***WILD AND SCENIC RIVERS ACT***
***FEDERAL, STATE AND LOCAL GOVERNMENT***
***LITIGATION CASES***

**Introduction:**

Listed below is list of litigation cases related to Wild and Scenic Rivers Act litigation cases related to grazing, recreation, construction, roads and private property impacts dating back to 2004, followed on page 6 with Pre-2004 litigation cases by E. Bradley Grenham (ALI-ABA *Survey Of Cases On The Management Of Wild And Scenic Rivers*) centered on livestock grazing, recreation; activities impacted outside WSR corridors.

Finally, starting on page 16, is Comprehensive Listing of Columbia River Gorge WSR Litigation. This should give the reader an idea as to the potential litigation that will be generated by declaring the Gila River/San Francisco River and tributaries as a Wild and Scenic Rivers designation..

## I. POST 2003 LITIGATION CASES

**2019 New York Adirondacks Wild & Scenic Rivers** lawsuit over snowmobile trail near WSR.

**PENDING**: Groups sue state over snowmobile trail on scenic river to protect the Adirondacks and Adirondack Wild; filed a state court challenge in Warren County arguing that the New York Department of Environmental Conservation violated state law in granting itself a variance to build a 9-foot-wide trail and a 12-foot-wide bridge on the Cedar River north of Indian Lake. That segment of river is designated "scenic" and protected against motorized recreation under the Wild and Scenic Rivers Act.

**2018 Double R. Ranch Trust v. Nedd. United States District Court for the District of Columbia**

**HOLDINGS:** [1]-Plaintiffs—an adjoining landowner and two trade associations—lacked standing under U.S. Const. art. III to challenge a determination by the Bureau of Land Management that a segment of a river was suitable for designation for future protection under the Wild and Scenic Rivers Act because the Bureau's suitability determination was but one step in a long and unpredictable process towards potential congressional designation under 16 U.S.C.S. § 1273(a)(i), and because all of the specifically-identified injuries that the plaintiffs pointed to arose from the river's designation under 16 U.S.C.S. § 1278(b), not directly from the river's suitability determination where the statutory restrictions that the plaintiffs said would prohibit their potential activities were not absolute or sufficiently "imminent" to meet the requirements for an injury-in-fact.

**2017 Murr v. Wisconsin - Supreme Court of the US Decision; 6/23/17.** A family that has owned a riverfront cabin on the St. Croix since 1960 wanted to redevelop the property into a residence, but the zoning board said that was a prohibited action under the National Wild and Scenic Rivers Act and other laws. Landowners argued that the WSR river protections intrude on their private property rights.

**HOLDINGS:** [1]-In the context of a regulatory takings claim, courts had to consider a number of factors in determining the denominator, including the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the regulated land, and the endeavor was to determine whether reasonable expectations about property ownership would have led a landowner to anticipate that his holdings would be treated as one parcel or separate tracts; [2]-Under the appropriate multi-factor standard, the landowners' property should have been evaluated as a single parcel consisting of two lots together for purposes of the takings analysis because state law had merged the lots, the physical characteristics supported treatment as a unified parcel, and the parcels could not be sold or built upon separately.
Outcome Judgment affirmed, upholding the Wis. Court, Murr v. State, 2015 WI App 13, 359 Wis. 2d 675, 859 N.W.2d 628, 2014 Wisc. App., denying the private property owner relief.

**2016 Fox v. Skagit County. Court of Appeals of Washington, Division One**

**HOLDINGS:** [1]-Property owners were not entitled to a writ of mandamus to compel the county to issue a building permit because the well on their property, despite being exempt from the water permit requirement under Wash. Rev. Code § 90.44.050, was not an adequate water supply for purposes of the building permit statute, Wash. Rev. Code § 19.27.097(1), because the well was subject to a senior water right appropriation—namely, the 2001 instream flow requirement for the Skagit River as prescribed by rule; [2]-A permit-exempt well under § 90.44.050 is subject to the prior appropriation doctrine and may be limited by senior water rights, including an instream flow rule; [3]- Because the property owners' well may be interrupted, water was not legally available for purposes of their building permit application.

**2016. Simmons v. Jarvis. United States District Court for the District of Nebraska.** The plaintiff, Lee M. Simmons ("Simmons"), owns land in Cherry County, Nebraska, a portion of which is included within the boundaries of the Niobrara National Scenic River. He brings this action to contest the boundary line that was drawn by the National Park Service ("NPS") in March 2007.

**HOLDING:** providing that this matter is remanded to the National Park Service with directions to remove from the Niobrara Scenic River area that portion of Plaintiff's property that was added to the area by changing Boundary Alternative 3 on January 10, 2003.

**2016 Idaho** – . **Idaho Rivers United v. Probert, 2016 U.S. Dist**. LEXIS 63767**:** Selway and Clearwater WSR – logging blocked by federal judge, May 13, 2016

**HOLDING**: Federal court blocked US Forest Service restoration logging project in Wild and Scenic Selway canyon. Two Idaho conservation groups – Idaho Rivers United and Friends of the Clearwater – argued that the Forest Service violated its duties to protect the Selway and Middle Fork Clearwater rivers under the Wild and Scenic Rivers Act. U.S. Magistrate Judge accused the US Forest Service for failing to adopt a comprehensive river management plan. The agency and any and all persons or entities operating on its behalf are hereby enjoined from proceeding with the on-the ground operations or other activities associated with the Johnson Bar Fire Salvage Project.

**2016. Wisconsin –Hense v. St. Croix County Bd. of Adjustment, 2005 Wisc. App. St Croix River – home building denied by local zoning after WSR**. Lawsuits showcase land disputes along St. Croix River By St. Croix River Kevin Giles MARCH 31, 2016 —A Hudson, Wis., couple wanted to build a house overlooking the St. Croix River. They sought four variances to laws that were designed to protect the federally protected river's "scenic and natural characteristics" from development. - County zoning denied variances.

**HOLDINGS:** The Henses filed and lost their law suits in the Wisc. Circuit Court and Court of Appeals.

Also, **US District Court of MINN., Lower St. Croix River <u>2008</u> Sierra Club North Star Chapter v. Secretary of Transportation;** Federal Highway Administrator; and Secretary of the Interior; et.

**2013 American Whitewater v. Tidwell- United States District Court of South Carolina**,

**HOLDINGS:** [1]-The USFS's 2012 plan for a wild and scenic river did not violate the Wild and Scenic Rivers Act, 16 U.S.C.S. § 1271 et seq., as whitewater floating was not an outstanding remarkable value of the river, and thus, was not entitled to the protect and enhance status conferred by 16 U.S.C.S. § 1271; [2]-The 2012 plan supported the USFS's determination that floating substantially interfered with other remarkable values given the evidence of potential conflicts and the longstanding evidence of previous conflicts; [3]-The user capacity study was legally sufficient under 16 U.S.C.S. § 1274(d)(1) where the USFS used both quantitative and qualitative measures to evaluate user capacities; [4]- The 2012 plan was consistent with 16 U.S.C.S. § 1275(a) as it identified the property interests and current land ownership status in the river's corridor.

**2013. Merced Irrigation Dist. v. County of Mariposa United States District Court for the Eastern District of California**

**HOLDINGS:** [1]-Remand to state court under 28 U.S.C.S. § 1447(c) was appropriate because hypothetical Administrative Procedure Act (APA) claims were not ripe and did not provide for removal jurisdiction; [2]-Further factual development would not only have significantly

advanced the ability to deal with the legal issues presented, it was absolutely necessary; [3]-There was no final agency decision to challenge under the APA because no agency proceedings had been initiated; [4]-A hypothetical claim for breach of an implied covenant was not determined only by an interpretation of the Wild and Scenic Rivers Act; [5]- Federal courts did not have exclusive jurisdiction over interpretations of the WSRA, and state courts were competent to interpret and apply federal law; [6]-There was no authority to suggest that a decision would have had binding and far-reaching effect on litigants elsewhere.

The findings and recommendations of the magistrate judge were adopted in full, the motion to remand was granted, and the case was administratively closed.

**2014-CA** – **Souza v. Cal. DOT, 2014 U.S. Dist**. LEXIS 24796 (N.D. Cal., Feb. 26, 2014). **Conservation groups sue to stop Caltrans from widening road along WSR – Smith River** – Lawsuit Filed to protect Wild and Scenic Smith River from Caltrans Highway-widening project by Gary Graham Hughes, 9/24/13. Caltrans approved a project to widen narrow sections of Highways 197 and 199 to provide access for oversized trucks. Friends of Del Norte, the Center for Biological Diversity and the Environmental Protection Information Center (EPIC) halted the $26 million

**HOLDINGS:** Caltrans project is enjoined from taking any further work until Plaintiffs' claims are resolved on the merits: May 2, 2014 /s/ James Donato

**2009-CA Rivers designated in 2009 – Litigation by Center for Biological Diversity –**

**HOLDING:** Federal government settles lawsuit over 'wild and scenic' California rivers, Ian James, Palm Springs Desert Sun, published 6:53 p.m. PT Aug. 17, 2018. Plan due in 3 years so under Obama, nothing happened – so they sue Trump Admin – ordered to finish by 2024

**2004. ORE Natural Desert Ass'n v. United States Forest Serv. United States District Court for the District of Oregon**

Alleging that defendants were violating the National Wild and Scenic Rivers Act (WSRA), the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA), and the Rescissions Act, plaintiffs requested an order prohibiting defendants and intervenors from authorizing, allowing, or conducting any grazing on certain forest lands until plaintiffs' claims could be heard on the merits. It seemed likely that plaintiffs would succeed on their WSRA and NFMA claims, as it appeared that defendants were in violation of mandatory duties under those statutes. Plaintiffs were also likely to succeed, at least in part, on their NEPA/Rescissions Act claim. The balance of hardships, however, tipped slightly against issuing an injunction. The areas at issue involved 12 livestock ranches, some of which were multiple family ranches. If the court enjoined grazing on the allotments that were grazed on a rotation system, the ranchers would have nowhere else to put their livestock during the allotted time. Because the motion was being

decided at the start of the grazing season, the court was influenced by the lack of time the ranchers would have had to mitigate the injunction's effects.

**HOLDING:** Plaintiffs' motion for a preliminary injunction was denied. The temporary restraining order signed on June 3, 2004, was dissolved.

