

**IN THE COURT OF APPEALS FOR THE STATE OF OREGON**

RICHARD J. MURRAY and	)	
GEORGIANA MURRAY,	)	Wasco County Circuit Court
	)	No. 9700012CC
Plaintiffs-Respondents,	)	
	)	CA A117707
v.	)	
	)	
STATE OF OREGON,	)	
	)	
Defendant-Appellant	)	
	)	
and	)	
	)	
COLUMBIA RIVER GORGE	)	
COMMISSION, and FRIENDS OF	)	
THE COLUMBIA GORGE,	)	
	)	
Intervenors-Appellants.	)	
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**INTERVENOR-APPELLANT COLUMBIA RIVER GORGE COMMISSION'S  
BRIEF**

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Appeal from the judgment of the Circuit Court for Wasco County  
Honorable Donald L. Kalberer, Senior Judge

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*Continued...*

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## STATEMENT OF THE CASE

### Nature of the Action and Relief Sought

This action was a civil claim alleging *inter alia* that an injunction issued in an earlier matter (upon application by the Columbia River Gorge Commission)<sup>1</sup> constituted inverse condemnation of the plaintiff's land. The trial judge in the instant case found in the plaintiff's favor and awarded \$222,000 plus interest.

Prior to trial in the instant case, the Court concluded for itself that the Gorge Commission is a state agency. Tr. 46. The Court reaffirmed its conclusion after trial orally, Tr. 401, and in its judgment. ER-78.<sup>2</sup> This legal determination is an error of law. The importance of this conclusion is unclear because the Court's reasoning in determining that action by the State of Oregon resulted in inverse condemnation is unclear. The State argued in its brief that the Court's basis was either because the Gorge Commission is a state agency or because the 1994 judgment in and of itself was the taking. State of Oregon Br. 31, 41. The Court's conclusion that the Gorge Commission is a state agency is relevant and important if that conclusion formed the basis of the Court's decision. Hence, the Gorge Commission appeals this conclusion specifically.

The Gorge Commission supports the assignments of error and arguments of the State of Oregon and urges this Court to decide all of the assignments of error stated in the State of Oregon's brief. Should the Court decide only the

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<sup>1</sup> *Columbia River Gorge Commission v. Murray*, Wasco County Circuit Court No. CC93-35 (October 24, 1994).

<sup>2</sup> The Gorge Commission cites to the State of Oregon's Excerpt of Record, rather than duplicate the excerpt herein.

issue of whether the State of Oregon was the proper defendant, the plaintiffs may attempt to seek compensation from the Gorge Commission based on the trial court's conclusion that the injunction effected inverse condemnation.<sup>3</sup>

### **Nature of the Judgment Sought to be Reviewed**

The judgment sought to be reviewed is a decision following a bench trial. The Gorge Commission accepts the State of Oregon's statement of the Nature of the Judgment Sought to be Reviewed. State of Oregon Br. 3.

### **Statutory Basis for Appellate Jurisdiction**

This Court has jurisdiction pursuant to ORS 19.205. The Columbia River Gorge Commission may appeal from the judgment pursuant to ORS 19.245(1).

### **Dates of Entry of Judgment and Notice of Appeal**

The Judgment was entered on March 4, 2002. The Columbia River Gorge Commission filed its Notice of Appeal on March 28, 2002. Less than 30 days elapsed between entry of the judgment and the Notice of Appeal.

### **Question Presented on Appeal**

Is the State of Oregon liable for inverse condemnation when a circuit court judge issues an injunction requested by the Columbia River Gorge Commission, an interstate compact agency?

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<sup>3</sup> The Gorge Commission believes such a claim would be barred, but does not wish further litigation to decide it. Litigation over this set of facts has been going on for nearly 10 years. The Gorge Commission believed it was over when the plaintiffs dismissed their appeal to this Court challenging the issuance of the injunction. *Columbia River Gorge Commission v. Murray*, CA A84424 (January 11, 1995) (Order of Dismissal and Appellate Judgment).

