

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

FINAL OPINION AND ORDER

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

CRGC NO. COA-16-02
Wasco County No.

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

This case involves two consolidated appeals.¹ Both appeals relate to Wasco County’s land use decision regarding Union Pacific Railroad Company’s application to construct approximately 4 miles of second mainline track near Mosier, Oregon. The Columbia River Gorge Commission met on June 13, 2017 to hear oral argument and deliberate to a decision. The Commission voted to uphold Wasco County’s decision.

TABLE OF CONTENTS

| | |
|--|---|
| I. PARTIES AND AMICUS CURIAE | 4 |
| II. RECORD PRESENT BEFORE THE COMMISSION | 4 |
| III. PROCEDURAL MATTERS AND RULINGS | 6 |
| A. Disclosure of Conflicts of Interest and Ex Parte Communications | 6 |
| B. Hearing Procedure | 6 |
| C. Motions and Orders Prior to the Hearing..... | 7 |
| D. Motions and Objections at the Hearing | 7 |
| IV. STANDARDS OF REVIEW | 8 |
| V. FACTS | 8 |

¹ In this consolidated proceeding, the parties prepared separate written briefs and delivered separate oral arguments on each appeal. The Commission held a single hearing, but decided each set of assignments of error separately, and prepared only this single order.

| | |
|---|----|
| VI. ANALYSIS OF ASSIGNMENTS OF ERROR | 9 |
| A. First Argument – <i>Union Pacific Railroad Company v. Wasco County</i> , CRGC No. COA-W-16-01 | 10 |
| 1. First Assignment of Error – Whether 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. | 10 |
| a. The National Scenic Area Act and Columbia Gorge Compact | 11 |
| b. Wasco County’s NSALUDO is not state or local law subject to preemption under the ICCTA. | 12 |
| c. The ICCTA does not preempt Wasco County’s implementation of federal law. | 18 |
| d. The ICCTA does not preempt Wasco County’s NSALUDO because Wasco County is complying with the Columbia River Treaties. | 23 |
| e. Conclusion for First Assignment of Error | 24 |
| 2. Second Assignment of Error – Whether Wasco County erred by denying Union Pacific’s permit application on the ground that Union Pacific’s “proposal affects treaty rights.” | 25 |
| a. Scope of Treaty Fishing Rights. | 25 |
| i. Usual and Accustomed Fishing Places and Stations. | 25 |
| ii. Treaty Right to Habitat Protection. | 32 |
| b. Wasco County’s decision was supported by substantial evidence in the record and Wasco County’s findings are sufficient to support the decision. | 34 |
| i. Substantial evidence exists in the whole record to support Wasco County’s decision that the proposal would affect treaty rights. | 34 |
| ii. Wasco County’s NSALUDO puts a burden on the county to justify reaching a conclusion that conflicts with the comments, recommendations, and concerns of tribes. | 37 |
| iii. Substantial evidence supports Wasco County’s conclusion that Union Pacific’s proposal would affect treaty-reserved fishing rights. | 39 |
| iv. Substantial evidence supports Wasco County’s conclusion that Union Pacific’s proposal would affect the treaty right to habitat protection. | 42 |
| v. Wasco County’s findings are sufficient to support its decision. | 45 |
| c. Conclusion for Second Assignment of Error | 47 |
| 3. Third Assignment of Error – Whether 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. | 47 |
| 4. Fourth Assignment of Error – Whether 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 – Whether 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..... | 50 |
| B. Second Argument – <i>Friends of the Columbia Gorge, et al. v. Wasco County</i> , CRGC No. COA-W-16-02..... | 50 |
| VII. SUMMARY OF CONCLUSIONS AND ORDER..... | 51 |

I. 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; Robert Belt, Union Pacific Railroad Company, Omaha, Nebraska (pro hac vice granted); and Deana Bennett, Modrall Sperling, Albuquerque, New Mexico (pro hac vice granted).
- 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, Joe Sexton, and Amber Penn-Rocco, Galanda Broadman, PLLC, Seattle, Washington.

The entities that 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.

II. RECORD PRESENT BEFORE THE COMMISSION

The Commission’s proceeding was on the record developed by Wasco County. Wasco County provided the record to the Commission in electronic form only. The parties raised several record objections. The Chair of the Commission resolved all record objections in prior orders and settled the record on March 13, 2017. Members of the Commission received an electronic

copy of the settled record approximately eight weeks prior to the hearing. A copy of the record was present at the oral argument.

In conjunction with settling the record, the Chair issued a protective order requiring the parties to keep confidential specific pages in the record relating to site-specific cultural resource information² and to destroy the pages following the hearing. The parties may continue to use those confidential pages in any subsequent appeal. The obligation to keep confidential and destroy the listed pages is a continuing and independent obligation even if the Gorge Commission's opinion and order is remanded or reversed.

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 the event the court requires or requests a paper copy of the record, Wasco County is responsible for supplying the paper copy of its record and the Commission is responsible for supplying a paper copy of the record of its proceeding. The Commission made an oral recording of its proceeding. The oral recording is part of the record of the Commission's action and is available to the parties for duplication and transcription. Union Pacific brought a court reporter to the hearing to create a transcription. As of the date of this order, Union Pacific provided a copy of the transcription to all parties and the Commission with recommended corrections, but not all parties have reviewed the transcription and the Commission has not accepted it as the official transcription.

² The Columbia River Gorge National Scenic Area Act requires cultural resource inventory information may be used only for administrative purposes. 16 USC 544d(a)(1)(A). Oregon and Washington state law also prohibit disclosure of such information. ORS 192.501(11); RCW 42.56.300.

III. PROCEDURAL MATTERS AND RULINGS

A. Disclosure of Conflicts of Interest and Ex Parte Communications

A staff report from the Commission's Counsel to the Commission listed several disclosures of Commission policy discussions, actions, and communications relating to hazardous waste transportation in the Gorge and Union Pacific's application to Wasco County. The Commission provided a copy of the staff report to the parties three weeks prior to the oral argument. None of the parties raised any concerns with the disclosures in the staff report. The staff report also noted that the parties could raise concerns or objections with the Commission's Counsel advising the Commission; no party raised any such concerns or objections. At oral argument, commissioners Bowen Blair, Rodger Nichols, Janet Wainwright, Robert Liberty, Don Bonker, Dan Ericksen, Bridget Bailey, Lynn Burditt, and Antone Minthorn made disclosures of past interactions with the parties or inadvertent receipt of information about the proposal outside the record. Following the disclosures, the Chair announced that the parties could raise concerns with and challenge commissioners' participation in the hearing. No party raised concerns with or challenged any commissioner's participation.

B. Hearing Procedure

Commission Chair, Bowen Blair, was the presiding officer. The Chair announced that parties could raise any objection about the procedure or conduct of the hearing at any time. No party raised any objections or concerns with the hearing process. The Commission adhered to the hearing procedure specified in the Notice of Hearing.

The Commission deviated from its rules (Commission Rule 350-60) governing appeal hearings in two respects. First, the Chair held a scheduling conference to establish a firm briefing schedule; the parties agreed on a briefing schedule and the Chair issued an order confirming it.

This briefing schedule differed from the times permitted in the Commission’s rule to write briefs and request extensions of time in the Commission’s rules. Second, the Chair ordered that *amici* briefs be submitted earlier than allowed in the Commission’s rules to allow Union Pacific an opportunity to respond. The Commission’s rules do not specifically authorize responses to *amici* briefs. No party objected to these deviations.

C. Motions and Orders Prior to the Hearing

The Chair issued several orders concerning briefing deadlines and other scheduling and procedural matters *sua sponte* and in response to parties’ motions. The Chair issued these orders after allowing all parties an opportunity for oral objection or written briefing.

D. Motions and Objections at the Hearing

The Chair asked the full Commission to decide a motion filed prior to the hearing from *amici* Confederated Tribes of the Warm Springs Reservation, Confederated Tribes of the Umatilla Indian Reservation, and Columbia River Inter-Tribal Fish Commission requesting permission 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 Commission considered the parties’ briefing and voted to hear oral argument from the *amici*. The Commission allowed the *amici* 15 minutes to present their argument and allowed Union Pacific 15 minutes to respond to the *amici*’s argument.

There were no other motions or objections at the hearing.

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IV. STANDARDS OF REVIEW

Commission Rule 350-60-220(1) specifies the standards of review that the Commission uses in its review of county land use decisions in the National Scenic Area. The rule states:

The Commission shall reverse or remand a land use decision for further proceedings when:

- (a) The governing body exceeded its jurisdiction;
- (b) The decision is unconstitutional;
- (c) The decision violates a provision of applicable law and is prohibited as a matter of law; or
- (d) The decision was clearly erroneous or arbitrary and capricious;
- (e) The findings are insufficient to support the decision;
- (f) The decision is not supported by substantial evidence in the whole record;
- (g) The decision is flawed by procedural errors that prejudice the substantial rights of the appellant(s);
- (h) The decision improperly construes the applicable law; or
- (i) A remand is required pursuant to 350-60-090(3)(d) [special review process for takings claims].

The parties argue that several of these standards apply to their assignments of error. We apply the relevant standards below as we resolve the assignments of error.

V. FACTS

Union Pacific Railroad Company applied to Wasco County for a National Scenic Area approval to construct approximately four miles of new second mainline track between rail MP 66.98 (approximately two miles east of Mosier) through rail MP 72.35 (approximately 3 miles west of Mosier) in Wasco County, Oregon in the National Scenic Area. This project would expand and convert an existing siding of approximately .37 miles in length into second mainline track. The application also requested approval for related development: realigning existing track; replacing five equipment shelters; installing drainage structures, including ditches and culverts; constructing a 170-foot long, 25-foot high retaining wall; blasting and excavating within an existing open tunnel; installing new lighting, signs, and wireless communication poles; modifying existing utilities; using temporary landing zones for construction; constructing

temporary and permanent access roads; and using off-site wetland mitigation. A signal building and two signal lights were also proposed at rail MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation was proposed on Wasco County Parcel 2N 13E Section 8 Lot 200. *See generally* CG14–15.³

The Wasco County Planning Director recommended approval of the application with numerous conditions of approval. The Wasco County Planning Commission approved the application, but removed and modified some of the conditions of approval that the Planning Director recommended. Union Pacific Railroad Company, a coalition of non-governmental organizations (“Friends”), and the Yakama Nation each separately appealed the Planning Commission’s decision to the Wasco County Board of Commissioners. The Wasco County Board of Commissioners heard the three appeals and reversed the Planning Commission’s decision and denied the application, concluding that the project would impair treaty-reserved fishing rights of the four Columbia River Treaty Tribes in the National Scenic Area. In conjunction with the denial, the Board of Commissioners added back the conditions of approval that the Planning Commission removed and affirmed the Planning Commission’s decision in all other respects.

