

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 OREGON SHORES CONSERVATION COALITION,
5 *Petitioner,*
6
7 and
8
9 JOHN CLARKE, DEB EVANS, RON SCHAAF,
10 ROGUE CLIMATE, HANNAH SOHL,
11 STACEY McLAUGHLIN, JODY McCAFFREE, and THE
12 CONFEDERATED TRIBES OF COOS, LOWER UMPQUA
13 and SIUSLAW INDIANS,
14 *Intervenors-Petitioners,*
15
16 vs.
17
18 COOS COUNTY,
19 *Respondent,*
20
21 and
22
23 JORDAN COVE ENERGY PROJECT LP,
24 *Intervenor-Respondent.*
25
26 LUBA No. 2016-095
27
28 ORDER

29 Before the Board are several motions and objections to the original and
30 supplemental record.

31 **MOTION TO AMEND LEAD INTERVENOR-PETITIONER**
32 **DESIGNATION**

33 Intervenors-petitioners Jody McCaffree (McCaffree) and Stacey
34 McLaughlin (McLaughlin) filed separate motions to intervene, and represent

1 themselves in this appeal. By order dated March 24, 2017, LUBA designated
2 McCaffree lead intervenor-petitioner between the two of them, pursuant to
3 OAR 661-010-0075(7)(b). McCaffree now moves to remove that designation,
4 pointing out that under OAR 661-010-0075(7)(b) the obligations of a lead
5 intervenor do not extend to parties who filed separate motions to intervene.
6 The motion is granted. The parties and LUBA shall henceforth mail and
7 provide service of all documents separately to McCaffree and McLaughlin.

8 **MOTION FOR OFFICIAL NOTICE**

9 Intervenor-petitioner McCaffree moves for LUBA to take official notice
10 of a February 10, 2017 ruling by the Federal Energy Regulatory Commission
11 (FERC), regarding the terminal that is at issue in this appeal. The motion is
12 granted, with the caveat that LUBA shall not take notice of adjudicatory facts
13 found in the ruling. *See Oregon Shores Conservation Coalition v. Coos*
14 *County*, ___ Or LUBA ___ (LUBA No. 2016-095, Order, March 24, 2017), slip
15 op 2-3 (granting similar motion).

16 **MOTION TO TAKE EVIDENCE**

17 Intervenor-petitioner The Confederated Tribes of Coos, Lower Umpqua
18 and Suislaw Indians (The Tribes) moves for an order to take evidence outside
19 the record, pursuant to OAR 661-010-0045.¹ The proffered evidence consists

¹ OAR 661-010-0045(1) provides:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record

1 of (1) the Declaration of Margaret Corvi, and (2) a binder of nine exhibits.
2 Exhibits 1 through 7 consist of e-mail exchanges between Corvi and county
3 planning staff regarding submission of the Tribes' comments and evidence.

4 Exhibit 8 is a complete copy of the Tribes' December 18, 2015
5 comments. Exhibit 9 is a complete copy of the Tribes' January 12, 2016
6 comments. We understand both Exhibits 8 and 9 to include sensitive
7 information regarding the location of archeological sites.

8 The motion to take evidence is based on OAR 661-010-0045(1), which
9 provides that LUBA may "on its own motion or at its discretion take evidence
10 to resolve disputes regarding the content of the record * * *." As explained
11 below, the record transmitted to LUBA in this appeal includes only redacted
12 copies of the documents in Exhibits 8 and 9. The Tribes have filed objections
13 to the record, arguing that the record should also include the complete copies of
14 the documents found at Exhibits 8 and 9 that the Tribes submitted to the county
15 below.

in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

1 Intervenor-respondent Jordan Cove Energy Project L.P. (JCEP) opposes
2 the motion to take evidence, arguing that there are no “disputes regarding the
3 content of the record” with respect to the documents in Exhibits 8 and 9.
4 According to JCEP, the county rejected the documents in Exhibits 8 and 9, and
5 therefore there is no dispute that those documents are not in the record.

6 As discussed below, there is a dispute regarding whether the county
7 rejected Exhibits 8 and 9 from the local record, and whether those documents
8 are part of the local record of this appeal. JCEP offers no other reason to
9 oppose the motion to take evidence of the declaration and attached exhibits.
10 Accordingly, the motion to take evidence is granted. LUBA will consider the
11 declaration and attached exhibits to the extent necessary to resolve the pending
12 record objections.

13 **RECORD OBJECTIONS**

14 On November 7, 2016, the county transmitted the Original Record to
15 LUBA, consisting of 12 paper volumes and oversize exhibits, pursuant to OAR
16 661-010-0025(2).² The Original Record totals approximately 12,000 pages.