## Summary of Arguments

The Columbia River Gorge Commission is not an Oregon state agency, nor a Washington state agency. It is an interstate compact agency created by the Columbia River Gorge Compact, to which Oregon and Washington are signatories.

The State of Oregon cannot be held liable for inverse condemnation following the issuance of an injunction requested by the Columbia River Gorge Commission for the following reasons:

1. The Columbia River Gorge National Scenic Area Act and Columbia River Gorge Compact indicate that the Gorge Commission is not an Oregon state agency because: (a) the Scenic Area is a single region for which both states have an equal interest; (b) the Gorge Commission is authorized to issue permits in Washington, monitor Washington actions, and take enforcement actions in Washington, which a typical Oregon state agency could not do; (c) both states created the Gorge Commission to replace prior individual state gorge commissions; (d) the Gorge Commission must adopt uniform rules, not just Oregon's administrative agency rules; and (e) the power to sue the Gorge Commission does not come from state law waivers of sovereign immunity.
2. Courts from around the country carefully avoid describing interstate compact agencies as state agencies.
3. The State of Oregon cannot be independently and solely liable for the actions of the Gorge Commission under the terms of the Columbia River Gorge Compact because: (a) the State did not waive its sovereign immunity to be

sued independently and solely for the actions of the Gorge Commission; (b) Oregon and Washington agreed to fund the Commission in equal amounts; and (c) a court cannot order relief inconsistent with the terms of the Columbia River Gorge Compact.

4. Washington has already addressed this question and rejected independent liability by the State of Washington for inverse condemnation claims resulting from application of the Scenic Area land use standards. Oregon should not interpret and apply the Columbia River Gorge Compact differently than its partner state.

The Commission has attempted not to reargue any points presented by the State, but in a couple of cases expanded on the State's arguments. The Commission points out in this brief where the State made a similar argument.

### **Summary of Facts**

The Gorge Commission adopts the State of Oregon's statement of facts.

### **ASSIGNMENT OF ERROR**

The trial court erred in concluding that the Columbia River Gorge Commission, which Oregon and Washington created by interstate compact, is an Oregon state agency and thus concluding the State of Oregon was solely and independently liable for an inverse condemnation claim resulting from the Gorge Commission applying its regional land use standards.

### **Preservation of Error**

The Gorge Commission preserved this point prior to trial. The Gorge Commission argued in favor of the State of Oregon's motion for summary

judgment. It engaged in an extended colloquy with the Court about whether the Gorge Commission is a state agency. The Court stated:

I just have the feeling – I was gonna use the phrase “inescapable”, but I don’t know if that’s an appropriate terminology or not. But that the Gorge Commission is a state agency. Even though I know that’s hotly disputed.

(1/23/01) Tr. 46.

The Gorge Commission responded:

I’m not quite sure where to go with all of this. But let me just start with Your Honor’s concern that the Gorge Commission is a state agency. And that’s incorrect, Your Honor. The Gorge Commission was created by an interstate compact between Oregon and Washington. \* \* \*

(1/23/01) Tr. 63. The colloquy continued from pages 63–69.

Following trial, the Gorge Commission moved for judgment of dismissal pursuant to ORCP 54B(2) and filed a memorandum in support of its motion, which argued that the Gorge Commission was not an Oregon state agency. Tr. 398–99. The Court denied the Commission’s motion. Tr. 401; Tr. 426.<sup>4</sup>

The Gorge Commission also adopts the State of Oregon’s Preservation of Error statement. State of Oregon Br. 33–34.

### **Standard of Review**

This case involves a legal determination by the trial court that the Gorge Commission is a state agency and thus the State of Oregon is liable for inverse condemnation resulting from the Gorge Commission applying its regional land

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<sup>4</sup> Although the Court never stated that the motion was “denied.” The Court effectively denied the motion when he stated, “Fair market value of the taking, \$222,000.” Tr. 426

use standards. This Court reviews legal determinations for errors of law.

