

**PROTECTING THE COLUMBIA RIVER GORGE:
A TWENTY-YEAR EXPERIMENT IN LAND-USE
FEDERALISM**

MICHAEL C. BLUMM*
JOSHUA D. SMITH**

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I. INTRODUCTION

As the Columbia River approaches the Pacific Ocean, it flows between Oregon and Washington through a dramatic canyon known as the Columbia River Gorge. The Gorge is a spectacularly beautiful region, rich in diverse plant and animal life, sacred Native American sites, natural resources such as timber, and recrea-

* Professor of Law, Lewis and Clark Law School. An earlier version of this article appeared as part of the Columbia River Basin chapter in 6 WATERS AND WATER RIGHTS (Robt. E. Beck ed., 2005 replacement vol.). Copyright © 2005 by Matthew Bender & Co., Inc. Reprinted with permission of Mathew Bender & Co., Inc., a member of the LexisNexis Group. All rights reserved. Thanks to Nathan Baker, J.D. 2000 Lewis and Clark Law School, for his careful and extremely helpful comments on a draft of this article. Thanks also to Jeff Litwack, J.D. 1997 Lewis and Clark Law School, Counsel to the Columbia River Gorge Commission.

** J.D. expected 2006, Lewis and Clark Law School; B.A. 1999, Boston College.

tional opportunities.¹ But the Gorge is not a pristine, undeveloped area. Highways and railroad tracks run along both sides of the Columbia River through the Gorge, and two large federal hydroelectric projects — which have decimated the Columbia River's salmon and permanently altered the flow of the river — lie within the canyon. Over 50,000 people live in the cities and unincorporated communities in the Gorge. The region is also politically fragmented, with two states, six counties, and thirteen cities and townships governing various parts of the Gorge; the U.S. Forest Service managing over 115,000 acres of land, roughly forty percent of the Gorge; and an interstate compact agency, the Columbia River Gorge Commission, with unprecedented regional land use powers under a federal statute.²

Prior to the establishment of the Gorge Commission in 1986, this collection of jurisdictions created conflicting policies that often threatened the Gorge's natural values. Although Washington and Oregon had considered various ways to protect the Gorge since 1937,³ there was no comprehensive legislation until 1986, when Congress passed the Columbia River Gorge National Scenic Area Act.⁴ This statute represents an unusual experiment in federalism, attempting to marshal a complex array of federal, regional, and local authorities to protect a scenic area that, because of its preponderance of private lands, is not suitable for inclusion in the national park system, yet merits greater protection than the state or local governments can provide.⁵

¹ See Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 868 (1987).

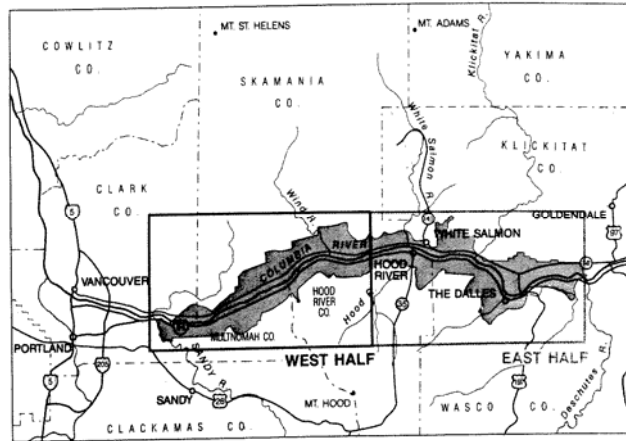
² *Id.* at 872-73. The Scenic Area encompasses the cities and towns of Cascade Locks, Hood River, Mosier, and The Dalles in Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram in Washington. Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544b(e)(1) (2000). The federal government also is quite influential, due to its status as the largest landowner in the Gorge. The Scenic Area contains approximately 292,615 acres, of which approximately 115,100 acres (nearly forty percent) fall within special management areas (SMAs), which are managed by the U.S. Forest Service. Of that 115,100 acres, approximately 71,000 acres are national forest system lands within the Gifford Pinchot and the Mount Hood National Forests. The remaining 44,100 acres consist of county, state, tribal, private, and other federal lands. Columbia River Gorge Commission, Revisions to the Management Plan for the Columbia River Gorge National Scenic Area IV-2 (2004), available at <http://www.gorgecommission.org/draft%20revised%20management%20plan.htm> (last visited Feb. 19, 2006).

³ Blair, *supra* note 1, at 878 (citing COLUMBIA GORGE COMMISSION, PACIFIC NORTHWEST REGIONAL PLANNING COMMISSION, REPORT ON THE PROBLEM OF CONSERVATION AND DEVELOPMENT OF SCENIC AND RECREATIONAL RESOURCES OF THE COLUMBIA GORGE IN WASHINGTON AND OREGON 2 (1937)).

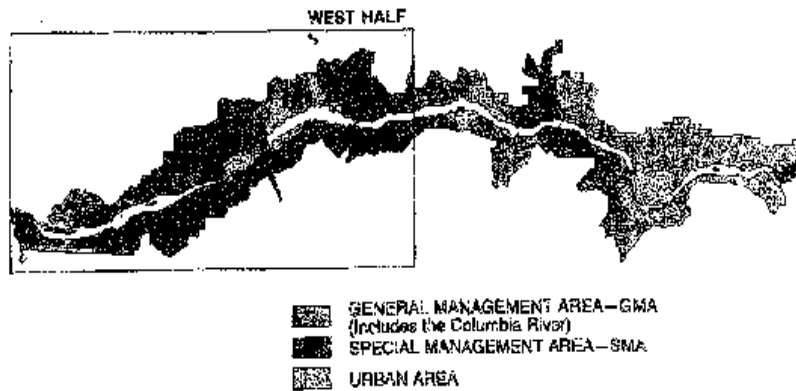
⁴ Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (2000).

⁵ Blair, *supra* note 1, at 867.

LOCATION MAP



MANAGEMENT AREAS



This map is a representation of the 1:24,000 scale official maps
Produced August 1992.

Adopting a regional approach to the Gorge's natural resources, the Act sought to establish relatively uniform land use controls on both the Washington and Oregon sides of the Gorge.⁶ But the goal of the statute — to protect and enhance the scenic, cultural, recreational, and natural resources of the Columbia River Gorge while also encouraging growth in urban areas and allowing future economic development in the Gorge in a manner consistent with the Act's primary conservation purpose⁷ — is quite vague. Thus, the implementing entities — which include the Gorge Commission authorized by the statute, the U.S. Forest Service, and local cities and counties — have considerable discretion in crafting management plans and zoning ordinances.⁸

Implementing the Gorge Act has proved to be difficult and often controversial. Although the statute survived a constitutional challenge,⁹ one of the six county governments within the Scenic Area unsuccessfully challenged the Gorge Commission's initial 1992 Management Plan,¹⁰ and thereafter refused to develop approvable implementing ordinance, requiring the Commission to remain the principal land use regulator for that county's Gorge Area lands.¹¹ There also have been widespread landowner allegations that various land use restrictions have worked unconstitutional takings, but those claims have yet to bear fruit.¹² More recently, the 2004 amendments to the Gorge Management Plan provoked environmentalist suits claiming that the amendments weaken scenic protections, inadequately address the cumulative

⁶ See Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 ENVTL. L. 1127, 1128 (1993).

⁷ 16 U.S.C. § 544a (2000).

⁸ For example, in 2005, conservationists challenged a Gorge Commission decision, which expanded a federally defined "urban area" (exempt from the Act's regulatory controls, see *infra* note 16 and accompanying text) to accommodate urban growth. Although the Washington Court of Appeals noted the conservationists' claims that the urban expansion was inconsistent with the primary purpose of the Act — to protect and enhance the scenic, cultural, recreational, and natural resources of the Columbia River Gorge — the court concluded that the Commission's decision to expand the urban area was supported by the record, and the expansion would benefit the Skamania Lodge, the county's largest private sector employer. *Friends of the Columbia Gorge, Inc., v. Columbia River Gorge Comm'n*, 108 P.3d 134 (Wash. Ct. App. 2005). This decision reflects the deferential role that courts have assumed in determining whether challenged land uses are consistent with the Act's underlying purposes. Consequently, the statutory directive to "protect and enhance" the values of the Columbia Gorge has been criticized by the Gorge Commission's Executive Director as being too vague and difficult to measure. See, e.g., Associated Press, *Air Pollution Worsens in Columbia Gorge, but Who's in Charge?*, THE DAILY NEWS, Aug. 26, 2005, available at http://www.tdn.com/articles/2005/08/27/area_news/news05.txt (last visited Feb. 19, 2006) (noting "when it comes down to the details, nobody knows what the standard really means").

⁹ See *infra* notes 53-61 and accompanying text.

¹⁰ See *infra* notes 62-65 and accompanying text.

¹¹ See *infra* note 65.

¹² See *infra* notes 66-84 and accompanying text.

effects of development, and fail to protect wildlife, water quality, and salmon habitat.¹³

This article provides a two-decade review of efforts to implement the Gorge Act, focusing especially on judicial interpretation. Parts II and III briefly outline the Act and the management plan it required. Part IV discusses the principal judicial interpretations of the statute and its implementation. These include constitutional and management plan challenges, takings cases, challenges to the implementation of the Act's innovative "opt-out" provision (under which some landowners may, under certain circumstances, evade the most stringent regulations under the Act by offering to sell their land to the federal government), and a controversial case in which the Washington Supreme Court limited the Gorge Commission's ability to invalidate county land use decisions after the period for appeals had passed. Part V surveys a series of problematic issues involving whether state agencies must implement the Gorge Act and its management plan. Part VI considers the 2004 revisions to the management plan and their pending challenges. The article concludes that, despite the contested nature of its implementation (perhaps because of it), the Gorge Act and its implementation are worthy of study by those seeking to protect other transboundary resources in other locations.

II. THE 1986 COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ACT

The Gorge Act established a National Scenic Area extending along the Columbia River for some eighty-five miles, from just east of Portland, Oregon and Vancouver, Washington, upstream to the Deschutes River.¹⁴ The statute divided the nearly 300,000 acres in the Scenic Area into three classifications: (1) Urban Areas (UAs); (2) Special Management Areas (SMAs); and (3) a General Management Area (GMA), comprised of land outside the UAs and SMAs;¹⁵ subjecting each to a different type of regulation. Land within UAs — comprising ten percent of the total Scenic Area — is exempt from the Act's provisions.¹⁶ SMAs — of which there are four, and which contain mostly federal lands and often the most

¹³ See *infra* notes 154-56 and accompanying text.

¹⁴ 16 U.S.C. § 544b (2000).

¹⁵ *Id.* The Gorge Act never actually mentions the GMA, a term coined by the implementing agencies.