² OAR 661-010-0025(2) provides, in relevant part:

“Transmittal of Record:

“(a) The governing body shall, within 21 days after service of
the Notice on the governing body, transmit to the Board a
certified paper copy of the record of the proceeding under
review. * * *

1 Petitioner Oregon Shores Conservation Coalition (Oregon Shores), JCEP and
2 the Tribes each filed objections to the Original Record. By agreement of each
3 of the parties, the county served an electronic copy of the Original Record on
4 the parties, recorded on compact discs (CDs), as authorized by OAR 661-010-
5 0025(3)(b).³

“(b) As an alternative to transmitting a certified paper copy of the record, a local government may transmit the record to the Board in electronic format. Transmittal of an electronic copy is accomplished by delivery of two complete copies of the record on optical disks, with documents recorded in a PDF format. If the record exceeds 100 pages, the electronic copy shall be searchable. A local government may transmit the record in electronic form, and also retain items until oral argument as described in OAR 661-010-0025(2)(a).”

³ OAR 661-010-0025(3) provides, in relevant part:

“Service of Record:

“(a) Contemporaneously with transmittal, the governing body shall serve a paper copy of the record, exclusive of large maps, media recordings, and difficult-to-duplicate documents and items, on the petitioner or the lead petitioner, if one is designated. The governing body shall also serve a paper copy of the record on any other party, including intervenors-petitioners, requesting a copy provided such other party reimburses the governing body for the reasonable expense incurred in copying the record.
* * *

“(b) By prior agreement of the party to be served, service of the record as described in OAR 661-010-0025(3)(a) may be in an electronic format instead of a paper copy.”

1 On March 17, 2017, the county filed a response to all three objections to
2 the Original Record, and transmitted to LUBA a Revised Table of Contents and
3 a Supplemental Record consisting of two paper volumes, totaling 1,400 pages.
4 On the same date, JCEP filed a response to Oregon Shores and the Tribes'
5 objections.

6 Petitioner Oregon Shores filed a Continued Record Objection to the
7 Original Record. Represented intervenors-petitioners Deb Evans, Ron Schaaf,
8 Rogue Climate, and Hannah Sohl (hereafter, Rogue Intervenors) filed
9 objections to the Supplemental Record. Intervenor-petitioner McCaffree also
10 filed objections to the Supplemental Record. On April 7, 2017, the county filed
11 a Second Response to the Record Objections, which includes replacement
12 pages for pages 517-30 of the Supplemental Record.

13 We now resolve all outstanding objections.

14 **A. JCEP's Objections to the Original Record**

15 We understand the Supplemental Record to resolve JCEP's objections to
16 the Original Record.

17 **B. The Tribes' Objections to the Original Record**

18 The Tribes object to the omission of complete copies of their December
19 18, 2015 testimony, with exhibits, and their January 12, 2016 testimony, with
20 exhibits. As explained, the complete copies of the Tribes' testimony included
21 sensitive information regarding the location of archeological sites, information
22 which the Tribes asserted is protected from public disclosure under the Oregon

1 Public Records Law, at ORS 192.410 to 192.505, and county equivalents. We
2 refer to this information as the Confidential Material. The Tribes also
3 submitted versions of their testimony that redacted the Confidential Material
4 with a request that the county keep confidential the Confidential Material. The
5 county responded to the Tribes' request by directing staff to "keep the
6 Confidential Record separate from the public record." Record 35. In
7 compiling the record on appeal, the county included the redacted versions of
8 the Tribes' testimony in the Original Record transmitted to LUBA and served
9 on the parties, but not the complete versions that include the Confidential
10 Material.

11 The Tribes argue that the complete versions were placed before, and not
12 rejected by, the final decision makers, and therefore are part of the local record
13 for purposes of appeal to LUBA. OAR 661-010-0025(1).⁴ Relatedly, as

⁴ OAR 661-010-0025(1) provides, in relevant part:

"Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

"(a) The final decision including any findings of fact and conclusions of law.

"(b) All written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker."

1 discussed below, the Tribes have filed a motion seeking a protective order from
2 LUBA to protect any Confidential Material included in the record on appeal
3 from public disclosure.