*Trabosh v. Washington County*, 140 Or App 159, 163, n 6, 915 P2d 1011, 1014 (1996).

## Argument

“[T]he states of Oregon and Washington establish, by way of this interstate agreement a *regional* agency known as the Columbia River Gorge Commission.”

Columbia River Gorge Compact, Art. I.a (codified at ORS 196.150; and RCW 43.97.015) (emphasis supplied).

### **A. The Columbia River Gorge National Scenic Area Act and Columbia River Gorge Compact, which created the Gorge Commission, both indicate that the Gorge Commission is not an Oregon state agency.**

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544 et seq., was the culmination of some fifty years of discussing and attempting management of both sides of the Columbia River Gorge as a single region. Perhaps the earliest dialogue about regional management occurred within the Columbia Gorge Committee of the Pacific Northwest Regional Planning Commission in the early 1930s. In 1935, that Committee issued a report that studied the Columbia River Gorge as a possible “interstate park along both sides of the river.” *Land Program Recreational Project Columbia Gorge Washington-Oregon* 1 (June 1935),<sup>5</sup>

The next several decades saw various attempts at regional management. In the 1950s, Oregon and Washington created separate but parallel advisory

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<sup>5</sup> The original of this report is on file with the Oregon Historical Society. A copy of the report is on file with the Columbia River Gorge Commission.

gorge commissions. The effectiveness of these advisory commissions was “hampered by their advisory authority, meager funding, and by hostility from certain counties in the Gorge \* \* \*.” Bowen Blair Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 *Env’tl L.* 863, 879 (1987). In 1979, the National Park Service studied four alternatives for regional management of the Gorge, which included establishment of a multi-governmental commission. United States Department of Interior, National Park Service, *Study of Alternatives* 9 (April 1980).<sup>6</sup>

Congress recognized that because the two states had conflicting approaches to land use, it was essential to adopt standards that transcended prior state law. Robert Packwood, *The Columbia River Gorge Needs Federal Protection*, 15 *Env’tl. L.* 67 (1988); 132 *Cong. Rec.* 29,498 (1986) (statement of Sen. Packwood); *Id.* (statement of Sen. Evans).

In the early 1980s, several Congressional bills were introduced, but failed. In August 1985, Governors Vic Atiyeh and Booth Gardiner sponsored a two-day meeting to discuss regional management of the Columbia River Gorge. The participants in that meeting included staff from the Governors’ offices and the offices of the four Northwest Senators (Senators Hatfield, Packwood, Evans and Gorton). The participants agreed to a two-tier management structure, including a single federal agency and a “regional commission.” Bowen Blair Jr., 17 *Env’tl. L.* at 897–98. The following year, in 1986, Congress adopted and President

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<sup>6</sup> A copy of this report is on file with the Columbia River Gorge Commission.

Reagan signed the Columbia River Gorge National Scenic Area Act. The Scenic Area Act is remarkably similar to the August 1985 agreement. *Id.*

The purposes of the Act are regional in nature, not specific to Oregon:

(1) to establish a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with [the first purpose].

16 U.S.C. § 544a. The Scenic Area Act has three important components, each of which indicate that the Gorge Commission is not a state agency.<sup>7</sup>

The first important component of the Scenic Area Act is that it established the Columbia River Gorge National Scenic Area (Scenic Area), 16 U.S.C. § 544b. The Scenic Area is an area of approximately 292,000 acres and is comprised of portions of six counties, Multnomah, Hood River, and Wasco counties in Oregon, and Clark, Skamania, and Klickitat counties in Washington. *Id.* There are 13 urban areas that are not subject to the land use regulations, 16 U.S.C. § 544b(e), but which enjoy the benefits of the National Scenic Area, including \$20 million in economic and recreation development funds, 16 U.S.C. § 544n. The regulated portion of the Scenic Area is nearly evenly divided between Oregon and Washington, which helps ensure equal interest by the states.<sup>8</sup>

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<sup>7</sup> The State's brief at pages 37-39 addresses the Scenic Area Act; the Gorge Commission concurs with and supplements the State's analysis.

