



MEMORANDUM

May 24, 2017

TO: Gorge Commissioners

FROM: Jeff Litwak, Counsel

SUBJECT: Staff Report for
Union Pacific Railroad Company v. Wasco County, CRGC No. COA-W-16-01
and
Friends of the Columbia Gorge, et al. v. Wasco County, CRGC No. COA-W-16-02
Hearing Scheduled for June 13, 2017

Action Requested

On June 13, 2017, you will hear oral argument and deliberate to an oral decision for two appeals: *Union Pacific Railroad Company v. Wasco County*, CRGC No. COA-W-16-01 and *Friends of the Columbia Gorge, et al. v. Wasco County*, CRGC No. COA-W-16-02. These two appeals have been consolidated into one proceeding. I have drafted this memorandum to assist you in your resolution of the appeals. I can answer questions as you review the materials prior to the hearing and at the hearing.

Your decision requires a simple majority of a quorum of commissioners. So far, I have not heard that any commissioners will be absent on June 13, so a decision requires at least seven votes.

Outline of Order of Hearing

1. Chair calls to the hearing to order and invites the parties to come forward and reviews the notice of hearing;
2. Chair asks members of the Commission for disclosures of conflicts of interest, potential bias, appearance of fairness concerns, and ex parte communications; parties may ask questions or challenge commissioners participation; resolution of concerns and challenges.
3. Decide amicus curiae tribes' and CRITFC's motion to give oral argument
4. Commissioners state questions that they wish the parties to address in their oral arguments
5. Oral argument for appeal in which Union Pacific is the appellant
6. Oral argument for appeal in which Friends of the Columbia Gorge, et al, is the appellant
7. Commissioners ask questions of the parties (parties get two minutes per side to answer questions)
8. Commissioners deliberate to an oral decision

Purpose of this Staff Report

You may use this memorandum to help you organize your review and analysis of the case, but this memorandum is not a substitute for reading the briefs and record and deciding the issues as the parties present them. The parties' arguments and the record are very detailed, and the detail is important. I am providing a copy of this memorandum to the parties as well. If a party disagrees with my analysis or wishes to discuss it, that party may do so during its oral argument; there is no opportunity for parties to file a written response to this memorandum.

I have made some recommendations throughout the Staff Report. You do not need to follow my recommendations; you are the decision makers. I can help guide you to a coherent final decision at the hearing no matter what you decide at any particular decision point.

Your appeal package includes:

- Staff report;
- Notice of Hearing;
- Record of Wasco County's Proceeding (Jason Hildreth sent you a thumb drive with a copy of the record in mid-April);
- Electronic copy of Wasco County's National Scenic Area Land Use and Development Ordinance;
- The following briefs for the first argument, *Union Pacific Railroad Company v. Wasco County*:
 1. Union Pacific Railroad Company's Opening Brief and separate Appendices
 2. Wasco County's Response Brief to Union Pacific's Opening Brief
 3. Friends of the Columbia Gorge, et al.'s Response Brief to Union Pacific's Opening Brief
 4. Yakama Nation's Response Brief to Union Pacific's Opening Brief and separate Appendices
 5. Oregon Wild's *Amicus Curiae* Brief
 6. Union Pacific's Response Brief to Oregon Wild's *Amicus Curiae* Brief.
 7. Joint *Amicus Curiae* Brief of The Confederated Tribes of the Warm Springs Reservation of Oregon, Columbia River Inter-Tribal Fish Commission and Confederated Tribes of the Umatilla Indian Reservation
 8. Union Pacific's Response Brief to Warm Springs, Umatilla Tribes, and CRITFC's Joint *Amicus Curiae* Brief
- The following briefs for the second argument, *Friends of the Columbia Gorge, et al. v. Wasco County*:
 9. Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility's Opening Brief
 10. Confederated Tribes and Bands of the Yakama Nation's Opening Brief
 11. Wasco County's Response Brief to Friends, et al.'s Opening Brief
 12. Union Pacific's Response Brief to Friends, et al.'s Opening Brief) and separate Appendices

I named your electronic copies of the briefs to start with the number (1–12) above to help you know which brief you are reading.

The Appellants, Respondents, and Intervenors are the "parties" to the appeals. For simplicity, I refer to Friends of the Columbia Gorge, Columbia Riverkeeper and Oregon Physicians for Social Responsibility together as "Friends." Please remember that all three entities present joint argument. "*Amicus curiae*" means "friend of the court" (the plural form is *amici*). *Amici* briefs are from entities that are not parties to the appeals, but want to point out facts in the record or present different reasoning and arguments on the issues that the parties briefed for you. *Amici* briefs do not offer new assignments of error in the appeals. You may use the *amici* briefs in your deliberation and decision if you believe they are helpful.

