

## THE STRUGGLE OVER THE COLUMBIA RIVER GORGE: ESTABLISHING AND GOVERNING THE COUNTRY'S LARGEST NATIONAL SCENIC AREA

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Kathie Durbin was a fearless, award-winning journalist for several publications for nearly forty years before she died in 2013.<sup>1</sup> Her passion was especially evident in her coverage of the environment.<sup>2</sup> In an era of declining investigative reporting, Durbin was an indefatigable investigative journalist, writing superb books on the Pacific Northwest's spotted owl controversy<sup>3</sup> and the fight to preserve Southeast

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1. See, e.g., Andrea Damewood, *Kathie Durbin, Long-time Portland Journalist, Dies*, WILLAMETTE WK. BLOG (Mar. 18, 2013), [http://www.wweek.com/portland/blog-29908-kathie\\_durbin\\_long\\_time\\_portland\\_journalist\\_dies.html](http://www.wweek.com/portland/blog-29908-kathie_durbin_long_time_portland_journalist_dies.html) (discussing Durbin's tenure with the *Willamette Week*, the Eugene Register-Guard, *The Oregonian*, and *The Columbian*); Paul Koberstein, *Remembering Kathie Durbin*, CASCADIA TIMES, Mar. 17, 2013, <http://times.org/2013/03/17/kathie-durbin/> (discussing Durbin's role in founding The Cascadia Times, a journal of investigative reporting, as well as her six-part series on Pacific Northwest forests published by *The Oregonian* in 1990); *People Who Matter—Remembering Kathie Durbin*, FRIENDS OF THE KALMIOPSIS (Mar. 27, 2013), <http://kalmiopsiswild.org/2993/kathie-durbin/> (a conservation organization's remembrances of Durbin's work on Northwest forest issues); Andy Kerr, *Kathie Durbin: Just the Facts*, OR. WILDBLOG (Mar. 20, 2013), <http://www.oregonwild.org/about/blog/just-the-facts> (a remembrance by a well-known conservationist).

2. See *A Guide to Kathie Durbin's Papers, Circa 1972–2013*, NW. DIGITAL ARCHIVES, <http://nwda.orbiscascade.org/ark:/80444/xv75274> (last visited Jan. 15, 2015).

3. See KATHIE DURBIN, *TREE HUGGERS: VICTORY, DEFEAT AND RENEWAL IN THE NORTHWEST ANCIENT FOREST CAMPAIGN* (1996).

Alaska's Tongass National Forest.<sup>4</sup> Her intrepid reporting caused *The Oregonian*, the largest newspaper in the state, to remove her from her environmental beat, prompting her resignation from the paper in 1994, an occasion that was no doubt a cause of celebration by the timber industry.<sup>5</sup>

Durbin's final book, published posthumously after her death from pancreatic cancer, is *Bridging a Great Divide: The Battle for the Columbia River Gorge*,<sup>6</sup> a thorough account of the historical and modern efforts to preserve the scenery and other resources of the spectacular Columbia River Gorge, which culminated in the creation of the Columbia River Gorge National Scenic Area in 1986. The approximately 300,000-acre National Scenic Area contains a canyon of the Columbia River up to 4,000 feet deep, stretching more than eighty miles along the boundary of the states of Oregon and Washington—roughly from the confluence of the Columbia and Deschutes Rivers in the east to the Portland metropolitan area in the west (pp. 2–6).<sup>7</sup> Home to the only sea-level passage through the Cascade Mountains,<sup>8</sup> the Gorge is the only water connection between the Columbia River Plateau and the Pacific Ocean. The Gorge is also one of the oldest inhabited places in North America (p. 15); natives have fished there for salmon for at least 9,000 years.<sup>9</sup> The canyon forming the Gorge is a scenic treasure and home to more than seventy-five

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4. KATHIE DURBIN, *TONGASS: PULP POLITICS AND THE FIGHT FOR THE ALASKA RAIN FOREST* (2d ed. 2005).

5. See Paul Koberstein, *Oregon Paper Clearcuts a Tough Reporter*, HIGH COUNTRY NEWS, Aug. 22, 1994, <http://www.hcn.org/issues/14/413> (noting that the timber industry responded to Durbin's acclaimed 1990 series on logging, *Day of Reckoning*, with an eighty-eight page critique).

6. KATHIE DURBIN, *BRIDGING A GREAT DIVIDE: THE BATTLE FOR THE COLUMBIA RIVER GORGE* (2013). When Durbin's doctors gave her a month to live, she promptly dismissed family and friends from her hospital room to finish the book. See Damewood, *supra* note 1.

7. See also 16 U.S.C. § 544b(a)(2) (2012) (congressional approval of maps depicting the boundaries of the National Scenic Area).

8. BLAINE HARDEN, *A RIVER LOST: THE LIFE AND DEATH OF THE COLUMBIA* 196 (1997).

9. See generally Michael C. Blumm & James Brunberg, "Not Much Less Necessary . . . Than the Atmosphere They Breathed": *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 494–96 (2006); Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741, 745 (1993).

waterfalls on the Oregon side alone.<sup>10</sup> Since white settlement in the mid-19th century, the Gorge has served as a major transportation corridor, with highways and railroads now paralleling both sides of the Columbia River (pp. 2–6, 21). In recent decades, it has also become home to a vibrant recreational industry, which includes world-class hiking, windsurfing, and kiteboarding opportunities (pp. 253–262). Now home to more than 75,000 people,<sup>11</sup> the Gorge with its scenery, commerce, fishing, forests, and land uses has served to foment numerous legal controversies over the last century.<sup>12</sup>

Durbin's book is not only a major addition to the literature of the Columbia River Gorge, it also is an in-depth, historical tracking of the design and implementation of a significant federal statute—something that natural resources law and policy needs in greater abundance. For example, a lack of learning from past mistakes is one of the chief failings of salmon management in the Northwest.<sup>13</sup> The Columbia River Gorge National Scenic Area will not likely experience a similar fate, largely because of Durbin's efforts.

This review first considers the historical conditions that coalesced in the late 1970s into the movement calling for federal protection of the Gorge. It then discusses the unlikely and convoluted scenario in which Congress passed and President Ronald Reagan signed into law the Columbia River Gorge National Scenic Area Act in 1986.<sup>14</sup> The review then turns to the institutions responsible for implementing the

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10. See JON ARES, *VINTAGE VIEW: TIMELESS BEAUTY OF THE COLUMBIA RIVER GORGE* 83 (2013) ("It is widely agreed that there are seventy-seven waterfalls of note on the Oregon side of the Gorge—the greatest concentration of high waterfalls in the country. The west end of the Historic Columbia River Highway is often called 'Waterfall Alley' due to the concentration of dramatic waterfalls.")

11. Cari Hachmann, *Commission Sounds Alarm on Coal, Oil Transport*, GRESHAM OUTLOOK, Aug. 5, 2014, <http://www.pamplinmedia.com/go/42-news/229169-92237-commission-sounds-alarm-on-coal-oil-transport>.

12. See generally Michael C. Blumm, *The Columbia River Gorge and the Development of American Natural Resources Law: A Century of Significance*, 20 N.Y.U. ENVTL. L.J. 1 (2012); Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 ENVTL. L. 1127 (1993); CARL ABBOTT, SY ADLER & MARGERY POST ABBOTT, *PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA* (1997).

13. See JIM LICHATOWICH, *SALMON, PEOPLE AND PLACE: A BIOLOGIST'S SEARCH FOR SALMON RECOVERY* 173–87 (2013).

14. Pub. L. No. 99-663, 100 Stat. 4274 (1986) (codified at 16 U.S.C. §§ 544–544p (2012)).

statute: the bi-state Columbia River Gorge Commission; the U.S. Forest Service; six county governments; those agencies' chief watchdog, the persistent and influential Friends of the Columbia Gorge; and the state legislatures, which control the Commission's budgets. It then spotlights several Gorge controversies, among them residential developments, commercial uses, a destination resort, a coal power plant, an Indian casino, wind farms, and dam removal. The review concludes with several observations about some enduring themes evident in Durbin's important case study of this pioneering piece of federal legislation.

