AN INTRODUCTION TO THE LAW AND PRACTICE OF THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA
(May 2006)

by:

Jeffrey B. Litwak, Counsel
Columbia River Gorge Commission
#1 Town & Country Square
P.O. Box 730
White Salmon, WA 98672
(509) 493-3323
www.gorgecommission.org
litwak@gorgecommission.org
# Table of Contents

## I. Scenic Area Laws and Standards .......................... 1
   A. Columbia River Gorge National Scenic Area Act,
      16 U.S.C. § 544 et seq. .................................. 1
   B. Columbia River Gorge Compact, RCW 43.97.015,
      ORS 196.150 ............................................. 1
   C. Wash. Rev Code 43.97.025, 35.63.150, 36.32.550,
      36.70.980, 90.58.600 .................................. 1
   E. Columbia River Gorge Commission Rules, Ch. 350........ 2
   F. Columbia River Gorge National Scenic Area
      Management Plan ......................................... 3
   G. Land Use Ordinances .................................... 3
   H. Decisions of the Columbia River Gorge Commission ........ 3

## II. Primer on Interstate Compact Law .......................... 4
   A. Congressional Consent Required ......................... 4
   B. The Compact is a Contract ................................ 5
   C. Application of State Law .................................. 5
      1. Pre-Compact State Law ................................ 5
      2. Post-Compact State Law ............................... 6
      3. Preservation of State Law in the Columbia River Gorge
         Compact .............................................. 6
   D. A Compact Agency is a Separate Legal Entity ............. 7

## III. Significant Litigation Involving the Scenic Area ........... 8
   A. Constitutionality of the Act ............................. 8
   B. Application of State Law .................................. 8
      1. *Seattle Master Builders* Standard Applied
         in the Scenic Area ..................................... 9
      2. Courts Look to State Law for Guidance ................. 10
      3. Gorge Commission Interpretation of its Standards .... 10
   C. Takings Claims ............................................. 11
      1. Takings Claims Against the Gorge Commission ......... 11
      2. “Special Review” Rule ................................ 12
      3. Inverse Condemnation ................................. 13
      4. Takings Claims Against the Forest Service ............ 13
   D. Enforcement of the Scenic Area Act and Land Use
      Ordinances ............................................... 14
      1. Commission Enforcement ............................. 14
      2. County Enforcement .................................. 16
   E. Interesting Pending Litigation ............................ 17
AN INTRODUCTION TO THE LAW AND PRACTICE OF THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA

I. SCENIC AREA LAWS AND STANDARDS

This summary of the applicable laws and legal standards within the Scenic Area gives an overview of the legal framework of the Scenic Area.


The Act created the Scenic Area, authorized the states to enter into a compact creating the Gorge Commission, required the Gorge Commission and Forest Service to adopt a regional management plan, and required counties to adopt land use ordinances consistent with the management plan.

B. Columbia River Gorge Compact, RCW 43.97.015, ORS 196.150

The Compact is the agreement between Oregon and Washington establishing the Gorge Commission. It is codified in both states’ statutes. The Gorge Commission’s authority is derived from the Compact. The Compact incorporates the Act by reference, so references to the Commission’s authority sometimes cite the Act.

C. Wash. Rev. Code 43.97.025, 35.63.150, 36.32.550, 36.70.980, 90.58.600

In addition to the Compact, Washington statutes grant authority and direct the state to carry out its respective functions under the Act. Washington has also specifically provided that County Commissioners and Planning Commissioners must act in conformance with the Scenic Area Act and Management Plan, and that planning under...
the Planning Enabling Act and the Shoreline Management Act must be in conformance with the Scenic Area Act and Management Plan. Washington does not specify procedures and standards for judicial review.


Oregon statutes also grant authority and direct the state to carry out its respective functions under the Act; they also specify procedures and standards for judicial review. Additionally, the Oregon legislature specifically found that the Management Plan achieves, on balance, the purposes of the statewide planning goals. The Oregon counties thus do not plan for Scenic Area land under the Oregon land use planning program.

