

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE,)
INC.; SAVE OUR SCENIC AREA;)
LORELEY DRACH; TOM DRACH;)
JOYCE EASTWICK; MIKE EASTWICK;)
CHARLIE GUTHRIE; ALEXANDER)
MECL; CHERYL PARK; VICKI PRYSE;)
DAN RAWLEY; JEANNIE RAWLEY;)
ADRIENNE RUDERMAN; GLENDA)
RYAN; and MATT RYAN,)

Appellants,)

vs.)

SKAMANIA COUNTY,)

Respondent,)

and)

WHISTLING RIDGE ENERGY, LLC,)

Intervenor-Respondent.)

CRGC No. COA-S-09-01

Skamania County Resolution No. 2009-22

APPELLANTS' BRIEF

Gary K. Kahn
Reeves, Kahn & Hennessy
P.O. Box 86100
Portland, OR 97286-0100
(503) 777-5473
Attorneys for Appellants Friends
of the Columbia Gorge, Inc.;
Loreley Drach; Tom Drach;
Joyce Eastwick; Mike Eastwick;
Charlie Guthrie; Alexander Mecl;
Cheryl Park; Vicki Pryse;
Dan Rawley; Jeannie Rawley;
Adrienne Ruderman;
Glenda Ryan; and Matt Ryan

Nathan Baker, Staff Attorney
Friends of the Columbia Gorge
522 SW 5th Avenue, Suite 720
Portland, OR 97204-2100
(503) 241-3762 x101

Attorney for Appellant Friends
of the Columbia Gorge, Inc.

J. Richard Aramburu
Aramburu & Eustis, LLP
720 Third Avenue, Suite 2112
Seattle, WA 98104-1860
(206) 625-9515

Attorneys for Appellant Save
Our Scenic Area

Attorneys continued on inside cover.

Peter S. Banks, County Prosecutor
Skamania County Courthouse
P.O. Box 790
Stevenson, WA 98648-0790
(509) 427-3790
Attorney for Respondent
Skamania County

Timothy L. McMahan
(503) 294-9517
Erin L. Anderson
(503) 294-9546
Stoel Rives LLP
900 SW 5th Ave., Ste 2600
Portland, OR 97204
Attorneys for Intervenor-Respondent
Whistling Ridge Energy, LLC

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IV. ARGUMENT

A. **Assignment of Error: The County erroneously determined that the proposed Project is allowed within the General Management Area.**

The Scenic Area Act and its implementing rules expressly prohibit industrial uses on GMA lands. In this case, the proposed Project and all of its components (including the haul route) is an industrial use. The Project is therefore prohibited within the GMA.

1. **The Project is an industrial use, and is therefore prohibited within the GMA.**

The Whistling Ridge Project, including the proposed haul route, would be “primarily involved in [the] production of electric power for commercial purposes,” and thus meets the definition of an “industrial use.” SCC § 22.04.010(88)(d). Industrial uses are expressly prohibited within the GMA. SCC § 22.10.020(A); 16 U.S.C. § 544d(d)(6). Because this Project is an industrial use, it is prohibited within the GMA. The County erred by concluding otherwise.

In a prior matter, the Gorge Commission expressly determined that wind energy facilities are prohibited industrial uses. In *Eagle I*, the Gorge Commission’s Executive Director declined to accept an application for a wind energy facility on Scenic Area lands because the use was prohibited and because the Commission’s ordinance forbids the acceptance and processing of applications for prohibited uses. (App. T-4.) On appeal, the Gorge Commissioners upheld the Executive Director’s decision. (App. T-1.)

Here, Skamania County failed to follow the binding precedent of *Eagle I*. Under *Eagle I*, the County cannot accept an application for a wind energy project within the GMA. *Eagle I*; SCC § 22.06.110(B) (Skamania County shall not accept or process applications for prohibited uses). The County was required to notify WRE that the Project is prohibited within the GMA and that the County cannot accept a land use application for the Project components proposed

within the GMA.¹⁶ Instead, the County determined that the Project is *allowed* on GMA lands, and *welcomed* a future land use application to review resource impacts. (App. A-1, B-18–19, C-2.) The County’s approach is directly contrary to *Eagle I*. The County’s Decision should be reversed.

