



WASCO COUNTY BOARD OF COMMISSIONERS
CONTINUATION OF APPEALS HEARING FOR
PLASAR 15-01-0004
NOVEMBER 10, 2016

PRESENT: Scott Hege, County Commissioner
Steve Kramer, County Commissioner
Rod Runyon, Commission Chair
STAFF: Tyler Stone, Administrative Officer
Kathy White, Executive Assistant

At 5:30 p.m. Chair Runyon re-opened the public hearing for the Appeals of the Planning Commission's decision regarding the Land Use Application PLASAR 15-01-0004. He explained that the Board will be reviewing the alterations to the final report prepared by staff; the Board met on November 2, 2016 to hear three appeals from the Planning Commission's Approval of the Application.

He stated that the three appeals were:

- Number 16-10-0001 from Friends of the Gorge, Columbia Riverkeeper and Physicians for Social Responsibility
- Number 16-10-0002 from the Union Pacific Railroad
- Number 16-10-0003 from the Confederated Tribes and bands of the Yakama Nation

As a reminder, this was an application from the Union Pacific Railroad for a conditional use approval and variance in the National Scenic Area to expand an existing railroad siding with 4.02 miles of new second mainline track, realign existing track, replace five equipment shelters and make related improvements.

The Board voted 3-0 to reverse the Planning Commission decision and deny the proposed development on the basis that the proposal affects treaty rights, to add back in the stricken

WASCO COUNTY BOARD OF COMMISSIONERS
CONTINUATION OF APPEALS HEARING FOR PLASAR 15-01-0004
NOVEMBER 10, 2016
PAGE 2

conditions of approval and affirm the Planning commission decision on all other grounds.

The Board of Commissioners record was closed on November 2nd. The Board directed staff to prepare draft findings based on the record and consistent with our tentative decision. No new testimony will be received and now new evidence may be provided.

Chair Runyon went on to say that the process will be as follows:

- County staff will present the final staff report, including summarizing the Commissioner's requested changes and final decision.
- The board will deliberate, make any necessary changes to the final decision and confirm the final decision.

Chair Runyon asked if anyone has an objection to the jurisdiction of this Commission, the described procedures or to the participation of any commissioner. There were none.

UPRR Counsel Ty Wyman submitted a request to reconsider the tentative decision. He stated that he had received a decision from the Army Corps of Engineers that contradicts the Board's tentative decision. He said that the highest priority is for the decision makers to consider all the evidence.

Outside Counsel Dan Olsen stated that the Board has three options: 1) They can deny the objection based on the hearing being closed to further evidence. 2) They can re-open the hearing which would require new noticing and will move the process beyond the statutory deadline – it is unclear what would happen in that case 3) They can remand it to the Planning Commission which would also push it past the statutory deadline. He noted that none of the commissioners have read the letter raising the objection. He stated that the Board will need to allow or deny the stated objection.

Commissioner Hege asked if the information regarding the objection will come forward in the next step of the process even if the objection is denied. Mr. Olsen replied that it would.

{{{Commissioner Kramer moved to deny Mr. Wyman's objection based on the fact that the hearing has been closed to further evidence. Commissioner Hege seconded the motion which passed unanimously.}}}

Chair Runyon asked Planning Director Angie Brewer to present the staff report. Ms. Brewer reported that staff has made changes to the findings appropriate to the Board's tentative decision. She stated that most of the changes are in the preamble and the

WASCO COUNTY BOARD OF COMMISSIONERS
CONTINUATION OF APPEALS HEARING FOR PLASAR 15-01-0004
NOVEMBER 10, 2016
PAGE 3

conditions removed by the Planning Commission have been added back in. In addition, the listing of commenting parties and additional comments have been completed. The last page of the preamble section contains a conclusion statement: On November 2, 2016, the Wasco County Board of Commissioners heard the appeals, staff's response, and public testimony, and closed the hearing to any new evidence or public testimony. With a vote of 3 - 0, the Board moved to tentatively overturn the Planning Commission decision on the basis that the proposal affects Treaty rights, to add back in the stricken conditions of approval and affirm the Planning Commission decision on all other grounds, and directed staff to return with findings for review and a final decision on November 10, 2016. No new evidence may be provided at the November 10 meeting, and no new testimony will be received.

Ms. Brewer read into the record the following passage from the Findings in the Final Decision Document (attached):

#81 (final paragraph) At its November 2, 2016 hearing, the Board of County Commissioners concluded that three of the four Treaty tribes of the Gorge had voiced concerns that the proposed development would adversely affect Treaty rights, and that in order to be consistent with the Management Plan for the Columbia River Gorge National Scenic Area and the Wasco County National Scenic Area Land Use and Development Ordinance, the proposed development must be denied. Pursuant to (2) above, the treaty rights protection process may conclude with the Commissioners' decision to deny the proposed development.

#82 In addition to the above stated findings, the Board adopts the analysis of appeals provided by Staff in Attachments E, H and J that responds directly to points raised in the hearings process.

Commissioner Hege noted that beginning on page 118 of the findings, there is a reference to tribal treaty rights: "This provision requires notices to include enough information for the tribal governments to evaluate possible impacts and provide comments back to staff within 20 days. Section 14.800(C) provides a 10 day consultation period to interested tribal governments that provide substantive written comments within a timely manner." He asked how that relates to the comments that were received. Ms. Brewer responded that the 20 day comment period is exclusive to the cultural resource coordination process and its substantive comments are received during that 20 days with an additional 10-day consultation period that is an offer made to the commenting party to see if they would like to go on-site and then further discuss the concerns. She said that process started but as it

WASCO COUNTY BOARD OF COMMISSIONERS
CONTINUATION OF APPEALS HEARING FOR PLASAR 15-01-0004
NOVEMBER 10, 2016
PAGE 4

evolved it turned out to be a request for addition cultural resource information and that information was provided by the applicant so ultimately that consultation process ceased. That request was specific to cultural resource concerns; however, those timelines are specified in some of the treaty rights language throughout the Scenic Area Rules. She stated that there are other instances in the rules where it says that lack of response or delayed response does not preclude the tribes from writing additional comment later.

Commissioner Hege asked if that provision for lack of response or delayed response is unique to the Tribes. Ms. Brewer replied that it is and is discussed in the findings.

Chair Runyon opened deliberations.

{{{Commissioner Kramer moved to reverse the Planning Commission's decision and deny the application on the basis that the proposed development affects Treaty rights, to add back in the stricken conditions of approval and affirm the Planning Commission decision on all other grounds. This decision is supported in detail by the Notice of Decision and Final Decision Report for PLASAR 15-01-0004 including Attachments A through L, which contain findings of fact and conclusions of law, conditions of approval, appeals received, Staff's response to the appeals and supplemental information used in the decision-making process – all of which are adopted. Commissioner Hege seconded the motion which passed unanimously.}}}

Chair Runyon closed the hearing at 5:51 p.m.

Wasco County
Board of Commissioners



Rod L. Runyon, Board Chair

Scott C. Hege, County Commissioner



Steven D. Kramer, County Commissioner



PLANNING DEPARTMENT

2705 East Second Street • The Dalles, OR 97058
p: [541] 506-2560 • f: [541] 506-2561 • www.co.wasco.or.us

Pioneering pathways to prosperity.

Notice of Decision Wasco County Board of Commissioners Hearing

FILE(S): PLAAPL-16-10-0001, 0002, and 0003 of PLASAR-15-01-0004
BOARD OF COUNTY COMMISSION HEARING DATE: November 2, 2016
BOARD OF COUNTY COMMISSION DECISION DATE: November 10, 2016

REQUESTS: Expand an existing railroad siding on either side of Mosier, Oregon to create a new second mainline track and realign existing track; replace five equipment shelters; install drainage structures including ditches and culverts, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and off-site wetland mitigation.

Board of County Commissioner's Decision: Denied 3-0

Unanimously agreed to reverse the Planning Commission decision and deny the proposed development on the basis that the proposal affects treaty rights, to add back in the stricken conditions of approval, and affirm the Planning Commission decision on all other grounds.

APPLICANT: Union Pacific Railroad **APPLICANT'S CONSULTANT:** CH2M Hill

LAND OWNERS: Union Pacific Railroad
Oregon Department of Transportation
Oregon Parks and Recreation Commission
Skylar and Kathleen Schacht

Space reserved for recording

PROJECT

LOCATION: The project area begins at rail MP 66.98, east of the Wasco County line, approximately two miles west of the City of Mosier, and ends at rail MP 72.35, approximately three miles east of Mosier, within Memaloose State Park. The project area roughly parallels the Columbia River and Interstate 84. More specifically, the project crosses Township 3 North, Range 12 East, Sections 31 and 32; Township 3 North, Range 11 East, Section 36; and Township 2 North, Range 11 East, Sections 1, 2, and 3. The replacement of a signal building and two signal lights are also proposed at MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation is proposed on Wasco County Parcel 2N 13E Section 8 Lot 200 (Account # 1274). The project will be predominantly located on lands owned by Union Pacific Railroad. Portions of the project are also proposed to occur on lands owned by Oregon Department of Transportation and Oregon State Parks and Recreation. Offsite wetland mitigation will occur on lands owned by Skylar and Kathleen Schacht.

ZONING: General Management Area Large-Scale and Small-Scale Agriculture (A-1 (40) and A-2 (80)), Open Space, and Water; and Special Management Area Public Recreation, Agriculture, and Open Space.

ATTACHMENTS:

- A. Conditions of Approval
- B. Summary of Information
- C. Board of Commissioner's Final Decision Report
- D. Appeal PLAAPL-16-10-0001 Friends of the Gorge, Columbia Riverkeeper, Physicians for Social Responsibility
- E. Staff Response to PLAAPL-16-10-0001
- F. Supplemental information provided by Friends of the Gorge at hearing
- G. Appeal PLAAPL-16-10-0002 Union Pacific Railroad
- H. Staff response to PLAAPL-16-10-0002
- I. Appeal PLAAPL-16-10-0003 Confederated Tribes and Bands of the Yakama Nation
- J. Staff response to PLAAPL-16-10-0003
- K. Supplemental letter provided by the Yakama Nation for the hearing
- L. Letters provided by Treaty Tribes (4)

ATTACHMENT A – CONDITIONS OF APPROVAL

General Conditions:

1. Noncompliance with any condition placed on a conditional use permit shall be grounds for revocation of the permit. Revocation of a conditional use permit shall be considered a land use action reviewed by the Planning Commission.
2. Section 2.140 of the Wasco County National Scenic Area Land Use and Development Ordinance requires all conditions attached to approval of uses shall be recorded in the County deeds and records to ensure notice of the conditions to successors in interest.
3. The proposed development shall not significantly deviate from the application materials reviewed for consistency.
4. Final engineering drawings shall be provided to the Wasco County Planning Director for review and confirmation prior to commencement of construction.
5. Grading, excavation and vegetation removal outside of previously disturbed areas shall be the minimum necessary to allow for construction. Best management practices shall be implemented to prevent excessive erosion.
6. All exposed graded areas shall be reseeded with the following native seed mix at the earliest planting season following construction (CRGNSA Botanist Robin Dobson can be contacted at 541-308-1700 or rdobson@fs.fed.us with any questions about seed sources or modified mixtures to comply with this requirement).
 - Idaho fescue (*Festuca idahoensis*) 30%
 - Bromus vulgaris 30%
 - Blue wild rye 20%
 - Blue bunch wheatgrass 20%
 - Add some herbaceous seed (1 -2 oz of each):
 - Annual lupine (*L. bicolor*)
 - Yarrow
7. Temporary traffic impacts during construction activities shall be coordinated with the Oregon Department of Transportation and the Wasco County Public Works Department.
8. A declaration shall be signed by the landowner and recorded into county deeds and records specifying that the owners, successors, heirs and assigns of the subject property are aware that adjacent and nearby operators are entitled to carry on acceptable agriculture or forest practices on lands designated Large-Scale or Small-Scale Agriculture, Agriculture-Special, Commercial Forest Land, or Large or Small Woodland.

9. New signal buildings on lands adjacent to agriculture zoned lands suitable for agriculture use, shall comply with the 30-foot setback from vineyards and 75-foot setback from orchards specified in the agriculture setbacks of Chapter 3.
10. To comply with Flood Hazard Overlay Section 3.243(C)(1)(a) new construction and substantial improvements shall be anchored to prevent flotation, collapse, and lateral movement of the structure in the event of a flood. The applicant is required to submit final specification sheets and an explanation of all building materials and methods utilized to demonstrate anchoring, flood proofing and flood damage resistance and minimization.
11. Certification by a registered professional engineer or architect that the flood-proofing methods for any non-residential structure meet the flood-proofing criteria in Section 3.243.D.6-Specific Standards is required.
12. Temporary construction site identification, public service company, safety, or information signs cannot be greater than 32 square feet. Exceptions may be granted for public highway signs necessary for public safety and consistent with the Manual for Uniform Traffic Control Devices. Removal of temporary construction site identification must be accomplished within 30 days of project completion.
13. Coal cars are required to be covered.
14. A spill response plan for derailment or other railroad accident is prepared or made available prior to the commencement of construction.
15. UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.
16. UPRR to adhere to all FRA safety standards, a including any safety improvements that are optional.
17. UPRR shall provide regular training to Gorge fire departments included in the Mid-Columbia Five County Mutual Aid Agreement and requires UPRR to solicit feedback about local needs for combatting a railroad related fire incident and assist in meeting those needs.
18. UPRR is required to comply with Chapter 11 for wildfire safety and prevention. Required compliance with fire safety standards shall be disclosed to future land owners prior to sale of any parcel.
19. UPRR must verify the use complies with all applicable federal, state, and local laws.

Treaty Rights Conditions:

20. The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

21. UPRR shall provide two (2) safe crossings for National Scenic Area Treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four Treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.
22. Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act.

Scenic Resource Conditions:

23. Colors approved for new structures include the colors identified in the *Interstate 84 Corridor Strategy Plan* for the eastern Gorge, including: Sherwin Williams "Otter" for signal buildings, any railing, support structures for signage, and retaining walls; and Federal Color 30099 for any new painted fences, lighting, and other associated equipment. The color palette for eastern stone facades (retaining walls) provide that "Otter" shall be the predominant base color, and that Sherwin Williams "Black Fox" and Miller Paint "Dapper" shall be used as highlights. If different brands are used, they shall match the color codes of these paint colors. To achieve a more natural appearance, colors are to be applied to the retaining wall surface as a multi-step, multi-colored staining process applied in the field. The Oregon Department of Transportation implements these requirements and may be source of technical assistance.

If the communications poles are untreated, they shall be painted "Otter".
24. Rock blasting shall occur in irregular patterns to produce a natural appearing cut face. Half casts shall be removed.
25. Clearing of 6.62 acre SMA Open Space area landing zone identified on the site plans east of the rock blasting site is prohibited.
26. Concrete retaining walls shall be stamped with a natural basalt rock pattern to emulate the surrounding landscape;
27. Existing trees north of the retaining wall and temporary construction areas shall be retained and maintained for screening to the maximum extent practicable;
28. Revegetation of the temporary construction areas shall occur within the first planting season immediately following completion of construction. Revegetation shall occur in compliance with the conditions of approval for natural resources below.

29. Ends of exposed culverts in the SMA shall be a dark earth-tone color listed above.
30. Guardrail repair shall be in-kind to continue the visual aesthetic of the existing guardrail system. In the event of an entire guardrail system replacement, corten pre-weathered guardrail material shall be used, consistent with the *Interstate 84 Corridor Strategy*.
31. All sign support structures and the backs of single sided signs to be dark brown or black with a flat, non-reflective finish, consistent with the *Interstate 84 Corridor Strategy*.
32. The surfaces of equipment buildings shall be treated with an approved polyacrylic paint and sand mixture to add texture and thus reduce reflectivity.
33. No new screening vegetation is required, but a condition of approval is included to require the retention of existing screening vegetation, existing backdrop vegetation, and the prohibition of the clearing in the 6.62-acre SMA Open Space landing zone.
34. Where it does not interfere with UPRR Uniform Signal Systems and Standards, all signal lights and affiliated structures are to be treated with a dark earth tone color. Outdoor lighting shall be directed downward, sited, limited in intensity, shielded and hooded in a manner that prevents the lighting from projecting onto adjacent properties, roadways, and the Columbia River as well as preventing the lighting from being highly visible from Key Viewing Areas and from noticeably contrasting with the surrounding landscape setting. Shielding and hooding materials shall be composed of non-reflective opaque materials. There shall be no visual pollution due to the siting or brilliance, nor shall it constitute a hazard for traffic.

Natural Resource Conditions:

35. The proposed clearing of SMA Open Space Areas identified as the “6.62-acre site near project MP 71.53” for temporary construction is **prohibited** due to the sensitive natural resources that exist in that area and the environmental constraints that prevent the proposed impacts from being temporary.
36. In all other locations, the wetland mitigation plan shall be implemented as specified in the Tooley Lake Wetland Mitigation Update (dated November 17, 2015); Implementation of the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (dated January 2015).
37. Wetlands restoration, creation, and enhancement efforts should be completed before a wetland is altered or destroyed. If it is not practicable to complete all restoration, creation, and enhancement efforts before the wetland is altered or destroyed, these efforts shall be completed before the new use is occupied or used. Five years after a wetland is restored, created, or enhanced at least 75 percent of the replacement vegetation must survive. The project applicant shall monitor the hydrology and vegetation of the replacement wetland for five years and shall take corrective measures to ensure that it conforms with the approved wetlands compensation plan and this guideline.
38. Blasted rock materials must be moved from the project area for off-site crushing at an existing quarry, in Urban Area, or outside of the NSA.

39. Avoid areas of identified special-status plant populations, priority habitats, sensitive wildlife and plant areas, and their buffer areas to the maximum extent practicable.
40. Implement micrositeing slight relocations of proposed project facilities to avoid special-status plant populations or habitats if practicable.
41. Remove and conserve plants that will be directly affected; replant immediately following construction.
42. Implement weed control procedures to prevent spread of noxious weeds to native plant habitats.
43. In the Special Management Area, any Oregon white oak trees removed for the project shall be mitigated at a ratio of 8:1. New trees shall be planted in a natural appearing configuration at a spacing of at least 15 feet between trees. Newly planted trees and existing Oregon oaks near the affected area, shall be monitored for a minimum of four years following the completion of construction to ensure survival. Monitoring reports shall be prepared and provided by a qualified professional in conjunction with the annual monitoring reports required for the approved wetland mitigation plan and habitat mitigation plan.

Cultural Resource Conditions

44. UPRR shall comply with Section 14.500(G) provides requirements for the protection of cultural resources discovered after construction begins; and Section 14.500(H) for the protection of human remains discovered during construction.
45. If cultural resources or human remains are discovered during construction, development shall cease immediately and the owner shall notify Wasco County Planning Department (541-506-2560), the Columbia River Gorge National Scenic Area Heritage Program Manager, the Columbia River Gorge Commission (509-493-3323), the four treaty tribes, and the State Historic Preservation Officer. If human remains are found, law enforcement shall be contact immediately.

Recreation Resource Conditions


46. UPRR shall work with the Oregon Parks and Recreation Department to develop a Columbia River access feasibility study to ensure long term impacts of the railroad do not impact established recreation uses or sites. Improved access from State Parks properties to the Columbia River shall be the outcome of this study and any resulting action items. The study shall be initiated with the Director of Oregon State Parks following the appeal period, but within 45 days of the final decision. Improved access, as identified and agreed upon by UPRR and Oregon State Parks as a result of this study shall be accomplished within two years of the commencement of development; extensions may only be requested by Oregon State Parks.
47. Construction activities on the road shared with OPRD for the Memaloose State Park Campground must occur either outside of the peak recreation season, or trucks used for hauling the blasted and crushed materials must be covered to minimize dust and related impacts to visitors at the park.

Miscellaneous Conditions:

48. Staff recommends but cannot require UPRR to work with the Oregon Department of Transportation to commence seismic stability studies and verify structural safety at the development sites located within the Mosier Urban Area.

NOTE: Any new land uses or structural development such as new buildings or structures; or additions or alterations to existing structures not included in the approved application or site plan will require a new application and review.

Signed this 10th day of November, 2016, at The Dalles, Oregon


Rod Runyon, Chair
Wasco County Board of County Commissioners

State of Oregon
County of Wasco

Signed or attested before me on November 10, 2016, by Rod Runyon, Chair of the Wasco County Board of Commissioners.


Notary Public – State of Oregon



NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: Oregon Revised Statutes, Chapter 215, requires that if you receive this notice, it must promptly be forwarded to the purchaser.

Time Limits:

Pursuant to Section 2.160 of the Wasco County National Scenic Area Land Use and Development Ordinance, the approved uses shall not commence until the appeal period has expired, and conditions of approval are adhered to.

Pursuant to Section 2.240 of the Wasco County National Scenic Area Land Use and Development Ordinance, this approval shall expire: (1) when construction has not commenced within two years of the date the land use approval was granted, or (2) when the structure has not been completed within two years of the date of commencement of construction. The expiration date for the validity of a land use approval is from the date of expiration of the appeal period and not the date the decision was issued.

Please Note: No guarantee of extension or subsequent approval either expressed or implied can be made by the Wasco County Planning Department. Please take care in implementing your proposal in a timely manner.

Appeal Process:

The decision date for this land use review is **Thursday, November 10, 2016**. The decision of the Board Commission shall be final unless an appeal from an aggrieved party is received by the Columbia River Gorge Commission within thirty (30) days of the mailing date of this decision, **Monday, November 14, 2016, at 4:00 p.m.** (Friday November 11 is a federal holiday). Please contact the Columbia River Gorge Commission if you would like to submit an appeal at (509) 493-3323.

A complete record of the matter is available online at <http://co.wasco.or.us/planning/UPRR.html>; can be made available for review upon request during regular business hours; or copies can be ordered at a reasonable price at the Wasco County Planning Department.

FINDINGS OF FACT:

Findings of fact in support of this decision may be reviewed at the Wasco County Planning Department, 2705 East Second Street, The Dalles, Oregon, 97058, or are available for purchase at the cost of \$0.25 per page. These documents are also available online at: <http://co.wasco.or.us/planning/UPRR.html>. The information will be available online at least until the end of the appeal period.

ATTACHMENT B – SUMMARY OF INFORMATION

A portion of Wasco County is included in the Columbia River Gorge National Scenic Area, an area designated for federal environmental and other resource protections by the Columbia River Gorge National Scenic Area Act, signed by President Ronald Reagan in 1986. Wasco County is a designated implementing authority and its National Scenic Area Land Use and Development Ordinance (NSALUDO) was approved by the Columbia River Gorge Commission, the United States Forest Service Columbia River Gorge National Scenic Area Office, and the United States Secretary of Agriculture to implement the National Scenic Area Act and the Management Plan for the Columbia River Gorge National Scenic Area (Management Plan) in those portions of the National Scenic Area located in Wasco County, Oregon.

The Management Plan and the NSALUDO require all new uses (including changes to existing uses) and all new development (including modifications to existing development) to be reviewed for compliance with applicable resource protections. Railroad modifications and expansions are identified in both documents as a large-scale use, subject to review and compliance. Large-scale uses are required to provide additional information prior to completeness, including professionally prepared cultural and natural resource surveys.

Following a 2014 pre-application conference with Wasco County Planning, Union Pacific Railroad and CH2M Hill submitted an application on January 9, 2015. Wasco County Planning requested additional information and studies to complete the application; the information was provided and the application became complete November 17, 2015. Upon completeness, Staff provided resource protection coordination notices to partner agencies February 24, 2015 (recreation), September 22, 2015 (cultural), and February 20, 2016 (natural). Following coordination with resource protection agencies, public notice was provided to adjacent property owners and the general public on March 11, 2016, April 26, 2016, June 1, 2016, June 23, 2016, August 11, 2016, and October 19, 2016. Throughout this timeline, approximately 3,000 comment letters were received from the general public and dozens of comment letters were received from government and non-government agencies (please see Attachment C).

In consultation with resource protection agencies and key stakeholders specified by NSALUDO, Staff evaluated the proposed development for consistency with the applicable regulations and requirements. The August 30, 2016 staff recommendation and staff report prepared for the Planning Commission recommended a conditioned approval. After the preparation of the staff report, additional comment was received by the Confederated Tribes and Bands of the Umatilla Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation citing adverse impacts to Treaty rights protected by the National Scenic Area Act, the Management Plan and the NSALUDO. On September 26, 2016, the Planning Commission voted 5 to 2 to approve the proposed development with a modified list of conditions of approval and limited changes to staff report findings.

Three timely appeals were filed in response to the Planning Commission's decision:

- Appeal PLAAPL-16-10-0001 was filed by the Friends of the Gorge, Columbia Riverkeeper, and Physicians for Social Responsibility (see Attachments D, E, F and L).
- Appeal PLAAPL-16-10-0002 was filed by Union Pacific Railroad (see Attachments G, H and L).
- Attachment H: Appeal PLAAPL-16-10-0003 was filed by the Confederated Tribes and Bands of the Yakama Nation (see Attachments I, J, K and L).

On November 2, 2016, the Wasco County Board of Commissioners heard the appeals, staff's response, and public testimony, and closed the hearing to any new evidence or public testimony. With a vote of 3 - 0, the Board moved to tentatively overturn the Planning Commission decision on the basis that the proposal affects Treaty rights, to add back in the stricken conditions of approval and affirm the Planning Commission decision on all other grounds, and directed staff to return with findings for review and a final decision on November 10, 2016. No new evidence may be provided at the November 10 meeting, and no new testimony will be received.

In addition to the conditions of approval included in Attachment A, and the findings of fact and conclusions of law included in Attachment C – Board of Commissioner's Final Decision Report, the Board adopts the analysis of appeals provided by staff in Attachments E, H, and J that responds directly to points raised in the hearings process.

This summary is not intended to replace the Final Order or Final Decision Report.

**Attachment C – Board of County Commissioners Final Report
PLASAR-15-01-0004 UPRR**

File Number: PLASAR-15-01-0004

Applicant: Union Pacific Railroad and consultants, CH2M Hill

Land Owners: Union Pacific Railroad
Oregon Department of Transportation
Oregon Parks and Recreation Commission
Skylar and Kathleen Schacht

Requests: Expand an existing railroad siding on either side of Mosier, Oregon for 4.02 miles of new second mainline track and realigned existing track; replace five equipment shelters; install drainage structures including ditches and culverts, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and off-site wetland mitigation.

Location: The project area begins at rail MP 66.98, east of the Wasco County line, approximately two miles west of the City of Mosier, and ends at rail MP 72.35, approximately three miles east of Mosier, within Memaloose State Park. The project area roughly parallels the Columbia River and Interstate 84. More specifically, the project crosses Township 3 North, Range 12 East, Sections 31 and 32; Township 3 North, Range 11 East, Section 36; and Township 2 North, Range 11 East, Sections 1, 2, and 3. The replacement of a signal building and two signal lights are also proposed at MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation is proposed on Wasco County Parcel 2N 13E Section 8 Lot 200 (Account # 1274). The project will be predominantly located on lands owned by Union Pacific Railroad. Portions of the project are also proposed to occur on lands owned by Oregon Department of Transportation and Oregon State Parks and Recreation. Offsite wetland mitigation will occur on lands owned by Skylar and Kathleen Schacht.

Zoning: General Management Area Large-Scale and Small-Scale Agriculture (A-1 (40) and A-2 (80)), Open Space, and Water; and Special Management Area Public Recreation, Agriculture, and Open Space.

Procedure

Type: Type III quasi-judicial hearing before the Wasco County Board of County Commissioners

Staff Report

Prepared for: Wasco County Board of County Commissioners

Staff Report

Prepared By: Angie Brewer, Planning Director

Board of County Commissioners

Hearing Date: November 2, 2016

Final Decision Date: November 10, 2016

Applicable Standards

The following Chapters of the Wasco County National Scenic Area Land Use & Development Ordinance (NSALUDO) are applicable to the proposed development and are addressed in detail below:

Chapter 1 – Introductory Provisions
Chapter 2 – Development Approval Procedures
Chapter 3 – Basic Zoning Provisions
Chapter 5 – Conditional Use Review
Chapter 6 – Variance Criteria
Chapter 11 – Fire Safety Standards
Chapter 14 – Scenic Area Review

A. Project Description

1. **Proposed Development:** Union Pacific Railroad (UPRR) has provided an application to the Wasco County Planning Department (the Department) for modification and expansion of an existing railroad mainline and siding between rail mileposts (rail MP) 66.98 and 72.35, including the replacement of existing signage, lighting, communications poles and equipment shelters. As shown on application materials provided by CH2M Hill, the project will begin at the western boundary line of Wasco County and continue east, through the City of Mosier, terminating approximately half way through Memaloose State Park¹. Additionally, the replacement of an existing signal building and two signal lights are proposed to occur at rail MP 74.73, and an off-site wetland mitigation area is proposed outside of the railroad right-of-way, adjacent to Tooley Lake; both sites are east of the primary development.

The purpose of the project is described in Section 2.1 of the application materials; it states:

“The purpose of the project is to improve operational efficiency of train movement along UPRR’s existing mainline track near the City of Mosier while maintaining safe operating conditions. Operational efficiency is improved by maintaining standard operating speed and system fluidity, improving the ability of trains to safely pass one another, reducing idling time at the short Mosier siding, and reducing barriers to the use of industry-standard train lengths.”

The project need is described in Section 2.2 of the application materials, and cites existing operational inefficiencies and constraints as well as existing safety concerns near the city of Mosier. Section 3 contains an alternatives analysis required by staff for completeness.

As proposed, the project will occur in the General Management Area (GMA), the Special Management Area (SMA), and the designated Urban Area (UA) of Mosier. In total, the project will occur in seven different land use designations (zones) within the Columbia River Gorge National Scenic Area (NSA) in Wasco County.

¹ A landowner consent form signed by Oregon State Parks and Recreation was provided as part of a complete application. Please note implementation of the development, as conditioned for approval, is at the discretion of the landowner.

Pursuant to the Columbia River Gorge National Scenic Area Act², the portion of the project occurring within the designated UA of Mosier is not subject to consistency with NSA rules and regulations. Furthermore, Wasco County does not have land use regulatory authority within the incorporated community of Mosier. Therefore, the following staff report addresses only those portions of the proposed development located outside of the Mosier UA, and within the Columbia River Gorge National Scenic Area (CRGNSA) portion of Wasco County.

Elements of the proposed development subject to compliance with the rules and regulations of the *Management Plan for the Columbia River Gorge National Scenic Area* (Management Plan) and the NSALUDO include:

- 3.58 miles of the 4.02 miles existing mainline and siding to result to be modified and expanded into second mainline, extending east and west of the Mosier UA. More specifically:
 - West of the Mosier UA, the existing siding will be extended west to create second mainline track north of the existing mainline (south of Interstate 84) between rail MP 66.98 and 68.58 (length of 1.6 miles);
 - East of the Mosier UA, the existing mainline and existing siding between rail MP 70.37 and 70.74 will be realigned, south of the current mainline track (length of 0.37 miles);
 - Further east of the Mosier UA, the existing siding will be extended to create second mainline track between rail MP 70.74 to 72.35, south of the current mainline track (length of 1.61 miles);
 - A third track to maintain a siding is not proposed or included in this review.
- Construct and improve drainage ditches as shown on the site plans;
- Extend six existing culverts and install three new culverts to improve fish passage;
- Remove five existing signal buildings and replace them with five new signal buildings that range in size from 6'L x 6'W x 9'H (36 square feet) to 8'L x 10'W x 9'H (80 square feet). Replacement will include some changes in location and relocated utility connections as shown in the site plan and engineering drawings;
- Remove existing telephone poles and antennae poles and install five new 53-foot tall wooden wireless signaling appurtenances (spaced several miles apart from each other);
- Relocate an existing pump house building within Memaloose State Park;
- Relocate existing utilities in areas of construction as shown on the site plan;
- Install twelve 22-foot tall combination signal lights;
- New signage as required by federal law for directional and safety requirements;
- Blast and excavate basalt rock walk within an existing open tunnel;
- Onsite rock crushing of blasted materials to repurpose onsite for expanded rail ballast;
- Construct a 170-foot long, 25-foot tall concrete retaining wall (stamped and dyed to emulate natural basalt rock wall face);
- Construct four temporary access roads and rail crossings;
- Regrade and re-gravel two existing gravel access roads and road shoulders to allow for ongoing maintenance needs (note: these existing roads are described as new permanent access roads in the application materials);
- Replace and extend portions of existing guardrail along Interstate 84;

² Columbia River Gorge National Scenic Area Act, Section 6(c)(5)(B)

- Temporary construction areas labeled “landing areas” on application materials; and
- The creation of a new wetland adjacent to Tooley Lake, which is proposed to mitigate the impacts to several wetlands along the length of the project.

With the exception of a portion of land within Memaloose State Park and the off-site wetland mitigation area, the development is proposed to occur within the existing railroad right of way and on the shoulder of Interstate 84 on ODOT lands. A table of impacted zones and disturbed areas (excluding the wetland mitigation site) was included as part of the application materials.

2. **Surrounding Landscape and Existing Development:** The project is located along the relatively level shoreline of the Columbia River. East of the Mosier UA, most of the project is north of and adjacent to Interstate 84; west of the Mosier UA, the project is south of and adjacent to Interstate 84. Throughout the entire length of the project, development will be near the base of basalt rock cliff faces containing a mixture of natural rock patterns and human-made cut patterns from the past construction of highway and railroad related infrastructure. The project will travel through a rock mesa by way of an open, at-grade tunnel. Although the tunnel through it is level, the rock mesa around it visibly rises in elevation and slopes upwards and then downwards, towards Mosier. The top of the mesa is comprised of slopes that contain Interstate 84, commercial orchards, vineyards, rural residences and a Department of Transportation rest area. The slope then rises again to the south, with additional rock outcroppings and mixed forests. Between the rest area and the tunnel, a topographic depression slopes towards the Columbia River and contains the Memaloose State Park campground.

As with most of the Columbia River Gorge, the landscape is ecologically diverse. The project area occupies a transitional landscape between the wet western forests and the dry eastern grasslands - and as a result contains a mixture of native and non-native grasses, forbs, and shrubs, poison oak, blackberries, ocean spray and a variety of wildflowers. Trees in the area consist of ponderosa pine, Oregon white oak, Douglas fir and big leaf maple trees. The landscape contains shorelines, wetlands, grasslands, mixed forests and basalt rock walls and cliff faces.

Existing development in the project area and vicinity includes the existing railroad mainline and siding, five equipment shelters, two informal access roads, six culverts, water and electrical utility lines that provide service to railroad equipment and adjacent properties, including Memaloose State Park and a private commercial orchard and associated agriculture residences. The site of the proposed wetland mitigation is currently farmed for row crops and contains an existing dwelling and agriculture buildings.

According to available information, it appears much of the large-scale development in the vicinity of the project – including the railroad (late 1800’s), State Park (established in 1925 and expanded in 1953) and Interstate 84 (1950’s through 60’s) – was constructed prior to the enactment of the WCLUDO (9/4/74) and prior to the passing of the Columbia River Gorge National Scenic Area Act (11/17/86).

3. **Legal Parcel Status:** Deed documentation of all affected properties was provided to verify land ownership and legal parcel status. The railroad right of way has been in its current configuration since the late 1890’s. Landowner consent forms for the purpose of Scenic Area review and

permitting were provided from the Oregon Department of Transportation, Oregon Parks and Recreation, and Skylar and Kathleen Schacht (wetland mitigation site).

B. Chapter 1 – Introductory Provisions

The National Scenic Area Land Use and Development Ordinance for Wasco County (NSALUDO) is enacted pursuant to Oregon Revised Statutes Chapters 92, 197, 203, and 215, and Public Law 99-663, Section 7 (Columbia River Gorge National Scenic Area Act).

Section 1.030 defines the purpose of the Wasco County NSALUDO as:

“The purposes of this Ordinance are: To promote public health, safety, convenience, and general welfare; to reduce congestion upon the streets and highways; to prevent excessive population density and the overcrowding of land; to provide for adequate air and light; to conserve natural resources and encourage the orderly growth of the County; to promote safety from fire and natural disaster; to assist in rendering adequate police and fire protection; to facilitate adequate and economic provision for public improvements, for recreation areas, and for public utilities and services; to conserve, stabilize, and protect property values; and to encourage the most appropriate use of land, all in accordance with the Comprehensive Plan for Wasco County and the Management Plan for the Columbia River Gorge National Scenic Area.”

Section 1.080 – Compliance Required, states:

“No structure or premises in the Columbia River Gorge National Scenic Area portion of Wasco County shall hereafter be used or occupied and no part or structure or part thereof shall be erected, moved, reconstructed, extended, enlarged, or altered contrary to the provisions of this Ordinance...”

Section 1.200 – Definitions, is referenced throughout this document and can be viewed in its entirety online at http://co.wasco.or.us/planning/nsa_ludo.html, at the Wasco County Planning Department Office, or by contacting the Department to request a mailed copy.

C. Chapter 2 – Development Approval Procedures

1. Section 2.050(B) – Wasco County Application Authority, identifies non-administrative variances and any matters the Director elects not to review pursuant to 2.050(A), as a Type III quasi-judicial action to be heard by the Planning Commission, subject to Sections 2.100 Notice Requirements, 2.180 Hearing Procedure, 2.190 Establishment of Party Status, 2.200 Official Notice, 2.210 General Conduct of All Hearings and 2.220 Approval, Rejection, Modification.
2. Section 2.100 provides notice requirements for new land use applications to ensure interested parties and the general public have an opportunity to contribute information and other input during the planning process. Consistent with the requirements of this Section, staff provided resource consultation notice to agencies identified for administrative coordination on February 24, 2015 for recreation resources, September 22, 2015 for cultural resources, February 20, 2016 for natural resources, and March 11, 2016 and April 26, 2016, June 1, 2016, June 23, 2016, and August 11, 2016 for the general public and affected adjacent property owners. The application

materials have been available for public review at the office and on the Department's website since March 11, 2016.

As of November 2, 2016, approximately 3,000 comments have been received from the general public; a large number of these comments are of the same template. Comments received have been summarized into the following categories:

1. Inconsistent with the purpose of the NSA Act:
 - a. Impacts to scenic resources from key viewing areas,
 - b. Impacts to natural resources and should require professional resource surveys
 - i. Impacts to wetlands, sensitive plants, salmon species,
 - c. Impacts to cultural resources and should require professional resource surveys
 - d. Impacts to recreation at Memaloose State Park
 - e. Does not protect treaty rights of NSA Treaty Tribes
 - f. The project could be accomplished in a different location and meet the same need
 - g. The project is not in the public's best interest
 - h. Sale of Oregon Parks land is not in public's best interest
2. Community impacts (local and regional):
 - a. Impacts to public health (air quality, water quality, safety, noise)
 - b. Impacts to residents of Mosier
 - c. Lack of local economic benefit
 - d. Safety risks from more trains, faster trains, longer trains, more parked trains, longer duration of idle times and parked trains.
3. Scope of review: the project should be reviewed as "new" not "expansion" of existing
4. Fossil fuel and fossil fuel related emergencies:
 - a. Fossil fuel consumption and climate change concerns, the proposed development may facilitate future extraction and related proposals.
 - b. Safety concerns due to more rail traffic including increased spill and explosion risks
 - c. Concern for cleanup needs and responsibilities of cleanup following a spill or explosion
 - d. Concern for cumulative effect of uncovered rail cars carrying loose commodities such as coal that could contribute to water quality degradation
 - e. Concern for cumulative effects to air quality resulting from more diesel train engines

In addition to public comment, written comments were received from the following individuals on behalf of treaty tribes, government agencies and non-government organizations (listed in alphabetical order):

Treaty Tribes:

- Gary Burke, Chairman, Confederated Tribes of the Umatilla Indian Reservation
- Catherine Dickson, Principal Investigator, Cultural Resources Protection Program, Confederated Tribes of the Umatilla Indian Reservation
- JoDe Goudy, Chairman of the Yakama Nation Tribal Council, Confederation Tribes and Bands of the Yakama Nation

- Audie Huber, Intergovernmental Affairs Manager, Department of Natural Resources, Confederated Tribes of the Umatilla Indian Reservation
- Holly Shea, Tribal Archeologist, Warm Springs Geo Visions, Confederated Tribes of the Warm Springs Reservation of Oregon
- Jeremy Wolf, Chair of the Fish and Wildlife Commission for the Confederated Tribes of the Umatilla Indian Reservation

Government Agencies:

- Jason Allen, Historic Preservation Specialist, Oregon State Historic Preservation Office
- Jim Appleton, Chief of Mosier Volunteer Fire and Rescue
- Arlene Burns, Mayor for the City of Mosier
- Ross Curtis, Archaeologist, Oregon State Historic Preservation Office
- MG Devereaux, Deputy Director, Oregon State Parks and Recreation
- Marge Dryden, Heritage Program Manager, U.S. Forest Service Columbia River Gorge National Scenic Area Office
- Rod French, Mid-Columbia District Fish Biologist, Oregon Department of Fish and Wildlife
- Darin Molesworth, Mosier Fire District Board President, Mosier Volunteer Fire and Rescue
- Nancy Nelson, Archaeologist, Oregon State Parks and Recreation
- John Pouley, Assistant State Archeologist, Oregon State Historic Preservation Office
- Robin Shoal, Staff Officer, Natural Resources and Planning, U.S. Forest Service Columbia River Gorge National Scenic Area Office
- Katie Skakel, Planner, Columbia River Gorge Commission
- Heather Staten, Executive Director, Hood River Valley Residents Committee
- Jeremy Thompson, Wildlife Biologist, Oregon Department of Fish and Wildlife
- Sue Vrilakas Botanist, Data Manager, Oregon Biodiversity Information Center

Non-Government Organizations:

- Laura Ackerman, Organizer and Oil Policy Director for The Lands Council
- Lauren Goldberg, Columbia Riverkeeper
- Jack Isslemann, Senior Vice President, External Affairs & Programs, The Greenbrier Companies, Inc.
- Matt Krogh, Stand
- Steve McCoy, Friends of the Columbia Gorge
- Regna Merritt, Oregon Physicians for Social Responsibility
- Gregory Monahan, Chair for Beyond Gas & Oil Team, Sierra Club
- Curtis Robinhold, Deputy Executive Director, Port of Portland
- Greg Stiegel, Executive Director, Columbia Gorge Windsurfing Association

FINDING: Where NSALUDO regulatory authority allows, staff has addressed these concerns, together with concerns raised by testimony during the hearing, throughout this document. Agency comments are discussed in greater detail below, under Section 14 – Scenic Area Review.

3. Section 2.120 requires the Director to consider the information provided by the applicant, determine consistency with the Management Plan and NSALUDO and the goals and policies of all other applicable referenced plans. Consistent with the requirements of this section, the Staff

Recommendation and the following Staff Report provided findings of fact, conclusions of law and supplemental conditions of approval recommended for inclusions in the final decision of the Wasco County Planning Commission.

4. Section 2.130 provides notice of decision requirements, including minimum information requirements and affected parties to receive the notice. Consistent with this section, staff provided this document and the Staff Recommendation to the Wasco County Planning Commission and Board of Commissioners for PLASAR-15-01-0004 to the applicant and property owners, affected property owners within 500 feet, affected government agencies, the U.S. Forest Service National Scenic Area Office (USFSNSA), the Columbia River Gorge Commission (CRGC), and the four treaty tribes of the National Scenic Area Act: Confederated Tribes and Bands of the Warm Springs Indian Reservation (Warm Springs), Confederated Tribes and Bands of the Umatilla Reservation (Umatilla), Confederated Tribes and Bands of the Yakama Indian Nation (Yakama), and the Nez Perce Tribe (Nez Perce).
5. Section 2.140 requires this land use decision to be recorded with the deeds of the affected parcel. A condition of approval will be included in the Notice of Decision to alert the landowner of this requirement.
6. Section 2.180 Hearing Procedure, specifies the conduct of the hearing and order of procedure. Section 2.190 Establishment of Party Status, identifies the requirements of a party to preserve standing and establish "party status". Section 2.200 Official Notice and 2.210 General Conduct of All Hearings, provides guidance on how the approving authority may take official notice and the rules that apply to the general conduct of County hearings.

At the commencement of the hearing, the Chair outlined the procedures for the hearing and provided the statutorily required information. Each commissioner indicated that he had no conflicts of interest. Commissioners disclosed that they had received generalized communications outside the record. Commissioner Runyon had attended a community meeting in Mosier where issues relating to the application were discussed by persons in favor and opposed. An opportunity was provided for any person to object to the procedures or participation of any commissioner, but no objection was received and there was no request to question any commissioner regarding contacts. The entire Planning Commission record was received into the record. There were no objections to any documents presented and all were received into the record. There were no objections to any oral testimony except that counsel for Friends of the Gorge objected to new material alleged to be contained in the applicant's rebuttal. As the information being discussed was in response to assertions during earlier testimony, the Board reopened the hearing for the limited purpose of receiving the new information and providing counsel for the Friends of the Gorge to respond.

D. Chapter 3 – Basic Provisions

1. Chapter 3 – Basic Provisions contains zoning and environmental protection districts. As noted above, the proposed development will occur in seven land use designations (zones) in the NSA, including GMA Large-Scale Agriculture, GMA Small-Scale Agriculture, SMA Agriculture, SMA Public Recreation, GMA and SMA Open Space, and GMA Water. Portions of the proposed

development will also occur in Environmental Protection Division 1 – Flood Hazard Overlay. Please see findings below for more information.

2. The purpose statements listed in the NSALUDO for each of the applicable zones are as follows:

Section 3.120 – Large Scale Agriculture Zone (GMA & SMA Agriculture): *“Protect and enhance large scale agriculture land for agriculture uses...”*

Section 3.130 – Small Scale Agriculture Zone (GMA Only): *“Protect and enhance the small scale agriculture land for agriculture uses...”*

Section 3.170 – Public Recreation (GMA & SMA): *“To protect and enhance opportunities for publically-owned, moderate and high intensity resource-based recreation uses on lands most suitable for such uses.”*

Section 3.180 – Open Space (GMA & SMA): *“Protect those most significant, sensitive and representative, scenic, cultural, natural and recreation resources on unimproved lands and enhance them where appropriate.”*

GMA Water is a designation indicated on the official maps provided with the Management Plan. However, the Management Plan does not explicitly described GMA Water as a land use designation and does not provide specific zoning regulations. Consistent with past policy interpretations made by Wasco County Planning, the Columbia River Gorge Commission, the US Forest Service National Scenic Area Office and the other five NSA county planning departments, new development in GMA Water must comply with the scenic, cultural, natural and recreation resource requirements of the NSALUDO and is reviewed by this staff report for consistency.

3. According to the application materials, the project will include the following area of potential affect in each zone (this table does not include the off-site wetland mitigation proposed):

TABLE 1-1
NSA Zoning Districts Crossed by the Project in Wasco County

NSA Zoning District	Zoning Abbreviation	Project Component	Total Length of Zone Crossed (miles)	Total Area of Zone Crossed (acres)*
GMA Large Scale Agriculture	GMA A-1 (40)	Existing UPRR ROW Mainline Track Construction Staging Temporary Access Road	0.74	3.30
GMA Small Scale Agriculture	GMA A-2 (80)	Existing UPRR ROW Mainline Track Temporary Access Road	0.26	0.90
GMA Open Space	GMA OS	Existing UPRR ROW Mainline Track Construction Staging Temporary Access Road Permanent Access Road	1.34	6.41
GMA Water	GMA W	Temporary Construction Area	0	0.01
SMA Agriculture	SMA Ag	Existing UPRR ROW Mainline Track	0.24	1.85
SMA Open Space	SMA OS	Existing UPRR ROW Mainline Track ROW Acquisition Construction Staging	0.37	8.93
SMA Public Recreation	SMA PR	Existing UPRR ROW Mainline Track ROW Acquisition Construction Staging Permanent Access Road	0.63	9.40
TOTAL			3.58 miles	30.80 acres

* Area of zone crossed includes the proposed area of disturbance within existing UPRR ROW, the entire area of proposed ROW acquisition, and temporary construction easement. For calculation of detailed project disturbance areas, refer to Table 4-1 in Section 4.2.2.

Note: In response to staff's request to minimize disturbances to Open Space zones, the applicant provided a revised site plan for temporary construction areas, reducing the impacted area referenced above by 1.21 acres.

4. Section 3.100, which applies to all GMA and SMA zones except GMA and SMA Open Space and Agriculture Special, and 3.180(B), which applies specifically to GMA and SMA Open Space, provide lists of uses that are allowed without review.

5. Section 3.100(D) and 3.180(B)(1) lists:

Repair, maintenance, and operation of existing structures, including but not limited to, dwellings, agriculture structures, trails, roads, railroads, and utility facilities.

Repair is defined in Section 1.200 as:

Replacement or reconstruction of a part of a serviceable structure after damage, decay or wear. A repair returns a structure to its original and previously authorized and undamaged condition (in kind). It does not change the original size, scope, configuration or design of a structure, nor does it excavate beyond the depth of the original structure.

Repair includes, but is not limited to, re-roofing a building, replacing damaged guardrails, reconstructing a rotten deck or porch, replacing a broken window or door, replacing a utility pole and associated anchors, replacing a section of broken water or sewer line, replacing a damaged or defective utility line, reconstructing a portion of a building damaged by fire or a natural event, and replacing railroad ties or rails.

Maintenance is defined in Section 1.200 as:

Ordinary upkeep or preservation of a serviceable structure affected by wear or natural elements. Maintenance does not change the original size, scope, configuration or design of a structure.

Maintenance includes, but is not limited to, painting and refinishing, regrouting masonry, patching roofs, grading gravel roads and road shoulders, cleaning and armoring ditches and culverts, filling potholes, controlling vegetation within rights-of-way, removing trees and other roadside hazards within rights-of-way, and testing and treating utility poles.

Finding: The proposed rail modification and replacement will result in new track and an expanded ballast in areas of siding extensions, changes in existing track location in areas proposed to be rerouted, and changes to equipment shelters, communications signals, lighting and signage – some in the same location, some in different locations. Given this information, the proposed development exceeds the scope of repair and maintenance and is subject to compliance with the review and requirements of the NSALUDO.

6. Section 3.100(H) and 3.180(B)(2) allows limited development for transportation facilities without review in all zones, including:

- a. *Replace existing safety or protective structures, including guardrails, access control fences and gates, barriers, energy attenuators, safety cables, and traffic signals and controllers, as well as existing traffic detection devices, vehicle weighing devices, and signal boxes provided the replacement structures are:*

(1) The same location and size as the existing structures and

- (2) *The same building materials as the existing structures, or building materials that are dark brown with a flat, non-reflective finish, or building materials consistent with the Historic Columbia River Highway Master Plan for the Historic Columbia River Highway or the scenic highway corridor strategy for Interstate 84 prepared according to the GMA policies in the section of the Scenic Resources chapter of the Management plan title “Scenic Travel Corridors”...*

Finding: The proposed development includes the removal and replacement of several transportation facilities, including signal buildings, signal lights, directional and safety signage, guardrail, fencing, gates, and other development associated with the modification of the railroad. Development that is proposed to be a different size or in a different location is subject to review and is further discussed below. The proposed development does include the removal and replacement of guardrail along Interstate 84 and existing access roads to allow temporary construction access and permanent maintenance access. The applicant consulted with the Oregon Department of Transportation and has proposed to replace the removed portions of guardrail with an in kind material – to continue the visual aesthetic and ensure consistent use of materials for each guardrail system – as required by the Interstate 84 Corridor Strategy. In the event an entire guardrail system is removed and replaced, it shall be replaced with low-reflective, earth-tone, corten material guardrail system encouraged by the Interstate 84 Corridor Strategy document for long term aesthetic improvements.

- b. *New raised pavement markers, guide posts, object markers, inlay markers, and pavement markings and striping.*

Finding: No new paved roads or associated road markers are proposed.

- c. *Permanent public regulatory, guide, and warning signs, except those excluded below, provided:*

The signs comply with the Manual for Uniform Traffic Control Devices and

The support structures and backs of all signs are dark brown with a flat, non-reflective finish. This category does not include specific service signs; destination and distance signs; variable message signs; or signs that bridge or are cantilevered over the road surface.

Finding: The applicant has proposed several directional and safety signs including those that say: “Station and Control Point”, “Whistle Signal”, “Vertical Control Point”, “Private Property”, “No Dumping”, “Speed Restriction”, and mile marker signage. According to the applicant, the signs will be non-reflective black and white signage and will be posted at approximately 10-feet. A condition of approval is included to require all sign support structures and the backs of single sided signs to be dark brown or black with a flat, non-reflective finish.

- d. *Extensions of existing guardrails less than or equal to 50 feet in length and new guardrail ends for existing guardrails, provided the guardrails and guardrail ends are*

- (1) *Located inside rights-of-way that have been disturbed in the past; and*
 - (2) *Constructed of materials that match the existing structure, natural wood, weathering steel (e.g., Corten), or materials consistent with the Historic Columbia River Highway Master Plan for the Historic Columbia River Highway or a scenic highway corridor strategy for Interstate 84 prepared according to the GMA policies in the section of the Scenic Resources chapter of the Management Plan titled "Scenic Travel Corridors."*
- e. *New guardrails and guardrail ends, provided the structures are*
- (1) *Located inside rights-of-way that have been disturbed in the past and*
 - (2) *Constructed of natural wood, weathering steel (e.g., Corten), or materials consistent with the Historic Columbia River Highway Master Plan for the Historic Columbia River Highway or a scenic highway corridor strategy for Interstate 84 prepared according to the GMA policies in the section of the Scenic Resources chapter of the Management Plan titled "Scenic Travel Corridors." This category does not include jersey barriers.*

Finding: Guardrails are addressed above in the finding for (a). A condition of approval is included to ensure compliance with this requirement.

- f. *Replace and/or expand existing culverts, provided the entity or person owning or operating the culvert shall obtain all necessary federal and state permits that protect water quality and fish and wildlife habitat before construction. (GMA Only)*
- g. *Replace and/or expand existing culverts for ephemeral streams or ditches, provided the visible ends of culverts shall be dark and non-reflective. (SMA Only)*

Finding: The proposed development includes the installation of three new culverts to improve fish passage and the extension of six existing culverts to maintain service with the existing and proposed track embankment. The applicant has obtained and provided a Biological Opinion from the United States Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service and a determination from the U.S. Army Corps of Engineers that concludes the proposed action is not likely to jeopardize the continued existence of salmon or steelhead species, or impact critical habitat. Oregon Fish and Wildlife was included in the analysis for these determinations and provided confirmation of consistency with state regulations through their review (see Chapter 14 – Natural below for more information about natural resource impacts). A condition of approval is included to ensure visible ends of new culverts in the SMA are a dark color and non-reflective.

- h. *Resurface or overlay existing paved roads, or grade and gravel existing road shoulders provided the activity does not:*
 - (1) *Increase the width of the road,*

(2) Disturb the toe of adjacent embankments, slopes, cut banks, or

(3) Change existing structures or add new structures.

Finding: No paved roads are proposed to be modified; existing gravel roads are proposed to be graveled, within their current footprints, consistent with this rule.

i. Apply dust abatement products to non-paved road surfaces.

Finding: No dust abatement products are proposed. However, if they are to be used, the applicant shall take extra caution to ensure the product does not reach or drain into nearby wetlands, streams, or the Columbia River.

j. Replace the superstructure of bridges (e.g., decks, beams) for bridges less than or equal to 30 feet in length and less than or equal to 1,000 square feet in area. This category does not include guardrails or the substructure of bridges (e.g., foundations, abutments).

Finding: The proposed development does not include any bridge work outside of the Mosier UA. Therefore, this rule is not applicable.

7. Sections 3.100(I) and 3.180(B)(3) allow limited underground utility facilities in all zones without review, including:

a. Replace or modify existing underground utility facilities located inside road, utility or railroad rights-of-way or easements that have been disturbed in the past or co-locate new underground utility facilities with existing underground facilities located inside road, utility or railroad rights-of-way or easements that have been disturbed in the past, provided no excavation would extend beyond the depth and extent of the original excavation.

b. Replace or modify existing underground utility facilities located inside road, utility or railroad rights-of-way or easements that have been disturbed in the past or co-locate new underground utility facilities with existing underground facilities located inside road, utility or railroad rights-of-way or easements that have been disturbed in the past, provided:

(1) No excavation would extend more than 12 inches beyond the depth and extent of the original excavation;

(2) No ditch for linear facilities would be more than 24 inches wide;

(3) No excavation for non-linear facilities would exceed 10 cubic yards, and;

(4) No recorded archaeological site is located within 500 feet of the development. To comply with (4), the entity or person undertaking the development shall contact the Oregon State Historic Preservation Office and obtain a letter or other

document stating no recorded archaeological site is located within 500 feet of the development.

Finding: The proposed development is a large-scale use and was thus required to provide a professionally prepared cultural resource survey and assessment of potential effect to be considered a complete application. The development includes the modification of existing utilities in several locations, some of which will remain in their current location and others that will be relocated to serve the new alignment and associated signal equipment buildings and lights. All proposed modifications to utilities have been indicated on the provided site plans and engineering drawings, and are reviewed below for any NSA resource impacts.

8. Sections 3.100(J) and 3.180(B)(4) allow limited aboveground and overhead utility facilities in all zones without review, including:
 - a. *Replace existing aboveground and overhead utility facilities including towers, pole/tower-mounted equipment, cables and wires, anchors, pad-mounted equipment, service boxes, pumps, valves, pipes, water meters, and fire hydrants, provided the replacement facilities would have:*
 - (1) *The same location and size as the existing facilities and;*
 - (2) *The same building materials as the existing facilities, or building materials that are dark brown with a flat, non-reflective finish, or building materials consistent with the Historic Columbia River Highway Master Plan for the Historic Columbia River Highway or the scenic highway corridor strategy for Interstate 84 prepared according to the GMA policies in the section of the Scenic Resources chapter of the Management plan title "Scenic Travel Corridors"*
 - b. *Replace existing utility poles, provided the replacement poles are*
 - (1) *Located within 5 feet of the original poles;*
 - (2) *No more than 5 feet taller and 6 inches wider than the original poles, and;*
 - (3) *Constructed of natural wood, weathering steel (e.g., Corten), materials that match the original poles, or materials that are dark brown with a flat, non-reflective finish.*
 - c. *New whip antennas for public service less than or equal to 8-feet in height and less than or equal to 2 inches in diameter, cables, wires, transformers, and other similar equipment, provided all such structures are on existing utility poles or towers.*

Finding: The proposed development includes the removal of existing communications equipment, including telephone poles and lines, communication poles and other appurtenances related to communication. The applicant proposed to replace the

existing equipment with fewer, more effective wooden monopole communication poles. The replacement structures will be of different materials, different size and in different locations, and are thus subject to review for consistency with resource protections.

9. Sections 3.100(K) and 3.180(B)(5) allow additional signage in all zones without review, including those needed for construction and to prevent trespass without review:

...

c. *Temporary construction site identification, public service company, safety, or information signs not greater than 32 square feet. Exceptions may be granted for public highway signs necessary for public safety and consistent with the Manual for Uniform Traffic Control Devices. Removal must be accomplished within 30 days of project completion.*

d. *Signs posted on private property warning the public against trespassing, danger from animals, the private nature of a road, driveway or premise, or signs prohibiting or otherwise controlling fishing or hunting, provided such signs are not greater than 6 square feet in the GMA and 2 square feet in the SMA.*

...

Finding: The signs listed in (c) and (d) above, are allowed without review. A condition of approval is included to make the applicant aware of the 30-day time constraint for construction signs, and the size limitations of private property warning signs.

10. Sections 3.110(A) list uses that qualify for the expedited review process, subject to the resource protections of Section 3.110(B).

Finding: Pursuant to the resource protection thresholds identified in 3.110(B)(2) Cultural and (4) Natural and 3.110(C) Treaty Rights, the proposed development does not qualify for expedited review and is therefore subject to the full review to ensure the appropriate resource protection process has occurred; see Chapter 14 below.

11. Pursuant to Sections 3.120(D)16, 3.130(D)(11) and 3.180(D)(5) the demolition and removal of existing structures more than 50 years old is a use permitted to occur in all three agriculture zones and both open space zones, subject to a full review and compliance with Subsection G - Property Development Standards, Chapter 11 - Fire Safety Standards, and Chapter 14 - Scenic Area Review, as well as all other listed or referenced standards. Similarly, Section 3.170(E)(23) lists this use as conditional use in the Public Recreation zones (GMA and SMA):

Removal/demolition of structures that are 50 or more years old, including wells, septic tanks and fuel tanks. (GMA & SMA)

Finding: The proposal includes the removal of existing equipment shelters, signal lights, signage, communications facilities, utilities, and other associated structures. As noted above, and described further below, a cultural resources survey and assessment of potential effect were prepared for the application to verify any potential effects to historic resources. Compliance with Subsection G, Chapter 11 and Chapter 14 are discussed below. Conditional Use provisions for portions of this activity proposed to occur in the SMA Public Recreation are discussed below.

12. Pursuant to Sections 3.120(D)17 and 3.130(D)(12) construction, reconstruction and modifications of roads is permitted to occur in both GMA Large-Scale and Small-Scale agriculture zones, subject to a full review and compliance with Subsection G - Property Development Standards, Chapter 11 - Fire Safety Standards & Chapter 14 - Scenic Area Review, as well as all other listed or referenced standards. Sections 3.120(D)17 and 3.130(D)(12) state:

*Construction, reconstruction, or modifications of roads not in conjunction with agriculture if designated in the Adopted Wasco County Transportation System Plan or designed and constructed as part of an approved, active development order.
(GMA Only).*

Finding: The proposal includes the construction and reconstruction of six 10-foot wide roads, including four new temporary roads and the improvement of two existing gravel roads to be used as permanent maintenance access. Much of the temporary roads are proposed to occur within the existing gravel shoulder of Interstate 84 and the railroad right-of-way – requiring minimal improvements for vehicular access. One temporary road is proposed to occur in the GMA Large-Scale Agriculture Zone, and one permanent road will be located partially in the GMA Small-Scale Agriculture Zone. The roads are accessory to the existing railroad, which is designated in the adopted Wasco County Transportation System Plan. As proposed, the roads are a permitted use in the GMA Agriculture Zones. Compliance with Subsection G - Property Development Standards, Chapter 11 - Fire Safety Standards and Chapter 14 - Scenic Area Review, are discussed below.

13. Railroad related development is proposed to occur in each of the seven affected zones. This table intends to provide an abbreviated list of regulations that specifically list railroad related development as an allowed review use, subject to full review and compliance with the NSALUDO. Each of these zones contain unique language and are discussed in more detail below:

Proposed Use: Railroad construction, reconstruction, replacement, and expansion		
Zone:	Listed as allowed review use?	Applicable Section NSALUDO:
GMA Large Scale Agriculture	Yes, subject to full review	Section 3.120(E)(20)
SMA Agriculture	Yes, subject to full review	Section 3.120(E)(18)
GMA Small Scale Agriculture	Yes, subject to full review	Section 3.130(E)(14)
GMA Open Space	Yes, subject to full review	Section 3.180(D)(2)
SMA Open Space	Yes, subject to full review	Section 3.180(D)(3)
SMA Public Recreation	Yes, subject to full review	Section 3.170(E)(27)
GMA Water	There are no uses listed for GMA Water. Consistent with past policy, the proposed use is subject to compliance with Chapter 14.	

14. Sections 3.120(E) and 3.130(E) list uses subject to a full review and permitted only conditionally in the GMA Large-Scale and SMA Agriculture zone, and GMA Small-Scale Agriculture zone, subject to compliance with Subsection G – Property Development Standards, Chapter 5 – Conditional Use Review, Chapter 11 – Fire Safety Standards, Chapter 14 – Scenic Area Review, and all other referenced standards applicable to the proposed development. Section 3.120(E)(18), and (20) and Section 3.130(E)(14) allow the proposed development as a conditional use, subject to compliance with resource protections listed above. They state:

18. *Road and railroad construction and reconstruction. (SMA Only)*

Finding: As noted above in Finding D. 11, six roads are proposed to be constructed and reconstructed for the development. None of these roads are proposed to occur within the SMA Agriculture zone. Portions of the realignment of existing mainline track and expansion of existing siding track to create new second mainline track (railroad reconstruction and construction) are proposed to occur in SMA Agriculture, as shown on the site plan materials. Compliance with Subsection G - Property Development Standards, Chapter 5 – Conditional Use Review, Chapter 11 - Fire Safety Standards and Chapter 14 - Scenic Area Review, are discussed below.

20. *Utility facilities and railroads necessary for public service upon a showing that:
(GMA & SMA)*

- a. *There is no practicable alternative location with less adverse effect on the scenic, cultural, natural, recreational, agricultural or forest lands; and*
- b. *The size is the minimum necessary to provide the service.*

Finding: The proposed development includes railroad development - including the creation of a second mainline by extending an existing siding, realigning an existing mainline, and the relocation and addition of associated railroad utilities and support structures. As part of their application, the applicant provided draft findings of consistency. Beginning on page 5-93 of their summary, the applicant makes the following finding:

“The proposed project serves a major public interest and satisfies the Public Interest Test included in the NSA-LUDO. UPRR currently moves a wide array of commodities through Oregon that support the regional and local economies. Grain, automobiles, lumber, cement, apparel and consumer electronics are commonly moved through this corridor. UPRR has been handling this traffic mix for years and plans to continue moving a similar product mix in the future. UPRR has typically moved 20 to 25 trains a day through this area; with seasonal increases of shipments in commodities such as grains resulting in upwards of 30 trains using the corridor over the period of a month. Oregon is a critical part of UPRR’s service to customers. UPRR has invested more than \$1 billion in the state in the last 10 years to improve its rail yards and enhance railroad track, strengthening the reliability of Oregon’s transportation infrastructure. The project is required to support the needs of UPRR’s current customers throughout the state and region and will eliminate one of its most significant operational bottleneck in the Pacific Northwest.

In addition, the proposed second mainline track would reduce the need for trains idling near the City of Mosier. Converting the existing Mosier Siding to mainline track in this way would have the secondary effect of reducing noise and idling emissions near the City of Mosier. Trains idling on the existing siding also pose a potential safety hazard because the public often perceives an idling train as stationed at a siding for an extended period of time. This results in increased occurrences of high-risk pedestrian and vehicle crossings in front of active trains at siding locations relative to trains moving at standard operating speed along the adjacent mainline

track. In addition, unauthorized pedestrian crossings between rail cars, train boarding, and vandalism are more common at siding locations in general. Operating fewer and longer trains reduces safety risks associated with collisions at pedestrian or vehicle crossing locations because longer trains present fewer occurrences of a train passing through a particular portion of a route. Accordingly, the economic and safety-related public benefits of the project outweigh the associated disturbance to aquatic and other resources. As discussed throughout this narrative and supported by the attached Mitigation Plan (Appendix D) and Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (Appendix K), UPRR proposes to avoid, minimize and mitigate for unavoidable disturbance resulting from the proposed project.

Therefore, the project meets the public interest test required by NSA-LUDO Section 14.600(F).

Finding: Staff required the applicant to prepare an Alternatives Analysis to verify the preferred alternative was the minimum scale of development in the best possible location to reduce known resource impacts. As a part of their analysis, the applicant provided six alternatives and proposed to further reduce Open Space impacts of the preferred alternative by 1.21 acres.

According to the information prepared by CH2M Hill on behalf of the applicant (including sensitive resource surveys and an analysis of potential resource impacts), and consistent with this rule, the applicants have proposed the alternative that will result in the least impacts to scenic, cultural, natural, recreational, and agricultural lands, while still meeting the project need.

It is important to note that public comments were received voicing concerns that the proposed development will not directly benefit Mosier area residents or the Columbia River Gorge region because it does not stop in or service any specific local businesses. Staff does not have sufficient information to verify the number of local business served by regional rail operations in the Gorge. Generally speaking however, having, maintaining, and making continual improvements to regional infrastructure, including transportation infrastructure, is an important part of planning for resilient communities and continued resource protection. Minimizing the number of heavy trucks on the highways and providing a critical redundancy in transportation in the event of an emergency is also beneficial to local and regional residents. This finding is also made in greater detail for Chapter 14 below.

15. Sections 3.120(G) and 3.130(G) contains property development standards for agriculture zones. Sections (G)(1) include the size requirements for new parcels; (G)(2) provides general setbacks for all structures; (G)(3) provides agriculture setbacks for new buildings adjacent to lands zoned for agriculture use; (G)(4) provides irrigation ditch setbacks; (G)(5) provides floodplain setbacks; (G)(6) specifies a maximum height for new structures; (G)(7) provides vision clearance requirements for corner lots; and (G)(8) refers new off street parking to provisions in Chapter 4.

Finding: No new parcels, irrigation ditches, development on corner lots, or parking areas are proposed. The development will occur within the existing railroad right-of-way and will be sited near the track to support the communication and utility needs of the rail traffic. Buildings will be a height of 9 feet. The height of the communications tower is discussed below. Given this information, Staff finds the proposed development to be consistent with these requirements.

16. Pursuant to Section 3.170(E) The following uses and activities may be allowed with conditions on legal parcels designated **Public Recreation**, subject to Subsection G – Conditional Use Approval Standards (GMA only), Subsection H - Property Development Standards, Chapter 5 - Conditional Use Review, Chapter 11 - Fire Protection Standards & Chapter 14 - Scenic Area Review, as well as any other listed or referenced standards.

27. Road and railroad construction and reconstruction. (SMA Only)

Finding: Portions of the proposed road and railroad construction and reconstruction are proposed in SMA Public Recreation, without conditional review, consistent with this provision. An analysis of consistency with property development standards, fire protection standards and Scenic Area requirements is included below.

17. Pursuant to Section 3.180(D)(2) and (3), the following may be allowed on a legal parcel designated **Open Space**, subject to Chapter 14 - Scenic Area Review, Subsection G - Property Development Standards, as well as any other listed or referenced standards.

2. *Repair, maintenance, operation, and improvement and expansion of existing serviceable structures, including roads, railroads, hydro facilities and utilities that provide sewer, transportation, electric, gas, water, telephone, telegraph, telecommunications. (GMA Only)*
3. *Changes in existing use, including reconstruction, replacement, and expansion of existing structures and transportation facilities, except for commercial forest practices (SMA Only)*

Finding: The proposed development includes the improvement and expansion of an existing railroad structure and transportation facility, within the GMA and SMA Open Space zones. Pursuant to Section 3.180(D)(2) and (3) the proposed development is an allowed use in the zone and can be permitted, subject to compliance with the resource protection requirements of the NSALUDO; see findings below.

18. Section 3.180(E) Special Management Area – Open Space, states:

1. *The primary managing agency for open space areas for the SMA shall prepare an open space management plan. The management plan shall be completed prior to any new land uses or development, and shall be reviewed by the Forest Service.*
2. *The open space management plan shall include the following:*
 - a. *Direction for resource protection, enhancement, and management.*
 - b. *Review of existing uses to determine compatibility with open space values.*
 - c. *Consultation with members of the public, and agency and resource specialists.*

3. *Upon request, the Forest Service will help located mapped boundaries of Open Space areas in cases of new land uses or developments.*

Finding: The development is located on SMA Open Space lands included in the *Rowena Plan-Columbia River Gorge National Scenic Area*, prepared by the U.S.D.A. Forest Service Columbia River Gorge National Scenic Area Office in 2005. Consistent with the requirements listed above, this document provides direction for resource protection, enhancement and management. The *Rowena Plan* also provides a review of existing uses to determine compatibility with Open Space values and was produced in consultation with members of the public, and agency and resource specialists.

On April 25, 2016, Robin Shoal, Staff Officer, Natural Resources and Planning for the USFS CRGNSA Office confirmed by email to Department staff that no other SMA Open Space plans applied to the development area. Specific resource protection requirements and recommendations to achieve desired future conditions are addressed below under Chapter 14.

The *Rowena Plan* addresses new development and uses on page 55, it states: “*Proposed new developments and uses in SMA Open Space would be consistent with this Open Space Plan if they: 1. Do not conflict with the plan, and 2. Meet the CGRNSA Plan guidelines or county ordinances for Open Space and for protection of scenic, natural, cultural and recreational resources.*” Consistent with this rule and the *Rowena Plan*, the proposed development is reviewed for consistency with the Open Space Plan and County NSA Ordinance to ensure implementation of the CRGNSA Plan guidelines.