### I. THE MOVEMENT TOWARD FEDERAL PROTECTION

As Durbin notes, by the mid-twentieth century, the Gorge was a "compromised beauty" (p. 21). It was a major transportation corridor with both highways and railroads spanning it (pp. 2–6, 21); clearcutting and other logging operations were commonplace (pp. 17, 21); and the completion of Bonneville Dam in 1938 ushered in an era of dam-building on the Columbia (p. 18).<sup>15</sup> The Dalles, McNary, and John Day Dams, all built on the Columbia in the mid-twentieth century, drowned at least forty-five archeological sites in a "slow bureaucratic genocide" (p. 19).<sup>16</sup>

These developments were countered by the Pacific Northwest Regional Planning Commission's 1937 recommendations to set aside a network of parks in the western Gorge to prevent industrial development below Bonneville Dam, to concentrate development in urban areas, and to establish a flat electric power rate from the region's dams that would disfavor development close to the Gorge's dam sites (p. 25). Twenty years earlier in 1915, the state of Oregon enacted legislation to protect many of the Gorge's waterfalls.<sup>17</sup> Also in 1915, the U.S. Secretary of Agriculture

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15. See generally Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175 (1983).

16. See also Rogers, *supra* note 9, at 748 (noting that when Bonneville Dam was completed in 1938, the resulting Bonneville Pool "flooded hundreds of Indian habitation, ceremonial, and burial sites").

17. Act of Feb. 9, 1915, ch. 36, 1915 Or. Laws 49 (entitled "An Act: To preserve the scenic beauty of certain waterfalls and streams in view of, or near the Columbia River Highway"); see also Janet C. Neuman, Anne Squier & Gail Achterman, *Sometimes a*

issued an order designating nearly 14,000 acres on the Gorge's Oregon side as the "Columbia Gorge Park" (p. 23), an event widely believed to be "the first time the Forest Service dedicated an extended area to purely recreational use."<sup>18</sup> The following year, federal legislation was proposed (but never enacted) to create a Mount Hood National Park, which would have included a portion of the Oregon side of the Columbia Gorge.<sup>19</sup>

In the 1950s, gorge commissions were founded in both states to promote planning for protecting the Gorge's scenery—although both commissions were fairly powerless (pp. 26–27). In general, enthusiasm for protecting the Gorge was considerably more muted in Washington,<sup>20</sup> where there were more sites available for both residential development and logging, and where there was no comprehensive land use planning program as in Oregon<sup>21</sup> (pp. 27–29). As late as 1979, Skamania County had no zoning (p. 33).

In the 1970s, proposed logging, mining, industrial development, and residential subdivisions alarmed many Gorge users (p. 31, 33–34, 40, 44).<sup>22</sup> As a result, the Columbia Gorge Coalition, a newly formed advocacy group organized by Gorge resident Chuck Williams, convinced the National Park

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*Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125, 1132, 1154 (2006).

18. WILLIAM C. TWEED, FOREST SERV., U.S. DEPT OF AGRIC., A HISTORY OF OUTDOOR RECREATION DEVELOPMENT IN NATIONAL FORESTS 1891–1942, at 4 (1989).

19. S. 6397, 64th Cong. (1916).

20. One notable exception took place in the late 1970s and early 1980s at the western end of the Gorge, in Clark County, Washington, when the local chapter of the Audubon Society helped block various plans for industrial development of ecologically valuable wetlands at Steigerwald Lake—eventually convincing U.S. Senator Mark Hatfield (D-Or.) to arrange for federal purchase of these lands and their designation as the Steigerwald Lake National Wildlife Refuge. DURBIN, *supra* note 6, at 44–50.

21. In 1973, Oregon launched the most comprehensive land use planning program in the country. *See generally* PLANNING THE OREGON WAY: A TWENTY YEAR EVALUATION (Carl Abbott, Deborah Howe & Sy Adler eds., 1994); Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357 (2012). Washington did not enact its Growth Management Act until 1990, and even today Skamania and Klickitat Counties are exempted from critical portions of that statute. DURBIN, *supra* note 6, at 28–29.

22. *See also* RICHARD V. GIAMBERDINE, NAT'L PARK SERV., U.S. DEPT OF THE INTERIOR, COLUMBIA RIVER GORGE: STUDY OF ALTERNATIVES 74–84 (1980) (summarizing threats to Gorge resources posed by industrialization, residential development, surface mining, dredge-spoil dumping, clearcutting, energy development, and loss of agricultural land).

Service to prepare a study of how to protect the Gorge's scenery while housing some 40,000 residents (pp. 31–33, 40). The models were not many, for the majority of the Gorge was not federally owned. Durbin suggests the agency looked to the English Lake District and the Adirondack Park<sup>23</sup> for guidance (p. 33).

In its 1980 study, the Park Service suggested that the Gorge should not be managed as a national park, as the Columbia Gorge Coalition had hoped, but rather as a national recreation area centrally managed by a federal agency, or as a scenic area managed by a new multi-governmental regional commission (p. 36).<sup>24</sup> Six years later, Congress more or less adopted a hybrid of these two approaches,<sup>25</sup> but it was a perilous path getting there.<sup>26</sup>

By the time the Park Service released its study, Nancy Russell, a wealthy Portlander, had become interested in protecting the Gorge, and Don Clark—then chairman of the Multnomah County Commission<sup>27</sup>—had contacted U.S.

23. The New York legislature established the Adirondack Forest Preserve in 1885, stating that the preserve “shall be forever kept as wild forest lands,” a promise subsequently enshrined in the New York Constitution in 1895. The surrounding park now contains over six million acres (roughly the size of Vermont and larger than Yellowstone, Yosemite, Grand Canyon, Glacier, and Olympic National Parks combined), but also contains some 130,000 residents. *See, e.g., History of the Adirondack Park*, ADIRONDACK PARK AGENCY, [http://apa.ny.gov/about\\_park/history.htm](http://apa.ny.gov/about_park/history.htm) (last visited Jan. 15, 2015); Louise A. Halper, ‘A Rich Man’s Paradise’: Constitutional Preservation of New York State’s Adirondack Forest, a Centenary Consideration, 19 *ECOLOGY L.Q.* 193 (1992); Brian Nearing, *Graying of Adirondacks Presents Future Challenges*, ALBANY TIMES UNION, May 19, 2014, <http://www.timesunion.com/business/article/Graying-of-Adirondacks-presents-future-challenges-5490236.php>.

24. *See also* GIAMBERDINE, *supra* note 22, at 154–80 (1980) (evaluating Alternative C, “Establishment of a Multigovernmental Commission,” and Alternative D, “Establishment of Central Federal Management”).

25. Pursuant to the Gorge Act, the Gorge Commission and participating counties now manage non-federal lands within the Scenic Area, while the U.S. Forest Service manages federal lands. *See infra* Part III. Interestingly, though, in its 1980 study, the Park Service expressly ruled out the option of creating a bi-state compact agency via a statutory compact between Washington and Oregon, because the Park Service believed such an option would be too legally complex, politically infeasible, and fraught with potential for disagreements between the two states. GIAMBERDINE, *supra* note 22, at 181–82. The Park Service believed that any regional commission should, instead, be a joint federal-state-local agency. *Id.* at 154–70. Congress and the two states, however, ultimately rejected the Park Service’s analysis by creating the Gorge Commission through a bi-state compact. *See infra* note 50 and accompanying text.

26. *See infra* Part II.

27. Multnomah County, which contains most of the city of Portland, also includes

Senator Mark Hatfield, seeking his support for federal protection of the Gorge (pp. 34–38). These proved to be critical moves in the years that followed. Russell became the chair of the newly formed Friends of the Columbia Gorge, modeled after the highly successful land use watchdog group 1000 Friends of Oregon (p. 41),<sup>28</sup> and was an indispensable advocate for decades (pp. 41–43, 139–41, 263–67). Don Clark was a persistent and effective local supporter of federal protection (pp. 38–42). His influence on Senator Hatfield was, according to both Clark and Durbin, profound (pp. 38–39).<sup>29</sup>

Another person interviewed by Durbin who claimed a large role in the creation of federal protection for the Gorge was Bob Packwood, who at the time served as a U.S. Senator from Oregon and later was forced to resign due to allegations of numerous sexual harassments and assaults.<sup>30</sup> Packwood claims an instrumental effect on the six-year campaign to enact federal protection (pp. 52, 57–62), and his claims may be true,<sup>31</sup> but they are a bit belied by the former Senator's mixed record on environmental issues.<sup>32</sup> It is abundantly clear, however, that the sustained movement for federal protection for the Gorge led by Russell and her colleagues at the Friends played a critical role in the adoption of the 1986 statute (pp. 40–43, 55–57, 59, 63).

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the western end of what is now the National Scenic Area. 16 U.S.C. § 544b(a)(2) (2012).

28. 1000 Friends of Oregon continues to be a critical component in enforcing Oregon's land use laws. See *1000 Friends of Oregon—39 Years of Accomplishments*, 1000 FRIENDS OF OR., <http://www.friends.org/about/history> (last visited Jan. 15, 2015).

