

Columbia River Gorge Commission
Meeting Minutes
June 13, 2017

Fort Dalles Readiness Center
402 E. Scenic Drive, The Dalles, Oregon

MEMBERS IN ATTENDANCE

Bridget Bailey
Bowen Blair
Don Bonker
Lynn Burditt
Keith Chamberlain
Lorrie DeKay
Dan Ericksen
Robert Liberty
Carl McNew
Antone Minthorn
Rodger Nichols
Janet Wainwright
Damon Webster

MEMBERS ABSENT

None

STAFF PRESENT

Nancy Andring, Administrative Analyst
Jessica Gist, Natural Resources and Land Use Planner
Jason Hildreth, GIS Analyst/Land Use Planner
Jeffrey Litwak, Counsel
Krystyna Wolniakowski, Executive Director

AUDIENCE PRESENT

Brian Talcott, Attorney for Union Pacific Railroad
Ty Wyman, Attorney for Union Pacific Railroad
Robert Belt, Attorney for Union Pacific Railroad
Deana Bennett, Attorney for Union Pacific Railroad
Gary Kahn, Attorney for Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon
Physicians for Social Responsibility
Steve McCoy, Attorney for Friends of the Columbia Gorge
Nathan Baker, Attorney for Friends of the Columbia Gorge
Kristen Campbell, Attorney for Wasco County
Angie Brewer, Planning Director, Wasco County
Ethan Brewer
Joe Sexton, Attorney for Confederated Tribes and Bands of the Yakama Nation
Amber Penn-Roco, Attorney for Confederated Tribes and Bands of the Yakama Nation
Marcus Shirzad, Attorney for Confederated Tribes and Bands of the Yakama Nation
Dave Becker, Attorney for Oregon Wild
Josh Newton, Attorney for The Confederated Tribes of Warm Springs

Rob Lothrop, Attorney for Columbia River Inter-Tribal Fish Commission
Julie Carter, Attorney for Columbia River Inter-Tribal Fish Commission
Brent Hall, Attorney for Confederated Tribes of the Umatilla Indian Reservation
Others were present during the day.

AGENDA

Call to Order and Roll

Chair Blair called the meeting to order and Nancy Andring called roll.

Approval of Minutes for April 11, 2017 Commission Meeting

Commissioner Nichols moved to adopt the minutes; Commissioner Ericksen seconded. The vote was unanimous to approve the minutes.

Oral Argument for Union Pacific Railroad Co. v. Wasco County, No. COA-W-16-01 and Friends of the Columbia Gorge, et al. v. Wasco County, No. COA-W-16-02

Chair Blair opened the hearing and asked the parties to introduce themselves. The parties introduced themselves. Chair Blair stated that the hearing was on the record and no new evidence would be allowed. Wasco County confirmed that all oversized exhibits were present. Chair Blair invited parties to raise any procedural objections. No parties raised any objections.

Chair Blair requested Commissioners disclose ex parte communications and conflicts of interest. Chair Blair noted the Commission's counsel issued a staff report with several general disclosures, and all parties received the staff report.

Chair Blair disclosed his past experiences, including his employment as Director of Friends of the Columbia Gorge between 1982 and 1988, a donor to, and board member of Friends of the Columbia Gorge from 1988 to March 2011, including Board Chair for part of that time. These dates preceded his appointment to the Commission. Commissioner Blair also disclosed that he was a staff member and officer for the Trust for Public Land from 1989 to 2010 and staff member and officer for the Indian Country Conservancy from 2010-2012 where he supervised or was directly involved in land transactions with four of the parties and *amicus curiae*: Confederated Tribes and Bands of the Yakama Indian Nation, Confederated Tribes of Warm Springs, Confederated Tribes of the Umatilla Indian Reservation, and Union Pacific Railroad Company. All the transactions, except a project involving the Yakama Nation and Union Pacific at Celilo Village, predated his appointment to the Commission, and the Celilo Village project predated filing the appeal. None of the transactions he was involved with involved the property at issue in the appeals. He said he is confident he could be impartial in this hearing.

