancestral homelands as well as to “take fish at all usual and accustomed places.” The treaties of 1855 were all ratified by the Senate of the United States. The Supremacy Clause of the Constitution applies to all such treaties.

¹ Treaty with the Yakama Tribe, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

The Columbia River Inter-Tribal Fish Commission was formed in 1977 by resolutions from the four Columbia River treaty tribes: Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes and Bands of the Yakama Nation, and Nez Perce Tribe. CRITFC's mission is to ensure a unified voice in the overall management of the fishery resource and to assist in protecting reserved treaty rights through the exercise of the inherent sovereign powers of the tribes. CRITFC provides coordination and technical assistance to the tribes in regional, national and international efforts to ensure that outstanding treaty fishing rights issues are resolved in a way that guarantees the continuation and restoration of our tribal fisheries into perpetuity.

Today the CRITFC tribes are globally-recognized leaders in fisheries restoration and management, working in collaboration with state, federal, and private entities. We are principals in the region's efforts to halt the decline of salmon, lamprey, and sturgeon populations and rebuild them to levels that support ceremonial, subsistence and commercial harvests. To achieve these objectives, our actions emphasize 'gravel-to-gravel' management including supplementation of natural stocks, healthy watersheds, and collaborative efforts.

Programs referenced in this testimony are carried out pursuant to the Indian Self-Determination and Assistance Act. Our programs are integrated as much as possible with state and federal salmon management and enforcement efforts.

A Brief History of the In-Lieu and Treaty Fishing Access Sites

Before the advent of non-Indian settlement, our people had thriving salmon-based communities all along the Columbia River. After the treaties were negotiated and ratified in the 1850s, our people living in the Columbia Basin continued to fish at numerous places along the Columbia River and its tributaries.

By the late 1880s, non-Indians had encroached upon many of the treaty tribes' usual and accustomed fishing grounds and access to the fishing grounds was blocked. During 1888-89, George Gordon, Special Indian Agent, investigated the Indian fisheries along the Columbia River and several tributaries and found that Indian fishers were being excluded from many of their traditional fishing grounds. Agent Gordon submitted his findings and recommended that the U.S. government purchase or withdraw from entry approximately 2,300 acres along the Columbia for use by tribal fishers. Although the government never acted on Agent Gordon's recommendations to acquire lands for tribal fishers, the U.S. did file several lawsuits seeking to protect the tribes' right to take fish at usual and accustomed fishing grounds (e.g., *U.S. v. Taylor*, *U.S. v. Winans*, *U.S. v. Seufert Brothers*, *U.S. v. Brookfield Fisheries*). As a result of these lawsuits, the tribes' treaty-protected right of access to usual and accustomed fishing grounds was firmly established as a matter of law.

During the 1930's, the Army Corps of Engineers (Corps), in response to congressionally mandated studies, proposed that a series of dams be built along the Columbia River. The Bonneville Dam was the first dam to be built in accordance with the Corps of Engineers proposals. Construction of the Bonneville Dam inundated the tribes' ancient fishing grounds and villages from the dam site to above The Dalles, Oregon. In 1939, a settlement agreement was

reached between the tribes and the United States relative to the inundation of these places. This agreement was approved by resolution of the Warm Springs, Yakama, and Umatilla tribes in 1939 and by the Secretary of War in 1940; it provided for the War Department to acquire approximately four hundred acres of lands at six sites along the Columbia River and install fishing and ancillary facilities to be used by tribal fishers.

In 1945, Congress included in the Rivers and Harbors Act of 1945 an authorization to the Secretary of War to, “acquire lands and provide facilities in the States of Oregon and Washington to replace Indian fishing ground submerged or destroyed as a result of the construction of Bonneville Dam ... and that such lands and facilities shall be transferred to the Secretary of the Interior for the use and benefit of the Indians, and shall be subject to the same conditions, safeguards, and protections as the treaty fishing grounds submerged or destroyed” (P.L. 79-14). An appropriation of \$50,000 was authorized; this sum was increased to \$185,000 in 1955. The legislative history indicates that the 1945 congressional authorization intended to implement the terms of the 1939 agreement. See House Report No. 1000, 78th Congress, 2nd Session; Senate Report No. 1189, 78th Congress, 2nd Session.