**E. Columbia River Gorge Commission Rules, Ch. 350**

The Gorge Commission has adopted administrative rules, including rules for open meetings, disclosure of public records, financial disclosure, conflicts of interest, public contracts, and administrative procedures. These Commission rules must be consistent with the more restrictive of the two states’ statutes on these subjects. 16 U.S.C. § 544c(b). The Commission reviews its rules after each legislative session to ensure the rules continue to comply with this requirement. Additionally, the Commission maintains specific rules for appeals, enforcement and other actions it handles on a regular basis.

The Commission files its rules with the Oregon Secretary of State and Washington Code Reviser, but the rules are not technically part of the Oregon Administrative Rules or the Washington Administrative Code. The Commission’s rules are retained in Chapter 350 in both states. The rules are available on the Commission’s website (www.gorgecommission.org).
F. Management Plan for the Columbia River Gorge National Scenic Area

The Management Plan contains the land use and resource protection standards, non-regulatory programs and projects for protecting and enhancing Gorge resources, and a description of roles and relationships of governments and agencies responsible for implementation of the Act. The Management Plan is effective both independently (See e.g., 16 U.S.C. § 544m and the ORS and RCW statutes listed above) and through land use ordinances. The Management Plan is required to be revised every 10 years. The Commission and Forest Service adopted the Management Plan in 1991. In 2004, the agencies completed the first revision. The Management Plan and the revisions are available on the Commission’s website.

G. Land Use Ordinances

The Act requires each of the six Gorge counties to adopt land use ordinances that are consistent with the Management Plan. In the event a county fails to do so, the Gorge Commission is required to adopt and administer a land use ordinance for Scenic Area lands in that county. Five of the counties have adopted Scenic Area land use ordinances: Clark County Code ch. 18.334A; Skamania County Code title 22; Multnomah County Code ch. 38; Hood River County Code, art. 75; and, Wasco County National Scenic Area Ordinance. The Gorge Commission administers a land use ordinance for Klickitat County, CRGC Rule 350-81.

H. Decisions of the Columbia River Gorge Commission

The Gorge Commission hears on-the-record appeals of land use decisions made by the counties (CRGC Rule 350-60) and de novo appeals of decisions by Commission staff for land use applications in Klickitat County (CRGC Rule 350-70). The Gorge
Commission prepares written decisions for each case it decides, and gives the decisions precedential effect. The Gorge Commission’s decisions are available on the Commission’s website.

Appeals of Gorge Commission decisions for land in Washington go to the Washington Superior Court. Appeals of Gorge Commission decisions for land in Oregon are filed directly in the Oregon Court of Appeals. ORS 196.115(2)(a).

II. PRIMER ON INTERSTATE COMPACT LAW

Because the Columbia River Gorge Commission is an interstate compact agency, and the Management Plan is the regional (interstate) land use plan, general principles of interstate compact law are an important aspect of Scenic Area law. Interstate compacts are expressly authorized by the U.S. Constitution.

No state shall, without the consent of Congress . . . enter into agreement or compact with another state . . .

U.S. Const. art. 1, § 10, cl. 3.

A. Congressional Consent Required

From the text of the Constitution, the first principle, thus, is that Congress must give its consent to an interstate compact. However, not every compact requires consent; only compacts that enhance state power to the detriment of federal supremacy require consent. United States Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452 (1978). A corollary to the requirement for consent is that if the states wish to amend a compact, they must either do so in a way that is not inconsistent with the terms of Congress’ consent, or seek consent to the amendment. The form of consent is not important. Congress may grant consent in advance or by giving express or implied approval to a compact. Cuyler v. Adams, 449 U.S. 433 (1981). If a compact concerns a subject that is
appropriate for federal legislation, and Congress gives its consent to the compact, then the compact becomes federal law. *Id.* at 438.