29. This observation may be one of the weaknesses of a journalist's history, because it is dependent on the recollections of those interviewed.

30. See Trip Gabriel, *The Trials of Bob Packwood*, N.Y. TIMES, Aug. 29, 1993, <http://www.nytimes.com/1993/08/29/magazine/the-trials-of-bob-packwood.html>; Edwin Chen, *Senator Packwood Resigns*, L.A. TIMES, Sept. 8, 1995, [http://articles.latimes.com/1995-09-08/news/mn-43532\\_1\\_senator-packwood-resigns](http://articles.latimes.com/1995-09-08/news/mn-43532_1_senator-packwood-resigns).

31. See Robert Packwood, *The Columbia River Gorge Needs Federal Protection*, 15 ENVTL. L. 67 (1984) (explaining Senator Packwood's case for his Gorge bill).

32. Packwood was instrumental in saving the French Pete Wilderness and the Hells Canyon National Recreation Area in the 1970s, but as early as 1980 he was accused of turning his back on environmental concerns. See, e.g., Steve Forrester, *Packwood Environmental Backslider*, EUGENE REGISTER-GUARD, Oct. 15, 1980, at 9A; Andy Kerr, *The Browning of Bob Packwood*, ANDYKERR.NET, <http://www.andykerr.net/browning-packwood/> (last visited Jan. 15, 2015).

## II. ENACTING THE GORGE NATIONAL SCENIC AREA ACT

In the mid-1980s, federal scenic protection for the Columbia Gorge was not at all assured.<sup>33</sup> Two House of Representatives members from Oregon, Republicans Bob and Denny Smith (who were unrelated), were adamantly opposed to any federal protection, along with many local residents, particularly those on the Washington side of the Gorge (pp. 53–56). Consequently, the path to federal protection seemed unlikely, especially since the incumbent Oregon and Washington governors were utterly ambivalent (pp. 55, 59).

But both senators from Oregon favored Gorge protection, and they would eventually acquire an ally when former Washington Governor Dan Evans became a senator in 1983.<sup>34</sup> In addition, both states' House delegations were led by Democrats who generally favored protection (pp. 53, 56–57).<sup>35</sup>

Clark, the Multnomah County Commissioner, worked to

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33. For her coverage of the convoluted legislative history of the Gorge Act, DURBIN, *supra* note 6, at 51–72, Durbin adapted a more detailed law review article written by Bowen Blair, Jr., *id.* at xii, 295. See Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 881–932 (1987). Blair was the first Executive Director of Friends of the Columbia Gorge and currently serves as a Gorge Commissioner. Neita Cecil, *Blair: Opinion Has Moderated*, THE DALLES CHRONICLE, Feb. 20, 2013, <http://www.thedalleschronicle.com/news/2013/feb/20/blair-opinion-has-moderated/>.

34. Evans was a three-term governor of Washington (1965–77) who founded the state's Department of Ecology, a model for President Nixon's Environmental Protection Agency. After deciding not to run for a fourth gubernatorial term, he served as president of The Evergreen State College and as the first Chair of the Northwest Power Planning Council. When Senator Henry Jackson unexpectedly died, Evans was appointed to the Senate in 1983 and won a special election later that year but declined to run for reelection in 1988, complaining of the Senate's constant bickering and protracted paralysis. See Daniel J. Evans, *Why I'm Quitting the Senate*, N.Y. TIMES, Apr. 18, 1988, <http://www.nytimes.com/1988/04/17/magazine/why-i-m-quitting-the-senate.html>.

35. Former Representative Don Bonker (D-Wash.), who served in Congress at the time and helped pass the Gorge Act, *see* DURBIN, *supra* note 6, at 70, now serves as a Gorge Commissioner, *id.* at 267. Mr. Bonker was appointed to the Gorge Commission in 2009 by former Washington Governor Christine Gregoire, *Governor appoints Bonker to Columbia River Gorge Commission*, COLUMBIA RIVER GORGE COMM'N (June 2, 2009), <http://www.gorgecommission.org/client/Bonker%20press%20release%20060209.pdf>. In addition to his work on the Gorge Act, Bonker fostered multiple environmental causes while in Congress, including the establishment of the Grays Harbor National Wildlife Refuge, Mount St. Helens National Volcanic Monument, and Protection Island National Wildlife Refuge; the preservation of the Point of Arches in the Olympic National Park; and the banning of exports of western red cedar. *Id.*



ensure that the 1980 Park Service study concerning protection of the Gorge “would not gather dust on a shelf” (p. 37). After the election of Ronald Reagan in the fall of 1980, Clark approached Hatfield, seeking his support for federal protection (pp. 38–39). The senator said he would support federal protection if there was widespread bipartisan support (p. 39). Clark proceeded to gather support from political leaders, such as former Oregon Republican Governor Tom McCall and former Oregon Democratic Governor Bob Straub (p. 39). This bipartisanship served Gorge advocates well, as did the clout that the Oregon senators enjoyed as members of a newly elected majority (p. 51). Not to be overlooked were Nancy Russell’s Republican ties as a member of the Portland Garden Club (p. 39).

Hatfield and Packwood introduced a Gorge protection bill in 1982 that was essentially drafted by Russell’s Friends of the Gorge (p. 57). The ensuing four years amounted to “a textbook exercise in compromise, negotiation, and hardball politics” (p. 55),<sup>36</sup> but Durbin makes clear that “Hatfield was in charge” (p. 55). The 1982 Hatfield-Packwood bill would have established a regional gorge commission that would approve a management plan for the Gorge drafted by the U.S. Forest Service and give advice to the federal agency on implementing the plan (p. 57). The same day as that 1982 bill, Hatfield introduced another bill that increased the role of the regional commission, ensured local control of the commission, and reduced the role of the Forest Service (p. 57).

The idea of a regional commission would become a fixture of the alternatives considered by Congress over the next four years, with the major issue being the relationship between the Forest Service and the commission. In general, Hatfield favored more expansive commission control, while Packwood (up for reelection in 1986 and courting environmental votes) favored more federal control (pp. 57–62).<sup>37</sup> Evans weighed in by proposing a reduction in the amount of lands subject to federal protection (p. 61). But serious congressional

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36. See also Mike Voss, Book Review, 26 *ECOLOGY L.Q.* 135, 135 (1999) (“Designation of the scenic area was a carefully constructed compromise between two very different ideologies—one representing the values of the Old West and the other representing the values of the New West.”).

37. See also Packwood, *supra* note 31, at 69–70.

consideration of the Gorge bill was delayed while Congress was preoccupied with several wilderness bills, including bills involving both Oregon and Washington national forests (pp. 60–61).<sup>38</sup>

Eventually, in 1985, after the election of Democrat Booth Gardner as Washington's governor, the governors and congressional staff agreed on a shared approach to Gorge governance, in which the Forest Service would adopt land use regulations for the so-called "special management areas" and the commission would adopt regulations for the lands in the remainder of the scenic area—and also began negotiating the details of a map of the scenic area and its boundaries (pp. 62–63). Senator Evans introduced the resulting bill and secured the support of the three other Northwest senators, in part by exempting a dozen urban areas (later expanded to thirteen) from the land use regulations required by the statute (p. 63).

Although public hearings on the bill ran into considerable local opposition in Skamania County, the local congressman, Republican Sid Morrison, eventually supported the bill after it was amended to increase local control over the selection of commission members (pp. 63–64). Hatfield guided the bill through the Senate (pp. 64, 66–67, 69), despite opposition from fellow Republicans such as James McClure of Idaho and Malcolm Wallop of Wyoming, who objected to federal regulation of private land in the special management areas (p. 66). A companion bill was shepherded through the House by Rep. Jim Weaver (D-Or.) (pp. 65–70) and House Majority Whip Tom Foley (D-Wa.) (pp. 66, 70).

With time running out on Congress before a recess for the 1986 elections, Hatfield engineered a procedural maneuver to get an amended version of the Evans bill to pass on the Senate floor with just three dissenting votes (p. 69).<sup>39</sup> However, Weaver's companion bill in the House was bottled up in multiple committees by opponents, including the Smiths, the

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38. See Michael C. Blumm & Lorena Wisheart, *The Underappreciated Role of the National Environmental Policy Act in Wilderness Designation and Management*, 44 ENVTL. L. 323, 343–47 (2014) (discussing the congressional reaction to *California v. Block*, 690 F.2d 753 (9th Cir. 1982), which, due to a violation of the National Environmental Policy Act, enjoined the Forest Service's attempt to release inventoried roadless areas to multiple use management).

