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 PETITION FOR REVIEW

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. IDENTITY OF RESPONDENT

The Columbia River Gorge Commission requests that the Court deny review of the Court of Appeals decision.

II. COURT OF APPEALS DECISION

Judith Zimmerly, Jerry Nutter, and the Nutter Corporation have filed a petition for review of a published unanimous decision of Division II of the Court of Appeals in *Zimmerly v. Columbia River Gorge Commission*, Court of Appeals No. 56417-3-II, filed on April 4, 2023 (herein cited as "Slip Op.").

III. COUNTERSTATEMENT OF THE ISSUES

1. The Court of Appeals decision correctly applied the exception to exclusive jurisdiction in the Land Use Petition Act in RCW 36.70C.030(1)(a)(ii) because the Gorge Commission was created by Washington statute (together with Oregon statute and the consent of Congress). Should this Court grant review pursuant to RAP 13.4(b)(1) when none of the decisions that the petitioners cite involve the exceptions in RCW 36.70C.030(1)(a)?

2. The Court of Appeals correctly concluded that Clark County's proceeding involved section 40.240.010(B) of Clark County's National Scenic Area Code and thus correctly concluded that Clark County's final order was

an action or order "relating to the implementation of the [National Scenic Area Act]" (16 U.S.C. § 544m(a)(2)), which is the predicate of the Gorge Commission's appellate authority. Should this Court grant review pursuant to RAP 13.4(b) when none of the decisions that the petitioners cite involve the Gorge Commission's appellate authority in 16 U.S.C. § 544m(a)(2) and there is no ambiguity in section 544m(a)(2)?

3. The Court of Appeals correctly applied the discontinued standard in Ms. Zimmerly's 1993 permit in accordance with the Gorge Commission's Management Plan for the National Scenic Area and not Washington common law. Washington common law may only apply when the Management Plan does not provide a solution. Should this Court grant review pursuant to RAP 13.4(b)(1) when the Management Plan expressly specifies that intent to abandon a use is not the applicable standard and thus, there is no conflict with Washington common law applying an intent to abandon standard?

IV. COUNTERSTATEMENT OF THE CASE

The petitioners seek to operate a gravel pit in the Columbia River Gorge National Scenic Area without a valid National Scenic Area permit. The origin of this case is a 2018 enforcement order issued by Clark County's code enforcement staff to petitioners Judith Zimmerly (the landowner) and Jerry Nutter and Nutter Corporation ("Nutter") (the mining operator)

requiring them to cease mining unless and until they receive a National Scenic Area permit from Clark County.

The site once lawfully operated. In 1993, the Gorge Commission issued a permit to Zimmerly Rock Products (which petitioner Judith Zimmerly owned) to operate and expand a gravel pit that started before Congress designated the National Scenic Area. In 1997, Ms. Zimmerly agreed to comply with the terms of that 1993 permit when she signed a consent decree and order with the Gorge Commission resolving an enforcement action. The 1993 permit specified that it "shall become void . . . when the development action is discontinued for any reason for one continuous year or more." (County Rec. 1927.) Thereafter, no mining occurred for at least one 18-month period and one 10-year period, before mining started again in 2017 (County Rec. 21) without any valid National Scenic Area permit.

The petitioners do not identify any conflicts with any Supreme Court or published decision of the Court of Appeals or

with the state or federal constitutions. The petitioners also exaggerate and dramatize this case as being of substantial public interest because it might set a precedent for the I-5 Bridge Replacement Program (interstate bridge over the Columbia River) to operate outside of Washington law. (Pet. at 2.) However, Washington and Oregon have not created an interstate commission like the Gorge Commission for the I-5 Bridge Replacement; rather, WSDOT and ODOT are co-managing the project themselves through an agreement between themselves, which specifies the application of the states' own laws. *See* WSDOT Agreement No. GCB 3342 and ODOT Misc. Contracts and Agreements No. 34096.[1]

A. The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p.

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p, created the Columbia River Gorge

[1] Available at https://www.oregon.gov/odot/Get-Involved/OTCSupportMaterials/Consent_12_Attach_01_I-5_Bridge_Program_Bi-State_Intergovernmental_Agreement.docx.pdf.