Commissioner Nichols disclosed that he attended the Wasco County Planning Commission and Board of Commissioners hearings in his professional role as a media reporter and he reported on the hearings. He reported live at the Mosier derailment. He attended press conferences, Mosier City Council, and Union Pacific meetings, Team Mosier, and other meetings following the derailment. None of these latter meetings had discussion of the appeals. Commissioner Nichols gave specific dates for these meetings. He said he would be balanced and impartial.

Commissioner Wainwright disclosed that she has professional relations with several members of the Yakama Nation through her prior work marketing motion pictures. She also serves on an advisory committee at the School of Environmental and Forest Science at the University of Washington and has a professional relationship with a member of the Yakama Nation through that committee.

Commissioner Liberty disclosed that he is a member of Friends of the Columbia Gorge and served on the Friends board 25 years ago. He said that he could be impartial in this hearing. Commissioner Bonker disclosed that when he was in Congress, he worked to develop the National Scenic Area Act.

Commissioner Ericksen stated that he served on Wasco County Board of Adjustment from 1978 to 1991, the Wasco County Planning Commission from 1991 to 1996, was a County Commissioner from 1996 to 2003, and County Judge [Commission Chair] from 2003 to 2011. He stated he is not prejudiced.

Commissioner Bailey clarified that her husband, Eric Nisley is the District Attorney for Wasco County, which is a state position, and he served as Wasco County Counsel until November, 2014.

Commissioner Burditt disclosed that she is responsible for treaty tribe consultation in her role as Area Manager for the U.S. Forest Service National Scenic Area office; she hosted an emergency response simulation in The Dalles in 2016 in which the scenario was a derailment leading to a wildland fire; she supervises the archaeologist for the response team for the 2016 Mosier derailment; and has submitted comment letters on proposed terminals throughout the northwest, noting that they would have an impact on the Gorge as a result of increased rail traffic.

Commissioner Minthorn disclosed that he is a member of the Confederated Tribes of the Umatilla Indian Reservation; he presently works with the tribal language program and was a former council member from 1981 to 2009.

None of the parties challenged any commissioner's participation in the hearing.

Chair Blair asked the Commissioners to decide to a motion by the Warm Springs and Umatilla tribes and the Columbia River Inter-Tribal Fish Commission to participate in oral argument. Commissioner Bailey moved to hear their argument, grant them 15 minutes to present their argument, and grant Union Pacific Railroad 15 minutes to respond to the argument; Commissioner Wainwright seconded. The motion was granted by unanimous voice vote.

Commissioners were provided an opportunity to present questions to the parties regarding both briefs. Commissioners Liberty, Bailey, Bonker, Blair, Minthorn, and Ericksen asked questions.

The first set of argument was for the appeal in which the applicant, Union Pacific Railroad Company, is the appellant.

Bob Belt presented opening argument on behalf of Union Pacific.

Kristen Campbell, Gary Kahn, and Joe Sexton presented response argument on behalf of Wasco County, Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility, and the Yakama Nation.

Josh Newton, Brent Hall, and Julie Carter presented argument on behalf of the *amicus curiae* parties.

Deana Bennett presented response argument to the *amici's* argument.

Bob Belt presented rebuttal to the respondents' argument.

--Break--

Chair Blair announced the second set of arguments in which Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility are joint appellants.

Gary Kahn presented opening argument on behalf of the appellants.

Ty Wyman and Kristen Campbell presented response argument on behalf of Union Pacific and Wasco County.

Gary Kahn presented rebuttal argument.

Chair Blair invited Commissioners to ask questions of the parties. Each side was generally provided up to two minutes to respond to each question. Where parties used extra time, the Chair allowed opposing parties similar extra time. Commissioners Liberty, DeKay, Wainwright, Bailey, Bonker, asked questions.

--Lunch-- Chair Blair reminded the members of the Commission not to discuss the appeal during the lunch break.

Commissioners continued to ask questions of the parties. Commissioners Ericksen, Chamberlain, Nichols, Webster, McNew, Minthorn, and Liberty asked questions.

After the Commissioners finished asking questions, Chair Blair explained that the Commission's role is to uphold, remand or reverse Wasco County's decision. The Commission deliberated on the assignments of error as follows.

First appeal, 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.