**2004. COLO.: Trout Unlimited v. USDA. United States District Court for the District of Colorado**

Plaintiffs alleged 13 claims under federal statutes, including the Federal Land Policy and Management Act of 1976 (FLPMA), the National Environmental Policy Act (NEPA), the Forest and Rangeland Renewable Resources Planning Act (FRRRPA), and the Wild and Scenic Rivers Act (WSRA), 16 U.S.C.S. § 1271 et seq. The court found that some claims were subject to dismissal for failure to exhaust administrative remedies. Second, it concluded that on the rare occasions when bypass flows were required as a condition to the use of federal lands, they neither reflected nor established a water right; rather, they merely addressed the nature of the use to which a water right might be put once the right is obtained from the state. Thus, pursuant to its regulatory authority, the Forest Service could have imposed bypass flows as a condition to the renewal of an authorization for Long Draw Reservoir. Regarding FLPMA, the court found that the clear weight of the evidence did not support a finding that "Alternative B" minimized damage to fish and wildlife habitat and otherwise protected the environment as required. The court rejected plaintiffs' remaining NEPA claims, and the FRRRPA and WSRA claims.

**HOLDING:** Plaintiffs' second, fifth, ninth, and thirteenth claims were dismissed for failure to exhaust administrative remedies. Plaintiffs' motion for summary judgment was granted as to their first claim for violation of FLPMA, and denied as to other remaining claims. Therefore, the decision of the Forest Service to issue the easement was reversed. The matter was remanded to the agency for further consideration in accordance with its FLPMA obligations.

**2004. ORE. Natural Desert Ass'n v. United States Forest Serv. United States District Court for the District of Oregon**

The organizations sued the Forest Service, alleging that its lack of management of livestock grazing had caused and was causing ecological damage to the riparian habitats of the two allotments. The organizations sought a preliminary injunction prohibiting the Forest Service for allowing any livestock grazing on the allotments. Even though the court held that the organizations were likely to succeed on the merits of their claims, it denied them the requested preliminary injunction. The court held that, confronted with the dilemma of having to decide whether to issue the extraordinary relief of an injunction on the eve of grazing season, the balance of harms tipped slightly against issuing an injunction. Given the critical timing of the injunction and the impact of transforming an injunction into an immediate, profound threat to the affected ranchers' livelihood, the court held that the threat could inflict more than mere economic harm on the ranchers and their families.

**HOLDING:** The organizations' motion for a preliminary injunction was denied.

## II. Survey of Pre-2004 Court Cases - Management Of Wild And Scenic Rivers

ALI-ABA Course #SJ023 by E. Bradley Grenham on 9/2003

### 1. The Wild and Scenic Rivers Act: A Brief Overview of Management Provisions

a. The Wild and Scenic Rivers Act (WSRA), *16 U.S.C. §§ 1271*-1287, provides that it is the policy of the United States that certain selected rivers which "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." *16 U.S.C. § 1271.* For rivers ***designated*** on or after January 1, 1986, the federal agency charged with administration of the river must prepare a comprehensive management plan to protect river values. *16 U.S.C. § 1274*(d). The river plan "shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable" to achieve the purposes of the Act. *Id.*

b. River management litigation has focused primarily on the degree to which various uses should be permitted under section 10(a) of the WSRA, *16 U.S.C. § 1281*(a), which provides:Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

c. Some courts have also relied on a river's classification as "wild," "scenic," or "recreational" in interpreting WSRA mandates for management. *16 U.S.C. § 1273*(b) provides:

Every wild, scenic, or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, ***designated***, and administered as one of the following:

1. Wild river areas - Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

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Fn1 Any views expressed herein are those of Mr. Grenham and do not necessarily reflect the views of the Department of the Interior or the United States.

2. Scenic river areas - Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

3.Recreational river areas - Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

2. **Judicial Interpretations of WSRA Management Provisions.** Courts have grappled with the interplay between the "protect and enhance" and "substantially interfere" language in section 10(a) of the WSRA, *16 U.S.C. § 1281*(a).

*a. Hells Canyon Alliance v. United States Forest Service, 227 F.3d 1170, 1177-78 (9th Cir. 2000)* (challenge by both non-motorized and motorized boaters to management plan providing specified periods for motorized water craft use on wild section of the river; the Hells Canyon Act recognized the use of motorized and nonmotorized water craft as a valid use of the Snake River; the court upheld the agency plan).

i. "Lacking a statutory definition of 'protect' or 'enhance,' we give these terms their common meaning. The mandate to 'protect and enhance' does not, however, lead inexorably to the conclusion that permitting motorized use on both the wild and scenic portions of the river violates the statute. Significantly, the WSRA's 'protect and enhance' language does not stand alone. Congress instructed that ***designated*** rivers be managed 'without, insofar as is consistent [with the values motivating ***designation*** of the river], limiting other uses that do not substantially interfere with public use and enjoyment of these values.' *16 U.S.C. § 1281*(a). Congress thus recognized that other uses could 'interfere with public use and enjoyment' but that not all such uses were to be prohibited. Only those uses that 'substantially interfere' with enjoyment and use of the values at issue-the values identified in the FEIS-are to be limited." (bracketed language in original).

*b. Oregon Natural Desert Ass'n v. Green, 953 F.Supp. 1133, 1143 (D.Or. 1997)* (challenge to the management plan for the Donner und Blitzen River and agency actions including cattle grazing, parking lot construction, road improvement, and a water diversion for irrigation; the court ultimately enjoined these activities).

i. "Significantly, when Congress ***designated*** the Donner und Blitzen it classified the river, including its major tributaries, as a 'wild' river… The classification 'wild' is the most restrictive of the three possible classifications."

*c. Oregon Natural Desert Ass'n v. Singleton, 47 F.Supp.2d 1182, 1192 (D.Or. 1998)* (challenge to Owyhee river management plan and associated livestock grazing).

i. "The WSRA provides that each component of the national wild and scenic rivers system is to be administered in such a manner as to 'protect and enhance' its ORVs [outstandingly remarkable values], 'without, *insofar as is consistent therewith*, limiting other uses that do not substantially interfere with public use and enjoyment of these values.' … The italicized phrase clearly gives primacy to 'protect and enhance,' and not to 'other uses.' … The court interprets this provision to mean that ORVs are to be protected and enhanced, and that uses which are *consistent with* such protection and enhancement *and* do not substantially interfere with public use and enjoyment of the river ORVs, should not be limited. In particular, the use of the word 'enhance' in the primary admonition to 'protect and enhance' cannot reasonably be interpreted to permit any use so long as it does not 'substantially degrade' the river system's values." (emphasis in original).

*d. Oregon Natural Desert Ass'n v. Singleton, 75 F.Supp.2d 1139, 1142 (D.Or. 1999)* (enjoining grazing at areas of concern).

i. "The 'wild' classification is the most restrictive of three possible classifications."

*e. Sierra Club v. Babbitt, 69 F.Supp.2d 1202, 1251 (E.D.Cal. 1999)* (action to enjoin highway reconstruction pending completion of river management plan for Merced River in Yosemite National Park; the court ordered completion of a management plan and enjoined the road project).

i."Defendants correctly point out that Section 1281 of WSRA grants agencies discretion in determining what degree of physical disruption of the river's ORV's is permissible by providing that 'management plans for [each component of the national wild and scenic rivers system] may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.' *16 U.S.C. § 1281.* As discussed more completely below, Defendants assertion of agency discretion fails to recognize the source of that discretion to 'establish varying degrees of intensity' is predicated on the existence of written plan. It is the plan that delineates the degree of protection that must be accorded the river's ORV's and, conversely, which delineates the degree of degradation of the river's ORV's that may be tolerated in the project's execution." (bracketed language in original).

ii. "If anything, WSRA seems deliberately ambiguous as to how an agency is supposed to balance the recognized tension between use and preservation." *Id. at 1261.*

*f. Center for Biological Diversity v. Lueckel, 248 F.Supp.2d 660, 663 (W.D.Mich. 2002)* (action seeking an injunction which would order preparation of river management plans and halt all

timber harvesting and road construction until that time; injunctive relief was denied and the case dismissed for lack of standing).

i. "While the WSRA does not ban activities such as timber harvesting and road construction, the WSRA does require that the Forest Service conduct them in such a manner as to protect and enhance river values based on ***designation*** level. The Forest Service is given the discretion to strike this balance."

ii. "The classification does not determine river management; it simply describes the degree of naturalness found at a particular river at the time of ***designation***. *47 Fed. Reg. 39,454, 39,458.* With the exception of mining, *16 U.S.C. § 1280*(a)(i)-(iii), the WSRA's mandate to 'protect and enhance' a river's Outstandingly Remarkable Values defines the Forest Service's management regime, *16 U.S.C. § 1281*(a)." *Id.* at 662 fn. 1.

**3. Livestock Grazing.**

*a. Oregon Natural Desert Ass'n v. Green, 953 F.Supp. 1133, 1144 (D.Or. 1997).*

i. "BLM had authority to exclude cattle grazing from the river area … This does not mean, however, that cattle grazing must be excluded from the river area. Rather, cattle grazing may continue, but only in accordance [with] the strictures of the WSRA to protect and enhance."

ii. "The record in this case establishes that several of these [river] values are being degraded by continued cattle grazing in the river area." *Id. at 1145.*

*b. Oregon Natural Desert Ass'n v. Singleton, 47 F.Supp.2d 1182, 1195 (D.Or. 1998)* (The court ultimately enjoined BLM to exclude grazing from identified areas of concern in *Oregon Natural Desert Ass'n v. Singleton, 75 F.Supp. 2d 1139 (D.Or. 1999)).*

…i. "The court concludes that the BLM has violated the WSRA by adopting a management plan which fails to consider whether cattle grazing is consistent with the rivers' ORVs. It has therefore 'failed to consider an important aspect' of river management which implicates the policy objectives of the WSRA."

ii. "Where the statutory command is straightforward, there is no reason to resort to legislative history....Accordingly, to the extent that the 1979 [environmental statement] appears to assume that grazing will continue, that assumption is overridden by the explicit 'protect and enhance' language of the WSRA and the ***designation*** of the Owyhee Rivers as 'wild,' which under the terms of the statute requires that watersheds be maintained in a primitive condition and the waters kept unpolluted. Regardless of whether cattle grazing was a permitted use when the rivers were first ***designated***, if grazing proves to be detrimental to soil, vegetation, wildlife, or other values, or is inconsistent with the 'wild' ***designation***, then clearly the BLM has the right--indeed, the duty--not only to restrict it, but to eliminate it entirely." *47 F.Supp.2d at 1192.*

**4. Recreation.**

*a. Hells Canyon Alliance v. United States Forest Service, 227 F.3d 1170, 1172-73 (9th Cir. 2000).*

i."This appeal brings to mind the maxim that you can please all of the people some of the time, and some of the people all of the time, but you can't please all of the people all of the time… Balancing the competing and often conflicting interests of motorized water craft users, including jetboaters, and non- motorized water craft users, such as rafters and kayakers, is no easy task."