National Scenic Area, granted consent for Washington and Oregon to enact an interstate compact to create the Gorge Commission, and authorized the administrative structure for land use in the National Scenic Area.

The states enacted the Columbia River Gorge Compact in 1987 (RCW 43.97.015; Or. Rev. Stat. § 196.150). The Compact is the states' joint creation of the Gorge Commission and the administrative structure authorized in the National Scenic Area Act. Article I.a of the Compact incorporates the National Scenic Area Act by reference, making the provisions of that federal law directly applicable to the Gorge Commission, the states, and local governments. Additionally, RCW 43.97.025(1) states:

> "The governor, the Columbia River Gorge commission, and all state agencies and counties are hereby directed and provided authority to carry out their respective functions and responsibilities in accordance with the compact executed pursuant to RCW 43.97.015, the Columbia River Gorge National Scenic Area Act, and the provisions of this chapter."[2]

[2] ORS 196.155 is Oregon's enactment of this same text.

The National Scenic Area Act requires the Gorge Commission and U.S. Forest Service[3] to jointly develop a regional Management Plan for the National Scenic Area and for the Gorge Commission to adopt it, incorporating the Forest Service's standards for designated special management areas and federal lands into the Management Plan without change. 16 U.S.C. §§ 544d, 544f. The U.S. Secretary of Agriculture must review the Management Plan and determine whether it is consistent with the National Scenic Area Act, a process called "concurrence." 16 U.S.C. § 544d(f).

The Gorge Commission adopted the Management Plan in 1991 and revised it in 2004 and 2020. The Secretary concurred on the original plan and all subsequent revisions and amendments. "The Commission's land management plan and the act's provisions relative to the plan are federally mandated,

[3] The National Scenic Area Act specifies the U.S. Secretary of Agriculture. The Secretary delegated the federal portion of administering the National Scenic Area to the U.S. Forest Service.

and do not constitute a state program." *Klickitat County v. State*, 71 Wn. App. 760, 767, 862 P.2d 629 (1993).

The National Scenic Area Act requires the six Gorge counties (which includes Clark County) to adopt and implement National Scenic Area ordinances, 16 U.S.C. §§ 544e(b), 544f(h), which the Gorge Commission and U.S. Secretary of Agriculture must review for consistency with the Management Plan, 16 U.S.C. §§ 544e(b), 544f(h). After determinations of consistency, the counties administer their own National Scenic Area land use ordinances. The ordinances are "required to comply with federal law." *Columbia River Gorge Commission v. Hood River County*, 152 P.3d 997, 1004, 210 Or. App. 689 (2007).

While the Gorge Commission and U.S. Forest Service were preparing and adopting the original Management Plan and the counties were crafting their National Scenic Area ordinances (1987 to mid-1994), the Gorge Commission and U.S. Forest Service were the permitting entities for all

development proposals in the National Scenic Area using "Final Interim Guidelines." *See* 16 U.S.C. § 544h. The Gorge Commission adopted the Final Interim Guidelines in *former* Commission Rule 350-20, which also contained development review procedures and standards for expiration of permits. A copy of the Final Interim Guidelines and *former* Commission Rule 350-20 is at County Rec. 409-35.

The Gorge Commission and U.S. Secretary of Agriculture determined that Clark County's ordinance (currently codified at Clark County Code chapter 40.240) is consistent with the National Scenic Area Management Plan. (CP 11, 36-37, 39-40.) Clark County's National Scenic Area code, at section 40.240.010, expressly states:

> "These regulations are intended to be consistent with and implement the Management Plan for the Columbia River Gorge National Scenic Area (CRGSNA) adopted and amended by the Columbia River Gorge Commission."

The National Scenic Area Act requires that the Gorge Commission is the initial appellate adjudicator for appeals of

the Gorge counties' final actions and orders relating to the implementation of the National Scenic Area Act. 16 U.S.C. § 544m(a)(2). Judicial review of Gorge Commission appellate decisions is exclusively in state court. 16 U.S.C. §§ 544m(b)(4), (6).