¹⁶ *Id.* § 544b(e)(1). The cities and towns included within UAs are Cascade Locks, Hood River, Mosier, and The Dalles in Oregon; and Bingen, Carson, Dallesport, Home Valley, Lyle, North Bonneville, Stevenson, White Salmon, and Wishram in Washington.

sensitive resources — are managed by the U.S. Forest Service.¹⁷ The GMA — which is non-federal land outside UAs — is overseen by the Columbia River Gorge Commission, a nonfederal, interstate compact agency authorized by the Act.¹⁸

Although the Act authorized the Commission, the agency was actually created by Oregon and Washington through state legislation.¹⁹ Of the twelve voting members of the Commission, half are appointed by the governors of Washington and Oregon (each appoints three), and half are appointed by the county commissioner of each of the six Gorge counties.²⁰ The Secretary of Agriculture appoints one non-voting member to represent the Forest Service.²¹

The Act's division of authority between the federal government and the bi-state commission was the product of a political compromise engineered by the drafters of the Act to alleviate concerns over the specter of federal zoning of private lands, which some conservative members of the U.S. Senate and the Reagan Administration claimed was unconstitutional.²² In an effort to limit the federal regulatory controls, the Act created a complex structure which envisioned that the Forest Service, the Gorge Commission, and local governments would work together to address the protection and development of the Gorge.²³

Although private property regulation by the Forest Service and other federal agencies in federal reserves is not a particularly novel development,²⁴ the Gorge Act contains a fairly unique allocation of power among federal, regional, and local authorities in its efforts to preserve a nationally significant landscape, spanning across two states, six counties, and thirteen cities and towns. The results have been decidedly mixed, with Gorge conservationists arguing that the multi-tiered structure of the Act can impede the achievement of the conservation goals of the Act,²⁵ while private

¹⁷ *Id.* § 544f. Approximately forty-five percent of the total land in the Scenic Area is contained in the SMAs.

¹⁸ *Id.* § 544c(a)(1)(A). The establishment of the Commission was not without controversy. *See infra* notes 53-61 and accompanying text.

¹⁹ Oregon and Washington approved the Commission by entering into the Columbia River Gorge Compact. OR. REV. STAT. § 196.150 (2003); WASH. REV. CODE ANN. § 43.97 (West 2005).

²⁰ 16 U.S.C. § 544c(a)(1)(C) (2000).

²¹ *Id.*

²² *See Blair, supra* note 1, at 920-22.

²³ *See id.* at 896-932 (thoroughly examining the Gorge Act's legislative history).

²⁴ *See id.* at 951-53 (describing the Sawtooth National Recreation Area and the Hell's Canyon National Recreation Area and noting that the 750,000 Sawtooth NRA includes 25,200 acres of privately owned lands, while the 650,000 acre Hell's Canyon NRA includes approximately 41,000 acres of private property).

²⁵ *See e.g.,* CARL ABBOTT ET AL., PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA 186-87 (William Lang ed., Oregon State University Press 1997)

property advocates decry the Commission's implementation of the Act as an impermissible governmental intrusion.²⁶

Land uses within the Scenic Area must be consistent with a comprehensive management plan.²⁷ This plan consists of two components: a plan for the SMAs prepared by the Forest Service, and a plan for the GMA approved by the Commission. The Act prescribed three components of the plan: (1) an inventory of existing land uses and resources in the Scenic Area, including an economic study and a recreation assessment;²⁸ (2) land use designations for both the GMA and the SMAs establishing land suitable for agriculture, timber production, open space, and commercial and residential development;²⁹ and (3) a Scenic Area management plan based on the resource inventories and the land use designations,³⁰ which the Commission must incorporate into the SMA plan prepared by the Forest Service.³¹

(discussing the complexities involved in implementing the Act's "horizontal" or "state/state" intergovernmental relations and the Act's "vertical" coordination among federal, state, and local governments); *id.* at 188 ("Environmentalists have criticized the Management Plan for giving too much away . . ."); *id.* at 189 ("The political legacy of the planning process is dissatisfaction among environmentalists and local residents . . . [Environmentalists] wanted a powerful agency to take care of the gorge. Instead, they got a mixed management system that requires constant monitoring in county seats as well as Gorge Commission and Forest Service offices.").

²⁶ *See id.* at 155-56 ("Residents often take the Scenic Area Act itself as a slap in the face. They resent the implied message that they are unable to manage their own communities and protect what they also see as a valuable resource . . . Opponents of the Scenic Area repeatedly claim that Management Plan regulations on open space and density constitute uncompensated takings of private property."); *id.* at 172 ("Many (but not all) residents of the Scenic Area remain convinced that the regulatory structure is basically illegitimate . . ."); *see also* Steve Stuebner, *Counties Want to Develop Public Land*, HIGH COUNTRY NEWS, February 16, 1998, at 3 (quoting Al McKee of the Skamania County Commission, "The people from the city think everything outside of the urban areas should be saved and that we're not capable of managing growth . . . We need more of a balanced perspective." According to McKee, restrictions on property development in the gorge . . . have left Skamania County with a shrinking tax base for basic services. "We're really scrambling to keep our county running."); RaeLynn Gill, *Arrowheads Point to Property Dilemma*, HOOD RIVER NEWS, Feb. 6, 2002 (quoting Cherry Trautwein, whose property was declared undevelopable after archaeologists found native American artifacts on the property, "I would have never dreamed that I'd lose the total use of my property, I never knew regulations could do that to you.").

²⁷ 16 U.S.C. § 544e(a),(c) (2000).

²⁸ *Id.* § 544d(a). The statute required the resource inventory to be completed within one year of the establishment of the Commission. *Id.*

²⁹ *Id.* §§ 544d(b)(1), 544f(e). The Act's principal development controls are (1) a prohibition on all "major development actions" in SMAs, (2) a restriction on all residential development in SMAs and the GMA adversely affecting Gorge resources, and (3) strict limits on mining and industrial and commercial development. *Id.* § 544d(d)(5)-(8). The statute required the Gorge Commission to develop land use designations within two years. *Id.*

³⁰ *Id.* § 544d(c).

³¹ *Id.* § 544d(c)(4); COLUMBIA RIVER GORGE COMM'N, MGMT. PLAN FOR THE COLUMBIA RIVER GORGE NAT'L SCENIC AREA (1992) [hereinafter 1992 MANAGEMENT PLAN]. The Secretary of Agriculture concurred in the plan's adoption on behalf of the Forest Service in February, 1992.

Although the Act required the U.S. Forest Service and the Commission to develop the management plan for SMAs and the GMA,³² the statute authorized the six Gorge counties within the Scenic Area to implement the plan through county land use zoning ordinances, which in turn must be consistent with the management plan's requirements.³³ The Act directed the Forest Service and the Commission to determine whether a county ordinance is consistent with the management plan for the SMAs and GMA, respectively.³⁴ For counties not enacting ordinances consistent with the statute, the Commission must develop and implement zoning consistent with the management plan.³⁵ Only Klickitat County, Washington has failed to adopt an approved ordinance, so the Commission is the principal land use regulator for Gorge Area lands in that county.³⁶

The Gorge Act also provided some protection for tributaries of the Columbia River that flow through the Scenic Area. All tributary rivers and streams flowing through SMAs — or those which have been designated as state wild, scenic, or recreation rivers — received federal Wild and Scenic Rivers Act protection from water resource projects unless (1) the project would have no “direct and adverse effect” on Scenic Area resources (for rivers flowing through SMAs), or (2) the project meets certain state-imposed conditions for state-designated rivers.³⁷ The Act also gave the Wind, Hood, and Little White Salmon Rivers federal Wild and Scenic Rivers Act protection for varying time periods.³⁸ In addition, the statute designated the White Salmon and Klickitat Rivers as fed-

³² 16 U.S.C. § 544d (2005).

³³ *Id.* §§ 544e, 544f.

³⁴ *Id.*

³⁵ *Id.* § 544f(f)(1).

³⁶ *See id.* § 544e(c). The Commission's ordinance governing land use in Klickitat County appears in Commission rule 350-81, available at <http://www.gorgecommission.org/Commission%20Rules.html> (last visited Feb. 19, 2006). The Forest Service concurred in the Commission's ordinance, as required by 16 U.S.C. § 544f(i)(2) (2000). Had the federal agency rejected the Commission's ordinance, the Commission could have overridden the objection by a vote of two-thirds of the Commission's members including a majority of the members appointed by each state, 16 U.S.C. § 544f(l)(5)(B) (2000), but the Forest Service would then have cut off certain federal funds available under the Act for a conference center, recreational facilities, and economic development. 16 U.S.C. §§ 544f(n), 544n(c).

³⁷ 16 U.S.C. § 544k(a) (2000).

³⁸ *Id.* Congress protected the Wind River “not less than three years” following the later of (1) final approval of the Gifford Pinchot National Forest Plan, or (2) the Secretary of Agriculture's determination of the suitability of the river for protection under the Wild and Scenic Rivers Act. *Id.* § 544k(a)(3). The statute protected the Hood River for a period not to exceed twenty years from November 1986, if water is diverted from that river by means other than a dam or diversion. *Id.* § 544k(a)(4). The segment of the Little White Salmon River between the Willard National Fishery Hatchery and the Columbia River was protected indefinitely. *Id.* § 544a(5).

eral wild and scenic rivers.³⁹ Consequently, certain water development projects are prohibited on these rivers, and the federal government may acquire lands within their protected corridors.⁴⁰

III. THE 1992 MANAGEMENT PLAN

The Columbia River Gorge Commission devoted more than four years to preparing a management plan.⁴¹ The planning process included a recreation assessment, a resource inventory, and an economic opportunity study, as well as a series of consultations with county, state, and federal officials and the four Indian tribal governments with treaty rights in the Scenic Area.⁴² The Gorge Commission also conducted a major public involvement and comment process.⁴³ Perhaps not surprisingly, this attempt to accommodate a multitude of disparate interests, while also balancing the Act's apparently inconsistent goals of resource protection and economic development, proved to be an enormous challenge. The goals, objectives, policies, and guidelines contained in the final management plan often were vague and, in some cases, internally inconsistent.⁴⁴ As a result, some provisions in the ensuing management plan have proved to be difficult to enforce, and courts have been willing to afford wide latitude to the Gorge Commission

³⁹ The Act designated the Klickitat and White Salmon Rivers as rivers under the protection of the Wild and Scenic Rivers Act, 16 U.S.C. § 1274(a)(60), (61) (2000).

⁴⁰ 16 U.S.C. §§ 1277, 1278(a) (2000).

⁴¹ 1992 MANAGEMENT PLAN, *supra* note 31, at 4.

⁴² *See id.* at 10-11.

⁴³ *Id.* at 11. The Gorge Commission received nearly 3,000 written comments from the public between 1988 and 1992 concerning the development of the management plan. *Id.* at 21.