4 JCEP responds that the county board of commissioners rejected the
5 Confidential Material by directing staff to “keep the Confidential Record
6 separate from the public record.” We disagree with JCEP. Directing staff to
7 “keep” the Confidential Material “separate” from the public record and hence
8 prevent public disclosure, as requested by the Tribes pursuant to state law, is
9 not fairly understood as “rejecting” the material from the record before the final
10 decision maker. What the county did is accurately described as the opposite of
11 rejecting the materials – it is a decision to “keep” the materials, i.e. not reject
12 them, but keep them separate from the other record materials. Accordingly, we
13 agree with the Tribes that the record on appeal includes the complete testimony
14 the Tribes submitted below, including the Confidential Material. The Tribes’
15 objection is sustained.

16 The remaining question is how to reflect the Confidential Material’s
17 inclusion in the record on appeal while both (1) allowing the parties reasonable
18 access to it, and (2) preserving it from public disclosure.

19 As we understand it, complete copies of the Tribes’ testimony, including
20 the Confidential Material, are located in Exhibits 8 and 9 attached to the
21 Tribes’ motion to take evidence. From the Tribes’ certificate of service, we
22 understand that the motion, including the attached declaration and binder of

1 exhibits, was served on all parties, as required by OAR 661-010-0075(2)(b).
2 Thus, all parties already have access to the Confidential Material.⁵
3 Accordingly, we see no need for the county to transmit and serve another
4 supplemental record including another copy of those materials. To reflect their
5 inclusion in the record the county will need to file a revised table of contents
6 stating something to the effect that the record includes complete copies of the
7 Tribes' December 18, 2015 and January 12, 2016 testimony, with exhibits, that
8 those copies include confidential material not subject to public disclosure, and
9 that copies of the testimony have been separately provided to LUBA and made
10 available to the parties. However, precise citation to Exhibits 8 and 9 is
11 difficult, because Exhibits 8 and 9 are unpaginated as a whole, and include a
12 number of attached documents, which have internal pagination. To provide for
13 more convenient citation, the revised table of contents must list the internal
14 documents and attachments in Exhibits 8 and 9. In that way, the parties can
15 cite to specific pages in Exhibits 8 and 9 using the name of the internal
16 document, and that document's internal page number. For example, a

⁵ If our understanding is incorrect, and the other parties were not served with copies of Exhibits 8 and 9, attached to the Tribes' motion to take evidence, the parties should advise LUBA immediately, along with any suggestions how the Confidential Material should be made reasonably available to the parties, while preserving those materials from public disclosure. LUBA will then issue a further order as necessary.

1 reasonable citation could take the form of Confidential Material, Exhibit 8,
2 Name of Document, page x.

3 We address the Tribes' related motion for a protective order, below.

4 **C. Oregon Shores' Objections to the Original Record**

5 Oregon Shores filed five objections to the Original Record. Oregon
6 Shores' Continued Objections restates only the first objection. We therefore
7 assume that the Supplemental Record resolved Oregon Shores' other four
8 objections.

9 **D. Oregon Shores' Continued Objections**

10 Oregon Shores objects that the electronic copies of the Original Record
11 and Supplemental Record served on them pursuant to OAR 661-010-0025(3)(a)
12 and (b) are not searchable. The county responds that OAR 661-010-0025(3)(b)
13 does not require the county to provide parties who agree to accept an electronic
14 service copy of the record with one that is searchable. The county argues that
15 the only LUBA rule that requires a searchable electronic copy is OAR 661-010-
16 0025(2)(b), which concerns only the option of transmitting an electronic record
17 to LUBA, an option the county did not exercise. *See* n 2. The county also
18 argues that to obviate this objection it has provided all parties with an URL
19 (uniform resource locator) link to an on-line site that contains searchable
20 versions of the Original and Supplemental Records. Apparently in response to
21 difficulties using the first link, in its Second Response the county provided new
22 links to the on-line copies of the Original and Supplemental Records.

1 Oregon Shores responds that it agreed to accept an electronic copy of the
2 record on the express condition that the copy is 100 percent searchable. Oregon
3 Shores also argues that OAR 661-010-0025(3)(b) should be interpreted in light
4 of OAR 661-010-0005 (LUBA's rules shall be interpreted to carry out the
5 objectives of promoting the speediest practicable review while affording
6 interested persons a full and fair hearing, and to promote justice) to implicitly
7 require that an electronic record of this size that is served on the parties should
8 be searchable, given the difficulty of locating items in a 13,400-page record.