<sup>8</sup> The area that is subject to the regulations of the Scenic Area is approximately 130,000 acres in Oregon and 134,000 acres in Washington.

The second important component of the Scenic Area Act is that it contained the pre-consent of Congress to an interstate compact to create the “regional commission” (the Columbia River Gorge Commission), 16 U.S.C. § 544c(a). In 1987, Oregon and Washington drafted and adopted the Columbia River Gorge Compact (Compact) and thus created the Gorge Commission. ORS 196.150; RCW 43.97.015. The make-up of the Gorge Commission is structured to address the varied interests of the National Scenic Area, not solely that of the State of Oregon. The State argued that this structure precludes it from controlling the Gorge Commission. State Br. at 37-38. The State is correct; the Gorge Commission must be concerned with the regional interests and needs of two states, six counties, thirteen urban areas, the federal government, and the four Native American tribes that have treaty rights within the National Scenic Area. To accomplish this, the Commission is made up of 13 members. Oregon’s Governor appoints only three members. Washington’s Governor also appoints three members, each county appoints one member, and the Secretary of Agriculture appoints one ex officio member to represent the Secretary.<sup>9</sup> 16 U.S.C. § 544c(a)(C). Because no single entity (not Oregon, not Washington, not any county, and not the federal government) appoints a majority of the membership of the Commission, none of the directly affected entities unilaterally controls the actions of the Gorge Commission. *Compare Marine Forests Society v. California Coastal Commission*, 128 Cal Rptr 2d 869, \_\_\_ P.3d \_\_\_ (Cal. App.

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<sup>9</sup> Although the Compact does not provide for the tribes to appoint representatives to the Commission, the Governor of Oregon has named a tribal representative as one of his appointments to the Commission for the past 12 years.

3 Dist. 2002) (California Legislature controls Coastal Commission because it appoints a majority of the members Commission, and the members serve at the will of the Legislature).

Also, the current interstate Columbia River Gorge Commission replaced the prior independent Oregon and Washington state gorge commissions created in the 1950s. Oregon and Washington clearly indicated their intention to abandon their separate state gorge commissions with the creation of the current interstate Columbia River Gorge Commission. The result is that the current interstate compact Columbia River Gorge Commission is an entity that cannot be thought of as a typical state agency. See *Yancoskie v. Delaware River Port Authority*, 478 Pa 396, 404, 387 A2d 41, 45 (1978) (citing *Souder v. Philadelphia Police Pension Fund*, 344 Pa 286, 25 A2d 191 (1942)).

[Pennsylvania] clearly indicated its intention to abandon a previous dependent administrative agency known as the 'Pennsylvania commission', and to establish in its stead the 'Delaware River Joint Commission' [i.e., the Authority] as a special public corporation. Upon the execution of the agreement on July 1, 1931, the Commission became a distinct entity, separate and apart from either State.

The third important component of the Scenic Area Act is that it provided a management program for the Scenic Area. The management program assigns many tasks to the Gorge Commission, each of which indicates that the Gorge Commission is no mere<sup>10</sup> state agency:

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<sup>10</sup> The term “mere” is not intended to denigrate state agencies, but rather to emphasize the Gorge Commission’s responsibilities, which necessarily cross state lines.