⁴⁴ The 1992 Management Plan is replete with provisions that seem to anticipate considerable discretion in determining whether a proposed land use complies with the plan. *See e.g.*, 1992 MANAGEMENT PLAN, *supra* note 31, at I-4 ("New buildings and roads shall be . . . designed to . . . reduce grading to the maximum extent practicable. . . . New buildings shall be generally consistent with the height and size of nearby development."); *id.* at I-9 ("New buildings or roads shall . . . minimize visibility from key viewing areas . . . to the maximum extent practicable."); *id.* at I-122 ("Protect and enhance natural resources . . . wetlands, ponds, lakes, riparians areas, old growth forests . . . sensitive wildlife and fishery habitats . . . shall be protected from adverse effects," *id.* at II-15 ("Agricultural lands shall be protected by minimizing adjacent land use conflicts."); *id.* at II-37 ("Forest landowners shall be encouraged to develop plans for long-term management of their property to protect and enhance the forest resource."). The plan also allowed new cultivation in SMA agriculture zones without review, unless there would be potential adverse effect on cultural or natural resources. *Id.* at II-16. However, the only way to find out if there is a potential adverse effect to cultural and natural resources is to review the proposed new cultivation. The plan prohibited residential development on parcels of land less than forty contiguous acres; *id.* at II-15; but allows boundary adjustments between two or more contiguous parcels that does not result in the creation of an additional parcel. *Id.* at II-89. Thus, through a lot line adjustment, a parcel that was previously ineligible for new residential development, can sidestep the prohibition.

and local government entities concerning their interpretation of the plan.⁴⁵

When it completed the management plan in 1992, the Commission forwarded the plan to the six Gorge counties for implementation.⁴⁶ Each county was to prepare a land use ordinance consistent with the plan; the ordinances then had to be approved by the Commission.⁴⁷ The Act authorized the Commission to adopt and implement ordinances for counties not enacting approved ordinances.⁴⁸ During the interim (between the adoption of a final management plan and county adoption of local development ordinances), the Commission enforced the development restrictions in the management plan itself.⁴⁹

⁴⁵ For example, in 2005, the Washington Court of Appeals reversed a lower court decision and upheld a Washington Department of Natural Resources (DNR) interpretation of portions of the Gorge Management Plan that had been incorporated into state forest practices regulations administered by the DNR, the effect of which was to allow a landowner to convert forest land within an SMA to agricultural land by logging the land. *Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 118 P.3d 354, 366 (Wash. Ct. App. 2005) (deferring to the DNR decision, which effectively exempted the land conversion from scenic resources review).

⁴⁶ See 1992 MANAGEMENT PLAN, *supra* note 31.

⁴⁷ 16 U.S.C. §§ 544e(c) (GMAs), 544f(i) (SMAs). The Secretary of Agriculture must concur in the Commission's approval of ordinances for SMAs, but the Commission may override the Secretary's denial of concurrence with a two-thirds majority vote, including a majority of the members appointed from each state. 16 U.S.C. § 544f(k) (2000). Indian tribes must be notified of development proposals and may submit comments but have no veto authority. 16 U.S.C. § 544d(e) (2000).

⁴⁸ *Id.* §§ 544e(c), 544f(i)(3). Before the counties adopted a consistent land use ordinance (still the case with Klickitat County, *see infra* note 52), the Commission and the Forest Service shared management authority over the GMA and in SMAs. 16 U.S.C. § 544h(c) (2000). The Commission must review all proposals for "major development actions" and new residential development outside UAs in these counties, and may allow these developments only if they are consistent with the Act's purposes and development standards. *Id.* One court has held that "major development actions can occur and be subject to Commission review in all land classifications in the scenic area except urban areas," meaning that the Commission has regulatory authority in the GMA as well as in SMAs. *Murray v. Columbia River Gorge Comm'n*, 891 P.2d 1380, 1382 (Or. Ct. App. 1995). In *Murray*, a landowner challenged a Commission decision that he willfully violated the Act by removing aggregate and other resources without Commission approval. The landowner claimed that removal of mineral resources was only a "major development action" under the Act if it disturbed land within the SMAs; since his land was in the GMA, he claimed that his activity was not subject to Commission review. *Id.* at 1381. See 16 U.S.C. § 544(j)(3) (2000) ("major development actions means that . . . the exploration, development and production of mineral resources unless such exploration, development or production can be conducted without disturbing the surface of any land within the boundaries of a [SMA]"). The court disagreed, stating that the language of section 544(j)(3) "is not a limitation on regulation outside SMAs; it is an exception from a prohibition within SMAs." *Murray*, 891 P.2d at 1381-2.

⁴⁹ In *Tucker v. Columbia River Gorge Comm'n*, 867 P.2d 686, 690 (Wash. Ct. App. 1994), the court upheld the Commission's denial of an application by a landowner to subdivide his ten-acre parcel because the Commission could consider "cumulative environmental harm" in determining whether the development impermissibly "adversely affected" the resources of the Scenic Area, and therefore was prohibited by § 554(d)(8) of the Act (quoting *Hayes v. Yount*, 552 P.2d 1038, 1043 (Wa. 1976)).

The Act's apparently conflicting objectives — to protect and enhance the area's scenic, cultural, recreational, and natural resources while protecting and supporting the area's economy⁵⁰ — provided the Commission with sufficient discretion to approve over eighty percent of proposed developments during the interim period before the approval of most county ordinances in 1991, and ninety-one percent of residential applications.⁵¹ Of the six Gorge counties, only Klickitat County, Washington, has failed to develop an approvable ordinance.⁵²

IV. JUDICIAL INTERPRETATION OF THE MANAGEMENT PLAN AND THE GORGE ACT

The Scenic Area Act and the Gorge Management Plan have survived a number of challenges in both federal and state courts. Landowners tested the constitutionality of the statute and the alleged inflexibility of the management plan it produced. They have also filed numerous constitutional takings claims, seeking just compensation for alleged over-regulation, and have sued over the implementation of the statute's unique "opt out" provisions. None of these challenges have succeeded, but landowners did manage to curb the ability of the Commission to invalidate local land use decisions outside the normal appeals process. This section discusses each of these issues in turn.

A. *Constitutional and Management Plan Challenges*

The constitutionality of the Scenic Act was the subject of *Columbia River Gorge United-Protecting People and Property v.*

⁵⁰ 16 U.S.C. § 544a.

⁵¹ See ABBOTT, *supra* note 25, at 128.

⁵² Multnomah, Hood, and Wasco Counties in Oregon and Skamania and Clark Counties in Washington all have adopted Scenic Area land use ordinances that the Gorge Commission approved, leaving Klickitat County as the only county for which the Commission continues to control land use within the Scenic Area under the authority of 16 U.S.C. § 544e(c). See Letter from Martha J. Bennett, Executive Director, Columbia River Gorge Commission, Annual Performance Report (Sept. 20, 2004) (on file with author) [hereinafter Bennett Letter]. Klickitat County refused to prepare an approvable ordinance because it claimed that Washington state planning and environmental regulations provided adequate protection of Gorge resources. ABBOTT, *supra* note 25, at 160. Even without a county ordinance, the vast majority of development proposals in Klickitat County have been approved by the Gorge Commission. For example, in 1996, the Commission approved one hundred percent of the development proposals in Klickitat County. That year the Commission and the Gorge counties approved a combined ninety-eight percent of all development proposals in the Scenic Area. 1996 COLUMBIA RIVER GORGE COMM'N, ANN REP. 5 (Feb. 1997). See also Nathan Baker & Michael Lang, *Gorge Commission Slides on Protecting Resources*, FRIENDS OF THE COLUMBIA GORGE NEWSLETTER, at 4 (Winter 2004) (noting that the Commission had not denied a single development application in over three years).

Yeutter, where the Ninth Circuit upheld the Act against a challenge brought by a group of Gorge property owners and an organization opposed to the legislation.⁵³ The plaintiffs claimed the Act violated the Tenth Amendment, the Commerce Clause, Property, and Compact Clauses of the Constitution.⁵⁴ The Ninth Circuit disposed of the Commerce Clause argument, holding that the Act was well within the “expansive power” of Congress under the commerce power because the Scenic Area in question “consists of portions of two states bisected by a navigable waterway . . . [and] virtually all activities affecting the land, the economy, the environment, or the resources have interstate ramifications.”⁵⁵ The court observed that “Congress found this area to be one of critical national significance” and intended to regulate economic activities, including logging, fishing, and recreation in the Gorge.⁵⁶ Congress noted that the area was also a destination for travelers, attracting recreation enthusiasts from throughout the country, thus directly affecting interstate travel.⁵⁷

The Ninth Circuit also rejected the plaintiffs’ argument that the interstate agreement between Oregon and Washington violated the Constitution’s Compact Clause, citing the need for innovative management solutions to “difficult interstate land preservation problem[s].”⁵⁸ Because the Act was a valid exercise of congressional power under the Commerce Clause, the court did not address whether the Act was within Congress’s power under the Property Clause, although the Supreme Court has ruled many times that the congressional power under the Property Clause is “without limitations.”⁵⁹ Finally, the court rejected the plaintiffs’ Fifth Amendment claim that residents of the Scenic Area were

⁵³ *Columbia River Gorge United - Protecting People and Property v. Yeutter*, 960 F.2d 110, 115 (9th Cir. 1992).

⁵⁴ *Id.* at 112.

⁵⁵ *Id.* at 113.

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *Id.* at 115. The Compact Clause requires any interstate agreement that increases the political power of the states to be approved by Congress. U.S. CONST., art. I, § 10, cl. 3. The *Yeutter* plaintiffs argued that advance congressional consent to the Gorge Compact was impermissible and maintained that the Gorge Act went too far in specifying the details of the compact. 960 F.2d at 114. The Ninth Circuit noted the difficulties in handling regional problems like environmental protection, pointed out that interstate compacts have been used in a wide variety of situations to promote both federal and state interests, and observed that the framers of the Constitution had the foresight to authorize inventive solutions to regional problems. *Id.* According to the court, the compact authorized in the Gorge Act was fully consistent with the need for “innovative solution[s]” to difficult “land preservation problem[s].” *Id.* at 115.