2. The proposed haul route must be reviewed not only for its construction, but also for its intended use.

As discussed above, the haul route is part of an industrial project that is prohibited within the GMA. The County completely ignored this prohibition. Instead, the County cited provisions of the Scenic Area ordinance that allow roads, and concluded that the proposed industrial haul route is therefore allowed. (App. B-18.)

The problem with the County’s analysis is that the County failed to review the proposed *purpose and use* of the haul route. In the National Scenic Area and in Skamania County generally, roads must be reviewed for both their construction and their intended uses.

A review of the ordinance sections cited by Skamania County in its Staff Report confirms that it is necessary to determine the proposed uses of roads in the National Scenic Area. For example, the provision cited by the County regarding roads in Commercial Forest zones allows “roads . . . not in conjunction with agriculture or with forest use or forest practice.” SCC § 22.14.030(E)(1)(h) (cited at App. B-18). The reference to specific road uses (agriculture and forest uses) shows that the proposed use of a road must be reviewed.

¹⁶ It appears that in *Eagle I*, the entire project, including the transportation components, would have been within the GMA. In the instant matter, only the transportation components of the Project are proposed within the GMA. Although the facts are slightly different, the legal conclusions in *Eagle I* still apply. For Whistling Ridge, the haul route is part of the Project for which WRE seeks approval. (App. D-2, E-11–12.) Wind energy facilities, either in whole or in part, are prohibited within the GMA. SCC § 22.10.020(A).

In addition, the Scenic Area ordinance states that no land or structure may be used within the Scenic Area in a manner that is inconsistent with the ordinance. SCC § 22.06.010. Here, the proposed use of the haul route is a prohibited industrial use.

Appendix U is a 2002 Gorge Commission letter discussing the requirement to review roads in the National Scenic Area for their intended uses. That matter involved a former logging road that was reestablished and used as an access road for geotechnical testing. The Gorge Commission explained that the landowner “should have obtained a permit . . . before using the road for a new purpose.” (App. U-2.)

A recent federal court decision discusses the same requirement. *Friends of the Columbia Gorge, Inc. v. United States Forest Serv.*, 546 F. Supp. 2d 1088 (D. Or. 2008).¹⁷ In that case, the court determined that because an existing road “had not been used in at least one year for log hauling, the use of the road for logging purposes is a ‘discontinued use.’” *Id.* at 1113 (emphasis added). The court then went on to hold that a change in the proposed project “from a one-time, temporary use for log hauling . . . to a permanent use that may often be repeated [and] potentially [to] a different use of the road” triggered further review under the Scenic Area rules. *Id.* at 1115.

Similar to Scenic Area requirements, Skamania County requires its private roads to be classified “based on their primary functions.” SCC § 12.03.030. The County road system has several different classification categories, ranging from private driveways to commercial development to recreational use. *Id.* Proposals to change roads from one category to another, such as residential to commercial use, trigger review. SCC § 12.03.070. These provisions further demonstrate that the County must review roads not only for their construction, but also for their uses.

¹⁷ A copy of this decision is attached as Appendix V.

Under these precedents, a reviewing authority must consider not only the construction of a proposed road, but also the proposed use of the road and whether such use is allowed or prohibited. If the proposed use is prohibited, it must be denied. If the use is allowed, the reviewing authority must also determine whether the project may adversely affect protected resources.

In most cases, the construction and use of roads will be allowed. For example, when a residential driveway¹⁸ is proposed, the proposed driveway and its use are allowed as accessory to a permitted use in the zone (e.g., a dwelling). *See, e.g.*, SCC § 22.14.040(E)(1)(n) (allowing “[p]rivate roads serving a residence” in GMA Large Woodland zones). To provide another example, forest practices roads and their use for logging purposes are themselves deemed forest practices that are allowed outright in the General Management Area and with review for resource impacts in the Special Management Areas. SCC §§ 22.04.010(68), 22.04.010(69), 22.10.040(A)(3), 22.16.020(D)(2)(a)(iii), 22.16.020(D)(2)(e); WAC 222-16-020 (includes logging roads within the definition of “forest practice”).