"Under the Act, and the resulting Compact, all land use within the Columbia River Gorge [National] Scenic Area, whether private, federal or local, will be consistent with the management plan developed by the Commission." *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 112 (9th Cir.) *cert. denied sub nom. Columbia Gorge United-Protecting People & Property v. Madigan*, 506 U.S. 863, 113 S. Ct. 184, 121 L. Ed. 2d 128 (1992).

B. Mining in the National Scenic Area

The National Scenic Area Act "require[s] that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural

resources of the scenic area." 16 U.S.C. § 544d(d)(9). Mining is a land use that requires review and approval. CCC 40.240.440.H.[4]

C. The Gorge Commission issued a permit to Zimmerly Rock Products in 1993, and then Ms. Zimmerly signed a consent decree and order in 1997 agreeing to comply with the 1993 permit.

In 1993, in accordance with section III.A.2 of the Final Interim Guidelines, the Gorge Commission reviewed and approved resuming and expanding previous mining activities at the site. (County Rec. 1934, 1919.) No person appealed the 1993 permit or challenged the Gorge Commission's authority to issue the permit or the terms and conditions therein.

Relevant to this matter, the 1993 permit stated that it "shall become void . . . when the development action is

[4] Clark County amended its National Scenic Area code in 2022 in accordance with the Gorge Commission's 2020 revisions to the Management Plan. This citation is to Clark County's current code as of 2022.

discontinued for any reason for one continuous year or more." (County Rec. 1927.)

Subsequently, in 1996, the Gorge Commission commenced an action to enforce several conditions in the 1993 permit. That enforcement action concluded in 1997 when Ms. Zimmerly (together with her counsel) signed a consent decree and order with the Gorge Commission in which she agreed to comply with the conditions in the 1993 permit. The Gorge Commission approved the consent decree and order following a hearing. (County Rec. 868-88; Slip Op. at 26.) Ms. Zimmerly agreed that the consent decree and order was consistent with the National Scenic Area rules. (County Rec. 878 (paragraph 23).) Ms. Zimmerly also agreed to seek a National Scenic Area approval from Clark County for any change to the 1993 permit and for any new development activities (County Rec. 874-75 (paragraphs 14, 16).) Ms. Zimmerly also argued at that time that her compliance with the 1993 permit excused her from

compliance with state agency requirements, which the state and Gorge Commission rejected. (*See* County Rec. 966-67.)

D. Clark County's 2018 Enforcement Proceeding, Subsequent Appeals to the Gorge Commission, and Judicial Review of the Gorge Commission's Decision

On March 29, 2018, the Clark County Code Enforcement Coordinator and Clark County Director of Community Development issued a Notice and Order to Ms. Zimmerly and Nutter, which commenced an enforcement action. (County Rec. 1386-88.) On May 17, 2018, the Coordinator and Director issued an Amended Notice and Order. (County Rec. 1389-91.) The Amended Notice and Order alleged violations of CCC 40.240.010.B, 40.250.022.E, and 022.F(1). (County Rec. 1389.) Chapter 40.240 is Clark County's National Scenic Area code and the cited provisions in chapter 40.250 are part of Clark County's surface mining regulations that apply in addition to the National Scenic Area code.

On May 25, 2018, Ms. Zimmerly and Nutter each filed an appeal of the Amended Notice and Order to Clark County's

Hearing Examiner. (County Rec. 2321, 2324.) On August 4, 2018, the Hearing Examiner issued Clark County's final order, which found that no mining occurred for at least one 18-month period and one 10-year period, before mining started again in 2017 (County Rec. 21), and which upheld the Amended Notice and Order in part and reversed it in part. (County Rec. 16-31.) On September 8, 2018, the Hearing Examiner issued a final order on reconsideration. (County Rec. 2068-71.)

