

How Much Evidence Should We Need to Protect Cultural Sites and Treaty Rights?*

By Jeffrey B. Litwak**

Good afternoon, thank you for inviting me today, and thank you Elizabeth Sanchez¹ for suggesting that the Columbia River Gorge Commission had something interesting to share with all of you. As you might expect from a government person, these are my personal remarks, please do not take these as any position of the Gorge Commission.

I'd like to start with a story. In 1989, my agency, the Columbia River Gorge Commission, denied a land use application to build a home on a piece of property in Wasco County here in Oregon.² We gave two reasons. First, the land was being grazed and the federal Columbia River Gorge National Scenic Area Act³ requires the Gorge Commission protect agricultural land for agricultural use.⁴ And second, we received information from one of the Columbia River Treaty tribes that the property contained a cultural site.⁵ It was not much

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² The records are available at the Gorge Commission office in White Salmon; however, they are confidential pursuant to 16 U.S.C. § 544d(a)(1)(A). The text and footnotes in this article redact names, location, and other information that could be used to identify the site.

³ 16 U.S.C. §§ 544 to 544p.

⁴ 16 U.S.C. § 544d(d)(1).

⁵ 16 U.S.C. § 544d(d)(8) requires that residential development may only “take place without adversely affecting the scenic, cultural, recreation, and natural resources of the [National Scenic Area].”

information—oral, or a letter, I don't recall. But we didn't question it. We didn't ask what the cultural site was. We didn't ask for corroborating evidence. We just accepted it.⁶

The applicant was hoping for the American Developer's Dream—to buy the land cheap, divide it, build on it to make a quick profit, and walk away. A reasonable applicant would have walked away after the Gorge Commission denied the application, but this applicant was anything but reasonable. He bought the property.

A few years later, in 1993, the applicant (now landowner) decided if he couldn't divide and build on it, he was going to mine it for gravel. That idea required that he make another application to the Gorge Commission.⁷ Armed with the prior information, we told him that he needed an archaeologist to demonstrate that he could mine the property without damaging the cultural site.⁸ Of course, we were skeptical he could do so, but we had to give him the opportunity to make his case. Nevertheless, he refused with a single word response, "No,"⁹ and so we denied his application.

Not taking our "no" for an answer, he took a bulldozer equipped with 12-inch ripper blades (essentially spikes) and drove all over the land attempting destroy the cultural site. His neighbor called us. We saw the dust cloud as we approached; we saw him on his equipment; and

⁶ However, the Gorge Commission's rules at the time required an archaeologist conduct a reconnaissance survey of the property, which was done, and which confirmed the presence of a cultural site.

⁷ Columbia River Gorge Commission File No. [redacted].

⁸ Letter from Jonathan Doherty, Executive Director, Columbia River Gorge Commission to [redacted] (DATE).

⁹ Letter from [redacted] to Jonathan Doherty, Executive Director, Columbia River Gorge Commission (DATE). The full text of his refusal was "Dear Mr. Doherty, No. Sincerely, [redacted]."

that same day, we obtained a temporary restraining order.¹⁰ He violated that too and only stopped after a judge threatened to confiscate his equipment.¹¹

This person was known to the local judges and after issuing the temporary restraining order, none of them wanted to do anything else with the case, so the court brought in a pro tem judge—a part-time judge—an attorney from Salem who mostly practiced tax law, not land use, not Indian law, not anything that would suggest he would be facile with our case.

Over several weeks of briefing, telephone hearings and conferences, and in-person court appearances, we educated the judge about the National Scenic Area, about land use law, and about why we protect cultural resources. The Confederated Tribes of Warm Springs and the Confederated Tribes of the Umatilla Indian Reservation sent representatives to testify, and in the end, the judge issued an order enjoining the landowner from using the property without a National Scenic Area permit and requiring him to pay for an archaeological survey and necessary restoration of the property. He wrote in his order:

[The landowner's] actions in this case indicate that he is not motivated primarily to lawfully husband his land but rather to “impress” the press and his constituency with brazen acts of bravado and vandalism. Knowing that these artifacts from past cultures are forever lost once damaged or destroyed, [the landowner's] acts of deliberate destruction of Native American artifacts, even in the cause of protesting the [National Scenic Area] Act amounts to cultural terrorism pure and simple. This type of conduct will not be tolerated by this court¹²

“Cultural terrorism.” Quite a statement for 1993. I was a land use planner for the Gorge Commission at the time. I took the neighbor's phone call; I saw the dust cloud; I took the photos of the landowner ripping his property; I wrote a declaration for our temporary restraining order; I

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was a witness in court; and after getting this injunction, I knew then that I needed to go to law school.