…ii. "Although the Council has identified several examples from the FEIS raising the specter of interference with the values for which the Snake River was included in the ***wild and scenic river*** system, it has not shown that the agency's limitations on motorized use are arbitrary and capricious, or even that the extent to which the agency allows motorized use of the river in fact substantially interferes with the river's outstandingly remarkable values. For example, although the agency acknowledges that motorized river craft are partly responsible for a 'reduction in the unique waterway sound of the Scenic ORV,' the mere existence of some decline in scenic value does not establish that motorized use substantially interferes with this value, nor does it show that the agency's chosen limitations in striking a balance between the recreation value-which expressly recognizes the legitimacy of motorized boating-and the scenic value are arbitrary and capricious." *Id. at 1178.*

*b. Oregon Natural Desert Ass'n v. Green, 953 F.Supp. 1133, 1148-49 (D.Or. 1997)* (citing the definition of a "wild" river as "free of impoundments and generally inaccessible except by trail," the court found that "BLM's decisions to improve and increase vehicle access within the river area by constructing new parking lots and improving existing roads without first considering the ***impacts*** violated the WSRA and NEPA").

c. *Sierra Club v. United States, 23 F.Supp.2d 1132, 1139 (N.D.Cal. 1998)* (action for preliminary injunction to bar National Park Service from implementing plan to replace public lodging outside the Merced River corridor and construct a road in the river corridor. The Park Service had not yet prepared a comprehensive river management plan. The court found a preliminary injunction unwarranted on WSRA grounds but granted it under NEPA).

i."Most importantly, agencies are given discretion to manage a river system with 'varying degrees of intensity for its protection and development, based on the special attributes of the area.' … The agency has explained that the trade-off for the removal of lodge facilities from the corridor would be the placement of a road within the corridor … the agency envisions that these changes will enhance the overall visitor experience in the Merced River area."

…ii."A scenic river area is one that is 'free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, *but accessible in places by roads'*… The

statute therefore does not preclude, in all circumstances, the existence of a road in a river corridor… Rather, the controlling principle is that the agency has substantial discretion to manage the river area, in light of its special attributes, to further the purposes of the WSRA." *Id. at 1140* (emphasis in original).

d. *Wilderness Watch v. United States Forest Service, 143 F.Supp.2d 1186, 1205 (D.Mont. 2000)* (finding that Forest Service special-use permits allowing construction of a permanent hunting and fishing lodge along a wild segment of the Salmon River violated the WSRA).

i. "When viewed on the continuum from 'essentially primitive' to allowing 'some development' at the other, the answer is clear: construction of permanent resort lodges in river corridors ***designated*** as 'wild' is inconsistent with the WSRA."

ii. "The third argument advanced by the USFS is that the hunting lodges further the 'recreational values' for which the Salmon River corridor was ***designated*** as 'wild.' The general statement of purpose, which applies to the Act as a whole, provides that certain ***designated*** rivers which possess 'outstandingly remarkable scenic, recreational, . . . or other similar values' shall be 'preserved in free-flowing condition' and 'protected for the benefit and enjoyment of present and future generations.' *16 U.S.C. § 1271.* However, while the Act states that recreational values are one of the many goals to be preserved in general, the Act makes it a mandatory duty for the USFS to place primary emphasis on a river's 'esthetic, scenic, historic, archaeological, and scientific features' in its management of the ***designated*** river area. *16 U.S.C. § 1281*(a). Moreover, promoting the river's recreational values cannot detract from the WSRA's clear directive that wild river segment remain 'essentially primitive' and a vestige of primitive America." *Id. at 1207*

*e. Riverhawks v. Zepeda, 228 F.Supp.2d 1173, 1183 (D.Or. 2002)* (upholding Forest Service authorization of commercial tour and fishing boats on the Rogue River under the WSRA but finding the permit process violated NEPA).

i. "Given this definition [of a wild river], it is questionable whether motorized use was intended on rivers ***designated*** as 'wild.' However, the WSRA does not explicitly prohibit motorized uses; the River Management Plan recognizes motorboat use.

ii. "Although defendants acknowledge possible conflicts between motorized and non-motorized recreationists and potential ***impacts*** on fish and wildlife, the Forest Service has determined that commercial boat tours enhance the recreational value of the Rogue WSR. Absent evidence that commercial motorized recreation 'substantially interferes' with other values of the river, the court must defer to the agency's balance of river values." *Id. at 1183-84.*

iii. "Thus, although plaintiffs' expert declarations raise 'the specter of interference' with Rogue WSR values, plaintiffs fail to show that '*the extent* to which the agency allows motorized use of

the river *in fact* substantially interferes with the river's outstandingly remarkable values.'" *Id. at 1185, citing Hells Canyon Alliance, 227 F.3d at 1178* (emphasis in original).

f. .*Friends of Yosemite Valley v. Norton, 194 F.Supp.2d 1066, 1102 (E.D. Cal. 2002)* (challenge to Merced ***Wild and Scenic River*** Comprehensive Management Plan. The Court upheld addressing user capacity for Merced River through a "Visitor Experience and Resource Protection (VERP)" process which is an iterative process of taking management action over time to achieve desired conditions stated in the plan).

i. "The requirement under section 1274(d)(1) that comprehensive management plans 'address' user capacities does not mandate that a plan place specific numerical limits on usage. The court further finds that, fundamentally, Plaintiffs object to the fact that VERP is a framework for a process, rather than a completed product. Yet Plaintiffs provide no authority that such a process cannot comply with the requirement of addressing user capacities set forth in section 1274(d)(1)."

ii. "The court rejects Plaintiffs' repeated contention that the management zones show a bias in favor of visitor use, but must note that visitor use is not antithetical to the goals of WSRA. Indeed, one of the express purposes of WSRA is that ***designated*** rivers 'and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.'" *Id. at 1105.*

**5. Activities Outside River Corridor Boundaries.**

*a. Wilderness Soc'y. v. Tyrrel, 918 F.2d 813, 819 (9th Cir. 1990)* (challenge to sale of fire damaged timber on National Forest land located 1/4 mile from ***designated*** river area).

i. "The proposed sale of timber, whether conducted on land within the river area's boundaries or adjacent to the river area, will ***impact*** protected values."

ii."Federal land must be managed so as to ensure that the purposes of the Wild and Scenic Rivers Act are not abrogated." *Id. at 820.*

*b. Newton County Wildlife Ass'n v. United States Forest Service, 113 F.3d 110, 113 (8th Cir. 1997)* (denying preliminary injunction against timber sales outside ***wild and scenic river*** corridor when Forest Service had not completed a river management plan).

i. "Because the Forest Service may limit WSRA plans to lands lying within ***designated*** river segments, failure to timely prepare the Plans cannot be a basis for enjoining timber sales on lands lying outside any ***designated*** area."

ii. "WSRA § 1283(a) imposes a general obligation on agencies having jurisdiction over lands 'which include, border upon, or are adjacent to' a ***designated*** river segment to protect the river in

accordance with WSRA. But in our view, § 1283(a) does not require agencies managing adjacent federal land to prepare or join in a WSRA plan. It merely instructs their managers to take actions that protect ***designated*** rivers." *Id. at 113, fn. 4.*

**6. Failure to Complete River Management Plans Required By *16 U.S.C. § 1274*(d).**

*a. National Wildlife Federation v. Cosgriffe, 21 F.Supp.2d 1211, 1220 (D.Or. 1998)* (granting injunction requiring development of comprehensive management plan for John Day River when agency had not finished a plan within statutory timeframe).

i. "Under either the *TRAC* [APA, *5 U.S.C. § 706*(1)] standards or the mandamus standards, plaintiffs are entitled to their requested injunction. Therefore, the BLM is ordered to prepare a comprehensive management plan for the John Day WSRs by November 1, 1999."

ii. "Improvement will take time, but this court is persuaded that the BLM is moving in the right direction by limiting grazing and negotiating with private landowners… this court declines to order the BLM to ban all grazing on allotments categorized as 'poor' or 'fair' as a remedy for the BLM's failure to prepare a comprehensive management plan." *Id. at 1222.*

*b. Sierra Club v. United States, 23 F.Supp.2d 1132, 1138 (N.D.Cal. 1998).*

*i*. "The WSRA provides no indication that a court may enjoin an agency's land management activities with respect to a ***wild and scenic river*** area merely because the agency has failed to timely adopt a comprehensive management plan."

c. *Sierra Club v. Babbitt, 69 F.Supp.2d 1202, 1250 (E.D.Cal. 1999)* (ordering that a management plan be completed within 12 months; predecessor to *Friends of Yosemite Valley*).

i. "Defendants are not in compliance with the provisions of section 1274(d) because they have not yet prepared a comprehensive management plan..."

ii.. The court enjoined a road project finding that "Defendants planned and executed those activities without reference to the required comprehensive management plan or any other pre-existing plan that would have adequately informed the decision whether the construction activities to be undertaken were an allowable degradation of the values for which the Merced River was included in the National ***Wild and Scenic River*** System." *Id. at 1257.* The court denied several other forms of requested injunctive relief.

d. *Center for Biological Diversity v. Lueckel, 248 F.Supp.2d 660, 668, n.5 (W.D.Mich. 2002)* (denying injunction and dismissing case for lack of standing).

i. "The Court notes that the United States District Court for the District of Oregon held that the APA authorizes courts to issue injunctive relief for failure to prepare river plans. *Nat'l Wildlife*

*Fed'n v. Cosgriffe, 21 F. Supp. 2d 1211, 1218-19 (D. Or. 1998).* However, since this decision appears to be an anomaly in the long line of environmental injunction cases, the Court finds *Cosgriffe* non-controlling and non-persuasive."

ii. "Plaintiffs essentially ask the Court to grant an injunction against the Forest Service because the Forest Service has failed to comply with two procedural requirements of the WSRA. Specifically, Plaintiffs allege that the Forest Service has not prepared CMPs and established detailed [river] boundaries … Injunctive relief is an extraordinary remedy, which does not automatically follow a violation of a procedural environmental statute." *Id.* at 668-69.