⁵⁹ *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (determinations under the Property Clause are primarily left to Congress), citing *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); *United States v. Gratiot*, 39 U.S. 526, 537-38 (1840).

treated unconstitutionally differently than state residents outside of the area, ruling that different treatment of people in different areas “is permissible, provided there are reasons for such treatment that do not reflect unconstitutional motivations.”⁶⁰ The court concluded, “preservation of the Columbia River Gorge Area is a permissible Congressional objective and a valid exercise of the power delegated to Congress under the Commerce Clause of the Constitution.”⁶¹

The Commission’s 1992 Management Plan drew a challenge from Klickitat County, which attempted to enjoin its adoption, contending that the plan was too inflexible in requiring counties to adopt conforming land use controls, thus impermissibly narrowing local discretion.⁶² In 1991, even before the Commission approved the plan, the county filed suit, seeking to enjoin approval of the plan because the Commission failed to prepare an environmental impact statement (EIS) under either federal or state law.⁶³ Klickitat County argued that Washington law required an EIS, as did the Gorge Act’s requirement of “disclosure of information.”⁶⁴ But a federal district court held that the Commission need not prepare an EIS because the court thought it incongruous for Congress to explicitly exempt the Forest Service from the federal EIS requirement, as the Act did, and then “by implication require the Commission to follow the EIS requirements” of the state of Washington.⁶⁵

B. Takings Claims and Fears of Takings Liability

A significant aspect of the Management Plan, and one that has been sharply criticized, concerns the restrictions the Act

⁶⁰ *Yeutter*, 960 F.2d at 115.

⁶¹ *Id.*

⁶² See *ABBOTT*, *supra* note 25, at 140.

⁶³ *Klickitat County v. Columbia River Gorge Comm’n*, 770 F. Supp. 1419, 1422 (E.D. Wash. 1991).

⁶⁴ *Id.* at 1427. The Gorge Act states: “[T]he Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State.” 16 U.S.C. § 544c(b) (2000).

⁶⁵ *Klickitat County*, 770 F. Supp. at 1428; 16 U.S.C. § 544o(f)(1) (2000). The court stated that the legislative history of the Act clearly indicated that Congress intended to direct the Commission to adopt the more restrictive state requirement regarding the release of public records, not to incorporate an environmental disclosure law by implication. *Klickitat County*, 770 F. Supp. at 1429. Klickitat County has continued to resist the Commission’s development standards and is the only county of the six Gorge counties that has not adopted an ordinance for implementing the management plan. See *Bennett Letter*, *supra* note 52, at 1.

placed on federal land acquisitions.⁶⁶ The Scenic Act authorized the Forest Service to acquire “lands or interests . . . within the special management areas”⁶⁷ The Act permitted the agency to purchase lands in SMAs which the Secretary determines are necessary to achieve the dual purposes of the Act:⁶⁸ (1) protection and “enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge;”⁶⁹ and (2) to provide protection and support for “the economy of the [Gorge] by encouraging growth . . . in existing urban areas.”⁷⁰ But the Act made no provision for the purchase of lands in the GMA.⁷¹ As a result, the approved counties, responsible for controlling development in the GMA, must rely heavily on regulatory controls and fear they will incur regulatory takings liability.⁷²

Avoiding takings-related litigation appears to have influenced implementation of the Gorge Management Plan. For example, in 1996, the counties approved ninety-eight percent of all development proposals in the GMA.⁷³ Although most of those approvals included conditions to assure resource protection, this high percentage of approvals may cast some doubt on the efficacy of the management plan and its implementing ordinances to effectively

⁶⁶ See 16 U.S.C. § 544g (2000).

⁶⁷ *Id.* § 544g(a)(1).

⁶⁸ *Id.*

⁶⁹ 16 U.S.C. § 544a(1) (2000).

⁷⁰ *Id.* § 544a(1).

⁷¹ The Act does authorize the purchase of land in one particular area of the GMA: the Dodson/Warrendale Special Purchase Unit, an area susceptible to geologic hazards, where a major landslide occurred in 1996. See 16 U.S.C. §§ 544g(a)(1), 544b(d) (2000). But this limited authority should be compared to the general authority to acquire lands in the SMAs. *Id.* § 544g (authorizing the Secretary of Agriculture to acquire lands within special management areas by purchase as well as eminent domain and land exchange in certain circumstances). The Secretary may acquire land by eminent domain only when “reasonably necessary to accomplish the purposes” of the Act, and when all “reasonable efforts” to acquire the land with the consent of the owner have failed. *Id.* § 544g(b)(1). The Secretary may exchange federal forest land outside of SMAs for private lands within SMAs. *Id.* § 544g(d). The exchanged lands must be of “approximately equal value,” and the exchange provision applies only to private “unimproved forest land at least forty acres in size within the boundaries of the special management areas” *Id.* § 544g(d)(1)-(2). Since the adoption of the Act, the Forest Service has acquired, through purchase, exchange, or donation, approximately 34,000 acres of new federal land in the Scenic Area. In addition, approximately 40,000 acres of the Gifford Pinchot National Forest and the Mount Hood National Forest are inside the boundary of the Scenic Area. COLUMBIA RIVER GORGE COMMISSION, 2004 REVISIONS TO THE MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA IV-1 (May 2004), available at <http://www.gorgecommission.org/Draft%20revised%20management%20plan.htm> (last visited Feb. 19, 2006) [hereinafter cited as 2004 MANAGEMENT PLAN].

⁷² See ABBOTT, *supra* note 25, at 110 (noting that the management plan imposes responsibility for regulating private property on the county governments, the governmental entities, least able, politically, technically, and financially, to bear the burden of takings-related claims).

⁷³ 1996 COLUMBIA RIVER GORGE COMM’N, ANN REP. 5 (Feb. 1997). See Baker & Lang, *supra* note 52 (no development denials during 2001-04).

balance development with protection and enhancement of the Scenic Area's resources.

Liability for regulatory takings-related claims has not materialized, however, and courts have not been particularly receptive to the relatively few takings-related claims that have been brought. In fact, several courts have avoided adjudicating such claims on the merits by disposing of them on procedural or justiciability grounds.⁷⁴ Of the claims that have been adjudicated on the merits, none have succeeded.⁷⁵ *Miller v. Columbia River Gorge*

⁷⁴ See, e.g., *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 622 (9th Cir. 1992) (holding "[b]ecause [plaintiff] did not demonstrate the inadequacy of the States' compensatory procedures and because it failed to seek compensation from Oregon or Washington prior to filing its suit in federal court, [plaintiff] has failed to satisfy the . . . ripeness requirement."); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 849 P.2d 1225 (Wash. 1993) (dismissing plaintiffs' appeal of the Commission's rejection of plaintiff's development proposal because plaintiffs failed to file a timely appeal); *W. Birkenfeld Trust v. Bailey*, 837 F. Supp. 1083, 1085 (E.D. Wash. 1993) (plaintiffs' claim of a taking without compensation for the closure of his quarry was not ripe because he failed to exhaust state compensation remedies).

⁷⁵ At the end of 2005, there were no reported cases in which a county or Gorge Commission land use decision had resulted in takings liability. In one case, the Wasco County Superior Court awarded a landowner \$220,000 under an Oregon inverse condemnation statute, OR. REV. STAT. § 358.953 (2005)), as compensation for the Gorge Commission's denial of the landowner's application to conduct mining and quarry operations on property in the Scenic Area. In December 2005, however, the Oregon Court of Appeals vacated that award on ripeness grounds in *Murray v. State*, 124 P.3d 1261 (Or. Ct. App. 2005).

In *Murray*, within the span of three years, a landowner had filed five separate applications with the Gorge Commission seeking approval to build a single-family residence, conduct mining and quarry activities, and partition property within the Scenic Area. *Id.* at 1264-65. Citing the presence of Native American artifacts as well as evidence of a Native American burial site on the land, the Gorge Commission denied each of the applications on the ground that the landowner had failed to complete a cultural resources survey to determine the extent and significance of the archeological material found on the property, as required by the Scenic Area management plan. *Id.* at 1264-65. Although the Gorge Commission provided Murray with a list of potential archeological experts and indicated that the land use applications would be reconsidered upon the completion of the requisite cultural resources survey, Murray conducted various surface mining and quarry operations on the land without obtaining approval, prompting the Gorge Commission to seek a court order enjoining the mining activity. *Id.* at 1265-66. Despite a trial court's issuance of a preliminary injunction, Murray continued to conduct mining operations on his property, at one point deliberately using a tractor with ripper blades over the portion of the property where it was believed that Native American artifacts were present. *Id.* at 1265-66. The trial court eventually issued a permanent injunction prohibiting "[a]ll ground-disturbing and earth-moving activities, new development, and new land uses" on the property until Murray obtained the required approval under the Scenic Act for conducting such activities. *Id.* at 1266. In 1997, Murray filed suit against the State of Oregon, claiming that the Gorge Commission's denial of his quarry application and the court's subsequent injunction effected a taking for which just compensation was required. *Id.* at 1266-67. After concluding that the Gorge Commission was a state agency, the Wasco County Superior Court agreed with Murray and held that Murray had been deprived of all economically viable use of the property, and awarded him \$220,000 under an Oregon inverse condemnation statute as compensation. *Id.* at 1267.

But in December 2005, the Oregon Court of Appeals vacated the Wasco County Superior Court award on ripeness grounds, noting there were available administrative procedures through which Murray could have pursued development of the property. *Id.* at 1269. Despite the Gorge Commission's representations that his application would be reconsidered

Commission is typical. There, the landowner claimed that the denial of an application to subdivide a parcel of land amounted to a taking of a scenic easement without just compensation. The court quickly dismissed the claim because the plaintiffs had not “been deprived of all economically viable or a substantial beneficial use of the property.”⁷⁶

upon the completion of a cultural resources survey, and the commission’s attempts to provide him with a list of consulting archeologists that could help complete the cultural resources survey, Murray refused to perform the requisite survey and deliberately destroyed Native American artifacts on the property. *Id.* In addition, Murray never sought review of the commission’s decisions denying his permit applications, and because he failed to pursue all available administrative remedies to obtain approval for development, and there remained the possibility that a solution allowing some development could be obtained, his inverse condemnation claim was not ripe. *Id.*

The *Murray* court also rejected the landowner’s claim that he did not need to wait until his claim became ripe because it would have been futile to do so. *Id.* at 1270-71. The court noted that the commission was willing to work with Murray to resolve the matter, and that the commission might have approved plaintiff’s development plans if Murray had completed the required cultural resources survey. *Id.* at 1270-71. In addition, there was evidence that the property could be used for other activities, such as grazing. *Id.* at 1270-71. The court concluded that Murray failed to prove that his completion of the administrative process would be futile because it might have been possible for Murray to conduct such activities if he complied with the applicable administrative regulations. *Id.* at 1271.

⁷⁶ *Miller v. Columbia River Gorge Comm’n*, 848 P.2d 629, 630 (Or. Ct. App. 1993). The Oregon Court of Appeals rejected a similar takings claim in *Murray v. Columbia River Gorge Comm’n*, 865 P.2d 1319 (Or. Ct. App. 1993) (Gorge Commission’s rejection of an application to subdivide a 37-acre parcel in the Scenic Area was not an uncompensated taking because nothing in the record suggested that the petitioner had lost all economically valuable or beneficial use of its property as a result of the denial).

In the November 2004 election, Oregon voters passed an initiative that would seemingly do away with the “all economically valuable or beneficial use of the property” standard for takings claims in Oregon. The initiative appears to be one of the most sweeping landowner compensation schemes ever enacted (Measure 37, to be codified at OR. REV. STAT. chap. 197, stating, “[i]f a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation”). Text of Measure 37 available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html (last visited Feb. 19, 2006).

