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To: Wasco County Board of County Commissioners
From: Gary Kahn, Reeves Kahn Hennessy & Elkins
Date: November 1, 2016
RE: PLAAPL-16-10-0001

I. Introduction

Union Pacific (“the Applicant”) proposed to build 4.02 miles of new mainline track and other associated facilities including new buildings within the Columbia River Gorge National Scenic Area (“the NSA”). Earth-disturbing work outside of the Mosier Urban Area would involve 11.22 acres of temporary disturbance and 19.58 acres of permanent disturbance, the installation of a new rock retaining wall, and construction of new temporary and permanent access roads. A cut through a mesa would also be greatly expanded through blasting. The applicant also requests four variances exceeding 50% of the applicable standards including a variance to the Columbia River development setback standard, the scenic travel corridor setback standard for I-84, the wetland buffer standard, and the sensitive plant buffer zone standard. Twelve wetlands, five lakes, and the Columbia River would be affected with a total of 0.41 acres of permanent open water disturbance, 0.75 acres of permanent disturbance to vegetated wetlands, and 8.75 acres of permanent disturbance to buffer areas.

This document outlines legal arguments made on behalf of Friends of the Columbia Gorge, Columbia Riverkeeper, and Oregon Physicians for Social Responsibility (collectively “Appellants”). In both oral and written substantive comments, the Appellants identified dozens of areas where the application fails to comply with the Columbia River Gorge National Scenic Area Act (“Gorge Act”), the Management Plan for the Columbia River Gorge National Scenic Area (“Management Plan”), and the National Scenic Area Land Use and Development Ordinance for Wasco County (“NSA-LUDO”). Despite being apprised of these issues, the Planning Commission approved the application and issued a Staff Summary with Planning Commission Revisions (“Staff Report”) and decision (collectively “Decision”). In this filing we also reply to arguments made in the Staff Response to Appeal PAAPL-16-10-0001 (“Staff Response”). We ask the Board of County Commissioners to reverse the Planning Commission and deny the application.

II. The proposal does not comply with the Gorge Act, the Management Plan, and the NSA-LUDO.

The Decision violates the general provisions and zoning ordinances of the Gorge Act, the Management Plan, and the NSA-LUDO in various ways. Twelve of those violations are highlighted below.

- a. The Management Plan does not allow expansion of railroads in the General Management Area (“GMA”) Open Space zone. However, about half of the proposed expansion is in this zone.*

The Staff Report explains that “[t]he proposed development includes the improvement and expansion of an existing railroad structure and transportation facility, within the GMA and SMA¹ Open Space zones.” Staff Report at 19. To permit the rail expansion, the Planning Commission relied on NSA-LUDO § 3.180(D)(2) which lists “improvement and expansion” of transportation facilities as a review use in GMA Open Space. However, expansion of transportation facilities in the GMA Open Space zone is not allowed by the Management Plan.² Where the Management Plan is more restrictive than the NSA-LUDO, the Management Plan controls. *See, e.g., NSA-LUDO § 1.070* (“When conditions herein imposed are less restrictive than comparative provisions imposed by any other provision of this Ordinance by resolution of State Law or State Administration regulations, or Management Plan Guidelines, then the more restrictive shall govern.”)

The Staff Response fails to address NSA-LUDO § 1.070 and concludes that the expansion of railroads is allowed in the GMA Open Space zone without ever addressing Appellants contentions. Staff Response at 1. The Management Plan does not allow expansion of railroads in the GMA Open Space zone. Thus, the railroad cannot be expanded in this zone. A condition of approval must be added to prohibit expansion of the railroad in this zone or the application must be denied.

- b. This project cannot be lawfully permitted in the GMA Large-Scale Agriculture zone because the legally required resource-by-resource, parcel-by-parcel analysis of the affected resources was not done and because the Applicant has not demonstrated that the new track is the minimum size necessary to provide the service as required by County ordinance.*

The Applicant and the Planning Commission relied on NSA-LUDO § 3.120(E)(20) as the permitting mechanism for the portion of the proposal within the GMA Large-Scale Agriculture zone. *See* Staff Report at 17–18. However, the finding adopted by the Planning Commission does not adequately address either of the criteria in NSA-LUDO § 3.120(E)(20). NSA-LUDO §

¹ Special Management Areas.

² *Compare* “Repair, maintenance, operation, and improvement of existing structures, trails, roads, railroads, utility facilities, and hydroelectric facilities.” Management Plan at II-3-5 *with* “Repair, maintenance, operation, and improvement and expansion of existing serviceable structures, including roads, railroads, hydro facilities and utilities that provide sewer, transportation, electric, gas, water, telephone, telegraph, telecommunications.” NSA-LUDO § 3.180(D)(2).

3.120(E)(20)(a) requires an analysis of practicable alternatives that would have fewer adverse effects on “scenic, cultural, natural, recreational, agricultural or forest lands” and also requires the size of the facility to be the minimum necessary to provide the service. *Id.* The Applicant, while purporting to have performed a large-scale analysis and asserting that it must have a minimum of 5 miles of continuous double tracks through the NSA to reap an undefined amount of operational efficiency, has not studied practicable alternatives on a resource-by-resource or parcel-by-parcel basis. Until it does so, NSA-LUDO § 3.120(E)(20)(a) is not met. Without sufficient detail on exactly what resources would be impacted and what the barriers are to alternatives, there is simply not enough information to conclude that “[t]here is no practicable alternative location with less adverse effect on the scenic, cultural, natural, recreational, agricultural or forest lands.” *Id.* The Staff Response merely refers to the analysis in the Staff Report. However, nowhere in the Application, the Staff Report, or the Staff Response is the required analysis to confirm that “[t]here is no practicable alternative location with less adverse effect on” the resources.

Additionally, NSA-LUDO § 3.120(E)(20)(b) requires a project to be “the minimum size necessary to provide the service.” The Applicant already provides rail service through the area and it asserts in its application that the project is for efficiency improvements, rather than to provide any different or expanded service. *See, e.g.,* PC 1 1-49. Based on the Applicant’s own words, the current size is already the minimum necessary (or larger) to provide the intended service, so NSA-LUDO § 3.120(E)(20)(b) is not met. Even if it was met, the Applicant proposes 5.37 miles of double track but asserts that “a minimum of 5 miles of contiguous second mainline track is required. . . .” PC 1 1-162. By the Applicant’s own admission, 5.37 miles is not the minimum size necessary to provide the service. For this reason alone, the proposed project cannot be permitted through the GMA Large-Scale Agriculture zone under NSA-LUDO § 3.120(E)(20).

The Staff Response contains no analysis and simply adopts the Applicant’s conclusion – that the expansion must be exactly as proposed by the Applicant to achieve an undefined amount of operational efficiency. This does not constitute evidence, much less substantial evidence of compliance with the ordinance. A condition of approval must be added to prohibit expansion of the railroad in this zone or the application must be denied.

c. The proposed new culvert cannot be legally placed in the GMA Open Space zone.

NSA-LUDO § 3.180 specifies which uses are allowed in the GMA Open Space zone. Culverts are not allowed. Culverts often block fish passage or provide access to habitat that is not appropriate for native fish but harbors non-native predatory species that harm native fish. The culvert is a prohibited use and cannot be lawfully permitted. NSA-LUDO § 3.180(F). If appropriate, a bridge must be constructed instead. The Staff Response does not address any legal justification for the new culvert. The Management Plan specifically allows culverts in some zones and not in others. The County must deny the proposed new culvert or condition the application so that the new culvert is not placed in the GMA Open Space zone.

d. The temporary construction area in the GMA Water zone is not an allowed use.

A construction area is proposed in the GMA Water zone. There are no specific zoning regulations for uses in the GMA Water zone, however, the Management Plan does list uses allowed outright and through expedited review that apply to the GMA Water zone. Management Plan at II-7-11–II-7-15; II-7-20–II-7-22. While “[r]epair, maintenance and operation of existing. . . railroads” is a use allowed outright, improvement and expansion of railroads is not. Management Plan at II-7-11. Where a use is not allowed outright, allowed through expedited development review, or allowed through conventional development review, it is prohibited. *See* NSA-LUDO § 3.020. (“A legal parcel may be used and a legal structure or part of a legal structure may be constructed, moved, occupied, or used only as this Ordinance permits.”) Thus, this use cannot take place.

The Staff Response implies that any use that complies with Chapter 14 is allowed in this zone and then lists water-dependent development and water-related recreation development (docks, boathouses, and moorage buoys) that have been unofficially countenanced by the Gorge Commission in the past. Staff Response at 4. The Management Plan is clear that only water-dependent development and water-related recreation development are allowed on the banks of the Columbia River. *See, e.g.*, Management Plan at I-1-6, I-1-11. This logically extends to uses that are in the river. A condition of approval must be placed on the decision to prevent this use or the County cannot lawfully approve the application.

e. Culverts in SMA Public Recreation zone are not an allowed use.

New culverts are proposed in the SMA Public Recreation zone.³ New culverts are not allowed in this zone for the reasons stated in Section II.c above. This is also a bright line rule. NSA-LUDO § 3.170(F). Since the culverts are not allowed, adverse impacts to fish must be avoided rather than mitigated or bridges must be substituted. The application must be denied or a condition of approval requiring avoidance of impacts on fish passage and prohibiting the culverts must be included.

f. The Decision unlawfully approves signage without adequate evidence and findings to support the decision. The Staff Report references Chapter 23 (Sign Provisions) but does not address it. In addition, the Applicant has not specified signage locations in its application. Therefore, whether the signage meets scenic area criteria cannot be evaluated and the signage cannot be approved.

The Applicant claims that all of its signage is exempt from permitting requirements because it falls under NSA-LUDO § 3.100(H)(4). *See, e.g.*, PC 1 1-184, PC 1 1-209. However, that provision only applies to “**public** regulatory, guide, and warning signs” “provided [t]he signs comply with the Manual for Uniform Traffic Control Devices.” NSA-LUDO § 3.100(H)(4) (emphasis added). The railroad is a private entity and its private “regulatory, guide, and warning signs” are not exempt from the sign provisions of Chapter 23. In addition, according to the

³ It is not clear from the materials provided by the Applicant if these culverts are still proposed. If so, they are not allowed by the NSA-LUDO and the Management Plan. If not, there is insufficient specificity in the application materials to determine that the project complies with the NSA-LUDO and the Management Plan.