You have copies of the Act and other National Scenic Area authorities in your Commissioner Notebook. Please contact me if you need help finding any other authority. Copies of the record, briefs, Wasco County's ordinance and all National Scenic Area authorities will be at the hearing in electronic form in case you want to look at them during the hearing.

Applicable Rules and Hearing Procedure

The appellants brought these appeals under Commission Rule 350-60. I recommend you review Commission Rules 350-60-120 and 220 concerning oral argument and standards of review, and the Notice of Hearing, which specifies the procedure for the hearing, especially concerning when you may ask questions of the parties and when you must just listen to the parties. Please keep in mind that the parties will have prepared oral argument, so any questions you want them to address takes away from their prepared argument. This is an on-the-record appeal, which means the parties will present oral argument and *amicus curiae* entities may also give oral argument if the Commission requests it. The public may attend and listen, but this is not a public hearing.

The two appeals have been consolidated into a single hearing and the Notice of Hearing gives the precise procedure for the hearing. For example, at the beginning of the hearing, you will ask the parties all your questions relating to both sets of briefs. I encourage you to read the Notice of Hearing.

Preliminary Issues

Conflicts of Interest/Bias/Appearance of Fairness

The hearing must be objectively fair and must appear fair to a reasonable person. To ensure a fair hearing, I advised you to distance yourself from Wasco County's proceedings right after Union Pacific filed its application, and I have reminded you several times since then to maintain this distance.

At the beginning of the Commission's hearing, the Chair of the Commission will request commissioners disclose any conflicts of interest, bias, prejudice and appearance of fairness concerns toward or against the project or any party. A conflict of interest involves any financial interest with one or more of the parties, with the property in question, or in the outcome of the appeals. You must disclose any conflict involving you or your immediate family. Bias, prejudice and appearance of fairness concerns arise when there are facts that would lead a reasonable person to believe that you cannot be a fair decision-maker in this appeal. You must disclose written or oral communications, statements, current or prior memberships, friendships, employment or other professional relationships, and other factors that might lead to such a concern. I recommend you make disclosures about communications you have had or statements you have made since January 2015 (when Union Pacific filed its application). You must make disclosures about communications and statements since December 2016 (when Union Pacific and Friends filed the appeals).

Generally, bias, prejudice and appearance of fairness jurisprudence do not prohibit the Commission from taking policy positions on matters that might be tangentially related to the appeal, but do not involve the issues on appeal. Additionally, these concerns typically attach only after a matter is pending before the Commission (which would be the date the appeals were filed in mid-December). As noted above, I recommended you avoid these concerns dating back to Union Pacific's application in January 2015 because I believed an appeal to the Commission would be likely.

There are several general disclosure matters involving the full Commission that I discuss immediately below. I do not recommend that any of these individually or combined suggest that members of the Commission are biased or have prejudged the appeals, and I recommend that these matters do not give an appearance that members of the Commission cannot be fair and impartial in deciding the appeals; however, you may believe differently for yourself. I invite you and the parties to contact me as soon as possible if you would like additional information about these disclosures, if you need to discuss whether you believe you can be a fair and impartial decision maker, or have any other concerns about a fair hearing, including if you have concerns whether I have given you fair and impartial advice. If you decide you cannot be fair and impartial, you will need to recuse yourself from the oral argument, deliberation and vote. If you recuse yourself, you should not be in the hearing room.

Coal and Oil Transport Generally: In July 2014, the Commission issued a resolution concerning coal and oil transport in the National Scenic Area. A copy of the resolution is on the Commission's website: http://www.gorgecommission.org/images/uploads/amendments/CRGC_Resolution_on_Coal_and_Oil_Transport_-_7.17.2014.pdf. Union Pacific submitted its application to Wasco County in January 2015, after the Commission adopted the resolution and sent copies to the states' governors, and several state agencies. In September 2016, prior to Wasco County issuing its final decision and prior to any appeals being filed with the Commission, the Commission's Tribal Affairs Committee voted to amend the resolution and asked the full Commission to amend the resolution. On the advice of the Commission's counsel, the full Commission did not discuss amending the resolution and did not take any action on the Tribal Affairs Committee's recommendation.

On April 20, 2016, the Commission's Executive Director organized a listening session on fossil fuel transport in the Gorge. This was done at the request of the Oregon and Washington Governors offices. Attendees included representatives of the Governors offices, Yakama Nation, the Warm Springs Tribes, and Umatilla Tribes, the Columbia River Inter-Tribal Fish Commission, and four Gorge Commissioners.