That measure, however, is unlikely to affect regulations under the Scenic Area’s management plan because the Oregon initiative expressly exempted from compensation land use regulations, like the Scenic Act, that are required under federal law. See Measure 37 § (3)(C). Although the Commission is expressly not a federal agency, 16 U.S.C. § 544c(a)(1)(A), Congress can direct state compact agencies (or other state or local agencies) to carry out federal law, so the exemption in the initiative would seem to apply to the Commission. See *Columbia River Gorge Comm’n v. Hood River Co.*, No. 050051 CC (Hood County Cir. Ct. Aug. 1, 2005), (enjoining Hood River County and two private plaintiffs from bringing Measure 37 claims against the Columbia River Gorge Commission because the Commission was carrying out federal law, and therefore exempt from the purview of Measure 37). However, land uses in urban areas, which are not subject to Commission controls, see 16 U.S.C. § 544d(c)(5)(B), and perhaps forest practices in the GMA, which are subject to state regulation, see *id.* § 544o(c), would seem to be subject to Measure 37 compensation requirements, while lands regulated by the Forest Service would seem clearly to be exempt.

After a lower court ruled that Measure 37 was inconsistent with several provisions of the Oregon and federal Constitutions, in February 2006, the Oregon Supreme Court unanimously upheld the measure on all counts. *MacPherson v. Dept. of Admin. Serv.*, No. S52875, 2006 WL 433953 (Or. Feb. 21, 2006). For a variety of perspectives on Measure 37,

In another takings claim, a developer with a water right to appropriate thirty cubic feet per second of water from the Little White Salmon River sought compensation in the Court of Federal Claims after the Gorge Commission denied his requested approval for a small hydroelectric project for which he had obtained a federal preliminary permit.⁷⁷ The claims court rejected the takings claim because completion of the project, which required multiple state and federal agency approvals, was too speculative.⁷⁸ The court observed that even in the absence of the Columbia River Gorge Scenic Area Act, a federal preliminary permit was unlikely to survive the federal licensing process.⁷⁹

The Washington Court of Appeals considered whether Gorge counties should pay compensation awards in *Klickitat County v. State* and concluded that the state of Washington would not be “liable for cost of paying and defending any inverse condemnation action brought by a landowner as a result of land use regulations adopted pursuant to . . . the Commission’s land management plan.”⁸⁰ Although the county had not adopted an approvable ordinance, it claimed that it needed “to assess the impact of implementing the Management Plan through the adoption of appropriate ordinances,” and consequently sued both the Gorge Commission and the state, seeking insulation for any costs that the county “might incur in adopting, implementing, and administering” an approvable ordinance.⁸¹

Klickitat County also maintained that by ratifying the interstate compact creating the Gorge Commission, the Washington legislature “impose[d] [on the county] responsibility for new programs,” thereby shifting responsibility for funding a state program to a local government in violation of Washington law.⁸² The Washington Court of Appeals disagreed, noting that when two states enter into a compact with congressional approval, the compact is “considered an instrument of federal law” and does not “constitute a state program.”⁸³ Because the Commission’s land management plan was federally required, a county adopting an ordinance to conform to the plan was acting as an agent of the Commission, not

see the symposium, *Ballot Measure 37: The Redrafting of Oregon’s Landscape*, 36 ENVTL. L. no. 1 (2006).

⁷⁷ *Broughton Lumber Co. v. United States*, 30 Fed. Cl. 239, 240 (1994).

⁷⁸ *Id.* at 243.

⁷⁹ *Id.*

⁸⁰ *Klickitat County v. State*, 862 P.2d 629, 634 (Wash. Ct. App. 1993).

⁸¹ *Id.* at 631.

⁸² *See id.* at 631-33 (citing WASH. REV. CODE ANN. § 43.135.060 (West 2005) preventing the legislature from imposing responsibility for new programs or increased levels of service on local governments unless the state reimburses the local governments).

⁸³ *Id.* at 634.

an agent of the state, so the state could not be liable for any costs that the county incurred defending takings claims.⁸⁴

C. Avoiding SMA Restrictions — the “Opt-out” Provision and Its Interpretation

Special Management Areas are those areas within the Scenic Area with the most significant scenic, natural, recreational, and cultural values.⁸⁵ These areas are largely federal land, regulated by the Forest Service.⁸⁶ The Gorge Act required the Forest Service to assure that both public and private land uses within the SMAs conform to both the purposes of the Act and the standards for management planning enumerated in the Act.⁸⁷ Although some of those standards are quite vague,⁸⁸ the Act specifically prohibits any “major development actions” in SMAs and requires that all residential, commercial, and mineral development “take place without adversely affecting the scenic, cultural, recreational, or natural resources of the scenic area.”⁸⁹ The Act also prohibits industrial development in SMAs and the GMA.⁹⁰

Although both public and private lands within the SMAs are subject to substantial restrictions, the statute (until the 2000 amendments to the Act)⁹¹ allowed the private landowners in SMAs

⁸⁴ *Id.* at 633-34 (noting that where Congress authorizes “the States to enter into a cooperative agreement, and where the subject matter . . . is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause,” citing *Cuyler v. Adams*, 449 U.S. 433, 440 (1981)). The *Klickitat County* court distinguished *Orion Corp. v. State*, 747 P.2d 1062 (1987), which had ruled that the state was responsible for compensating landowners burdened by local regulations imposed to carry out state mandates because the ordinance in that case — the Skagit County’s Shoreline Management Master Plan — had been adopted at the direction and control of the state. The decision in *Klickitat County* is significant from the perspective of the Columbia River Gorge counties because it effectively precludes the counties from obtaining any relief for potential takings related liability from the state, and federal relief seems quite unlikely. Although the court’s characterization of the Commission as a “creature of federal law” seems to suggest that counties, as agents of the Commission, could seek compensation from the federal government, in fact the Act expressly states that the Commission “shall not be considered an agency or instrumentality of the United States for the purpose of any federal law.” 16 U.S.C. § 544c(a)(1)(A) (2000).

⁸⁵ See Blair, *supra* note 1, at 934.

⁸⁶ 16 U.S.C. § 544f(a) (2000).

⁸⁷ 16 U.S.C. §§ 544f(f), 544d(d)(1)-(9) (2000).

⁸⁸ For example, the Act requires the management plan for the Scenic Area, developed jointly by the Forest Service and the Gorge Commission, to include provisions that are designed to “protect and enhance” agricultural lands, forest lands, open spaces, and recreational uses. 16 U.S.C. § 544d(d)(1)-(4). The Act does not define the term “protect and enhance,” however.

⁸⁹ 16 U.S.C. § 544d(d)(5) and (7)-(9) (2000).

⁹⁰ 16 U.S.C. § 544d(d)(5),(6) (2000).

⁹¹ Dept’t of Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, tit. 3, §346(b)(3), 114 Stat. 922, 999-1000 (2000) (codified at 16 U.S.C. § 544f(o)(2)) (prospectively ending the “opt out” provision described in this section and requiring all land-

to avoid SMA regulation under certain circumstances: the so-called “opt-out” provision. Under this provision, an owner of SMA property made a *bona fide* offer to sell her land to the Forest Service for fair market value enabling the agency to purchase the land.⁹² If, however, the Forest Service failed to accept a landowner’s *bona fide* offer within three years, the Act released that land from SMA status, rescinding applicable SMA regulations, effectively allowing the landowner to “opt-out” of SMA restrictions.⁹³ But an owner’s offer would not be a *bona fide* offer if the landowner refused to accept the Secretary’s fair market value bid, as determined by the Uniform Appraisal Standards for Federal Land Acquisitions, except that any restrictions imposed by the Gorge Act do alter fair market value.⁹⁴

Although prospectively terminated by the 2000 congressional amendments, the amendments prompted a flood of claims before the filing deadline on April 1, 2001. Landowners made some 187 offers in the six months between the enactment of the amendments on October 11, 2000 and the filing deadline, totaling more than 6,700 acres.⁹⁵

Courts have had to interpret a number of ambiguities in the “opt-out” provision. One federal court ruled that a Forest Service initial offer to buy private land within the SMA was not a final action subject to judicial review because the statute specifically provided for review of the landowner’s offer after expiration of the three-year period.⁹⁶ The court noted that the purpose of the three-year period was to facilitate negotiation between the government and the landowner throughout that period, with the goal of con-

owner offers to be made before April 1, 2001). The 2000 amendments, chiefly sponsored by former Senator Slade Gorton (R-Wash.), also required that appraised fair market value under the “opt out” provision not include any pre-April 2000 restrictions imposed by the Gorge Act. *Id.* §346(a)(3)(A).

⁹² 16 U.S.C. §§ 544f(o)(1), 544g(a)(1).

⁹³ 16 U.S.C. § 544f(o) (2000). The Forest Service retains management authority over private land during this three-year period. If three years elapse, and the Secretary of Agriculture has not accepted a landowner’s *bona fide* market value offer, the SMA ordinance will no longer apply to that property. But the landowner is still subject to the applicable county ordinance or, if that county has not adopted an ordinance, to the Commission’s land use ordinance. 16 U.S.C. §§ 544f(o), 544e(c).

⁹⁴ *Id.* §544g(e)(3)(A). *See supra* note 91 on the effect of Gorge Act restrictions on fair market value prior to April 2000.

⁹⁵ E-mail from Nathan Baker, Attorney, Friends of the Columbia Gorge (Oct. 3, 2005) (on file with the author).

⁹⁶ *Stevenson v. Rominger*, 909 F. Supp. 779, 784-85 (E.D. Wash. 1995). In *Stevenson*, the landowner offered to sell her SMA property for \$400,000, but the Forest Service countered with a one-year offer to purchase at \$108,000; by limiting the counter-offer to one year, the landowner claimed the Forest Service effectively forced her to forfeit her ability to “opt-out” of the ordinance because if a court later determined that the \$108,000 was fair market value, she could not accept the earlier, expired offer, and her land would remain subject to SMA regulation.

sensual federal acquisition of private lands within the SMA.⁹⁷ The decision seemed to give the Forest Service wide latitude to negotiate throughout the three-year period following the landowner's offer.⁹⁸

What constitutes fair market value is obviously of critical importance in the SMA land acquisition program because a landowner's fair market offer to sell land to the Forest Service in the SMA begins the three-year statutory time limit, at the end of which, the Secretary must release the land from SMA restrictions unless the affected landowner agrees to an extension of time.⁹⁹ Another federal district court held that since the Gorge Act does not specify who exactly determines fair market value, the Forest Service's determination of that value is not entitled to any more deference than the landowner's appraisal.¹⁰⁰ According to that court, what amounts to a fair market bid is a question for *de novo* judicial determination.¹⁰¹ Thus, the court rejected the Forest Service's assessment of value, ruling that the Gorge Act did not "authorize the agency to arbitrarily close its eyes to additional appraisals submitted by the owner, or categorically prohibit negotiation regarding the purchase price."¹⁰² The court stated that Congress "intended to establish a [land acquisition] procedure that minimizes confrontation, and ensures that landowners are fairly. . . compensated"¹⁰³ and that the agency's method of calculation for fair market value seemed to frustrate congressional intent.¹⁰⁴ The court doubted that "Congress ever has or could give a federal agency the power to unilaterally determine the ultimate

⁹⁷ *Id.* The court also ruled that the plaintiff was not adversely affected — a prerequisite for judicial review — by the low offer, since she merely had to make a choice whether to accept the offer or not. *Id.* at 785.

