

# ATTACHMENT G

## Staff Response to Appeal PLAAPL-16-10-0002

**Appeal Number: PLAAPL-16-10-0002**

**Appellant: Union Pacific Railroad**

Grounds for appeal provided by the applicant are listed below in **bold font**; Staff's response follows each ground in regular font.

### **Public Interest in River Access is Best Accomplished by a Voluntary Process.**

**Conditions 21 and 47 require UPRR to address tribal access demands that extend well beyond this project. They mandate a Gorge-wide study that includes consideration of impacts well beyond construction of four miles of track. They also put an arbitrary deadline on UPRR to bring other parties to the negotiating table. Several policy considerations support our request that the Board decouple the tribal river access solution from the construction of four miles of track.**

Condition 21 of the Planning Commission's Final Decision states:

"UPRR shall provide two (2) safe crossings for National Scenic Area treaty tribe members within Wasco County. The safe crossings will each include a minimum of new crossing lights and crossing arms for safety. The safe crossings must occur in locations deemed appropriate by the four treaty tribes. Following the appeal period, but within 45 days of the final decision, UPRR shall establish contact to begin this work. The safe crossings shall be completed within two years of the commencement of second mainline development; extensions of this timeline may be requested by the tribes. Please note a subsequent review may be required depending on the scope and location of proposed safe crossings."

Condition 47 of the Planning Commission's Final Decision states:

"Prior to construction, UPRR shall work with the Confederated Tribes of the Umatilla Indian Reservation on the development of a study to analyze the impacts of trains on tribal fishing. The study shall identify uncontrolled crossings tribal fishers use and the number of train fatalities related to train traffic in the Gorge - both recent and those projected to occur in the future. The study shall include identifying and designating funding necessary to mitigate the impacts of additional trains. As a result of the study, crossings must be improved to better protect tribal members lawfully accessing the river under treaty rights established in 1855 and protected by the National Scenic Area Act."

Please see Appendix F for the full text of the appeal, including points made to support this ground for appeal. The appeal is supported by four points summarized here by Staff: (1) that this project did not create the existing and ongoing river access issue throughout the Gorge, (2) that UPRR has demonstrated an ability to work voluntarily with stakeholders to improve access along railroad tracks, (3) the tribes are not the only stakeholders seeking access to the Columbia River (other stakeholders include the City of Mosier and Oregon State Parks and Recreation), and (4) Conditions 21 and 47 fail to recognize federal and state policies governing railroad grade crossings including public safety requirements of Oregon Department of Transportation.

# ATTACHMENT G

Staff agrees that this project did not create the current access constraints to the Columbia River at most locations. Staff is aware that there is an existing river access issue as well as a noise issue, identified in the Oregon State Parks Gorge Unit Plan. Staff also notes that although the proposed project cannot drive market forces to immediately bring more rail traffic, the removal of the “pinch point” ultimately provides the railroad the ability to expand traffic when the market can support it.

It is important to note that when evaluating impacts of a proposed development, it is required by the Management Plan for the Columbia River Gorge National Scenic Area and the Wasco County National Scenic Area Land Use and Development Ordinance, that Staff evaluate the direct and indirect impacts of the proposed development as well as the individual and cumulative effects of the development. This includes projecting likely outcomes of the proposed development and identifying significant changes from the current use. If potential changes of concern are anticipated, conditions of approval are typically applied to ensure the approval does not inadvertently allow unintended consequences to public health and safety or protected resources.

UPRR may have demonstrated past successes in voluntary compliance, but the Management Plan and NSALUDO require demonstrated or required compliance prior to concluding that there will be no adverse effects to sensitive and protected resources. If the applicant had sought to do this activity voluntarily, it should have been done prior to application to the County so that stakeholders could accurately and comfortably state that they had no resource impact concerns or that a solution was already underway. Voluntary compliance does not make it any easier to make progress, and does not afford any guarantee that the stakeholder’s concerns will be addressed adequately, and in a timely manner.

Staff agrees the tribes are only one of several interested stakeholders seeking improved access to the Columbia River. Access improvements are also being sought by the Community of Mosier and the Oregon State Parks and Recreation Department. The tribes however, are not interested in pursuing or securing recreation access, they are solely interested in preserving their access as allowed by Treaty Rights. As well, recreationists are seeking a different form of access, and a different kind of activity on the river. The Columbia River Gorge is riddled with conflict between recreation uses and tribal fishing uses. These two uses typically do not co-exist well, which is why the conditions of approval explicitly separate the needs identified by stakeholders during the review process. Furthermore, any recreation access changes will need to be confirmed for Treaty Rights impacts prior to establishment or approval. It is clear to staff that the access issues identified by the tribes and Oregon State Parks need to be addressed separately.

The appellant states: “Any grade crossing... will be subject to stringent regulations of the Federal Railroad Administration and ODOT.” Stringent regulation does not mean prohibited.

Staff Conclusion: The conditions of approval requiring the applicant to work with the tribes and Oregon State Parks to identify and implement improvements for river access is doable, has a direct nexus to resource impacts identified in the Scenic Area Review process and is not arbitrary.