**7. Agency Classification of Rivers, Consideration of Eligible Rivers, and *Designation* of River Boundaries and Outstandingly Remarkable Values.**

*a. Sokol v. Kennedy, 210 F.3d 876, 877 (8th Cir. 2000)* (ruling on adjacent landowner's challenge to National Park Service selection of boundaries for newly-designated Niobrara River).

i. "The Park Service did not evaluate the land adjacent to the Niobrara River in terms of 'outstandingly remarkable' values. Instead, from the beginning, the planning team analyzed the Niobrara River area in terms of 'significant' and 'important' values."

ii. "The Park Service's statutory duty was to establish detailed boundaries, within the acreage limits of Section 1274(b), that would protect and enhance the outstandingly remarkable values that caused the river area to be included in the Wild and Scenic Rivers System. This duty does not always bar the administering agency from including unremarkable land; indeed, the Act could require such inclusion where necessary to protect outstandingly remarkable resources, e.g. because of the need for buffer zones around resources or because of discontinuities in a resource's locations. Equally, the Act does not require that the boundaries encompass all the outstandingly remarkable resources; this might be impossible given the acreage limitation. Neither categorical alternative is required by our decision. The Act allows the administering agency discretion to decide which boundaries would best protect and enhance the outstandingly remarkable values in the river area, but it must identify and seek to protect those values, and not some broader category." *Id. at 879.*

*b. Friends of Yosemite Valley v. Norton, 194 F.Supp.2d 1066, 1097 (E.D. Cal. 2002).*

*i.* The Court upheld Park Service decisions on what ORVs to include under interagency criteria governing ORV designations. The court also upheld the boundary designation noting that "WSRA does not define the terms 'immediate environments' or 'related adjacent land area.' Neither Section 1274(b), Section 1273(b) nor Section 1271 mandate an exact procedure for determining the width of river corridor boundaries, nor do these sections require that boundaries be drawn so as to include the physical location of each and every ORV."

ii. "The court finds that despite their strenuous arguments, Plaintiffs cite no authority forbidding an agency from changing the classification of a river segment [from scenic to recreational]… Defendants offer a rational explanation of the change in classification based on the enlarged boundary including more development." *Id. at 1113.*

*c.* *Center for Biological Diversity v. Veneman, No. 02-16201, 2003 U.S. App. LEXIS 13560* *18 (9th Cir. July 7, 2003) (suit for injunctive and declaratory relief alleging Forest Service violated *16 U.S.C. § 1276*(d)(1) by failing to consider effects of a plan on 57 rivers the Service identified as potentially eligible for designation as wild and scenic rivers. While the court concluded that inventorying the rivers did not constitute final agency action, the court held that there is a mandatory duty to consider effects on eligible rivers which can be reviewed under§ 706(1) of the APA.)

i. "In the context of the WSRA ***designation*** process, the duty to consider eligible rivers while planning means that federal agencies must consider the future ***designation*** of an eligible river when planning for that river and its immediate area. Although, unlike the [Wilderness] Study Act, § 1276(d)(1) does not require preservation or maintenance, it does require federal agencies to obtain site-specific information to discern the effect of any action on the river's eligibility for ***designation***. This consideration requirement does not necessarily preclude the agency from taking action, but it does require the agency to openly study, consider and discuss the action before taking it."

## III. Comprehensive Listing of Columbia River Gorge WSR Litigation

According to the Friends of the Columbia Gorge, "the Columbia This section contains all case law involving the Columbia River Gorge National Scenic Area. Unpublished decisions and decisions reversed on appeal are not included. The cases are listed in reverse chronological order under each jurisdiction. The cases have not been Shepardized to determine whether they are still valid case law; please check other sources to ensure their validity before citing them. A summary of Friends' current legal docket is also available."

**Federal Circuit Courts of Appeal**

- *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616 (9th Cir. 1992), *cert. denied*, 510 U.S. 813 (1993).

*Inverse condemnation actions against Oregon, Washington, and the Gorge Commission and declaratory judgment action against the Commission dismissed. For actions involving the Commission, the Act does not grant subject matter jurisdiction upon the federal district courts; to the contrary, sections 15(b)(4) through (b)(6) of the Act confer mandatory jurisdiction upon the state courts. The Commission's waiver of its sovereign immunity to suit in state court does not act to abrogate its immunity from suit in federal court. The states have not waived their sovereign immunity to suits in federal court. Finally, because Broughton failed to seek compensation via existing state procedures prior to filing this action, Broughton's claim was not ripe for judicial review in federal court.*

- **Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110 (9th Cir.), *cert. denied sub nom. Columbia Gorge United-Protecting People & Property v. Madigan*, 506 U.S. 863 (1992).

*The Scenic Area Act is not unconstitutional. The Act does not exceed Congress's Commerce and Property Clause authorities, and is therefore within the scope of its legislative power. The National Scenic Area regulatory system is a valid product of Congress's power under the Compact Clause. The fact that residents of the National Scenic Area do not get to vote for their land-use planners does not violate the Equal Protection Clause of the Fifth Amendment. A geographical area may be singled out for different treatment, as long as such treatment is not unconstitutionally motivated.*

- *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547 (Fed. Cir. 1991).

*The Scenic Area Act does not authorize suit against the Secretary of Agriculture for the alleged taking of Broughton's water rights. A claim seeking compensation for alleged damages arising from the implementation of the Interim Guidelines does not qualify as a "civil action to compel compliance" under section 15(b)(2) of the Act. Finally, construing 28 U.S.C. § 1331 to give the district court original jurisdiction would render the Little Tucker Act and section 15(b)(5) of the Scenic Area Act meaningless. Transfer to the United States Claims Court is proper.*top

**Federal District Courts**

- *<u>GLW Ventures LLC v. U.S. Dep't of Agric.</u>, 261 F. Supp. 3d 1098 (W.D. Wash. 2016).
*Action brought by landowner against United States Forest Service dismissed for lack of subject matter jurisdiction. The landowner sought to compel the Forest Service, which holds a conservation easement on the property, to accept a reconfiguration of the parcels through a boundary line adjustment. However, Skamania County, the Columbia River Gorge Commission, and the Skamania County Superior Court all held that the proposed boundary line adjustment would violate the Skamania County National Scenic Area ordinance because it would reduce an approximately 96-acre parcel below the 80-acre minimum parcel size. Collateral estoppel precluded the landowner from relitigating the lawfulness of its proposed boundary adjustment. The federal district court must give preclusive effect to the superior court's decision, which forecloses the possibility that the landowner may adjust the parcel boundaries as proposed.*

*Finally, the case was moot because no effective relief remains available to the landowner. The preclusive effect of the superior court decision made it impossible for the district court to grant effective relief to the landowner. The court also could not rescind the conservation easement deed, because to do so would defy the objectives of the Scenic Area Act.*

- *<u>Friends of the Columbia Gorge, Inc. v. Schafer</u>, 624 F. Supp. 2d 1253 (D. Or. 2008).
*Friends of the Columbia Gorge had standing to bring a facial challenge to the provisions of the Gorge Management Plan. Friends' purpose is to to protect and enhance the resources of the Scenic Area, and its members use and enjoy Gorge lands. Friends asserts that implementation of the provisions at issue will adversely affect its interests. Friends' claims are redressable by the court even though the Secretary of Agriculture could have let the Plan go into effect without issuing a formal concurrence that the Plan was consistent with the Scenic Area Act.*

*The Secretary of Agriculture's concurrence with a Management Plan provision allowing new dwellings on Special Management Area parcels in Rowena Dell was contrary to law. The provision violates the Scenic Area Act's unambiguous prohibition against residences on SMA parcels smaller than 40 acres. Petitioners' related claims involving dwellings in SMA Residential land use designations and farm-labor dwelling guidelines were not ripe for review.*

*The Secretary's concurrence with a Plan provision that allows the expansion of existing commercial and multifamily residential uses in the SMAs was also contrary to law. Expansions of such uses are major development actions, which the Scenic Area Act unambiguously prohibits.*

*A number of Petitioners' claims were not ripe for review. These included a claim that the Plan fails to include standards to protect against adverse cumulative effects to scenic, natural, and cultural resources; a claim challenging the Plan's failure to require new development in the SMAs to be compatible with the size and scale of nearby existing development; challenges to the Plan's SMA water resource buffer and SMA forest practices provisions; and a claim that the Plan fails to prevent recreational vehicle campgrounds in SMA Recreation Intensity Class 2 areas. In the alternative, the Secretary's concurrence on these provisions was not arbitrary and capricious.*

*Petitioners' challenges to Plan provisions allowing livestock grazing and the replacement and expansion of existing culverts as uses allowed outright were assumed to be ripe for review. However, the Secretary's concurrence on these provisions was not arbitrary and capricious.*

- *<u>Friends of the Columbia Gorge, Inc. v. United States Forest Serv.</u>, 546 F. Supp. 2d 1088 (D. Or. 2008).

*The Forest Service violated the Scenic Area Act and NEPA when it failed to review the impacts of its decision to convey a permanent easement across National Forest land to access adjacent private land for logging purposes.*

*The Forest Service erroneously relied on a prior Scenic Area consistency determination that was based on temporary use of the road. A new consistency determination was required because the proposed use changed from temporary use granted by a special use permit to permanent use granted by an easement. The cumulative effects of recurring, permanent use of the easement for road reconstruction and log hauling were never considered. In addition, the requirement to prepare a Scenic Area consistency determination triggered NEPA.*

*The adjacent landowner did not have a preexisting right to use the subject road under theories of boundary acquiescence, prescriptive easement, appurtenant easement, or "explicit easement." Furthermore, the Alaska National Interest Lands Conservation Act requires the Forest Service to grant reasonable access to private lands only when they are completely surrounded by federal lands—not when they are merely adjacent to federal lands. Ultimately, the Forest Service's decision to grant a permanent easement was a discretionary act that altered the status quo and triggered NEPA.*

- <u>Stevenson v. Rominger</u>, 909 F. Supp. 779 (E.D. Wash. 1995).