We explain the facts related to specific assignments error below in our analysis and resolution of the assignments of error.

VI. ANALYSIS OF ASSIGNMENTS OF ERROR

The parties argued the two appeals separately and consecutively. Our decision thus addresses the assignments of error in the two appeals separately and consecutively.

³ “CG” followed by numbers refers to the Administrative Record from Wasco County, which is numbered beginning CG1. A supplement to the record is numbered beginning CGSUPP1.

A. First Argument – *Union Pacific Railroad Company v. Wasco County*, CRGC No. COA-W-16-01

1. First Assignment of Error – Whether 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.

This assignment of error presents a question of law. Union Pacific argues that Wasco County’s decision violates a provision of applicable law (the Interstate Commerce Commission Termination Act (“ICCTA”)) and is prohibited as a matter of law. That standard of review is Commission Rule 350-60-220(1)(c). Union Pacific also argues that Wasco County is without jurisdiction to review the subject application; thus, we also review Wasco County’s decision for whether the governing body exceeded its jurisdiction. That standard of review is Commission Rule 350-60-220(1)(a). Applying these standards of review, we conclude that Wasco County correctly concluded that its National Scenic Area Land Use and Development Ordinance permitting process is not preempted by federal law as applied to railroad development projects, such as Union Pacific’s project, and thus does not violate the ICCTA, and that Wasco County properly had jurisdiction to review Union Pacific’s application and deny the application because it did not satisfy the standards for approval.

At base, Union Pacific argues that Wasco County’s National Scenic Area Land Use and Development Ordinance (NSALUDO) is local law enacted under the authority of state law, and as such, the ICCTA preempts it pursuant to 49 USC § 10501(b). Union Pacific also argues that even if Wasco County’s NSALUDO is federal law, the ICCTA would also preempt it. We disagree with both arguments. Wasco County’s legal counsel and Friends briefed responses to Union Pacific’s arguments in Wasco County’s proceeding (CG1754–55, 1527–30, 1535–36 (Wasco County’s briefing and oral points); CG587–89 (Friends’ briefing)), and we generally agree their briefing, although we amplify some of the legal points.

In short, the legal structure of the National Scenic Area and its administration, and case law involving the National Scenic Area and other similarly situated interstate compacts compel the conclusion that the Wasco County NSALUDO is not local law. Instead, it is mandated by federal law and implements federal law. These National Scenic Area authorities and other case law involving other cooperative federalism laws also suggest that Wasco County's NSALUDO is itself federal law, again, not local or state law. Further, the Surface Transportation Board and the U.S. Court of Appeals for the Ninth Circuit state that the proper approach to resolve a potential conflict between federal railroad law and federal environmental law is to harmonize the laws, and that the ICCTA does not preempt local or state governments implementing federal law. We discuss and apply these authorities below.

a. The National Scenic Area Act and Columbia Gorge Compact

In 1986, Congress enacted the Columbia River Gorge National Scenic Area Act, Pub L 99-663, 100 Stat 4274 (1986), codified as amended at 16 USC §§ 544–544p (2012). The National Scenic Area Act created the nearly 300,000-acre Columbia River Gorge National Scenic Area in both states. The federal legislation was also Congress's preauthorization for Oregon and Washington to enact an interstate compact to create a regional agency (the Columbia River Gorge Commission) to write a management plan for the National Scenic Area in partnership with the U.S. Forest Service, under which all land use and development within the National Scenic Area must be consistent with the standards in the National Scenic Area Act. 16 USC § 544c. That compact, the Columbia River Gorge Compact, is codified at ORS 196.150 and RCW 43.97.015.

In *Cuyler v. Adams*, 449 US 433, 438 (1981), the Supreme Court concluded that an interstate compact is federal law if it has received the consent of Congress and its subject matter

is appropriate for federal legislation. The Columbia River Gorge Compact satisfies the two *Cuyler v. Adams* criteria. As noted above, the Columbia River Gorge National Scenic Area Act contains Congress's consent for Oregon and Washington to enact the Columbia River Gorge Compact. As well, the Ninth Circuit has determined that the subject matter is appropriate for federal legislation under the Commerce Clause. *Columbia River Gorge United v. Yeutter*, 960 F2d 110, 113 (9th Cir 1992).

b. Wasco County's NSALUDO is not state or local law subject to preemption under the ICCTA.

Union Pacific agrees that the National Scenic Area Act and Gorge Compact are federal law, but it argues that provisions in the National Scenic Area Act and state law suggest that the Wasco County implements state law, not federal law. Union Pacific argues:

Congress made clear that “the States of Oregon and Washington *shall provide* the [Gorge] Commission, State agencies, and *the counties under State law* the authority to carry out their respective functions and responsibilities” 16 USC § 544c(a)(1)(B). The Oregon Legislature, in turn, passed a statute that gave the Gorge Commission, state agencies, and counties authority under state law to carry out their respective functions in accordance with the interstate compact. ORS 196.155. Thus, the NSALUDO was passed under state law. By congressional mandate, it does not have the force and effect of federal law.

Union Pacific Opening Brief at 19 (emphasis in brief, not in original statute). We disagree that Wasco County adopted its NSALUDO under solely state law authority. In the National Scenic Area, Wasco County is operating under federal and state authority. Congress's consent to the Columbia River Gorge Compact, 16 USC § 544c(a)(1), made the compact federal law and conferred authority to Oregon and Washington to engage in activity that might not be valid under the Commerce Clause and Tenth Amendment without consent (*see Columbia Gorge United*, 960 F2d 110). As a condition of its consent, Congress required the states to confer authority to the six National Scenic Area counties and the Gorge Commission to implement the National Scenic

Area Act and Columbia River Gorge Compact. 16 USC § 544c(a)(1)(B). The states in turn conferred the requisite authority in ORS 196.155 and RCW 43.97.025(1), which grants authority and requires the states and counties to carry out their functions in accordance with the Act. The authority to implement the National Scenic Area Act thus comes from three sovereigns—the federal government, Oregon, and Washington, acting cooperatively. In short, Wasco County operates under both federal and state authority to implement the National Scenic Area Act.

We also disagree with Union Pacific’s argument that the grant of authority under state law means that Wasco County implements state law. The National Scenic Area Act requires Wasco County to adopt a National Scenic Area land use ordinance. 16 USC §§ 544e(b), 544f(h). The Gorge Commission must review the ordinance for consistency with the National Scenic Area Management Plan, 16 USC § 544e(b)(3), and the U.S. Secretary of Agriculture must also review and concur with the ordinance. 16 USC § 544f(j). There would be no role for the bi-state Gorge Commission and U.S. Secretary of Agriculture if Wasco County was operating solely under state law authority and solely implementing state law. Further, appellate courts in both states have recognized that the National Scenic Area is not a state program. *E.g.*, *Klickitat County v. State*, 71 Wn App 760, 767, 862 P2d 629, 634 (1993) (concluding “[O]nce two states enter into a compact with congressional approval, the compact is considered an instrument of federal law). The Commission’s land management plan and the act’s provisions relative to the plan are federally mandated, and do not constitute a state program”); *Columbia River Gorge Comm’n v. Hood River County*, 210 Or App 689, 703, 152 P3d 997 (2007) (concluding “We thus conclude that the land use ordinances enacted by Wasco, Hood River, and Multnomah counties in accordance with, and to implement, the Commission’s management plan are land use regulations that are “required to comply with federal law . . .”).

Additionally, an established principle of interstate compact law is that regulations adopted by an interstate compact agency pursuant to an interstate compact with consent also have the status of federal law. The issue does not arise very often, but every court that has expressly considered the question has concluded that regulations implementing an interstate compact are also federal law. *E.g.*, *Rhode Island Fisherman's Alliance v. R.I. Dep't of Env'tl. Mgmt.*, 585 F3d 42, 49 (1st Cir 2009) (Atlantic States Marine Fisheries Commission's interstate fishery management plan for American Lobster is federal law); *Lake Tahoe Watercraft Rec. Ass'n v. Tahoe Reg'l Planning Agency*, 24 F Supp 2d 1062, 1068–69 (ED Cal 1998) (TRPA ordinance prohibiting discharge of unburned fuel and oil by carbureted two-stroke engines is federal law); *Stephans v. Tahoe Reg'l Planning Agency*, 697 F Supp 1149, 1152 (D Nev 1988) (characterizing the TRPA's 1987 Regional Plan as federal law). The TRPA cases are especially apt because the National Scenic Area Act borrowed heavily from lessons from the TRPA Compact. Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 *Env'tl L* 863, 968 (1987).

Without citing these authorities, the Oregon Supreme Court *sua sponte* specifically treated the Management Plan as federal law in *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or 366, 384, 410, 213 P3d 1164 (2009) when it concluded the Commission's interpretation of the National Scenic Area Act in the Management Plan was reviewable under the federal *Chevron v. Nat. Res. Defense Council* and *Auer v. Robbins* frameworks for reviewing a federal agency's interpretation of the statute it administers and interpretation of its own federal regulations.

There is no meaningful distinction between the Commission's rules and Wasco County's NSALUDO for the purpose of characterizing Wasco County's ordinance as federal, state or

local. The National Scenic Area Act expressly requires that Wasco County “shall” implement the National Scenic Area land management standards that the Gorge Commission and U.S. Secretary of Agriculture create. 16 USC §§ 544e, 544f(h). We therefore conclude that Wasco County’s NSALUDO is required by federal law, implements federal law, and should be treated the same as Gorge Commission actions implementing the same federal law—that is, the NSALUDO should be treated like federal law.

The National Scenic Area authorities are no less federal authorities simply because they are implemented by bi-state and local officials. Indeed, this form of cooperative federalism is common and courts regularly conclude that other similar cooperative federalism permitting systems do not change the character of the federal law into only state authorization. For example, courts have ruled that after the EPA approves a State Implementation Plan (SIP) under the Clean Air Act, the requirements of the SIP become federal law, binding federal regulations, or have the force and effect of federal law. *See, e.g., Safe Air for Everyone v. EPA*, 488 F3d 1088, 1091 (9th Cir 2007); *Trustees for Alaska v. Fink*, 17 F3d 1209, 1210 n 3 (9th Cir 1994). The Supreme Court has also reached the same conclusion for state implementation plans under the Clean Water Act. *Arkansas v. Oklahoma*, 503 US 91, 110, 112 S Ct 1046, 117 L Ed 2d 239 (1992). As with these well-recognized cooperative federalism programs, after the U.S. Secretary of Agriculture concurred with the Management Plan and Wasco County’s NSALUDO, Wasco County’s NSALUDO became federal law or binding federal regulations, or it has the force and effect of federal law even without a federal moniker.