Friends of the Columbia Gorge and neighboring property owners appealed the Hearing Examiner's decision to the Gorge Commission pursuant to 16 U.S.C. § 544m(a)(2). (CRGC Rec. 755, 803.) Ms. Zimmerly and Nutter did not appeal the Hearing Examiner's decision, but they intervened in the appeals and challenged the Gorge Commission's jurisdiction to hear the appeals. The Gorge Commission concluded that it had jurisdiction, reversed the hearing examiner's decision, and affirmed the enforcement staff's notice and order. (CRGC Rec. 5-45.)

Ms. Zimmerly and Nutter sought judicial review of the Gorge Commission's decision. The Superior Court affirmed the Gorge Commission's decision in full (CP 1181) and the Court of Appeals subsequently affirmed the decisions of the Gorge Commission and Superior Court.

V. ANSWERS TO PETITIONERS' ISSUES

A. The Court of Appeals correctly applied the jurisdictional exception in RCW 36.70C.030(1)(a)(ii) of the Land Use Petition Act.

The jurisdictional provision of the Land Use Petition Act at RCW 36.70C.030(1)(a)(ii) states:

> "(1) This chapter . . . shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:
>
> "(a) Judicial review of:
>
> ". . . .
>
> "(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;"

The Court of Appeals correctly concluded that the Gorge Commission fits within the exception in this subsection. The Gorge Commission was created by Washington statute (RCW

43.97.015) in addition to Oregon statute (ORS 196.150), with the consent of Congress (16 U.S.C. § 544c(a)(1)(A)). The Gorge Commission also has quasi-judicial authority to hear appeals of "any final action or order of a county relating to the implementation of [the National Scenic Area Act]" (16 U.S.C. § 544m(a)(2)).

The petitioners' two principal arguments regarding this issue are incorrect. First, the petitioners' discussion of LUPA as the manner for reviewing local land use decisions does not acknowledge that the National Scenic Area Act and Columbia River Gorge Compact require and govern Clark County's enactment and implementation of its National Scenic Area code and appeals of Clark County's decisions relating to the implementation of the National Scenic Area Act. *See Klickitat County v. State*, 71 Wn. App. at 767 ("The Commission's land management plan and the act's provisions relative to the plan are federally mandated, and do not constitute a state program"); *Columbia River Gorge Comm'n v. Hood River County*, 152

P.3d at 1004 (county National Scenic Area ordinances required to comply with federal law). Washington's Planning Enabling Act, Growth Management Act or any other state law do not require or provide authority for Clark County to enact its National Scenic Area code. Indeed, Clark County's National Scenic Area code, at section 40.240.010 specifically states:

> "These regulations are intended to be consistent with and implement the Management Plan for the Columbia River Gorge National Scenic Area (CRGSNA) adopted and amended by the Columbia River Gorge Commission."

LUPA's exclusive jurisdiction applies to land use decisions authorized by state law, not to land use decisions authorized by, implementing, and issued pursuant to National Scenic Area authorities.

Second, the petitioners incorrectly argue that the federal government established the Gorge Commission and that Washington only "ratified" the compact. (Pet. at 9.) But that is not how interstate compacts work. States enact interstate compacts and Congress gives consent as required by the

Compact Clause in the U.S. Constitution,[5] which is what happened here. The National Scenic Area Act expressly states:

> "[T]he consent of Congress is given for an agreement described in [the National Scenic Area Act] pursuant to which, within one year after November 17, 1986—
> "(A) *the States of Oregon and Washington shall establish* by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . ."

16 U.S.C. § 544b(a)(1) (emphasis added). Pursuant to this federal consent, Washington and Oregon jointly created the Gorge Commission in Article I.a of the Columbia River Gorge Compact, which states:

> "The States of Oregon and Washington establish by way of this interstate compact a regional agency known as the Columbia River Gorge Commission."

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[5] U.S. CONST. art. I, § 10, cl. 3. The order of enacting the compact and receiving congressional consent does not matter. Congress's consent may be in advance of the states enacting the compact. Indeed, the Ninth Circuit expressly concluded that Congress's consent to the Gorge Compact in advance of the states enacting the compact was valid. *Columbia River Gorge United*, 960 F.2d at 114.