*The Forest Service's offer to purchase plaintiff's property is not reviewable under sections 15(b)(4) or 15(b)(5)(C) of the Scenic Area Act. The Service's offer is not a "final action" and plaintiff has not been "adversely affected" by the offer. Furthermore, because there remains a possibility that the Service might later make higher offers to the plaintiff within the three-year waiting period specified in section 8(o) of the Act, the claim is not ripe for federal adjudication.*

- <u>Stevenson v. Rominger</u>, 905 F. Supp. 836 (E.D. Wash. 1995).

*In landowner's challenge to the Forest Service's valuation of her property under section 8(o) of the Scenic Area Act, both Friends and the Gorge Commission met the requirements for intervening as of right. Friends' interests are identical to the purposes of the Act and are protected by the Act. A ruling in favor of the landowner might vitiate Friends' interest in the Forest Service's land acquisition program. The Commission's interests in administering the Management Plan and the GMA could be affected by the outcome of this case. Finally, the interests of both Friends and the Commission would not be adequately represented by the Forest Service.*

- *<u>*W. Birkenfeld Trust v. Bailey*</u>, 837 F. Supp. 1083 (E.D. Wash. 1993).

*Following dismissal of plaintiffs' as-applied challenge to the Management Plan, plaintiffs' motion for reconsideration denied. Because plaintiffs offer no new evidence and cite no change in the law, there is no basis for reopening the case. Until all administrative and state court remedies are exhausted, plaintiffs' claim is not ripe for adjudication.*

- *<u>*W. Birkenfeld Trust v. Bailey*</u>, 827 F. Supp. 651 (E.D. Wash. 1993).

*The Eleventh Amendment does not grant the Gorge Commissioners immunity from suit, especially where it is alleged that the Commissioners are acting beyond their statutory powers or in an unconstitutional manner. However, in this case challenging the adoption of the Final Management Plan, the Commissioners were entitled to absolute legislative immunity, and plaintiffs' claims against the individual Commissioners were accordingly dismissed.*

*Claims challenging the constitutional validity of the Management Plan may be brought under section 15(b)(4) of the Scenic Area Act. Claims seeking to set aside portions of the Management Plan as inconsistent with the Act must be brought under section 15(b)(2) of the Act, and therefore must comply with the 60-day notice requirements of section 15(b)(3). Here, even though only four of the plaintiffs served notice on the Forest Service, and apparently none of the plaintiffs served notice on the Gorge Commission, the record contained a "multitude" of objections to the challenged Management Plan provisions putting defendants on notice of the pending challenge and giving defendants an opportunity to investigate and prepare for suit. Thus, the purpose of the notice requirement had been served. Motion to dismiss the claims on the basis of insufficient notice denied.*

*Plaintiffs' claims seeking to require compliance with the Act appeared to satisfy the constitutional element of standing by showing a threat of real and imminent injury to their property interests upon adoption of the land use ordinance. However, plaintiffs' claims do not constitute anything more than a "generalized grievance" until the ordinance is adopted, the restrictions are applied to plaintiffs' land, and plaintiffs exhaust their administrative remedies. The claims were not ripe for adjudication and were dismissed.*

- *<u>*Klickitat County v. Columbia River Gorge Comm'n*</u>, 770 F. Supp. 1419 (E.D. Wash. 1991).

*Motion to dismiss case for failure to strictly comply with the citizen-suit notice provisions under section 15(b)(3)(A) of the Scenic Area Act denied. Although only one of the six plaintiffs had served notice on the Forest Service, the Service was aware of the pending lawsuit and its claims. Although none of the plaintiffs had formally served notice on the Gorge Commission, the plaintiffs had voiced their requests in the form of written and oral testimony before the Commission, and the Commission had presumably rejected these requests.*

*The Forest Service is not required to comply with NFMA planning regulations or to prepare alternatives under NEPA in developing the Management Plan. Further, section 17(f)(1) of the Scenic Area Act exempts the Forest Service from having to prepare an environmental impact statement or an environmental assessment under NEPA. State law cannot be imposed on the Gorge Commission unless the Gorge Compact specifically reserves the right to do so. Thus, the*

*Gorge Commission is not required to follow SEPA procedures in developing the Management Plan. Finally, the Gorge Commission is entitled to some deference in its interpretation of the Scenic Area Act.*

**Federal Court of Claims**

- Broughton Lumber Co. v. United States, 30 Fed. Cl. 239 (1994).

*The National Scenic Act did not effect a Fifth Amendment taking of Broughton's alleged right to apply an existing state-granted water right toward a future FERC hydroelectric power license. Given the significant obstacles posed by preexisting federal and state obligations, Broughton possessed no compensable expectancy in the use of its water right for hydroelectric generation.*

**Oregon Supreme Court**

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 346 Or 415, 212 P3d 1243 (2009).

*Gorge Commission order approving Multnomah County ordinance authorizing commercial uses on historic properties upheld. The Commission properly interpreted its Plan Amendment to require the County to authorize all of the specified uses both on properties listed on the National Register for Historic Places and on properties "eligible" for listing. The phrase "may be allowed" in the Plan Amendment is not ambiguous. It denotes discretion, unlike the phrase "shall be permitted." However, this does not mean that a county has discretion to omit uses that "may be allowed" from the county's ordinance. Rather, absent a showing that omitting a use from an ordinance is more protective of resources, counties must list specified uses in their ordinances and then decide on a case by case basis whether to allow the uses.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 346 Or 433, 213 P3d 1191 (2009).

*Court of Appeals' decision upholding Management Plan Amendment authorizing commercial uses on historic properties affirmed. The challenged Plan Amendment did not violate the purposes and standards of the Scenic Area Act. The Scenic Area Act does not expressly prohibit commercial uses outside of the urban areas and commercial zones. The Commission properly gave due consideration to proposed alternatives.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 346 Or 366, 213 P3d 1164 (2009).

*In facial challenges to Management Plan provisions, it is consistent with the statutory standards of review in ORS 196.115(3)(c) to (e) to also apply the judicial standard of review of whether the challenged provisions depart from a legal standard expressed or implied in the Scenic Area Act or contravene the Act or some other applicable statute.*

*The Gorge Commission is entitled to Chevron deference in interpreting ambiguous provisions of*

*the Scenic Area Act or filling in the gaps of the statute. However, post hoc rationalizations interpreting the Scenic Area Act offered for the first time on appeal by the Gorge Commission's counsel, when the agency itself has not articulated a position on the issue, are not entitled to deference.*

*The Management Plan complies with the Scenic Area Act's requirement to protect scenic resources from cumulative adverse effects. The Plan meets this mandate by requiring reviewing agencies to review potential cumulative effects in the context of each development application and prohibit uses and development that would contribute to adverse cumulative effects.*

*The Management Plan does not comply with the Scenic Area Act's requirement to protect natural and cultural resources from cumulative adverse effects.*

*GMA Overall Scenic Policy #1 does not violate the Scenic Area Act. Under this policy, reviewing agencies must review proposed development and prevent adverse scenic impacts through a number of means, including modifications to siting, size, and other design features.*

*The Commission must decide whether to protect geologic resources and whether to require avoidance of residential development in areas with geological hazards.*

*The Commission did not violate the Scenic Area Act by authorizing fish processing operations and commercial events in specific land use designations, nor by allowing livestock grazing without review in most General Management Area land use designations.*

**Washington Supreme Court**

- *Skamania County v. Columbia River Gorge Comm'n, 144 Wn. 2d 30, 26 P.3d 241 (2001).

*Section 15(a)(1) of the Scenic Area Act does not give the Gorge Commission the authority to collaterally invalidate a final county land use decision after expiration of the appeal period.*

- Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn. 2d 366, 849 P.2d 1225 (1993).

*Landowner's appeal of a Gorge Commission decision denying development dismissed because appeal was not perfected in a timely manner. A motion for reconsideration is timely only when a party both files and serves the motion within ten days. Because Shaefco's motion for reconsideration was not served on the Commission within ten days, the motion was untimely and the thirty-day deadline under RAP 5.2(a) for filing a notice of appeal was not extended. As a result, the subsequent notice of appeal was also untimely.*

**Oregon Court of Appeals**

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 257 Or App 197, 305 P3d 156 (2013).

*Gorge Commission decision to approve the Columbia River Gorge Air Study and Strategy affirmed. The state agencies' reliance on the existing federal Regional Haze Program as*

*their approach for improving air quality in the Scenic Area was not inconsistent with the Management Plan and Scenic Area Act. The Strategy is a "regional air quality strategy" within the meaning of the Management Plan, and concrete targets for improvement are not required. Utilizing visibility impairment as a surrogate for other pollution concerns was a legally permissible approach.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 248 Or App 301, 273 P3d 267 (2012).

*Management Plan revisions affirmed in part, reversed in part, and remanded for reconsideration. Revisions to the Plan's glossary definition of "natural resources" were reasonable, and the Commission did not abuse its discretion in adopting them. The Plan's glossary definition of "natural resources" need not include all natural resources, even if other natural resources are protected by other provisions of the Plan. The Management Plan fails to comply with the Scenic Area Act's mandate to prevent adverse effects, including cumulative adverse effects, to water resources (e.g., streams, ponds, wetlands, riparian areas). However, the Plan does properly prevent cumulative adverse effects to wildlife habitat and rare plants. Finally, the Plan provisions exempting proposed land divisions from the requirement to prepare a cultural resources reconnaissance survey may violate the Act's requirement to prevent cumulative adverse effects to cultural resources.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 236 Or App 479, 238 P3d 378 (2010), *rev den*, 349 Or 654, 249 P3d 542 (2011).

*Management Plan amendment authorizing recreation resort review use on lands designated commercial recreation upheld. Petitioners did not show that the Gorge Commission erred in concluding that there had been a significant change in circumstances to justify the Plan Amendment. Nor did Petitioners show that the challenged Plan Amendment violated the purposes and standards of the Scenic Area Act. Finally, the Commission's order approving the Plan Amendment did not make any legal determinations about whether there are any legally existing industrial uses at the Broughton Landing site.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 218 Or App 261, 179 P3d 700, *aff'd*, 346 Or 415, 212 P3d 1243 (2009).