The Columbia River Gorge National Scenic Area Act contains Congress’ pre-authorization for Oregon and Washington to enter into the Columbia River Gorge Compact. 16 U.S.C. § 544c(a); *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992) (discussed below). Congress has amended the Act (i.e., the terms of its consent) several times; however, no person has raised the question of whether the states must readopt the compact to recognize the amendments. This question of law is untested.

**B. The Compact is a Contract**


**C. Application of State Law**

1. **Pre-Compact State Law**

The Ninth Circuit and Washington courts have determined that in order for a state to impose its pre-compact laws on a compact agency, the compact itself must specifically reserve the law it wishes to impose. *Seattle Master Builders v. Pacific NW Elec. Power and Cons. Planning Council*, 786 F.2d 1359 (9th Cir.), *cert. denied*, 479 U.S. 1059 (1987); *Salmon For All v. Dep’t of Fisheries*, 118 Wash.2d 270 (1992); *Klickitat County*
v. Columbia River Gorge Comm'n, 770 F. Supp. 1419 (E.D. Wash. 1991). The Hood River County Circuit Court in Oregon recently held that a ballot measure adopted in Oregon was not effective in the Scenic Area because the Scenic Area regulations are required to comply with federal law, and because it would have unilaterally impaired the relationship between the states. Columbia River Gorge Comm'n v. Hood River County, et al., No. 050051 CC (Hood River County Cir. Ct. Aug. 3, 2005), appeal filed, No. A129652 (Or. App. Aug. 24, 2005). This case is discussed below as pending litigation.

2. Post-Compact State Law

Similarly, states are restricted from imposing post-compact laws on a compact agency. See e.g., C.T. Hellmuth & Assoc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408 (D. Md. 1976). However, states may impose new law on a compact entity if the compact expressly allows this. For example, the New York-New Jersey Port Authority Compact allows amendment of the compact through legislation by one state that is “concurred in” by the state. The Courts differ what constitutes “concurred in,” but the majority of the courts require an express statement that they intend to modify the compact. See e.g., Int'l Union of Operating Eng'rs, Local 542 v. Delaware River Joint Toll Bridge Comm'n, 311 F.3d 273 (2002).

3. Preservation of State Law in the Columbia River Gorge Compact

The Scenic Area Act requires the Gorge Commission to adopt the more restrictive of the two states’ “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). Additionally, the Act contains
savings provisions that require the Scenic Area land use regulations not affect forest
practices regulation in the General Management Area, state hunting and fishing
These are the specific reservations in the Act. The Compact does not reserve the states’
substantive land use laws for the Scenic Area.

An example of a post-compact state law that Oregon intends to apply to the Gorge
Compact is ORS 196.110. In 2003, the Oregon Legislature amended ORS 196.110 to
require land use decisions in the Scenic Area be issued in accordance with the Oregon
state land use decision time requirements. This statute has not been challenged.

D. A Compact Agency is a Separate Legal Entity

Fourth, an interstate compact agency is neither a state nor a federal agency.
Courts throughout the country have recognized the independent nature of interstate
compact agencies. Several courts have described the Gorge Commission as a separate
tentity in their various decisions. The Washington Court of Appeals has stated that the
Commission is “a bi-state agency acting under the authority of both federal and state
law.” *Tucker v. Columbia River Gorge *Comm’n, 73 Wash. App. 74, 77–78, 867 P.2d
686, 688 (1994). It also indicated by analogy, that the Commission is a “political
subdivision independent of the states that conceived it.” *Tucker v. Columbia River Gorge
Comm’n*, 73 Wash. App. at 80 (1994). The U.S. District Court for the Eastern District of
Washington stated that the Gorge Commission is “a bi-state compact between Oregon
(E.D. Wash. 1991). The Hood River County Circuit Court stated that the Commission is
neither a federal agency nor an Oregon state agency, but is a “bi-state commission.”