The Washington State Legislature enacted the compact in Laws of 1987, ch. 499, § 1, codified at RCW 43.97.015. Likewise, the Oregon Legislature enacted the compact in Oregon Laws of 1987, ch. 14, § 1, codified at ORS 196.150.

The Court of Appeals decision correctly concluded that the Gorge Commission is a quasi-judicial body created by state law, and thus the Court of Appeals correctly applied RCW 36.70C.030(1)(a)(ii). (Slip Op. at 20-21.)

The petitioners have not established that the Court of Appeals decision conflicts with any Supreme Court decision. This case is the only case in which a party has ever argued that LUPA review applies to judicial review of county actions relating to the implementation of the Columbia River Gorge National Scenic Area Act. The Supreme Court cases that the petitioners cite, *Lauer v. Pierce Cnty.*, 173 Wn.2d 242, 267 P.3d 988 (2011) and *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011), merely recite the exclusivity language in RCW 36.70C.030(1); they do not

involve the exceptions to LUPA review specified in RCW 36.70C.030(1)(a). The petitioners also cite two Court of Appeals decisions, neither of which involve the exceptions to LUPA review.

B. The Court of Appeals correctly concluded that Clark County's final order related to the implementation of the National Scenic Area Act.

The Gorge Commission's appellate authority is at 16 U.S.C. § 544m(a)(2), which states,

> Any person or entity adversely affected by *any final action or order of a county relating to the implementation of [the National Scenic Area Act]* may appeal such action or order to the Commission . . . . (Emphasis added)

The petitioners argue that they appealed the Notice and Order pursuant to Clark County Code chapter 32.08, which they argue does not relate to the implementation of the National Scenic Area Act because that chapter is not part of Clark County's National Scenic Area code. (Pet. at 14.) Chapter 32.08 is Clark County's internal procedures for enforcement proceedings.

Clark County's use of its internal enforcement procedures does not divest the Gorge Commission of its federally required jurisdiction. Clark County's final order related to the implementation of the National Scenic Area Act because:

- Clark County's Notice and Order alleged a violation of section 40.240.010.B of Clark County's National Scenic Area code[6] (County Rec. 1386) (again, chapter 40.240 of the Clark County Code is Clark County's National Scenic Area code);

[6] CCC 40.240.010.B states,

> "B. Review and Approval Required. No building, structure or land shall be used and no building or structure shall be hereafter erected, altered or enlarged, including those proposed by state or federal agencies, in the Clark County portion of the Columbia River Gorge National Scenic Area except for the uses listed in this chapter, when considered under the applicable procedural and substantive guidelines of this chapter."

- The petitioners' appeals to the Clark County Hearing Examiner specifically asked the Hearing Examiner to determine their rights under another provision of Clark County's National Scenic Area code, CCC 40.240.170. (County Rec. 58, 120, 239-41, 255, 493);
- The Hearing Examiner interpreted and applied the county's National Scenic Area standards and decided the petitioners' rights under the county's National Scenic Area standards. The Hearing Examiner specifically recognized that the application of CCC 40.240.010.B was at issue, applied CCC 40.240.010.B, and concluded the petitioners violated CCC 40.240.010.B. (County Rec. 16 (issues paragraph B.3); County Rec. 22 (applicable law paragraph E.1); County Rec. 29-30 (discussion paragraphs F.4.d, F.6, F.7); County Rec. 30 (conclusion paragraphs G.1, G.2); County Rec. 31 (decision paragraphs H.1.a, H.1.b)); and
- The Hearing Examiner cited, interpreted, applied, and resolved questions of fact and law concerning CCC

40.240.170.D(4) and 40.240.170.E, the very National Scenic Area code provisions that the petitioners asked the Hearing Examiner to apply. (County Rec. 22-23, 26-30.)

Because compliance with Clark County's National Scenic Area code was the express subject of Clark County's action, the Court of Appeals correctly concluded that the Hearing Examiner's final order related to the implementation of the National Scenic Area Act. (Slip Op. at 22-23).