39. See also Blair, *supra* note 33, at 923–24.

Republican House members from Oregon (pp. 66).<sup>40</sup> Majority Whip Foley used another procedural maneuver to discharge the bill from the Rules Committee, and then secured a favorable vote on the House floor, 290 to 91 (p. 66, 70).<sup>41</sup> The bill then returned to the Senate, which after several reassurances and clarifications by the sponsoring senators, passed the bill on a voice vote on October 17, 1986, the last full day of the 99th Congress (pp. 66–67).<sup>42</sup>

Against considerable odds, the 99th Congress had passed the Columbia River Gorge National Scenic Area Act. Skamania County lowered the American flag at the county courthouse to half-staff (p. 70).

The fate of the legislation was not yet secure, however. Reagan Administration officials, including Attorney General Ed Meese and Interior Secretary Don Hodel (the former Administrator of the Bonneville Power Administration), urged the president to veto the bill (p. 71). But Hatfield was Chair of the Senate Appropriations Committee, and Durbin suggests that Hatfield convinced President Reagan to sign the bill in return for supporting funding of the Administration's Strategic Defense Initiative, a missile-defense system popularly known as "Star Wars" (p. 71, 267). Reagan signed the bill on November 17, 1986, the last day before it would die of a pocket veto (p. 71). Upon signing the bill, Reagan issued a signing statement in which he worried the law might lead to "undue Federal intervention in local land use decisions." (p. 71).<sup>43</sup>

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40. *See also id.* at 924–28.

41. *See also id.* at 927–30.

42. *See also id.* at 930.

43. Presidential Statement on Signing H.R. 5705, 22 WEEKLY COMP. PRES. DOC. 1576 (Nov. 24, 1986).

The unlikely journey of the Gorge bill into federal law was complete.

### III. INSTITUTIONS IMPLEMENTING THE GORGE ACT

The Gorge Act included several institutional innovations that are worthy of study, particularly because they tackle difficult issues of federalism in the joint management of interspersed federal and nonfederal lands by multiple government entities.<sup>44</sup> First, of course, are the noteworthy purposes of the Act:

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

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with [the first purpose].<sup>45</sup>

The two goals of preserving the Gorge and its resources, including its scenery, and encouraging economic growth are not coequal; future economic development is expressly subordinated to preservation.<sup>46</sup> The Gorge Act is an example of dominant use legislation. The statute permits economic development outside urban areas only where consistent with resource preservation.<sup>47</sup>

Achieving the Gorge Act's goals is chiefly the shared responsibility of the Columbia River Gorge Commission and the U.S. Forest Service.<sup>48</sup> The thirteen-member Gorge Commission includes three gubernatorial appointees from each state and one representative appointed by each of the six counties within the Scenic Area boundaries, plus one non-voting representative of the U.S. Forest Service.<sup>49</sup> The Commission was not directly established by the Gorge Act. It

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44. Durbin refers to this joint management arrangement under the Gorge Act as "truly . . . a balancing act." DURBIN, *supra* note 6, at 71.

45. 16 U.S.C. § 544a (2012).

46. *See id.*

47. *See id.* § 544a(2).

48. *See id.* §§ 544c–544h, 544l–544m.

49. *Id.* § 544c(a)(1)(C).

merely provided advance consent for the creation of the Commission as an interstate compact agency if the states agreed, which they quickly did.<sup>50</sup> Congress gave the Commission responsibility for developing and overseeing a land use plan governing what is referred to as the general management area,<sup>51</sup> consisting of all Scenic Area lands not located in the designated special management areas<sup>52</sup> or in the exempt urban areas.<sup>53</sup>

Immediately following the passage of the Gorge Act, the Forest Service was required to prepare interim guidelines for the Scenic Area, and spent the first year of implementation deciding land use applications (pp. 75–80).<sup>54</sup> Durbin notes that hundreds of applications were filed during this time by landowners eager to maximize (or even just test) the development potentials of their properties before adoption of permanent regulations (pp. 76–78, 84). Upon its creation, the Commission was responsible for clearing the backlog of applications that had been under review by the Forest Service, and then became responsible for deciding new applications—at first using the Forest Service’s final interim guidelines, and then the Commission’s more detailed management plan and ordinances (pp. 83–101).<sup>55</sup>

The Act also authorized the Commission to approve county-adopted zoning ordinances if consistent with the Commission’s management plan.<sup>56</sup> These county ordinances would ultimately become the principal means of land use regulation in the Scenic Area. In counties that have chosen not to or failed to adopt Scenic Area ordinances (now limited to Klickitat County, Washington) (p. 127), the Commission adopts an ordinance

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50. *See id.* § 544c(a) (providing advance consent to the states’ establishment of the Commission by interstate agreement); Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty-Year History in Land Use Federalism*, 21 J. LAND USE & ENVTL. L. 201, 206 (2006) (discussing the states’ subsequent agreement, the Columbia River Gorge Compact).

51. 16 U.S.C. § 544d(c). The statute actually does not mention the general management area, a term used by the implementing agencies. *See* Blumm & Smith, *supra* note 50, at 205 n.15.

52. 16 U.S.C. § 544b(b).

53. *Id.* § 544b(e). The thirteen urban areas constitute about ten percent of the Scenic Area’s acreage. *See* Blumm & Smith, *supra* note 50, at 205.

54. *See also* 16 U.S.C. § 544h(a).

55. *See also id.* §§ 544d(c), 544h(c).

56. *Id.* § 544e(b).

and is the permitting agency (pp. 98–99).<sup>57</sup> Congress also gave the Commission authority to monitor county compliance with the Act and take enforcement actions if necessary<sup>58</sup> and to overturn county permitting decisions on appeal.<sup>59</sup>

The Act requires the Commission to “incorporate without change” into its management plan the Forest Service’s provisions for the regulation of lands in the special management areas,<sup>60</sup> which largely (although not exclusively) consist of federal lands. The Forest Service’s provisions can regulate private lands in the special management areas, but until 2001, owners of regulated lands in these areas could, pursuant to section 8(o) of the Gorge Act, ask the federal agency to purchase their lands, and if the Forest Service did not, the landowners could thereafter avail themselves of the less stringent Commission regulations for the general management area.<sup>61</sup> Like the Commission’s responsibilities for the general management area provisions of the plan,<sup>62</sup> the Forest Service must review and make any necessary revisions to the special management area provisions at least every ten years.<sup>63</sup>

The statute also included provisions authorizing substantial funding for the Forest Service to purchase private lands within the special management areas (p. 72).<sup>64</sup> Durbin recounts that in the beginning the congressional funds for such purchases flowed freely and abundantly, and that the Forest Service was

57. *See also id.* § 544e(c). In the other five counties, the Commission continues to be responsible for enforcing the terms of the land use decisions it issued before those counties adopted Scenic Area ordinances. *See id.* § 544h(c).

58. *Id.* § 544m(a)(1).

59. *Id.* § 544m(a)(2). In effect, the Commission serves as a board of appeals for counties, much like the Land Use Board of Appeals (LUBA) in Oregon. *See OR. REV. STAT.* §§ 197.805–197.860 (2013) (creating and governing LUBA).

60. 16 U.S.C. § 544d(c)(4); *see also* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n, 215 Or. App. 557, 579–81, 171 P.3d 942, 958–59 (2007) (Forest Service is responsible for special management area provisions of the plan, even when periodic review is involved), *aff’d in part and rev’d in part on other grounds*, 346 Or. 366, 213 P.3d 1164 (2009).

61. 16 U.S.C. § 544f(o). *See* Blumm & Smith, *supra* note 50, at 218–21 (discussing section 8(o) of the Gorge Act, the so-called opt-out provision).

62. *See supra* note 51 and accompanying text.

63. 16 U.S.C. § 544d(g); *see also* Friends of the Columbia Gorge v. Columbia River Gorge Comm’n, 215 Or. App. at 579–81, 171 P.3d at 958–59; Friends of the Columbia Gorge, Inc. v. Schafer, 624 F. Supp. 2d 1253, 1262, 1266–67 (D. Or. 2008).