Federal Highway Safety Administration, the Manual on Uniform Traffic Control Devices “defines the standards used by road managers nationwide to install and maintain traffic control devices on all public streets, highways, bikeways, and private roads open to public travel.” See <http://mutcd.fhwa.dot.gov/>. It is not a private railroad standard. This makes it clear that § 3.100(H)(4) does not apply to the signs proposed by the Applicant but rather to road signs.

Additionally, the Applicant has not identified the signage it plans to install with sufficient specificity to determine if it complies with Chapter 23. In fact, the application says that signage locations would be determined in the field. PC 1 1-73. There is no way to determine if the signs comply with the requirements of Chapter 23 and with scenic area standards without specific locations. For example, there does not appear to be a path to permitting signage in SMA Open Space. If signs are proposed in this zone then they must be denied. In addition, signs with flashing lights are not allowed. The Staff Response does not address any of these arguments. Staff Response at 5. Signage must be located with sufficient specificity so that proper review can take place, a condition of approval must be added to deny the signs, or the application must be denied.

- g. All over-height structures must be denied or conditioned to meet the County ordinance. Based upon scenic resource review, the County may determine that the structures must be even shorter.***

The Applicant proposed communication poles that would be over 50 feet tall. Sections 3.120(G)(6), 3.130(G)(5), 3.170(H)(4), 3.180(G)(4) state that the maximum height for all new structures shall be 35 feet, unless restricted to a lesser amount by scenic resource provisions in Chapter 14 (Scenic Area Review). This is a bright-line requirement that must be met. Rather than pointing to an exception in the law, the Staff Response presents reasons why the law should be violated. Staff Response at 5–6. The application must be denied or all structures must be at most 35 feet tall. Based upon scenic resource review, the County may determine that the structures must be even shorter.

- h. For resources in the GMA, the Planning Commission unlawfully granted blanket exemptions from four different setback and buffer standards. In the GMA, each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. The evidence in the record does not demonstrate that this has been done. In addition, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest.***

Relying on NSA-LUDO § 6.020(B), the Planning Commission approved variances in the GMA to:

- The Columbia River development setback standards contained in NSALUDO Section 14.200(G),
- The Scenic Travel Corridor (I-84) setback standard contained in NSALUDO Section 14.300(B)(2),
- The wetland buffer standards contained in NSALUDO Section 14.600(A)(3)(c), and

- The sensitive plant buffer zones contained in NSALUDO Section 14.600(D)(3).

Staff Report at 35–37.

The Planning Commission cites the Applicant’s justification but does not address any of the criteria in NSA-LUDO § 6.020(B). However, that provision only applies when there are conflicting setbacks and buffers. To grant a variance, NSA-LUDO § 6.020(B) must be applied on a parcel by parcel basis to each protected resource to demonstrate that “building height, setbacks or buffers . . . for protection of scenic, cultural, natural, recreational, agricultural or forestry resources overlap or conflict.” Once this is accomplished, a demonstration that

“1. [a] building height, setback or buffer specified in [the NSA-LUDO] to protect one resource would cause the proposed use to fall within a setback or buffer specified in this ordinance to protect another resource; and 2. Variation from the specified building height, setbacks or buffer would, on balance, best achieve the protection of the affected resources.”

Each setback and buffer that is to be varied must be identified, the overlapping or conflicting setbacks and buffers (if any) must be identified, and then each instance must be analyzed to determine which buffers or setbacks should be varied to best achieve the protection of the affected resources. This has not been done.

The Staff Report also states that the project is proposed to be located within 100 feet of the ordinary high water mark of the Columbia River in several places in the GMA, although the total number, exact locations, and lengths of these locations are not stated. Staff Report at 47. The ordinance requires a mandatory 100-foot setback from the Columbia River in the GMA in order to protect scenic views from and along the river. NSA-LUDO § 14.200(G). The only exceptions are if the project is water-dependent or if applying the 100-foot setback “would render a property unbuildable.” *Id.*⁴ If the setback would render a property unbuildable, then the project may be eligible for a variance to the setback, but only if the project meets all requirements for a variance set forth in Chapter 6 of the Scenic Area ordinance. NSA-LUDO § 14.200(G).

Here, the proposed project is not eligible for an exception to the setback, because the proposed project is not water-dependent, and the 100-foot setback does not render the property unbuildable. In fact, the property has already been built on, and is currently being used for rail traffic daily. If the setback is enforced and the requested variances denied, the Applicant can continue using the property, including repairing, maintaining, and operating its existing rail line. Management Plan at II-7-11. Because the setback does not render the property unbuildable, the project does not qualify for an exception or a variance. The County must deny these variances or deny the application.

The Staff Report also concludes that because the railroad existed when the Management Plan was adopted and expansion is allowed as a review use (something Appellants strongly deny), somehow that means the setback is not applicable. Staff Report at 47. This conclusion is a non-

⁴ The Staff Report misquotes the exception as whether “the setback would render a property **unusable**.” Staff Report at 47 (emphasis added). The correct word in the ordinance is “unbuildable,” not unusable. NSA-LUDO § 14.200(G).

sequitur that misunderstands the meaning of a review use. The County ordinance defines “review uses” as “[p]roposed uses and developments that must be reviewed by Wasco County **to determine if they comply** with the Wasco County National Scenic Area Land Use and Development Ordinance.” NSA-LUDO § 1.200 (emphasis added). Thus, all review uses must comply with the ordinance.

In addition, the County Staff Report fails to analyze the requested variance under the factors set forth in Chapter 6 of the ordinance. Instead, the Staff Report summarily concludes (without any analysis of the legal criteria) that “Chapter 6 is addressed by this analysis.” Staff Report at 47. But in the section of the Staff Report covering Chapter 6, there is no County analysis of the requested Columbia River setback variance. *Id.* at 36–37. Instead, there is only a single, broad sentence intended to address multiple requested variances in multiple locations:

Because there is no way to repair, maintain or modify the railroad without requiring a variance, Staff recommends granting variances, reducing Open Space impacts and requiring the mitigation plans prepared for the application.

Id. at 37. In addition to being inaccurate,⁵ this single, solitary sentence does not even purport to analyze the factors required by Chapter 6. The Staff Report does not evaluate or explain how many separate locations within the project site variances are sought; where the requested variances are sought; how much land would be covered by the requested variances; whether the variances are greater than 50% of the setbacks and buffers stated in the ordinance; whether there are multiple setbacks, buffers, or other review criteria for the protection of scenic, cultural, natural, recreational, agricultural or forestry resources that overlap or conflict (other than a vague reference to “reducing Open Space impacts”); whether applying the required setbacks and buffers would cause the proposed project to fall within another setback or buffer; and whether variation from the required setbacks and buffers would best achieve the protection of the affected resources. All of these factors **must** be evaluated by the County. *See* NSA-LUDO §§ 6.010, 6.020. Yet none of them were. Setting aside for a moment the fact that the proposed project is not eligible for a variance to the Columbia River scenic setback because applying the setback would not render the property unbuildable, the Staff Report should be revised to evaluate and adopt findings applying each of the factors specified in Chapter 6 in each specific location where each variance is sought.

Finally, to disturb the protected resources of the NSA within the GMA, the Applicant must demonstrate that the project is in the public interest. NSA-LUDO § 14.600(B)(5)(b). However, the Planning Commission unlawfully removed a condition necessary to determine that the project was in the public interest and then unlawfully granted the variances. Staff Report at 114.

⁵ “Repair, maintenance and operation of existing. . . railroads” is a use allowed outright. NSA-LUDO 3.100(D); Management Plan at II-7-11.

i. The Planning Commission unlawfully granted variances to setbacks and buffer zones in the SMA. The Applicant failed to adequately complete the Practicable Alternative Test which is a prerequisite to obtaining the requested variances.

The Applicant has requested a variance for nine wetlands or waterbodies or their buffer zones in the SMA. PC 1 1-68. To grant such a variance, a Practicable Alternative Test must show that there is no practicable alternative and NSA-LUDO Chapter 6 must be followed. NSA-LUDO § 14.610(A)(2)(g)(1) & (5). NSA-LUDO Chapter 6 (Variance) requires not only that all setbacks and buffer zones in the SMA be undisturbed unless there are no practicable alternatives, but also that all adverse effects shall be fully mitigated. NSA-LUDO § 6.020(D). Both NSA-LUDO § 6.020(D) and NSA-LUDO § 14.610(A)(2)(g)(1) require the completion of a Practicable Alternative Test. However, the Applicant has not adequately completed the test.

The Practicable Alternative Test is contained in NSA-LUDO § 14.610(D) and is discussed at 5–102 through 5–104 of the Applicant’s Project Narrative and on page 18 of the Staff Report. The Applicant must demonstrate that “the basic purpose of the use” cannot be accomplished on another site in the vicinity that would result in fewer adverse impacts. In this case, according to the Applicant, the basic purpose of the use is to provide the amount of rail service that the Applicant already provides. *See, e.g.*, PC 1 1-49. This purpose has already been accomplished with “less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife or plant areas” than what the Applicant proposes. NSA-LUDO § 14.610(D)(1). Thus, a practicable alternative exists and the application must be denied.

Even if that were not the case, the requirement in The Practicable Alternative Test to study sites with “less adverse effects on wetlands, ponds, lakes, riparian areas, wildlife, or plant areas” is not an academic requirement or one that can be met without actually studying each wetland, pond, lake, riparian area, wildlife or plant area and determining if adverse effects can be diminished or eliminated for each impacted resource. NSA-LUDO § 14.610(D)(1). For example, a subtle change to the alignment of the tracks could result in less adverse effects to a protected resource. However, there is no evidence in the record that an analysis was ever done for each wetland, pond, lake, riparian area, wildlife or plant area. Instead, the Applicant touts its efforts to reduce the footprint of the proposed development without actually addressing each protected resource. PC 1 1-172–PC 1 1-174. This does not support a finding that the test is met.