9 The county was saved the considerable trouble and expense of copying
10 and mailing a paper copy of the 13,400-page record to petitioner, as otherwise
11 required by OAR 661-010-0025(2)(a), because petitioner agreed to accept an
12 electronic copy on CDs, on the express condition that the copy be 100 percent
13 searchable. The county apparently accepted that condition, and provided an
14 electronic copy. For whatever reason, that initial copy was not fully searchable,
15 although the county now clearly possesses a copy that is. Under these
16 circumstances, we agree with Oregon Shores that the county is obligated to
17 fulfill the condition it apparently agreed to by providing petitioner with a
18 searchable copy of the record on compact discs or an equivalent medium. As
19 explained below, providing a link to an on-line source of a searchable copy is
20 not a satisfactory substitute. Links to on-line sites are not always reliable, as the
21 county's first attempt at providing links to an internet site demonstrated, and the
22 documents located at the end of such links do not necessarily have the same

1 integrity as a paper copy or electronic copy permanently recorded on a medium
2 such as a compact disc. Accordingly, per the parties' agreement, the county
3 shall serve petitioner with compact discs or the equivalent medium including
4 searchable copies of the Original and Supplemental Records.

5 **E. McCaffree's Objections to the Supplemental Record.⁶**

6 **1. Searchable Copy**

7 McCaffree argues that the electronic version of the 1,400-page
8 Supplemental Record that she acquired from the county on CDs pursuant to
9 OAR 661-010-0025(3)(a) is not fully searchable. McCaffree argues that the
10 links provided to the copy of the Supplemental Record are unreliable, and
11 requests that LUBA order the county to provide all parties with searchable
12 copies on CDs.

13 OAR 661-010-0025(3)(a) requires the county to serve a party who is not
14 the petitioner with a copy of the record, provided the party reimburses the
15 county for the reasonable expense incurred in copying the record. *See* n 3.
16 LUBA's rules do not require the county to provide an additional copy of the

⁶ McCaffree refers to objections to the Original Record that she asserts she filed November 21, 2016, jointly with the Rogue Intervenors. LUBA has not received such an objection from McCaffree or Rogue Intervenors, and the county's response does not mention it. McCaffree does not indicate in her objections to the Supplemental Record that any objections to the Original Record, if filed, are still outstanding. Accordingly, we understand McCaffree's objections to the Supplemental Record filed March 31, 2017, and April 21, 2017, to represent the only unresolved objections from McCaffree.

1 record at no expense to McCaffree or other parties who are not the petitioner.
2 However, as explained below, after transmitting the record to LUBA the county
3 has apparently continued to modify the record on appeal in a manner that
4 creates significant potential for confusion. Under these circumstances, and in
5 order to ensure that all parties are working from the same record, we agree with
6 McCaffree that the county must provide all parties and LUBA with electronic,
7 searchable, copies of the Original and Supplemental Records on CDs or an
8 equivalent permanently-recorded medium.

9 **2. Missing or Incorrect Documents**

10 McCaffree argues that a copy of materials she submitted, found at
11 Supplemental Record 517 to 530, are missing three divider pages labeled
12 “exhibit,” but otherwise blank, inserted between three exhibits. McCaffree also
13 argues that a two-page copy of an article downloaded from the internet, at SR
14 529-30, differs from the three-page copy she submitted, a copy of which is
15 attached to her objection.

16 On April 7, 2017, the county transmitted to LUBA paper replacement
17 pages for Supplemental Record 517 to 530, without explaining the reason for
18 doing so. The replacement pages include blank divider pages between the
19 three exhibits, but no “exhibit” label. The two-page replacement copy of the
20 internet article at replacement pages 529-30 is unchanged from the two-page
21 copy in the Supplemental Record. Confusingly, we note that the on-line
22 version of the Supplemental Record at the second link the county provided,

1 which is dated March 30, 2017, has labeled divider pages, and the three-page
2 version that McCaffree submitted to the county, with the third page identified
3 as page 530A. Thus, at some point the county apparently modified the on-line
4 version of the Supplemental Record. Those modifications are not reflected in
5 the paper Supplemental Record and replacement pages transmitted to LUBA.
6 LUBA's paper record, for example, includes no Supplemental Record page
7 530A.

8 The present situation illustrates the pitfalls of relying on on-line versions
9 of the record to resolve objections to the record or make the record available to
10 the parties. On-line links are not reliable, and the documents at the end of
11 those links can be modified, as apparently happened in this case. An additional
12 problem is that the county transmitted a paper copy of the record to LUBA,
13 with paper supplements and replacement pages, but electronic copies to the
14 parties, and is apparently supplying the parties with paper copies of the
15 replacement pages, or perhaps relying on the on-line versions to provide the
16 parties access to a slightly different version of the replacement pages. The mix
17 of paper and electronic and on-line records, although not prohibited under
18 LUBA's rules, is highly problematic in this case. It is essential that LUBA and
19 the parties work from copies of the same record, with the same pagination. We
20 conclude that the most appropriate course is for the county to transmit to
21 LUBA and serve on all parties electronic, searchable copies of the Original and
22 Supplemental Records on CDs or an equivalent permanently-recorded medium.