64. *See* 16 U.S.C. § 544g.

all too willing to purchase conservation easements or fee simple property from virtually every landowner who walked in the door (pp. 78, 101–03, 111, 135–41). Apparently, the Forest Service’s lack of a focused land acquisition strategy created tensions with the Gorge Commission, which felt that the federal agency should use funds strategically in ways that might preclude controversial land use projects and ward off potential constitutional takings claims in the most restrictive zones (p. 101–03).<sup>65</sup>

By 1998, the Forest Service had acquired more than 30,000 acres of land in the Scenic Area, through both purchases (p. 135)<sup>66</sup> and land exchanges (p. 135).<sup>67</sup> In 1999, the Forest Service began to slow its rate of land acquisition in the Scenic Area, even “though there was no shortage of willing sellers” (p. 135). Durbin suggests that Senator Gorton then used his influence to “effectively end[] the Forest Service land acquisition program,” and it is true that Gorton worked to legislatively sunset the Gorge Act’s section 8(o) program, which had helped prevent landowner hardships through the purchase of private lands within the special management areas (pp. 136–37).<sup>68</sup> However, federal purchases have in fact continued to the present day<sup>69</sup> under section 9 of the Gorge Act<sup>70</sup> as well

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65. Years later, a Forest Service staffer publicly lamented that the federal agency had made mistakes in acquiring so much land without assurances that it would have the money to manage it, and that much of the acquired land ended up being a patchwork of noncontiguous, forested lands that could not be used for recreation. DURBIN, *supra* note 6, at 137. That viewpoint was, however, the “minority . . . opinion” among Forest Service staffers, according to Jurgen Hess, who served as the Forest Service’s planning manager and landscape architect for the Scenic Area for more than two decades. E-mail from Jurgen Hess (June 20, 2014) (on file with authors). According to Mr. Hess, the Forest Service’s early land purchases were appropriate and fulfilled important conservation purposes. *Id.*

66. See also Brian T. Meehan, *Sheer Preservation*, OREGONIAN, Feb. 15, 1998, <http://archives.evergreen.edu/webpages/curricular/1998-1999/geopn/Gorge3.html> (noting that, as of February 1998, the Forest Service had spent \$39.4 million to acquire more than 30,000 acres of private land in the Scenic Area, mostly in Washington).

67. For example, a Forest Service land exchange with local timber companies privatized lands in the Gifford Pinchot National Forest in return for lands within the Scenic Area. See DURBIN, *supra* note 6, at 137–38.

68. See *supra* note 61 and accompanying text.

69. At the time of passage of the Gorge Act in 1986, the Forest Service owned approximately 25,000 acres of land inside the newly created Scenic Area. Since then, the Forest Service’s ownership has more than tripled, to approximately 80,000 acres in 2014. See Neita Cecil, *Gorge Commission Looks at City Lines*, THE DALLES CHRONICLE, June 12, 2014, <http://www.thedalleschronicle.com/news/2014/jun/12/gorge-commission->

as the Land and Water Conservation Fund<sup>71</sup>—despite objections that such purchases take lands off local tax rolls.<sup>72</sup>

In addition to the Gorge Commission, Forest Service, and counties, other important implementing institutions include the Washington and Oregon legislatures, because one of the statute's compromises was to leave funding of the Commission to the discretion of the states (p. 72), not the federal government. State governors also appoint half of the voting members of the Commission.<sup>73</sup> Durbin emphasizes how, at times, cutbacks in funding levels have affected the oversight role of the Commission (pp. 72, 104–05, 166).<sup>74</sup>

Perhaps the most crucial implementing entity is not a governmental entity at all. Nancy Russell's Friends of the Columbia Gorge has been as essential to the implementation of the statute as it was to its enactment (p. 291). Friends continues to influence land use and environmental issues in the Scenic Area to this day through active public participation and litigation efforts.<sup>75</sup> Friends also created a land trust in

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looks-city-lines/.

70. 16 U.S.C. § 544g (2012).

71. Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460l-4 to 460l-11. In one particularly successful example of a purchase under this fund, in 2011 the Forest Service purchased from the Friends of the Columbia Gorge Land Trust a scenic property at the top of Cape Horn in western Skamania County. The property, located along the Cape Horn Trail, includes a magnificent overlook that is dedicated to the memory of Friends' founder Nancy Russell, who was instrumental in protecting the Cape Horn area. See DURBIN, *supra* note 6, at 263–67.

72. See, e.g., Kathie Durbin, *Skamania Clout Limits Preserve*, COLUMBIAN, July 8, 2003, [http://www.citizenreviewonline.org/july\\_2003/skamania.htm](http://www.citizenreviewonline.org/july_2003/skamania.htm) (complaint by Skamania County Commissioner that, as of 2003, more than 19,000 acres in Skamania County alone had been taken off the tax rolls by the Forest Service).

73. 16 U.S.C. § 544c(a)(1)(C). The states, however, must provide the Commission and other state agencies the authority under state law to carry out the interstate compact's purposes. *Id.* § 544c(a)(1)(B).

74. See also Eric Florip, *Is Gorge Commission Still Relevant?*, COLUMBIAN, Dec. 21, 2014, <http://www.columbian.com/news/2014/dec/21/is-gorge-commission-still-relevant/> (“The commission, hobbled by tight budgets for years, struggles to keep up with even its most basic duties, staff and appointed leaders say. As staffing levels and resources have dwindled, so has the agency's relevance and reach in some circles.”).

75. See generally James L. Olmsted, *The Global Warming Crisis: An Analytical Framework to Regional Responses*, 23 J. ENVTL. L. & LITIG. 125, 142–43 (2008) (“Armed with its own attorney, fulltime staff, and a board comprised of wealthy and influential citizens, [Friends of the Columbia Gorge] not only helped get the Columbia River Gorge Act enacted, it has spent years guiding it, and, when necessary, correcting its course. It is also likely . . . that there has never been a land use case that involved the Columbia River Gorge in which the Friends of the Columbia Gorge has not been a



2005, allowing it to protect and enhance Gorge resources through purchases and donations of land (pp. 140–41, 265). Without the consistent external oversight provided by the Friends, it seems certain that implementation of the Gorge Act could not achieve its paramount preservationist goal.<sup>76</sup>

#### IV. IMPLEMENTATION CONTROVERSIES

Durbin's book recounts numerous controversies over the first quarter-century of the Gorge Act's implementation. Durbin was in a particularly good position to recount these controversies because she reported on so many of them during her tenure at *The Columbian* from 1999 to 2011 (pp. xi–xii). But her book focuses predominantly on that time period from her reporting days, giving short shrift to the first ten years of the Act's implementation following its enactment in 1986.

For instance, Durbin only briefly mentions the major litigation brought by property owners and local governments in that first decade, much of which challenged the entire Gorge regulatory structure (pp. 94–95, 108, 178–79).<sup>77</sup> As Durbin notes, the Gorge Commission and Forest Service prevailed in all of these cases (p. 95, 108, 179); if the agencies had not prevailed, the Gorge might be very different today. These important early cases included a facial challenge to the constitutionality of the Gorge Act,<sup>78</sup> multiple challenges to the legality of the original Gorge management plan once it was finalized in 1992,<sup>79</sup> numerous takings claims that involved the

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party."); *Legal Docket*, FRIENDS OF THE COLUMBIA GORGE, <http://www.gorgefriends.org/article.php?id=134> (summaries of items of Friends of Columbia Gorge's current legal docket) (last visited Jan. 5, 2015); *Past Case Law*, FRIENDS OF THE COLUMBIA GORGE, <http://www.gorgefriends.org/article.php?id=135> (last visited Jan. 5, 2015) (summaries of past case law involving the National Scenic Area, including multiples cases to which Friends was a party).

76. See *supra* text accompanying notes 27–28. See also Olmsted, *supra* note 75, at 142–43.

77. Durbin erroneously counts “sixty-three suits filed to overturn the [Gorge Act],” a figure multiple times higher than the true number. DURBIN, *supra* note 6, at 179. The major cases challenging the Act and management plan are listed *infra* notes 78–80. Durbin may have been counting the total number of individual plaintiffs in these cases; several of these cases involved multiple plaintiffs.

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

79. See, e.g., *Klickitat County v. State*, 71 Wash. App. 760, 862 P.2d 629 (1993); W.

effects of the Gorge Act and its regulations on individual property rights,<sup>80</sup> and disputes between landowners and the Forest Service over potential land acquisitions.<sup>81</sup> Although Durbin glosses over these cases, many of them were previously analyzed by other authors.<sup>82</sup>

As with the first decade of Gorge Act implementation, the primary controversies in the second decade also involved litigation. The majority of cases during the second decade involved land use disputes over how to apply the newly adopted Gorge regulations to specific properties. Easily the most well-known of these cases was the dispute over Brian and Jody Bea's house, the construction of which was already underway when the litigation began (pp. 112–21).<sup>83</sup> The Gorge Commission, concerned about the scenic impacts of the dwelling and inconsistencies in Skamania County's land use decision approving it, ordered the Beas to stop construction and relocate the house to a less visible location (pp. 117, 119). The ensuing litigation quickly evolved into a jurisdictional battle between the Gorge Commission and Skamania County over which entity should be allowed to enforce the Scenic Area rules on the Bea property (pp. 119–20). The case was written up in national publications like *Reader's Digest*, which portrayed the Beas as hapless landowners subjected to the whims of a rapacious government bureaucracy,<sup>84</sup> and the *The*

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Birkenfeld Trust v. Bailey, 837 F. Supp. 1083 (E.D. Wash. 1993); W. Birkenfeld Trust v. Bailey, 827 F. Supp. 651 (E.D. Wash. 1993); Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419 (E.D. Wash. 1991).