19. Pursuant to Sections 3.120(G)(2), 3.130(G)(2), 3.170(H)(2), 3.180(G)(2) General Setbacks apply to all new structures other than approved signs and fences – as listed here for each zone:

Zone	Setback Front	Setback Side	Setback Side Exterior	Setback Rear
GMA Large-Scale and Small-Scale Agriculture; SMA Agriculture	25 feet	25 feet	n/a	40 feet
SMA Public Recreation	25 feet	15 feet	20 feet	20 feet
GMA and SMA Open Space	25 feet	15 feet	20 feet	20 feet
GMA Water	n/a	n/a	n/a	n/a

The proposed development will occur within a traditionally narrow, linear railroad corridor for existing railroad infrastructure development. Wasco County has consistently³ allowed approved signs, fences, transportation facilities and utilities to exist within these setback areas, inside rights-of-way of existing transportation and utility facilities. Application of setback requirements in these instances would necessitate the acquisition of larger right-of-way widths, resulting in unnecessary loss of resource and agricultural lands. Consistent with past practice, staff does not believe the general setback standards were intended to apply to transportation and utilities facilities and finds the proposed development to be consistent with the intent of the Management Plan and requirements of the NSALUDO.

³ See Wasco County Land Use Application PLASAR-14-12-0022

20. Sections 3.120(G)(3), 3.130(G)(3), 3.170(H)(3), 3.180(G)(3), requires new buildings located on parcels adjacent to lands that are designated Large-Scale or Small-Scale Agriculture and are currently used for or are suitable for agriculture use, to comply with the following agriculture setback standards:

Adjacent Use	Open or Fenced	Natural or Created Vegetation Barrier	8 foot Berm or Terrain Barrier
Orchards	250'	100'	75'
Row Crops/vegetables	300'	100'	75'
Livestock, grazing, pasture, haying	100'	15'	20'
Grains	200'	75'	50'
Berries, vineyards	150'	50'	30'
Other	100'	50'	30'

Finding: The proposed development includes five new signal buildings that will replace existing signal buildings in new, but nearby locations. One of the new signal buildings is proposed to be located in the GMA Small-Scale Agriculture zone. Adjacent lands zoned for agriculture are owned by the Oregon Department of Transportation and are managed for the use of Interstate 84 and the recreation portions of the Historic Columbia River Highway State Trail. Given this information, the westernmost signal building is exempt from agriculture setbacks. Agriculture zoned lands suitable for agriculture uses exist south of the project area, east of Mosier. This area contains commercial orchards and vineyards. In all instances, natural vegetation and topography provide a barrier greater than eight feet in height. A condition of approval is included to ensure the signal buildings on lands adjacent to agriculture zoned lands that are suitable for agriculture use, comply with the 30-foot setback from vineyards and 75-foot setback from orchards. With conditions, the signal buildings are consistent with the agriculture setbacks of Chapter 3.

21. Section 3.120(G)(6) 3.130(G)(5), 3.170(H)(4), 3.180(G)(4) state the maximum height for all new structures shall be 35 feet, unless further addressed by scenic resource provisions in Chapter 14.

Finding: According to application materials, the railroad track modifications and expansion will occur at grade with few exceptions. All five signal buildings will be 9-feet tall, signs will be posted at a height of approximately 10-feet, twelve new signal lights will be 22-feet tall, a 120-foot long retaining wall will be 25-feet tall, and five new communication poles will be 53-feet tall. It is worth noting that most of the proposed development is replacement or medication of existing development. With the exception of the new communication poles, the proposed development is less than 35-feet tall and is consistent with this requirement. The 35-foot height maximum has historically not been applied to communications towers, which typically exceed 75-feet in height. As discussed below for Chapter 14, Scenic, the proposed poles will not adversely affect scenic resources and recommended for approval with conditions. As proposed staff finds the development consistent with the height requirements of NSALUDO Chapter 3.

22. Section 3.120(5), 3.130(4), 3.170(5), and 3.180(6) provide for floodplain protections in each of the affected zones. The guidelines state: *“Any development including but not limited to buildings, structures or excavation, proposed within a FEMA designated flood zone, or sited in an*

area where the Planning Director cannot deem the development reasonably safe from flooding shall be subject to Section 3.240, Flood Hazard Overlay”.

Finding: Consistent with the requirements of these rules, development proposed to occur in the Flood Hazard Overlay is addressed below in Finding 25.

23. Section 3.200 – Environmental Protection Districts, provides the following purpose statement:

The purpose of the Environmental Protection District is to permit the regulation of environmental hazards, the qualification of lands for floodplain insurance programs and preferential taxation assessment, and the protection of the health, safety and welfare of residents of Wasco County. The specific intent of this district is:

- A. To combine with present zoning requirements certain restrictions to promote the general health, welfare, and safety of the County.*
- B. To prevent the establishment of certain structures and land uses in areas unfit for human habitation because of the danger of flooding, unsanitary conditions, mass earth movement, unstable soils, or other hazards.*
- C. To minimize danger to public health by protecting the water supply and promoting safe and sanitary drainage.*
- D. To reduce the financial burden imposed on the public and governmental units by frequent and periodic flooding.*
- E. To permit certain uses which can be located on flood plains and which will not impede the flow of flood waters, or otherwise cause danger to life and property at, above, or below their locations within the flood plain.*
- F. To permit uses on lands subject to mass earth movement or unstable soils which will not increase the potential for environmental degradation.*
- G. To require that uses vulnerable to hazards, including public facilities which serve such uses be provided with protection at the time of initial construction.*
- H. To protect individuals, as much as possible through education and information from buying lands which are unsuited for intended purposes.*

24. Section 3.210 identifies district divisions, Division 1 – Flood Hazard Overlay, and Division 2 – Geologic Hazards Overlay. Portions of the project will occur in each of these districts and are reviewed for consistency below. Section 3.230 contains a non-liability clause, which states:

The granting of approval of any structure or use shall not constitute a representation, guarantee or warranty of any kind or nature by Wasco County, or the County Court, the Planning Commission, or by any officer or employee thereof, of the practicability or safety of any structure or use proposed and shall create no

liability upon or cause action against such public body, officer or employee for any damage that may result pursuant thereto.

Finding: Staff's analysis is based upon the application materials provided by the applicant and inventories provided by State and Federal agencies.

25. Section 3.240 Division 1 – Flood Hazard Overlay, provides the following purpose statement: *“It is the purpose of this chapter to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas by implementing provisions designed to...”*

Section 3.240(A) provides background, findings of fact, statement of purpose and methods to reduce flood losses; Section (B) provides applicability, the basis for establishing areas of special flood hazard, and direction for abrogation and greater restrictions; Section (C) provides guidance on interpretation; and Section (D) provides a warning and disclaimer of liability for the County and any officer or employee of the Federal Insurance Administration.

Section 3.241 contains a list of special definitions to be used for this chapter only, including a unique definition for “structures”, it states: “Structure (Flood Hazard Overlay Section only) – A walled and roofed building, as well as any gas or liquid storage tank, that is principally above ground.”

Section 3.42 identifies the role, duties, and responsibilities of the Planning Director as the appointed administrator to implement this chapter.

Section 2.43 – Development Permit, identifies when a development permit is required in the Flood Hazard Overlay, it states: Wasco County National Scenic Area Land Use & Development Ordinance (NSALUDO)

Section 3.243, Division 1 – Flood Hazard Overlay – Development Permit

*(***)*

B. Application Requirements

Any application for a Development Permit shall be made on forms furnished by the Planning Director and may include, but not limited to: plans drawn to scale showing the nature, location, dimensions, and elevations of the area in question; existing structures, proposed structures, fill, storage of materials, utilities, septic facilities, and drainage facilities.

Specifically, the following information is required:

- 1. General elevation to mean sea level of building site using best information available.*
- 2. Elevation of the lowest floor (including basement) of all structures.*

3. *Distance between ground elevation and level to which a structure is to be flood-proofed.*
4. *Certification by a registered professional engineer or architect that the flood-proofing methods for any non-residential structure meet the flood-proofing criteria in Section 3.243.D.6 – Specific Standards.*
5. *Description of the extent to which any watercourse will be altered or relocated as a result of proposed development.*
6. *Copies of all permits required from any governmental agency, together with a certification under penalties of perjury that all certificates and permits requested have been obtained.*

Finding: The application submitted includes a Floodplain Development Application with maps and a technical memorandum prepared by Branden Strahm, PE. According to the application, the proposed application includes the following development: widening of the existing railroad track embankment approximately 30-ft along the north embankment for 12, 200 feet to the west between MP 66.98 and 69.54 and 10,500 feet to the south between MP 70.45 and MP 72.35 to accommodate the new mainline track and access road; the 8 foot extension of an existing culvert at mile post 68.57; the 16 foot extension of an existing culvert at mile post 70.67; the 12 foot extension of an existing culvert at mile post 70.93; the 28 foot extension of an existing culvert at mile post 71.89; the creation of two 60 inch culverts for fish passage at mile post 71.84; the creation of a new 90 foot Bridge over Rock Creek at mile post 68.88; and the construction of a new 210 foot bridge over Mosier Creek at mile post 69.35.

The application and memorandum includes the general elevation of several proposed development sites, the post development elevation of the sites, and a description of the developments. Statements made by the applicant on the application and memorandum indicated that no alteration or relocation of any watercourse will result from the development.

A filed application serves to certify under penalties of perjury that all certificates and permits have been obtained based on language included on Page 5 of the application.

A condition of approval will require certification by a registered professional engineer or architect that the flood-proofing methods for any non-residential structure meet the flood-proofing criteria in Section 3.243.D.6-Specific Standards.

C. General Standards

In all areas of special flood hazards the following standards are required:

1. *Anchoring*
 - a. *All new construction and substantial improvements shall be anchored to prevent flotation, collapse, and lateral movements of the structure.*
2. *Construction Materials and Methods*

- a. *All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.*
- b. *All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.*
- c. *Electrical, heating, ventilation, plumbing, and air-conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.*

Finding: In the memorandum, attached specification sheets indicate the culverts will be constructed using concrete with steel reinforcements. According to the definition listed in the NSA LUDO, flood resistant material includes any building product capable of withstanding direct and prolonged (at least 72 hours) contact with floodwaters without sustaining significant damage. Generally, reinforced concrete is capable of sustaining such prolonged contact with waters with minimal impact. The culverts will be anchored using steel and concrete construction.

According to specification sheets submitted by applicant, the new bridges will also be constructed with steel and concrete and therefore be considered constructed from flood resistant materials. The proposed construction methods indicate the bridges will be anchored with cast-in place concrete drilled shafts with permanent steel casing.

Additional material submitted demonstrate the second track will be constructed using 12 inch ballast and subballast on an elevated subgrade adjacent to existing subgrade and track.

A condition of approval will require the applicant to submit final specification sheets and an explanation of all building materials and methods utilized to demonstrate anchoring, flood proofing and flood damage resistance and minimization.

D. Specific Standards

In all areas of special flood hazards where base flood elevation data has been provided as set forth in Section 3.242.B.4 Use of Other Base Flood Data, the following standards are required:

6. Non-residential construction

New construction and substantial improvement of any commercial, industrial or other non-residential structure shall either have the lowest floor, including basement, elevated at or above the base flood elevation; or, together with attendant utility and sanitary facilities, shall:

- a. *Be flood-proofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water;*
- b. *Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and,*

- c. *Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the official as set forth in Section 3.242.B.6.e.*
- d. *Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in Section 3.243.D.1 – Specific Standards.*
- e. *Applications floodproofing nonresidential building shall be notified that flood insurance premiums will be based on rates that are one foot below the floodproofed level (e.g. a building constructed to the base flood level will be rated as one foot below that level).*

Finding: The memorandum submitted by the applicant indicates that the post development water surface elevation (WSE) will remain at the current WSE level. Therefore, the non-residential construction as proposed will maintain the lowest floor at the base flood elevation.

- 26. Section 3.250 Division 2 – Geologic Hazards Overlay provides the following purpose statement: *“The purpose of the Geologic Hazards Overlay District is to protect the public health, safety and welfare by assuring that development in hazardous or potential hazardous areas is appropriately planned to mitigate the threat to man's life and property.”*

Finding: According to data provided by the Oregon Department of Geology and Mineral Industries (DOGAMI), the proposed development will occur outside of the Geologic Hazards Overlay. Given this information, the proposed development is not subject to the requirements of Section 3.250- Division 2 – Geologic Hazards Overlay. The applicant provided professional engineering drawings to clearly identify areas of excavation, blasting and fill. Typical cross sections of these areas were also provided to confirm that roads and structures were thoughtfully placed to ensure compliance with the purpose of this overlay.

F. Chapter 5 – Conditional Use Review

- 1. As noted above for several land use designations, much of the proposed development must also comply with Chapter 5, Conditional Use Review. The purpose of this chapter is to ensure new uses are compatible with the permitted uses in that zone, and with the general and specific purposes of the applicable County ordinances, Comprehensive Plan and the Management Plan for the Columbia River Gorge National Scenic Area. Section 5.020 provides the conditional use review criteria; Section 5.030 allow the application of reasonable conditions of approval to ensure the compatibility of the conditional use with the surrounding permitted uses as necessary to comply with this ordinance. Section 5.020 states:
 - A. *The proposal is consistent with the goals and objectives of the Management Plan for the Columbia River Gorge National Scenic Area, and consistent with the provisions of the County’s implanting ordinances.*

Finding: The County's NSALUDO was acknowledged by the Columbia River Gorge Commission and the Secretary of Agriculture as the mechanism with which to implement the Management Plan in Wasco County. The proposed development is reviewed for consistency with the NSA rules and regulations throughout this document. The Staff Recommendation contains recommended conditions of approval to ensure consistency with applicable rules.

B. Taking into account location, size, design and operational characteristics of the proposed use, the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.

Finding: The surrounding area includes other transportation infrastructure, rural residences, the Columbia River and other sensitive resources, commercial agriculture and recreation facilities. As the only sea level passage through the Cascade Mountain Range, the Columbia River Gorge contains extensive transportation infrastructure on both sides of the River and in the River that serve an expansive region. The proposed development will modify and expand an existing railroad in the same general location. The applicant provided an Alternatives Analysis to verify the location, size and design of the development minimize impacts to sensitive resources and the general public, to the maximum extent practicable.

Public comments received express concerns regarding the compatibility of increased rail traffic. The application materials discuss existing and proposed operational characteristics, including the general speed, length and number of trains. Application materials explain that the proposed modifications will directly increase efficiencies in velocity, but not necessarily directly increase traffic (number of trains or number of cars) – which is currently driven by the commercial market. Application materials state the average daily traffic includes 20 to 30 individual trains. The applicant provided proprietary train volume records from the last ten years to confirm that this number is factual. The proprietary information also demonstrates no visible increase in cars due to any one or more unique commodity.

The application materials state that the speed and length of trains, as currently regulated by federal law, will not be directly affected, but the need to slow down or stop to pass one another will be reduced in an effort to increase rail “fluidity”, passing safety, and other operational efficiencies.

A Mosier City Council town hall meeting was held in Mosier in November of 2014 to increase local awareness of the proposed development and solicit feedback to regulatory agencies, including Wasco County and the U.S. Army Corps of Engineers.

Adjacent property owners were provided notice of the proposed project and encouraged to provide feedback. Tom Garnier, owner of the commercial farm adjacent to the project area east of Mosier, initially wrote to staff and the applicant inquiring about access to existing farm irrigation equipment north of the railroad tracks and concerns about trespass on their private property by longtime beach goers. Mr. Garnier ultimately corresponded directly with UPRR and did not request any changes or modifications to staff.

Adjacent lands east and west of Mosier used for recreation at Memaloose State Park and portions of the Historic Columbia River Highway State Trail, do not provide legal access to the river for recreation but do experience trespass and informal access. As described in more detail below for Chapter 14 provisions regarding recreation resource impacts, nearby established recreation sites were developed after the railroad, highway and interstate were constructed. The parks are located immediately adjacent to several major transportation facilities.

The applicant provided a map produced by the Columbia River Inter-Tribal Fisheries Commission 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. Comments were received from the Confederated Tribes of Umatilla Indian Reservation. Treaty rights impacts and protections are discussed in greater detail below. With conditions of approval to require improved access, the proposed development is not anticipated to directly impact treaty rights.

Application materials also state that the proposed development will decrease the instances of parked or idling trains on the existing siding, within the community of Mosier or near the commercial orchards and agriculture.

In sum, Staff finds that - with conditions to ensure resource protection - the proposed development will be compatible with the surrounding area and current and future development of abutting properties.

- C. The proposed use will not exceed or significantly burden public facilities and services available to the area, including but not limited to: roads, fire, and police protection, sewer and water facilities, telephone and electrical service, or solid waste disposal facilities.*

Finding: The proposed development includes the expansion of existing railroad infrastructure. Although some onsite utilities are proposed to be relocated, no new utilities will be constructed. According to the applicant, the project will not increase use of sewer and water facilities, telephone and electrical service, or solid waste disposal facilities. Notice of the proposed development was provided to the State Fire Marshall's Office, Mid-Columbia Fire and Rescue, Mosier Rural Fire Department, Oregon Department of Transportation, Wasco County Public Works, the City of Mosier, Wasco County Sheriff's Office, local PUD offices and the Wasco County Health Department. No concerns about the proposed development were expressed by these organizations or any others that provide public facilities and services. The project was publically noticed multiple times following the 2014 city town hall meeting in Mosier. Staff also solicited verbal feedback during a 2015 Wasco County Fire Board meeting, and did not receive any written or oral concerns. Given this information, Staff concludes the proposed development will not exceed or significantly burden public facilities or services in the area.

D. The proposed use will not unduly impair traffic flow or safety in the area.

Finding: The proposed development will require several temporary roads along the shoulder of Interstate 84 to access the project area. The applicant provided the following information regarding traffic impacts in the application:

“During the project design phase, UPRR coordinated with ODOT District 9 Manager, Pat Cimmiyotti and confirmed that ODOT did not foresee any potential for operational or safety concerns associate with the project. UPRR incorporated minor changes to the project area and access adjacent to I-84 based on ODOT’s comment, following which ODOT indicated they had no further concerns regarding potential increased site traffic volume, intersection traffic, or use of adjacent roads, and indicated that a TIA is not required (ODOT, Personal communication, 2014). UPRR also consulted the Wasco County Roadmaster, Marty Matherly, who indicated he had no concerns or foresaw any potential impacts to roads under the County’s jurisdiction (Wasco County, Personal communication, 2014a).

During operation, an average of one to two maintenance vehicles per month will access the project site using existing access roads along the project’s corridor. Two 10-foot-wide permanent access roads will be established to provide maintenance access to the existing rail and new second mainline track. The first will be located at the western side of the project at MP 66.98 from eastbound I-84 to the proposed second mainline. A break in the guardrail will be required to facilitate this access road, however, no improvement to the road shoulder and existing ROW will be required. The second access point will be located within Memaloose State Park at approximately MP 71.79. This complete road length will total approximately 0.6 mile, and will use an existing travel corridor for much of the route (see Figure 4-1). The majority of this road is currently paved and will not require additional upgrades to support maintenance equipment. Maintenance activities will not result in an impact to the flow of traffic. Accordingly, site traffic related to operational maintenance will not exceed site traffic volumes designated in NSA-LUDO 120(C)(1)(c).

Temporary traffic delays may occur during construction along portions of I-84; however, these delays will be brief and construction flaggers will be onsite to safely direct traffic as needed. Therefore, UPRR will comply with the provisions of NSA-LUDO Section 4.120 and Section 303(c) DOT Act (49 CFR 303).

Application materials were provided at the time of notice; no comments were received from ODOT or Public Works requesting additional information or corrections. Given this information, it is reasonable to conclude that the anticipated traffic impacts to occur during construction have been coordinated, and that no significant permanent impacts are anticipated. A condition of approval is included in the Staff Recommendation to require ongoing traffic coordination with ODOT and Wasco County Public Works.

E. The effects of noise, dust and odor will be minimized during all phases of development and operation for the protection of adjoining properties.

Finding: Application materials describe construction related noise, dust, and odor:

“The effects of noise, dust and odor will be minimized during all phases of construction and operation of the project for protection of adjoining properties. In Oregon, ODEQ regulates noise; however, ODEQ does not regulate construction noise per Oregon Administrative Rule (OAR) 340-035-0035(5)(g). During construction, noise will be generated from construction equipment, but noise levels will be consistent with other heavy construction projects. Any increase in noise level from construction activities will be temporary, will take place during designated construction hours, and will comply with applicable railroad standards, as federally regulated by Title 49 CFR Part 210. Noise generated during operation of the project will not be greater than noise levels currently generated by use of the existing mainline track. Railroad operations are currently and will continue to be required to meet applicable federal regulations.

Limited dust may be generated by construction equipment during construction, primarily during grading activities. Fugitive dust associated with construction vehicles will be minimized through the use of BMPs, including dust suppression and limiting the duration of exposed soil. During operations, any effects related to fugitive dust from trains and maintenance vehicles will be negligible. No significant odors will be generated during project construction or operation. Therefore, the project complies with this provision.”

Some of the comments heard from the citizens of Mosier at the Mosier Town Hall included concerns for the sound of slowing trains (screeching brakes), parked or slowed locomotive engines idling, powering up and powering down, whistle blowing, and the noises of general freight movement. Throughout the application materials, the applicant describes impacts to long-term operation of the development as a project that will increase fluidity in rail movement, resulting in fewer parked or idling trains, and less noise overall due to a decrease in the need to stop and wait for other trains to pass (less noise from brakes and less frequent powering down and powering up). Application materials also described operational efficiencies provided by the use of standard length trains, including the more efficient use of diesel locomotive engines.

As noted below, a condition of approval is required to move blasted rock materials out of the project area for offsite crushing. Although this will reduce noise and dust in the project area, the transportation of the materials out (to be crushed) and back (to be used as new ballast materials), may create temporary dust and noise on the road shared with OPRD for the Memaloose State Park Campground. A condition of approval is included to ensure that either construction in this area occurs outside of the peak recreation season, or trucks used for hauling the blasted and crushed materials are covered to minimize dust and related impacts to visitors at the park.

F. The proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion.

Finding: The development is proposed to occur in areas containing sensitive plant and wildlife habitat and wetlands. As further explained in the natural resource sections of

Chapter 14, Staff recommends conditions of approval to require the implementation of the off-site wetland mitigation, the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan provided by the applicant and confirmed by resource protection agencies, the use best management practices to prevent erosion and control noxious weeds from encroaching disturbed areas, and to eliminate the landing zone/rock crushing site from the Open Space zone. As conditioned, the proposed development is consistent with (F) above.

G. *The proposed use will not adversely affect the air, water, or land resource quality of the area.*

Findings:

Air: For the protection of air quality in the CRGNSA, the Management Plan refers to the *Columbia River Gorge Air Study and Strategy* prepared by the Oregon Department of Environmental Quality and the Washington State Ecology Southwest Clean Air Agency. The primary goal of this strategy is to reduce regional haze and air pollution through several identified strategies, including a bi-state solutions effort called the “Columbia River Regional Diesel Emissions Reduction Project.”

Specific to locomotives (pages 10, 12, and 24), the Strategy States:

“Rail also serves an important function in the Gorge, carrying freight from Portland/Vancouver to eastern parts of Oregon and Washington. While the federal government regulates railroads and interstate transport, Oregon and Washington have been working with railroads to seek local efforts to reduce rail emissions. In 2004, SWCAA worked with Burlington Northern and Santa Fe Railway Company, the U.S. Environmental Protection Agency and Kim Hotstart Manufacturing Company to install three retrofit devices on diesel switchyard locomotive engines in Vancouver's switchyard. These devices keep critical fluids warm and flowing, allowing the locomotive engines to be shut down when not performing work and then quickly restart when needed. Reductions from the retrofits have reduced NOx and particulate matter by 9 tons a year and saved over 47,000 gallons of fuel a year.”

The application materials note in several instances that the development would allow for more efficient use of diesel engines by allowing industry standard length trains and thus, fewer currently shorter trains. Based on this information, it appears that proposed development will result in the more efficient use of diesel locomotive engines, consistent with the *Columbia River Gorge Air Quality Strategy*.

Staff is also aware of a recent, peer reviewed article produced by the University of Washington titled: *Diesel particulate matter and coal dust from trains in the Columbia River Gorge, Washington State, USA*⁴. It is worth noting the lead author of this article, Dr. Daniel Jaffe, is also one of the authors of the *Columbia River Gorge Air Quality Strategy*.

⁴ October 20, 2015 Journal of Atmospheric Pollution Research (www.journals.elsevier.com/locate/apr)

The article specifically evaluates diesel particulate matter and coal dust collected from trains on the Washington side of the Columbia River. Anecdotal information including staff observation of existing rail traffic observes that much of the coal and oil transported through the Gorge is currently carried by BNSF on the Washington side of the Gorge, which may indicate why the study was focused on that one side of the River. The conclusion of the article abstract states: *“Our results demonstrate that, on average, passage of a diesel powered open-top coal train result in nearly twice as much respirable PM2.5 compared to passage of a diesel-powered freight train.”*

According to the applicant, commodities are not proposed to be altered by the proposed track development. The applicant has also provided information to demonstrate commodities are driven by current market demand and regulated federally. Approximately 1,000 comments of concern were received regarding the project’s potential to increase the freight movement of coal and oil. Although much of the commodities of public concern are carried in Washington, it is within the Gorge on similarly sited tracks and we can use the conclusions to inform this review.

The proposed development includes physical improvements to an existing railroad corridor which currently contains an average of 20 to 30 trains per day, carrying a variety of commodities. The development does not propose changes to specifically enable any more of any one particular commodity and does not proposed to significantly increase rail traffic. In sum, the proposed project does not appear to directly impact the amount of particulate matter resulting from any one commodity, but does appear to have some potential to decrease diesel locomotive emissions. A condition of approval is included to require the covering of coal cars.

Water: Water resources were evaluated by the US Army Corps of Engineers 404 process. The Water Master and local water districts, was provided notice of the project and did not raise any concerns for community water resources. The applicant has obtained and provided a Biological Opinion from the United States Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service and a determination from the U.S. Army Corps of Engineers that concludes the proposed action is “not likely to jeopardize the continued existence” of salmon or steelhead species, or impact critical habitat. Oregon Fish and Wildlife was included in the analysis for these determinations and provided confirmation of consistency with state regulations through their review (see Chapter 14 – Natural below for more information about natural resource impacts). With conditions to ensure best management practices are implemented to prevent erosion and sedimentation, to implement off-site wetland mitigation plans, and to protect the Flood Hazard Overlay Zone, the proposed development will not adversely affect water resources.

Land Resource Quality: As previously described above, the development will occur within an existing railroad corridor. The proposed expansion includes development or construction related activities on lands owned by UPRR, Oregon Department of Transportation, Oregon State Parks and Recreation, and offsite wetland mitigation will require development on privately owned lands adjacent to Tooley Lake. The referenced landowners have provided written consent for the review of this development. According to the application materials, temporary construction areas are proposed to occur adjacent to the track expansion, and include:

Two 10-foot-wide permanent access roads will be established to provide maintenance access to the existing rail and new second mainline track. One will be located at the western side of the project at MP 66.98 from eastbound I-84 to the proposed second mainline track. A break in the guardrail will be required to facilitate this access road; however, no improvement to the road shoulder and existing ROW will be required. The second access point will be located within Memaloose State Park, at approximately MP 71.79. This complete road length will total approximately 0.6 mile, and will use an existing travel corridor for much of the route. The majority of this road is currently paved and will not require additional upgrades to support maintenance equipment. A small, approximately 800-foot segment of the road will require minor grading, vegetation removal, and placement of crushed gravel to accommodate vehicles as they exit the existing paved road and connect to the existing ROW near Thompson's Lake.

Four temporary 10-foot-wide construction access roads will be established to provide construction access to the project area. The complete length of construction roads required will total approximately 0.64 mile, will consist of crushed gravel road surfaces, and will use existing travel corridors for much of the route. Access to temporary construction roads will be made by existing roads, including I-84.

The project will require nine construction staging areas, of which six will be located partly or entirely outside of the permanent project footprint. Materials to be stored at staging areas may include soil, rock, track materials (ballast, ties, rail, track hardware), construction materials (filter fabric, riprap, erosion control material, water) and construction equipment and support material. These materials will generally be transported to and from the staging areas by truck. Temporary staging areas will be restored as closely as practical to their original condition following construction, including replanting with native vegetation in accordance with all permit requirements.

The project will also include rock blasting to expand the width of a passage through the basalt walls and allow for two mainline tracks. Staff required the applicant to provide an Alternatives Analysis to demonstrate the proposed location and scope of development is the minimum size necessary to meet the need and will occur in a manner that minimizes impacts to sensitive resources, agricultural lands, and area residents. Findings are contained in this document to address natural resource impacts, established recreation sites and any potential conflicts with nearby agriculture; please see Chapter 14 below for additional information. As addressed in the findings below, conditions of approval are recommended to further reduce resource impacts. With conditions of approval contained in the Staff Recommendation, Staff finds the proposed development will not have an adverse effect on land resource quality.

H. The location and design of the site and structures for the proposed use will not significantly detract from the visual character of the area.

Finding: As discussed in findings that address scenic resource impacts protected by Chapter 14 below, the proposed development will not significantly detract from the visual character of the area and is therefore consistent with this rule.

- I. *The proposal will preserve areas of historic value, natural or cultural significance, including archaeological sites, or assets of particular interest to the community.*

Finding: Cultural resources, including historic resources, archaeological resources, traditional cultural properties, are discussed below under Cultural Resources for Chapter 14. Natural resources and assets of particular interest, include nearby recreation areas and the scenic resources viewed from scenic travel corridors and key viewing areas, are discussed below for the natural and scenic resource protection sections of Chapter 14.

For properties located within or adjacent to farm or forest zones or located nearby agricultural and forest operations, the following shall apply:

- J. *The proposed use is compatible with agricultural uses and will not force a change in, or significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to, or available for, farm or forest use.*
- K. *The proposed use or development will be sited in such a way to minimize the loss of forest or agricultural land suitable for the production of crops or livestock and to minimize the chance of interference and not force a change in accepted farm or forest practices on surrounding lands devoted to, or available for, farm or forest use.*
- L. *The use or development will not significantly increase fire hazard, fire suppression costs or risks to fire suppression personnel.*
- M. *A declaration shall be signed by the landowner and recorded into county deeds and records specifying that the owners, successors, heirs and assigns of the subject property are aware that adjacent and nearby operators are entitled to carry on acceptable agriculture or forest practices on lands designated Large-Scale or Small-Scale Agriculture, Agriculture-Special, Commercial Forest Land, or Large or Small Woodland.*

Finding: As explained above, the proposed development expands an existing railroad siding to create second mainline in the same general location. Rock blasting and vegetation removal is proposed to occur in areas near an existing farm east of Mosier. The adjacent farm has worked with the applicant directly to ensure there will be no conflicts with current farm practices, access to irrigation lines, or any other conflicts. Additionally, no concerns were received from other nearby farmers with concerns regarding possible conflicts. Given this information, staff recommends the proposed development is compatible with adjacent farm uses. A condition is included to require compliance with (M) above. Staff solicited feedback from the Wasco County Fire Board at a quarterly meeting and has provided multiple project notices to the City of Mosier and Mosier Fire Department; no comments on the subject application have been received to date. Based on several conversations with local emergency response personnel, Staff assumes that this is partly due to the fact that the existing railroad has an inherent fire risk and that an expanded track would become part of the existing risk – not a new risk. Based on the lessons learned from a recent derailment within the vicinity of the project, staff recommends including a condition of approval that requires UPRR to provide regular training to Gorge fire departments

included in the Mid-Columbia Five County Mutual Aid Agreement and requires UPRR to solicit feedback about local needs for combatting a railroad related fire incident and assist in meeting those needs. With conditions, staff finds the development to be consistent with this provision.

2. Section 5.040 authorizes the revocation of a conditional use permit if the conditions of approval are not being met, or the use is no longer compliant with the applicable rules. It states:

Noncompliance with any condition placed on a conditional use permit shall be grounds for revocation of the permit. Revocation of a conditional use permit shall be considered a land use action and reviewed by the Planning Commission...

Finding: A condition of approval will be included in the Notice of Decision to alert the landowner and future owners of this requirement.

3. Section 5.050 provides additional criteria for transportation projects not part of the Wasco County Transportation System Plan.

Finding: The existing railroad and related infrastructure, including recommendations for future development, are included in the Wasco County TSP. As proposed, the development is consistent with the Wasco County TSP and is therefore not subject to Section 5.050.

G. Chapter 6 – Variances from Building Heights, Slope, Setbacks and Buffers

SECTION 6.010 Purpose

- A. *When building height, setbacks, buffers or other review criteria specified in this Ordinance for protection of scenic, cultural, natural, recreational, agricultural or forestry resources overlap or conflict, building height, setbacks, or buffers should be varied in a manner to achieve, to the greatest extent possible, the overall protection of the affected resources.*

...

- B. *Building height, setbacks and buffers specified in this Ordinance for protection of scenic, cultural, natural, recreational, agricultural or forestry resources shall not be applied in the General Management Area in such a manner as to deprive the owner of a tract of land of the opportunity to establish a residence on the land if that opportunity is otherwise authorized by the land use designation. (GMA Only)*

SECTION 6.020 Criteria for Decision

- A. *Authority*

1. *Administrative Variance*

The request shall be for a variance to a building height, setback or buffer which is less than 50% of the stated standard for the building height, setback or buffer as stated in this ordinance.

2. Planning Commission Variance

The request shall be for a variance to a building height, setback or buffer which is 50% or greater of the stated standard for the building height, setback or buffer as stated in this ordinance.

Finding: Application materials include variance requests that are 50% or greater of the stated standard contained in the NSA-LUDO and acknowledges the need for a variance and Type III Quasi-Judicial approval from the Wasco County. The applicant requests the following variances:

- Planning Commission variance to the Columbia River development setback standards contained in NSALUDO Section 14.200(G).
- Planning Commission variance to the Scenic Travel Corridor (I-84) setback standard contained in NSALUDO Section 14.300(B)(2).
- Planning Commission variance to the wetland buffer standards contained in NSALUDO Section 14.600(A)(3)(c).
- Planning Commission variance to the sensitive plant buffer zones contained in NSALUDO Section 14.600 (D)(3).

B. When building height, setbacks or buffers specified in the standards for protection of scenic, cultural, natural, recreational, agricultural or forestry resources overlap or conflict, the building height, slope setbacks or buffers may be varied upon a demonstration that: (GMA Only)

1. *A building height, setback or buffer specified in this Ordinance to protect one resource would cause the proposed use to fall within a setback or buffer specified in this ordinance to protect another resource; and*
2. *Variation from the specified building height, setbacks or buffer would, on balance, best achieve the protection of the affected resources.*

Finding: The applicant provides the following statement to justify the requested variances: “The proposed project has been designed and sited to utilize primarily the existing, previously disturbed ROW in order to minimize the project footprint and its impacts on scenic, cultural, natural, recreational, and agricultural resources to the greatest extent feasible. Avoidance of the Scenic Travel Corridor setback of 100 feet, and the Columbia River development setback of 100 feet in the GMA and 200 feet within the SMA would require construction of an entirely new railroad corridor and result in significantly greater impacts to all resource areas and their associated buffer areas. Due to the pre-existing, linear nature of the railroad, avoidance of all wetland and sensitive plant buffer areas would render the project unbuildable and impracticable. The proposed project’s use of the existing ROW for the majority of the project alignment will best achieve the protection of affected resources. Therefore, the project complies with these provisions.” Because there is no way to repair, maintain or modify the railroad without requiring a variance, Staff recommends granting variances, reducing Open Space impacts and requiring the mitigation plans prepared for the application.

D. All setbacks and buffer zones in the SMA shall remain undisturbed unless:

1. *It has been shown that no practicable alternatives exist, as evidenced by completion of a practicable alternative test; and*

2. *The natural resources mitigation plan completed in accordance with Chapter 14 of this ordinance ensures that the development can be mitigated to ensure no adverse effects would result.*

Finding: The applicant has demonstrated that no practicable alternative exists for the proposed development. A condition of approval is included to ensure the resources mitigation plan is completed as proposed and developed in accordance with Chapter 14. With a condition of approval to reduce impacts to SMA Open Space (addressed in more detail below), staff concludes the proposed development will have no adverse effects on setbacks or buffer zones for resource protection.

H. Chapter 11 - Fire Safety Standards

1. WCNSALUDO Chapter 11 provides fire safety standards applicable to all new development in Wasco County. This chapter was developed in conjunction with an inter-agency team of fire protection districts. The intent of this chapter is to inform, notify and educate rural residents of their fire risks and limited fire protections services; reduce threats to life, safety, property, and resources by improving access and defensible spaces; provide clear communication of fire department needs; establish consistency in fire prevention requirements; and encourage participation in the local volunteer fire programs.
2. WCNSALUDO Section 11.020 through 11.150 provide requirements and considerations for new structural development including requirements for siting to avoid steep slopes, provide and maintain defensible spaces of a 50-foot fuel break, provide onsite fire protection water, meet fire safe construction standards, and meet access standards to ensure fire and other emergency equipment can access the property. The applicant has completed a Fire Safety Standards Self Certification Application, verifying that the proposed development complies with the required Fire Safety Standards. A condition of approval is included in the Notice of Decision to ensure the landowner, and future landowners, comply with Chapter 11 for wildfire safety and prevention.
3. WCNSALUDO Section 11.210 requires compliance with the applicable fire safety standards for all new, replacement, and modified structures in rural zones. It states:
 - A. *Compliance with applicable fire safety standards is required by the ordinance for new, replacement, and modified structures in all rural zones.*
 1. *Fire standards shall be made a part of the conditions of approval when a conditional use permit, site plan or subject to standards review, partition, subdivision, or other land use action is required prior to construction.*
 2. *Structures or alterations to structures that are subject to ministerial review must also comply with all applicable fire standards prior to receiving zoning approval on a building permit application.*
 3. *In all cases compliance with applicable fire standards shall be self-certified prior to receiving zoning approval on a building permit.*

4. *Certifications shall be verified within one year of approval and may be verified by staff site visits at any time.*

B. Continued compliance with fire safety standards is required.

1. *Compliance is the responsibility of the land owner.*
2. *An illustrative checklist will be provided to land use permit applicants and building permit applicants that explains all necessary steps to comply with applicable fire safety standards.*
3. *Required compliance with fire safety standards shall be disclosed to future land owners prior to sale of any parcel.*

Where fire safety standards, or a modification of the standards pursuant to 11.220 below, are applied through a land use review as conditions of approval, the conditions of approval shall be recorded along with the notice of decision.

Finding: The applicant provided a completed and signed Fire Safety Standard Self-Certification Checklist to confirm compliance with the requirements of Chapter 11. A condition of approval is included in the Notice of Decision document to be recorded with the deed of the subject property.

As discussed further in this report, a condition of approval is included to require the development of a Spill Response Plan for derailments and other railroad accidents and to provide regular training to Gorge fire departments included in the Mid-Columbia Five County Mutual Aid Agreement and requires UPRR to solicit feedback about local needs for combatting a railroad related fire incident and assist in meeting those needs.

I. Chapter 14 – Scenic Area Review

Pursuant to Section 14.010, the purpose of the Scenic Area review is to preserve, protect and enhance the scenic, natural, cultural and recreational values of the Gorge and to assure that development occurs in a manner that is compatible with its unique qualities.

Scenic Resources (GMA and SMA)

1. Section 14.020 contains a list of information and materials required for a complete application. The application was submitted on January 9, 2015. The application became complete November 18, 2016 upon the submittal of a complete wetland mitigation plan and associated cultural and natural resource surveys.
2. Section 14.100 contains scenic resource protection guidelines applicable to all new development except those uses allowed without review or allowed through the expedited review process. As noted above, the proposed development is not allowed without review or eligible for the expedited review process. Applicable provisions from Section 14.100 are addressed below.

3. Section 14.100(B) pertains to siting, it states:

New buildings and roads shall be sited and designed to retain the existing topography and to minimize grading activities to the maximum extent practicable.

Finding: The intent of this rule is to ensure the visibility of cut banks and fills slopes associated with development are minimized and the existing visual character of the landscape is retained, to the maximum extent practicable. An Alternatives Analysis was required for completeness to demonstrate the proposed development was sited and designed to minimize impacts to the surrounding landscape. The proposed development (the preferred alternative from the Alternatives Analysis) extends an existing siding to create new double mainline track within an existing rail corridor; siting the development in the existing rail corridor and extending an existing siding minimizes grading when compared to a new corridor or second line elsewhere.

Construction will require blasting rock walls, the addition of a significant retaining wall, temporary landing zones for construction, and the fill of wetlands. Much of the visual impacts however, will be minimized by topographic screening from the very rock wall feature that will be partially blasted. Most of the excavation and extensive construction projects will occur within or immediately adjacent to an open tunnel through a large rock mesa. A portion of the blasting will be visible, and a portion of the retaining wall will be as well. However, much of this construction will occur in an area screened by topography.

As explained in the application narrative and Alternatives Analysis, the project location is the only location that addresses the capacity constraints of the railroad. If the project had been proposed in a different location, the amount of excavation may have been different, but it would not have been practicable for the applicant's need. Vegetation impacts are addressed below.

Given this information, Staff concludes the proposed development has been sited and designed to retain the existing topography and minimize grading activities to the greatest extent practicable.

4. Section 14.100(C) pertains to design, it states:

New buildings shall be compatible with the general scale (height, dimensions, and overall mass) of existing nearby development. Expansion of existing development shall comply with this guideline to the maximum extent practicable.

Finding: The proposed development includes the replacement of five existing signal buildings (equipment shelters) with five new signal buildings that range in size from 6'L x 6'W x 9'H (36 square feet) to 8'L x 10'W x 9'H (80 square feet). Surrounding development includes rural residences, public recreation facilities, and commercial agriculture – all of which include buildings larger than 80 square feet. Staff finds the replacement buildings to be consistent with the general scale of existing nearby development, consistent with this rule.

5. Section 14.100(D) and (E) pertain to color, they state:

(D) Unless expressly exempted by other provisions, colors of all exterior surfaces of structures not visible from key viewing areas shall be earth-tones found at the specific site or in the surrounding landscape. The specific colors or list of acceptable colors shall be included as condition of approval. The Scenic Resources Implementation Handbook will include a recommended palette of colors.

(E) Additions to existing buildings smaller in total square area than the existing building may be the same color as the existing building. Additions larger than the existing building shall be of dark earth-tone colors found at the specific site or in the surrounding landscape. The specific colors or list of acceptable colors shall be included as a condition of approval. The Scenic Resources Implementation Handbook will include a recommended palette of colors.

Finding: Consistent with (D), and as discussed in greater detail below, are required to be dark earth-tone colors found at the site or surrounding landscape. Because no additions to buildings are proposed, (E) does not apply.

6. Section 14.100(F) pertains to exterior lighting, it states:

Outdoor lighting shall be directed downward, sited, limited in intensity, shielded and hooded in a manner that prevents the lighting from projecting onto adjacent properties, roadways, and the Columbia River as well as preventing the lighting from being highly visible from Key Viewing Areas and from noticeably contrasting with the surrounding landscape setting. Shielding and hooding materials shall be composed of nonreflective opaque materials. There shall be no visual pollution due to the siting or brilliance, nor shall it constitute a hazard for traffic.

Finding: The application includes twelve new 22-foot tall combination signal lights; the application states this is the minimum necessary to comply with federal law for safe operation requirements. According to the application narrative, the proposed lights will be “*side-shielded to limit the amount of light directed away from the rail centerline to minimize contrasts with the visual character of the area*” and “*Lighting will be directed to prevent projection onto adjacent properties, roadways, and the Columbia River as well as preventing the lighting from being highly visible from KVAs.*” Site plans indicating the location of the proposed lights and technical drawings of the typical appearance of the proposed lights were provided (see application Appendix B, Detail 8). These drawings illustrate “signal combination back to back side ladder” lights. The side view depicts a ladder to the top of the structure, and three three-light signals that are hooded and shielded to direct light down the track. The front view shows a maximum of two three-light signals, mounted at 8’4” and 16’4”. This elevation indicates that the lights will be visible from the direction of the track. The purpose of these lights is to communicate with rail traffic, not vehicle traffic. The lights are angled and shielded to focus on the track in both directions. It is anticipated that the lights will be visible from KVAs from some angles, but that they will not cause visual pollution due to the siting or brilliance. The lights intend to provide safety to rail traffic; Staff does not anticipate the lights posing a hazard for vehicle traffic. With a condition of approval to require the structures to be treated with a dark earth tone color where it does not interfere with UPRR Uniform Signal Systems and Standards, the proposed lighting structures are consistent with this rule.

7. Sections 14.100(G) and (H) pertain to landscaping, it states:

(G) All ground disturbance as a result of site development shall be revegetated no later than the next planting season (Oct-April) with native species. The property owners and their successors in interest shall be responsible for the survival of planted vegetation, and the replacement of such vegetation if it does not survive.

(H) Except as necessary for site development or fire safety purposes, the existing tree cover screening the development area on the subject parcel from Key Viewing Areas and trees that provide a back drop on the subject parcel which help the development area achieve visual subordination, shall be retained. Additionally, unless allowed to be removed as part of the review use, all trees and vegetation within the buffer zones for wetlands, streams, lakes, ponds and riparian areas shall be retained in their natural condition. Any of these trees or other trees required to be planted as a condition of approval that die or any reason shall be replaced by the current owner or successors in interest no later than the next planting season (Oct – April) after their death with trees of the same species or from the list in the landscape setting for the property.

To ensure survival, new trees and replacement trees shall meet the following requirements...

Finding: To the extent practicable, and as required by conditions of approval, native trees will be preserved and protected during construction. Disturbed areas will be revegetated with a native seed mix; A condition of approval is also included in the Notice Decision to require revegetation of disturbed areas no later than the next planting season (October – April).

8. Section 14.200 contains additional scenic resource protection requirements for new development that is topographically visible from designated key viewing areas. The proposed development will be topographically visible from the Historic Columbia River Highway (Highway 30), Interstate 84, the Columbia River, and State Route 14; Section 14.200 is addressed below. Please note the visibility of development proposed within the Mosier UA is not included in the following analysis.
9. Section 14.200(A) requires new development to be visually subordinate to its setting, it states:

Each development and land use shall be visually subordinate to its setting in the GMA and meet the required scenic standard (visually subordinate or visually not evident) in the SMA as seen from Key Viewing Areas. The extent and type of conditions applied to a proposed development to achieve visual subordination shall be proportionate to its potential visual impacts as seen from Key Viewing Areas.

1. *Decisions shall include written findings addressing the factors influencing potential visual impact including but not limited to:*

a. The number of Key Viewing Areas it is visible from;

- b. The distance from the building site to the Key Viewing Areas it is visible from;*
- c. The linear distance along the Key Viewing Areas from which the building site is visible (for linear Key Viewing Areas, such as roads and the Columbia River);*
- d. The difference in elevation between the building site and Key Viewing Areas;*
- e. The nature and extent of topographic and vegetative back screening behind the building site as seen from Key Viewing Areas;*
- f. The amount of area of the building site exposed to Key Viewing Areas; and*
- g. The degrees of existing vegetation providing screening.*

Finding: The proposed development will be visible from four key viewing areas. As noted above, these include the Historic Columbia River Highway, The Columbia River, Interstate 84 and State Route 14. All four of these key viewing areas are linear features with prolonged views that extend a great distance. Based on Wasco County GIS data and field visits by Staff, the proposed development will be topographically visible intermittently from the foreground (up to one half mile) middle ground (between one half and three miles) and in some cases, the background (greater than three miles) of each of these protected public viewsheds. The existing railroad corridor is an at grade rail service, and closely parallels the Columbia River for an elevation of approximately 40 feet above sea level (ABSL).

Historic Columbia River Highway: The development west of Mosier will be visible in the foreground and middle ground from the pedestrian portion (a State Trail) of the Historic Columbia River Highway for an approximate length of one mile. Intermittent topographic screening is provided by basalt rock formations and the curve of the natural landscape and river bend surrounding the trail. From this angle, the key viewing area is approximately 40 feet higher in elevation and the viewer is looking down upon the tracks from the trail in the foreground or out to the far east, viewing a small portion of the eastern development as it curves underneath Interstate 84 in the far middle ground. Portions of the development are also visible from drivable portions of the Historic Columbia River Highway, chiefly the Memaloose Overlook – from which the rock to be blasted and the landing zones are visible in the middle ground, and for a short distance east of Mosier, traveling west – from which the western bend of the rail expansion can be viewed in the far middle ground. Both of these sites are higher in elevation than the development site; the Interstate 84 infrastructure and existing topographic features occur between these viewing locations and the proposed development, resulting in only partial topographic visibility. Scattered tree cover exists on either side of the railroad corridor, providing some screening and a backdrop for any equipment shelters, communications poles, signage and lighting structures may also be visible.

Columbia River: According to Wasco County GIS inventories, the proposed rail development is approximately 40 feet higher in elevation than the River. Due to the presence of a gentle berm that exists between the rail ballast and the shore of the River, it is not anticipated that the proposed track will be visible or any more visible than the current track. It is also anticipated that all equipment shelters, communications poles, signage and lighting structures visible from

this key viewing area will have sufficient background vegetation and rock wall backdrop to allow the development to blend with the surrounding landscape. This determination is based on staff observations of existing railroad development in the same landscape. The proposed rock blasting, vegetation clearing for landing zones, and a portion of the proposed retaining wall is expected to be topographically visible from the foreground and middle ground of the River. In the area of proposed rock blasting and vegetation clearing, very little vegetation exists north of the existing rail bed. Due to the height of the rock to be blasted, it is unlikely that any mature native tree could have provided effective screening from this location. The proposed vegetation clearing east of the rock blasting site will have the visible effects of a timber harvest in a sensitive landscape – and will not be substantially screened from views along the River or from State Route 14. As discussed below for natural resources, a condition of approval is recommended to prohibit the clearing of this area due to the sensitive natural resources that exist, and the landscape constraints that would prevent any proposed impact from being “temporary” for scenic or natural resources. With conditions to prohibit this clearing, the most visible portions of the project from the Columbia River will be the eastern edge of the blasted rock wall and the western edge of the retaining wall. The retaining wall site will be partially screened by existing trees and woody shrubs that exist north of the tracks.

Interstate 84: Staff has driven the length of Interstate 84 through this project site many times since the application was provided, each time assessing the overall visibility of the proposed development. Staff observes that the site is more visible when traveling west due to the bends in the highway and intervening topography. While traveling west, a portion of the site (limited to rock blasting and possibly vegetation clearing) begins to be topographically visible just west of the Memaloose Public Rest Stop, which is higher in elevation than the proposed development. From this angle, the casual traveler can topographically view the southern aspect of the eastern edge of the rock face to be blasted, partially screened by mature coniferous trees; visible for approximately one half of a mile. The project is then screened to viewers by topography or Interstate 84 until you reach the portion of the project west of the Mosier UA, which is topographically visible and partially screened with limited vegetation for approximately 1.6 miles. This portion of the project occurs at roughly the same elevation and within the immediate foreground of Interstate 84. Existing vegetation and a basalt wall back drop provide a background and shadows that will allow equipment shelters, communications poles, signage and lighting structures to blend with the surrounding landscape. This determination is based on staff observations of existing railroad development in the same landscape.

State Route 14: Based on staff observations and Wasco County GIS data, the eastern edge of the rock blasting, western half of the retaining wall, the vegetation clearing proposed for temporary construction zones, and some of the equipment shelters, communications poles, signage and lighting structures will likely be visible from this key viewing area. The elevation of the state highway changes dramatically from east to west, affording a variety of views in the middle ground and background. In most locations, topography between the state highway and the Columbia River screens the visual impacts from casual travelers viewing the landscape. There are several locations however, that the site will be visible and unscreened in the middle ground. From these locations, the most visible portions of the project will include the vegetation clearing and rock blasting. As noted above, staff recommends a condition of approval to prohibit the clearing of Open Space areas east of the rock blasting site.

2. *Conditions may be applied to various elements of proposed developments to ensure they are visually subordinate to their setting in the GMA and meet the required scenic standard (visually subordinate or visually not evident) in the SMA as seen from Key Viewing Areas, including but not limited to:*
 - a. *Siting (location of development on the subject property, building orientation, and other elements);*
 - b. *Design (color, reflectivity, size, shape, height, architectural and design details and other elements); and*
 - c. *New landscaping.*

Finding: The visual quality objective, or scenic standard, is dependent upon the landscape setting and zoning of the land to be affected. For all landscape settings and zones in the GMA, the scenic standard is Visually Subordinate. For some zones in the SMA, the standard is Visually Not Evident. The SMA areas affected by this proposal have landscape settings of River Bottomlands and Oak Pine Woodland. Lands with these landscape settings zoned Open Space are required to meet the standard of Visually Not Evident. Lands with this landscape setting zoned Agriculture or Public Recreation are required to meet the standard of Visually Subordinate. Section 1.200 defines these terms:

Visually Subordinate:

A description of the relative visibility of a structure or use where that structure or use does not noticeably contrast with the surrounding landscape, as viewed from a specified vantage point. As opposed to structures which are fully screened, structures which are visually subordinate may be partially visible. They are not visually dominant in relation to their surroundings. Visually subordinate forest practices in the SMA shall repeat form, line, color, or texture common to the natural landscape, while changes in their qualities of size, amount, intensity, direction, pattern, etc., shall not dominate the natural landscape setting.

Visually Not Evident:

A visual quality standard that provides for development or uses that are not visually noticeable to the casual visitor. Developments or uses shall only repeat form, line, color, and texture that are frequently found in the natural landscape, while changes in their qualities of size, amount, intensity, direction, pattern, etc., shall not be noticeable.

Siting: As proposed, the railroad expansion would occur within the existing railroad corridor. An Alternatives Analysis was provided to demonstrate the proposed location was the preferred alternative and minimized impacts to all protected resources in the NSA. With the exception of Open Space zones proposed to be cleared for temporary construction uses, Staff does not recommend changes to the location or orientation of the track or support structures listed above to achieve the required visual quality objective. Staff recommends prohibiting the

proposed vegetation clearing in Open Space zones east of the rock blasting site because it would adversely affect the natural resources in that area (see natural findings below), as well as result in the long-term visual appearance of an unscreened logging practice – which is inconsistent with the uses allowed in this zone and therefore unable to achieve the visual quality objective for this landscape. Based on information included in the Rowena Open Space Plan prepared by the US Forest Service for resource management in this area, it is unlikely that vegetation clearing of this scale could be easily mitigated and truly temporary, due to harsh environmental constraints such as limited water, severe winds, steep slopes and limited soils.

Design: The colors provided by the applicant for the equipment shelters, communications poles, lighting structures and signage match existing development in an effort to comply with past NSA color requirements for earth tone colors. The NSA rules currently require dark earth tone colors found in the shadows of the surrounding landscape. Staff recommends a condition of approval to require all new buildings, structures and appurtenances be treated with the colors identified by the Interstate 84 Corridor Strategy Plan for the eastern Gorge, including: Sherwin Williams “Otter” for equipment shelters, any railing, support structures for signage, and retaining wall; and Federal Color 30099 for any new painted fences, lighting, and other associated equipment.

The proposed retaining wall will be a concrete wall stamped with an “Oregon Basalt” pattern and treated with colors found in the surrounding landscape. Staff recommends the retaining wall also be consistent with the Corridor Strategy Plan, and implement a color palette that uses “Otter” as the predominant base color, and Sherwin Williams “Black Fox” and Miller Paint “Dapper” as highlights. If different brands are used, they must match the color codes of these paint colors. To achieve a more natural appearance, colors are to be applied to the retaining wall surface as a multi-step, multi-colored staining process applied in the field. The Oregon Department of Transportation implements these requirements and may be source of technical assistance.

The visible development includes: an extension of existing track to create a double mainline track, the blasting of a rock wall to create space for the new track, a 170-foot long and 25-foot tall retaining wall, five replacement equipment shelters that range in size from 6’L x 6’W x 9’H (36 square feet) to 8’L x 10’W x 9’H (80 square feet), twelve 22-foot tall signal lighting structures, required safety signage, and the extension of six culverts and addition of three new culverts. Several miles of existing telephone poles will be removed and replaced with five 53-foot tall wooden monopoles carrying communication equipment, spaced several miles apart. Other visible impacts will be construction related and in most cases, temporary (e.g. graveling existing road shoulders and replacing guardrail in the same location). Improving drainage ditches, and updating existing utilities may also have some temporary visible impacts. Wetlands west of Mosier will be reduced – which will have a permanent change to the landscape, but not so significant that it would be considered an adverse effect to the landscape as a whole. Vegetation and natural impacts associated with wetland fill and wetland creation are discussed below under Natural.

As previously noted, Staff has been able to observe existing equipment shelters, lighting and signage in the field to evaluate the level of visual contrast with the surrounding landscape. The backdrop of basalt rock walls, existing trees and woody shrubs, and the shadows cast by those features as a north facing slope, allow the proposed development to blend. With conditions the conditions described above, Staff finds the proposed design, color, reflectivity, size, shape,

height, architectural design details, and other elements to be consistent with the visual quality objectives for each zone.

10. Section 14.200(B) through (H) pertain to siting, they state:

- B. New development shall be sited to achieve visual subordination from Key Viewing Areas, unless the siting would place such development in a buffer specified for protection of wetlands, riparian corridors, endemic and listed plants, sensitive wildlife sites or conflict with standards to protect cultural resources. In such situations, development shall comply with this standard to the maximum extent practicable (GMA) only.*

Finding: As note above, the proposed development minimizes impacts to scenic resources and achieves visual subordination by being collocated with existing railroad development. An Alternatives Analysis was prepared to verify the proposed development (the preferred alternative) minimizes impacts to sensitive resources to the maximum extent practicable. Please see the Cultural and Natural findings below for more information regarding unavoidable resource impacts and mitigation strategies.

- C. New development shall be sited to achieve visual subordination utilizing existing topography, and/or existing vegetation as need in the GMA and meet the require scenic standard (visually subordinate or visually not evident) in the SMA from Key Viewing Areas.*

Finding: With the exception of the rock blasting and proposed Open Space clearing, the applicant has used existing topography and vegetation to meet the required scenic standards. Rock blasting is not common in the NSA but has certainly been used before, enabling the construction, maintenance, rock fall safety improvements, and expansions of Highway 30, Interstate 84, and State Route 14 - which has shaped many of the walls we see today. With conditions of approval to ensure rock blasting occurs in a random pattern (using a half cast removal method often employed by ODOT) to appear as natural as possible, the implementation of the color treatment plan discussed above for the basalt stamped concrete retaining wall, and the prohibition of clearing in Open Space, the proposed development is consistent with this requirement.

- D. Driveways and buildings shall be designed and sited to minimize visibility of cut banks and fill slopes from Key Viewing Areas.*

Finding: No new driveways are proposed, however six access roads will be improved. Four of these roads are existing gravel shoulder that will be improved with gravel to facilitate construction access. The other two roads also exist but are used infrequently and require regrading and re-graveling; they will be used for construction access and long-term maintenance access. Only minimal grading will be necessary to level and add new gravel to all six of the proposed roads; no new cut banks or fill slopes have been identified. New buildings are limited to replacement of existing buildings. The buildings will be placed in the same or similar locations, within the level, graveled, right-of-way of the railroad. Given this information, the roads and buildings have been designed to minimize the visibility of cut banks and fill slopes from key viewing areas, consistent with this rule.

- E. *The silhouette of new buildings shall remain below the skyline of a bluff, cliff or ridge as seen from Key Viewing Areas. A variance in the General Management Area may be granted according to Chapter 6 if application of the guidelines would leave the owner without a reasonable economic use. The variance shall be the minimum necessary to allow the use and may be applied only after all reasonable efforts to modify the design, building height and site to comply with the criteria have been made.*
- F. *An alteration to a building built prior to November 17, 1986, which already protrudes above the skyline of a bluff, cliff or ridge as seen from Key Viewing Areas, may itself protrude above the skyline if:*
1. *The altered building, through use of color, landscaping and/or other mitigation measures, contrasts less with its setting than before the alteration; and*
 2. *There is no practicable alternative means of altering the building without increasing the protrusion.*

Finding: The proposed replacement buildings are 9-feet tall. As noted above, significant backdrop exists behind the development from all affected key viewing areas. Consistent with this rule, no new building will protrude above the skyline, bluff, cliff, or ridge as seen from key viewing areas. No alterations to existing buildings are proposed; (F) does not apply.

- G. *Except for water-dependent development and for water-related recreation development, development shall be set back 100 feet from the ordinary high water mark of the Columbia River below Bonneville Dam, and 100 feet from the normal pool elevation of the Columbia River above the Bonneville Dam, unless the setback would render a property unusable. In such cases, variances to this guideline may be authorized according to Chapter 6 of this Ordinance. In the SMA the setbacks described above shall be 200 feet.*

Finding: The proposed development is not water dependent or water related recreation development, but it will occur within 100 feet of the Ordinary High Water Mark (OHWM) of the Columbia River in several instances (see site plan). The *Management Plan* and subsequent NSA land use ordinances were prepared and adopted after the railroads were established, and contain specific review uses that allow railroad development and expansion; Staff notes that the use was anticipated, and the finds that the statement “unless the setback would render a property unusable” applies to the subject development. Given this information, Chapter 6 is addressed by this analysis.

- H. *New buildings shall not be permitted on lands visible from Key Viewing Areas with slopes in excess of 30 percent. Variances to this guideline may be authorized according to Chapter 6 of this Ordinance if its application would render a property unbuildable. In determining the slope, the average percent slope of the proposed building site shall be utilized.*

Finding: New buildings will be placed within the existing railroad corridor, at grade and on gravel. Consistent with this rule, no new buildings visible from key viewing areas will be placed on slopes greater than 30%.

11. Section 14.200(I) pertains to color, it states:

Unless expressly exempted by other provisions in this chapter, colors of all exterior surfaces of structures visible from Key Viewing Areas shall be dark earth-tones found at the specific site or in the surrounding landscape. The specific colors or list of acceptable colors shall be included as a condition of approval. The Scenic Resources Implementation Handbook will include a recommended palette of colors.

Finding: The applicant proposed colors to match existing development, which had been addressed by an older scenic resource standard (earth tone instead of a dark earth tone). To ensure compliance with this requirement, Staff recommends a condition of approval to require the color palette prescribed by the Interstate 84 Corridor Strategy for all elements of this development.

12. Section 14.200(J) pertains to reflectivity, it states:

The exterior of buildings in the GMA and structures in the SMA on lands seen from Key Viewing Areas shall be composed of nonreflective materials or materials with low reflectivity, unless the structure would be fully screened from all Key Viewing Areas by existing topographic features. The Scenic Resource Implementation Handbook will include a list of recommended exterior materials. These recommended materials and other materials may be deemed consistent with this criterion, including those where the specific application meets recommended thresholds in the "Visibility and Reflectivity Matrices" in the Implementation Handbook (once they are created). Continuous surfaces of glass unscreened from Key Viewing Areas shall be limited to ensure visual subordination. Recommended square footage limitations for such surfaces will be provided for guidance in the Implementation Handbook.

Finding: As proposed, the equipment shelters will be prefabricated metal structures that measure 36 square feet and 80 square feet, with a height of 9 feet. At the widest visible face, the 80 square foot structures will be 10 feet wide and 9 feet tall. With the exception of boaters on the Columbia River and hikers and bikers on the Historic Columbia River Highway, most public views of these buildings will occur at 65 miles per hour in the immediate foreground and middle ground. That said, there is no exception to this requirement and staff has only approved limited exceptions for public health and safety (e.g. fuel tanks that must be white due to heat). To comply with this requirement, a condition of approval is included to require the use of a low-reflective material or to treat the surface of the buildings with an approved matte finish polyacrylic paint and sand mixture to add texture and thus reduce reflectivity. Although this treatment may not be as effective on large building, staff finds it to be an effective treatment for small structures, and consistent with this rule.

13. Section 14.200(K) provides requirements applied to new landscaping necessary to screen development from key viewing areas. Some new landscaping is necessary for the proposed development to achieve visual subordination with the surrounding landscape.

Finding: No new screening vegetation is proposed. Natural resource mitigation, including the creation of a new wetland, is proposed, and is addressed below in findings for Natural. In the case of the proposed development, the backdrop of vegetation and rock wall provides a landscape for the small structures to recede and blend into. No new screening vegetation is required, but a condition of approval is included requiring the retention of existing screening vegetation, existing backdrop vegetation, and the prohibition of the clearing in Open Space.

14. Section 14.200(L) considers the possible cumulative effects of the proposed development, it states:

Determination of potential visual effects and compliance with visual subordination policies shall include consideration of the cumulative effects of proposed development.

Finding: The proposed development is a large-scale use of railroad expansion. Since the NSA Act was passed in 1986, this use has been proposed and approved only one other time in the NSA, at Doug's Beach in Klickitat County. The proposed development's visibility is discussed in detail above for Section 14.200(A)(1) and (2). NSALUDO defines Cumulative Effects as:

The combined effects of two or more activities. The effects may be related to the number of individual activities, or to the number of repeated activities on the same piece of ground. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

To evaluate the cumulative impact to scenic resources, Staff identified the Study Area to be from the Wasco-Hood River County line (on the west) to the Memaloose Rest Area (on the east). As noted above, only portions of the development will be visible from key viewing areas due to topographic screening and existing interstate infrastructure blocking views of the tracks. With the prohibition of the proposed Open Space clearing, the visible development has sufficient screening and backdrop landscape to achieve the required scenic standard.

Based on zoning, land use patterns and existing ownership, future development likely to occur in this area includes public recreation, commercial agriculture and rural residential development. The volume of applications and discussions with staff over the last 20 years, indicate very few railroad projects exceed the scope of repair and maintenance activities – which are allowed by Section 3.100(D) without review. When projects do exceed this scope, it is still usually confined to the replacement of a single structure, such as a signal light or and communications pole.

The application materials provided information explaining that this specific location was the primary bottleneck for their larger network – and did not list any other sites in the region as a challenge. No other large-scale rail projects are proposed in Wasco County and Staff is not aware of any proposed in other NSA counties that are similar in scope.

The site of the proposed development is confined by rock walls, Interstate 84 and the City of Mosier to the south and the Columbia River to the north. The expansion is limited to extending an existing siding in either direction, and yet will still require rock blasting and wetland fill. Future expansion is limited in these areas, especially as it terminates at a rock tunnel on the county line. Required by the NSALUDO, the development scope was limited to the minimum size necessary to meet the current need. If the need were to increase in the future, Staff can reasonably foresee (because the topography is permitting) a future request to further extend the track to the east. Zoning in this area is SMA Open Space, which would limit the amount of ground disturbing activities that could be allowed outside of the existing and previously disturbed ballast and railroad right-of-way.

Public comments were received with concerns regarding the visual impact of train cars on the rails, and a concern that the proposal would result in an increase in the number of train cars on the rails at any given time, thus blocking views of the river from key viewing areas, recreation sites and private residences. Potential cumulative visual effects of increased railroad traffic (e.g. rail cars blocking views) could ultimately have an adverse effect to the scenic resources experienced from several key viewing areas. The application states that the project will not add more trains, but will allow industry standard length trains. Staff interprets this to mean that at least some trains will be at least slightly longer than they have been in the past. A condition of approval to ensure the current average of rail cars (20-30 cars per train) is maintained, the development should not significantly change the railroads current impact to scenic resources.

Given this information and recommended conditions of approval, staff feels it is reasonable to conclude that in the foreseeable future, this development will not be combined with any similar rail development that would further magnify resource impacts and that a project of this scale will not be repeated on the same piece of ground. With conditions of approval to ensure rail traffic does not significantly increase beyond the current average of 20-30 trains per day, the individually minor, but collectively significant impacts of blocked views should not result in a cumulatively adverse effect to scenic resources.

15. Section 14.200(M) contains provisions for new mainlines on lands visible from key viewing areas for the transmission of electricity, gas, oil, other fuels or communications, and requires them to be built in existing transmission corridors unless it can be demonstrated that the use of existing corridors is not practicable. This rule also requires new lines to be undergrounded as a first preference unless it can be demonstrated to be impracticable.

Finding: No new mainlines for the transmission of electricity, gas, oil, other fuels, or communications are proposed; this rule is not applicable. However, it should be noted that smaller, individual user utilities are being replaced near equipment shelters and Memaloose State Park. The applicant proposes to collocate these replacement lines in the same location or closer the track (in previously disturbed trenches) where ever possible. Buried utilities will consist of water and electricity; communication structures are addressed below in (N) and (O).

16. Section 14.200(N) and (O) address new communication facilities, they state:

N. New communication facilities (antennae, dishes, etc.) on lands visible from Key Viewing Areas, which require an open and unobstructed site shall be built upon

existing facilities unless it can be demonstrated that use of existing facilities is not practicable.

O. New communications facilities may protrude above a skyline visible from a Key Viewing Area only upon demonstration that:

- 1. The facility is necessary for public service;*
- 2. The break in the skyline is seen only in the background; and*
- 3. The break in the skyline is the minimum necessary to provide the service.*

Finding: The proposed development includes the removal of several miles of telephone poles and installation of five new 53-foot tall wooden mono-poles with communications equipment attached to the top. The poles will serve as one element of the communication system for railroad traffic. The poles will be individually spaced several miles apart and near equipment buildings with support equipment. The antennas cannot be built upon existing facilities because they must run with the length of the track, and no other poles exist to meet the needs. Staff has observed these structures in other parts of the Gorge and is familiar with the anticipated visual impacts. As noted above, the railroad is at the base of a rock wall that provides significant backdrop for the proposed structures to blend into. Staff does not anticipate any of the proposed communications poles exceeding the skyline from a key viewing area. As proposed, staff finds the communications poles to be consistent with this rule.

17. Section 14.200(P) provides guidelines for the visual impacts of overpasses, safety and directional signs and other road and highway facilities that may protrude above the skyline visible from key viewing areas. Now highway development or signage is proposed; (P) is not applicable to the proposed request.
18. Section 14.200(Q) provides a reference for additional criteria that apply to mineral and aggregate related uses. Although this typically applies to commercial aggregate uses only, public comments were received that the proposed development should be reviewed as a mineral and aggregate related use. In response to this, Staff has confirmed with the applicant that the rock blasting activities will remove rock that will be crushed and used onsite for ballast development. Based on this information, Staff finds this to be part of the construction necessary for development, not a commercial aggregate operation where rock is removed, crushed or processed and then sold for profit. As noted throughout this report, staff recommends a condition of approval to prohibit vegetation clearing in Open Space, which will require the blasted materials to be trucked offsite (outside the GMA or SMA) for crushing and brought back in for ballast development. In sum, Staff finds that (Q) is not applicable to the proposed development.
19. Section 14.200(R) provides additional scenic resource protection standards for development in the SMA. Section 14.200(R)(1) provides a table to identify the applicable scenic standard. This is addressed above in Scenic Finding 9 for Section 14.200(A)(2).

20. Section 14.200(R)(2) states:

Structure height shall remain below the average tree canopy height of the natural vegetation adjacent to the structure, except if it has been demonstrated that meeting this criterion is not feasible considering the function of the structure.

Finding: The height of the equipment shelters will be 9 feet tall, the light structures will be 22 feet tall, the retaining wall will be 25 feet tall, and the communications poles will be 53 feet tall; some of these structures will occur in the SMA. The development will be located within the existing gravel railroad corridor, which is kept clear of vegetation that might interfere with safe operations. As noted above, the rock wall south, east and west of the development provides good backdrop for all of the proposed development to blend into. Mature trees in the backdrop include ponderosa pine, Oregon white oak, big leaf maple and some Douglas fir. Based on observations made at several site visits and drives through the area to evaluate scenic impacts, the development will be within the height of the average tree canopy. If the event that the wooden monopoles are not immediately adjacent to trees (as some were observed in the west Gorge), the material itself is a dark wood, and blends into the natural elements of the surrounding landscape. In sum, staff finds the development to be consistent with this rule.

21. Section 14.200(R)(3) addresses seasonal lighting displays and is not applicable to the proposed development.

22. Section 14.200(R)(4) states:

Proposed developments or land uses shall be sited to achieve the applicable scenic standard. Development shall be designed to fit the natural topography, to take advantage of landform and vegetation screening, and to minimize visible grading or other modifications of landforms, vegetation cover, and natural characteristics. When screening of development is needed to meet the scenic standard from key viewing areas, use of existing topography and vegetation shall be given priority over other means of achieving the scenic standard such as planting new vegetation or using artificial berms.

Finding: As explained above for the GMA and SMA portions of the project, the proposed development was sited to achieve the applicable scenic standard the extent practicable. With conditions of approval regarding existing vegetation, colors, and materials, the proposed development will be consistent with this rule.

23. Section 14.200(S) provides a list of uses that are not required to meet scenic standards because they are (a) located in a Developed Setting as specified in Section 14.400(J), Landscape Settings; (2) the rehabilitation or modification of a significant historic structure; or (3) shoreline developments on the main stem of the Columbia River that adjoin an Urban Area.

Finding: The proposed development does not occur in a developed setting, will not modify a significant historic structure, and will not include development within the Columbia River immediately adjacent to an Urban Area. Given this information, (S) is not applicable to the proposed development.