The Applicant also has not demonstrated for each area to be impacted that it has complied with the requirements to assess other sites (e.g. other parcels that would still meet the basic purpose of the use) while reducing adverse impacts as required by NSA-LUDO § 14.610(D)(1) and (D)(2). The proposed project would result in the “direct permanent disturbance of approximately 19.58 acres, and temporary disturbance of approximately 11.22 acres,” require the acquisition of 2.71 acres of additional ROW, and result in the disturbance of 7.68 acres of wetlands and wetland buffers and 7.35 acres of priority habitats. PC 1 1-63; Staff Report at 68 & 93; PC 1 1-61. It is difficult to conceive, in part because no evidence is offered in the record, that each resource that is proposed to be harmed was studied and tradeoffs were evaluated to ensure that there are no other sites for the project that would result in less adverse effects. Unless the Practicable Alternative Test is applied to each impacted resource on a parcel-by-parcel and resource-by-

resource basis for each requested variance, NSA-LUDO § 14.610(D) has not been met and the application cannot be lawfully approved.

The Practicable Alternative Test also requires the Applicant to show that it cannot meet the basic purpose of the use – rather than the basic purpose of the project – in a way that produces less adverse effects. NSA-LUDO § 14.610(D)(1). This analysis must include “reducing its proposed size, scope, configuration, or density, or by changing the design of the use.” NSA-LUDO § 14.610(D)(2). The use, as identified by the Applicant, is to provide the same volume of rail service as the Applicant provides today. The Applicant is already providing this level of rail transportation in a less impactful way. Therefore, this portion of the test is also not met. Even if the County accepts that the basic purpose of the use is to improve operational efficiency, reducing the size, scope, configuration, or density of the use (e.g. scaling back the amount of efficiency to be attained by reducing the proposed length of the double track) was not considered as part of the Applicant’s Practicable Alternative Test analysis.⁶ Without such an analysis the test is not met and the application cannot be lawfully approved.

The County Staff Report states that the project is proposed to be located within 200 feet of the ordinary high water mark of the Columbia River in the SMA, although the total number, exact locations, and lengths of these locations are not stated. *See* Staff Report at 47. The Wasco County Scenic Area ordinance requires a mandatory 200-foot setback from the Columbia River in the SMA in order to protect scenic views from and along the river. *See* NSA-LUDO § 14.200(G). The only exceptions are if the project is water-dependent or if applying the 200-foot setback “would render a property unbuildable.” *Id.*⁷ If the setback would render a property unbuildable, then the project may be eligible for a variance to the setback, but only if the project meets all requirements for a variance set forth in Chapter 6 of the Scenic Area ordinance. NSA-LUDO § 14.200(G).

Here, the proposed project is not eligible for an exception to the setback, because the proposed project is not water-dependent, and the 200-foot setback does not render the property unbuildable. In fact, the property has already been built on, and is currently being used for rail service daily. If the setback is enforced and the requested variances denied, the Applicant can continue using the property, including repairing, maintaining, and operating its existing rail line. Management Plan at II-7-11. Because the setback does not render the property unbuildable, the project does not qualify for an exception or a variance. The County must deny these variances or deny the application altogether.

In addition, the application purports to perform various practicable alternatives tests, but none of them address the scenic impacts of varying from the 200-foot Columbia River setback. *See, e.g.,*

⁶ While it was not discussed as part of the Practicable Alternative Test, reducing the length of the double track was included as Alternative C in Section 3.13 of the Applicant’s Project Narrative. However, the alternative was not fully developed, the target metrics for operational efficiency improvements were not discussed, and there was no discussion of why the project must intrude on SMA resources when a double track of ~4.9 miles could be achieved on GMA and urban area zoned lands. Until such practicable alternatives are developed and included in the Practicable Alternative Test, the application of the test is incomplete.

⁷ The County Staff Report misquotes the exception as whether “the setback would render a property **unusable**.” Staff Report at 47 (emphasis added). The correct word in the ordinance is “unbuildable,” not unusable. NSA-LUDO § 14.200(G).

PC 1 1-161–PC 1 1-162, PC 1 1-172. Instead, the purported practicable alternatives tests included in the application discuss impacts to natural, cultural, agricultural, and forest resources. There is no analysis in the application (nor in the County Staff Report, for that matter) of the scenic impacts of specifically granting the requested variances to the Columbia River scenic setback.⁸ The Applicant has not met its burden to demonstrate compliance with the approval criteria. The Applicant’s failure to perform a practicable interest test specifically addressing the requested variances from the 200-foot Columbia River scenic setback directly violates NSA-LUDO § 6.020(D)(1) and warrants denial of the requested variances.

If the Applicant does, in the future, prepare a practicable alternatives test specifically to evaluate the requested 200-foot Columbia River scenic setback, then both the Applicant and the County must consider alternatives to the requested variances. Practicable alternatives may include allowing some of the requested variances in some locations while denying others in other locations, or allowing variances to the 200-foot setback at smaller distances than sought by the Applicant. Failure to consider such alternatives violates the ordinance and warrants denial of all requested scenic variances.

In addition to completion of the Practicable Alternative Test, NSA-LUDO § 6.020(D), requires a mitigation plan that will fully mitigate all harm caused by the variance. In addition to the defects in the application of the practicable alternatives test discussed above necessary, mitigation plans have not been proposed to mitigate for damage to scenic resources due to construction in protected areas. The Columbia River development setback standards contained in NSA-LUDO § 14.200(G) is a scenic resources setback standard as is the Scenic Travel Corridor (I-84) setback standard contained in NSA-LUDO § 14.300(B)(2). The mitigation plan required in NSA-LUDO § 6.020(D) ensuring that “the development can be mitigated to ensure no adverse effects would result” has not been submitted by the Applicant so a variance in the SMA cannot be granted for either of these scenic resource setback standards.

j. The Decision unlawfully allows the Applicant to violate general and agricultural setback standards.

Sections 3.120(G)(2), 3.120(G)(3), 3.130(G)(2), 3.130(G)(3), 3.170(H)(2), 3.170(H)(3), 3.180(G)(2), and 3.180(G)(3) contain the required general and agricultural setback standards. The general setback requirements are dismissed in the Staff Report and Staff Response with the assertion that “staff does not believe the general setback standards were intended to apply to transportation and utilities facilities. . . .” Staff Report at 21; Staff Response at 8. However, these legal requirements do apply. Neither the Applicant nor the Planning Commission points to any exemption in County ordinance that prevents the setbacks from being applied to transportation and utility facilities. In addition, it appears that the Applicant and the Planning Commission are relying on screening vegetation that currently exists on adjacent parcels to comply with some of the agricultural setbacks. Staff Report at 21. Since conditions of approval cannot be applied to maintain screening on adjacent parcels, all screening must take place on the Applicant’s parcel. A condition of approval must be added to ensure that all legally required setback standards are met.

⁸ The Applicant’s failure to propose any new screening trees to screen the proposed project as viewed from the Columbia River further exacerbate its errors in violating the 200-foot Columbia River setback.

- k. Conditions of approval to enforce the Planning Commission’s conclusions regarding the proposed rock blasting and crushing must be included in Condition 37 or a new condition must be included to ensure that the rock cannot be sold or used off site.***

The Staff Report concludes that NSA-LUDO § 14.200(Q), which applies to mineral and aggregate related uses, does not apply to the rock blasting and crushing proposed by the Applicant for this project because the proposal is “not a commercial aggregate operation where rock is removed, crushed or processed and then sold for profit.” Staff Report at 51. The Staff Report then goes on to allow the proposed rock blasting, and purports to require the Applicant to truck the blasted rock offsite for crushing and to bring it back onsite for ballast development. *Id.* Contrary to this finding, however, the relevant proposed condition of approval (No. 37) only addresses off-site crushing, and is silent on the ultimate use of the crushed rock. Condition No. 37 is inconsistent with the findings because it does not actually require the same rock from the site, once crushed, to be returned to the site for ballast development.

Moreover, the Staff Report fails to include adequate conditions of approval to enforce its conclusions regarding whether the proposed rock blasting and crushing is a mineral or aggregate related use. In particular, the Staff Report fails to include any conditions that would prohibit the Applicant from hauling the blasted rock off-site and then crushing it and using it at other sites or selling the rock to other users. Under the County’s legal analysis, either such practice would be a mineral or aggregate related use, and would therefore be prohibited. The Staff Report errs by failing to include conditions prohibiting off-site use and/or sale of any rock blasted from the site. Absent such conditions, the County’s legal conclusions regarding mineral or aggregate development may not be enforceable against the Applicant, should it attempt to sell the crushed rock or use it off-site. While the Staff Response dismisses this concern and states that such use or sale would violate the NSA-LUDO, we recommend that Condition 37 be clarified to include this language. Staff Response at 9.

- l. The proposed findings unlawfully allow the Applicant to violate conditional use criteria because of fire and traffic safety issues; because it would significantly impair sensitive wildlife habitat and riparian vegetation; because there would be adverse effects on air, water, and land; because of the visual impacts that it would cause; and because the use is not compatible with surrounding uses.***

We concur with the Staff Response that the Conditions of Approval that were removed by the Planning Commission must be restored. Staff Response at 10. However, as discussed throughout this document, those conditions did not go far enough. The Decision as ultimately conditioned fails to meet at least NSA-LUDO § 5.020(A–D), (F–H), and (L).

NSA-LUDO § 5.020(A) requires a proposed conditional use to be “consistent with the goals and objectives of the Management Plan for the Columbia River Gorge National Scenic Area, and consistent with the provisions of the County’s implementing ordinances.” As discussed at length in this document and in our previous comments that are in the record, the proposal is not consistent with the Wasco County NSA-LUDO, the Wasco County Comprehensive Plan, or the Management Plan. As such, the County cannot lawfully approve the application.

The Applicant's proposal also does not meet the requirements in NSA-LUDO § 5.050(A)(4). The Applicant's Project Narrative entirely skips this requirement, ignoring how "[t]he project includes provisions for bicycle and pedestrian access and circulation." To meet this requirement, much-needed improvements to river access should be required by the County.