On July 12, 2016, the Gorge Commission heard a presentation at its regular Commission meeting from Brady Kent, Water Quality Scientist, Yakama Nation, on fossil fuel transportation in the ceded lands of the Yakama Nation. A copy of Mr. Kent's PowerPoint presentation is available from the Commission office.

At the March 2017 Commission meeting, Friends of the Columbia Gorge provided public testimony to the Commission on Oregon HB 2131 and SB 7 regarding oil train legislation and requested the Commission send a letter of support for the bills. The Commission voted to do so, specifically referring the Legislature to the Commission's July 2014 resolution. Subsequently, the Commission's Executive Director reported that she did not send the letter after consulting with the Oregon Governor's Office and agencies.

Union Pacific Breakfast for Public Officials: In April 2015, Union Pacific invited public officials in the Gorge to breakfast in one of its dining cars in Hood River for the purpose of meet and greet and discussing its rail operations and the need for a rail expansion at Mosier. On advice of counsel, no Gorge Commissioners attended; the Commission's then-Interim Executive Director, Krystyna Wolniakowski, attended and Commissioner Lynn Burditt attended in her capacity as USFS Area Manager; neither reported on the event to the full Commission.

Commission Staff Comments Relating to Union Pacific's Application: On February 29, 2016, the Oregon Governor's Office requested the Commission's Executive Director speak with the Oregon Parks and Recreation Department about National Scenic Area requirements for a land transfer request between OPRD and Union Pacific. On March 1, 2016, the Commission's Executive Director and Counsel spoke by phone with MG Devereux, Deputy Director, Oregon Parks and Recreation Department about the legal requirements in the National Scenic Area for a land division or lot line adjustment application and for additional recreation access across Union Pacific's tracks and encouraged consultation with the Treaty Tribes.

On April 11, 2016, Katie Skakel, a temporary planner for the Commission submitted a comment letter to Wasco County during the comment period for the Wasco County staff's review of the application. The letter advised Wasco County on National Scenic Area standards that appeared to apply. The letter did not recommend specific findings of fact or legal conclusions, or take any position on whether the application should be approved. A copy of the letter appears at CG-9339, and there are references to the letter (e.g., CG-18). Members of the Commission were not involved in drafting the letter and did not approve the letter.

Friends of the Columbia Gorge Correspondence: Friends of the Columbia Gorge emailed the Commission office copies of its some of its comments to Wasco County (e.g., email from Steven McCoy, Aug 18, 2016). Staff did not forward these emails to members of the Commission.

Request from Friends of the Columbia Gorge to participate in the Planning Commission and Board of Commissioners hearings: Staff members of Friends of the Columbia Gorge made several requests to Krystyna Wolniakowski, for Commission staff to attend and give testimony at Wasco County's Planning Commission and Board of Commissioners' hearings on Union Pacific's application. Krystyna discussed the requests with the Chair of the Commission and Counsel, and decided that the Commission staff would not attend or participate in Wasco County's hearings.

Federal Court Litigation: In January 2017, after filing its appeal with the Commission, Union Pacific filed a complaint in U.S. District Court seeking a declaration that the National Scenic Area authorities do not apply to its application and seeking an injunction that would have stopped the appeals. The court dismissed the complaint on a motion from three of the Treaty Tribes arguing that the case could not proceed without the tribes and the tribes would not waive their sovereign immunity from suit. The complaint named the six Oregon commissioners as defendants in addition to four Wasco County defendants. In the process of defending the commissioners, I had conversations with all the parties in the appeals before the Commission and wrote briefing on preemption and the legal status of the National Scenic Area authorities; you did not help draft or preapprove these briefs (your bylaws delegate litigation decisions to the Executive Director). I prepared a joint brief with Wasco County's attorney responding to Union Pacific's motion for preliminary injunction. I gave copies of all the parties' briefing in the case and I consulted with you (attorney-client privileged) on the case, the briefs, and questions you had. I am not aware than any member of the Commission has discussed the litigation with any appeal party.

At your April 11, 2017 Commission meeting, I gave you oral advice that you must decide the appeals based solely on the record and the parties' arguments and told you that the briefing and legal positions that I wrote and that the other litigation parties wrote are not relevant in these appeals and that you cannot consider them. I advised you that the litigation occurred completely after Wasco County finished its proceeding, so none of those documents are part of the administrative record that you are limited to considering. I also advised you that neither the U.S. District Court, nor the Ninth Circuit decided the merits of the preemption or treaty rights claims, so the courts' decisions do not bind you to make any particular decision about the merits of the parties' arguments in these appeals. The arguments that I and the other parties made in the litigation filings were responsive only to the arguments in those litigation cases, and were made prior to any party filing a brief in these appeals. Even if the parties raise similar arguments in their briefs in these appeals, you need to decide the law and facts based on how the parties present them solely in these appeals.