24. Section 14.300 provides scenic resource protections for designated Scenic Travel Corridors in the GMA and SMA. Section 14.300(A) provides chapter context, Section(B) states:

The Historic Columbia River Highway and Interstate 84 are designated as Scenic Travel Corridors. Development along these corridors shall be subject to the following standards:

1. *For the purposes of implementing this section, the foreground of a Scenic Travel Corridor shall include those lands within one-quarter mile of the edge of pavement of the Scenic Travel Corridor roadway.*
2. *All new buildings and alterations to existing buildings shall be set back at least 100 feet from the edge of pavement of the Scenic Travel Corridor roadway. A variance to this setback requirement may be granted pursuant to Chapter 6. All new parking lots and expansions of existing parking lots shall be set back at least 100 feet from the edge of pavement of the Scenic Travel Corridor Roadway, to the maximum extent practicable.*
3. *Additions to existing buildings or expansion of existing parking lots located within 100 feet of the edge of pavement of a Scenic Travel Corridor roadway shall comply with standard 2 of this subsection to the maximum extent practicable.*
4. *All proposed vegetation management projects in public rights-of-way to provide or improve views shall include the following:*
 - a. *An evaluation of potential visual impacts of the proposed project as seen from Key Viewing Areas;*
 - b. *An inventory of any rare plants, special wildlife habitat, wetlands or riparian areas on the project site. If such resources are determined to be present, the project shall comply with the applicable Management Plan guidelines to protect the resources.*

Finding: The application states: “The only new buildings that would be located within 100 feet of the edge of the pavement of a National Scenic Highway would be two of the five small signal buildings that are required for safe rail operations. Of the five total signal buildings that will be installed as a result of the project, five existing signal buildings will be removed. This results in no net increase of structures throughout the project area. Each of these signal buildings will have a footprint that will range from approximately 6 feet by 6 feet to approximately 8 feet by 10 feet and will be approximately 9 feet in height (see Appendix B). Because it is necessary for two of these buildings to be located within 100 feet of the pavement for I-84, UPRR will obtain a setback variance pursuant to NSA-LUDO Chapter 6.”

25. Section 14.300(B)(5) states: When evaluating which locations to consider undergrounding of signal wires or powerlines, railroads and utility companies shall prioritize those areas specifically recommended as extreme or high priorities for undergrounding in the *Columbia River Gorge National Scenic Area Corridor Visual Inventory*, prepared in April, 1990.

The CRGNSA Corridor Visual Inventory provides management reports, landscape assessments and recommendations for protecting and enhancing views experienced from Scenic Travel Corridors. A specific management report was prepared for railroad signal wires, it states:

The railroad is a vital part of the transportation network of the Columbia River Gorge. Tracks run the length of the National Scenic Area on both sides of the river. While the tracks are of little consequence visually and the trains themselves are an interesting visual element, there are other elements associated with the railroad that are very discordant in this scenic landscape. Perhaps the most noticeable of these are signal wires that run adjacent to the tracks. This corridor analysis proposes having sections of these wires put underground to greatly enhance the scenic quality of the SR14 and I-84 highway corridors...It is hoped, however, that serious consideration can be given to undergrounding signal wires of extreme or high priorities, situations where wires totally dominate an otherwise spectacular view of the river or stack up as a long line of discordant vertical elements. This could be accomplished either as a special project or in conjunction with other rail work.

Finding: The proposed development will remove telephone poles that currently impact the views of the Columbia River from key viewing areas and replace them with five wooden monopole communications towers. Staff finds this proposal to be an improvement to viewshed, and to be consistent with this rule.

26. Section 14.300(B) (6) and (7) provide requirements for the production of mineral resources and the expansion of existing quarries. The proposed development does not include mineral resource development. Given this information, Sections 14.300 (6) through (7) do not apply to the proposed development.

27. Section 14.300(C) provides additional criteria for projects proposed in the SMA, it states:

In the SMA the following additional criteria shall apply to development within the immediate foregrounds of Key Viewing Areas. Immediate foregrounds are defined as within the developed prism of a road or trail KVA or within the boundary of the developed area...

Finding: Development located within the development prism of a Scenic Travel Corridor is limited to the use of existing gravel shoulders for construction access and the replacement of guardrail following construction. A condition of approval is included to ensure the applicant adheres to the requirements of the Interstate 84 Corridor Strategy Plan.

28. Section 14.400 provides landscape settings. The proposed development will occur in the Pastoral landscape setting in the GMA, the Oak Pine Woodland Landscape Setting in the SMA, River Bottomlands Landscape Setting in the GMA and SMA, the Gorge Walls, and the Canyonlands and Wildlands Landscape Setting in the GMA.

Requirements of the Pastoral Landscape Setting are listed in Section 14.400(A)(1) and (2), which state:

1. *Accessory structures, outbuildings, and accessways shall be clustered together as much as possible, particularly towards the edges of existing meadows, pastures and farm fields.*
2. *In portions of this setting visible from Key Viewing Areas, the following standards shall be employed to achieve visual subordination for new development and expansion of existing development:*
 - a. *Vegetative landscaping shall, where feasible, retain the open character of existing pastures and fields.*
 - b. *At least half of any trees planted for screening purposes shall be species native to the setting or commonly found in the area. Such species include fruit trees, Douglas fir, Lombardy poplar (usually in rows), Oregon white oak, bigleaf maple, and black locust (primarily in eastern Gorge).*
 - c. *At least one-quarter of any trees planted for screening shall be coniferous for winter screening.*

Finding: The application narrative addressed this setting with the following statement: “The project area crosses the Pastoral landscape setting from MP 70.37 to MP 70.62 in Segment 2 West where I-84 crosses over the rail corridor. The only KVA from which this 0.25-segment has the potential to be seen would be I-84. As described in Section 5.2.3 and in the response to NSA-LUDO Section 14.200(A), the visibility of any project-related changes in this area will likely be limited given the location of the rail corridor in a trench 30 feet or more below the overcrossing and the presence of obstructions to views from the roadway, and are likely to be fleeting given the speeds of the vehicles on the interstate. One of the five new signal buildings is proposed within the Pastoral landscape setting. Because of its small dimensions and its surface textures and colors that would conform to the specifications set out in the *Scenic Resources Implementation Handbook*, the structure would be visually subordinate. Additionally, because of the limited visibility from I-84 into this area along the track, it is unlikely that screening landscaping would be necessary. Should a determination that landscaping of the area around any signal building located in this area be required, UPRR will provide landscaping that will be consistent with the provisions of NSA-LUDO Section 14.400(A)(2) and will use the recommended species for the Pastoral Landscape setting as provided by the *Scenic Resources Implementation Handbook*. Therefore, the project will comply with the applicable provisions of NSA-LUDO Section 14.400(A).” Staff concurs with this finding.

29. Section 14.400(C)(3) contains the Oak Pine Woodland Landscape Setting SMA only:

3. *Woodland areas should retain the overall appearance of a woodland landscape. New developments and land uses shall retain the overall visual character of the natural appearance of the Oak/Pine Woodland landscape.*
 - a. *Use of plant species native to the landscape setting shall be encouraged. Where non-native plants are used, they shall have native appearing characteristics.*

- b. Buildings shall be encouraged to have horizontal overall appearance.*

Finding: The project narrative provides the following information about impacts to this landscape setting: “The project includes an area of the Oak-Pine Woodland Landscape in the segment from MP 71.16 to MP 71.48 at the eastern end of Segment 2 West, where the UPRR alignment passes through a cut in the rock mesa that extends to the edge of the river in this area. In addition, the three staging areas that will be located south of the alignment segment from UPRR MP 71.53 to MP 71.79 include portions of the Oak-Pine Woodland landscape setting. None of the proposed five signal buildings will be installed in the area of Oak-Pine Woodland Landscape between MP 71.16 and 71.48. The excavation required for widening of the cut through the rock mesa to accommodate the new track may result in clearing of vegetation in the area of Oak-Pine Woodland Landscape on the top of the mesa along the southern end of the cut. In addition, installation of the construction staging area will require some clearing of vegetation in Oak-Pine Woodland Landscape area. After construction of the project is complete, the cleared construction staging areas along the southern edge of the cut will be replanted, and all of the cleared areas that lie within the Oak-Pine Woodland Landscape will be replanted with the species specified for this landscape area in the *Scenic Resources Implementation Handbook*. Because of these measures, the project will be compliant with the applicable provisions of NSA-LUDO Section 14.400(C).” With conditions to reduce vegetation impacts by prohibiting the clearing of the 6.62 acre SMA Open Space landing zone, staff finds the proposed development to be consistent with this landscape setting to the maximum extent practicable.

30. Section 14.400(H) River Bottomlands Landscape Setting GMA and SMA:

GMA Only

1. *In portions of this setting visible from Key Viewing Areas, the following standards shall be employed to achieve visual subordination for new development and expansion of existing development:*
 - a. *At least half of any trees planted for screening purposes shall be species native to the River Bottomland setting. Public recreation developments are encouraged to maximize the percentage of planted screening vegetation native to this setting. Such native species include: black cottonwood, bigleaf maple, red alder, Oregon white ash, Douglas fir, western red cedar and western hemlock (west Gorge) and various native willow species.*
 - b. *At least one-quarter of any trees planted for screening purposes shall be coniferous for winter screening.*

SMA Only

2. *River bottomlands shall retain the overall visual character of a floodplain and associated islands:*
 - a. *Buildings shall have an overall horizontal appearance in areas with little tree cover.*

- b. Use of plant species native to the landscape setting shall be encouraged. Where non-native plants are used, they shall have native-appearing characteristics.*

Finding: The application narrative provides the following statement in response to these provisions in the GMA: “In Segment 1, the project alignment crosses areas of GMA-zoned River Bottomlands Landscape from MP 66.98 to 67.04, 67.18 to 67.22, and 67.34 to 67.75 along I-84. In Segment 2 West, the alignment travels through a GMA-zoned area of River Bottomlands Landscape from UPRR MP 70.62 to 71.27. In Segment 2 East, there are some areas of River Bottomlands Landscape, but because all of Segment 2 East lies in an area that has an SMA designation, they are not governed by this provision. As established in Section 5.2.2 and in the response to NSA-LUDO Section 14.200(A), project changes in the River Bottomlands Landscape areas within Segment 1 along I-84 will be visually evident but not visually dominant in views from eastbound I-84, and will not be visually evident in views from the westbound I-84, SR-14, and Columbia River KVAs. In Segment 2, project features will not be visually evident in views from the SR-14 and Columbia River KVAs of the River Bottomlands Landscape areas. Given that the project will be either not visually evident or will be visually subordinate in all views from KVAs within the GMA-zoned River Bottomlands Landscapes, this provision does not apply.”

And for the SMA: “In Segment 2 East (MP 71.43 to MP 72.35), the alignment is located within an SMA-zoned River Bottomlands Landscape area, as are the three proposed construction staging areas. As established in Section 5.2.4 and in the response to NSA-LUDO Section 14.200(A), in the River Bottomlands Landscape of Segment 2 East, the second mainline track and associated facilities will not be visually evident in views from KVAs. As a consequence, development of the second mainline track will be consistent with this provision. Installation of the construction staging areas will require removal of existing vegetation from portions of River Bottomland Landscape area. UPRR will comply with this provision by restoring the site after completion of the project, and will plant the site with native species as specified in the *Scenic Resources Implementation Handbook*.”

Consistent with the intent of Section 14.400, the development is subject to landscape setting requirements regardless of topographic visibility. New buildings are limited to replacement buildings that will be 9 feet tall and should blend with the surrounding landscape. Staff recommends that with the conditions of approval noted above and below for Natural, the proposed development complies with this setting.

31. Section 14.400(I) contains the Gorge Walls Canyonlands and Wildlands Landscape Setting. The GMA rules state:

- 1. New development and expansion of existing development shall be screened so as to not be seen from Key Viewing Areas to the maximum extent practicable.*
- 2. All trees planted to screen permitted development and uses from Key Viewing Areas shall be native to the area.*
- 3. All buildings shall be limited in height to 1 1/2 stories.*
- 4. The exteriors of structures shall be non-reflective.*

5. *Signage shall be limited to natural materials such as wood or stone, and natural colors (GMA only) or earth-tone colors (SMA or GMA), unless public safety concerns or federal or state highway standards require otherwise.*

Finding: The applicant has provided the following information in response to these requirements: “The project alignment crosses areas of GMA-zoned Gorge Walls, Canyonlands and Wildlands Landscape in Segment 1 along I-84 from MP 66.90 to 67.34, and 67.75 to 68.58. As established in the Section 5.2.2 and in the response to NSA-LUDO Section 14.200(A), in the Gorge Walls, Canyonlands and Wildlands Landscape areas along I-84, the project changes will be visually evident but not visually dominant in views from eastbound I-84, and will not be visually evident in views from westbound I-84 and from the SR-14 and Columbia River KVAs. At present, there is little to no vegetation in the area between the southern edge of the interstate’s eastbound lanes and the UPRR ROW. To conform with highway and railroad safety standards, this area will continue to be kept free of any large, woody vegetation. The only project-related structures that will be visible along the rail corridor would be two new signal buildings that will be installed in this area. Because the signal buildings will be no more than 9 feet in height, they will be well below the one and a half story height limit. The exteriors of the signal buildings will be non-reflective, and will be treated with dark colors intended to help them blend into the landscape backdrop, in conformance with the *Scenic Resources Implementation Handbook* (see Detail 10 of Appendix B). Signage posted in this landscape area will include Station and Control Point, Whistle Signal, Vertical Control Point, Private Property, No Dumping, Speed Restriction, and Mile Marker signage. Most signage will be non-reflective black and white signage and will be posted at an approximate height of 10 feet. All signage installed will be the minimal amount required under federal law for the safe operation of the railroad and, to the extent that is consistent with safety requirements, the surfaces of sign posts will be treated with colors that are consistent with their landscape backdrop. Images of example standard railroad signage are included in Appendix B. Therefore, the project will comply with the applicable provisions of NSA-LUDO Section 14.400(I).

Regardless of topographic visibility, the landscape settings apply to the proposed development. With a condition of approval to require the implementation of the colors and materials identified in the Interstate 84 Corridor Strategy Plan, staff finds the proposed development to be consistent with this setting.

Cultural Resources GMA

32. Section 14.500 contains cultural resource protection provisions for projects occurring within the GMA. The purpose of this section is to protect and enhance cultural resources and to ensure that proposed development and uses do not have an adverse effect on significant cultural resources. There are three types of cultural resources: archaeological resources, traditional cultural properties, and historic buildings and structures.

33. Section 14.500(B) explains when a reconnaissance survey and historic survey are required. Section (B)(1)(a) provides a list of exemptions; the proposed development is a large scale use and was required to provide a professionally prepare archeological survey for completeness.

Section 14.500(B)(2) requires a historic survey for all proposed uses that would alter the exterior architectural appearance of buildings and structures that are 50 years old or older, or compromise features of the surrounding area that are important in the defining the historic or

architectural character of the buildings or structures that are 50 years old or older. The proposed development included the alteration of buildings and structures older than 50 years old, and as a large scale use, was required to provide a historic resource survey for completeness.

Pursuant to (B)(3) through (5) the applicant was required to bear the expense of hiring a qualified professional to prepare cultural and historic resource surveys. The application narrative states:

“UPRR completed the Cultural Resources Survey Union Pacific Railroad Second Mainline Track Project Wasco County, Oregon (Cultural Resources Survey Report; provided as Appendix L) to comply with the applicable provisions of NSA-LUDO Section 14.500(B). The report provides an inventory of archaeological investigations conducted within 1 mile of project areas in the GMA. The inventory was compiled through a file search conducted on April 14, 2014. The search was carried out at the Oregon State Historic Preservation Office (SHPO) in Salem. The file search was used to determine if previously recorded pre-contact and historic sites are located within or near the study area, and to determine whether any part of the study area had been surveyed previously for cultural resources. In addition to the file search, UPRR conducted a reconnaissance survey from April 30, 2014, through May 1, 2014. The Cultural Resource Survey Report, included as Appendix L, was prepared by CH2M HILL archaeologists. The research design for the project was reviewed and approved by CRGNSA Heritage Resources Director Marge Dryden on April 18, 2014 (see Appendix B of the Cultural Resources Survey Report). The results of this survey are described in Appendix L. Therefore, the project complies with the applicable provisions of NSA-LUDO Section 14.500(B)(1)....

“The Cultural Resources Survey Report presents the results of CH2M HILL’s cultural resources and historic properties investigation for the UPRR project. CH2M HILL conducted a detailed review of historic and potentially historic properties in the vicinity of the project area in accordance with NSA-LUDO Section 14.500(B)(2). The Cultural Resources Survey Report (see Appendix L) shows that two historic properties have been recorded in the vicinity of the project area. One is the ...which has been recommended eligible for listing in the NRHP (Donovan, 1994). The Cultural Resources Survey Report also shows that one building in poor condition and five UPRR signal buildings are located in the project area.”

Staff finds the applicant provided professionally prepared cultural resource surveys for the proposed development, consistent with this rule.

34. Section 14.500(B)(5) also includes a practicable alternatives test, it states:

An alternative site for a proposed use shall be considered practicable if it is available and the proposed use can be undertaken on that site after taking into consideration cost, technology, logistics, and overall project purposes.

A practicable alternative does not exist if a project applicant satisfactorily demonstrates all of the following:

- a. *The basic purpose of the use cannot be reasonably accomplished using one or more other sites in the vicinity that would avoid or result in less adverse effects on cultural resources;*
- b. *The basic purpose of the use cannot be reasonably accomplished by reducing its size, scope, configuration, or density as proposed, or by changing the design of the use in a way that would avoid or result in less adverse effects on cultural resources; and*
- c. *Reasonable attempts were made to remove or accommodate constraints that caused a project applicant to reject alternatives to the use as proposed. Such constraints include inadequate infrastructure, parcel size, and land use designations. If a land use designation or recreation intensity class is a constraint, an applicant must request a management plan amendment to demonstrate that practicable alternatives do not exist.*

Finding: An Alternatives Analysis was prepared by the application to verify the proposed development would have the least impacts on sensitive resources as possible. The railroad expansion is dependent upon the location of the existing railroad corridor and the Columbia River Gorge as a passageway through the Cascade mountain range. Based on the application materials provided by the applicant, Staff concludes that no alternative that better protects resources exists and that reasonable attempts have been made to accommodate constraints and to minimize cultural resource impacts, consistent with this rule.

35. Sections 14.500(C)(1) through (3) specify notice and coordination requirements for cultural resource surveys:

1. *Gorge Commission/Tribal Government Notice*

- a. *In addition to other public notice requirements that might exist, the County shall notify the Indian tribal governments when:*
 - (1) *a reconnaissance survey is required; or*
 - (2) *cultural resources that are prehistoric or otherwise associated with Native Americans exist in the project area.*
- b. *Notices sent to Indian tribal governments shall include a site plan as stipulated in Section 14.040.*
- c. *Indian tribal governments shall have 20 calendar days from the date a notice is mailed to submit written comments to the County Planning Office.*
 - (1) *Written comments should describe the nature and extent of any cultural resources that exist in the project area and identify individuals with specific knowledge about them.*

(2) The County shall send a copy of all comments to the Gorge Commission.

2. Consultation and Ethnographic Research

a. When written comments are submitted to the County Planning Office in a timely manner, the project applicant shall offer to meet with interested persons within 10 calendar days.

(1) The 10 day consultation period may be extended upon agreement between the project applicant and the interested persons.

(2) Consultation meetings should provide an opportunity for interested persons to explain how the proposed use may affect cultural resources. Recommendations to avoid potential conflicts should be discussed.

(3) All written comments and consultation meeting minutes shall be incorporated into the reconnaissance or historic survey report. In instances where a survey is not required, all such information shall be recorded and addressed in a report that typifies a survey report; inapplicable elements may be omitted.

b. A project applicant who is proposing a large-scale use or development shall conduct interviews and other forms of ethnographic research if interested persons submit a written request for such research.

*(***)*

3. Notice of Survey Results

a. The County shall submit a copy of all cultural resource survey reports to the State Historic Preservation Office and the Indian tribal governments.

(1) Survey reports may include measures to avoid affected cultural resources, such as a map that shows a reasonable buffer zone.

(2) The State Historic Preservation Office and tribes shall have 30 calendar days from the date a survey report is mailed to submit written comments to the County Planning Office.

(3) The County shall record and address all written comments in its development review order.

Finding: The applicant was required to solicit feedback from tribal governments during the preparation of their survey materials. Upon receipt of the final survey addendum, a cultural resource notice and project description was provided September 22, 2015. The project has since been publically noticed and re-noticed for the public hearing multiple times; notices have been sent to tribal governments March 10, 2016, April 26, 2016, June 1, 2016, June 23, 2016, and August 11, 2016.

Following the initial notice, there was a request for onsite consultation regarding cultural resources from Holly Shea of the Warm Springs Tribe, Catherine Dickson of the Confederated Tribes of the Umatilla Indian Reservation, and Nancy Nelson, Oregon State Parks and Recreation Archaeologist. Consistent with the GMA provisions, the applicant offered to meet onsite, and consistent with the SMA provisions, the Forest Service offered to participate in the onsite consultation. Through email exchanges, the request for consultation evolved into a request for more information. The additional information was provided for the cultural resource protection process and ultimately, the consultation was no longer desired. Please see Cultural above for more information.

36. Section 14.500(C)(4) describes the conclusion of the cultural resource protection process; it states:

- a. *The County Planning Office will make a final decision on whether the proposed use would be consistent with the cultural resource goals, policies, guidelines, and standards.*
- b. *If the final decision contradicts the comments submitted by the State Historic Preservation Office, the County must justify how it reached an opposing conclusion.*
- c. *The cultural resource protection process may conclude when one of the following conditions exist:*
 - (1) *The proposed use does not require a reconnaissance or historic survey, no cultural resources are known to exist in the project area, and no substantial concerns were voiced by interested persons within 20 calendar days of the date that a notice was mailed.*
 - (2) *A reconnaissance survey demonstrates that cultural resources do not exist in the project area and no substantiated concerns were voiced by interested persons within 20 calendar days of the date the notice was mailed.*
 - (3) *The proposed use would avoid archaeological resources and traditional cultural resources that exist in the project area.*
 - (*****)
 - (4) *A historic survey demonstrates that the proposed use would not have an effect on historic buildings or structures because:*
 - (a) *The State Historic Preservation Office concludes that the historic buildings or structures are clearly not significant, as determined using the criteria in the "National Register Criteria for Evaluation" (36 CFR Part 60.4) ; or*
 - (b) *The proposed use would not compromise the historic or architectural character of the affected buildings or structures, or compromise the features of the site that are important in defining the overall historic character of the*

affected buildings or structures, as determined by the guidelines and standards in The Secretary of the Interior's Standards for Rehabilitation (U.S. Department of the Interior 1990) and The Secretary of the Interior's Standards for Historic Preservation Projects (U.S. Department of the Interior 1983).

*(***)*

Finding: The surveys were provided to the four tribal governments, the State Historic Preservation Officer and the Heritage Program Manager for the Columbia River Gorge National Scenic Area. As previously noted, there were several requests for additional information. These requests were addressed by the applicant and also through the U.S. Army Corps of Engineers Section 106 review and consultation process, which entered into government-to-government consultation. No outstanding requests exist for the NSA review process.

Marge Dryden, Cultural Heritage Program Manager for the Columbia River Gorge National Scenic Area provided multiple letters throughout the cultural review process. Her most recent letter, dated April 28, 2016 states:

"...I reviewed three cultural resource reports that address the cultural resource process (letters dated July 31 and August 24, 2015). Subsequent to my review, questions and concerns were submitted by archaeologists with Oregon State Parks and the Confederated Tribes of the Umatilla Reservation. Both I and the Army Corps have responded to these emails (December 13, 2015 and March 16, 2016).

I have reviewed the project record and find that, taken in combination, the three reports provided by CH2M Hill comply with the cultural resource provisions in the Management Plan and Wasco County Ordinance. The Army Corps of Engineers (ACE) is responsible for review of the project as a federally permitted undertaking under Section 106 of the National Historic Preservation Act. The ACE made the determination that there would be "no adverse effect" (letter to SHPO dated September 8, 2015). The Oregon State Historic Preservation Office accepted these reports and concurred that there would be "no adverse effect" from the implementation of the proposed project (letters dated September 21 and September 23, 2015) They affirmed these findings in an email dated April 25, 2016. As I stated in my previous letters, I concur with these findings of "no adverse effect..."

It is my understanding that the ACE has requested additional information from the Confederated Tribes of the Umatilla Reservation (April 25, 2016) regarding "how this proposal may affect cultural resources and/or Tribal treaty rights". It is also my understanding that Oregon State Parks have requested that supplementary cultural resource survey/testing be conducted on Oregon State Parks land. Should either of these requests result in cultural resource concerns, I will review my findings again."

Ross Curtis, SHPO Archaeologist provided a response to the initial cultural resource notice in a letter dated September 23, 2016 that states:

"...We concur that the two sites containing railroad segments...would not be eligible for the National Register because of their condition and poor integrity. The additional information from supplemental shovel probes... verifies the sites do not extend in the current project area and will not be impacted by the proposed project. Avoidance flagging to ensure there are no impacts to ...as proposed in the reports is supported by our office. We agree that the project activities...will likely have no adverse effect on these or any other known archaeological sites..."

Jason Allen, M.A. Historic Preservation Specialist for the SHPO provided a letter dated September 21, 2015 that states:

"We have reviewed the reviewed the revised and supplemental materials...and concur with the following determinations: ...1. Not Eligible, No Effect...2. ...Not Eligible, No Effect...3...Eligible, No Adverse Effect...We therefore concur with the overall finding of no adverse effect for the proposed project..."

Finding: Based on the feedback received from the tribes, SHPO and the Heritage Program Manager, Staff finds the proposed development, will not have an adverse effect to cultural resources and the Cultural Resource Protection Process may conclude.

37. Section 14.500(D) provides the required criteria, evaluation process and information needs necessary for the evaluation of significance. Section 14.500(E) Specifies the evaluation criteria and information needs for the assessment of effect. The archaeologist contracted by the applicant coordinated with National Scenic Area Heritage Program Manager, Marge Dryden to ensure the correct process, evaluation criteria and information needs had been met, consistent with this rule.

38. Section 14.510 provides cultural resource protection requirements for the SMA. It states:

D. This section is applicable to all Federal agencies for new developments and land uses on all Federal lands, federally assisted projects and forest practices. The Forest Service will provide for completing the requirements of this Section for forest practices and National Forest system lands.

C. All projects that are not included for review in B above shall be reviewed under Section 14.500 of this Chapter.

Finding: The proposed development will not occur on federal lands. Consistent with (C), the proposed development was reviewed for compliance with Section 14.500 of this Chapter.

39. Section 14.500(G) provides requirements for the protection of cultural resources discovered after construction begins; Section 14.500(H) provides requirements for the protection of human remains discovered during construction. These procedures are included as a condition of approval in the Notice of Decision. With a condition requiring the current landowner and any successors or heirs to adhere to these procedures, the proposed development is consistent.

Wetlands, Streams, Ponds, Lakes and Other Bodies of Water (GMA)

40. Section 14.600 provides natural resource protection policies, guidelines and requirements for new development in the GMA only. Pursuant to Section 14.600(A)(1), the purpose of this chapter is to (a) achieve no net loss of wetlands, acreage and functions, and (b) increase the quantity and quality of wetlands. Section (A) also provides rules for proper delineation of wetland boundaries, establishes wetland buffer zones, lists uses allowed and relevant approval criteria, and mitigation requirements. Section (B) pertains to the protection of streams, ponds, lakes and other bodies of water. Section (C) provides regulations for wildlife habitat and (D) addresses the protection of rare plants. A similar framework exists in Section 14.610 for natural resource protection in the SMA, and is discussed below in greater detail.

As part of their application (see application Appendix D: Mitigation), the applicant provided a table of wetland and waterbody disturbances to confirm anticipated impacts in the GMA and SMA designations. Information from this table is used below to address resource impacts.

Table 1
Wetland and Water Body Disturbance

Wetland ID	GMA/SMA	Approx. Milepost(s)	Total Wetland/ Waterbody Area (acres)	Open Water Permanent Impacts (acres)	Vegetated Wetland Permanent Impacts (acres)	Total Buffer Zone Impact (acres)
Wetland 1	SMA	71.82 – 71.97	0.61	0.00	0.24	
Lake 1/ Thompson Lake	SMA	71.82 – 71.92	1.59	0.24	0.00	1.61
Wetland 3	SMA	72.21 – 72.22	0.06	0	0	
Wetland 4	SMA	72.24	0.02	0	0	1.73 ¹
Wetland 5	SMA	72.24 – 72.25	0.06	0	0	
Wetland 6	SMA	72.25 – 72.33	0.24	0	0	
Wetland 7	SMA	72.28 – 72.34	0.17	0	0.17	
Wetland 9	SMA	71.46 – 71.51	0.24	0	0	1.59 ¹
Wetland 9B	SMA	71.47 – 71.51	1.78	0	0	
Wetland 11	GMA	70.72 – 70.95	1.15	0.00	0.25	
Lake 11	GMA	70.78 – 70.94	1.86	0.14	0.00	1.01 ¹
Wetland 12	GMA	70.69 – 70.72	0.14	0	0.03	
Wetland 17	GMA	68.55 – 68.57	0.08 ²	0.00	0.06 ²	
Wetland 18	GMA	68.56 – 68.58	0.09 ²	0	0	0.20 ¹
Lake 18	GMA	68.56 – 68.58	1.21 ³	0	0	
Wetland 20	GMA	66.97 – 67.12	0.15	0	0	0.55
Lake 20	GMA	66.97 – 67.12	1.66	0.02	0	
Columbia River/Bonneville Reservoir	GMA/SMA	North of project area for full project length	-	0.00 ³	0	5.58 ⁴
Total Impacts to Wetlands, Waterbodies & Buffers				0.41	0.75	Temp: 3.52 Perm: 8.75

¹ The buffer zones of adjacent wetlands and/or waterbodies overlap in some cases, necessitating buffer disturbance to be reported as a combined acreage.

² A portion of Wetlands 17 and 18 are located within the NSA-designated Urban Area; the total wetland/waterbody and impact areas provided in this table constitute only the portions within the NSA and outside of the designated Urban Area.

³ No permanent disturbance to the Columbia River/Bonneville Reservoir will result from the project; however, approximately 0.01 acres will be temporarily affected during the installation of two culverts proposed to mitigate for potential impacts to fish habitat.

41. Section 14.600(A)(2) provides rules for delineating wetland boundaries, it states:

- a. *The approximate location and extent of wetlands in the Scenic Area is shown on the National Wetlands Inventory (U.S. Fish and Wildlife Service 1987). In addition, the list of hydric soils and the soil survey maps shall be used as an indicator of wetlands.*
- b. *Some wetlands may not be shown on the wetland inventory or soil survey maps. Wetlands that are discovered by the County planning staff during an inspection of a potential site shall be delineated and protected unless the proposed development is clearly sited beyond the wetland buffers as stated in A(3).*
- c. *Determining the exact location of a wetlands boundary shall be the responsibility of the project applicant.*
 - (1) *Wetlands boundaries shall be delineated using the procedures specified in the Corps of Engineers Wetlands Delineation Manual (Wetlands Research Program Technical Report Y-87-1, on-line edition, updated through March 21, 1997)*
 - (2) *All wetlands delineations shall be conducted by a professional who has been trained to use the federal delineation procedures, such as a soil scientist, botanist, or wetlands ecologist.*
- d. *The County may verify the accuracy of, and may render adjustments to, a wetlands boundary delineation.*
- e. *In the event the adjusted boundary delineation is contested by the project applicant, the County shall, at the applicant's expense, obtain professional services to render a final delineation.*

Finding: Appendix E of the application contains a wetland delineation report. It states: “CDM Smith was retained by Union Pacific Railroad (UPRR) to conduct a delineation of wetlands under the jurisdiction of the Army Corps of Engineers (USACE) pursuant to Section 404 of the Clean Water Act. The delineation was conducted to identify potential jurisdictional waters of the United States that occur within the project area for the proposed Second Mainline Track Project in Wasco County, Oregon. CDM Smith conducted a field investigation for wetlands within the proposed project area on October 15-17, 2013. This delineation report documents our findings regarding the occurrence and extent of wetlands located in the project area. This report documents the field investigation, best professional judgment, and conclusions of CDM Smith scientists. However, the jurisdictional determination of wetland boundaries and associated permitting requirements for this region are the responsibility of the Portland District Regulatory Branch of USACE.”

Upon receipt of the application, Staff began coordination with the Army Corps of Engineers, who are also reviewing the proposed development for resource impacts. Pursuant to (b) above, the NSALUDO regulations apply to all of the wetlands identified in the survey (shown in the table above). Army Corps of Engineers resource specialists verified the accuracy of the delineations in the field and confirmed that no revisions were required. Based on this information, Staff finds the professionally prepared wetland delineation to comply with Section 14.600(A)(2).

42. Section 14.600(3) defines the width of wetland buffer zones in the NSA, it states:

- b. The width of wetlands buffer zones shall be based on the dominant vegetation community that exists in a buffer zone.*
- b. The dominant vegetation community in a buffer zone is the vegetation community that covers the most surface area of that portion of the buffer zone that lies between the proposed activity and the affected wetland. Vegetation communities are classified as forest, shrub, or herbaceous.*
 - (1) A forest vegetation community is characterized by trees with an average height equal to or greater than 20 feet, accompanied by a shrub layer; trees must form a canopy cover of at least 40 percent and shrubs must form a canopy cover of at least 40 percent.*
 - (2) A forest community without a shrub component that forms a canopy cover of at least 40 percent shall be considered a shrub vegetation community.*
 - (3) A shrub vegetation community is characterized by shrubs and trees that are greater than 3 feet tall and form a canopy cover of at least 40 percent.*
 - (4) A herbaceous vegetation community is characterized by the presence of herbs, including grass and grasslike plants, forbs, ferns, and nonwoody vines.*
- c. Buffer zones shall be measured outward from a wetlands boundary on a horizontal scale that is perpendicular to the wetlands boundary. The following buffer zone widths shall be required.*
 - (1) Forest communities: 75 feet*
 - (2) Shrub communities: 100 feet*
 - (3) Herbaceous communities: 150 feet*
- d. Except as otherwise allowed, wetlands buffer zones shall be retained in their natural condition.*
- e. When a buffer zone is disturbed by a new use, it shall be replanted with native plant species.*

Finding: The applicant was required to use the information contained within this ordinance to prepare their delineation, conceptual mitigation plan, and final mitigation plan to comply with NSA requirements. The application materials state: "Figure 4-3 includes the wetlands and waterbodies located within the NSA and outside of a designated Urban Area in the vicinity of the project area, with buffer zones delineated pursuant to protocol outlined in NSA-LUDO Sections 14.600 and 14.610." The US Army Corps of Engineers verified the accuracy of the delineation and mitigation plans, as did the National Marine Fisheries Service for an assessment discussed

below for wildlife impacts. Given this information, Staff finds the application materials to be accurate and in compliance with (a) through (c) above.

The proposed development will have impacts to wetlands and wetland buffer zones. As shown in the table above from Appendix D and in the delineations contained within Appendix E, 0.34 acres of vegetated wetlands and 7.34 acres of wetland buffers will be permanently displaced by the proposed development (total of 7.68 acres). Mitigation plans for permanent impacts are discussed below. Section 4.2.5.6 of the Project Narrative states: "Disturbed areas will be restored as closely as practical to their original condition, permanent erosion control measures will be installed as appropriate, and revegetation measures will be implemented in accordance with federal permit requirements. Permanent seeding and stabilization measures will be placed prior to track construction and final stabilization is expected prior to the completion of track construction activities. An ODOT-recommended native grass seed mixture appropriate to the region will be used to revegetate the specified areas. Mitigation associated with disturbance of fish habitat and loss of wetland form and function will be completed in accordance with UPRR's Mitigation Plan, included as Appendix D. This mitigation plan has been prepared to satisfy NSA-LUDO and MSA-MP standards, and has been designed through coordination with NMFS, U.S. Fish and Wildlife Service, and Oregon Department of Fish and Wildlife (ODFW)."

With a condition of approval to require use of the NSA eastern gorge seed mix and revegetation of all temporary impacts to buffer zones with native plant species in the next possible planting season, the proposed development is consistent with this rule.

43. Section 14.600(A)(4) allows for the modifications of serviceable structures in wetlands and wetland buffer zones, subject to approval criteria and additional requirements found in section (5) and (7) below, as well as the remaining sections of this chapter. Section (4) lists the following uses:

c. The modification, expansion, replacement, or reconstruction of serviceable structures, if such actions would not:

(1) Increase the size of an existing structure by more than 100 percent;

(2) Result in a loss of wetlands acreage or functions; and

(3) Intrude further into a wetland or wetlands buffer zone.

New structures shall be considered to be intruding further into a wetland or wetlands buffer zone if any portion of the structure is located closer to the wetland or wetlands buffer zone than the existing structure.

Finding: The proposed rail expansion is a long, linear project along a long linear piece of infrastructure. The railroad currently travels the entire length of Wasco County, the Oregon side of the NSA, and continues in either direction. Given this information, the size of the existing structure will not increase by more than 100 percent. As noted above, the applicant has provided a professionally prepared wetland mitigation plan and habitat rehabilitation plan to achieve a no net loss of wetland acreage or function. Staff finds the use to be consistent with (1) and (2).

Application materials state that there will be permanent displacement of wetlands not currently impacted; the use is therefore inconsistent with (3) and subject to compliance with Section 14.600(A)(6).

- b. The construction of minor water-related recreation structures that are available for public use. Structures in this category shall be limited to boardwalks; trails and paths, provided their surface is not constructed of impervious materials; observation decks; and interpretive aids, such as kiosks and signs.*
- c. The construction of water-dependent structures that are placed on pilings, if the pilings allow unobstructed flow of water and are not placed so close together that they effectively convert an aquatic area to dry land. Structures in this category shall be limited to public and private docks and boat houses, and fish and wildlife management structures that are constructed by federal, state, or tribal resource agencies.*

Finding: The proposed development does not include water related structures available for public use or on pilings. Therefore, guidelines (b) and (c) are not applicable.

44. Section 14.600(A)(6) lists other uses and activities allowed in wetlands and wetland buffer zones, it states:

Except for uses permitted without review in Section 3.100 and 3.180(B) (Open Space) and Modifications to Serviceable Structures and Placement of Minor Water-Dependent and Water-Related Structures in Wetlands as specified in (4) above, other uses authorized by the applicable zoning designation may be allowed in wetlands and wetland buffer zones subject to (7) below, Site Plans, the remaining applicable sections of this Chapter and the following criteria:

- a. The proposed use is water-dependent, or is not water-dependent but has no practicable alternative as determined by E, Practicable Alternative Test.*

Finding: Although the railroad is dependent upon the Columbia River channel through the Cascade Mountain range, it is not a directly water depended use. Consistency with (E) the No Practicable Alternative Test is discussed below.

- b. The proposed use is in the public interest as determined by F, Public Interest Test.*

Finding: Compliance with this provision is discussed below in Finding 77.

- c. Measures will be applied to ensure that the proposed use results in the minimum feasible alteration or destruction of the wetland's functions, existing contour, vegetation, fish and wildlife resources, and hydrology.*

Finding: The application narrative explains that several design changes were made to reduce the scale and therefore the overall impact. Section 3.1.1 of the Project Narrative states:

Alternative A [the alternative reviewed by this report] also implements the following design measures to further avoid and minimize disturbance to sensitive resources:

- *Track Alignment and Centerline Offset Width Reduction. In determining the alignment for the proposed track in the project area, UPRR reduced the centerline offset from 20 feet to 15 feet (the minimum allowable centerline offset) to significantly reduce the project footprint and avoid waters and wetlands to the north and south of the track. On the west end of the project (MP 66.98 to MP 69.38), an alignment to the north of the track was selected because it would have fewer aquatic disturbances, and avoid additional excavation of a tall rock face. On the east end of the project (MP 70.73 to MP 72.35), an alignment primarily to the south of the existing track was selected to avoid direct effects to the Columbia River. The reduction of centerline-track offsets decreased the project footprint by 2.1 acres along the 4.02 miles of new track.*
 - *Embankment Design Minimization. UPRR design standards for track embankments are for a 2:1 horizontal to vertical (H:V) slope, which provides stability to the rail roadbed and incorporates safety considerations for maintenance work along the tracks. Geotechnical design options to steepen the embankment slope (standard 2H:1V slopes to vertical retaining walls) were assessed to reduce project footprint and adjacent aquatic disturbance. Based on site-specific considerations, UPRR selected 1.5H:1V slopes in waters and wetland areas to provide the greatest effective reduction in aquatic disturbance while retaining the safe functioning of the railroad. Riprap/rock fill can provide the steepest slope at 1.5H:1V achievable with natural materials.*
 - *Reduced Access Road and Drainage Ditches. UPRR design standards include construction of a 10-foot-wide access road outside the tracks for ease of operation and maintenance and to construct a 10-foot-wide flat bottom drainage ditch adjacent to the track embankment in cut sections. To reduce the project footprint and associated disturbance, UPRR eliminated the access road in all but one location and reduced the widths of associated drainage ditches where compliant with UPRR-required hydraulic design guidelines. The elimination of the access road and reduced ditch width reduced the potential project footprint by roughly 5.5 acres along the 4.02 miles of new track construction.*
- d. Groundwater and surface-water quality will not be degraded by the proposed use.*

Finding: The applicant has responded to this requirement, stating: “UPRR will avoid impacts to groundwater and surface water quality during construction of the project through implementation of BMPs as well as specific requirements contained within the state and federal permits listed in Table 1-4 of this narrative, which will be obtained prior to the start of project construction. BMPs will include, but not be limited to:

- Areas for fuel storage, refueling, and servicing of construction equipment must be located in an upland location.

- Prior to use, clean all equipment to remove external oil, grease, dirt, or mud.
- Wash sites must be located in upland locations so that dirty wash water does not flow into stream channel or wetlands.
- Erosion control measures will be in place at all times during construction. Construction will not start until all temporary control devices (straw bales, silt fences, etc.) are in place downslope or downstream of project site.”

Based on this information, Staff does not anticipate the construction related activities to degrade the quality groundwater or surface water, and finds the development to be consistent with this rule.

e. Those portions of a proposed use that are not water-dependent or have a practicable alternative will not be located in wetlands or wetlands buffer zones.

Finding: As noted above, and further explained below in (E), the proposed use has no practicable alternative. Because it has no practicable alternative, (e) allows the use, subject to compliance with all applicable regulations in this chapter. The applicant proposes to extend an existing siding to maximize existing infrastructure, has provided information to demonstrate that it is the minimum length to meet the current need and has taken measures to reduce the width of the track by changing angles and materials. Based on the application materials, it appears the development has been minimized to prevent impacts to wetlands and wetland buffer.

f. The proposed use complies with all applicable federal, state, and local laws.

Finding: According to the application materials, and as confirmed by staff participation in agency coordination conference calls, the applicant has prepared application materials with several federal, state and local agencies including the Wasco County Planning Department for NSA review, the U.S. Army Corps of Engineers, the U.S. Forest Service, U.S. National Marine Fisheries Service, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife, Department of State Lands, the Oregon State Water Master, and others. A condition of approval included to remind the applicant that this requirement is applicable during and after construction.

g. Areas that are disturbed during construction of the proposed use will be rehabilitated to the maximum extent practicable.

Finding: Consistent with (g), the applicant has prepared a Wetland Compensation Plan; please see below for more detail. The application materials outline best management practices to be implemented during and after construction activities in several locations, including the following:

The construction schedule will also consider best management practices to minimize potential effects to species and habitats to the maximum extent practicable. Specifically listed on Project Narrative page 4-3:

- *Land clearing will begin between May 15 and June 1, after the end of the rainy season.*

- *Work timing will be coordinated with the biological needs of special-status species. For example, no tree removal or blasting in riparian areas will occur until migratory bird species have completed nesting activities, after August 15 and before April 15, unless biological surveys indicate the absence of nesting.*
- *Vegetation clearing will take advantage of the dry season.*

On page 4-5:

... During non-working hours, this equipment will be parked near the location where it is to be used the next day with consideration for applicable stormwater protection best management practices (BMPs) such as cleaning of equipment and buffers from wetlands and waters for equipment parking.

And, on page 4-6:

- *An Erosion and Sediment Control Plan will be implemented, which will include a variety of erosion control and spill prevention measures.*
- *Erosion control measures from the Construction Stormwater Best Management Practices Manual published by the ODEQ will be implemented at applicable locations based on existing and proposed site topography as well as construction phasing considerations.*
- *A spill prevention plan will be implemented to reduce the risk of a potential hazardous materials spill. The plan will incorporate the following guidelines:...*

Finding: Additional references to the use of best management practices are contained throughout the application materials and mitigation plans. With a condition of approval to require the implementation of these referenced practices, the proposed use will be consistent with (d) above. As explained in Finding #37 above, the application states that the disturbed areas “will be restored as closely as practical to their original condition, permanent erosion control measures will be installed as appropriate, and revegetation measures will be implemented in accordance with federal permit requirements. Permanent seeding and stabilization measures will be placed prior to track construction and final stabilization is expected prior to the completion of track construction activities.”

- h. Unavoidable impacts to wetlands will be offset through the deliberate restoration, creation, or enhancement of wetlands. Wetlands restoration, creation, and enhancement are not alternatives to the guidelines listed above; they shall be used only as a last resort to offset unavoidable wetlands impacts. Wetlands restoration, creation, and enhancement shall be in accordance with Subsection (8) below, Wetlands Compensation Plans.*

The following wetlands restoration, creation, and enhancement guidelines shall apply:

- (1) Impacts to wetlands shall be offset by restoring or creating new wetlands or by enhancing degraded wetlands. Wetlands restoration shall be the preferred alternative.*
- (2) Wetlands restoration, creation, and enhancement projects shall be conducted in accordance with a wetlands compensation plan.*
- (3) Wetlands restoration, creation, and enhancement projects shall use native vegetation.*
- (4) The size of replacement wetlands shall equal or exceed the following ratios. The first number specifies the acreage of wetlands requiring replacement and the second number specifies the acreage of wetlands altered or destroyed.*
 - (a) Restoration: 2:1*
 - (b) Creation: 3:1*
 - (c) Enhancement: 4:1*
- (5) Replacement wetlands shall replicate the functions of the wetland that will be altered or destroyed such that no net loss of wetlands function occurs.*
- (6) Replacement wetlands should replicate the type of wetland that will be altered or destroyed. If this standard is not feasible or practical due to technical constraints, a wetland type of equal or greater benefit may be substituted, provided that no net loss of wetlands functions occurs.*

Finding: According to the application, the project “will result in direct impacts to three delineated wetlands and five buffer zones within designated GMA zones. Measures will be applied to ensure that the project results in the minimum amount of disturbance practicable to the affected wetlands, pursuant to NSA-LUDO Section 14.600 (A)(6), and in accordance with applicable federal permit conditions. These measures will include, but not be limited to, restoration of temporarily disturbed areas to pre-construction conditions to the greatest extent feasible. Permanent wetland impacts will be mitigated through compensatory mitigation, as described in the Mitigation Plan (see Appendix D). Therefore, the project complies with these provisions.”

According to the application (Appendix D page 2), the development will permanently disturb 7.68 acres of wetlands in the GMA. The application states, “Temporary impacts to wetland buffers will be mitigated through onsite, in-kind restoration following construction. There will be no temporary impacts to wetlands.” Because the impacts are predominantly permanent, restoration was not an effective option. The applicant has provided professionally prepared wetland delineation (with habitat functions assessment), conceptual mitigation plan with general mitigation and rehabilitation plans for temporary disturbance sites, and a site specific wetland mitigation plan that includes the creation of a new wetland and wetland buffers

consistent with the ratios identified above (3:1 for creation). The Tooley Lake Mitigation Plan proposes to convert a low elevation agricultural field into a new wetland that specifically addresses habitat values and functions that will be destroyed, and at the ratio required, consistent with (1) through (6) above.

(7) Wetlands restoration, creation, or enhancement should occur within 1,000 feet of the affected wetland. If this guideline is not practicable due to physical or technical constraints, replacement shall occur within the same watershed and as close to the altered or destroyed wetland as practicable.

Finding: A thorough evaluation of potential wetland restoration, creation, and enhancement options occurred over several months and included coordination with the U.S. Army Corps of Engineers, U.S. National Marine Fisheries Service, U.S. Fish and Wildlife, Oregon Fish and Wildlife, the Oregon State Water Master, and Wasco County Planning. Sites within 1,000 feet of the development were either not large enough to absorb the required mitigation ratios (individually or cumulatively), or did not provide an opportunity to mitigate for the same functions lost at the site – and would not have complied with this requirement. Before agreeing to creation, Staff required the applicant to verify no sites for restoration or enhancement capable of complying with these rules were available within the Columbia River watershed. Sites as far as the Sandy River Delta and vernal ponds on the Chenoweth table were explored and discussed. Ultimately, the multi-agency team agreed that of the sites proposed, the Tooley Lake wetland proposal was the most appropriate location for mitigation efforts. The reason for this is in part due to the (1) proximity of the site to the site of disturbance, the Columbia River, and the railroad; (2) existing and available water resources that would provide a self-sustaining feature (once created); and (3) because it seems to be the most "in kind" mitigation option for the habitat function that will be impacted by the proposed development. As proposed, the Tooley Lake wetland creation will occur within the same watershed (the Columbia River watershed) and as close to the altered or destroyed wetland as possible, and is therefore consistent with (7).

(8) Wetlands restoration, creation, and enhancement efforts should be completed before a wetland is altered or destroyed. If it is not practicable to complete all restoration, creation, and enhancement efforts before the wetland is altered or destroyed, these efforts shall be completed before the new use is occupied or used.

Finding: A condition of approval is included to ensure compliance with this requirement.

(9) Five years after a wetland is restored, created, or enhanced at least 75 percent of the replacement vegetation must survive. The project applicant shall monitor the hydrology and vegetation of the replacement wetland and shall take corrective measures to ensure that it conforms with the approved wetlands compensation plan and this guideline.

Finding: The Tooley Lake wetland mitigation plan and Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (see Section 12 of Appendix K) describe a three year monitoring plan that includes annual monitoring, reporting and maintenance to ensure survival

of planted vegetation. A condition of approval is included to ensure that it is implemented for the full five years required by (9) above.

45. Section 14.600(A)(7) contains additional site plan requirements for proposed uses in wetlands or wetland buffer zones. It states:

In addition to the information required in all site plans, site plans for proposed uses in wetlands or wetlands buffer zones shall include: a site plan map prepared at a scale of 1 inch equals 100 feet (1:1,200), or a scale providing greater detail; the exact boundary of the wetland and the wetlands buffer zone; and a description of actions that would alter or destroy the wetland.

Finding: Consistent with this requirement, the application materials included a professionally prepared wetland delineation report with appropriate scale site plan maps and provided sufficient information for the analysis of resource impacts by Staff and partner agencies that provided technical assistance.

46. Section 14.600(A)(8) specifies requirements for wetland compensation plans. It states:

Wetlands compensation plans shall be prepared when a project applicant is required to restore, create, or enhance wetlands. They shall satisfy the following guidelines:

- a. Wetlands compensation plans shall be prepared by a qualified professional.*
- b. The primary responsibility and cost of preparing wetland compensation plans shall be borne by the applicant. If the applicant has no practicable alternative, according to E below, Practicable Alternative Test, to locating within the wetland or wetland buffer area, the Forest Service has agreed to provide assistance in the preparation of the plan, to the greatest extent possible.*
- c. Wetland compensation plans shall provide for land acquisition, construction, maintenance, and monitoring of replacement wetlands.*
- d. Wetlands compensation plans shall include an ecological assessment of the wetland that will be altered or destroyed and the wetland that will be restored, created, or enhanced. This assessment shall include information on flora, fauna, hydrology, and wetlands functions.*
- e. Compensation plans shall also assess the suitability of the proposed site for establishing a replacement, wetland, including a description of the water source and drainage patterns, topography, wildlife habitat opportunities, and value of the existing area to be converted.*
- f. Plan view and cross-sectional, scaled drawings; topographic survey data, including elevations at contour intervals no greater than 1 foot, slope percentages, and final grade elevations; and other technical information shall be provided in sufficient detail to explain and illustrate:*

- (1) *Soil and substrata conditions, grading, and erosion and sediment control needed for wetland construction and long-term survival.*
 - (2) *Planting plans that specify native plant species, quantities, size, spacing, or density; source of plant materials or seeds; timing, season, water, and nutrient requirements for planting; and where appropriate, measures to protect plants from predation.*
 - (3) *Water-quality parameters, water source, water depths, water-control structures, and water-level maintenance practices needed to achieve the necessary hydrologic conditions.*
- g. A 5-year monitoring, maintenance, and replacement program shall be included in all plans. At a minimum, a project applicant shall provide an annual report that documents milestones, successes, problems, and contingency actions. Photographic monitoring stations shall be established and photographs shall be used to monitor the replacement wetland.*

Finding: As noted above, a condition of approval is included to ensure the proposed monitoring plan is implemented for the full five years, consistent with this rule.

- h. A project applicant shall demonstrate sufficient fiscal, technical, and administrative competence to successfully execute a wetlands compensation plan...*

Finding: The applicant has contracted with CH2M Hill and CDM Smith to prepare delineation and mitigation materials in a manner that demonstrates fiscal, technical and administrative competence to successfully execute the proposed wetland compensation plan. Staff considers his binding land use decision, with the recommended conditions of approval, sufficient to ensure the plan is implemented prior to wetland disturbances in the project area.

47. Section 14.600(B) contains provisions for streams, ponds, lakes, and riparian areas. The purposes listed in (B)(1) for this section include: (1) protect water quality, natural drainage, and fish and wildlife habitat of streams, ponds, lakes, and riparian areas; and (2) enhance aquatic and riparian areas. Section 14.600(B)(2) provides guidelines for measuring buffer zones and determining the exact location of the ordinary high water mark, it states:

- d. Buffer zones shall generally be measured landward from the ordinary high water-mark on a horizontal scale that is perpendicular to the ordinary high water-mark. On the main stem of the Columbia River above Bonneville Dam, buffer zones shall be measured landward from the normal pool elevation of the Columbia River. The following buffer widths shall be required:*

- (1) *Streams used by anadromous or resident fish (tributary fish habitat), special streams, intermittent streams that include year-round pools, and perennial streams: 100 feet.*

(2) *Intermittent streams, provided they are not used by anadromous or resident fish: 50 feet.*

(3) *Ponds and lakes:*

(a) *The pond or lake buffer zones shall be based on the dominant vegetation community that exists in a buffer zone.*

(b) *The dominant vegetation community in a buffer zone is the vegetation community that covers the most surface area of that portion of the buffer zone that lies between the proposed activity and the affected pond or lake. Vegetation communities are classified as forest, shrub, or herbaceous.*

(i) *A forest vegetation community is characterized by trees with an average height equal to or greater than 20 feet, accompanied by a shrub layer; trees must form a canopy cover of at least 40 percent and shrubs must form a canopy cover of at least 40 percent.*

(ii) *A forest community without a shrub component that forms a canopy cover of at least 40 percent shall be considered a shrub vegetation community.*

(iii) *A shrub vegetation community is characterized by shrubs and trees that are greater than 3 feet tall and form a canopy cover of at least 40 percent.*

(iv) *A herbaceous vegetation community is characterized by the presence of herbs, including grass and grasslike plants, forbs, ferns, and nonwoody vines.*

(c) *Buffer zones shall be measured outward from a pond or lake boundary on a horizontal scale that is perpendicular to the pond or lake boundary. The following buffer zone widths shall be required.*

(i) *Forest communities: 75 feet*

(ii) *Shrub communities: 100 feet*

(iii) *Herbaceous communities: 150 feet*

(d) *When a buffer zone is disturbed by a new use, it shall be replanted with native plant species.*

b. *Determining the exact location of the ordinary highwater-mark or normal pool elevation shall be the responsibility of the project applicant. The County may verify the accuracy of, and may render adjustments to, an ordinary high water-mark or normal pool delineation. In the event the*

adjusted boundary delineation is contested by the project applicant, the County shall, at the project applicant's expense, obtain professional services to render a final delineation.

- c. *Except as otherwise allowed, buffer zones shall be retained in their natural condition. When a buffer zone is disturbed by a new use, it shall be replanted with native plant species.*

Finding: As explained above, the applicant provided a wetland delineation and mitigation plans prepared by a qualified professional. The delineation identified wetlands and lakes, but no streams. The application narrative states (page 5-75):

“Delineated ponds and lakes and their associated buffers in the project vicinity are described in Table 4-3 and shown in Figure 4-3 in Appendix A, in accordance with NSA-LUDO Section 14.600(B)(2). The vegetation communities surrounding Lakes 11, 17, and 18 delineated in the GMA zones conform to the definition of shrub communities, and therefore are shown with a 100-foot buffer zone. The area between the project area and Lake 20 between MP 66.98 and MP 67.12 consists of previously disturbed, unvegetated area immediately adjacent to the existing mainline track embankment, and therefore does not conform to the vegetation communities defined in this provision.

The Columbia River and its associated buffer zone are delineated based on the boundaries of the GMA Open Water zone, according to geospatial data provided by the CRGC. No streams, special streams, or intermittent streams are located within the project area. Therefore, the project complies with these provisions.

The project will result in impacts to two delineated waterbodies and three waterbody buffer zones within designated GMA zones. Temporary and permanent buffer zone disturbance will be mitigated to the greatest degree feasible through onsite, in-kind restoration following construction, including replanting with native plant species. Buffer areas that are currently unvegetated, including the existing railroad track embankment, will not be revegetated. Detailed restoration measures are described in the Mitigation Plan and the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan, included as Appendixes D and K to this narrative, respectively. Therefore, the project complies with these provisions.”

Finding: As previously noted, staff has coordinated with several natural resource agencies to verify the accuracy of the delineation (including buffers), restoration opportunities, and ability for the proposed mitigation plans to meet the mitigation need. With conditions of approval to require the use of best management practices, restoration where possible, implementation of the proposed mitigation plans, and a five year monitoring plan, Staff finds the proposed development to be consistent with these rules.

- 48. Section 14.600(B)(3) allows limited modifications to existing serviceable structures in aquatic riparian areas, subject to approval criteria. Similar to the finding above for Section 14.600(A)(4), the proposed use does not qualify for this use because it will cause the railroad infrastructure to intrude further into two lakes and three lake buffer zones. Given this information, the proposal is

subject to compliance with (B)(5) *Other Uses and Activities Located in Aquatic and Riparian Areas*, which states:

Except for uses permitted without review in 3.100 and 3.180(B) (Open Space) and modifications to serviceable structures and placement of minor water-dependent and water-related structures in aquatic and riparian areas as specified in (3) above, other uses authorized by the applicable zoning designation may be allowed in aquatic and riparian areas subject to (6) below, Site Plans, the remaining applicable sections of this Chapter, and the following criteria:

- a. The proposed use is water-dependent, or is not water-dependent but has no practicable alternative as determined by E below, Practicable Alternative Test of this section.*
- b. The proposed use is in the public interest as determined by F below, Public Interest Test of this section.*

Finding: Please see Findings 76 and 77 below.

- c. Measures have been applied to ensure that the proposed use results in minimum feasible impacts to water quality, natural drainage, and fish and wildlife habitat of the affected stream, pond, lake and/or buffer zone.*

As a starting point, the following mitigation measures shall be considered when new uses are proposed in streams, ponds, lakes, and buffer zones:

- (1) Construction shall occur during periods when fish and wildlife are least sensitive to disturbance. Work in streams, ponds, and lakes shall be conducted during the periods specified in "Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources" (Oregon Department of Fish and Wildlife 2000) unless otherwise coordinated with and approved by the Oregon Department of Fish and Wildlife.*
- (2) All natural vegetation shall be retained to the greatest extent practicable, including aquatic and riparian vegetation.*
- (3) Nonstructural controls and natural processes shall be used to the greatest extent practicable.*
- (4) Bridges, roads, pipeline and utility corridors, and other water crossings shall be minimized and should serve multiple purposes and properties.*

Finding: As noted in Finding 39 above, the development has been sited and designed to minimize impacts to all hydrologic features and sensitive habitats using nonstructural controls and preserving natural processes to the maximum extent practicable. Where restoration is not possible, offsite mitigation has been proposed. Within the buffer of Appendix D provides information regarding anticipated impacts, and open water mitigation plans. The project narrative defines construction schedules in Section 4.2.1 and states intended compliance with

the timelines set forth by Oregon Department of Fish and Wildlife and taking advantage of the dry season. With conditions to use best management practices during construction, retain natural vegetation to the greatest extent practicable, and abide by the ODFW timing of water work requirements, Staff finds the proposed development to be consistent with these rules.

(5) Stream channels shall not be placed in culverts unless absolutely necessary for property access. Bridges are preferred for water crossings to reduce disruption to streams, ponds, lakes, and their banks. When culverts are necessary, oversized culverts with open bottoms that maintain the channel's width and grade should be used.

Finding: No streams are proposed to be placed in culverts. Several culverts connecting existing lakes to the Columbia River will be extended to ensure the wider ballast does not impede water flow or fish passage. The mitigation also plan includes the placement of two new culverts at Thompsons Lake (in the SMA) to improve fish passage and the overall habitat function of this feature. The changes to culverts have been coordinated with several federal and state natural resource agencies to ensure habitat is retained or improved. Based on this information, staff finds the proposed development to be consistent with this rule.

(6) Temporary and permanent control measures shall be applied to minimize erosion and sedimentation when riparian areas are disturbed, including slope netting berms and ditches, tree protection, sediment barriers, infiltration systems, and culverts.

Finding: Please see Finding 44.

49. Section 14.600(B)(5)(d) requires the use not to degrade quality of groundwater or surface-water. The application narrative states (page 5-78):

UPRR will avoid disturbance to groundwater and surface water quality during construction of the project through implementation of BMPs as well as requirements contained in the state and federal permits listed in Table 1-4, which will be obtained prior to the start of project construction. BMPs will include, but not be limited to:

- Areas for fuel storage, refueling, and servicing of construction equipment must be located in an upland location.*
- Prior to use, clean all equipment to remove external oil, grease, dirt, or mud.*
- Wash sites must be located in upland locations so that dirty wash water does not flow into stream channel or wetlands.*

Erosion control measures will be in place at all times during construction. Construction will not start until all temporary control devices (straw bales, silt fences, etc.) are in place downslope or downstream of project site. Therefore, the project complies with this provision.

Finding: With a condition of approval to implement the proposed best management practices, conceptual mitigation plan, habitat protection and rehabilitation plan, and the Tooley Lake mitigation plan, Staff does not believe the proposed use will have unduly amounts of erosion or sedimentation and therefore will not degrade the quality of groundwater or surface water, consistent with this rule.

50. Section 14.600(B)(5)(e) states: "Those portions of a proposed use that are not water-dependent or have a practicable alternative will be located outside of stream, pond, and lake buffer zones." The applicant provided the following statement: "...the location of the existing railroad depends directly on proximity to the Columbia River. Furthermore, UPRR demonstrates in its finding to NSA-LUDO Section 14.600(E) below that the project has no practicable alternative that would result in fewer impacts to natural resources. Due to the nature of the railroad as a pre-existing, interstate transportation system, there are no portions of the proposed project which do not meet these criteria. Therefore, the project complies with this provision."

Finding: The development is not directly water dependent, but does rely on the Columbia River Gorge for passage through the Cascade Mountain range. There is no other at-grade passage, making it difficult to have any other practicable alternative that would avoid hydrologic features. Staff required an Alternatives Analysis for application completeness and agrees that the proposed alternative minimizes impacts to sensitive resources to the maximum extent practicable, consistent with this rule.

51. Section 14.600(B)(5)(f) require the use to comply with all applicable federal state and local laws. As explained in Finding 39 on page 69 above, staff finds the application to be consistent with this requirement.
52. Section 14.600(B)(g) provides rehabilitation and enhancement standards that apply to unavoidable aquatic and riparian areas impacted by development. It states:

Unavoidable impacts to aquatic and riparian areas will be offset through rehabilitation and enhancement.

Rehabilitation and enhancement shall achieve no net loss of water quality, natural drainage, and fish and wildlife habitat of the affected stream, pond, lake, and/or buffer zone. When a project area has been disturbed in the past it shall be rehabilitated to its natural condition to the maximum extent practicable.

When a project area cannot be completely rehabilitated, such as when a boat launch permanently displaces aquatic and riparian areas, enhancement shall also be required.

The following rehabilitation and enhancement standards shall apply:

- (1) Rehabilitation and enhancement projects shall be conducted in accordance with a rehabilitation and enhancement plan.*
- (2) Natural hydrologic conditions shall be replicated, including current patterns, circulation, velocity, volume, and normal water fluctuation.*

- (3) Natural stream channel and shoreline dimensions shall be replicated, including depth, width, length, cross-sectional profile, and gradient.*
- (4) The bed of the affected aquatic area shall be rehabilitated with identical or similar materials.*
- (5) Riparian areas shall be rehabilitated to their original configuration, including slope and contour.*
- (6) Fish and wildlife habitat features shall be replicated, including pool-riffle ratios, substrata, and structures. Structures include large woody debris and boulders.*
- (7) Stream channels and banks, shorelines, and riparian areas shall be replanted with native plant species that replicate the original vegetation community.*
- (8) Rehabilitation and enhancement efforts shall be completed no later than 90 days after the aquatic area or buffer zone has been altered or destroyed, or as soon thereafter as is practicable.*
- (9) Three years after an aquatic area or buffer zone is rehabilitated or enhanced, at least 75 percent of the replacement vegetation must survive. The project applicant shall monitor the replacement vegetation and take corrective measures to meet this standard.*

Finding: As previously explained, the applicant provided several mitigation strategies prepared by a qualified professional, designed to comply with the NSALUDO and several other federal and state natural resource regulatory requirements. The application narrative, Appendix D and K, and the Tooley Lake mitigation plan provide sufficient information to demonstrate compliance with Section 14.600(B)(5). To comply with Section 14.600(A) above, conditions of approval are included in the staff recommendation that exceed the requirements of (8) and (9), and instead require a five year monitoring plan and that the creation of the new water feature prior to any impacts at existing features. With conditions, staff finds the application to be consistent with this rule.

53. Section 14.600(B)(6) contains additional site plan requirements, similar to Section 14.600(A)(7) above.

Finding: Consistent with this requirement, the application materials included a professionally prepared delineation report with appropriate scale site plan maps, providing sufficient information for the analysis of resource impacts by Staff and partner agencies that provided technical assistance.

54. Section 14.600(B)(7) provides standards for rehabilitation and enhancement plans:

Rehabilitation and enhancement plans shall be prepared when a project applicant is required to rehabilitate or enhance a stream, pond, lake, and/or buffer zone. They shall satisfy the following standards:

- a. *Rehabilitation and enhancement plans shall be primarily the responsibility of the applicant. If the applicant has no practicable alternative, according to E below, Practicable Alternative Test, to locating within the stream, pond, lake, riparian zone, or buffer area, the Forest Service has agreed to provide assistance in the preparation of the plan, to the greatest extent possible.*
- b. *Rehabilitation and enhancement plans shall be prepared by qualified professionals, such as fish or wildlife biologists.*
- c. *All plans shall include an assessment of the physical characteristics and natural functions of the affected stream, pond, lake, and/or buffer zone. This assessment shall include hydrology, flora, and fauna.*
- d. *Plan view and cross-sectional, scaled drawings; topographic survey data, including elevations at contour intervals of at least 2 feet, slope percentages, and final grade elevations; and other technical information shall be provided in sufficient detail to explain and illustrate:*
 - (1) *Soil and substrata conditions, grading and excavation, and erosion and sediment control needed to successfully rehabilitate and enhance the stream, pond, lake, and buffer zone.*
 - (2) *Planting plans that specify native plant species, quantities, size, spacing, or density; source of plant materials or seeds; timing, season, water, and nutrient requirements for planting; and where appropriate, measures to protect plants from predation.*
 - (3) *Water-quality parameters, construction techniques, management measures, and design specifications needed to maintain hydrologic conditions and water quality.*
- e. *A 3-year monitoring, maintenance, and replacement program shall be included in all rehabilitation and enhancement plans. At a minimum, a project applicant shall prepare an annual report that documents milestones, successes, problems, and contingency actions. Photographic monitoring shall be used to monitor all rehabilitation and enhancement efforts.*
- f. *A project applicant shall demonstrate sufficient fiscal, administrative, and technical competence to successfully execute and monitor a rehabilitation and enhancement plan.*

Finding: The proposed development will impact lake and lake buffers within the project area. As noted above in Finding 47, the applicant provided several mitigation strategies prepared by a qualified professional, designed to comply with the NSALUDO and several other federal and state natural resource regulatory requirements. The application narrative, Appendix D and K, and the Tooley Lake mitigation plan provide sufficient information to demonstrate compliance with Section 14.600(B)(7), including the required information listed above. To comply with

Section 14.600(A), conditions of approval are included in the staff recommendation that exceed the requirements of (e), and instead require a five year monitoring plan. With conditions, staff finds the application to be consistent with this rule. In preparation of the application materials provided, staff finds the applicant has demonstrated sufficient fiscal, administrative and technical competence to successfully execute and monitor the mitigation plan, consistent with this rule.

Wetlands, Streams, Ponds, Lakes and Other Bodies of Water (SMA)

55. Section 14.610 addresses natural resources in the SMA. Section 14.610(A) provides resource protection requirements for water resources. Section 610(A)(1) states the purpose of this chapter is to protect and enhance the quantity and quality of water resources and their functions. Section 14.610(A)(2) identifies requirements for delineations and establishing buffers. It states:

Buffer zones shall be measured outward from the bank full flow boundary for streams, the high water mark for ponds and lakes, the normal pool elevation for the Columbia River, and the wetland delineation boundary for wetlands on a horizontal scale that is perpendicular to the wetlands, stream, pond or lake boundary. On the main stem of the Columbia River above Bonneville Dam, buffer zones shall be measured landward from the normal pool elevation of the Columbia River. The following buffer zone widths shall be required:

- (a) A minimum 200 foot buffer on each wetland, pond, lake, and each bank of a perennial or fish bearing stream, some of which can be intermittent.*

Finding: On page 5-94, the application materials state: “Delineated wetlands, ponds, lakes, and riparian areas and their associated 200-foot buffers in the project vicinity within the SMA are described in Table 4-3 and shown in Figure 4-3 in Appendix A, in accordance with NSA-LUDO Section 14.610(A)(2). The project will result in unavoidable impacts to three delineated wetlands or waterbodies, and nine wetland or waterbodies buffer zones within designated SMA zones. Temporary waterbody impacts will be mitigated through onsite, in-kind restoration following construction. Permanent wetland and waterbody impacts will be mitigated through compensatory mitigation, as described in the Mitigation Plan, included as Appendix D to this narrative. The final Mitigation Plan will satisfy all requirements of NSA-LUDO Section 14.610(E). Therefore, the project complies with these provisions.” Staff finds that the delineation report includes the appropriate buffers identified by this rule, and is therefore consistent.

- (b) A 50-foot buffer zone along each bank of intermittent (including ephemeral), non-fish bearing streams.*

Finding: As proposed, no streams exist within the vicinity of the proposed development. Streams do exist in the UA of Mosier but the buffers do not extend into the GMA or SMA and are therefore not subject to this review.

- (c) Maintenance, repair, reconstruction and realignment of roads and railroads within their rights-of-way shall be exempted from the wetlands and riparian guidelines upon demonstration of all of the following:*

- i. *The wetland within the right-of-way is a drainage ditch not part of a larger wetland outside of the right-of-way.*
- ii. *The wetland is not critical habitat.*
- iii. *Proposed activities within the right-of-way would not adversely affect a wetland adjacent to the right-of-way.*

Finding: Several ditches located within the railroad right of way will be improved by the proposed development to improve drainage and decrease erosion risks. The application also includes the creation of trackside ditches, to move storm waters away from the track. The wetland delineation report was prepared by a qualified professional, using the NSA LUDO as a guide to address these requirements as well as other applicable federal and state natural resource protection requirements. Based on the provided documents and discussions with partner agencies, staff concludes that all wetlands that do not qualify for the exemption listed above, are contained within the delineation report and any impacts are proposed to be mitigated, as indicated in Appendix D and K, and the Tooley Lake mitigation plan.

