

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

UNION PACIFIC RAILROAD)
COMPANY,)

Appellant,)

v.)

WASCO COUNTY BOARD OF)
COMMISSIONERS,)

Respondent,)

and)

FRIENDS OF THE COLUMBIA GORGE,)
COLUMBIA RIVERKEEPER, and)
OREGON PHYSICIANS FOR SOCIAL)
RESPONSIBILITY,)

Intervenor-Respondents,)

and)

CONFEDERATED TRIBES AND)
BANDS OF THE YAKAMA INDIAN)
NATION,)

Intervenor-Respondent.)

CRGC NO. COA-16-01

Wasco County No.

PLASAR 15-01-004,

Order No. 16-067

PLAAPL-16-10-0001, 0002, 0003

NOTICE OF HEARING

FRIENDS OF THE COLUMBIA GORGE,)
COLUMBIA RIVERKEEPER, and)
OREGON PHYSICIANS FOR SOCIAL)
RESPONSIBILITY,)

CRGC NO. COA-16-02

Wasco County No.

)	
Appellant,)	PLASAR 15-01-004,
)	Order No. 16-067
and)	PLAAPL-16-10-0001, 0002, 0003
)	
CONFEDERATED TRIBES AND)	
BANDS OF THE YAKAMA INDIAN)	
NATION,)	
)	
Intervenor-Appellant,)	
)	
v.)	
)	
WASCO COUNTY BOARD OF)	
COMMISSIONERS and UNION)	
PACIFIC RAILROAD COMPANY,)	
)	
Respondents.)	

The Columbia River Gorge Commission will hold a hearing on June 13, 2017 at 9:00 a.m.¹ at the Fort Dalles Readiness Center, 402 E. Scenic Drive, The Dalles, Oregon, to consider oral argument in the matter concerning the consolidated appeals by Union Pacific Railroad and Friends of the Columbia Gorge, Columbia Riverkeeper and Oregon Physicians for Social Responsibility of Wasco County Nos. PLASAR 15-01-004, Order No. 16-067, and PLAAPL-16-10-0001, 0002, 0003.

The Commission derives its jurisdiction over the matter from Section 15(a)(2) of the Columbia River Gorge National Scenic Area Act (16 U.S.C. § 544m(b)(2)), which allows a person adversely affected by a final action or order of a county relating to the implementation of the Scenic Area Act to appeal to the Commission. If the parties wish to challenge the

¹ At the time of this notice, the Commission has not finalized its agenda for its meeting, so the Commission is noticing this hearing for the beginning of the meeting. The Commission finalizes its agenda approximately one week prior to its meeting. The Commission will provide a copy of the final agenda to the parties at that time.

jurisdiction of the Commission to hear this appeal, the parties may raise jurisdiction in their oral argument and the Commission will consider that argument as part of its deliberation and decision.

PARTIES AND *AMICUS CURIAE*

The parties in the appeals are:

- Union Pacific Railroad Company, represented by Brian Talcott and Ty Wyman, Dunn Carney Allen Higgins & Tongue, LLP, Portland Oregon.
- Friends of the Columbia Gorge, Columbia Riverkeeper and Oregon Physicians for Social Responsibility, represented by Gary K. Kahn, Reeves Kahn Hennessy & Elkins, Portland Oregon. Friends of the Columbia Gorge is also represented by Steven D. McCoy, Staff Attorney, Friends of the Columbia Gorge, Portland, Oregon.
- Wasco County, represented by Kristen A. Campbell, Timmons Law PC, The Dalles, Oregon.
- Confederated Tribes and Bands of the Yakama Indian Nation, represented by Anthony Broadman and Joe Sexton, Galanda Broadman, PLLC, Seattle, Washington.

The entities that have submitted *amicus curiae* briefs are:

- Oregon Wild, represented by David Becker, Law Office of David Becker, LLC, Portland, Oregon
- Confederated Tribes of Warm Springs, represented by Ellen H. Grover and Josh Newton, Karnopp Petersen LLP, Bend, Oregon.
- Columbia River Inter-Tribal Fish Commission, represented by Julie A. Carter and Robert C. Lothrop, Columbia River Inter-Tribal Fish Commission, Portland, Oregon
- Confederated Tribes of the Umatilla Indian Reservation, represented by Brent Hall, Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon

RECORD

The hearing is on the record developed by Wasco County. If a party appeals the Commission's action, the Commission will transmit Wasco County's record and the record of the Commission's action (under separate cover) to the court in which the appeal is filed. In this case, Wasco County provided only an electronic record to the Commission. In the event, the court requires or requests a paper copy of the record, Wasco County must supply the paper copy of its record. The Commission makes an oral recording of its proceeding (the parties' oral

argument and the Commission's deliberation and oral decision), but does not create a transcription. The oral recording is part of the record of the Commission's action and is available to the parties for duplication and transcription.