3. Illegible Photographs

McCaffree argues that color copies of photographs in a PowerPoint presentation at Supplemental Record 900 to 944 are of poor quality, and requests that the county include in the record as a retained exhibit a copy of a CD that includes the original PowerPoint presentation. McCaffree also notes that many of the page numbers in the electronic version of the Supplemental Record from 900 to 944 are missing.

The county offers no response to this objection. McCaffree is correct that the quality of the photographs, both in LUBA's paper copy, and in the electronic copy provided to the parties on discs, and available via the on-line link, is much worse than the originals in the CD that accompanies McCaffree's objection. It is not clear that the lesser quality is a material defect, but there is no argument otherwise. Further, as explained above in resolving the Tribes' objection, the county must revise the table of contents in any case. Therefore, we sustain this objection, and the county shall list the provided CD of the original PowerPoint presentation as a retained exhibit in a revised table of contents. It is not clear if the county can correct the missing page numbers in the electronic version of the Supplemental Record that the county will transmit to LUBA and serve on the parties, but if it can, the county should do so prior to transmitting and serving the electronic copies required by this order.

1 **F. Rogue Intervenors’ Objections to the Supplemental Record**

2 Rogue Intervenors object that the electronic copy of the Supplemental
3 Record that they obtained from the county is not searchable. This objection is
4 resolved by our order above.

5 Rogue Intervenors also state that without a searchable Supplemental
6 Record, they cannot tell if the Supplemental Record resolves six objections to
7 the Original Record that they assert they filed in conjunction with other
8 intervenors-petitioners, on November 21, 2016. However, as noted, LUBA has
9 not received any such objections. The county’s responses do not mention any
10 objections from Rogue Intervenors. We note, however, that the Supplemental
11 Record and revised Table of Contents appear to resolve the six objections to
12 the Original Record and original Table of Contents that Rogue Intervenors
13 restate in their objections to the Supplemental Record. As far as we can tell,
14 Rogue Intervenors’ objections are now resolved.

15 **MOTION FOR PROTECTIVE ORDER**

16 As noted, the Tribes filed a motion for a protective order from LUBA
17 requesting that LUBA order the parties to refrain from public disclosure of
18 Confidential Material found in Exhibits 8 and 9 to the Tribes’ motion to take
19 evidence. LUBA and the county, as public bodies, have an obligation to
20 comply with the statutes in ORS 192.501(11) that exempt from public
21 disclosure public records concerning the location of archeological sites.
22 However, the Tribes cite no authority under the statutes that govern LUBA, or

1 any other statute, authorizing LUBA to order the other parties to this appeal to
2 prevent public disclosure of information that is in their private possession.
3 Absent such authority, we grant the motion for protective order only with
4 respect to the public records within LUBA's possession.

5 LUBA will label its copy of Exhibits 8 and 9 to the Tribes' motion to
6 take evidence "Confidential," separate it from the public record of this appeal,
7 and otherwise take steps to prevent public disclosure of its contents. We
8 request that the other parties voluntarily do the same. In the pleadings, the
9 parties should refer and cite, as much as possible, to the redacted versions in
10 the record. If the parties need to refer to the sensitive information in the
11 Confidential Material, they should refrain from quoting sensitive information
12 in the briefs or including such information as attachments to a brief, but instead
13 refer the reader to the appropriate document and internal page number.

14 **CONCLUSION**

15 Within seven days of the date of this order, the county shall (1) transmit
16 to LUBA and serve on the parties electronic, searchable copies of the Original
17 and Supplemental Records, on CDs or an equivalent medium, and (2) a revised
18 Table of Contents that reflects inclusion of the Confidential Material (*i.e.*,
19 Exhibits 8 and 9 attached to the Declaration of Margaret Corvi) and the
20 PowerPoint CD as retained items. The revised Table of Contents must list the
21 individual documents in Exhibits 8 and 9 in a manner that allows the parties to
22 locate those documents with reasonable effort. LUBA and the parties will label

1 their copies of Exhibits 8 and 9 as “Confidential Material Supplement to the
2 Record.” The county, however, need not bring a copy of the Confidential
3 Material or the PowerPoint CD to oral argument, as LUBA already possesses
4 copies. On receipt of the foregoing, LUBA will issue an order settling the
5 record and setting a briefing schedule.

6 Dated this 9th day of May, 2017.

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Tod A. Bassham
Board Member