There were numerous disagreements among and between the Corps, the Bureau of Indian Affairs (BIA), state and local governments, and the tribes regarding the acquisition and development of the sites. It took the Corps nearly twenty years to acquire five sites, totaling slightly more than 40 acres. Two sites were essentially the same as proposed in 1939 (Wind River; Underwood); three sites were different (Lone Pine; Cascade Locks; Cooks); and the sixth site (Big Eddy) was acquired but later subsumed by The Dalles Dam project.

Over the years, other dams were built, destroying other treaty fishing grounds and villages, and other development occurred, leading to other fishing conflicts and restrictions. In 1973, as a result of litigation initiated after the Army Corps of Engineers proposed to alter the water levels of the pools behind the dams, a settlement order was entered by the U.S. District Court for Oregon. The judgment and order in that case, *CTUIR v. Calloway*, noted that the Secretary of the Army and the Secretary of the Interior agreed to propose legislation providing for the acquisition and improvement of additional sites and the upgrading of all sites to National Park Service standards. Legislation was forwarded to Congress in 1974, but no action was taken by Congress at that time. The BIA pursued similar legislation again in the early 1980s but failed to garner Administration support.

During the late 1970s and 1980s several things occurred that influenced in-lieu site issues. As a result of the improvement in the fish runs in the mid-1980s, the pressure on the existing in-lieu sites and the need for improvements and additional access to fishing sites increased. Pressure on the existing in-lieu sites and other public camping/boat launching sites also resulted from the increase in recreational activities along the Columbia River. In addition, between 1982 and 1986 numerous bills seeking to establish a Columbia Gorge National Scenic Area were considered by members of the Northwest congressional delegation. During consideration of the Gorge legislation, the tribes once again brought attention to the in-lieu site issue, specifically the fact that the tribes were still owed significant acreage for fishing sites from the 1939 agreement. Although the congressional delegation decided not to address the in-lieu site issue in the Gorge

legislation, several offices indicated they would consider providing additional fishing access and support sites in the future (Senator Evans (R-WA) and Senator Hatfield (R-OR)).

In 1987 and 1988, at the request of Senator Evans and the Senate Select Committee on Indian Affairs, the tribes identified a number of locations which could be suitable for additional access and support sites. All of these sites were already being used by tribal fishers. During hearings held before the Senate Select Committee in April 1988, representatives from the Corps of Engineers testified that the Corps required additional legislation before the Corps could provide the tribes additional sites along the Columbia. The 1988 legislation (P.L. 100-581) provided the Corps with the authority the agency suggested to the Select Committee at the hearing.

SUMMARY OF P.L. 100-581

Public Law 100 581, Title IV Columbia River Treaty Fishing Access Sites was enacted in November 1988. The legislation has six major elements:

§ 401(a) - designates certain federal lands along the Columbia River between Bonneville and McNary dams to be administered to provide access to usual and accustomed treaty fishing places and other ancillary fishing activities for members of the Nez Perce, Umatilla, Warm Springs and Yakama tribes.

§ 401(b) - requires the Corps of Engineers to (1) identify and acquire at least six additional sites adjacent to Bonneville Pool from willing sellers for the purpose of providing access and ancillary fishing facilities; (2) improve the designated federal lands and acquired lands to provide facilities for treaty fishing and ancillary activities and then transfer those lands and facilities to the Department of Interior for the purpose of maintaining the sites; and (3) make improvements at the five existing (original) in lieu sites.

§ 401(c) - specifies that the Corps shall treat the costs of implementing the §§ 401(b)(2) (b)(3) as project costs of the Columbia River projects and allocate such costs in accordance with existing principles of allocating Columbia River project costs.

§ 401(d) - authorizes appropriation of \$ 2 million to acquire the Bonneville Pool sites from willing sellers.

§ 401(e) - provides the Secretary of Interior with the right of first refusal to accept any excess federal lands adjacent the Columbia between Bonneville and McNary dams and notes the total acreage provided adjacent to the Bonneville Pool not exceed 360 acres.

§ 401(f) - contains a savings provision to protect existing treaty and other rights.

Several post authorization amendments have been enacted that modify the legislation. These amendments provide the Corps with flexibility on technical boundary adjustments at the § 401(a) sites, increase the authorization for appropriations to acquire sites in Bonneville Pool to \$4 million, authorize the Corps to transfer capitalized funding for operations and maintenance to the BIA, and authorize the Corps to make improvements at Celilo Village.