The petitioners also argue that the Hearing Examiner's order does not relate to the implementation of the National Scenic Area Act because they argue that the term "implementation" in 16 U.S.C. § 544m(a)(2) refers to section 544*l* of the National Scenic Area Act, which is entitled "implementation measures." (Pet. at 15-19). The Court of Appeals correctly rejected this argument. (Slip Op. at 22-23). The problem with the petitioners' argument is that none of the provisions in section 544*l* specify or relate to county actions or orders. Again, section 544m(a)(2) states, "any final action or

order of a *county* relating to the implementation of [the National Scenic Area Act]" (emphasis added). The provisions in section 544*l* specify only federal actions—the Secretary of Agriculture providing technical assistance to counties (section 544*l*(a)); payments from the federal government of timber receipts and in lieu of taxes (sections 544*l*(b), (c)); requirements for federal agency actions to be consistent with the National Scenic Area Act (section 544*l*(d)); a requirement for the U.S. Secretary of Agriculture to determine consistency of any new federal expenditure or permit required by any federal law if the states did not enact the Gorge Compact (section 544*l*(e)); and transfers of lands between the U.S. Bureau of Land Management and the U.S. Forest Service (section 544*l*(f)).

In contrast to section 544*l*, the authority for counties to take final actions is in sections 544e(b) and 544f(h), which require the Gorge counties to adopt land use ordinances consistent with the National Scenic Area Management Plan, and by reasonable extension, administer their National Scenic

Area ordinances by issuing or denying National Scenic Area permits and enforcing their National Scenic Area ordinances. The phrase, "*any final action or order of a county* relating to the implementation of [the National Scenic Area Act]" in section 544m(a)(2) (emphasis added) very obviously relates back to sections 544e(b) and 544f(h) .

The petitioners argue that the Court of Appeals decision conflicts with *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 78, 896 P.2d 682, 688 (1995). (Pet. at 11.) The petitioners seem to refer to this Court's explanation of a "strong presumption against finding preemption [of State law] in an ambiguous case . . ." *Hue*, 127 Wn. App. at 78 (brackets in original). There is no conflict with *Hue* because there is no ambiguity in the National Scenic Area Act. Section 544m(a)(2) of the National Scenic Area Act refers to county actions, which, without question, occur under sections 544e(b) and 544f(h) of the National Scenic Area Act—not under section 544*l* as the petitioners argue.

Furthermore, Washington's enactment of the Columbia River Gorge Compact in 1987 did not conflict with or cede any police power in conflict with LUPA because LUPA was enacted in 1995, eight years after Washington enacted the compact and because LUPA contains an exception for agencies created by state law that have quasi-judicial authority. RCW 36.70C.030(1)(a)(ii). Consequently, this case does not involve any significant constitutional issue or issue of substantial public interest.

C. The Court of Appeals correctly concluded that Ms. Zimmerly discontinued mining in accordance with the 1993 permit.

The petitioners' third issue is partially based on several new claims and arguments that they did not raise below. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."); *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or

briefed in the Court of Appeals will not be considered by this court.").

The petitioners start their third issue for review by arguing that this Court should review the Court of Appeals decision because "the actions required to preserve vested rights must not be vague." (Pet. at 20-22). However, the petitioners never made any unconstitutional vagueness claim before the Hearing Examiner, Gorge Commission, Superior Court, or Court of Appeals. The petitioners do not cite to any place in the records of Clark County's or the Gorge Commission's proceedings, in the Superior Court Clerk's papers, or in any filing in the Court of Appeals in which they raised vagueness.

Friends of the Columbia Gorge and the neighbors' Answer identifies other new claims and arguments that were not raised below.

