# THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA: THE ACT, ITS GENESIS AND LEGISLATIVE HISTORY

**By**

**Bowen Blair, Jr.*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>866</td>
</tr>
<tr>
<td>II.</td>
<td>THE COLUMBIA RIVER GORGE</td>
<td>868</td>
</tr>
<tr>
<td>A.</td>
<td>Natural Resources and Values</td>
<td>869</td>
</tr>
<tr>
<td>1.</td>
<td>Geology, Flora and Fauna</td>
<td>869</td>
</tr>
<tr>
<td>2.</td>
<td>Scenery</td>
<td>870</td>
</tr>
<tr>
<td>3.</td>
<td>History and Culture</td>
<td>870</td>
</tr>
<tr>
<td>4.</td>
<td>Recreation</td>
<td>871</td>
</tr>
<tr>
<td>B.</td>
<td>Geopolitical Complexities</td>
<td>872</td>
</tr>
<tr>
<td>1.</td>
<td>Political Divisions</td>
<td>872</td>
</tr>
<tr>
<td>2.</td>
<td>Economy</td>
<td>873</td>
</tr>
<tr>
<td>C.</td>
<td>Development Threats</td>
<td>874</td>
</tr>
<tr>
<td>1.</td>
<td>Subdivisions and Single-Family Residential Development</td>
<td>874</td>
</tr>
<tr>
<td>2.</td>
<td>Commercial Development</td>
<td>876</td>
</tr>
<tr>
<td>3.</td>
<td>State and Federal Actions</td>
<td>877</td>
</tr>
<tr>
<td>III.</td>
<td>HISTORY OF GORGE PROTECTION EFFORTS</td>
<td>878</td>
</tr>
<tr>
<td>A.</td>
<td>Early Alternatives</td>
<td>878</td>
</tr>
<tr>
<td>B.</td>
<td>National Park Service Study</td>
<td>879</td>
</tr>
<tr>
<td>IV.</td>
<td>COLUMBIA RIVER GORGE BILLS, 97TH AND 98TH CONGRESSES</td>
<td>880</td>
</tr>
<tr>
<td>A.</td>
<td>97th Congress</td>
<td>881</td>
</tr>
<tr>
<td>1.</td>
<td>S. 2318</td>
<td>881</td>
</tr>
<tr>
<td>2.</td>
<td>S. 2319</td>
<td>882</td>
</tr>
<tr>
<td>3.</td>
<td>Differences Between S. 2318 and S. 2319 (Commission Composition and Authority)</td>
<td>883</td>
</tr>
<tr>
<td>B.</td>
<td>98th Congress</td>
<td>883</td>
</tr>
<tr>
<td>1.</td>
<td>Hearing, Senate Commerce Committee, Hood River, Oregon, February 10</td>
<td>883</td>
</tr>
</tbody>
</table>

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2. Introduction of S. 627 and the Governors’ Initiative ........................................... 884
3. Introduction of Bills Based Upon the Governors’ Initiative .............................. 887
   a. Commission authority and composition ................................................................. 889
4. Conclusion of 98th Congress ................................................................. 893
   a. Hearing, Senate Energy and Natural Resources Committee, Stevenson, Washington, November 8, 1984 ...................................................... 894

V. COLUMBIA RIVER GORGE BILLS, 99TH CONGRESS ........................................... 896
   A. Senate Workshops, June 1985 ........................................................................ 896
   B. Introduction of Gorge Bills ................................................................. 898
   C. Comparison of Bills ..................................................................................... 899
      1. Enforcement ......................................................................................... 900
      2. Development Standards ................................................................. 900
      3. Management Plan .............................................................................. 902
      4. Interim Management ......................................................................... 902
   D. Washington, D.C., Hearings ................................................................. 903
      1. Hearing, Senate Subcommittee on Public Lands and Reserved Water, Washington, D.C., June 17, 1986 ...................................................... 904
         a. Enforcement ......................................................................................... 906
         b. Development Standards ................................................................. 908
         c. Voting Procedure .............................................................................. 908
         d. Tributaries .......................................................................................... 908
      2. Hearing, House Subcommittee on National Parks and Recreation, June 19, 1986 ................................................................. 910

VI. COLUMBIA RIVER GORGE BILLS, 99TH CONGRESS, COMMITTEE PROCESS ................................................................. 911
   A. Senate Energy and Natural Resources Committee Markup, August 14, 1986 .... 913
   B. House Subcommittee and Committee Markups .............................................. 915
      1. Subcommittee on National Parks and Recreation Markup, October 2, 1986 .... 916
      2. Committee on Interior and Insular Affairs Markup, October 3, 1986 .......... 917
      3. Committee on Interior and Insular Affairs Markup, October 7, 1986 .......... 917
      4. Subcommittee on Forests, Family Farms and Energy Markup, October 8, 1986 .... 918
5. Committee on Agriculture Markup, October 10, 1986 ................................. 919

C. Senate Passage, October 10, 1986 .......................................................... 919
   1. Changes Sought by Committees ......................................................... 920
      a. Federal Authority ........................................................................ 920
      b. Cost ........................................................................................... 922
      c. Inconsistencies ........................................................................... 922
   2. Floor Passage, October 8, 1986 .............................................................. 923

D. House Passage, October 16, 1986 ............................................................. 924
   1. Rules Committee, October 15 and 16, 1986 ............................................. 927
   2. Floor Passage .................................................................................... 928

E. Senate Repassage, October 17, 1986 ........................................................... 930

F. Presidential Approval, November 17, 1986 .................................................. 931

VII. COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ACT 933
    A. Purposes  .......................................................................................... 933
    B. Framework ...................................................................................... 933
       1. Special Management Areas ............................................................... 934
       2. General Management Areas ............................................................ 935
          a. Composition of Commission ......................................................... 935
       3. Urban Areas .................................................................................. 937
    C. Management Plan .............................................................................. 937
       1. Process .......................................................................................... 938
          a. First year: Resource inventory, economic opportunity study and recreation assessment ........................................ 938
          b. Second year: Land use designations ............................................. 939
          c. Third year: Adoption of management plan ..................................... 939
             i. Development Standards .............................................................. 939
             ii. Plan Adoption ........................................................................ 942
          d. Fourth year: Implementation of management plan ....................... 944
             i. General Management Areas ....................................................... 944
             ii. Special Management Areas ....................................................... 945
                aa. Secretarial concurrence ......................................................... 946
                bb. County penalties ................................................................. 947
                cc. Legislative history ............................................................... 948
                dd. Constitutionality ................................................................. 950
                ee. Similar Federal Approaches ............................................... 951
    D. Interim Protection .............................................................................. 953
    E. Acquisition Authority ........................................................................ 955
The Columbia River Gorge National Scenic Area Act of 1986 is a bold and innovative vehicle which recognizes that a median position between little or no Federal protection for a scenically important area on the one hand, and a wilderness or national park designation on the other, is both prudent and necessary in this age.

—Sen. Mark Hatfield

Maybe we ought to design a red flag and put a hammer and sickle over it, because that is what we are doing here.

—Rep. Don Young

I. Introduction

For the past seven decades, the politics of protecting the Columbia River Gorge has divided the states of Oregon and Washington as effectively as the Gorge divides these states geographically. When President Reagan signed H.R. 5705 on November 17, 1986 creating the Columbia River Gorge National Scenic Area, despite the strenuous objections of cabinet members and perhaps several thousand Gorge residents, a new era dawned for Oregon’s and Washington’s relationship concerning the Gorge. More importantly, the legislation established a new future for the Gorge.

and possibly other prominent areas in the United States.

The Columbia River Gorge National Scenic Area Act (Gorge Act or Act) creates a novel mechanism for protecting large, populous, and geopolitically-complex areas which, for a variety of reasons (especially political), may be unsuitable for more traditional protection as a national park or national recreation area. Nevertheless, these areas warrant—because of their nationally significant values—greater protection than can be afforded by local, state, or regional governments. While original, this mechanism both deviates and borrows heavily from precedents established in other regions of the country, including the Sawtooth National Recreation Area, the Cape Cod National Seashore, and the Lake Tahoe Bi-State Compact.

Whether the Act successfully accomplishes its difficult objectives of preserving the Gorge's world-class landscape, and natural, historic, and recreational values while addressing the legitimate concerns of the 41,000 Gorge residents will not be known for years, perhaps decades. An analysis of the Act's earlier drafts, the legislative precedents relied upon by the Act (and the problems encountered by these precedents), coupled with a close examination of the Act itself, provides a solid basis for predicting the Gorge Act's chances for success. Such an analysis, moreover, provides a critical legislative history for the Act. Such a history, because of the abbreviated and extremely controversial process taken by the bill as it ricocheted through Congress, does not otherwise exist.

This Article, therefore, will closely trace the legislative history of the Gorge Act and examine the legislation's structure and contents. Section II sets the context for enactment by briefly reviewing the unique natural and other values of the Columbia

4. The terms "national park" and "national recreation area" are generic terms, not legal definitions. National parks consist almost entirely of public lands and are managed by the National Park Service. National recreation areas often include private lands and generally—although not entirely—are administered by the United States Forest Service. "National recreation area" is a "catch-all" term which indicates that the area will not be subject to traditional multiple use management, but rather will be managed for special considerations such as recreation and scenery. No two national recreation areas, or their management guidelines, are the same. Telephone interview with James B. Snow, Office of General Counsel of the United States Department of Agriculture (Mar. 23, 1987).
River Gorge, its geopolitical complexities, and the threats which have consistently jeopardized this magnificent area. Section III provides a short description of the early historical efforts to bring comprehensive protection to the Gorge.

Sections IV-VI describe the legislative process as the Gorge Act wound its way through Congress: the various bills introduced from 1982 and their dissimilarities, the official hearings, committee deliberations, congressional passage and finally, Presidential approval. Section IV covers the 97th and 98th Congresses. Section V covers the 99th Congress. The 99th Congress' committee deliberations are explained in section VI. Finally, the Act itself is examined in detail in section VII.

This Article is written primarily for two segments of the public: (1) those who need to interpret the Gorge Act, whether litigants under the Act, residents of the area, or public officials who must enforce the Act's provisions; and (2) those who want to protect new areas from the excesses of urban encroachment. This Article will offer explanations and clarifications to the former, as well as a blueprint of paths to take and avoid to the latter.

II. THE COLUMBIA RIVER GORGE

One cannot overstate the complexity of the Columbia River Gorge. Sacred Native American sites, rare plants and animals, historic campsites and structures, and unparalleled scenery and recreation opportunities contend with a traditional resource-based economy, homes, and the related infrastructure required for 41,000 residents and several million annual visitors. The federal government, two states, and six counties have promulgated a hodgepodge of laws to govern the frequent conflicts which have arisen between those who would preserve, and those who would develop, certain resources. Understanding this complexity provides insight into the difficult balance Congress sought to achieve with the Gorge Act.

5. Already, the media is touting the Gorge Act as a model for other natural areas in the United States, including Jackson Hole, Big Sur, Napa Valley, Connecticut River Valley, Hudson River Valley, the Appalachicola River and Bay, the Mobile-Tensaw River Bottom Lands, and the Greater Everglades Ecosystem. See The Oregonian, Nov. 24, 1986, at 1, col. 2.
A. Natural Resources and Values

1. Geology, Flora and Fauna

Several powerful, interrelated forces combined to produce the formation of the Gorge as early as two million years ago. As the Cascade Mountain range erupted skyward, the Columbia River sliced downward, creating the Gorge. Further sculpting occurred during the Pleistocene era when huge ice dams near Butte, Montana, burst and shot cataclysmic floods westward through the Gorge's narrow passage.

It is this breaching of the Cascades which gives the Gorge its spectacular beauty, disparate climates and unusual diversity. Through its eighty-five mile length, the Gorge transforms, west to east, from coniferous rain forests near Bonneville Dam to pine-oak grasslands near Mosier, Oregon, to sagebrush desert east of The Dalles. Rainfall averages seventy-five inches annually in the western Gorge, but only twelve inches in the eastern Gorge. This diverse climate has provided the Gorge with over eight hundred native species of wildflower, at least forty-two of which are considered endangered, threatened, or sensitive. Thirteen species are found nowhere else.

Rare animal species, such as the Larch Mountain salamander (found only in the Gorge), as well as cougar, elk, deer and black

7. See id.
11. See Detling, supra note 8 at 160; e.g., telephone interview with Russ Jolley, Native Plant Expert (Mar. 21, 1987).
12. J. Larsen, Larch Mountain Salamander (1983) (enclosures with letter from John H. Larson, Jr., Professor of Zoology, Wash. State Univ., to Nancy Russell (May 20, 1985)) (a copy of this paper is available at the office of Friends of the
bear flourish. Peregrine falcons, and both bald and golden eagles soar on the Gorge's thermals, while tundra swans, great blue heron and countless species of duck splash down on small lakes, the Columbia, and adjacent wetlands.

2. Scenery

It is the Gorge's overwhelming beauty, however, which has earned it its national reputation. Mountains five thousand feet high rise from the edge of the Columbia River, and year-round snow-capped Mounts Hood, Adams, and St. Helens loom nearby. Waterfalls, including six hundred foot Multnomah Falls, leap from countless cliffs in the western Gorge, creating the greatest collection of permanent waterfalls in North America. This startling congregation of waterfalls caught the attention of one of the Gorge's most famous earlier visitors. Meriwether Lewis, during the Lewis and Clark Expedition's voyage through the Gorge in 1806, remarked:

[w]e passed several beautifull cascades which fell from a great hight over the stupendious rocks which closes the river on both sides nearly ... the most remarkable of these casscades falls about 300 feet perpendicularly over a solid rock ... several small streams fall from a much greater hight, and in their decent become a perfect mist . . . .

3. History and Culture

Lewis and Clark, however, were not the first to appreciate the beauty, and incomparable bounty, of the Gorge. Native Americans have settled there for anywhere between 10,000 and 20,000 years.\textsuperscript{14} Drawn to sites like Celilo Falls by the enormous salmon runs which choked the Columbia and its tributaries, the Wind, Little White Salmon, White Salmon, Klickitat, Deschutes, Hood and Sandy Rivers, the Gorge is believed to have harbored one of the largest pre-Columbian populations in North America.

\begin{thebibliography}{99}

\bibitem{13} 4 \textit{Original Journals of the Lewis and Clark Expedition} 1804-1806 259 (R. Thwaits ed. 1905).

\bibitem{14} \textit{See} R. Pettigrew, \textit{A Prehistoric Cultural Sequence in the Portland Basin of the Lower Columbia Valley} 111-114, 137-38 (Univ. of Or. Anthropological Papers No. 22 (1981)).
\end{thebibliography}
Remnants of these earlier settlements, including several Lewis and Clark campsites, exist throughout the National Scenic Area. Despite the flooding of several valuable Indian sites, including Celilo Falls, by the Gorge's two federal dams, Bonneville and The Dalles, visitors to the National Scenic Area still can see petroglyphs, pictographs, and Indian vision quest sites. More recent generations have also left unique pieces of their history in the Gorge. Ruts from the Oregon Trail still scar the prairie east of The Dalles. Chinese bake ovens, built by coolie railroad workers, can be found in the forests lining the Union Pacific and Burlington Northern tracks. A nine mile long wooden log flume built in the 1920s clings to the escarpment east of Stevenson, Washington.

Perhaps the National Scenic Area’s finest treasure is the Scenic Highway, a dream realized by Sam Hill, Samuel Lancaster, John B. Yeon, Simon Benson, and others in 1914 and 1915. The graceful, curving Highway, whose bridges and guardrails were sculpted by Italian stonemasons, was modeled after similar roads along Germany’s Rhine River, and has been recently included in the National Register of Historic Places.

4. Recreation

The Gorge's scenery and natural values attract millions of visitors annually. Many visitors fish in the Columbia or its tributaries, hike on several hundred miles of maintained trails (many of which are usable throughout the year), rock climb or raft on the Gorge tributaries. As a result of the thirty miles per hour winds, which are common during spring and summer, the National Scenic Area has become one of the premier windsurfing areas in the world.


B. Geopolitical Complexities

1. Political Divisions

The Gorge is far from pristine. Two federal dams, an interstate and a state highway, and two railroad tracks trace its length. The Bonneville Power Administration's power lines emerge from the dams and snake across the Gorge's escarpments. Communication towers dot the peaks of mountains. The Gorge is also home to 41,000 people, most of whom live within its nine incorporated cities. Unincorporated rural communities also have sprung up, often in response to federal construction projects like Bonneville Dam.

The 253,500 acre National Scenic Area is as fragmented politically as it is climatically diverse. In addition to the two states, six counties, seven ports, and nine cities, twenty-six other entities retain legal jurisdiction within the Gorge. The federal government—primarily the United States Department of Agriculture's Forest Service—is the largest landowner, owning approximately twenty percent of the Area.17 State lands comprise approximately nine percent of the Area, with the remainder in private ownership.18

This confusing array of jurisdictions has created conflicting policies, often to the detriment of the Gorge's natural values. Oregon and Washington, for example, have very dissimilar land use and environmental policies. Oregon has a statewide land use program which requires counties to provide a considerable degree of protection for resource lands and natural resources in their comprehensive plans and zoning ordinances. Washington, however, does not require counties to enact zoning ordinances, and county comprehensive plans are advisory only. Washington has a State Environmental Policy Act19 which requires the preparation of an environmental impact statement for major state actions which would significantly affect the environment,20 and a Shoreline

18. See id.
20. Id. § 43.21C.030(2)(c) (1985).
Management Act\textsuperscript{21} which protects shorelines within two hundred feet of the high water mark of most bodies of water.\textsuperscript{22} Oregon does not.

The states' dissimilarities are shared at the county level. A large portion of the Columbia River Gorge National Scenic Area is contained within Multnomah County, Oregon's most populous and politically powerful county. Directly across the river, however, is Skamania County, Washington, which encompasses more of the National Scenic Area than any other county. Skamania County is the state's least populous county, far from Washington's political and population nucleus in Puget Sound. Almost ninety percent of Skamania County is in federal ownership, yet the portion of the county within the National Scenic Area is overwhelmingly in private ownership.

The dichotomy in land use planning in the Gorge is best exemplified by these two counties. Multnomah County has a sophisticated "outreach program" which includes educational, environmental, and recreational "planning categories," and a detailed inventory of the Gorge's special sites, facilities and trails,\textsuperscript{23} whereas Skamania County has not completed zoning the county.

2. Economy

The economy of the Columbia Gorge is, in many ways, a microcosm of the Northwest. Lumber preparation, agriculture, and tourism are all economic mainstays. Although little commercial timber exists within the National Scenic Area, seven mills are found within its boundaries. The most popular tourist attraction in the Northwest (since the flooding of Celilo Falls) is Bonneville Dam, which attracts almost a million visitors annually.\textsuperscript{24} Windsurfing has become Hood River's fastest growing industry, and the largest employer in Cascade Locks is the sternwheeler Columbia Gorge,\textsuperscript{25} which carries tourists through the National Scenic

\begin{footnotes}
\item[21.] Id. § 90.58.010 (1985).
\item[22.] Id. § 90.58.030(2)(f) (1985).
\item[23.] See Multnomah County Educ. Serv. Dist. & Portland Bureau of Parks and Recreation, A Special Place: A Program for the Columbia Gorge Urban Outreach (1980).
\item[24.] Telephone interview with Dan Troglin, Resources Manager for Bonneville Dam (Mar. 26, 1987).
\item[25.] Portland Business Today, Nov. 27, 1985, at 24, col. 3.
\end{footnotes}
Area each summer. Vineyards, cherry, apple, and pear orchards are critical industries, especially in the middle and eastern portions of the Gorge.

Often these interests clash. Fly fishermen complain of timber practices which they believe contribute to the siltation of valuable spawning tributaries. Tourists do not appreciate clearcuts. Timber companies are often reluctant to manage their lands for scenic purposes. In 1982, a poorly executed clearcut created a landslide which destroyed a section of the 1914 Scenic Highway. In the late 1970's, effluent from an aluminum plant damaged cherry crops in The Dalles. Indian fishermen complain that windsurfers tear their fishing nets, and windsurfers worry about the huge grain barges which plow through their favorite windsurfing areas with limited maneuverability.

C. Development Threats

1. Subdivisions and Single-Family Residential Development

The greatest threat to the natural and scenic values of the Columbia Gorge is residential development outside of urban areas. A 1980 attempt to build a twenty-four lot subdivision in Skamania County directly across the Columbia River from Multnomah Falls, one of Oregon's premier tourist attractions, highlighted this problem. This subdivision, Columbia Gorge Riverfront Estates, provided the catalyst which galvanized public support for comprehensive Columbia Gorge protection. A public interest organization, Friends of the Columbia Gorge, formed to defeat the development and to seek permanent protection for the Gorge's natural resources.

Columbia Gorge Riverfront Estates was not the only subdivision proposed for critical open space lands in unzoned Skamania

27. See Montchalin v. Skamania County, Skamania County Wash., Superior Court Case No. 6931 (1981) (order granting preliminary injunction later stipulated to judgment for plaintiffs). Two years later, however, the applicant proposed a new subdivision of twenty-one lots, which the county also approved. On November 6, 1983, before a second lawsuit could be filed, a non-profit organization, the Trust for Public Land, purchased the subject parcel for preservation purposes. See Harrison, Colonel of Columbia Gorge Stuns Foes, Vancouver Columbian, Nov. 6, 1983, at 17, col. 1.
County. Skamania County approved a twelve lot subdivision, Rim View Estates, in 1981 on top of Washington’s best known and perhaps most scenic viewpoint in the Gorge—Cape Horn. In 1983, Skamania County also approved the eighty-three lot riverfront subdivision, Hidden Harbor, on wetlands just downriver from Washington’s Beacon Rock State Park, across the Columbia from Oregon’s renowned Horsetail Falls. A Friends of the Columbia Gorge lawsuit also successfully challenged that subdivision. 28

Although Rim View Estates, Columbia Gorge Riverfront Estates, and Hidden Harbor graphically illustrated the Gorge’s vulnerability, the more insidious threat to the area’s natural values is posed by the construction of individual houses. Two studies completed by the State Gorge Commissions documented this danger. The studies found trends with respect to land parcellization in western Skamania County (perhaps the most vulnerable area of the Gorge), and land platting and building activity in Skamania and Klickitat Counties. The Commissions’ February 2, 1983 parcellization report 29 concluded that within its 10,504 acre study area in western Skamania County, “[e]ncouraged by lax land use and platting controls, land divisions have occurred in a leapfrog, haphazard manner, affecting nearly one-third of the land within the study boundary.” 30

The Commissions’ February 1985 report 31 focused on land platting and building activity within Skamania and Klickitat Counties from 1980 to 1984. This report concluded that these counties’ rural lands in the Gorge were being converted to medium density residential lands at an alarming pace, even though Skamania County’s population had remained static for the five year period. 32 The statistics assembled by the Commissions’ staff

28. See Friends of the Columbia Gorge v. Skamania County, Nos. 84-57 and 84-60 (Wash. State’s Shorelines Hearings Board, final findings of fact, conclusion of law, and order reversing Skamania County’s approval of Columbia Gorge Riverfront Estates (Feb. 28, 1986).
29. OREGON AND WASHINGTON COLUMBIA RIVER GORGE COMMS’ STAFF REPORT, SKAMANIA COUNTY WEST END LAND USE AND PARCELLIZATION PATTERNS (Feb. 2, 1983).
30. Id. at 5.
32. See id. at 3.
presented a bleak future for this area of the Columbia Gorge:

During the past five years in the unincorporated areas of Skamania and Klickitat Counties over 890 acres have been subdivided into 232 lots averaging 3.8 acres in size. During this same period over 246 new dwelling units have been added to the same unincorporated area... Significant acreages within the Gorge are incrementally being converted from undeveloped rural lands to medium density residential lands.88

2. Commercial Development

Commercial development also has threatened to undermine the Gorge's values. The Port of Hood River, for example, proposed a conference center, interpretive building, and a docking facility on tiny Wells Island, home to the eighth largest Great Blue Heron rookery and third largest Canada Goose nesting site on the three hundred miles of Columbia River from the Pacific Ocean to McNary Dam. A lawsuit filed by conservation organizations in the Oregon Court of Appeals overturned approval of the proposal by Hood River County and Oregon's Land Conservation and Development Commission.84

Hydroelectric proposals on Gorge tributaries conflict with scenic, recreational, and fishery values. One such proposal, the $6.8 million Wyeth Hydroelectric Project, which endangers spectacular one hundred foot Gorton Creek Falls, is pending before the Federal Energy Regulatory Commission.85 Another project, by Broughton Lumber Company, could threaten fish hatcheries on the Little White Salmon River.86 Conservationists oppose both projects.87

33. Id.
35. Wyeth Hydroelectric Project, FERC, Project No. 9704-000 (application for major license filed Dec. 23, 1985).
37. Friends of the Columbia Gorge filed for intervenor status in both applications before the Federal Energy Regulatory Commission.
3. State and Federal Actions

Counties are not the only authorities which have approved actions detrimental to the Gorge. Oregon and Washington have also participated. In 1983, for example, the state of Oregon destroyed fifty acres of sand dunes east of The Dalles, despite their identification as "sensitive lands" by the National Park Service. 38 A year later, Oregon proposed a $2.1 million commercial trucking facility for an extremely significant scenic area at Wyeth, 39 and later, adjacent to the heavily used Lewis and Clark State Park. 40 In March 1984, Washington attempted to transfer, for future sale, forty acres of its largest park in the western Gorge, Beacon Rock State Park. 41

Of all levels of government, the federal government has contributed to the greatest degradation of the Columbia Gorge. Two major dams have decimated the Columbia's anadromous fish runs and destroyed Celilo Falls, a culturally significant area as well as the Northwest's foremost tourist attraction. The Public Utilities Regulatory Policy Act 42 creates a market for hydroelectric projects on the Gorge's tributaries. The Bonneville Power Administration's power lines slash across the Gorge's majestic landscape, and Interstate 84 winds the length of this scenic corridor.