LAW AND PRACTICE OF THE
COLUMBIA RIVER GORGE
NATIONAL SCENIC AREA (May 2006) 7


III. SIGNIFICANT LITIGATION INVOLVING THE SCENIC AREA

The Columbia River Gorge National Scenic Area has been the subject of several legal challenges. Both the Forest Service and the Gorge Commission have been involved in defensive and affirmative litigation. A common theme throughout the litigation involving the Scenic Area Act is its interstate nature. An early lawsuit challenged the constitutionality of the Act. Several lawsuits have involved the application of state law in the Scenic Area; and some lawsuits have involved takings claims.

A. Constitutionality of the Act

The most significant case upholding the constitutionality of the Act is Columbia River Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992). In this case, the Ninth Circuit Court of Appeals held that the Act did not violate the Commerce Clause, the Tenth Amendment, or the Equal Protection Clause, and that the Columbia River Gorge Compact was valid under the Compact Clause. This case also established that Congress could have regulated land use in the Gorge. Thus with Congress’ consent and this determination that the Columbia River Gorge Compact is appropriate for federal legislation, the Gorge Compact is federal law under the Cuyler v. Adams standard.

B. Application of State Law

As noted above, interstate compact law provides that state law cannot be applied to an interstate compact agency unless the compact specifically preserves that law.
1. **Seattle Master Builders Standard Applied in the Scenic Area**

In the first Scenic Area case concerning the applicability of state law (and other federal law), Klickitat County sued the Gorge Commission and Forest Service seeking to compel: (1) the Gorge Commission to prepare an environmental impact statement under the Washington State Environmental Policy Act and (2) the Forest Service to prepare an EIS or environmental assessment under either the National Forest Management Act (NFMA) or NEPA prior to adopting the final Management Plan required by the Act. *Klickitat County v. Columbia River Gorge Comm’n*, 770 F. Supp. 1419 (E.D. Wash. 1991). Klickitat County argued that SEPA is an environmental full disclosure law and pointed to the section of the Act that requires the Gorge Commission to adopt administrative rules consistent with the more restrictive of Oregon or Washington’s law for disclosure of information. The Court concluded that the Act was “far from a specific reservation of the right to impose SEPA on the Gorge Commission.” The Court deferred to the Gorge Commission’s interpretation of the Act’s reference to “disclosure of information” to mean release of public records rather than environmental disclosure.

The claims against the Forest Service were likewise dismissed. The Act expressly exempts the Forest Service from preparing an EIS or EA for the Management Plan. 16 U.S.C. § 544o(f)(1). The Court reiterated this and expressed doubt that Congress intended the Forest Service to identify alternatives under NEPA if it exempted the Forest Service from preparing an EIS or EA. Finally, the Court cited to 29 C.F.R. § 219.2(a), which exempts planning under the NFMA for special area plans where the NFMA conflicts with the requirements for the special area plan, and ruled that such a conflict existed between the NFMA and the Scenic Area Act.
2. Courts Look to State Law for Guidance

In the *Tucker* case, the Washington Court of Appeals struggled with deciding what standard of review applies when reviewing a land use permit denial from the Gorge Commission. After citing to several cases that did not clearly provide what law applies, the Court decided that because the Gorge Commission was acting as a local government, it would review the decision as it would review any other local land use decision. *Tucker v. Columbia River Gorge Comm'n*, 73 Wash. App. at 77–79. The Washington Court of Appeals more recently determined that it must apply the standards of review found in the Washington Administrative Procedures Act, notwithstanding the Act’s requirement that the Commission must apply the more restrictive of the Oregon and Washington APAs. *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 126 Wash. App. 363, modified, 2005 Wash. App. LEXIS 968 (2005). In the future, a possible result of this decision is that even if the Commission applied a more restrictive provision of the Oregon APA, the Washington Court would look to Washington’s APA for judicial review.

