

HOW MUCH EVIDENCE SHOULD WE NEED TO PROTECT CULTURAL SITES AND TREATY RIGHTS?

BY

JEFFREY B. LITWAK*

Too often, the administrative and judicial systems require tribes to reveal too much about their cultural site and treaty rights before agencies and courts are willing or “able” to protect them. Tribes must make a difficult decision whether to reveal information about their cultural site and treaty rights practices, which, when made public, leads to damage, vandalism, and personal safety concerns. To prevent these effects, agencies and courts can, and should, consider these concerns in determining how much detail is needed to constitute “substantial evidence.” This Article gives examples from the practice of the Columbia River Gorge Commission, a regional land use planning agency created by an interstate compact between Oregon and Washington, which, by its compact, must engage with the four Columbia River Treaty Tribes and protect cultural resources and treaty rights.

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 1990, my agency, the Columbia River Gorge Commission, denied a land use application to build a home 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

*Counsel, Columbia River Gorge Commission; Adjunct Professor, Lewis & Clark Law School. This talk was initially presented at the 2019 U.S. Environmental Protection Agency (EPA) Region 10 Tribal Environmental Leaders Summit, March 7, 2019 in Portland, Oregon. I adjusted some of the text for context and readability for Lewis & Clark Law School's *U.S. v. Oregon: 50th Anniversary Symposium* and publication.

¹ Environmental Manager for Yakama Nation; EPA Region 10 Tribal Operations Committee (RTOC) Tribal Co-Chair.

² COLUMBIA RIVER GORGE COMM'N, DEVELOPMENT REVIEW NO. [REDACTED] (1990). The records relating to this matter are on file with the Columbia River Gorge Commission office in White Salmon, Washington; however, they are confidential pursuant to 16 U.S.C. § 544d(a)(1)(A) (2018). The text and footnotes in this Article redact names, location, and other information that could be used to identify the site.

Area Act³ requires the Gorge Commission to protect agricultural land for agricultural use.⁴ And second, we received information from one of the Columbia River Treaty tribes that the land contained a cultural site.⁵ It was not much 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, 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 land.⁷

A couple years later, in 1992, the applicant (now landowner) decided if he couldn't build on it, he was going to mine it for gravel. That idea required that he make another application to the Gorge Commission.⁸ Armed with the prior information, we told him that he needed an archaeologist to demonstrate that he could mine the land without damaging the cultural site.⁹ 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,"¹⁰ and so we denied his application.¹¹

Not taking our "no" for an answer, two days after we denied his application, he started mining on the land. His neighbor called us; we saw trucks filled with rock leaving the site;¹² and that same day, we obtained a temporary restraining order,¹³ followed several days later by a preliminary injunction.¹⁴ He violated the preliminary injunction when he took a bulldozer equipped with twelve-inch ripper blades (essentially

³ Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p (2018).

⁴ *Id.* § 544d(d)(1).

⁵ *Id.* § 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]."

⁶ However, the Gorge Commission's rules at the time required an archaeologist to conduct a reconnaissance survey of the land, which was done, and which confirmed the presence of a cultural site. See COLUMBIA RIVER GORGE COMM'N, *supra* note 2.

⁷ See COLUMBIA RIVER GORGE COMM'N, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA LAND USE APPLICATION FORM FILE NO. [REDACTED] (1990).

⁸ See COLUMBIA RIVER GORGE COMM'N, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA LAND USE APPLICATION FORM FILE NO. [REDACTED] (1992).

⁹ Letter from Jonathan Doherty, Executive Director, Columbia River Gorge Commission to [redacted] (1993).

¹⁰ Letter from [redacted] to Jonathan Doherty, Executive Director, Columbia River Gorge Commission (1993). The full text of his refusal was "Dear Mr. Doherty, No. Sincerely, [redacted]." *Id.*

¹¹ COLUMBIA RIVER GORGE COMM'N, DEVELOPMENT REVIEW NO. [REDACTED] (1993).

¹² *Aff. of Brian Litt, Columbia River Gorge Comm'n v. [redacted]* (Wasco Cty. Cir. Ct. 1993) (No. [redacted]).

¹³ *Temporary Restraining Order and Order to Show Cause, Columbia River Gorge Comm'n v. [redacted]* (Wasco Cty. Cir. Ct. 1993) (No. [redacted]).

¹⁴ *Preliminary Injunction, Columbia River Gorge Comm'n v. [redacted]* (Wasco Cty. Cir. Ct. 1993) (No. [redacted]).

spikes) and drove all over the land attempting to destroy the cultural site, and only stopped after the judge issued an order to show cause why he should not be held in contempt.¹⁵

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—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 Act, about land use law, and about why we protect cultural resources. The Confederated Tribes of Warm Springs intervened, and in the end, the judge issued an order enjoining the landowner from using the land without a National Scenic Area permit and requiring him to pay for an archaeological survey and necessary restoration of the land. 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 court¹⁶

"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 when the landowner violated the preliminary injunction; I saw the dust cloud; I took the photos of the landowner ripping his land; I wrote an affidavit for the contempt proceeding; I 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.¹⁷ 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 about the site all along but didn't want to disclose the burial sites to the Gorge Commission or to the court for fear

¹⁵ Order to Show Cause Why [redacted] Should Not be Held in Contempt for Remedial Sanctions, Columbia River Gorge Comm'n v. [redacted] (Wasco Cty. Cir. Ct. 1993) (No. [redacted]).

¹⁶ Memorandum Trial Opinion, No. [redacted] (Wasco Cty. Cir. Ct. 1994).

¹⁷ CULTURAL RESOURCE SURVEY AND LAND RESTORATION PLAN FOR THE [REDACTED] PROPERTY, WASCO COUNTY, OREGON.