ATTORNEYS

An attorney may represent any party. It is not necessary, however, that parties have an attorney. Any individual may elect to proceed without an attorney and speak on his or her own behalf. Oregon and Washington law require that attorneys must represent governments and all non-governmental organizations or associations. The Commission's counsel, Jeffrey Litwak, will be present to provide advice to the Commission.

ROLE OF PRESIDING OFFICER AND COMMISSION

The Chair of the Commission will act as presiding officer at the hearing. In the absence of the Chair, the Vice Chair of the Commission or Chair of the Commission's Executive Committee will act as presiding officer. The presiding officer will rule on all motions, evidentiary questions, and other similar matters. The presiding officer may, at his or her discretion, refer motions and questions to the full Commission. The full Commission will hear argument on the appeals and will make an oral decision. The presiding officer is responsible for issuing the final decision on behalf of the full Commission. The Chair of the Commission is Bowen Blair, P.O. Box 730, White Salmon, WA 98672 (509) 493-3323, email: info@gorgecommission.org; the Vice-Chair of the Commission is the Honorable Don Bonker, at the same mailing address, phone number, and email address; the Chair of the Executive Committee is Lorrie Dekay, at the same mailing address, phone number, and email address. All filings should be sent to the Commission office with copies to other parties as appropriate. No person shall send any materials directly to the Chair, Vice-Chair, or Chair of the Executive

Committee at any address other than one of the addresses listed above. The Commission requests persons send a courtesy copy of any filing to the commission's counsel at jeff.litwak@gorgecommission.org.

The presiding officer will issue a written decision within 90 days after the date the Commission completes its deliberation and issues an oral decision.

EVIDENCE

The evidence the Commission may consider is derived only from the record submitted by Wasco County. New evidence may not be presented and will not be accepted in briefs or at oral argument.

Pursuant to Commission Rule 350-60-120(6), Wasco County is responsible for transmitting to the Commission, at or prior to the hearing, all audiotape recordings, large maps, and exhibits and documents that were not provided in the duplicated record, even if Wasco County chooses not to participate in oral argument. The presiding officer has broad authority to redress a failure to do so, including but not limited to, postponing the hearing, excluding a missing item from the record before the Commission, or taking official notice of the missing item and the content of the item as presented by a party that wishes to use the item.

ORAL ARGUMENT

Oral argument is conducted in accordance with Rule 350-60-120. Only parties that have filed briefs may present oral argument to the Commission. *Amici curiae* may not participate in oral argument unless the Commission specifically requests oral argument. If a party waives oral argument, the Commission will consider the case based on that party's brief along with the briefs and oral argument presented by the other parties. The parties may, with the consent of the Commission, stipulate to submit a case to the Commission on briefs without oral argument.

HEARING PROCEDURE

This matter is two consolidated appeals. The hearing will be as follows:

Members of the Commission received a copy of the county's administrative record on April 17, 2017. Approximately 20 days prior to the hearing, members of the Commission will receive a copy of this notice of hearing, a staff report from the Commission's counsel, the parties' and *amicus curiae* briefs, and a copy of Wasco County's National Scenic Area Land Use and Development Ordinance that was effective at the time Wasco County considered the application on appeal. The Commission will also provide the parties and *amici curiae* a courtesy copy of the staff report from the Commission's counsel. There is no opportunity to file a written response to the staff report. Parties may address points in the staff report as part of their oral argument.

At the hearing, the Commission will first take up preliminary matters, including disclosures of conflicts of interest and ex parte contacts, a pending motion from three of the *amici curiae* to participate in the oral argument in which Union Pacific Railroad Company is the appellant, and other issues that may arise.

Members of the Commission will then have an opportunity to ask questions that they wish the parties to address in their oral arguments. This opportunity for questions covers both appeal matters. Members of the Commission need not identify which appeal their questions relate to; the parties will address the questions they believe apply to their issues in their oral arguments.

After questions from the members of the Commission, the Commission will hear argument in case no. COA-W-16-01 (Union Pacific Railroad Company as appellant). The appellant in this matter shall be allowed 20 minutes for oral argument, which may be divided

between the initial presentation and rebuttal. The respondent and intervenor-respondents in this matter shall be allowed 20 minutes (shared) to respond. These are uninterrupted times; members of the Commission do not ask questions during the parties' oral arguments. The presiding officer will track the parties' overall time, but does not provide warnings at set times; the parties are responsible for managing the length of their arguments. If the Commission requests *amici curiae* to participate in this oral argument, it shall specify the length of argument and may permit the appellant time to rebut the argument. If requested to present oral argument, *amici curiae* shall present oral argument between the respondent's argument and the appellants' rebuttal.