The Gorge Commission arranged for the archaeological survey and in a rare moment of compliance, the landowner paid for it. And we got lucky. The ripped ground disturbed the site, but the site was still generally intact.¹³ But, more importantly, the landowner's destruction missed the cairns. There were cairns on the land, which the archaeologists and tribes' representatives discussed and agreed were likely burials. Of course, we didn't touch them. I suspect the tribes' representatives knew this all along but didn't want to disclose it to the Gorge Commission or the court for fear that it would get out. And it might have. Because in the quest to make administrative and judicial decisions based on "substantial evidence," that is the type of detail that state and federal agencies and courts typically want in their administrative and judicial records and decisions.

I tell you this story because at the time I didn't understand the significance of how the Gorge Commission and our pro tem judge relied on the little bit of information we had (at least to start) that the land is culturally sensitive. I understand it now and marvel at it. Who makes land use decisions and seeks court orders based on a few oral words and written sentences saying only the land is a cultural site? What court relies on that little bit of evidence to issue an injunction?

Almost none.¹⁴

This is what I want to discuss today. How much evidence should we, non-tribal people, need to make decisions to protect the tribes' cultural sites and treaty rights that overlay our

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¹⁴ Indeed, the Wasco County Circuit Court held a trial prior to issuing the permanent injunction.

concept of ownership and use of land? Why do we need a trial to establish what the tribes know and have shared with us? Why shouldn't we rely on whatever information tribes are willing to share—information from those who best know their history, their culture, the highest law of the land (their treaties), and those who have the most to lose by revealing too much?

Jump ahead to 2017, the Gorge Commission was hearing an appeal of a Wasco County decision denying permission for Union Pacific Railroad Company to build several miles of second mainline track through Mosier, Oregon, where less than a year earlier there was an oil train derailment, explosion, fire, and spill. Why did Wasco County deny it? Impact to treaty rights. The County Board was concerned that the second track would be an increased impediment—an impact—for tribal fishers to access a treaty fishing area. The Board also cited an increased risk of a spill and damage to the Columbia River habitat, but I want to talk about the access issue. What was the evidence? Staff and Tribal Council leaders from the Yakama Nation, Confederated Tribes of Warm Springs and Confederated Tribes of the Umatilla Indian Reservation spoke with Wasco County staff and testified at the county's hearings. They indicated that the area was used for river access and fishing. Union Pacific argued that the second track would not affect access because there was no physical evidence of fishing and no tribal fisher had testified that he or she actually used the site for fishing, when he or she used the site, and how he or she used the site.

At the Gorge Commission's hearing, the Commission had to determine whether the tribes' general statements of use constituted substantial evidence that tribal fishers accessed the Columbia River and exercised their treaty rights in the project vicinity. "Substantial evidence" is a legal term. The U.S. Supreme Court says it is "such evidence as a reasonable mind might

accept as adequate to support a conclusion.”¹⁵ And the Gorge Commission concluded that the tribes’ statements of their fishing use was “substantial evidence.”

So why does the Gorge Commission rely on general statements from tribes’ representatives? Why doesn’t the Gorge Commission require more detailed information? The short answer is two-fold.

First, the Columbia River Gorge National Scenic Area Act, the federal law creating the National Scenic Area, contains a provision saying that nothing in the Act shall “affect or modify any treaty or other rights of any Indian tribe.”¹⁶ This is not the same as allowing development where there is only “de minimis effect,” which is the standard that the Army Corps of Engineers and other federal agencies typically use.¹⁷ The National Scenic Area Act essentially says “no effect.”

Second, and implementing that “no effect” standard, the U.S. Forest Service and Gorge Commission’s Management Plan for the National Scenic Area requires permitting agencies to accept and rely on the information that tribes’ representatives provide, unless those agencies can justify otherwise.¹⁸ And in 30-plus years of the National Scenic Area, no agency has been able to justify otherwise. The Plan essentially creates a rebuttable presumption that cultural sites and treaty rights exist when and where tribes’ representatives say they do.