Incremental residential development, subdivisions, commercial development, hydroelectric development, timber harvesting, surface mining, and industrial development have all contributed to the degradation of the Columbia Gorge's scenic, natural, cultural, and recreational values. Yet most believe that these activities, in certain locations and subject to restrictions, should be permitted within the Gorge. Exactly which activities should be allowed, according to which standards, at whose authority, and at

38. See Study, supra note 17, at 77.
41. Skamania County, joined by Friends of the Columbia Gorge and the Sierra Club successfully opposed this transfer. See The Oregonian, Mar. 7, 1984, at B1, col. 2.
what cost to local residents have been hotly debated issues in the Northwest for decades.

III. History of Gorge Protection Efforts

During these decades of debates, proposals for Gorge protection—whether by creating more state parks or establishing either a national recreation area or national park—have ebbed and flowed, yet a steady undercurrent of public support for comprehensive protection has always been detectable.

A. Early Alternatives

The desire to protect the Gorge arose at least as early as the turn of the century. One of the purposes of building the Scenic Highway in 1914 was to bring tourists to the Gorge and to Oregon to expose, in the words of Highway Engineer Samuel Lancaster, “hidden waterfalls and mountain crags, dark wooded, fern-clad coves, and all else that a wise creator [sic] chose to make for the pleasure and enjoyment of the children of men.”43

In 1915, the first of thirty Columbia River Gorge state parks (twenty-six in Oregon, four in Washington) was created. A year later, the proposed (but never formed) Mount Hood National Park included the Oregon portion of the Columbia Gorge.44 This was the first of many official, but unsuccessful, recognitions that the federal government should be included in protecting the Gorge.

By 1937, in conjunction with planning for the recently completed Bonneville Dam, the Northwest Regional Planning Commission considered establishing an interstate park for the Gorge. A study completed by that commission stated, “[T]his rapid acceleration of activity precipitates a crisis in the destiny of the area, in which the perishable natural values of a phenomenal region would, under ordinary circumstances, have no protection comparable in authority or scope to the various forces which endanger them.”45

43. Fahl, supra note 15, at 114.
44. S. 6397, 64th Cong., 1st Sess. (1916).
45. COLUMBIA GORGE COMM., PACIFIC NORTHWEST REGIONAL PLANNING COMM’N, REPORT ON THE PROBLEM OF CONSERVATION AND DEVELOPMENT OF SCENIC
In the 1950’s, Oregon and Washington addressed the issue by creating Gorge Commissions. These separate Commissions (which later shared staff and an office) were formed by dissimilar enabling legislation. The effectiveness of the Commissions, a majority of whose membership resided within the local Gorge counties, has been hampered by their advisory authority, meager funding, and by hostility from certain counties in the Gorge, particularly Skamania.

The decade of the 1970’s witnessed greater public coalescence around the realization that the Gorge had national, not just regional or local, significance. In 1970, at a meeting of the Gorge Commissions and the Governors of Washington and Oregon, a Columbia Gorge National Recreation Area was proposed and received considerable editorial support.

A 1976 study by the National Park Service noted that the Gorge “has the possibility of fulfilling a need for an urban park area that would be nationally significant.”

B. National Park Service Study

In 1979, the Columbia Gorge Coalition (a small conservation organization composed mostly of Gorge residents) requested the National Park Service to initiate a more comprehensive study of the Columbia River Gorge pursuant to the Secretary of the Interior’s responsibility to “investigate, study, and continually monitor the welfare of areas whose resources exhibit qualities of national significance and which may have potential for inclusion in

and Recreational Resources of the Columbia Gorge in Washington and Oregon 2 (1937).


48. For example, Skamania County wrote a letter in 1984 to the Governor of Washington asking that the Washington Gorge Commission be disbanded. See Vancouver Columbia, June 14, 1984, at 13, col. 1. In July, 1986, the Skamania County Commissioners evicted the Gorge Commissions’ staff from their Skamania County building. See Kennewick Washington Tri-City Herald, July 9, 1986.


the National Park System."\(^{51}\)

The National Park Service Study, published in April, 1980, revealed a host of disturbing development trends in the Gorge and analyzed the problems inherent in the Gorge’s multi-jurisdictional governing structure. The Study proposed four separate management alternatives for the Gorge, each with its own boundary options. The alternatives were: (1) the continuation of existing policies, (2) the expansion of the roles of the existing state Gorge Commissions, (3) the establishment of a multi-governmental Commission, and (4) the establishment of central federal management.\(^{52}\)

Fortuitously for proponents of federal legislation, the release of the Park Service Study coincided with an attempt to subdivide a natural area across from the Gorge’s most famous waterfall, Multnomah Falls, and underscored the inability and unwillingness of local counties to protect the Gorge’s nationally significant values. While Columbia Gorge Riverfront Estates dramatized the need for legislation, the Park Service Study showed the way.

IV. COLUMBIA RIVER GORGE BILLS, 97TH AND 98TH CONGRESSES

The Park Service Study delighted supporters of federal legislation, however, the intricacies of the legislative process quickly sobered them. The two congressional sessions which followed the release of the Park Service Study provided little progress toward enactment of Gorge legislation and caused considerable polarization. A compromise measure offered by the states’ Governors called for the establishment of an omnipotent regional commission to manage the Gorge. This measure received support from neither advocates of federal legislation, who saw in it too much control vested in local representatives, nor from those who opposed all federal legislation. Two significant events occurred during the 98th congressional session which foretold a political shift: (1) the death of powerful Washington Senator Henry Jackson,

51. 16 U.S.C. § 1a-2(e) (1982). The Study would provide information to Congress regarding: the area’s significance; threats to the area; sensitive parcels within the area; public needs and concerns; current plans to protect the area; feasible alternatives for preservation and use; and impacts of alternatives. See also Study, supra note 17, at 19.
52. Study, supra note 17, at 139-85.
and (2) the election of Washington Governor Booth Gardner. Nevertheless, this session ended with few hopes for resolution of the conflict as adversaries clashed at a raucous Senate field hearing in Stevenson, Washington.

A. 97th Congress

1. S. 2318

In 1982, despite the 1980 presidential election of notable new parks antagonist Ronald Reagan, Oregon Senators Bob Packwood and Mark Hatfield introduced S. 2318, the “Columbia River Gorge Act of 1982,” drafted by Friends of the Columbia Gorge. Oregon Congressmen Les AuCoin and Jim Weaver also introduced this bill in the House of Representatives as H.R. 6026. The bill incorporated the fourth alternative presented in the National Park Service Study: direct management of the Columbia Gorge by a federal agency, specifically, the United States Forest Service. No member of the Washington congressional delegation introduced S. 2318 or any other Gorge bill.

S. 2318 authorized the Forest Service to administer the Columbia Gorge with the advice of a regional commission composed of thirteen voting members: six chosen by the governing body of each Gorge county, two chosen by each Governor, and three appointed by the Secretary of Agriculture. Under S. 2318, the Chief of the Forest Service, with the consultation and advice of the regional commission, would select an interdisciplinary planning team to prepare a management plan for the Area. The management plan would be implemented through the zoning ordinances of local governments, or by the Forest Service.

The standards for development contained in S. 2318 were extremely general. For instance, the management plan would be based upon an inventory of the area’s resources, and would “protect, maintain, and enhance the scenic, natural, and cultural val-

54. Id. § 4(a)(1).
55. Id. § 4(b)(1).
56. Id. § 5(a).
57. Id. § 9(b)(2).
58. Id. § 9(c).
ues of the Area," in addition to designating "appropriate uses of all lands within the Area in order to achieve the purposes of this Act." S. 2318's purposes also lacked specificity, and relied upon requirements that the Area's resources be protected, conserved, enhanced, and preserved without specifying how this would be accomplished.

S. 2318 did require that "lands which are critical to the protection, development, and interpretation of the resource values of the area" be identified for greater protection. However, the Forest Service had complete discretion as to the means of protecting both the critical areas and the remainder of the National Scenic Area.

2. S. 2319

On the same day the Oregon Senators introduced S. 2318, Senator Hatfield introduced another bill, S. 2319, also entitled the "Columbia River Gorge Act of 1982." S. 2319 (introduced by Oregon Representative Ron Wyden in the House as H.R. 6001) retained the fundamental structure of S. 2318 but included significant changes which bolstered the management authority of the regional commission at the expense of the Forest Service's authority.

Senator Hatfield stated that S. 2319 incorporated comments by Gorge residents, many of whom saw S. 2318 as "a Federal takeover of private property." While Senator Hatfield acknowledged that Friends of the Columbia Gorge "disagreed with the direction this new draft [S. 2319] took and instead preferred the original legislation," the Senator had introduced both bills "so as to provide a complete public forum for these ideas to be discussed and debated."

59. Id. § 5(b)(2).
60. Id. § 5(b)(3).
61. Id. § 2(b).
62. Id. § 5(b)(5).
65. Id.
66. Id.
3. Differences Between S. 2318 and S. 2319 (Commission Composition and Authority)

S. 2319 altered both the composition and authority of the regional advisory commission. The bill created an eleven-member commission, unlike the thirteen-member commission created by S. 2318, by replacing the three members appointed by the Secretary of Agriculture in S. 2318, with one member, the Chief of the Forest Service or that person's designee.\(^{67}\) Otherwise, the composition of the two commissions was identical. The change in the makeup of the commission wrought by S. 2319 was significant since, unlike S. 2318, it allowed the local county commissions to choose a majority of the commissioners.

S. 2319 also fundamentally altered the authority of the commission. Responsibility for preparing and adopting the management plan vested in the Commission, rather than the Forest Service interdisciplinary team\(^{68}\) called for in S. 2318. The Commission assumed considerable authority under S. 2319 to approve development proposals during the interim period after enactment but before adoption of a management plan,\(^{69}\) and to override Secretarial condemnation of lands used for inconsistent purposes.\(^{70}\) Because of the absence of support for Gorge legislation in the Washington congressional delegation, neither S. 2318 nor S. 2319 were granted a hearing or committee action during the remainder of the 97th Congress.

Hopes for federal legislation rose, however, during the early months of 1983 when two field hearings were held, a new federal bill was introduced and a joint initiative was revealed by the Oregon and Washington Governors.

B. 98th Congress

1. Hearing, Senate Commerce Committee, Hood River, Oregon, February 10

On February 10, 1983, Senator Packwood, Chairman of the Senate Committee on Commerce, Science and Transportation,
called the first official hearing on the future of the Columbia Gorge to order at 9:30 a.m. in Hood River, Oregon, the heart of the Columbia Gorge. A large crowd, mostly composed of Gorge residents, had gathered. Because of the committee's jurisdiction, testimony centered upon the relationship of legislation to the tourist and other industries in the Columbia Gorge.

Philosophical sides were drawn early by both proponents and opponents of legislation. Conservation organizations supported federal legislation, while most Gorge residents and local officials opposed it. The states' Governors were noncommittal. While Multnomah County Executive Dennis Buchanan conveyed that county's support for a National Scenic Area, Chairman Bill Benson of the Skamania County Commission bitterly opposed the hearing, as well as the legislation. Benson announced that Clark, Skamania, and Klickitat counties had just signed an interlocal agreement to develop a plan and guidelines to protect the Washington side of the Gorge. Soon after the hearing, Skamania County abrogated this agreement.

2. Introduction of S. 627 and the Governors' Initiative

Within a month of the hearing, on March 1, 1983, Senators Packwood and Hatfield introduced a new bill, S. 627, the "Columbia River Gorge Act of 1983." This new bill, introduced in the House as H.R. 1747 by Representatives AuCoin and Weaver, was identical in every significant respect to S. 2318. S. 2319 was not reintroduced.

In his floor statement, Senator Packwood, "with renewed commitment and an increasing sense of urgency," described the nature of the threats to the Gorge's nationally significant resources. Senator Hatfield sounded a heavy note of caution, however, when he mentioned the concern of many Gorge residents.

72. See id. at 47-51 (statement of Bill Benson).
with the federal government's role in local land use planning decisions: "[t]hat concern and divergence of opinion continues, and a great deal of discussion and cooperation with State and local governments, as well as gorge residents on both sides of the Columbia River, will have to take place before the legislation moves forward." 76

The discussion desired by Senator Hatfield boiled over fourteen days after the introduction of S. 627 when Oregon Governor Atiyeh and Washington Governor Spellman, amidst great fanfare and media interest, 77 announced a historical agreement between their states. The agreement was based on twenty-two "principles" and eight "key elements" to be incorporated into federal legislation. 78 While most of the principles and key elements were general in nature, they contained sufficient specificity to infuriate both supporters and opponents of legislation.

Essentially, the Governors' joint statement recommended the creation of a large, twenty-three person commission 79 to develop and enforce a management plan 80 for the Columbia Gorge. The


79. See id. at 47. The Commission would consist of: six representatives of local government (half from each state); four representatives of state government (half from each state); three representatives of federal agencies (the U.S. Forest Serv., Bonneville Power Admin. and U.S. Army Corps of Eng'rs); and ten representatives-at-large, half from each state. Id.

80. See id. at 45-46. The management plan created by the Commission was required to:
- include a full commitment to the preservation and protection of the unique natural and scenic beauty of the Gorge;
- encourage the continued vitality of existing municipalities;
- "recognize" existing homes and businesses;
- support the "historical uses of the Gorge as a vital transportation corridor and as an important source of power generation";
- encourage and strengthen "economic development efforts in the Gorge that are compatible with the unique natural setting of the area"; and
- encourage and support efforts to strengthen the Gorge's tourist industry. Id.
management plan would be binding upon local governments, who would be responsible for implementing the plan.81

Ten days after its release, opposition to the Governors' initiative emerged at a Senate Energy and Natural Resources Committee hearing on Gorge legislation in Portland chaired by Senator Hatfield. Fifty-four witnesses testified, often emotionally, over the course of seven hours. Klickitat and Skamania County commissioners once more vehemently denied the need for federal legislation.82 Commissioner Benson labeled the Governors' joint statement a "misbegotten agreement"83 which:

seems an innocuous document that harms no one, makes some partly happy. However, when it reaches the Houses of Congress, the Sierras, Audubons, 1000 Friends of Oregon, the garden clubs, the Friends of the Columbia Gorge, to name a few, and they finish cutting, slashing, and amending it, they will have accomplished their original goal: To put Skamania County under an onerous, unreasonable, unheeding, uncaring, unfeeling, unthinkable bureaucracy, which will toll the death knell for life as we know and love it.84

While perhaps not as descriptive, conservationists' testimony generally supported the progress, particularly on the part of Washington State, generated by the Governors' joint statement, but they did not support the substance. Conservationists clearly preferred S. 627. Amendments to S. 627 to substitute the National Park Service for the Forest Service and to provide protection for the Gorge's tributary streams were offered. Additionally there was criticism of the Governors' initiative over the unwieldy nature of a twenty-three person commission, the lack of a meaningful federal role, and the absence of interim protection.85

A few witnesses expressed cautious optimism over the Gover-

81. See id. at 46.
82. See id. at 84-85 (statement of Fred Holly, County Comm'r, Klickitat County, Wash.); see also id. at 82-84 (statement of Ed Callahan and William Benson, County Comm'rs, Skamania County, Wash.).
83. Id. at 83 (statement of William Benson).
84. Id. at 83-84 (statement of William Benson).
nors' joint statement: representatives of the Oregon and Washington State Columbia River Gorge Commissions (whose members were appointed by the Governors), Hood River County, and industrial and trade organizations such as Pacific Northwest Waterways Association and Mid-Columbia Marketing. Senator Hatfield concluded the hearing by expressing his belief that the Gorge is "one of the great resources of the Nation," and that federal legislation could resolve many of the concerns raised by Gorge residents during the hearing. The Senator also stated that the Governors' statement deserved "careful consideration."

3. Introduction of Bills Based Upon the Governors' Initiative

During the spring and summer of 1983, Governors Atiyeh and Spellman drafted a bill based upon their joint statement. On August 4, at the Governors' request, Senator Hatfield and

86. See id. at 53-62 (statement of Jeff Breckel, representing Or. and Wash. State Columbia River Gorge Commissions). Breckel stated: [The Gorge Commissions] are greatly encouraged by the joint commitment that's been made by Governor Spellman and Governor Atiyeh. . . . To date, no one proposal has fully satisfied our criteria. We do believe, however, that the approach outlined by the two Governors, while only conceptual at this time, offers the greatest opportunity for reaching a viable and effective compromise to the ongoing gorge management debate. . . . This is not to say that we have no concerns regarding the key elements espoused by the Governors. We do.

Id. at 53-54.

87. See id. at 93-94 (statement of Glenn Palmer, County Comm'r, Hood River County, Or.).

88. See id. at 328-34 (statement of Stephen Lindstrom, Exec. V. Pres., Pacific Northwest Waterways Assoc.).

89. See id. at 335-41 (statement of Bill Hemingway, Pres., Mid-Columbia Marketing).

90. Id. at 418 (statement of Sen. Hatfield).

91. Id. at 420.

92. Id.

93. Frequently, when Congressmen introduce a bill which they neither particularly favor nor disfavor, they will specifically introduce it "at the request" of another party. Senator Jackson's floor speech certainly indicated that position: Mr. President, I want to make it abundantly clear to my colleagues in the Senate as well as others interested in the Columbia River Gorge that I have taken no position relative to the merits of the Governor's proposal. I am joining in the introduction of this amendment as a courtesy to the chief executives of the two States involved so that their proposal may, in due course, be considered along with other measures that have or may be intro-
Washington Senators Jackson and Gorton introduced this bill as Amendment Number 2125. Senator Packwood felt the bill was insufficient, and refused to sponsor what quickly became known as the "Governors' bill." Congressman Wyden introduced H.R. 3853, a bill almost identical to the "Governors' bill," in the House of Representatives on the same day on behalf of the entire Oregon and Washington House delegations except for Representative Denny Smith of Oregon, who opposed any federal legislation.

Gorge legislation supporters found the Governors' bill and H.R. 3853 deficient since both removed a meaningful federal role. Debate focused upon four major differences between S. 627, and the Governors' bill and H.R. 3853: the size of the management area (a third smaller in the bills based upon the Governors' initiative); the composition and function of the regional commission; interim protection; and new exemptions from regulation regarding the Gorge. I would not want my introduction of this measure today to be construed by anyone as an endorsement of the provisions or the concepts embodied in it.

96. S. 627 differed from the Governors' and Wyden bills in the label for the area to be managed. S. 627 established the "Columbia River Gorge National Scenic Area," S. 627, supra note 74, § 3(a), while the Governors' and Wyden bills merely created a "Columbia River Gorge Area." See Amend. No. 2125, supra note 94, § 204; H.R. 3853, supra note 95, § 4. While not of substantive effect, the absence of "national" revealed both the perspective taken by the Governors as well as the level of management authority created by their proposal.
97. The Governors' and Wyden bills used the original boundaries established in the 1950's for the Gorge Commissions as the boundaries for the new area. Amend. No. 2125, supra note 94, § 203(b); H.R. 3853, supra note 95, § 3(b). S. 627, however, used the boundaries established in 1979 by the Nat'l Park Serv.'s computer technology for the 1980 Study of Alternatives. The Study incorporated the "viewshed" of the Columbia River Gorge as seen from the Columbia River, Wash. State Route 14 and Interstate 84. S. 627, supra note 74, § 3(b)(2). S. 627's boundaries, therefore, encompassed an area approximately thirty percent larger than that included by the Governors' and Wyden bills. A Gorge Commission study determined that S. 627 incorporated 260,260 acres while the Governors' and Wyden bills included only 190,500 acres. COLUMBIA GORGE COMMS, COMPARISON OF GORGE LEGISLATION (Nov. 1983).
98. A critical difference between the Packwood bill and the bills based upon the Governors' initiative involved the degree of protection offered to Gorge resources during the three-year interim period after enactment of legislation yet
lation, including a complete exemption of timber harvesting practices, provided by the Governors' initiative bills.\(^{99}\)

\(a.\) Commission authority and composition

The most important difference between S. 627 and the Governors' bill and H.R. 3853 concerned the authority and composition of the regional commission. The Governors' and Wyden bills sliced the size of the regional commission from twenty-three members announced in the Governors' joint statement, to fourteen—one elected official or other county resident from each of the six Gorge counties; four members-at-large from Oregon and four from Washington, at least half of whom were required to be Gorge residents.\(^{100}\) The commission would be a federal commis-

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99. The Governors' and Wyden bills flatly exempted commercial forest activities conducted on forest lands from the Act's jurisdiction. Amend. No. 2125, supra note 94, § 215(d); H.R. 3853, supra note 95, § 15(4). These lands comprised approximately twenty percent of the area. See Study, supra note 17, at 185, 192. Accordingly, the Act would not affect damaging harvesting practices such as the 1982 clearcut on steep slopes which destroyed a section of Oregon's Scenic Highway. The bills based upon the Governors' initiative also exempted from regulation the development of new locks at Bonneville Dam, despite widespread controversy over proposed locations for the spoils material taken from the new locks' site. Amend. No. 2125, supra note 94, § 215(a); H.R. 3853, supra note 95, § 15(1).