The Commission will next hear argument in case no. COA-W-16-02 (Friends of the Columbia Gorge, Columbia Riverkeeper and Oregon Physicians for Social Responsibility as joint appellants). The joint appellants and intervenor-appellant in this matter shall be allowed 20 minutes (shared) for oral argument, which may be divided between the initial presentation and rebuttal. The respondents in this matter shall be allowed 20 minutes (shared) to respond.

After the parties' arguments, members of the Commission may ask brief questions of the parties and *amici curiae* concerning the facts of the case, the arguments made, and applicable law. Each side shall have two (2) minutes to answer each question, except that the Chair may allow a longer time provided that he or she allows both sides the same time to answer the question. Multiple appellants or respondents shall share the allotted time to answer a question. This opportunity for questions covers both appeal matters. Members of the Commission need not identify which appeal their questions relate to.

After oral argument is completed, the Commission will deliberate to an oral decision. Members of the Commission may ask questions of its counsel during deliberations; parties do not have an opportunity to respond to the Commission's counsel, except that the presiding

officer may at his or her discretion allow the parties to respond. The presiding officer may at his or her discretion also refer questions during deliberation to the parties, in which case each side will have the same amount of time to answer a question. The Commission may vote on each assignment of error separately or multiple assignments of error together. A simple majority of the Commission is required for a decision. The presiding officer participates in all voting. In the event of a tie vote, the presiding officer may request the Commission continue deliberating to reach a majority or conclude that additional deliberation will not break a tie. A tie vote means that a motion does not pass.

FINAL WRITTEN ORDER

There will be a final written order. The presiding officer will issue the final written order in accord with Rules 350-60-210 and 350-60-220 within 90 days of the date the Commission makes its oral decision. The presiding officer typically asks the Commission's counsel to draft the final written order for the presiding officer's signature. The Commission's counsel may consult with members of the Commission while drafting the order, but the full Commission does not hold a hearing or vote to adopt a final written order. There is no opportunity for the parties to review any draft final written order.


Any party may appeal the Commission's final written order within 60 days after the date of service of the order, as allowed by Section 15(b)(4) of the Scenic Area Act (16 U.S.C. § 544m(b)(4)).

NOTICES

A party who fails to attend or participate in the hearing may be held in default in accordance with Commission Rule 350-16.

In the event a party is not represented by an attorney, that party may, during the course of the proceedings, request a recess if at any point the party determines that representation by an attorney is necessary to the protection of that party's rights.

DATED this 8th day of May 2017



Nancy A. Andring
Administrative Analyst

NOTICE OF MAILING

I certify that on May 8th, 2017, I mailed the attached NOTICE OF HEARING by electronic mail to the following persons, all of whom have indicated that they accept email service:

Ty Wyman
Dunn Carney Allen Higgins & Tongue LLP
Attorney for Union Pacific Railroad Company
twyman@dunncarney.com

Brian Talcott
Dunn Carney Allen Higgins & Tongue LLP
Attorney for Union Pacific Railroad Company
btalcott@dunncarney.com

Kristen Campbell
Timmons Law PC
Attorney for Wasco County
kristen@timmonslaw.com

Gary K. Kahn
Reeves Kahn Hennessy & Elkins
Attorney for FOCG, Columbia Riverkeeper & Oregon Physicians for Social Responsibility
gkahn@rke-law.com

Steven D. McCoy
Friends of the Columbia Gorge
Attorney for Friends of the Columbia Gorge
steve@gorgefriends.org

Anthony Broadman
Galanda Broadman PLLC
Attorney for Yakama Nation
anthony@galandabroadman.com

Joe Sexton
Galanda Broadman PLLC
Attorney for Yakama Nation
joe@galandabroadman.com

David Becker
Law Office of David H. Becker, LLC
Attorney for Oregon Wild
davebeckerlaw@gmail.com

Ellen H. Grover
Karnopp Petersen LLP
Attorney for Warm Springs
ehg@karnopp.com

Josh Newton
Karnopp Petersen LLP
Attorney for Warm Springs
jn@karnopp.com

Julie A. Carter
Columbia River Inter-Tribal Fish Commission
Attorney for Columbia River Inter-Tribal Fish Commission
carj@critfc.org

Robert C. Lothrop
Columbia River Inter-Tribal Fish Commission
Attorney for Columbia River Inter-Tribal Fish Commission
lotr@critfc.org

Faron Scissons
Legal Assistant to Julie Carter and Robert Lothrop
scif@critfc.org

Brent Hall
Office of Legal Counsel, Confederated Tribes of the Umatilla Indian Reservation
Attorney for Confederated Tribes of the Umatilla Indian Reservation
brenthall@ctuir.org

/s/ Nancy A. Andring
Nancy A. Andring
Administrative Analyst