First, the Scenic Area Act required the Gorge Commission and U.S. Forest Service to develop a regional land use management plan for the entirety of the Scenic Area. 16 U.S.C. § 544d. The Gorge Commission and Forest Service completed the Management Plan in 1991. Following completion of the Management Plan, each county was required to adopt a land use ordinance consistent with the Management Plan, to implement the Management Plan. 16 U.S.C. §§ 544e(b) and 544f(h). In the event that a county failed to do so, the Gorge Commission was required to adopt and implement a land use ordinance. 16 U.S.C. §§ 544e(c) and 544f(i). Klickitat County in Washington did not adopt a land use ordinance, thus the Gorge Commission adopted and currently implements that ordinance. See Commission Rule 350-80.<sup>11</sup> Unlike typical state agencies, the Gorge Commission is authorized to develop and implement land use regulations that cross state boundaries, and unlike a typical Oregon agency, the Gorge Commission directly adopts and administers regulations in Washington.

Second, the Act gives the Gorge Commission several enforcement responsibilities. The Gorge Commission must monitor and correct county actions to ensure consistency with the Scenic Area Act. 16 U.S.C. § 544m(a)(1). No Oregon state agency has such monitoring and enforcement authority for the actions of Washington counties. Additionally, the Gorge Commission is required

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<sup>11</sup> The Gorge Commission chose to adopt rule numbers in the same format as the states (agency number (350), division number, and specific provision). The Oregon Secretary of State generously publishes the Commission's rules on its website with Oregon's administrative rules. Washington does not.

to hear appeals of any final action relating to the implementation of the Scenic Area Act. 16 U.S.C. § 544m(a)(2). Thus the Gorge Commission hears appeals of land use decisions from Oregon and Washington counties. To implement this appeal requirement, the State of Oregon specifically provided that appeals to the Gorge Commission supplant the typical land use appeal to LUBA. ORS 196.115(2)(d), (e); ORS 197.825(2)(f); *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580, 584–85 (2000). Again, no Oregon state agency has such appellate jurisdictional authority for actions arising in Washington. Further, the Gorge Commission may also seek injunctive relief and other appropriate remedies independent of the states' authorities to do so. 16 U.S.C. § 544m(b)(1)(B) ("The Commission, or at the request of the Commission, the attorney general of Oregon or Washington may institute a civil action \* \* \*"). This specific grant of authority would be unnecessary if the Gorge Commission were a state agency, because it would need to rely on the attorneys general to handle its civil litigation. See ORS 180.060; RCW 43.10.030.

Third, as the State points out in its brief at page 38, the Gorge Commission does not directly apply Oregon law that is typically applicable to state agencies. The Scenic Area Act requires that the Gorge Commission adopt rules relating to open meetings, public records disclosure, financial disclosure, conflicts of interest, making of contracts, and administrative procedure consistent with the more restrictive of the two states' statutes. 16 U.S.C. § 544c(b). This requirement is, "For the purpose of providing a uniform system of laws which, in addition to [the Scenic Area Act], are applicable to the Commission." *Id.* Were

the Gorge Commission an Oregon state agency, it would need to comply with Oregon's laws regarding these subjects, and not be concerned with Washington's laws too.

The Columbia River Gorge Compact also indicates that the Gorge Commission is not a state agency. The very first power assigned to the Gorge Commission is the power to sue and be sued. ORS 196.150, RCW 43.97.015 (Art. I.a.1). Lawsuits concerning actions by the Gorge Commission are maintained under this authority. That the states needed to specifically authorize the Gorge Commission to sue and be sued is a strong indicator that the Gorge Commission is not a state agency for which Oregon is independently and solely liable. Were the Gorge Commission a state agency, its authority to sue and be sued would come from Oregon's various waivers of sovereign immunity, such as the Administrative Procedures Act, ORS 183.025 et seq., and the Tort Claims Act, ORS 30.260 et seq. If this were the case, the Compact's assignment of the power to sue and be sued would be surplusage.

**B. Other Courts do not describe interstate compact agencies as state agencies.**

A review of how other courts describe interstate compact agencies might also be helpful to the Court. Where courts attempt to describe just what is an interstate compact agency, they stop short of stating that such agencies are state agencies.