SITE IMPLEMENTATION ISSUES

Site Development and Planning

The tribes, Corps, and BIA (the Task Force) met regularly from 1989-2011 to discuss and address various implementation issues. The construction of facilities occurred in incremental contracts, each issued for a set of sites (4-6 at a time) and taking approximately one year to complete. Conceptual site designs were developed in the early 1990s and the Corps obtained OMB budgetary authorization to proceed with implementation using cost estimates based on the conceptual designs. The Task Force refined these designs as construction proceeded based on cost, site constraints, cultural resources issues, and engineering feasibility as well as the tribes' recommendations, fishers' needs, and BIA input.

Throughout the implementation process, the Task Force addressed various issues with a cooperative, government-to-government approach. Although there was some bureaucratic resistance initially, the cooperative approach proved to be effective for developing solutions to difficult issues. For example, as many of the new sites were located near historic fishing places, the Task Force had to address the potential for impacts to cultural resources. The Task Force developed a cultural resources MOA that outlined various processes and considerations that respected the tribes' concerns. Similarly, the Tribal Employment Rights Offices assisted the Task Force in developing tribal employment opportunities during site construction.

The Corps completed construction at the sites in 2011. Facilities at the sites include access roads and parking areas, boat ramps and docks, fish cleaning tables, net racks, drying sheds, restrooms, mechanical buildings, and shelters. Six additional sites were acquired along Bonneville Pool from willing sellers; with the 5 original in-lieu sites and the addition of one 401(a) (designated) site, there are now 12 sites in Bonneville Pool totaling 189 acres. The acreage amount for all the sites is approximately 718 acres. The sites are located throughout the three-pool, 140-mile long, Zone 6 area. There are ten new treaty fishing launch facilities in Washington; the total number of sites with launch facilities in Washington is 12. There are six new launch sites in Oregon; the Oregon side did not have sites with launch facilities prior to P.L. 100-581.

Operation and Maintenance Issues

For all new treaty fishing access sites (those designated in the P.L. 100-581 legislation and those acquired by the Corps of Engineers) and for the new facilities at the original in-lieu sites, the legislation requires that the Corps transfer those sites and facilities to the Department of Interior "for the purpose of maintaining the sites." There is a long history of inadequate funding to provide operation and maintenance and enforcement protection services at the sites. Faced with the prospect of having additional sites added to its administrative responsibilities without additional funding, the BIA sought to make the Corps responsible for funding the O&M. In 1994, the Corps refused to begin construction under P.L. 100-581 until BIA agreed to a transfer process for when the construction was completed, while the BIA refused to agree to a transfer process until Corps provided O&M funding.

This impasse between the two agencies led to a meeting between the agencies and the tribes in September 1994. Both agencies were represented by key staff at the ASA level. The agencies agreed to work out a solution to the O&M issue and in 1995 the Corps and BIA agreed to an interagency MOU for the Transfer, Operation, Maintenance, Repair and Rehabilitation of the Columbia River Treaty Fishing Access Sites (1995 MOU). The 1995 MOU sets forth procedures for effectuating the transfer of facilities, lands, and for provision of operations and maintenance funding. The intent of the plan was for the Corps to provide a lump sum of monies appropriated to it for each set of sites to be built and then transfer those monies to the BIA upon completion of construction. The amount of money needed was calculated under a capitalized cost basis, the assumption being that the BIA would invest the lump sum in an interest bearing account and thus have steady funding to maintain the sites for five decades. An amendment to P.L. 100-581 (P.L. 104-109, Section 15, February 1996) provided the authority to transfer funds and property between the Corps and BIA.

In a February 10, 1998 memorandum, the Department of the Interior Solicitor's Office determined that BIA could enter into a contract under P.L. 93-638 with a tribal organization to assume certain BIA responsibilities for the sites constructed or rehabilitated pursuant to P.L. 100-581, including fund investment and administration, provided all four tribes named in that statute pass resolutions authorizing the tribal organization to enter such a contract. Eventually, after each tribe passed resolutions authorizing CRITFC to be the contractor, the CRITFC and the BIA entered into a 638 contract in 2003.