56. Section 14.610(A)(3), (4), (5) and (6) provide instances in which buffer zones can be modified, they state:

(3) The buffer width shall be increased for the following:

- (a) When the channel migration zone exceeds the recommended buffer width, the buffer width shall extend to the outer edge of the channel migration zone.*
- (b) When the frequently flooded area exceeds the recommended riparian buffer zone width, the buffer width shall be extended to the outer edge of the frequently flooded area.*
- (c) When an erosion or landslide hazard area exceeds the recommended width of the buffer, the buffer width shall be extended to include the hazard area.*

(4) Buffer zones can be reconfigured if a project applicant demonstrates all of the following:

- (a) the integrity and function of the buffer zones is maintained,*
- (b) the total buffer area on the development proposal is not decreased,*
- (c) the width reduction shall not occur within another buffer, and*
- (d) the buffer zone width is not reduced more than 50% at any particular location. Such features as intervening topography, vegetation, man made features, natural plant or wildlife habitat boundaries, and flood plain characteristics could be considered.*

(5) Requests to reconfigure buffer zones shall be considered if an appropriate professional (botanist, plant ecologist, wildlife biologist, or hydrologist), hired by the project applicant

(a) identifies the precise location of the sensitive wildlife/plant or water resource,

(b) describes the biology of the sensitive wildlife/plant or hydrologic condition of the water resource, and

(c) demonstrates that the proposed use will not have any negative effects, either direct or indirect, on the affected wildlife/plant and their surrounding habitat that is vital to their long-term survival or water resource and its long term function.

(6) The County shall submit all requests to re-configure sensitive wildlife/plant or water resource buffers to the Forest Service and the appropriate state agencies for review. All written comments shall be included in the project file. Based on the comments from the state and federal agencies, the County will make a final decision on whether the reconfigured buffer zones are justified. If the final decision contradicts the comments submitted by the federal and state agencies, the County shall justify how it reached an opposing conclusion.

Finding: No requests have been made by the applicant or natural resource partner agencies involved in the review of the provided application materials, which included the U.S. Army Corps of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and the Oregon Department of Fish and Wildlife. Staff concludes the 200-foot buffer applies to the bodies of water located within the vicinity of the project area (in the SMA).

57. Section 14.610(A)(2)(b) requires any buffer zone disturbance to be replanted with only native species found within the Columbia River Gorge. The proposed mitigation plans included planting plans and seed mixes of native species that were reviewed and acknowledged by the partner agencies listed above. No changes were requested however Staff is recommending a condition of approval that the eastern gorge seed mix provided by the Forest Service be used instead of the ODOT mix referenced in the application. Staff concludes the mitigation plans and best management practices described in the application materials are consistent with this requirement.

58. Section 14.610(2)(c) through (f) state that the applicant is responsible for identifying all water resource boundaries and buffers (c), and provides delineation requirements. It states:

d. Wetlands Boundaries shall be delineated using the following:

(1) The approximate location and extent of wetlands in the Scenic Area is shown on the National Wetlands Inventory (U. S. Department of the Interior 1987). In addition, the list of hydric soils and the soil survey maps shall be used as an indicator of wetlands.

- (2) *Some wetlands may not be shown on the wetlands inventory or soil survey maps. Wetlands that are discovered by the local planning staff during an inspection of a potential project site shall be delineated and protected.*
- (3) *The project applicant shall be responsible for determining the exact location of a wetlands boundary. Wetlands boundaries shall be delineated using the procedures specified in the '1987 Corps of Engineers Wetland Delineation Manual (on-line Edition)'.*
- (4) *All wetlands delineations shall be conducted by a professional who has been trained to use the federal delineation procedures, such as a soil scientist, botanist, or wetlands ecologist.*
- e. *Stream, pond, and lake boundaries shall be delineated using the bank full flow boundary for streams and the high water mark for ponds and lakes. The project applicant shall be responsible for determining the exact location of the appropriate boundary for the water resource.*
- f. *The County may verify the accuracy of, and render adjustments to, a bank full flow, high water mark, normal pool elevation (for the Columbia River), or wetland boundary delineation. If the adjusted boundary is contested by the project applicant, the County shall obtain professional services, at the project*

Finding: As noted throughout this report, the application materials included a professionally prepared wetland delineation, a list of best management practices to be used during construction, a conceptual mitigation plan, a habitat protection and rehabilitation plan, and a compensatory mitigation plan that will create a new feature adjacent to Tooley Lake. All of these documents were shared and discussed with the partner agencies listed above to ensure all resources were adequately documented using the appropriate methodologies, assessed for impacts, and proposed for mitigation where necessary. Staff finds the application materials contain accurate wetland boundaries, consistent with this requirement.

59. Section 14.610(A)(2)(g) states:

Buffer zones shall be undisturbed unless the following criteria have been satisfied:

- (1) *The proposed use must have no practicable alternative as determined by the practicable alternative test.*

Those portions of a proposed use that have a practicable alternative will not be located in wetlands, stream, pond, lake, and riparian areas and/or their buffer zone.

Finding: The proposed development relies on the location of the existing railroad and the Columbia River Gorge as the only at grade passage through the Cascade Mountains; there is no portion of the project that could have an alternative location and still meet the project need. As noted above, an Alternatives Analysis was prepared to verify the proposed development has

been sited and designed to minimize unavoidable impacts to sensitive resources and buffers. Staff finds the proposed development to be consistent with this requirement.

- (2) Filling and draining of wetlands shall be prohibited with exceptions related to public safety or restoration/enhancement activities as permitted when all of the following criteria have been met:*
 - (a) A documented public safety hazard exists or a restoration/ enhancement project exists that would benefit the public and is corrected or achieved only by impacting the wetland in question, and*
 - (b) Impacts to the wetland must be the last possible documented alternative in fixing the public safety concern or completing the restoration/enhancement project, and*
 - (c) The proposed project minimizes the impacts to the wetland.*
- (5) [(3)] Unavoidable impacts to wetlands and aquatic and riparian areas and their buffer zones shall be offset by deliberate restoration and enhancement or creation (wetlands only) measures as required by the completion of a Mitigation Plan as described in E below.*

Finding: The applicant provided the following statement in response to the criteria: "...UPRR notes that idling trains tend to attract trespassers. Thus, by reducing (if not eliminating) the time that trains idle at this location, the project will increase public safety. Also, as described in the finding in response to NSA-LUDO Section 14.610(E), the project will enhance existing degraded wetlands and mitigate for project-related disturbance. Therefore, the project complies with these provisions."

The application materials describe the perceived safety of slow and idling trains as a public safety hazard that currently exists because people continue to trespass informally, and dangerously, for river access. In the Scenic Area, access to the Columbia River is typically related to treaty tribe fishing practices and public recreation uses. The project is not a restoration or enhancement project as proposed or defined by the NSA LUDO. However, as required below to mitigate impacts to treaty rights identified by the Confederated Tribes of the Umatilla Indian Reservation, and established recreation sites identified by Oregon State Parks, Staff is recommending conditions of approval to require safe crossings in several locations. The crossings will mitigate impacts by providing safe crossings, and thus enhancing treaty rights protections and recreation access. Coupled with the development of safe crossings, staff agrees that a reduction in idling trains could improve the public safety concern and be consistent with this requirement.

As noted above, the application materials include an accurate delineation of potential impacts and several strategies for rehabilitation of temporary impacts, improvements of fish passage and habitat, and offsite mitigation to create a new wetland feature that can replace the habitat values that will be lost within the project area. As proposed and conditioned, the development is consistent with Section 14.610(A)(2)(g).

Wildlife Habitat (GMA)

60. Section 14.600(C) provides wildlife habitat resource regulations; Section (C)(1) states the purpose of this chapter is to:

- e. *Ensure that new uses do not adversely affect sensitive wildlife areas and sites.*
- b. *"Sensitive wildlife areas" means the 17 land and water areas that are included in the wildlife inventory of the Management Plan.*

"Sensitive wildlife sites" is used here in a generic sense to refer to sites that are used by species that are:

- (1) *Listed as endangered or threatened pursuant to federal or state endangered species acts,*
- (2) *Listed as sensitive by the Oregon Fish and Wildlife Commission, or*
- (3) *Considered to be of special interest to the public, limited to great blue heron, osprey, mountain goat, golden eagle, and prairie falcon.*

- c. *Enhance wildlife habitat that has been altered or destroyed by past uses.*

Finding: The application included a professionally prepared survey of sensitive wildlife and rare plant populations. The survey identified several sensitive wildlife areas, as shown in Table 4 of Appendix J, Plant Survey and Habitat Mapping Report includes the following table:

TABLE 4

Sensitive Wildlife Areas and Sites Mapped within the Project Area

Sensitive Wildlife Area	CRGC Habitat Inventory Mapping	Habitat within Project Area ¹ (acres)	Project Area within Buffer Zone (acres)
Deer and elk winter range	Big Game Turkey		
Elk habitat	Big Game Turkey	0.02 ²	
Turkey Habitat	Big Game Turkey		5.95 ²
Waterfowl Area	Shallow Water - Waterfowl	0.06	
Shallow water fish habitat (Columbia River)	Shallow Water/ Shallow Water Waterfowl	---	
Waterfowl Area	Special Habitat - Waterfowl	---	

¹ Project area calculations include the proposed area of disturbance within existing UPRR ROW, the proposed ROW acquisition area, and the temporary construction easements.

² Sensitive wildlife areas and sites and their buffer zones overlap in several cases, necessitating disturbance to be reported as a combined acreage.

Source: Wasco County National Scenic Area Land Use Development Ordinance (Wasco County, 2010)

61. Section 14.600(C)(2) provides approval criteria for new fences in deer and elk winter range. Temporary silt fences will be used during construction to prevent erosion, and existing guardrail will be replaced as necessary, but no new permanent fences are proposed by this application. Given this information, staff concludes that this rule is not applicable.
62. Section 14.600(C)(3) allows uses within 1,000 feet of sensitive wildlife areas or sites subject to (C)(4) for additional site plan requirements and the remaining applicable portions of this chapter. It states:
- a. Uses that are proposed within 1,000 feet of a sensitive wildlife area or site shall be reviewed by the Oregon Department of Fish and Wildlife.*
 - (1) The approximate locations of sensitive wildlife areas and sites are shown in the wildlife inventory.*
 - (2) State wildlife biologists will help to determine if a new use would adversely affect a sensitive wildlife area or site.*
 - b. The Site plan shall be submitted to the Oregon Department of Fish and Wildlife by the County. State wildlife biologists will review the site plan and their field survey records. They will:*
 - (1) Identify/verify the precise location of the wildlife area or site,*
 - (2) Ascertain whether the wildlife area or site is active or abandoned,*
 - (3) Determine if the proposed use may compromise the integrity of the wildlife area or site or occur during the time of the year when wildlife species are sensitive to disturbance, such as nesting or rearing seasons, and*
 - (4) In some instances, state wildlife biologists may conduct field surveys to verify the wildlife inventory and assess the potential effects of a proposed use.*

Finding: The applicant provided a Plant Survey and Wildlife Habitat Mapping Report (Appendix J) that states: "CH2M HILL conducted special-status plant surveys and mapped existing vegetation communities in support of the project to identify potential populations of special-status species or priority habitats within and immediately adjacent to the proposed construction corridor. The project will avoid sensitive populations and priority habitats to the greatest extent possible."

According to the Wasco County natural resource inventories provided by the State and the Columbia River Gorge Commission, and the results of the survey and mapping report, the proposed development will occur within 1,000 feet of deer and elk winter range, wild turkey range, shallow water habitat, waterfowl habitat areas. On February 20, 2016, Staff provided the application and Wildlife Mapping Report to Rod French, Mid-Columbia District Fish Biologist, and Jeremy Thompson, Wildlife Biologist, at the Oregon Department of Fish and Wildlife.

- c. The following factors may be considered when site plans are reviewed:*

- (1) *Biology of the affected wildlife species.*
 - (2) *Published guidelines regarding the protection and management of the affected wildlife species. The Oregon Department of Forestry has prepared technical papers that include management guidelines for osprey and great blue heron.*
 - (3) *Physical characteristics of the subject parcel and vicinity, including topography and vegetation.*
 - (4) *Historic, current, and proposed uses in the vicinity of the sensitive wildlife area or site.*
 - (5) *Existing condition of the wildlife area or site and the surrounding habitat and the useful life of the area or site.*
- d. *The wildlife protection process may terminate if the County, in consultation with the state wildlife agency, determines:*
- (1) *The sensitive wildlife area or site is not active, or*
 - (2) *The proposed use would not compromise the integrity of the wildlife area or site or occur during the time of the year when wildlife species are sensitive to disturbance.*
- e. *If the County, in consultation with the State wildlife agency, determines that the proposed use would have only minor effects on the wildlife area or site that could be eliminated through mitigation measures recommended by the state wildlife biologist, or by simply modifying the site plan or regulating the timing of new uses:*
- (1) *A letter shall be sent to the project applicant that describes the effects and measures needed to eliminate them.*
 - (2) *If the project applicant accepts these recommendations, the County will incorporate them into its development review order, and*
 - (3) *The wildlife protection process may conclude.*

Finding: On March 14, 2016, Rod French responded to Staff by email:

“The ODFW supports the UPRR conceptual mitigation plan for their Second Mainline Track Project. As you are aware, ODFW along with NOAA Fisheries staff, has had considerable coordination in the development, and support the open water mitigation plan for Thompsons Lake. The Wetland Mitigation Plan, including the Tooley Lake mitigation site, while less developed than the open water plan, is also supported by ODFW.

We request that applicant work with ODFW, and NOAA Fisheries on developing in-water timing guidelines for all proposed work in Columbia River Tributaries, and the culvert work associated with Thompsons Lake.

Thanks for the opportunity to comment.

*Rod A. French
Mid-Columbia District Fish Biologist"*

Mr. French later clarified by email that the in-water timing guidelines had already been developed in the manner he requested and that no additional work was required. Based on this information, staff concludes that the proposed mitigation plans included with this application will offset any known or unknown impacts to sensitive wildlife habitat areas in the GMA, consistent with this rule.

63. Sections 14.600(C)(4) Site Plans and Field Surveys and (5) Wildlife Management Plans are not addressed in detail because the wildlife protection process concluded in (3) above. However, it is worth noting that the applicants were required to prepare detailed site plans and field surveys for completeness of a large-scale application. The surveys were conducted by qualified professionals and their inventory included sensitive plants, wildlife, critical habitat areas and a mapped inventory of existing trees. The report provides the following conclusions and recommendations:

"The surveys identified 134 plant species and 3 special-status plant species. The surveys identified five general habitat types that have the potential to support 22 special-status wildlife species. Within those habitats, the survey identified 7.35 acres of priority habitats including riparian, wetland, cliffs, dunes, talus, and oak woodland within the proposed project grading limits. These priority habitats have the potential to support 16 special-status terrestrial wildlife species. The surveys confirmed the presence of six Sensitive Wildlife Areas. These areas may support deer, elk, turkey, peregrine falcon, fish, and waterfowl. To the extent practicable, special-status species and priority habitats will be avoided.

A Protection, Management, Rehabilitation, & Mitigation Plan has been prepared to address unavoidable impacts to special-status plant species and their buffer zones, priority habitats, and special-status terrestrial wildlife species. The proposed project will avoid and/or minimize impacts to special-status plant species or habitats to the extent practicable during construction as follows:

- Avoid areas of identified special-status plant populations to the maximum extent practicable.*
- Where possible, avoid or minimize impacts to priority habitats.*
- Implement micrositeing slight relocations of proposed project facilities to avoid special-status plant populations if practicable.*
- Implement weed control procedures to prevent spread of noxious weeds to native plant habitats.*
- Implement all appropriate best management practices as outlined in the Protection and Rehabilitation Plan."*

Finding: As required for the wetlands mitigation and below for rare plants mitigation, Staff recommends a condition of approval to implement all of the mitigation plans and best management practices proposed by the applicant.

Rare Plants (GMA)

64. Section 14.600(D) provides resource protections for rare plants in the GMA. The purpose statements include:

a. Ensure that new uses do not adversely affect plant species that are, according to lists kept current by the Gorge Commission:

(1) endemic to the Columbia River Gorge and vicinity,

(2) listed as endangered or threatened pursuant to federal or state endangered species acts, or

(3) listed as endangered or threatened on list (1) or list (2), by the Oregon Natural Heritage Program. (For brevity, these species will be referred to as "sensitive" plant species.)

b. Encourage the protection of plant species that are classified "Review" {list 3}, or "Watch" {list 4} by the Oregon Natural Heritage Program.

c. Enhance the natural habitat of rare plant species.

Finding: As noted above in Finding 58, the field survey provided by the applicant documented the occurrence of 134 plant species total, and 3 special-status plant species. Wasco County natural resource inventories provided by the Gorge Commission and the Oregon Biodiversity Information Center (ORBIC), indicate that the up to 7 special status plant species may be within 1,000 feet of the proposed development (note: plant names withheld from this report to reduce risk of vandalism and other forms of intentional resource damage).

65. Section 14.600(D)(2) defines sensitive plant buffer zones, it states:

f. A 200 foot buffer zone shall be maintained around sensitive plants. Buffer zones shall remain in an undisturbed, natural condition.

b. Buffer zones may be reduced if a project applicant demonstrates that intervening topography, vegetation, manmade features, or natural plant habitat boundaries negate the need for a 200 foot radius. Under no circumstances shall the buffer zone be less than 25 feet.

Finding: According to the survey provided by the applicant, development will occur within the 200-foot buffer of sensitive plants and in some cases remove or relocate the plants. The application narrative states (on page 5-86): "All efforts will be made to avoid disturbance to special-status species and priority habitats. If disturbance cannot be avoided, efforts will be employed to minimize disturbance to the maximum extent practicable. A Sensitive Species and

Wildlife Habitat Protection and Rehabilitation Plan has been prepared to address unavoidable impacts to special-status plant species and their buffer zones, as well as priority habitats in the GMA (see Appendix J).” A variance request to this buffer is addressed on page 35 for Chapter 6.

- c. *Requests to reduce buffer zones shall be considered if a professional botanist or plant ecologist hired by the project applicant:*
 - (1) *identifies the precise location of the sensitive plants,*
 - (2) *describes the biology of the sensitive plants, and*
 - (3) *demonstrates that the proposed use will not have any negative effects, either direct or indirect, on the affected plants and the surrounding habitat that is vital to their long-term survival.*
 - (4) *All requests shall be prepared as a written report. Published literature regarding the biology of the affected plants and recommendations regarding their protection and management shall be cited. The report shall include detailed maps and photographs.*
- d. *The County shall submit all requests to reduce sensitive plant species buffer zones to the Oregon Natural Heritage Program.*
 - (1) *The state heritage program will have 20 days from the date that such a request is mailed to submit written comments to the County Planning Office.*
 - (2) *The County shall record and address any written comments submitted by the state heritage program in its development review order.*

Finding: As part of their request for a variance to the buffer requirements, the applicant provided surveys and recommendations prepared by qualified professionals: Plant Survey and Habitat Mapping Report (Appendix J), Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (Appendix K), and wetland mitigation strategies that overlap geographically. On February 20, 2016, Staff provided the surveys and reports to Sue Vrilakas, Botanist and Data Manager for ORBIC and Robin Dobson, Botanist for the Forest Service National Scenic Area Office.

Sue Vrilakas responded to Staff by email on April 4, 2016 and provided the following comment:

“Of the 3 rare plants that will be impacted, I am only really concerned with the [redacted for resource protection] and then for only 1 plant. It sounds like they will avoid if possible or transplant if not. When they built the “new” locks for Bonneville Dam (must be about 30+ years ago) they had to transplant the [redacted], and as I recall, the plants did OK. They used mud and slingshots to plaster the plants against their new home, a high cliff wall.

Staff requested confirmation to which Ms. Vrilakas responded on April 6, 2016:

"Yes, I'm comfortable with their plans."

Robin Dobson did not respond to the review request. Robin Shoal, the Natural Resources Office for the Forest Service National Scenic Area Office provided comment regarding rare plants and priority habitats in the SMA. Ms. Shoal's comments are included below.

(3) Based on the comments from the state heritage program, the County will make a final decision on whether the reduced buffer zone is justified. If the final decision contradicts the comments submitted by the state heritage program, the local government shall justify how it reached an opposing conclusion.

Finding: Based on the extensive survey and mitigation plans that have been coordinated with several federal and state natural resource protection agencies, and the level of comfort exhibited by Ms. Vrilakas (ORBIC equivalent to the state heritage program manager), staff recommends a variance for reduced plant buffers as specified in the applicants proposal - in the GMA. The recommendation is consistent with the comments received by the state heritage program and thus consistent with this rule.

66. Section 14.600(D)(3) lists uses and activities permitted within 1,000 feet of sensitive plants:

Except for uses permitted without review in Section 3.100 and 3.180(B) (Open Space) uses and activities authorized by the applicable zoning designation may be allowed within 1,000 feet of a sensitive plant subject to (4) below, Site Plans and Field Surveys, the remaining applicable sections of this Chapter and the following criteria:

a. Uses that are proposed within 1,000 feet of a sensitive plant shall be reviewed by the Oregon Natural Heritage Program.

(1) The approximate locations of sensitive plants are shown in the rare plant species inventory.

(2) State heritage staffs will help determine if a new use would invade the buffer zone of sensitive plants.

b. Site plans shall be submitted to the State Natural Heritage Program by the County.

(1) The State Heritage staff will review the site plan and their field survey records.

(2) The State Heritage Office will identify the precise location of the affected plants and delineate a 200 foot buffer zone on the project applicant's site plan.

(3) If the field survey records of the state heritage program are inadequate, the project applicant shall hire a person with recognized expertise in botany or plant ecology to ascertain the precise location of the affected plants.

- c. The rare plant protection process may conclude if the local government, in consultation with the State Heritage Program, determines that the proposed use would be located outside of a sensitive plant buffer zone.*

Finding: Consistent with this rule, a survey was prepared by the applicant and shared by County Staff to the State Natural Heritage Program (ORBIC). The state natural heritage program manager said she was comfortable with the materials provided by the applicant and did not have any concerns. The rare plant protection process may conclude, consistent with (c). Please see Finding 60 above for more detail.

67. Section 14.600(D)(3)(d) states: “New uses shall be prohibited within sensitive plant species buffer zones, except for those uses that are allowed outright.”

Finding: Consistent with past practice and regional implementation of the *Management Plan*, alterations, modifications, and expansion of existing uses are not considered “new” uses. The proposed expansion will impact sensitive plants however, and is subject to resource protection requirements contain throughout this document. Staff concludes that with conditions of approval to ensure resource impacts are prevented to the maximum extent practicable and mitigated where necessary, the proposed development will not have an adverse effect to sensitive plants in the GMA.

68. Section 14.600(D)(3)(e) states that if a use must be allowed within a sensitive plant buffer zone, then the applicant shall comply with Chapter 6 Variances, and prepare a protection and rehabilitation plan that complies with (D)(7) below.

Finding: Variance requests made by the applicant are addressed above on page 35. Consistent with this requirement, the applicant prepared a protection and rehabilitation plan that complies with (D)(7). The plans were reviewed by ORBIC and confirmed to be effective for resource protection in the GMA.

69. Similar to Section 14.600(D)(2)(d) above, Section 14.600(D)(3)(f) requires the County to provide a copy of all field surveys and protection and rehabilitation plans to ORBIC for review, and based on that consultation, make a final decision as to whether the proposed use would be consistent with the rare plant protection policies and guidelines. As noted above in more detail, staff recommends the proposed development is consistent with rare plant protection requirements in the GMA.

70. Consistent with Section 14.600(4), site plans and field surveys were prepared in a manner consistent with the requirements of the NSALUDO.

71. Consistent with Section 14.600(5), protection and rehabilitation plans were prepared in a manner consistent with the requirements of this section, which states:

Protection and rehabilitation plans shall minimize and offset unavoidable impacts that result from a new use that occurs within a sensitive plant buffer zone as the result of a variance granted according to Chapter 6. All plans shall meet the following guidelines:

- a. Protection and rehabilitation plans shall be prepared by a professional botanist or plant ecologist.*
- b. The primary responsibility and cost of preparing protection and rehabilitation plans shall be borne by the applicant. Recognizing the limited number of situations in which an applicant will be forced to locate within a sensitive plant buffer area, the Forest Service has agreed to provide assistance in the preparation of these plans, to the greatest extent possible.*
- c. Construction, protection, and rehabilitation activities shall occur during the time of the year when ground disturbance will be minimized and protection, rehabilitation, and replacement efforts will be maximized.*
- d. Sensitive plants that will be destroyed shall be transplanted or replaced to the maximum extent practicable.*
 - (1) Replacement is used here to mean the establishment of a particular plant species in areas of suitable habitat not affected by new uses.*
 - (2) Replacement may be accomplished by seeds, cuttings, or other appropriate methods.*
 - (3) Replacement shall occur as close to the original plant site as practicable.*
 - (4) The project applicant shall ensure that at least 75 percent of the replacement plants survive three years after the date they are planted.*
- e. Sensitive plants and their surrounding habitat that will not be altered or destroyed shall be protected and maintained. Appropriate protection and maintenance techniques shall be applied, such as fencing, conservation buffers, livestock management, and noxious weed control.*
- f. Habitat of a sensitive plant that will be affected by temporary uses shall be rehabilitated to a natural condition.*
- g. Protection efforts shall be implemented before construction activities begin. Rehabilitation efforts shall be implemented immediately after the plants and their surrounding habitat are disturbed.*
- h. Protection and rehabilitation plans shall include maps, photographs, and text. The text shall:*

- (1) *Describe the biology of sensitive plant species that will be affected by a proposed use.*
- (2) *Explain the techniques that will be used to protect sensitive plants and their surrounding habitat that will not be altered or destroyed.*
- (3) *Describe the rehabilitation and enhancement actions that will minimize and offset the impacts that will result from a proposed use.*
- (4) *Include a 3-year monitoring, maintenance, and replacement program. The project applicant shall prepare and submit to the local government an annual report that documents milestones, successes, problems, and contingency actions.*

The application provides the following response (see page 5-91):

“All efforts will be made to avoid disturbance to special-status species and priority habitats. Where disturbance cannot be avoided, efforts will be employed to minimize disturbance to the maximum extent practicable. The proposed project will require construction within the sensitive plant buffer zones within the GMA. UPRR completed a Special-status Species Plant Survey and Habitat Mapping Report (see Appendix J) which includes field surveys covering all areas affected by the proposed project. Field surveys were conducted by a professional wildlife biologist hired by the project applicant. All sensitive wildlife areas and sites discovered in the project area are described and shown on the site plan map (Appendix J).

Accordingly, UPRR prepared a Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan to address unavoidable impact to special-status plant species and their buffer zones, as well as priority habitats (see Section 8 of Appendix K to this application narrative). The Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan was prepared by a professional botanist and specifically addresses the provisions included in NSA-LUDO Section 14.600(D)(5)(a-h). The proposed project will avoid and/or minimize impacts to special-status plant species or habitats as follows:

- *Avoid areas of identified special-status plant populations, priority habitats, and sensitive wildlife and plant areas to the maximum extent practicable.*
- *Implement microsite slight relocations of proposed project facilities to avoid special-status plant populations or habitats if practicable.*
- *Remove and conserve plants that will be directly affected; replant following construction (see Rehabilitation below)*
- *Implement weed control procedures to prevent spread of noxious weeds to native plant habitats.*

The purpose of the rehabilitation activities is to revegetate areas of temporary disturbance, enhance altered or degraded plant and wildlife habitat, re-establish populations of special-status plant species, and offset unavoidable impacts that result from project construction activities within sensitive plant buffer zones. Rehabilitation measures include seeding of all areas of temporary disturbance, planting of trees and shrubs for re-establishment of temporarily disturbed priority habitats and sensitive wildlife and plant habitats, replanting of special-status plant species removed for construction, and enhancement of existing vegetation communities within or immediately adjacent to the proposed project to compensate for loss of trees or priority habitats.

The following methods will be used for all areas of temporary ground and/or vegetation disturbance throughout the project area:

- *Removal of woody vegetation shall be the minimum necessary to achieve the project purposes. Trees that are removed will be replaced with planted stock of the same or equivalent species on a 1 for 1 basis and planted according to supplier specifications.*
- *Large downed wood will be stockpiled onsite and distributed throughout restoration and enhancement area upon completion of construction.*
- *Restoration areas will be maintained and monitored as stipulated in the monitoring and maintenance plans for the project to meet success criteria of 80% survival of planted species, and 80% cover of all disturbed soils.*

In addition, Section 8 the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan provides specific methods for seeding, seed planting methods, and habitat restoration and enhancement planting which includes guidance for site preparation, planting schedules, maintenance, tree and shrub planting, special-status plant species relocation, and erosion control.

Section 11 of the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan provides a specific maintenance and monitoring program to guide rehabilitation and enhancement actions that will be conducted for a period of 3 years in affected project areas following final installation by a qualified botanist. Therefore, the project complies with the applicable provisions of NSA-LUDO Section 14.600(D)(5)."

Wildlife and Plants (SMA)

72. Section 14.610(B) provides resource protection requirements for sensitive wildlife and plants in the SMA. Section (B)(1) provides the following purpose statement:

- a. *Protect (ensure that new uses do not adversely affect, including cumulative effects) and enhance the wildlife and plant diversity of the Gorge.*

- b. *Encourage the protection of plant species that are classified as "List 3 (Review)" or "List 4 (Watch)" by the Oregon Natural Heritage Program.*
- c. *Ensure that new uses do not adversely affect natural areas that are potentially eligible for the Oregon Register of Natural Heritage Resources.*

Finding: The application provided the following statement in response to (B)(1): "UPRR is committed to ensuring that the project does not adversely affect natural areas that are potentially eligible for the Oregon Register of Natural Heritage Resources. UPRR prepared a Special-status Species Plant Survey and Habitat Mapping Report (see Appendix K) and a Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (see Appendix J) to identify and enhance the wildlife and plant diversity of the Gorge within the project area. These plans were developed to ensure that new uses do not adversely affect natural areas that are potentially eligible for the Oregon Register of Natural Heritage Resources..." (Page 5-97)

Consistency with the purposes of this chapter is discussed below.

73. Section 14.610(B)(2) contains provisions for all new development within 1,000 feet of sensitive wildlife and plants, it states:

All new developments and uses, as described in a site plan prepared by the applicant, shall be evaluated using the following guidelines to ensure that natural resources are protected from adverse effects. Comments from state and federal agencies shall be carefully considered.

- g. *Protection of sensitive wildlife/plant areas and sites shall begin when proposed new developments or uses are within 1000 ft of a sensitive wildlife/plant site and/or area.*

Sensitive Wildlife Areas and endemic plants are those areas depicted in the wildlife inventory and listed in the Priority Habitats Table below, including all Priority Habitats listed in this Chapter. The approximate locations of sensitive wildlife and/or plant areas and sites are shown in the wildlife and rare plant inventory.

Finding: The proposed development was determined by Staff to be a large-scale use and thus required biological surveys as part of a complete application. The surveys were prepared to comply with the requirements of the NSALUDO and delineate the existence of sensitive wildlife and plant sites and areas, as well as priority habitats shown in the table below. According to Appendix J: Plant Survey and Habitat mapping Report, the survey determined the project would occur in seven SMA priority habitats, including: Oregon White Oak, Riparian, Wetlands, Snags and Logs, Talus, Cliffs, and Dunes. The field survey confirmed the presence of three sensitive plants within or adjacent to the development site as well as the presence of deer and elk winter habitat, turkey habitat, and waterfowl areas.

- b. *The County shall submit site plans (of uses that are proposed within 1,000 feet of a sensitive wildlife and/or plant area or site) for review to the Forest Service and*

Oregon Department of Fish and Wildlife and Oregon Natural Heritage Program for plant issues.

- c. *The Forest Service wildlife biologists and/or botanists, in consultation with the appropriate state biologists, shall review the site plan and their field survey records. They shall:*

(1) Identify/verify the precise location of the wildlife and/or plant area or site,

(2) Determine if a field survey will be required,

(2) [3] Determine, based on the biology and habitat requirements of the affected wildlife/plant species, if the proposed use would compromise the integrity and function of or result in adverse affects (including cumulative effects) to the wildlife or plant area or site. This would include considering the time of year when wildlife or plant species are sensitive to disturbance, such as nesting, rearing seasons, or flowering season, and

(4) Delineate the undisturbed 200 ft buffer on the site plan for sensitive plants and/or the appropriate buffer for sensitive wildlife areas or sites, including nesting, roosting and perching sites.

(a) Buffer zones can be reconfigured if a project applicant demonstrates all of the following:

i. the integrity and function of the buffer zones is maintained,

ii. the total buffer area on the development proposal is not decreased,

iii. the width reduction shall not occur within another buffer, and

iv. the buffer zone width is not reduced more than 50% at any particular location. Such features as intervening topography, vegetation, man made features, natural plant or wildlife habitat boundaries, and flood plain characteristics could be considered.

(b) Requests to reduce buffer zones shall be considered if an appropriate professional (botanist, plant ecologist, wildlife biologist, or hydrologist), hired by the project applicant,

i. identifies the precise location of the sensitive wildlife/plant or water resource,

ii. describes the biology of the sensitive wildlife/plant or hydrologic condition of the water resource, and

iii. demonstrates that the proposed use will not have any negative effects, either direct or indirect, on the affected wildlife/plant and

their surrounding habitat that is vital to their long-term survival or water resource and its long term function.

- (c) The County shall submit all requests to re-configure sensitive wildlife/plant or water resource buffers to the Forest Service and the appropriate state agencies for review. All written comments shall be included in the record of application and based on the comments from the state and federal agencies, the County will make a final decision on whether the reduced buffer zone is justified. If the final decision contradicts the comments submitted by the federal and state agencies, the County shall justify how it reached an opposing conclusion.*
- d. The County, in consultation with the State and federal wildlife biologists and/or botanists, shall use the following criteria in reviewing and evaluating the site plan to ensure that the proposed developments or uses do not compromise the integrity and function of or result in adverse affects to the wildlife or plant area or site:*
 - (1) Published guidelines regarding the protection and management of the affected wildlife/plant species. Examples include: the Oregon Department of Forestry has prepared technical papers that include management guidelines for osprey and great blue heron; the Washington Department of Wildlife has prepared similar guidelines for a variety of species, including the western pond turtle, the peregrine falcon, and the Larch Mountain salamander (Rodrick and Milner 1991).*
 - (2) Physical characteristics of the subject parcel and vicinity, including topography and vegetation.*
 - (3) Historic, current, and proposed uses in the vicinity of the sensitive wildlife/plant area or site.*
 - (4) Existing condition of the wildlife/plant area or site and the surrounding habitat and the useful life of the area or site.*
 - (5) In areas of winter range, habitat components, such as forage, and thermal cover, important to the viability of the wildlife must be maintained or, if impacts are to occur, enhancement must mitigate the impacts so as to maintain overall values and function of winter range.*
 - (6) The site plan is consistent with the "Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources" (Oregon Department of Fish and Wildlife 2000).*
 - (7) The site plan activities coincide with periods when fish and wildlife are least sensitive to disturbance. These would include, among others, nesting and brooding periods (from nest building to fledgling of young) and those periods specified.*

- (8) *The site plan illustrates that new developments and uses, including bridges, culverts, and utility corridors, shall not interfere with fish and wildlife passage.*
- (9) *Maintain, protect, and enhance the integrity and function of Priority Habitats (such as old growth forests, talus slopes, and oak woodlands) as listed on the following Priority Habitats Table. This includes maintaining structural, species, and age diversity, maintaining connectivity within and between plant communities, and ensuring that cumulative impacts are considered in documenting integrity and function.*
- e. *The wildlife/plant protection process may terminate if the County, in consultation with the Forest Service and state wildlife agency or Heritage program, determines*
 - (1) *the sensitive wildlife area or site is not active, or*
 - (2) *the proposed use is not within the buffer zones and would not compromise the integrity of the wildlife/plant area or site, and*
 - (3) *the proposed use is within the buffer and could be easily moved out of the buffer by simply modifying the project proposal (site plan modifications). If the project applicant accepts these recommendations, the local government shall incorporate them into its development review order and the wildlife/plant protection process may conclude.*
- f. *If the above measures fail to eliminate the adverse affects, the proposed project shall be prohibited, unless the project applicant can meet the Practicable Alternative Test in D below, and prepare a Mitigation Plan pursuant to E below to offset the adverse effects by deliberate restoration and enhancement.*
- g. *The County shall submit a copy of all field surveys (if completed) and mitigation plans to the Forest Service and appropriate state agencies. The County shall include all comments in the record of application and address any written comments submitted by the state and federal wildlife agency/heritage programs in its development review order.*

Based on the comments from the state and federal wildlife agency/heritage program, the County shall make a final decision on whether the proposed use would be consistent with the wildlife/plant policies and guidelines. If the final decision contradicts the comments submitted by the state and federal wildlife agency/heritage program, the County shall justify how it reached an opposing conclusion.

- h. *The County shall require the project applicant to revise the mitigation plan as necessary to ensure that the proposed use would not adversely affect a sensitive wildlife/plant area or site.*

Finding: The applicant is seeking a variance to resource buffers protected by these rules. As noted above for GMA natural resources, field surveys and mitigation plans prepared by a qualified professional were required for completeness. Staff provided a copy of the site plans, survey documents and mitigation proposals to the Forest Service National Scenic Area Office, Oregon Department of Fish and Wildlife, and the Oregon Biodiversity Information Center on February 20, 2016.

Although ODFW and ORBIC expressed support for the proposed mitigation plans; the Forest Service provided two letters expressing concerns about natural and scenic resource impacts. On May 3, 2016, Robin Shoal wrote:

“...This proposal includes activities and development in or near numerous sensitive wildlife and plant areas and sites and their associated buffers.

The proposal includes several staging areas. The largest of these staging areas is described in the application narrative as a “6.62-acre site near project MP 71.53.” Construction of this staging area would require removal of the trees on the site and grading to level the sloped terrain. This site is located in SMA Open Space, in an area of Oregon white oak woodland and mixed coniferous-deciduous habitat that contains a notable Oregon white oak component. Oregon white oak habitats are considered a Priority Habitat in the CRGNSA Management Plan. Priority habitats are considered sensitive wildlife areas. The proposed staging area is also topographically visible from several KVAs.

Because the project as proposed would potentially result in adverse effects to sensitive wildlife and plants and their buffers, a practicable alternative test must be conducted. Avoiding adverse effects is preferred to mitigation. Mitigation is not a substitute for avoidance if a practicable alternative is available. If the County determines that there are no practicable alternatives to the uses and development proposed in and near these areas, a complete mitigation plan must be submitted to offset the adverse effects by deliberate restoration and enhancement. Impacts to sensitive wildlife and plant sites and areas and their buffers may require the establishment of off-site replacement or enhancement areas, as close to the original as possible.

The mitigation plan submitted by UPRR relies on revegetation of disturbed sites rather than proposing deliberate restoration and enhancement to offset project impacts. Revegetation of disturbed sites is separately required by other Management Plan guidelines. County staff must determine whether there are practicable alternatives for the components of the project that impact sensitive sites and buffers, including alternative locations for the proposed staging areas. Any mitigation plan must sufficiently offset the impacts of the proposed uses and development.”

In a May 11, 2016 email, Robin Shoal states:

“Here is some additional input regarding the UPRR proposal and mitigation for the proposed 6.62 acres of staging area west of Memaloose Park, and for disturbance to other sensitive plant sites and their buffers.

The area proposed for staging is currently good quality, relatively undisturbed Oregon white oak woodland in SMA Open Space. Oregon white oak woodland is identified as both a priority habitat and as sensitive wildlife habitat in the Management Plan. Disturbance in this habitat type is long-term, and the habitat currently on the site has been present for many decades. There needs to be extremely strong rationale for clearing and grading in this location. Avoidance of the adverse effects of clearing and grading is definitely preferred to mitigation. One alternative would be to limit the grading and staging area to the area at track miles 71.7-71.8, which is already disturbed and has good access. Use of this area instead would also avoid adverse effects to the scenic resource associated with the currently proposed staging area.

Compared with some other habitat types, when oaks are removed the mitigation requirements are much more complicated because it takes so long for the oak habitat to regenerate (up to four decades for an oak to begin producing acorns). A mitigation ratio of 8:1 has been required to offset impacts to Oregon white oak woodlands. Each acre of clearing and grading would require either long-term protection of eight acres of equivalent white oak habitat, mitigation planting of eight acres of oak habitat, or a combination of those. Planting would also entail monitoring for four or more years to ensure survival.

In the mitigation plan that accompanies the application, the primary mitigation proposed for sensitive plant sites in general appears to be revegetation of the disturbed sites, and does not include mitigation for entering the 200-foot buffers. A complete mitigation plan should identify additional enhancement sites to mitigate for disturbance to sensitive plant sites and their buffers.”

The applicant states there is no practicable alternative, and has provided information to verify the proposed development is reliant upon the existing railroad corridor through the Columbia River Gorge, and the location within the Gorge, based on the safe spacing distances of double mainlines required throughout the larger railroad framework. Staff agrees the proposed development is the preferred alternative from the Alternatives Analysis prepared by the applicant, and that it will have the least impacts to natural resources.

Staff also agrees with the Forest Service recommendations that the 6.62-acre temporary landing zone and construction area near project MP 71.53 in SMA Open Space would have an adverse effect on natural resources and should be denied. The quality of habitat in this location is unique and would be very difficult to mitigate for natural resources and scenic resources.

Based on this information and the findings above for GMA impacts, staff recommends denying the 6.62 acre landing zone in SMA Open Space and requiring the proposed mitigation and rehabilitation for all other disturbances and impacts associated with the proposed development.

74. Section 14.610(C) protects soil productivity in the SMA, it states:

Soil productivity shall be protected using the following criteria:

- 1. A description or illustration showing the mitigation measures to control soil erosion and stream sedimentation.*
- 2. New developments and land uses shall control all soil movement within the area shown on the site plan.*
- 3. The soil area disturbed by new development or land uses, except for new cultivation, shall not exceed 15 percent of the project area.*
- 4. Within 1 year of project completion, 80 percent of the project area with surface disturbance shall be established with effective native ground cover species or other soil-stabilizing methods to prevent soil erosion until the area has 80 percent vegetative cover.*

Finding: The application has provided the following response on page 5-102 of the narrative: “The proposed project includes infrastructure improvements to an existing railroad track, and is not considered a new development or land use. As described in Section 4.2.5.5, UPRR will implement a variety of BMPs and mitigation measures as part of the project in order to maintain soil productivity, and control soil erosion and stormwater impacts. These measures will include but not be limited to revegetation of the temporarily disturbed project area following construction, erosion control measures from the Construction Stormwater Best Management Practices Manual published by the ODEQ, and BMPs implemented in accordance with state and federal permit requirements. Therefore, the project complies with these provisions.”

Staff finds the proposed development to be an expansion of an existing use, and not a “new” development; (2) and (3) are not applicable. Consistent with (1) the application includes a detailed grading plan, site plans showing disturbance areas, and a description of best management practices to minimize risk of erosion and sedimentation. The rehabilitation and mitigation plans provided the application address revegetation of disturbed soils; a condition of approval is included to ensure revegetation occurs as quickly as possible and will be monitored for five years following implementation. With conditions, staff finds the proposed development to be consistent with the soils productivity requirements.

75. Section 14.610(E) requires mitigation plans to be prepared when a proposed uses is within a buffer zone of a sensitive resource, or there in no practicable alternative according to (D) below, Practicable Alternative Test. It states:

- 1. Mitigation Plan shall be prepared when:*
 - a. The proposed development or use is within a buffer zone (wetland, pond, lakes, riparian areas, wildlife or plant areas and/or sites)*
 - b. There is no practicable alternative according to D below, Practicable Alternative Test.*

2. *In all cases, Mitigation Plans are the responsibility of the applicant and shall be prepared by an appropriate professional (botanist/ecologist for plant sites, a wildlife/fish biologist for wildlife/fish sites, and a qualified professional for water resource sites).*
3. *The primary purpose of this information is to provide a basis for the project applicant to redesign the proposed use in a manner that protects sensitive water resources, and wildlife/plant areas and sites, that maximizes his/her development options, and that mitigates, through restoration, enhancement, and replacement measures, impacts to the water resources and/or wildlife/plant area or site and/or buffer zones.*
4. *The applicant shall submit the mitigation plan to the County. The County shall submit a copy of the mitigation plan to the Forest Service, and appropriate state agencies. If the final decision contradicts the comments submitted by the state and federal wildlife agency/heritage program, the County shall justify how it reached an opposing conclusion.*
5. *A project applicant shall demonstrate sufficient fiscal, technical, and administrative competence to successfully execute a mitigation plan involving wetland creation.*
6. *Mitigation plans shall include maps, photographs, and text. The text shall:*
 - a. *Describe the biology and/or function of the sensitive resources (eg. Wildlife/plant species, or wetland) that will be affected by a proposed use. An ecological assessment of the sensitive resource to be altered or destroyed and the condition of the resource that will result after restoration will be required. Reference published protection and management guidelines.*
 - b. *Describe the physical characteristics of the subject parcel, past, present, and future uses, and the past, present, and future potential impacts to the sensitive resources. Include the size, scope, configuration, or density of new uses being proposed within the buffer zone.*
 - c. *Explain the techniques that will be used to protect the sensitive resources and their surrounding habitat that will not be altered or destroyed (for examples, delineation of core habitat of the sensitive wildlife/plant species and key components that are essential to maintain the long-term use and integrity of the wildlife/plant area or site).*
 - d. *Show how restoration, enhancement, and replacement (creation) measures will be applied to ensure that the proposed use results in minimum feasible impacts to sensitive resources, their buffer zones, and associated habitats.*
 - e. *Show how the proposed restoration, enhancement, or replacement (creation) mitigation measures are NOT alternatives to avoidance. A*

proposed development/use must first avoid a sensitive resource, and only if this is not possible should restoration, enhancement, or creation be considered as mitigation. In reviewing mitigation plans, the County, appropriate state agencies, and Forest Service shall critically examine all proposals to ensure that they are indeed last resort options.

- 7. At a minimum, a project applicant shall provide to the County a progress report every 3-years that documents milestones, successes, problems, and contingency actions. Photographic monitoring stations shall be established and photographs shall be used to monitor all mitigation progress.*
- 8. A final monitoring report shall be submitted to the County for review upon completion of the restoration, enhancement, or replacement activity. This monitoring report shall document successes, problems encountered, resource recovery, status of any sensitive wildlife/plant species and shall demonstrate the success of restoration and/or enhancement actions. The County shall submit copies of the monitoring report to the Forest Service; who shall offer technical assistance to the County in helping to evaluate the completion of the mitigation plan. In instances where restoration and enhancement efforts have failed, the monitoring process shall be extended until the applicant satisfies the restoration and enhancement guidelines.*
- 9. Mitigation measures to offset impacts to resources and/or buffers shall result in no net loss of water quality, natural drainage, fish/wildlife/plant habitat, and water resources by addressing the following:*
 - a. Restoration and enhancement efforts shall be completed no later than one year after the sensitive resource or buffer zone has been altered or destroyed, or as soon thereafter as is practicable.*
 - b. All natural vegetation within the buffer zone shall be retained to the greatest extent practicable. Appropriate protection and maintenance techniques shall be applied, such as fencing, conservation buffers, livestock management, and noxious weed control. Within five years, at least 75 percent of the replacement vegetation must survive. All plantings must be with native plant species that replicate the original vegetation community.*
 - c. Habitat that will be affected by either temporary or permanent uses shall be rehabilitated to a natural condition. Habitat shall be replicated in composition, structure, and function, including tree, shrub and herbaceous species, snags, pool-riffle ratios, substrata, and structures, such as large woody debris and boulders.*
 - d. If this standard is not feasible or practical because of technical constraints, a sensitive resource of equal or greater benefit may be substituted, provided that no net loss of sensitive resource functions occurs and provided the County, in consultation with the appropriate State and Federal agency, determine that such substitution is justified.*

- e. *Sensitive plants that will be destroyed shall be transplanted or replaced, to the maximum extent practicable. Replacement is used here to mean the establishment of a particular plant species in areas of suitable habitat not affected by new uses. Replacement may be accomplished by seeds, cuttings, or other appropriate methods.*

Replacement shall occur as close to the original plant site as practicable. The project applicant shall ensure that at least 75 percent of the replacement plants survive 3 years after the date they are planted

- f. *Nonstructural controls and natural processes shall be used to the greatest extent practicable.*
 - (1) *Bridges, roads, pipeline and utility corridors, and other water crossings shall be minimized and should serve multiple purposes and properties.*
 - (2) *Stream channels shall not be placed in culverts unless absolutely necessary for property access. Bridges are preferred for water crossings to reduce disruption to hydrologic and biologic functions. Culverts shall only be permitted if there are no practicable alternatives as demonstrated by the 'Practical Alternative Test'.*
 - (3) *Fish passage shall be protected from obstruction.*
 - (4) *Restoration of fish passage should occur wherever possible.*
 - (5) *Show location and nature of temporary and permanent control measures that shall be applied to minimize erosion and sedimentation when riparian areas are disturbed, including slope netting, berms and ditches, tree protection, sediment barriers, infiltration systems, and culverts.*
 - (6) *Groundwater and surface water quality will not be degraded by the proposed use. Natural hydrologic conditions shall be maintained, restored, or enhanced in such a manner that replicates natural conditions, including current patterns (circulation, velocity, volume, and normal water fluctuation), natural stream channel and shoreline dimensions and materials, including slope, depth, width, length, cross-sectional profile, and gradient.*
 - (7) *Those portions of a proposed use that are not water-dependent or that have a practicable alternative will be located outside of stream, pond, and lake buffer zones.*
 - (8) *Streambank and shoreline stability shall be maintained or restored with natural revegetation.*

(9) The size of restored, enhanced, and replacement (creation) wetlands shall equal or exceed the following ratios. The first number specifies the required acreage of replacement wetlands, and the second number specifies the acreage of wetlands altered or destroyed.

Restoration: 2: 1

Creation: 3: 1

Enhancement: 4: 1

- g. Wetland creation mitigation shall be deemed complete when the wetland is self-functioning for 5 consecutive years. Self-functioning is defined by the expected function of the wetland as written in the mitigation plan. The monitoring report shall be submitted to the County to ensure compliance. The Forest Service, in consultation with appropriate state agencies, shall extend technical assistance to the County to help evaluate such reports and any subsequent activities associated with compliance.*
- h. Wetland restoration/enhancement can be mitigated successfully by donating appropriate funds to a non-profit wetland conservancy or land trust with explicit instructions that those funds are to be used specifically to purchase protection easements or fee title protection of appropriate wetlands acreage in or adjacent to the Columbia River Gorge meeting the ratios given above in (f)(9) above. These transactions shall be explained in detail in the Mitigation Plan and shall be fully monitored and documented in the monitoring report.*

Finding: As noted throughout this report, professionally prepared delineations, rehabilitation and mitigation plans were provided following extensive resource surveys for plants, wildlife and critical habitat areas. The reports were prepared in accordance with the methodology and inventories required above. Because the same plan addresses impacts in the GMA as well, and the GMA wetland mitigation requirements include a five year monitoring requirement, a condition of approval is included to ensure the entire project is monitored for mitigation success for five years. A condition of approval is also included to prohibit the development proposed for the 6.62 acre landing zone in SMA Open Space. This prohibition is necessary to prevent adverse effects to sensitive natural resources, consistent with this chapter.

No Practicable Alternative Test – GMA and SMA

76. Section 14.600(E) and Section 14.610(D) (same text in both) require all new development with potential impacts to sensitive resource sites and buffers to comply with the no practicable alternative test. It states:

An alternative site for a proposed use shall be considered practicable if it is available and the proposed use can be undertaken on that site after taking into consideration cost, technology, logistics, and overall project purposes.

A practicable alternative does not exist if a project applicant satisfactorily demonstrates all of the following:

1. *The basic purpose of the use cannot be reasonably accomplished using one or more other sites in the vicinity that would avoid or result in less adverse effects on wetlands, streams, ponds, lakes, riparian areas, wildlife, or plant areas and sites; and*
2. *The basic purpose of the use cannot be reasonably accomplished by reducing its size, scope, configuration, or density as proposed, or by changing the design of the use in a way that would avoid or result in less adverse effects on wetlands, streams, ponds, lakes, riparian areas, wildlife or plant areas and sites.; and*

Reasonable attempts were made to remove or accommodate constraints that caused a project applicant to reject alternatives to the use as proposed. Such constraints include inadequate infrastructure, parcel size, and land use designations. If a land use designation or recreation intensity class is a constraint, an applicant must request a management plan amendment to demonstrate that practicable alternatives do not exist.

Finding: The application narrative provides sufficient information to confirm there is no practicable alternative to the location, length or width of the proposed track development. It states that the track expansion is reliant on the location of the existing railroad and Columbia River Gorge as it travels through the Cascade Mountains at the only available at-grade crossing. The applicant also provided information about the Mosier area location, citing that due to the distances between other existing sidings and double tracks, and the industry standard length of trains, there is no other location that would be able to meet their project goals. An Alternatives Analysis was prepared and identified the proposed development as the preferred alternative that minimizes impacts to sensitive resources. The Alternatives Analysis provides information about the specific design precautions that have been taken to further reduce the rail footprint and construction areas, including reducing the centerline offset from 20 to 15 feet, minimizing embankment design, and reducing access roads and associated drainage ditches. Based on the application materials, staff concludes there is no other practicable alternative due to geographic and topographic constraints that could not be accommodated without additional resource impacts. Staff finds the proposed development to be consistent with this requirement.

77. Section 14.600(F) includes the Public Interest Test. All uses in the GMA that may impact sensitive resources are required to comply, it states:

F. Public Interest Test

The following factors shall be considered when determining if a proposed use is in the public interest:

1. *The extent of public need for the proposed use.*

2. *The extent and permanence of beneficial or detrimental effects that the proposed use may have on the public and private uses for which the property is suited.*
3. *The functions and size of the wetland, stream, pond, lake, or riparian area that may be affected.*
4. *The economic value of the proposed use to the general area.*

The ecological value of the wetland, stream, pond, lake, or riparian area and probable effect on public health and safety, fish, plants, and wildlife.

Finding: On page 5-93 of the application narrative, the application provides the following response to this requirement:

“The proposed project serves a major public interest and satisfies the Public Interest Test included in the NSA-LUDO. UPRR currently moves a wide array of commodities through Oregon that support the regional and local economies. Grain, automobiles, lumber, cement, apparel and consumer electronics are commonly moved through this corridor. UPRR has been handling this traffic mix for years and plans to continue moving a similar product mix in the future. UPRR has typically moved 20 to 25 trains a day through this area; with seasonal increases of shipments in commodities such as grains resulting in upwards of 30 trains using the corridor over the period of a month. Oregon is a critical part of UPRR’s service to customers. UPRR has invested more than \$1 billion in the state in the last 10 years to improve its rail yards and enhance railroad track, strengthening the reliability of Oregon’s transportation infrastructure. The project is required to support the needs of UPRR’s current customers throughout the state and region and will eliminate one of its most significant operational bottleneck in the Pacific Northwest.

In addition, the proposed second mainline track would reduce the need for trains idling near the City of Mosier. Converting the existing Mosier Siding to mainline track in this way would have the secondary effect of reducing noise and idling emissions near the City of Mosier. Trains idling on the existing siding also pose a potential safety hazard because the public often perceives an idling train as stationed at a siding for an extended period of time. This results in increased occurrences of high-risk pedestrian and vehicle crossings in front of active trains at siding locations relative to trains moving at standard operating speed along the adjacent mainline track. In addition, unauthorized pedestrian crossings between rail cars, train boarding, and vandalism are more common at siding locations in general. Operating fewer and longer trains reduces safety risks associated with collisions at pedestrian or vehicle crossing locations because longer trains present fewer occurrences of a train passing through a particular portion of a route. Accordingly, the economic and safety-related public benefits of the project outweigh the associated disturbance to aquatic and other resources. As discussed throughout this narrative and supported by the attached Mitigation Plan (Appendix D) and Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (Appendix K), UPRR proposes to avoid,

minimize and mitigate for unavoidable disturbance resulting from the proposed project.

Therefore, the project meets the public interest test required by NSA-LUDO Section 14.600(F).

Finding: The UPRR line is one of two railroads that pass through the length of the Columbia River Gorge. As the only sea level passage through the Cascade Mountain Range, the Gorge is a hub of large-scale infrastructure that includes an interstate, five state highways, commercial barge traffic, two significant hydroelectric dams, three bi-state bridges, and more. Staff recognizes the significance of these infrastructure elements and the maintenance and changes necessary overtime to ensure safe operations and ability to meet the public needs. Functional and well maintain infrastructure is an integral component of a resilient community – on any scale. The public does not have ability to use the UPRR trains for passenger rail services, but does currently benefit in some forms from commodities shipped by rail to Portland and then re-distributed locally by truck. The applicant states that the proposed development will not result in a change to number of trains, but that it could allow for fewer, longer trains operating more efficiently. The applicant also states that the project would benefit residents with a noise reduction by reducing the number of idling trains and the sound of trains stopping or starting in communities throughout the Gorge.

In this evaluation, it is important to note that more than one thousand public comments were received citing concerns about the impacts of increased coal and oil transport that could result from the proposed development in the Mosier community, the Columbia River Gorge National Scenic Area, and the Pacific Northwest. According to the application materials, UPRR currently carries mixed freight commodities driven by commerce demands and the requirements of the Federal Railroad Association. UPRR also states that the proposed development is not intended to increase the carrying of any one commodity. The application states that the development will not substantially result in an increase to the number of trains, the speed of trains or the length of trains and that they will continue to operate within their current volume, just more efficiently and more safely. Staff recommends a condition of approval that ensures this outcome by requiring UPRR to stay within the existing range of 20 to 30 trains per day. Staff recognizes that the NSALUDO cannot regulate what is being carried on a train, but recommends a condition of approval to address how dangerous materials are carried through our communities. To address this, staff recommends a condition of approval that requires UPRR to adhere to the FRA safety standards (including any safety improvements that are optional).

A condition is included to eliminate the largest disturbance to SMA Open Space Priority Habitat - high functioning habitat - and to ensure all other impacts to lesser functioning and impacted wetlands are mitigated as described in the rehabilitation and mitigation plans.

The economic value to the region (general area) is difficult to quantify because the proposed development expands something that is already present. The applicant provided information to demonstrate that significant financial investments have been

made in Gorge communities because of the maintenance and operation of existing infrastructure and the fact that they employ a large number of Gorge residents. Alternatively, if the railroad was not able to operate more efficiently, and mixed freight continues to increase in demand, there could be an unintended consequence of more trucks on the highway, which could lead to more individual events that risk safety or require costly emergency responses.

The ecological value of the impacted wetlands are discussed above and in the application materials. With conditions of approval to require UPRR to carry all freight in the safest vessels possible, to stay within the current traffic volumes, and to provide training to emergency service providers in the Gorge, Staff finds the proposed development is unlikely to change the current probable effect on public health, and safety, fish, plants and wildlife.

In sum, staff recommends several conditions of approval to ensure the development is in the best interest of the public.

Recreation Resources SMA

78. Section 14.710 provides recreation resource guidelines and protections for the SMA. Applicable provisions are listed below:

- A. If a standard or condition of this subsection is more restrictive than other subsections of this section, this subsection is controlling;*
- B. New developments and land uses shall not displace existing recreational use.*
- C. Protect recreation resources from adverse effects by evaluating new developments and land uses as proposed in the site plan. An analysis of both on- and off-site cumulative effects shall be required.*
- ...
- E. Mitigation measures shall be provided to preclude adverse effects on the recreation resource.*
- ...
- J. Recreation resources shall be protected by limiting development and uses as per the Recreation Intensity Classes.*

Finding: As proposed, the development will occur on lands owned by Oregon State Parks and managed at the Memaloose State Park and Campground. According to State Parks website, park uses include day use area, overnight camping for tents and RVs, restrooms and showers, playground, scenic overlook, and an amphitheater. The park is approximately 441 acres and was made available to the public since 1925 and was expanded in 1953.

Staff provided notice to Oregon State Parks on February 24, 2015. Following a more recent public notice, Deputy Director MG Devereaux provided formal comments on April 25, 2016. In his letter, he states:

“In 2015, the Oregon Parks and Recreation Department (OPRD) finalized the Columbia River Gorge Management Unit Plan covering the approximately 9,500 acres of OPRD managed property in the Columbia River Gorge. This planning effort included a robust public outreach effort to identify the current and future management issues on OPRD properties. Analysis included the existing challenges of an active rail corridor. The plan identified several areas where rail traffic has an impact on recreation. These areas are:

- Disconnection of existing recreation opportunity from the Columbia River*
- Noise*
- Natural and cultural resource disruption...*

Disconnection

The railroad has been in operation longer than many of the OPRD recreation sites, and in some cases the track creates a real property barrier between developed recreation sites and access to the Columbia River. The plan notes that federal crossing standards create a significant barrier to creating at-grade crossings, creating situations where the public trespasses across the rail line in order to access the Columbia River. The current trend toward increased visitation and recreation in the Columbia River Gorge means this demand will continue to place pressure on the need to find legal, safe crossings. Public input into the state park plan identifies several general areas where crossings would be desirable, and areas where existing recreation is limited because of the barrier to access created by the track. Developing new separated grade crossings would improve recreational access to the Columbia River, relieving pressure on other sites that are quickly becoming congested.

OPRD has also committed to developing and maintaining the partnership with Union Pacific Railroad (UPRR) to look for other ways develop recreation opportunities, such as trail connections, to expand recreation capacity of the Gorge.

Noise

*The planning process illustrated a reality everyone who lives, works, and plays in the Gorge already understands: traffic noise—especially rail noise—is a significant challenge for visitors and park staff. It constrains recreation, especially camping, and the impact is documented in the plan as well as other media sources... See article: *When Camping Columbia Gorge It Pays to be a Little Deaf*. It is difficult to quantify a precise impact of increased noise based on the information provided by UPRR.*

If the project results in a significant increase in train volume or increased speeds this may have additional impacts on recreational uses, especially in the overnight areas near the tracks.

Resource Impacts

State Parks in the Columbia River Gorge often serve as recreational gateways to larger tracts of public lands and also serve as habitat corridors for wildlife. Rail and road transportation often fragments these habitat corridors. The interface between parks and rail or road corridors are often highly degraded with noxious weeds, and lower diversity of flora. Any new disturbance of these areas should take great care to remove non-native invasive weeds, and create opportunities for greater native bio-diversity.

The Columbia River Gorge also contains significant cultural resources. Great care should be taken to ensure that rail projects and operations do not impact cultural resources. Tribal coordination regarding these potential resource impacts is an important element of resource protection.

*The Columbia River Gorge Management Unit Plan can be found at:
http://www.oregon.gov/oprd/PLANS/Pages/planning_gorge.aspx. Specific References can be found:*

- *Pg 6 - Overview of railroads effects on state parks in Gorge*
- *Pg 20 - RR Impact on Recreation on Gorge*
- *Pg 26-27 - Historic Cultural References*
- *Pg 44 - RR Impacts on Habitat connectivity*
- *Pg 103 – Historic Illegal Use Addressed at Memaloose, among other places*
- *Pg 104-5 - Map of potential railroad crossings to be studied in feasibility study*
- *Pg 106 – Public Comment about increase in railroad traffic and potential risk, OPRD response*
- *Pg 108 – Reference to UPRR partnership*
- *Pg 114 – Railroad as challenge to river access*
- *Pg 116 – Railroad impacts to overnight facilities (noise)*
- *Pg 118 – Wyeth’s existing access over railroad as opportunity*
- *Pg 119 – Memaloose river access unsafe, unfeasible as constraint*
- *Pg 120 - Squally Point potential access needs to be explored*
- *Pg 155 – River access strategy to explore access point feasibility in multi-agency study*
- *Pg 138-139 – Railroad as barrier to increasing river access points in Gorge, and Plan for River access study*
- *Pg 150, 156 – Value of potential for Railroad crossing at Rooster Rock described*
- *Pg 158 – Reference to UPRR owning land near Bridal Veil*
- *Pg 161 – RR Impacts on recreation at Benson*
- *Pg 166 – Wyeth’s existing access over railroad as opportunity described*
- *Pg 169 – Viento existing condition of at grade crossing*
- *Pg 175 – Description of Memaloose as limited for river recreation with no access*
- *Pg 177 - West Mayer as having potential for increased facilities based on proximity from railroad (decreased noise), existing access to river*
- *Pg 180 – East Mayer/ Squally Point, mostly limiting factors for consideration in potential development”*

Finding: The proposed development will not physically displace any camping or day use areas, but will have temporary impacts (noise, dust, traffic, disruption) from construction and long term impacts that may result from any increases in rail traffic. Based on this letter, and the references to additional information in the OPRD Gorge Unit Parks Plan, which includes a goal to prepare a study to improve coordination with the railroad, provide safe access where informal access continues to occur in an unsafe manner, and to enhance existing connections to park properties along the Columbia River. A condition of approval is included to ensure these concerns are addressed through a Columbia River access feasibility study. A condition of approval is also included to require UPRR to coordinate with OPRD to help mitigate noise, safety, gate security, and impacts to overnight visitors resulting from construction activities. That may look like signage, limited hours of operation.

Tribal Treaty Rights GMA and SMA

79. Section 14.800 protects Indian Tribal Treaty Rights and specifies consultation procedures for the GMA. The purpose of this chapter is to ensure the implementing plans and ordinances do not affect or modify any treaty or other rights of any Indian tribe. Section 14.810 provides Indian Tribal Treaty Rights and Consultation for the SMA.

GMA Section 14.800(B) describes the tribal government notice and comment period. This provision requires notices to include enough information for the tribal governments to evaluate possible impacts and provide comments back to staff within 20 days. Section 14.800(C) provides a 10 day consultation period to interested tribal governments that provide substantive written comments within a timely manner. In the SMA, the Forest Service is responsible for consulting with Indian Tribal Governments at a government-to-government level.

FINDING: A cultural resource notice and project description was provided September 22, 2015. The project has since been re-noticed for the public hearings multiple times; notices have been sent to tribal governments March 10, 2016, April 26, 2016, June 1, 2016, June 23, 2016, and August 11, 2016.

Following the initial notice, there was a request for onsite consultation regarding cultural resources from Holly Shea of the Warm Springs Tribe, Catherine Dickson of the Confederated Tribes of the Umatilla Indian Reservation, and Nancy Nelson, Oregon State Parks and Recreation Archaeologist. Consistent with the GMA provisions, the applicant offered to meet onsite, and consistent with the SMA provisions, the Forest Service offered to participate in the onsite consultation. Through email exchanges, the request for consultation evolved into a request for more information. The additional information was provided for the cultural resource protection process and ultimately, the consultation was no longer desired. Please see the Cultural Section above for more information.

In April of 2016, Staff spoke with Audie Huber, Government Affairs for the Confederated Tribes of the Umatilla Indian Reservation. Mr. Huber expressed concerns regarding Treaty rights related to accessing traditional fishing grounds and the safety of fishermen who will now face a possible increase in train speed and frequency. In his April 6, 2016, email, he states:

"...How much will traffic increase is based on an approximation of the railroad, and in reality will be based on the number of customers, which fluctuates. There is no

upper limit to the number of trains, the only limit is the physical carrying capacity of the tracks and the logistics of getting east and westbound trains around each other. Tribal fishers need to get to the river, and for the bulk of the real estate, the railroad tracks are in the way. “

Jeremy Wolf, Chair of the Fish and Wildlife Commission for the Confederated Tribes of the Umatilla Indian Reservation, provided comment to the U.S. Army Corps of Engineers and the Wasco County Planning Department in a letter dated May 11, 2016. Mr. Wolf's comments cite several impacts to treaty rights, including:

“...The increased railroad traffic all along the Columbia River, particularly in Zone 6 between Bonneville and McNary Dams, will impair the Tribe's interests in the following ways: damage to Treaty [sic] resources and the ecosystems they depend on, eradication of tribal fishing areas, impeded access to tribal fishing areas and increased risks to tribal member safety, and damage and access to cultural resources...”

Gary Burke, Chairmen of the Board of Trustees for the Confederated Tribes of the Umatilla Indian Reservation, provided additional comments in a letter dated September 2, 2016. Chairman Burke states:

“...The double-tracking at Mosier will result in increased train traffic and potentially increase train speeds. More train traffic will endanger tribal fishers who access the river throughout the Columbia River Basin as well as increase the likelihood of derailments and spills in the Gorge like the one we all witnessed on June 3, 2016. Unless and until a comprehensive, regional environmental review is done that addresses the numerous proposals to ship highly flammable Bakken crude oil and other dangerous commodities and the associated safety concerns, no new infrastructure expansion should be approved to facilitate additional rail shipment...”

Before another project that results in more crude-by-rail shipments, the CTUIR would like to see a study done to analyze the impacts trains have on tribal fishing. It should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge both recent and those projected to occur in the future. There are many uncontrolled crossings along the Columbia River both within and outside the Gorge. Funding must be identified and set aside to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured in our Treaty of 1855.”

JoDe Goudy, Chairman of the Yakama Nation Tribal Council provided comments in letters dated September 13, 2016 and September 26, 2016. In his September 13 letter (received prior to the Planning Commission's decision), Chairman Goudy states:

“...The proposed rail expansion may 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 proposed rail expansion will increase train traffic, which already

poses a risk to the safety of the Yakama Nation's People, including tribal 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 rail traffic in and around their usual and accustomed areas and other lands upon which Yakama People retain usufructuary rights pursuant to the Treaty of 1855 with the Yakama Nation...

The proposed rail expansion would have a direct adverse impact to the Yakama Nation, its People, and its Treaty-reserved rights and Treaty-protected resources. The Yakama Nation considers these impacts to the Yakama Nation's Treaty rights unacceptable... there is no mitigation adequate to address the diminishment or destruction of the Yakama Nations' Treaty-reserved rights and Treaty-protected resources. There is no adequate mitigation that will compensate the Yakama Nation, or its People, for the continued degradation of our sacred places, the incremental, but constant damage to our natural resources that sustain our culture and the constant threat to the livelihood and cultural practices of the Yakama People..."

In his September 26, 2016 letter (received after the Planning Commission record had been closed), Chairman Goudy clarifies that his earlier letter was prepared after reading Staff's proposed conditions of approval to mitigate Treaty rights concerns. He states:

"...to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by the rail expansion project – they do not...the proposed Conditions of Approval will not bring the project to a level where there are no adverse impacts to Yakama Nation's Treaty rights. The Yakama Nation urges the Wasco County Planning Commission ("Commission") to reject Union Pacific Railroad's Application."

The Wasco County Planning Commission approved the development on September 26, 2016 with modified conditions of approval, removing several conditions staff deemed necessary for compliance. In addition to appeals filed by the applicant, and the Friends of the Gorge, the Yakama Nation filed a timely appeal of the Planning Commission's decision citing adverse impacts to Treaty rights and a failure to comply with the NSALUDO, as it protects those rights.

A subsequent letter from the Yakama Nation was provided for the November 2, 2016 Board of County Commissioner's hearing, in which Chairman Goudy states:

"The proposed rail expansion has the potential to interfere with the Yakama Nation's exercise of its Treaty rights, to hunt, fish, and gather it [sic] its usual and accustomed areas...the proposed rail traffic will directly interfere with fishing in the Columbia River...Increased train traffic would limit both access to the Yakama Nation's usual and accustomed fishing areas and would increase the risk of injury or death to tribal fishers...The Yakama Nation considers these impacts to the Yakama Nation's Treaty rights unacceptable...there is no mitigation adequate to address the diminishment or destruction of the Yakama Nation's Treaty-reserved rights and Treaty-protected resources...The proposed rail expansion negatively impacts the Yakama Nation's Treaty Rights. Accordingly, the Yakama Nation urges the Board to deny Union Pacific's Application for Rail expansion."

At the November 2, 2016 Board of County Commissioner's Hearing, Austin Greene, Tribal Chairman for the Confederated Bands and Tribes of the Warm Springs Indian Reservation

provided testimony citing support for the comments provided by the Umatilla and Yakama Nation, as well as his own concerns regarding the proposed development.

Staff notes that three of the four National Scenic Area Act Treaty Tribes provided comments of concern regarding the proposed development and adverse impacts to Treaty rights. Please see Attachments I and L to review the complete letters and testimony provided by Columbia River Gorge National Scenic Area Act Treaty tribes.

80. Section 14.810 states:

“... Section 17 (Savings Provisions of the Scenic Area Act) contains several provisions regarding the need to avoid potential effects to treaty rights. Treaty rights are defined by the Treaties of 1855 between the Congress and Indian Tribal governments. These rights are not subject to negotiation. Potential effects to treaty rights must be avoided...”