First, the Supreme Court does not consider interstate compact agencies to be state agencies. "The inherent nature of interstate compact agencies precludes their being found so intricately intertwined with the state as to

constitute an ‘arm of the State.’” *Port Authority Trans-Hudson Corp. v. Feeney*, 495 US 299, 312, 110 S Ct 1868, 1876, 109 L Ed 2d 264, 277 (1990) (Brennan, concurring). See also *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 US 391, 402, 99 S Ct 1171, 1177–78, 59 L Ed 2d 401, 411 (1979) (“Indeed that TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA.”).

In *Yancoskie*, 387 A2d at 42, the Pennsylvania Supreme Court stated that the Delaware River Port Authority is not “an integral part of the Commonwealth,” and is therefore subject to suit, as are “political subdivisions or governmental entities *other than the Commonwealth itself*.” (emphasis supplied, citations omitted)). The Court also specified that the Authority is a “distinct entity, separate and apart from either State.” *Id.* at 404 (full quote above at page 10 of this brief).

In holding that Port Authority, the largest and perhaps most well-known of all interstate compact agencies, is not a federal agency, the Federal District Court for the Eastern District of New York noted:

Compact Clause entities are hybrids occupying a special position in the federal system. As the Supreme Court has recognized, a Compact Clause entity is really the creation of multiple sovereigns: the compacting states whose actions are its genesis, and the federal government whose approval is constitutionally required when the agency will operate in an area affecting the national interest.”

*Brooklyn Bridge Park Coalition v. Port Authority of New York and New Jersey*, 951 F Supp 383, 393 (ED NY 1997) (citations omitted).

The State also cited to several decisions involving the Tahoe Regional Planning Agency in its brief at pages 35-37. These decisions consistently hold that the interstate Tahoe Regional Planning Agency is not a state agency.

**C. The State of Oregon is not independently and solely liable for actions of the Gorge Commission under the terms of the Columbia River Gorge Compact.**

The Columbia River Gorge Compact, which created the Gorge Commission, assigned the limited powers of the Gorge Commission. ORS 196.150; RCW 43.97.015 (Art.1.a). The states also enacted statutes to address implementation issues not part of the compact. See ORS 196.105–125 and ORS 196.155–165. Two provisions of the Compact strongly indicate that the State of Oregon cannot be held independently and solely liable for the acts of the Gorge Commission.

First, as noted above, the Compact authorizes the Gorge Commission to sue and be sued. ORS 196.150, RCW 43.97.015 (Art. I.a.1). Lawsuits concerning actions by the Gorge Commission are maintained under this authority. Nowhere in the Oregon statutes or Columbia River Gorge Compact is a waiver of sovereign immunity for Oregon to be sued independently and solely for an action of the Gorge Commission.

Second, the Columbia River Gorge Compact requires that Oregon and Washington fund the Gorge Commission in equal amounts. ORS 196.150, RCW 43.97.015 (Art. IV.d). As such, holding Oregon solely liable for an act of the Gorge Commission would be hostile to the compact. If an action of the Gorge

Commission did result in liability, then that would be a debt of the Gorge Commission, not solely the State of Oregon.

Consider, in comparison, Oregon's statutes enabling local governments to create intergovernmental entities. The statutes specifically provide, "The debts, liabilities and obligations of an intergovernmental entity shall be, jointly and severally, the debts, liabilities and obligations of the parties to the intergovernmental agreement that created the entity, unless the agreement specifically provides otherwise." ORS 190.080(3). The Oregon Legislature is thus aware of the problem of whether the creators of an intergovernmental agency might be independently liable for the actions of the agency. Oregon has not specifically negotiated with Washington to provide several liability for itself and Washington, much as it provided for Oregon local governments to have several liability for their intergovernmental agencies. Hence, in this absence of any express or even implied waiver of sovereign immunity for several liability, the State of Oregon cannot be held solely liable for an act of the Gorge Commission. Rather the Gorge Commission is liable for its own acts.