***Ex Parte* Communication**

During the past several years, the Commission has received oral and written public comment on rail transport of hazardous waste through the National Scenic Area. The Commission received some of these comments after Union Pacific filed its original application with Wasco County in 2015. I am not aware that any of the comments were specific to Union Pacific's application or Wasco County's decision other than as disclosed above. If you understood those comments to relate to the application, Wasco County's decision or the appeals pending before the Commission, you should disclose those comments and your understanding of them.

If you have had conversations about this application or appeal, you must disclose those statements. The most relevant conversations for disclosure are those occurring after the appeals were filed (mid-December 2016), but I recommend you disclose conversations dating back to January 2015 or earlier if you became aware before January 2015 that Union Pacific was going to submit an application.

Objections to a Commissioner's Participation in the Appeals

One or more of the parties may object to a commissioner's participation. If that occurs, the full Commission may discuss that individual commissioner's participation, but the ultimate decision about whether to participate remains with the individual commissioner at issue. If that commissioner chooses not to participate in the appeal,

that commissioner should leave the hearing room so there is no risk that commissioner will interact with the remaining decision-making commissioners. If a commissioner participates, but a court later determines that commissioner should have recused him or herself, the court can remand the matter back to the Gorge Commission for a new hearing without the participation of that commissioner.

Motion by Amici to Participate in Oral Argument

Amicus Curiae, The Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes of the Umatilla Indian Reservation, and the Columbia River Inter-Tribal Fish Commission filed a motion to participate in oral argument. Commission Rule 350-60-170(2) specifies that amicus participation is by brief only unless the Commission requests oral argument. Union Pacific filed a response opposing the *amici's* motion; Union Pacific also responded to the *amici's* motion in its brief responding to the *amici's* joint brief. The Chair of the Commission is referring the *amici's* motion to the full Commission. Please read the motion and response and be prepared to vote on the motion.

To hear argument from the *amicus curiae*, you will need a motion to grant the *amici's* motion. Your motion needs only a simple majority.

If you wish to have oral argument from these amicus curiae parties, I recommend your motion specify the length of their oral argument (the movants request 15 minutes) and I recommend you permit Union Pacific the same amount of time you give the *amici* to rebut the *amici's* argument.

Summary of Facts

The parties' briefs contain their recitations of the facts that they believe are important to this appeal. The parties' statements of the facts differ. You do not need to resolve the conflicts in the statements. Review the briefs and the pages of the record that the parties refer to in their briefs, and review the entire record because there may be other information that may be helpful to your decision on this appeal.

Overall Decision Options

Your rules require you to uphold, reverse or remand Wasco County's decision. You should affirm Wasco County's decision if you do not believe the County erred (even if you would prefer a different decision). You should remand or reverse Wasco County's decision if you believe Wasco County erred. All of Union Pacific's assignments of error request that you reverse Wasco County's decision. For its second and third assignments of error (relating to treaty rights), Union Pacific requests that as an alternative to reversal, that you remand the decision. All of Friends' assignments of error request that you reverse Wasco County's decision. If a party specifically requests reversal, you must either affirm or reverse; you cannot remand because you cannot grant relief that the parties did not request.

Where you have a choice of whether to reverse or remand, there are a couple of rules of thumb about choosing which remedy to use. You would reverse the decision if you believe there is no way for Wasco County to correct an error—such as if the decision is prohibited as a matter of law. You would remand the decision if the identified errors can be corrected by adopting new findings or accepting new evidence. For example, if you determine that the law requires Wasco County to approve the application, you would reverse Wasco County's decision; if you believe that Wasco County committed a procedural error or could make a correct decision with different information, then you should remand the decision.

Wasco County's procedure on a reversal or remand could vary depending on any errors you identify. I can advise you at the oral argument what I believe would be implications of any specific decision you make. You can also ask the parties a question about this prior to their argument.

Discussion of Assignments of Error

You will hear two sets of arguments. The first argument will be the appeal in which Union Pacific Railroad is the appellant and all of the other parties are respondents. The second argument will be the appeal in which Friends of the Columbia Gorge, Columbia Riverkeeper and Oregon Physicians for Social Responsibility are the appellants, and Wasco County and Union Pacific are respondents.

