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Supreme Court No. 101,960-2
Court of Appeals No. 56417-3-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

JUDITH ZIMMERLY, JERRY NUTTER, and NUTTER
CORPORATION,

Appellants,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

**RESPONDENT COLUMBIA RIVER GORGE
COMMISSION'S ANSWER TO
BIAW'S AMICUS BRIEF**

JEFFREY B. LITWAK, WSBA No. 31119
Columbia River Gorge Commission
57 NE Wauna Ave.
P.O. Box 730
White Salmon, WA 98672
Telephone: (509) 493-3323
jeff.litwak@gorgecommission.org
*Attorney for Respondent
Columbia River Gorge Commission*

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I. INTRODUCTION

The Building Industry Association of Washington’s (BIAW) amicus brief in support of the petition for review introduces new issues not contained in the petition for review or in the answers to the petition. The amicus brief does not identify or address points in the Court of Appeals decision and does not cite or address RAP 13.4(b) or even explain how the issues it raises satisfy any of this Court’s criteria for discretionary review. In short, the amicus brief is not helpful in deciding the petition.

II. POINTS AND AUTHORITIES IN RESPONSE TO BIAW’S AMICUS BRIEF

A. The Court of Appeals independently interpreted the National Scenic Area Act, without deference and specifically addressed the term “implementation.”

BIAW argues that this court should not defer to the Gorge Commission when determining the meaning of 16 U.S.C. § 544m(a)(2)¹ using the federal method for statutory

¹ 16 U.S.C. § 544m(a)(2) states in relevant part, “Any person or entity adversely affected by any final action or order of a county relating to the

interpretation in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Amicus Brief at 8-9. This argument does not relate to the Court of Appeals decision. The Court of Appeals independently interpreted section 544m(a)(2) without citing or applying *Chevron* or any deference to the Gorge Commission. BIAW's deference argument also does not relate to any of the issues presented in the petition for review because the petition did not assign error to the Court of Appeals decision based on the application of *Chevron* or deference (or in this case lack thereof), and neither of the answers to the petition argued for or against, or even mentioned *Chevron* or deference in any form.

The Court of Appeals did not explain why it did not apply the *Chevron* method,² which this Court and the Oregon

implementation of [the National Scenic Area Act] may appeal such action or order to the Commission * * *.”

² *Chevron* only arose during oral argument before Division II when Judge Birk asked the Gorge Commission's counsel about the application of decisions of the U.S. Supreme Court when interpreting a federal statute. See Oral Argument at 22:25-23:03, <https://tvw.org/video/division-2-court-of-appeals-2023011378/?eventID=2023011378>.

Supreme Court have long applied to the Gorge Commission's interpretations of the National Scenic Area Act. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42-43, 26 P.3d 241 (2001); *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1171-75, 346 Or. 366 (2009).

The Court of Appeals' reason for not applying *Chevron* is unimportant in deciding the petition because, again, no party raised *Chevron* as an issue for review. Nevertheless, *Chevron* itself gives the most logical answer. Deference under *Chevron* only applies when a court concludes that the statute at issue is ambiguous. *Chevron*, 467 U.S. at 842-43. In the instant case, the Court of Appeals expressly concluded that the National Scenic Area Act is not ambiguous with respect to the petitioners' arguments. The Court of Appeals explained that the NSA "unambiguously" requires a management plan to set the standards for county land use ordinances, and that Clark County's National Scenic Area code states that it is intended to

“implement” the Management Plan. (Slip Op. at 22.) The Court of Appeals thus concluded, “Although nothing in the Act specifically identifies county scenic area ordinances as ‘related to implementation of the Act,’ the relationship between the Act and the county code is plain.” *Id.* (emphasis added).

BIAW’s attempt to introduce *Chevron* is not helpful in deciding the petition for review. An action to enforce county ordinances adopted to “implement” the Management Plan is plainly an action related to the implementation of the National Scenic Act, as the Court of Appeals correctly determined.

BIAW’s further argument that the Court of Appeals “omitted” the term “implementation” in its analysis (Amicus Brief at 11-12) is false, and therefore also is not helpful. The Court of Appeals expressly included the term “implementation” in its analysis and conclusion. In addition to the quotes above from the Court of Appeals decision, the Court of Appeals also expressly described the Clark County Code provisions at issue and their origin in the Gorge Commission’s Management Plan,

and concluded, “This question relates to implementation of the Act.” (Slip Op. at 22 (emphasis added).)