3. Gorge Commission Interpretation of its Standards

a. The *Andersen* Case (Unpublished)

In a pair of cases, the Washington Court of Appeals upheld a Gorge Commission interpretation of a particular term, first in an unpublished case, but then in a second published case, reversed the identical interpretation of the same term. In the first case, *Andersen v. Columbia River Gorge Comm'n*, No. 18370-6-II (Wash. App. Dec. 13, 1996), the Court upheld the Gorge Commission’s determination that a nonconforming use is “discontinued” under an objective standard, rather than Washington’s subjective
standard (requiring intent). The Court stated, “As Congress expressly conditioned its approval of the agreement at issue here on the Commission having all those powers and responsibilities identified under the Act, 16 U.S.C. § 5440(d), Washington has no control over the Commission through the application of its own laws.”

b. **The Woodall Case (Seattle Master Builders Misapplied)**

In 2001, the Washington Court of Appeals decided the second case, *Skamania County v. Woodall*, 104 Wash. App. 525, 16 P.3d 701 (2001). In this case, Skamania County approved a land use application to expand a nonconforming use, finding that the use had not been discontinued under Washington’s subjective standard (requiring intent). The Gorge Commission reversed Skamania County’s decision, concluding that it had applied the wrong legal standard because in the Scenic Area, the term “discontinued” was an objective standard. The Superior Court affirmed the Gorge Commission’s decision. The Court of Appeals reversed, concluding that the Gorge Commission should have deferred to Washington’s state law for interpretation of Scenic Area regulations. Although it should not have been necessary, the Commission clarified in its 2004 Management Plan revisions that it does not apply either state’s substantive land use laws.

C. **Takings Claims**

Very few takings claims have been made in response to application of the scenic area regulations. None have been successful.

1. **Takings Claims Against the Gorge Commission**

   In *Miller v. Columbia River Gorge Comm’n*, 118 Or. App. 553 (1993), the plaintiffs claimed that denial of an application to divide an already developed parcel and develop a second dwelling on the newly created parcel constituted a taking. The Gorge
Commission had denied the application because it would adversely affect scenic resources by changing the setting from a rural setting to a developed setting, and was contrary to the second purpose of the Act—encouraging new development to occur in existing urban areas. The Oregon Court of Appeals affirmed that the police power encompasses aesthetics and channeling development to existing urban areas, and found that no taking occurred. Subsequent Oregon cases involving takings claims in the Scenic Area cite to this *Miller* case.

2. “Special Review” Rule

In response to concerns about potential takings claims, the Gorge Commission adopted a “Special Review” rule in 1994, which provides a process for the Gorge Commission to handle takings claims administratively. Under this rule, a person must allege a taking as part of his or her appeal to the Columbia River Gorge Commission.

The rule provides:

Where the Commission finds that enforcement of the land use ordinance will deprive the landowner of all economic or beneficial use of the property, the Commission shall remand the matter to the county for the county to allow a use as provided for by the order of the Commission. The economic or beneficial use allowed shall be the use that on balance best protects the affected resources.

CRGC Rule 350-60-090(3)(d). This rule was challenged, but upheld. *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, No. 94-2-03896-0 (Clark County Sup. Ct. 1998). The Court upheld the Gorge Commission’s reasoning that although the rule would allow a land use inconsistent with the Management Plan and county land use ordinances, such a result would be necessary to comply with constitutional requirements.
3. **Inverse Condemnation**

The Gorge Commission has not been the direct subject of any inverse condemnation litigation, however, both states have been defendants in inverse condemnation cases arising from the Scenic Area. In Washington, Klickitat County sued the State of Washington for a declaratory judgment that the State of Washington must defend and indemnify counties for inverse condemnation actions resulting from the application of the National Scenic Area standards. The Washington Court of Appeals concluded that the State of Washington was not liable for such inverse condemnation actions because the Gorge Commission was created by interstate compact and is thus a creature of federal law. *Klickitat County v. State*, 71 Wash App. 760, 767, 862 P.2d 629, 634 (1993).

More recently, in Oregon, a landowner filed an inverse condemnation claim against the State of Oregon, claiming that an injunction had prevented him from using his property. The Gorge Commission had obtained the injunction preventing the landowner from ground-disturbing activity because the landowner had purposefully destroyed archaeological resources that he knew were present on a portion of his property. The Circuit Court found for the landowner and ordered the state to pay compensation, but the Court of Appeals reversed, finding that the claim was not ripe. *Murray v. State*, 203 Or. App. 377 (2005). The landowner has sought judicial review at the Oregon Supreme Court, which has not yet ruled on the petition.