The 1995 MOU did not pan out as intended as the BIA lacked authority to invest and generate interest earnings on the Corps-provided O&M funds. In addition, the original capital account for O&M Fund for the sites assumed that funds could be invested in federal securities at the then prevailing interest rate of approximately 5% and that this investment scenario would provide a stream of revenues to cover annual O&M costs. These interest rate assumptions, which over a 30-year retrospective period appeared reasonably safe, did not hold true. Effective federal interest rates dropped below 2% in 2002 and later collapsed in 2008 and have remained well-below 1% since 2009. In addition, BIA expended principal from the capital account between 1998 and 2003 to cover annual O&M costs. By the time CRITFC assumed 638 contract responsibilities in 2004, BIA's expenditure of the principal and fallen federal interest rates, had diminished the time horizon of the useful life of the initial capitalization.

CRITFC assumed O&M responsibilities for the sites on January 1, 2004. The Commission's objectives for O&M program are: 1) Invest the principal and earnings to maximize the time horizon over which the O&M can be provided for the sites; 2) Perform the O&M for the sites in a cost effective manner that also ensures they are maintained in good condition; and 3) Provide for tribal member employment. The program employs seven CRITFC tribal members (Six full-time) who conduct the operations and maintenance of the sites pursuant to approved annual budgets. The investment program is managed to maximize the time horizon for the funds provided, but given higher than anticipated levels of use and costs, current funding levels, lower than anticipated interest rates on federal securities, and financial constraints, staff projects the funds to be depleted between 2022-2023 which is approximately 20 years earlier than planned.

CRITFC is working on options to extend the time horizon for the O&M funding. These options include the BIA placing the Treaty Fishing Access Sites on the Indian Affairs Facilities Management System / MAXIMO (IAFMA to provide access to annual federal facilities funding for these sites (the five original in-lieu sites are already on the BIA's FMIS)). Another option is to supplement the O&M account with annual BIA appropriations. This would involve developing a BIA program and account for In-lieu and TFAS O&M funding. Both of these actions would be covered by the terms of CRITFC's existing Self-Determination Act Agreement for O&M. See Section (b)(3)(B)(v) and (vi).

An Assessment of needs

The 31 In-Lieu and Treaty Fishing Access Sites are highly used, often exceeding their capacities and compounded by extended seasonal and year-round occupancy. The sites were designed in the early 1990s based on estimated use during the then existing commercial gill net seasons. In the early 1990s the primary commercial season was the fall gill net season, which ran for four to six weeks between September and October. Over the past twenty years, the salmon runs started on a road to recovery which has led to increases of salmon abundance in Zone 6 of the Columbia River and to increases in the numbers and durations of the commercial gill net seasons when Columbia River treaty tribal members can exercise their right to harvest salmon. The levels of use at the In-lieu and TFAS have increased accordingly and currently many sites are occupied and used for 18 to 20 weeks of the 22-week period between mid-May and mid-October each year.

The increase in usage duration, 300% to 500% over initial estimates, is also tied to a similar increase in usage population, 300% to 470%, on most of the sites between mid-May through mid-October. The increase in duration, population, and use of the sites has naturally caused an increase in utility costs, i.e. water, sewer, electricity and garbage. O&M labor costs have also increased over the course of the 13 years that CRITFC has had the BIA 638 Self-Determination Act contract, not only because of the increased use but five TFAS were added since 2003, increasing the original number of sites from 26 to the 31 we have today.

The increase in duration and population has led to eight out of twelve In-lieu and TFAS that have wells on them being identified by the Indian Health Service as Public Water Systems. These sites are: North Bonneville, Stanley Rock, Dallesport, Celilo, Maryhill, Pasture Point, and Roosevelt TFAS, and Cooks Landing In-lieu site.

Site evaluations conducted in 2016 by CRITFC and the Yakama Nation found 17 of the 31 sites with distressed conditions and the remaining 14 sites with specific unmet needs. These evaluations were based on several criteria including safety, health, sanitation, and existing utilities. Among the most common needs are water based; for example, wash stations, showers, and drinking water systems. There are multiple instances of need for additional restrooms and fire suppression infrastructure. Wastewater disposal and maintenance and garbage collection are also continuing concerns. Four of the five original in-lieu sites were constructed without regards to washing dishes or anticipating occupancy for more than a few days at a time.

Major expenses and incidents that bear on the continued increase costs of maintaining the In-lieu and TFAS are:

- Number of sites available;
- Weeks of commercial gillnet seasons;
- Population using the sites;
- Periodic major clean-ups;
- Fuel costs, utility costs; and
- Other relevant increases or actions – SDWA Public Water System, Acts of vandalism.