Oregon Wild's *amicus* brief applies to both appeals; the tribes and CRITFC's joint *amicus* brief applies only to the appeal in which Union Pacific is the appellant.

The parties prepared separate briefs for the two sets of arguments. Please don't hesitate to call me if you need help sifting through and organizing the briefs or finding a specific brief in your pile of briefs.

First Argument – *Union Pacific Railroad Company v. Wasco County* CRGC No. COA-W-16-01 (Briefs 1–8)

First Assignment of Error – Wasco County erred by deciding that its NSALUDO permitting process is not preempted by federal law as applied to interstate railroad development projects such as this one.

Union Pacific's first assignment of error seeks reversal of Wasco County's decision, arguing that the ICCTA preempts the National Scenic Area authorities. The applicable standard of review is whether the decision violates a provision of applicable law and is prohibited as a matter of law (Commission Rule 350-60-220(1)(c).

If you conclude that the ICCTA completely preempts the National Scenic Area authorities, then you would conclude that the decision violates a provision of applicable law and reverse Wasco County's decision. You would, however, also need to address Union Pacific's other assignments of error to give direction to Wasco County. You would not need to address the assignments of error in the second argument because these relate to provisions that you would have determined are preempted.

Union Pacific essentially argues that Wasco County's National Scenic Area Land Use and Development Ordinance is state or local law, which the ICCTA preempts. Union Pacific makes several arguments concerning the nature of the National Scenic Area Act, the Columbia River Gorge Compact, and court decisions involving the Gorge Commission that it believes leads to a conclusion that the Wasco County ordinance is not federal law and does not implement federal law.

Wasco County and the Yakama Nation adopt the arguments in Friends' brief and Oregon Wild's *Amicus Curiae* brief.

Friends makes arguments about the National Scenic Area Act, Gorge Compact and several court decisions involving the Gorge Commission that Wasco County's ordinance is federal law and implements federal law. The arguments in this brief are generally consistent with the law as I have advised you over the years. While I have tried to explain opposing views, this is the first time you will have received Union Pacific's argument on the law in any detail. You should not accept Friends' argument without testing it against Union Pacific's arguments.

Oregon Wild's *Amicus Curiae* brief argues that the legislative history of the National Scenic Area Act demonstrates that Congress intended for the National Scenic Area authorities to apply to railroad construction projects. The brief contains appendices with pages and documents from the legislative history of the National Scenic Area Act. Union Pacific's Response Brief to Oregon Wild's brief argues that the legislative history is not conclusive and

reiterates many of its argues about the purpose and effect of the ICCTA. If you believe the legislative history is helpful in this case, you can consider it in your deliberations.

Union Pacific briefly mentions that the ICCTA came after the National Scenic Area Act, but does not explain why it mentions this. You might ask the parties to provide you legal authority about whether Congress’s replacement of the Interstate Commerce Commission and prior federal railroad laws with the Surface Transportation Board and the ICCTA has any effect on the legislative history that Oregon Wild presents. One possible inference is that any congressional intent survives subsequent changes in federal railroad law. Another possible inference is that Congress’s intent was specific to federal railroad law as of the date of the National Scenic Area Act and is not helpful in determining the relationship between the National Scenic Area Act and current federal railroad law. Again, you should ask the parties about this.

Second Assignment of Error – Wasco County erred by denying Union Pacific’s permit application on the ground that Union Pacific’s “proposal affects treaty rights.”

and

Third Assignment of Error – Wasco County erred when it refused to consider and give effect to the Corps’ determination that Union Pacific’s proposed project would not impact treaty fishing rights.

Union Pacific provides a combined argument for the second and third assignments of error. There are three subsections to this combined argument, subsection A introduces the argument; subsection B relates to the Second Assignment of Error; and subsection D relates to the Third Assignment of Error. Union Pacific’s brief does not contain a subsection C. Union Pacific argues that you should reverse Wasco County’s decision or in the alternative remand the decision back to Wasco County.

For both subsections, you should keep in mind the savings provision in section 17 of the National Scenic Area Act relating to treaty rights and the definition of “Effect on Treaty Rights” in Wasco County’s ordinance, which is identical to the definition in the Management Plan:

Nothing in [the National Scenic Area Act] shall – (1) affect or modify any treaty or other rights of any Indian tribe. (16 U.S.C. § 544o(a)(1)).

To bring about a change in, to influence, to modify, or to have a consequence to Indian treaty or treaty related rights in the Treaties of 1855 with the Nez Perce, Umatilla, Warm Springs and Yakama tribes, executed between the individual Indian tribes and the Congress of the United States and as adjudicated by the Federal courts. (Wasco County NSA-LUDO, § 1.200; Management Plan, Glossary 7).