*Gorge Commission order approving Multnomah County ordinance authorizing commercial uses on historic properties upheld. Petitioners did not show that the Commission erred in concluding that the County's preferred approach of limiting commercial uses to properties listed on the National Register of Historic Places was not more protective of resources than the Commission's approach.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n 218 Or App 232, 179 P3d 706, *aff'd*, 346 Or 433, 213 P3d 1191 (2009).

*Management Plan Amendment authorizing commercial uses on historic properties upheld. Petitioners did not show that the Gorge Commission erred in concluding that there had been a significant change in circumstances to justify the Plan Amendment. Nor did Petitioners show that the challenged Plan Amendment violated the purposes and standards of the Scenic Area Act.*

*Although Petitioners did not show that the Plan Amendment would adversely affect resources, Petitioners may challenge individual land uses on that basis in the future on an as-applied basis. The Gorge Commission is not required to consider cumulative effects at the time it adopts a Plan Amendment, but adverse cumulative effects must be protected against at the time land use applications are reviewed. Finally, even if the Plan Amendment did not meet its stated goal of protecting historic resources, that would not necessarily mean that the Plan Amendment violates the Act.*

- *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n 215 Or App 557, 171 P3d 942 (2007), *aff'd in part and rev'd in part*, 346 Or 366, 213 P3d 1164 (2009).

*The Commission did not violate the Scenic Area Act during its Management Plan review process by limiting its revisions to selected portions of the Plan. However, upon completion of plan review, any portion of the Plan may be challenged as inconsistent with the Act, including previously adopted provisions that were unchanged during plan review. Finally, provisions involving the Special Management Areas are subject to the authority of the United States Forest Service, and therefore challenges to such provisions cannot be brought in the state courts.*

*Petitioners' claims involving the scenic resources implementation handbook and the retention of tree cover were not ripe for review.*

*The Commission did not violate the Act by deleting the requirement to site new development to minimize visibility, nor by extending the time period for new development to achieve visual subordinance from two years to five years.*

*The Commission did not violate the Scenic Area Act by declining to expand the riparian buffers required by the Management Plan. The current buffers are not optional. The Management Plan provision that exempts portions of the Columbia River adjoining the urban areas from the riparian resource protection guidelines does not violate the Act.*

*The provisions of the Management Plan involving the protection and enhancement of agricultural lands for agricultural uses do not violate the Scenic Area Act.*

*The Commission did not violate the Scenic Area Act by allowing outright the replacement or expansion of existing culverts in Open Space land use designations.*

*The Commission violated the Scenic Area Act by allowing the expansion of existing industrial uses in the General Management Area.*

- *Columbia River Gorge Comm'n v. Hood River County, 210 Or App 689, 152 P3d 997, *rev den*, 342 Or 727, 160 P3d 992 (2007).

*Oregon's Ballot Measure 37 does not apply within the Columbia River Gorge National Scenic Area. The Columbia River Gorge Commission is a bistate entity rather than a state agency. The Columbia River Gorge Compact has the force of federal law. The Scenic Area Act's implementing*

*rules, including the Management Plan and the county ordinances, are required by federal law and are thus not subject to Measure 37.*

- *Murray v. State, 203 Or App 377, 124 P3d 1261 (2005), *rev den*, 340 Or 672, 136 P3d 742 (2006).

*Inverse condemnation claim dismissed. The plaintiffs had not pursued all available administrative remedies, and therefore the case was not ripe. Although the Gorge Commission had denied the plaintiffs' application for a mining operation, the plaintiffs did not seek review of that denial, nor did they complete a cultural resources survey or file a new development application.*

*In addition, although the plaintiffs had been enjoined from further ground-disturbing activities after bulldozing the property without a permit, the issuance of the injunction did not ripen the inverse condemnation claim. The injunction was necessary to prevent further unlawful actions by the plaintiffs, and did not foreclose the possibility of future lawful development activities on the property.*

- Haigh v. Columbia River Gorge Comm'n, 142 Or App 550, 921 P2d 1350 (1996).

*Commission approval of an application for a mobile home and accessory structures upheld. The Commission properly determined through the "special review" process that alternative nonresidential uses would pose a greater threat to deer and elk winter range than the proposed use. Intervention status for opposing neighbor was proper.*

- *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 133 Or App 1, 889 P2d 1303 (1995).

*Commission approval of proposed facility for storing explosives on Forest land upheld. Installation of the facility is a permitted, non-forest use rather than a conversion of forest land to commercial use, and therefore does not violate the Final Interim Guidelines or section 6(d)(2) of the National Scenic Act.*

- Murray v. Columbia River Gorge Comm'n, 133 Or App 461, 891 P2d 1380 (1995).

*The mining of aggregate and other material in the GMA is a "major development action" that requires review under section 10(c) of the Scenic Area Act. Major development actions are subject to Commission review in all land classifications in the National Scenic Area except urban areas. Landowner's mining in the GMA without prior Commission approval was a willful violation of the Act.*

- *J. Arlie Bryant, Inc. v. Columbia River Gorge Comm'n, 132 Or App 565, 889 P2d 383, *rev den*, 321 Or 47, 892 P2d 1024 (1995).

*Commission's order directing five-year phase-out of petitioner's quarry operation, a non-conforming use in the National Scenic Area, upheld. The five-year period was legitimately selected based on the Director's findings and conclusions regarding a conflict between the quarry operation and the planned expansion of recreational resources in the area.*

- *Murray v. Columbia River Gorge Comm'n, 125 Or App 444, 865 P2d 1319 (1993).

*Commission's denial of application to build a road and subdivide an agricultural area upheld. Commission properly found that approval of the application would set a precedent resulting in adverse cumulative impacts of future parcelization, diversion of agricultural land to residential use, and adverse effects on scenic resources in the area. Because the record did not demonstrate that the applicant was left with no economically viable or beneficial use of the property, the denial was not an uncompensated taking.*

- *<u>Miller v. Columbia River Gorge Comm'n</u>, 118 Or App 553, 848 P2d 629 (1993).

*Commission's denial of application for a land division and new residence was a legitimate exercise of police power regulatory authority. The denial was not a scenic easement. Furthermore, because the applicants did not demonstrate that they had been deprived of all economically viable or substantial beneficial use of the property, the denial was not an unconstitutional taking.*

- *<u>Friends of the Columbia Gorge, Inc. v. Land Conservation & Dev. Comm'n</u>, 85 Or App 249, 736 P2d 575 (1987).

*LCDC's acknowledgement of the City of Hood River's comprehensive plan to develop Wells Island was improper because the City's Goal 5 resource inventory and its analysis of economic consequences were inadequate. The inventory's exclusion of all but two relevant bird species on the island was unacceptable and the economic analysis failed to estimate how many people might use the facilities, the costs of establishing and maintaining the facilities, and how much revenue the facilities might generate.*

**Washington Court of Appeals**

- *<u>Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.</u>, 129 Wn. App. 35, 118 P.3d 354 (Div. II 2005).

*The DNR properly granted a forest practices permit for a proposal to convert 30 acres of land in a Special Management Area from forest use to new agricultural use. The Management Plan rules in effect at the time the application was filed allowed this type of conversion without review for protection of scenic resources. State law incorporates the Management Plan's conversion provisions.*

- *<u>Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n</u>, 126 Wn. App. 363, 108 P.3d 134 (Div. III 2005).

*The Gorge Commission's decision to approve a 36-acre expansion of the Stevenson Urban Area was supported by substantial evidence. The 36 acres had been within the city limits since before the passage of the Scenic Area Act and the expansion would benefit Skamania Lodge, the county's largest private sector employer.*

- <u>Skamania County v. Woodall</u>, 104 Wn. App. 525, 16 P.3d 701 (Div. II 2001), *review denied*, 144 Wn.2d 1021, 34 P.3d 1232 (2001), *cert. denied*, 535 U.S. 980, 122 S. Ct. 1549, 152 L. Ed. 2d 399 (2002).

*If the National Scenic Act or Management Plan does not provide a solution to resolve a land use dispute, state common law must be applied. The Management Plan dictates that the right to a nonconforming use terminates when the use is discontinued for more than one year, but does not*

*define "discontinued." Under Washington common law, if a nonconforming use has been abandoned for the specified time period, a rebuttable presumption arises that the landowner intended to abandon the use, but the landowner can overcome the presumption with evidence that there was no intent to abandon. The case must be remanded for a determination of whether the record shows that the landowners did not intend to abandon.*

- *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 867 P.2d 686 (Div. II 1994).

*The Gorge Commission was allowed to administer the Final Interim Guidelines adopted by the Forest Service without adopting its own regulations. The Commission's denial of landowner's application to subdivide his property was not arbitrary or capricious. The Commission properly determined that the proposed subdivision would "adversely affect" the resources of the National Scenic Area because of its potential cumulative effects.*

- *Klickitat County v. State*, 71 Wn. App. 760, 862 P.2d 629 (Div. III 1993).

*The state courts do not have subject matter jurisdiction over claims for declaratory and injunctive relief against the Gorge Commission unless the claims allege a violation of the Scenic Area Act. The Act does not grant the states plenary jurisdiction over all types of suits against the Commission. The Act and Management Plan are federally mandated, and therefore do not constitute state programs for purposes of a Washington statute that prohibits the state from shifting the costs of state programs to the counties. Finally, because the Commission is a creature of federal rather than state law, the state cannot be liable for any costs associated with any inverse condemnation action brought against a county as a result of a county scenic area ordinance.*

**Surface Transportation Board**

- *Burlington Northern Railroad Company—Abandonment Exemption—Between Klickitat and Goldendale, WA*, Docket No. AB-6 (Sub-No. 335X) (STB served June 8, 2005).

*The Surface Transportation Board denied a petition to (1) reopen railbanking proceedings involving the Klickitat Trail, (2) declare certain portions of the Trail abandoned, and (3) revoke authority for interim trail use. The petitioners failed to provide reliable evidence to support their claims. The BNSF Railroad Company retains a right-of-way connecting the trail to the Railroad's main line. In addition, the Klickitat Trail Conservancy owns an easement that connects the trail to the BNSF property.*

**Columbia River Gorge Commission**

- **GLW Ventures, LLC v. Skamania County*, CRGC Nos. COA-S-13-02 & COA-S-13-03 (May 13, 2014), *aff'd*, No. 14-2-00071-7 (Skamania Cnty. Super. Ct. Dec. 17, 2015).