Union Pacific makes two other arguments, but neither compels a conclusion that Wasco County’s NSALUDO implements state law. In one of those arguments, Union Pacific argues that 16 USC § 544c(a)(1)(A), which states that the Commission “shall not be considered an agency or

instrumentality of the United States for the purpose of any federal law” (which the Washington Court of Appeals found persuasive in *Skamania County v. Woodall*, 104 Wn App 525, 16 P3d 701 (2001)), suggests Wasco County’s NSALUDO does not have the status of federal law. We are not persuaded by this argument because subsequent to the *Woodall* decision, both the Oregon Supreme Court and Washington Supreme Court have applied federal law standards of judicial review to the Commission’s interpretation of the National Scenic Area Act. *Friends of the Columbia Gorge*, 346 Or at 378–83; *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn 2d 30, 43–45, 16 P3d 241, 247 (2001) (decided only a few months after *Woodall*). We also point out that *Woodall* contains faulty reasoning and is an anomaly in an otherwise long line of cases treating the Commission’s authorities as superseding conflicting state law. One example of the faulty reasoning in *Woodall* is the Washington Court of Appeals application of a key holding in *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power and Cons. Planning Council*, 786 F2d 1359, 1371 (9th Cir 1986), stating that “A state can impose state law on a compact organization only if the compact specifically reserves its right to do so.” Without explanation or further citation, the Court applied the inverse of that presumption, stating “Nothing in the [Columbia River Gorge] Compact or the [National Scenic Area] Act can be interpreted as a clearly expressed intention of the Legislature to give the Commission the authority to ignore Washington common law when interpreting a Washington State county ordinance.” *Woodall*, 16 P3d at 705. The court of appeals did not explain why it applied the inverse presumption when a different division of the Washington Court of Appeals, and the U.S. District Court for the Eastern District of Washington, both applied the correct *Seattle Master Builders* presumption. *Klickitat County*, 71 Wn App at 767; *Klickitat County v. Columbia River Gorge Comm’n*, 770 F Supp 1419, 1426 (ED Wash 1991). Further illustrating that *Woodall* was an anomaly, Oregon

appellate courts have never cited it, even when deciding whether to apply federal law standards of judicial review to the Commission in *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 215 Or App 557 (2007), *aff'd*, 346 Or 366 (2009).

In its other ancillary argument, Union Pacific argues that legislative history (including President Reagan's signing statement stating his opposition to the federal government being involved with zoning) and the U.S. District Court's decision in *Columbia Gorge United v. Yeutter*, CV No. 88-1319-PA, 1990 US Dist LEXIS 15447 (D Or May 23, 1990), suggest that Congress did not intend the National Scenic Area authorities to create federal law. Again, we do not believe these authorities compel a conclusion that Wasco County is not implementing federal law. Union Pacific's citations from the U.S. District Court's decision in the *Yeutter* case are out of context. The court was discussing that the National Scenic Area Act was proper under the Tenth Amendment in part because the states retained the power to enact zoning laws, and with that power chose to enact the Columbia River Gorge Compact, which made the standards in the National Scenic Area Act effective in the states. The Ninth Circuit affirmed the District Court's decision in *Columbia Gorge United v. Yeutter*, 960 F2d 110 (9th Cir 1992), but did not adopt the district court's reasoning. The Ninth Circuit simply stated, "Since the Act is within the powers granted to Congress under the *Commerce Clause*, it cannot constitute an exercise of a power reserved to the states." Further, with respect to the Commerce Clause argument in *Yeutter*, the Ninth Circuit concluded, "There is no merit to the appellant's claim on appeal that by upholding the constitutionality of the [Gorge] Compact, we are upholding the authority of Congress to impose zoning regulations throughout the country. As the district court noted, Congress found this area to be one of critical national significance." *Id.* at 113. The *Yeutter* case does not suggest that Wasco County's NSALUDO implements only state law, rather, Wasco County's

NSALUDO implements Congress’s intent to regulate in the Gorge—an area of critical national significance. And again, we point out every subsequent court decision (except some elements of the *Woodall* decision) treats the National Scenic Area authorities as federal law, required by federal law, or implementing federal law.

Consistent with the long history of court decisions involving the National Scenic Area, we conclude that Wasco County’s NSALUDO must be treated like federal law.

c. The ICCTA does not preempt Wasco County’s implementation of federal law.

Union Pacific next argues that ICCTA preemption applies even if the Wasco County NSALUDO is federal law. We disagree. Union Pacific has overstated the effect of 49 USC § 10501(b).⁴ The Surface Transportation Board has already interpreted the ICCTA and concluded, “nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes.” *Joint Petition for Declaratory Judgment Order – Boston and Maine Corp. and Town of Ayer, MA*, STB No. FD 33971 0, 2001 STB LEXIS 435 at **19–20 (Surface Transp. Bd. May 1, 2001). The Ninth Circuit Court of Appeals cited that STB decision with approval in *Ass’n of Am. RRs v. S. Coast Air Quality Mgmt. Dist.*, 622 F3d 1094, 1098 (9th Cir 2010). The Ninth Circuit also explained, “If an apparent conflict exists between ICCTA and a *federal* law, courts must strive to harmonize the two laws, giving effect to both

⁴ We note that Union Pacific sought other federal environmental law approvals without claiming ICCTA preemption. For example, Union Pacific received approval from the Army Corps of Engineers (discussed below in Union Pacific’s third assignment of error), and page CG540 of the record is a slide from Union Pacific’s presentation to the Wasco County Board of Commissioners showing other federal environmental law requirements for Union Pacific’s project. The record does not reflect Union Pacific arguing that the ICCTA preempts these other federal environmental law requirements.

laws if possible.” *Id.* (citing *Boston and Maine Corp and Town of Ayer* with approval (emphasis in original)).

The *Association of American Railroads* case is especially on point because the Ninth Circuit concluded that railroads are subject to non-federally enacted regulations after the federal government approves those regulations pursuant to a statutorily created cooperative federalism program. *Id.* Here, there is no dispute that the U.S. Secretary of Agriculture concurred with Wasco County’s National Scenic Area Land Use and Development Ordinance in 1994, and to subsequent amendments as well.

Instead of complete preemption as Union Pacific argues, the Surface Transportation Board has explained:

Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

Boston and Maine Corp. and Town of Ayer, 2001 STB LEXIS 435 at **19–21. Union Pacific’s sole argument is that the ICCTA preempts the Wasco County NSALUDO. However, preemption is not presumed as it is for state and local law—the applicable legal standard is harmonizing the two federal laws and their application on an individualized basis. Union Pacific made no argument about whether the Wasco County NSALUDO can be harmonized with federal railroad statutes and regulations, and made no argument about whether Wasco County’s application of the NSALUDO violated any concerns from the STB’s *Boston and Maine Corp and Town of Ayer*

decision. Wasco County's decision also did not address the STB's *Boston and Maine Corp and Town of Ayer* factors.

We conclude that the ICCTA does not completely preempt the National Scenic Area Act and implementing authorities; rather preemption depends on whether application of the National Scenic Area Act and implementing authorities violates any of the factors identified in the STB decision, confirmed by the Ninth Circuit. Again, those factors are whether the decision unduly restricts Union Pacific from conducting its operations, or unreasonably burdens interstate commerce, or whether Wasco County applied its NSALUDO in a discriminatory manner, or as a pretext for frustrating or preventing Union Pacific operations. We conclude Wasco County's decision survives those factors.

Regarding Union Pacific conducting its operations and burden on interstate commerce, Union Pacific argues that it needs the project for system fluidity (CG209 (explaining that this means to "decrease the amount of starting and stopping")), but it also stated that it is currently operating the line at less than capacity (CG214 n 22); that train volumes "has nothing to do with the amount of track [it] installs in any given area" (CG1756, 1763); and that it can increase the number of trains it runs on the tracks in response to market conditions (*see* CG220, 214 n 23). Wasco County imposed a condition of approval prohibiting an increase in the number of trains (CG5); however, we do not address the correctness of that condition of approval as Wasco County denied the decision. Union Pacific explains that without a second mainline, there would be continued delays and idling trains, and Union Pacific would not be able to run longer trains. CG12326. However, there is nothing in the record that suggests Wasco County is altering the way that Union Pacific conducts its current operation or restricting Union Pacific from conducting its current operations or increasing those operations on its existing track. Instead, as

noted above, Union Pacific is currently handling its current market demand and has capacity to increase its operations.

Union Pacific also cited *EPA-Petition for Declaratory Order*, No. FD 35803, 2014 WL 7392860 (Surface Transp. Bd. Dec. 30, 2014), in which the STB opined (but did not order) that,

“it is likely that [certain locomotive idling regulations] would be preempted because of the potential patchwork of regulations that could result, contravening Congress’s purpose in enacting § 10501(b). If the Rules were adopted into the California SIP, locomotives would be subject ‘to fluctuating rules as they cross[] state lines’ (and as they cross air quality regions), and the Rules would therefore likely ‘directly interfere’ with the purpose of § 10501(b). . . . Such a variety of localized regulations would likely have a “practical and cumulative impact” on rail operations on the national rail network.”

Id. at 8–9 (internal citations omitted). Here, however, there is no potential patchwork of regulations that could result from requiring Union Pacific to avoid effects on the Columbia River Treaty Tribes’ treaty-reserved fishing rights. There are not multiple jurisdictions adopting new or different treaty rights, and the Columbia River Tribes’ treaty-reserved fishing rights are the same in each county within the National Scenic Area and outside the National Scenic Area. Moreover, as discussed below, the treaties are the highest law of the land and Congress did not abrogate the treaties in the ICCTA.

Union Pacific makes no argument regarding Wasco County applying its NSALUDO in a discriminatory manner and nothing in the record suggests that the NSALUDO discriminates against railroad construction or that Wasco County applied its NSALUDO in a manner discriminatory to railroad construction projects or operation, or Union Pacific. The treaty rights provisions in the NSALUDO apply to all types of projects and all types of applicants. *See, e.g.*, NSALUDO § 1.080.A (stating, “This Ordinance shall protect treaty and other rights of Indian tribes. Nothing in this Ordinance may interfere with the exercise of those rights.”); NSALUDO §

14.800 (using the general term “new uses” to invoke application of the treaty rights protection process and standards”).