81. Section 14.800(D) explains how the treaty rights protection process may conclude, it states:

1. *The County will decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe.*
 - a. *The final decision shall integrate findings of fact that address any substantive comments, recommendations, or concerns expressed by Indian tribal governments.*
 - b. *If the final decision contradicts the comments, recommendations or concerns of Indian tribal governments, the County must justify how it reached an opposing conclusion.*
2. *The treaty rights protection process may conclude if the County 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 County 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.*

Finding: As explained above, adverse impacts to Treaty rights were raised by the Confederated Tribes of the Umatilla Indian Reservation (before the Planning Commission decision), the Confederated Tribes and Bands of the Yakama Nation (before and after the Planning Commission decision), and the Confederated Tribes and Bands of the Warm Springs Indian Reservation (at the Board’s Hearing). Concerns focused on Treaty-reserved rights and Treaty-protected resources, including, impacts to and possible elimination of fishing access, ecosystem health that would harm the tribal members’ ability to hunt, fish and gather for foods at usual and accustomed areas, participate in traditional religious and cultural practices, and likely

damage cultural resources. Cultural resource impacts are addressed by Sections 14.500 and 14.510 above.

Prior to receipt of the Treaty rights comment letters, staff coordinated extensively with the U.S. Army Corps of Engineers, U.S. National Marine Fisheries Service, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, Oregon Fish and Wildlife, the Oregon State Water Master to evaluate the impacts to wetlands, priority habitats and sensitive wildlife and plants. Staff concludes that with conditions of approval to require the mitigation plans prepared by the applicant, and to eliminate the 6.62 acre landing zone for construction in SMA Open Space, the proposed development will not adversely affect natural resources.

To address emergency response needs for the protection of natural resources and public health and safety, Staff recommended UPRR be required to prepare a Spill Response Plan for derailments and railroad accidents prior to commencement of construction and to provide railroad emergency response training to emergency service providers in the Gorge.

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 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.

As stated in (2) above, "uses that would affect or modify such rights shall be prohibited". Prior to receipt of the comments received from the Yakama Nation and testimony from the Warm Springs Indian Reservation, Staff proposed the following conditions of approval for the Planning Commission's consideration to address the Treaty rights impacts raised by the Umatilla, with the direction that if these conditions were not included, the use must be denied:

- The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

- A study shall be conducted to analyze the impacts trains have on tribal fishing. It should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge both recent and those projected to occur in the future. There are many uncontrolled crossings along the Columbia River both within and outside the Gorge. Funding must be identified and set aside to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured by Treaty rights.

Staff solicited feedback on the proposed conditions of approval from Mr. Huber, but did not receive formal guidance. Pursuant to (3) above, a lack of response does not indicate approval.

The Planning Commission voted to remove the first condition due to a lack of staff resources to effectively monitor and implement the condition for compliance. The Planning Commission also voted to modify the second condition to be inclusive of all four tribes (was previously limited to the Umatilla based on comment letters received at that time).

As noted above, several letters were received from the Treaty tribes following the preparation of Staff's initial report and recommendation to the Planning Commission (please see Attachments I, K and L for letters). In their September 26, 2016 letter, and subsequent appeal to the Planning Commission's decision, the Yakama Nation provided a response stating that the proposed conditions were not capable of mitigating the potential impacts associated with the proposed development, and that no known mitigation options existed to prevent adverse impacts to Treaty rights. Testimony provided by the Warm Springs at the Board's hearing on November 2, 2016 supported these concerns.

In its appeal to the Board, the applicant requested the second condition of approval be removed and allowed to be implemented through a voluntary process (see Attachment G and H). The applicant provided examples of past voluntary efforts that have proven successful for achieving the desired outcome. The NSALUDO requires the Board to make a finding of no effect or prohibit the proposed use. 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.

At its November 2, 2016 hearing, the Board of County Commissioners concluded that three of the four Treaty tribes of the Gorge had voiced concerns that the proposed development would adversely affect Treaty rights, and that in order to be consistent with the Management Plan for the Columbia River Gorge National Scenic Area and the Wasco County National Scenic Area Land Use and Development Ordinance, the proposed development must be denied. Pursuant to (2) above, the treaty rights protection process may conclude with the Commissioner's decision to deny the proposed development.

82. In addition to the above stated findings, the board adopts the analysis of appeals provided by Staff in Attachments E, H, and J that responds directly to points raised in the hearings process.

**Wasco County Planning Department***"Service, Sustainability & Solutions"*

2705 East Second St. • The Dalles, OR 97058

(541) 506-2560 • wcplanning@co.wasco.or.us

www.co.wasco.or.us/planning

FILE NUMBER: PLAAPL-16-10-0001 ofPLASAR-15-01-0004**APPEAL OF LAND USE DECISION**ORIGINAL PLANNING DEPARTMENT FILE NUMBER: PLASAR-15-01-0004Date Received: 10/13/2016 Planner Initials: DN Date Complete: _____ Planner Initials: _____**APPELLANT INFORMATION**Name: Friends of the Columbia Gorge, Columbia Riverkeeper, Physicians for Social ResponsibilityMailing Address: Gary Kahn, Reeves Kahn Hennessy & Elkins, PO Box 86100City/State/Zip: Portland, OR 97286Phone: 503-777-5473Email: gkahn@rke-law.com**APPEAL INFORMATION****1. Appeal Type**

- ☐ Administrative Decision to the Planning Commission: Fee = \$250
- ☒ Planning Commission Decision to the Board of County Commissioners: Fee = \$ 1,200

If appellant prevails at Planning Commission or a subsequent appeal, the \$250 fee for the initial appeal shall be refunded per ORS 215.416(11)(b). This is not applicable for any subsequent appeal costs.

2. Appeal Deadline: October 14, 2016Date Submitted: October ¹³ 14, 2016

All appeal documents filed with Wasco County must be delivered to the Wasco County Planning Department Office by postal service or in person. Documents faxed are not considered filed. An appeal will not be considered timely unless received no later than 4:00 p.m. on the deadline stated on the Notice of Decision or Resolution. AN APPEAL IS NOT CONSIDERED COMPLETE UNTIL BOTH THE SIGNED NOTICE OF APPEAL AND FILING FEE ARE RECEIVED.

3. Party Status: State how the petitioner(s) qualifies as a party to this matter:Please see attached statement of party status.

Party includes the following:

- The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor's Office, of the property which is the subject of the application.
- All property owners of record, as provided in (a) above, within the notification area, as described in section 2.080 A.2., of the property which is the subject of the application.
- A Citizen Advisory Group pursuant to the Citizen Involvement Program approved pursuant to O.R.S. 197.160.
- Any affected unit of local government or public district or state or federal agency.
- Any other person, or his representative, who is specifically, personally or adversely affected in the subject matter, as determined by the Approving Authority. (Revised 1/92)

4. Grounds for appeal: List the **specific** grounds relied upon in the petition request for review (e.g. ordinance criteria not met, procedural error, etc.) Additional pages may be attached.

Please see attached grounds for appeal.

5. De Novo vs. On the record: All appeals to Planning Commission are DeNovo meaning new information can be entered into the record. All appeals to the Board of Commissioners are on the record unless a request is made as part of this request by party filing the petition. Any other party must make such a request no more than seven (7) calendar days after the deadline for filing a petition for review has expired.

The appeal is to the Board of Commissioners?

☐ NO ☒ YES

I request the hearing to be DeNovo or partial DeNovo?

☒ NO ☐ YES

State the reasons you are requesting a DeNovo or partial DeNovo without addressing the merits of the land use action:

Indicate any persons known to be opposed to a request for a DeNovo hearing.

When practicable, the requesting party shall advise the other parties and attempt to gain their consent.

I have attempted to gain the consent of the other parties associated with this file?

☐ NO ☐ YES

If you answered no indicate why this is not practicable. If you answered yes list the parties who have consented for this to be a DeNovo or partial DeNovo hearing.

The request for a DeNovo hearing for appeal of a quasi-judicial plan amendment shall be decided by the Board of Commissioners as a nonpublic hearing item, except that the Board may make such provision for notice to the parties

and may take such testimony as it deems necessary to fully and fairly address significant procedural or substantive issues raised. The Court shall grant the request only upon findings that:

- A de novo hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action;
- The substantial rights of the parties will not be significantly prejudiced; and
- The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

5. Outstanding Appeal Fees: Any person wishing to appeal any decision shall be required to pay all outstanding appeal fees prior to their appeal application being considered complete.

List prior appeals filed:

PLAAPL-11-12-002 & 003

SPR-02-107-WARR1-GA

APL-99-104

I have paid all outstanding fees associated with prior appeals:

☐ NO ☒ YES

SIGNATURES



ATTORNEY FOR APPELLANTS

10/13/16

Name, Title

Date

Name, Title

Date

Additional petitioner(s):

Name

Address

Name

Address

Name

Address

Name

Address

Statement of Party Status (Item 3)

Friends of the Columbia Gorge (Friends) is a non-profit organization with approximately 6,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge. As documented in Friends' written and oral comments to the Planning Commission, the proposed project will violate the applicable law and harm the protected resources of the Columbia River Gorge National Scenic Area (NSA). This harm is in direct opposition to Friends' mission and would cause irreparable harm to Friends and its members.

Oregon Physicians for Social Responsibility (PSR), guided by the values and expertise of medicine and public health, works to protect human life from the gravest threats to health and survival by striving to protect our climate and advance environmental health. The proposed project would degrade the environmental health of the NSA and would add capacity for more trains through the Gorge thus causing harm to PSR and its members.

Columbia Riverkeeper's mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. The proposed project would cause irreparable harm to the aquatic and wildlife resources of the NSA in direct opposition to Columbia Riverkeeper's mission, thus harming the organization and its members.

Grounds for Appeal (Item 4)

In both oral and written substantive comments, the Appellants identified dozens of areas where the application fails to comply with the Wasco County National Scenic Area Land Use and Development Ordinance (NSA-LUDO), the Management Plan for the Columbia River Gorge National Scenic Area (Management Plan), and the Columbia River Gorge National Scenic Area Act (Scenic Area Act). The Appellants hereby incorporate all issues raised in the Appellants' comments to the Planning Commission. Despite being apprised of these issues, the Planning Commission approved the application and issued a Staff Summary with Planning Commission Revisions ("Staff Report") and decision (collectively "Decision"). The appeal issues include but are not limited to the following:

The proposal does not comply with the Management Plan and the Wasco County zoning ordinance:

- The Management Plan does not allow expansion of railroads in the GMA Open Space zone. However, about half of the proposed construction is in this zone. *See* Management Plan at II-3-5, NSA-LUDO § 1.070.
- This project cannot be lawfully permitted in the GMA Large-Scale Agriculture zone because the legally required resource-by-resource, parcel-by-parcel analysis of the affected resources was not done and because the applicant has not demonstrated that the new track is the minimum size necessary to provide the service as required by County code. *See* NSA-LUDO § 3.120(E)(20).
- The proposed new culvert cannot be legally placed in the GMA Open Space zone. *See* NSA-LUDO § 3.180(F).
- The temporary construction area in the GMA Water zone is not an allowed use. *See* NSA-LUDO § 3.020.

- Culverts in SMA Public Recreation are not an allowed use. *See* NSA-LUDO § 3.170(F).
- The Decision unlawfully approves signage without adequate evidence and findings to support the decision. The Staff Report references Chapter 23 (Sign Provisions) but does not address it. In addition, the applicant has not specified signage locations in its application. Therefore, whether the signage meets scenic area criteria cannot be evaluated and the signage cannot be approved. *See generally* NSA-LUDO Chapters 14 & 23.
- All over-height structures must be denied or conditioned to meet code. Based upon scenic resource review, the County may determine that the structures must be even shorter. *See* NSA-LUDO §§ 3.120(G)(6), 3.130(G)(5), 3.170(H)(4), 3.180(G)(4).
- For resources in the GMA, the Planning Commission unlawfully granted blanket exemptions from four different setback and buffer standards. In the GMA, each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. The evidence in the record does not demonstrate that this has been done. *See* NSA-LUDO § 6.020(B).
- The Planning Commission unlawfully granted variances to setbacks in the SMA. The applicant failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances. *See* NSA-LUDO §§ 6.020(D), 14.500(B)(5). In addition, for scenic resource variances, the scenic mitigation plan required in NSA-LUDO § 6.020(D) ensuring that “the development can be mitigated to ensure no adverse effects would result” has not been submitted by the applicant so the variances allowed in the Decision are unlawful. Also, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest and then unlawfully granted the variances. *See* Staff Report at 114.
- The Decision unlawfully allows the applicant to violate general setback standards. *See* Staff Report at 21; NSA-LUDO §§ 3.120(G)(2), 3.120(G)(3), 3.130(G)(2), 3.130(G)(3), 3.170(H)(2), 3.170(H)(3), 3.180(G)(2), and 3.180(G)(3).
- Conditions of approval to enforce the Planning Commission’s conclusions regarding the proposed rock blasting and crushing must be included. Condition 37, or a new condition, must ensure that the rock cannot be sold or used off site.
- The proposed findings unlawfully allow the applicant to violate conditional use criteria because of fire and traffic safety issues; because it would significantly impair sensitive wildlife habitat and riparian vegetation; because there will be adverse effects on air, water, and land; because of the visual impacts that it will cause; and because the use is not compatible with surrounding uses. *See* NSA-LUDO § 5.020, Staff Report at 32.

The proposal would unlawfully harm scenic resources in the NSA:

- The approval was unlawful because the applicant acknowledges that it failed to include a landscaping plan that meets the requirements of the Scenic Area ordinance, the application lacks adequate elevation drawings, and the record does not reflect the location, size, and shape of all existing and proposed buildings and structures,” *See* NSA-LUDO § 14.020(D–E) & (B)(2).
- The application and Decision fail to disclose and evaluate details about the surface area of the proposed project that would be visible from key viewing areas (KVAs) and the linear distances along the KVAs from which the project would be visible making it

impossible to conclude that the scenic resource standards will be met. *See* NSA-LUDO §§ 14.200(A)(1)(f), 14.200(A)(1)(c). The Decision also does not address or even mention some of the KVAs from which the proposed development is topographically visible. *See* NSA-LUDO § 14.020(A)(5).

- The project violates the scenic protection requirements of County code because the applicant has failed to propose any new trees to screen the new development from key viewing areas and the conditions of approval unlawfully fail to ensure the retention and replacement of existing screening trees. *See, e.g.*, NSA-LUDO § 14.400(I)(1).
- The applicant fails to demonstrate that the proposed development is sited to achieve the applicable scenic standards including that the development must be sited on each parcel so as to use the existing topography and vegetation for screening. *See* NSA-LUDO § 14.200(R)(4).
- The not visually evident and visual subordination standards are often impermissibly discussed interchangeably and/or conflated in the Decision. This leads to violations of the not visually evident standard in the zones in which it applies. *See* Staff Report at 57.
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to scenic resources. *See, e.g.*, NSA-LUDO §§ 14.200(L), 1.200 (definition of “cumulative effects”); Staff Report at 50 (removing a condition that purported to minimize cumulative effects).
- In Condition 33, the Planning Commission unlawfully defers to Union Pacific standards that are not in the record and are under the control of the applicant, allowing it to violate scenic resource protections.

The proposal would unlawfully harm recreation resources in the NSA:

- The Decision fails to adequately ensure that the proposed development would comply with the protection measures for recreation resources in the Management Plan and in the County code. *See* Management Plan at I-4-25; NSA-LUDO §§ 14.700(F), 14.710.
- The conditions of approval unlawfully defer determination of mitigation measures until after project approval or omit mitigation measures entirely. *See* NSA-LUDO § 14.710(E).
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to recreation resources. *See, e.g.*, Management Plan at I-4-25.

The proposal would unlawfully harm natural resources in the NSA:

- The applicant unlawfully proposes to intrude on both water resources and their buffer zones. *See, e.g.*, NSA-LUDO § 14.610(A)(2)(g)(2).
- The applicant has failed to meet its burden to demonstrate compliance with the natural resource protection requirements. *See* NSA-LUDO § 14.610(D)(1–2).
- The Decision unlawfully substitutes the applicant’s standards for the legal standards found in the Management Plan and County code for the protection of sensitive wildlife and plants. *See* NSA-LUDO § 14.610(B)(2).
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to natural resources. *See, e.g.*, Management Plan at I-3-3, I-3-31, I-3-36.

The proposal would unlawfully harm cultural resources and treaty rights in the NSA:

- The applicant failed to complete adequate cultural resource reconnaissance surveys and therefore failed to meet its burden to demonstrate compliance with the cultural resource protection requirements. *See* NSA-LUDO § 14.500.
- The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to cultural resources. *See Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 346 Or 366, 213 P3d 1164 (2009).
- The Planning Commission unlawfully removed a condition to protect treaty rights and acknowledged this would bring the Decision out of compliance with the law. *See* Staff Report at 120.

Attachment E - Staff Response to Appeal PLAAPL-16-10-0001

Appeal Number: PLAAPL-16-10-0001

Appellant: Friends of the Gorge, Columbia Riverkeeper, and Physicians for Social Responsibility

Grounds for appeal provided by the applicant are listed below in **bold font**; Staff's response follows each ground in regular font. Staff replaced the bullets with numbers to simplify references during discussion.

The proposal does not comply with the Management Plan and the Wasco County zoning ordinance:

- 1. The Management Plan does not allow expansion of railroads in the GMA Open Space zone. However, about half of the proposed construction is in this zone. See Management Plan at II-3-5, NSA-LUDO § 1.070.**

The Management Plan for the Columbia River Gorge National Scenic Area allows the following uses, subject to compliance with the guidelines for the protection of scenic, cultural, natural, and recreation resources:

“Repair, maintenance, operation, and improvement of existing structures, trails, roads, railroads, utility facilities, and hydroelectric facilities.” (GMA Guidelines, Review Uses – All Lands Designated Open Space (1)(C)) See MP II-3-5.

“Changes in existing uses, including reconstruction, replacement, and expansion of existing structures and transportation facilities, except for commercial forest practices.” (SMA Guidelines, Review Uses (2)(A)) See MP-II-3-12.

The Wasco County National Scenic Area Land Use and Development Ordinance was adopted in 1994 to implement the Management Plan for the Columbia River Gorge National Scenic Area. The NSALUDO was reviewed and approved by the Columbia River Gorge Commission and the Secretary of Agriculture prior to final adoption and implementation. The Wasco County NSA LUDO allows the following uses subject to review and compliance with Chapter 14 – Scenic Area Review for the protection of scenic, cultural, natural, and recreation resources and treaty rights:

“Repair, maintenance, operation, and improvement and expansion of existing serviceable structures, including roads, railroads, hydro facilities and utilities that provide sewer, transportation, electric, gas, water, telephone, telegraph, telecommunications. (GMA only)” See NSALUDO § 3.180(D)(2)

“Changes in existing use, including reconstruction, replacement, and expansion of existing structures and transportation facilities, except for commercial forest practices. (SMA only)” See NSALUDO § 3.180(D)(3).

Staff Conclusion: Staff finds the expansion of existing and servicable railroads to be a use allowed with review in the GMA and SMA, subject to compliance with the protections for scenic, cultural, natural, and recreation resources and treaty rights. Staff finds this use to be allowed in the Wasco County NSALUDO and Management Plan for the Columbia River Gorge National Scenic Area.

2. **This project cannot be lawfully permitted in the GMA Large-Scale Agriculture zone because the legally required resource-by-resource, parcel-by-parcel analysis of the affected resources was not done and because the applicant has not demonstrated that the new track is the minimum size necessary to provide the service as required by County code. See NSA-LUDO § 3.120(E)(20).**

NSALUDO § 120(E)(20) states:

- “Utility facilities and railroads necessary for public service upon showing that: (GMA & SMA)
- a. There is no practicable alternative location with less adverse effect on the scenic, cultural, natural, recreational, agricultural or forest lands; and
 - b. The size is the minimum necessary to provide the service.”

There is no reference in the NSALUDO for a “resource-by-resource, parcel-by-parcel analysis” specific to the GMA Large-Scale Agriculture zone. There are requirements for resource impacts analysis in Chapter 14 – Scenic Area Review, but that does not appear to be what the appellant is referencing. Property development standards listed in the GMA Large-Scale Agriculture zone include general property line setbacks and agricultural setbacks for the protection of current and future agricultural uses occurring on lands suitable for agricultural use and designated GMA Large-Scale or Small-Scale Agriculture. The Planning Commission’s Final Decision and Report contain findings addressing these setbacks: Finding D(15) on page 18 and Finding D(20) on page 20. Finding D(20) includes a description of adjacent agricultural properties and a condition of approval to require replacement signal buildings (the only new buildings proposed) to adhere to the required agriculture setbacks of 30-feet from vineyards and 75-feet from orchards. The condition of approval was included in the Planning Commission’s Final Decision.

As required for completeness, the applicant provided an Alternatives Analysis to verify the proposed development would minimize impacts to protected resources and will be the minimum size necessary to provide the service. The provided Alternatives Analysis (see Section 3 of the Project Narrative) compares five siting and design options – all of which are located within the vicinity of Mosier, Oregon. The applicant states in the analysis, and throughout the application materials, that the Mosier vicinity is the only location that can accomplish the project goals. Planning Staff evaluated the five alternatives and, based on the natural and cultural resource surveys prepared by qualified professionals, concluded that the applicant’s preferred alternative did indeed minimize impacts to protected resources, when compared to the alternatives that could accomplish the project goals. The Planning Commission’s Final Decision relies on the applicant’s Alternatives Analysis and Staff’s review of the alternatives.

The Planning Commission’s Final Decision and Report contain several findings addressing the requirement that there is “no practicable alternative” to the location (see Findings 14 and 76) and the project is the “minimum size necessary to provide the service” (see Finding F(1) on page 26, Finding I(14) on page 50, and Finding I(76) on page 111).

Staff Conclusion: Staff finds that with conditions of approval to ensure agricultural setbacks are met by the proposed replacement signal buildings, the proposed development will comply with the requirements specific to the GMA Large-Scale Agriculture zone. Staff also finds that the applicant provided an alternatives analysis to verify the proposed development was the minimum size necessary to provide the service, that there is not practicable alternative for the location of the development that

would still meet the project goals, and that it minimizes the impacts explicitly protected resources addressed by Chapter 14 – Scenic Area Review.

3. The proposed new culvert cannot be legally placed in the GMA Open Space zone. See NSALUDO § 3.180(F).

Section 3.180(F) of the NSALUDO states: “Prohibited Uses: All other uses not listed.”

Section 3.180 (B)(2) provides for the replacement and expansion of existing culverts as a use permitted without review for lands zoned Open Space in the GMA and SMA, as long as all necessary federal and state permits that protect water quality and fish and wildlife habitat are obtained prior to construction.

Section 3.180(D)(4) allows resource enhancement projects in the GMA and SMA for the purpose of enhancing scenic, cultural, recreation, and/or natural resources, subject to the Resource Enhancement standards in Chapter 10.

The application includes the replacement and expansion of several culverts, as well as the placement of a new culvert. All proposed culvert modifications are proposed to provide for improved water passage and fish passage between the railroad created lakes and the Columbia River. The proposed culvert improvements, including the new culvert, were included in the Water Resources Compensatory Mitigation Plan (see Appendix D of the application) and not as unique review use. The Wetland Mitigation Plan was reviewed and approved by the U.S. Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon Department of Fish and Wildlife. No objections or requests for modification were provided by any of these agencies.

Staff Conclusion: The Board of Commissioners may choose to add findings that explicitly address Chapter 10 of the NSALUDO. However, Staff feels this is unnecessary because the proposed culvert was reviewed for resource impacts as a component of a larger mitigation strategy required by Section 14.600 – Natural Resources (GMA Only); Section 14.600 does not include any cross references or requirements for wetland mitigation, creation or enhancement to comply with Chapter 10. Furthermore, the approved Mitigation Strategy was extensively vetted by federal and state resource experts for impacts to natural resources prior to approval.

4. The temporary construction area in the GMA Water zone is not an allowed use. See NSALUDO § 3.020.

NSALUDO Section 3.020 states:

“Compliance Required. A legal parcel may be used and a legal structure or part of a legal structure may be constructed, moved, occupied, or used only as this Ordinance permits.

New cultivation and some re-cultivation are subject to Chapter 14 – Scenic Area Review. The Gorge Commission, Forest Service and County will work together to establish a farm stewardship program enabling the County’s Technical Advisory Committee, the Soil Conservation Service, Cherry Grower’s Association and other affected groups to help educate Wasco County National Scenic Area residents about compliance requirements and preferable farming practices.”

The appellant has not challenged legal parcel status, legal structure status or farming practices. Therefore, Staff is responding only to the uses allowed in the GMA Water zone – which is not addressed by Section 3.020 as the appellant references.

Many shoreline properties within the National Scenic Area contain areas zoned GMA Water or contain development such as docks, that extend from another zone into GMA Water. Other uses, such as new mooring buoys exist exclusively in GMA Water. The Management Plan for the Columbia River Gorge National Scenic Area does not establish this zone or contain guidance for allowed review uses in this zone. The original 1992 zoning maps, adopted with the 1992 Management Plan, are the only location in which the Lakes, Tributaries, and Columbia River “zone” is actually indicated. This paper map has since been digitized to be used as a GIS zoning map resource. The GIS version of this map refers to the zone as GMA Water. Very little evidence has been found to support the actual intent of this zone or the anticipated uses to occur within it - with or without review for resource impacts.

Past guidance from the Columbia River Gorge Commission and U.S. Forest Service National Scenic Area Office has concluded with policy direction that requires any physical development that extends from non-Urban Areas (explicitly exempt) into GMA Water (e.g. new docks or boathouses) or any other structural development in GMA Water (e.g. new mooring buoys) to comply with the requirements for the protection of scenic, cultural, natural, and recreational resources and treaty rights.

The Management Plan and NSALUDO contain references to new projects and project related ground disturbing activities and mitigation of those activities occurring in and along the main stem of the Columbia River; see NSA LUDO §§ 14.200(S), 14.600(B)(2)(a), 14.610(A)(2)(a)(2), 14.610(A)(2)(f), 14.610(E)(9)(h), 14.700(C)(6) and (7), 14.700(E)(1)(a), 14.800(B)(1)(b), and 14.800(B)(3).

Staff Conclusion: There is no explicit zoning language in the Management Plan or the NSALUDO to provide guidance on what uses (e.g. windsurfing) and development (e.g. private dock) are allowed exclusively in GMA Water zones – as the underlying zoning. Instead, the rules identify resource protection requirements for uses that may occur within or near the Columbia River and its tributaries.

5. Culverts in the SMA Public Recreation [sic] are not an allowed use. See NSA-LUDO § 3.170(F).

NSALUDO Section 3.170(F) states: “Prohibited Uses: All other uses not listed.”

NSALUDO Section 3.170(G)(31) allows resource enhancement projects in the GMA and SMA Public Recreation zones for the purpose of enhancing scenic, cultural, recreation and/or natural resources, subject to compliance with the Resource Enhancement standards in Chapter 10.

The culverts proposed for this project are part of a larger Compensatory Water Resource Mitigation Plan (see Appendix D of the application) that expands and extends existing culverts and adds new culverts for the purposes of wetland mitigation and enhancement. The Mitigation Plan prepared by the applicant was reviewed and approved by the U.S. Army Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon Department of Fish and Wildlife. No concerns or requests for modification were provided by these reviewing agencies.

Staff Conclusion: For the same reasons provided in Staff’s response to Ground # 3 above, Staff finds the culverts in this zone to be part of a larger mitigation strategy that was prepared for compliance with Chapter 14 – Scenic Area Review.

- 6. The Decision unlawfully approves signage without adequate evidence and findings to support the decision. The Staff Report references Chapter 23 (Sign Provisions) but does not address it. In addition, the applicant has not specified signage locations in its application. Therefore, whether the signage meets scenic area criteria cannot be evaluated and the signage cannot be approved. See generally NSA-LUDO Chapters 14 & 23.**

Staff requested a correction at the Planning Commission hearings to remove references to Chapter 23 from the list of applicable provisions; the Planning Commission agreed but the change was erroneously not made by Staff to the Final Decision.

The reason for staff's request is that NSALUDO Sections 3.100(H)(4) and 3.180(B)(2)(c) allow permanent public regulatory, guide, and warning signs without review in each of the affected zones - as long as they comply with the *Manual for Uniform Traffic Control Devices* and the support structures and backs of all signs are dark brown with a flat, non-reflective finish. As described and shown in the application materials, signage proposed for the project include double sided, permanent public regulatory, guide, and warning signs required by the Federal Rail Administration for navigation and public safety. This is addressed by the Planning Commission's Final Decision and Report in Finding D(6) on page 11. Temporary signs necessary for construction are addressed by Finding D(9) on page 15. Conditions of approval were included in the Planning Commission's Final Decision to require compliance with the color and material requirements (Conditions 22 and 30), as well as the size and 30-day time constraints for construction related signage (Condition 12).

Staff Conclusion: The Final Decision lawfully approves signage as an allowed outright use, with conditions of approval to ensure compliance with color and material requirements. The Board of Commissioners should allow the missing change to the Final Decision Report striking the reference to Chapter 23 on page 2.

- 7. All over-height structures must be denied or conditioned to meet the code. Based upon scenic resource review, the County may determine that the structures must be even shorter. See NSA-LUDO §§ 3.120(G)(6), 3.130(G)(5), 3.170(H)(4), 3.180(G)(4).**

In addition to the rock blasting, ballast development, and track installation, structures proposed by the application include 9-foot tall signal buildings, a variety of signage up to 10 feet tall, a 25-foot tall retaining wall, twelve 22-foot tall signal light structures, and the replacement of existing telephone poles with five new, 53-foot tall wooden monopole communications towers.

NSALUDO Sections 3.120(G)(6) GMA Large-Scale Agriculture, 3.130(G)(5) GMA Small-Scale Agriculture, 3.170(H)(4) GMA and SMA Public Recreation, and 3.180(G)(4) GMA and SMA Open Space all state:

"Height – Maximum height for all structures shall be thirty-five (35) feet unless further restricted in accordance with Chapter 14 – Scenic Area Review."

The zones listed above also allow new and/or the replacement of existing above ground utility facilities, including towers, pole and tower-mounted equipment, and associated facilities, subject to development standards that include size reference above. That said, the NSALUDO was prepared in the early 1990s and adopted in 1994 to implement the Management Plan in Wasco County. Recent updates occurring as recently as 2010, were limited in scope. The Management Plan imposes a maximum height of 24 feet for new accessory buildings, but does not state specific height maximums for other buildings

or structures that are not buildings (see example on MP II-4-8, Review Uses 1(E)(2)). Resource impacts associated with the height of new development are addressed by the Scenic Resources Chapter, which requires that silhouette of all new buildings to remain below the skyline of a bluff, cliff or ridge as seen from designated Key Viewing Areas (see MP-I-1-8, GMA Guideline 8). Impacts of height are also addressed through the scenic quality objective (visually subordinate or not visually evident) established for each zone and landscape settings note additional requirements in which height must be carefully designed for scenic resource protection. For example in the GMA, the Management Plan and NSALUDO require new development to be visually subordinate to its setting as seen from key viewing areas.” And, in the Coniferous Woodland landscape setting, structure height is required to remain below the tree canopy level in wooded portions of the setting (see MP-I-1-7, GMA Guideline 2, MP-I-1-16, Design Guideline 1, NSALUDO 14.200)(A) and 14.400(B)(1)).

Staff Conclusion: Technology has changed significantly since the rules were developed to require all new buildings and structures to adhere to a 35-foot height maximum, including the development and implementation of cell phone towers and other communication towers necessary for emergency response providers and other service providers necessary for public health and safety. The Management Plan and NSALUDO require new above ground utility facilities to be the minimum size necessary to provide the service, meet a public need, and comply with the scenic quality objective for the applicable zone. The NSALUDO uses buildings and structures interchangeably throughout, but the Management Plan does not, and only sets explicit numerical height limitations on new accessory buildings. Staff believes that it is not the intent of the NSALUDO to prevent above ground communication facilities that are necessary for providing public service (e.g. emergency service communications, transportation communications, radio communications, etc.) and the minimum size necessary to provide that service. Staff believes this is an ordinance oversight – especially since it is not required by the Management Plan. Staff also concludes that the removal of telephone poles and connecting lines along the length of the project area, and replacing that communication need with five new wooden monopoles will be an improvement to the scenic quality of the affected landscape.

- 8. For resources in the GMA, the Planning Commission unlawfully granted blanket exemptions from four different setback and buffer standards. In the GMA, each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. The evidence in the record does not demonstrate that this has been done. See NSA-LUDO § 6.020(B).**

NSALUDO Section 6.020(B) states:

“When building height, setbacks or buffers specified in the standards for protection of scenic, cultural, natural, recreational, agricultural or forestry resources overlap or conflict, the building height, slope setbacks or buffers may be varied upon demonstration that: (GMA Only)

1. A building height, setback or buffer specified in this Ordinance to protect one resource would cause the proposed use to fall within the setback or buffer specified in this ordinance to protect another resource; and
2. Variation from the specified building height, setbacks or buffer would, on balance, best achieve the protection of the affected resources.”

As noted in Section G on page 36 of the Planning Commission's Final Decision Report, the applicant request variances of greater than 50% to the Columbia River setbacks, Scenic Travel Corridor setbacks, wetland buffer standards and sensitive plant buffer standards.

Railroad related repair and maintenance activities (allowed without review), structural replacement, modification and expansion (allowed with review) are uses listed in the Management Plan and NSALUDO. Staff's analysis found that due to the narrow width of the railroad right-of-way, location of the existing railroad corridor between the Columbia River and Interstate 84, and proximity to existing waterbodies, sensitive plants and designated Scenic Travel Corridors – there are very few instances in which any railroad actions could occur outside of the buffer of a natural or scenic resource buffer. An Alternatives Analysis was provided by the applicant to demonstrate the proposed development minimized impacts to sensitive resources and extensive mitigation plans were reviewed and confirmed by federal and state agency experts to ensure any unavoidable impacts are fully addressed.

Staff Conclusion: Staff finds that the Scenic Area regulations anticipate railroad related development and provide for a process in which they may be conducted. The regulations also provide a variance mechanism and mitigation mechanisms to address unavoidable conflicts and impacts. Staff concludes that it would be nearly impossible for the railroad to conduct any activities, even those necessary for safety, without conflicting with protected resource buffers. The required mitigation plans were prepared by qualified professionals and vetted by federal and state resource professionals to ensure there will be no adverse effects or cumulative adverse effects to the protected resources.

- 9. The Planning Commission unlawfully granted variances to setbacks in the SMA. The applicant failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances. See NSA-LUDO §§ 6.020(D), 14.500(B)(5). In addition, for scenic resource variances, the scenic mitigation plan required in NSA-LUDO § 6.020(D) ensuring that “the development can be mitigated to ensure no adverse effects would result” has not been submitted by the applicant so the variances allowed in the Decision are unlawful. Also, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest and then unlawfully granted variances. See Staff Report at 114.**

NSALUDO Section 6.020(D) states:

“All setbacks and buffer zones in the SMA shall remain undisturbed unless:

1. It has been shown that no practicable alternatives exist, as evidenced by completion of a practicable alternative test; and
2. The natural resources mitigation plan completed in accordance with Chapter 14 of this ordinance ensures that the development can be mitigated to ensure no adverse effects would result.”

Please see Staff's response to Ground 8 above. The applicant provided and an Alternatives Analysis to demonstrate compliance with the Practicable Alternatives Test (see Section 3 of the Application to review the five design options provided by the applicant). The applicant provided a mitigation plan in accordance with Chapter 14 that was reviewed and confirmed with federal and state agency resource professionals including: the U.S. Army Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon Department of Fish and Wildlife. When staff explicitly asked these agencies for confirmation of no adverse effects, no concerns or

requests for modification were provided. The Forest Service provided recommendations to ensure Chapter 14 was fully addressed, Staff recommended conditions of approval to include these recommendations, and the Planning Commission adopted these conditions in their Final Decision - including Conditions 5, 6, 24, 28, 32, 34, 38, and 46.

NSALUDO Section 14.500(B)(5) refers to applicability of the cultural resource reconnaissance and historic survey requirements and whether sites have been adequately surveyed for cultural and historic resources in the past. No requests for variances were made to cultural resources. Furthermore, a complete archeological and historic resource survey, was prepared by qualified professionals and reviewed and confirmed by the National Scenic Area Heritage Program Manager, the State Historic Preservation Officer, and the U.S. Army Corps of Engineers and the four treaty tribes of the National Scenic Area.

The appellant's reference to the requirement of a scenic resource mitigation plan before a variance can be granted assumes that the proposed development will have an adverse effect to scenic resources. As conditioned to ensure the 6.62 acres of Open Space are not cleared for construction purposes, the most visible development will be modifications to an existing railroad – which already looks like a railroad and already exists in the immediate foreground of Key Viewing Areas. A portion of the rock mesa to be blasted will also be visible, as will a portion of the proposed retaining wall. The retaining wall will be partially screened by existing vegetation and will be designed to blend with the surrounding landscape, but the rock blasting occurs at a higher elevation, and will not be screened at the easternmost edge. It is important to note that rock blasting is a regular occurrence for highway related infrastructure and has occurred several times on the Oregon and Washington side of the Gorge for various infrastructure projects. The Planning Commission's Final Decision includes a condition of approval (Condition 23) to require rock blasting to occur in irregular patterns to produce a natural appearing cut face and to remove half casts to further reduce any appearance of non-natural patterns.

Staff Conclusion: Staff finds that the Alternatives Analysis and Mitigation Plans satisfy the requirements for variances in the SMA, as specified in Section 6.020(D). Staff also finds that as conditioned by the Planning Commission's Final Decision, there will be no adverse effects to cultural or scenic resources.

10. The Decision unlawfully allows the applicant to violate general setback standards. See Staff Report at 21; NSA-LUDO §§ 3.120(G)(2), 3.120(G)(3), 3.130(G)(2), 3.130(G)(3), 3.170(H)(2), 3.170(H)(3), 3.180(G)(2), and 3.180(G)(3).

The appellant is referring to general setback standards (property line setbacks) and agricultural setbacks. The applicable setbacks are identified in Findings 19 and 20 on pages 20 and 21 of the Planning Commission's Final Decision Report. Finding 19 addressed general setbacks. It states:

"The proposed development will occur within a traditionally narrow, linear railroad corridor for existing railroad infrastructure development. Wasco County has consistently¹ allowed approved signs, fences, transportation facilities and utilities to exist within these setback areas, inside rights-of-way of existing transportation and utility facilities. Application of setback requirements in these instances would necessitate the acquisition of larger right-of-way widths, resulting in unnecessary loss of resource and agricultural lands. Consistent with past practice, staff does not believe the general setback standards were intended to apply to transportation and utilities facilities and finds

¹ See Wasco County Land Use Application PLASAR-14-12-0022

the proposed development to be consistent with the intent of the Management Plan and requirements of the NSALUDO.”

Finding 20 addresses agricultural setbacks and includes a condition of approval that states:

“A condition of approval is included to ensure the signal buildings on lands adjacent to agriculture zoned lands that are suitable for agriculture use, comply with the 30-foot setback from vineyards and 75-foot setback from orchards. With conditions, the signal buildings are consistent with the agriculture setbacks of Chapter 3.”

Staff Conclusion: Staff finds these findings to be consistent with past practice and agrees with the condition of approval included by the Planning Commission (Condition 9).

11. Conditions of approval to enforce the Planning Commission’s conclusions regarding the proposed rock blasting and crushing must be included. Condition 37, or a new condition, must ensure that the rock cannot be sold or used offsite.

The Planning Commission’s Final Decision includes a condition of approval (Condition 37) that states:

“Blasted rock materials must be moved from the project area for off-site crushing at an existing quarry, in Urban Area, or outside of the NSA.”

The Planning Commission did not expressly review or approve a new quarry for commercial rock excavation, which would include the sales of the rock removed for this project. Therefore, it would be a violation if the applicant did attempt to sell the materials. The Final Decision does not include this language because the application materials state that the blasted materials will be crushed and used onsite for the construction of new and expanded railroad ballast; fill areas are shown on the site plans.

Staff Conclusion: The addition of this language would not change anything. If the applicant sold the materials, it would be a violation of the NSALUDO because they did not apply for a new quarry and do not have an approval to operate one. Instead, they were approved to excavate as necessary for construction (and as further restricted by conditions of approval). If they violated the conditions of approval by excavating in areas not identified on the site plan and approved by the Planning Commission, then it would be a violation of the land use decision. No changes are recommended.

12. The proposed findings unlawfully allow the applicant to violate conditional use criteria because of fire and traffic safety issues; because it would significantly impair sensitive wildlife habitat and riparian vegetation; because there will be adverse effects on the air, water, and land; because of the visual impacts that it will cause; and because the use is not compatible with surrounding uses. See NSA-LUDO § 5.020, Staff Report at 32.

The Planning Commission voted to eliminate conditions of approval included by Staff to comply with the NSALUDO Conditional Use Criteria. Please see Section F, beginning on page 26, of the Final Decision Report to review the findings and changes made by the Planning Commission.

In most instances, the Planning Commission removed these conditions due to their difficulty to enforce with existing staff resources. The Planning Commission did not provide revisions to findings as a result of their modifications.

Staff Conclusion: Staff finds the conditions of approval removed by the Planning Commission to be necessary for compliance with the Conditional Use Criteria contained within NSALUDO Section 5, and recommends they be added back in to the Board's Final Decision.

The proposal would unlawfully harm scenic resources in the NSA:

- 13. The approval was unlawful because the applicant acknowledges that it failed to include a landscaping plan that meets the requirements of the Scenic Area ordinance, the application lacks adequate elevation drawings, the record does not reflect the location, size, and shape of all existing and proposed buildings and structures.” [sic] See NSA-LUDO § 14.020(D—E) & (B)(2).**

Application materials provide engineering drawings indicating the location of existing structures, the location of proposed structures, ground disturbances, wetland disturbances, rock blasting and excavation, and vegetation removal – including a tree inventory mapped with GPS. As the development will occur within the existing railroad corridor, most of which is railroad ballast, very little room exists for the addition of new screening trees that would not create a safety hazard. Instead of requesting a traditional landscaping plan, staff requested specific information about the location and species of trees to be removed (see Figure 10 – Tree Survey of Appendix J Special Status Species Plant Survey and Habitat Mapping Report). Based on Staff's analysis of this information, the Planning Commission's Final Decision includes conditions of approval to eliminate a highly visible clearing of sensitive species; significant mitigation and monitoring of that mitigation; the retentions of all existing trees, except as required for construction; best management practices for the minimization of erosion, reseeding disturbed areas immediately following construction, and more. The Final Decision also includes conditions approval to ensure the visible portions of the development will be able to comply with the visual quality objectives for each zone.

Staff Conclusion: A traditional landscaping plan providing new landscaping for scenic resource protection was not required by staff because it simply did not make sense for the scale, location and physical constraints of the site on which the development proposed. Instead, a landscaping plan in the form of verifying the exact location and species of existing tree to be removed for construction was required to verify scenic resource impacts and the ability of the development to comply with the scenic resource standards without new landscaping. For this reason, Staff finds the approval to be lawful.

- 14. The application and the Decision fail to disclose and evaluate details about the surface area of the proposed project that would be visible from key viewing areas (KVAs) and the linear distances along the KVAs from which the project would be visible making it impossible to conclude that the scenic resource standards will be met. See NSA-LUDO §§ 14.200(A)(1)(f), 14.200(A)(1)(c). The Decision also does not address or even mention some the KVAs from which the proposed development is topographically visible. See NSA-LUDO § 14.020(A)(5).**

Finding I(9), beginning on page 42 of the Planning Commission's Final Decision Report, provides Staff's analysis of the visibility of the proposed development, including a description of the visible development, the approximate linear distances from which it will be visible, the distances from Key Viewing Areas from which it will be visible, the differences in elevation, existing screening afforded by the topography and vegetation, and a list of affected Key Viewing Areas confirmed in the field. The application also included elevation drawings depicting the view of the rock blasting areas from State

Route 14, a designated Key Viewing Area (see page 16 of the Supplemental Application Materials provided by the applicant June 2, 2015 for completeness), engineering drawings identifying the length and depth of the rock blasting and retaining walls (see Appendix C – Engineering Drawings of the application materials).

Staff Conclusion: Staff finds adequate information was available and thoughtfully considered prior to concluding scenic resource impacts that will result from the proposed development.

- 15. The project violates the scenic protection requirements of County code because the applicant has failed to propose any new trees to screen the new development from key viewing areas and the conditions of approval unlawfully fail to ensure the retention and replacement of existing trees. See, e.g., NSA-LUDO § 14.400(I)(1).**

Staff Conclusion: As noted above for Staff's response to Ground #13, the physical space necessary to install new trees simply does not exist within the existing railroad corridor. Instead, staff required a tree removal plan to verify scenic resource impacts and condition new structural development and ground disturbance to ensure the visual quality objective for each zone could be attained. To require new trees could have resulted in an increased safety risk, which seemed like an unnecessary and dangerous.

- 16. The applicant fails to demonstrate that the proposed development is sited to achieve the applicable scenic standards including that the development must be sited on each parcel so as to use the existing topography and vegetation for screening. See NSA-LUDO § 14.200(R)(4).**

The project's ability to achieve the applicable scenic standards (visual quality objective) is discussed throughout the Final Decision Report, beginning with Section 14.200 on page 41. The proposed development will occur within an existing railroad corridor that includes intermittent topographic and vegetation screening from some Key Viewing Areas. The existing corridor is parallel to the Columbia River to take advantage of the only sea level passage through the Cascade Mountain range. To construct a new corridor through this passage would have caused more ground disturbance and excavation, and more scenic, natural, cultural and recreation impacts than what has been proposed.

Staff Conclusion: Staff finds the development has been sited within an existing railroad corridor so as to use the existing topography and vegetation to the maximum extent practicable.

- 17. The not visually evident and visual subordination standards are often impermissibly discussed interchangeably and/or conflated in the Decision. This leads to violations of the not visually evident standard in the zones in which it applies. See Staff Report at 57.**

The ability of the development to comply with the required visual quality objective is discussed in Finding 9 on pages 41 through 45. The appellant refers to a finding on page 57 that responds to the requirements of the River Bottomlands Landscape Setting (NSALUDO Section 14.400(H)). The GMA reference in this rule includes standards to be employed to achieve visual subordination. The SMA reference in this rule requires new buildings to maintain a horizontal appearance in areas with little tree cover, and encourages the use of native plant species and native-appearing vegetation clusters. The referenced finding uses the terms "visual subordination" and "not visually evident" to describe the ability of the development to blend with the landscape and thus, comply with the landscape setting.

Staff Conclusion: Although the terms may be perceived to be used interchangeably in this finding, this is not the appropriate finding or code reference to verify the development complies with the required visual quality objective. Furthermore, not visually evident is a more restrictive scenic standard than visual subordination and any reference to not visually evident is exceeding the requirement of visual subordination. The only visual quality object (scenic standard) identified in the rule listed above is visual subordination.

18. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to scenic resources. See, e.g., NSA-LUDO §§ 14.200(L), 1.200 (definition of “cumulative effects”); Staff Report at 50 (removing a condition that purported to minimize cumulative effects).

Staff Conclusion: Cumulative effects to scenic resources are addressed in Finding I(14) beginning on page 49 of the Planning Commission’s Final Decision Report. Staff finds the conditions of approval limiting rail traffic to the current average of 20-30 cars per train removed by the Planning Commission to be necessary to comply with NSALUDO Section 14.200(L), and recommends they be added back in to the Board’s Final Decision.

19. In Condition 33, the Planning Commission unlawfully defers to Union Pacific standards that are not in the record and are under the control of the applicant, allowing it to violate scenic resource protections.

The Planning Commission elected to modify Condition 33, which has to do with signal lighting, to ensure the requirements of the NSALUDO would not result in a decrease in public safety. The revised condition reads (Planning Commission modification shown as underlined text):

“Where it does not interfere with UPRR Uniform Signal Systems and Standards, All signal lights and affiliated structures are to be treated with a dark earth tone color. Outdoor lighting shall be directed downward, sited, limited in intensity, shielded and hooded in a manner that prevents the lighting from projecting onto adjacent properties, roadways, and the Columbia River as well as preventing the lighting from being highly visible from Key Viewing Areas and from noticeably contrasting with the surrounding landscape setting. Shielding and hooding materials shall be composed of non-reflective opaque materials. There shall be no visual pollution due to the siting or brilliance, nor shall it constitute a hazard for traffic.”

Staff Conclusion: As explained in Finding I(6) on page 40 of the Final Decision Report, the proposed lighting is not anticipated to have an adverse effect on scenic resources. The language added by the Planning Commission does not prevent the lighting from complying with the scenic resource requirements of Chapter 14 – Scenic Area Review.

The proposal would unlawfully harm recreation resources in the NSA:

20. The Decision fails to adequately ensure that the proposed development would comply with the protection measures for recreation resources in the Management Plan and in the County code. See Management Plan I-4-25; NSA-LUDO §§ 14.700(F), 14.710.

Page I-4-25 of the Management Plan lists seven guidelines for new development in the SMA, requiring that new development and uses shall not displace existing recreational uses, protecting existing

recreation resources from adverse effects by requiring an analysis of both onsite and offsite cumulative effects, and requiring mitigation to preclude adverse effects on the recreation resource.

Conditions of approval are included in the Final Decision (conditions 44 and 45) to address anticipated impacts to existing recreation resources, based on written comments received from Oregon State Parks and Recreation Department. They state:

- UPRR shall work with the Oregon Parks and Recreation Department to develop a Columbia River access feasibility study to ensure long term impacts of the railroad do not impact established recreation uses or sites. Improved access from State Parks properties to the Columbia River shall be the outcome of this study and any resulting action items. The study shall be initiated with the Director of Oregon State Parks following the appeal period, but within 45 days of the final decision. Improved access, as identified and agreed upon by UPRR and Oregon State Parks as a result of this study shall be accomplished within two years of the commencement of development; extensions may only be requested by Oregon State Parks.
- Construction activities on the road shared with OPRD for the Memaloose State Park Campground must occur either outside of the peak recreation season, or trucks used for hauling the blasted and crushed materials must be covered to minimize dust and related impacts to visitors at the park.

NSALUDO Sections 14.700 and 14.710 provide recreation intensity classes, approval criteria, and facility design standards for all new recreation development. No new recreation is proposed by the applicant. If new projects are identified by the feasibility study, they will be required to comply with Scenic Area rules and regulations, including the recreation intensity classes, approval criteria and facility design standards referenced above. Any new development will be required to be applied for through a subsequent application reviewed for compliance with all of NSALUDO requirements.

Staff Conclusion: Oregon State Parks was solicited multiple times for feedback over the length of the review process. Two comment letters were provided to Planning Staff. Planning Staff incorporated those comments into the Final Decision Report and included conditions of approval to ensure any necessary mitigation will preclude adverse effects to existing recreation resources.

21. The conditions of approval unlawfully defer determination of mitigation measures until after project approval or omit mitigation measures entirely. See NSA-LUDO § 14.710(E).

The Oregon State Parks Department was solicited for feedback early on in the review process; comments were not received until after the agency consultation period and public comment period had expired. Oregon State Parks was not able to provide comment in a timely manner that would have allowed the determination of mitigation measures to be addressed prior to approval. Therefore, to ensure compliance, and show deference to our technical resource experts in recreation resources, a condition of approval was included to ensure any impacts would be appropriately mitigated in a manner consistent with the comments received from Oregon State Parks.

22. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to recreation resources. See, e.g., Management Plan at I-4-25.

Staff Conclusion: Finding I(78) beginning on page 115 addresses anticipated impacts to recreation resources. A condition of approval (noted above for Grounds 20 and 21) is included to ensure adequate mitigation is identified and initiated to preclude any adverse effects to recreation resources.

The proposal would unlawfully harm natural resources in the NSA:

23. The applicant unlawfully proposes to intrude on both water resources and their buffer zones. See, e.g., NSA-LUDO § 14.610(A)(2)(g)(2).

NSALUDO Section 14.610(A)(2)(g)(2) states:

“Filling and draining of wetlands shall be prohibited with exceptions related to public safety or restoration/enhancement activities as permitted when all of the following criteria have been met:

- (a) A documented public safety hazard exists or a restoration/enhancement project exists that would benefit the public and is corrected or achieved only by impacting the wetland in question, and
- (b) Impacts to the wetland must be the last possible documented alternative in fixing the public safety concern or completing the restoration/enhancement project, and
- (c) The propose project minimizes the impacts to the wetland.”

Finding I(55) on page 85 summarizes these criteria and addresses wetland buffer impacts in the SMA. Although explicit findings are not made for these criteria, the public safety aspects (see Public’s Interest Test on page 112), the applicant’s attempts to minimize wetland impacts (see No Practicable Alternative Test on page 111), and a Mitigation Plan reviewed and approved by the U.S. Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon Department of Fish and Wildlife, were provided to comply with the requirements of this rule.

Staff Conclusion: The applicant was required to provide this information for completeness, and was confirmed to comply with all three requirements listed above.

24. The applicant has failed to meet its burden to demonstrate compliance with the natural resource protection requirements. See NSA-LUDO § 14.610(D)(1—2).

NSALUDO Section 14.610(D)(1) through (2) state:

- “1. The basic purpose of the use cannot be reasonably accomplished using one or more other sites in the vicinity that would avoid or result in less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife or plant areas and/or sites.
- 2. The basic purpose of the use cannot be reasonably accomplished by reducing its proposed size, scope, configuration, or density, or by changing the design of the use in a way that would avoid or result in less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife or plant areas and/or sites.”

The applicant was required to prepare and provide an Alternatives Analysis (please see Section 3 of the Project Narrative). The Alternatives Analysis identified that in order to accomplish the project goals, the project location needed to be within the immediate vicinity of Mosier, Oregon. The analysis provides a comparison of five different design options considered by the applicant to demonstrate that all

practicable alternatives had been explored, and all impacts to sensitive resources has been prevented, minimized, or mitigated.

Staff Conclusion: Based on the information provided by the applicant, it does not appear the basic purpose of the project can be reasonably accomplished in any other location or configuration. Conditions of approval included in the Final Decision require mitigation to preclude adverse effects to protected resources and to minimize the ground disturbance, vegetation clearing and other anticipated impacts wherever possible.

25. The Decision unlawfully substitutes the applicant's standards for the legal standards found in the Management Plan and the County code for the protection of sensitive wildlife and plants. See NSA-LUDO § 14.610(B)(2).

With regards to wildlife and plants, NSALUDO Section 14.610(B)(2) states:

"All new developments and uses, as described in a site plan prepared by the applicant, shall be evaluated using the following guidelines to ensure that natural resources are protected from adverse effects. Comments from state and federal agencies shall be carefully considered."

The applicant provided wildlife, plants and habitat surveys, assessments of impact, and proposed mitigation plans prepared by qualified resource professionals. The site plans, resource surveys and Mitigation Plan were reviewed and approved by the U.S. Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon Department of Fish and Wildlife. When asked to specifically address adverse effects, no objections or requests for modification were provided by any of these agencies. As noted above for Ground 9, the Forest Service provided a separate comment letter with concerns regarding vegetation clearing and recommended mitigation ratios. These comments were included in Staff's review and conditions of approval were adopted into the Final Decision to ensure compliance with Chapter 14 and to preclude any adverse effects to protected resources.

Staff Conclusion: The Final Decision relies on the NSALUDO for compliance in all instances.

26. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to natural resources. See, e.g., Management Plan I-3-3, I-3-31, I-3-36.

GMA provisions at the top of Management Plan page I-3-3 requires the consideration of cumulative effects of proposed development within wetlands and their buffer zones; streams, ponds, lakes, riparian areas and their buffer zones; sites within 1,000 feet of wildlife areas and sites; and sites within 1,000 feet of rare plants. This provision is implemented in NSALUDO Sections 14.600 and 14.610. Management Plan pages I-3-31 and 36 contain lengthy but incomplete lists SMA guidelines for Natural resources. It is not clear from the appellant's statement which guideline to address.

Cumulative effects of the proposed development to natural resources are addressed throughout the findings included for NSALUDO Sections 14.600 and 14.610. Site plans, sensitive resource surveys and the final Mitigation Plan were reviewed and approved by the U.S. Corp of Engineers, U.S. National Marine Fisheries, U.S. Fish and Wildlife, U.S. Forest Service National Scenic Area Office, and Oregon

Department of Fish and Wildlife. When asked to specifically address adverse effects (including cumulative effects), no objections or requests for modification were provided by any of these agencies.

Staff Conclusion: Through consultation with federal and state natural resource protection agencies, it was determined that with conditions of approval to prevent the clearing of 6.62 acres of Open Space, to implement the Mitigation Plans, to require monitoring of mitigation success for five years instead of three, and to use best management practices throughout the construction process, it was concluded that the proposed development would not have an adverse cumulative effect to any protected natural resources.

The proposal would unlawfully harm cultural resources and treaty rights in the NSA:

27. The applicant failed to complete adequate cultural resource reconnaissance surveys and therefore failed to meet its burden to demonstrate compliance with the cultural resource protection requirements. See NSA-LUDO § 14.500.

The applicant prepared cultural resource and historic resource surveys in accordance with the requirements of Chapter 14. The methodology used by the applicant was verified by the National Scenic Area Heritage Program Manager and the State Historic Preservation Officer, prior to implementation. The applicant provided a copy of the survey materials to Staff, the NSA Heritage Program Manager, the State Historic Preservation Officer, the U.S. Army Corps of Engineers, and the four treaty tribes of the National Scenic Area: Confederated Tribes and Bands of the Warm Springs Indian Reservation (Warm Springs), Confederated Tribes and Bands of the Umatilla Reservation (Umatilla), Confederated Tribes and Bands of the Yakama Indian Nation (Yakama), and the Nez Perce Tribe (Nez Perce). When questions arose, the applicant offered to meet with the party onsite. The applicant also provided several supplemental reports and addendums in response to questions from the tribes and the Oregon State Parks Archaeologist.

Staff Conclusion: The applicant complied with the cultural resource requirements of Chapter 14. As noted on the County website, these survey documents are not shared with the public to ensure the safety and protection of the identified resources.

28. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to cultural resources. See Friends of the Columbia Gorge v. Columbia River Gorge Comm’n, 346 Or 366, 213 P3d 1164 (2009).

Staff Conclusion: Cultural resources are addressed in Findings I(32) through I(39) on pages 58 through 64 of the Final Decision Report. Finding I(36) concludes “Based on the feedback received from the tribes, SHPO and the Heritage Program Manager, Staff finds the proposed development, will not have an adverse effect to cultural resources and the Cultural Resource Protection Process may conclude.”

29. The Planning Commission unlawfully removed a condition to protect treaty rights and acknowledged this would bring the Decision out of compliance with the law. See Staff Report at 120.

Several conditions of approval were included in Staff’s recommendation to the Planning Commission to ensure the protection of treaty rights and compliance with the NSALUDO. Staff’s recommendations were based on written comments received prior to August 30, 2016 by the Confederated Tribes of the

Umatilla Indian Reservation. The concerns focused on ecosystem health in the event of a disaster, elimination of fishing access, and damage to cultural resources. Impacts to the natural environment are discussed throughout this report. The conditions of approval responding to Treaty Rights concerns not already addressed by other conditions of approval included:

- “The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: one east of the project area, and one west of the project area within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes Umatilla Fish and Wildlife Commission. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the CTUIR the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.”

On September 26, 2016, the Planning Commission voted to remove the first condition due to the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs. They also voted to modify the second condition to ensure that all four treaty tribes were included in the process, not just the Umatilla. The modified conditions now appear as follows:

- ~~The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.~~
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: ~~one east of the project area, and one west of the project area~~ within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes ~~Umatilla Fish and Wildlife Commission~~. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the ~~CTUIR~~ the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

The Yakama Nation provided written comment on September 13, 2016 and September 26, 2016. Neither of these comment letters were received in time to be included in the written Staff recommendation, which was published August 30, 2016. The September 13, 2016 letter was received during the open record, and was verbally discussed at the Planning Commission hearings. The September 26, 2016 letter was received after the Planning Commission’s record had closed, and as new evidence, could not be considered for their decision. This letter was received prior to the Board’s hearing however, and should be considered for the Board’s Final Decision.

The September 13, 2016 letter (attached) states: “...The Yakama Nation stands opposed to the proposed rail expansion. As discussed in detail below, the Yakama Nation has significant interests that will be severely impacted and/or harmed by the proposed rail expansion...”

The September 26, 2016 letter (attached) states: "...to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by rail expansion – they do not."

These letters, as well as the letters received by the Confederated Tribes and Bands of the Umatilla Reservation, are attached for the Board's consideration.

Staff worked with the Umatilla Government Affairs staff and other partner agencies on the development of the recommended conditions of approval to ensure compliance with Treaty Rights and Chapter 14 – Scenic Area Review.

The Planning Commission removed and modified several conditions, including those listed above, because of the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs.

Staff Conclusion: NSALUDO Section 14.800(D)(2) states: "The treaty rights protection process may conclude if the County 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."

Treaty rights concerns have been expressed by two of the four NSA Treaty tribes. Comments are specific to increased rail traffic and therefore increased risk to resources and access to those resources protected by Treaty Rights. Adding back the conditions of approval previously eliminated by the Planning Commission will ensure that existing rail traffic does not result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

The Yakama have voiced concerns similar to those of the Planning Commission regarding Staff's ability to enforce these conditions. If the Board share's these concerns, the options are (1) to include additional conditions of approval requiring regular reporting from Union Pacific Railroad and specifying that a violation would result in a failure to comply with a conditional use, thus requiring removal of the development, or (2) denial of the proposed development. In order to approve the proposed development, the Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied.

REEVES, KAHN, HENNESSY & ELKINS

ATTORNEYS · AT · LAW

H. PHILIP EDER (1927-2004)
TIFFANY A. ELKINS*
J. MICHAEL HARRIS
PEGGY HENNESSY*
GARY K. KAHN*
MARTIN W. REEVES*

P.O. BOX 86100
PORTLAND, OREGON 97286-0100

Please Reply To P.O. Box

TELEPHONE (503) 777-5473
FAX (503) 777-8566

direct e-mail:
gkahn@rke-law.com

*Also Admitted in Washington

To: Wasco County Board of County Commissioners
From: Gary Kahn, Reeves Kahn Hennessy & Elkins
Date: November 1, 2016
RE: PLAAPL-16-10-0001

I. Introduction

Union Pacific (“the Applicant”) proposed to build 4.02 miles of new mainline track and other associated facilities including new buildings within the Columbia River Gorge National Scenic Area (“the NSA”). Earth-disturbing work outside of the Mosier Urban Area would involve 11.22 acres of temporary disturbance and 19.58 acres of permanent disturbance, the installation of a new rock retaining wall, and construction of new temporary and permanent access roads. A cut through a mesa would also be greatly expanded through blasting. The applicant also requests four variances exceeding 50% of the applicable standards including a variance to the Columbia River development setback standard, the scenic travel corridor setback standard for I-84, the wetland buffer standard, and the sensitive plant buffer zone standard. Twelve wetlands, five lakes, and the Columbia River would be affected with a total of 0.41 acres of permanent open water disturbance, 0.75 acres of permanent disturbance to vegetated wetlands, and 8.75 acres of permanent disturbance to buffer areas.

This document outlines legal arguments made on behalf of Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility (collectively “Appellants”). In both oral and written substantive comments, the Appellants identified dozens of areas where the application fails to comply with the Columbia River Gorge National Scenic Area Act (“Gorge Act”), the Management Plan for the Columbia River Gorge National Scenic Area (“Management Plan”), and the National Scenic Area Land Use and Development Ordinance for Wasco County (“NSA-LUDO”). Despite being apprised of these issues, the Planning Commission approved the application and issued a Staff Summary with Planning Commission Revisions (“Staff Report”) and decision (collectively “Decision”). In this filing we also reply to arguments made in the Staff Response to Appeal PAAPL-16-10-0001 (“Staff Response”). We ask the Board of County Commissioners to reverse the Planning Commission and deny the application.

II. The proposal does not comply with the Gorge Act, the Management Plan, and the NSA-LUDO.

The Decision violates the general provisions and zoning ordinances of the Gorge Act, the Management Plan, and the NSA-LUDO in various ways. Twelve of those violations are highlighted below.

- a. The Management Plan does not allow expansion of railroads in the General Management Area (“GMA”) Open Space zone. However, about half of the proposed expansion is in this zone.***

The Staff Report explains that “[t]he proposed development includes the improvement and expansion of an existing railroad structure and transportation facility, within the GMA and SMA¹ Open Space zones.” Staff Report at 19. To permit the rail expansion, the Planning Commission relied on NSA-LUDO § 3.180(D)(2) which lists “improvement and expansion” of transportation facilities as a review use in GMA Open Space. However, expansion of transportation facilities in the GMA Open Space zone is not allowed by the Management Plan.² Where the Management Plan is more restrictive than the NSA-LUDO, the Management Plan controls. *See, e.g.,* NSA-LUDO § 1.070 (“When conditions herein imposed are less restrictive than comparative provisions imposed by any other provision of this Ordinance by resolution of State Law or State Administration regulations, or Management Plan Guidelines, then the more restrictive shall govern.”)

The Staff Response fails to address NSA-LUDO § 1.070 and concludes that the expansion of railroads is allowed in the GMA Open Space zone without ever addressing Appellants contentions. Staff Response at 1. The Management Plan does not allow expansion of railroads in the GMA Open Space zone. Thus, the railroad cannot be expanded in this zone. A condition of approval must be added to prohibit expansion of the railroad in this zone or the application must be denied.

- b. This project cannot be lawfully permitted in the GMA Large-Scale Agriculture zone because the legally required resource-by-resource, parcel-by-parcel analysis of the affected resources was not done and because the Applicant has not demonstrated that the new track is the minimum size necessary to provide the service as required by County ordinance.***

The Applicant and the Planning Commission relied on NSA-LUDO § 3.120(E)(20) as the permitting mechanism for the portion of the proposal within the GMA Large-Scale Agriculture zone. *See* Staff Report at 17–18. However, the finding adopted by the Planning Commission does not adequately address either of the criteria in NSA-LUDO § 3.120(E)(20). NSA-LUDO §

¹ Special Management Areas.

² Compare “Repair, maintenance, operation, and improvement of existing structures, trails, roads, railroads, utility facilities, and hydroelectric facilities.” Management Plan at II-3-5 with “Repair, maintenance, operation, and improvement and expansion of existing serviceable structures, including roads, railroads, hydro facilities and utilities that provide sewer, transportation, electric, gas, water, telephone, telegraph, telecommunications.” NSA-LUDO § 3.180(D)(2).

3.120(E)(20)(a) requires an analysis of practicable alternatives that would have fewer adverse effects on “scenic, cultural, natural, recreational, agricultural or forest lands” and also requires the size of the facility to be the minimum necessary to provide the service. *Id.* The Applicant, while purporting to have performed a large-scale analysis and asserting that it must have a minimum of 5 miles of continuous double tracks through the NSA to reap an undefined amount of operational efficiency, has not studied practicable alternatives on a resource-by-resource or parcel-by-parcel basis. Until it does so, NSA-LUDO § 3.120(E)(20)(a) is not met. Without sufficient detail on exactly what resources would be impacted and what the barriers are to alternatives, there is simply not enough information to conclude that “[t]here is no practicable alternative location with less adverse effect on the scenic, cultural, natural, recreational, agricultural or forest lands.” *Id.* The Staff Response merely refers to the analysis in the Staff Report. However, nowhere in the Application, the Staff Report, or the Staff Response is the required analysis to confirm that “[t]here is no practicable alternative location with less adverse effect on” the resources.

Additionally, NSA-LUDO § 3.120(E)(20)(b) requires a project to be “the minimum size necessary to provide the service.” The Applicant already provides rail service through the area and it asserts in its application that the project is for efficiency improvements, rather than to provide any different or expanded service. *See, e.g.,* PC 1 1-49. Based on the Applicant’s own words, the current size is already the minimum necessary (or larger) to provide the intended service, so NSA-LUDO § 3.120(E)(20)(b) is not met. Even if it was met, the Applicant proposes 5.37 miles of double track but asserts that “a minimum of 5 miles of contiguous second mainline track is required. . . .” PC 1 1-162. By the Applicant’s own admission, 5.37 miles is not the minimum size necessary to provide the service. For this reason alone, the proposed project cannot be permitted through the GMA Large-Scale Agriculture zone under NSA-LUDO § 3.120(E)(20).

The Staff Response contains no analysis and simply adopts the Applicant’s conclusion – that the expansion must be exactly as proposed by the Applicant to achieve an undefined amount of operational efficiency. This does not constitute evidence, much less substantial evidence of compliance with the ordinance. A condition of approval must be added to prohibit expansion of the railroad in this zone or the application must be denied.

c. The proposed new culvert cannot be legally placed in the GMA Open Space zone.

NSA-LUDO § 3.180 specifies which uses are allowed in the GMA Open Space zone. Culverts are not allowed. Culverts often block fish passage or provide access to habitat that is not appropriate for native fish but harbors non-native predatory species that harm native fish. The culvert is a prohibited use and cannot be lawfully permitted. NSA-LUDO § 3.180(F). If appropriate, a bridge must be constructed instead. The Staff Response does not address any legal justification for the new culvert. The Management Plan specifically allows culverts in some zones and not in others. The County must deny the proposed new culvert or condition the application so that the new culvert is not placed in the GMA Open Space zone.

d. The temporary construction area in the GMA Water zone is not an allowed use.

A construction area is proposed in the GMA Water zone. There are no specific zoning regulations for uses in the GMA Water zone, however, the Management Plan does list uses allowed outright and through expedited review that apply to the GMA Water zone. Management Plan at II-7-11–II-7-15; II-7-20–II-7-22. While “[r]epair, maintenance and operation of existing. . . railroads” is a use allowed outright, improvement and expansion of railroads is not. Management Plan at II-7-11. Where a use is not allowed outright, allowed through expedited development review, or allowed through conventional development review, it is prohibited. *See* NSA-LUDO § 3.020. (“A legal parcel may be used and a legal structure or part of a legal structure may be constructed, moved, occupied, or used only as this Ordinance permits.”) Thus, this use cannot take place.

The Staff Response implies that any use that complies with Chapter 14 is allowed in this zone and then lists water-dependent development and water-related recreation development (docks, boathouses, and moorage buoys) that have been unofficially countenanced by the Gorge Commission in the past. Staff Response at 4. The Management Plan is clear that only water-dependent development and water-related recreation development are allowed on the banks of the Columbia River. *See, e.g.*, Management Plan at I-1-6, I-1-11. This logically extends to uses that are in the river. A condition of approval must be placed on the decision to prevent this use or the County cannot lawfully approve the application.

e. Culverts in SMA Public Recreation zone are not an allowed use.

New culverts are proposed in the SMA Public Recreation zone.³ New culverts are not allowed in this zone for the reasons stated in Section II.c above. This is also a bright line rule. NSA-LUDO § 3.170(F). Since the culverts are not allowed, adverse impacts to fish must be avoided rather than mitigated or bridges must be substituted. The application must be denied or a condition of approval requiring avoidance of impacts on fish passage and prohibiting the culverts must be included.

f. The Decision unlawfully approves signage without adequate evidence and findings to support the decision. The Staff Report references Chapter 23 (Sign Provisions) but does not address it. In addition, the Applicant has not specified signage locations in its application. Therefore, whether the signage meets scenic area criteria cannot be evaluated and the signage cannot be approved.

The Applicant claims that all of its signage is exempt from permitting requirements because it falls under NSA-LUDO § 3.100(H)(4). *See, e.g.*, PC 1 1-184, PC 1 1-209. However, that provision only applies to “**public** regulatory, guide, and warning signs” “provided [t]he signs comply with the Manual for Uniform Traffic Control Devices.” NSA-LUDO § 3.100(H)(4) (emphasis added). The railroad is a private entity and its private “regulatory, guide, and warning signs” are not exempt from the sign provisions of Chapter 23. In addition, according to the

³ It is not clear from the materials provided by the Applicant if these culverts are still proposed. If so, they are not allowed by the NSA-LUDO and the Management Plan. If not, there is insufficient specificity in the application materials to determine that the project complies with the NSA-LUDO and the Management Plan.

Federal Highway Safety Administration, the Manual on Uniform Traffic Control Devices “defines the standards used by road managers nationwide to install and maintain traffic control devices on all public streets, highways, bikeways, and private roads open to public travel.” See <http://mutcd.fhwa.dot.gov/>. It is not a private railroad standard. This makes it clear that § 3.100(H)(4) does not apply to the signs proposed by the Applicant but rather to road signs.

Additionally, the Applicant has not identified the signage it plans to install with sufficient specificity to determine if it complies with Chapter 23. In fact, the application says that signage locations would be determined in the field. PC 1 1-73. There is no way to determine if the signs comply with the requirements of Chapter 23 and with scenic area standards without specific locations. For example, there does not appear to be a path to permitting signage in SMA Open Space. If signs are proposed in this zone then they must be denied. In addition, signs with flashing lights are not allowed. The Staff Response does not address any of these arguments. Staff Response at 5. Signage must be located with sufficient specificity so that proper review can take place, a condition of approval must be added to deny the signs, or the application must be denied.