B. Nothing in this case, which involves review of an enforcement action for mining without a permit, relates to the cost and timing in permits for housing in the National Scenic Area.

BIAW’s argument that the Gorge Commission’s jurisdiction to hear appeals increases the time and cost of permits for new housing developments (Amicus Brief at 13-15) is again not helpful. These concerns are unrelated to the Gorge Commission’s jurisdiction to hear appeals of decisions on County enforcement actions. Furthermore, the Gorge Commission’s general jurisdiction to hear appeals is not at issue in the petition. The Court of Appeals expressly stated, “The parties agree that the Act allows an aggrieved person to appeal to the Commission from ‘any final action or order of a county relating to the implementation of [the Act].’ 16 U.S.C. § 544m(a)(2).” (Slip Op. at 21 (emphasis added)). The petitioners did not raise that statement as an issue for review. The only

issue that the Court of Appeals had to decide was whether Clark County's order in this case related to the implementation of the National Scenic Area Act. *Id.*

BIAW's concern is properly addressed to the Legislature. For example, to reduce the length of time that a Gorge Commission decision spends in the judicial system, the Washington Legislature could provide for direct review of Gorge Commission cases in the Court of Appeals like the Oregon Legislature did in ORS 196.115(2)(a). By analogy, the Washington Legislature recently did so for appeals under the Land Use Petition Act. RCW 36.70C.150.

Finally, this case does not involve permitting for housing in any way. This case is about Clark County's enforcement action against the petitioners for mining in the National Scenic Area without a valid permit. BIAW's concerns are misplaced.

III. CONCLUSION

The Court should conclude that BIAW's arguments are not helpful in deciding the petition for review, and in

accordance with the respondents' briefing, the Court should deny the petition for review.

Certificate of Compliance (RAP 18.17(b))

I certify this brief was prepared using Microsoft Word and contains 1043 words as counted by Microsoft Word, exclusive of words contained in the portions of this brief specified in RAP 18.17(b).

Respectfully Submitted this 25th day of July 2023.

s/ Jeffrey B. Litwak

Jeffrey B. Litwak, WSBA No. 31119
Attorney for Respondent,
Columbia River Gorge Commission

CERTIFICATE OF FILING AND SERVICE

I certify that I filed a true and correct copy of the *Respondent Columbia River Gorge Commission's Answer to BIAW's Amicus Brief* through the Court's e-filing system, which will send email notifications of this filing to all parties of record, and that I served the following persons by separate email:

Stephen Horenstein – shorenstein@schwabe.com
Maren Calvert – mcalvert@schwabe.com
Appellateassistants@schwabe.com
astewart@schwabe.com
lmckee@schwabe.com
patricia@horensteinlawgroup.com
lydia@horensteinlawgroup.com
Attorneys for Jerry Nutter and Nutter Corporation

David Bowser – david.bowser@jordanramis.com
Jamie Howsley – jamie.howsley@jordanramis.com
litparalegals@jordanramis.com
rose.hedrick@jordanramis.com
Attorneys for Judith Zimmerly

Nathan Baker – nathan@gorgefriends.org
Attorney for Friends of the Columbia Gorge

Jeffrey Myers – jmyers@lldkb.com
Attorney for Jody Akers, et al.

Curtis Burns – curtis.burns@clark.wa.gov
Sheryl.thrasher@clark.wa.gov
Attorney for Clark County, Washington

///
///

Jackson Maynard, Jr. – jacksonm@biaw.com
Ashli Tagoai – ashlit@biaw.com
Paige Jaramillo – paigej@biaw.com
*Attorneys for Building Industry Association of
Washington*

DATED this 25th day of July 2023

s/ Jeffrey B. Litwak
JEFFREY B. LITWAK, WSBA No. 31119
Attorney for Respondent
Columbia River Gorge Commission

COLUMBIA RIVER GORGE COMMISSION

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- jamie.howsley@jordanramis.com
- jmyers@lldkb.com
- jwmaynard2003@yahoo.com
- lisa@lldkb.com
- litparalegal@jordanramis.com
- lydia@horensteinlawgroup.com
- nathan@gorgefriends.org
- patricia@horensteinlawgroup.com
- shorenstein@schwabe.com

Comments:

Sender Name: Jeffrey Litwak - Email: jeff.litwak@gorgecommission.org
Address:
57 NE WAUNA AVE
PO BOX 730
WHITE SALMON, WA, 98672-1850
Phone: 509-493-3323

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