Regarding Wasco County applying its NSALUDO as a pretext for frustrating or preventing Union Pacific operations, we note that Wasco County was inclined to approve the proposal (*see* CG 1743, 693 (Wasco County staff recommending approval to Planning Commission (which it did), and staff explaining the Board of Commissioners’ options to approve)); however, two factors seemed to have led the Board of Commissioners to deny the application. First, Union Pacific objected to proposed conditions of approval that would have addressed Wasco County staff’s concern with effect on treaty rights—requiring Union Pacific to construct two safe crossing for tribal fishing. CG204–15. Union Pacific suggested that access be provided through a voluntary process. *Id.* However, the Wasco County planning staff pointed out that Union Pacific’s suggestion would not ensure treaty fishing access, CG217, and multiple times pointed out that the conditions of approval were necessary to ensure treaty fishing access. *E.g.*, CG216–20, 302, 7821–22. Second, the tribes argued that Wasco County staff’s recommended conditions of approval requiring the crossings would not have alleviated their concerns about impact to their treaty-reserved fishing rights. *E.g.*, CG120, 230, 391, 971. Wasco County ultimately concluded:

Allowing the applicant to proceed with a voluntary process does not afford the Board with a known outcome, and therefore prevents a finding of no effect. Given the concerns raised by the Treaty tribes and testimony provided at the hearing, it is apparent that the voluntary process proposed by the applicant would be unlikely to succeed in satisfactorily addressing impacts to Treaty rights.

CG133. Here, where Wasco County staff recommended approval, the Wasco County Planning Commission approved the application, and both Union Pacific and the tribes objected to Wasco County’s attempt to find a means to approve the application, we cannot conclude that Wasco

County's decision was any type of pretext for frustrating or preventing Union Pacific's operations.

We also note that both the final decision and the Wasco County Staff and Board of Commissioners' discussion of the application during the Board of Commissioners' hearing focused on the decision criteria and not the ancillary (and extensive) public testimony relating to railroad operations and expressing concern over the recent derailment at the project site. Wasco County's staff final recommendation to the Board for its deliberation was:

Staff recommend[s] to you, the Board, is that if, based on evidence provided at the hearing, the Board is able to find that the proposed development would not adversely affect treaty rights protected by Chapter 14, Scenic Area Review, then the staff recommends affirming the Planning Commission's decision to approve the requests with modified conditions, including the conditions removed by the Planning Commission to make sure that we are following our ordinance. If the Board is not able to find that the proposed development would not adversely affect treaty rights, then staff finds that the Board should reverse the Planning Commission's decision and deny the development.

CG321–22; *see also* CG693. Consistent with the staff's recommendation, the Board rested its decision solely on its conclusion that the project would affect treaty rights. CG133. The record shows a genuine treaty rights issue, the tribes' participation, Wasco County staff trying to resolve the issue, and lengthy Planning Commission and Board discussions of treaty rights. Wasco County's decision made within this context does not show that Wasco County used treaty rights as any type of pretext to frustrate or prevent railroad operations.

d. The ICCTA does not preempt Wasco County's NSALUDO because Wasco County is complying with the Columbia River Treaties.

Here, where Wasco County denied the application because it would affect treaty rights, there is an additional layer of preemption analysis on top of the factors expressed by the STB and Ninth Circuit—that is, whether the ICCTA preempts treaty rights that the Columbia River Treaty tribes reserved in their treaties with the U.S. government. Federal law only abrogates treaties

when Congress does so expressly. *U.S. v. Washington*, 827 F3d 836, 854 (9th Cir 2016); *U.S. v. Dion*, 476 US 734, 746, 106 S Ct 2216, 90 L Ed 2d 767 (1986) (Bald Eagle Protection Act terminated treaty hunting rights because Congress expressly considered the issue and its action “reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to permit, is inconsistent with the need to preserve those species”). None of Union Pacific’s arguments demonstrate that Congress ever considered whether the ICCTA should preempt treaty-reserved rights and we do not find any in our research. We have searched the legislative history of the ICCTA; there is no mention of treaty-reserved rights. Because there is no clear congressional intent that the ICCTA abrogates the rights reserved in the Columbia River Treaties, the treaties remain the supreme law of the land (U.S. Const., Art. VI; *see also, e.g., Sohappy v. Smith (U.S. v. Oregon)*, 302 F Supp 899, 905 (D Or 1969), *U.S. v. Washington*, 384 F Supp 312, 338 (WD Wash 1974)).

e. Conclusion for First Assignment of Error

Wasco County’s NSALUDO is not state or local law subject to preemption under the ICCTA, and the ICCTA does not preempt Wasco County’s NSALUDO because Wasco County is implementing federal law and applying the Columbia River treaties. Wasco County’s application of its NSALUDO does not violate the ICCTA and is not prohibited as a matter of law. Because Wasco County may apply its NSALUDO to Union Pacific’s application, Wasco County did not exceed its jurisdiction by reviewing and denying Union Pacific’s application. The first assignment of error is denied.

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

This assignment of error presents questions of law and fact. The legal question is whether Wasco County’s decision improperly construes applicable law. Commission Rule 350-60-220(1)(h). The applicable law at issue in this assignment of error is the law of the Columbia River Treaty Tribes’ fishing rights. The factual questions are whether Wasco County’s findings are sufficient to support the decision and whether Wasco County’s decision is supported by substantial evidence in the record. Commission Rules 350-60-220(1)(e) and (1)(f).

a. Scope of Treaty Fishing Rights⁵

The parties disagree about whether Union Pacific’s project will affect usual and accustomed fishing places and stations by blocking access to those places or making access more dangerous, and whether there is a treaty right to avoiding future risk of environmental degradation.⁶ We start with the legal question of whether Wasco County properly construed the tribes’ fishing rights reserved in their treaties with the United States.

i. Usual and Accustomed Fishing Places and Stations

The parties describe “usual and accustomed place and stations” differently. We start by summarizing the parties’ descriptions and arguments about what constitutes usual and accustomed fishing places and stations. Union Pacific argues:

Treaty fishing rights are limited to “usual and accustomed stations,” which are places from which certain tribes have fished since 1855. Alternatively, due to

⁵ We recognize that the Yakama Nation, Warm Springs Tribe, Umatilla Tribe and Nez Perce Tribe each have their own treaty with the United States and the text of the treaties is not identical. The tribes do not argue that their individual treaties grant different fishing rights relevant to this matter. Where we use the word “treaty” in the singular, we mean the Yakama Nation, Warm Springs Tribe, Umatilla Tribe, and Nez Perce treaties collectively.

⁶ This matter does not involve any question of whether the tribes have a treaty right to catch fish, the quantum of fish, or state regulation of fishing.

flooding, “in lieu”⁷ locations are protected by treaties. Tribes also have a limited right to access treaty-era stations and grounds. Outside of such places, however, tribes and tribal members may fish. The tribes here never specified a treaty-era station, ground, or in-lieu ground, within the project area. Nor did they specify an access route. . . .

Union Pacific Opening Brief at 24. Union Pacific further argues that usual and accustomed fishing stations are limited to those that existed at the time of the treaties and that historical evidence demonstrates regular and continuous use. *Id.* at 26 (citing *Seufert v. Olney*, 193 F 200 (ED Wash 1911) and *U.S. v. Brookfield Fisheries*, 24 F Supp 712, 713, 716 (D Or 1938)).

Wasco County’s decision relied on the tribes’ description of their treaty-reserved fishing rights (CG129–32) and Wasco County’s briefing to the Commission referred to its decision and adopted the Yakama Nation’s briefing. Wasco County Response Brief at 8. Friends also adopted the Yakama Nation’s briefing on this issue. Friends’ Response Brief at 3.

In contrast to Union Pacific’s arguments, the Yakama Nation argues that its treaty-reserved fishing right is much broader in geographic scope than access to in lieu sites and historically identified usual and accustomed fishing stations. The Yakama Nation argues that its usual and accustomed fishing places and stations is the “Columbia River area” and “a property right in adjacent lands ‘to the extent and for the purpose mentioned in the treaties.’” Yakama Nation Response Brief at 14, note 47 (citing CG895, testimony of JoDe L. Goudy, Chairman, Yakama Nation Tribal Council). Chairman Goudy cited *U.S. v. Washington*, 384 F Supp 312, 382 (WD Wash 1974), the “Boldt decision,” which found, “Approximately four hundred [Yakama Nation] tribal members fish commercially for the most part in the Columbia River

⁷ “In lieu” sites are fishing access sites and facilities provided by the federal government after the federal government constructed dams that flooded usual and accustomed fishing station. CG12502 is a map of in-lieu sites from the Columbia River Inter-Tribal Fish Commission.

area,”⁸ and *U.S. v. Winans*, 198 US 371, 381, 25 S Ct 662, 49 L Ed 1089 (1905), which stated in part, “The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned.”

Amici Warm Springs Tribe, Umatilla Tribe, and Columbia River Inter-Tribal Fish Commission adopted the Yakama Nation’s briefing, *Amici* Brief at 8, but also cite to *U.S. v. Oregon*, CV 68-513-KI (D Or), and argue, “the section of the Columbia River between Bonneville Dam and McNary Dam, known as Zone 6, is held to be an exclusive treaty Indian commercial fishing area.” *Amici* Brief at 6.

The legal question is thus whether the Columbia River Treaty Tribes’ reserved fishing rights are: (1) only at locations that access the Columbia River from historically identified usual and accustomed fishing stations and current in-lieu sites, as Union Pacific described, or (2) a broader geographic scope (“the Columbia River area,” or “Zone 6”) as the tribes and the Columbia River Inter-Tribal Fish Commission describe. We conclude that the scope of the tribes’ treaty-reserved fishing rights are the latter.

The four treaties use two different terms to describe their reserved fishing rights. The Yakama and Nez Perce treaties use the term “usual and accustomed places,” and the Middle Oregon (Warm Springs) and Umatilla treaties use the term “usual and accustomed stations.”⁹ Courts have largely collapsed “places” and “stations” into one overall term, focusing on the words “usual and accustomed” rather than “places” and “stations.” For example, Judge Belloni’s

⁸ This finding and other findings in the Boldt decision are quoted below on page 29 of this order.