- g. All over-height structures must be denied or conditioned to meet the County ordinance. Based upon scenic resource review, the County may determine that the structures must be even shorter.***

The Applicant proposed communication poles that would be over 50 feet tall. Sections 3.120(G)(6), 3.130(G)(5), 3.170(H)(4), 3.180(G)(4) state that the maximum height for all new structures shall be 35 feet, unless restricted to a lesser amount by scenic resource provisions in Chapter 14 (Scenic Area Review). This is a bright-line requirement that must be met. Rather than pointing to an exception in the law, the Staff Response presents reasons why the law should be violated. Staff Response at 5–6. The application must be denied or all structures must be at most 35 feet tall. Based upon scenic resource review, the County may determine that the structures must be even shorter.

- h. For resources in the GMA, the Planning Commission unlawfully granted blanket exemptions from four different setback and buffer standards. In the GMA, each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. The evidence in the record does not demonstrate that this has been done. In addition, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest.***

Relying on NSA-LUDO § 6.020(B), the Planning Commission approved variances in the GMA to:

- The Columbia River development setback standards contained in NSALUDO Section 14.200(G),
- The Scenic Travel Corridor (I-84) setback standard contained in NSALUDO Section 14.300(B)(2),
- The wetland buffer standards contained in NSALUDO Section 14.600(A)(3)(c), and

- The sensitive plant buffer zones contained in NSALUDO Section 14.600(D)(3).

Staff Report at 35–37.

The Planning Commission cites the Applicant’s justification but does not address any of the criteria in NSA-LUDO § 6.020(B). However, that provision only applies when there are conflicting setbacks and buffers. To grant a variance, NSA-LUDO § 6.020(B) must be applied on a parcel by parcel basis to each protected resource to demonstrate that “building height, setbacks or buffers . . . for protection of scenic, cultural, natural, recreational, agricultural or forestry resources overlap or conflict.” Once this is accomplished, a demonstration that

“1. [a] building height, setback or buffer specified in [the NSA-LUDO] to protect one resource would cause the proposed use to fall within a setback or buffer specified in this ordinance to protect another resource; and 2. Variation from the specified building height, setbacks or buffer would, on balance, best achieve the protection of the affected resources.”

Each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers (if any) must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. This has not been done.

The Staff Report also states that the project is proposed to be located within 100 feet of the ordinary high water mark of the Columbia River in several places in the GMA, although the total number, exact locations, and lengths of these locations are not stated. Staff Report at 47. The ordinance requires a mandatory 100-foot setback from the Columbia River in the GMA in order to protect scenic views from and along the river. NSA-LUDO § 14.200(G). The only exceptions are if the project is water-dependent or if applying the 100-foot setback “would render a property unbuildable.” *Id.*⁴ If the setback would render a property unbuildable, then the project may be eligible for a variance to the setback, but only if the project meets all requirements for a variance set forth in Chapter 6 of the Scenic Area ordinance. NSA-LUDO § 14.200(G).

Here, the proposed project is not eligible for an exception to the setback, because the proposed project is not water-dependent, and the 100-foot setback does not render the property unbuildable. In fact, the property has already been built on, and is currently being used for rail traffic daily. If the setback is enforced and the requested variances denied, the Applicant can continue using the property, including repairing, maintaining, and operating its existing rail line. Management Plan at II-7-11. Because the setback does not render the property unbuildable, the project does not qualify for an exception or a variance. The County must deny these variances or deny the application.

The Staff Report also concludes that because the railroad existed when the Management Plan was adopted and expansion is allowed as a review use (something Appellants strongly deny), somehow that means the setback is not applicable. Staff Report at 47. This conclusion is a non-

⁴ The Staff Report misquotes the exception as whether “the setback would render a property **unusable**.” Staff Report at 47 (emphasis added). The correct word in the ordinance is “unbuildable,” not unusable. NSA-LUDO § 14.200(G).

sequitur that misunderstands the meaning of a review use. The County ordinance defines “review uses” as “[p]roposed uses and developments that must be reviewed by Wasco County **to determine if they comply** with the Wasco County National Scenic Area Land Use and Development Ordinance.” NSA-LUDO § 1.200 (emphasis added). Thus, all review uses must comply with the ordinance.

In addition, the County Staff Report fails to analyze the requested variance under the factors set forth in Chapter 6 of the ordinance. Instead, the Staff Report summarily concludes (without any analysis of the legal criteria) that “Chapter 6 is addressed by this analysis.” Staff Report at 47. But in the section of the Staff Report covering Chapter 6, there is no County analysis of the requested Columbia River setback variance. *Id.* at 36–37. Instead, there is only a single, broad sentence intended to address multiple requested variances in multiple locations:

Because there is no way to repair, maintain or modify the railroad without requiring a variance, Staff recommends granting variances, reducing Open Space impacts and requiring the mitigation plans prepared for the application.

Id. at 37. In addition to being inaccurate,⁵ this single, solitary sentence does not even purport to analyze the factors required by Chapter 6. The Staff Report does not evaluate or explain how many separate locations within the project site variances are sought; where the requested variances are sought; how much land would be covered by the requested variances; whether the variances are greater than 50% of the setbacks and buffers stated in the ordinance; whether there are multiple setbacks, buffers, or other review criteria for the protection of scenic, cultural, natural, recreational, agricultural or forestry resources that overlap or conflict (other than a vague reference to “reducing Open Space impacts”); whether applying the required setbacks and buffers would cause the proposed project to fall within another setback or buffer; and whether variation from the required setbacks and buffers would best achieve the protection of the affected resources. All of these factors **must** be evaluated by the County. *See* NSA-LUDO §§ 6.010, 6.020. Yet none of them were. Setting aside for a moment the fact that the proposed project is not eligible for a variance to the Columbia River scenic setback because applying the setback would not render the property unbuildable, the Staff Report should be revised to evaluate and adopt findings applying each of the factors specified in Chapter 6 in each specific location where each variance is sought.

Finally, to disturb the protected resources of the NSA within the GMA, the Applicant must demonstrate that the project is in the public interest. NSA-LUDO § 14.600(B)(5)(b). However, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest and then unlawfully granted the variances. Staff Report at 114.

⁵ “Repair, maintenance and operation of existing. . . railroads” is a use allowed outright. NSA-LUDO 3.100(D); Management Plan at II-7-11.

i. The Planning Commission unlawfully granted variances to setbacks and buffer zones in the SMA. The Applicant failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances.

The Applicant has requested a variance for nine wetlands or waterbodies or their buffer zones in the SMA. PC 1 1-68. To grant such a variance, a Practicable Alternative Test must show that there is no practicable alternative and NSA-LUDO Chapter 6 must be followed. NSA-LUDO § 14.610(A)(2)(g)(1) & (5). NSA-LUDO Chapter 6 (Variance) requires not only that all setbacks and buffer zones in the SMA be undisturbed unless there are no practicable alternatives, but also that all adverse effects shall be fully mitigated. NSA-LUDO § 6.020(D). Both NSA-LUDO § 6.020(D) and NSA-LUDO § 14.610(A)(2)(g)(1) require the completion of a Practicable Alternative Test. However, the Applicant has not adequately completed the test.

The Practicable Alternative Test is contained in NSA-LUDO § 14.610(D) and is discussed at 5–102 through 5–104 of the Applicant’s Project Narrative and on page 18 of the Staff Report. The Applicant must demonstrate that “the basic purpose of the use” cannot be accomplished on another site in the vicinity that would result in fewer adverse impacts. In this case, according to the Applicant, the basic purpose of the use is to provide the amount of rail service that the Applicant already provides. *See, e.g.*, PC 1 1-49. This purpose has already been accomplished with “less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife or plant areas” than what the Applicant proposes. NSA-LUDO § 14.610(D)(1). Thus, a practicable alternative exists and the application must be denied.

Even if that were not the case, the requirement in The Practicable Alternative Test to study sites with “less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife, or plant areas” is not an academic requirement or one that can be met without actually studying each wetland, pond, lake, riparian area, wildlife or plant area and determining if adverse effects can be diminished or eliminated for each impacted resource. NSA-LUDO § 14.610(D)(1). For example, a subtle change to the alignment of the tracks could result in less adverse effects to a protected resource. However, there is no evidence in the record that an analysis was ever done for each wetland, pond, lake, riparian area, wildlife or plant area. Instead, the Applicant touts its efforts to reduce the footprint of the proposed development without actually addressing each protected resource. PC 1 1-172–PC 1 1-174. This does not support a finding that the test is met.

The Applicant also has not demonstrated for each area to be impacted that it has complied with the requirements to assess other sites (e.g. other parcels that would still meet the basic purpose of the use) while reducing adverse impacts as required by NSA-LUDO § 14.610(D)(1) and (D)(2). The proposed project would result in the “direct permanent disturbance of approximately 19.58 acres, and temporary disturbance of approximately 11.22 acres,” require the acquisition of 2.71 acres of additional ROW, and result in the disturbance of 7.68 acres of wetlands and wetland buffers and 7.35 acres of priority habitats. PC 1 1-63; Staff Report at 68 & 93; PC 1 1-61. It is difficult to conceive, in part because no evidence is offered in the record, that each resource that is proposed to be harmed was studied and tradeoffs were evaluated to ensure that there are no other sites for the project that would result in less adverse effects. Unless the Practicable Alternative Test is applied to each impacted resource on a parcel-by-parcel and resource-by-

resource basis for each requested variance, NSA-LUDO § 14.610(D) has not been met and the application cannot be lawfully approved.

The Practicable Alternative Test also requires the Applicant to show that it cannot meet the basic purpose of the use – rather than the basic purpose of the project – in a way that produces less adverse effects. NSA-LUDO § 14.610(D)(1). This analysis must include “reducing its proposed size, scope, configuration, or density, or by changing the design of the use.” NSA-LUDO § 14.610(D)(2). The use, as identified by the Applicant, is to provide the same volume of rail service as the Applicant provides today. The Applicant is already providing this level of rail transportation in a less impactful way. Therefore, this portion of the test is also not met. Even if the County accepts that the basic purpose of the use is to improve operational efficiency, reducing the size, scope, configuration, or density of the use (e.g. scaling back the amount of efficiency to be attained by reducing the proposed length of the double track) was not considered as part of the Applicant’s Practicable Alternative Test analysis.⁶ Without such an analysis the test is not met and the application cannot be lawfully approved.

The County Staff Report states that the project is proposed to be located within 200 feet of the ordinary high water mark of the Columbia River in the SMA, although the total number, exact locations, and lengths of these locations are not stated. *See* Staff Report at 47. The Wasco County Scenic Area ordinance requires a mandatory 200-foot setback from the Columbia River in the SMA in order to protect scenic views from and along the river. *See* NSA-LUDO § 14.200(G). The only exceptions are if the project is water-dependent or if applying the 200-foot setback “would render a property unbuildable.” *Id.*⁷ If the setback would render a property unbuildable, then the project may be eligible for a variance to the setback, but only if the project meets all requirements for a variance set forth in Chapter 6 of the Scenic Area ordinance. NSA-LUDO § 14.200(G).

Here, the proposed project is not eligible for an exception to the setback, because the proposed project is not water-dependent, and the 200-foot setback does not render the property unbuildable. In fact, the property has already been built on, and is currently being used for rail service daily. If the setback is enforced and the requested variances denied, the Applicant can continue using the property, including repairing, maintaining, and operating its existing rail line. Management Plan at II-7-11. Because the setback does not render the property unbuildable, the project does not qualify for an exception or a variance. The County must deny these variances or deny the application altogether.

In addition, the application purports to perform various practicable alternatives tests, but none of them address the scenic impacts of varying from the 200-foot Columbia River setback. *See, e.g.,*

⁶ While it was not discussed as part of the Practicable Alternative Test, reducing the length of the double track was included as Alternative C in Section 3.13 of the Applicant’s Project Narrative. However, the alternative was not fully developed, the target metrics for operational efficiency improvements were not discussed, and there was no discussion of why the project must intrude on SMA resources when a double track of ~4.9 miles could be achieved on GMA and urban area zoned lands. Until such practicable alternatives are developed and included in the Practicable Alternative Test, the application of the test is incomplete.

⁷ The County Staff Report misquotes the exception as whether “the setback would render a property **unusable**.” Staff Report at 47 (emphasis added). The correct word in the ordinance is “unbuildable,” not unusable. NSA-LUDO § 14.200(G).

PC 1 1-161–PC 1 1-162, PC 1 1-172. Instead, the purported practicable alternatives tests included in the application discuss impacts to natural, cultural, agricultural, and forest resources. There is no analysis in the application (nor in the County Staff Report, for that matter) of the scenic impacts of specifically granting the requested variances to the Columbia River scenic setback.⁸ The Applicant has not met its burden to demonstrate compliance with the approval criteria. The Applicant’s failure to perform a practicable interest test specifically addressing the requested variances from the 200-foot Columbia River scenic setback directly violates NSA-LUDO § 6.020(D)(1) and warrants denial of the requested variances.

If the Applicant does, in the future, prepare a practicable alternatives test specifically to evaluate the requested 200-foot Columbia River scenic setback, then both the Applicant and the County must consider alternatives to the requested variances. Practicable alternatives may include allowing some of the requested variances in some locations while denying others in other locations, or allowing variances to the 200-foot setback at smaller distances than sought by the Applicant. Failure to consider such alternatives violates the ordinance and warrants denial of all requested scenic variances.

In addition to completion of the Practicable Alternative Test, NSA-LUDO § 6.020(D), requires a mitigation plan that will fully mitigate all harm caused by the variance. In addition to the defects in the application of the practicable alternatives test discussed above necessary, mitigation plans have not been proposed to mitigate for damage to scenic resources due to construction in protected areas. The Columbia River development setback standards contained in NSA-LUDO § 14.200(G) is a scenic resources setback standard as is the Scenic Travel Corridor (I-84) setback standard contained in NSA-LUDO § 14.300(B)(2). The mitigation plan required in NSA-LUDO § 6.020(D) ensuring that “the development can be mitigated to ensure no adverse effects would result” has not been submitted by the Applicant so a variance in the SMA cannot be granted for either of these scenic resource setback standards.

j. The Decision unlawfully allows the Applicant to violate general and agricultural setback standards.

Sections 3.120(G)(2), 3.120(G)(3), 3.130(G)(2), 3.130(G)(3), 3.170(H)(2), 3.170(H)(3), 3.180(G)(2), and 3.180(G)(3) contain the required general and agricultural setback standards. The general setback requirements are dismissed in the Staff Report and Staff Response with the assertion that “staff does not believe the general setback standards were intended to apply to transportation and utilities facilities. . . .” Staff Report at 21; Staff Response at 8. However, these legal requirements do apply. Neither the Applicant nor the Planning Commission points to any exemption in County ordinance that prevents the setbacks from being applied to transportation and utility facilities. In addition, it appears that the Applicant and the Planning Commission are relying on screening vegetation that currently exists on adjacent parcels to comply with some of the agricultural setbacks. Staff Report at 21. Since conditions of approval cannot be applied to maintain screening on adjacent parcels, all screening must take place on the Applicant’s parcel. A condition of approval must be added to ensure that all legally required setback standards are met.

⁸ The Applicant’s failure to propose any new screening trees to screen the proposed project as viewed from the Columbia River further exacerbate its errors in violating the 200-foot Columbia River setback.

- k. Conditions of approval to enforce the Planning Commission's conclusions regarding the proposed rock blasting and crushing must be included in Condition 37 or a new condition must be included to ensure that the rock cannot be sold or used off site.***

The Staff Report concludes that NSA-LUDO § 14.200(Q), which applies to mineral and aggregate related uses, does not apply to the rock blasting and crushing proposed by the Applicant for this project because the proposal is “not a commercial aggregate operation where rock is removed, crushed or processed and then sold for profit.” Staff Report at 51. The Staff Report then goes on to allow the proposed rock blasting, and purports to require the Applicant to truck the blasted rock offsite for crushing and to bring it back onsite for ballast development. *Id.* Contrary to this finding, however, the relevant proposed condition of approval (No. 37) only addresses off-site crushing, and is silent on the ultimate use of the crushed rock. Condition No. 37 is inconsistent with the findings because it does not actually require the same rock from the site, once crushed, to be returned to the site for ballast development.

Moreover, the Staff Report fails to include adequate conditions of approval to enforce its conclusions regarding whether the proposed rock blasting and crushing is a mineral or aggregate related use. In particular, the Staff Report fails to include any conditions that would prohibit the Applicant from hauling the blasted rock off-site and then crushing it and using it at other sites or selling the rock to other users. Under the County's legal analysis, either such practice would be a mineral or aggregate related use, and would therefore be prohibited. The Staff Report errs by failing to include conditions prohibiting off-site use and/or sale of any rock blasted from the site. Absent such conditions, the County's legal conclusions regarding mineral or aggregate development may not be enforceable against the Applicant, should it attempt to sell the crushed rock or use it off-site. While the Staff Response dismisses this concern and states that such use or sale would violate the NSA-LUDO, we recommend that Condition 37 be clarified to include this language. Staff Response at 9.

- l. The proposed findings unlawfully allow the Applicant to violate conditional use criteria because of fire and traffic safety issues; because it would significantly impair sensitive wildlife habitat and riparian vegetation; because there would be adverse effects on air, water, and land; because of the visual impacts that it would cause; and because the use is not compatible with surrounding uses.***

We concur with the Staff Response that the Conditions of Approval that were removed by the Planning Commission must be restored. Staff Response at 10. However, as discussed throughout this document, those conditions did not go far enough. The Decision as ultimately conditioned fails to meet at least NSA-LUDO § 5.020(A–D), (F–H), and (L).

NSA-LUDO § 5.020(A) requires a proposed conditional use to be “consistent with the goals and objectives of the Management Plan for the Columbia River Gorge National Scenic Area, and consistent with the provisions of the County's implementing ordinances.” As discussed at length in this document and in our previous comments that are in the record, the proposal is not consistent with the Wasco County NSA-LUDO, the Wasco County Comprehensive Plan, or the Management Plan. As such, the County cannot lawfully approve the application.

The Applicant's proposal also does not meet the requirements in NSA-LUDO § 5.050(A)(4). The Applicant's Project Narrative entirely skips this requirement, ignoring how "[t]he project includes provisions for bicycle and pedestrian access and circulation." To meet this requirement, much-needed improvements to river access should be required by the County.

The Management Plan prohibits developments and land uses that adversely affect or displace recreation uses and require mitigation measures that preclude adverse effects. The Applicant and the Decision fail to meet these mandatory guidelines. "Taking into account location, size, design and operational characteristics of the proposed use, the proposal [must be] compatible with the surrounding area and development of abutting properties by outright permitted uses." NSA-LUDO § 5.020(B). This conditional use criteria is not met. Hundreds of members of the public, recreation groups and the Oregon Parks and Recreation Department ("OPRD") have commented that the project would adversely affect recreation resources in the Columbia River Gorge. OPRD wrote that the project's construction would require temporary closure of a state park and adversely affect other recreation sites throughout the Gorge. Further, OPRD recommended several mitigation measures that are not implemented in the Decision. PC 1 SUP 1-176. The record shows that the project is incompatible with surrounding land uses and development and must be denied.

Under NSA-LUDO § 5.020(C) & (L), the proposed use must not significantly burden fire facilities and available services, nor significantly increase fire hazards, fire suppression costs, or risks to fire suppression personnel. In addition to the significant increase in fire hazards that the project would bring, which are likely to further burden fire facilities and services, the likelihood of another incident like the one that occurred in Mosier presents a very real risk to fire suppression personnel. The application fails to meet these criteria.

NSA-LUDO § 5.020(D) requires that "[t]he proposed use will not unduly impair traffic flow or safety in the area." With at least five at-grade street crossings in the County and the potential increase in train traffic, there would be an impairment of traffic flow in the area. The increase in trains would likely include an increase in oil trains through the National Scenic Area. Such trains severely threaten public safety and would increase the dangers of driving along I-84 and city streets in Mosier, Rowena, and The Dalles. This criterion is also not met.

NSA-LUDO § 5.020(F) requires that "[t]he proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion." The proposed project would result in the "direct permanent disturbance of approximately 19.58 acres, and temporary disturbance of approximately 11.22 acres" and the disturbance of 7.68 acres of wetlands and wetland buffers and 7.35 acres of priority habitats, plus it would require work within the Columbia River. PC 1 1-63; Staff Report at 93; PC 1 1-61. This would result in significant impairment of riparian vegetation and sensitive wildlife habitat. This criterion is not met and the application must be denied.

NSA-LUDO § 5.020(G) requires that "[t]he proposed use will not adversely affect the air, water, or land resource quality of the area." Simply put, derailments, spills, and fires happen. The more trains that travel the tracks, the higher the likelihood that there would be another large-scale spill

that would affect the surrounding area. Any adverse effect on the air, water or land resource quality makes the application fail these criteria. While the Applicant asserts that diesel emissions would be reduced due to fewer idling trains in Mosier, the NSA-wide impact is entirely different. Faster, longer, and more frequent trains can only mean that additional particulate matter (PM 2.5) would be emitted and that it would negatively affect the air resources of the NSA. PM 2.5 has been tied to cancer, cardiovascular disease, neurodevelopmental disorders, and pulmonary problems. PC 1 4-1383–PC 1 4-1390. In addition, every coal car that runs the rails emits fugitive emissions of PM 2.5. PC 1 4-1328. The Planning Commission unlawfully removed a condition of approval that would have prevented this from happening. Staff Report at 32. The degradation of air resources proposed by the Applicant is justification to deny the application. The adverse effects discussed in the previous paragraph and in the sections above show the impacts on water resources. The massive excavations, grading, and other land development would impact land resources in the area. This criterion is also not met.

NSA-LUDO § 5.020(H) requires that “[t]he location and design of the site and structures for the proposed use will not significantly detract from the visual character of the area.” There would be both temporary and permanent significant changes to the visual character of the area. From the rock excavations, to the removal of several acres of vegetation, to the proposed new permanent road – not to mention the additional buildings, track, signals, and trains – the project would result in significant adverse effects to the visual character of the area. This criterion is not met.

Finally, NSA-LUDO § 5.020(B) requires the County to take “into account location, size, design and operational characteristics of the proposed use” when determining whether “the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.” The surrounding area includes Mosier; Memaloose State Park; and the scenic, natural, cultural and recreation resources of the Columbia River Gorge National Scenic Area. In addition to the new track, bridges, buildings, roads, excavations, culverts, signals, guardrail, staging areas, and intrusions into wetlands and floodplains, the proposed use would provide capacity for more trains to travel through the area each day and all trains could be longer.⁹ PC 1 1-214–PC 1 1-214. The location of this enormous development along with the additional trains next to the Columbia River in designated open space is not compatible with the surrounding area. The project fails on this criterion and a permit cannot be lawfully issued.

III. The proposal would unlawfully harm scenic resources in the NSA.

For proposed projects in the Scenic Area, the burden is always on the Applicant to demonstrate that the proposal complies with all applicable requirements of the ordinance. NSA-LUDO § 2.120(A). Here, the Applicant utterly fails to meet its burden to demonstrate compliance with the scenic resource protection requirements. The application lacks basic required information, making it impossible for the County and the reviewing public to review the project’s scenic

⁹ The rail experts Appellants retained to double-check the railroads numbers determined that the proposed project could allow up to two more trains per hour to move through the project area. PC 1 SUP 1-193. Even by the Applicant’s own admission, traffic could double over current levels. The Applicant states that 20-30 trains a day traverse the project area. *See, e.g.*, PC 1 1-31. It also states that the current capacity is 25-32 trains a day and that the expansion would add 5-7 trains a day. PC 2 1-22. So, according to the Applicant, traffic could go from a low estimate of 20 trains per day today to 39 trains per day after the proposed expansion.

impacts and evaluate compliance with the ordinance. In addition, the project fails to comply with the applicable scenic resource protection standards. Accordingly, the application should be denied. NSA-LUDO § 2.120(A); ORS 196.110(1).

- a. The approval was unlawful because the Applicant acknowledges that it failed to include a landscaping plan that meets the requirements of the Scenic Area ordinance, the application lacks adequate elevation drawings, and the record does not reflect the location, size, and shape of all existing and proposed buildings and structures.*

All Applicants must submit “[a] detailed plan for landscaping which shall clearly illustrate . . . [t]he location, height and species of existing trees and vegetation.” NSA-LUDO § 14.020(D). The Applicant has failed to comply with these requirements. The Applicant submitted plant surveys (figures 10A through 10R), but these surveys are not landscaping plans and were not prepared to comply with the scenic resource protection requirements. PC 1 3-831–PC 1 3-848. In fact, the Applicant freely admits that it has failed to submit the required landscaping plan, conceding that it did not prepare “the kind of formal landscape plan that would be more appropriate for projects like housing developments, resorts, or commercial facilities.” PC 1 1-112. Nothing in the applicable law distinguishes a large-scale rail expansion from a commercial facility or housing development; all are required to submit detailed landscaping plans. The Applicant is in blatant violation of the ordinance requirements. There is no dispute that figures 10A through 10R, as well as the application as a whole, omit many mandatory requirements for a landscaping plan, all of which are required to ensure compliance with the scenic resource protection requirements of the ordinance.

First, other than sensitive and rare species, the application fails to “[i]ndicate which [trees] are proposed to be removed,” which is a mandatory requirement of NSA-LUDO § 14.020(D)(1).¹⁰ Without this required information, it is impossible to evaluate the full extent of the project’s impacts to scenic resources. The Applicant has failed to meet its burden to demonstrate that the project complies with the scenic resource protection requirements of the ordinance.

Second, the application fails to comply with the following requirement:

The landscaping plan shall include detailed information to the level of individual trees and groupings of vegetation for the proposed development area and all topographically visible corridors between the proposed development area and Key Viewing Areas. The landscaping information for the remainder of the property may be generalized.

NSA-LUDO § 14.020(D)(1). The application only identifies trees “within the proposed project grading limits.” PC 1 3-735. The application ignores the individual trees and groupings of vegetation in “all topographically visible corridors between the proposed development area and Key Viewing Areas,” as required. NSA-LUDO § 14.020(D)(1). It is thus impossible to evaluate the extent to which existing trees and other vegetation provide screening from key viewing areas,

¹⁰ The Applicant may be proposing to remove as many as 1,438 trees, since the application states that “[a] total of 1,438 trees were identified and mapped within the proposed project grading limits.” Application at Appendix J, § 5.2.3 (PC 1 3-735). However, it is not expressly stated whether **all** trees within the grading limits would be removed.

and thus impossible to evaluate the project's scenic impacts. The Applicant has failed to meet its burden to demonstrate that the proposed project complies with the scenic resource protection requirements.

Third, the application fails to indicate "[t]he location, height and species of individually proposed trees and vegetation groupings." NSA-LUDO § 14.020(D)(2). In fact, it appears that the Applicant is not proposing any new screening vegetation — not even to replace any trees that would be removed for project construction (which, as discussed above, have not been adequately identified). The Applicant's failure to propose any new screening vegetation violates the scenic resource protection requirements, as will be discussed below. In addition, if the Applicant does intend to propose planting new screening trees, then the Applicant has failed to submit an adequate landscaping plan identifying the locations, heights, and species of those trees as required by the ordinance. The Staff Response does not address the legal inadequacies, but instead provides reasons why the Applicant should not be required to comply with the law. Staff Response at 10. The Applicant has failed to meet its burden to demonstrate that the proposal complies with the scenic resource protection requirements.

In addition, all Applicants must submit "[e]levation drawings [that] show the appearance of all sides of the proposed structures and [that] include natural grade, finished grade, and the geometrical exterior of at least the length and width of structures as seen from a horizontal view." NSA-LUDO § 14.020(E). Here, the Applicant has failed to comply with these requirements. The Applicant submitted cross-section engineering drawings (Appendix C to the application) and photographs of "typical" structures (Appendix B), but these appendices fail to depict the geometrical exterior of the actual buildings proposed by the Applicant at each site. Although Appendix B may show "typical" existing buildings, a "typical" building is not necessarily the same as a building actually proposed for a specific site. Because the Applicant has failed to submit the required site-specific evaluation drawings, it is impossible to evaluate the project's scenic impacts. The Staff Response does not address this argument. The Applicant has failed to demonstrate that the proposed project complies with the scenic resource protection requirements of the Scenic Area ordinance.

b. The application and Decision fail to disclose and evaluate details about the surface area of the proposed project that would be visible from key viewing areas (KVAs) and the linear distances along the KVAs from which the project would be visible making it impossible to conclude that the scenic resource standards would be met. The Decision also unlawfully does not address or even mention some of the KVAs from which the proposed development is topographically visible.

In order to determine the project's impacts to scenic resources, the County **must** evaluate "the amount of area of the building site exposed to Key Viewing Areas." NSA-LUDO § 14.200(A)(1)(f). The Applicant must include this information in the application, as well as the "[l]ocation, size, and shape . . . of all existing and proposed buildings and structures," all of which allow the project's scenic impacts to be evaluated. *Id.* § 14.020(B)(2). Yet, despite the massive scale of the proposed project, the Applicant has violated these requirements, completely failing to supply essential details about the project. For instance, the application omits basic information about the total surface area of the proposed project (including the proposed new

tracks, buildings, guardrails, rock blasting, vegetation removal, etc.) that would be visible from key viewing areas. The Applicant's omissions make it impossible to evaluate the scenic impacts of the proposed development—let alone the scenic impacts of the train use that would result from the proposed development. Without this fundamental and required evidence, neither the County nor interested persons and agencies are able to evaluate whether the proposal complies with the scenic resource protection requirements. The Applicant has failed to meet its burden of demonstrating compliance with the County's ordinance.

The Applicant acknowledges that the proposed project, including the tracks, buildings, other structures, and trains, would be visible from multiple linear key viewing areas, including the Columbia River, Interstate 84, the Historic Columbia River Highway, County Road 1230, and Washington State Route 14. In order to determine the project's impacts to scenic resources, the County **must** evaluate "[t]he linear distance along the Key Viewing Areas from which the building site is visible (for linear Key Viewing Areas, such as roads and the Columbia River." NSA-LUDO § 14.200(A)(1)(c). The Applicant must include this information in the application in order to allow the project's scenic impacts to be evaluated. Yet neither the application nor the County Staff Report contain adequate information disclosing the total lengths along the affected linear key viewing areas from which the project would be visible.

In particular, the proposed tracks and facilities and the trains that utilize them are likely to be visible in the immediate foreground along several miles of the Columbia River, which parallels the entire length of the proposed project. Yet nowhere does the application even attempt to estimate the length of the sections along the Columbia River from which the project would be visible nor does it adequately analyze the visual impacts on the Columbia River KVA. *See* Appendix II.

The Applicant has failed to meet its burden of demonstrating compliance with the application by failing to disclose the total distances along each of the linear key viewing areas from which the project would be visible, and by failing to explain, in both map and narrative formats, exactly where these sections of these linear KVAs are located. The Applicant's failure to provide this information makes it impossible to evaluate the project's scenic impacts and warrants denial of the project.

Additionally, the Applicant and the Staff Report ignore the scenic impacts from several KVAs from which large portions of the project would be visible, including Cook-Underwood Road, Rowena Plateau, Washington State Route 141, and Washington State Route 142. *See* Appendix I. These adverse impacts are not included in the project narrative, and omitting them from the application renders it inaccurate and incomplete. PC 1 1-116–PC 1 1-129, NSA-LUDO § 14.020(A)(5). It also makes it impossible to weigh the cumulative adverse effects of the project and violates NSA-LUDO § 14.200(A)(1)(a–g). The Staff Response points out a high-level narrative that does not meet any of the legal standards and does not meet the standards of a professional visual impacts analysis. Staff Response at 10–11; PC 2 1-95–PC 2 1-101. We ask the County to deny the application and to instruct the Applicant to submit a new application with a complete and accurate visual impacts analysis.

- c. The project violates the scenic protection requirements of County ordinance because the Applicant has failed to propose any new trees to screen the new development from key viewing areas and the conditions of approval unlawfully fail to ensure the retention and replacement of existing screening trees.*

Shockingly, the Applicant does not propose to plant any new trees to screen the project from key viewing areas and the Decision does not require any new screening vegetation. Condition 32, Decision at 5. This ensures that the project would not meet the scenic protection requirements of the Scenic Area ordinance. Apparently the Applicant proposes to plant some new trees, although they are proposed solely as mitigation for natural resource impacts, and are not proposed to meet the scenic resource protection requirements of the County's ordinance. Moreover, almost all details regarding these natural resource mitigation trees are unclear. The Applicant has failed to provide details about the number,¹¹ species, heights, and locations of any trees to be planted. In particular, there is no explanation **where** the natural resource mitigation trees would be planted, thus making it impossible to evaluate whether these trees would provide sufficient screening to comply with the scenic protection requirements.

Because the Applicant proposes no new screening trees, the project would violate a number of scenic resource protection requirements. As acknowledged in the application and the County Staff Report, both the proposed development and the train use of the proposed new rail line would be completely unscreened in multiple locations as viewed from multiple key viewing areas. In many of these locations, the project would violate the "not visually evident" standard that applies to portions of the project. This strict standard requires that new development and uses must be **not visible** from key viewing areas. *See* NSA-LUDO § 1.200 (definition of "not visually evident (SMA)").¹² An unscreened development or use is fully **visible**, and thus is almost certain to violate the not visually evident standard—particularly in locations where the project would be fully visible in the immediate foreground as viewed from key viewing areas.

In other locations, the project would violate the visual subordination standard, which is not as strict as the not visually evident standard but still requires development and uses to blend in with the natural landscape. Even the Staff Report acknowledges the need for some screening vegetation: "[s]ome new landscaping is necessary for the proposed development to achieve

¹¹ The County Staff Report states that "[n]o new screening vegetation is proposed." Staff Report at 49. The application states in one location that "[a] total of 1,438 trees (7 species), 5,760 shrubs (6 species), and 1,500 herbs (3 species) will be planted." PC 1 3-911. Those trees are ostensibly proposed as mitigation for natural resource impacts by replacing the up to 1,438 trees that may be removed by the project. *See* PC 1 3-735. Similarly, the Application states that "[t]rees that are removed will be replaced with planted stock of the same or equivalent species on a 1 for 1 basis." PC 1 3-909. However, in another location, the Application states that "[t]rees that are removed will be replaced with planted stock of the same or equivalent species on a **2 for 1 basis**." PC 1 3-913 (emphasis added). Given these vague and conflicting numbers in the application, it is impossible to tell how many trees would be planted—let alone the trees' species, locations, and heights at time of planting. It is clear, however, that any trees that would be planted would not be for screening purposes.

¹² The "not visually evident" standard corresponds to the "retention" standard under the U.S. Forest Service's scenery management system. "Retention" is defined in pertinent part as a landscape with "high scenic integrity" that "appears unaltered." USDA Forest Service, *Landscape Aesthetics: A Handbook for Scenery Management* at 2-4 (Dec. 1995). Under retention, any human-caused deviations to the landscape "must repeat the form, line, color, texture, and pattern common to the landscape character so completely and at such scale that they are not evident." *Id.* at 2-4.

visual subordination with the surrounding landscape.” Staff Report at 49. Yet the Decision fails to require any new screening vegetation.

The failure to require new screening vegetation also violates several landscape setting requirements. For example, in the SMA River Bottomlands landscape setting, the landscape “shall retain the overall visual character of a floodplain and associated islands.” NSA-LUDO § 14.400(H)(2). Without screening vegetation, the proposal fails to retain the visual character of a floodplain and thus violates this standard. To provide another example, in the GMA Gorge Walls, Canyonlands and Wildlands landscape setting, “[n]ew development and expansion of existing development **shall be screened** so as to not be seen from Key Viewing Areas to the maximum extent practicable.” NSA-LUDO § 14.400(I)(1). The Staff Response does not provide any legal justification for violating the standard. If the Applicant cannot adequately screen the development to meet legal standards, the application must be denied.

The Staff Report includes two proposed conditions of approval (Nos. 26 and 32) that purport to require retention of existing screening trees. However, these conditions are deficient and inconsistent with the requirements of the County Scenic Area ordinance. First, these conditions do not sufficiently identify the required existing trees, for example by cross-referencing landscaping plans, site plans, or photos of existing tree cover. Thus, if the trees were removed, enforcement of these conditions could be extremely difficult. Second, the proposed conditions lack the standard required language for conditions to ensure the survival of screening trees—including requirements to replace dead or dying trees in kind during the first available planting season and to ensure the survival of replacement trees with guy wires and regular irrigation. *See* NSA-LUDO §§ 14.100(G), 14.100(H). Adoption of the conditions as proposed in the Staff Report would fail to ensure the retention and replacement of existing screening trees and would violate the County ordinance.

d. The Applicant fails to demonstrate that the proposed development is sited to achieve the applicable scenic standards including that the development must be sited on each parcel so as to use the existing topography and vegetation for screening.

Pursuant to the Scenic Area ordinance, “[p]roposed developments or land uses shall be sited to achieve the applicable scenic standard. Development shall be designed to fit the natural topography, to take advantage of landform and vegetation screening, and to minimize visible grading or other modifications of landforms, vegetation cover, and natural characteristics.” NSA-LUDO § 14.200(R)(4). The Applicant fails to demonstrate compliance with this requirement. There is no indication that the locations for the proposed rail lines, buildings, guardrails, and other elements of the project were selected because they fit the natural topography or take advantage of existing screening. Nor has the Applicant submitted any photo simulations to allow for a proper evaluation of whether the proposed development sites would comply with the applicable scenic standards.¹³

¹³ Perhaps because of these flaws in the application, the Staff Report further confuses compliance with the scenic standard protection standards, in many places containing internally inconsistent findings about the visibility of the project. For example, in its evaluation of the visibility of the project as viewed from the Columbia River, the Staff Report finds that “it is not anticipated that the proposed track will be visible,” and yet in the same sentence concludes that “it is not anticipated that the proposed track will be . . . any more visible than the current track.” Staff

Although the application includes an alternatives analysis, it evaluates alternatives only in a very broad way, for example evaluating the total length of the project and possible other locations for the entire project. The alternatives analysis does not evaluate each individual proposed location of each rail line segment, building, or other structure to show that its site was chosen to ensure compliance with the applicable scenic standards. In fact, the alternatives analysis focuses mainly on protecting natural resources, barely even mentioning scenic impacts, except for broad, conclusory statements that development locations were chosen to protect the scenic, natural, cultural, and recreational resources of the Gorge. *See* PC 1 1-55–PC 1 1-60. The alternatives analysis was simply not prepared to comply with the Wasco County scenic resource protection standards, nor does it evaluate the siting of the individual project elements to demonstrate that they meet those standards. The Staff Response does not address the ability of the railroad to site the development elsewhere within the right of way. The Applicant and the Decision have failed to demonstrate compliance with the requirements of the ordinance.

e. The not visually evident and visual subordination standards are often impermissibly discussed interchangeably and/or conflated in the Decision. This leads to violations of the not visually evident standard in the zones in which it applies.

In several places, the County Staff Report evaluates compliance with the visual subordination and not visually evident standards together in the same findings, effectively conflating these standards and improperly treating them as one and the same. For example, although it is unclear whether any buildings are proposed in the SMA River Bottomlands landscape setting, the Staff Report evaluates compliance with the GMA and SMA River Bottomlands landscape settings together, and concludes that the proposed new buildings “should blend with the surrounding landscape.” Staff Report at 57; *see also id.* at 43 (concluding that the development would “blend with the surrounding landscape” as viewed from the Columbia River and Interstate 84). Blending with the surrounding landscape is a hallmark of visual subordination (which applies in the GMA portions of the project site), not the not visually evident standard (which applies in the SMA portions). To comply with the law, the Staff Report must be revised throughout to evaluate compliance with the GMA and SMA scenic standards separately. The not visually evident standard is stricter than the visual subordination standard and should not be “watered down” by treating it the same as the visual subordination standard.

f. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to scenic resources.

The County is legally obligated to evaluate the potential cumulative visual effects of proposed development in order to ensure that scenic resources would not be adversely affected. NSA-LUDO § 14.200(L). This includes evaluation of past, present, and likely future actions. In addition, the County is required to evaluate individually insignificant but cumulatively significant actions and avoid cumulative adverse effects. 16 USC 544(a)(3), *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 346 Or 366, 213 P3d 1164 (2009)

Report at 43. Both findings cannot be simultaneously correct. If the proposed second track will be as visible as the current track, then it will be visible. If the proposed second track will in fact be visible from any portion of the Columbia River, then the Staff Report should not have included a finding that it will not be visible.

[henceforth *Friends*]. The application does not even attempt to meet this legal standard and even endeavors to use past impacts – like the blasted area through the mesa – to support approval of this application. *See, e.g.*, PC 1 1-127 (“The cumulative effects analysis did not include an analysis of past actions.”). Therefore, the application cannot be lawfully approved.

The cumulative impacts to scenic resources caused by a proposed project in conjunction with other projects must be considered and addressed as part of the evaluation of the project’s potential impacts to scenic resources. NSA-LUDO § 14.200.L; *see also id.* § 1.200 (definition of “cumulative effects”). Projects that would contribute to cumulative adverse impacts to scenic resources are prohibited. *Friends* at 385–91; *Murray v. Columbia River Gorge Comm’n*, 125 Or. App. 444, 865 P.2d 1319 (1993); *Tucker v. Columbia River Gorge Comm’n*, 73 Wash. App. 74, 867 P.2d 686 (1994). Both the application and the Staff Report violate the cumulative effects requirements by failing to analyze and address the cumulative adverse impacts to scenic resources.

Neither the application nor the Staff Report evaluate whether this project, in conjunction with past and current activities in the same viewsheds, would cause adverse cumulative effects. Instead, both the application and the Staff Report consider only whether this project, by itself, would meet the applicable scenic standards, and whether this project in conjunction with other reasonably foreseeable future projects would cause adverse cumulative effects. In essence, both the application and the Staff Report ignore baseline conditions and whether those conditions contribute to cumulative effects.¹⁴

In particular, what are the baseline conditions of the affected viewsheds on a landscape level? For example, in the landscapes where the not visually evident standard applies, is that standard currently met on a landscape level, *i.e.*, are all human-caused alterations to the landscapes not noticeable? In addition, even assuming that the proposed project would comply with the applicable scenic standards (an assertion that Appellants vigorously dispute), what would be the combined effect of the proposed project in conjunction with existing uses and existing viewshed conditions? Will the proposed project, added to baseline conditions, satisfy the applicable standards on a landscape level? These questions must be addressed; unfortunately, neither the application nor the Staff Report fail to address them.

The Staff Report correctly states that since the passage of the Scenic Area Act thirty years ago, only one similar large-scale railroad expansion has been allowed in the National Scenic Area, the BNSF siding project at Doug’s Beach in Klickitat County. Staff Report at 49. However, the Staff Report fails to analyze the details of that project in conjunction with the proposed project. The Doug’s Beach project has caused significant adverse impacts to scenic resources along Washington State Route 14 and the Columbia River—particularly when trains are stopped along the new tracks, blocking scenic views. The total length of the Doug’s Beach siding was only 8,400 feet (1.59 miles)—about one-third of the total second mainline length sought by the Applicant if the proposed project is approved. What are the combined adverse impacts to scenic resources in the Scenic Area, including the loss and degradation of scenic views, caused by the

¹⁴ The Application states that baseline conditions will be considered, but then it fails to actually do that in its subsequent analysis of cumulative effects. *See* PC 1 1-127–PC 1 1-128.

Doug's Beach project in combination with the proposed project? Both the application and the Staff Report fail to address that question.

The Staff Report erroneously concludes that there are no other, similar large-scale rail expansions in the Scenic Area: "Staff is not aware of any [such projects] proposed in other NSA counties that are similar in scope." Staff Report at 49. This ignores evidence in the record of two large-scale rail expansions proposed by BNSF that are currently pending. PC 2 Supp 1-1-PC 2 Supp 1-61. One project, the BNSF Melonas Siding Project, would add an extra track to BNSF's existing mainline in Skamania County. The second project, the BNSF Washougal to Mt. Pleasant Double-Track Project, would similarly add an extra track to the BNSF mainline in both Clark and Skamania Counties. Together, these projects would add approximately 4.79 miles of additional track, much of it inside the National Scenic Area. Both of these projects would cause adverse scenic impacts and block scenic views from important public vantage points in the Scenic Area. There was also testimony at the Planning Commission Hearing on September 6, 2016 from a Cascade Locks City Council member that the Applicant has approached Cascade Locks about expanding the double track there. Transcript p. 64, Ln 22-23. The County must analyze the cumulative impacts to scenic resources of these projects in conjunction with the Applicant's proposed double-track project. The County should also correct its erroneous finding that "in the foreseeable future, [the proposed] development will not be combined with any similar rail development that would further magnify resource impacts." Staff Report at 50.

Despite the inadequate analysis done by the Applicant and the County, Staff did propose Condition of Approval 15 and concluded that with that condition, the "collectively significant impacts of blocked views should not result in a cumulatively adverse effect to scenic resources." Staff Report at 50. However, the Planning Commission unlawfully removed that condition of approval. *Id.* The cumulative adverse impacts of additional trains on the scenic resources of the NSA must be identified, analyzed, and mitigated or the application must be denied or conditioned to disallow additional train traffic.

In summary, both the application and the Staff Report fail to include baseline conditions in its analysis of the potential cumulative effects to the affected viewsheds, and also fail to address the combined effects to scenic resources of the proposed large-scale rail expansion in combination with other, similar existing, proposed, and reasonably foreseeable projects in other counties in the National Scenic Area. The Applicant has failed to meet its burden to demonstrate that the proposal would not result in adverse cumulative effects to scenic resources. The proposed project, as well as the Doug's Beach project, the two projects currently proposed in Skamania and Clark Counties, and other similar, reasonably foreseeable projects by the Applicant to relieve congestion elsewhere in Hood River and Wasco Counties collectively pose serious threats to scenic resources. These are easily the largest projects ever to be proposed for Scenic Area review. Collectively, the projects would exacerbate existing conditions in the affected landscapes, where existing railroad development already dominates or nearly dominates views. The projects would constantly block scenic views from important public vantage points with stopped and moving trains. And approval of the projects could create a snowball effect that would lead to even further proposals for large-scale rail expansions in the Scenic Area by the Applicant and BNSF. Given these serious and significant cumulative adverse impacts, the proposed project must be denied.

The Staff Response correctly states that the removal of Condition 15 by the Planning Commission renders the Decision unlawful. We agree that this condition must be added back, however, that is only the first step to compliance with the NSA-LUDO. The analysis discussed above must also be completed and cumulative adverse impacts must be avoided.

- g. In Condition 33, the Planning Commission unlawfully defers to the Applicant's standards that are not in the record and are under the control of the Applicant, allowing it to violate scenic resource protections.***

At the urging of the Applicant, the Planning Commission altered Condition 33 to incorporate the Applicants' Uniform Signal Systems and Standards. This raises two issues. First, that document is not in the record so the Planning Commission does not know to what it has agreed. Condition 33 was necessary to comply with NSA-LUDO § 14.100(F). Altering the condition without sufficient evidence in the record puts the Decision out of compliance and is unlawful. The Staff Response merely asserts that following the unseen Union Pacific standard will still comply with the NSA-LUDO. However, even if the document was in the record and had been studied for compliance with scenic area standards, it is under the control of the Applicant and can be changed at any time. This puts the condition entirely within the control of the Applicant, rendering the condition a nullity. To comply with NSA-LUDO § 14.100(F) the Condition must be restored to its original form.

IV. The proposal would unlawfully harm recreation resources in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of recreation resources and prohibits adverse effects to these resources. The project would result in adverse effects to recreation resources and should be denied. Hundreds of recreation users have submitted comments raising concerns over impacts to recreation. The Columbia Gorge Windsurfing Association submitted comments that raised concerns about river access and water-based recreation. PC 1 SUP 1-158. The Oregon Parks and Recreation Department has submitted comments identifying adverse impacts to Memaloose State Park and other state parks throughout the Gorge. PC 1 SUP 1-175–PC 1 SUP 1-176. The Applicant fails to demonstrate a need for the project, fails to explore alternatives to the proposed project that would lessen adverse impacts to recreation resources, and fails to identify specific mitigation measures that would reduce or eliminate these adverse effects. The Decision fails to require avoidance or sufficient mitigation for adverse effects to recreation resources and instead relies on undetermined future actions, including a vague, after-the-fact feasibility study to improve access from State Parks to the Columbia River to mitigate for adverse individual and cumulative impacts to recreation resources.

The Staff Response to these items states that the County sought input from the Oregon Parks and Recreation Department (OPRD) and incorporated the proposed mitigation measures. However, the mitigation measures adopted in the Decision are not fully developed and only take into account the input of one recreation entity – OPRD. Hundreds of other recreation users provided comments on the harm to recreation resources that are not addressed in the decision or in the proposed mitigation measures.

a. The Decision unlawfully fails to adequately ensure that the proposed development would comply with the protection measures for recreation resources in the Management Plan and in the County ordinance.

The project proposal includes rock crushing, road building, blasting, grading, track construction, and additional train traffic on lands adjacent to Memaloose State Park and the Columbia River. In addition, the project would allow more trains per day to pass through the park. To build the proposed project and meet rail safety standards, the Applicant must also complete a land transfer that would make Memaloose State Park smaller. PC 1 1-61. This is diametrically opposed to the provisions of the Management Plan at I-4-25 and NSA-LUDO §§ 14.700(F) and 14.710(M) and cannot be lawfully permitted.

The ordinance requires an appropriate buffer to be established when new buildings and structures “may detract from the use and enjoyment of established recreation sites on adjacent parcels.” NSA-LUDO §§ 14.700(F), 14.710(M). A new pump house would be constructed along with new track directly adjacent to the camping area at Memaloose State Park. Rather than creating an appropriate buffer, the Applicant proposes to reduce the area between the tracks and the camping area. Reducing the current buffer is the exact opposite of establishing a buffer. The project cannot be lawfully permitted as long as the buffer will not be established.

The ordinance also requires that “[n]ew developments and land uses shall not displace existing recreational use” NSA-LUDO § 14.710(B). Reducing the size of the park, as the Applicant proposes in its application, would result in de facto displacement of existing recreational uses. Due to these reasons, the project cannot be lawfully permitted.

b. The conditions of approval unlawfully defer determination of mitigation measures until after project approval or omit mitigation measures entirely.

The ordinance requires that “[m]itigation measures shall be provided to preclude adverse effects on the recreation resource.” NSA-LUDO § 14.710(E). The Applicant concedes that there would be adverse effects on the recreation resource and yet does not propose any mitigation measures to preclude these effects. PC 1 1-178. Permanent degradation of the resource would also occur due to more frequent train traffic waking campers and detracting from the recreational experiences at Memaloose State Park and at other parks and recreation areas in the NSA. In fact, The Oregonian reported that “When camping in the Gorge, it pays to be a little deaf” and singled Memaloose State Park out as already being impacted by excessive train noise. http://blog.oregonlive.com/terryrichard/2008/05/when_camping_columbia_gorge_it.html. Cumulative adverse impacts of increased train traffic to the recreation resource of the NSA must be considered and impacts caused by past actions must be included. *Friends*.

Condition of Approval 44 defers compliance with mandatory requirements of NSA ordinance to a future date and fails to identify specific enforceable measures that would require the project to avoid adverse effects to recreation resources. NSA-LUDO § 14.710(E). Such a decision is subject to reversal, as unanimously held by the Gorge Commission in the *Eagle Ridge* case. CRGC No. COA-S-99-01 (June 22, 2001). It is similarly unlawful for the County to use

conditions of approval to defer the submission of complete and adequate application materials. *Eagle Ridge* at 9–10. The lack of a mitigation plan renders the application incomplete. In addition, the Staff Report ignores all recreation sites along the Columbia River that are not managed by OPRD.

In its August 30, 2016 comment letter, OPRD said that the project would worsen the already significant fragmentation of the recreation experience. PC 1 SUP 1-175–PC 1 SUP 1-175. OPRD also said that the increased number of trains, including longer trains, would have a regional impact to recreation. *Id.* OPRD requested mitigation measures that require:

1. Creating an overall analysis of vehicle and pedestrian crossings to identify areas where upgrades can be made.
2. Defining new separated grade crossings in the project area.
3. Upgrading existing crossings to decrease vehicle wait times and improve access across the rail.

PC 1 SUP 1-175. In order to determine whether the project is consistent with the requirements of the NSA-LUDO, the identification of mitigation measures and the evaluation of those mitigation measures must be completed prior to a decision by Wasco County or the application must be denied. *Friends*.

Condition of Approval 45 also fails to require the avoidance or mitigation of adverse effects on Memaloose State Park. Moving construction activities to less than peak recreation season, or requiring covered trucks, does not adequately mitigate for the noise, dust and traffic impacts caused to Memaloose State Park and recreation users in the area. In its August 30, 2016 comment letter, OPRD stated that “the noise and disruption from construction would necessitate closure of the Park.” PC 1 SUP 1-176. Therefore, the project would result in direct adverse effects to recreation in the Columbia River Gorge and must be denied.

c. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to recreation resources.

Both the decision in *Friends* and the Management Plan at I-4-25 require that cumulative adverse impacts to recreation resources be prevented. The Management Plan states that “[r]ecreation resources shall be protected from adverse effects by evaluating new developments and land uses as proposed in the site plan. An analysis of both onsite and offsite cumulative effects shall be required.” Management Plan at I-4-25. However, there is no analysis in the Staff Report of past actions nor is there an analysis of the offsite impacts of the rail expansion up and down the NSA – including the additional train traffic that the project would allow. Without such an analysis there is no way to lawfully conclude that recreation resources will be protected. This analysis must be completed and recreation resources must be protected or the application must be denied.

V. The proposal would unlawfully harm natural resources in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of natural resources and prohibits adverse effects to these resources. The project would result in adverse effects to natural resources and should be denied.

a. The Applicant unlawfully proposes to intrude on both water resources and their buffer zones within the SMA.

The Applicant proposes to intrude on both water resources and their buffer zones in the SMA. However, in the SMA, water resource buffer zones must be untouched and maintained in their natural condition. NSA-LUDO § 14.610(A)(2)(a)(1) & (A)(2)(g). For both buffer zones and water resources the Practicable Alternatives Test must be completed and development cannot intrude on the resources or buffer zones if a practicable alternative exists. As discussed in Section II.i above, the Applicant has not completed a compliant Practicable Alternatives Test. Thus, a condition of approval must protect these resources or the proposal must be denied.

In addition, NSA-LUDO § 14.610(A)(2)(g)(2) requires that, within the SMA, wetlands and aquatic and riparian areas can only be disturbed when a public safety hazard exists or when the disturbance is for a restoration/enhancement project. In its application materials, the Applicant attempts to inject ambiguity into this crystal clear requirement. PC 1 1-167. With the exception of a scrivener's error, this requirement was lifted verbatim from the Management Plan. *Compare* NSA-LUDO § 14.610(A)(2)(g) *with* Management Plan at I-3-36. According to the Management Plan, which controls, only unavoidable impacts from public safety hazards and restoration/enhancement projects can be allowed and they must be mitigated with a complete mitigation plan. Management Plan at I-3-36. The proposal is not to alleviate unavoidable impacts from public safety hazards – it would, in fact, greatly increase the hazard to the public by allowing greater capacity for extremely hazardous trains to travel on poorly maintained tracks – nor is it a restoration/enhancement project. Thus, a variance cannot be granted. Even though a variance is not available the Applicant has requested variances for three delineated wetlands or waterbodies within the SMA. Since these requested variances cannot be lawfully granted a condition of approval must be added to prevent disturbances to these resources or the application must be denied.

b. The Decision unlawfully substitutes the Applicant's standards for the legal standards found in the Management Plan and the NSA-LUDO for the protection of sensitive wildlife and plants.

The Applicant and the Staff Report do not address the many requirements of NSA-LUDO § 14.610(B)(2)(a–h). None of the criteria are individually analyzed or met in the Application or in the Staff Report. *See* Staff Report at 89. Instead, the Applicant pledges to avoid sensitive species and priority habitats to the extent practicable. This falls far short of the required standards in NSA-LUDO § 14.610(B)(2)(a–h). The Staff Response states in a conclusory manner that the Decision complies with the ordinance – again without actually analyzing any of the criteria. The application must be denied or conditioned to meet the requirements of NSA-LUDO § 14.610(B)(2)(a–h).

c. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to natural resources.

Both the decision in *Friends* and the Management Plan require that cumulative adverse impacts to natural resources be prevented. A cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, is required by the Act and must be completed by the County. Once the cumulative adverse impacts – including the cumulative adverse impacts of the additional trains that the project would accommodate – are identified, they must be avoided or the application must be denied. This analysis must go above and beyond the requirements of the NSA-LUDO. *Friends*. However, there is no analysis in the Staff Report of cumulative impacts to natural resources including the impacts of past actions. Without such an analysis there is no way to lawfully conclude that cumulative impacts to natural resources will be prevented. The Staff Response ignores the case law from *Friends* and states that the NSA-LUDO has been followed. This is simply not enough. *Friends*. This analysis must be completed and natural resources must be protected or the application must be denied.

VI. The proposal would unlawfully harm cultural resources and treaty rights in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of cultural resources and prohibits adverse effects to these resources and to treaty rights. The project would result in adverse effects to cultural resources and treaty rights and should be denied.

a. The Applicant failed to complete adequate cultural resource reconnaissance surveys and therefore failed to meet its burden to demonstrate compliance with the cultural resource protection requirements.

Due to its location along the Columbia River and near Memaloose Island there is a high likelihood of cultural resources within the project area. For most uses and developments in the Special Management Areas, NSA-LUDO § 14.500 contains the standards for the protection of cultural resources. See NSA-LUDO § 14.510(C). The cultural resource reconnaissance survey and report must be prepared to meet NSA-LUDO § 14.500(K) and (L).

The cultural survey required under NSA-LUDO § 14.500 and initiated by the railroad's contractor was incomplete. The railroad acknowledges that it failed to survey large areas due to blackberry brambles and poison oak. PC 1 1-217. When it became inconvenient to survey for cultural artifacts the railroad's contractor simply stopped surveying. The area that was not surveyed has been identified as having high likelihood of containing historic and pre-contact artifacts. Under the adjudicative decision handed down in *Eagle Ridge* this survey work must be done before the County approves the application. Deferring this work with a condition of approval is not legally adequate. Due to likely impacts on cultural resources a complete cultural resources survey must be completed before the application is decided upon the application must be denied.

b. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to cultural resources.

Both the decision in *Friends* and the Management Plan require that cumulative adverse impacts to cultural resources be prevented. A cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, is required by the Act and must be completed by the County. Once the cumulative adverse impacts are identified – including the cumulative adverse impacts of the additional trains that the project would accommodate – they must be avoided or the application must be denied. This analysis must go above and beyond the requirements of the Wasco County Ordinance. *Friends*. However, there is no analysis in the Staff Report of cumulative impacts to cultural resources including the impacts of past actions. Without such an analysis there is no way to lawfully conclude that cumulative impacts to cultural resources will be prevented. In addition, the incomplete survey discussed above makes it impossible to determine what the impacts of the proposal will be. An analysis including the past, present, and likely future actions must be completed and cultural resources must be protected or the application must be denied.

c. The Planning Commission unlawfully removed a condition to protect treaty rights and acknowledged this would bring the Decision out of compliance with the law.

NSA-LUDO § 14.800(D)(2) requires that uses that would affect or modify treaty rights shall be prohibited. The Staff Report discusses the impacts to treaty rights of the proposal and then proposes a condition of approval to prevent impacts to treaty rights. Staff Report at 119-120. At the Planning Commission hearing, Planning Staff noted that removing Condition 20 would make the decision fall out of compliance with the law. Some Commissioners even acknowledged that removing the condition would have the effect of making the decision unlawful. Still, the Planning Commission removed Condition 20. Staff Report at 120. This condition must be added back or the application must be denied.

VII. The law does not preempt either the permitting process or the placement of conditions of approval on a permit.

The Applicant has argued that Wasco County's NSA-LUDO is fully preempted under the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (49 U.S.C. § 10501(b)(2)). *See, e.g.*, PC 1 1-3. The Applicant is apparently also relying on ICCTA to refuse to seek permits from the Oregon Department of Forestry and the City of Mosier. PC 1 1-217. If the Applicant truly believed that the Wasco County NSA permitting process was fully preempted by federal law, it is likely that the railroad would not be seeking permits from the County either. As the County's legal counsel has advised the County, the requirements of the Columbia River Gorge National Scenic Area Act, the Management Plan, and local rules implementing the Act, including the NSA-LUDO, are not preempted. PC-2 1-13.

While railroads do enjoy broad preemption of local, state, and federal laws, there are limits to what is preempted. Due to constitutional principles, courts have repeatedly ruled that ICCTA is not "intended to interfere with the role of state and local agencies in implementing Federal

environmental statutes.” *Bos. & Me. Corp.*, STB¹⁵ Finance Docket No. 33971, at 9 (2001). The Columbia River Gorge National Scenic Area Act is a Federal environmental statute and Wasco County’s Land Use and Development ordinance implements it. Thus it is not preempted. Instead, courts are required to “harmonize” ICCTA and the NSA-LUDO. *Ass’n of American R.R. v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097–1098 (9th Cir., 2010). If asked to review a decision for preemption, a court would be required to read both sets of laws together and attempt to give effect to both to the extent possible. *Id.*

The contention put forth by the applicant that the NSA-LUDO does not implement federal law because the Columbia River Gorge Commission is explicitly not a federal agency is a ruse. The Gorge Act, which was passed by Congress, signed by President Reagan, and is codified in the United States Code at 16 U.S.C. §§ 544–544p is a federal environmental¹⁶ law. The Gorge Act *requires* the Gorge Commission to develop and adopt a Management Plan compliant with the requirements of the Gorge Act.¹⁷ It then *requires* the Gorge Commission to submit the Management Plan to the Forest Service, which then reviews the plan for consistency with the Gorge Act.¹⁸ The Gorge Act then *requires* the counties to establish ordinances – the NSA-LUDO is one such ordinance – that comply with the Management Plan (and thus the Gorge Act) and *requires* the Gorge Commission to step in and develop ordinances compliant with the Management Plan (and thus the Gorge Act) for any counties that fail to develop compliant ordinances.¹⁹ Arguing that the NSA-LUDO does not implement federal law is simply incorrect.

In addition, case law does not support the Applicant’s position. Applicant relies on *Woodall* to make its argument that the NSA-LUDO is not implementing federal law. However, that case resolved the question of whether state or federal common law controls when there are ambiguities or omissions in Skamania County Code. *Skamania County v. Woodall*, 104 Wn. App. 525, 16 P.3d 701 (Div. II 2001), *rev. den.*, 144 Wn.2d 1021, 34 P.3d 1232 (2001), *cert. den.*, 535 U.S. 980, 122 S. Ct. 1549, 152 L. Ed. 2d 399 (2002). As there is no federal common law of land use to fall back on, if the Gorge Act or Management Plan does not provide a solution to resolve a land use dispute, state common law must be applied. *Woodall* is simply not on point.

¹⁵ The Surface Transportation Board, or the STB, is the entity that oversees the railroads and implements ICCTA.

¹⁶ Of course, ICCTA and any other federal law – whether environmental in nature or not – must be harmonized. *See, e.g., Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (“If an apparent conflict exists between ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible.”).

¹⁷ “Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area.” 16 U.S.C. § 544d(c).

¹⁸ “Upon adoption of the management plan, the Commission shall promptly submit the plan to the Secretary for review. If the Secretary agrees with the Commission that the management plan is consistent with the standards established in this section and the purposes of sections 544 to 544p of this title, the Secretary shall concur to that effect.” 16 U.S.C. § 544d(f)(1).

¹⁹ “Within two hundred and seventy days of receipt of the management plan, each county shall adopt a land use ordinance consistent with the management plan. . . .” 16 U.S.C. § 544e(b)(2). “Within ninety days after making a determination that a county has failed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area, excluding urban areas identified in section 544b(e) of this title. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan.” 16 U.S.C. § 544e(c)(1).

However, there are several cases that are on point and that conclude that county ordinances implementing the Gorge Act are federal in nature – including cases that have been decided subsequent to *Woodall*. In 2007, the Oregon Court of appeals determined that the Columbia River Gorge Compact has the force of federal law and the Gorge Act’s implementing rules, including the Management Plan and the county ordinances, are required by federal law and are thus not subject to a state law that ran counter to them. *Columbia River Gorge Comm’n v. Hood River County*, 210 Or App 689, 152 P3d 997, *rev. den.*, 342 Or 727, 160 P3d 992 (2007). In 1993, the Washington Court of Appeals determined that the Gorge Act and Management Plan are federally mandated, and therefore do not constitute state programs for purposes of a Washington statute that prohibits the state from shifting the costs of state programs to the counties. *Klickitat County v. State*, 71 Wn. App. 760, 862 P.2d 629 (Div. III 1993). In 2009, the Oregon Supreme Court also determined that, as a creature of federal law, the Gorge Commission is entitled to significant deference in interpreting ambiguous provisions of the Scenic Area Act or filling in the gaps of the statute. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or 366, 213 P3d 1164 (2009). Both Washington and Oregon courts routinely have determined that local land use and development ordinances within the NSA implement federal law. Thus they would not be fully preempted.

Additionally, treaty rights are not preempted.²⁰ While the preemption clause of ICCTA purports to expressly preempt federal and state laws, it does not expressly abrogate the United States’ treaty obligations with sovereign tribes. Abrogation of a treaty cannot be done in “a backhanded way” but must be “clear and plain.” *United States v. Dion*, 476 U.S. 734, 738–739 (1986). Here, it is not. Thus, the proposed conditions of approval to protect treaty rights held by the tribes, as well as any other conditions of approval that are necessary to protect treaty rights, are not preempted by ICCTA.

Finally, the Applicant has, in certain cases, voluntarily limited the scope of its request to the County. For example, the Applicant, both in its application and in its public statements, has said that the improvements would not result in a significant increase in train traffic through the County. In statements to the Planning Commission, the Applicant has gone as far as pledging that the improvements would only allow 5–7 more trains to pass through the project area per day. There is a line of cases that stand for the proposition that when a railroad enters into a voluntary agreement the commerce clause is not implicated and those agreements are not preempted. *See, e.g., Township of Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053, at 5 (2000); *Pcs Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212 (4th Cir., 2009). A logical extension of those cases would be a situation such as this – where a railroad has voluntarily made assurances and predicated its application on those assurances the railroad is bound by those assurances. It would also be difficult for the railroad to argue that getting what it requested from the County, but nothing more, is an unreasonable burden on interstate commerce. Holding the Applicant to what it requested is not preempted.

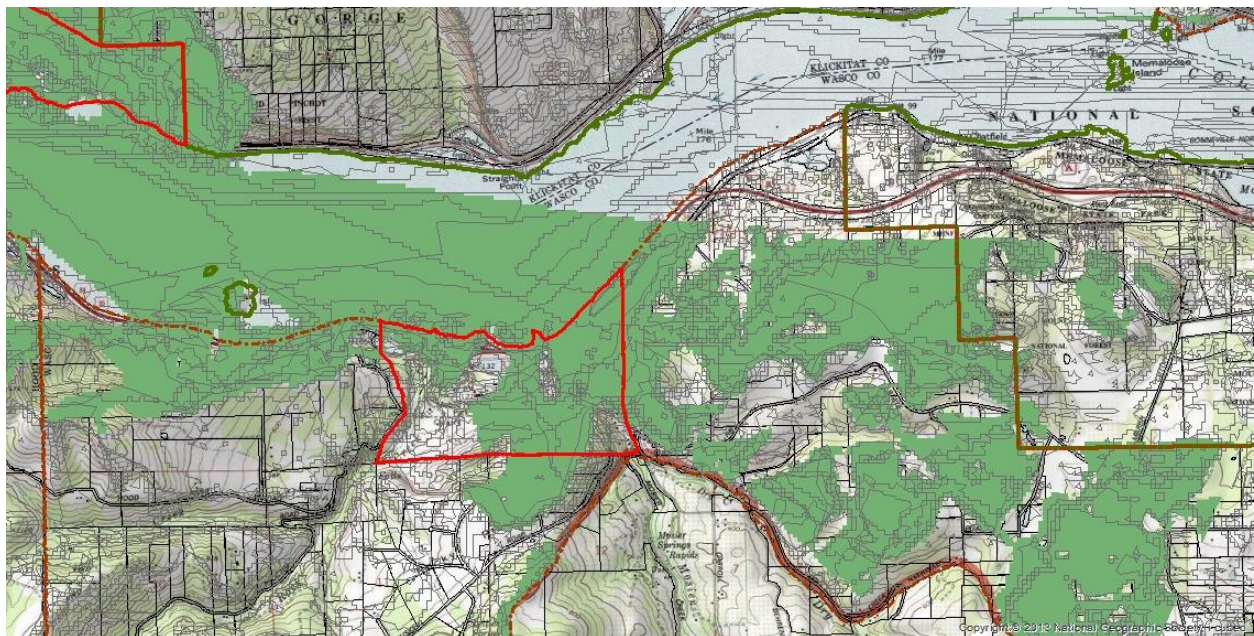
²⁰ In its appeal PLAAPL-16-10-0003, while attempting to deprive the tribes of their treaty rights, the Applicant asserts “that the treaties of 1855 acknowledged the fact that a railroad would be built along the Oregon side of the Gorge.” Attachment F at 4. However, while the treaty between the United States and the Confederated Tribes of the Umatilla Indian Reservation did include a mention of railroads in Article 10, it only discussed the railroad’s potential existence within the Umatilla Indian Reservation, not within the Columbia River Gorge as claimed by the applicant. In addition, the 1855 treaty with the Yakama Nation did not even mention railroads. The Applicant should withdraw this factual misstatement that was put forth as a way to rationalize the unlawful abrogation of treaty rights.

VIII. Conclusion

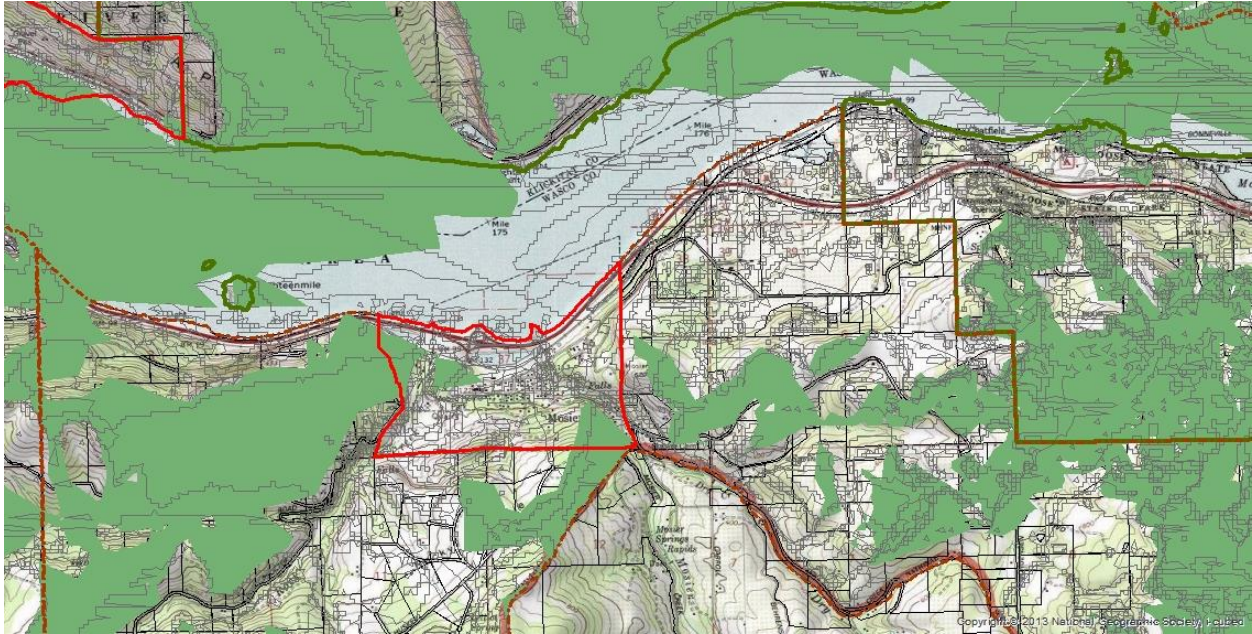
The Applicant has proposed a massive new project within the NSA. As discussed above, the proposal violates the Gorge Act, the Management Plan, and the NSA-LUDO in dozens of ways. The County has the authority to impose a wide range of conditions on the permit or deny the proposal outright. Appellants ask the County to deny the proposal to prevent irreparable harm to the protected resources of the Columbia River Gorge National Scenic Area.