But where a new haul route is proposed specifically for a prohibited use, such as an industrial use, it is prohibited. That is the case here, as will be explained below.

3. Because the haul route is proposed for industrial purposes, it is prohibited.

The haul route is proposed solely for industrial purposes. Not only is the haul route part of the overall Project, it also meets the definition of an industrial use in and of itself. Major portions of the haul route—especially the land on which new and widened roadways would be constructed—would be “*primarily involved in* [the] production of electric power for commercial

¹⁸ The Scenic Area ordinance does not separately define or reference driveways, but they are inherently included within the definitions of both “road” and “structure,” which are found at SCC §§ 22.04.010(141) and 22.04.010(162), respectively.

purposes, SCC § 22.04.010(88)(d) (emphasis added),¹⁹ because they are proposed specifically for hauling construction materials and equipment for the production of electric power for commercial purposes.

It is important to keep in mind that the roads proposed here are not typical roads similar to those commonly proposed and reviewed in the National Scenic Area. A Washington DNR consultant who specializes in reviewing wind energy projects recently described wind energy roads as “almost like a superhighway.” (App. L-2.) The road dimensions and specifications for this Project are consistent with those of an industrial park.

For example, WRE proposes to more than double the width of an existing private logging road, place asphalt along sections of that road, construct entirely new sections of road, and flatten and rebuild currently steep sections. (App. E-11–12, E-18–E-20, E-25.) Once the roads are constructed, WRE proposes to haul wind energy turbine components and construction materials—industrial loads that would exceed the WSDOT legal load limit of 52.75 tons. (App. E-21, E-24.) The proposed construction and use of the haul route is a new industrial activity, and it is prohibited.

Bowman Park Neighborhood Association v. City of Albany, 11 Or LUBA 197 (1984) is instructive here. In *Bowman Park*, a landowner proposed a private road in a residentially zoned area that would access a proposed industrial use in an industrially zoned area. LUBA concluded that the proposed road was an accessory industrial use, and was not permitted within the residentially zoned area. *Id.* at 203.

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¹⁹ *Webster's Third New International Dictionary of the English Language, Unabridged* (2002) defines “involve” in pertinent part as “to have an effect on” and to “concern directly.”

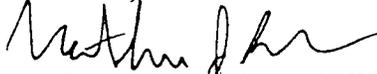
The facts here are very similar to those in *Bowman Park*. Here, WRE proposes to construct and use a new industrial haul route on GMA lands zoned and used for open space, agricultural, residential, and forest uses. Because industrial uses are not allowed in these zones, the proposed construction and use of the industrial haul route is not allowed. The Gorge Commission should reach the same conclusion as that of LUBA in *Bowman Park*, and should reverse the County's Decision.

V. CONCLUSION

Based on the foregoing, the Commission should reverse Skamania County's determination that the Project is allowed within the General Management Area.

Dated: July 27, 2009.

REEVES, KAHN & HENNESSY



Gary K. Kahn, WSBA No. 17928

Attorney for Appellant Friends of the Columbia Gorge, Inc.; Loreley Drach; Tom Drach; Joyce Eastwick; Mike Eastwick; Charlie Guthrie; Alexander Mecl; Cheryl Park; Vicki Pryse; Dan Rawley; Jeannie Rawley; Adrienne Ruderman; Glenda Ryan; and Matt Ryan

FRIENDS OF THE COLUMBIA GORGE, INC.



Nathan Baker, WSBA No. 35195

Attorney for Appellant Friends of the Columbia Gorge, Inc.

ARAMBURU & EUSTIS, LLP



J. Richard Aramburu, WSBA No. 466

Attorney for Appellant Save Our Scenic Area