The Management Plan prohibits developments and land uses that adversely affect or displace recreation uses and require mitigation measures that preclude adverse effects. The Applicant and the Decision fail to meet these mandatory guidelines. "Taking into account location, size, design and operational characteristics of the proposed use, the proposal [must be] compatible with the surrounding area and development of abutting properties by outright permitted uses." NSA-LUDO § 5.020(B). This conditional use criteria is not met. Hundreds of members of the public, recreation groups and the Oregon Parks and Recreation Department ("OPRD") have commented that the project would adversely affect recreation resources in the Columbia River Gorge. OPRD wrote that the project's construction would require temporary closure of a state park and adversely affect other recreation sites throughout the Gorge. Further, OPRD recommended several mitigation measures that are not implemented in the Decision. PC 1 SUP 1-176. The record shows that the project is incompatible with surrounding land uses and development and must be denied.

Under NSA-LUDO § 5.020(C) & (L), the proposed use must not significantly burden fire facilities and available services, nor significantly increase fire hazards, fire suppression costs, or risks to fire suppression personnel. In addition to the significant increase in fire hazards that the project would bring, which are likely to further burden fire facilities and services, the likelihood of another incident like the one that occurred in Mosier presents a very real risk to fire suppression personnel. The application fails to meet these criteria.

NSA-LUDO § 5.020(D) requires that "[t]he proposed use will not unduly impair traffic flow or safety in the area." With at least five at-grade street crossings in the County and the potential increase in train traffic, there would be an impairment of traffic flow in the area. The increase in trains would likely include an increase in oil trains through the National Scenic Area. Such trains severely threaten public safety and would increase the dangers of driving along I-84 and city streets in Mosier, Rowena, and The Dalles. This criterion is also not met.

NSA-LUDO § 5.020(F) requires that "[t]he proposed use will not significantly reduce or impair sensitive wildlife habitat, riparian vegetation along streambanks and will not subject areas to excessive soil erosion." The proposed project would result in the "direct permanent disturbance of approximately 19.58 acres, and temporary disturbance of approximately 11.22 acres" and the disturbance of 7.68 acres of wetlands and wetland buffers and 7.35 acres of priority habitats, plus it would require work within the Columbia River. PC 1 1-63; Staff Report at 93; PC 1 1-61. This would result in significant impairment of riparian vegetation and sensitive wildlife habitat. This criterion is not met and the application must be denied.

NSA-LUDO § 5.020(G) requires that "[t]he proposed use will not adversely affect the air, water, or land resource quality of the area." Simply put, derailments, spills, and fires happen. The more trains that travel the tracks, the higher the likelihood that there would be another large-scale spill

that would affect the surrounding area. Any adverse effect on the air, water or land resource quality makes the application fail these criteria. While the Applicant asserts that diesel emissions would be reduced due to fewer idling trains in Mosier, the NSA-wide impact is entirely different. Faster, longer, and more frequent trains can only mean that additional particulate matter (PM 2.5) would be emitted and that it would negatively affect the air resources of the NSA. PM 2.5 has been tied to cancer, cardiovascular disease, neurodevelopmental disorders, and pulmonary problems. PC 1 4-1383–PC 1 4-1390. In addition, every coal car that runs the rails emits fugitive emissions of PM 2.5. PC 1 4-1328. The Planning Commission unlawfully removed a condition of approval that would have prevented this from happening. Staff Report at 32. The degradation of air resources proposed by the Applicant is justification to deny the application. The adverse effects discussed in the previous paragraph and in the sections above show the impacts on water resources. The massive excavations, grading, and other land development would impact land resources in the area. This criterion is also not met.

NSA-LUDO § 5.020(H) requires that “[t]he location and design of the site and structures for the proposed use will not significantly detract from the visual character of the area.” There would be both temporary and permanent significant changes to the visual character of the area. From the rock excavations, to the removal of several acres of vegetation, to the proposed new permanent road – not to mention the additional buildings, track, signals, and trains – the project would result in significant adverse effects to the visual character of the area. This criterion is not met.

Finally, NSA-LUDO § 5.020(B) requires the County to take “into account location, size, design and operational characteristics of the proposed use” when determining whether “the proposal is compatible with the surrounding area and development of abutting properties by outright permitted uses.” The surrounding area includes Mosier; Memaloose State Park; and the scenic, natural, cultural and recreation resources of the Columbia River Gorge National Scenic Area. In addition to the new track, bridges, buildings, roads, excavations, culverts, signals, guardrail, staging areas, and intrusions into wetlands and floodplains, the proposed use would provide capacity for more trains to travel through the area each day and all trains could be longer.⁹ PC 1 1-214–PC 1 1-214. The location of this enormous development along with the additional trains next to the Columbia River in designated open space is not compatible with the surrounding area. The project fails on this criterion and a permit cannot be lawfully issued.

III. The proposal would unlawfully harm scenic resources in the NSA.

For proposed projects in the Scenic Area, the burden is always on the Applicant to demonstrate that the proposal complies with all applicable requirements of the ordinance. NSA-LUDO § 2.120(A). Here, the Applicant utterly fails to meet its burden to demonstrate compliance with the scenic resource protection requirements. The application lacks basic required information, making it impossible for the County and the reviewing public to review the project’s scenic

⁹ The rail experts Appellants retained to double-check the railroads numbers determined that the proposed project could allow up to two more trains per hour to move through the project area. PC 1 SUP 1-193. Even by the Applicant’s own admission, traffic could double over current levels. The Applicant states that 20-30 trains a day traverse the project area. *See, e.g.*, PC 1 1-31. It also states that the current capacity is 25-32 trains a day and that the expansion would add 5-7 trains a day. PC 2 1-22. So, according to the Applicant, traffic could go from a low estimate of 20 trains per day today to 39 trains per day after the proposed expansion.

impacts and evaluate compliance with the ordinance. In addition, the project fails to comply with the applicable scenic resource protection standards. Accordingly, the application should be denied. NSA-LUDO § 2.120(A); ORS 196.110(1).

- a. The approval was unlawful because the Applicant acknowledges that it failed to include a landscaping plan that meets the requirements of the Scenic Area ordinance, the application lacks adequate elevation drawings, and the record does not reflect the location, size, and shape of all existing and proposed buildings and structures.*

All Applicants must submit “[a] detailed plan for landscaping which shall clearly illustrate . . . [t]he location, height and species of existing trees and vegetation.” NSA-LUDO § 14.020(D). The Applicant has failed to comply with these requirements. The Applicant submitted plant surveys (figures 10A through 10R), but these surveys are not landscaping plans and were not prepared to comply with the scenic resource protection requirements. PC 1 3-831–PC 1 3-848. In fact, the Applicant freely admits that it has failed to submit the required landscaping plan, conceding that it did not prepare “the kind of formal landscape plan that would be more appropriate for projects like housing developments, resorts, or commercial facilities.” PC 1 1-112. Nothing in the applicable law distinguishes a large-scale rail expansion from a commercial facility or housing development; all are required to submit detailed landscaping plans. The Applicant is in blatant violation of the ordinance requirements. There is no dispute that figures 10A through 10R, as well as the application as a whole, omit many mandatory requirements for a landscaping plan, all of which are required to ensure compliance with the scenic resource protection requirements of the ordinance.

First, other than sensitive and rare species, the application fails to “[i]ndicate which [trees] are proposed to be removed,” which is a mandatory requirement of NSA-LUDO § 14.020(D)(1).¹⁰ Without this required information, it is impossible to evaluate the full extent of the project’s impacts to scenic resources. The Applicant has failed to meet its burden to demonstrate that the project complies with the scenic resource protection requirements of the ordinance.

Second, the application fails to comply with the following requirement:

The landscaping plan shall include detailed information to the level of individual trees and groupings of vegetation for the proposed development area and all topographically visible corridors between the proposed development area and Key Viewing Areas. The landscaping information for the remainder of the property may be generalized.

NSA-LUDO § 14.020(D)(1). The application only identifies trees “within the proposed project grading limits.” PC 1 3-735. The application ignores the individual trees and groupings of vegetation in “all topographically visible corridors between the proposed development area and Key Viewing Areas,” as required. NSA-LUDO § 14.020(D)(1). It is thus impossible to evaluate the extent to which existing trees and other vegetation provide screening from key viewing areas,

¹⁰ The Applicant may be proposing to remove as many as 1,438 trees, since the application states that “[a] total of 1,438 trees were identified and mapped within the proposed project grading limits.” Application at Appendix J, § 5.2.3 (PC 1 3-735). However, it is not expressly stated whether **all** trees within the grading limits would be removed.

and thus impossible to evaluate the project's scenic impacts. The Applicant has failed to meet its burden to demonstrate that the proposed project complies with the scenic resource protection requirements.

Third, the application fails to indicate "[t]he location, height and species of individually proposed trees and vegetation groupings." NSA-LUDO § 14.020(D)(2). In fact, it appears that the Applicant is not proposing any new screening vegetation — not even to replace any trees that would be removed for project construction (which, as discussed above, have not been adequately identified). The Applicant's failure to propose any new screening vegetation violates the scenic resource protection requirements, as will be discussed below. In addition, if the Applicant does intend to propose planting new screening trees, then the Applicant has failed to submit an adequate landscaping plan identifying the locations, heights, and species of those trees as required by the ordinance. The Staff Response does not address the legal inadequacies, but instead provides reasons why the Applicant should not be required to comply with the law. Staff Response at 10. The Applicant has failed to meet its burden to demonstrate that the proposal complies with the scenic resource protection requirements.

In addition, all Applicants must submit "[e]levation drawings [that] show the appearance of all sides of the proposed structures and [that] include natural grade, finished grade, and the geometrical exterior of at least the length and width of structures as seen from a horizontal view." NSA-LUDO § 14.020(E). Here, the Applicant has failed to comply with these requirements. The Applicant submitted cross-section engineering drawings (Appendix C to the application) and photographs of "typical" structures (Appendix B), but these appendices fail to depict the geometrical exterior of the actual buildings proposed by the Applicant at each site. Although Appendix B may show "typical" existing buildings, a "typical" building is not necessarily the same as a building actually proposed for a specific site. Because the Applicant has failed to submit the required site-specific evaluation drawings, it is impossible to evaluate the project's scenic impacts. The Staff Response does not address this argument. The Applicant has failed to demonstrate that the proposed project complies with the scenic resource protection requirements of the Scenic Area ordinance.

b. The application and Decision fail to disclose and evaluate details about the surface area of the proposed project that would be visible from key viewing areas (KVAs) and the linear distances along the KVAs from which the project would be visible making it impossible to conclude that the scenic resource standards would be met. The Decision also unlawfully does not address or even mention some of the KVAs from which the proposed development is topographically visible.