4. **Takings Claims Against the Forest Service**

The Forest Service has also been the subject of “takeings” claims, and like the Gorge Commission, none have been successful. One early case is of particular interest.
Broughton Lumber Company had a water right to divert water into its log flume. Broughton closed its mill for economic reasons and applied to produce hydroelectric power with its water right. The Forest Service notified Broughton that generating hydroelectric power was an industrial use, prohibited by the Scenic Area Act. In a long court battle, involving jurisdictional claims, the U.S. Court of Federal Claims concluded that Broughton did not have a compensable property interest in turning a water right into a profitable enterprise through a change of use. *Broughton Lumber Co. v. United States*, 30 Fed. Cl. 239 (1994).

D. **Enforcement of the Scenic Area Act and Land Use Ordinances**

The Scenic Area Act provides authority to the Gorge Commission to enforce the Scenic Area Act, Management Plan, and the land use ordinances through administrative or judicial means, and issue, administratively, civil penalties of up to $10,000 per day for willful violations. 16 U.S.C. §§ 544m(a)(1); 544m(a)(3); 544m(b)(1)(B). The Gorge Commission is also required to monitor the activities of the counties and take necessary actions to ensure compliance with the Act. 16 U.S.C. § 544m(a)(2). The Forest Service may also use judicial means to enforce the Act for special management areas. 16 U.S.C. § 544m(b)(1)(A). Finally, the Act authorizes citizen suits against the Gorge Commission, Forest Service, and counties. 16 U.S.C. § 544m(b)(2).

1. **Commission Enforcement**

The Commission has specific enforcement procedures and an on-going enforcement program. Most violations are resolved through a cooperative agreement—either informally (*de minimis*) or through an agreement after a formal Notice of Alleged Violation is issued. The Commission holds hearings for violations that are not resolved
through agreement. In the past, most violators wanted to challenge Notices of Alleged Violation. More recently, the Commission has held hearings because the violators have been unresponsive to a Notice of Alleged Violation. Civil penalty monies go to the states’ general funds; except that the Commission’s costs, including staff time, is returned to the Commission’s budget.

One well-known violation involved a Notice of Alleged Violation that the Commission issued to Skamania County for allowing construction of a house that did not comply with the Scenic Area regulations. The Executive Director issued the Notice 14 months after the land use decision was issued, and after the house was framed. The county and landowner claimed that the permit was final and could not be collaterally attacked. The Executive Director claimed that the original permit gave no indicia of concern at the time of issuance, but the manner that the County implemented the permit resulted in violation of the Scenic Area regulations. The County testified that most people probably wouldn’t have understood the permit to have allowed the house that was actually being built, however, the house was what the County intended.

The Gorge Commission found the county in violation of the Act, Management Plan, and its land use ordinance, and ordered the county to issue a new decision to bring the house into full compliance with the regulations (including moving the house). Both the county and the landowner appealed the decision. The landowner also sued the Gorge Commission and the County for damages. The Clark County Superior Court upheld the Gorge Commission’s decision. *Skamania County v. Columbia River Gorge Comm’n*, Clark County Superior Court No. 99-2-00020-1 (July 26, 1999). The Washington

The Supreme Court concluded that the Gorge Commission does not have the authority to collaterally attack a final land use decision through an enforcement proceeding. The Court’s primary concern was that the Commission’s action offended the doctrine of finality. However, the Court did list the various options that the Gorge Commission should have used in this case, including initiating a civil action for injunction, conducting an enforcement proceeding for civil penalty, and appealing county decisions. The case may have turned out differently had the Commission ordered the County to enforce the permit as a reasonable person would have understood the permit, instead of nullifying it.