⁹ Treaty of June 9, 1855, with the Yakima Tribe, art. 3 (12 Stat. 951); Treaty of June 25, 1855, with the Tribes of Middle Oregon, art. 1 (12 Stat. 963); Treaty of June 9, 1855, with the Umatilla Tribe, art. 1 (12 Stat. 945); Treaty of June 11, 1855, with the Nez Perce Tribe, art. 3 (12 Stat. 957).

seminal decision in *Sohappy v. Smith (U.S. v. Oregon)*, 302 F Supp 899, 904 (D Or 1969), stated, “Each of these treaties [Yakama, Nez Perce, Middle Oregon, and Umatilla] contained a substantially identical provision securing to the tribes ‘the right of taking fish at all usual and accustomed places in common with citizens of the Territory.’” Any distinction in these terms of the four treaties seems to be without legal meaning now. We understand Union Pacific’s argument that uses the terms “stations” and “grounds” (a term used in other Pacific Northwest treaties, not the Columbia River treaties) is not intended to artificially limit Columbia River treaty rights to only “stations.”

Union Pacific’s argument that treaty fishing rights are limited solely to access at historically identified “usual and accustomed stations” is too narrow and is based on court decisions from the early 1900s that have been superseded by decades of litigation in *U.S. v. Washington* and *U.S. v. Oregon*.

In *U.S. v. Washington*, 384 F Supp 312 (WD Wash 1974) (commonly referred to as the “Boldt decision”), Judge Boldt made specific findings of fact and conclusions of law suggesting that the Columbia River Treaty Tribes’ usual and accustomed fishing places were not limited to specific stations identifiable by historical evidence, and that many fishing stations and locations are unknown. For example, some of Judge Boldt’s findings and conclusions are:

[Established Basic Facts and Law]

8. The tribes reserved the right to fish at “*all* usual and accustomed grounds and stations.” The words “grounds” and “stations” have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. “Stations” indicates fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area; “grounds” indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. . . .¹⁰

¹⁰ We recognize that the Boldt decision related to all tribes in Washington State, not just Columbia River Treaty Tribes. Some of the Puget Sound treaties use the term “grounds,” a term

[Findings of Fact]

10. The Northwest Indians developed and utilized a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. They harvested fish from the high seas, inland salt waters, rivers and lakes. They took fish at river mouths as well as at accessible points or stretches along the rivers all the way to the headwaters. Some locations were more heavily utilized than others. Like all fishermen, they shifted to those locales which seemed most productive at any given time. . . .

. . .
12. Indian fishing practices at treaty time were largely unrestricted in geographic scope . . .

13. Each of the Plaintiff tribes had usual and accustomed fishing places within the case area. Although there are extensive records and oral histories from which any specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. . . . Among the reasons for this are the following: 1) Indian fisheries existed at all feasible places along a given drainage system. Fishing stations which were the site of weirs or permanent villages are more easily documented than riffles where fish were speared; 2) Indian fishermen shifted to those locales which seemed most productive at any given time depending upon such factors as changes in river flow, turbidity or water course; 3) some important recorded fishing sites are no longer extant because of subsequent man-made alterations in watersheds and water systems; and, 4) use of some sites has been discontinued because appropriate Indian gear for those sites has been outlawed or because competing uses and users have made utilization of the sites by Indian fishermen unfeasible.

. . .
163. Approximately four hundred [Yakama Nation] tribal members fish commercially for the most part *in the Columbia River area*, . . .

[Conclusions of Law]

25. The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, . . .

. . .
26. . . . Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

not found in any of the four Columbia River Treaties. We cite this finding to illustrate that not all fishing locations are known, which we believe suggests that treaty fishing is not limited to only known and provable stations.

U.S. v. Washington, 384 F Supp at 332, 352–53, 383, 402 (emphasis added in finding 163).¹¹

In *Sohappy v. Smith (U.S. v. Oregon)*, 302 F Supp 899 (D Or 1969) (commonly referred to as the “Belloni decision”),¹² Judge Belloni held that the four treaty tribes were entitled to a “fair share” of the fish runs and that the state was limited in its power to regulate tribal treaty fishing (the state could only regulate for conservation purposes and the regulation had to meet specific criteria). Prior to that decision, Judge Belloni issued a pretrial order stating that “[the four Columbia River Treaty Tribes] and their members had usual and accustomed fishing places in the Columbia River Basin, in water now under Oregon’s jurisdiction, including areas upstream (east) from the confluence of the Deschutes River in Oregon and on the Columbia River.” *U.S. v. Oregon*, No. 68-513, slip op. at 8 (D Or Feb. 24, 1969).

Amici argues that there has never been any attempt to more specifically define precise locations of usual and accustomed fishing places. Instead, following that decision, the tribes and the states of Oregon and Washington acted through the 1918 Columbia River Compact (codified at ORS 507.010 and RCW 77.75.010), to adopt a zone system in “A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries above Bonneville Dam (Jan. 20, 1977), a five-year plan that the court adopted by order.”¹³ The 1977 plan provided that in the

¹¹ We are aware that the Boldt decision also contained findings that might suggest “usual and accustomed places and stations” should be read narrowly, such as, finding 24, which states in part “The words ‘usual and accustomed’ were probably used in the restrictive sense, not intending to include areas where use was occasional or incidental.” *U.S. v. Washington*, 384 F Supp at 356. As discussed below, the states’ zone system for the Columbia River largely obviated questions of frequency of use for Zone 6.

¹² *U.S. v. Oregon* was consolidated with *Sohappy v. Smith* and Judge Belloni issued his original decision as *Sohappy v. Smith*. The subsequent decisions that we cite in this final order and opinion were issued as *U.S. v. Oregon*. The case is now solely entitled *U.S. v. Oregon*.

¹³ We have been unable to determine which orders adopted the 1977 Plan, but we accept the *amici*’s representation that it was adopted. Audio Recording of Gorge Commission Hearing, Argument of Brent Hall, Attorney for *Amicus Curiae*, Confederated Tribes of the Umatilla Indian Reservation, Audio Segment B at 20:50.

main stem of the Columbia River, Zone 6 is solely for Indian fishing, and every management plan since 1977 has applied the treaty fishing right in this manner. The premise that Zone 6 is an exclusive tribal commercial fishery where Indian treaty fishing rights apply has also been upheld by the Ninth Circuit. *U.S. v. Oregon*, 718 F2d 299 (9th Cir 1983). Illustrating a broad geographic scope of the treaty fishing right, the Ninth Circuit refused to accept the parties' arguments that would "erode severely the geographical aspect of the tribes' treaty rights." *Id.* at 305.¹⁴ Most recently, in 2008, the court adopted the 2008–2017 *United States v. Oregon* Management Agreement as a court order. *U.S. v. Oregon*, No. CV 68-513-KI (D Or) (docket nos. 2455 (plan) and 2456 (order adopting plan)). That plan continues to reserve Zone 6 for treaty fishing. 2008–2017 *United States v. Oregon* Management Agreement at 52.

Counsel for *amicus curiae* Umatilla Tribe explained at oral argument why the zone approach is necessary for the Columbia River:

[The *U.S. v. Oregon*] ruling also reflects the reality of fishing in the Columbia River. The nature of changing river levels and flows, predation, infiltration, fish returns in various years, means some areas may be productive and others may not. Some areas may not be fished for years only to return to productivity once the hydro-system changes, storage project operations are altered, flows and eddies change, new predation reduction activities are changed or increased. So an inquiry about impacts to treaty fishing in the Columbia River is a much different question than whether there is a fishing site at any one location between Bonneville and McNary dams.

Audio Recording of Gorge Commission Hearing, Argument of Brent Hall, Attorney for *Amicus Curiae*, Confederated Tribes of the Umatilla Indian Reservation, Audio Segment B at 20:50.¹⁵

¹⁴ The Ninth Circuit did note "Limitations on the geographical aspect of the tribes' treaty rights to promote [conservation] are permissible"). *U.S. v. Oregon*, 718 F2d at 305. No party here argues that the instant case involves limitations on fishing for the purpose of conservation.

¹⁵ "Audio Segment" refers to the Gorge Commission's segments of the audio recording of the hearing before the Gorge Commission. This order cites to the audio recording because as of the date of this order, there is not an official transcription. See page 5 above.

Union Pacific’s argument relies on cases that predated the litigation in *U.S. v. Oregon* and *U.S. v. Washington* and conflicts with the Zone approach that the tribes and states have used (and courts have adopted in myriad orders) since 1977. We agree with the tribes and Columbia River Inter-Tribal Fish Commission that treaty fishing rights are not geographically limited to specifically identifiable historically used stations, but that the term “usual and accustomed” encompasses all of Zone 6 without need to establish specific historical access points to Zone 6. This right also includes the right of crossing land to access the Columbia River from the *Winans* case noted above.

Although Wasco County did not describe the treaty fishing right in the detail we have above, Wasco County properly construed the law of the Columbia River Treaty Tribes’ fishing rights by applying treaty rights protection where there was information from the tribes about treaty fishing access beyond historically used stations within the confines of the project area. CG133.

ii. Treaty Right to Habitat Protection

The Yakama Nation also argues that Union Pacific’s project would affect treaty rights because the project would increase the risk of a derailment and spill that would affect fish populations and habitat. Yakama Nation Response Brief at 14–15. *Amici* Warm Springs Tribe, Umatilla Tribe, and Columbia River Inter-Tribal Fish Commission specifically argue that the treaty fishing right includes a right to protection of habitat:

The treaty fishing right carries with it an inherent right to protect the resource from despoliation from man-made acts.

...

Union Pacific’s proposed construction has the potential to undo [the tribes’ ‘activities relating to the protection and restoration of anadromous and resident fish stocks in the Pacific Northwest and the ecosystems on which they depend, including but not limited to the Columbia River, its tributaries and estuary’] because of the impacts that would be caused by increased rail traffic and the risk

of derailment and spill, as well as the risks to tribal member safety and cultural resources.

Amici Brief at 5–6, (quoted text in brackets from page 7).

Union Pacific does not argue that there is no treaty right to habitat protection. Rather, Union Pacific argues that the tribes and CRITFC have not provided the requisite “[scientific] evidence of how the Project would impact the fish population or how that impact, if there was one, would impact the Tribes’ right to a fair share in common with other fishermen.” Union Pacific Response to *Amici* Brief at 10.