## **The Law Precludes Conditions 21 and 47**

**Beyond these policies, several legal considerations demonstrate that the County may not enforce mandates set forth in Conditions 21 and 47. Repeatedly, we observe that the conditions rest on**

## ATTACHMENT G

**misconstruction of the law. We further observe in several instances that, even under the project opponents' vision of the law, the record does not support these conditions.**

**At the top of this legal heap stands the Commerce Clause of the U.S. Constitution. A bedrock of federalism is that state and local governments not be able to impede transcontinental trade..."**

Please see Appendix F for the full text of the appeal, including points made to support this ground for appeal. The following response has been provided by County Counsel, Kristen Campbell:

"While the scope of the Interstate Commerce Commission Termination Act's preemption is broad, there are exceptions to its preemptive effect. Specifically, the Surface Transportation Board has expressly held that this preemption is not intended to interfere with local implementation of federal environmental statutes such as the National Scenic Area Act ("NSA"). *Boston and Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971, 2001 WL 458685, at \*5 (S.T.B., Apr.30, 2001). By consenting to that NSA, Congress transformed that Act into federal law and precedent clearly establishes instances where similarly situated regional agencies' land use plans have been recognized as federal law.

Next, whether a particular federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. None of the proposed conditions suggest that the County is enforcing the NSA management plan in a discriminatory manner or as a pretext to frustrate Applicant's operations or that they would "unduly restrict" railroad operations particularly when it is unlikely that cost alone is an unreasonable burden. Furthermore, the 3<sup>rd</sup> Circuit has concluded that a local government may enforce generally applicable regulations relating to health and safety as long as they do not discriminate against or unreasonably burden rail carriage. *New York Susquehanna v Jackson*, 500 F3d 238 (3d Cir 2007).

Finally, a compact that is federal law is treated as any other federal statute in a conflict-of-laws analysis. If federal schemes conflict, it can be argued that the Act which: 1) authorized the compact that created the Columbia River Gorge Commission; 2) required the Columbia River Gorge Commission to adopt a regional management plan; and 3) required Wasco County to adopt land use ordinances consistent with the management plan, should be given effect because it is a congressional enactment passed later in time and is more specific, limited to a narrow geographical region. *See generally, Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F Supp 2d 1062, 1073 (E D Cal 1998)."

Staff Conclusion: The NSALUDO implements federal law (the Columbia River Gorge National Scenic Area Act) to ensure that all new uses and development do not adversely affect explicitly protected scenic, cultural, natural, recreation resource and treaty rights. In the project area, the railroad is subject to this law, as it is implemented through the local Scenic Area Ordinance of Wasco County.

**...In sum, then, there is simply no evidence that the project would affect or modify treaty rights. Without such evidence, NSALUDO 14.800(D) provides no basis on which to compose Conditions 21 and 47.**

**The County's authority to condition approval of the subject application is further limited. As UPRR noted in its September 21 memo, the record before the Planning Commission included no evidence of**

## ATTACHMENT G

**“any project impact that necessitates or even supports a condition requiring to provide this Access.” Such evidence is required by Nollan v. California Coastal Commission...and Dolan v. City of Tigard...The record still lacks it.**

Three letters were received before the Planning Commission expressing Treaty Rights impacts: two from the Umatilla and one from the Yakama Nation. A second letter was received from the Yakama Nation September 26, 2016 – after the Planning Commission record was closed. All four letters may be considered by the Board for their review; they are attached in Appendix J.

The letters provide specific concerns that include, but are not limited to, Treaty Rights access and safety of access that would result from an increase in rail traffic afforded by the physical development proposed to eliminate an existing bottleneck where traffic must currently slow down. At the Planning Commission hearing, UPRR staff stated that rail traffic is driven by market demands. When asked, UPRR staff confirmed that the proposed development would allow for increased velocity, more efficient movement and a possible expansion of freight carried through the project area. Staff proposed conditions of approval to address these concerns by limiting rail traffic to the current average of 20 to 30 trains per day and to require the proposed development to not directly result in significantly increased net volume of rail traffic, including number of individual trains, length of trains, or speed of trains. The Planning Commission voted to remove these conditions due to the difficulty in enforcing them with current staff capacity and tools.

NSALUDO Section 14.800(D) explains how the treaty rights protection process may conclude, it states:

- “1. The County will decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe.
  - a. The final decision shall integrate findings of fact that address any substantive comments, recommendations, or concerns expressed by Indian tribal governments.
  - b. If the final decision contradicts the comments, recommendations or concerns of Indian tribal governments, the County must justify how it reached an opposing conclusion.
2. The treaty rights protection process may conclude if the County determines that the proposed uses would not affect or modify treaty or other rights of any Indian tribe. Uses that would affect or modify such rights shall be prohibited.
3. A finding by the County that the proposed uses would not affect or modify treaty or other rights, or a failure of an Indian tribe to comment or consult on the proposed uses as provided in these guidelines, in no way shall be interpreted as a waiver by the Indian tribe of a claim that such uses adversely affect or modify treaty or other tribal rights.”

Findings 80 and 81 on page 119 and 120 of the Planning Commission’s Final Decision Report describe the Treaty Rights impacts and concerns expressed by the Umatilla, prior to the first Planning Commission hearing. Both letters received from the Yakama have been provided after viewing the Staff Report findings and recommended conditions of approval. The Planning Commission’s removal of

## ATTACHMENT G

conditions to address rail traffic, in response to Treaty Rights concerns, has resulted in an appeal from the Yakama Nation.

Staff Conclusion: The potential increase in market driven rail traffic afforded by the physical improvements to an existing bottleneck is difficult to predict. However, it is clear from application materials and testimony provided by UPRR staff at the Planning Commission hearings that the project will allow for a potential increase in traffic, if the market demanded it. The potential increase is a known factor and has direct nexus to potential impacts associated with the physical development proposed by UPRR. This confirms the nexus of the physical development to the Treaty Rights impacts and concerns expressed by the Umatilla and Yakama. As stated in (2) above, “uses that would affect or modify such rights shall be prohibited”.