⁹⁸ The court concluded that it is the "plaintiff's offer that triggers the effect of [the 'opt-out' provision]; the government's offer or complete failure to make an offer has no effect on the operation of" the three-year period. *Id.* at 784. This means that a landowner rejecting an initial offer to purchase from the Forest Service must wait at least three years to obtain judicial review of that offer to ascertain whether it was a "fair market" offer under 16 U.S.C. § 544f(o). This may place the landowner in a precarious position where, as in *Stevenson*, the Forest Service makes a time-limited offer, since the landowner must decide whether to accept or reject it long before a court may review the offer. If it turns out that the landowner rejected what was a "fair market" offer, the land would remain subject to SMA regulation.

⁹⁹ 16 U.S.C. § 544f(o)(1).

¹⁰⁰ *Stone v. United States Forest Service*, 2004 W.L. 1631321, at *7 (D. Or. July 16, 2004), where the landowner thought the Forest Service's offer of \$138,000 was too low and employed an independent appraiser, one the Forest Service thought habitually overstated land values. The Forest Service's policy in such a situation was to retain another appraiser, compare the two appraisals, and select the one having the "strongest support for value." *Id.* at *3.

¹⁰¹ *Id.* at *7.

¹⁰² *Id.* at *7.

¹⁰³ *Id.* at *5.

¹⁰⁴ *Id.* at *7.

price it must pay to acquire private property for public purposes.”¹⁰⁵

D. Curbing the Gorge Commission’s Authority to Reverse Local Government Decisions

The tension between regional management and local control was quite evident in *Skamania County v. Columbia River Gorge Commission*, where the Washington Supreme Court held that the Gorge Commission lacked authority to invalidate land use decisions after the appeals period had expired.¹⁰⁶ The Commission asked the court to nullify a development approved by Skamania County, claiming that the county’s decision to approve a residential development was inconsistent with its management plan and the house that was built was inconsistent with the county’s permit.¹⁰⁷ More than a year after the expiration of the time for appeals — and after significant progress in the construction of the residence — the Commission sued to nullify the county’s approval of the development.¹⁰⁸

The Washington Supreme Court decided that, in order to promote finality and avoid injustice, the Gorge Act gave the Commission no authority to invalidate final county land use decisions. Thus, any Commission attempt to modify a county land use decision had to be made in a timely manner.¹⁰⁹ Observing that the Commission had ample opportunity to challenge the development within the statutory time for appeal, the court decided that the Commission could not overrule a county decision after that time because it would produce unnecessary uncertainty for all land developers in the Gorge.¹¹⁰ Consequently, despite considerable evidence that the landowner failed to meet the conditions of project

¹⁰⁵ *Id.* at *5.

¹⁰⁶ *Skamania County v. Columbia River Gorge Comm’n*, 26 P.3d 241, 254 (Wash. 2001).

¹⁰⁷ *Id.* at 245. In 1993, Skamania County’s Commission-approved Scenic Area ordinance provided a public comment period on all development applications. Following that comment period, the county’s Department of Planning and Community Development had to make a decision, which could be appealed to the county Board of Adjustment by any interested party within 20 days. Skamania County Code § 22.06.060. If there was an appeal within that 20-day period, the county board had to consider that decision *de novo*. *Id.* The county’s decision, in turn, could be appealed to the Gorge Commission within thirty days. 16 U.S.C. § 544m(a)(2). In *Skamania County*, the county approved the landowner’s application in 1996, but neither the Commission nor anyone else appealed the decision, and the landowner began to build the residence in 1997. *Skamania County*, 26 P.3d at 244-45.

¹⁰⁸ *Id.* at 245.

¹⁰⁹ *Id.* at 253.

¹¹⁰ *Id.* at 250-51.

approval,¹¹¹ the court refused to allow the Commission to invalidate county decisions after the period of review had passed.¹¹²

The *Skamania County* court's observations emphasize the enormous importance of the Gorge Commission's oversight, review, and monitoring of development projects. But reviewing and monitoring county development approvals is no small task, requiring constant diligence on the part of the Commission. These challenges are daunting in light of recent budget constraints. For example, the Commission's budget for the 2003-05 biennium was around twenty percent less than the previous biennium. In dollars adjusted for inflation, the Commission's budget is now lower than at any time in its history.¹¹³ At the same time, the number of development applications the Commission must review increased by twenty percent between 2002 and 2003 alone.¹¹⁴ Moreover, the Commission must decide on an increasing number of development applications in Klickitat County, which has failed to adopt an approvable Scenic Act ordinance.¹¹⁵ These budget cuts leave a small staff,¹¹⁶ making the Commission's task to effectively review and monitor an increasingly large volume of land use applications increasingly infeasible.

The Commission's discretion to interpret management plan ambiguities has also been judicially limited to an extent. One Washington court ruled that although the Gorge Act and the interstate compact are federal laws, the Gorge Commission is required to apply state law when interpreting zoning issues which the man-

¹¹¹ *Id.* at 245, 251.

¹¹² *Skamania County*, 26 P.3d at 254. The court also noted the numerous other opportunities the Commission had available to it under the Act: (1) it failed to file an appeal of the director's decision when it allegedly discovered the decision violated the Act; (2) it failed to file a civil action for injunctive relief as it is entitled to do under the Act; and (3) it failed to monitor and review county land use decisions. *Skamania County*, 26 P.3d at 253-54.

In 2003, the Commission promulgated Commission Rule 350-060-0240(3), creating "Special Rules for Filing Appeals After Expiration of Appeal Period" (authorizing "late appeals" where "the development constructed is materially different from the development allowed in the local government's decision to such a degree that a reasonable person could not have understood the decision to allow the actual development constructed"). OR. ADMIN. R 350-060-0240 (2006). Had this rule been in place prior to the *Skamania County* litigation, the provision likely would have authorized a challenge to the development, since the landowner constructed a house ten feet taller than the county authorized and built the house at a different location than the county approved.

¹¹³ Bennett Letter, *supra* note 52, at 2. The budget for the 2005-2007 biennium improved relative to the 2003-05 biennium. Telephone conversation with Jeff Litwack, Counsel to the Gorge Commission (Feb. 21, 2006).

¹¹⁴ Bennett Letter, *supra* note 52, at 2. Jeff Litwack noted, however, that as of early 2006, there were virtually no pending appeals of Commission decisions. Litwack, *supra* note 113.

¹¹⁵ See *supra* note 65 and accompanying text.

¹¹⁶ See ABBOTT, *supra* note 25, at 189.

agement plan does not squarely address.¹¹⁷ This court noted that (1) Congress had specifically decided not to make the Commission a federal agency;¹¹⁸ (2) Congress gave state courts almost exclusive jurisdiction over appeals from the Commission;¹¹⁹ and (3) the legislative history of the Act evidenced serious congressional concern that the Act would amount to a “federal zoning” law, suggesting that Congress wanted the Commission to apply state law.¹²⁰ Since the court declared there was “no federal law of zoning,” it was unclear what law would apply.¹²¹ Thus, when neither the Gorge Act nor the management plan provides a resolution to a zoning dispute, the court concluded that the Commission must apply relevant state law.¹²²

This decision suggests that the Commission must more clearly define Scenic Area objectives and policies in its management plan, because broadly worded language that is subject to conflicting interpretations will be difficult to effectively enforce. Any review of a county zoning or development decision will apply state law, rather than the Commission’s interpretation. The Gorge Commission responded to the *Skamania County* decision by amending its management plan to attempt to preempt state laws concerning vested rights.¹²³ This judicial demand for specificity at a time of diminished budgets and increasing land development applications will pose formidable challenges for the Commission in the years ahead.

¹¹⁷ *Skamania County v. Woodall*, 16 P.3d 701, 705 (Wash. Ct. App. 2001) (concerning whether a mobile home park owner, who had been renovating the facility for more than a year, had discontinued its use on seven of the ten spaces in the park, and therefore it was no longer a pre-existing, non-conforming use under the Management Plan).

¹¹⁸ 16 U.S.C. § 544c(a)(1)(A) (2000).

¹¹⁹ 16 U.S.C. § 544m(b)(6) (2000).

¹²⁰ *Skamania County*, 16 P.3d at 705-06. Note that, according to the Washington Court of Appeals, although the statute expressly states that the Commission is not a federal agency under 16 U.S.C. § 544c(a)(1)(A), it is nevertheless apparently a “creature of the federal government.” *Klickitat County v. State*, 862 P.2d. 629, 634 (Wash. Ct. App. 1993). The *Skamania County* court also pointed to the Scenic Act’s legislative history and the absence of a congressional directive to apply federal law to zoning disputes as reflecting congressional intent that state common law would apply to issues left unresolved by the Act or the management plan. *Skamania County*, 16 P.3d at 706-07.

¹²¹ *Skamania County*, 16 P.3d at 706.

¹²² *Id.* at 709. Moreover, the Commission would not seem to be entitled to the same kind of deference in interpreting state law as it would its own management plan.

¹²³ 2004 MANAGEMENT PLAN, *supra* note 71, at II-102 (2004) (stating that “[t]he laws of the states of Oregon and Washington concerning vested rights shall not apply in the National Scenic Area”).

V. THE UNCERTAIN RELATIONSHIP BETWEEN THE GORGE ACT AND STATE AGENCIES

The federalism conflict illustrated by the *Skamania County* decision is far from unusual. In fact, there are a number of unresolved tensions between the Gorge Act and local law. Although the Columbia River Gorge Compact expressly directs state agencies to carry out their functions in accordance with the Gorge Act,¹²⁴ three prominent areas of conflict concern air quality issues, forest practices within SMAs, and state wildlife introduction on federal lands. This section discusses each in turn.