We agree with the *amici* that the treaty fishing right includes a right to fish habitat. The Ninth Circuit originally did not recognize this element of the treaty right, but does so now. In a *U.S. v. Washington* proceeding subsequent to the Boldt decision, Judge Orrick determined that the tribes have a treaty right to habitat protection. *U.S. v. Washington*, 506 F Supp 187 (WD Wash 1980). However, a three-judge panel of the Ninth Circuit concluded that the treaties did not provide for an environmental servitude, *U.S. v. Washington*, 694 F2d 1374 (9th Cir 1982), and an *en banc* panel subsequently concluded that Judge Orrick should not have decided the issue because the dispute in that case did not involve concrete facts. *U.S. v. Washington*, 759 F2d 1353 (9th Cir 1985). In 2007, in another subproceeding of *U.S. v. Washington*, Judge Martinez concluded that the State of Washington maintains culverts that blocked fish passage and thus damage fish habitat in violation of the tribes’ treaty right. *U.S. v. Washington*, 20 F Supp 3d 828, 889 (WD Wash 2007). In 2013, Judge Martinez issued an injunction in that proceeding ordering the State of Washington to repair the offending culverts. *U.S. v. Washington*, 20 F Supp 3d 986, 1000, 1023 (WD Wash 2013). The Ninth Circuit affirmed, *U.S. v. Washington*, 827 F3d 836 (9th Cir 2016), and then affirmed again in *U.S. v. Washington*, 853 F3d 946 (9th Cir 2017) (amending the 2016 decision), and *U.S. v. Washington*, 2017 US App LEXIS 8804 (9th Cir May 19, 2017)

(order denying rehearing). Courts have now settled that the Columbia River Treaty Tribes' treaty fishing right includes the right to fish habitat free from human acts of despoliation. *See also* Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH L REV 1 (2017).

Although Wasco County did not describe the treaty right to habitat protection in the detail we have above, Wasco County properly construed the law of the Columbia River Treaty Tribes' fishing rights by considering whether Union Pacific's application could result in habitat damage in violation of protected treaty rights. CG132–33.¹⁶

b. Wasco County's decision was supported by substantial evidence in the record and Wasco County's findings are sufficient to support the decision.

With this construction of the Columbia River Treaty Tribes' reserved fishing rights, we turn to the factual questions: whether Wasco County's findings are sufficient to support the decision and whether Wasco County's decision was supported by substantial evidence in the record. We review the record for substantial evidence, then evaluate Wasco County's findings for whether they clearly explain the County's reasoning, identify the evidence necessary to establish substantial evidence, and are based on the proper understanding of treaty rights that our decision outlines above.

i. Substantial evidence exists in the whole record to support Wasco County's decision that the proposal would affect treaty rights.

Substantial evidence is “more than a mere scintilla” and “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 US 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951). Oregon's formulation of substantial evidence

¹⁶ We note that Wasco County evaluated habitat protection from the perspective of spill response and imposing a condition of approval for a spill response plan and local training. We evaluate the sufficiency of the county's findings and evidence below.

also uses the reasonable person standard. *See* ORS 183.482(8)(c) (“Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.”).

Wasco County’s treaty rights protection standards are at NSALUDO § 14.800. These standards come verbatim from the Management Plan for the Columbia River Gorge National Scenic Area. To understand the standards and their application, we start with a review of the context of the standards within the requirements of the National Scenic Area Act and the development of the standards, and then review Wasco County’s application of the standards.

The National Scenic Area Act specifies that nothing in the Act shall, “affect or modify any treaty or other rights of any Indian Tribe.” 16 USC § 544o(a)(1). The Gorge Commission and U.S. Forest Service interpreted this provision when drafting the Management Plan to prohibit proposed uses that would affect or modify a treaty right or other rights of any Indian tribe. *See* Management Plan, Indian Tribal Treaty Rights and Consultation Policy GMA Policy 4 (page IV-3-2) and SMA Policy 6 (page IV-3-7). The Management Plan defines “Effect on treaty rights” as:

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 Yakima tribes executed between the individual Indian tribes and the Congress of the United States and as adjudicated by the Federal courts.

Management Plan at Glossary 7. We begin by reviewing the Commission’s development of the cultural resources and treaty rights protection standards in the Management Plan, which illustrates that the Gorge Commission intended to give tribal governments a greater role in identifying their cultural resources and treaty rights in the National Scenic Area than under

federal or state law, and that greater role does not require the tribes or members of the tribes to reveal site-specific sensitive (from the tribes' perspective) information.

For this historical context, we turn to a law review article written by Kristine Olson during her tenure as a Gorge Commissioner detailing the Commission's deliberations that led to the current cultural resources and treaty rights protection standards in the Management Plan. Kristine Olson Rogers,¹⁷ *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT L REV 741 (1993). Ms. Olson wrote the article nearly contemporaneously with the Commission's drafting and adoption of the Management Plan. The article explains that the Commission wanted the staff to design a protection process that "guarantees tribal governments a role in the decision-making process." *Id.* at 770. The Commission amended an early draft of the protection process to allow "tribal governments to identify those resources that were of concern to Native Americans and in need of protection." *Id.* at 772. One Warm Springs staff person, who would later become a Gorge Commissioner, "registered his concern that [a later staff proposal establishing evaluation criteria] would 'ignore unknown [to Euro-Americans] cultural resources." *Id.* at 777. Ultimately, the Commission voted to "allow[] tribal governments to identify sensitive resources." *Id.* at 778. The Commission then explained the cultural resource protection process as: "The Commission expanded its criteria for determining significance to give Indian tribal governments a greater role. Now, a resource can be found to be significant if it is deemed culturally significant even though it doesn't meet other significance tests." *Id.* at 779. The article further explained that the purpose of the Commission's cultural resource protection process is to "recognize the 'Indian

¹⁷ Ms. Olson dropped "Rogers" from her name after publication of this article.

world view.’ Western scientists and planners expect a checklist; Native Americans do not operate that way.” *Id.* at 784.

Much of the article relates to policies developed for protection of cultural resources for which local governments must incorporate the tribes’ comments, recommendations, and concerns, or must justify a decision that contradicts the tribes’ identification of significant cultural resources. Management Plan at I-2-15, I-2-17, & I-2-18. However, this approach of giving tribal governments a lead role in protecting cultural resources also informed the process and standards for protection of treaty rights. Indeed, the treaty rights protection process in the Management Plan creates the same rebuttable presumption in favor of tribal governments when they identify and describe an effect on treaty rights in the National Scenic Area.

ii. Wasco County’s NSALUDO puts a burden on the county to justify reaching a conclusion that conflicts with the comments, recommendations, and concerns of tribes.

The treaty rights protection process in the Management Plan and Wasco County’s NSALUDO specifies in part:

Conclusion of the Treaty Rights Protection Process

1. The local government shall decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe.

The final decision shall integrate findings of fact that address any substantive comments, recommendations, or concerns expressed by Indian tribal governments. *If the final decision contradicts the comments, recommendations or concerns of Indian tribal governments, the local government must justify how it reached an opposing conclusion.*

2. The treaty rights protection process may conclude if the local government determines that the proposed uses would not affect or modify treaty or other rights of any Indian tribe. Uses that would affect or modify such rights shall be prohibited.
3. A finding by the local government that the proposed uses would not affect or modify treaty or other rights, or a failure of an Indian tribe to comment or

consult on the proposed uses as provided in these guidelines, in no way shall be interpreted as a waiver by the Indian tribe of a claim that such uses adversely affect or modify treaty or other tribal rights.

Management Plan at IV-3-4 (emphasis added). Wasco County's NSALUDO contains the identical standard, except that the NSALUDO uses the term "County" in place of "local government." NSALUDO § 14.800.D. As explained above, the intent of the Management Plan is for local governments to follow the comments, recommendations, and concerns of the treaty tribes unless the local governments can justify otherwise.¹⁸ This is the way that the Management Plan and NSALUDO protect cultural resources and treaty rights using the "Indian world view." Essentially, the "reasonable person" standard for determining substantial evidence must consider the Indian world view. The Commission's experience at the time it developed the Management Plan was that when the tribes participate in land use decisions, they do not typically reveal site specific information out of concern for privacy and to prevent non-Indian use, vandalism and looting.¹⁹ In other words, information from tribes about their treaty-protected and cultural sites may not have the same high level of detail as information establishing other relevant facts. As reflected in the "Conclusion of the Treaty Rights Process" guidelines cited above, the Commission made a policy decision that it and local governments in the National Scenic Area must accept and use the evidence that the tribes provide, unless affirmatively making contrary findings, for which it would need contrary evidence. Additionally, when a tribe chooses not to

¹⁸ Ms. Olson recounted concerns that the treaty tribes would use this role in the Management Plan to stall development in the Gorge (17 VT L REV at 778), but this concern never materialized. Since the Commission adopted the Management Plan, this matter is the only time the tribes have participated in a land use appeal in the National Scenic Area to enforce their treaty rights.

¹⁹ By the time it adopted the Management Plan in October 1991, the Gorge Commission staff had reviewed more than 800 land use applications and the Gorge Commission itself heard more 125 appeals.

provide detailed evidence, that choice, “in no way shall be interpreted as a waiver by the Indian tribe of a claim that such uses adversely affect or modify treaty or other tribal rights.”

Against this context, we evaluate Wasco County’s findings, decision, and administrative record.

iii. Substantial evidence supports Wasco County’s conclusion that Union Pacific’s proposal would affect treaty-reserved fishing rights.

Based on the definition of “Effect on treaty rights” noted above, we must determine whether Wasco County’s decision was based on substantial evidence that the proposal would bring about a change in, influence, modify, or have a consequence to the treaty rights.

The Yakama Nation, Umatilla Tribe and Warm Springs Tribe all provided evidence to Wasco County of how Union Pacific’s proposal would affect their Treaty-reserved fishing rights. CG397–98, 551–560, 875–910. The Yakama Nation summarized this evidence in its brief:

- The Application would result in violations of the Yakama Nation’s Treaty rights to hunt, fish, and gather traditional foods, and to maintain and continue their traditional, religious and cultural practices, including subsistence living and the provision of foods, through fishing, hunting, and gathering, to underserved individuals within the Yakama Nation community;
- The Application will increase train traffic, which already poses a risk to the safety of the Yakama Nation’s People, including traditional fishers who regularly cross train tracks to access fishing sites. Further, increasing rail traffic will only aggravate the risks the Yakama Nation People already bear with respect to train traffic in and around their usual and accustomed areas and other lands upon which the Yakama Nation retain usufructuary rights, pursuant to the Treaty of 1855 with the Yakama Nation (June 9, 1855, 12 Stat. 951);
- The Application would result in irreparable harm to the Yakama Nation’s cultural and natural resources;
- The Application would increase the risk of derailments, spills, explosions, and other avoidable catastrophic impacts resulting from the increase in rail traffic through the Yakama Nation’s lands; and
- The Application would increase emissions, aggravating climate change.