100. Amend. No. 2125, supra note 94, § 205(a).
sion with the President of the United States appointing commissioners from a slate provided by the Governors.\textsuperscript{101} This cumbersome process was established in order to avoid a conflict with the Constitution's Appointments Clause, which places the authority to appoint "all other officers of the United States, whose appointments are not herein otherwise provided for"\textsuperscript{102} solely with the President.

Unlike S. 627, under which the commission had only advisory authority, the commission under the Governors' bill and H.R. 3853 assumed the powers retained by the Forest Service in the Packwood bill. This power included the responsibility to "prepare, adopt, implement and enforce a unified Management plan for the Gorge."\textsuperscript{103} Among its numerous powers, the commission had authority to direct the Forest Service to exchange land.\textsuperscript{104} Federal agencies were required to manage their lands in a manner consistent with the Act.\textsuperscript{105} The commission's expansive authority over federal actions, therefore, created a legitimate concern that the commissioners were, in fact, "officers of the United States," and thus required the President to appoint its members.

The Governors' bill and H.R. 3853 occupied a political vacuum between supporters and opponents of federal protection.\textsuperscript{106} Opponents were not mollified by the increased local authority evident in the Governors' bill. In fact, the spokesperson for Columbia Gorge United, a Skamania County-based grassroots organiz-

\begin{itemize}
  \item \textsuperscript{101} Amend No. 2125, supra note 94, § 205(a); H.R. 3853, supra note 96, § 5(b).
  \item \textsuperscript{102} U.S. CONST. art. II, § 2, cl. 2.
  \item \textsuperscript{103} Amend. No. 2125, supra note 94, § 206(a)(1); H.R. 3853, supra note 95, § 6(a)(1).
  \item \textsuperscript{104} Amend No. 2125, supra note 94, § 211(d); H.R. 3853, supra note 95, § 11(d).
  \item \textsuperscript{105} Unlike the Packwood bill, the Governors' and Wyden bills gave federal agencies only an advisory role in the management of the Gorge. The Governors' bill required the President to appoint, as non-voting, ex-officio members of the Commission, representatives of the U.S. Forest Serv., Bonneville Power Administration, Army Corps of Eng'rs and "such other federal or state agencies as may be deemed appropriate." Amend No. 2125, supra note 94, § 205(e); H.R. 3853, supra note 95, § 5(e) (the Wyden bill added one more non-voting, ex-officio member from the U.S. Fish and Wildlife Serv.).
  \item \textsuperscript{106} The only complete supporter of the Governors' and Wyden bills appeared to be the timber industry because of its exemption from regulation. Philo Greg, Dist. Forester, Industrial Forestry Ass'n, supported the Governors' statement. See 1983 Hearings, supra note 78, at 305-11.
\end{itemize}
tion which opposed any and all federal legislation, analogized the bills’ differences to being conquered by Russian troops or Polish troops.\(^{107}\) Supporters of federal Gorge protection, including the editorial boards of most of the Northwest’s major newspapers, conversely, believed the Governors’ bill and H.R. 3853 merely legislated the status quo by turning Gorge management back to the local authorities, since ten of the fourteen commissioners were required to reside within the local counties. Conservationists believed a locally-dominated commission would be more inclined to favor short-term economic development projects rather than long-term protection for the Gorge’s nationally significant values. Moreover, some believed that a commission composed primarily of local residents and elected officials would have divided loyalties between serving the national interests or their neighbors and constituents, and would be less willing than federal agencies to enforce frequently necessary—but often locally unpopular—decisions. Supporters of federal protection also pointed to the absence in the bills based upon the Governors’ initiative of a meaningful role for an agency with the land management experience, skills, and resources of the Forest Service or National Park Service.

Conservationists believed a legitimate precedent for the inability of a regional commission to manage a complex, bi-state natural area had been set, indelibly and disastrously, at Lake Tahoe. Remarkably similar to the Columbia Gorge,\(^{108}\) Lake Tahoe forms the boundary between two states, California and Nevada, that had disagreed for dozens of years over how, and even whether, to protect the Lake. Lake Tahoe also contains scenic,

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\(^{107}\) Radio interview with Joe Wrabek, Dir. of Columbia Gorge United (Sept. 11, 1983).

\(^{108}\) This Article will not compare, in depth, the similarities between the Governors’ and Wyden bills and the Lake Tahoe Bi-state Compacts. That has been admirably done in Myers & Meshke, Proposed Federal Land Use Management of the Columbia River Gorge, 15 ENVTL. L. 71 (1984). That Article compares the Gorge bills in the 98th congressional session to similar existing legislation, including the Lake Tahoe Compact and Hell’s Canyon and Sawtooth National Recreation Areas. The Article also examines the constitutional implications of the 98th Congress’ bills.

The most thorough analysis of the history of the Lake Tahoe Area, which includes a very comprehensive examination of the Tahoe Regional Planning Agency (TRPA), is found in D. STRONG, TAHOE: AN ENVIRONMENTAL HISTORY (1984). Another excellent analysis, although less detailed, appears in Anderson, The Tahoe Troubles, 13 CRY CAL. 27 (1978).
natural, cultural, and recreational values of national significance. It has parallel land ownership patterns to the Gorge, and a very similar history with respect to development, timber harvesting and commercial exploitation.

Unfortunately, the commission created to manage Lake Tahoe, the Tahoe Regional Planning Agency (TRPA), achieved national recognition as a failure. In the ten years from its creation in 1969, TRPA approved an astonishing ninety-six percent of all development proposals put before it, resulting in the swift and steady deterioration of the Lake's scenic and natural values. On June 15, 1984, United States District Judge Edward Garcia delivered a legal opinion of TRPA's effectiveness when he enjoined it from approving any development project in the Lake Tahoe Basin until the states adopted a management plan which did not violate the federal compact.

The failure of the Lake Tahoe bi-state compact is partially attributed to the preponderance of local officials on the Tahoe Regional Planning Agency. The 1969 compact created a ten-member commission, six of whose members were required to be


112. In a detailed article which closely analyzed the fundamental problems of TRPA, commentator Walt Anderson described "the big three" problems of TRPA as "the dual majority rule, the 60-day 'deemed approved' provision, and the preponderance of local government representatives." Anderson, The Tahoe Troubles, CRY CAL. 27, 29 (1978). The Wyden and Senate bills contained two out of the "big three" problems. Only the third—the dual majority rule, which required both state delegations to TRPA to reject a development proposal or it would proceed—was missing. Another commentator states:

An assessment of TRPA performance before adoption of the regional plan gave reason for concern. The staff failed to alter or even seriously delay most proposed projects that it believed were destructive to Tahoe's environmental quality. Time and again it was overruled by the Advisory Planning commission and the Governing Body, which were dominated by local members sympathetic to development.

Strong, supra note 108, at 155-56. Conservationists dubbed the Governors' and Wyden bills "Sons of Tahoe."
residents of the local counties. In 1980, California and Nevada remedied this problem when they entered into a new bi-state compact that reformed TRPA's composition. The new compact added four more members to the TRPA commission, three of whom were to represent the state at large, and the fourth to be picked by the other six members of the Nevada portion of the commission. Local resident membership, therefore, went from a six out of ten majority in the 1969 compact to either a six out of fourteen minority, or possibly a seven out of fourteen split in the 1980 compact. Despite the lessons learned in Lake Tahoe, the Governors' bill and H.R. 3853 assured local counties a ten out of fourteen majority.

4. Conclusion of 98th Congress

The summer and fall of 1984 lapsed with no appreciable narrowing of the gap between the Packwood bill's Forest Service management and the Governors' bills and H.R. 3853's management by commission. Senators Packwood and Hatfield had been able to persuade forty-two colleagues to co-sponsor S. 627, but could not persuade Washington's Senators. Most doubted the co-sponsors would remain supportive of S. 627 if seriously challenged by the Washington Senators.

113. See Tahoe Compact, supra note 109, art. III(a).
115. The 1980 Lake Tahoe compact also corrected a provision in the 1969 compact which treated a development proposal as approved if the TRPA Commission did not specifically deny it within sixty days: "[w]henever . . . the agency is required to review or approve any proposal, . . . the agency shall take final action within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved." Tahoe Compact, supra note 109, art. VI(k) (emphasis added). The 1980 Lake Tahoe compact reversed this procedure by requiring the affirmative vote of at least five members of the state in which the project is located and nine votes from TRPA overall, in order for a proposal to be approved. Act of Dec. 19, 1980, supra note 114, art. III(g)(1). If such a vote could not be reached, "an action of rejection shall be deemed to have been taken." Id. (emphasis added). Again, sponsors of the Senate and Wyden bills found themselves repeating the failed policies of the 1969 compact by including provisions in their bills in which development proposals were "deemed approved" during the interim period unless the Commission issued a "written determination of inconsistency" within sixty days after receiving the application. Amend No. 2125, supra note 94, §§ 208(b)(3), (c); H.R. 3853, supra note 95, § 8(b)(3), (c).
Two major political changes occurred between the fall of 1983 and November 1984, however, which greatly affected passage of Gorge legislation. First, Senator Henry Jackson, never an enthusiastic advocate of Gorge legislation, died on September 12, 1983. Dan Evans replaced him. Senator Evans had earned a solid reputation of favoring environmental protection during three terms as Governor of Washington. Second, Booth Gardner, a vigorous advocate of comprehensive Gorge legislation, defeated John Spellman for the Washington governorship in November, 1984.

a. Hearing, Senate Energy and Natural Resources Committee, Stevenson, Washington, November 8, 1984

The positions of the new Senator and Governor clashed only two days after the 1984 election in Stevenson, Washington, at a hearing sponsored by the Senate Energy and Natural Resources Committee, which Senator Evans chaired. Stevenson was the hotbed of vehement opposition to federal legislation. Several hundred people crowded into, and spilled outside of, the Rock Creek auditorium. Most wore buttons stating "No Federal Control" and "Thou Shalt Not Covet Thy Neighbors' Gorge."

Senator Evans opened the hearing by stating that he was "seeking new ideas." Fourteen hours and 125 witnesses later, the Senator closed the hearing, after asking whether anyone remaining wished to testify. Although he had few new ideas, he now had a keen appreciation for the high emotions and enormous polarization created by this issue. Testimony had changed very little in the nineteen months from Senator Hatfield's hearing. Most Gorge residents and local officials rancorously resisted all federal efforts while citizens, elected officials, and conservation organizations, typically based outside the area, promoted legis-

117. See supra note 93 for Sen. Jackson's cool floor speech.
118. Senator Evans won the subsequent Nov. 8, 1983 election against Congressman Mike Lowry.
120. Id. at 607.
121. Many conservation organizations were represented by Gorge residents
lation at least as strong as that codified by S. 627.

Two fresh and extremely important positions, however, were revealed during the hearing’s first hour. To the consternation of conservationists, Senator Evans announced that while he would “study this matter carefully before making any decisions,” he believed “[t]he initiative of the Governors of Oregon and Washington, together with the cooperation of local governments, should represent the prime effort for preservation of the gorge.”

Those favoring strong legislation were as elated by the testimony of Governor Booth Gardner’s representatives as they were disappointed by Senator Evans’ words. The Governors’ statement stressed four points. First, the federal government should play “the primary role” in Gorge management. Second, any commission created by the legislation must represent “the broad interests of all Washington and Oregon citizens, as well as the interests of local gorge residents.” Third, key Washington tributaries which flow into the Gorge needed protection. Fourth, a moratorium on development in the Gorge should be instituted until a management plan could be adopted. Finally, the Governor’s representative stated: “[C]learly, Booth Gardner is on the side of taking action now to protect the gorge and urges strongly that legislation embodying the general criteria above be enacted without further delay.” At that point, the mutters and groans from the Stevenson crowd which accompanied the Governor’s testimony erupted into a cacophony of boos, hisses, and cat-calls. Senator Evans slammed down his gavel several times to quell the outburst and threatened to adjourn the hearing.

The 98th Congress and 1984 ended with no further progress towards a Gorge Act. The Northwest delegation was unable to

who supported federal legislation. Several county officials also favored legislation. See generally Hearing on Land Management, supra note 119.

123. Id.
124. Id. at 32 (statement of Booth Gardner, Governor-Elect, State of Wash., as presented by Dave Michener).
125. Id.
126. Id.
127. Id.
128. Id. at 33.
129. Id. (statement of Sen. Evans; personal knowledge of author).
bridge the abyss between opponents and proponents of legislation, nor was it able to reconcile the differences between the commission form of management proposed by Governor Atiyeh and former Governor Spellman, and the direct federal management favored by the Packwood bill.

V. COLUMBIA RIVER GORGE BILLS, 99TH CONGRESS

The 99th congressional session witnessed dramatic progress towards enacting legislation. Senators and Congressmen introduced five Gorge bills, the Senate held a fact-finding workshop in the Gorge, and Congress convened two hearings in the nation's capital. This session established the framework for the eventual National Scenic Area Act as the Congressmen melded the different management approaches taken in the Governors' initiative bills with S. 627 and H.R. 1747 by providing management authority to both the Forest Service and to a regional commission—not dominated by local representatives—and by geographically segregating this authority. This section charts the legislative progress as well as analyzes the fundamental differences between the 99th Session's bills concerning enforcement, standards for development, adoption of a management plan, and interim management.

A. Senate Workshops, June, 1985

In the spring of 1985, still unable to settle their philosophical differences over management, the Senators tried a new tack. On March 29, they sent a letter to interested parties announcing a basic agreement on the need for federal legislation (although disagreement remained on the content of the legislation) and proposed a series of workshops in the Gorge.130 The purposes of these workshops would be to identify the following areas on maps provided by the Senators:

1. Areas of high residential density and commercial use which should be exempted from federal legislation. These may include incorporated cities and towns and unincorporated areas where existing and future development may be concentrated.
2. Areas of scenic, cultural, and natural resource concern which require binding and coordinated policies and goals for their use.

130. See letter from Senators Evans, Gorton, Hatfield, and Packwood to Friends of the Columbia Gorge (Mar. 29, 1985).
and management.
3. Areas appropriate for special protection, including federal acquisition. These may include areas with outstanding scenic, cultural, recreation, and natural resource value. 131

The workshops shifted the arguments from land management philosophy to arguments over the relative value of certain lands. After overcoming a temporary setback caused by mailing maps labeling certain lands “areas of potential acquisition” 132 to the local county planning departments, the workshops proceeded constructively. Residents mingled with the Senate staffs at several meetings, thus lowering the level of rhetoric while attaining valuable information about the Gorge’s resources. Nevertheless, enormous differences remained.

During 1985, the first year of the 99th congressional session, extensive discussions took place concerning several issues including: the merits of management by a federal agency versus management by a regional commission, the relative value of particular areas within the Gorge, the nature of the development threats facing the Gorge and the adequacy of local and state regulations. The discussions did not go smoothly. Progress made the previous week evaporated as new issues emerged. Slowly, however, a general consensus began to form.

On August 14 and 15, 1985, the Washington and Oregon Governors sponsored a retreat in Lacey, Washington, for the staff of Senators, Governors and certain Representatives to resolve outstanding philosophical differences. After two days of difficult and emotional negotiating, they reached a breakthrough with a general consensus on several key elements and concepts to be included in legislation. This consensus formed the genesis for subsequent bills, and eventually, the National Scenic Area Act.

The following were among the agreements the Lacey partici-

131. Id. at 2.
132. Gorge residents had been told by opponents to legislation that the federal government would condemn their houses and throw residents off their lands if the National Scenic Area Act were enacted. One organization, Columbia Gorge United, even distributed a primer based upon “the House that Jack Built,” which culminated in the U.S. Forest Serv. condemning Jack’s house. See J. Wrabek, A Columbia Gorge Primer (1982) (available at the office of Friends of the Columbia Gorge). Accordingly, many Gorge residents were not reassured when maps were distributed which labeled some lands “areas of potential acquisition.”
pants reached:

1. The creation of a two-tiered management structure for the Gorge which would create "special management areas under the planning and management authority of a single federal agency" with the remainder of the Gorge area being "the responsibility of a regional commission,"

2. General goals and policies to be included in separate management plans prepared by the federal agency and the regional commission,

3. Veto authority in the federal agency over the commission's management plan,

4. Interim protection measures,

5. Tentative boundaries. 133

B. Introduction of Gorge Bills

Congress remedied the failure to introduce any Gorge bills in 1985 by introducing a flurry of bills early in 1986. On February 6, the four Senators introduced as a consensus, albeit a consensus with varying degrees of enthusiasm, Senate bill 2055. 134 S. 2055 walked, very carefully, the line between the commission form of management espoused in the old Governors' bill and the federal management form sponsored in the old Packwood bill. Except for designated urban areas, which were exempted (as in the Packwood bill), S. 2055 divided the Gorge into areas directly managed by the Forest Service, and into other areas that would be managed by a regional commission.

Aware of the imminent introduction of S. 2055, Congressmen Weaver (D., Or.) and Lowry (D., Wa.) had introduced, two days before the introduction of S. 2055, the old Packwood Bill (S. 627) as H.R. 4114. 135 Whether the purpose of introducing H.R. 4114 was to gain tactical or political advantage (Congressman Weaver was running against Senator Packwood for his seat in the November election), conservationists were as surprised as senators.

135. Id. § 4(c)(1).
On the same day that the Senators introduced S. 2055, Congressmen AuCoin (D., Or.) and Bonker (D., Wa.) also introduced a bill—H.R. 4134—which captured the middle ground between S. 2055 and H.R. 4114. H.R. 4134, later reintroduced with minor, perfecting amendments as H.R. 4221, used the same structure as the Senate bill, but strengthened key provisions. To further complicate matters, Congressmen Wyden and Morrison introduced, also on February 6, a bill—H.R. 4161. They intended it to be identical to S. 2055, but H.R. 4161 was actually, to everyone’s surprise including the sponsors, different from the Senate bill in several fundamental respects.

C. Comparison of Bills

S. 2055 (Senate bill), H.R. 4221 (AuCoin/Bonker bill), and H.R. 4161 (Wyden/Morrison bill) were based upon the same structure. Under these bills, the Forest Service would directly manage the Area’s most critical lands—the special management areas (SMAs). The remaining lands (except for twelve designated urban areas which were exempted from the Act’s regulations) would be managed by a twelve-member commission composed of six county appointees and six appointees by the Governors. Unlike the previous bills based upon the Governors’ initiative, however, this commission would be created by state,
not federal, law.\textsuperscript{146} H.R. 4114 (Weaver/Lowry bill), conversely, established the Secretary of Agriculture as the administrator of the entire National Scenic Area,\textsuperscript{148} created an advisory commission,\textsuperscript{147} and exempted only incorporated cities.\textsuperscript{148}

1. Enforcement

Although they shared comparable frameworks, the Senate, AuCoin/Bonker, and Wyden/Morrison bills differed in fundamental respects. Perhaps the most critical difference concerned enforcement. The Senate bill made enforcement of the Act's standards and management plan entirely discretionary: "The commission shall monitor activities of counties pursuant to this Act and \textit{may} take such action as necessary to ensure compliance."\textsuperscript{149} Both the AuCoin/Bonker and Weaver/Lowry bills, however, made enforcement mandatory.\textsuperscript{150} For example, the AuCoin/Bonker bill stated: "The commission shall monitor activities of counties pursuant to this Act and \textit{shall} take such action to ensure compliance."\textsuperscript{151} The Wyden/Morrison bill also deviated from the Senate bill by requiring mandatory enforcement.\textsuperscript{152}

2. Development Standards

Just as important as enforcement were the development standards in the various bills. Generally, the standards contained in the AuCoin/Bonker bill were clearer and more protective than those in the Senate and Wyden/Morrison bills. The standards in the Weaver/Lowry bill, which the Forest Service would implement, were the least specific of all.

The Senate and Wyden/Morrison bills relied upon a standard which allowed certain land use activities—residential development,\textsuperscript{153} surface mining,\textsuperscript{154} and hydroelectric projects\textsuperscript{155}—to pro-

\textsuperscript{146} H.R. 4114, \textit{supra} note 136, § 4(a)(1).
\textsuperscript{147} Id. § 4(b)(2).
\textsuperscript{148} Id. § 3(b)(3).
\textsuperscript{149} S. 2055, \textit{supra} note 134, § 15(a) (emphasis added).
\textsuperscript{150} H.R. 4221, \textit{supra} note 138, § 15(a); H.R. 4114, \textit{supra} note 136, § 9(a).
\textsuperscript{151} H.R. 4221, \textit{supra} note 138, § 15(a).
\textsuperscript{152} H.R. 4161, \textit{supra} note 139, § 15(a) (emphasis added).
\textsuperscript{153} \textit{See} S. 2055, \textit{supra} note 134, §§ 6(b)(9)(A)-(B); H.R. 4161, \textit{supra} note 139, §§ 6(b)(9)(A)-(B); H.R. 4114, \textit{supra} note 136, § 9(a).
ceed if these activities did not “substantially impair” the Gorge’s resources. These bills “encourage[d] but [did] not require” commercial development in the exempted urban areas.139

Conservation bills prohibited “major development actions” within SMAs. S. 2055, supra note 134, §§ 6(b)(9)(A)-(B); H.R. 4161, supra note 139, § 6(b)(9)(A). Major development actions included subdivisions, short plats, multifamily residential, commercial and industrial facilities. S. 2055, supra note 134, § 2(h); H.R. 4161, supra note 139, § 2(h). S. 2055 and H.R. 4161 allowed residential development in SMAs as long as that development did not “substantially impair” the Gorge’s resources. S. 2055, supra note 134, § 6(b)(9)(A); H.R. 4161, supra note 139, § 6(b)(9)(A).

By contrast, in addition to prohibiting “major development actions” within the SMAs, H.R. 4221 permitted new residential development within the SMAs only by the owner of record as of the enactment date, and only if the development would not “adversely impair” the Gorge’s values. See H.R. 4221, supra note 138, § 6(b)(7)(B). H.R. 4221 also required all medium and high density residential development to be directed to the urban areas, see id. § 6(b)(7)(A), and expressly discouraged the conversion of forest and agricultural lands to urban and other incompatible uses. See id. §§ 6(b)(1)-(2).

The Senate bill (S. 2055) and the Wyden/Morrison bill (H.R. 4161) used the “substantial impairment” standard to determine whether surface mining should be conducted, even within the SMAs. See S. 2055, supra note 134, § 6(b)(8); H.R. 4161, supra note 139, § 6(b)(8). H.R. 4221 prohibited surface mining in the SMAs, H.R. 4221, supra note 138, § 6(b)(6)(A), and applied a more rigorous “adversely impair” standard (also used by the Gorge Commissions) to operations outside SMAs. See id. § 6(b)(6)(B).

Except for the White Salmon River (which would be studied under the Wild and Scenic Rivers Act), see S. 2055, supra note 134, § 13(b); H.R. 4161, supra note 139, § 13(b), the Senate and Wyden/Morrison bills allowed hydroelectric development—even within SMAs—as long as that development did not “substantially impair” the Area’s resources. S. 2055, supra note 134, §§ 13(a)(1)-(2); H.R. 4161, supra note 139, §§ 13(a)(1)-(2). H.R. 4221 also established a study for the White Salmon River, see H.R. 4221, supra note 138, § 13(b), which prohibited hydroelectric development within SMAs, and only allowed projects outside SMAs which would not “adversely impair” the Area’s resources. H.R. 4221, supra note 138, §§ 13(a)(1)-(2). H.R. 4114 neither addressed hydroelectric activities nor included Gorge tributaries within its legislative purview.