For the longer version of how this came to be, there’s a 1993 Vermont Law Review article by Kris Olson, Multnomah County’s original appointee to the Gorge Commission, who was at the time a law professor and associate dean at Lewis and Clark and an early mentor to

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¹⁶ 16 U.S.C. § 544o(a)(1).

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¹⁸ See *Management Plan for the Columbia River Gorge National Scenic Area* Conclusion of the Cultural Resource Protection Process, Guideline 1 (rev. 2016), at I-2-12.

me.¹⁹ Kris’s article recounted her efforts to ensure the Gorge Commission’s cultural resource and treaty rights regulations took—in her words—the “Indian World View.”²⁰

In the Union Pacific appeal, the Gorge Commission considered the “Indian World View” in terms of substantial evidence. Remember that the definition of “substantial evidence” asks whether a reasonable person would be persuaded. Who is the reasonable person? Law students spend hours debating this, but the Gorge Commission simply acknowledged that the reasonable person in this situation must include the tribal perspective, and that perspective includes tribes’ concerns about sharing detailed information about their fishing practices.²¹

So how is it that general statements could be enough? We consider the context. For example, in the Union Pacific matter, the project is located within Zone 6 of the Columbia River—the exclusive use area for treaty fishing²²; the tribes reserved the right of access to the river in their treaties²³; and the Commission has heard from tribal fishers in the past that they have been harassed and threatened, had their fishing gear vandalized and stolen, and had their

¹⁹ Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741 (1993).

²⁰ *Id.* at 784 (using term).

²¹ Final Opinion and Order, *Union Pacific RR Co. v. Wasco County*, Columbia River Gorge Comm’n Nos. COA-16-01 and COA-16-02, at 38 (Sept. 8, 2017), http://www.gorgecommission.org/images/uploads/appeals/20170908_Final_Opinion_and_Order_%2816-01%2C_16-02_%28Consolidated%29%29.pdf.

²² See, e.g., the 2008-2017 *United States v. Oregon* Management Agreement (*United States v. Oregon*, CV 68-513-KI (D. Or.), docket no. 2455), adopted as a court order, August 12, 2008 (docket no. 2456) **UPDATE WITH 2018-2027 AGREEMENT**.

²³ Treaty of June 9, 1855, with the Yakima Tribe, art. 3 (12 Stat. 951); Treaty of June 25, 1855, with the Tribes of Middle Oregon, art. 1 (12 Stat. 963); Treaty of June 9, 1855, with the Umatilla Tribe, art. 1 (12 Stat. 945); Treaty of June 11, 1855, with the Nez Perce Tribe, art. 3 (12 Stat. 957).

platforms and boats vandalized when they've given detailed testimony about their fishing practices.²⁴

There's another important consideration—the tribes have impressed on the Commission that fishing practices and knowledge are cultural traditions passed from generation to generation and are thus themselves a cultural resource to protect and part of the treaty right itself. Knowing all this, how can we, non-tribal regulators, require tribes' representatives to disclose more detailed information.

Now I want to caution that as of the date of this talk, the Union Pacific case is on appeal at the Oregon Court of Appeals.²⁵ The case has not yet been briefed. There's also a companion case on appeal to the U.S. Court of Appeals for the Ninth Circuit.²⁶ I can't tell you how it will all shake out, but I feel good about the Gorge Commission's approach.

So you may be wondering whether other agencies, federal, state, local, regional, and multi-state, can do the same? Well, why not? There is not any reason that these agencies can't fit an "Indian world view" into their existing administrative processes and practices. They may need to change their rules a bit, but overall, there's not any big legal impediment. Consider if your favorite regulator did the following:

(1) What if your favorite regulator did more than just send a notice that the agency was preparing to take an action and the passively wait to see if the tribes respond. For example, the Army Corps issued a Clean Water Act permit to Union Pacific for its

²⁴ See, e.g., Coyote Island Terminals, LLC, Oregon Off. Of Admin. Hrgs. Case No. 1403883 and 1403884 (June 30, 2015) (Declaration of Wilbur Slockish, Jr.).

²⁵ Petition for Judicial Review, *Union Pacific R.R. Co. v. Wasco County*, No. A166300 (Or. Ct. App. Nov. 7, 2017).

²⁶ Notice of Appeal, *Union Pacific R.R. Co. v. Runyon*, No. 17-35207 (9th Cir. Mar. 13, 2017).