In order to determine the project's impacts to scenic resources, the County **must** evaluate "the amount of area of the building site exposed to Key Viewing Areas." NSA-LUDO § 14.200(A)(1)(f). The Applicant must include this information in the application, as well as the "[l]ocation, size, and shape . . . of all existing and proposed buildings and structures," all of which allow the project's scenic impacts to be evaluated. *Id.* § 14.020(B)(2). Yet, despite the massive scale of the proposed project, the Applicant has violated these requirements, completely failing to supply essential details about the project. For instance, the application omits basic information about the total surface area of the proposed project (including the proposed new

tracks, buildings, guardrails, rock blasting, vegetation removal, etc.) that would be visible from key viewing areas. The Applicant's omissions make it impossible to evaluate the scenic impacts of the proposed development—let alone the scenic impacts of the train use that would result from the proposed development. Without this fundamental and required evidence, neither the County nor interested persons and agencies are able to evaluate whether the proposal complies with the scenic resource protection requirements. The Applicant has failed to meet its burden of demonstrating compliance with the County's ordinance.

The Applicant acknowledges that the proposed project, including the tracks, buildings, other structures, and trains, would be visible from multiple linear key viewing areas, including the Columbia River, Interstate 84, the Historic Columbia River Highway, County Road 1230, and Washington State Route 14. In order to determine the project's impacts to scenic resources, the County **must** evaluate “[t]he linear distance along the Key Viewing Areas from which the building site is visible (for linear Key Viewing Areas, such as roads and the Columbia River.” NSA-LUDO § 14.200(A)(1)(c). The Applicant must include this information in the application in order to allow the project's scenic impacts to be evaluated. Yet neither the application nor the County Staff Report contain adequate information disclosing the total lengths along the affected linear key viewing areas from which the project would be visible.

In particular, the proposed tracks and facilities and the trains that utilize them are likely to be visible in the immediate foreground along several miles of the Columbia River, which parallels the entire length of the proposed project. Yet nowhere does the application even attempt to estimate the length of the sections along the Columbia River from which the project would be visible nor does it adequately analyze the visual impacts on the Columbia River KVA. *See* Appendix II.

The Applicant has failed to meet its burden of demonstrating compliance with the application by failing to disclose the total distances along each of the linear key viewing areas from which the project would be visible, and by failing to explain, in both map and narrative formats, exactly where these sections of these linear KVAs are located. The Applicant's failure to provide this information makes it impossible to evaluate the project's scenic impacts and warrants denial of the project.

Additionally, the Applicant and the Staff Report ignore the scenic impacts from several KVAs from which large portions of the project would be visible, including Cook-Underwood Road, Rowena Plateau, Washington State Route 141, and Washington State Route 142. *See* Appendix I. These adverse impacts are not included in the project narrative, and omitting them from the application renders it inaccurate and incomplete. PC 1 1-116–PC 1 1-129, NSA-LUDO § 14.020(A)(5). It also makes it impossible to weigh the cumulative adverse effects of the project and violates NSA-LUDO § 14.200(A)(1)(a–g). The Staff Response points out a high-level narrative that does not meet any of the legal standards and does not meet the standards of a professional visual impacts analysis. Staff Response at 10–11; PC 2 1-95–PC 2 1-101. We ask the County to deny the application and to instruct the Applicant to submit a new application with a complete and accurate visual impacts analysis.

- c. The project violates the scenic protection requirements of County ordinance because the Applicant has failed to propose any new trees to screen the new development from key viewing areas and the conditions of approval unlawfully fail to ensure the retention and replacement of existing screening trees.*

Shockingly, the Applicant does not propose to plant any new trees to screen the project from key viewing areas and the Decision does not require any new screening vegetation. Condition 32, Decision at 5. This ensures that the project would not meet the scenic protection requirements of the Scenic Area ordinance. Apparently the Applicant proposes to plant some new trees, although they are proposed solely as mitigation for natural resource impacts, and are not proposed to meet the scenic resource protection requirements of the County's ordinance. Moreover, almost all details regarding these natural resource mitigation trees are unclear. The Applicant has failed to provide details about the number,¹¹ species, heights, and locations of any trees to be planted. In particular, there is no explanation **where** the natural resource mitigation trees would be planted, thus making it impossible to evaluate whether these trees would provide sufficient screening to comply with the scenic protection requirements.

Because the Applicant proposes no new screening trees, the project would violate a number of scenic resource protection requirements. As acknowledged in the application and the County Staff Report, both the proposed development and the train use of the proposed new rail line would be completely unscreened in multiple locations as viewed from multiple key viewing areas. In many of these locations, the project would violate the “not visually evident” standard that applies to portions of the project. This strict standard requires that new development and uses must be **not visible** from key viewing areas. *See* NSA-LUDO § 1.200 (definition of “not visually evident (SMA)”).¹² An unscreened development or use is fully **visible**, and thus is almost certain to violate the not visually evident standard—particularly in locations where the project would be fully visible in the immediate foreground as viewed from key viewing areas.

In other locations, the project would violate the visual subordination standard, which is not as strict as the not visually evident standard but still requires development and uses to blend in with the natural landscape. Even the Staff Report acknowledges the need for some screening vegetation: “[s]ome new landscaping is necessary for the proposed development to achieve

¹¹ The County Staff Report states that “[n]o new screening vegetation is proposed.” Staff Report at 49. The application states in one location that “[a] total of 1,438 trees (7 species), 5,760 shrubs (6 species), and 1,500 herbs (3 species) will be planted.” PC 1 3-911. Those trees are ostensibly proposed as mitigation for natural resource impacts by replacing the up to 1,438 trees that may be removed by the project. *See* PC 1 3-735. Similarly, the Application states that “[t]rees that are removed will be replaced with planted stock of the same or equivalent species on a 1 for 1 basis.” PC 1 3-909. However, in another location, the Application states that “[t]rees that are removed will be replaced with planted stock of the same or equivalent species on a **2 for 1 basis**.” PC 1 3-913 (emphasis added). Given these vague and conflicting numbers in the application, it is impossible to tell how many trees would be planted—let alone the trees' species, locations, and heights at time of planting. It is clear, however, that any trees that would be planted would not be for screening purposes.

¹² The “not visually evident” standard corresponds to the “retention” standard under the U.S. Forest Service's scenery management system. “Retention” is defined in pertinent part as a landscape with “high scenic integrity” that “appears unaltered.” USDA Forest Service, *Landscape Aesthetics: A Handbook for Scenery Management* at 2-4 (Dec. 1995). Under retention, any human-caused deviations to the landscape “must repeat the form, line, color, texture, and pattern common to the landscape character so completely and at such scale that they are not evident.” *Id.* at 2-4.

visual subordination with the surrounding landscape.” Staff Report at 49. Yet the Decision fails to require any new screening vegetation.

The failure to require new screening vegetation also violates several landscape setting requirements. For example, in the SMA River Bottomlands landscape setting, the landscape “shall retain the overall visual character of a floodplain and associated islands.” NSA-LUDO § 14.400(H)(2). Without screening vegetation, the proposal fails to retain the visual character of a floodplain and thus violates this standard. To provide another example, in the GMA Gorge Walls, Canyonlands and Wildlands landscape setting, “[n]ew development and expansion of existing development **shall be screened** so as to not be seen from Key Viewing Areas to the maximum extent practicable.” NSA-LUDO § 14.400(I)(1). The Staff Response does not provide any legal justification for violating the standard. If the Applicant cannot adequately screen the development to meet legal standards, the application must be denied.

The Staff Report includes two proposed conditions of approval (Nos. 26 and 32) that purport to require retention of existing screening trees. However, these conditions are deficient and inconsistent with the requirements of the County Scenic Area ordinance. First, these conditions do not sufficiently identify the required existing trees, for example by cross-referencing landscaping plans, site plans, or photos of existing tree cover. Thus, if the trees were removed, enforcement of these conditions could be extremely difficult. Second, the proposed conditions lack the standard required language for conditions to ensure the survival of screening trees—including requirements to replace dead or dying trees in kind during the first available planting season and to ensure the survival of replacement trees with guy wires and regular irrigation. *See* NSA-LUDO §§ 14.100(G), 14.100(H). Adoption of the conditions as proposed in the Staff Report would fail to ensure the retention and replacement of existing screening trees and would violate the County ordinance.

d. The Applicant fails to demonstrate that the proposed development is sited to achieve the applicable scenic standards including that the development must be sited on each parcel so as to use the existing topography and vegetation for screening.

Pursuant to the Scenic Area ordinance, “[p]roposed developments or land uses shall be sited to achieve the applicable scenic standard. Development shall be designed to fit the natural topography, to take advantage of landform and vegetation screening, and to minimize visible grading or other modifications of landforms, vegetation cover, and natural characteristics.” NSA-LUDO § 14.200(R)(4). The Applicant fails to demonstrate compliance with this requirement. There is no indication that the locations for the proposed rail lines, buildings, guardrails, and other elements of the project were selected because they fit the natural topography or take advantage of existing screening. Nor has the Applicant submitted any photo simulations to allow for a proper evaluation of whether the proposed development sites would comply with the applicable scenic standards.¹³

¹³ Perhaps because of these flaws in the application, the Staff Report further confuses compliance with the scenic standard protection standards, in many places containing internally inconsistent findings about the visibility of the project. For example, in its evaluation of the visibility of the project as viewed from the Columbia River, the Staff Report finds that “it is not anticipated that the proposed track will be visible,” and yet in the same sentence concludes that “it is not anticipated that the proposed track will be . . . any more visible than the current track.” Staff

Although the application includes an alternatives analysis, it evaluates alternatives only in a very broad way, for example evaluating the total length of the project and possible other locations for the entire project. The alternatives analysis does not evaluate each individual proposed location of each rail line segment, building, or other structure to show that its site was chosen to ensure compliance with the applicable scenic standards. In fact, the alternatives analysis focuses mainly on protecting natural resources, barely even mentioning scenic impacts, except for broad, conclusory statements that development locations were chosen to protect the scenic, natural, cultural, and recreational resources of the Gorge. *See* PC 1 1-55–PC 1 1-60. The alternatives analysis was simply not prepared to comply with the Wasco County scenic resource protection standards, nor does it evaluate the siting of the individual project elements to demonstrate that they meet those standards. The Staff Response does not address the ability of the railroad to site the development elsewhere within the right of way. The Applicant and the Decision have failed to demonstrate compliance with the requirements of the ordinance.

e. The not visually evident and visual subordination standards are often impermissibly discussed interchangeably and/or conflated in the Decision. This leads to violations of the not visually evident standard in the zones in which it applies.