The AuCoin/Bonker bill (H.R. 4221) required commercial development within the designated urban areas, except for five other urban areas where such develop-
tionists preferred the AuCoin/Bonker bill’s stricter “adversely impair” standard. The adverse impairment standard required only a single determination, while the substantial impairment standard needed an additional step: the proposal’s impairment must be both adverse and substantial.

3. Management Plan

The Senate, Wyden/Morrison, and AuCoin/Bonker bills provided that the regional commission draft, and approve by eight votes (a majority of each state’s delegation to the commission), a management plan for the entire National Scenic Area. The approved plan would be subject to a Secretarial veto, which in turn could be overridden by a “supermajority” (two-thirds) vote of the commission.

The AuCoin/Bonker bill required nine votes to override the Secretarial veto, whereas the Senate and Wyden/Morrison bills required only eight votes. The Secretarial veto was of less consequence, therefore, in the latter bills since once the commission had enough votes to adopt the management plan, it had sufficient votes to override a Secretarial veto.

4. Interim Management

The AuCoin/Bonker bill provided greater interim protection for the Gorge’s resources by replacing the Senate bill’s “substantial impairment” standard with the “adverse impairment” standard during this period, and by establishing a six-month development moratorium in the SMAs while the Secretary adopted

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157. S. 2055, supra note 134, § 6(a); H.R. 4161, supra note 139, § 6(a).
158. S. 2055, supra note 134, § 6(d)(1); H.R. 4161, supra note 139, § 6(d)(1).
159. S. 2055, supra note 134, § 6(d)(3); H.R. 4161, supra note 139, § 6(d)(3)(B).
interim guidelines. Curiously, the Wyden/Morrison bill used the AuCoin/Bonker bill’s “adverse impairment” standard during this interim period, but did not include the temporary development moratorium for the SMAs.

The Senate, AuCoin/Bonker, and Wyden/Morrison bills shared one provision critical to interim protection. If the states failed to establish the commission, or if any substantial functions or responsibilities of the commission were held unconstitutional, then the Secretary would establish the commission as a federal agency. This provision was remarkably similar to one used for the Pacific Northwest Electric Power and Conservation Planning Council, of which Senator Evans, coincidentally, had been chairman.

D. Washington, D.C. Hearings

The Senate Energy and Natural Resources Committee, chaired by Senator James McClure (R., Id.) received jurisdiction over the Senate bill. The three House bills, the AuCoin/Bonker bill, Weaver/Lowry bill and Wyden/Morrison bill, were jointly referred to the House Committee on Interior and Insular Affairs and Agriculture Committee.

Realizing that passage of H.R. 4114 was extremely unlikely in the House, virtually impossible in the Senate, and preferring the stranger standards, superior tributary protection, and firmer constitutionality found in H.R. 4221, supporters of federal legislation pushed for passage of the AuCoin/Bonker bill with strengthening amendments. Washington Congressmen Miller (R., Wa.), Dicks (D., Wa.) and Swift (D., Wa.) quickly joined their colleague Don Bonker (D., Wa.) and Oregon Congressman Les AuCoin (D., Or.) as co-sponsors of the AuCoin/Bonker bill.

The first Washington, D.C., hearings were scheduled for June

163. Id. § 10(a)(2)(A).
166. S. 2055, supra note 134, § 5(c)(1)(C); H.R. 4221, supra note 138, § 5(c)(1)(C); H.R. 4161, supra note 139, § 5(c)(1)(C).
before Chairman Malcolm Wallop's Senate Subcommittee on Public Lands and Reserved Waters, and before Chairman Bruce Vento's House Interior Subcommittee on National Parks and Public Lands. Two months later the House Agricultural Subcommittee on Forests, Family Farms, and Energy scheduled its first hearing for Stevenson, Washington.


Almost one hundred witnesses flew to Washington, D.C. for the Senate and House hearings. More than eighty witnesses testified before the Senate Subcommittee chaired by Malcolm Wallop (R., Wy.), and also chaired at various times during the nine hour hearing by Subcommittee member Senator Hatfield and Committee member Senator Evans.

The hearing's first witness was Senator Packwood. The Senator stated his belief that S. 2055 "leaves in some doubt effective protection of the scenic and natural values of the Gorge,"168 and that the bill represented "an outline for protection rather than . . . a final product."169 Senator Packwood urged the committee to strengthen the bill in four respects:

1. Enforcement of the management plan by the commission should be mandatory, not discretionary;
2. Commission override of a Secretarial veto of the management plan should require nine, not eight votes;
3. Standards for development should be strengthened;
4. Interim land use and resource management decisions should be reviewed.170

President Reagan's Administration presented its first official perspective on Gorge legislation at this hearing. The Administration's perspective dramatically contradicted the views of Senator Packwood as well as the other sponsors of the Senate bill.

169. Id.
170. Id. at 68-69.
The Deputy Secretary of Agriculture testified that while the administration supported "the concept of maintaining this scenic area," it opposed the Senate bill's creation of "an overriding Federal presence in this area." Specifically, the Administration opposed any federal authority over private lands, the concept of a federally created commission if the states failed to establish the regional commission, the enforcement of zoning through federal fines, and the "substantial Federal expenditures" authorized in the bill.

Local residents echoed the Administration's sentiments. Testimony from the Gorge counties ranged from Skamania County's denunciation of "flatland carpetbaggers" and "dilettante nongorge residents and nongorge taxpayers who wish to steal our own birthright by making the gorge their scenic playground," to Multnomah County's embrace of strengthening amendments to S. 2055. Several counties recommended amendments to exempt more cities and towns from regulation, create greater local representation on the regional commission, and minimize, or eliminate, any legislative impacts on economic development.

Supporters of Gorge legislation—particularly conservation organizations—concentrated their testimony on four amendments to the Senate bill: mandatory enforcement; stronger standards

171. Id. at 127 (statement of Peter C. Myers, Deputy Secretary, U.S. Dep't of Agric.).
172. Id.
173. See id.
174. See id. at 128.
175. footnote 175 missing
176. Id.
177. Id. at 364 (statement of William Benson, Chair., Bd. of County Comm'rs, Skamania County, Wash.).
178. Id.
179. See id. at 690-91 (statement of Dennis Buchanan, County Exec., Multnomah County, Or.).
180. See id. at 369-70 (statement of Ed Callahan, County Comm'r, Skamania County, Wash.).
181. See id. at 192 (statement of Jerry Routson, County Comm'r, Hood River County, Or.); see id. at 203 (statement of Judge William Hulse, Chair., Bd. of County Comm'rs, Wasco County, Or.); see also id. at 372 (statement of Ed Callahan).
182. See id. at 202 (statement of Judge William Hulse); see also id. at 372-73 (statement of Ed Callahan).
183. See id. at 561-72 (statement of Richard P. Benner, Staff Attorney, 1000
(including those in the interim period), an voting procedures, and greater tributary protection.

a. Enforcement

Witnesses stressed that if enforcement were discretionary, compliance with the Act would be discretionary. Moreover, the

Friends of Oregon).

184. See id. at 542-47 (statement of Gail L. Achterman, Friends of the Columbia Gorge).

185. See id. at 548-56 (statement of Borden F. Beck, Jr.).


187. See id. at 570-72 (exchange between Sen. Evans and Richard P. Benner). Sen. Evans and Mr. Benner engaged in the following exchange regarding the issue of discretionary enforcement:

SEN. EVANS: Clear and objective I can understand. Discretion is not quite the same thing. Frankly, I am astonished listening to you say that it is not just that local officials like discretion. It is that anyone—a manager of a major corporation, a schoolteacher, a doctor—does not like to be mandated by such strict requirements that they cannot use their professional discretion.

It seems to me that it is totally inappropriate to suggest that no discretion be allowed. Every single person sitting in this room wants and asks for some discretion and would object if, in their own professional circumstances, they were continually stifled by people not having any trust at all in their so-called discretion.

MR. BENNER: I understand that fully, Senator. And that is not what I am advocating. My testimony was that enforcement of the law not be discretionary with the commission. If it is the commission's law, the commission ought to enforce it. If in the minds of Congress that is not appropriate, then certainly citizens ought to be encouraged to enforce it and not have to bear the full brunt of enforcement by putting forward their own resources. One of the two things has to happen or you will have a program that will not work.

SEN. EVANS: You did not like the language that I read saying the administration shall be in accordance with the laws, rules, and regulations in such manner as in his judgment will best contribute to the attainment of the purposes? That would be inadequate to use?

MR. BENNER: Senator, when you use those words, are you talking about the enforcement of the law or are you talking about implementation of the law?

SEN. EVANS: I am talking implementation and enforcement. Enforcement of the law is to implement it.

MR. BENNER: Are you suggesting that that language be substituted for the language in section [544m(a)]?

SEN. EVANS: Would you think that would be an appropriate substitution?
citizen's suit provision contained in the Senate bill\footnote{\textit{supra} note 134, at \S 15(d).} would be useless with respect to commission enforcement, since a court could not compel the commission to exercise a purely discretionary function. Senator Evans indicated his concern that the commission should possess a certain amount of discretion in the establishment of rules and regulations.\footnote{\textit{Hearings, supra} note 168, at 570-72.} Some witnesses stressed that rulemaking discretion, which Senator Evans favored, was a separate issue from discretion in the actual enforcement of those rules and regulations.\footnote{See \textit{id.} at 572 (statement of Richard P. Benner); see also \textit{id.} at 686-87 (statement of Alan Merson, Wash. Envtl. Council). Merson clarified the distinction between the Commission's discretion in rulemaking and enforcement functions as follows:}

\begin{quote}
As a former law professor and as a resource manager for a number of years, I guess my observation is that certainly every bureaucrat, everybody who is in a position of authority, wants to have discretion to use his own best judgment as he will. I think the quotes from the Oregon Dunes National Recreation Area legislation are apt. But I think we ought to remember that in that legislation you have a unified manager. You have the Forest Service basically as an entity given responsibility for administering that area.

We are talking here about a very diverse body, a commission composed of 12 people holding varied opinions. It seems to me the environmentalists at this point, having finally accepted a two-tiered management approach such as is embodied in S.2055, if you take away the one chance to focus responsibility, to say the buck stops here, it stops with this commission, and you do not provide some clear guidelines for that commission to act and say to them, ladies and gentlemen, if you find that management plans are not being drawn up in accordance with the wishes of the commission at the local level, then you have the choice of deciding whether or not to take action, I am not sure what we have won.

I am not sure in fact that we really have a workable framework for achieving protection of the gorge. So, Senator, I would hold myself open for questions either at the end of my testimony, or at the end of the testimony of this panel, to further discuss the issue.
\end{quote}
b. Development Standards

Considerable discussion with Senator Evans also occurred during the hearing over the relative merits of the AuCoin/Bonker bill's "adversely impair" standard for residential development, surface mining, hydroelectric projects, and interim protection versus the Senate bill's "substantial impairment" standards.\textsuperscript{191} Senator Evans, who asked almost all of the questions on behalf of the Committee, believed the term "adversely impair" was redundant if not self-contradictory.\textsuperscript{192} One witness made a well-received\textsuperscript{193} proposal of a bifurcated standard loosely patterned after the National Environmental Policy Act and its Washington State counterpart,\textsuperscript{194} of "no adverse impact," for most uses within the SMAs, and "no significant adverse impact" in the General Management Areas.\textsuperscript{195}

c. Voting Procedures

Supporters of Gorge legislation also promoted a nine-vote requirement for the commission to override a Secretarial veto of the management plan instead of the Senate bill's eight votes—the same number needed to initially approve the plan. Testimony stressed that a nine-vote override would provide a greater incentive for the commission to work closely with the Forest Service during the development of the management plan and would also better represent the national interest by strengthening the impact of a Forest Service veto.\textsuperscript{196}

d. Tributaries

The American Rivers Conservation Council proposed greater

\begin{quotation}
I feel very, very strongly that discretion in enforcement is not appropriate. Discretion in interpreting the act and in deciding upon the adequacy of the local government's response is perfectly appropriate.

Thank you.
\end{quotation}

\textit{Id.}

191. See \textit{id.} at 242-47 (statement of Gail Achterman).
192. See \textit{id.} at 570 (remarks of Sen. Evans).
193. See \textit{id.} at 691-92 (exchange between Alan Merson and Sen. Evans).
194. See \textit{id.} at 542-47 (statement of Gail Achterman).
195. See \textit{id.}
196. See \textit{id.} at 553 (statement of Borden F. Beck, Jr.).
protection for the Gorge's tributaries from residential development, logging, and hydroelectric activities. It recommended that the Commission focus upon a combination of instant designations and studies for the seven tributaries to the Columbia River under the National Wild and Scenic Rivers Act. 197

Senator Evans adjourned the hearing more than nine hours after its start with a note of urgency if legislation were to pass in the 99th congressional session. 198 Only ten working weeks were


[Instant] Wild and Scenic River designations for:
1. Deschutes River, Oregon: 100 miles, from the Pelton Dams to its confluence with the Columbia River, to be administered cooperatively with the state.
2. Sandy River, Oregon: 12.5 miles, from Dodge Park (near the mouth of the Bull Run [R]iver) to Dabney Park (at the Stark St. Bridge near Troutdale), to be administered cooperatively with the state.

Wild and Scenic River studies for:
1. Klickitat River, Washington: 95 miles, entire length, to be conducted in cooperation with the Yakima Indian Nation.
2. White Salmon River, Washington: 40 miles, entire length.
5. Deschutes River, Oregon: 145 miles, from the headwaters to the Pelton Dams, to be conducted in cooperation with the Warm Springs Indian [T]ribe.
6. Hood River, Oregon: 67 miles, including its three major tributaries: 11 miles of the mainstem, 17 miles of the West Fork, 9 miles of the Middle Fork, and 30 miles of the East Fork.
7. Sandy River, Oregon: 36.4 miles, from source to Dodge Park (near the mouth of the Bull Run [R]iver), and from Dabney Park (at the Stark St. Bridge, near Troutdale) to its confluence with the Columbia River.

198. See id. at 780 (remarked by Sen. Evans). Evans stated:
This has been very helpful. I think that there is no question that we have a lot to go over, and a lot to examine. We will take all of this under advisement. I know Senator Packwood, Senator Hatfield, Senator Gorton, and I, and the committee, our own staffs and the committee staff will work hard to try to produce not only the report that will accompany this hearing, but also our decisions as promptly as we can make them on the proposed legislation, decisions as to what to do, and how to do it, and when to do it.

Then 'when' is rather urgent. If there is to be legislation of any kind, there is not very much time left in this session of Congress. We unques
left in the 99th Congress, and there were substantial disagreements over the content of the legislation. The Senator also reiterated his concern that those advocating strengthening amendments to the Senate bill recognize the concerns, and occasionally fears, of Gorge residents.¹⁹⁹

2. *Hearing, House Subcommittee on National Parks and Recreation, June 19, 1986*

Two days later, across the Capitol's rotunda, the House Interior Subcommittee on National Parks and Recreation held the first House hearing on Gorge legislation.²⁰⁰

...ably will be in front of a July recess pretty quickly, and after that there is a one 5-week period, and one 4-week period, and that is it before Congress adjoins. Anything after that of course would have to come up again as part of a brand-new piece of legislation with the beginning of the next Congress.

Id. ¹⁹⁹. *Id.* Senator Evans stated:

'I just hope that all of those who have these legitimate concerns which have been expressed today, concerns that particularly deal with the need for strengthening legislation, do so with the recognition of the needs and the concerns of the many people who live in the gorge.

Many of them have come here today expressing their concerns, sometimes their fears, over what has happened. These are not bad people; they are good citizens, good citizens who are frightened about what might happen. I think what we have got to do is find a way to, as closely as possible, assimilate those two views with the recognition that there is a uniqueness here that deserves to be recognized and preserved. There are also 40,000 good citizens who need to be reassured, and to be reassured particularly that their lands and their living will not be taken away from them. I would make just one final admonishment. I think there are some from time to time who feed on those fears, and who carry to people in the gorge some outrageously wrong information about how their property and their lands and their lives might be adversely affected. I have no truck for those who do that. I think they are damaging in the utmost to the very people they are trying to attract, because they are creating fear where fear should not occur, and that is too bad. But there is no way to stop that in a country like this one.'

Opponents of legislation raised substantially similar, if not identical, criticisms of the four pending House bills as were raised against the Senate bill. Proponents also raised similar issues, such as the need for greater protection for Gorge tributaries, but stressed other amendments, including: broader and stronger interim protection;\(^{201}\) the need for federal and state actions to be consistent with the management plan;\(^{202}\) and revision of scenic, special management and urban area boundaries, including the establishment of a Rowena Special Management Area in the eastern Gorge.\(^{203}\)

With the Washington, D.C., hearings before the major Senate and House committees out of the way, proponents of Gorge legislation were optimistic that a bill could pass in the 99th Congress. Although fundamental issues, including enforcement, standards for development, adoption procedures for the management plan, and interim protection remained unresolved, many problems had been solved and considerable congressional momentum had been generated.

VI. COLUMBIA RIVER GORGE BILLS, 99TH CONGRESS COMMITTEE PROCESS

As the 99th Congress drew to a close, the Gorge bills entered the post-hearing phase of the legislation process, when committees deliberated over the bills' substance. Markups before the congressional committees were highly politicized and quite unusual. In the House of Representatives, Gorge bills were defeated in an Interior subcommittee and in the Agriculture Committee: only a three-line bill emerged, after an earlier defeat, from the Interior committee. Conservative members of the Republican party turned Gorge legislation into a "cause célèbre," and appeared to have defeated legislation through parliamentary delaying tactics until a dramatic midnight reversal occurred before the Rules Committee. The Reagan Administration also became actively involved during this period and voiced substantial opposi-

\(^{201}\) See id.

\(^{202}\) See id.

\(^{203}\) See Hearings, supra note 168, at 200 (testimony of Lynn Herring, Portland Audubon Soc'y). The Rowena special management area is an SMA which eventually was created by the Act near Rowena, Oregon in the eastern part of the Columbia Gorge.
tion to the existing bills. This section examines the substantive modifications to the bills as they wound through the various committees and were passed by the House, twice passed by the Senate, and finally reluctantly approved by the President.

The four Gorge bills (S. 2055, H.R. 4114, H.R. 4221 and H.R. 4161) lurched toward committee markup during the summer of 1986 (a year whose legislative session was shortened to accommodate the upcoming congressional campaigns). The leaders of the Republican-controlled Senate were particularly supportive of the scheduled October 3 adjournment date in order to provide Republican incumbents sufficient time to combat an anticipated intense Democratic effort to recapture the Senate. Three committees and two subcommittees had jurisdiction over the bills, and a third committee—the House Rules Committee—would play a pivotal role.

Impetus for committee action came on August 4 when Senator Packwood agreed with his colleagues to significant amendments to S. 2055. These modifications strengthened the Senate bill in five fundamental respects: (1) commission enforcement of the Act became non-discretionary; 204 (2) development standards became stricter for Special Management Areas; 205 (3) interim protection was overhauled to give the Secretary sweeping powers throughout the National Scenic Area; 206 (4) Gorge tributaries received added protection; 207 and (5) federal and state actions were required to be consistent with the Act. 208

Other substantial amendments, many of which satisfied local concerns, also were included. For instance, amendments further restricted the Forest Service's condemnation powers; 209 a Rowena SMA in Oregon 210 and a National Wild and Scenic Rivers Act classification for the Klickitat replaced the Klickitat River SMA; 211 Home Valley, Washington became a new exempted

205. Id. §§ 6(d)(1)-(9).
206. Id. §§ 10(a)-(b).
207. Id. §§ 13(a)-(d).
208. Id. § 14(d).
209. Id. § 4(b)(1).
210. Id. § 13(c).
211. Id. § 9(b)(2)(B).
area;\textsuperscript{212} and local counties were granted payments-in-lieu-of-taxes for lands the federal government acquired.\textsuperscript{213}

Local and national conservation organizations gave the Senate bill (S. 2055), now considerably more protective of the Gorge's resources than any of its House counterparts, their enthusiastic endorsement.\textsuperscript{214} With new-found public support and full agreement among the Senators, the path was clear for the next legislative step—committee markup.

\textit{A. Senate Energy and Natural Resources Committee Markup, August 14, 1986}

The most difficult aspects of passing S. 2055 through the Senate Committee on Energy and Natural Resources were obtaining both a place on the committee agenda and a quorum to pass the bill out of committee in the waning days before the August 17th congressional recess. Ten days after the Senators announced their agreement to amend S. 2055—the last possible day for the Committee to meet before the recess—the Committee placed the new bill, styled as an amendment in the nature of a substitute to S. 2055, on its agenda. At the last moment, fifty-six "technical amendments" were included with the substitute amendment.

On the morning of August 14, the Committee met, but was unable to address the Gorge bill since it had been placed late on the agenda. Senate rules prohibited the Committee from meeting in the afternoon. Both Northwest members of the Committee stressed the urgency of the situation and noted that failure to pass the bill out of committee before the recess would preclude passage of Gorge legislation in the 99th Congress.\textsuperscript{215}

\begin{itemize}
  \item \textsuperscript{212} Id. \S 4(e)(1).
  \item \textsuperscript{213} Id. \S 14(c).
  \item \textsuperscript{215} See Roseburg News-Review, Aug. 15, 1986, at 4, col. e, \textit{quoting} Senators Hatfield and Evans as follows: "We are at the junction where we have the opportunity to either get this through both the House and the Senate or we'll have to wait until the next Congress" (Sen. Hatfield).

  "Failure to move today [would make] the chances of passage this year almost
Three hours later, the situation completely reversed. Senator Hatfield had marched to the Senate floor and obtained, in twenty minutes, unanimous consent from his colleagues for the Committee to meet at 1:30 that afternoon to consider his bill. Usually a full day is required for such approval through normal channels.216 Any Senator who disagreed with the bill could have stopped its passage at this point and incurred the wrath of Senator Hatfield, who also happened to be Chairman of the Appropriations Committee. By 1:50 p.m., a quorum existed and the committee unanimously approved the bill during a hurried, abbreviated session. Members broke into applause upon approval, undoubtedly cheering the unusual, and successful, process, rather than the content of the legislation.

No committee report accompanied the approved bill, which, after all, had been completed only hours before. Chairman McClure, reacting to what he described as an “extraordinary procedure,” announced that the committee staff would have an opportunity to digest the bill during the August recess, and any “necessary improvements” could be raised by amendment on the Senate floor.217

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extinct” (Sen. Evans).

216. See The Oregonian, Aug. 15, 1986, at A1, col. 4. According to The Oregonian:

It appeared for a while Thursday that the committee would not be permitted to vote out the bill. In the waning hours of the congressional session before the August recess this weekend, there have been tight controls on committee business.

The energy panel was prohibited from considering any legislation past 10:45 a.m. Thursday. When that deadline expired, Hatfield went to the Senate floor and won special permission from Democratic and Republican leaders for the committee to take up the gorge bill.

Ordinarily, it takes a day for such permission to be approved through normal channels. It took Hatfield 20 minutes of floor lobbying to get the Senate’s unanimous consent for the committee to proceed.

The committee vote was scheduled for 1:30 p.m. when many committee members were involved in other Senate business. It took about 20 minutes for enough senators to arrive at the committee room to approve the measure.

Id.

217. See id.
B. House Subcommittee and Committee Markups

Although unusual, the Senate markup process had been quick and effective. House subcommittee and committee markups, while also unusual, were contentious, slow, and ineffective. House Republicans, particularly Oregon Congressman Denny Smith, were determined to disrupt the bill's progress with all available parliamentary tactics. Time, especially the October 3rd adjournment date, was on their side.