80. See, e.g., Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616 (9th Cir. 1992), *cert. denied*, 510 U.S. 813 (1993); Broughton Lumber Co. v. Yeutter, 939 F.2d 1547 (Fed. Cir. 1991); Broughton Lumber Co. v. United States, 30 Fed. Cl. 239 (1994); Tucker v. Columbia River Gorge Comm'n, 73 Wash. App. 74, 867 P.2d 686 (1994); Murray v. Columbia River Gorge Comm'n, 125 Or. App. 444, 865 P.2d 1319 (1993); Miller v. Columbia River Gorge Comm'n, 118 Or. App. 553, 848 P.2d 629 (1993).

81. See, e.g., Stevenson v. Rominger, 909 F. Supp. 779 (E.D. Wash. 1995); Stevenson v. Rominger, 905 F. Supp. 836 (E.D. Wash. 1995).

82. See, e.g., Watters, *supra* note 12; Blumm & Smith, *supra* note 50, at 211–21; Blumm, *supra* note 12, at 17–18; ABBOTT, ADLER, & ABBOTT, *supra* note 12, at 135; Jeffrey B. Litwak, *Basic Scenic Area Law*, ENVTL. & LAND USE L. NEWSL. Feb. 2002, at 13, 15–17; Roberta Ulrich, *Gorge Plan Survives Court Battles*, OREGONIAN, Jan. 1, 1995, at B3.

83. See also Skamania County v. Columbia River Gorge Comm'n, 144 Wash. 2d 30, 26 P.3d 241 (2001).

84. Randall Fitzgerald, *Mugged by the Law*, READER'S DIGEST, Sept. 2000, at 144F. But see Tom Koenninger, *Tom's Column: This Just In: Bea House Mugs Gorge!*,

*New York Times*, which provided more balanced coverage.<sup>85</sup> Ultimately, in 2011 the Washington Supreme Court reversed a lower court decision that had required the Bea house to be moved (p. 119).<sup>86</sup> The state Supreme Court held that the Gorge Commission had exceeded its authority by collaterally attacking a final county land use decision in an enforcement action after the appeal period had passed (p. 119).<sup>87</sup> However, because the house did not conform to all of the county-imposed conditions of approval, it was still required by a subsequent settlement agreement to be redesigned, including reductions to its height, and a decrease in its scenic impacts (p. 120–21).

Although the Commission did not prevail in the Bea litigation, the Washington Supreme Court's decision has required the Commission to assume a more proactive management role, which the counties have largely respected,<sup>88</sup> but which funding limits have often hampered (pp. 72, 104–05, 166). Even before the Bea case was fully resolved, the Commission found itself embroiled in a similar conflict involving a large house built by Lyle and Debbie Nelson at a highly visible location in Clark County (pp. 125–26). Despite the significant scenic impacts of the Nelson house, the Gorge Commission had not appealed the county's land use decision and therefore had to settle for minor increases in vegetative screening to reduce visibility (pp. 125–26).

Durbin also covers several other land use disputes in the Scenic Area during the second decade of implementation, including replacements of non-conforming uses like the houses owned by Gail Castle (pp. 121–25)<sup>89</sup> and Tim and Casey

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COLUMBIAN, Sept. 10, 2000, at 11 (“The [*Reader's Digest*] story, at least as it deals with the Beas, is rife with errors of omission, distorted and unbalanced.”).

85. Sam Howe Verhovek, *Dream House with Scenic View is Environmentalists' Nightmare*, N.Y. TIMES, Apr. 24, 1999, <http://www.nytimes.com/1999/04/24/us/dream-house-with-scenic-view-is-environmentalists-nightmare.html>.

86. See also *Skamania County v. Columbia River Gorge Comm'n*, 144 Wash. 2d at 57–58, 26 P.3d at 254–55.

87. See also *id.*

88. See, e.g., Kevin Gorman, *Executive Director's Letter*, FRIENDS OF THE COLUMBIA GORGE NEWSL., Summer 2001, at 2, available at [http://gorgefriends.org/downloads/newsletter\\_summer2001.pdf](http://gorgefriends.org/downloads/newsletter_summer2001.pdf) (“Since [the Bea] case rose to national prominence, [Skamania County land use planners have] often referred to their world as ‘pre-Bea’ and ‘post-Bea.’ In the ‘post-Bea’ world, they have been more careful in writing development decisions as they realize they are under closer scrutiny than ever.”).

89. See also *Castle v. Exec. Dir.*, No. C99-0017-K-G-11 (Columbia River Gorge

Heuker (pp. 145, 157–59),<sup>90</sup> whether Sylvia Campbell could build a house on land zoned for agriculture (pp. 132–34),<sup>91</sup> and Roy Ostroski’s proposal to clear-cut thirty acres of timberland in the Scenic Area and convert the property from forest to agricultural use (pp. 209–10).<sup>92</sup> The Gorge Commission and Forest Service later addressed the regulatory issues involved in most of these cases during their first-ever review of the Gorge management plan, a process they began in the late 1990s and completed with the adoption of a revised plan in 2004.<sup>93</sup>

The 2004 revised plan proved controversial in its own right, and ushered in a new wave of litigation brought by the Friends against the Gorge Commission and Forest Service, all of which involved either the 2004 revised plan or various discretionary amendments to the Plan adopted by the Commission in the 2000s.<sup>94</sup> In all, this litigation resulted in ten published court opinions from 2007 to 2013.<sup>95</sup> Some of the most controversial

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Comm’n Feb. 16, 2001), available at [http://www.gorgecommission.org/recent\\_appeals.cfm](http://www.gorgecommission.org/recent_appeals.cfm).

90. See also *Friends of the Columbia Gorge v. Multnomah County*, No. COA-M-02-01 (Columbia River Gorge Comm’n July 9, 2002), available at [http://www.gorgecommission.org/recent\\_appeals.cfm](http://www.gorgecommission.org/recent_appeals.cfm).

91. See also *Columbia River Gorge Comm’n v. Clark County*, No. 01-2-04155-3 (Clark Cnty. Super. Ct. Oct. 15, 2002).

92. See also *Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 129 Wash. App. 35, 118 P.3d 354 (2005).

93. Periodic review of the Gorge plan is required by the statute at least every ten years. 16 U.S.C. § 544d(g) (2012). The prescribed periodic review has occurred only once since the original management plan became effective in 1992. That review was completed in 2004. DURBIN, *supra* note 6, at 166. Under the statute’s ten-year mandate, 16 U.S.C. § 544d(g), the Gorge Commission and Forest Service are now late in performing their second periodic review.

94. Amendments to the Plan are allowed at any time if consistent with the Gorge Act and if conditions in the Scenic Area have significantly changed. 16 U.S.C. § 544d(h).

95. The 2004 revisions to the management plan that resulted from plan review and subsequent revisions on remand led to four published court opinions. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 248 Or. App. 301, 273 P.3d 267 (2012); *Friends of the Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253 (D. Or. 2008); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 215 Or. App. 557, 171 P.3d 942 (2007), *aff’d in part and rev’d in part*, 346 Or. 366, 213 P.3d 1164 (2009). A 2005 Commission amendment to the Plan to allow certain commercial uses on historic properties led to an additional four court opinions. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 218 Or. App. 261, 179 P.3d 700, *aff’d*, 346 Or. 415, 212 P.3d 1243 (2009); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n* 218 Or. App. 232, 179 P.3d 706, *aff’d*, 346 Or. 433, 213 P.3d 1191 (2009). See also *infra* notes 101–11 and accompanying text (discussing cases involving the Commission’s 2008 recreation resorts plan amendment and

issues involved in this round of litigation concerned whether to relax the “minimize visibility” standard for new developments (pp. 156–57, 166),<sup>96</sup> provisions allowing expansions and replacements of nonconforming uses,<sup>97</sup> and new provisions authorizing small-scale fish processing plants in certain zones (pp. 159–61).<sup>98</sup> Some issues dragged on in the courts for years; Durbin notes that Oregon appellate courts have twice required the Commission to rewrite its plan to account for the cumulative effects of development (p. 166).<sup>99</sup>

One of the striking controversies from the litigation brought by Friends concerned new plan provisions authorizing low-intensity commercial events like weddings in rural areas of the Gorge (pp. 161–66). This conflict pitted local landowners, who argued that these were reasonable uses of the rural Gorge, against Friends, other rural landowners, and business owners inside the urban areas, who objected to allowing commercial activities outside the designated urban areas on lands where they were arguably foreclosed by the statute (pp. 161–62).<sup>100</sup> This dynamic—between the reasonableness of a relatively benign use and its precedent-setting possibilities—epitomized conflicts over implementation of the Gorge Act.