Visibility of the Proposed Project Area from Key Viewing Areas not Analyzed by the Applicant or the County

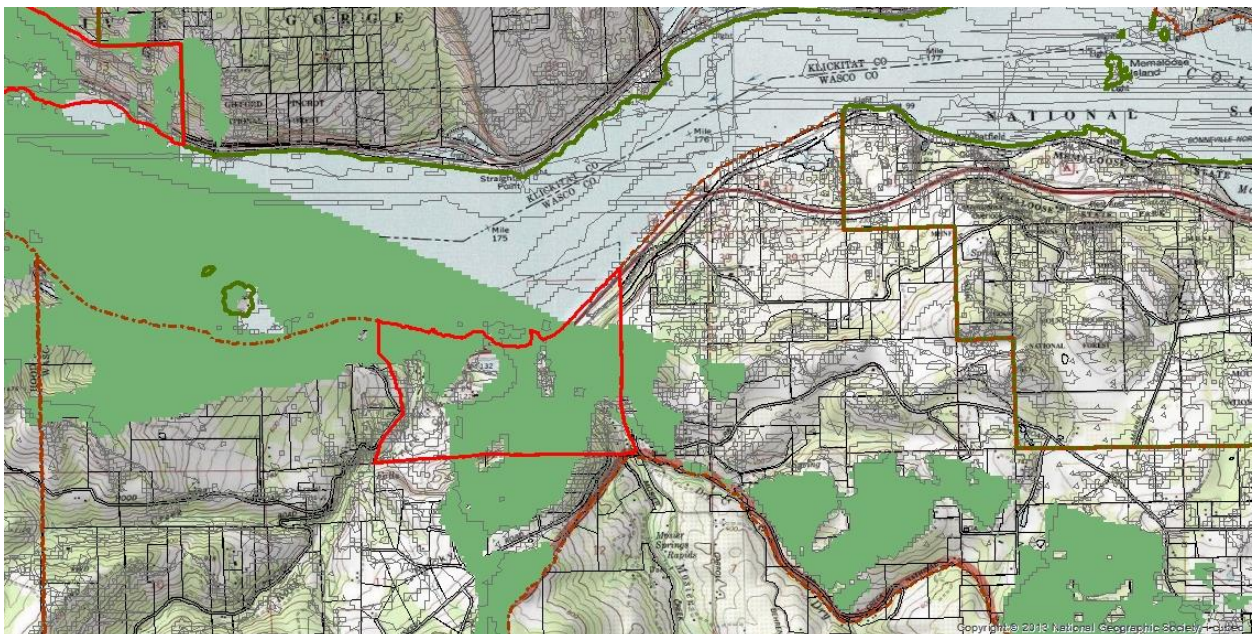
The applicant cursorily analyzed visibility of the project area from the Columbia River, Interstate 84, Washington State Route 14, County Road 1230 (Old Washington State Route 14), and Historic Columbia River Highway KVAs. PC 1 1-71–PC 1 1-79. The County analyzed visibility of the project area from the Columbia River, Interstate 84, Washington State Route 14, and Historic Columbia River Highway KVAs – omitting the highly visible County Road 1230 KVA. Staff Report at 42–44. However, the project area is also topographically visible from the Cook-Underwood Road, Rowena Plateau, State Road 141, and State Road 142 KVAs. As discussed above, a complete analysis of all topographically visible KVAs must be completed to satisfy the NSA-LUDO and the Management Plan.



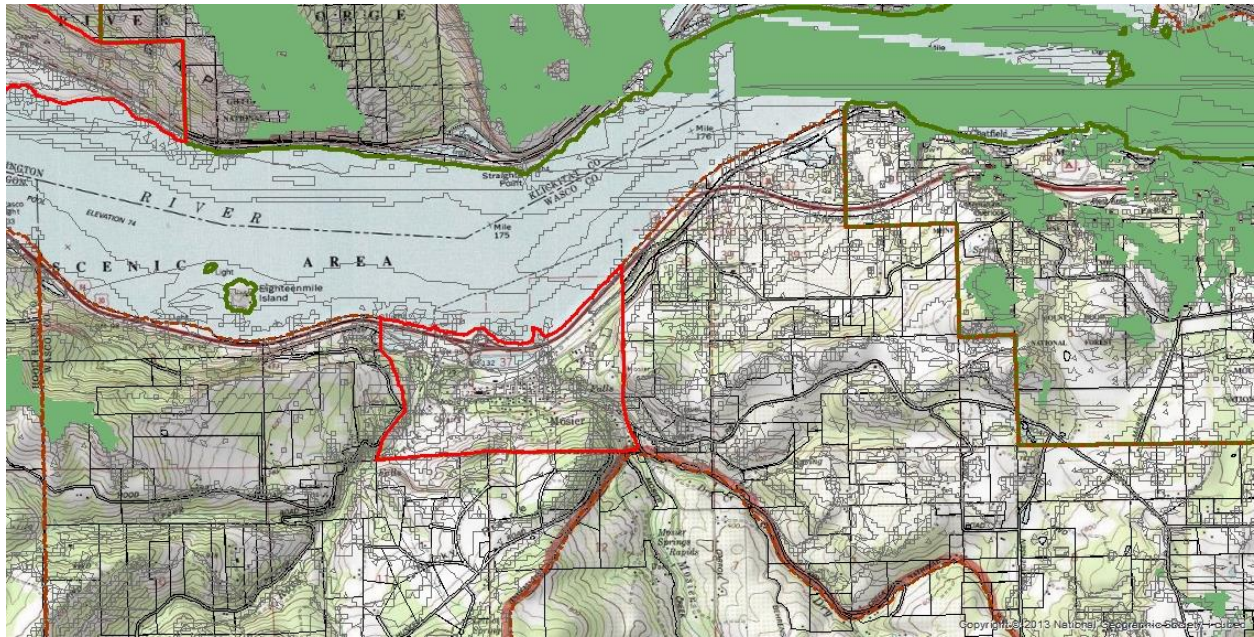
This map depicts the topographically visible areas from the Cook-Underwood Road KVA shaded in green. The proposed project area is on the South side of the Columbia River from the Hood River County line (the dashed red line at the far left of the frame) through the Memaloose State Park campground (on the far right of the frame). Most of the Western half and part of the Eastern half of the project area is topographically visible from this KVA.



This map depicts the topographically visible areas from the Rowena Plateau KVA shaded in green. Areas on both the East and West parts of the proposed project area are topographically visible from this KVA.



This map depicts the topographically visible areas from the Washington State Route 141 KVA shaded in green. Virtually the entire Western part of the proposed project area is topographically visible from this KVA.



This map depicts the topographically visible areas from the Washington State Route 142 KVA shaded in green. Much of the Eastern part of the proposed project area is topographically visible from this KVA.

Visibility of the Proposed Project Area from the Columbia River Key Viewing Area

In its application, the Applicant downplayed the visibility of the project area from the Columbia River KVA. In fact, the Applicant only briefly discussed views from the river and instead focused on views from the North bank of the river. PC 1 1-78. However, the KVA is the river itself, not an arbitrary location across the river. The Staff Report also dismissed the visibility of the project area from this KVA with little analysis and no hard evidence. Staff Report at 43.

The following photographs were taken from the Columbia River KVA on October 21, 2016 and show that the project area and various proposed features of the project would be highly visible. The analyses done by the applicant and the County simply do not stand up to the evidence.



This photograph shows the existing cut through the rock mesa at approximately milepost 71.4 within the project area. The expansion of this rock cut as proposed by the applicant will be clearly visible to all river uses, will not meet the not visually evident standard, and will greatly contribute to the cumulative adverse effects of the project.



This photograph depicts a closer view of the rock cut that the applicant proposes to expand. The applicant and the Planning Commission do not propose any screening vegetation to attempt to meet scenic area standards.



This is a view of a train traversing the project area. The train visually dominates the area. Even an increase in traffic of 5–7 trains per day or an increase in the length of trains would have large cumulative adverse impacts on the scenic resources of the NSA.



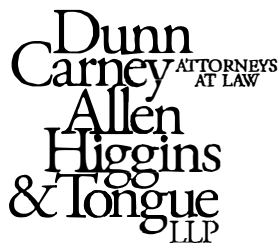
This is another photo of the adverse visual impacts the operation of the railroad has on the NSA. The area of deciduous trees on the left side of the photo is the area that the applicant proposed to clear and use as a staging area.



This is a photo from a kayak of the tracks through the project area at approximately milepost 71. Despite the applicant's narrative, the tracks within the project area are clearly visible from the Columbia River KVA and the additional development would also be highly visible and not meet the required scenic area standards.



These signals and utility poles are clearly visible from the Columbia River KVA at approximately milepost 71. Despite the applicant's narrative, features like the rails and signals that would be located on the flat area on top of the bank would be highly visible from the Columbia River KVA and not meet the required scenic area standards.



WASCO COUNTY PLANNING
AND DEVELOPMENT
2705 EAST SECOND ST.
THE DALLES, OR 97058
R'd 11AM (DN)

October 14, 2016

TY K. WYMAN
Admitted in
Oregon and Washington

DIRECT DIAL
503-417-5478

E-MAIL
twyman@
dunncarney.com

ADDRESS
Suite 1500
851 S.W. Sixth Avenue
Portland, Oregon
97204-1357

Phone 503.224.6440
Fax 503.224.7324

INTERNET
www.dunncarney.com

VIA MERCURY MESSENGER DELIVERY

Angie Brewer
Planning Director
Wasco County Planning Department
2705 East Second Street
The Dalles, OR 97058

Re: Appeal of Land Use Decision
Union Pacific - Mosier Double Track Project
County File No. PLASAR 15-01-0004
Our File No.: UNI45-86

Dear Angie:

As you know, we represent Union Pacific Railroad Co. in the referenced matter. With reference to the Planning Commission decision dated September 29, 2016, I enclose for filing the following documents ahead of your appeal deadline (October 14, 2016 at 4:00 pm):

1. Completed Appeal of Land Use Decision form;
2. Accompanying Narrative Statement; and
3. Check in the amount of \$1,200 to cover the filing fee. (Note that information provided to us regarding the amount of that fee was ambiguous. We understood from staff that the fee is \$250. However, the only provision for "Appeal to Board of Commissioners" listed on the published Wasco County Planning Department Fees schedule (effective September 24, 2014) is \$1,200. We submit the higher amount just to be certain that it is adequate.)

Angie Brewer
October 14, 2016
Page 2

If you have any questions concerning the above, please do not hesitate to call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ty K. Wyman', with a long horizontal stroke extending to the right.

Ty K. Wyman

TKW:car

Enclosures

cc: Luke Baatz, Union Pacific Railroad (UPRR)
Linnea Eng, CH2M

DCAPDX_2187087_v1



Wasco County Planning Department
"Service, Sustainability & Solutions"
2705 East Second St. • The Dalles, OR 97058
(541) 506-2560 • wcplanning@co.wasco.or.us
www.co.wasco.or.us/planning

FILE NUMBER: PLASAR 15-01-0004

APPEAL OF LAND USE DECISION

ORIGINAL PLANNING DEPARTMENT FILE NUMBER: PLASAR 15-010-0004 UPRR

Date Received: _____ **Planner Initials:** _____ **Date Complete:** _____ **Planner Initials:** _____

APPELLANT INFORMATION

Name: Union Pacific Railroad (UPRR); Attention Luke Baatz
Mailing Address: 1400 Douglas Street, Stop 0910
City/State/Zip: Omaha, NE 68179
Phone: 402-544-3527 **Email:** lmbaatz@up.com

APPEAL INFORMATION

1. Appeal Type

- ☐ Administrative Decision to the Planning Commission: Fee = \$250
☒ Planning Commission Decision to the Board of County Commissioners: Fee = \$ 1200

If appellant prevails at Planning Commission or a subsequent appeal, the \$250 fee for the initial appeal shall be refunded per ORS 215.416(11)(b). This is not applicable for any subsequent appeal costs.

2. Appeal Deadline: October 14, 2016

Date Submitted: October 14, 2016

All appeal documents filed with Wasco County must be delivered to the Wasco County Planning Department Office by postal service or in person. Documents faxed are not considered filed. An appeal will not be considered timely unless received no later than 4:00 p.m. on the deadline stated on the Notice of Decision or Resolution. AN APPEAL IS NOT CONSIDERED COMPLETE UNTIL BOTH THE SIGNED NOTICE OF APPEAL AND FILING FEE ARE RECEIVED.

3. Party Status: State how the petitioner(s) qualifies as a party to this matter:

Applicant and property owner

Party includes the following:

- The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor's Office, of the property which is the subject of the application.
- All property owners of record, as provided in (a) above, within the notification area, as described in section 2.080 A.2., of the property which is the subject of the application.
- A Citizen Advisory Group pursuant to the Citizen Involvement Program approved pursuant to O.R.S. 197.160.
- Any affected unit of local government or public district or state or federal agency.
- Any other person, or his representative, who is specifically, personally or adversely affected in the subject matter, as determined by the Approving Authority. (Revised 1/92)

4. Grounds for appeal: List the **specific** grounds relied upon in the petition request for review (e.g. ordinance criteria not met, procedural error, etc.) Additional pages may be attached.
The attached narrative statement describes these grounds.

5. De Novo vs. On the record: All appeals to Planning Commission are DeNovo meaning new information can be entered into the record. All appeals to the Board of Commissioners are on the record unless a request is made as part of this request by party filing the petition. Any other party must make such a request no more than seven (7) calendar days after the deadline for filing a petition for review has expired.

The appeal is to the Board of Commissioners?

☐ NO ☒ YES

I request the hearing to be DeNovo or partial DeNovo?

☐ NO ☒ YES

State the reasons you are requesting a DeNovo or partial DeNovo without addressing the merits of the land use action:

With this statement, the form conflicts with NSALUDO 2.170 (A), which states that,, "review of the decision of the Planning Commission by the County Governing Body shall be conducted as a 'de novo' hearing, including but not limited to the record established at the Planning Commission level." Because the code supersedes the form in governing this process, we understand that the Board must, regardless of what an appellant requests, conduct a *de novo* hearing as to stated grounds of appeal. We mark the form as requesting partial *de novo* review because we believe the Board would benefit from accepting additional evidence that responds to comments made by staff and the Planning Commission during its deliberations (after the record was closed).

Indicate any persons known to be opposed to a request for a DeNovo hearing.

No.

When practicable, the requesting party shall advise the other parties and attempt to gain their consent.

I have attempted to gain the consent of the other parties associated with this file?

☒ NO ☐ YES

If you answered no indicate why this is not practicable. If you answered yes list the parties who have consented for this to be a DeNovo or partial DeNovo hearing.

Other interested parties of this matter are adverse.

The request for a DeNovo hearing for appeal of a quasi-judicial plan amendment shall be decided by the Board of Commissioners as a nonpublic hearing item, except that the Board may make such provision for notice to the parties

and may take such testimony as it deems necessary to fully and fairly address significant procedural or substantive issues raised. The Court shall grant the request only upon findings that:

- A de novo hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action;
- The substantial rights of the parties will not be significantly prejudiced; and
- The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

5. Outstanding Appeal Fees: Any person wishing to appeal any decision shall be required to pay all outstanding appeal fees prior to their appeal application being considered complete.

List prior appeals filed:

_____	_____
_____	_____
_____	_____

I have paid all outstanding fees associated with prior appeals:

☒ NO ☐ YES

SIGNATURES

[Signature], attorney for Union Pacific
10/14/16
Name, Title Date

Name, Title Date

Additional petitioner(s):

Name Address

Name Address

Name Address

Name Address

Before the Wasco County Board of Commissioners
Notice of Review - Union Pacific Railroad Co.

County File No. PLASAR 15-01-0004
October 14, 2016

Union Pacific Railroad Co. asked the County to approve, under its Scenic Area land use ordinance, addition of four miles of track in and around the City of Mosier¹. Two of the four Columbia River treaty tribes² asserted that the project will interfere with their ability to access the river and, unless UPRR mitigates such interference, the County should not issue that approval.

In its September 29, 2016 decision, the Planning Commission approved UPRR's application, but imposed two conditions regarding access to the river.³ We appreciate the Planning Commission's thoughtfulness in this endeavor - and its yeoman's work in trying to craft a compromise on this issue. In the end, however, these conditions present UPRR with open-ended and unspecified mandates that unduly burden our ability to transport interstate commerce. The conditions neither advance the public interest nor comply with the law, so UPRR files, pursuant to NSALUDO 2.160(A), this Notice of Review.⁴

UPRR and the agencies interested in river access can better address that issue outside the permit process. UPRR has stated repeatedly our commitment to river access and taken proactive steps to work directly with Columbia River stakeholders to understand and plan for the maintenance and improvement of safe river access. We note particularly the testimony of Wes Lujan, UPRR Vice President of Public Affairs, Western Region, to the Planning Commission:

My chairman [Lance Fritz] is committed to working with the communities on safe and reasonable access.⁵

We ask the Board to uphold the chairman's commitment by deleting Conditions 21 and 47 and noting that access is something the parties are to pursue outside the permit process.

One purpose of this notice is to preserve UPRR's rights in the event that further appeals are filed. As such, we describe below ways in which the law prohibits the County from imposing Conditions 21 and 47. More important to us than legalities, however, is to advance the public interest, so we start there.

The Public Interest in River Access is Best Accomplished by a Voluntary Process

Conditions 21 and 47 require UPRR to address tribal access demands that extend well beyond this project. They mandate a Gorge-wide study that includes consideration of impacts well beyond construction of four miles of track. They also put an arbitrary deadline on UPRR to bring other parties to the negotiating table. Several policy considerations support our request that the Board decouple the tribal river access solution from the construction of four miles of track.

1. Quite simply, the project did not create the river access issue, nor would it even exacerbate the issue to any material extent.⁶ Rather, the river access issue is a constant of the Gorge. It arose well before this project was conceived and will continue long into the future.⁷
2. UPRR has a demonstrated record of working voluntarily with stakeholders to improve access across its tracks. In 2014, UPRR forged a consensus with the City of South St. Paul, Minnesota, on committing to trail access through an MOU at Kaposia Landing Park on a double track project next to the Mississippi River.⁸ Closer to home, we worked with the CTUIR to provide access so their members can exercise treaty rights in Meacham Canyon.⁹ Indeed, UPRR is presently engaged in ongoing discussions with CTUIR about tribal treaty access within the Gorge.
3. The tribes are not the only stakeholders seeking access to the river. The City of Mosier sought access improvements at Rock Creek. UPRR accommodated this request in the form of a 2015 Memorandum of Understanding with the City of Mosier that outlines voluntary UPRR commitments to the City that will enhance safety and access upon completion of UPRR's proposed rail siding extension project.¹⁰ Additionally, we have offered to work with the Oregon Parks & Recreation Department on improved access.

Given the diverse interests of these stakeholders, we offered to pay for a process by which the County would convene them (City, OPRD, and tribes) to identify access improvements in the Gorge.¹¹ The Planning Commission demurred on the idea, but we still believe it could work. A voluntary process would allow us to search for a solution that brings these agencies together.

4. Conditions 21 and 47 also fail to recognize policies governing railroad grade crossings. UPRR does not exclude the public from railroad property because

it's unsociable. It does so for the public's safety. *See* ORS 824.202 ("It is the policy of this state to achieve uniform and coordinated regulation of railroad-highway crossings and to eliminate crossings at grade wherever possible. To these ends, authority to control and regulate the construction, alteration, and protection of railroad-highway crossings is vested exclusively in the state, and in the Department of Transportation as provided in ORS 824.200 to 824.256.") Any grade crossing (new construction or improvement of existing) will be subject to stringent regulations of the Federal Railroad Administration and ODOT.

In short, we believe using this particular project to mandate that UPRR reach agreement with the tribes regarding access improvements will accomplish nothing. Indeed, it seems more likely to leave all parties frustrated with each other (as well as the County). A better approach is for the Board to allow us to continue working voluntarily with the tribes (and other interested agencies) to reach a long-term solution.

The Law Precludes Conditions 21 and 47

Beyond these policies, several legal considerations demonstrate that the County may not enforce the mandates set forth in Conditions 21 and 47. Repeatedly, we observe that the conditions rest on misconstruction of the law. We further observe in several instances that, even under the project opponents' vision of the law, the record does not support these conditions.

At the top of this legal heap stands the Commerce Clause of the U.S. Constitution.¹² A bedrock of federalism is that state and local governments not be able to impede transcontinental trade.¹³

The Commerce Clause is so important to railroad operations that Congress implemented it with the Interstate Commerce Commission Termination Act ("the ICCTA").¹⁴ UPRR noted in its application that the ICCTA preempts local government permitting processes, including Scenic Area Review.¹⁵

Further to this issue, local government implementation of federal laws such as the Clean Water Act and Clean Air Act are generally exempt from ICCTA preemption. However, the Scenic Act is not a federal environmental law and the SAR process does not cloak the County with federal authority or turn it into federal agency. *See* September 21 memo of Alice Loughran, at 4 ("Congress made clear that the [Gorge] Commission is a 'regional entity' and 'shall not be considered an agency or

instrumentality of the United States for purposes of any Federal law[.]’ 16 U.S.C. § 544c(l)(A).”)

Finally on this issue, let us assume, for the purposes of argument, that the Scenic Act is a federal environmental law. The mandates of Conditions 21 and 47 would still fail. *See Grafton & Upton R.R. Co.—Petition for Declaratory Order*, FD 35779, 2014 STB LEXIS 12 at *15 (Served Jan. 27, 2014) (local government enforcement of federal environmental laws is preempted if the “laws are being used to regulate rail operations”). By mandating crossings along a main line transcontinental railroad track, Conditions 21 and 47 will impact UPRR’s rail operations.

Beyond these overarching considerations of federal law, Conditions 21 and 47 are not even supported by state and local law.¹⁶ These conditions were imposed with reference to NSALUDO 14.800(D)(2), under which “uses that would affect or modify treaty or other rights of any Indian tribe . . . shall be prohibited.” By imposing Conditions 21 and 47, the Planning Commission misconstrued the nature and extent of those treaty rights.

The tribes asserted that treaties dating to 1855 confer on their members a right to access “usual and accustomed” fishing locations along the Columbia River. We do not dispute that those treaties confer those rights. Nor do we assert that those rights are limited to access to specific river locations at specific times.

As described by Planning staff, however, “[t]reaty rights impacts are pretty black and white” and “[t]he tribes feel very strongly that that is part of their treaty rights is to be able to cross wherever they are”¹⁷ This suggests that the right of access is absolute, *i.e.*, authorizes crossing the railroad at all locations at all times. With this we cannot agree.

We note here that the treaties of 1855 acknowledged the fact that a railroad would be built along the Oregon side of the Gorge.¹⁸ Nothing in those treaties suggested an intent to limit the railroad to a single track. Furthermore, several other double tracks have been built in the Gorge. To our knowledge, none mitigated for any perceived impact to tribal access.

We further note that the treaties did not foresee the interstate freeway. Accordingly, ODOT has no inherent standing to affect tribal treaty rights. We do not believe that the tribes suggest that they have an unfettered right to cross the freeway at all locations and all times. In fact, many stretches of I-84 are closer to the river than is the railroad track, and effectively block access to the river.

More importantly, the tribes provided no evidence that the project would cause such an interference. Neither tribe suggested that the railroad is unlawful in its current location or that the track to be added would physically bar tribal members from accessing “usual and accustomed” fishing locations. Rather, they asserted that the project would interfere with access to such locations throughout the Gorge, and would do so by increasing train traffic.¹⁹

The Planning Commission took on directly the question of whether the project would increase train traffic and, if so, whether UPRR could be required to mitigate the impact of such an increase. Its answer was a clear “no.” On this point, the Planning Commission deleted staff-proposed conditions that the project “not directly result in significantly increase net volume of rail traffic, including number of individual trains, length of trains, and speed of trains” and “UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.”²⁰

The railroad was first built here in the 1880’s.²¹ Rail traffic has clearly increased since then.²² We have been provided no evidence that this increase in train traffic modified or affected tribal members’ ability to fish.

Even assuming for purposes of argument that an increase in train traffic would affect or modify tribal treaty rights for purposes of NSALUDO 14.800(D), the project, in and of itself, would not cause such an increase.²³ The effect of the project, rather, would be to increase the fluidity of train traffic (*i.e.*, decrease the amount of starting and stopping).²⁴ Indeed, to the extent anyone has a legal right to cross its tracks to reach the river, such stopping and starting tends to create a greater interference.²⁵ The only contrary evidence on this point was repeated supposition.²⁶

In sum, then, there is simply no evidence that the project would affect or modify treaty rights. Without such evidence, NSALUDO 14.800(D) provides no basis on which to impose Conditions 21 and 47.

The County’s authority to condition approval of the subject application is further limited. As UPRR noted in its September 21 memo, the record before the Planning Commission included no evidence of “any project impact that necessitates or even supports a condition requiring UPRR to provide this Access.” Such evidence is required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 US 374 (1994). The record still lacks it.

Based on the foregoing, conditioning the permit on access is not an appropriate exercise of the County's authority. Rather, UPRR and the agencies interested in river access can better address that issue outside the permit process, as UPRR has already committed to do. We ask the Board to delete Condition 21 and 47, noting that access is something the parties may pursue outside the permit process.

Endnotes

¹ To the existing Mosier Siding the project would add 4.02 miles of track, of which 3.58 miles is under NSA zoning. The remainder of the project is in the City of Mosier.

² Namely, the Confederated Tribes of the Umatilla Indian Reservation and the Yakama Nation.

³ These mandates are set forth as Conditions 21 and 47 of the Planning Commission decision and read, respectively:

UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act.

⁴ Under NSALUDO 1.200 party status is conferred upon the applicant and owner of record ("Party - With respect to administrative actions, the following persons or entities only, who file a timely statement or request for hearing as provided by general provisions of this Ordinance, are hereby defined as a party: a. The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor's Office, of the property which is the subject of the application."); *See* also Planning Commission Packet, Volume 1, PC 2 1-1 (County Summary naming "Union Pacific Railroad" as "Applicant").

⁵ Minutes of the September 9, 2016 Hearing Attachment B Page 173 line 3. Mr. Lujan also testified as follows:

We are working with Team Mosier, which has a Chairman, Mr. Terri Moore. We are having conversations with them. We are going to see how we can move forward together. It doesn't stop after the initial response. We are going to keep working with them in collaboration to build a dialogue and find solutions that are amicable and reasonable for all parties involved

⁶ The river length of the NSA being about 85 miles, the project seeks to increase UPRR's track mileage through the Gorge by less than 5%.

⁷ Note here that Planning staff stated as follows at the September 6th Hearing, "It's important to note that the railroad has been in existence before our rules were even written. The plan (NSALUDO) anticipates railroad development; at the very least, railroad maintenance and minor expansion where necessary." Furthermore, *See* September 13 memorandum of Grant Janke, Wasco County Planning Commission Agenda Packet, Volume 1, PC 2 1-21 ("The 187 mile Portland Subdivision, where the Mosier double track project is located, includes only 24 miles (13%) of existing double track segments spaced throughout the corridor"). "

⁸ UPRR will also submit at hearing a Memorandum of Understanding it reached with the City of South St. Paul to address impact mitigation for a project there.

⁹ *See* UPRR and CTUIR MOU Press Release dated August 28, 2013 Wasco County Planning Commission Agenda Packet, Volume 1, PC 2 1-69.

¹⁰ *See* MOU Mosier UPRR Letter of Offer, dated March 25, 2015, Wasco County Planning Commission Agenda Packet, Volume 1, PC 2 1-71 ("Within 120 days of starting train operations on our newly constructed track, UP will donate approximately 2.5 acres of our [Union Pacific] land to the City for their future use. . . UP will work with the City on its plans for a future pedestrian crossing. . . UP will support the City in its ongoing efforts to convert the existing crossing under out tracks at Rock Creek from a private to public crossing.").

¹¹ *See* Ty Wyman Memo to Planning Commission dated September 21, 2016 ("Notwithstanding the fact that it is under no obligation to do so, UPRR again offers to help the County. . . UPRR will provide funding not exceeding \$2,000,000 to support planning, permitting, and building up to two railroad crossings to facilitate access to the Columbia River."); *See* also Planning Commission September 26, 2016 Hearing ("Their [Union Pacific] suggestion is that the access concerns be addressed perhaps more comprehensively through a sort of unified approach, and they [Union Pacific] suggest a fund of \$2 million to support the planning, permitting and building of those access areas.").

¹² Article 1, Section 8, Clause 3: "The Congress shall have Power To. . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

¹³ *See C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 389 (1994) ("We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.").

¹⁴ 49 U.S.C. § 10501, et.seq.

¹⁵ Application p. 2, dated Jan. 9, 2015: UPRR is a "Class I" railroad under federal regulations. UPRR's system consists of roughly 31,800 route miles, principally in the western and midwestern United States. Like other Class I railroads, UPRR is not

averse to working cooperatively with local authorities to resolve critical local concerns. In fact, voluntary notification of potential projects is normal practice, and discussions between railroads and local authorities resolve most local conflicts.

UPRR therefore has engaged in the Wasco County permitting process voluntarily. Ordinarily, an interstate railroad is not required to obtain state or local construction permits to build any facility that is integrally related to the railroad's transportation operations. Under the ICC Termination Act of 1995 (ICCTA), the federal Surface Transportation Board (STB) is vested with exclusive jurisdiction over interstate rail transportation (49 U.S.C. § 10501[b]). The ICCTA categorically preempts – regardless of context or rationale for the action – any form of state or local permitting that (1) could be used to deny the railroad the ability to conduct some part of its operations or (2) purports to regulate matters already regulated by the STB such as the construction of rail lines (*Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 [Mo. App. 2012]).

ICCTA preemption has been applied to a wide variety of local permitting and land use requirements for the construction of facilities related to rail transportation. In particular, *see Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 (Mo. App. 2012), specifically the holding that the ICCTA preempts the village's ordinance – promulgated pursuant to federal law – requiring the railroad to conduct a hydrological and hydraulic study, provide the results to the village, and obtain a permit from the village before starting construction on interstate rail facilities. Also *see City of Auburn v. United States*, 154 F.3d 1025, 1028-30 (9th Cir. 1998), specifically the ruling that ICCTA preempts state and local laws providing for environmental review as they relate to the construction and operation of side tracks and rail facilities.

¹⁶ The direct legal basis for all 44 conditions attached to the Decision appears to be NSALUDO 5.030, under which conditions must be “necessary to ensure the compatibility of a conditional use to surrounding permitted uses as are necessary to fulfill the general and specific purposes of this Ordinance.” *See Davis v. City of Bandon*, 28 Or LUBA 38 (1994) (clarifying that conditions of land use approval must support some legitimate planning purpose and must be authorized by the local government's comprehensive plan or land use regulations).

¹⁷ PLASAR 15-01-004, September 26, 2016 Wasco County Application Hearing Transcript, Pg. 107, Lines 18-22.

¹⁸ *See* Article 10, Treaty between the Cayuse, Umatilla and Walla Walla Tribes, in Confederation, and the United States, June 9, 1855.

¹⁹ *See* CTUIR Letter to Planning Commission dated September 2, 2016 (“The double-tracking at Mosier will result in increased train traffic and potentially increase train speeds.”); *See also*, Ty Wyman Memo to Planning Commission dated September 13, 2016 quoting UPRR's application (“UPRR further stated that it ‘anticipated moving a similar number of trains after the project is completed.’”); *See also*, September 13 Memo of Grant Janke, Planning Commission

Packet, Volume 1, PC 2 1-21 (“It is also important to recognize that the presence of a short stretch of double-track along a single-track route does not change the designation of the entire route to double-track and does not increase the capacity of the route.”).

²⁰ The September 29 Revised Staff Report does not fully and correctly capture the context and intent of the Planning Commission’s decision on this issue. Specifically, it asserts (p. 120) that the Planning Commission removed the condition because of “difficulty in monitoring and enforcing rail traffic.” In fact, the Planning Commission clearly stated during deliberation that they disagreed with staff’s determination that there was an impact. *See* Minutes of the September 9, 2016 Hearing Attachment B Page 83 Line 10 (Chair Hargrave speaking in reference to Condition 15: “[I]f we don't think that the capacity should be increased, and that's really what this condition says. It says, I don't think the capacity should be increased. That would be -- to me, denying it would be the straightforward way to do that rather than this, you know, sort of backdoor way of limiting capacity.”)

²¹ Minutes of the September 9, 2016 Hearing Attachment B Page 46 Line 3 and *See* Planning Commission Packet, Volume 1, PC 1 1-110 (“Finding: The existing UPRR Portland Subdivision was constructed in 1882, and is present in Wasco County Assessor records. . .”).

²² Minutes of the September 9, 2016 Hearing Attachment B Page 174 Line 14 and *See* National Scenic Area Application, Planning Commission Packet, Volume 1, PC 1 1-31 (“UPRR typically moves 20 to 30 trains a day through the project area, and anticipates a similar number of daily trains with implementation of the proposed project.”); *See* also, September 13 Memo of Grant Janke, Planning Commission Packet, Volume 1, PC 2 1-21 (“The calculated fluid capacity of the entire subdivision today is 25-32 trains per day, with two equally restrictive bottleneck locations. . .”).

²³ Minutes of the September 9, 2016 Hearing Attachment B Page 174 Line 3 and *see* September 13 Memo of Grant Janke, Planning Commission Packet, Volume 1, PC 2, 1-21 (“It is also important to recognize that the presence of a short stretch of double-track along a single-track route does not change the designation of the entire route to double-track and does not increase the capacity of the route. . . .It is important to note that the additional capacity will not inherently increase the frequency of trains through the Columbia River Gorge. Only the general economic conditions will dictate future train frequency and how much of the estimated total capacity is ultimately used.”).

²⁴ *Id.* at PC 2 1-22 (“Incorporating the existing Mosier Siding into a stretch of double-track extending both east and west will shorten the gaps between meet points which will reduce congestion. Simulation of train operations on the route indicates that it is necessary to address the gaps on both sides of Mosier in order to achieve the desired improvement in operational efficiency at current traffic volumes.”); *see* also Minutes of the September 9, 2016 Hearing Attachment B Page 175 Line 9

²⁵ Minutes of the September 9, 2016 Hearing Attachment B Page 179 Line 18 and *see* Planning Commission September 6, 2016 Hearing (Angie Brewer for the County stated “. . . There could be an issue of safety in crossing the track. If the track - - if the trains don't have to stop to pass each

other, then hypothetically the result would be you wouldn't want to cross because the trains are not running. So – it is not a designated safe crossing.”)

²⁶ See Planning Commission Packet, Volume 3, PC 2 1-47 (“The extra train traffic would adversely affect scenic, natural, cultural and recreation resources and endanger local communities.”); See also Planning Commission September 6, 2016 Hearing (“They [experts, Terry Whiteside and Gerald Fauth] determined that because of this particular location of the proposed project that this would increase the operation or practical capacity up to 75 to 100 trains per day.”); See UPRR rebuttal, Ty Wyman Memo to Planning Commission dated September 13, 2016 quoting UPRR’s application (““With over 80% single-track [between Portland and Hinkle] and at least 20 single-track gaps between meet points still remaining after completion of the project,’ the line cannot handle 75-100 trains per day.”); See also, September 13 Memo of Grant Janke, Planning Commission Packet, Volume 1, PC 2 1-21 (“It is also important to recognize that the presence of a short stretch of double-track along a single-track route does not change the designation of the entire route to double-track and does not increase the capacity of the route.”).

Attachment H – Staff Response to Appeal PLAAPL-16-10-0002

Appeal Number: PLAAPL-16-10-0002

Appellant: Union Pacific Railroad

Grounds for appeal provided by the applicant are listed below in **bold font**; Staff's response follows each ground in regular font.

Public Interest in River Access is Best Accomplished by a Voluntary Process.

Conditions 21 and 47 require UPRR to address tribal access demands that extend well beyond this project. They mandate a Gorge-wide study that includes consideration of impacts well beyond construction of four miles of track. They also put an arbitrary deadline on UPRR to bring other parties to the negotiating table. Several policy considerations support our request that the Board decouple the tribal river access solution from the construction of four miles of track.

Condition 21 of the Planning Commission's Final Decision states:

"UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings."

Condition 47 of the Planning Commission's Final Decision states:

"Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act."

Please see Appendix F for the full text of the appeal, including points made to support this ground for appeal. The appeal is supported by four points summarized here by Staff: (1) that this project did not create the existing and ongoing river access issue throughout the Gorge, (2) that UPRR has demonstrated an ability to work voluntarily with stakeholders to improve access along railroad tracks, (3) the tribes are not the only stakeholders seeking access to the Columbia River (other stakeholders include the City of Mosier and Oregon State Parks and Recreation), and (4) Conditions 21 and 47 fail to recognize federal and state policies governing railroad grade crossings including public safety requirements of Oregon Department of Transportation.

Staff agrees that this project did not create the current access constraints to the Columbia River at most locations. Staff is aware that there is an existing river access issue as well as a noise issue, identified in the Oregon State Parks Gorge Unit Plan. Staff also notes that although the proposed project cannot drive market forces to immediately bring more rail traffic, the removal of the “pinch point” ultimately provides the railroad the ability to expand traffic when the market can support it.

It is important to note that when evaluating impacts of a proposed development, it is required by the Management Plan for the Columbia River Gorge National Scenic Area and the Wasco County National Scenic Area Land Use and Development Ordinance, that Staff evaluate the direct and indirect impacts of the proposed development as well as the individual and cumulative effects of the development. This includes projecting likely outcomes of the proposed development and identifying significant changes from the current use. If potential changes of concern are anticipated, conditions of approval are typically applied to ensure the approval does not inadvertently allow unintended consequences to public health and safety or protected resources.

UPRR may have demonstrated past successes in voluntary compliance, but the Management Plan and NSALUDO require demonstrated or required compliance prior to concluding that there will be no adverse effects to sensitive and protected resources. If the applicant had sought to do this activity voluntarily, it should have been done prior to application to the County so that stakeholders could accurately and comfortably state that they had no resource impact concerns or that a solution was already underway. Voluntary compliance does not make it any easier to make progress, and does not afford any guarantee that the stakeholder’s concerns will be addressed adequately, and in a timely manner.

Staff agrees the tribes are only one of several interested stakeholders seeking improved access to the Columbia River. Access improvements are also being sought by the Community of Mosier and the Oregon State Parks and Recreation Department. The tribes however, are not interested in pursuing or securing recreation access, they are solely interested in preserving their access as allowed by Treaty Rights. As well, recreationists are seeking a different form of access, and a different kind of activity on the river. The Columbia River Gorge is riddled with conflict between recreation uses and tribal fishing uses. These two uses typically do not co-exist well, which is why the conditions of approval explicitly separate the needs identified by stakeholders during the review process. Furthermore, any recreation access changes will need to be confirmed for Treaty Rights impacts prior to establishment or approval. It is clear to staff that the access issues identified by the tribes and Oregon State Parks need to be addressed separately.

The appellant states: “Any grade crossing... will be subject to stringent regulations of the Federal Railroad Administration and ODOT.” Stringent regulation does not mean prohibited.

Staff Conclusion: The conditions of approval requiring the applicant to work with the tribes and Oregon State Parks to identify and implement improvements for river access is doable, has a direct nexus to resource impacts identified in the Scenic Area Review process and is not arbitrary.

The Law Precludes Conditions 21 and 47

Beyond these policies, several legal considerations demonstrate that the County may not enforce mandates set forth in Conditions 21 and 47. Repeatedly, we observe that the conditions rest on

misconstruction of the law. We further observe in several instances that, even under the project opponents' vision of the law, the record does not support these conditions.

At the top of this legal heap stands the Commerce Clause of the U.S. Constitution. A bedrock of federalism is that state and local governments not be able to impede transcontinental trade..."

Please see Appendix F for the full text of the appeal, including points made to support this ground for appeal. The following response has been provided by County Counsel, Kristen Campbell:

"While the scope of the Interstate Commerce Commission Termination Act's preemption is broad, there are exceptions to its preemptive effect. Specifically, the Surface Transportation Board has expressly held that this preemption is not intended to interfere with local implementation of federal environmental statutes such as the National Scenic Area Act ("NSA"). *Boston and Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971, 2001 WL 458685, at *5 (S.T.B., Apr.30, 2001). By consenting to that NSA, Congress transformed that Act into federal law and precedent clearly establishes instances where similarly situated regional agencies' land use plans have been recognized as federal law.

Next, 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. None of the proposed conditions suggest that the County is enforcing the NSA management plan in a discriminatory manner or as a pretext to frustrate Applicant's operations or that they would "unduly restrict" railroad operations particularly when it is unlikely that cost alone is an unreasonable burden. Furthermore, the 3rd Circuit has concluded that a local government may enforce generally applicable regulations relating to health and safety as long as they do not discriminate against or unreasonably burden rail carriage. *New York Susquehanna v Jackson*, 500 F3d 238 (3d Cir 2007).

Finally, a compact that is federal law is treated as any other federal statute in a conflict-of-laws analysis. If federal schemes conflict, it can be argued that the Act which: 1) authorized the compact that created the Columbia River Gorge Commission; 2) required the Columbia River Gorge Commission to adopt a regional management plan; and 3) required Wasco County to adopt land use ordinances consistent with the management plan, should be given effect because it is a congressional enactment passed later in time and is more specific, limited to a narrow geographical region. *See generally, Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F Supp 2d 1062, 1073 (E D Cal 1998)."

Staff Conclusion: The NSALUDO implements federal law (the Columbia River Gorge National Scenic Area Act) to ensure that all new uses and development do not adversely affect explicitly protected scenic, cultural, natural, recreation resource and treaty rights. In the project area, the railroad is subject to this law, as it is implemented through the local Scenic Area Ordinance of Wasco County.

...In sum, then, there is simply no evidence that the project would affect or modify treaty rights. Without such evidence, NSALUDO 14.800(D) provides no basis on which to compose Conditions 21 and 47.

The County's authority to condition approval of the subject application is further limited. As UPRR noted in its September 21 memo, the record before the Planning Commission included no evidence of

“any project impact that necessitates or even supports a condition requiring to provide this Access.” Such evidence is required by Nollan v. California Coastal Commission...and Dolan v. City of Tigard...The record still lacks it.

Three letters were received before the Planning Commission expressing Treaty Rights impacts: two from the Umatilla and one from the Yakama Nation. A second letter was received from the Yakama Nation September 26, 2016 – after the Planning Commission record was closed. All four letters may be considered by the Board for their review; they are attached in Appendix J.

The letters provide specific concerns that include, but are not limited to, Treaty Rights access and safety of access that would result from an increase in rail traffic afforded by the physical development proposed to eliminate an existing bottleneck where traffic must currently slow down. At the Planning Commission hearing, UPRR staff stated that rail traffic is driven by market demands. When asked, UPRR staff confirmed that the proposed development would allow for increased velocity, more efficient movement and a possible expansion of freight carried through the project area. Staff proposed conditions of approval to address these concerns by limiting rail traffic to the current average of 20 to 30 trains per day and to require the proposed development to not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains. The Planning Commission voted to remove these conditions due to the difficulty in enforcing them with current staff capacity and tools.

NSALUDO Section 14.800(D) explains how the treaty rights protection process may conclude, it states:

- “1. The County will decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe.
 - a. The final decision shall integrate findings of fact that address any substantive comments, recommendations, or concerns expressed by Indian tribal governments.
 - b. If the final decision contradicts the comments, recommendations or concerns of Indian tribal governments, the County must justify how it reached an opposing conclusion.
2. The treaty rights protection process may conclude if the County 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 County 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.”

Findings 80 and 81 on page 119 and 120 of the Planning Commission’s Final Decision Report describe the Treaty Rights impacts and concerns expressed by the Umatilla, prior to the first Planning Commission hearing. Both letters received from the Yakama have been provided after viewing the Staff Report findings and recommended conditions of approval. The Planning Commission’s removal of

conditions to address rail traffic, in response to Treaty Rights concerns, has resulted in an appeal from the Yakama Nation.

Staff Conclusion: The potential increase in market driven rail traffic afforded by the physical improvements to an existing bottleneck is difficult to predict. However, it is clear from application materials and testimony provided by UPRR staff at the Planning Commission hearings that the project will allow for a potential increase in traffic, if the market demanded it. The potential increase is a known factor and has direct nexus to potential impacts associated with the physical development proposed by UPRR. This confirms the nexus of the physical development to the Treaty Rights impacts and concerns expressed by the Umatilla and Yakama. As stated in (2) above, “uses that would affect or modify such rights shall be prohibited”.

WASCO COUNTY PLANNING
AND DEVELOPMENT
2705 EAST SECOND ST.
THE DALLES, OR 97058

12:56 PM (DN)



Wasco County Planning Department
"Service, Sustainability & Solutions"
2705 East Second St. • The Dalles, OR 97058
(541) 506-2560 • wcplanning@co.wasco.or.us
www.co.wasco.or.us/planning

FILE NUMBER: _____

APPEAL OF LAND USE DECISION

ORIGINAL PLANNING DEPARTMENT FILE NUMBER: PLASAR-15-01-0004

Date Received: _____ Planner Initials: _____ Date Complete: _____ Planner Initials: _____

APPELLANT INFORMATION

Name: Confederated Tribes and Bands of the Yakama Nation

Mailing Address: P.O. Box 15146

City/State/Zip: Seattle, WA 98115

Phone: (206) 321-2672

Email: anthony@galandabroadman.com

APPEAL INFORMATION

joe@galandabroadman.com

1. Appeal Type

- ☐ Administrative Decision to the Planning Commission: Fee = \$250
☒ Planning Commission Decision to the Board of County Commissioners: Fee = \$ 250.00

If appellant prevails at Planning Commission or a subsequent appeal, the \$250 fee for the initial appeal shall be refunded per ORS 215.416(11)(b). This is not applicable for any subsequent appeal costs.

2. Appeal Deadline: October 14, 2016

Date Submitted: October 14, 2016

All appeal documents filed with Wasco County must be delivered to the Wasco County Planning Department Office by postal service or in person. Documents faxed are not considered filed. An appeal will not be considered timely unless received no later than 4:00 p.m. on the deadline stated on the Notice of Decision or Resolution. AN APPEAL IS NOT CONSIDERED COMPLETE UNTIL BOTH THE SIGNED NOTICE OF APPEAL AND FILING FEE ARE RECEIVED.

3. Party Status: State how the petitioner(s) qualifies as a party to this matter:

The Yakama Nation is a federally recognized sovereign nation, signatory to the Treaty of 1855 (June 9, 1855, 12 Stat. 951). The decision impacts the Yakama Nation's Treaty rights. As such, it qualifies as an affected unit of local government.

Party includes the following:

- The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor's Office, of the property which is the subject of the application.
- All property owners of record, as provided in (a) above, within the notification area, as described in section 2.080 A.2., of the property which is the subject of the application.
- A Citizen Advisory Group pursuant to the Citizen Involvement Program approved pursuant to O.R.S. 197.160.
- Any affected unit of local government or public district or state or federal agency.
- Any other person, or his representative, who is specifically, personally or adversely affected in the subject matter, as determined by the Approving Authority. (Revised 1/92)

4. Grounds for appeal: List the **specific** grounds relied upon in the petition request for review (e.g. ordinance criteria not met, procedural error, etc.) Additional pages may be attached.

The decision violates the Yakama Nation's Treaty protected rights.

The decision violates the National Scenic Area Land Use Development Ordinance.

5. De Novo vs. On the record: All appeals to Planning Commission are DeNovo meaning new information can be entered into the record. All appeals to the Board of Commissioners are on the record unless a request is made as part of this request by party filing the petition. Any other party must make such a request no more than seven (7) calendar days after the deadline for filing a petition for review has expired.

The appeal is to the Board of Commissioners?

☐ NO ☒ YES

I request the hearing to be DeNovo or partial DeNovo?

☐ NO ☒ YES

State the reasons you are requesting a DeNovo or partial DeNovo without addressing the merits of the land use action:

The Yakama Nation has additional evidence demonstrating the impact of the project on its Treaty rights. The Planning Commission removed the Staff's recommended Treaty Rights Conditions, disregarding the impact on the Yakama Nation that was highlighted by the Nation in a comment letter and over staff's objections at the hearing.

Indicate any persons known to be opposed to a request for a DeNovo hearing.

When practicable, the requesting party shall advise the other parties and attempt to gain their consent.

I have attempted to gain the consent of the other parties associated with this file?

☒ NO ☐ YES

If you answered no indicate why this is not practicable. If you answered yes list the parties who have consented for this to be a DeNovo or partial DeNovo hearing.

The Tribal Leadership for the Yakama Nation met to determine whether it would appeal the Planning Commission's decision on October 12, 2016. Because of the short timeline to file an appeal, it was not practicable to delay filing the appeal in order to contact the other parties.

The request for a DeNovo hearing for appeal of a quasi-judicial plan amendment shall be decided by the Board of Commissioners as a nonpublic hearing item, except that the Board may make such provision for notice to the parties

and may take such testimony as it deems necessary to fully and fairly address significant procedural or substantive issues raised. The Court shall grant the request only upon findings that:

- A de novo hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action;
- The substantial rights of the parties will not be significantly prejudiced; and
- The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

5. Outstanding Appeal Fees: Any person wishing to appeal any decision shall be required to pay all outstanding appeal fees prior to their appeal application being considered complete.

List prior appeals filed:

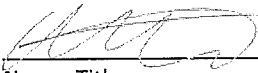

None

_____	_____
_____	_____
_____	_____

I have paid all outstanding fees associated with prior appeals:

☐ NO ☒ YES

SIGNATURES

	Anthony Broadman, Counsel for Yakama Nation	10/13/16
Name, Title		Date
	R. Joseph Sexton, Counsel for Yakama Nation	10/13/16
Name, Title	Pro Hac Vice Admission Pending	Date

Additional petitioner(s):

_____	_____
Name	Address
_____	_____
Name	Address
_____	_____
Name	Address
_____	_____
Name	Address

Attachment J – Staff Response to Appeal PLAAPL-16-10-0003

Appeal Number: PLAAPL-16-10-0003

Appellant: Confederated Tribes and Bands of the Yakama Nation

Grounds for appeal provided by the applicant are listed below in **bold font**; Staff's response follows each ground in regular font. Staff added numbers to simplify references during discussion.

1. The decision violates the Yakama Nation's Treaty protected rights.

Several conditions of approval were included in Staff's recommendation to the Planning Commission to ensure the protection of Treaty Rights and compliance with the NSALUDO. Staff's recommendations were based on written comments received prior to August 30, 2016 by the Confederated Tribes of the Umatilla Indian Reservation. The concerns focused on ecosystem health in the event of a disaster, elimination of fishing access, and damage to cultural resources. Impacts to the natural environment are discussed throughout this report. The conditions of approval responding to Treaty Rights concerns not already addressed by other conditions of approval included:

- "The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: one east of the project area, and one west of the project area within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes Umatilla Fish and Wildlife Commission. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the CTUIR the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings."

On September 26, 2016, the Planning Commission voted to remove the first condition due to the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs. They also voted to modify the second condition to ensure that all four treaty tribes were included in the process, not just the Umatilla. The modified conditions now appear as follows:

- ~~The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.~~
- UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: ~~one east of the project area, and one west of the project area~~ within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes ~~Umatilla Fish and Wildlife Commission~~. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline

may be requested by the ~~CTUR~~ the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

The Yakama Nation provided written comment on September 13, 2016 and September 26, 2016. Neither of these comment letters were received in time to be included in the written Staff recommendation, which was published August 30, 2016. The September 13, 2016 letter was received during the open record, and was verbally discussed at the Planning Commission hearings. The September 26, 2016 letter was received after the Planning Commission's record had closed, and as new evidence, could not be considered for their decision. This letter was received prior to the Board's hearing however, and should be considered for the Board's Final Decision.

The September 13, 2016 letter (attached) states: "...The Yakama Nation stands opposed to the proposed rail expansion. As discussed in detail below, the Yakama Nation has significant interests that will be severely impacted and/or harmed by the proposed rail expansion..."

The September 26, 2016 letter (attached) states: "...to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by rail expansion – they do not."

These letters, as well as the letters received by the Confederated Tribes and Bands of the Umatilla Reservation, are attached for the Board's consideration.

Staff worked with the Umatilla Government Affairs staff and other partner agencies on the development of the recommended conditions of approval to ensure compliance with Treaty Rights and Chapter 14 – Scenic Area Review. The Planning Commission removed and modified several conditions, including those listed above, because of the difficulty in monitoring and enforcing rail traffic for compliance with existing staff and programs.

Staff Conclusion: NSALUDO Section 14.800(D)(2) states: "The treaty rights protection process may conclude if the County 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."

Treaty rights concerns have been expressed by two of the four NSA Treaty tribes. Comments are specific to increased rail traffic and therefore increased risk to resources and access to those resources protected by Treaty Rights. Adding back the conditions of approval previously eliminated by the Planning Commission will ensure that existing rail traffic does not result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

The Yakama have voiced concerns similar to those of the Planning Commission regarding Staff's ability to enforce these conditions. If the Board share's these concerns, the options are (1) to include additional conditions of approval requiring regular reporting from Union Pacific Railroad and specifying that a violation would result in a failure to comply with a conditional use, thus requiring removal of the development, or (2) denial of the proposed development. In order to approve the proposed development in manner consistent with the NSALDUO, the Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied.

2. The decision violates the National Scenic Area Land Use and Development Ordinance.

The Planning Commission's Final Decision and Report assess the proposed development's ability to comply with the Wasco County National Scenic Area Land Use and Development Ordinance (NSALUDO). With the exception of the Treaty Rights findings, conclusions and conditions of approval, the proposed development, as conditioned, has been found to comply with the requirements and protections included in the NSALUDO. As noted above, in order to approve the proposed development in manner consistent with the NSALUDO, the Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied.



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

November 2, 2016

VIA ELECTRONIC MAIL AND U.S. MAIL

Angie Brewer
Wasco County Planning and Development Office
2705 East Second Street
The Dalles, OR 97058
angieb@co.wasco.or.us

Re: Comments on Wasco County Planning Commission's Decision to Approve Union Pacific Railroad's Application for Rail Extension (PLASAR-15-01-0004)

Dear Ms. Brewer:

On behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), I submit to the Wasco County Board of Commissioners ("Board") the following comments regarding the Wasco County Planning Commission's ("Planning Commission") decision to approve Union Pacific Railroad's ("Union Pacific") Application for Rail Extension, Application Number PLASAR-15-01-0004, for inclusion in the record and as Yakama Nation's position on the appeal of the above-referenced matter.

I. The Proposed Rail Expansion Interferes with Yakama Nation's Treaty Rights.

The Yakama Nation previously submitted correspondence to the Wasco County Planning and Development Office detailing the adverse impacts of the proposed rail expansion on the Yakama Nation, including the impacts on our Treaty rights. The Yakama Nation submitted letters on September 13, 2016, and September 26, 2016; both are attached. Below, is an excerpt of the comment letters, demonstrating the impact on Yakama Nation's Treaty rights.

The Yakama Nation is a federally recognized sovereign nation, a signatory to a Treaty with the United States. In the Treaty, the Yakama Nation explicitly reserved the right of its People to hunt, fish and gather, at their usual and accustomed places. Treaty, Art. 3. The Treaty provides:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for

curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The Yakama Nation's Treaty rights are not granted to the Yakama Nation, but rather are "grants of rights from them—a reservation of those not granted."¹ Treaties are the highest law of the land and create a special fiduciary duty and trust responsibility upon all agencies of the United States to protect Treaty rights, including fishing rights.² These Treaty rights cannot be abrogated except by explicit Congressional authorization. Courts have consistently required federal agencies and states to keep the Treaty promises upon which tribes relied when they ceded huge tracts of land.³

Further, Treaty rights include a property right in adjacent lands "to the extent and for the purpose mentioned" in the treaties.⁴ As part of these Treaty rights, courts have confirmed that the tribes of Washington have a right to half of the harvestable fish in state waters.⁵

Accordingly, the Yakama Nation, as a sovereign nation, has a profound interest in the preservation of its Treaty rights. The *United States v. Oregon* and Boldt Decision also established the Yakama Nation as a co-manager of the fisheries resource with the State of Washington.⁶ The Yakama Nation actively regulates its fisheries; the Yakama Nation staffs the Yakama Nation Fisheries ("Fisheries"). The Fisheries focus on the protection of Treaty rights; the restoration of aquatic populations and their habitats; and ensuring the fish are honored, in a manner reflecting their paramount importance to the Yakama Nation's People, diet and health. The Fisheries accomplish these goals using two primary methods: population and habitat management goals and actions and natural resource policies and regulatory mechanisms.

The Yakama Nation resides on central Washington's plateau and along the Columbia River. While the Yakama Nation was officially recognized by the United States in 1855 by the Treaty, the People that comprise the Yakama Nation have lived in this area since the time immemorial. Historically, villages were located on or near waterways, in places

¹ *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905).

² *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

³ See, e.g., *U.S. v. Winans*, 198 U.S. 371 (1905); *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *U.S. v. Oregon*, 718 F.2d 299 (9th Cir.1983); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515 (W.D. Wash. 1996); *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007). See also *Confederated Tribes & Bands of Yakama Nation v. U.S. Dep't of Agric.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (entering an injunction barring the shipment of garbage, as a landfill was located in an area where the Yakama Nation's members exercised their Treaty rights).

⁴ *Winans*, 198 U.S. at 381 (finding the Yakama Nation retained the right to make use of the land surrounding the usual and accustomed sites, as required by its members, to exercise their Treaty rights).

⁵ *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the "Boldt Decision"), *aff'd*, 520 F.2d 676 (9th Cir.1975).

⁶ *U.S. v. Washington*, 384 F. Supp. at 403. The Yakama Nation was also a party to the *United States v. Oregon* proceeding, a federal case. The Yakama Nation participated in that long-running case in order to protect their Treaty fishing interest and to "exercise their sovereign powers in a coordinated and systematic manner to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both Treat Indian and non-treaty fisheries." 2008-2017 *United States v. Oregon*, Management Agreement, p. 1; *United States v. Oregon*, No. 68-513 (D. Or. Aug. 12, 2008) (Management Agreement adopted as an Order of the Court).

where a variety of resources could be obtained. Currently, the People use vegetation and wildlife as both food resources and cultural resources. The People gather edible greens, roots and berries. The People hunt and fish, many earn their living fishing for salmon in the waters of the Columbia River and its tributaries. The proposed rail expansion has the potential to interfere with the Yakama Nation's exercise of its Treaty rights, to hunt, fish, and gather in its usual and accustomed areas.

For example, the proposed rail traffic will directly interfere with fishing in the Columbia River. The Boldt Decision affirmed the Yakama Nation's usual and accustomed fishing areas include the "Columbia River area" where "[a]pproximately four hundred tribal members fish commercially[.]"⁷ The Yakama Nation jointly regulates the exercise of its members' Treaty fishing rights on the Columbia River.⁸ The court also noted that the Yakama Nation's members utilize fish for both "ceremonial and personal" reasons and that they "have been and continue to be very dependent on anadromous fish to sustain their way of life." The court found that "[a]nadromous fish are vital" to the Yakama Nation's members' diets.⁹

As the Boldt Decision observed, many of the Yakama Nation's usual and accustomed fishing areas lie along the Columbia River. Along the Columbia River, there are train tracks. The proposed rail expansion would be in Mosier, Washington, which is situated along the Columbia River. The proposed rail expansion raises two significant issues, in regards to the exercise of the Yakama Nation's Treaty rights. Increased train traffic would limit both access to the Yakama Nation's usual and accustomed fishing areas and would increase the risk of injury or death to tribal fishers.

In regards to access to fishing sites, there is the obvious impact that increasing train traffic will make it more difficult to cross the train tracks, limiting access to those sites that lie alongside train tracks. These significant impacts must be addressed in any proper analysis of the Application at issue here. Further, as discussed in detail below, increased train traffic results in an increased risk of trains derailing and spilling. Historically, the Yakama Nation has endured the loss of many traditional fishing places due to the development of the Columbia River and spills. The loss of more fishing sites due to a train derailment, or any resulting oil spill, would place an unacceptable cumulative burden of loss on the Yakama Nation. Again, these significant impacts must likewise be addressed in any adequate analysis on the Application.

...

The biggest risk to the safety of tribal fishers when accessing fishing sites is the proximity of the train tracks to fishing sites. Many fishing sites can *only* be accessed by crossing train tracks. In order to access fishing sites, tribal fishers have to cross the train tracks, by foot or in vehicles. The crossings, especially in remote locations, do not always have signal and safety measures. Every time a tribal fisher crosses a train track

⁷ *Id.* at 382.

⁸ *Id.*

⁹ *Id.*

they are exposing themselves to a significant risk of injury or death. Over the years, the Yakama Nation has suffered fatalities and injuries due to train strikes. Any increase in the train traffic would both make it more difficult for tribal fishers to access Treaty-protected fishing sites and would increase the safety risks faced by tribal fishers.

The Yakama Nation's Treaty rights allow its People to maintain their customary way of life. The Treaty rights include the right to hunt, fish, and gather at all usual and accustomed places and throughout the Yakama Nation's Ceded Lands, including those usual and accustomed places along the Columbia River at issue here. The proposed rail expansion would have a direct adverse impact to the Yakama Nation, its People, and its Treaty-reserved rights and Treaty-protected resources.

The Yakama Nation considers these impacts to the Yakama Nation's Treaty rights unacceptable.

Further, in regards to mitigation, to put it simply, there is no mitigation adequate to address the diminishment or destruction of the Yakama Nations' Treaty-reserved rights and Treaty-protected resources. There is no adequate mitigation that will compensate the Yakama Nation, or its People, for the continued degradation of our sacred places, and the incremental, but constant damage to our natural resources that sustain our culture and the constant threat to the livelihood and cultural practices of the Yakama People.

Further, and as outlined in detail in the Yakama Nation's prior correspondence, the Yakama Nation has other significant interests that will be impacted by the proposed rail expansion, including:

- The proposed rail expansion would result in irreparable harm to the Yakama Nation's cultural and natural resources.
- The proposed rail expansion would increase the risk of derailments, spills, explosions, and other avoidable catastrophic impacts resulting from the increase in rail traffic through our lands that will follow the proposed rail expansion.
- The proposed rail expansion would increase emissions, aggravating climate change.

The Planning Commission did not adequately protect the Yakama Nation's interests. As discussed below, the Planning Commission's decision is in direct violation of the applicable laws.

II. The Decision Violates the Applicable Laws, Which Prohibit Projects That Affect Or Modify Treaty Rights.

The National Scenic Area Act provides that nothing shall “affect or modify any treaty or other rights of any Indian tribe.”¹⁰ This requirement is recognized in the Management Plan for the Columbia River Gorge National Scenic Area (“Management Plan”), which expressly cites the National Scenic Area Act.¹¹ The Management Plan further provides that “Indian treaty rights **must be** observed by the Gorge Commission as well as local and state governments, federal agencies, and private citizens.”¹² The National Scenic Area Land Use Development Ordinance (“NSA Ordinance”) recognizes these requirements and provides that “Uses that would affect or modify such [treaty] rights shall be prohibited.”¹³

In recognition of these limitations, the Staff Recommendation & Conditions of Approval recommended the inclusion of two “Treaty Rights Conditions.”¹⁴ The recommended conditions provided:

20. The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.

21. UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members: one east of the project area, and one west of the project area. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the Umatilla Fish and Wildlife Commission. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the CTUIR. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.¹⁵

Further, the staff recommended that the following related condition be included:

15. UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.¹⁶

At the September 26, 2016 hearing, the Planning Commission discussed removing Condition 20. At the hearing, the Director of the Wasco County Planning Department informed the Commissioners that if the Planning Commission removed Condition 20, “we would be allowing something that has a potential adverse effect to treaty rights” which would be in violation of the

¹⁰ National Scenic Area Act, Section 17(a)(1).

¹¹ Management Plan, Part IV, Chapter 3.

¹² *Id.* (emphasis added).

¹³ NSA Ordinance, Section 14.800(D)(2).

¹⁴ Staff Recommendation & Conditions of Approval, p. PC1, SR-3-SR-4.

¹⁵ *Id.*

¹⁶ *Id.* at PC1 SR-3.

applicable laws.¹⁷ Further, Commissioners suggested that removing a limit on the number of trains allowed per day would make the decision violate the Planning Commission's ordinances and treaties with tribes.¹⁸ However, the Planning Commission dismissed the concerns of its owner Director, and removed the condition despite legal requirements to the contrary.¹⁹

Here, the Yakama Nation informed the Planning Commission that the proposed rail expansion would result in violations of the Yakama Nation's Treaty rights. Accordingly, the governing laws require the Planning Commission to ensure that the proposed rail expansion did not "affect or modify" treaty rights, as uses that affect or modify treaty rights "shall be prohibited."²⁰ By ignoring the staff recommendations, and warnings at the hearing, the Planning Commission violated its governing laws.

Further, even if Condition 20 was included, the proposed rail expansion would still adversely impact the Yakama Nation's Treaty rights. In the Yakama Nation's September 26, 2016 letter, it pointed out that Condition 20 was unenforceable by the County, and based on this, informed the Planning Commission that even with the recommended conditions, the proposed rail expansion would still have adverse impacts on Yakama Nation's Treaty rights. The Commissioners shared the Yakama Nation's concerns about enforceability of the conditions, as evidenced by their comments at the September 26, 2016 hearing.²¹ The Commissioners stated that a limitation on the number of trains per day "very well might not be something that's enforceable in the first place" and, in regards to the Treaty Rights Condition, "I don't know if it's something that's enforceable."²² Accordingly, because the proposed rail expansion will have an adverse impact on the Yakama Nation's Treaty rights, even if the decision is revised to include Condition 20, the Board should deny Union Pacific's application.

This conclusion is supported by the Planning Department's review of our application. The Planning Department concluded that the "Board must find that the proposed use would not affect or modify treaty or other rights of any Indian tribe. If this cannot be concluded, then the proposed development is inconsistent with the NSALUDO and should be denied." Staff Response to Appeal PLAAPL-16-10-0003, p. 3. Here, the Planning Commission determined that the proposed condition could not be enforced. The Yakama Nation agrees. However, the Planning Commission's response to their conclusion should not have been removal of the condition. The application will negatively impact the Yakama Nation's Treaty rights. Accordingly, and as outlined by the Planning Department, the Board must deny the application.

III. Conclusion

The proposed rail expansion negatively impacts the Yakama Nation's Treaty rights. Accordingly, the Yakama Nation urges the Board to deny Union Pacific's Application for Rail Expansion.

¹⁷ Transcript, Wasco County Planning Commission, Application for Conditional Use, Union Pacific Case File PLASAR 15-01-0004, September 26, 2016 ("September 26 Transcript"), pp. 40-48.

¹⁸ *Id.* at 86-87.

¹⁹ Planning Commission Final Decision & Conditions of Approval, p 4.

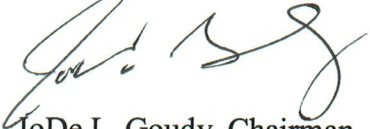
²⁰ NSA Ordinance, Section 14.800(D)(2).

²¹ September 26 Transcript, p. 86-87.

²² *Id.*

Thank you for your time and consideration. The Yakama Nation stands prepared to help provide any information the Board may need in making its decision. If you have any questions, please feel free to contact the Yakama Nation through our attorney, Joe Sexton, who may be reached directly at (509)910-8842 or joe@galandabroadman.com.

Sincerely,

A handwritten signature in black ink, appearing to read "JoDe L. Goudy", with a stylized flourish at the end.

JoDe L. Goudy, Chairman
Yakama Nation Tribal Council

Yakama Nation – Appeal Testimony

The Yakama Nation is a federally recognized sovereign nation. It was first expressly and legally recognized in 1855, in a Treaty with the United States. The Treaty explicitly reserved the right of the Yakama Nation People to hunt, fish, and gather at their usual and accustomed places.

The Yakama Nation's Treaty rights were not granted to the Yakama Nation. Rather, the Treaty was a reservation of rights NOT ceded to the United States.

The Yakama Nation has always lived along the Columbia River. Generations of our ancestors have hunted, fished, and gathered in the surrounding areas. Our right to continue to exercise our Treaty rights is well-documented in the court system. We are fiercely protective of our Treaty rights, as those rights have been under near-constant attack since they were memorialized in 1855.

We are protective of the rights our ancestors reserved for us because our people depend on them. Our tribal members fish in the Columbia River. Fishing is done for a variety of purposes beyond commercial gain. We also fish for subsistence purposes, to provide food to our communities—including our elders and those who can't provide for themselves—and for religious and cultural purposes. We eat the fish we catch and we use the fish in many of our ceremonies. Fishing is a tradition passed down along families since time immemorial, and both the act of fishing and the fish themselves are important cultural resources. The same may be said for hunting and gathering. These things are woven into the fabric of our People, just as the Bill of Rights is woven into the fabric of the United States.

Our usual and accustomed fishing grounds lie along the Columbia River, and we have reserved rights to hunt and gather in our Ceded Lands along the Columbia River.¹ Any impact to the Columbia River, and the surrounding areas, threatens our Treaty rights.

The proposed rail expansion will increase the amount of train traffic. This will have a negative impact on the Yakama Nation, in a variety of ways.

Most importantly, the increased rail traffic will interfere with the exercise of the Yakama Nation's Treaty rights. An increase in train traffic will impact both access to fishing sites and the risk of injury or death to tribal fishers.

Along the Columbia River, there are train tracks. Many of our fishing sites are accessed by crossing those train tracks. An increase in train traffic will limit access to those sites that lie alongside the train tracks.

¹ *Confederated Tribes and Bands of the Yakama Nation et al. v. United States Dept. of Agriculture et al.*, 2010 WL 3434091 (2010 E.D. Wash.) (“tribal members enjoy ‘in common’ usufructuary rights” on lands ceded by the Yakama Nation).

Further, an increase in train traffic will increase the risk of injury or death. Every time a tribal fisher crosses a train track, they are exposing themselves to the risk of injury or death. Over the years, the Yakama Nation People have suffered fatalities and injuries due to train strikes in areas where it is perilous to cross but necessary to access Treaty-protected fishing sites. Any increase in train traffic would increase the safety risks faced by tribal fishers.

There are a variety of other impacts, that were discussed in detail in the letters submitted to the Commission—the increase in rail traffic threatens those cultural resources – like She Who Watches—that lie along the Columbia River. It threatens the fish and wildlife restoration that the Yakama Nation has been doing through its fisheries management program. It also increases the risk of train derailments and spills, as we have seen in the recent derailment at Mosier. Finally, it increases emissions, negatively impacting climate change.

When making your decision on the application, it is important to keep in mind the real-world impact of your decision.

We provided all of this information to the Commission. The Department recommended conditions to protect the Yakama Nation's Treaty rights. However, the Commission seemingly discounted the importance of the Yakama Nation's Treaty rights, and eliminated the recommended conditions.

If you look at the transcript of the Commission's hearing, it is clear that the Department's own Director warned the Commission that removing the recommended condition would have an adverse impact on Treaty rights, which would violate the governing laws.

The Scenic Area Act, the Management Plan, the Scenic Area Ordinance, all require protection of Treaty rights. They prohibit uses that negatively affect Treaty rights.

The removal of the recommended conditions, which were included to protect Treaty rights, shows the Commission violated its own laws in approving the application.

However, even if the conditions were re-incorporated, the conditions will not adequately protect Treaty rights. Before the last meeting, we informed the Commission of our position, that the Commission does not have the ability to enforce a provision limiting train traffic. This concern was echoed by many of the Commissioners at their last meeting. Several Commissioners stated that as a reason the conditions should be removed.

However, that is not what the applicable laws governing your decision on this application provide. As the Department stated in its review of our appeal, the Board has only two options. The Board must either include conditions that would ensure the project would not affect or modify any Treaty rights, OR the Board must deny the railroad's application.

I am here to tell you that any supposed condition limiting the amount of rail traffic would not be adequately enforced against the railroad. If the Board grants this application, it will have a negative impact on Treaty rights. Therefore, the Board must deny the application.

Thank you for your time and attention. The Yakama Nation appreciates your careful consideration of this issue.

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Board of Trustees & General Council



Attachment L - Tribal Comment

46411 Timíne Way • Pendleton, OR 97801
(541) 429-7030 • fax (541) 276-3095
info@ctuir.org • www.umatilla.nsn.us

September 2, 2016

Wasco County Planning and Development Office
2705 East Second St.
The Dalles, OR 97058

Submitted electronically to: angieb@co.wasco.or.us

Dear Wasco County Planning Commission:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) is deeply concerned about increased shipment of fossil fuels through the Columbia River Gorge. The transportation of dangerous fossil fuels in Oregon has increased dramatically over the last few years with little or no federal, state or local oversight. The double-tracking at Mosier will result in increased train traffic and potentially increase train speeds. More train traffic will endanger tribal fishers who access the river throughout the Columbia River Basin as well as increase the likelihood of derailments and spills in the Gorge like the one we all witnessed on June 3, 2016. Unless and until a comprehensive, regional environmental review is done that addresses the numerous proposals to ship highly flammable Bakken crude oil and other dangerous commodities and the associated safety concerns, no new infrastructure expansion should be approved to facilitate additional rail shipment.