One Commissioner has asked me whether Wasco County has an independent obligation to consider impact to treaty rights outside of this National Scenic Area requirement. This would be a good question to ask the parties at the hearing.

Subsection B, Relating to the Second Assignment of Error

The arguments in this subsection are lengthy and complex. I do not try to summarize them here, instead, I point you to the pages in the briefs that discuss the parties’ arguments.

Union Pacific argues that Wasco County did not apply the law of treaty fishing rights. Union Pacific provides briefing on the law of treaty rights and explains why it believes Wasco County did not apply treaty rights law. It argues that the applicable standards of review are that the decision improperly construes applicable law and is arbitrary and capricious. (Commission Rule 350-60-220(1)(h) and (1)(d). (Union Pacific Opening Brief at 25–33).

“Improperly construes applicable law” does not require explanation. You would review Wasco County’s decision to determine it identified (and if necessary interpreted) treaty rights law. “Arbitrary and capricious” is a legal term of art, and applies to how Wasco County applied the applicable law. The U.S. Supreme Court has identified factors that would make a decision arbitrary and capricious: when an agency relies on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manuf. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Wasco County adopts the arguments in the Yakama Nation’s brief relating to the law of treaty rights and points to pages in the record containing evidence relating to treaty rights. (Wasco County Response Brief at 8). Wasco County also made additional arguments about the County’s application of the National Scenic Area treaty rights protection process. (Wasco County Response Brief at 9–11).

Friends of the Columbia Gorge adopts the arguments in the Yakama Nation’s and Wasco County’s briefs relating to the law of treaty rights and Wasco County’s application of that law. (Friends Response Brief at 3).

The Yakama Nation argues that Wasco County properly applied the National Scenic Area Land Use and Development Ordinance requirements for protection of treaty fishing rights. (Yakama Nation Response Brief at 11–19).

Amici Warm Springs Tribe, Umatilla Tribe, and CRITFC discuss the law of treaty rights in their joint brief. (Joint *Amici* Brief at 5–9). The explanation of treaty rights in this brief differs from the explanation of treaty rights in Union Pacific’s brief. Union Pacific responded to the Joint *Amici* Brief, largely arguing that the *Amici* Brief should not have been allowed and the Gorge Commission cannot consider the information in the brief for multiple reasons, (Union Pacific Response to *Amici* Tribes’ Brief at 1–9), but also addressing the merits of the joint *Amici* brief. (Union Pacific Response to *Amici* Tribes’ Brief at 9–11).

I recommend you start with determining whether Wasco County properly construed the law of treaty rights. Because Union Pacific’s brief and the other parties’ briefs present conflicting argument on the law of treaty rights, you will need to resolve that conflict. If you have specific questions, you should ask the parties before they begin oral argument. If you conclude that Wasco County properly construed the law of treaty rights, you must then decide whether Wasco County properly applied that law. If you believe Wasco County did not construe the law of treaty rights properly, then you would also necessarily conclude that Wasco County did not properly apply the law.

Subsection D: Relating to the Third Assignment of Error

Union Pacific argues that Wasco County should have considered the Army Corps permit that it submitted before the Board of Commissioners issued its final written decision. There is a dispute about whether this document is part of the factual record, which the parties brief. The Gorge Commission Chair allowed the Army Corps permit into the record before the Commission to allow the parties to raise this issue before the full Commission. To assist the Commission, the Chair expressly asked the parties to brief the legal and factual significance of the Army Corps permit.

Union Pacific argues that Wasco County’s ordinance allows for the Board to consider a document after issuing an oral decision, but before reducing that decision to a final written decision--the decision to allow new evidence is permissible and discretionary. Union Pacific argues that Wasco County should have considered the Army Corps permit because its content was highly relevant to the determination of effect on treaty rights and because it would have provided a strong factual basis (i.e., substantial evidence) for determining that the project does not

affect treaty rights. Union Pacific argues that the Board's refusal to include the permit into the record was arbitrary and capricious. (Union Pacific Opening Brief at 34–37).

Wasco County argues that Wasco County was not required to consider the new evidence and largely adopts the response arguments of Friends and the Yakama Nation. (Wasco County Response Brief at 8–9).

Friends argues that the Board had stated that no new evidence would be allowed after its November 2, 2016 oral decision; that Union Pacific presented it to the Wasco County Board too late for the Board's consideration, and that it does not provide such a factual basis because the permit states it is deferring consideration of National Scenic Area standards to Wasco County. (Friends Response Brief at 23–26).