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implementation of the Commission’s 2000 air quality plan amendment).

96. See also *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 215 Or. App. at 586–89, 171 P.3d at 961–63.

97. See *id.* at 599–600, 171 P.3d at 968 (replacements and expansions of culverts and industrial uses).

98. See *id.* at 599–603, 171 P.3d at 968–70, *aff’d*, 346 Or. at 1188–90, 213 P.3d at 408–11.

99. See also *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 346 Or. at 393–99, 405–08, 213 P.3d at 1180–83, 1187–88; *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n*, 248 Or. App. 301, 273 P.3d 267 (2012). As of 2014, “because of ongoing litigation,” several of the Gorge counties had not yet begun implementing the Commission’s first round of changes regarding cumulative effects, which the Commission added to the management plan in 2010 in response to the Oregon Court of Appeals’ 2009 decision. Cecil, *supra* note 69.

100. See also *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 218 Or. App. 261, 179 P.3d 700, *aff’d*, 346 Or. 415, 212 P.3d 1243 (upholding a Gorge Commission order approving a Multnomah County ordinance that authorized commercial uses on historic properties); *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n* 218 Or. App. 232, 179 P.3d 706, *aff’d*, 346 Or. 433, 213 P.3d 1191 (upholding management plan amendment that authorized commercial uses on historic properties); *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 215 Or. App. at 603–05, 171 P.3d at 970–71, *aff’d*, 346 Or. at 411–13, 213 P.3d at 1190–91 (upholding plan revisions that authorized outdoor commercial events in conjunction with lawful wineries, wine tasting rooms, bed and breakfast inns, other commercial uses, and dwellings listed on the National Register of Historic Places).

Another representative controversy concerned a local timber company's plans for a destination resort at one of its old mills, a proposal inconsistent with the Gorge management plan and which required amendment of either the plan or the statute (pp. 180–82).<sup>101</sup> Broughton Lumber, which had earlier succeeded in limiting the Commission's ability to regulate timber harvests and in lobbying for land exchange provisions under which it later obtained timberlands outside the Scenic Area (pp. 56, 178), but which had failed in multiple challenges to the statute and management plan (pp. 178–79),<sup>102</sup> now sought to diversify its lands through a proposed resort called Broughton Landing that would take advantage of the windsurfing boom in the Gorge (p. 180). Although the Gorge Commission's executive director suggested to Broughton that it seek an amendment to the Gorge management plan, the company refused without the advance endorsement of the Commission (p. 182). Instead, the company enlarged its proposal to include approximately 250 high-end units, a lodge, and retail shops and lobbied local governments for support (p. 180, 183).<sup>103</sup> These efforts seemed to meet with success when the Gorge Commission surprisingly approved the proposal in 2008, over objections of dissenting commissioners and Friends of the Gorge, who claimed that the plan amendment would effectively create an unlawful new urban area (pp. 185–86). The plan amendment survived a legal challenge brought by Friends.<sup>104</sup> But the economic recession that began in 2008 intervened and prevented construction of the destination resort as of the publication of Durbin's book (p. 187).<sup>105</sup>

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101. *See also* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 236 Or. App. 479, 238 P.3d 378 (2010), *rev. denied*, 349 Or 654, 249 P.3d 542 (2011) (upholding management plan amendment that added new provisions authorizing "recreation resorts" on industrial properties if certain conditions are met).

102. Broughton was a plaintiff in at least four of the early Scenic Area challenges, *see supra* notes 79–80 and accompanying text, including Broughton Lumber v. Columbia River Gorge Commission, Broughton Lumber v. Yeutter, Broughton Lumber v. United States, and W. Birkenfeld Trust v. Bailey.

103. *See also* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 236 Or. App. at 486, 238 P3d at 383.

104. *See* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 236 Or. App. 479, 238 P3d 378, *rev. denied*, 349 Or 654, 249 P.3d 542 (2010).

105. As of 2015, Skamania County has not yet amended its zoning ordinance to implement the Broughton plan amendment, which would be the next required step for allowing the project, pursuant to 16 U.S.C. § 544e(b) (2012).

The final legal dispute in the round of litigation between Friends and the Gorge Commission involved the protection and enhancement of air quality within the Scenic Area (pp. 197–203, 208).<sup>106</sup> As Durbin notes, haze-induced visibility impairment in the Scenic Area is noticeable on at least ninety percent of the days in any given year, and the Scenic Area is consistently ranked among the most impaired federally protected areas in the western United States (pp. 198, 202). In addition to harming visibility, air pollution also threatens natural resources in the Scenic Area such as ecosystems, as well as fragile cultural resources such as Native American rock art (pp. 200, 203). In recognition of these problems, the Gorge Commission amended the Gorge management plan in 2000 to require the states of Oregon and Washington to develop a regional air quality strategy for protecting and enhancing air quality in the Scenic Area.<sup>107</sup> In 2011, the Gorge Commission approved an air quality strategy developed by the states.<sup>108</sup> The states' strategy sets a goal of "continued improvement" in air quality in the Scenic Area,<sup>109</sup> but provides few mechanisms for reaching that goal, other than relying on the prospect that the preexisting federal regional haze program—which applies under the federal Clean Air Act<sup>110</sup> to the nearby Mount Hood and Mount Adams Wilderness Areas—will result in incidental benefits to the Gorge (p. 208). In 2013, the Oregon Court of Appeals rejected Friends' challenge to the Gorge Commission's approval of the states' 2011 air quality strategy.<sup>111</sup> Although the states' strategy could have done more to tackle Gorge air quality issues, in Durbin's words, "[i]t was a start" (p. 208).<sup>112</sup>

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106. *See also* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 257 Or. App. 197, 305 P.3d 156 (2013); Blumm & Smith, *supra* note 50, at 224–26.

107. Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 257 Or. App. at 198–99, 305 P.3d at 156–57.

108. *Id.* at 199–200, 305 P.3d at 157–58; *see also* OR. DEP'T OF ENVTL. QUALITY & SW. CLEAN AIR AGENCY, COLUMBIA RIVER GORGE AIR STUDY AND STRATEGY (2011), available at [http://www.deq.state.or.us/aq/gorgeair/docs/11aq035\\_gorgeAirStudy.pdf](http://www.deq.state.or.us/aq/gorgeair/docs/11aq035_gorgeAirStudy.pdf).

109. Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 257 Or. App. at 201–02, 305 P.3d at 158–59.

110. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

111. Friends of the Columbia Gorge v. Columbia River Gorge Comm'n, 257 Or. App. 197, 305 P.3d 156.

112. The air quality provisions of the management plan and the states' air quality strategy may soon get their first test case, with the current conflict over the Troutdale Energy Center, a 652-MW natural gas power plant proposed at the Port of Troutdale,

Other major events recounted in Durbin's book were resolved without the involvement of the Gorge Commission. For example, resolution of the haze and other air pollution caused by Portland General Electric's Boardman plant was achieved through settlement of a suit brought by environmentalists under the Clean Air Act, which will result in the shuttering of that plant by 2020 (pp. 203–07).<sup>113</sup> Review of controversial wind farms proceeded without Gorge Commission oversight because the projects were proposed adjacent to, but outside, the Scenic Area (pp. 233–44).<sup>114</sup> Continued tribal access to a traditional fishing site at Lyle Point was secured without Gorge Commission involvement because the site was in an urban area, beyond Commission jurisdiction.<sup>115</sup> Instead, the site was maintained due to the combined efforts of the Yakama Indian Nation and the Trust for Public Land (pp. 169–75).