The CTUIR has watched crude-by-rail traffic increase substantially in recent years. Oil shipments increased by 250% in 2013 alone. Analysts expect crude-by-rail shipments to increase when oil prices improve, particularly from the tar sands region of Alberta, Canada. A spill of crude oil along the Columbia River would have disastrous consequences for the people, the communities, and the resources of the Gorge.

The risks from crude-by-rail shipments have not been fully analyzed due to the regulatory patchwork over the railroads and docks subject in part to the antiquated federal Rivers and Harbors Act. This minimal, haphazard regulatory approach has been exploited by companies that have begun shipping massive amounts of crude oil little to no public input. Instead, there needs to be a regional Environmental Impact Statement pursuant to the National Environmental Policy Act to analyze the cumulative impacts and risks posed by increased fossil fuel transport. Unless and until that is done, no additional projects should be approved.

The CTUIR believes that increased shipments of crude oil will create many additional threats to the communities in the Gorge and the citizens who live and travel through it, as well as tribal members and tribal fishers. The risks of transporting such inherently dangerous commodities warrant a reconsideration of the appropriate train speeds through the Gorge. The characteristics of tar sands oil itself justify further consideration of its risks. Without knowing the cumulative impacts of all these projects, their potential risks cannot be fully understood, addressed, or mitigated will not be addressed.

This year the CTUIR commissioned a report by Hill and Associates that discusses the risks of derailments in the Columbia River Basin. The report identifies the types of incidents we've already seen with crude oil trains causing significant property damage and loss of life. Derailments have become so common and consistent, new regulations have been developed specifically for Bakken crude oil trains. The report concludes that the risks from crude oil trains are significant. There are numerous projects that currently ship crude oil through the Gorge. Still more are proposed due to drilling in the Bakken Region of North Dakota and the tar sands region of Alberta, Canada. If nothing more is done, these incidents will continue to occur.

The derailment that we all witnessed on June 3, 2016 was a stark reminder of the risks we face from crude-by-rail shipments through the Columbia River Gorge. The CUTIR is thankful that the accident didn't result in the loss of life or more significant property damage. However this derailment should be a wakeup call to the region. Currently, all crude-by-rail shipments into the Northwest travel through the Columbia River Gorge. On June 3, tribal members were on the Columbia River and witnessed the damage caused by the spill.¹ The derailment could have been much worse and impacted the resources of the Gorge we all depend upon for decades.

Before another project that results in more crude-by-rail shipments, the CTUIR would like to see a study done to analyze the impacts trains have on tribal fishing. It should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge—both recent and those projected to occur in the future. There are many uncontrolled crossings along the Columbia River both within and outside the Gorge. Funding must be identified and set aside to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured in our Treaty of 1855.

Thank you for your consideration of our comments.

Sincerely


Gary Burke
Chairman, Board of Trustees

¹ See testimony of Randy Settler in the Washington Energy Facility Site Evaluation Council, available on-line at: <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/TSVEPadj.shtml#Transcripts> pages 3979-3995/



Wasco County Planning Department

"Service, Sustainability & Solutions"

2705 East Second St. • The Dalles, OR 97058
(541) 506-2560 • wcplanning@co.wasco.or.us
www.co.wasco.or.us/planning

WASCO COUNTY PLANNING COMMISSION

Notice of Rescheduled Quasi-Judicial Public Hearing for September 6, 2016

Notice of Amended Agenda for July 5, 2016

Date of This Notice: June 23, 2016

Please Note: The quasi-judicial hearing for PLASAR-15-01-004 has been rescheduled to September 6, 2016. The July 5, 2016 work session will only include a Planning Commission work session for Commissioner training and an update on the status of long-range planning projects.

Date & Time: NOTICE IS HEREBY GIVEN that the WASCO COUNTY PLANNING COMMISSION will meet Tuesday, July 5, 2016 to host a Planning Commission work session and Tuesday, September 6, 2016 to hold a quasi-judicial hearing for the UPRR proposal. Both events will begin at 3:00pm.

Location: The July 5, 2016 work session will be held at the Wasco County Planning Department Conference Room, located at 2705 East Second Street, The Dalles, OR. The September 6, 2016 quasi-judicial hearing will be held at the Columbia Gorge Discovery Center, located at 5000 Discovery Drive, The Dalles, OR 97058. Both meeting facilities are handicapped accessible, and language interpreters are available with one week notice. If you need special accommodations to attend, please call (541) 506-2560 to make a request.

Hearings before the Wasco County Planning Commission are governed by ORS 197.763 and ORS 215.402 to 215.431, Section 2.100(B) of the Wasco County National Scenic Area Land Use and Development Ordinance, and the Rules of Procedure of the Wasco County Planning Commission. The meeting agenda include:

July 5, 2016 Work Session Details: Commissioner training may include Robert's Rules and Oregon State Ethics training. Staff will also provide an update on the status of long-range planning projects and work plans.

September 6, 2016, 2016 Hearing Details: File # PLASAR-15-01-004. The Wasco County Planning Department has received an application from Union Pacific Railroad and their land use consultants, CH2M Hill, to expand an existing railroad siding on either side of Mosier, Oregon for 4.02 miles of new second mainline track and realigned existing track; place five new equipment shelters; install drainage structures, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; and construct temporary and permanent access roads. The request also includes off-site wetland mitigation east of the primary project site.

The project area begins at rail MP 66.98, east of the Wasco County line, approximately 2 miles west of the City of Mosier, and ends at MP 72.35, approximately 3 miles east of Mosier. The subdivision roughly parallels the Columbia River and Interstate 84 for the length of the project. More specifically, the project crosses Township 3 North, Range 12 East, Sections 31 and 32; Township 3 North, Range 11 East, Section 36; and Township 2 North, Range 11 East, Sections 1, 2, and 3. One new signal building and two signal lights are also proposed at MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation is

proposed on Wasco County Parcel 2N 13E Section 8 Lot 200 (Account # 1274). The project will be predominantly located on lands owned by Union Pacific Railroad. Portions of the project will also occur on lands owned by Oregon State Parks and Recreation Commission and Oregon Department of Transportation. Offsite wetland mitigation will occur on lands owned by Skylar and Kathleen Schacht.

Applicable Zoning: General Management Area Large-Scale and Small-Scale Agriculture (A-1 (40) and A-2 (80)), Open Space, and Water; Special Management Area Agriculture, Public Recreation, and Open Space.

Review Authority & Criteria: W LUDO, Chapter 1 – Introductory Provisions, Chapter 2 – Development Approval Procedures, Chapter 3 – Basic Provisions and Zoning, Chapter 4 – Supplemental Provisions, Chapter 5 – Conditional Use Review, Chapter 6 – Variances, Chapter 8 – Temporary Use Permit, Chapter 11 – Fire Safety Standards, Chapter 14 – Scenic Area Review, and Chapter 23 – Sign Provisions.

Portions of the proposed development will occur inside the City of Mosier and portions will occur outside the city, within the Columbia River Gorge National Scenic Area. Wasco County Planning has regulatory authority provided by the National Scenic Area Act outside of the Mosier Urban Area.

QUESTIONS/COMMENTS: Comments may be provided up until the date of the hearing. Comments may be submitted in writing to the Wasco County Planning and Development Office, at 2705 East Second St., The Dalles, Oregon 97058, by email to angieb@co.wasco.or.us, or in person at the hearing. Written testimony submitted by Testimony and evidence must be directed toward the listed review criteria or other criteria in the plan or land use regulation which the person believes to apply to that decision. Questions about the application should be directed to: Angie Brewer, Planning Director, at 541-506-2560 or angieb@co.wasco.or.us.

AVAILABILITY OF INFORMATION: Any staff report used at the hearing shall be available for inspection at no cost at least seven (7) days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Copies of the application(s) and all documents and evidence relied upon by the applicant(s), all applicable criteria, and any staff reports are available for inspection at no cost and will be provided at reasonable cost at 2705 East Second Street, The Dalles, OR 97058.

Documents will be available online at: www.co.wasco.or.us/planning, click on Pending Land Use Decisions. The actions table is sorted alphabetically by the name of the applicant/owner. The information will be available until the end of the appeal period.

APPEAL INFORMATION: Failure to raise an issue in the hearing, in person or by letter, accompanied by statements or evidence sufficient to afford the Planning Commission or other parties an opportunity to respond to the issue, precludes appeal to the Wasco County Court on such issue.

PUBLICATION DATE: THURSDAY JUNE 26, 2016

Statement of James E. Hall regarding crude oil train accident risk in relation to the proposed routing of crude oil trains through the Columbia River Basin

Accident experience has clearly demonstrated that the consequences of train derailments carrying large numbers of crude oil tank cars have been catastrophic. Even after industry attempts to improve the poor crashworthiness of DOT-111 tank cars by offering CPC-1232 tank cars with enhanced safety features, the failure of tank cars in accidents and the quantity of crude oil released is enormous.

To understand the scope of how serious a train derailment can be when carrying more than 3,000,000 gallons of crude oil in tank cars, it is paramount that we study and understand recent accident history, not rely upon normalized data that includes accidents from decades ago involving different equipment and operating conditions. The National Transportation Safety Board (NTSB) issued a special study on risk concepts in dangerous goods transportation regulation that identified an important concept that is applicable today: That it is not until accident experience begins to accumulate that the change in risk becomes evident.

Since 2006, there have been many accidents in the United States and Canada involving derailments of trains carrying large quantities of crude oil and ethanol that provide us a realistic picture of accident experience and consequences. In 24 of those accidents 442 tank cars derailed and 71% of them (314) were breached. About 6.5 million gallons of crude oil and ethanol were released, an average of 270,000 gallons per accident; the equivalent of 30 highway gasoline cargo tanks.

The poor crashworthiness of tank cars used to transport crude oil and ethanol is evident in these train derailments. For example:

- October 20, 2006 – New Brighton, Pennsylvania, 23 tank cars derailed and 20 tank cars breached (87%), 485,278 gallons of ethanol were released (the equivalent of 54 highway gasoline cargo tanks);
- June 19, 2011 – Cherry Valley, Illinois, 19 tank cars derailed and 15 tank cars breached (79%), 323,963 gallons of ethanol were released (the equivalent of 36 highway gasoline cargo tanks);

- February 6, 2011 – Arcadia, Ohio, all 31 tank cars derailed were breached, 834,840 gallons of ethanol were released (the equivalent of 93 highway gasoline cargo tanks);
- July 6, 2013 – Lac Megantic, Quebec, 63 tank cars derailed and 59 tank cars breached (93.6%), 1,580,000 gallons of crude oil were released (the equivalent of 175 highway gasoline cargo tanks);
- November 8, 2013 – Aliceville, Alabama, 26 tank cars derailed and 25 tank cars breached (96%), 630,000 gallons of crude oil were released (the equivalent of 70 highway gasoline cargo tanks);
- February 14, 2015 – Gogama, Ontario, 29 tank cars derailed and 19 tank cars breached (65.5%), 264,172 gallons of crude oil were released (the equivalent of 29 highway gasoline cargo tanks);
- February 16, 2015 – Mount Carbon, West Virginia, 27 tank cars derailed and 20 tank cars breached (74%), 378,034 gallons of crude oil were released (the equivalent of 42 highway gasoline cargo tanks); and
- March 7, 2015 – Gogama, Ontario, 39 tank cars derailed and 36 tank cars breached (92%), more than 500,000 gallons of crude oil were released (the equivalent of 83 highway cargo tanks).

The U.S. Department of Transportation's Federal Railroad Administration (FRA) and Pipeline and Hazardous Materials Safety Administration (PHMSA) issued speed restriction for high hazard flammable trains (including crude oil trains) to 50 mph and to 40 mph in high-threat urban areas. The agencies recognized that greater tank car damage can be expected at high speeds.

But accident data shows that the tank car failures are significant and consequences are substantial in train derailments at speeds below 50 mph and below 40 mph. In all of the 24 accidents reviewed all but one, accidents occurred at train speed below these restrictions:

- New Brighton, Pennsylvania – 37 mph,
- Cherry Valley, Illinois – 36 mph,
- Arcadia, Ohio – 46 mph,
- Aliceville, Alabama – 39 mph,

- Gogama, Ontario (February 14) – 38 mph,
- Mount Carbon, West Virginia – 33 mph, and
- Gogama, Ontario (March 7) – 43 mph.

Even at lower speeds (23 mph, 19 mph and 10 mph), tank car failures and consequences have been significant:

- August 5, 2012 – Pleva, Montana, train speed 23 mph, 17 tank cars derailed and 12 tank cars breached (74%), 245,336 gallons of ethanol were released (the equivalent of 27 highway gasoline cargo tanks),
- August 22, 2008 – Luther, Oklahoma, train speed 19 mph, 8 tank cars derailed and 5 tank cars breached (62.5%), 80,746 gallons of crude oil were released (the equivalent of 9 highway gasoline cargo tanks), and
- September 19, 2015 – Bon Homme County, South Dakota, train speed 10 mph, 7 tank cars derailed and 3 tank cars breached (43%), 49,748 gallons of crude oil were released (the equivalent of 5 and ½ highway cargo tanks).

Fire resulting from train derailments and tank car breaches has been significant. Of the 24 train derailments reviewed with tank car breaches 20 resulted in a fire. The volatility of crude oil has significant safety implications and when it has been released from tank cars during derailments fire threats were substantial.

The FRA accident data for Class 1 railroads (Excluding AMTRAK) show 2,522 train derailments on main line track for the period 2008 through 2015. The data identifies broken rails attributed to detail fractures including shelling and head checks, irregular track alignment including track that has buckled, and wide gage including defective or missing crossties, spikes or other fasteners as leading causes of derailments assigned to track, roadbed and structure related causes. Although investigations of some of the 24 crude oil and ethanol train accidents are ongoing, a significant number of these accidents have been attributed to track conditions like broken rails.

The accumulation of data from these accidents clearly illustrate that the consequences of high hazard flammable train derailments are significant. Crude oil tank cars have increased in size over the years and now are built for a gross weight of 286,000 pounds. NTSB has investigated several accidents where rail head wear and rolling contact fatigue were attributed to rail failure. Following the New Brighton accident, NTSB recommended that the FRA require railroads to develop inspection and maintenance programs based on damage-tolerance principles that take

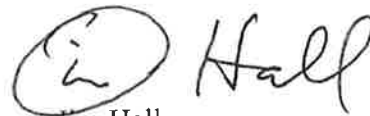
into account accumulated tonnage, track geometry, rail surface conditions, rail head wear and crack growth rates that can be affected by the frequency, size and weight of trains.

Although the U.S. Department of Transportation has mandated improvements for tank cars that carry crude oil – the new DOT-117 tank car – it is uncertain when enough of those tank cars will be available for all crude oil shipments. It will certainly be several years. Further, it is unknown how well they will perform in accidents until we accumulate accident history, like we have for DOT-111 and CPC-1232 tank cars. Tank cars are subject to strong forces during violent train derailments and subject to failure from punctures from broken rail and accident debris. Although the probability of any train derailment is portrayed by industry as low, we have seen many high hazard flammable train accidents since 2006 and the results have been high consequence and catastrophic.

Trains safely passed through the town of Lac Megantic, Quebec for years. But that was little comfort for the residents when one of them finally derailed on July 6, 2013. The resulting explosion and fire destroyed the downtown and killed 47 people. And consider the residents living near Gogama, Ontario, who suffered through a catastrophic derailment in February 2015. Despite industry claims about how rare such accidents are, the community was again visited by a similar disaster just three weeks later.

As tragic as industrial accidents can be (i.e., a refinery explosion), one can argue that a community has accepted certain risks for tangible benefits like employment and commerce. However, oil transportation industry statistics cannot be used to dismiss legitimate concerns of residents who bear all the risk of catastrophe with no tangible benefit simply because railroads have chosen their towns as convenient transit points.

It has been proposed that four crude oil trains a day, each carrying over 3,000,000 gallons of crude oil (the equivalent of 333 highway gasoline cargo tanks for each train), travel the Columbia River Basin. Because of the recent history of significant accidents with crude oil trains, the poor crashworthiness of tank cars and the significant number of those accidents that have resulted in fire, an extensive effort is essential to study the needs for the equipment, infrastructure and resources necessary to protect the people who live, fish and work along the Columbia River Basin.

A handwritten signature in black ink, consisting of a stylized 'J' and 'H' followed by the name 'Hall'.

Jim Hall
Principal
Hall & Associates LLC

May 10, 2016

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Board of Trustees & General Council



46411 Timíne Way • Pendleton, OR 97801
(541) 429-7030 • fax (541) 276-3095
info@ctuir.org • www.umatilla.nsn.us

May 11, 2016

Shawn Zinszer, Regulatory Chief
Army Corps of Engineers, Portland District
P.O. Box 2947
Portland, OR 97208-2946

**Re: UPRR Joint Permit Application No. 2014-364, Construction of 4.02 miles of track
creating a 5.37 miles second mainline track near Mosier, OR**

Dear Mr. Olmstead:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR or Umatilla Tribe) Fish and Wildlife Commission (FWC) appreciates the opportunity to provide input on the proposed track construction near Mosier, Oregon that will result in 4.02 miles of new track and a new 5.37 mile second mainline track. The CTUIR FWC has serious concerns regarding this project as it entails significant construction over two tributaries to the Columbia River and numerous wetlands, will increase rail traffic on the Columbia River and also allow for increased train speed and length. Additionally, the citizens of the CTUIR and other tribes access the river across railroad tracks, often at unmarked crossings to access the Columbia River to exercise their constitutionally-protected Treaty reserved right to fish. Increased rail traffic increases safety risks to tribal members crossing the tracks. Further, because the project potentially impacts Treaty rights, both directly and indirectly, the use of a Nationwide permit for this project is inappropriate. The CTUIR requests that the Corps of Engineers remove this project review from the Nationwide process and put it on an individual permit review process. Such a move will allow the Corps to conduct the required analyses to ensure there is little to no impacts to Treaty rights and the resources on which they depend.

The Umatilla Tribe's Constitutionally-Protected Treaty Fishing Rights

The Supreme Court of the United States has repeatedly recognized the significance of the treaty right to fish at off-reservation usual and accustomed places, holding that the right is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Washington v. Washington State Comm'l Pass. Fishing Vessel*, 443 U.S. 658, 680, 99 S. Ct. 3055, 3071-3072 (1978), *quoting United States v. Winans*, 198 U.S. 371, 380 (1905). This treaty right to fish is a property right, protected by the Fifth Amendment to the Constitution of the United States. *See Muckleshoot Indian Tribe v. United States Corps of Engineers*, 698 F.Supp. 1504, 1510 (W.D. Wash. 1988), *citing Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-412, 88 S.Ct. 1705, 1710-1711 (1968). The right to take fish includes a right to cross private property to access those areas, "imposing a servitude" upon the land. *Winans*, 198 U.S. at 381. Since 1968, the Umatilla Tribe has also protected these treaty rights as a plaintiff in *United States v. Oregon*, CV 68-513-KI, in the U.S. District Court for the District of Oregon.

The treaty fishing right carries with it an inherent right to protect the resource from despoliation from man-made acts. "[A] fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *United States v. Washington*, 506 F.Supp. 187, 203 (W.D. Wash.

1980). *See also, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (Tribes with Treaty reserved fishing rights are entitled to something more tangible than “merely the chance...occasionally to dip their nets into the territorial waters.”) The ecosystem necessary to sustain the fish cannot be diminished, degraded or contaminated such that either the fish cannot survive, or that consuming the fish threatens human health. *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. Mar. 29, 2013)(State “impermissibly infringed” tribes’ treaty based fishing right in Washington by constructing culverts that “reduced the quantity of quality salmon habitat, prevented access to spawning ground, reduced salmon production...and diminished the number of salmon available for harvest.”) *See also, e.g., Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034-35 (9th Cir. 1985)(Tribe’s fishing right can be protected by enjoining ground water withdrawals that would destroy eggs before they could hatch). This project, both in its immediate construction impacts, and its resultant long-term increase in rail traffic and speed, carry impermissible potential impacts to both the access of the treaty fishing right, and degradation of the ecosystem on which those treaty resources depend.

According to the JARPA permit document, the proposed project will construct approximately four miles of new double-track rail line, which includes two new bridges over tributaries to the Columbia River and going through multiple wetlands and adjacent lakes, many of which are spawning habitat for salmonid species listed on the Endangered Species Act. The proposal would also construct two new signal cabins, which are curiously omitted from the permit plans based on the applicant’s conclusory statement that “there are no waters for the United States what will be affected” (Project No. 2014-364 JARPA at pp 6-7.) The project also calls for over 1.5 acres of fill to open waters and wetlands. Further, the project includes a new paved area that directs any runoff from the increased train traffic to bare ground, possibly adjacent to wetlands, for “infiltration” into the ground. Given that the runoff will largely come from train traffic, and given the 250% increase in rail traffic between 2013 and 2014¹, it is likely that some type of contaminants would pollute this runoff. Any runoff that infiltrates into the bare ground will then go into the groundwater, which is often hydraulically connected to the Columbia River through the Gorge. The potential for the project to contaminate the Columbia River and adjacent wetlands, in which listed salmonids – treaty resources that the Corps has a trust duty to protect - is a potential effect the Corps must analyze, and is another reason a Nationwide Permit should not be used. Similarly, the potential impacts from the construction of bridges, cabins and tracks over sensitive wetlands and lake ecosystems in which listed species spawn and travel through requires the Corps abandon the use of the Nationwide process.

The Project will Likely Harm the Umatilla Tribe’s Treaty Resources and Interests

This proposal will increase rail traffic in the Columbia River Gorge. In a one page document prepared by Union Pacific Railroad entitled “Union Pacific to Enhance Infrastructure in Mosier” submitted in their public outreach effort, UPRR stated:

¹ http://www.oregonlive.com/environment/index.ssf/2014/07/everything_you_need_to_know_ab.html

The Federal Railroad Administration speed limit on the new track will be 35 mph. Union Pacific currently moves about 25 to 30 trains per day through Mosier. The new double track will allow us to move 5 to 7 more trains per day through Mosier.

This statement reveals several things. First, double-tracking this area will increase the railroad speed. The current speed limit in Mosier is 30 miles per hour.² Second, UPRR estimates that this project will increase traffic through in the area by approximately 25%. Also, the Columbia River Gorge is essentially a closed system for trains. If seven more trains go through Mosier, seven more trains go through Rufus, Biggs, The Dalles, Celilo, Hood River, Cascade Locks, etc. Increased traffic in Mosier generates impacts up and down the Columbia in the form of additional trains, pollution, noise and risks of derailment. Finally, while train traffic in Mosier is currently limited to 30 miles an hour, trains up river, between The Dalles and Boardman, travel up to 70 miles an hour.

The increased railroad traffic all along the Columbia River, particularly in Zone 6 between Bonneville and McNary Dams, will impair the Tribe's interests in the following ways: damage to treaty resources and the ecosystems they depend on, eradication of tribal fishing areas, impeded access to tribal fishing areas and increased risks to tribal member safety, and damage and access to cultural resources.

The ecosystem and treaty resources will suffer catastrophic damage from accidents and spills.

The Project would result in an increase in shipment of tank cars, many of which may carry crude oil or similarly dangerous products, traveling in the Columbia River Gorge and adjacent to the Columbia River, where many tribal fishing areas are located. Train derailments, shipping spills, and fire and explosions from those derailments are a certainty. This is evident from the cascade of derailments across the United States and Canada reported in the media. For example, on February 17, 2015, a town in West Virginia suffered the derailment of a unit train of more than 100 oil tank cars carrying Bakken crude. Fourteen of the tankers ignited in an explosion, and at least one went into the Kanawha River. Hundreds of families were evacuated, and two downstream water treatment plants were closed. Photos of the explosion and subsequent tour of the scene as reported by the Boston Globe and Newsweek are below.

² <http://www.fogchart.com/Down/Beta/PORTLAND.pdf>



Photo caption: "Steve Keenan/The Register-Herald via Associated Press."

John Raby, *Oil-bearing train derailed in West Virginia, setting off explosion*, The Boston Globe, February 17, 2015, at <http://www.bostonglobe.com/news/nation/2015/02/17/west-virginia-train-derailment-causes-oil-spill-and-fires/opo6XRXLUV0URv8EiDSYQJ/story.html>



Photo caption: West Virginia Governor Earl Ray Tomblin surveyed the wreck site on February 17. "Many of the tanks had gaping holes in the tops where they had exploded," he tells Newsweek. Office of Governor Earl Ray Tomblin.

Max Kutner, *West Virginia Begins Investigating Massive Train Derailment*, Newsweek, February 20, 2015, at <http://www.newsweek.com/west-virginia-begins-investigating-massive-train-derailment-308428>.

The day before, February 16, witnessed the derailment and spill of more than 260,000 gallons of crude oil near Timmons, Ontario. The photograph below, from the Transportation Safety Board of Canada, shows workers fighting the oil spill fire.



Photo caption: "In this Feb. 16, 2015, file photo, provided by the Transportation Safety Board of Canada, workers fight a fire after a crude oil train derailment south of Timmons, Ontario. The train derailment this month suggests new safety requirements for tank cars carrying flammable liquids are inadequate, Canada's transport safety board (sic) announced Monday, Feb. 23, 2105."

Rob Gillies, *Canada safety board says latest oil train derailment shows new safety standards are inadequate*, U.S. News, February 23, 2105, at <http://www.usnews.com/news/world/articles/2015/02/23/canada-oil-train-accident-shows-new-safety-rules-inadequate>.

While the U.S. Department of Transportation is considering new standards for rail cars, newly built tanks cars do not appear to reduce the risk of accidents and spills as "both the West Virginia accident and the oil train derailment and fire in Ontario involved recently built tank cars that

were supposed to be an improvement,” but the Canadian Transportation Safety Board said these new cars still “performed similarly” to the older models. *Id.* It is an unfortunate reality that “[t]he number of gallons spilled in the United States in [2013], federal records show, far outpaced the total amount spilled by railroads from 1975 to 2012.” Clifford Kraus and Jad Mouawad, *Accidents Surge as Oil Industry Takes the Train*, N.Y. Times, Jan. 26, 2014, at A1, and <http://www.nytimes.com/2014/01/26/business/energy-environment/accidents-surge-as-oil-industry-takes-the-train.html>. If the Project goes forward, it is only a matter of time before a similar accident brings ecological catastrophe to the Columbia River, devastating the fishery and other resources the Umatilla Tribe depends on and has worked so hard to protect and restore. A derailment and spill along the Columbia River will not only be tragic for the resource, it will also work immeasurable hardships on the many tribal members that depend on the Columbia River and its riches for their living. It will likely eradicate productive fishing areas in the immediate area of the spill, and the consequences will be along the entire River, as a spill could wipe out stocks of salmon and steelhead that are already listed under the Endangered Species Act, erasing the many years and billions of dollars of effort that has gone into restoring the resource.

Increased rail traffic will inhibit access to fishing areas and endanger tribal members.

On both sides of the Columbia River, tribal members cross train tracks multiple times on a daily basis to exercise their treaty fishing rights. There is a great deal of scaffold fishing up stream and downstream of the project area that is visible from satellite images on Google Earth. This fishing is most often restricted by the crossing of the railroad tracks.

The increase in the number of trains, and possibly the length of such trains, will delay tribal members’ ability to cross the tracks to access fishing areas. Such delays become acute during adverse or impending weather, when members must sometimes get to their nets in the water as quickly as possible.

The increase in rail traffic and the speed of that traffic will also increase the incidence of tribal members stuck by rail cars. Tribal members are at risk of rail-strikes when crossing the tracks to access fishing sites, In-Lieu sites, Treaty Fishing Access Sites, homes and markets for the sale of harvested fish. Recently, on February 21, 2015, a man was killed by train strike near Kalama, WA. <http://www.khq.com/story/28168097/railroad-man-on-track-dies-after-being-struck-by-train>. According to railroad statistics, 27 people were killed by train strikes across Washington State in 2014.³ In Oregon, 11 were killed in 2015. *Id.* The likelihood of train-strike fatalities, injuries and property damage will increase from the increase in rail traffic and speed that would result from the Project.

Increased rail traffic will damage cultural and religious tribal interests.

The increased rail traffic will affect properties and items governed and protected by the National Historic Preservation Act, the Archaeological Resources Protection Act, the Native American

³ <http://safetydata.fra.dot.gov/Officeofsafety/publicsite/Query/TenYearAccidentIncidentOverview.aspx>

Graves Protection and Repatriation Act and other laws. The transit corridor passes through tribal trust and traditional use areas. There are ancestral human remains, traditional cultural properties, historic properties of religious and cultural significance to Indian Tribes, and archaeological resources and sites in these areas. Any accidents, spills, explosions and related fires can damage these properties and items, and cause irreversible loss. Similarly, the increased traffic could result in increased risks of earthquake, liquefaction, or landslide, rail caused fires (without derailment), contaminant leakage onto tracks and sites, all of which could damage cultural and religious resources.

All of the potential impacts discussed above counsel for removal of the project review from the abbreviated Nationwide process, and the conduct of a robust review under the individual permit process. Moreover, it appears the Corps does not have accurate and complete information about the project before it on which to make a decision.

The permit application contains inaccurate, inconsistent and incomplete information.

There are inaccuracies and inconsistencies in the application as well. For instance, in the November, 2014 Project Purpose and Need and Alternative Analysis, it stated that trains along this route can range up to 12,000 feet and that the siding in Mosier siding is the shortest in the 206 mile subdivision. In conversations with UPRR it was clarified that UPRR does not run 12,000 foot trains, though there is nothing preventing them from doing so. The average length of train in the Gorge is 6,200 feet, half the length referenced in the report prepared by CH2M Hill. Also, Mosier is not the shortest siding in the Portland subdivision. From our information, the Mosier siding is 6,751 feet. The Bridal Veil siding is 6,360. The report contends that “[s]tandard trains currently operating on the route can range in length up to 12,000 feet, and many of these standard-length trains are unable to use the Mosier Siding for passing.” However, most of the sidings between Troutdale and The Dalles, are less than 12,000 feet including Sandy (10,617 feet), Bridal Veil (6,360 feet), Dodson (10,617 feet), Cascade Locks (6,751 feet), and Meno (9,916 feet). A chart of the siding length and locations is attached. Further, in response to cultural resource concerns by Catherine Dickson, the contractor stated that “the total number of trains per day is anticipated to remain similar to existing levels. The existing main line track speed limit would not be increased as a result of the project.” A potential increase of 28% of train traffic is not similar to existing levels. Further, as noted above, in one pager, “Union Pacific to Enhance Infrastructure in Mosier,” the speed limit will increase from 30 mph to 35 mph. The point of all of these inconsistencies is that the information before the Corps at this time is inaccurate. The project needs an individual permit review process, not the abbreviated whitewashing of the Nationwide process.

At a staff meeting with the Corps of Engineers regarding this permit on April 15, 2016, Corps staff expressed the opinion that the increased rail traffic of this project would be an indirect effect of this project. However, the Corps also did not know whether they could deny a permit if the indirect effects of the project had more than a de minimus impact on tribal treaty rights. This is a critical issue. The CTUIR believes that any impact by Corps authorized projects on treaty rights is unacceptable. Further, whether the impacts of this project are direct or indirect, the results will increase rail traffic and that will affect tribal fishers. The CTUIR would like a formal response to the question of whether or not the increased rail traffic and the threats that increase pose to tribal fishers and potential impacts on Treaty rights are direct or indirect effects of this project?

CTUIR FWC Letter to Shawn Zinszer
Re: Mosier 5.37 Second Mainline construction
May 11, 2016
Page 8 of 8

Project elements have changed.

UPRR has proposed the transfer of 2.82 acres of land from the Oregon Parks and Recreation Commission (OPRC) on September 23, 2015 in order to construct the second mainline construction.⁴ On April 27, 2016, the OPRC unanimously rejected the proposal by UPRR to secure the lands from OPRC for the expansion. This denial will affect the project proposal. Since the project can no longer as designed, how will the Corps address mid-review changes?

The project is currently under county review.

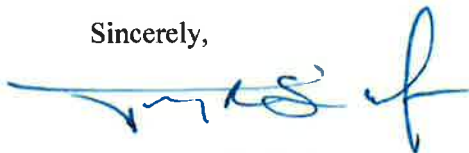
Finally, the Wasco County Planning Commission is currently reviewing the UPRR application under county rules that implement the Columbia River Gorge National Scenic Area Act (Scenic Area Act). Until this use is authorized under the county review process, with all limitations and conditions, Corps review of the project under a Nationwide permit is premature. The Scenic Area Act is federal law, and county ordinances implementing that law are federal in nature. Therefore limitations on state and local authority over railroads are inapplicable to county actions under the Scenic Area Act.

Conclusion:

Until these questions are answered, it remains unclear whether the Corps is willing or able to address treaty impacts of this project. Please provide the answers to these questions to Brent Hall, Tribal Attorney at 541-429-7200.

We look forward to consulting with the Corps on this issue further to address potential impacts to treaty rights.

Sincerely,



Jeremy Wolf, Chair
Fish and Wildlife Commission
Confederated Tribes of the Umatilla Indian Reservation

Cc: Wasco County
Yakama Nation Fish and Wildlife Committee
Warm Springs Fish and Wildlife Committee
Nez Perce Tribe Fish and Wildlife Committee
Paul Lumley, Executive Director, CRTIFC

⁴ <http://www.oregon.gov/oprd/Documents/Commission/2016.4-Salem/April6.pdf>



**Testimony of the Confederated Tribes of the Umatilla Indian Reservation
Wasco County Planning Commission Hearing, September 6, 2016, 3:00 pm
Columbia River Gorge Discovery Center**

The Confederated Tribes of the Umatilla Indian Reservation is deeply concerned about increased shipment of fossil fuels through the Columbia River Gorge.

For instance, transportation of dangerous fossil fuels in Oregon increased by 250% in 2013 with little or no federal, state or local oversight.

The double-tracking at Mosier will increase train traffic and speeds even more.

Increased train traffic will endanger tribal fishers who access the river throughout the Columbia River Basin, including the Columbia River Gorge.

Increased train traffic will also increase the likelihood of a spill.

Transporting crude oil by rail may also increase more if the tar sands region of Alberta, Canada, goes into full production if oil prices increase.

A spill of crude oil along the Columbia would have disastrous consequences for the people, the resources, and the communities in the Gorge.

In support of our testimony, the CTUIR offers a report by Hill and Associates that discusses the risks of derailments.

The CTUIR would like to see a study done that analyzes the impacts trains have on tribal fishing.

The study should identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge—both recent, and those projected to occur in the future.

There are many uncontrolled crossings along the Columbia River both within and outside the Gorge.

Funding must be provided to mitigate for the impacts of additional trains. Crossings must be improved, to better protect community members and tribal members lawfully accessing the river under the rights secured in our Treaty of 1855.

Many projects that involve shipment of crude oil through the Gorge are already operating.

Still more are proposed to accommodate more drilling in the Bakken Region of North Dakota and the Canadian Tar Sands.

The CTUIR believes increased shipments of crude oil will pose many threats to the communities in the Gorge and the citizens who live and travel through it, as well as tribal members and tribal fishers.

The derailment that we all witnessed on June 3, 2016 was a stark reminder of the risks we face from crude-by-rail shipments through the Columbia River Gorge.

The CUTIR is thankful that the accident didn't result in the loss of life or more significant property damage.

However this derailment should be a wakeup call to the region.

Currently, all crude-by-rail shipments into the Northwest travel through the Columbia River Gorge.

On June 3, tribal members were on the Columbia River and witnessed the damage caused by the spill.

The derailment could have been much worse and impacted the resources of the Gorge we all depend upon for decades.

The risks of transporting such inherently dangerous commodities require reconsideration of appropriate train speeds through the Gorge.

A regional Environmental Impact Statement should also be produced, to analyze the cumulative impacts and risks associated with the dramatic increase in fossil fuel transport.

Unless and until that is done, no additional projects should be approved.

Without knowing the cumulative impacts of all these projects, their potential risks cannot be fully understood, addressed, or mitigated until it is too late.



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

September 13, 2016

VIA ELECTRONIC MAIL AND U.S. MAIL

Angie Brewer
Wasco County Planning and Development Office
2705 East Second Street
The Dalles, OR 97058
angieb@co.wasco.or.us

**Re: Comments on Union Pacific Railroad's Application for Rail Extension
Application Number: PLASAR-15-01-0004**

Dear Ms. Brewer:

On behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), I submit to the Wasco County Planning Commission ("Commission") the following comments regarding Union Pacific Railroad's ("Union Pacific") Application for Rail Extension, Application Number PLASAR-15-01-0004, for inclusion in the record.

The Application would allow Union Pacific to make significant expansions to its rail line. Union Pacific requested approval to expand an existing railroad siding on either side of Mosier, Oregon for 4.02 miles of new second mainline track and realign existing track; place five new equipment shelters; install drainage structures, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and make a property line adjustment. The request also includes off-site wetland mitigation east of the primary project site.

The Yakama Nation stands opposed to the proposed rail expansion. As discussed in detail below, the Yakama Nation has significant interests that will be severely impacted and/or harmed by the proposed rail expansion, including:

- The proposed rail expansion may 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 proposed rail expansion will increase train traffic, which already poses a risk to the safety of the Yakama Nation's People, including tribal 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

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

to rail traffic in and around their usual and accustomed areas and other lands upon which Yakama People retain usufructuary rights pursuant to the Treaty of 1855 with the Yakama Nation (“Treaty”) (June 9, 1855, 12 Stat. 951).

- The proposed rail expansion could result in irreparable harm to the Yakama Nation’s cultural and natural resources.
- The proposed rail expansion would increase the risk of derailments and spills.
- The proposed rail expansion would increase emissions, negatively impacting climate change.

Accordingly, because of the significant and irreparable impacts that the proposed rail expansion will have on the Yakama Nation and its People, the Yakama Nation urges the Commission to deny Union Pacific’s Application.¹

I. Rail Expansion Negatively Impacts the Yakama Nation.

1. Rail Expansion Interferes with Yakama Nation’s Treaty Rights.

i. Rail Expansion Limits Access to Usual and Accustomed Areas.

The Yakama Nation is a federally recognized sovereign nation, a signatory to a Treaty with the United States. In the Treaty, the Yakama Nation explicitly reserved the right of its People to hunt, fish and gather, at their usual and accustomed places. Treaty, Art. 3. The Treaty provides:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The Yakama Nation’s Treaty rights are not granted to the Yakama Nation, but rather are “grants of rights from them—a reservation of those not granted.”² Treaties are the highest law of the land and create a special fiduciary duty and trust responsibility upon all agencies of the United States to protect Treaty rights, including fishing rights.³ These Treaty rights cannot be abrogated except by explicit Congressional authorization. Courts have consistently required federal agencies and states to keep the Treaty promises upon which tribes relied when they ceded huge tracts of land.⁴

¹ The Yakama Nation reserve any and all rights to supplement these comments with additional information to the fullest extent permitted by applicable laws, regulations, policies, and procedures.

² *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905).

³ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

⁴ See, e.g., *U.S. v. Winans*, 198 U.S. 371 (1905); *Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977); *U.S. v. Oregon*, 718 F.2d 299 (9th Cir.1983); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash.

Further, Treaty rights include a property right in adjacent lands “to the extent and for the purpose mentioned” in the treaties.⁵ As part of these Treaty rights, courts have confirmed that the tribes of Washington have a right to half of the harvestable fish in state waters.⁶

Accordingly, the Yakama Nation, as a sovereign nation, has a profound interest in the preservation of its Treaty rights. The *United States v. Oregon* and Boldt Decision also established the Yakama Nation as a co-manager of the fisheries resource with the State of Washington.⁷ The Yakama Nation actively regulates its fisheries; the Yakama Nation staffs the Yakama Nation Fisheries (“Fisheries”). The Fisheries focus on the protection of Treaty rights; the restoration of aquatic populations and their habitats; and ensuring the fish are honored, in a manner reflecting their paramount importance to the Yakama Nation’s People, diet and health. The Fisheries accomplish these goals using two primary methods: population and habitat management goals and actions and natural resource policies and regulatory mechanisms.

The Yakama Nation resides on central Washington’s plateau and along the Columbia River. While the Yakama Nation was officially recognized by the United States in 1855 by the Treaty, the People that comprise the Yakama Nation have lived in this area since the time immemorial. Historically, villages were located on or near waterways, in places where a variety of resources could be obtained. Currently, the People use vegetation and wildlife as both food resources and cultural resources. The People gather edible greens, roots and berries. The People hunt and fish, many earn their living fishing for salmon in the waters of the Columbia River and its tributaries. The proposed rail expansion has the potential to interfere with the Yakama Nation’s exercise of its Treaty rights, to hunt, fish, and gather in its usual and accustomed areas.

For example, the proposed rail traffic will directly interfere with fishing in the Columbia River. The Boldt Decision affirmed the Yakama Nation’s usual and accustomed fishing areas include the “Columbia River area” where “[a]pproximately four hundred tribal members fish commercially[.]”⁸ The Yakama Nation jointly regulates the exercise of its members’ Treaty fishing rights on the Columbia River.⁹ The court also noted that the Yakama Nation’s members utilize fish for both “ceremonial and personal” reasons and that they “have been and continue to

1996); *U.S. v. Washington*, 2007 WL 2437166 (W.D. Wash. 2007). See also *Confederated Tribes & Bands of Yakama Nation v. U.S. Dep’t of Agric.*, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010) (entering an injunction barring the shipment of garbage, as a landfill was located in an area where the Yakama Nation’s members exercised their Treaty rights).

⁵ *Winans*, 198 U.S. at 381 (finding the Yakama Nation retained the right to make use of the land surrounding the usual and accustomed sites, as required by its members, to exercise their Treaty rights).

⁶ *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the “Boldt Decision”), *aff’d*, 520 F.2d 676 (9th Cir.1975).

⁷ *U.S. v. Washington*, 384 F. Supp. at 403. The Yakama Nation was also a party to the *United States v. Oregon* proceeding, a federal case. The Yakama Nation participated in that long-running case in order to protect their Treaty fishing interest and to “exercise their sovereign powers in a coordinated and systematic manner to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both Treaty Indian and non-treaty fisheries.” 2008-2017 *United States v. Oregon*, Management Agreement, p. 1; *United States v. Oregon*, No. 68-513 (D. Or. Aug. 12, 2008) (Management Agreement adopted as an Order of the Court).

⁸ *Id.* at 382.

⁹ *Id.*

be very dependent on anadromous fish to sustain their way of life.” The court found that “[a]nadromous fish are vital” to the Yakama Nation’s members’ diets.¹⁰

As the Boldt Decision observed, many of the Yakama Nation’s usual and accustomed fishing areas lie along the Columbia River. Along the Columbia River, there are train tracks. The proposed rail expansion would be in Mosier, Washington, which is situated along the Columbia River. The proposed rail expansion raises two significant issues, in regards to the exercise of the Yakama Nation’s Treaty rights. Increased train traffic would limit both access to the Yakama Nation’s usual and accustomed fishing areas and would increase the risk of injury or death to tribal fishers.

In regards to access to fishing sites, there is the obvious impact that increasing train traffic will make it more difficult to cross the train tracks, limiting access to those sites that lie alongside train tracks. These significant impacts must be addressed in any proper analysis of the Application at issue here. Further, as discussed in detail below, increased train traffic results in an increased risk of trains derailing and spilling. Historically, the Yakama Nation has endured the loss of many traditional fishing places due to the development of the Columbia River and spills. The loss of more fishing sites due to a train derailment, or any resulting oil spill, would place an unacceptable cumulative burden of loss on the Yakama Nation. Again, these significant impacts must likewise be addressed in any adequate analysis on the Application.

ii. Rail Expansion Increases Risk of Injury and Death.

The biggest risk to the safety of tribal fishers when accessing fishing sites is the proximity of the train tracks to fishing sites. Many fishing sites can *only* be accessed by crossing train tracks. In order to access fishing sites, tribal fishers have to cross the train tracks, by foot or in vehicles. The crossings, especially in remote locations, do not always have signal and safety measures. Every time a tribal fisher crosses a train track they are exposing themselves to a significant risk of injury or death. Over the years, the Yakama Nation has suffered fatalities and injuries due to train strikes. Any increase in the train traffic would both make it more difficult for tribal fishers to access Treaty-protected fishing sites and would increase the safety risks faced by tribal fishers.

The Yakama Nation’s Treaty rights allow its People to maintain their customary way of life. The Treaty rights include the right to hunt, fish, and gather at all usual and accustomed places and throughout the Yakama Nation’s Ceded Lands, including those usual and accustomed places along the Columbia River at issue here. The proposed rail expansion would have a direct adverse impact to the Yakama Nation, its People, and its Treaty-reserved rights and Treaty-protected resources.

The Yakama Nation considers these impacts to the Yakama Nation’s Treaty rights unacceptable.

Further, in regards to mitigation, to put it simply, there is no mitigation adequate to address the diminishment or destruction of the Yakama Nations’ Treaty-reserved rights and Treaty-protected resources. There is no adequate mitigation that will compensate the Yakama Nation, or its People, for the continued degradation of our sacred places, and the incremental, but constant

¹⁰*Id.*

damage to our natural resources that sustain our culture and the constant threat to the livelihood and cultural practices of the Yakama People.

2. Rail Expansion Threatens Cultural Resources.

There are numerous cultural resources that would be at risk from increased train traffic. As previously stated, historically, the Yakama Nation situated its villages near waterways, in places where a variety of resources could be obtained. As a result, many of its cultural resources are located along the Columbia River. There are thousands of cultural and archeological sites up and down the Columbia River. For example, in Wasco County, close to where Mosier is located, is "She Who Watches." She Who Watches is one of the most famous petroglyphs in North America. She Who Watches is located approximately 120 feet from railroad tracks, near the Columbia Hills State Park, along the Columbia River.

She Who Watches, and other important cultural archeological resources would be at risk from increased rail traffic. These sites are at risk to oil spills and burning trains. Oil spills and fires can be damaging to archeological resources. In fact, current railroad operations are impacting cultural resource sites along the Columbia River, due to grading and other operations.

The significance of these cultural and archeological resources to the Yakama Nation cannot be overstated. Cultural resources represent the concrete, physical evidence of the Yakama Nation's presence and its relationship to the ancestors. The sites are a cultural record of the Yakama Nation's presence, since time immemorial. The sites are a physical connection to the Yakama Nation's past and the Yakama People's ancestors. These cultural resources are unique, priceless and irreplaceable. They cannot be restored in the event that a site is excavated or damaged and destroyed, as has happened before with routine rail operations.¹¹ The proposed rail expansion poses significant risks of adverse if not destructive impacts to these cultural resources.

3. Rail Expansion Threatens Fish and Wildlife.

As discussed above, the Yakama Nation has a significant interest in fish and wildlife restoration as the Yakama Nation considers it a part of its duties as co-manager of the fisheries. The Yakama Nation benefits from its fisheries management, as it allows them to preserve their cultural practices, including fishing and the use of fish in cultural ceremonies.

The Yakama Nation has made considerable investments into fish and wildlife restoration efforts. In 1996, the Yakama Nation has adopted the Wy-Kan-Ush-Mi Wa-Kish-Wit, or Spirit of the Salmon Plan; the Plan was updated in 2014. Accordingly, the Columbia River Basin is now engaged in one of the largest fish and wildlife restoration efforts in the world, more than \$300 million is being invested annually in this effort.

¹¹ Recently, a railroad bulldozed a known (to the railroad) Yakama Nation burial ground while the railroad was conducting so-called routine frontage road maintenance. The railroad's bulldozer scattered the remains of at least two Yakama ancestors in a wide swath of excavated materials. Only through the actions of a concerned landowner were the molested remains discovered and, partially, recovered for reburial. Unfortunately, this is not an isolated incident and is representative of railroad corporations' general apathy towards Yakama People and their culture and sacred places.

A wide variety of fish species that are significant and important to the Yakama Nation live in the Columbia River. The Columbia River contains chinook, sockeye, steelhead, coho and chum salmon. There are twelve different stocks of salmon and steelhead in the Columbia River Basin that are listed under the Endangered Species Act (“ESA”). The Columbia River also contains sturgeon, lamprey and smelt, all of which hold significant cultural value to the Yakama Nation.

The Yakama Nation’s substantial investment in restoring fish and wildlife populations, and their habitats, impacts both cultural and natural resources. These efforts, and the subject fish and wildlife, are threatened by the proposed rail expansion. As discussed below, the increased train traffic may result in a train derailment or spill, which would be devastating to the local fish and wildlife.

i. Rail Expansion Increases Risk of Derailment and Spills.

The proposed rail expansion would result in increased train traffic; this, in turn, would increase the likelihood of a train derailment and increase the possibility of a spill. Oil is frequently transported along the rail lines that border the Columbia River. A number of scientific studies have demonstrated the negative impact of an oil spill on fish:

- After a crude oil spill a period of acute mortalities is often observed; these acute mortalities can affect the entire foodweb from phytoplankton to apex predators.¹² Acute exposure is also very damaging to organisms during early development, such as invertebrate and fish larvae.¹³
- Chronic long-term exposure of salmon to small amounts of residual oil, particularly multi-ringed polycyclic aromatic hydrocarbons (PAHs), has been associated with reductions in salmon survival.¹⁴ Studies after the Exxon Valdez spill indicated that populations of pink salmon demonstrated elevated mortality for at least 4 years after the spill; mark and recapture studies demonstrated that pink salmon exposed to PAHs had elevated rates of post-release mortality, with an average reduction in adult survival of 35%.¹⁵
- There are complex food web interactions that may be negatively and indirectly affected by an oil spill, which are generally effects that are not immediately obvious; in considering oil spill effects, it is important to consider indirect effects

¹² Charles H. Peterson, et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, SCIENCE, Dec. 19, 2003.

¹³ J.P. Incardona, et al., *Deepwater Horizon Crude Oil is Cardiotoxic to the Developing Hearts of Large Pelagic Fish*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, 111(15): E1510-E1518 (2014).

¹⁴ A.M. Blanc, et al., *Anthropogenically Sourced Low Concentration PAHS: In Situ Bioavailability to Juvenile Pacific Salmon*, ECOTOXICOLOGY AND ENVIRONMENTAL SAFETY, 73(5): 849-857 (2010).

¹⁵ Corinne E. Hicken, et al., *Sublethal Exposure to Crude Oil During Embryonic Development Alters Cardiac Morphology and Reduces Aerobic Capacity in Adult Fish*, Proceedings of the National Academy of Sciences 108(17): 7086-7090 (2011).

that occur throughout the food web.¹⁶ Scientists from NOAA have developed food web understandings for the Columbia River Estuary.¹⁷

The studies indicate that oil can be difficult to remove from the environment and that oil can remain in an environment long after the spill has occurred. In making its decision, the Commission should consider the potential long-term impact of an oil spill.

For tribal fishers, there are many ways an oil spill will impact a fishing site. The most immediate effect would be the closure of an area, making the area inaccessible for fishing. Also, any residual oil at a fishing site may make it so the fish avoid the area; this would negatively impact the catch rate at the fishing site. Further, among tribal fishers a spill may result in stigmatism; many tribal fishers are leery of fishing in an area where there has been a spill. In sum, an oil spill may impact both the catch rates and the fishing efforts at a fishing site.

In addition to the protection of its restoration activities, the Yakama Nation also has a vested interest in the prevention of oil spills, as it is actively involved in spill response and clean up. The Yakama Nation has its own spill response team, called the Hazmat Team. The Hazmat Team typically responds to ten to twelve spills a month, and coordinates its efforts with the Washington State Department of Ecology, the Oregon State Department of Environmental Quality, and the Environmental Protection Agency. The Yakama Nation is also on the Northwest Area Committee, Region 10 Response Team. The Yakama Nation has been forced to respond to and clean up a variety of spills, as a direct result of train accidents and derailments, including the recent train derailment at Mosier, Washington.

The Yakama Nation's Hazmat Team spent two weeks at Mosier. There, a train derailment resulted in an oil spill and fire. The Hazmat Team were particularly concerned about salmon and lamprey populations, as oil was reaching the adjacent Columbia River through an outflow pipe of a wastewater treatment plant. Further, the train derailment at Mosier resulted in the closure of multiple tribal fishing operations.

Overall, the Yakama Nation will bear the costs associated with an oil spill. In addition to the risk to fishing sites and cultural and natural resources, the Yakama Nation will have to expend a significant amount of resources in dealing with the consequences of the proposed rail expansion. The increased risk of oil spills will have a direct impact on the Yakama Nation. It is important that the Commission consider these risks as part of a comprehensive analysis when making a decision on Union Pacific's Application.

4. Rail Expansion Increases Emissions, Negatively Impacting Climate Change.

The proposed rail expansion, and the resulting increase in train traffic, would increase the amount of greenhouse gases emitted. It is widely recognized that the emission of greenhouse

¹⁶ Charles H. Peterson, et al., *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, SCIENCE, Dec. 19, 2003.

¹⁷ H.L. Diefenderfer, *An Evidence-Based Assessment of the Cumulative Effects of Tidal Freshwater and Estuarine Ecosystem Restoration: Early Life-Stage Habitat Functions for Endangered Salmonids*, DRAFT REPORT FOR U.S. ARMY CORPS OF ENGINEERS: PORTLAND DISTRICT, 2012.

gases negatively impacts climate change. This issue is particularly important to the Yakama Nation, as climate change has, historically, had a disparate impact on indigenous peoples. As recognized by the United Nations Permanent Forum on Indigenous Issues:

Indigenous peoples are among the first to face the direct consequences of climate change, owing to their dependence upon, and close relationship with the environment and its resources. Climate change exacerbates the difficulties already faced by vulnerable indigenous communities, including political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment.¹⁸

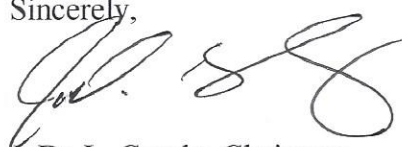
As previously stated, the People of the Yakama Nation have a very close relationship with the land and its natural resources. The People consistently gather vegetation to use as both food and cultural resources. Because of the Yakama Nation's symbiotic relationship with the lands and the natural resources on those lands, the proposed rail expansion's potential impact on climate change could have devastating, and disparate, impact on the Yakama Nation.

II. Conclusion

The proposed rail expansion has the potential to negatively impact the Yakama Nation's, its People and its cultural and natural resources. In short, the consequences of the proposed rail expansion could devastate the Yakama Nation. Accordingly, the Yakama Nation urges the Commission to deny Union Pacific's Application for Rail Expansion.

Thank you for your time and consideration. The Yakama Nation stands prepared to help provide any information the Commission may need in making its decision. If you have any questions, please feel free to contact the Yakama Nation through our attorney, Joe Sexton, who may be reached directly at (509)910-8842 or joe@galandabroadman.com.

Sincerely,



JoDe L. Goudy, Chairman
Yakama Nation Tribal Council

¹⁸ United Nations Permanent Forum on Indigenous Issues, *Climate Change and Indigenous Peoples*, INDIGENOUS PEOPLES INDIGENOUS VOICES 1 (2015), http://www.un.org/en/events/indigenousday/pdf/Backgrounder_ClimateChange_FINAL.pdf.



September 26, 2016

VIA ELECTRONIC MAIL AND U.S. MAIL

Angie Brewer
Wasco County Planning and Development Office
2705 East Second Street
The Dalles, OR 97058
angieb@co.wasco.or.us

**Re: Supplemental Comments on Union Pacific Railroad's Application for Rail
Extension Application Number: PLASAR-15-01-0004**

Dear Ms. Brewer:

This is intended to supplement the Confederated Tribes and Bands of the Yakama Nation's ("Yakama Nation") previous comments on the above-referenced matter, dated September 13, 2016 ("Comments").

We have been asked to specify whether Yakama Nation's Comments pertained to the Application only, or to both the Application and Wasco County Staff's Recommendation and Conditions of Approval ("Conditions of Approval"), and further to specify whether those Conditions of Approval mitigate the adverse impacts to Yakama Nation's Treaty rights that will result from the proposed rail expansion.

First, the Comments did address both the Application and the Conditions of Approval.

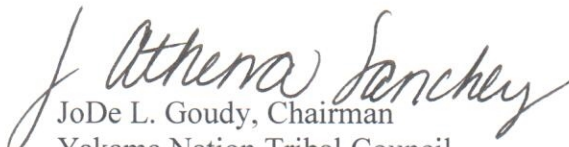
Second, Yakama Nation does not bargain its Treaty rights. We have no word for "mitigation" in our language, and see attempts to mitigate violations of our Treaty rights as the equivalent of bargaining away rights secured to our people by our ancestors 161 years ago, and leaving those who have yet to come with diminished rights. That is unacceptable.

That being said, to address whether the specific Conditions of Approval negate or neutralize the adverse impacts to Treaty rights threatened by the rail expansion project—they do not. Specifically, for example, we understand one condition on the rail expansion project being considered is to limit the number of trains utilizing the expanded tracks to roughly the current number of trains presently running through that area on a daily basis. But Yakama Nation questions how this condition, among others, will be enforced, and whether it can be enforced. We understand that Union Pacific Railroad specifically denies that this condition can be enforced. Accordingly, because the Applicant has already signaled that this specific condition is unenforceable, the significant impacts to Yakama Nation's Treaty rights that will result from rail expansion and the potential for increased rail traffic—which is promised by a number of current

and ongoing proposals to traffic fossil fuels through Yakama ancestral lands by rail, among other means of conveyance—are not reduced in any meaningful way. Accordingly, the proposed Conditions of Approval will not bring the project to a level where there are no adverse impacts to Yakama Nation’s Treaty rights. The Yakama Nation urges the Wasco County Planning Commission (“Commission”) to reject Union Pacific Railroad’s Application.

Thank you for your time and consideration. Unfortunately, Yakama Nation Tribal Leaders are otherwise committed today during the deliberation on this matter before the Commission. Notwithstanding, the Yakama Nation stands prepared to help provide any information the Commission may need in making its decision through its staff and attorney on this matter. If you have any questions, please contact Yakama Nation through our attorney, Joe Sexton who may be reached directly at joe@galandabroadman.com, or our Environmental Manager, Elizabeth Sanchey at esanchey@yakama.com

Sincerely,


JoDe L. Goudy, Chairman
Yakama Nation Tribal Council

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON
IN AND FOR THE COUNTY OF WASCO

IN THE MATTER OF THE WASCO COUNTY BOARD)	
OF COMMISSIONERS LAND USE PLANNING)	ORDER
CASE PLASAR-15-01-0004)	#16-067
)	
)	

NOW ON THIS DAY, the above matter having come on regularly for consideration, said day being one duly set in term for the transaction of public business and a majority of the Board of Commissioners being present; and

IT APPEARING TO THE BOARD: That on January 9, 2015, an application was received from Union Pacific Railroad and their consultants, CH2M Hill, for the expansion of an existing railroad siding on either side of Mosier, Oregon to create a new second mainline track and realign existing track; replace five equipment shelters; install drainage structures including ditches and culverts, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and off-site wetland mitigation. Following the submittal of additional information requested by staff, the application became complete

November 17, 2015. The project area begins at rail MP 66.98, east of the Wasco County line, approximately two miles west of the City of Mosier, and ends at rail MP 72.35, approximately three miles east of Mosier, within Memaloose State Park. The project area roughly parallels the Columbia River and Interstate 84. More specifically, the project crosses Township 3 North, Range 12 East, Sections 31 and 32; Township 3 North, Range 11 East, Section 36; and Township 2 North, Range 11 East, Sections 1, 2, and 3. The replacement of a signal building and two signal lights are also proposed at MP 74.73, approximately 2.4 miles east of the contiguous project area and off-site wetland mitigation is proposed on Wasco County Parcel 2N 13E Section 8 Lot 200 (Account # 1274). The project will be predominantly located on lands owned by Union Pacific Railroad. Portions of the project are also proposed to occur on lands owned by Oregon Department of Transportation and Oregon State Parks and Recreation. Offsite wetland mitigation will occur on lands owned by Skylar and Kathleen Schacht.

IT FURTHER APPEARING TO THE BOARD: That notice of the complete application was sent to adjacent property owners, key stakeholders and affected agencies required by the Wasco County National Scenic Area Land Use and Development Ordinance. All parties receiving notice of the application, including the general public, was invited to submit written comments on the application; and

IT FURTHER APPEARING TO THE BOARD: That at 3:00 p.m. on Wednesday, November 2, 2016, the Wasco County Board of Commissioners met to conduct a public hearing on the compliance of the proposed development with the applicable statute and

administrative rules. Notice of the hearing was published on March 11, 2016, April 26, 2016, June 1, 2016, June 23, 2016, August 11, 2016, and October 19, 2016, in *The Dalles Chronicle*, and was mailed to owners of property within 750 feet of the subject parcel. The public hearing was opened, the staff report was presented, and testimony was received. The Board opened the hearing, considered the matter, and based upon evidence and testimony presented at the hearings, voted 3 to 0 to deny the application on the basis that the proposal affects Treaty rights, to add back in the stricken conditions of approval, and affirm the Planning Commission decision on all other grounds.

FINDINGS OF FACT

Please see attached Board of County Commissioners Final Decision for PLAAPL-16-10-0001, 0002, and 0003 of PLASAR-15-01-0004.

CONDITIONS

1. Noncompliance with any condition placed on a conditional use permit shall be grounds for revocation of the permit. Revocation of a conditional use permit shall be considered a land use action reviewed by the Planning Commission.
2. Section 2.140 of the Wasco County National Scenic Area Land Use and Development Ordinance requires all conditions attached to approval of uses shall be recorded in the County deeds and records to ensure notice of the conditions to successors in interest.
3. The proposed development shall not significantly deviate from the application materials reviewed for consistency.
4. Final engineering drawings shall be provided to the Wasco County Planning Director for review and confirmation prior to commencement of construction.
5. Grading, excavation and vegetation removal outside of previously disturbed areas shall be the minimum necessary to allow for construction. Best management practices shall be implemented to prevent excessive erosion.

6. All exposed graded areas shall be reseeded with the following native seed mix at the earliest planting season following construction (CRGNSA Botanist Robin Dobson can be contacted at 541-308-1700 or rdobson@fs.fed.us with any questions about seed sources or modified mixtures to comply with this requirement).

Idaho fescue (*Festuca idahoensis*) 30%

Bromus vulgaris 30%

Blue wild rye 20%

Blue bunch wheatgrass 20%

Add some herbaceous seed (1 -2 oz of each):

Annual lupine (*L. bicolor*)

Yarrow

7. Temporary traffic impacts during construction activities shall be coordinated with the Oregon Department of Transportation and the Wasco County Public Works Department.
8. A declaration shall be signed by the landowner and recorded into county deeds and records specifying that the owners, successors, heirs and assigns of the subject property are aware that adjacent and nearby operators are entitled to carry on acceptable agriculture or forest practices on lands designated Large-Scale or Small-Scale Agriculture, Agriculture-Special, Commercial Forest Land, or Large or Small Woodland.
9. New signal buildings on lands adjacent to agriculture zoned lands suitable for agriculture use, shall comply with the 30-foot setback from vineyards and 75-foot setback from orchards specified in the agriculture setbacks of Chapter 3.
10. To comply with Flood Hazard Overlay Section 3.243(C)(1)(a) new construction and substantial improvements shall be anchored to prevent flotation, collapse, and lateral movement of the structure in the event of a flood. The applicant is required to submit final specification sheets and an explanation of all building materials and methods utilized to demonstrate anchoring, flood proofing and flood damage resistance and minimization.
11. Certification by a registered professional engineer or architect that the flood-proofing methods for any non-residential structure meet the flood-proofing criteria in Section 3.243.D.6-Specific Standards is required.
12. Temporary construction site identification, public service company, safety, or information signs cannot be greater than 32 square feet. Exceptions may be granted for public highway signs necessary for public safety and consistent with the Manual for

Uniform Traffic Control Devices. Removal of temporary construction site identification must be accomplished within 30 days of project completion.

13. Coal cars are required to be covered.
14. A spill response plan for derailment or other railroad accident is prepared or made available prior to the commencement of construction.
15. UPRR shall stay within the existing range of 20 to 30 trains per day as stated in the application materials.
16. UPRR to adhere to all FRA safety standards, a including any safety improvements that are optional.
17. UPRR shall provide regular training to Gorge fire departments included in the Mid-Columbia Five County Mutual Aid Agreement and requires UPRR to solicit feedback about local needs for combatting a railroad related fire incident and assist in meeting those needs.
18. UPRR is required to comply with Chapter 11 for wildfire safety and prevention. Required compliance with fire safety standards shall be disclosed to future land owners prior to sale of any parcel.
19. UPRR must verify the use complies with all applicable federal, state, and local laws.

Treaty Rights Conditions:

20. The proposed development shall not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains.
21. UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings.

22. Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act.

Scenic Resource Conditions:

23. Colors approved for new structures include the colors identified in the *Interstate 84 Corridor Strategy Plan* for the eastern Gorge, including: Sherwin Williams “Otter” for signal buildings, any railing, support structures for signage, and retaining walls; and Federal Color 30099 for any new painted fences, lighting, and other associated equipment. The color palette for eastern stone facades (retaining walls) provide that “Otter” shall be the predominant base color, and that Sherwin Williams “Black Fox” and Miller Paint “Dapper” shall be used as highlights. If different brands are used, they shall match the color codes of these paint colors. To achieve a more natural appearance, colors are to be applied to the retaining wall surface as a multi-step, multi-colored staining process applied in the field. The Oregon Department of Transportation implements these requirements and may be source of technical assistance.

If the communications poles are untreated, they shall be painted “Otter”.

24. Rock blasting shall occur in irregular patterns to produce a natural appearing cut face. Half casts shall be removed.
25. Clearing of 6.62 acre SMA Open Space area landing zone identified on the site plans east of the rock blasting site is prohibited.
26. Concrete retaining walls shall be stamped with a natural basalt rock pattern to emulate the surrounding landscape;
27. Existing trees north of the retaining wall and temporary construction areas shall be retained and maintained for screening to the maximum extent practicable;
28. Revegetation of the temporary construction areas shall occur within the first planting season immediately following completion of construction. Revegetation shall occur in compliance with the conditions of approval for natural resources below.

29. Ends of exposed culverts in the SMA shall be a dark earth-tone color listed above.
30. Guardrail repair shall be in-kind to continue the visual aesthetic of the existing guardrail system. In the event of an entire guardrail system replacement, corten pre-weathered guardrail material shall be used, consistent with the *Interstate 84 Corridor Strategy*.
31. All sign support structures and the backs of single sided signs to be dark brown or black with a flat, non-reflective finish, consistent with the *Interstate 84 Corridor Strategy*.
32. The surfaces of equipment buildings shall be treated with an approved polyacrylic paint and sand mixture to add texture and thus reduce reflectivity.
33. No new screening vegetation is required, but a condition of approval is included to require the retention of existing screening vegetation, existing backdrop vegetation, and the prohibition of the clearing in the 6.62acre SMA Open Space landing zone.
34. Where it does not interfere with UPRR Uniform Signal Systems and Standards, all signal lights and affiliated structures are to be treated with a dark earth tone color. Outdoor lighting shall be directed downward, sited, limited in intensity, shielded and hooded in a manner that prevents the lighting from projecting onto adjacent properties, roadways, and the Columbia River as well as preventing the lighting from being highly visible from Key Viewing Areas and from noticeably contrasting with the surrounding landscape setting. Shielding and hooding materials shall be composed of non-reflective opaque materials. There shall be no visual pollution due to the siting or brilliance, nor shall it constitute a hazard for traffic.

Natural Resource Conditions:

35. The proposed clearing of SMA Open Space Areas identified as the “6.62-acre site near project MP 71.53” for temporary construction is **prohibited** due to the sensitive natural resources that exist in that area and the environmental constraints that prevent the proposed impacts from being temporary.
36. In all other locations, the wetland mitigation plan shall be implemented as specified in the Tooley Lake Wetland Mitigation Update (dated November 17, 2015); Implementation of the Sensitive Species and Wildlife Habitat Protection and Rehabilitation Plan (dated January 2015).
37. Wetlands restoration, creation, and enhancement efforts should be completed before a wetland is altered or destroyed. If it is not practicable to complete all restoration, creation, and enhancement efforts before the wetland is altered or destroyed, these efforts shall be completed before the new use is occupied or used. Five years after a wetland is restored, created, or enhanced at least 75 percent of the replacement

vegetation must survive. The project applicant shall monitor the hydrology and vegetation of the replacement wetland for five years and shall take corrective measures to ensure that it conforms with the approved wetlands compensation plan and this guideline.

38. Blasted rock materials must be moved from the project area for off-site crushing at an existing quarry, in Urban Area, or outside of the NSA.
39. Avoid areas of identified special-status plant populations, priority habitats, sensitive wildlife and plant areas, and their buffer areas to the maximum extent practicable.
40. Implement microsite slight relocations of proposed project facilities to avoid special-status plant populations or habitats if practicable.
41. Remove and conserve plants that will be directly affected; replant immediately following construction.
42. Implement weed control procedures to prevent spread of noxious weeds to native plant habitats.
43. In the Special Management Area, any Oregon white oak trees removed for the project shall be mitigated at a ratio of 8:1. New trees shall be planted in a natural appearing configuration at a spacing of at least 15 feet between trees. Newly planted trees and existing Oregon oaks near the affected area, shall be monitored for a minimum of four years following the completion of construction to ensure survival. Monitoring reports shall be prepared and provided by a qualified professional in conjunction with the annual monitoring reports required for the approved wetland mitigation plan and habitat mitigation plan.

Cultural Resource Conditions

44. UPPR shall comply with Section 14.500(G) provides requirements for the protection of cultural resources discovered after construction begins; and Section 14.500(H) for the protection of human remains discovered during construction.
45. If cultural resources or human remains are discovered during construction, development shall cease immediately and the owner shall notify Wasco County Planning Department (541-506-2560), the Columbia River Gorge National Scenic Area Heritage Program Manager, the Columbia River Gorge Commission (509-493-3323), the four treaty tribes, and the State Historic Preservation Officer. If human remains are found, law enforcement shall be contact immediately.

Recreation Resource Conditions

46. UPRR shall work with the Oregon Parks and Recreation Department to develop a Columbia River access feasibility study to ensure long term impacts of the railroad do not impact established recreation uses or sites. Improved access from State Parks properties to the Columbia River shall be the outcome of this study and any resulting action items. The study shall be initiated with the Director of Oregon State Parks following the appeal period, but within 45 days of the final decision. Improved access, as identified and agreed upon by UPRR and Oregon State Parks as a result of this study shall be accomplished within two years of the commencement of development; extensions may only be requested by Oregon State Parks.
47. Construction activities on the road shared with OPRD for the Memaloose State Park Campground must occur either outside of the peak recreation season, or trucks used for hauling the blasted and crushed materials must be covered to minimize dust and related impacts to visitors at the park.

Miscellaneous Conditions:

48. Staff recommends but cannot require UPRR to work with the Oregon Department of Transportation to commence seismic stability studies and verify structural safety at the development sites located within the Mosier Urban Area.

CONCLUSIONS OF LAW

1. This request is for the expansion of an existing railroad siding on either side of Mosier, Oregon to create a new second mainline track and realign existing track; replace five equipment shelters; install drainage structures including ditches and culverts, a retaining wall, new lighting and signage, and wireless communication poles; modify existing utilities, temporary landing zones for construction; construct temporary and permanent access roads; and off-site wetland mitigation.
2. With findings of fact in the Summary of Information and Board of Commissioner's Final Decision Report published on November 10, 2016, the Board's decision is consistent with The Columbia River Gorge National Scenic Area Act, The Management Plan for the Columbia River Gorge National Scenic Area, the Wasco County National Scenic Area Land Use and Development Ordinance, Oregon Revised Statute, and Oregon Administrative Rules.

NOW, THEREFORE, IT IS HEREBY ORDERED: That the Wasco County Board of Commissioners denies the proposed development on the basis that the proposal affects treaty rights, to add back in the stricken conditions of approval, and affirm the Planning Commission decision on all other grounds.

SIGNED THIS 10th DAY OF November, 2016.

WASCO COUNTY BOARD
OF COMMISSIONERS

Rod L. Runyon, Commission Chair

APPROVED AS TO FORM:

Scott C. Hege, County Commissioner

Kristen Campbell
Wasco County Counsel

Steven D. Kramer, County Commissioner