ATTACHMENT F

Dunn Carney Allen Higgins & Tongue LLP
ATTORNEYS AT LAW

WASCO COUNTY PLANNING
AND DEVELOPMENT
2705 EAST SECOND ST.
THE DALLES, OR 97058
Rcd 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.)

Member
MERITAS
LAW FIRMS WORLDWIDE

INDEPENDENT MEMBER OF MERITAS
WITH AFFILIATED OFFICES IN MORE THAN 250 CITIES AND 60 FOREIGN COUNTRIES

ATTACHMENT F

If you have any questions concerning the above, please do not hesitate to call.

Very truly yours,

Ty K. Wyman

TKW:car
Enclosures
cc: Luke Baatz, Union Pacific Railroad (UPRR)
Linnea Eng, CH2M
DCAPDX_2187087_v1

ATTACHMENT F

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)

ATTACHMENT F

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

[illegible], 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 Mosier[1]. Two of the four Columbia River treaty tribes[2] 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.

<u>The Law Precludes Conditions 21 and 47</u>

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

Minutes of the September 9, 2016 Hearing Attachment B Page 172 line 1.

[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 stope 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.").