In several places, the County Staff Report evaluates compliance with the visual subordination and not visually evident standards together in the same findings, effectively conflating these standards and improperly treating them as one and the same. For example, although it is unclear whether any buildings are proposed in the SMA River Bottomlands landscape setting, the Staff Report evaluates compliance with the GMA and SMA River Bottomlands landscape settings together, and concludes that the proposed new buildings “should blend with the surrounding landscape.” Staff Report at 57; *see also id.* at 43 (concluding that the development would “blend with the surrounding landscape” as viewed from the Columbia River and Interstate 84). Blending with the surrounding landscape is a hallmark of visual subordination (which applies in the GMA portions of the project site), not the not visually evident standard (which applies in the SMA portions). To comply with the law, the Staff Report must be revised throughout to evaluate compliance with the GMA and SMA scenic standards separately. The not visually evident standard is stricter than the visual subordination standard and should not be “watered down” by treating it the same as the visual subordination standard.

f. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to scenic resources.

The County is legally obligated to evaluate the potential cumulative visual effects of proposed development in order to ensure that scenic resources would not be adversely affected. NSA-LUDO § 14.200(L). This includes evaluation of past, present, and likely future actions. In addition, the County is required to evaluate individually insignificant but cumulatively significant actions and avoid cumulative adverse effects. 16 USC 544(a)(3), *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 346 Or 366, 213 P3d 1164 (2009)

Report at 43. Both findings cannot be simultaneously correct. If the proposed second track will be as visible as the current track, then it will be visible. If the proposed second track will in fact be visible from any portion of the Columbia River, then the Staff Report should not have included a finding that it will not be visible.

[henceforth *Friends*]. The application does not even attempt to meet this legal standard and even endeavors to use past impacts – like the blasted area through the mesa – to support approval of this application. *See, e.g.*, PC 1 1-127 (“The cumulative effects analysis did not include an analysis of past actions.”). Therefore, the application cannot be lawfully approved.

The cumulative impacts to scenic resources caused by a proposed project in conjunction with other projects must be considered and addressed as part of the evaluation of the project’s potential impacts to scenic resources. NSA-LUDO § 14.200.L; *see also id.* § 1.200 (definition of “cumulative effects”). Projects that would contribute to cumulative adverse impacts to scenic resources are prohibited. *Friends* at 385–91; *Murray v. Columbia River Gorge Comm’n*, 125 Or. App. 444, 865 P.2d 1319 (1993); *Tucker v. Columbia River Gorge Comm’n*, 73 Wash. App. 74, 867 P.2d 686 (1994). Both the application and the Staff Report violate the cumulative effects requirements by failing to analyze and address the cumulative adverse impacts to scenic resources.

Neither the application nor the Staff Report evaluate whether this project, in conjunction with past and current activities in the same viewsheds, would cause adverse cumulative effects. Instead, both the application and the Staff Report consider only whether this project, by itself, would meet the applicable scenic standards, and whether this project in conjunction with other reasonably foreseeable future projects would cause adverse cumulative effects. In essence, both the application and the Staff Report ignore baseline conditions and whether those conditions contribute to cumulative effects.¹⁴

In particular, what are the baseline conditions of the affected viewsheds on a landscape level? For example, in the landscapes where the not visually evident standard applies, is that standard currently met on a landscape level, *i.e.*, are all human-caused alterations to the landscapes not noticeable? In addition, even assuming that the proposed project would comply with the applicable scenic standards (an assertion that Appellants vigorously dispute), what would be the combined effect of the proposed project in conjunction with existing uses and existing viewshed conditions? Will the proposed project, added to baseline conditions, satisfy the applicable standards on a landscape level? These questions must be addressed; unfortunately, neither the application nor the Staff Report fail to address them.

The Staff Report correctly states that since the passage of the Scenic Area Act thirty years ago, only one similar large-scale railroad expansion has been allowed in the National Scenic Area, the BNSF siding project at Doug’s Beach in Klickitat County. Staff Report at 49. However, the Staff Report fails to analyze the details of that project in conjunction with the proposed project. The Doug’s Beach project has caused significant adverse impacts to scenic resources along Washington State Route 14 and the Columbia River—particularly when trains are stopped along the new tracks, blocking scenic views. The total length of the Doug’s Beach siding was only 8,400 feet (1.59 miles)—about one-third of the total second mainline length sought by the Applicant if the proposed project is approved. What are the combined adverse impacts to scenic resources in the Scenic Area, including the loss and degradation of scenic views, caused by the

¹⁴ The Application states that baseline conditions will be considered, but then it fails to actually do that in its subsequent analysis of cumulative effects. *See* PC 1 1-127–PC 1 1-128.

Doug's Beach project in combination with the proposed project? Both the application and the Staff Report fail to address that question.

The Staff Report erroneously concludes that there are no other, similar large-scale rail expansions in the Scenic Area: "Staff is not aware of any [such projects] proposed in other NSA counties that are similar in scope." Staff Report at 49. This ignores evidence in the record of two large-scale rail expansions proposed by BNSF that are currently pending. PC 2 Supp 1-1-PC 2 Supp 1-61. One project, the BNSF Melonas Siding Project, would add an extra track to BNSF's existing mainline in Skamania County. The second project, the BNSF Washougal to Mt. Pleasant Double-Track Project, would similarly add an extra track to the BNSF mainline in both Clark and Skamania Counties. Together, these projects would add approximately 4.79 miles of additional track, much of it inside the National Scenic Area. Both of these projects would cause adverse scenic impacts and block scenic views from important public vantage points in the Scenic Area. There was also testimony at the Planning Commission Hearing on September 6, 2016 from a Cascade Locks City Council member that the Applicant has approached Cascade Locks about expanding the double track there. Transcript p. 64, Ln 22-23. The County must analyze the cumulative impacts to scenic resources of these projects in conjunction with the Applicant's proposed double-track project. The County should also correct its erroneous finding that "in the foreseeable future, [the proposed] development will not be combined with any similar rail development that would further magnify resource impacts." Staff Report at 50.

Despite the inadequate analysis done by the Applicant and the County, Staff did propose Condition of Approval 15 and concluded that with that condition, the "collectively significant impacts of blocked views should not result in a cumulatively adverse effect to scenic resources." Staff Report at 50. However, the Planning Commission unlawfully removed that condition of approval. *Id.* The cumulative adverse impacts of additional trains on the scenic resources of the NSA must be identified, analyzed, and mitigated or the application must be denied or conditioned to disallow additional train traffic.

In summary, both the application and the Staff Report fail to include baseline conditions in its analysis of the potential cumulative effects to the affected viewsheds, and also fail to address the combined effects to scenic resources of the proposed large-scale rail expansion in combination with other, similar existing, proposed, and reasonably foreseeable projects in other counties in the National Scenic Area. The Applicant has failed to meet its burden to demonstrate that the proposal would not result in adverse cumulative effects to scenic resources. The proposed project, as well as the Doug's Beach project, the two projects currently proposed in Skamania and Clark Counties, and other similar, reasonably foreseeable projects by the Applicant to relieve congestion elsewhere in Hood River and Wasco Counties collectively pose serious threats to scenic resources. These are easily the largest projects ever to be proposed for Scenic Area review. Collectively, the projects would exacerbate existing conditions in the affected landscapes, where existing railroad development already dominates or nearly dominates views. The projects would constantly block scenic views from important public vantage points with stopped and moving trains. And approval of the projects could create a snowball effect that would lead to even further proposals for large-scale rail expansions in the Scenic Area by the Applicant and BNSF. Given these serious and significant cumulative adverse impacts, the proposed project must be denied.

The Staff Response correctly states that the removal of Condition 15 by the Planning Commission renders the Decision unlawful. We agree that this condition must be added back, however, that is only the first step to compliance with the NSA-LUDO. The analysis discussed above must also be completed and cumulative adverse impacts must be avoided.

g. In Condition 33, the Planning Commission unlawfully defers to the Applicant's standards that are not in the record and are under the control of the Applicant, allowing it to violate scenic resource protections.

At the urging of the Applicant, the Planning Commission altered Condition 33 to incorporate the Applicants' Uniform Signal Systems and Standards. This raises two issues. First, that document is not in the record so the Planning Commission does not know to what it has agreed. Condition 33 was necessary to comply with NSA-LUDO § 14.100(F). Altering the condition without sufficient evidence in the record puts the Decision out of compliance and is unlawful. The Staff Response merely asserts that following the unseen Union Pacific standard will still comply with the NSA-LUDO. However, even if the document was in the record and had been studied for compliance with scenic area standards, it is under the control of the Applicant and can be changed at any time. This puts the condition entirely within the control of the Applicant, rendering the condition a nullity. To comply with NSA-LUDO § 14.100(F) the Condition must be restored to its original form.

IV. The proposal would unlawfully harm recreation resources in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of recreation resources and prohibits adverse effects to these resources. The project would result in adverse effects to recreation resources and should be denied. Hundreds of recreation users have submitted comments raising concerns over impacts to recreation. The Columbia Gorge Windsurfing Association submitted comments that raised concerns about river access and water-based recreation. PC 1 SUP 1-158. The Oregon Parks and Recreation Department has submitted comments identifying adverse impacts to Memaloose State Park and other state parks throughout the Gorge. PC 1 SUP 1-175–PC 1 SUP 1-176. The Applicant fails to demonstrate a need for the project, fails to explore alternatives to the proposed project that would lessen adverse impacts to recreation resources, and fails to identify specific mitigation measures that would reduce or eliminate these adverse effects. The Decision fails to require avoidance or sufficient mitigation for adverse effects to recreation resources and instead relies on undetermined future actions, including a vague, after-the-fact feasibility study to improve access from State Parks to the Columbia River to mitigate for adverse individual and cumulative impacts to recreation resources.