After the recess, on September 23, the key House members announced their united support behind a new bill, H.R. 5583, which was similar to S. 2055's substitute amendment. Among the differences, called "technical" by the House sponsors, were the following:

1. Extension of the initial terms of Commission members from two, three, and four years to four, five, and six years;
2. Reformattting the bill's provisions for adoption and development of the management plan;
3. Tightening procedures for the approval of land use ordinances; and
4. Inclusion of a provision which prohibited federal funding of certain development projects during the bill's interim period.

While not of great substantive import, certain of these changes, especially the federal funds prohibition, met with considerable philosophic resistance from Senators Hatfield and Evans. Fortunately for the supporters of the Gorge legislation, Congress failed to resolve three other major issues: a tax overhaul bill, federal spending bills (lumped together as a continuing resolution), and a solution for the Gramm-Rudman deficit reduction process (necessitated by a Supreme Court decision). Therefore, Congress

222. Id. §§ 6(a)-(d).
223. Id. §§ 7(b), 8(h)-(1).
224. Id. § 14(e).
postponed the October 3rd adjournment date for four days.

1. Subcommittee on National Parks and Recreation Markup, October 2, 1986

The first House Subcommittee markup was not scheduled until October 2. At that meeting, the Gorge bill ran into a political buzzsaw operated by conservative Republican Committee members who vehemently opposed the bill. They stated that the legislation was too onerous for local residents, instituted too much federal control over private lands, was too expensive, and was unnecessary.

The members' tactics were simple and effective. After offering an amendment to the bill, they would then demand a quorum. The Subcommittee would then be forced to recess in order to obtain a quorum (a difficult task, particularly in the dwindling days of the session) in order to vote on the amendment. Congressman Denny Smith had eighty amendments.226

After three frustrating hours, punctuated by continual recesses, the Subcommittee had only considered the first two pages of the seventy-four page bill, and only six of the eighty amendments. Chairman Bruce Vento (D. Mn.) ended the markup, stating, "[i]t's apparent to me that because of the tactics being used here that the subcommittee will not be able to conclude deliberations."227 Congressman Weaver maintained that the Republican tactics were "pure obstructionism for no purpose."228

Congress planned to recess in eight days, on October 10.229 Congressman Denny Smith rejoiced: "[w]e've only got time on our side."230

226. See The Oregonian, Oct. 3, 1986, at B8, col. 1 (three Republican Senators, led by Sen. Smith, raised six amendments and seventy-four were on the table already).
227. See id. at col. 2.
228. See id. at col. 3.
229. See id. at col. 2.
230. See id.
2. Committee on Interior and Insular Affairs Markup, October 3, 1986

The full Interior and Insular Affairs Committee met the following day in an attempt to discharge the bill out of subcommittee. Congressman Vento so moved, citing Republican obstructionist tactics, but Representative Larry Craig (R., Id.) opposed the move and called for a quorum. Unable to obtain a quorum of the full Committee on the Friday before an important campaign weekend—especially once all the Republican members, except for Congressman Craig who was needed to call for the quorum, absent themselves—the Committee was adjourned.

3. Committee on Interior and Insular Affairs Markup, October 7, 1986

Four days later, the Committee met again to try to discharge H.R. 5625\(^{231}\)—an amendment in the nature of a substitute for H.R. 5583—from the Subcommittee. Congressional adjournment had been postponed for another three days. Once more, Republicans intended to use procedural maneuvers to delay sending the bill out of committee.\(^{232}\) Representative Denny Smith again planned to offer eighty amendments.\(^{233}\)

This time, however, the Democrats frustrated the Republicans. Over the weekend, the Democratic leadership obtained commitments from a sufficient number of committee members to

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Employing some procedural tricks themselves to counteract those of their Republican adversaries, Democrats in the House Interior Committee yesterday won that panel's blessing for the controversial Columbia River Gorge bill.

... 

House Republicans opposed to the bill came to yesterday morning's Interior Committee meeting intent on using the same procedural maneuvers they employed last week to block action on the measure.

For example, Rep. Denny Smith, R-Ore., planned to offer about 80 amendments. The strategy: Use committee rules to delay and obstruct until majority Democrats quit in frustration.

Id.
233. See id. at col. 2.
maintain a quorum to discharge the bill from Subcommittee. Representative Vento moved to discharge, Representative Marlenee (R. Wyo.) objected for lack of quorum, a quorum was obtained, and the Subcommittee discharged the bill.

Representative Weaver next moved the Committee to substitute a five line bill for the seventy-three page H.R. 5625. This maneuver would create a "blank check" bill which would contain no provisions vulnerable to Republican amendment. Later, perhaps on the House floor, a full bill could be substituted for the blank check. The requirement of a larger quorum to approve the substitute caused supporters to recess until 4:00 that afternoon, to complete markup.

At 4:00 p.m., the Committee reconvened. By 4:15, with no Republicans having yet appeared, the Committee—still short a quorum, but with no Republicans to object—approved the substitute and voted the bill out of committee by unanimous consent. Moments later, Representative Smith, the Republican apparently designated to object to the presumed lack of quorum, appeared. Incensed, Smith shouted at Committee Chairman Representative Seiberling (D. Oh.), "Is this that important to you, to railroad it through like this?" The Chairman's succinct reply was "If you didn't get here, that's tough." The laughter of most committee members (several of whom embraced Congressman Weaver and repeatedly yelled "Save the Gorge") evidenced the delight of having overcome the Republicans' dilatory tactics. Again, no committee report accompanied the five line bill.

4. Subcommittee on Forests, Family Farms and Energy Markup, October 8, 1986

Two days before Congress' new adjournment date, and a day after the Interior Committee's action, the House Agricultural Committee's Subcommittee on Forests, Family Farms and Energy met to consider H.R. 5625. Congressman Bob Smith, while opposed to the bill, did not make the continual quorum calls used by the Interior Subcommittee members six days earlier, and suc-

234. See id.
235. See id.
236. See id. at col. 5.
237. See id.
cessfully attached several amendments to the bill.

The most significant amendment adopted by the Subcommittee required all of the counties' appointees, and two of the Governors' six appointees to the Commission, to reside within the boundaries of the National Scenic Area. The Subcommittee approved H.R. 5625 as amended. No committee report, however, accompanied the bill.

5. Committee on Agriculture Markup, October 10, 1986

Once again, Congress pushed its adjournment date back, breathing new life into the Gorge bill. On October 10, the full Committee on Agriculture met to consider the bill that the Subcommittee passed. Republican members of the Committee, however, again used delaying tactics. Congressman Smith prepared eight amendments. Congressman Marlenee had eighty.

Congressman Marlenee's opening statement alliteratively maintained that the bill had been "ram-rod, bulldozed, and railroaded" in the Interior Committee. Congressman Weaver, also a member of the Agricultural Committee, responded that the Gorge bill was "the gentlest of bills," thwarted by the "dilatory tactics of a small band of willful men."

The markup quickly deteriorated. Congressman Marlenee objected to each amendment vote. After several quorum calls, Chairman de la Garza (D. Tex.) abruptly banged down his gavel and adjourned the Committee stating "it's regrettable that action would get stalled here when we're trying to preserve that beautiful area," and that the only hope for passage of a Gorge bill was "maybe the Senate bill or nothing."

C. Senate Passage, October 10, 1986

Indeed, chances of enacting the Senate bill had increased considerably since the Energy and Natural Resources Committee markup. During the intervening two months, the Committee's professional staff had an opportunity to dissect the substitute amendment to S. 2055 and provide further modifications.

1. Changes Sought by Committees

The Reagan Administration, however, supported by Senators McClure and Wallop, found the Committee-approved version of S. 2055 unacceptable.\(^{240}\) The Administration, and the Committee's professional staff, sought amendments to limit the federal government's authority over private lands;\(^{241}\) reduce the financial cost of the legislation;\(^{242}\) and clarify elements in the bill which the Administration found "confusing [and] internally inconsistent."\(^{243}\) Senator Wallop threatened to request a roll call vote on any bill which did not address these requirements.\(^{244}\)

Given the time needed for such a vote, and the controversial nature of the bill, such a request—in the last few days of the congressional session—would kill all hopes of enacting Gorge legislation during the 99th Congress. The personal staffs of the Northwest Senators and the Committee staff commenced a series of round-the-clock negotiations to try to resolve the concerns of the Senate chairmen and the administration.

a. Federal Authority

The Administration's greatest objection to the bill concerned federal authority over private lands: "The Federal role should be limited to providing advice to the Bistate Columbia Gorge Commission that would be established by the States under the bill . . . . There should be no direct Federal approval or control responsibilities over zoning the use of private lands."\(^{246}\) Federal authority over the special management areas—the most valuable lands in the Gorge—was the foundation upon which the tenuous compromise between the land management structures offered by the Governors' bill and the Packwood bill rested. Without this authority, the coalition of support for S. 2055 would dissipate and the fight for legislation would persist.

\(^{240}\) See U.S. DEP'T OF AGRIC., MEMORANDUM 1 (Sept. 29, 1986) [hereinafter MEMORANDUM].
\(^{241}\) See id.
\(^{242}\) See id. at 1-2.
\(^{243}\) Id. at 2.
\(^{244}\) Interview with Joe Mentor, Legislative Assistant for Sen. Evans (Oct. 2, 1986).
\(^{245}\) MEMORANDUM, supra note 240, at 1.
Senator Evans and his legislative assistant for the Gorge, Joe Mentor, were particularly forceful advocates for retaining this Secretarial authority. One comical episode occurred on September 26, when, during the course of a seven hour meeting between the Senators' personal staff and the Committee staff, Mr. Mentor articulated the legislative precedents for this type of authority, including the Sawtooth National Recreation Area and the Cape Cod National Seashore. The Committee staff interrupted this recitation with howls of laughter as they explained that those bills were passed over the objections of their Senators who had been in the Senate minority. These same Senators, now in important leadership positions, found everything they considered objectionable in the earlier bills now combined in a single bill.\footnote{246}{Interview with Mark Walker, Legislative Assistant for Sen. Hatfield (Sept. 27, 1986).}

A similar objection that Senators McClure, Wallop, and the Administration had to the substitute amendment to S. 2055 concerned the scope and length of interim protection. They believed the Forest Service's interim powers were too extensive,\footnote{247}{See Memorandum, supra note 240, at 3.} and that if the states failed to ratify, the federal authority over the National Scenic Area should sunset within a specific time.\footnote{248}{See 132 Cong. Rec. S15,646-49 (daily ed. Oct. 8, 1986) (statements of Sen. Wallop and Sen. McClure).} The Administration characterized the Secretary's interim authority and his permanent authority within the SMAs as "an inappropriate and untenable role for the Federal Government. It is unacceptable and strongly opposed by the Administration."\footnote{249}{Memorandum, supra note 240, at 3.}

At the last moment, opponents struck a compromise regarding the Secretary's permanent authority. The Secretary would retain his authority over the SMAs. The Commission, however, would be placed as an intermediary between the counties and the Secretary.\footnote{250}{Amendment to S. 2055, supra note 204, §§ 8(h)-(m).} Also, the Commission could ultimately disagree with, and override, the Secretary's interpretation of whether a county's land use ordinance was consistent with the Secretary's SMA guidelines.\footnote{251}{See id. § 9(1)(5)(B).} If this happened, though, the Secretary retained—at the expense of the county—significant funding and condemnation
authority within the SMA.

No compromise, however, could be reached concerning the Secretary's interim authority. The Secretary's broad authority during this period provided a critical incentive for the states to ratify the legislation, in addition to assuring protection before approving the management plan. Conservationists regarded the interim provisions as fundamental, and they received support from Washington Governor Booth Gardner.

b. Cost

Although the substitute amendment to S. 2055 authorized only $64.8 million in expenditures, the Administration concluded that actual expenditures "could run over 100 million dollars over the next five years. Long-term costs could be much higher." Technical amendments which set caps upon certain expenditures were rapidly agreed to, and the general authorization amounts were left untouched.

In another marathon meeting, the Committee staff facetiously offered to double—to $20 million—the economic development funds authorized in the bill if only the Northwest Senators would withdraw their legislation.

c. Inconsistencies

The Administration also objected to bill language which it found confusing, and, at times, contradictory. The Committee staff modified language eliminating the possible creation of new, unintended Indian rights. It reformatted the bill to provide additional clarity, and rewrote portions of the findings and

252. See id. §§ 8(n), 9(b)(2)(B).
254. Amend. to S. 2055, supra note 204, §§ 16(a)-(b).
255. MEMORANDUM, supra note 240, at 4.
256. Interview with Mark Walker, Legislative Assistant for Sen. Hatfield (Sept. 29, 1986).
257. See MEMORANDUM, supra note 240, at 4.
258. See id. at 5.
259. Amend. to S. 2055, supra note 204, § 6.
purposes.\textsuperscript{260}

2. \textit{Floor Passage, October 8, 1986}

By October 7, two days before the anticipated adjournment date, the staff had the new version of S. 2055\textsuperscript{261} ready. While not entirely satisfactory to either the Administration or to Senators McClure and Wallop, this version \textit{did} dispel much of their harshest criticism. A letter dated October 6, to the Northwest Senators from Assistant Secretary of Agriculture George Dunlop, stated that the bill had been "substantially" improved.\textsuperscript{262}

According to Assistant Secretary Dunlop, the bill's amendment regarding federal authority over private lands in the SMAs "goes a long way toward addressing our objections."\textsuperscript{263} While "significant new spending authorities" are created, "the potential cost of this legislation has been reduced,"\textsuperscript{264} and "appropriate amendments have been developed to significantly clarify and improve the workability of the legislation."\textsuperscript{265}

On October 8, the Northwest Senators found a brief gap in the Senate's calendar and rushed to the floor to introduce, and try to pass, the amended version of S. 2055. Because of the end-of-session time constraints, all motions and amendments—except the actual vote for passage—required unanimous consent. Any Senator could therefore block the bill.

Senator Hatfield successfully obtained unanimous consent to consider S. 2055, to present and withdraw the committee-reported amendment in the nature of a substitute, and to present Amendment No. 3260, an amendment in the nature of a substitute to the earlier substitute amendment. The next hour witnessed the most thorough Senate explanation of what the amendment contained.

Senators Hatfield, Packwood, Evans, and Gorton gave floor speeches which summarized the amendment, stressing the importance of protecting the Columbia Gorge, the need for (and fair-

\begin{itemize}
\item 260. \textit{See id.} § 3.
\item 263. \textit{Id.}
\item 264. \textit{Id.}
\item 265. \textit{Id.} at S15,639-40.
\end{itemize}
ness of) the legislation, and the considerable amount of work and discussion which contributed to the bill’s evolution.\textsuperscript{266}

Senators Wallop and McClure quizzed the bill’s sponsors on a variety of issues, particularly relating to the bill’s relationship to timber harvesting practices,\textsuperscript{267} national forest lands,\textsuperscript{268} “federal zoning”,\textsuperscript{269} and the Commission’s authority with respect to federal agencies\textsuperscript{270} including the Forest Service,\textsuperscript{271} Bonneville Power Administration,\textsuperscript{272} and the Army Corps of Engineers.\textsuperscript{273} Although Senators Wallop and McClure found that the most recent bill was “really much closer to being satisfactory”\textsuperscript{274} and “a significant improvement over earlier versions,”\textsuperscript{275} respectively, both voted against the bill because of the failure to include a sunset deadline on the Secretary’s interim powers,\textsuperscript{276} the costs to the federal government,\textsuperscript{277} and—although both Senators agreed that “federal zoning” had been removed\textsuperscript{278}—the considerable federal authority over private lands.\textsuperscript{279}

At the conclusion of the discussion among the six Senators, the Senate voted upon and agreed to the amendment, with Senators Wallop, McClure, and Steven Symms (R. Id.) opposing it.\textsuperscript{280}

\textbf{D. House Passage, October 16, 1986}

While the Senate neatly concluded its deliberations, the House remained in disarray. On the same day the Senate passed

\textsuperscript{266} See id. at S15,641-45.
\textsuperscript{267} Id. at S15,646-48.
\textsuperscript{268} Id. at S15,647. This section-by-section analysis submitted for the record by the four Oregon and Washington Senators is the most thorough discussion of the bill’s provisions. Its usefulness, however, from the standpoint of legislative history, is limited because it is more explanatory than interpretive.
\textsuperscript{270} Id. at S15,648-49.
\textsuperscript{271} Id. at S15,648.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at S15,645.
\textsuperscript{275} Id. at S15,649.
\textsuperscript{276} See id. at S15,647, S15,650.
\textsuperscript{277} See id.
\textsuperscript{278} See id.
\textsuperscript{279} See id.
\textsuperscript{280} See id. at S15,650.
Amendment No. 3260 to S. 2055, the House Agriculture Committee could not pass H.R. 5625 out to the floor. Congress again postponed adjournment to the following week, October 14, 1986.

The problem confronting the House sponsors was how to reach the floor of the House, where it was assumed sufficient Democratic votes existed to pass a Gorge bill. Conservative Republicans had made the Gorge bill a "cause Célèbre," and were rallying loyal troops by urging, among other tactics, all Representatives in "Dear Colleague" letters to "oppose 'lock-up' of the Columbia River Gorge." The Wall Street Journal carried a guest editorial on the Gorge bill entitled "Stop Congress's National Adjournment Park".

The 99th Congress, in its stampede toward its planned adjournment on Oct. 3, appears ready to trample 41,000 residents of the Columbia River Gorge, a four-mile-wide, 90-mile-long river valley that forms part of the Oregon-Washington border.

* * *

This legislation offhandedly sacrifices people's homes, jobs and communities and casually supercedes elected governments with appointed 'managers' accountable only to Washington, D.C.

* * *

If Congress could be deflected from its adjournment stampede, there might later be time for these and other questions to be discussed and answered. For now, the rush for adjournment is on. One can only hope the stampede comes to an end before it reaches the Columbia Gorge.

Even a letter from Senator Hatfield, the dean of the Oregon delegation, to Representative Bob Smith stating: "Bob, I must plead with you to assist in the House effort to pass the Senate-passed bill without amendments," was to no avail.

To further complicate matters, after months of unsuccessful efforts by the Senators to involve it, the United States Department of Justice became embroiled. In an October 14, 1986 letter

to Representative Morris Udall, Chairman of the Interior Committee, the Department harshly criticized both H.R. 5625 and the recently-passed S. 2055: “Our concerns . . . are fundamental and serious enough to warrant consideration of a veto recommendation from this Department should the Congress now pass the legislation.” The Justice Department’s concerns included opposition to the Secretary’s interim injunctive authority during the pendency of a condemnation action, the citizen suit provision, the “indeterminate” interim period, federal land use regulation, and other provisions.

House sponsors were now presented with a five line bill which had emerged from the Interior Committee only by fluke after being defeated in two other committees. Sponsors also faced steadily growing opposition from both House Republicans and the Administration. Congress, moreover, was two weeks past its adjournment date and anxious to leave the Capital. A battle on the floor of the House—the only refuge in the gathering storm—was assured, but only if a Gorge bill could reach the floor.

Of all the factors working against reaching the House floor, the pro-environmental Democratic chairman of the Subcommittee on National Parks and Recreation, Representative Bruce Vento (D. Mn.) ironically posed the greatest obstacle. Congresswoman Vento insisted on relatively insignificant bill modifications (which in some instances diminished protection for the area), including: a requirement that state forest lands not be traded out of the Area like other forest lands; a delineation of certain federal lands; and other provisions.

286. See id.
287. See id.
288. See id.
289. See id.
290. See id.
291. The Washington delegation and conservationists who wanted the Wash. Dep’t of Natural Resources (DNR) lands traded out of the Nat’l Scenic area opposed this modification because of DNR’s constitutional mandate to provide revenue for schools and roads from harvesting its forested lands. This modification was particularly harmful because Congressman Vento also wanted to remove the bill’s clause which required state actions to be consistent with the Act. See H.R. 5705, infra note 295, § 9(d)(1).
funds which could not be appropriated within the National Scenic Area if the states failed to ratify, 292 an authorization cap on the funding of recreational facilities, 293 and a requirement that certain appropriations be contingent upon state ratification of the legislation. 294

Because the bill's sponsors were unable to resolve these and other issues to the satisfaction of conservation organizations and the Northwest Senators (who would have to pass any House bill dissimilar to S. 2055 as amended), precious time elapsed. A critical consequence of the lost time was that during the few remaining days before adjournment no more suspension calendars (which allowed any bill to be taken to the floor upon a two-thirds vote) would be scheduled. One hope remained. The Rules Committee could issue a rule that would allow a vote on the new version of H.R. 5625—H.R. 5705 295—which addressed Congressman Vento's concerns, and limiting debate, since most members would not want to spend the last hours of the session debating a bill to protect the Columbia River Gorge. The Rules Committee, however, was not scheduled to meet during the session's last week.

1. Rules Committee, October 15-16, 1986

Nevertheless, on the morning of October 15, Congressman Weaver successfully set a hearing before the Rules Committee. At the hearing, the Congressman sought a "closed rule" which would have limited debate on the bill and prohibited amendments. Congressman Robert Smith strenuously objected, however, stating he had ten amendments for debate. Other Congressmen joined him and defeated the rule. Opponents rejoiced. Congressman Weaver declared chances of bill passage as "nil," and his staff advised

292. While the purpose of this modification was to protect the area's resources, many believed it superfluous because federal actions were already required to be consistent with the Act. By implication, therefore, this modification could be interpreted as permitting these funds to be appropriated within the National Scenic Area—even if such appropriation were judged inconsistent with the Act—once the states ratified the Act. See H.R. 5705, infra note 295, § 14(e).
293. H.R. 5705, infra note 295, § 16(b)(2).
294. H.R. 5705, infra note 295, § 16(c). Note, however, that this provision had been included in the amended version of S. 2055 passed by the Senate. See Amend. to S. 2055, supra note 204, § 16(c).
lobbyists to return to the Northwest.\textsuperscript{296}

Hours later, yet another dramatic reversal occurred. Congressmen AuCoin, Bonker, and Wyden rounded up members of the Rules Committee and asked them to reconsider the matter. Most importantly, Washington Congressman and House Majority Whip Tom Foley intervened with the Chairman of the Rules Committee, Claude Pepper (D., Fla.). Since the rules required a legislative day to lapse between issuance of a rule and debate on that rule, sponsors knew any delay would require debate on the Gorge bill on the session's last day. Few members would support spending several hours debating an issue as controversial as the Columbia Gorge on the last day of the session. The Rule Committee, accordingly, agreed to meet at midnight that night—the same legislative day.

The midnight meeting proved explosive. Bill sponsors sought a "modified closed rule" which limited debate and permitted opponents to offer only three amendments. Congressman Robert Smith objected stating that he had ten amendments and would not be given an opportunity to represent his constituents. Neither he nor Congressmen Denny Smith and Ron Marlenee were swayed by Congressman AuCoin's testimony that those amendments could be condensed into a single substitute amendment. Congressmen Bonker, Miller, and Morrison also testified in favor of the rule. Republican members of the committee stomped out of the room. At 1:00 a.m., the Democrats finally mustered a majority to approve the rule. Later, Chairman Pepper understatedly described the hearing as an "unusual circumstance."\textsuperscript{297}

2. \textit{Floor Passage}

The next day, the House met for over four hours to consider the rule, H.R. 5705, and Congressman Smith's three amendments. Raucous debate ensued. Opponents emphasized, often vitriocially,\textsuperscript{298} the bill's failure to pass cleanly through committees, its

\begin{itemize}
\item \textsuperscript{296} Telephone interview with Kevin Kerschner, Legislative Assistant for Rep. Weaver (Oct. 15, 1986).
\item \textsuperscript{297} Tacoma News Tribune, Dec. 14, 1986.
\item \textsuperscript{298} Three hours into the debate, Congressman Strang (R. Co.) stated: "Mr. Chairman, we are spending 3 hours on this issue which has slithered through the process here during the dark of night, a slimy travesty, a ripoff of the American taxpayer. . . . [a] slimy raid on the American taxpayer." 130 Cong. Rec. H11,124
\end{itemize}
controversial provisions regarding federal authority over private lands, costs, and the resistance of Gorge residents. Proponents emphasized the bill's widespread grassroots and political support, that Congressmen Robert and Denny Smith were the only members of the Oregon and Washington delegations who opposed the legislation, that the bill was the product of years of compromise, and that the committee process was the fault of the conservative Republicans' dilatory tactics. Discussion focused upon ideology rather than the bill's actual provisions, and is of limited interpretive value.