A. Air Quality: Visibility Declines and the Rise of Acid Fog and Rain

The drafters of the Gorge Act were not primarily concerned about air pollution, but it would seem to be among those “natural resources” the statute aimed to protect and enhance.¹²⁵ Indeed, in 2000, an amendment to the Gorge Management Plan declared that “[a]ir quality shall be protected and enhanced, consistent with the purposes of the Scenic Area Act” and required the states to “develop and implement” a regional air quality strategy to fulfill the protection and enhancement purposes of the Gorge Act.¹²⁶ Yet, Gorge air quality concerns have become an increasing concern, as recent studies have indicated that the Scenic Area suffers from some of the worst air quality in the country, largely due to power plant emissions from a nearby coal plant, ammonia fumes from a

¹²⁴ OR. REV. STAT. § 196.155 (2005); WASH. REV. CODE § 43.97.025 (2005) (“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] the Columbia River Gorge National Scenic Area Act”) The 1992 Management Plan included a directive aimed at ensuring consistency of state and federal agency actions with the Management Plan: “[u]ses by state or federal agencies shall comply with the policies and guidelines in the Management Plan.” 1992 MANAGEMENT PLAN, *supra* note 31, at II-96.

¹²⁵ The Gorge Act specifically aimed to “protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge.” 16 U.S.C. § 544a(1). Although neither the term “scenic resources” nor “natural resources” are defined in the statute, common sense suggests that the term “natural resources” includes air quality. *See* 16 U.S.C. § 544a. Further, degraded air quality would certainly affect the “scenic resources” of the Columbia River Gorge. In addition, the Gorge Act also aimed to “protect and enhance open spaces.” 16 U.S.C. § 544d(d)(3). The Act defines “open spaces” to include “outstanding scenic views and sites.” 16 U.S.C. § 544(l)(5). By seeking to protect the scenic views and resources of the Columbia Gorge, Congress likely intended to provide for the protection and enhancement of air quality as well.

¹²⁶ *See* 2004 MANAGEMENT PLAN, *supra* note 71, at I-82.

dairy complex, and vehicle exhausts largely from the Portland metropolitan area.¹²⁷

All of these sources of pollution come from outside the Scenic Area, and consequently there are questions as to whether the Gorge Commission has the authority to restrict them. Environmentalists cited to the fact that Forest Service data shows that Scenic Area visibility is impaired at least ninety percent of the time and getting worse, including acid fog and rain ten to thirty times more acidic than normal Northwest rainfall, corroding petroglyphs and harming animals.¹²⁸ They therefore petitioned the Gorge Commission to issue a finding that the states are not in compliance with the Gorge Act's "protect and enhance" directive and its management plan.¹²⁹ But the Commission's executive director responded by claiming that Congress did not anticipate air quality problems and, unlike in the case of national parks, imposed no specific air quality safeguards.¹³⁰ She also maintained that the Commission lacked air quality expertise, and consequently was likely unwilling to direct the states to take action.¹³¹ A state official opined that the kinds of regulatory controls necessary to restore Gorge air quality to 1986 levels would impose "draconian"

¹²⁷ See Michael Milstein, *Beauty of the Gorge Slowly Choking Amid a Haze of Bureaucracy*, OREGONIAN, Aug. 26, 2005. The power plant and dairy emissions, emanating from east of the Gorge, are most serious in the winter, due to east winds; the vehicle emissions are most serious in the summer, due to west winds. *Id.*

¹²⁸ Letter from Nathan Baker, Staff Attorney, Friends of the Columbia River Gorge, to Columbia River Gorge Comm'n (Aug. 8, 2005) (noting that a recent Forest Service study shows that noticeable visibility impairment during the immediately preceding five years at its Wishram monitoring station was almost 100% and requesting the Gorge Commission to call upon the states to take action within six months) (on file with author).

¹²⁹ *Id.* The 1992 Management Plan had only the following declarations addressing air quality: "Existing levels of air visibility shall not be degraded. The Scenic Area shall be studied for designation as a Class I airshed." 1992 MANAGEMENT PLAN, *supra* note 31, at I-123. In May 2000, the Commission deleted this provision, replacing it with the following language:

Air quality shall be protected and enhanced, consistent with the purposes of the Scenic Area Act. The States of Oregon and Washington shall: (1) continue to monitor air pollution and visibility levels in the Gorge; (2) conduct an analysis of monitoring and emissions data to identify all sources, both inside and outside the Scenic Area, that significantly contribute to air pollution. Based on this analysis, the States shall develop and implement a regional air quality strategy to carry out the purposes of the Scenic Area Act, with the U.S. Forest Service, the Southwest Air Pollution Control Authority [now the Southwest Clean Air Agency], and in consultation with affected stakeholders.

2004 MANAGEMENT PLAN, *supra* note 71, at I-82 (also requiring the states and the Forest Service to produce annual reports to the Commission of progress under this policy).

¹³⁰ See Milstein, *supra* note 127 (quoting Martha Bennett, Executive Director, Columbia River Gorge Commission).

¹³¹ See *id.*

costs.¹³² This issue appears almost certainly headed to the courts.¹³³

B. Forest Practices and the Role of State Agencies in Implementing the Gorge Act

Whether state agencies can or must implement the Gorge Act or its management plan is an issue that has yet to be definitively resolved. The Act seemed to enlist state agencies in its implementation, requiring the states to provide “the Commission, State agencies, and the counties under State law [with] the authority to carry out their respective functions and responsibilities” under the Act.¹³⁴ The Compact implementing the Act stated that “[t]he 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” to implement the Act and the Compact.¹³⁵ These provisions were not sufficient to convince the Washington Forest Practices Appeals Board that the state Department of Natural Resources had to deny or condition its approval orders to satisfy the Gorge Act.

In its 1996 *Seeder Tree* decision, the board ruled that since there was no provision in the state Forest Practices Act or its implementing regulations requiring the Department of Natural Resources to satisfy the more restrictive requirements of the Gorge Act, the department had no authority to disapprove or condition the Seeder Tree Company’s forest practices application to meet those requirements.¹³⁶ The board did not interpret the provisions quoted above to require the department to “administer” the Gorge Act, only to “not approve [forest practice] which purports to supervene” the Gorge Act.¹³⁷ According to the board, it was sufficient for the department merely to disclaim that its approval did not ensure compliance with other federal or state laws.¹³⁸

The *Seeder Tree* decision prompted the Gorge Commission and others to convince the department to amend its regulations to incorporate the SMA forest practices provisions of the manage-

¹³² See *id.* (quoting Robert Elliott, Executive Director, Washington Southwest Clean Air Agency).

¹³³ See *id.* (quoting Brent Foster, an attorney with Columbia Riverkeeper, as promising that environmentalists will use “the hammer of litigation” if government agencies fail to act).

¹³⁴ 16 U.S.C. § 544c(a)(1)(B) (2000).

¹³⁵ See WASH. REV. CODE ANN. § 43.97.025(1) (West 2005).

¹³⁶ Columbia River Gorge Comm’n v. State of Wash. Dep’t of Nat’l Res., Forest Practices Appeal Bd. No. 95-31 and 95-32 (Oct. 10, 1996).

¹³⁷ *Id.* at 7.

¹³⁸ *Id.*

ment plan. The amended regulations make the department ultimately responsible for implementing and enforcing the SMA provisions.¹³⁹ But the rules make no attempt to incorporate the provisions of the Gorge Act itself. A recent decision of the Washington Court of Appeals ducked the issue of whether the Gorge Act required the department to implement its provisions.¹⁴⁰ Consequently, the issue of whether state agencies must implement the Gorge Act and its management plan remains a live one.

C. Wildlife Introduction on Federal Lands

In April 2005, the Forest Service and the Oregon Fish and Wildlife Commission signed a memorandum of understanding aimed at introducing Rocky Mountain goats on federal lands within the Gorge with the goal of establishing a healthy, viable population of around 300 goats.¹⁴¹ The plan was to trap up to forty goats from various locations in northeast Oregon and release them on federal lands in the Gorge. Environmentalists challenged the plan, claiming that there are serious questions about whether the goats are native to the Gorge, alleging that the introduction would harm sensitive plant species and increase erosion,¹⁴² and noting that a similar goat introduction effort in Olympic National Park in the 1920s produced an overpopulation sixty years later.¹⁴³

After the environmentalists filed suit (alleging violations of the Gorge Act, the management plan, and various other federal laws), the Forest Service withdrew from the memorandum of understanding.¹⁴⁴ But it is not quite clear that the state has aban-

¹³⁹ WASH. ADMIN. CODE §§ 222-46-015, 222-20-040(5)(b), and 222-16-010 (2005) (definition of "Columbia River Gorge National Scenic Area special management area guidelines"). The rule changes were the product of a memorandum of understanding negotiated between the Commission, the Washington Department of Natural Resources, and the Forest Service in the wake of the *Seeder Tree* decision that called for a negotiated rulemaking by the state Forest Practices Board to implement the purposes of the Gorge Act and the management plan in SMAs. Memorandum of Understanding Between Washington State Dept. of Nat. Resources, U.S. Dept. of Agric. Forest Service, and Columbia River Gorge Comm'n (Feb. 24, 1998) (on file with author). The Gorge Act includes no provisions on logging in the GMA.

¹⁴⁰ See *Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practice Appeals Bd.*, 118 P.3d 354, 360 nn.9 & 11 (Wash. Ct. App. 2005) (declining to address whether Washington's Department of Natural Resources was required to use the Gorge Scenic Act as its decisional authority).

¹⁴¹ See Memorandum of Understanding between Oregon Dept. of Fish and Wildlife and USDA—Forest Service, Columbia River Gorge National Scenic Area and Mount Hood National Forest (April 4, 2005) (on file with author).

¹⁴² Memorandum in Support of Pl.'s Mot. Summ. J. at 6-18, *Friends of the Columbia Gorge v. Ball*, (D. Or. June 15, 2005) (No. 05-646 BR).

¹⁴³ *Id.* at 3-4.

¹⁴⁴ Letter from Daniel T. Harkendrider, Area Manager, Columbia River Gorge National Scenic Area, and Gary L. Larson, Forest Supervisor, Mount Hood National Forest to Kris

done the plan. If, in fact, the state does not withdraw the plan, the environmentalists will likely seek to have the courts settle the question of whether the state must act consistently with the Gorge Act and the management plan.¹⁴⁵

VI. THE 2004 REVISIONS TO THE MANAGEMENT PLAN

The Gorge Act requires the Commission and the Forest Service to review the management plan every ten years.¹⁴⁶ In 2004, the agencies responded to this directive by adopting revisions to the management plan which provided more specific directives for resource protection and management in the Gorge.¹⁴⁷ The process took three years, during which the Commission received over 1,600 comments on possible changes to the management plan.¹⁴⁸ The revisions produced more explicit resource protection policies, modified some land use designations, and clarified the Forest Service's role in the management plan.¹⁴⁹ The amendments authorized a number of new uses not previously permitted, including commercial events, road spoil disposal sites, and fish processing plants.¹⁵⁰ They also addressed some areas of the plan which engendered litigation or proved difficult to implement, such as Forest Service's land acquisition guidelines.¹⁵¹ For example, one of

Kautz, Deputy Director for Administration, Oregon Dept. of Fish & Wildlife (Sept. 30, 2005) (on file with author).