Holding the State of Oregon solely liable for an act of the Gorge Commission is simply contrary to the states' agreed funding mechanism. The U.S. Supreme Court has long held, expressly, that a court cannot order relief inconsistent with the Columbia River Gorge Compact. *Green v. Biddle*, 8 Wheat (21 US) 1, 92, 5 L Ed 547, 579 (1823) ("In fact, the terms 'contract' and 'compact' are synonymous"); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 US 275,

285, 79 S Ct 785, 792, 3 L Ed 2d 804, 812 (1959) (Frankfurter dissenting<sup>12</sup>) (“[an interstate] compact is, after all, a contract.”). As such, a court cannot order relief inconsistent with the express terms of a compact. *Texas v. New Mexico*, 462 US 554, 564, 103 S Ct 2558, 2565, 77 L Ed 2d 1, 12 (1983).

**D. The Washington Court of Appeals refused to hold the State of Washington liable for inverse condemnation claims resulting from application of the Scenic Area land use standards.**

Given all of this background, in a 1993 declaratory judgment action, the Washington Court of Appeals declared that the State of Washington would not be liable for inverse condemnation claims resulting from the Scenic Area land use standards. *Klickitat County v. State*, 71 Wash App 760, 768, 862 P2d 629, 634 (Wash. App. Div. 3 1993). The Court’s reasoning was quite simple. It first recognized that the Commission is a creature of federal law under *Cuyler v. Adams*, 449 US 433, 440, 101 S Ct 703, 708, 66 L Ed 2d 641, 649 (1981) (“Where Congress has authorized 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”). It then noted that the Gorge Commission has the authority to approve and disapprove county regulations, which must be patterned after the Gorge Commission’s Management Plan. Based on this, the Washington Court of Appeals concluded that the county

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<sup>12</sup> Justice Frankfurter was a recognized expert in interstate compact law. He co-authored the seminal article, Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1925), which still forms the cornerstone of much of the current interstate compacts jurisprudence.

would not be acting as an agent of the state, and consequently there would be no state liability. *Klickitat County*, 862 P2d at 634.

The instant case virtually identically involves a situation in which a landowner is seeking to hold the one of the compacting states liable in inverse condemnation, the same theory as in the *Klickitat County* case. The only difference is that the instant case did not involve a county applying the Gorge Commission's standards, but rather the Gorge Commission directly applying the standards itself. If the county was not acting as an agent of the state because the Compact is federal law, then certainly the Gorge Commission is not acting as an agent of the state either. This Court should give substantive precedence value to Washington's previous interpretation of the Columbia River Gorge Compact that Washington is not severally liable for inverse condemnation claims. To hold the State of Oregon independently and solely liable in the instant case would be to impose inconsistent obligations on Oregon and Washington under the same compact.

### **CONCLUSION**

The Scenic Area Act, Columbia River Gorge Compact, Washington's prior interpretation of the Compact, and other courts expressly and impliedly provide that Oregon and Washington are not independently and solely liable for the actions of the Gorge Commission. Washington State does not hold itself liable for inverse condemnation claims resulting from application of the Scenic Area standards, and neither should Oregon. For these reasons, the Gorge Commission supports the brief of the State of Oregon and urges this Court to

reverse the judgment of the trial court and order that judgment be entered in favor of the State of Oregon.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of April 2003.

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## NOTICE OF FILING AND CERTIFICATE OF SERVICE

I certify that on the \_\_\_\_\_ day of April 2003, I filed the original and 20 copies of this INTERVENOR-APPELLANT COLUMBIA RIVER GORGE COMMISSION'S BRIEF by United States Postal Service, ordinary first class mail, with the State Court Administrator, Records Section at 1163 State Street, Salem, Oregon 97301-2563

I further certify that on the \_\_\_\_\_ day of April 2003, I served two true copies of this INTERVENOR-APPELLANT COLUMBIA RIVER GORGE COMMISSION'S BRIEF by United States Postal Service, ordinary first class mail, on the attorneys listed below.

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