The rule, labeled a "gag rule" by opponents, passed 252 to 138 after the obligatory quorum call. Attention next turned to Congressman Smith's three amendments.

Congressman Smith first proposed an amendment in the nature of a substitute. He offered a 1983 bill, H.R. 3853 (based upon the Governors' initiative), as his substitute. The Congressman preferred this substitute because it provided for "local control" and did not permit "the authority of the existing land use laws" to be exceeded. The House defeated the amendment 272 to 111.

His second amendment required one of each Governor's three appointees to the Columbia Gorge Commission to reside within the National Scenic Area. A similar amendment had been initially approved by the House Agriculture subcommittee. After clarification that the amendment would include residents of the exempted urban areas, the bill's sponsors accepted it. Congressman Weaver later explained he accepted this amendment because Congressmen were becoming extremely impatient with the amount of time the House devoted to the Gorge debate, and that each Governor would most likely appoint a Gorge resident to the Commission anyway.

Congressman Smith's third amendment basically required

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300. Id. at H11,140.
301. Id.
302. Id. at H11,145.
303. Id. at H11,143-45.
that the Act prohibit the adoption of any land use regulations which were more stringent than the land use ordinances already acknowledged in Oregon by the Land Conservation and Development Commission. The House rejected this amendment by voice vote.

Four hours and fifteen minutes after debate commenced, the House voted on H.R. 5705 and passed it by an overwhelming margin of 290 to 91.

E. Senate Repassage, October 17, 1986

The Senate staff whisked H.R. 5705 to the Senate floor. While not pleased with several amendments contained in the House bill, particularly the removal of the state agency consistency clause\(^{306}\) and the grant of authority to the Commission to override an interim condemnation action by the Secretary,\(^{307}\) the Senate sponsors rushed to pass the House bill. After several unsuccessful attempts, Senator Hatfield brought the bill to the Senate floor on October 17, the last full day of the 99th Congress.

After Senate sponsors reassured Senator McClure that the bill would not affect certain water rights, including specific interstate water compacts,\(^{308}\) they then clarified federal agencies’ responsibilities pursuant to the Act\(^{309}\) and addressed the previously expressed concern over the constitutionality of the interim provision permitting disapproval of a Secretarial condemnation action.\(^{310}\) The Senate then voted upon, and unanimously passed, the bill.

Congress adjourned the next day and Skamania County lowered the American flag to half-mast for the following week.\(^{311}\)

\(^{306}\) Amend. to S. 2055, supra note 204, § 14(d).

\(^{307}\) H.R. 5705, supra note 295, § 10(b)(1).


\(^{309}\) Id. at S16,877-79.

\(^{310}\) Id. at S16,878.

\(^{311}\) See The Oregonian, Oct. 22, 1986, at C1, col. 1. According to The Oregonian:

The U.S. flag was flying at half-staff this week in front of the Skamania County Courthouse, part of a weeklong mourning period declared by the county commission after Congress passed legislation Oct. 17 creating a Columbia River Gorge National Scenic Area.

A resolution adopted Monday by County Commissioners Bill Benson
F. Presidential Approval, November 17, 1986

Supporters of H.R. 5705 wanted the bill sent to President Reagan's desk before the November 4, elections. They believed the President would be more likely to sign the bill, against his usual instincts, to help one of the bill's sponsors, Republican Senator Slade Gorton's close campaign. This particular campaign sparked national interest because many considered the seat a swing vote in the Democrats' bid to recapture the Senate.

The bill, however, did not reach the President's desk until November 5th. Since, Congress had adjourned for the year, the President would have to sign the bill by midnight, November 17, or it would die of a pocket veto.

The bill's supporters grew apprehensive as the 17th approached with no indication from the President that he would sign the bill. Veto recommendations were forwarded (officially and unofficially) to the Office of Management and Budget (OMB) by the Departments of Justice and Interior. Only the Department of Agriculture recommended approval. Senators Hatfield, Evans, and Packwood contacted the Administration, with Senator Hatfield staying in particularly close touch with OMB Director James Miller. Gorge residents orchestrated a mail campaign to the President urging a veto.

and Harold Vandenberg declared the week of mourning 'for the loss of principles upon which this nation was founded, namely representation by government and freedom to be secure in their persons and property. . . .'

The county commission, and many Skamania County residents, have vociferously opposed passage of gorge legislation—a collective sentiment that resulted in a line in the resolution that said Congress had acted on the legislation 'without any consideration for the people affected by it.'

* * *

President Reagan has until Monday to sign the bill, and a number of Skamania County residents and other gorge residents are lobbying for a veto. A cardboard box on the counter at the Skamania County Pioneer was labeled for 'veto letters,' and the weekly newspaper's advertising director, Joe Wrabek, the head of Columbia Gorge United, said the anti-legislation agency has been sending packets of the letters to the president since Saturday. The Pioneer's edition this week carries the headline, 'A Time for Mourning,' across the top of the front page, over a photo of the courthouse with the flag at half-staff.

Id.

312. The day before, Senator Gorton lost his bid for reelection to Brock Adams, former Congressman and Sec. of Transp.
On November 17, 1986, hours before the bill would have died, President Reagan signed it with one hand holding his nose, according to Senator Hatfield.\textsuperscript{313} In his signing statement, the President emphasized:

\begin{quote}
I am concerned that H.R. 5705 could lead to undue Federal intervention in local land use decisions. I believe that the regulation of private land use is generally not a responsibility of Federal government. While I am strongly opposed to Federal regulation of private land use planning, I am signing this bill because of the far-reaching support in both States for a solution to the long-standing problems related to management of the Columbia River Gorge.\textsuperscript{314}
\end{quote}

The President also expressed "grave doubts"\textsuperscript{315} as to the constitutionality of the House-added interim provision, which permitted the Commission—or the governor from the pertinent state if the Commission were not formed—to disapprove a Secretarial condemnation action.\textsuperscript{316} Accordingly, President Reagan stated that this disapproval should be interpreted as advisory rather than as an actual veto.\textsuperscript{317}

Upon learning of the President's signature, Skamania County Commissioner Bill Benson vowed to burn the flag.\textsuperscript{318}

While the tactics employed by conservative Republicans, primarily in the House, ultimately failed, their legacy will undoubtedly be felt in the Columbia River Gorge for years to come. Because of these tactics, which forced the Act's sponsors to rush the bills through the Committees before congressional adjournment, not a single committee report was adopted. Accordingly, the Columbia River Gorge National Scenic Area Act is devoid of a prime element of legislative history often necessary for interpretation.

\begin{itemize}
\item \textsuperscript{313} Television interview with Sen. Hatfield (KGW Television, Nov. 17, 1986) (transcript unavailable).
\item \textsuperscript{314} President's Statement Upon Signing H.R. 5705, 22 WEEKLY COMP. PRES. Doc. 1576 (Nov. 24, 1986) [hereinafter President's Statement].
\item \textsuperscript{315} Id.
\item \textsuperscript{316} H.R. 5705, supra note 295, § 10(b)(1).
\item \textsuperscript{317} President's Statement, supra note 314.
\item \textsuperscript{318} Television interview with William Benson (KGW Television, Nov. 17, 1986) (transcript unavailable).
\end{itemize}
VII. COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ACT

Columbia Gorge National Scenic Area

This section examines each section of the Columbia River Gorge National Scenic Area Act (Gorge Act or Act). Where appropriate, clarifying elements of legislative history are referenced and explanations for certain key provisions are presented.

A. Purposes

The purposes for enacting the Gorge Act are unambiguous. Unlike earlier drafts which contained as many as twenty-one frequently contradictory findings and purposes, the Act is a testimony to simplicity:

The purposes of this Act are—

(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 paragraph (1).

B. Framework

What the Act achieves through clarity of purpose, however, is somewhat overshadowed by the complexity of its remaining provisions. As in earlier drafts, the Columbia River Gorge National

320. Id. § 544a (West Supp. 1987).
Scenic Area (Scenic Area or Area) is divided into three separate land classifications: Special Management Areas (SMAs), General Management Areas (GMAs) and Urban Areas (UAs). Each of these areas is administered by different management entities and subject to disparate land use standards. The boundaries for the three designated areas are set on maps incorporated into the Act, and can be altered only in a limited fashion subject to strict criteria.

1. Special Management Areas

Special Management Areas are those areas within the Scenic Area with the most significant scenic, natural, recreational, and cultural values. Historically, these lands are the most vulnerable to development pressure. Approximately forty-five percent, or 112,328 acres, of the 253,500 acre Scenic Area is included within the SMAs. The five SMAs are:

<table>
<thead>
<tr>
<th>Area</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gates of the Columbia River Gorge, Oregon</td>
<td>51,746</td>
</tr>
<tr>
<td>Gates of the Columbia River Gorge, Washington</td>
<td>26,732</td>
</tr>
<tr>
<td>Wind Mountain, Washington</td>
<td>15,799</td>
</tr>
<tr>
<td>Burdoin Mountain, Washington</td>
<td>10,204</td>
</tr>
<tr>
<td>Rowena, Oregon</td>
<td>5,120</td>
</tr>
<tr>
<td>All islands within the Scenic Area</td>
<td>2,727</td>
</tr>
</tbody>
</table>

A slight majority of the land within the SMAs is in public ownership, primarily federal.
The Forest Service has direct management authority over all lands—both public and private—within the SMAs.328 This authority is enforced through the Forest Service's acquisition powers as well as through its ability to seek injunctive, or other appropriate relief, against violations of the Gorge Act.329 The Secretary is authorized to make "minor revisions" to the boundaries of the SMAs, at his discretion.330

2. General Management Areas

The bulk of the land within the Scenic Area outside the SMAs is included within the General Management Areas. The Columbia River Gorge Commission331 (Commission) has direct management authority over these lands which comprise approximately 45%—or about 113,257 acres—of the Scenic Area.332 While an integral part of the overall scenic, natural, cultural, and recreational values of the area, these lands are generally considered not as critically important as the lands within the SMAs.

a. Composition of Commission

While Congress consented to its formation in the federal Act, the Commission is solely a creature of state law. Oregon and Washington must ratify the Act within one year of its enactment333 by specific incorporation in state law,334 by establishing the Commission,335 and by providing the Commission with legal authority to enable it to carry out its functions and responsibilities.336 The Commission is considered established when four members have been appointed from each state.337

329. Id. §§ 544g(a)(1), m(b)(1) (West Supp. 1987). Violators of Secretarial orders, regulations and other actions also may be subject to criminal penalties imposed pursuant to the traditional federal authority contained in 16 U.S.C.A. § 551 and other applicable laws. 16 U.S.C.A. § 544m(b)(5)(A) (West Supp. 1987).
331. Id. § 544c(a)(1)(A) (West Supp. 1987).
332. Id.
335. Id.
336. Id.
337. Id. § 544c(a)(2) (West Supp. 1987).
fails to ratify the Act, the Secretary is given management authority over the entire Scenic Area, including both SMAs and GMAs, but excluding the Urban Areas.\textsuperscript{338}

The Commission has twelve voting members and a thirteenth, \textit{ex officio}, nonvoting member appointed by the Secretary\textsuperscript{339} who must be an employee of the Forest Service.\textsuperscript{340} Of the twelve voting members, half are appointed by the two Governors\textsuperscript{341} and half by the local county commissioners (one appointee from each Gorge county).\textsuperscript{342} County appointees must reside within the county of appointment, but not necessarily within the Scenic Area.\textsuperscript{343} One of the three appointees by each Governor must reside within the Area.\textsuperscript{344} No members of the Commission may be federal, state, or local elected or appointed officials.\textsuperscript{345} If any county fails to appoint a commissioner, the Governor of the state will make the county’s appointment.\textsuperscript{346}

While the composition of the Commission shares some similarities to the 1969 Lake Tahoe Bi-state Compact (particularly that a majority, eight of twelve, of the commissioners must reside within the local counties), the differences are more pronounced. The primary distinctions between the Commission and the 1969 Compact are (1) that an equal number of appointments are made by authorities outside the Scenic Area as are made by authorities within, and (2) that elected and appointed officials—those who, theoretically, would be more likely to sacrifice long-term protection for short-term economic development—are barred from serving on the Commission.

The Gorge Act also differs in fundamental respects from both Tahoe compacts, especially the 1969 one, by greatly restricting Commission authority through complex voting procedures, and by incorporating mandatory and specific land use standards in the Act itself.

\textsuperscript{338} Id. § 544h(a)(1) (West Supp. 1987).
\textsuperscript{339} Id. § 544c(a)(1)(C)(iv) (West Supp. 1987).
\textsuperscript{340} Id.
\textsuperscript{341} Id. §§ 544c(a)(1)(C)(ii), (iii) (West Supp. 1987).
\textsuperscript{342} Id. § 544c(a)(1)(C)(i) (West Supp. 1987).
\textsuperscript{343} Id.
\textsuperscript{344} Id. §§ 544c(a)(1)(C)(ii), (iii) (West Supp. 1987).
\textsuperscript{345} Id. § 544c(a)(3) (West Supp. 1987).
\textsuperscript{346} Id. § 544c(a)(1)(C)(i) (West Supp. 1987).
3. Urban Areas

Thirteen cities and towns, totaling 27,915 acres—ten percent of the Scenic Area—are exempt from the Act's purview. The Commission may make "minor revisions" to the boundaries of an Urban Area, but such revisions require a vote of two-thirds of the Commission members, including a majority of the members appointed from each state. The revision must also comply with four rigorous criteria.

C. Management Plan

Land use activities within the Scenic Area must be consistent with the Act's comprehensive management plan. The management plan will be based upon various studies and resource inventories and must be consistent with nine development standards. Local county zoning ordinances must be consistent with the management plan.

347. See Kennedy, supra note 324.


350. These criteria require the Commission to find that:

(A) A demonstrable need exists to accommodate long-range urban population growth requirements or economic needs consistent with the management plan;

(B) revision of urban area boundaries would be consistent with the standards established in section 544d of this title and the purposes of sections 544-544p of this title;

(C) revision of urban area boundaries would result in maximum efficiency of land uses within and on the fringe of existing urban areas; and

(D) revision of urban area boundaries would not result in the significant reduction of agricultural lands, forest lands, or open spaces.


354. Id. §§ 544e(b)(2), f(h)(2) (West Supp. 1987) (Act creates affirmative duty on local governments as local zoning ordinance shall be consistent regardless of
1. Process

The management plan has two components, a plan prepared by the Forest Service for the SMAs and a plan prepared by the Commission for the GMAs. The Act establishes requisite plan elements and timelines for completing the elements.

a. First year: Resource inventory, economic opportunity study and recreation assessment

Within one year of its establishment, the Commission—in cooperation with the Secretary—must complete a resource inventory for the entire Scenic Area. The inventory must "incorporate without change" a similar resource inventory that the Secretary must prepare for the SMAs. The inventory "document[s] all existing land uses, natural features and limitations, scenic, natural, cultural, archeological and recreation and economic resources and activities . . . ." Also within a year of establishment, the Commission must complete an economic opportunity study "to identify opportunities to enhance the economies of communities in the Scenic Area in a manner consistent with the purposes of the Act."

The third requirement for the Commission during the first year is to prepare a recreation assessment for the Scenic Area. This assessment—which incorporates a similar recreation assessment completed by the Secretary for the SMAs—must: (1) designate areas for an interpretive center in Oregon and conference center in Washington, or for other appropriate facilities; (2) identify areas suitable for other public use facilities; and (3) designate areas for increased recreational access to the Co-

357. Id. § 544f(c) (West Supp. 1987).
358. Id. § 544d(a)(1)(A) (West Supp. 1987).
359. Id. § 544d(a)(2) (West Supp. 1987).
360. Id. § 544d(a)(3) (West Supp. 1987).
361. Id. § 544f(d) (West Supp. 1987).
lumbia River and its tributaries.\textsuperscript{364}

\textit{b. Second year: Land use designations}

Within two years of its establishment, the Commission must develop "land use designations" for the use of non-federal land within the Area.\textsuperscript{365} The Secretary, however, develops land use designations for the SMAs.\textsuperscript{366} The land use designations must be based upon the resource inventory and be consistent with the Act's development standards.\textsuperscript{367} The land use designations must also:

1. Designate lands "used or suitable for the production of crops, fruits or other agricultural products or the sustenance of livestock" as agricultural lands,\textsuperscript{368}

2. Designate "lands used or suitable for the production of forest products" as forest lands,\textsuperscript{369}

3. Designate "lands suitable for the protection and enhancement of open spaces",\textsuperscript{370}

4. Designate lands outside of SMAs "used or suitable for commercial development",\textsuperscript{371}

5. Designate areas "used or suitable for residential development",\textsuperscript{372} and

6. Incorporate without change the Act's designation of Urban Areas.\textsuperscript{373}

\textit{c. Third year: Adoption of management plan}

\textit{i. Development Standards}

The Act specifies a level of protection with respect to certain lands within the Scenic Area and with respect to specific land use activities. For example, the management plan and all land use or-

\textsuperscript{364} Id. § 544d(a)(3)(C) (West Supp. 1987).
\textsuperscript{365} Id. § 544d(b) (West Supp. 1987).
\textsuperscript{366} Id. § 544f(e) (West Supp. 1987).
\textsuperscript{367} Id. § 544d(b)(1) (West Supp. 1987). For a discussion of the Gorge Act's development standards, see infra text accompanying notes 374-77.
\textsuperscript{368} Id. 16 U.S.C.A. § 544d(b)(2) (West Supp. 1987).
\textsuperscript{369} Id. § 544d(b)(3) (West Supp. 1987).
\textsuperscript{370} Id. § 544d(b)(4) (West Supp. 1987).
\textsuperscript{371} Id. § 544d(b)(5) (West Supp. 1987).
\textsuperscript{372} Id. § 544d(b)(6) (West Supp. 1987).
\textsuperscript{373} Id. § 544d(b)(7) (West Supp. 1987).
ordinances and interim guidelines are required to "protect and enhance" agricultural lands,374 forest lands,376 open spaces,378 and public and private recreation resources.377 They also must protect and enhance educational and interpretive facilities and opportunities throughout the Scenic Area.378

The Act also places rigorous standards upon certain land use activities. The strictest standard is an outright prohibition on "major development actions" within the SMAs.379 Major development actions are defined by the Act as:

(1) subdivisions, partitions and short plat proposals;

(2) any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment;

(3) 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 special management area or is for sand, gravel and crushed rock used for the construction, maintenance or reconstruction of roads within the special management areas used for the production of forest products; and

(4) permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size;380

This standard strikes at the heart of the greatest threat to the Scenic Area's resources and values: residential development. It prohibits a landowner within an SMA from dividing his land381 or from building a residence unless he owns forty acres or more.382 The Act also prohibits commercial (except certain recreation facilities), industrial, and multi-family residential development

375. Id. § 544d(d)(2) (West Supp. 1987).
376. Id. § 544d(d)(3) (West Supp. 1987).
377. Id. § 544d(d)(4) (West Supp. 1987).
378. Id.
379. Id. § 544d(d)(5) (West Supp. 1987).
380. Id. §§ 544(j)(1)-(4) (West Supp. 1987).
381. Id. §§ 544(j)(1), d(d)(5) (West Supp. 1987). Note, however, that § 544d(d)(5) gives the Secretary authority to permit plats and subdivisions that facilitate land acquisitions pursuant to the Gorge Act.
within SMAs, as well as mineral exploration, development, and production with two limited exceptions.

All residential development within the Scenic Area (excluding the designated Urban Areas)—even that development on SMA parcels larger than 40 acres—is prohibited if it would "adversely affect" the scenic, cultural, recreational, and natural resources of the Area.

The definition of "adversely affect" is a compromise struck between S. 2055's "substantially impair" and H.R. 4221's "adversely impair" standard. "Adversely affect" is defined in the Act as:

a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the Scenic Area, the determination of which is based on—

(1) the context of a proposed action;
(2) the intensity of a proposed action, including the magnitude and duration of an impact and the likelihood of its occurrence;
(3) the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and
(4) proven mitigation measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant affects to an insignificant level . . .

This definition was partially borrowed from the Council on Environmental Qualities' regulations, with one significant exception. That exception is the additional criterion that the determination of whether a project would adversely affect the Area's values take into account "proven mitigation measures" implemented by the proponent.

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384. Id. § 544(j)(3) (West Supp. 1987). The two limited exceptions are: (1) projects "which can be conducted without disturbing the surface of any land" within an SMA, and (2) projects that are for the extraction of "sand, gravel and crushed rock used for the reconstruction of roads" within the SMAs that are "used for the production of forest products." Id.
386. Id. §§ 544(a)(1)-(4) (West Supp. 1987).
387. 40 C.F.R. § 1508.27 (1986).
In addition to residential development, the Gorge Act contains strong standards for industrial and commercial development, and for the exploration, development, and production of mineral resources. For example, the Act prohibits industrial development within the Scenic Area except for within designated Urban Areas.\textsuperscript{389}

Commercial development, except for facilities included within the recreation assessment,\textsuperscript{390} is prohibited within the SMAs. The Act permits commercial development within the GMAs only if the activity does not adversely affect the Area’s scenic, cultural, recreational, or natural resources.\textsuperscript{391}

Other restrictions apply to the mining and forestry industries. The Act bans the exploration, development, and production of mineral resources (typically surface mining for gravel, although placer mining for gold\textsuperscript{392} also has been proposed) within the SMAs with two limited exceptions, and within the GMAs unless the mining could occur without adversely affecting the Area’s values.\textsuperscript{393} Similarly, the Act restricts timber management, utilization, and harvesting (including the construction of logging roads) within the SMAs. These activities on federal lands are subject to the Forest Service’s visual resource management guidelines.\textsuperscript{394} Timber related activities on private lands within the SMAs are subject to the adverse affect standard.\textsuperscript{395} The Act does not affect the rights and responsibilities of private timber land owners under the state Forest Practice Acts outside the SMAs.\textsuperscript{396}

\textit{ii. Plan Adoption}

Three years after the Commission has been created by state law, it must adopt a management plan for the Scenic Area.\textsuperscript{397} The

\begin{footnotesize}
392. Skamania County Pioneer, Feb. 25, 1987, at 6, col. 1 (North Bonneville resident Daryl Peterson argued that his gold mining claims staked prior to the effective date of the Gorge Act are protected by grandfathering).
396. \textit{Id.} § 544o(c) (West Supp. 1987).
397. \textit{Id.} § 544d(c) (West Supp. 1987).
\end{footnotesize}
management plan must contain the separate components created by the Forest Service for the SMAs, and by the Commission for the GMAs. The Commission and the Forest Service must base their components upon the resource inventories, include the respective land use designations adopted by both, and incorporate without change the Forest Service’s management direction for use of federal lands and the Forest Service’s guidelines for the development of SMA land use ordinances.