The Court of Appeals correctly analyzed this case without reference to Washington's common law of vested rights. The petitioners argue that *Skamania County v. Woodall*,

104 Wn. App. 525, 16 P.3d 701 (2001) required the Court to apply Washington's common law of vested rights. (Pet. at 22-23.) The petitioners are incorrect. In *Woodall*, the Court of Appeals concluded, "Congress intended the Commission to apply Washington common law to resolve zoning disputes, such as the one before this court, *when the Act or Management Plan does not provide a solution*." *Id*. at 539-40 (emphasis added). In 2004, in accordance with *Woodall*, the Gorge Commission revised the Management Plan to provide a solution—it expressly specifies that "Proof of intent to abandon is not required to determine that an existing use or use of an existing structure has been discontinued," a standard that Clark County then adopted into its National Scenic Area code. Clark County Code § 40.240.170.E.[7]

The Court of Appeals cited this standard in its decision, (Slip Op. at 12), demonstrating that it understood that

[7] This citation is to Clark County's current National Scenic Area code.

discontinuance of a use or structure in the National Scenic Area does not require an intent to abandon.

Furthermore, the petitioners' argument that Ms. Zimmerly did not intend to abandon the mining use does not fully engage with the principal authority they cite. The petitioners argue:

> [T]he Court of Appeals acknowledged that the "contrary evidence primarily consists of reclamation permit renewals…" Renewing a permit to reclaim the property clearly shows that Zimmerly did not intend to abandon its vested mining right. *See Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 903 & n.17, 478 P.3d 142, 151 (2020) (filing necessary paperwork demonstrates an objective intent not to abandon).

(Pet. at 26.) In effect, the petitioners argue that the Court of Appeals should have relied on one factor—that Ms. Zimmerly filed paperwork. But in *Tateuchi*, the Court of Appeals considered the whole record, not just the submission of reports to the city. In the instant case, consistent with *Tateuchi*, the Court of Appeals conducted its own review of the whole record—or in its words: "the sum of the conflicting evidence

Zimmerly and Nutter recite," (Slip Op. at 28)—and the Court of Appeals found that "in the most generous interpretation, there is still a six-year gap . . ." (*id*.). The Court of Appeals cited:

- "Inspection reports from the Department of Ecology state that the site was 'currently inactive' in 2005 and 'not being actively mined' in 2009" (Slip Op. at 8);
- "The utility company serving the site also disconnected power to the site 'sometime between 1998 [and] 2003' because the mine 'was all but abandoned and unsupervised.'" (Slip Op. at 8);
- "[T]he stockpiles and disturbed areas had revegetated with voluntary trees and grasses" (Slip Op. at 27); and
- "[E]xcise tax documents showing that Zimmerly paid business and occupation taxes accounted for less than half of the time period the hearing examiner found the mine to be inactive (Slip Op. at 28)

Furthermore, the temporary cessation at issue in *Tateuchi* was caused by the city's restrictions on helicopter flights. *Tateuchi*, 15 Wn. App. 2d at 902. In the instant case, no government agency restricted Ms. Zimmerly from mining: her cessation of

mining was her own decision. Considering the whole record, the Court of Appeals reached the correct conclusion.

The Court of Appeals decision did not conflict with *Woodall* or any other decision of this Court or the Court of Appeals.

VI. CONCLUSION

The Court of Appeals decision was correct on the law and facts and this case does not meet this Court's criteria for accepting review. This 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 4786 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 5th day of June 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 Petition for Review* through the Court's e-filing system and served the following persons by separate email:

Stephen Horenstein – shorenstein@schwabe.com
Maren Calvert – mcalvert@schwabe.com
Appellateassistants@schwabe.com
astewart@schwabe.com
troberts@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
Keenan Ordon-Bakalian – keenan.ordon-bakalian@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.

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///

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Curtis Burns – curtis.burns@clark.wa.gov
Sheryl.thrasher@clark.wa.gov

DATED this 5th day of June 2023

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

COLUMBIA RIVER GORGE COMMISSION

June 05, 2023 - 8:56 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,960-2
Appellate Court Case Title:	Judith Zimmerly, et al. v. Columbia River Gorge Commission, et al.
Superior Court Case Number:	19-2-03321-9

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- jmyers@lldkb.com
- lisa@lldkb.com
- litparalegal@jordanramis.com
- lydia@horensteinlawgroup.com
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Sender Name: Jeffrey Litwak - Email: jeff.litwak@gorgecommission.org
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