*Skamania County decision denying a proposed boundary line adjustment upheld in part and remanded in part.*

*Skamania County's National Scenic Area ordinance authorized participants in a County appeal hearing to raise new issues before the close of the public record, so long as each issue was*

*raised in "sufficient detail to afford the County and all parties an opportunity to respond to the issue." The U.S. Forest Service properly raised issues in the County appeal pursuant to this authority.*

*Skamania County correctly concluded that the 80-acre minimum parcel size in the Scenic Area ordinance applied to, and prohibited, the proposed boundary line adjustment, which would have reduced a 96.06-acre parcel below the 80-acre minimum. An exception in the ordinance that allowed parcels to be reduced below the minimum size under certain circumstances did not apply here. On the issue of parcel size, the County's zoning ordinance was more restrictive and controlled over a federal conservation easement that potentially allowed the ownership of the property to be broken into two specific tracts. Skamania County's decision did not repeal, abrogate, or violate the federal conservation easement. Finally, Skamania County's decision did not effect an unconstitutional taking of property.*

*The term "property owner" in Skamania County's Scenic Area ordinance is ambiguous. In this case, the Forest Service was a property owner because it owned a conservation easement worth nearly two-thirds of the appraised value of the property. Under the County's Scenic Area ordinance, the land use application was not complete and could not be processed unless and until the Forest Service signed or consented to the application.*

- *<u>*Easton v. Wasco County*</u>, CRGC No. COA-W-12-01 (Feb. 14, 2013).

*The parties filed a stipulated motion for a voluntary remand that met all the requirements of Commission Rule 360-60-220(2). The Gorge Commission granted the motion and remanded the appeal to the county for a new decision.*

- *<u>*Drach v. Skamania County*</u>, CRGC No. COA-S-10-01 (Aug. 24, 2010).

*The Gorge Commission did not have jurisdiction to review a Skamania County resolution addressing land use consistency for a proposed commercial wind energy facility that was under review by the Washington Energy Facility Site Evaluation Council (EFSEC). The County's resolution was not a final action. Questions of law and fact about whether the project would require road construction within the National Scenic Area should be raised to EFSEC.*

- *<u>*Darcy v. Multnomah County*</u>, CRGC No. COA-M-06-04 (June 29, 2007), *aff'd*, 222 Or App 330, 194 P3d 193 (2008).

*County determination that a commercial horse boarding operation and a single-family dwelling were not legally existing uses upheld. The burden is always on the landowner to obtain all relevant land use approvals. Because the landowners in this appeal failed to obtain the required community services permit for the horse boarding operation and the required land use decision for the dwelling, neither use was lawfully established.*

- <u>*Bacus v. Skamania County*</u>, CRGC No. COA-S-04-01 (Aug. 10, 2004), *appeal dismissed*, No. 09-2-00190-3 (Skamania Cnty. Super. Ct. Jan. 25, 2018).

*When a de novo hearing is held, the parties may submit new evidence, and the applicant retains the burden to demonstrate that the application is consistent with the applicable standards. Here, although the Skamania County Board of Adjustment committed procedural errors during its de novo hearing, the appellants' substantial rights were not prejudiced. In addition, decision makers are required to ensure that applications are complete before providing notice of an opportunity to comment. Here, although the application was technically incomplete at the time of the notice, Skamania County reasonably believed that it was complete, and the application was made complete prior to the County's final decision. Thus, no procedural error was committed.*

*When reviewing an application for a residence, decision makers must evaluate whether the subject lot was legally created. Creation through a prior governmental approval results in a presumption that the lot was legally created.*

*In addition, when proposed development is located within 1000 feet of a sensitive wildlife site, the application must be reviewed by the state fish and wildlife agency. Here, informal review satisfied this requirement. The Columbia River constitutes a sensitive wildlife site because it is used by several legally protected species. Finally, highway demolition spoils containing asphalt do not meet the definition of "fill" and may not be used for site development.*

- **Friends of the Columbia Gorge v. Multnomah County* ("*Heuker*") CRGC No. COA-M-02-01 (July 9, 2002), *recons den* (Sep. 17, 2002), *rev dismissed* (Or. Ct App. June 30, 2004).

*In-kind replacement structures must be made visually subordinate to the maximum extent practicable through the use of proper colors, reflectivity levels, and landscaping. The emergency/disaster response rules do not apply to in-kind replacement dwellings proposed to replace dwellings destroyed by fire.*

- *Bacus v. Skamania County*, CRGC No. COA-S-01-04 (June 19, 2002).

*Skamania County's approval of a proposed road was improper because the applicant's site map did not identify the precise location of the road, the applicant had not submitted a required grading plan prior to the decision, and the record did not demonstrate that the applicant had a legal interest in the land on which the road would be built. As a result, the decision was not based on substantial evidence and the findings were insufficient to support the decision. Scenic area decisions must be based on complete and accurate application materials and a complete review of the materials. Review cannot be deferred through conditions of approval.*

- **Irish v. Skamania County*, CRGC No. COA-S-01-07 (May 8, 2002).

*Skamania County improperly concluded that the dwellings in a proposed cluster development were clustered. The dwellings were nearly one-quarter mile apart on opposite ends of the parcel. Further, existing dwellings on adjacent parcels may not be used to effectuate a cluster. Finally, the County's decision was flawed because the County merely relied on the applicant's review of his own application rather than conducting an independent review.*

- **Messmer v. Multnomah County*, CRGC No. COA-M-01-06 (Mar. 19, 2002).

*Appeal dismissed because petitioners failed to timely file their request for review.*

- *Johnson v. Multnomah County, CRGC No. COA-M-01-02 (Nov. 5, 2001), *rev dismissed* (Or. Ct. App. Aug. 15, 2003).

*Appeal dismissed for lack of jurisdiction. A change in Multnomah County's scenic area ordinance deprived the Petitioner from the opportunity for a de novo hearing before the County. As a result, there was no final County action or order that could be heard by the Commission. In addition, because the Commission had no jurisdiction to hear the appeal, it also did not have any authority to order the County to hold a de novo hearing.*

- *Friends of the Columbia Gorge v. Skamania County ("*Eagle Ridge*"), CRGC No. COA-S-99-01 (June 22, 2001).

*A decision maker cannot make a decision as to whether a proposed land use complies with a scenic area ordinance without a complete application. A decision based on an incomplete application is not based on substantial evidence and deprives the public of the opportunity to review and comment on the proposal. Finally, a decision maker cannot defer the submission of required application materials through conditions of approval.*

- *Murray v. Executive Director, CRGC No. C98-0010-K-G-11 (May 30, 2001).

*Appeal dismissed as moot. Petitioners had sold the subject property and no longer had any legal interest in the property or any authority to act as agents for the new property owner. In addition, the new property owner had not indicated any interest in continuing the appeal.*

- *Haigh v. Wasco County, CRGC No. COA-W-00-01 (Apr. 16, 2001), *aff'd*, 182 Or App 292, 49 P3d 851 (2002).

*Residential building site approved by County complied with the "minimize visibility" standard. There was no marked difference in visibility between the approved site and the least visible site. In addition, the least visible site was unbuildable because the septic field apparently could not be built within an existing easement for a power line. On the other hand, the alleged $10,000 increase in costs to build at the least visible site was an improper basis for determining unbuildability. Evidence regarding buildability must be well-documented with the testimony of competent professionals and must include an analysis explaining why alternative means of ensuring compliance would not be reasonable.*

- Castle v. Executive Director, CRGC No.C99-0017-K-G-11 (Feb. 16, 2001).

*Because proposed building site for replacement dwelling was approximately ten feet east of the existing dwelling and on a different footprint, replacement dwelling was not an "in-kind" replacement. However, the replacement dwelling complied with the "minimize visibility" standard even though it would not be sited on the least visible portion of the property. Because less visible alternative sites would not allow the landowner to oversee the ongoing operations of her established viable commercial farming operation, the less visible sites were not practicable. Finally, failure by the Executive Director to issue a decision within 72 days does not result in automatic approval of the application.*

- *Friends of the Columbia Gorge v. Skamania County ("*Huett*"), CRGC No. COA-S-00-02 (Dec. 20, 2000).

*County decision approving boundary line adjustments between three tracts of land reversed. The County's finding that the three tracts each met the one-acre minimum lot size was not supported by substantial evidence. In addition, because the three tracts were remnants of a 1904 "ancient subdivision" that had never been recognized under modern zoning standards, the tracts did not constitute legally separate and buildable lots. The Scenic Area Act and Management Plan do not allow for recognition of ancient subdivisions. Finally, Washington's Growth Management Act does not apply within the National Scenic Area and could not be used to legitimize the ancient subdivision.*

- *Friends of the Columbia Gorge v. Skamania County ("*L'Hommedieu*"), CRGC No. COA-S-00-04 (Oct. 16, 2000), *aff'd*, No. 00-2-00157-8 (Skamania Cnty. Super. Ct. Feb. 7, 2002).

*County decision approving new residence upheld. Although approved building site was not the least visible, it nevertheless complied with the "minimize visibility" standard because the least visible site was a "wet" area and therefore would be impracticable.*

- *Heany v. Executive Director, CRGC No. C99-0002-K-S-11 (Feb. 22, 2000).

*Executive Director properly denied a proposed 2400-square-foot, 34-foot-tall accessory building. The proposed building would not have been incidental and subordinate to the main use of the property because the building was too large and would have been used to store farm machinery and materials for a construction business. There can only be one "main use" per property, and the main use of this property was residential.*

- Clark v. Skamania County, CRGC No.COA-S-99-04 (Feb. 22, 2000).

*County condition of approval requiring a single-family dwelling to be sited at a different location than applicant's proposed site upheld. The approved site would better meet the requirements for siting dwellings on forest land because it would be closer to the main road, thus minimizing overall disturbance to the parcel and minimizing the amount of forest land used to site dwellings, structures, access roads, and service corridors.*

- *Murray v. Wasco County, CRGC No. COA-W-98-03 (Oct. 5, 1999).