Mosier track project after “consulting” with the Columbia River Treaty Tribes.²⁷ But even though the Army Corps consulted with the Treaty Tribes, the Army Corps also stated that it was not coordinating with Wasco County or evaluating compliance with the National Scenic Area Act. Instead, the Army Corps deferred to Wasco County’s consultation pursuant to the National Scenic Area Act.²⁸

Our job as regulators is to prevent impacts from occurring, not to pump out decisions as quickly as possible, and we are not doing our job when we write decisions that simply say we sent notice, but the tribes didn’t respond.

(2) What if your favorite regulator didn’t create impossibly short deadlines for consultation or comments. In the land use context, a typical comment period is 20 days. We give a more generous 30 days for tribes in the National Scenic Area. But in our experience, that’s never been enough time for tribes to discuss whether and how to meaningfully participate. Sure, we might like if tribes would delegate the power to consult or comment to individuals that can act quickly, but who are we to tell the tribes that for our purposes they must abandon their deliberative processes that have served them for far longer than 1986 when Congress enacted the National Scenic Area Act? To compensate for this deficiency in our rules, we often send notices or request consultation before a “formal” comment period starts and we accept tribes’ participation after that formal comment period ends. If your favorite regulator says he or she can’t do extra-legal steps, it is time to change the rules.

²⁷ Nationwide Permit Verification, U.S. Army Corps of Engineers No. NWP-2014-364 (Nov. 4, 2016).

²⁸ Memorandum for Record, U.S. Army Corps of Engineers No. NWP-2014-364 (Nov. 4, 2016), at 18.

(3) And what if your favorite regulator would really understand the implications of demanding more detailed information—the history of and ever-present possibility of vandalism and personal injury, and the indignity when he or she requires tribal fishers to share their fishing practices and traditions before being willing to protect them?

Oh, sure, we could tell the tribes that they can seek a protective order, but it is not a good solution. Protective orders are hard to obtain in an administrative proceeding, and typically, you must submit the evidence without knowing first whether there will be a protective order.

For example, in the Coyote Island Terminal case, the Port of Morrow’s proposal to build a new loading dock in a treaty fishing site,²⁹ the administrative law judge refused to issue an order protecting public disclosure of the identities of tribal fishers and their fishing activities, reasoning in part that the Tribes had previously submitted evidence of their fishing activities to the Department of State Lands.³⁰ And she also wrote,

“the Tribes have made no showing that, *in the context of this contested case*, disclosure of tribal fishing information, in particular the identities of tribal fishers, would lead to annoyance, embarrassment, or oppression of these potential witnesses.”³¹

“In the context of this contested case?” Why was that the ALJ’s focus? Once the information is out in the public, it’s out for all purposes and all time, not just for that contested case.

With the Gorge Commission’s way, protective orders would never be needed because we would never have insisted on that information in the first place.

Earlier this year, Professor Blumm at Lewis and Clark and I finished an article observing that when the tribes asserted their treaty rights in several recent fossil fuel permitting cases, the

²⁹ See Findings and Order, Or. Dep’t of State Lands, Application No. 49123-RF (Aug. 18, 2014).

³⁰ Ruling on Dep’t of State Lands’ Motion for Protective Order No. 1403883 at 3, Or. Off. of Admin. Hearings. (Feb. 11, 2016).

³¹ *Id.*

agencies listened and denied those permits based on impacts to treaty rights.³² Professor Mary Wood at the University of Oregon Law School, with two co-authors, has another similar article.³³ People are talking about the power of tribes' participation in administrative proceedings. Yet, we don't make it easy for the tribes to participate.

Professor Blumm and I recognized that tribes must make difficult choices in deciding whether to identify their cultural sites and raise their treaty rights in any legal proceeding. And the typical requirement for detailed information, which more often than not gets out to the public, is part of the tribes' calculus for whether to participate. Professor Blumm and I asked, if we take that one problem away, would that make tribes feel more comfortable participating in administrative processes? We don't know. But regardless, it is the right thing to do.

Thank you for letting me share with you today.

³² Michael C. Blumm and Jeffrey B. Litwak, *Democratizing Treaty Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 COLO. NAT. RES., ENERGY & ENVTL L. REV. 1 (2019).

³³ Mary Christina Wood, Anna Elza Brady & Brendan Keenan Jr., *Tribal Tools & Legal Levers for Halting Fossil Fuel Transports & Exports Through the Pacific Northwest*, 7 Am. Indian L.J. 247 (2018).