The Staff Response to these items states that the County sought input from the Oregon Parks and Recreation Department (OPRD) and incorporated the proposed mitigation measures. However, the mitigation measures adopted in the Decision are not fully developed and only take into account the input of one recreation entity – OPRD. Hundreds of other recreation users provided comments on the harm to recreation resources that are not addressed in the decision or in the proposed mitigation measures.

a. *The Decision unlawfully fails to adequately ensure that the proposed development would comply with the protection measures for recreation resources in the Management Plan and in the County ordinance.*

The project proposal includes rock crushing, road building, blasting, grading, track construction, and additional train traffic on lands adjacent to Memaloose State Park and the Columbia River. In addition, the project would allow more trains per day to pass through the park. To build the proposed project and meet rail safety standards, the Applicant must also complete a land transfer that would make Memaloose State Park smaller. PC 1 1-61. This is diametrically opposed to the provisions of the Management Plan at I-4-25 and NSA-LUDO §§ 14.700(F) and 14.710(M) and cannot be lawfully permitted.

The ordinance requires an appropriate buffer to be established when new buildings and structures “may detract from the use and enjoyment of established recreation sites on adjacent parcels.” NSA-LUDO §§ 14.700(F), 14.710(M). A new pump house would be constructed along with new track directly adjacent to the camping area at Memaloose State Park. Rather than creating an appropriate buffer, the Applicant proposes to reduce the area between the tracks and the camping area. Reducing the current buffer is the exact opposite of establishing a buffer. The project cannot be lawfully permitted as long as the buffer will not be established.

The ordinance also requires that “[n]ew developments and land uses shall not displace existing recreational use” NSA-LUDO § 14.710(B). Reducing the size of the park, as the Applicant proposes in its application, would result in de facto displacement of existing recreational uses. Due to these reasons, the project cannot be lawfully permitted.

b. *The conditions of approval unlawfully defer determination of mitigation measures until after project approval or omit mitigation measures entirely.*

The ordinance requires that “[m]itigation measures shall be provided to preclude adverse effects on the recreation resource.” NSA-LUDO § 14.710(E). The Applicant concedes that there would be adverse effects on the recreation resource and yet does not propose any mitigation measures to preclude these effects. PC 1 1-178. Permanent degradation of the resource would also occur due to more frequent train traffic waking campers and detracting from the recreational experiences at Memaloose State Park and at other parks and recreation areas in the NSA. In fact, The Oregonian reported that “When camping in the Gorge, it pays to be a little deaf” and singled Memaloose State Park out as already being impacted by excessive train noise. http://blog.oregonlive.com/terryrichard/2008/05/when_camping_columbia_gorge_it.html. Cumulative adverse impacts of increased train traffic to the recreation resource of the NSA must be considered and impacts caused by past actions must be included. *Friends*.

Condition of Approval 44 defers compliance with mandatory requirements of NSA ordinance to a future date and fails to identify specific enforceable measures that would require the project to avoid adverse effects to recreation resources. NSA-LUDO § 14.710(E). Such a decision is subject to reversal, as unanimously held by the Gorge Commission in the *Eagle Ridge* case. CRGC No. COA-S-99-01 (June 22, 2001). It is similarly unlawful for the County to use

conditions of approval to defer the submission of complete and adequate application materials. *Eagle Ridge* at 9–10. The lack of a mitigation plan renders the application incomplete. In addition, the Staff Report ignores all recreation sites along the Columbia River that are not managed by OPRD.

In its August 30, 2016 comment letter, OPRD said that the project would worsen the already significant fragmentation of the recreation experience. PC 1 SUP 1-175–PC 1 SUP 1-175. OPRD also said that the increased number of trains, including longer trains, would have a regional impact to recreation. *Id.* OPRD requested mitigation measures that require:

1. Creating an overall analysis of vehicle and pedestrian crossings to identify areas where upgrades can be made.
2. Defining new separated grade crossings in the project area.
3. Upgrading existing crossings to decrease vehicle wait times and improve access across the rail.

PC 1 SUP 1-175. In order to determine whether the project is consistent with the requirements of the NSA-LUDO, the identification of mitigation measures and the evaluation of those mitigation measures must be completed prior to a decision by Wasco County or the application must be denied. *Friends*.

Condition of Approval 45 also fails to require the avoidance or mitigation of adverse effects on Memaloose State Park. Moving construction activities to less than peak recreation season, or requiring covered trucks, does not adequately mitigate for the noise, dust and traffic impacts caused to Memaloose State Park and recreation users in the area. In its August 30, 2016 comment letter, OPRD stated that “the noise and disruption from construction would necessitate closure of the Park.” PC 1 SUP 1-176. Therefore, the project would result in direct adverse effects to recreation in the Columbia River Gorge and must be denied.

c. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to recreation resources.

Both the decision in *Friends* and the Management Plan at I-4-25 require that cumulative adverse impacts to recreation resources be prevented. The Management Plan states that “[r]ecreation resources shall be protected from adverse effects by evaluating new developments and land uses as proposed in the site plan. An analysis of both onsite and offsite cumulative effects shall be required.” Management Plan at I-4-25. However, there is no analysis in the Staff Report of past actions nor is there an analysis of the offsite impacts of the rail expansion up and down the NSA – including the additional train traffic that the project would allow. Without such an analysis there is no way to lawfully conclude that recreation resources will be protected. This analysis must be completed and recreation resources must be protected or the application must be denied.

V. The proposal would unlawfully harm natural resources in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of natural resources and prohibits adverse effects to these resources. The project would result in adverse effects to natural resources and should be denied.

a. The Applicant unlawfully proposes to intrude on both water resources and their buffer zones within the SMA.

The Applicant proposes to intrude on both water resources and their buffer zones in the SMA. However, in the SMA, water resource buffer zones must be untouched and maintained in their natural condition. NSA-LUDO § 14.610(A)(2)(a)(1) & (A)(2)(g). For both buffer zones and water resources the Practicable Alternatives Test must be completed and development cannot intrude on the resources or buffer zones if a practicable alternative exists. As discussed in Section II.i above, the Applicant has not completed a compliant Practicable Alternatives Test. Thus, a condition of approval must protect these resources or the proposal must be denied.

In addition, NSA-LUDO § 14.610(A)(2)(g)(2) requires that, within the SMA, wetlands and aquatic and riparian areas can only be disturbed when a public safety hazard exists or when the disturbance is for a restoration/enhancement project. In its application materials, the Applicant attempts to inject ambiguity into this crystal clear requirement. PC 1 1-167. With the exception of a scrivener's error, this requirement was lifted verbatim from the Management Plan. *Compare* NSA-LUDO § 14.610(A)(2)(g) *with* Management Plan at I-3-36. According to the Management Plan, which controls, only unavoidable impacts from public safety hazards and restoration/enhancement projects can be allowed and they must be mitigated with a complete mitigation plan. Management Plan at I-3-36. The proposal is not to alleviate unavoidable impacts from public safety hazards – it would, in fact, greatly increase the hazard to the public by allowing greater capacity for extremely hazardous trains to travel on poorly maintained tracks – nor is it a restoration/enhancement project. Thus, a variance cannot be granted. Even though a variance is not available the Applicant has requested variances for three delineated wetlands or waterbodies within the SMA. Since these requested variances cannot be lawfully granted a condition of approval must be added to prevent disturbances to these resources or the application must be denied.

b. The Decision unlawfully substitutes the Applicant's standards for the legal standards found in the Management Plan and the NSA-LUDO for the protection of sensitive wildlife and plants.

The Applicant and the Staff Report do not address the many requirements of NSA-LUDO § 14.610(B)(2)(a–h). None of the criteria are individually analyzed or met in the Application or in the Staff Report. *See* Staff Report at 89. Instead, the Applicant pledges to avoid sensitive species and priority habitats to the extent practicable. This falls far short of the required standards in NSA-LUDO § 14.610(B)(2)(a–h). The Staff Response states in a conclusory manner that the Decision complies with the ordinance – again without actually analyzing any of the criteria. The application must be denied or conditioned to meet the requirements of NSA-LUDO § 14.610(B)(2)(a–h).

c. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to natural resources.

Both the decision in *Friends* and the Management Plan require that cumulative adverse impacts to natural resources be prevented. A cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, is required by the Act and must be completed by the County. Once the cumulative adverse impacts – including the cumulative adverse impacts of the additional trains that the project would accommodate – are identified, they must be avoided or the application must be denied. This analysis must go above and beyond the requirements of the NSA-LUDO. *Friends*. However, there is no analysis in the Staff Report of cumulative impacts to natural resources including the impacts of past actions. Without such an analysis there is no way to lawfully conclude that cumulative impacts to natural resources will be prevented. The Staff Response ignores the case law from *Friends* and states that the NSA-LUDO has been followed. This is simply not enough. *Friends*. This analysis must be completed and natural resources must be protected or the application must be denied.

VI. The proposal would unlawfully harm cultural resources and treaty rights in the NSA.

The Columbia River Gorge National Scenic Area Act requires protection and enhancement of cultural resources and prohibits adverse effects to these resources and to treaty rights. The project would result in adverse effects to cultural resources and treaty rights and should be denied.

a. The Applicant failed to complete adequate cultural resource reconnaissance surveys and therefore failed to meet its burden to demonstrate compliance with the cultural resource protection requirements.

Due to its location along the Columbia River and near Memaloose Island there is a high likelihood of cultural resources within the project area. For most uses and developments in the Special Management Areas, NSA-LUDO § 14.500 contains the standards for the protection of cultural resources. See NSA-LUDO § 14.510(C). The cultural resource reconnaissance survey and report must be prepared to meet NSA-LUDO § 14.500(K) and (L).