Yakama Nation Response Brief at 14. There is much other evidence as well. For example, a representative of the Umatilla Tribe stated that this project could result in more stopped trains at

other places where there is treaty fishing access, such as the Celilo site, blocking access at those sites. CG9336.

Union Pacific argues that the evidence is not substantial because there is no “known traditional Treaty Fishing Access Site, In-Lieu Sites, or Shared Use Sites” within the physical boundaries of the project, and Wasco County staff conducted a site inspection and did not see any evidence of fishing access or activities. Union Pacific Opening Brief at 30–31. Wasco County, however, explained that the site inspection was not conclusive:

With regards to existing fishing access, Staff visited Memaloose State Park and UPRR properties and did not see any evidence of recent fishing access or activities. Additionally, there is no public vehicle access to the waterfront at the park. Staff notes however, that the park is only one portion of the waterfront that exists within the project area. Following the site visit, Staff spoke with Audie Huber [staff at the Umatilla Tribe] and learned that historic scaffolding not visible from the shore may be present in the vicinity of the development site. Mr. Huber noted safety concerns and also explained that Memaloose beach is one of many traditional fishing access areas east and west of the development site that will be impacted by the proposed development. As noted above, Mr. Huber’s concerns were echoed and expanded in subsequent letters and testimony received from Chairman Burke of the Umatilla, Chairman Goudy of the Yakama Nation, and Chairman Greene of the Warm Springs Indian Reservation.

CG133. Union Pacific also relies on a Columbia River Inter-Tribal Fish Commission map of in-lieu fishing sites (CG12502), which shows that there are no in-lieu sites in the project area as defined by the east and west ends of the new mainline. Union Pacific Opening Brief at 27.

Wasco County also addressed this map in its decision, stating,

The applicant provided a map produced by the [CRITFC] that illustrates the location of known in-lieu/treaty fishing access sites and amenities. No sites are indicated on this map for the affected area. *However, it is important to note that not all sites are known or mapped.*

CG40 (emphasis added). Wasco County’s explanation that not all sites are known or mapped specifically states that fact comes from testimony and conversations with the tribes, which we note is consistent with finding 13 and conclusion of law 26 in the Boldt decision cited above. In

short, Wasco County’s decision specifically explains Union Pacific’s evidence and other evidence in the record, and why Wasco County chose which evidence to use. This illustrates that Wasco County considered all the evidence in the record. Where there is evidence from the tribes that not all treaty fishing sites are known or mapped, and that there is historic scaffolding not visible from the shore in the project site, and the Management Plan and NSALUDO do not require the tribes to specifically identify their fishing sites, a reasonable person could readily conclude that treaty fishing and access to the Columbia River occurs in the project site and vicinity.

We also note that Wasco County recognized that access to the Columbia River is already impeded along the Oregon shore by Interstate 84 and Union Pacific’s existing mainline track. CG217. The tribes also recognized this but argued that adding the second mainline will affect their treaty-reserved fishing right. One significant reason is that the second mainline would make access (a treaty right itself) to the Columbia River (their treaty-reserved fishing area) less safe because the second mainline would allow for more trains, faster trains, longer trains, and continuously moving trains where today trains come to a stop on the existing siding. CG9407, 875, 893; *see also* PC 1 SR-68 (no CG number) (stating “Mr. Huber [of the Umatilla Tribe] is concerned that with reduced slowing and parking, the tracks will no longer afford even somewhat safe access”).²⁰ Union Pacific argued that adding its second mainline could improve safety because it would require tribal fishers to be more diligent in crossing the railroad tracks or discourage tribal fishers from crossing tracks where stopped trains could begin moving without warning, CG352. Faced with two plausible perspectives, Wasco County followed its NSALUDO

²⁰ This finding is from the staff report to the Planning Commission. The Board of County Commissioners’ final decision contains a substantially similar finding. CG133.

requirement to “decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe” considering the Indian world view and adopted the tribes’ perspective of effect of treaty rights. In short, Wasco County’s decision is well supported by three tribes’ testimony and Wasco County staff’s efforts to understand the treaty fishing situation in and around the project area.

iv. Substantial evidence supports Wasco County’s conclusion that Union Pacific’s proposal would affect the treaty right to habitat protection.

This matter presents a slight twist on the culverts case that Judge Martinez decided. In the culverts case, the tribes presented specific information about current habitat damage relating to fish-blocking culverts. Here, the tribes describe a high risk of future environmental degradation rather than current degradation. Having already concluded that Wasco County’s decision is supported by substantial evidence that Union Pacific’s second mainline would affect access to the Columbia River, we do not need a second reason to uphold Wasco County’s denial of Union Pacific’s application. Nevertheless, we believe the tribes’ argument and Wasco County’s decision correctly apply the Martinez decision and the Ninth Circuit’s decisions affirming it. Nothing in those decisions requires the tribes take a wait and see approach to protecting their treaty-reserved fishing places from environmental degradation where Wasco County’s administrative record contains substantial evidence that a derailment and spill into or adjacent to the Columbia River would damage or destroy habitat in Zone 6, which the federal government, the tribes, and others have spent decades restoring. *See* CG888 (testimony of restoration efforts); *U.S. v. Washington*, 827 F3d 836, 851–52 (9th Cir 2016) (affirming the district court’s explanation that the treaty right to habitat protection comes from Governor Stevens (who negotiated the treaties on behalf of the United States) promising an adequate supply of salmon forever, and inferring such a promise if Governor Stevens had not expressly made his promise).

The only evidence in the record about the effect of spill is that it could devastate fish habitat (CG879–82), which is an effect on treaty rights.²¹ We note that the Stanley Rock in-lieu fishing site is located approximately two miles downstream of the project site (CG 12493; *see also* Union Pacific Opening Brief at 31), so a derailment and spill could reasonably affect that treaty reserved access point to Zone 6.²² Wasco County also considered evidence that there is treaty fishing in or at the vicinity of the project area at Memaloose State Park adjacent to the project area. CG133 (“Staff spoke with Audie Huber [of the Umatilla Tribe] and learned that historic scaffolding not visible from the shore may be present in the vicinity of the development site. Mr. Huber also explained that the Memaloose beach is one of many traditional fishing access areas east and west of the development site that will be impacted by the proposed development”).

Additionally, Union Pacific’s proposal would allow for five to seven more trains to pass through Zone 6, and those trains to be longer and travel faster. *See* CG9407.²³ Although Union Pacific states that the intent of the project is not to increase the number of trains, or use longer trains and faster speeds (Union Pacific Opening Brief at 32 (citing to the record)), Union Pacific states this could occur if market conditions change and Union Pacific gets the business. CG7831–32. Wasco County considered a report commissioned by the Umatilla Tribe, which noted that

²¹ Friends submitted a report concerning the Vancouver Energy Distribution Terminal, a different project for which the Washington Energy Facility Site Evaluation Council was holding hearings in 2016, which explains the effect of an oil spill just upriver of Bonneville Dam on commercial and recreational fishing, including a closure of the fishery. CG11551. We recognize that an oil spill or spill of another commodity at or around Union Pacific’s project site would have different characteristics being far upriver from Bonneville Dam; nevertheless, this report is illustrative of the effects of a spill.

²² In addition to use as an access site, the record notes that between 25 and 50 treaty fishers live at Stanley Rock during the May through September months. CG11697

²³ There is evidence in the record that there may be more than five to seven additional trains (CG12125–141) although Union Pacific disputes this (CG7963). We acknowledge that estimating the number of additional trains is complicated and that the parties do not agree. We understand that five to seven is the lowest estimate in the record.

there were more than 2500 derailments between 2008 and 2015; a study of 24 derailments since 2006 involving crude oil and ethanol showed 20 resulted in a fire and the average spill was 270,000 gallons; and that greater tank car damage can be expected at higher speeds. CG879–82. The Fire Chief of the City of Mosier explained other environmental factors that create a high risk of a catastrophic fire. CG1824–25. And, Wasco County considered observations of the impact of spill because that there had been a derailment at the project site just a few months prior to the hearing, which resulted in a spill of crude oil and an accompanying fire. CG7789 et seq., 12116. Wasco County also considered Union Pacific’s arguments and evidence that hazardous materials are less than one percent of the commodities that it carries (CG7833) and thus the likelihood of an accident that would impact habitat is very low.

We laud Union Pacific’s expressed commitment to safety, and upgrades to its track and equipment to reduce accidents (*see, e.g.*, CG1758), and of course Union Pacific does not intend to damage salmon habitat. However, we note that Washington State argued that it did not build culverts purposefully to degrade salmon habitat, *see U.S. v. Washington*, 827 F3d at 853, and the Ninth Circuit still concluded that the consequence of building and maintaining barrier culverts was a degradation in habitat that diminished the supply of salmon. Here, we cannot say that Wasco County erred in concluding that the consequence of adding capacity for more rail traffic increases the future risk of a derailment that would degrade habitat and diminish the supply of salmon.

While no party can say for sure whether or when a train will derail and affect treaty-protected habitat, the record before Wasco County supports Wasco County’s conclusion that this project significantly increases the likelihood that it will happen. We believe that Wasco County honored Governor Stevens’s promise of salmon forever when it concluded that it could not

approve Union Pacific's application where there was concrete and substantial evidence (statistical evidence, expert testimony, and observed effect) in the whole record of a significantly increased risk of treaty fishing habitat degradation.

v. Wasco County's findings are sufficient to support its decision.

Union Pacific argues that Wasco County's findings are inadequate to support its decision because there "is no [specific] evidence, or even a concrete explanation, of how fishing rights would be affected." Union Pacific Opening Brief at 29. We disagree. Union Pacific's argument is based on its argument that the Columbia River Treaties would only protect specifically identifiable, historically used sites within the east-west construction boundaries of the project. We have already rejected that view of the Columbia River Treaties. We also explained above that we evaluate effect on treaty rights considering the Indian world view. Essentially, we review all the evidence in the record for substantial evidence, understanding that the tribes may not have disclosed specific information that they reasonably believe is sensitive.