We would be pleased to share our analysis with the Committee upon your request.

Law Enforcement Issues

While not directly addressed by S. 3222, public safety provided by a fully equipped law enforcement detail are needed at the 31 sites and especially so for the off-reservation Columbia River corridor where the tribes conduct significant fisheries on a nearly year-round basis. Over the years, there have been numerous jurisdictional issues relative to criminal and civil law enforcement by tribes, BIA, Corps of Engineers, and state and local departments. Questions of where tribal, state, and federal jurisdictions begin, end, or are concurrent are complicated and unsettled judicially and politically.

In 1997, the Nez Perce, Umatilla, Warm Springs and Yakama tribes passed resolutions authorizing and supporting the Columbia River Inter-Tribal Fish Commission to contract with the BIA under P.L. 93-638 for the law enforcement services at the sites. The Commission's law enforcement department, Columbia River Inter-Tribal Fisheries Enforcement, has had a 638 contract with the BIA since the early 1980s to provide fisheries enforcement services in Zone 6 for the four Columbia River treaty tribes. The Commission's 638 contract submission, which included a scope of work based on a 1990 BIA proposal and would have provided 24/7 law enforcement coverage at the six sites on line at the time, was declined by the BIA due to lack of funding. Several subsequent attempts were similarly declined. Still, Columbia River Inter-Tribal Fisheries Enforcement officers continued to respond to calls but without dedicated contractual support from BIA could only address the most serious problems.

In the early 2000s BIA assigned one or two uniformed officers to the Columbia River sites. Their presence was scarce, no one knew how to contact the officer(s) or BIA dispatch, the officers had little or no knowledge of the tribal fishing practices or treaty case law and little or no coordination with Columbia River Inter-Tribal Fisheries Enforcement. Tribal members knew how to contact Columbia River Inter-Tribal Fisheries Enforcement dispatch and had rapport with Columbia River Inter-Tribal Fisheries Enforcement officers. Tribal members and leadership became increasingly dissatisfied with the BIA enforcement services, or lack thereof. As the fishing access sites were developed and fish runs improved, the number of tribal fishers using the sites increased and site usage throughout the year increased. Consequently, law enforcement problems and calls increased. These increases, compounded by the limited and ineffective policing by BIA, added to the pressure on the capacity of CRITFC law enforcement.

In September 2010, CRITFC submitted to the BIA another proposal to enter into a contract under Title I of the Indian Self-Determination and Education Assistance Act, P.L. 93-638 as amended, to assume BIA law enforcement responsibilities and associated funding for law enforcement in the area of the Columbia River, including law enforcement responsibilities for the sites named in P.L. 100-581 and P.L. 79-14. This proposal was again supported by tribal resolutions and was finalized in 2011.

In addition to law enforcement responsibilities, our officers are also tasked with search and rescue duties. These incidents put extreme pressures on staffing and resources when operations extend over many days. Often when tragedies in the treaty fishery occur, families establish vigil camps that are occupied until the missing individual is recovered. This requires a constant security presence. At this point, CRITFC would have major challenges in conducting search and rescue operation and camp security at the same time.

Currently, capacity allows for response to calls for service (reactive policing). There is very little capacity in terms of implementing problem-oriented policing and community-oriented policing (proactive prevention) strategies, at least in any comprehensive manner. CRITFC is specifically concerned about the crime types of violence, substance abuse, child welfare, and property crimes. In order to fully achieve the capacity of a modern policing service at the In-lieu and Treaty Fishing Access Sites, the annual funding need is approximately \$942,000 (not including indirect costs).

Our immediate priority is to add two Patrol officers, one Sergeant, one Investigator and one Dispatcher. Full funding for this Enforcement need is \$943,000 which would support a total of four officers, one sergeant, an investigator and a dispatcher. I respectfully say again, S. 3222 does not explicitly address law enforcement but we wish to identify this critically important unmet need because of its direct relationship to public safety at the sites.

In summary, through the combined efforts of the four Columbia River Treaty Tribes, supported by a staff of experts, we are committed to assisting our tribes and tribal members to exercise fully their treaty reserved rights to fish in all usual and accustomed places. We support S. 3222, the *Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act* as means to ensure the treaty fishing sites are safe and sanitary.

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Columbia River In-lieu and Treaty Fishing Access Sites