The Yakama Nation makes arguments like Friends' arguments, but also adds an argument that I believe requires a little additional explanation—if the Wasco County Board considered that if it would receive the new evidence, then it must also permit time for rebuttal (Oregon law requires seven days for rebuttal), which would have forced the County to make a decision that violates Oregon's law allowing only 215 days of extensions to the 150-day rule. The implication in the Yakama Nation's argument is that if Union Pacific had submitted the new evidence immediately after the Army Corps made its decision on November 4, there could have been time for rebuttal and for Wasco County to still issue a decision within the Oregon statutory time period. Finally, the Yakama Nation argues that the Army Corp permit had limited value because the permit states it is deferring consideration of National Scenic Area standards to Wasco County. (Yakama Nation Response Brief at 20–24).

Based on the parties' arguments, you must decide whether Wasco County's decision to not consider the Army Corps permit was "arbitrary and capricious."

Fourth Assignment of Error – The Wasco County Board erred by reinstating four approval conditions on Union Pacific's permit that were stricken by the Planning Commission when it initially allowed the permit.

Union Pacific argues that conditions 13, 15, 16, and 20 are improper because the County is improperly attempting to regulate interstate rail operations, the conditions lack a sufficient nexus to the project itself, and the Wasco County Board's findings are not supported by substantial evidence in the record and do not support the Board's conclusion that the project's impacts justify the conditions. (Union Pacific Opening Brief at 39–47).

Wasco County argues that the conditions are appropriate and permissible. (Wasco County Response Brief. At 12–16).

Friends of the Columbia Gorge adopts the arguments in Wasco County's brief relating to these conditions of approval. (Friends Response Brief at 3).

The Yakama Nation adopts the argument in Wasco County's brief relating to these conditions of approval. (Yakama Nation Response Brief at 27).

I recommend you start your analysis for this assignment of error with a decision whether you should consider the merits of this assignment of error. Conditions of approval are used to ensure that an application complies with specific provisions in an ordinance by requiring an applicant to do or not do something in conjunction with an approval. Here, where the application was not approved, the conditions of approval do not seem to have any effect on the decision or the parties; consequently, any decision the Commission makes about the correctness of the conditions of approval would be advisory only. Courts do not issue advisory opinions in this circumstance and the Commission has never done so in any past appeal decision.

Wasco County's decision does not specify why it imposed conditions of approval on a denied application and I recommend the Commission should not assume any reason for doing so. It is possible that Wasco County

imposed the conditions in the event the Gorge Commission would reverse the decision and order Wasco County to approve the application. That action is allowed in Oregon law (ORS 197.835(1)(a)) and an approval in that circumstance would include conditions of approval that an applicant does not contest. See *Stewart v. City of Salem*, 58 Or LUBA 605 (2009). The National Scenic Area Act and Commission’s rules for appeals, however, do not authorize the Commission to reverse a decision and order that Wasco County approve the application. The Commission’s rules only allow the Commission to affirm, remand, or reverse a decision.

Alternatively (or additionally) Wasco County may have been applying Oregon law requiring that a decision denying an application must also inform an applicant what steps are necessary to obtain an approval. See, e.g., *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016); *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008). The National Scenic Area authorities do not require Wasco County to inform the application what steps it must take to obtain a National Scenic Area approval. If Wasco County intended the conditions of approval to inform the applicant what steps are necessary to obtain an approval, then the conditions of approval would not be reviewable now; they would be reviewable when Wasco County actually imposes the conditions on Union Pacific.

If you conclude that you cannot address the conditions of approval, then you would deny this assignment of error and you not need to do anything more with the parties’ arguments. If you conclude that you should address the conditions of approval, then you must consider the merits of the parties’ arguments.

Fifth Assignment of Error – The Wasco County Board erred by denying Union Pacific's appeal of the Wasco County Planning Commission decision, which sought to eliminate two conditions regarding access to the Columbia River.

If in the fourth assignment of error above, you conclude that you cannot address the conditions of approval, then you would similarly deny this assignment of error and you not need to do anything more with the parties’ arguments. If you conclude that you should address the conditions of approval, then you must consider the merits of the parties’ arguments.

Union Pacific argues that conditions 21 and 47 are improper because the County is improperly attempting to regulate interstate rail operations, the conditions lack a sufficient nexus to the project itself, and the Wasco County Board's findings are not supported by substantial evidence in the record and do not support the Board's conclusion that the project's impacts justify the conditions. (Union Pacific Opening Brief at 47–50).