Adoption of the management plan requires a majority vote by the appointed commissioners—not a simple majority of a quorum—and the majority must include at least three members from each state. The Commission then forwards the adopted plan to the Secretary for his review. If the Secretary agrees that the plan is consistent with the Gorge Act’s purposes and development standards, or if he fails to act within ninety days, the process of adoption is complete. If, however, the Secretary disapproves of the plan by the Commission, he must state his reasons for his findings and submit suggested modifications to the Commission that would make the plan consistent with the Act’s purposes and standards. The Commission, within 120 days after receiving notice of the Secretary’s non-concurrence, must either revise and re-submit the plan to the Secretary, or override his objections. In order to override the Secretary’s objections, the Commission must muster a vote of two-thirds of its membership, including a majority of the members appointed from each state. The plan which is finally adopted must, even if the Secretary’s objections are overridden, be consistent with the Act’s purposes and development standards.

The override mechanism seems to reflect a curious agreement

398. Id. §§ 544d(c)(1), (4)-(5) (West Supp. 1987).
399. Id. § 544d(c)(1) (West Supp. 1987).
400. Id. §§ 544d(c)(2), (4) (West Supp. 1987).
401. Id. § 544d(c)(4) (West Supp. 1987).
402. Id. § 544d(c) (5)(A) (West Supp. 1987).
403. Id. § 544d(c) (West Supp. 1987).
405. Id.
409. Id.
with the arguments raised by conservationists at the June 17, 1986 Senate hearing that S. 2055's override provision (which required eight votes to override, but only eight votes to initially adopt the plan) was ineffective, yet disagreement with the proposed solution: a nine vote override.

At least every ten years the Commission must review the plan to determine whether it should be revised.\textsuperscript{410} Revisions must comply with the procedures for plan adoption,\textsuperscript{411} as must any amendments to the plan.\textsuperscript{412}

\textit{d. Fourth year: Implementation of management plan}

The approved management plan is forwarded to the six local counties for implementation. The procedures for approval of the counties' implementation ordinances differ depending upon the areas affected by the ordinances: the Commission has approval over ordinances for the GMAs while the Forest Service has considerable, but not total, authority over SMA ordinances.

\textit{i. General Management Areas}

Within sixty days after receiving the approved management plan, each county must submit a letter to the Commission stating that it proposes to adopt a land use ordinance which is consistent with the management plan's provisions for the GMAs.\textsuperscript{413} If the county does not submit such a letter, the Commission prepares the ordinance for the county.\textsuperscript{414} Subsequently, if the noncompliant county wishes, it may adopt a land use ordinance subject to Commission review.\textsuperscript{415}

A county which has decided to prepare an ordinance which is consistent with the plan must do so within 270 days of receiving the plan.\textsuperscript{416} The Commission must review the ordinance to determine whether it is consistent with the Act within ninety days of

\textsuperscript{410.} Id. § 544d(g) (West Supp. 1987).
\textsuperscript{411.} Id.
\textsuperscript{412.} Id. § 544d(h) (West Supp. 1987).
\textsuperscript{413.} Id. § 544e(b)(1) (West Supp. 1987).
\textsuperscript{414.} Id. § 544e(c) (West Supp. 1987).
\textsuperscript{415.} Id. § 544e(c)(2) (West Supp. 1987).
\textsuperscript{416.} Id. § 544e(b)(2) (West Supp. 1987).
receipt or it is deemed approved.417 If the Commission deter-
mines, however, that the ordinance is inconsistent with the man-
agement plan, it may deny approval.418 If denied, the Commission
must state the reasons for denial and submit suggested modifica-
tions to the county.419 The county then has ninety days to make
the suggested modifications and resubmit the ordinances to the
Commission.420 The Commission must accept or reject the new
ordinance within sixty days.421 If it rejects the ordinance, the
Commission will resubmit the ordinance to the county,422 and the
entire process begins again. Any amendments, revisions or vari-
ances to an approved land use ordinance must follow the same
procedures as initial adoption of the ordinance.423

ii. Special Management Areas

Given the concerns of unconstitutional “federal zoning”
raised by Senators Wallop and McClure and the Reagan adminis-
tration,424 the implementation process is more complicated for the
SMAs.

Within sixty days after receiving the approved management
plan, each county must submit a letter to the Commission stating
that it proposes to adopt a land use ordinance which is consistent
with the management plan’s provisions for SMAs.425 The plan, of
course, has incorporated without change the management direc-
tion for the use of federal lands,426 the land use designations for
the SMAs,427 and the guidelines for the development of SMA land
use ordinances—all of which must be developed and adopted by
the Secretary of Agriculture.428

418. Id.
419. Id. § 544e(b)(3)(B) (West Supp. 1987).
420. Id. § 544e(b)(3)(C) (West Supp. 1987).
421. Id.
422. Id.
423. Id. § 544(i) (West Supp. 1987). This section defines “land use ordinance”
as including any amendments to, revisions of, or variances from any ordinances
adopted by a county or the Commission pursuant to the Act.
424. See supra text accompanying notes 245-53.
426. Id. § 544d(c)(4) (West Supp. 1987).
427. Id.
428. Id. § 544d(c)(5)(A) (West Supp. 1987).
If a county fails to submit a consistency letter to the Commission, the Commission is responsible for creating the land use ordinance which remains subject to the SMA approval process. A non-compliant county may eventually decide to enact a consistent ordinance which would similarly be subject to the approval process.

Within 270 days of receipt of the management plan, each county is required to adopt an SMA land use ordinance which is consistent with the plan, and promptly submit it to the Commission. The Commission either must review the ordinance within ninety days and make a "tentative decision" that the ordinance is consistent with the management plan and forward the ordinance to the Secretary for his concurrence, or it must decide that the ordinance is inconsistent and return the ordinance to the county with suggested modifications. The county has ninety days after notification of inconsistency is given to modify and resubmit the ordinance to the Commission. The Commission then has sixty days to tentatively approve the ordinance and forward it to the Secretary or, if the ordinance is still inconsistent, to adopt its own ordinance for the county.

**aa. Secretarial concurrence**

Eventually, whether the Commission adopts its own ordinance for the county or tentatively approves a county ordinance, the Commission must submit the ordinance to the Secretary for his concurrence. The Secretary has ninety days upon receipt of the ordinance to concur with the Commission's determination of consistency, or to determine the ordinance is inconsistent.

If the Secretary does not act within ninety days, or if he concurs with the Commission's determination of consistency, the pro-

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429. Id. § 544f(h)(2) (West Supp. 1987).
430. Id. § 544f(e)(1) (West Supp. 1987).
431. Id. § 544f(m) (West Supp. 1987).
432. Id. § 544f(h)(2) (West Supp. 1987).
433. Id. § 544f(i)(1) (West Supp. 1987).
434. Id. § 544f(i)(2) (West Supp. 1987).
435. Id. § 544f(i)(3) (West Supp. 1987).
436. Id.
437. Id. § 544f(j) (West Supp. 1987).
cess halts.438 The ordinance is approved. However, if the Secretary decides the ordinance is inconsistent, he must submit modifications to the Commission which will make the ordinance consistent with the plan and the Act's purposes.439 The Commission then resubmits the ordinance to the county for revision and resubmission to the Commission, which then resubmits it to the Secretary.440 At this point, the process changes. If the Secretary again denies concurrence, the Commission must either prepare an ordinance for the county which meets the Secretary's approval, or it must override the Secretary's denial of concurrence.441 The override requires a two-thirds vote by the Commission, including a majority of the members appointed from each state.442

It is important to emphasize the consequence of the Commission override. The effect is not to replace the Secretary's responsibility for developing land use designations and guidelines for developing SMA ordinances, but to authorize the Commission, at the conclusion of the process, to disagree with the Secretary's interpretation of whether the county land use ordinance is consistent with the plan and the Act's purposes. Any amendments, revisions or variances to an approved land use ordinance must follow the same procedures as initial adoption of the ordinance.443

bb. County penalties

If the Commission overrides the Secretary's denial of concurrence, several significant penalties to the county automatically slide into place. Perhaps the most severe penalty is that certain federal funds authorized by the Act may not be made available to the offending county.444 These funds include:

1. Payments in lieu of taxes (the purpose of these payments is to partially offset revenue losses to counties caused by removing private land from the tax rolls)—$2,000,000.445
2. Construction costs for interpretive and conference

438. Id.
439. Id. § 544f(j)(2) (West Supp. 1987).
440. Id. § 544f(k) (West Supp. 1987).
441. Id.
442. Id.
443. Id. § 544(i) (West Supp. 1987).
444. Id. §§ 544f(n), n(c) (West Supp. 1987).
445. Id. §§ 544n(a)(2), 1(c) (West Supp. 1987).
centers—$10,000,000.  

3. Construction costs for recreation facilities—$10,000,000.  

4. Payments for restoration and reconstruction of the old Columbia River Scenic Highway—$2,800,000.  

5. Economic development grants (for projects that further the purposes of the Act, the management plan and the consistent land use ordinances)—$10,000,000.

The second major penalty applicable to a county which has adopted a land use ordinance approved by the Commission, but not by the Secretary, concerns the Secretary’s condemnation powers. These powers are suspended in counties for which the Secretary has concurred with the SMA land use ordinances, but are retained otherwise. Hopefully, these penalties will serve as incentives to counties to adopt land use ordinances which the Secretary will approve.

cc. Legislative history

The Rube Goldberg process for adopting SMA county land use ordinances which are consistent with the management plan and the Act’s purposes arose from the Reagan Administration’s conservative philosophy as well as from fears that direct Forest Service involvement in the approval of county land use ordinances would constitute unconstitutional “federal zoning.” The Department of Agriculture first articulated these concerns at the June 17, 1986 Senate hearing on S. 2055. That bill did not include the middle step of passing county land use ordinances through the Commission, but instead provided for direct relay of these ordinances to the Secretary for his approval or disapproval. Congress did not grant the Commission authority to override Secretarial interpretations of consistency. Deputy Secretary Myers testified, “Specifically, the Federal government should

446. Id. § 544n(b)(1) (West Supp. 1987).
447. Id. § 544n(b)(2) (West Supp. 1987).
448. Id. § 544n(b)(3) (West Supp. 1987).
449. Id. §§ 544n(b)(4), i(c)(1) (West Supp. 1987).
450. Id. § 544g(b)(2)(B) (West Supp. 1987). The Secretary's condemnation authority is retained if the subject lands are being used, or are in imminent danger of being used, in a manner incompatible with approved land use ordinances. Id.
451. See supra text accompanying notes 171-76.
452. S. 2055, supra note 134, at § 8(d).
not approve or disapprove plans for controlling private land use or variances from such plans . . . .”\textsuperscript{453} Senator Wallop, the subcommittee chair for Public Lands, Reserved Waters, and Resource Conservation found S. 2055 a “completely intolerable piece of legislation as it pertained to the concepts of Federal zoning . . . .”\textsuperscript{454}

The Act solved these concerns by isolating the Forest Service from county action in the land use ordinance adoption phase. Even though county ordinances must conform to Forest Service land use designations and guidelines for private and public lands within the SMAs, the Commission intervenes in any interaction between the county and the Forest Service. This labyrinth process, however, apparently alleviated much of the Administration’s concerns, according to an October 6, 1986 letter from the Department of Agriculture’s Assistant Secretary to Senator Gorton:

Our most serious previous concern was the relationship of the Secretary of Agriculture to State and local governments in the regulation of private lands. The proposed amendment would place the Commission, established under State law, in the role of direct interaction with local government. At the same time, the Secretary, in the special management areas that contain the vast bulk of Federal ownership, would retain a role in helping to develop guidelines for use by the Commission and local government. In addition, the Secretary would have an additional review role after the Commission and local government have developed regulations. This approach makes it clear that the Secretary consults with and provides advice to the Commission, while the Commission that would be established under State law deals with the counties. The Commission would retain authority to override Secretarial recommendations.

The amendment goes a long way toward addressing our objections to those provisions in the bill which some have described as tantamount to Federal land use zoning.\textsuperscript{455}

\textsuperscript{453} Hearings, supra note 168, at 127 (testimony of Peter C. Myers, Deputy Secretary, U.S. Dep’t of Agric.).


\textsuperscript{455} Id. at S15,639 (letter from Assistant Secretary Dunlop to Sen. Gorton).
dd. Constitutionality

The Reagan Administration’s distaste for the Forest Service’s role in guiding development on private lands within the SMAs seems grounded more upon personal philosophy than upon constitutional law. The Constitution’s property and commerce clauses have long supported certain federal regulation of activities conducted on private lands.456

As early as the nineteenth century, the Supreme Court held that Congress could regulate particular actions on nearby private lands which affected public lands.457 The property clause has most often been the constitutional foundation upon which this authority rests: “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.”458

When deciding whether a federal regulation constitutes a “needful” one “respecting” public lands, courts rely heavily upon Congress’ determination of compatibility with the property clause459 and pay close attention to such factors as: (1) the nexus between the private activity being regulated and the purposes for

456. This Article will not explore the constitutionality arguments in depth. That has been accomplished ably by other works. See, e.g., Soper, The Constitutional Framework of Environmental Law, FED. ENVTL. L. (1973) (the article articulates the numerous constitutional provisions which support environmental regulations by the federal government).

The two provisions which best buttress the constitutionality of the Gorge Act are the commerce clause—given the importance of the Act to international and national tourism, the impact on the Area’s resources created by an interstate highway and two interstate railroads, interstate commerce on the Columbia River and the profoundly important fisheries resource which uses the Columbia and its tributaries within the Act—and the property clause.

A more thorough discussion of the property clause issue may be found in G. Myers & J. Meschke, Proposed Federal Land Use Management of the Columbia River Gorge, 15 ENVTL. L. 71 (1984). That article contains a comprehensive analysis of the constitutionality, under the property clause, of federal land use regulation of private lands in or adjacent to federally reserved lands, as it applies to earlier bills to protect the Columbia Gorge, S. 627 and H.R. 3553.


458. U.S. Const. art. IV, § 3, cl.2.

enacting the regulation;\textsuperscript{460} (2) a direct relationship between the regulated activity and the federal interest;\textsuperscript{461} and (3) the extent of the federal interest.\textsuperscript{462}

The Supreme Court's interpretation of the property clause supports the Secretary's authority over private land use activities. The purposes of the Gorge Act—to protect the Gorge's scenic, natural, recreational, and cultural values—are clear, and the legislative history, embodied in the records of hearings and in the findings and purposes contained in earlier bill drafts, plainly articulates the threats to these values. The Act's development standards precisely address these threats, and the federal interest, identified by substantial federal land ownership within the SMAs and the nationally significant resources represented in the Scenic Area, is manifest.

\textit{ee. Similar Federal Approaches}

Private property regulation by the Forest Service and other federal agencies within federally-designated areas certainly is not a novel approach. Two prominent examples, the Sawtooth National Recreation Area\textsuperscript{463} and Hell's Canyon National Recreation Area,\textsuperscript{464} exist in the Northwest. The 750,000 acre Sawtooth NRA includes 25,200 acres of privately-owned lands,\textsuperscript{465} while the 650,000 acre Hell's Canyon NRA incorporates approximately 41,000 privately-owned acres.\textsuperscript{466}

Both of these NRAs use a regulatory method derived from the Cape Cod National Seashore,\textsuperscript{467} popularized as the "Cape Cod formula." The Cape Cod formula, as used by the sponsors of the

\textsuperscript{460} Alford, 274 U.S. at 267.
\textsuperscript{461} United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979).
\textsuperscript{462} Camfield, 167 U.S. at 529.
\textsuperscript{463} 16 U.S.C. § 460aa (1982). This Article will not analyze in depth the similarities between the Sawtooth and Hell's Canyon National Recreation Areas and the Columbia River Gorge National Scenic Area. For a comparison of those national recreation areas with earlier drafts of the Gorge Act, see Myers & Meschke, \textit{supra} note 456 at 84-89.
\textsuperscript{466} Telephone interview with Ron Bonar, Assistant Projects Manager of the Hell's Canyon National Recreation Area (Mar. 23, 1987).
\textsuperscript{467} 16 U.S.C. §§ 459b-4(b) (1982).
Gorge Act, requires local governments to enact zoning ordinances (and variances to the ordinances) which are consistent with standards promulgated by the Secretary of the Interior and subject to Secretarial approval. The need for this type of regulator mechanism is well articulated in the legislative history for the Cape Cod National Seashore:

The Federal Government does not have authority directly to enact zoning laws applicable to private property in any of the States. If it had such authority the task of preserving an area such as lower Cape Cod in such a way as to safeguard the interests of private landowners might be somewhat simplified, for Congress could simply enact a zoning law for the area . . . .

If the Federal Government acting on behalf of all the people of the United States is to establish a national seashore in such a way as not to interfere with the continued ownership and enjoyment of their property by private landowners within the seashore area, it is only reasonable that the communities involved adopt zoning laws which will assure that the property within the seashore will be used in a manner consistent with the purposes of the seashore.

For this reason section 5 requires the Secretary of the Interior to issue regulations as soon as possible after the enactment of the bill setting forth the standards which must be met by town zoning bylaws for purposes of suspending his power of eminent domain as provided in section 4. Zoning bylaws which meet such standards must be approved by the Secretary.468

At the Cape Cod National Seashore, the Secretary's standards for zoning bylaws include a general prohibition on all commercial and industrial use not specifically permitted by the Secretary.469 The Secretary, moreover, cannot approve a zoning bylaw which "contains any provision which he may consider adverse to the preservation and development" of the Seashore.470

The Hell's Canyon NRA and Sawtooth NRA Acts similarly provide the Secretary of Agriculture with the authority to establish regulations for private property.471 For instance, the Sawtooth NRA Act requires the Secretary of Agriculture to "make

470. Id. § 459b-4(c)(1) (1982).
471. Id. §§ 459gg-7(a), aa-3(a) (1982).
and publish regulations setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area."\(^{472}\) The regulations, as codified, specifically address land use activities including such standards as height, square footage, appearance, and setback requirements for buildings.\(^{478}\)

**D. Interim Protection**

If the Commission is formed by the states, the interim period established by the Act lasts until the counties' consistent zoning ordinances are adopted,\(^{474}\) or approximately four years. During this period, the Secretary is required to develop interim guidelines for the entire Scenic Area.\(^{475}\) The purpose of these guidelines is twofold: (1) to identify land use activities which are inconsistent with the Act, and (2) to govern the Secretary's condemnation powers.\(^{476}\)

The Secretary is authorized to enforce the interim guidelines through injunctive and condemnation authority until the Commission has approved zoning ordinances for the GMAs and the Secretary has concurred with SMA ordinances.\(^{477}\) With several exceptions, the Secretary may condemn "any land or interest which is being used or threatened to be used in a manner inconsistent with the purposes for which the scenic area was established and which will cause or is likely to cause impacts adversely affecting the scenic, cultural, recreation, and natural resources of the area."\(^{478}\)

The Secretary's interim condemnation authority does not extend to any lands or interests which are being used "in the same manner and for the same purpose" as used on the date of enactment "unless [the] land is used for or interest is in the development of sand, gravel, or crushed rock, or the disposal of refuse."\(^{479}\) The Secretary's interim condemnation authority is

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\(^{472}\) Id. § 460aa-3(a) (1982).
\(^{475}\) Id.
\(^{476}\) Id.
\(^{477}\) Id. § 544h(b) (West Supp. 1987).
\(^{478}\) Id.
\(^{479}\) Id.
further restricted by limitations placed on his permanent condemnation authority.480 One restriction placed on the Secretary's interim condemnation authority met with strong opposition from the Reagan Administration. This restriction allows the Commission—or the Governor from the pertinent state if the Commission is not yet formed—to override a condemnation action by a two-thirds dual majority vote.481 The Justice Department believed this override authority violated the Constitution's appointments clause,482 and President Reagan, upon signing the bill, stated his opinion that the override was advisory only.483

When formed, the Commission will share management authority over all private lands (within both SMAs and GMAs) with the Secretary until the interim period ends.484 The Commission is required to review all proposals for major development actions and new residential development.485 The Commission may allow these developments only if they are consistent with the Gorge Act's purposes and development standards.486 An interim development project located on private lands, therefore, may be prevented through the Commission's regulatory authority, through county regulatory authority, through the Secretary's acquisition authority, or through the Secretary's injunctive authority if the project is located within an SMA.487

480. See infra text accompanying notes 498-509.
482. U.S. Const. art. II, § 2, cl. 2. This Article will not analyze the appointments clause issue for two reasons. First, it is unlikely that a situation will arise—given the political sensitivities of the U.S. Forest Service—in which that agency would institute a condemnation proceeding unless it had first obtained the support of the Commission. Because this override authority exists only during the interim period, such a situation would have to develop in that relatively brief period.

Second, if this authority were held unconstitutional (presumably after years of litigation extending past the interim period), it would simply be severed from the Act pursuant to the section 544p severability clause. Loss of this authority would not affect implementation of the Act; it would only strengthen the Forest Service's management powers.

483. President's Statement, supra note 314.
484. 16 U.S.C.A. § 544h(c) (West Supp. 1987).
485. Id.
486. Id.
487. Violators of any order, regulation, or other action taken by the Secretary pursuant to the Act also may be subject to criminal sanctions. Id. § 544m(b)(5)(A) (West Supp. 1987).
If the Commission is not formed by either state, the Secretary's management authority over the GMAs and SMAs continues.\footnote{488} Should this happen, moreover, the $10 million authorized by the Act for compatible economic development is switched to the Secretary's land acquisition budget.\footnote{489} This authority, perhaps more than any other, incited the wrath of conservative Congressmen and the Administration. Senator Wallop referred to the concept of interim authority becoming permanent as "a dangerous proposition" over which he had "several reservations."\footnote{490} Senator McClure urged a time limit for the interim authority,\footnote{491} stating that the "possibilities for abuse are frightening."\footnote{492} The Justice Department announced that the failure to include a sunset provision for the Secretarial interim responsibilities was one reason it considered a veto recommendation to the President.\footnote{493}

It should be emphasized that early drafts of the Gorge Act did not contain this plenary interim authority. For instance, S. 2055 provided for a back-up regional commission, modeled after the Pacific Northwest Regional Power Council, appointed by the Secretary (albeit with identical compositional requirements) to manage the GMAs if the states failed to ratify the Act.\footnote{494} S. 2055 limited the Secretary's interim authority to the SMAs.\footnote{495} H.R. 4221\footnote{496} and H.R. 4161\footnote{497} emulated S. 2055.