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.¹⁸

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 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 a second mainline track through Mosier, Oregon, where less than a year earlier there was an oil train derailment, explosion, fire, and spill.¹⁹ 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.²⁰ The Board also cited an increased risk of a spill and damage to the Columbia River habitat,²¹ 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.²² They indicated that the area was used for river access and fishing.²³ Union Pacific argued that the second track would not affect access because there was no physical evidence of fishing and no tribal

¹⁸ Indeed, the Wasco County Circuit Court held a trial prior to issuing the permanent injunction. Memorandum Trial Opinion at 1, No. [redacted] (Wasco Cty. Cir. Ct. 1994).

¹⁹ Final Opinion and Order at 44, *Union Pac. R.R. Co. v. Wasco Cty. (Union Pacific)*, Nos. COA-16-01 & COA-16-02 (Columbia River Gorge Comm’n, Sept. 8, 2017), <https://perma.cc/476T-TFCS>.

²⁰ WASCO CTY. BD. OF CTY. COMM’RS., FINAL REPORT PLASAR-15-01-0004, at 118–23 (2016).

²¹ *Id.* at 121–23.

²² *Id.* at 118–22.

²³ *Id.* at 118–21.

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.²⁴

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 United States Supreme Court says it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁵ 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."²⁶ 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.²⁷ 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.²⁸ And in thirty-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 & Clark Law School and an early mentor to me.²⁹ 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."³⁰

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

²⁴ *Id.* at 29.

²⁵ *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

²⁶ 16 U.S.C. § 5440(a)(1) (2018).

²⁷ *See Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520–22 (W.D. Wash. 1996).

²⁸ *See COLUMBIA RIVER GORGE COMM'N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA*, at I-2-12 (2016).

²⁹ Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741 (1993).

³⁰ *See id.* at 784 (using the term).

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.³¹

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 fishing;³² the tribes reserved the right of access to the river in their treaties;³³ and the Commission had heard from tribal fishers in the past that they had been harassed and threatened, had their fishing gear vandalized and stolen, and had their platforms and boats vandalized when they had given detailed testimony about their fishing practices.³⁴

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.³⁵ 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.³⁶ 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 then passively wait to see if the tribes respond. For example, the Army Corps issued a Clean Water Act permit to Union Pacific for its Mosier track project after

³¹ Final Opinion and Order at 38, *Union Pac.*, Nos. COA-16-01 & COA-16-02 (Columbia River Gorge Comm'n, Sept. 8, 2017), <https://perma.cc/476T-TFCS>.

³² See, e.g., 2018–2027 UNITED STATES V. OREGON MANAGEMENT AGREEMENT 36 (Feb. 26, 2018).

³³ Treaty with the Yakimas, U.S.-Yakima Tribe, art. 3, June 9, 1855, 12 Stat. 951; Treaty with Indians in Middle Oregon, Middle Or. Tribes-U.S., art. 1, June 25, 1855, 12 Stat. 963 (Walla-Wallas and Wascoes); Treaty with the Walla-Wallas, U.S.-Walla-Walla Tribe, art. 1, June 9, 1855, 12 Stat. 945 (Cayuses and Umatilla Tribes); Treaty with the Nez Percés, Nez Percé Tribe-U.S., art. 3, June 11, 1855, 12 Stat. 957.

³⁴ See, e.g., Declaration of Wilbur Slockish, Jr., Coyote Island Terminals, L.L.C., Or. Office of Admin. Hearings, Nos. 1403883 & 1403884 (June 30, 2015).

³⁵ Petition for Judicial Review, *Union Pac.*, No. A166300 (Or. Ct. App. Nov. 7, 2017).

³⁶ Notice of Appeal, *Union Pac. R.R. Co. v. Runyon*, No. 17-35207 (9th Cir. Mar. 13, 2017).

“consulting” with the Columbia River Treaty Tribes.³⁷ 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.³⁸

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 twenty days. We give a more generous thirty 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 when Congress enacted the National Scenic Area Act in 1986? 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.

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?

Sure, we could tell the tribes that they can seek a protective order, but that 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,³⁹ the administrative law judge (ALJ) 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

³⁷ Nationwide Permit Verification, U.S. Army Corps of Eng’rs, No. NWP-2014-364 (Nov. 4, 2016).

³⁸ Memorandum for Record at 18, U.S. Army Corps of Eng’rs, No. NWP-2014-364 (Nov. 4, 2016).

³⁹ See Findings and Order, Application No. 49123-RF (Or. Dep’t of State Lands, Aug. 18, 2014).

evidence of their fishing activities to the Department of State Lands.⁴⁰ 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.”⁴¹ “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 & Clark Law School and I finished an article observing that when the tribes asserted their treaty rights in several recent fossil fuel permitting cases, the agencies listened and denied those permits based on impacts to treaty rights.⁴² Professor Mary Wood at the University of Oregon Law School, with two co-authors, has another similar article.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

Thank you for letting me share with you today.

⁴⁰ Ruling on Dep’t of State Lands’ Motion for Protective Order at 3–4, Or. Office of Admin. Hearings, Nos. 1403883 & 1403884 (Feb. 11, 2016) (emphasis added).

⁴¹ *Id.* at 3.

⁴² Michael C. Blumm & Jeffrey B. Litwak, *Democratizing Treaty Rights: Denying Fossil-Fuel Exports in the Pacific Northwest*, 30 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 4 (2019).

⁴³ Mary Christina Wood et al., *Tribal Tools & Legal Levers for Halting Fossil Fuel Transports & Exports Through the Pacific Northwest*, 7 AM. INDIAN L.J. 266 (2018).

⁴⁴ Blumm & Litwak, *supra* note 42, at 5–6.

⁴⁵ *Id.*

⁴⁶ *Id.* at 32–33.