Friends of the Columbia Gorge adopts the arguments in Wasco County’s brief relating to these conditions of approval. (Friends Response Brief at 3).

The Yakama Nation adopts the argument in Wasco County’s brief relating to these conditions of approval. (Yakama Nation Response Brief at 27).

**Second Argument – *Friends of the Columbia Gorge, et al. v. Wasco County*
CRGC No. COA-W-16-02
(Briefs 9–12)**

Friends’ Opening Brief argues that Wasco County erred in finding that the proposal complied with several provisions of the Wasco County National Scenic Area Land Use and Development Ordinance. Wasco County argues that these arguments are moot because Wasco County denied the application, which is the ultimate decision that Friends sought, and the decision would thus have no effect on Friends. Union Pacific argues that Friends and the Yakama Nation lack standing to appeal because they are not “adversely affected.”

I recommend that you cannot determine whether Friends' assignments of error are moot until you decide the assignments of error in the first argument. I also recommend that Friends and the Yakama Nation have standing.

Friends' appeal would clearly have been moot if Union Pacific had not appealed Wasco County's decision because there would have been no opportunity for the Commission or a court to change Wasco County's decision into an approval that would have affected Friends. Instead, mootness depends on how you resolve Union Pacific's assignments of error in the first argument. If you affirm Wasco County's decision with respect to the assignments of error in the first argument, then the assignments of error in this second argument would not seem to have any practical effect on any of the parties because the application would have been denied and a denial requires only one reason for that denial. You may still choose to decide these assignments of error. If, however, you reverse or remand Wasco County's decision based on any of the assignments of error in the first argument, then the assignments of error in this second argument could have a practical effect on the parties, and you must decide these assignments of error.

I recommend Friends and the Yakama Nation have standing. Friends and the Yakama Nation are also potentially "adversely affected" because there is the potential for the Commission or a court to reverse or remand Wasco County's decision. A determination of standing is made at the time of the appeal and is not conditional based on whether the Commission or a court affirms Wasco County's decision.

The assignments of error in this second argument are technical and involve many provisions of the Wasco County ordinance and other law. I do not summarize the arguments here. I recommend you address each point and decide whether you affirm, reverse, or remand each. The parties' briefs track each other, so you should not get lost. I recommend you read Friends' Opening Brief, then Wasco County and Union Pacific's responses for the first point, then do the same for the next point, etc., until you have worked through each point. You might make notes in advance of the hearing about your thoughts for deliberation, but keep an open mind as you hear the parties' oral arguments and other commissioners' deliberation.

First Assignment of Error – The County erroneously determined that expansions of existing railroads and new culverts are allowed uses in the GMA Open Space zone.

Friends, Wasco County, and Union Pacific briefed this point. The Yakama Nation adopts the arguments and reasoning in Friends' brief for this assignment of error. (Yakama Nation Opening Brief at 5).

Second Assignment of Error – The County erred by failing to apply the restrictions against over-height structures.

Friends and Union Pacific briefed this point. Wasco County did not provide additional argument, noting that Friends and Union Pacific fully briefed this assignment of error. (Wasco County Response Brief at 8). The Yakama Nation adopts the arguments and reasoning in Friends' brief for this assignment of error. (Yakama Nation Opening Brief at 5).

Third Assignment of Error – The County erred by failing to properly apply multiple scenic resource protection requirements.

Friends and Union Pacific briefed these points. Wasco County did not provide additional argument, noting that Friends and Union Pacific fully briefed this assignment of error. (Wasco County Response Brief at 8). The Yakama Nation adopts the arguments and reasoning in Friends' brief for this assignment of error. (Yakama Nation Opening Brief at 5).

Fourth Assignment of Error – The County erred by unlawfully concluding that Union Pacific may disturb multiple protected resources, setbacks, and buffer zones in the Scenic Area.

Friends and Union Pacific briefed these points. Wasco County did not provide additional argument, noting that Friends and Union Pacific fully briefed this assignment of error. (Wasco County Response Brief at 9). The Yakama Nation adopts the arguments and reasoning in Friends’ brief for this assignment of error. Yakama Nation Opening Brief at 5).

Fifth Assignment of Error – The County erred by failing to adequately evaluate and prevent cumulative adverse effects to scenic, cultural, recreational, and natural resources.

Friends and Union Pacific briefed these points. Wasco County did not provide additional argument, noting that Friends and Union Pacific fully briefed this assignment of error. (Wasco County Response Brief at 9). The Yakama Nation adopts the arguments and reasoning in Friends’ brief for this assignment of error. Yakama Nation Opening Brief at 5).