¹⁴⁵ Should the state proceed with the goat introduction, it would seem to be in violation of the management plan, which directs state and federal agencies to "comply with" the plan. See *supra* note 124. Which court system would decide the issue is an interesting question, since the Forest Service has rescinded the MOU, *supra* note 144 and accompanying text; the only remaining defendant is the state. Environmentalists maintain that the federal suit is still proper, since the mountain goat plan involves federal land, and the state officials could be sued in federal court for violating federal law under the doctrine established by *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (holding that the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law).

¹⁴⁶ 16 U.S.C. § 544d(g) (2000).

¹⁴⁷ 2004 MANAGEMENT PLAN, *supra* note 71.

¹⁴⁸ See Nancy Lemons, *Gorge Panel Adopts 'Triage' Strategy*, THE DALLES CHRONICLE, Mar. 31, 2003, available at http://www.citizenreviewonline.org/april_2003/gorge.htm (last visited Feb. 18, 2006).

¹⁴⁹ *Id.*

¹⁵⁰ 2004 MANAGEMENT PLAN, *supra* note 71, at II-153 to II-154 (allowing for commercial events, such as weddings, small parties, and receptions on open space or forest use lands); *id.* at II-128 to II-131 (providing procedures for the disposal of spoil material associated with an emergency response action); *id.* at II-151 to II-153 (providing guidelines for the disposal of spoil material from public road maintenance); *id.* at II-148 to II-150 (allowing small-scale fishing support and processing facilities for the purpose of supporting small family-based commercial fishing businesses).

¹⁵¹ Although the Forest Service retains ultimate authority to acquire land in the Scenic Area, the 2004 amendments to the management plan call for an acquisition philosophy based on the "willing seller, willing buyer" concept, emphasizing limited use of eminent domain powers and a policy of voluntary negotiation with landowners in SMAs. 2004 MANAGEMENT PLAN, *supra* note 71, at IV-3.

the most contentious aspects of the Act authorizes the Forest Service to purchase large tracks of land only in SMAs.¹⁵² Short of congressional action amending the Gorge Act to authorize broader purchase authority, the revised management plan points out that “[i]n addition to the Scenic Area Act, there are other land adjustment authorities applicable to the Forest Service that allow acquisition of lands and interests outside of the [SMAs].”¹⁵³

Environmentalists filed suit challenging the 2004 Management Plan, charging that the amendments weakened protection for scenic landscapes, failed to update wildlife and rare plant inventories, did not establish adequate buffer zones to protect water quality and salmon habitat from development, allowed new clear-cutting even within SMAs, and ignored requests to designate landslide and geo-hazard areas and protect them from development.¹⁵⁴ Among other things, the suit charged that the 2004 amendments failed to address the cumulative visual effects of over 600 new residences and thousands of new structures built in the Scenic Area since its designation in 1986.¹⁵⁵ The same plaintiffs have also challenged the Forest Service’s concurrence on the plan amendments in federal court.¹⁵⁶

A possible change to the Commission’s administration of the management plan could come, not from amendments to the plan, but from the Oregon legislature. In 2003, an Oregon legislative subcommittee proposed to change the way that the state implements the Scenic Area Act by creating a standing committee to

¹⁵² 16 U.S.C. § 544g (2000). The Forest Service does have authority to purchase land in the Dodson/Warrendale Special Purchase Unit of the GMA. *Id.* § 544g(a).

¹⁵³ 2004 MANAGEMENT PLAN, *supra* note 71, at IV-3. The Commission urged the Forest Service to be creative in its land acquisition program and to “identify resource opportunities and needs that are important to fulfill the purposes of the Scenic Area Act.” *Id.* Some groups are particularly concerned with extending the buyout program to non-SMA areas because the process could take land off of the property tax rolls, adversely affecting already strained county budgets. See Nancy Lemons, *Committee Eyes Gorge Commission Changes*, THE DALLES CHRONICLE, Feb. 28, 2003, available at www.citizenreviewonline.org/april_2003/gorge.htm (last visited Feb. 8, 2006).

¹⁵⁴ Press Release, Friends of the Columbia Gorge, (June 14, 2004) (on file with author) (noting that the amendments ignored the recommendations of an advisory committee of the American Society of Landscape Architects concerning scenic protection, rejected recommendations of the Washington Department of Fish and Wildlife on the size of no development buffer zones around streams, and rejected requests by Multnomah County, Oregon, to designate landslide and geohazard zones). A number of businesses have joined the Friends of the Gorge, Columbia Riverkeeper, and 1000 Friends of Oregon (a land-use watchdog group) in this lawsuit, including the Columbia Gorge Hotel and the owners of the Mt. Hood Railroad. At the time of this writing, the suit was pending before the Oregon Court of Appeals. Brief for Petitioners, *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, CA No. A125031 (Or. Ct. App. Sept. 2005).

¹⁵⁵ Press Release, *supra* note 154.

¹⁵⁶ See Brief for Friends of the Columbia Gorge, Inc., et al. v. Johanns (D. Ct. Or. June 29, 2005) (No. 04-CV-1423-MO).

oversee Commission decisions within the state. Proponents claimed such oversight would ensure consistency in the application of land development controls and might help provide needed funding for economic and recreational development in the Gorge. Others criticized the planned oversight as adding another level of bureaucratic red tape to the process of Gorge protection.¹⁵⁷ Creation of such an oversight committee was at least delayed due to the results of the 2004 election, as the Democrats regained control of the Oregon Senate, thus ensuring a divided Oregon legislature, and consequently less appetite for deregulation.

VII. CONCLUSION

Twenty years after its enactment, the Columbia Gorge National Scenic Area Act remains a singular federal experiment in land use regulation. The Act aimed to protect scenic, ecological, and cultural resources while maintaining economic growth in a bi-state region of unparalleled beauty.¹⁵⁸ Because the Gorge is predominately comprised of non-federal lands, the statute created a complex web of federalism, enlisting federal, interstate, and local entities in its implementation. Without displacing local land use regulation, the Act aimed to reform local control through the planning and implementation efforts of a unique interstate compact agency.¹⁵⁹ This effort to infuse a regional perspective to preserve resources of greater-than-local significance has not been without controversy and a considerable amount of litigation.¹⁶⁰

Regional-local tensions are not the only source of conflicts in the Gorge, however. An especially sensitive source of controversy concerns Forest Service regulation of private inholdings within SMAs. Aware of the potential problems federal regulation of private property could engender, for nearly fifteen years Congress authorized landowners to “opt-out” of the Gorge Act regulation by invoking a process leading to a federal buyout of their land or an exemption from regulation.¹⁶¹ These provisions have not been free from controversy, as evidenced by their 2000 repeal, and there is considerable litigation pending over pre-existing claims.¹⁶² There are also significant unresolved questions about the respon-

¹⁵⁷ See Lemons, *supra* note 148. The 2003 legislature did enact one bill which requires the three Oregon counties to issue land-use decisions within 150 days of receiving a completed application. OR. REV. STAT. § 198.330 (2005).

¹⁵⁸ See 16 U.S.C. § 544a.

¹⁵⁹ See *supra* notes 23, 33-36, 46-49 and accompanying text.

¹⁶⁰ See, e.g., *supra* Part V.

¹⁶¹ See *supra* notes 91-98 and accompanying text.

¹⁶² See *supra* notes 99-105 and accompanying text.

sibility of state agencies to enforce the Gorge Act and the 2004 Management Plan, which have produced court decisions in the past and will continue to produce more in the future.¹⁶³

More controversy is on the horizon concerning the pending challenges to the 2004 amendments to the management plan. Environmentalists charge that the amendments roll back scenic protections, overlook cumulative environmental effects, and fail to adequately protect water quality and wildlife habitat.¹⁶⁴ This litigation will keep the Gorge Act in the headlines, as will the question of whether implementation of the statute by the Gorge Commission and Oregon local governments is subject to Measure 37 compensation requirements.¹⁶⁵

The Gorge Act's regional, multi-jurisdictional approach to protecting an area of national significance comprised primarily of private lands is a noteworthy and perhaps the preeminent ongoing experiment in federal land use planning.¹⁶⁶ Although this unusual intergovernmental structure has engendered its share of controversies, its approach should serve as a model for protecting other

¹⁶³ See *supra* § VI.

¹⁶⁴ See *supra* notes 154-56 and accompanying text.

¹⁶⁵ See *supra* note 75 and accompanying text. The Gorge Commission bears a resemblance to the Tahoe Regional Planning Agency, another interstate compact agency, which may be its closest analogue. See Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969) (this special act of Congress is not codified in U.S.C.). For an in-depth comparison between the Lake Tahoe Bi-state Compact and a draft of Columbia River Gorge Scenic Area Act, which was similar in many respects to the Gorge Act Congress ultimately enacted, see Gary D. Meyers & Jean Meschke, *Proposed Federal Land Use Management of the Columbia River Gorge*, 15 ENVTL. L. 71, 89-92 (1984).

¹⁶⁶ Other well-known examples of federal land use controls include wetlands regulation under § 404 of the Clean Water Act, 33 U.S.C. § 1344 (2000), and the species take prohibition under § 9 of the Endangered Species Act, 16 U.S.C. § 1538 (2000). However those programs are not as institutionally complex as the Gorge Act. More similar models may be found in the California approach to implementing the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (2000), which involves a regional approach to preserving coastal resources. That approach was a state innovation; it was not a federal idea. The Hells Canyon Recreation Area, 16 U.S.C. § 460gg (2000), was also a predecessor of the Gorge Act, but that initiative relied on federal land managers to implement an area with a much larger proportion of federal lands than the Gorge. See Meyers & Meschke, *supra* note 165, at 84-92 (analyzing both the Tahoe and Hells Canyon legislation through the lens of the then-proposed Gorge Act).

Another predecessor of the Gorge Act was the 1980 Northwest Power Act, 16 U.S.C. § 839b (2000), which created an interstate compact agency that might have been the model for the Gorge Commission (authorized six years later). But that agency, the Northwest Power Planning and Conservation Council, has virtually no role beyond supplying advice in state law, and its role in influencing federal agencies is questionable. On the Council and its authority, see e.g. Roy Hemmingway, *The Northwest Power Planning Council: Its Origins and Future Role*, 13 ENVTL. L. 673, 683-87 (1983); *Symposium on Seattle Masters Builders and Creative Cooperative Federalism*, 17 ENVTL. L. no. 4 (1987); Michael C. Blumm, *The Appointments Clause, Innovative Federalism, and the Constitutionality of the Northwest Power Planning Council*, 8 J. ENERGY L. & POL'Y 1 (1987); MICHAEL C. BLUMM, *SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON* 132, 134-36 (Bookworld Publications 2002).

important transboundary natural resources in other parts of the country.