The cultural survey required under NSA-LUDO § 14.500 and initiated by the railroad's contractor was incomplete. The railroad acknowledges that it failed to survey large areas due to blackberry brambles and poison oak. PC 1 1-217. When it became inconvenient to survey for cultural artifacts the railroad's contractor simply stopped surveying. The area that was not surveyed has been identified as having high likelihood of containing historic and pre-contact artifacts. Under the adjudicative decision handed down in *Eagle Ridge* this survey work must be done before the County approves the application. Deferring this work with a condition of approval is not legally adequate. Due to likely impacts on cultural resources a complete cultural resources survey must be completed before the application is decided upon the application must be denied.

b. The application and Decision unlawfully fail to analyze and address the cumulative adverse impacts of the proposed project to cultural resources.

Both the decision in *Friends* and the Management Plan require that cumulative adverse impacts to cultural resources be prevented. A cumulative impacts evaluation of past, present, and likely future actions, including actions that are individually insignificant but cumulatively significant, is required by the Act and must be completed by the County. Once the cumulative adverse impacts are identified – including the cumulative adverse impacts of the additional trains that the project would accommodate – they must be avoided or the application must be denied. This analysis must go above and beyond the requirements of the Wasco County Ordinance. *Friends*. However, there is no analysis in the Staff Report of cumulative impacts to cultural resources including the impacts of past actions. Without such an analysis there is no way to lawfully conclude that cumulative impacts to cultural resources will be prevented. In addition, the incomplete survey discussed above makes it impossible to determine what the impacts of the proposal will be. An analysis including the past, present, and likely future actions must be completed and cultural resources must be protected or the application must be denied.

c. The Planning Commission unlawfully removed a condition to protect treaty rights and acknowledged this would bring the Decision out of compliance with the law.

NSA-LUDO § 14.800(D)(2) requires that uses that would affect or modify treaty rights shall be prohibited. The Staff Report discusses the impacts to treaty rights of the proposal and then proposes a condition of approval to prevent impacts to treaty rights. Staff Report at 119-120. At the Planning Commission hearing, Planning Staff noted that removing Condition 20 would make the decision fall out of compliance with the law. Some Commissioners even acknowledged that removing the condition would have the effect of making the decision unlawful. Still, the Planning Commission removed Condition 20. Staff Report at 120. This condition must be added back or the application must be denied.

VII. The law does not preempt either the permitting process or the placement of conditions of approval on a permit.

The Applicant has argued that Wasco County's NSA-LUDO is fully preempted under the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (49 U.S.C. § 10501(b)(2)). *See, e.g.*, PC 1 1-3. The Applicant is apparently also relying on ICCTA to refuse to seek permits from the Oregon Department of Forestry and the City of Mosier. PC 1 1-217. If the Applicant truly believed that the Wasco County NSA permitting process was fully preempted by federal law, it is likely that the railroad would not be seeking permits from the County either. As the County's legal counsel has advised the County, the requirements of the Columbia River Gorge National Scenic Area Act, the Management Plan, and local rules implementing the Act, including the NSA-LUDO, are not preempted. PC-2 1-13.

While railroads do enjoy broad preemption of local, state, and federal laws, there are limits to what is preempted. Due to constitutional principles, courts have repeatedly ruled that ICCTA is not "intended to interfere with the role of state and local agencies in implementing Federal

environmental statutes.” *Bos. & Me. Corp.*, STB¹⁵ Finance Docket No. 33971, at 9 (2001). The Columbia River Gorge National Scenic Area Act is a Federal environmental statute and Wasco County’s Land Use and Development ordinance implements it. Thus it is not preempted. Instead, courts are required to “harmonize” ICCTA and the NSA-LUDO. *Ass’n of American R.R. v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097–1098 (9th Cir., 2010). If asked to review a decision for preemption, a court would be required to read both sets of laws together and attempt to give effect to both to the extent possible. *Id.*

The contention put forth by the applicant that the NSA-LUDO does not implement federal law because the Columbia River Gorge Commission is explicitly not a federal agency is a ruse. The Gorge Act, which was passed by Congress, signed by President Reagan, and is codified in the United States Code at 16 U.S.C. §§ 544–544p is a federal environmental¹⁶ law. The Gorge Act *requires* the Gorge Commission to develop and adopt a Management Plan compliant with the requirements of the Gorge Act.¹⁷ It then *requires* the Gorge Commission to submit the Management Plan to the Forest Service, which then reviews the plan for consistency with the Gorge Act.¹⁸ The Gorge Act then *requires* the counties to establish ordinances – the NSA-LUDO is one such ordinance – that comply with the Management Plan (and thus the Gorge Act) and *requires* the Gorge Commission to step in and develop ordinances compliant with the Management Plan (and thus the Gorge Act) for any counties that fail to develop compliant ordinances.¹⁹ Arguing that the NSA-LUDO does not implement federal law is simply incorrect.

In addition, case law does not support the Applicant’s position. Applicant relies on *Woodall* to make its argument that the NSA-LUDO is not implementing federal law. However, that case resolved the question of whether state or federal common law controls when there are ambiguities or omissions in Skamania County Code. *Skamania County v. Woodall*, 104 Wn. App. 525, 16 P.3d 701 (Div. II 2001), *rev. den.*, 144 Wn.2d 1021, 34 P.3d 1232 (2001), *cert. den.*, 535 U.S. 980, 122 S. Ct. 1549, 152 L. Ed. 2d 399 (2002). As there is no federal common law of land use to fall back on, if the Gorge Act or Management Plan does not provide a solution to resolve a land use dispute, state common law must be applied. *Woodall* is simply not on point.

¹⁵ The Surface Transportation Board, or the STB, is the entity that oversees the railroads and implements ICCTA.

¹⁶ Of course, ICCTA and any other federal law – whether environmental in nature or not – must be harmonized. *See, e.g., Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (“If an apparent conflict exists between ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible.”).

¹⁷ “Within three years after the date the Commission is established, it shall adopt a management plan for the scenic area.” 16 U.S.C. § 544d(c).

¹⁸ “Upon adoption of the management plan, the Commission shall promptly submit the plan to the Secretary for review. If the Secretary agrees with the Commission that the management plan is consistent with the standards established in this section and the purposes of sections 544 to 544p of this title, the Secretary shall concur to that effect.” 16 U.S.C. § 544d(f)(1).

¹⁹ “Within two hundred and seventy days of receipt of the management plan, each county shall adopt a land use ordinance consistent with the management plan. . . .” 16 U.S.C. § 544e(b)(2). “Within ninety days after making a determination that a county has failed to comply with the provisions of this section, the Commission shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area, excluding urban areas identified in section 544b(e) of this title. The ordinance shall have the object of assuring that the use of such non-Federal lands is consistent with the management plan.” 16 U.S.C. § 544e(c)(1).

However, there are several cases that are on point and that conclude that county ordinances implementing the Gorge Act are federal in nature – including cases that have been decided subsequent to *Woodall*. In 2007, the Oregon Court of appeals determined that the Columbia River Gorge Compact has the force of federal law and the Gorge Act’s implementing rules, including the Management Plan and the county ordinances, are required by federal law and are thus not subject to a state law that ran counter to them. *Columbia River Gorge Comm’n v. Hood River County*, 210 Or App 689, 152 P3d 997, *rev. den.*, 342 Or 727, 160 P3d 992 (2007). In 1993, the Washington Court of Appeals determined that the Gorge Act and Management Plan are federally mandated, and therefore do not constitute state programs for purposes of a Washington statute that prohibits the state from shifting the costs of state programs to the counties. *Klickitat County v. State*, 71 Wn. App. 760, 862 P.2d 629 (Div. III 1993). In 2009, the Oregon Supreme Court also determined that, as a creature of federal law, the Gorge Commission is entitled to significant deference in interpreting ambiguous provisions of the Scenic Area Act or filling in the gaps of the statute. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or 366, 213 P3d 1164 (2009). Both Washington and Oregon courts routinely have determined that local land use and development ordinances within the NSA implement federal law. Thus they would not be fully preempted.

Additionally, treaty rights are not preempted.²⁰ While the preemption clause of ICCTA purports to expressly preempt federal and state laws, it does not expressly abrogate the United States’ treaty obligations with sovereign tribes. Abrogation of a treaty cannot be done in “a backhanded way” but must be “clear and plain.” *United States v. Dion*, 476 U.S. 734, 738–739 (1986). Here, it is not. Thus, the proposed conditions of approval to protect treaty rights held by the tribes, as well as any other conditions of approval that are necessary to protect treaty rights, are not preempted by ICCTA.

Finally, the Applicant has, in certain cases, voluntarily limited the scope of its request to the County. For example, the Applicant, both in its application and in its public statements, has said that the improvements would not result in a significant increase in train traffic through the County. In statements to the Planning Commission, the Applicant has gone as far as pledging that the improvements would only allow 5–7 more trains to pass through the project area per day. There is a line of cases that stand for the proposition that when a railroad enters into a voluntary agreement the commerce clause is not implicated and those agreements are not preempted. *See, e.g., Township of Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053, at 5 (2000); *Pcs Phosphate Co., Inc. v. Norfolk Southern Corp.*, 559 F.3d 212 (4th Cir., 2009). A logical extension of those cases would be a situation such as this – where a railroad has voluntarily made assurances and predicated its application on those assurances the railroad is bound by those assurances. It would also be difficult for the railroad to argue that getting what it requested from the County, but nothing more, is an unreasonable burden on interstate commerce. Holding the Applicant to what it requested is not preempted.

²⁰ In its appeal PLAAPL-16-10-0003, while attempting to deprive the tribes of their treaty rights, the Applicant asserts “that the treaties of 1855 acknowledged the fact that a railroad would be built along the Oregon side of the Gorge.” Attachment F at 4. However, while the treaty between the United States and the Confederated Tribes of the Umatilla Indian Reservation did include a mention of railroads in Article 10, it only discussed the railroad’s potential existence within the Umatilla Indian Reservation, not within the Columbia River Gorge as claimed by the applicant. In addition, the 1855 treaty with the Yakama Nation did not even mention railroads. The Applicant should withdraw this factual misstatement that was put forth as a way to rationalize the unlawful abrogation of treaty rights.

VIII. Conclusion

The Applicant has proposed a massive new project within the NSA. As discussed above, the proposal violates the Gorge Act, the Management Plan, and the NSA-LUDO in dozens of ways. The County has the authority to impose a wide range of conditions on the permit or deny the proposal outright. Appellants ask the County to deny the proposal to prevent irreparable harm to the protected resources of the Columbia River Gorge National Scenic Area.