*County approval of proposal to lay a fiber optic cable affirmed. The decision was supported by substantial evidence and was not clearly erroneous or arbitrary and capricious. The County did not make any enforcement errors; the record showed that the applicant ceased its unpermitted operations once it learned that a permit was required and then fully complied with the permit process.*

- *Friends of the Columbia Gorge, Inc. v. Skamania County ("*Carell*"), CRGC No. COA-S-96-03 (June 2, 1998).

*County approval of proposed cluster development reversed. The county road crossing the property was owned in fee simple by the County rather than the applicant and therefore could not be counted toward the property's total acreage. The property was only 38.12 acres, which did not meet the 40-acre minimum lot size. In addition, the County erred in processing the application as a simple land division. In evaluating a cluster development application, the*

*decision maker must compare the impacts of the proposed cluster with the impacts from conventional parcel-by-parcel development. This comparison must evaluate siting opportunities with respect to all of the factors in the ordinance (visibility, landscape features, landscape setting, cultural resources, consolidation of development, natural resources, and resource management). The County also failed to ensure permanent protection for at least 75% of the property. Finally, the County erred in not requiring a cultural resource reconnaissance survey prior to approval.*

- *<u>Friends of the Columbia Gorge v. Skamania County</u> ("*Spiegl*"), CRGC No. COA-S-96-02 (July 24, 1997).

*County approval of proposed cluster development reversed and remanded. The County erred in processing the application as a simple land division and in failing to scrutinize resource impacts prior to approval.*

- <u>Windle v. Doherty</u>, CRGC No. C96-0009-H-G-11 (Dec. 10, 1996).

*Although a single-family residence could be allowed on the subject property, the Executive Director's findings regarding the siting and size of the approved dwelling were insufficient to support the decision, and the decision was not supported by substantial evidence in the whole record. The Executive Director did not properly evaluate the following factors: siting of the residence in relation to the existing trees on the property, protection of the rural character of the rural residential land use designation, a determination of the exact size of the dwelling, and compatibility with existing development in the vicinity. Remanded for further review.*

- *<u>Friends of the Columbia Gorge v. Skamania County</u> ("*Mills*"), CRGC No. COA-S-95-02 (June 27, 1996).

*County decision approving a farm dwelling and accessory building reversed. The subject 20-acre parcel was one of eleven contiguous tracts all owned by the same property owner. The proposal must be analyzed in light of the entire 335-acre "subject farm or ranch." A residence already existed on the subject farm, and the criteria did not permit approval of an additional dwelling.*

- *<u>Friends of the Columbia Gorge, Inc. v. Skamania County</u> ("*Nature Friends Northwest*"), CRGC No. COA-S-95-01 (Nov. 16, 1995).

*County decision approving a "clubhouse" reversed because a clubhouse is not an allowed use in the underlying land use designation. If the Scenic Area rules do not allow a use outright or though review, it is not permitted. In addition, the clubhouse can not be allowed as a "learning or research facility," because its primary purpose would be recreational or social.*

- <u>Haigh v. Doherty</u>, CRGC No. C94-0041-W-G-11 (Apr. 12, 1995), *aff'd sub nom. Haigh v. Columbia River Gorge Comm'n*, 142 Or App 550, 921 P2d 1350 (1996).

*Although a mobile home could be allowed on the subject property, the Executive Director's findings with regard to the required agricultural buffer were insufficient to support the decision and the decision was not supported by substantial evidence in the whole record. Remanded for further review.*

- <u>Sexton v. Doherty</u>, CRGC No. C94-0068-K-G-11 (Mar. 16, 1995).

*Executive Director's approval of a proposed single-family dwelling, detached garage, and septic tank upheld. Executive Director's findings of fact and conclusions of law adopted.*

- *Kuhlman v. Skamania County, CRGC No. COA-S-94-01 (Mar. 14, 1995).

*County's denial of request to build a residence on a 10-acre parcel in an SMA upheld. Section 6(d)(5) of the Scenic Area Act prohibits major development actions in SMAs, and the subject action qualifies as a major development action under section 2(j)(4).*

*The Kuhlmans did not meet the requirements for invoking the special review process. They had not described how the scenic area rules impact the use of their property, nor had they explained why the requested use must be allowed to provide economic or beneficial use of the property.*

- *In re Eagle I Wind Partners, Inc. (Apr. 18, 1994).

*Commission upheld Executive Director's decision to deny acceptance of application to place 33 wind turbine modulars. The proposed facility would produce electric power for commercial purposes, and therefore constituted a prohibited industrial use.*

**Oregon Land Use Board of Appeals**

- *Lois Thompson Housing Project v. Multnomah County, 37 Or LUBA 580 (2000).

*Appeal of County notice of violation of land use permit dismissed for lack of jurisdiction. An appeal of a county scenic area decision filed with LUBA prior to the date the Gorge Commission issues a final decision reviewing the county decision is premature and will be dismissed. LUBA has jurisdiction over a county scenic area decision only when the decision is first appealed to the Gorge Commission and then appealed to LUBA in lieu of the Oregon Court of Appeals. Finally, where LUBA lacks jurisdiction over a scenic area appeal, it will not transfer the appeal to circuit court.*

- Kelley v. City of Cascade Locks, 37 Or LUBA 80 (1999).

*Appeal of a city council resolution endorsing the siting of a tribal casino within city limits dismissed for lack of jurisdiction because the resolution was not a land use decision. The resolution merely expressed conditional support for the casino, did not apply the city's land use regulations, and did not have any impact on present or future uses of land.*

*Land owned by a tribe in fee simple is subject to the jurisdiction of the state government and its political subdivisions. In contrast, land held in trust for a tribe by the U.S. Secretary of the Interior is not subject to the jurisdiction of the states, but rather is subject to the jurisdiction of the tribal government.*

- Mazeski v. Wasco County, 28 Or LUBA 159 (1994), *aff'd*, 133 Or App 258, 890 P2d 455 (1995).

*Application for a sand and gravel mining conditional use permit on property located within the National Scenic Area and subject to the Columbia River Gorge Overlay zone must be reevaluated by the County under various review criteria. County's findings regarding continuation of historic levels of extraction and operation, historic compatibility with surrounding properties, and impacts on traffic flow and safety in the area were not supported by substantial evidence in the record. County's findings regarding compatibility with farm uses, public roads, and right-of-way uses were mere conclusions that did not demonstrate that the approval standards were met.*

*On the other hand, criterion prohibiting development from causing "a negative impact on the scenic quality of the Gorge" is highly subjective and was satisfied when the County performed the required site visibility analysis and considered the visual impacts of the "level of development proposed" on the Gorge as a whole, taking into consideration existing conditions at and near the site. The visibility from vantage points not specifically listed in the ordinance need not be considered.*

- <u>*Mazeski v. Wasco County*</u>, 26 Or LUBA 226 (1993).

*Petitioners reasonably relied on a local code provision and hearing notice stating that the county court's review would be limited to the evidentiary record before the planning commission, and were unaware that materials not in the planning commission record had been placed before the county court. Petitioners did not waive their right to challenge the submission of these materials by failing to object below. Because the materials were relevant to the applicable approval standards and because petitioners had been denied the opportunity to rebut the materials, their substantial rights were prejudiced and the challenged decision must be remanded.*

**Washington Growth Management Hearings Boards**

- *<u>*Achen v. Clark County*</u>, Western Washington Growth Management Hearings Board, Case No. 95-2-0067, Final Decision and Order (Sep. 20, 1995).

*A Washington Growth Management Hearings Board does not have jurisdiction to determine whether the Scenic Area Act has been violated. However, the Growth Management Act provides no authority to place an Urban Growth Area within the GMA or the SMAs.*

**Washington Forest Practices Appeals Board**

- <u>*Columbia River Gorge Comm'n v. State*</u> ("*Seeder Tree*"), FPAB Nos. 95-31 & 95-32 (Oct. 10, 1996).

*When reviewing an application for forest practices in the National Scenic Area, the DNR must base its review solely upon the Forest Practices Act and its regulations. Here, no provision of the Forest Practices Act or its regulations required the DNR to apply the scenic area rules. Therefore, when reviewing Seeder Tree's forest practices application, the DNR was not required to deny or condition the application in order to meet the scenic area rules.*

*On the other hand, applicants for forest practices in the National Scenic Area must know and adhere to the scenic area rules, and RCW 43.97.025(1) requires the DNR to deny applications that purport to disregard or supervene these rules.*

- *<u>Friends of the Columbia Gorge v. Washington DNR</u> ("*Underwood Mountain*"), FPAB No. 93-61 (Nov. 30, 1993).

*The FPAB does not have jurisdiction to review the promulgation of a rule, but it does have jurisdiction to review the application of a rule in the issuance of a specific permit.*

*The DNR properly classified SDS's forest practices application as Class III rather than Class IV. The permit was exempt from SEPA because the logging did not have a potential for a substantial impact on the environment. First, the logging on Underwood Mountain occurred in a mosaic pattern that was compatible with the surrounding area. Second, the operations were located in the middle ground or background as seen from key viewing areas. Third, the Scenic Area Act imposes lesser scenic restrictions on logging of non-federal lands within the GMA. Finally, appellants did not show that SDS's clearcuts, when considered in conjunction with other applicants' clearcuts in the area, were either related or cumulatively sufficient to have a potential for a substantial impact on the environment.*

- <u>Friends of the White Salmon v. State</u>, FPAB Nos. 89-18 & 90-1 (Jan. 16, 1991).

*The FPAB has jurisdiction to review the consistency of forest practices regulations with the Forest Practices Act and SEPA when the DNR's application of such regulations is at issue. WAC 222-16-050(1), a forest practices regulation that subjects certain types of applications to SEPA, is invalid because it is underinclusive when compared with RCW 76.09.050(1), which makes SEPA applicable to all forest practices with "a potential for a substantial impact on the environment."*

*Scenic resources and aesthetics are elements of the environment under SEPA. In addition, the Forest Practices Act obligates state officials to consider the effects of timber cutting on scenic beauty. In a National Wild and Scenic River corridor, clearcutting or overstory removal leaving stock of unspecified size has the potential for a substantial impact on the environment and triggers SEPA. Remanded to the DNR for a determination of whether an environmental impact statement must be prepared.*