

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.

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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

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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.”

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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.

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- 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

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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.”

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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

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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

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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.

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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

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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 propose 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 object 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 impermissible 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.

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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

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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.

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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

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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

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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

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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...”

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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.