We still review Wasco County's decision for whether its findings are sufficient to support its decision. Commission Rule 350-60-220(1)(e) (which expresses this standard of review) comes from the Oregon Land Use Board of Appeals' (LUBA) rules, specifically, OAR 661-010-0071(2)(a). While the Commission is not bound by LUBA rules or LUBA's interpretation and application of its rules, LUBA's interpretation and application of its similar rules is helpful context. LUBA applies this standard of review broadly and in many situations. Relevant to this appeal, we consider whether Wasco County's findings address applicable approval criteria (*e.g.*, *Vesper Park v. Washington County*, 68 Or LUBA 106 (2013)); explain why the county believed the proposal satisfied the applicable standards (*e.g.*, *Burgermeister v. Tillamook County*, 73 Or

LUBA 291 (2016)); and explain discrepancies in factual assertions and why the county chose the factual assertion it did (*e.g.*, *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014)).

Union Pacific does not argue that Wasco County failed to consider a relevant approval criterion and we readily conclude that Wasco County's decision addresses all applicable treaty rights protection criteria in the NSALUDO. CG129–34. Union Pacific argues that Wasco County did not adequately explain why its application does not satisfy the applicable criteria. We noted above that although Wasco County did not explain treaty fishing rights in detail, it properly applied treaty fishing rights to the Columbia River area, not just identifiable, historically used sites within the construction boundaries of the project, and to protecting fish habitat. We also noted above that Wasco County considered Union Pacific's asserted evidence that there are no treaty fishing sites in the project area. There was a conflict between Union Pacific's evidence and the tribes' evidence, which Wasco County explained and affirmatively chose to follow the tribes' evidence. This is a concrete explanation of the County's reasoning.

Union Pacific's argument that Wasco County did not have specific evidence of a of how treaty-reserved fishing rights would be affected is also incorrect. Wasco County explained that there was evidence of treaty fishing in the project area and vicinity of the project, and cited the tribes' comments and testimony, which identified their treaty-reserved fishing right and the effect that a second mainline would have on that right immediately by impacting access to the Columbia River and in the future on habitat.

In short, we conclude that Wasco County's findings identified and applied the applicable criteria, explained why the application did not satisfy those criteria, and explained conflicting evidence and why Wasco County chose to rely on the evidence that it relied on and why it chose not to rely the evidence that it did not rely on, and that its

decision was based on substantial evidence. Wasco County's findings are adequate to support its decision.

c. Conclusion for Second Assignment of Error

Wasco County correctly interpreted the Columbia River Treaties' reserved fishing rights as broadly applicable to the Columbia River rather than limited to specific historically used access points, and as providing for a right to fish habitat protection. Wasco County's findings relating to treaty fishing were also supported by substantial evidence and adequately support its decision. The second assignment of error is denied.

3. Third Assignment of Error – Whether 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.

In this assignment of error, Union Pacific argues that Wasco County should have allowed new relevant evidence into the record after Wasco County closed the record to new evidence pursuant to NSALUDO § 2.170. This provision states:

The County Governing Body may remand the matter to the Planning Commission if it is satisfied that testimony or other evidence could not have been presented at the hearing before the Planning Commission. In deciding such remand, the County Governing Body shall consider and adopt findings and conclusions respecting:

1. Prejudice to parties;
2. Convenience or availability of evidence at the time of the initial hearing;
3. Surprise to opposing parties;
4. Date notice was sent to other parties as to an attempt to admit; and
5. The competency, relevancy and materiality of the proposed testimony or other evidence.

The new evidence that Union Pacific argues the Board of Commissioners should have considered is the Army Corps of Engineers' Nationwide Permit allowing Union Pacific to conduct in-water work in wetlands, riparian areas, and the main stem of the Columbia River. CGSUPP81-101. As part of its decision, the Army Corps consulted with or requested

consultation with the four Columbia River Treaty Tribes and other tribes, and concluded that the project would have no effect on Treaty Rights. CGSUPP95. However, as discussed below, the Army Corps permit deferred to Wasco County to determine compliance with National Scenic Area standards (which includes treaty rights provisions). CGSUPP98.

Union Pacific argues that the standard of review is whether Wasco County's decision constitutes a procedural error that prejudiced Union Pacific's substantial rights. Commission Rule 350-60-220(1)(h). Based upon this standard of review, we conclude that Wasco County did not err.

NSALUDO § 2.170 states that the Wasco County Governing Board may remand a matter back to the Planning Commission if specific criteria are met, and that the Board must make findings supporting its decision. Wasco County did not make findings relating to NSALUDO §§ 2.170(1)–(5), but instead relied only on the fact that the Board had determined to preclude new evidence at the end of the evidentiary hearing, which concluded several days prior to Union Pacific submitting the Army Corps permit for the Board's consideration.²⁴

Wasco County should have made the requisite findings; however, based on our review of the record and the parties' arguments, we readily conclude that Wasco County did not err in deciding not to remand the matter back to the Planning Commission. Regarding the second factor, the Army Corps' decision was not available while the record before the Board of Commissioners was open. The Army Corps issued its decision on November 4, 2016, two days

²⁴ Union Pacific filed an objection to the administrative record that Wasco County submitted to the Commission arguing that Wasco County should have included the Army Corps' decision in the administrative record. The objection hinted that Union Pacific wanted to rely on the decision in its substantive briefing; thus, the Chair of the Commission ordered Wasco County to include the decision in the record and that if the parties would rely on it, to "brief the factual and legal weight to be given to the documents given their apparent late appearance in Wasco County's proceeding."

after Wasco County concluded its evidentiary hearing. This factor weighs in favor of Wasco County considering the evidence. However, regarding the first, third, and fourth factors, Union Pacific only presented the Army Corps' decision to Wasco County and the other parties to Wasco County's proceeding on November 10, 2017, the date the Board of Commissioners deliberated to a final decision. (*See* Friends Response Brief at 24). By waiting until this last minute, Union Pacific surprised and would have prejudiced the opposing parties in the proceeding by not allowing time for opposing parties to respond. If, on or immediately after November 4, 2016, Union Pacific alerted Wasco County and the opposing parties of its intention to present the Army Corps' decision, the Board of Commissioners may have been able to provide an opportunity (albeit a short opportunity²⁵) for the opposing parties to respond, and avoid surprise and prejudice. Regarding the fifth factor, the Army Corps permit deferred to Wasco County to determine compliance with National Scenic Area standards. CGSUPP98.²⁶ As such, the permit would not have any evidentiary or persuasive value to help Wasco County determine compliance with the NSALUDO. Thus, the first, third, fourth, and fifth factors weigh in favor of Wasco County not considering the evidence.

Because Union Pacific's late attempt to admit the Army Corps' decision surprised and prejudiced opposing parties and because it has no evidentiary or persuasive value regarding compliance with the NSALUDO, Wasco County's decision to not remand the matter to consider the Army Corps permit did not prejudice any substantive right of Union Pacific and was not in error. We deny Union Pacific's third assignment of error.

²⁵ The Board of Commissioners had received prior advice from its staff and counsel that it was running up against a statutory deadline to make its decision. CG465–66.

²⁶ The Army Corps clearly understood that it was deferring to Wasco County. *See, e.g.*, CGSUPP233 (email from Marge Dryden, USFS to Christopher Page, ACE regarding tribal access and Christopher Page's forward of the email to Angie Brewer asking about it)

4. Fourth Assignment of Error – Whether 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 – Whether 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.

The Gorge Commission voted not take up these assignments of error related to conditions of approval because the decision before the Commission is a denial and therefore the conditions of approval are of no effect.²⁷

Wasco County’s decision does not specify why it included conditions of approval with a denial, and the Commission cannot assume or speculate a reason for doing so. 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 denied, Wasco County’s decision to include conditions of approval has no effect on the decision or the parties; consequently, any decision the Commission makes about the correctness of the conditions of approval would have no effect and would be advisory only. The Commission has never issued an advisory opinion in this circumstance in any past appeal decision.

B. Second Argument – *Friends of the Columbia Gorge, et al. v. Wasco County*, CRGC No. COA-W-16-02

The Gorge Commission addressed only two points involving the second consolidated appeal. First, Union Pacific argued that the appellants, Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility, lacked standing because they

²⁷ Had the Commission reversed Wasco County’s decision, the Commission would have needed to resolve the assignments of error relating to the conditions of approval.

were not adversely affected because they were appealing Wasco County's denial and wanted the Commission to affirm the denial. The Commission concluded these appellants had standing to bring their appeal because they are "adversely affected" because at the time they filed their appeal, Union Pacific had also filed an appeal of Wasco County's denial asking the Commission to reverse or remand the denial. The appellants were thus adversely affected in retaining their ability to raise additional reasons for denying the application and participating in subsequent judicial review of the Commission's decision.

Second, the Commission concluded that its resolution of the assignments of error above caused all the assignments of error in *Friends of the Columbia Gorge, et al. v. Wasco County*, CRGC No. COA-W-16-02, to become moot. Because the Commission affirms the decision of Wasco County, resolution of the assignments of error in this second appeal would have no effect on the parties. If a court remands this matter back to Wasco County and Wasco County does not address the issues that Friends raised, Friends is, of course, free to raise the issues again in a new appeal to the Gorge Commission.

VII. SUMMARY OF CONCLUSIONS AND ORDER

For the reasons explained above, we conclude that the Wasco County Board of Commissioners' decision properly construed applicable law; does not violate provisions of law; and is not clearly erroneous. Findings of fact are supported by substantial evidence and the county's findings of fact support its decision, and the county's reasoning and decision is not arbitrary and capricious. We deny assignments of error 1, 2, and 3 that Union Pacific made, and we conclude that all other assignments of error are moot and we decline to address the merits of those assignments of error. If an appellate court remands Wasco County's decision back to

Wasco County, the parties may raise their issue with the assignments of error that we have concluded are moot.

The decision of the Wasco County Board of Commissioners is AFFIRMED.

IT IS SO ORDERED this 8th day of September 2017



Bowen Blair, Chair
Columbia River Gorge Commission

NOTICE: You are entitled to seek judicial review of this Final Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the Scenic Area Act, 16 USC § 544m(b)(4).

NOTICE OF MAILING

I certify that on September 8, 2017 I mailed the attached FINAL OPINION AND ORDER 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

Robert Belt
Union Pacific Railroad Company
Attorney for Union Pacific Railroad Company
bnbelt@up.com

Deana M. Bennett
Modrall Sperling
Attorney for Union Pacific Railroad Company
dmb@modrall.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

Amber Penn-Roco
Galanda Broadman PLLC
Attorney for Yakama Nation
amber@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

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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

for 

NANCY A. ANDRING
Administrative Analyst