Commissioner Liberty moved to conclude that Wasco County had the authority to make the decision finding that the application did not comply with treaty rights and that treaty rights were not preempted by the ICCTA. Commissioner Ericksen seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y

Keith Chamberlain - Y
Lorrie DeKay - Y
Dan Ericksen - Y
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y
Damon Webster - Y
Bowen Blair - Y

The motion passed 12 to 0.

Commissioner Bailey moved to deny the first assignment of error on the basis that the Scenic Area Act is not preempted by the railroad statute, the ICCTA. Commissioner Bonker seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y
Keith Chamberlain - N
Lorrie DeKay - Y
Dan Ericksen - Y
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y
Damon Webster - Y
Bowen Blair - Y

The motion passed 11 to 1.

First appeal, 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."

Commissioner Liberty moved to uphold Wasco County's Board of Commissioners' determination with regard to treaty rights, and find that it is supported by substantial evidence in the record and that the findings are adequate. Commissioner Wainwright seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y
Keith Chamberlain - N
Lorrie DeKay - Y
Dan Ericksen - N
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y

Damon Webster - N
Bowen Blair - Y

The motion passed 9 to 3.

First appeal, 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.

Commissioner Nichols moved to deny the third assignment of error in full. Commissioner McNew seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y
Keith Chamberlain - Y
Lorrie DeKay - Y
Dan Ericksen - Y
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y
Damon Webster - Y
Bowen Blair - Y

The motion passed 12 to 0.

First appeal, 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.

and

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.

Commissioner Liberty moved to not take up any assignments of error related to conditions of approval because before us is a decision to deny and so far we have upheld all of the bases for the denial. Commissioner Nichols seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y
Keith Chamberlain - Y
Lorrie DeKay - Y
Dan Ericksen - Y
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y

Damon Webster - Y
Bowen Blair - Y

The motion passed 12 to 0.

Commissioner Nichols moved to conclude that all of the assignments of error in the second appeal are moot, and that the appellants [Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility, and the Yakama Nation] have standing for reason that they were adversely affected or potentially adversely affected because had there been a remand, they needed a chance to present their arguments. Commissioner Wainwright seconded. The Commission voted as follows:

Bridget Bailey - Y
Don Bonker - Y
Keith Chamberlain - N
Lorrie DeKay - Y
Dan Ericksen - N
Robert Liberty - Y
Carl McNew - Y
Antone Minthorn - Y
Rodger Nichols - Y
Janet Wainwright - Y
Damon Webster - Y
Bowen Blair - Y

The motion passed 10 to 2.

Chair Blair thanked the attorneys for their helpful presentations and announced the Commission's counsel would draft the final order for the Chair's signature. The Commission will not discuss the final order. The Commission will issue the order by September 11, 2017. There is no opportunity to see a draft order before it is signed. Parties may appeal the order within 60 days after the Commission issues the final order. The Commission will email the final order to the parties' attorneys and post it on the Commission's website.

Multnomah County Ordinance:

Jason Hildreth presented the staff report for Multnomah County Ordinance 1242. Commissioners asked questions of the staff. Commissioner Ericksen moved to approve staff recommendations' Commissioner Liberty seconded. The Commission voted unanimously to find Ordinance 1242 consistent with the Management Plan and adopt the staff recommendations.

Opportunity for Treaty Tribes to Address Commission

There was no comment from Treaty Tribes.

Public Comment

There was no public comment.

Committee Assignments

Chair Blair announced that he assigned Commissioner Bailey to the Assessment and Outreach committees; Chair Blair moved Commissioner Bonker off the Outreach Committee to ensure that committee did not constitute a quorum of commissioners. Motion supporting these appointments. Commissioner Nichols moved to approve the committee assignments; Commissioner DeKay seconded. The Commission voted unanimously to approve the committee assignments.

Executive Director's Report

Krystyna Wolniakowski stated she will submit a written report. Commissioner Liberty asked for an update on the budget. Krystyna Wolniakowski reported that the Washington Legislature is going into a third special session, so we won't see a budget until the end of June.

U.S. Forest Service NSA Manager's Report

Lynn Burditt gave an update on the Forest Service budget; discussed challenges to fill Marge Dryden's position after her retirement at the end of August; and passed out the Ready-Set-Gorge brochure.

Other Business

Chair Blair thanked Commissioners and staff for their work on the appeal.

Adjourn at 4:13

Approved 7.11.17