2. **County Enforcement**

Although not expressly mentioned in the Act, counties may also enforce the Scenic Area Act, Management Plan, and land use ordinances through administrative actions or judicial means. One case has established two important principles for county enforcement of the Act. *Multnomah County v. Geoffrey Thompson and Lois Thompson Housing Project*, Multnomah County Planning Division No. ZV 99-06 (April 5, 1999).

In that case, Multnomah County found the defendants in violation of their previously issued land use permit in the Scenic Area. Three appeals of that decision followed—(1) appeal to the Land Use Board of Appeals, (2) judicial review by writ of review, and (3) appeal to the Gorge Commission. Additionally, Multnomah County obtained injunctive relief to enforce its decision.
The first principle established by this case is that appeals of county enforcement actions are properly taken to the Gorge Commission in the same manner as an appeal of a permit decision. *Lois Thompson Housing Project v. Multnomah County*, 37 Or. LUBA 580 (2000). This is one significant difference with Oregon practice—LUBA does not review enforcement actions, but the Commission does.

The second principle followed from the defendants’ motion to dismiss the county’s injunction action. The defendants argued, *inter alia*, that the Act gave authority to seek injunctive relief only to the Gorge Commission, the states’ Attorneys General, and the Attorney General of the United States, but not to the counties. The Multnomah County Circuit Court concluded that the Act did not deprive it of jurisdiction to enjoin the defendants when the injunction was sought by the county. *Multnomah County v. Thompson*, No. 99-07-07733 (Mult. Co. Cir. Ct. Sept. 29, 1999).

E. Interesting Pending Litigation


In 2004, Oregon voters passed Ballot Measure 37, which requires compensation for the enactment or enforcement of a land use regulation that restricts the use of private property and has the effect of reducing the value of the property. Measure 37 also allows governments to modify, remove, or not apply a regulation in lieu of compensation.

Section (3)(C) of Measure 37 specifies that Measure 37 does not apply to land use regulations to the extent the land use regulations are required to comply with federal law.

In 2005, the Gorge Commission sought declaratory judgment that this new Oregon state law does not apply to Scenic Area land use regulations adopted by Gorge counties as required by the Scenic Area Act. The Hood River County Circuit Court found that
Measure 37 does not apply in the Scenic Area under the Measure’s federal law exemption because the land use regulations are required by federal law, and because applying this new state law to the Oregon side of the Gorge would impermissibly affect Washington’s rights under the Compact. *Columbia River Gorge Comm’n v. Hood River County et al.*, No. 050051 CC (Hood River County Cir. Ct. Aug. 3, 2005), appeal filed (Or. App. No. 129652, Aug. 24, 2005).

An appeal, the Petitioners are arguing that the Gorge Commission is a state agency that has adopted Management Plan provisions beyond what is required to comply with what the Scenic Area Act requires. They argue that the only provisions required by the Act are the Act’s broad standards for the Management Plan’s provisions.

2. **Judicial Review of the 2004 Plan Review**


One of the most interesting issues is whether the Commission did a complete review of the Plan. The Commission held several scoping meetings and received 1600 comments, which covered every aspect of the Plan. The comments were catalogued into nearly 90 different issues. Given its limited resources, the Commission prioritized those issues and chose to address only about 25 of them. After the Commission started its work, both states experienced budget crises and reduced all agencies’ budgets, including the Commission’s. The Commission then reprioritized and reduced its scope of work. The Petitioners claim that the Commission did not address all of the important issues.
The Commission has argued that it could not do the work when its funding was reduced.

Some of the other issues include:

- whether some of new guidelines adequately ensure new development will be screened from view;
- whether the Commission should have increased the widths of its wetland and riparian buffers;
- whether some of the new land uses, such as small-scale fish processing, temporary commercial events, and road spoil disposal sites are permissible in the Scenic Area; and,
- whether the guidelines adequately protect against cumulative effects of individual development proposals.

The case is currently pending before the Court of Appeals. Oral argument has not yet been scheduled. The Commission is not expecting a decision in the case until mid-late 2007. In the meantime, the new provisions are in effect and being used to review development proposals in the Scenic Area.