E. Acquisition Authority

Except during the interim period, the Secretary's acquisition authority is limited to the lands within the SMAs and the Dodson/Warrendale Special Purchase Unit which the Secretary determines are needed to achieve the purposes of the Act.\footnote{498} The Special Purchase Unit is a small unincorporated residential area

\footnotesize{\begin{itemize}
\item \footnote{488} Id. § 544o(e) (West Supp. 1987).
\item \footnote{489} Id. § 544n(b)(4) (West Supp. 1987).
\item \footnote{491} Id. at S15,649 (statement of Sen. McClure).
\item \footnote{492} Id.
\item \footnote{493} See Justice Dep't Letter, supra note 285.
\item \footnote{494} S. 2055, supra note 134, § 5(c)(1).
\item \footnote{495} Id. § 10(a).
\item \footnote{496} H.R. 4221, supra note 138, § 5(c)(1).
\item \footnote{497} H.R. 4161, supra note 139, § 5(c)(1).
\item \footnote{498} 16 U.S.C.A. § 544g(a)(1) (West Supp. 1987).
\end{itemize}}
located near the Gates of the Gorge, Oregon SMA. The Act authorizes $40,000,000 to be spent for land acquisition.\textsuperscript{498a}

As discussed above, the Secretary's condemnation authority is greatly restricted. In addition to not allowing condemnation of land or interests used primarily for educational, religious, charitable, single-family residential, farming, or grazing purposes,\textsuperscript{499} the Secretary may not condemn lands or interests: (1) located in counties for which the Secretary has concurred with SMA land use ordinances (unless the lands are being used, or in imminent danger of being used, in a manner incompatible with the ordinances);\textsuperscript{500} (2) located within the Dodson/Warrendale Special Purchase Unit;\textsuperscript{501} or (3) are owned, held in trust for, or administered for, an Indian tribe.\textsuperscript{502} The Secretary may only condemn land or interests "as is reasonably necessary to accomplish the purpose of this Act,"\textsuperscript{503} and only when "all reasonable efforts" to acquire land with the owner's consent have failed.\textsuperscript{504}

While the Act does not specifically authorize, or preclude, the Commission from acquiring land, the Oregon and Washington enabling acts do provide the Commission this authority.\textsuperscript{505} Historically, the former State Gorge Commissions were empowered to acquire land from their inception,\textsuperscript{506} but this power was neglected.\textsuperscript{507}

The Act contains an unusual provision to benefit landowners within the SMAs. This provision suspends the application of an SMA land use ordinance if three years elapse after a landowner forwards "a bona fide offer to sell at fair market value" his land to the Secretary.\textsuperscript{508} If the Secretary does not buy the land within

\begin{thebibliography}{10}
\bibitem{506} See WASH. REV. CODE § 43.97.040(1) (1983); see also OR. REV. STAT. § 390.430(1)(a) (1985).
\bibitem{507} Telephone interview with Jeffrey Breckel, Director of the Columbia Gorge Commissions (Mar. 24, 1987).
\bibitem{508} 16 U.S.C.A. § 544f(o) (West Supp. 1987). This provision does not go into
\end{thebibliography}
that time period (unless the landowner extends the period), the land is subject to the relevant GMA land use ordinance. Landowners who own less than 40 acres likely will avail themselves of this provision.

F. Federal and State Consistency

With limited exceptions, federal agencies must exercise their responsibilities within the Scenic Area in a manner the Secretary determines is consistent with the Act. This provision was the subject of considerable attention on the floor of the Senate when both the substitute amendment to S. 2055 and H.R. 5705 passed. The substitute amendment to S. 2055 contained a federal and a state consistency clause, but the House bill deleted the section which required state agencies to act in a consistent manner with the Act. The States' enabling and ratifying legislation corrected this oversight.

G. Tributary Protection

The Scenic Area's major tributaries, the Wind, Little White Salmon, White Salmon, Klickitat, Deschutes, Hood, and Sandy Rivers are given varying degrees of protection which greatly exceed that given by earlier Senate and House bills.

The Gorge Act provides two general, far-reaching safeguards for tributaries and streams flowing through an SMA, and for rivers flowing through the Scenic Area that are established (or are under study) as a state-designated wild, scenic, or recreation river. The Act also provides specific protections, including designation under the National Wild and Scenic Rivers Act

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509. Id.
510. Id. § 5441(d) (West Supp. 1987).
511. See supra text accompanying notes 267-79.
512. Amendment to S. 2055, supra note 204, § 14(d).
513. See Or. H.B. 2472, supra note 505; see also Wash. H.B. 426, supra note 505.
(W&SRA), for individual tributaries.\footnote{516}

All tributary rivers and streams to the Columbia River which flow through a special management area are protected as components of the National Wild and Scenic Rivers System under the W&SRA,\footnote{517} unless construction of a water resources project would not have a “direct and adverse effect” on the Area’s resources.\footnote{518} Similarly, any river which flows through the Scenic Area which the state has established as a wild, scenic, or recreation river (or is under study for the same) is protected under the W&SRA unless the project meets conditions imposed by the state’s administering agency.\footnote{519} Currently, Oregon’s Sandy\footnote{520} and Deschutes\footnote{521} Rivers are the only Gorge tributaries which meet this test.

The Act also offers W&SRA protection to the following Gorge tributaries:

1. The Wind River, for not less than three years following the final approval of the Gifford Pinchot National Forest Plan\footnote{522} or submittal by the President to the Congress of a report which discusses the suitability of designating the Wind under the W&SRA,\footnote{523} whichever is later.\footnote{524}
2. The Hood River for not more than twenty years,\footnote{525} and
3. A segment of the Little White Salmon River, permanently.\footnote{526}

Section 1278(a) of the W&SRA prohibits federal licensing of the construction of any “dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act” on or directly affecting a protected river.\footnote{527} This section also prohibits federal assistance, “by loan, grant, license, or otherwise” of any water resources project which affects a protected river’s values directly and adversely.\footnote{528} To the extent that develop-
opment above or below the protected river segment will invade or "unreasonably diminish" the scenic, recreational, fish, and wildlife values present on the river segment when it was designated, those developments can also be proscribed by the W&SRA. Since a federal agency, the Federal Energy Regulatory Commission, must authorize most water resources projects, the W&SRA's protection is comprehensive.

The Gorge Act also provides instant designation under the W&SRA for the White Salmon and Klickitat Rivers. A segment of the Klickitat is designated a "recreation" river that the Secretary administers, while a section of the White Salmon is classified as a "scenic" river, also administered by the Secretary. Furthermore, nine miles of the Klickitat above the recreation portion and twelve miles of the White Salmon above the scenic segment is to be studied under section 1276(a) of the W&SRA.

Rivers classified under the W&SRA have two levels of protection against incompatible development: (1) federal prohibitions against water resource projects, and (2) federal acquisition authority over lands within the river corridor. Although subject to restrictions, the federal administering agency is permitted to acquire by condemnation, or on a willing seller basis, lands or lesser interests within the protected river corridor.

Rivers studied under the auspices of the W&SRA also receive certain safeguards for as long as three years, including: full protection against water resources projects; withdrawal of all public lands located within a quarter mile of the river from entry, sale, or other disposition; and withdrawal from prospecting or leasing of all minerals located on federal lands within a quarter of a mile of the study river. The federal government, however, is

529. Id.
532. Id. § 1274(a)(60) (West Supp. 1987).
533. Id. §§ 1276(a)(94)-(95) (West Supp. 1987).
534. Id. § 1278(a) (West Supp. 1987).
535. Id. § 1277 (West Supp. 1987).
536. Id. § 1277(a) (West Supp. 1987).
537. Id. § 1277 (West Supp. 1987).
538. Id. § 1278(b) (West Supp. 1987).
539. Id. § 1279(b) (1982).
540. Id. § 1280(b) (West Supp. 1987).
not given acquisition authority over lands adjacent to a study river.

H. Economic Development

To address the widespread local perception that the Act would harm the Gorge’s economy (a more cynical commentator might add, to lessen local political opposition to passage of the Act), several economic development and economic mitigation measures are included in the Gorge Act. These measures are broad in scope—including an economic opportunity study, special projects and local government assistance—but narrow in purpose—to provide for economic development that is consistent with the protection and enhancement of the Area’s scenic, cultural, recreational, and natural values.541

1. Economic Opportunity Study

Within one year of its establishment, the Commission is required to complete an economic opportunity study “to identify opportunities to enhance the economies of communities in the scenic area in a manner consistent with the purposes of this Act.”542 The Act’s purposes direct that such enhancement occur in only two ways: (1) by encouraging growth in the exempted urban areas, and (2) by allowing future economic development which is consistent with the protection and enhancement of the Gorge’s scenic, cultural, recreational, and natural resources.543

2. Special Projects

The Gorge Act authorizes numerous projects that will enhance the Area’s resources as well as bring federal funds into local coffers. For example, $10 million is authorized for conference and interpretive centers,544 and $10 million for recreational facilities.545 Moreover, the Act authorizes an appropriation of $2.8 million for preparing a program for restoring and reconstructing

542. Id. § 544d(a)(2) (West Supp. 1987).
543. Id. § 544a(2) (West Supp. 1987).
544. Id. § 544n(b)(1) (West Supp. 1987).
545. Id. § 544n(b)(2) (West Supp. 1987).
Oregon's Scenic Highway. The Oregon Department of Transportation is charged with the responsibility for the program and restoration efforts, whose purpose is "to preserve and restore the continuity and historic integrity of the remaining segments of the Old Columbia River Highway for public use as a Historic Road, including recreation trails to connect intact and usable segments."

The Act also authorizes appropriation of $5 million to each state for "grants and loans for economic development projects that further the purposes of this Act." These funds will be allocated pursuant to state plans, formulated in consultation with the counties and the Commission, which must be based upon the Commission's economic development plan. The Commission must certify that all grants and loans are consistent with the Act's purposes, management plan, and implementing land use ordinances.

3. Local Government Assistance

To smooth the transition period from local management to management pursuant to the Gorge Act, financial and technical assistance is provided to local governments. The Secretary is required to provide technical assistance on a non-reimbursable basis to the counties for the development of SMA and GMA land use ordinances. The Act modified the formula for distributing federal timber receipts (the economic staple of Skamania County) to provide counties with a greater percentage of timber receipts as well as allow them more flexibility regarding the expenditure of these receipts.

The Secretary is also directed to make payments-in-lieu-of taxes to the counties for any lands or interests acquired by the

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546. Id. § 544n(b)(3) (West Supp. 1987).
547. Id. § 544j (West Supp. 1987).
548. Id. § 544i(b) (West Supp. 1987).
549. Id. § 544i(a) (West Supp. 1987).
550. Id. § 544i(c)(1) (West Supp. 1987).
551. Id. § 5441(a) (West Supp. 1987).
552. See Hearings, supra note 168, at 533. In fiscal year 1985, Skamania County received $5,107,038.37 in federal timber receipts, almost double that received by the next most enriched Washington county. See id.
Secretary which were subject to local real property taxes within the five year period preceding the acquisition. Payments shall constitute one percent of the property's fair market value unless that sum exceeds the previous year's tax, and shall terminate after five years.

4. Penalties/Incentives

To encourage counties to submit land use ordinances for the SMAs which meet the Secretary's approval, and to penalize those counties which do not, all of the aforementioned funds may not be used in counties for which the Secretary has failed to concur with an SMA land use ordinance.

I. Enforcement

1. Commission Authority

Considerable debate occurred during the hearings process over whether enforcement by the Commission should be discretionary or mandatory. The Act is unambiguous. The Commission is required to enforce the Act, but has discretion regarding the method of ensuring compliance: "[t]he Commission shall monitor activities of counties pursuant to this Act and shall take such actions as it determines are necessary to ensure compliance."

The Commission is given considerable authority to ensure compliance with its enforcement mandate. It may assess a civil penalty against a willful violator of the management plan, a land use ordinance, or any implementation measure or order issued by the Commission, not to exceed $10,000 per violation. The Commission—or the Attorney General of Oregon or Washington at the Commission's request—may also seek an injunction, or other appropriate order, to prevent violations of the Act, management plan, land use ordinances, or interim guidelines, or actions taken

554. Id. § 5441(c)(1) (West Supp. 1987).
555. Id.
556. Id. § 5441(c)(2) (West Supp. 1987).
557. Id. § 5441(c)(3) (West Supp. 1987).
558. Id. §§ 544m(c), 1(b)(2)(B), 1(c) (West Supp. 1987).
559. See supra text accompanying notes 187-96.
561. Id. § 544m(a)(3) (West Supp. 1987).
2. Secretarial Authority

The Gorge Act grants the Secretary comprehensive enforcement authority. The Secretary's primary tool is acquisition. Although restricted, the Secretary is authorized to condemn lands used for inconsistent purposes within the SMAs, and, during the interim period, within the GMAs. The Secretary also has authority to request the U.S. Attorney General to seek an injunction or other appropriate order to prevent any person or entity from using lands within the SMAs in violation of the Act, interim guidelines, or other actions taken by the Secretary. The Secretary may also seek criminal sanctions for violations of any order, regulation, or other action he takes pursuant to the Act.

3. Citizen Authority

The Act also grants citizens broad authority to enforce its provisions. Any citizen or entity which has been adversely affected may file a lawsuit to compel compliance with the Act:

(A) against the Secretary, the Commission or any county where there is alleged a violation of the provisions of [this Act], the management plan or any land use ordinance or interim guideline adopted or other action taken by the Secretary, the Commission, or any county pursuant to or Commission under [this Act]; or

(B) against the Secretary, the Commission, or any county where there is alleged a failure of the Secretary, the Commission or any county to perform any act or duty under [this Act] which is not discretionary with the Secretary, the Commission or any county.

The Act requires written notification sixty days prior to the commencement of a citizens' suit. Moreover, the Act precludes

562. Id. § 544m(b)(1)(B) (West Supp. 1987).
563. See supra text accompanying notes 498-509.
565. Id. § 544m(b)(5)(A) (West Supp. 1987) (authorizes criminal penalty); see also 16 U.S.C. § 551 (1985) (provides fine of not more than $500 or imprisonment for not more than six months, or both).
566. Id. § 544m(b)(2) (West Supp. 1987).
commencement of a suit (but permits intervention) if either the state or U. S. Attorney General has commenced, and is diligently prosecuting, a lawsuit on the same matter.\footnote{568}

\textbf{J. Appellate Process}

Any person or entity adversely affected by any county’s final action or order relating to the Act’s implementation may appeal the action or order to the Commission within thirty days.\footnote{569} Any person or entity adversely affected by: "(A) any final action or order of a county, the Commission, or the Secretary relating to the implementation of this Act; (B) any land use ordinance or interim guideline adopted pursuant to this Act; or (C) any appeal to the Commission pursuant to this section; or (D) any civil penalty assessed by the Commission . . . [may appeal to the appropriate courts within sixty days]."\footnote{570} Federal district courts in Oregon and Washington have jurisdiction over criminal penalties imposed for violations of Secretarial orders, regulations, and other actions;\footnote{571} civil actions brought against the Secretary;\footnote{572} and appeals of orders, regulations, and actions taken by the Secretary.\footnote{573}

State courts in Oregon and Washington retain jurisdiction over appeals of county actions taken to the Commission;\footnote{574} civil actions brought by the Commission;\footnote{575} citizen actions brought against the Commission, a state, or county;\footnote{576} appeals of Commission or county orders, regulations, and actions;\footnote{577} and any civil penalties assessed by the Commission.\footnote{578}

\textbf{K. Savings Provisions}

The Gorge Act specifically exempts certain activities from its

\begin{itemize}
  \item 569. \textit{Id.} § 544m(a)(2) (West Supp. 1987).
  \item 570. \textit{Id.} § 544m(b)(4) (West Supp. 1987).
  \item 571. \textit{Id.} § 544m(b)(5)(A) (West Supp. 1987).
  \item 572. \textit{Id.} § 544m(b)(5)(B) (West Supp. 1987).
  \item 573. \textit{Id.} § 544m(b)(6)(A) (West Supp. 1987).
  \item 574. \textit{Id.}
  \item 575. \textit{Id.} § 544m(b)(6)(B) (West Supp. 1987).
  \item 576. \textit{Id.}
  \item 577. \textit{Id.} § 544m(b)(6)(C) (West Supp. 1987).
  \item 578. \textit{Id.} § 544m(b)(6)(D) (West Supp. 1987).
\end{itemize}
purview. Among the more significant actions and rights listed in section 5440 that the Act will not affect are:

1. certain Indian rights;\(^{579}\)
2. certain water rights,\(^{580}\) nor authorize new water appropriations;\(^{581}\)
3. interstate compacts which predate the Act;\(^{582}\)
4. certain Bonneville Power Administration\(^{583}\) and U.S. Army Corps of Engineers\(^{584}\) activities relating to the operation of existing transmission facilities and improvement of Bonneville Dam;
5. existing hunting and fishing laws;\(^{585}\)
6. forest plans adopted pursuant to the National Forest Manage-

\(^{579}\) Id. §§ 5440(a)(1), (7) (West Supp. 1987). Nothing in the Act shall:
(1) affect or modify any treaty or other rights of any Indian tribe; [or]
* * *
(7) affect lands held in trust by the Secretary of the Interior for Indian tribes or individual members of Indian tribes or other lands acquired by the Army Corps of Engineers and administered by the Secretary of the Interior for the benefit of Indian tribes and individual members of Indian tribes. . . .

\(^{580}\) Id. §§ 5440(a)(3)-(4) (West Supp. 1987). Nothing in the Act shall:
(3) except as provided in section 544k(c), affect the rights or jurisdictions of the United States, the States, Indian tribes or other entities over waters of any river or stream or over any ground water resource or affect or interfere with transportation activities on any such river or stream;
(4) except as provided in section 544k(c), alter, establish, or affect the respective rights of the United States, the States, Indian tribes, or any person with respect to any water or water-related right. . . .

\(^{581}\) Id. § 5440(a)(2) (West Supp. 1987). Nothing in the Act shall, \"(2) except as provided in section 544k(c), authorize the appropriation or use of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. . . .\" Id.

\(^{582}\) Id. § 5440(a)(5) (West Supp. 1987). Nothing in the Act shall, \"(5) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States before the enactment of this Act. . . .\" Id.

\(^{583}\) Id. § 5440(a)(6) (West Supp. 1987). Nothing in the Act shall, \"(6) affect or modify the ability of the Bonneville Power Administration to operate, maintain, and modify existing transmission facilities. . . .\" Id.

\(^{584}\) Id. § 5440(b) (West Supp. 1987). According to the Act: \"(b) Except for the offsite disposal of excavation material, nothing in this Act shall be construed to affect or modify the responsibility of the U.S. Army Corps of Engineers to improve navigation facilities at Bonneville Dam pursuant to Federal law.\" Id.

\(^{585}\) Id. § 5440(a)(8) (West Supp. 1987).
ment Act of 1976, and
7. except for activities within the SMAs, "the rights and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable State law supercede such Acts." 587

The Act also does not intend to establish "protective perimeters or buffer zones" around the Scenic Area or around SMAs. 588

Certain actions taken by the Secretary regarding adoption of the management plan, development and concurrence with SMA land use ordinances, land acquisition, and the development and implementation of interim guidelines are excluded from the National Environmental Policy Act's definition of "major Federal actions significantly affecting the quality of the environment" and its environmental assessment preparation requirements. 589

L. Severance Clause

If any provision of the Gorge act, or its application, is held invalid, the remainder of the Act, and its application to other persons, states, Indian tribes, entities, or circumstances, is unaffected. 590

VIII. Conclusion

Seventy years after introduction of the first congressional bill to protect the Gorge's world-class values, Congress enacted the Columbia River Gorge National Scenic Area Act. The Act establishes a different type of protection than that provided in the 1916 bill to create a national park, but the Gorge itself has changed over the past seven decades. Although it has become less wild and more populous, the Gorge's nationally significant scenic, natural, cultural, and recreational resources have mostly endured.

The Act evolved from two early proposals: one by Senators Packwood and Hatfield that would have created direct Forest

586. Id. § 544o(a)(9) (West Supp. 1987).
587. Id. § 544o(c) (West Supp. 1987).
588. Id. § 544o(a)(10) (West Supp. 1987).
590. Id. § 544p(a) (West Supp. 1987).
591. See S. 6397, supra note 44.
Service management over the Scenic Area, and the Governors' proposal, that would have created a commission to manage the entire Area. Senator Evans, drawing upon his state experience as a former Governor and Northwest Regional Power Council member, and upon his recent federal experience, melded together the earlier approaches. The result of these efforts is, essentially, part traditional recreation area and part greenline park. 592

Congress passed this new concept with difficulty. Buffeted by fierce local opposition, and frequently delayed to the brink of failure by parliamentary tactics, the Act barely survived. Accordingly, the usual complement of committee reports and floor statements which aid in the interpretation of acts (particularly ones as complex as this) did not accompany the Act. Of the two subcommittees that considered Gorge bills, only one passed out a bill. Of the three authorized committees, only one approved a complete bill. No committee issued reports. Floor statements, moreover, were usually limited to the venting of ideological diatribes rather than rational discussion. This also characterized the six congressional hearings, which offered little of interpretive value.

President Reagan ultimately signed H.R. 5705 because of its "far-reaching support" in Oregon and Washington, despite his remaining "strongly opposed to Federal regulation of private land

592. The greenline park concept originated in Britain after World War II as a method to protect the countryside from industrial and dense residential development. Greenline parks occupy a niche between full national park or recreation area protection (which require large scale acquisition and direct management by the National Park Service or U.S. Forest Service), and zoning by local governments.

Protection as a greenline park offers one significant advantage over more traditional approaches such as national parks and national recreation areas: governmental cost, since to a large degree regulation replaces land acquisition. Regulation is frequently implemented by a management commission. Greenline parks rely heavily upon relatively recent tools such as transfer of development rights, purchase of scenic easements, even the creation of private land trusts, in addition to common devices such as fee simple acquisition and zoning.

Perhaps the best example of a greenline park in the United States is the one million acre Pinelands National Reserve created in southern New Jersey by Congress in 1978. 16 U.S.C. § 471l (1982). The Pinelands is managed by a fifteen-member commission (one member appointed by the Secretary of Interior, one member from each of the Reserve's seven counties appointed by the counties' governing bodies, and seven members appointed by the Governor). Id. § 471l(d). See generally NATIONAL PARKS AND CONSERVATION ASS'N, GREENLINE PARKS: LAND CONSERVATION TRENDS FOR THE EIGHTIES AND BEYOND (1983).
The best legislative history of the Gorge Act derives from an analysis of the Act's previous bills in the 97th, 98th, and 99th Congresses, and the modifications made to those bills. An examination of the precedents the Act relied upon or avoided (such as the Lake Tahoe Bi-state Compact) also provides insight. Such an examination, moreover, provides an indication of how successful the Act will be in achieving its purposes.

A host of critical elements must favorably coalesce if the Scenic Area will accomplish its objective of protecting the Gorge's natural and scenic resources. One critical factor is the composition of the regional commission that has direct management authority over forty-five percent of the Area. In large measure, the Lake Tahoe Bi-state Compact failed because of the TRPA's unwillingness to exercise its discretion to protect Lake Tahoe's magnificent resources. The Gorge Act sought to avoid this problem by ensuring that local county appointees were not a majority, and that elected and appointed officials, who are responsible for their own, separate constituencies, would not serve on the Commission.

While it is too early to judge how successful the approach taken by the Gorge Act will be, the Act is considerably less reliant than the Lake Tahoe Compact on the whims of individual commissioners. Standards for development—such as a forty acre minimum lot size for the Scenic Area's most significant lands,\(^\text{594}\) and a requirement throughout the Area that new residential development not "adversely affect" the Gorge's scenic, natural, cultural, and recreational values\(^\text{595}\)—ensure a minimum level of protection. Provisions that remove any Commission discretion regarding redressing violations of the Act, and provisions that provide citizen recourse to enforce the Act certainly enhance resource protection.

A recent poll conducted for the President's Commission on American Outdoors found that eighty-one percent of adult Americans "strongly agree" that governmental action is needed to preserve natural areas for use by future generations.\(^\text{596}\) Few areas of national park quality remain in the continental United States,

\(^{593}\) President's Statement, supra note 314.


\(^{595}\) Id. § 544d(d)(8) (West Supp. 1987).

\(^{596}\) 6 AM. OUTDOORS 1 (May 1986), at 1.
however, and competition for land acquisition money is intense.

The “bold and innovative” Columbia River Gorge National Scenic Area Act, which emphasizes regulation yet encourages acquisition, may well be a significant contribution to the movement to preserve valuable but complex areas for future generations.