Longstanding efforts of the Warm Springs Tribes to site a casino on land they owned inside the Cascade Locks urban area ultimately failed, but not due to the opposition of the

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immediately west of the National Scenic Area. See Cari Hachmann, *Troutdale Power Plant Runs Into Opposition*, GRESHAM OUTLOOK, Jan. 28, 2014, <http://www.pamplinmedia.com/go/42-news/208788-66120-troutdale-power-plant-runs-into-opposition>; Rick Till, *A Power Plant at the Gateway to the Gorge?*, FRIENDS OF THE COLUMBIA GORGE NEWSL., Spring 2014, at 6, available at [http://gorgefriends.org/downloads/newsletter\\_spring2014.pdf](http://gorgefriends.org/downloads/newsletter_spring2014.pdf); Cari Hachmann, *Friends File Suit to Protect Gorge Air Quality*, GRESHAM OUTLOOK, Sept. 5, 2014, <http://pamplinmediagroup.com/go/42-news/232504-96617-friends-file-suit-to-protect-gorge-air-quality>.

113. See Erik Summers, *PGE, Environmental Groups Reach Boardman Settlement*, SUSTAINABLE BUS. OR. BLOG (July 19, 2011), <http://www.bizjournals.com/portland/blog/sbo/2011/07/pge-environmental-groups-reach.html?page=all>; Michael Lang, *Settlement with PGE Benefits Gorge Air and Environment*, FRIENDS OF THE COLUMBIA GORGE NEWSL., Summer 2011, at 8, available at [http://www.gorgefriends.org/downloads/newsletter\\_summer2011.pdf](http://www.gorgefriends.org/downloads/newsletter_summer2011.pdf). Durbin is not clear about the fate of another significant source of air pollution in the Gorge: the ammonia emissions from a large cattle feedlot, Threemile Canyon Farms, which expanded rapidly in the early 2000s. DURBIN, *supra* note 6, at 203–04.

114. See *Friends of the Columbia Gorge, Inc. v. State Energy Facility Site Evaluation Council*, 178 Wash. 2d 320, 327, 331 n.3, 310 P.3d 780, 382, 784 n.3 (2013) (noting that Gorge Act compliance was not in dispute in the appeal challenging the Whistling Ridge Wind Energy Project). Early in the review process for the Whistling Ridge project, the applicant modified the proposal to remove any road improvements inside the Scenic Area. See *Drach v. Skamania County*, No. COA-S-10-01 (Columbia River Gorge Comm'n Aug. 24, 2010), available at [http://www.gorgecommission.org/recent\\_appeals.cfm](http://www.gorgecommission.org/recent_appeals.cfm).

115. See 16 U.S.C. § 544d(c)(5)(B) (2012).



Gorge Commission (pp. 216–32). Instead, it was the opposition of Oregon Governor John Kitzhaber, who possesses a statutory veto over off-reservation casinos under the Indian Gaming Regulatory Act,<sup>116</sup> which has effectively blocked the Warm Springs casino (pp. 231–32).

The new 31-mile Klickitat Trail, which begins inside the Scenic Area, was created after the right-of-way along an abandoned railbed was transferred to the Washington State Parks and Recreation Commission (pp. 188–96). The Forest Service at first waffled on its support for the project, but ultimately agreed to assume some of the management responsibilities for the lower trail once adjacent landowners failed in an administrative challenge to the trail (pp. 194–95).<sup>117</sup>

Durbin ends her book on a largely positive note, first discussing the growing public demand for new recreational opportunities in the Gorge for hiking, windsurfing, mountain biking, and other uses, but also noting some of the challenges that must be met to satisfy that demand, including potential impacts to fragile cultural sites, native plants, and other resources (pp. 253–62).<sup>118</sup> Durbin then covers the spectacular and precedent-setting removal of Condit Dam from the White Salmon River in 2011 (pp. 269–74),<sup>119</sup> which occurred due to the operation of the fish passage provisions of the Federal Power Act,<sup>120</sup> but which was also determined by the Forest Service to be consistent with the Gorge Act.<sup>121</sup>

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116. See 25 U.S.C. § 2719(b).

117. See also *Burlington N. R.R. Co.—Abandonment Exemption—Between Klickitat County and Glendale, WA*, S.T.B. Docket No. AB-6 (Sub-No. 335X) (S.T.B. served June 8, 2005) available at [http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/45B419EA10D5E6F18525701900669D32/\\$file/35652.pdf](http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/45B419EA10D5E6F18525701900669D32/$file/35652.pdf).

118. See also Amber Marra, *New Gorge Commission Recreation Committee Sees High Interest from Community*, HOOD RIVER NEWS, April 8, 2014, <http://www.hoodrivernews.com/news/2014/apr/09/new-gorge-commission-recreation-committee-sees-hig/>.

119. See *Spectacular Time Lapse Dam “Removal” Video*, NAT’L GEOGRAPHIC (Oct. 28, 2011), <http://video.nationalgeographic.com/video/news/environment-news/us-condit-dam-breach-vin/> (time lapse video of the breach and removal of Condit Dam).

120. See Michael C. Blumm & Andrew B. Erickson, *Dam Removal in the Pacific Northwest: Lessons for the Nation*, 42 ENVTL. L. 1043, 1058–66 (2012).

121. In addition to Condit Dam, five other dams were removed between 2007 and 2013 in or near the Scenic Area from tributaries of the Columbia: three dams from the Sandy River, Powerdale Dam from the Hood River, and Hemlock Dam from Trout Creek. *Know Your Gorge: Rivers Restored!*, FRIENDS OF THE COLUMBIA GORGE NEWSL

Finally, Durbin discusses new controversies in the Gorge that were emerging as she finished her book. These included proposals to ship massive amounts of coal by train and barge from the Powder River Basin through the National Scenic Area for export to Asian markets (pp. 283–85)<sup>122</sup> and a desire by the city of The Dalles, Oregon to expand its urban area boundary to take in lands currently part of the general management area (pp. 286–87).<sup>123</sup>

## V. CONCLUSION

The Columbia River Gorge National Scenic Area, crafted by compromise in a bygone, bipartisan era, has had an eventful, tumultuous quarter-century since its creation. The National Scenic Area is unique not only because of its overwhelming beauty but also because, unlike similar national gems, its lands are not mostly publicly owned. In fact, nearly half of its lands are owned privately by more than 75,000 residents.<sup>124</sup> Preservation of the Gorge's great aesthetic beauty in the context of significant private land ownership has required deft leadership.

Kathie Durbin's engaging book makes clear what a great debt all who value the beauty of the Gorge owe to the late Senator Mark Hatfield, who against substantial odds navigated the Gorge legislation through Congress and a hostile Reagan Administration. The book reflects a bipartisan approach to environmental protection that has all but completely disappeared in the ensuing quarter-century. But

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Fall 2013, at 12, available at [http://gorgefriends.org/downloads/newsletter\\_fall2013.pdf](http://gorgefriends.org/downloads/newsletter_fall2013.pdf).

122. Burlington Northern Santa Fe Railroad is already shipping some coal through the National Scenic Area; the proposals currently on the table would dramatically expand the total volume of shipped coal. In 2013, Friends of the Columbia Gorge joined the Sierra Club, Columbia Riverkeeper, and other environmental groups in suing Burlington Northern over its existing coal shipping, alleging violations of the Clean Water Act caused by the spilling of coal dust and debris from uncovered trains in the Columbia River and other navigable waterways. See Complaint, *Sierra Club v. BNSF Ry. Co.*, No. C13-00967-JCC (W.D. Wash. June 4, 2013).

123. See also Cecil, *supra* note 69; Michael Lang, *Urban Sprawl Proposals Threaten the Gorge*, FRIENDS OF THE COLUMBIA GORGE NEWSL., Summer 2008, at 4, available at [http://www.gorgefriends.org/downloads/newsletter\\_summer2008.pdf](http://www.gorgefriends.org/downloads/newsletter_summer2008.pdf).

124. FOREST SERV., U.S. DEP'T OF AGRIC., 25 YEARS LATER, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA MARKS ITS CREATION (2011), available at [http://www.fs.fed.us/images/CRGNSA\\_25\\_years.pdf](http://www.fs.fed.us/images/CRGNSA_25_years.pdf).

Durbin also traces the origins of the kind of environmental partisanship that now characterizes the early 21st century, as seen in the steadfast, though unsuccessful, opposition in the 1980s to the Gorge bills in Congress by the Smiths of Oregon.<sup>125</sup> That sort of sentiment would almost certainly preclude the enactment of a statute as unique as the Gorge Act today.

Because of its current deep partisan divide, Congress is not likely to replicate the Gorge Act anytime soon. Thus, Durbin's book and similar studies that evaluate the implementation of experiments like the Gorge Act hold special importance. They may serve either as artifacts of a bygone era or as a way forward for federal-state-private relations in protecting public resources. Durbin's valuable historical account suggests that the Gorge offers federalism and regulatory lessons for other efforts to preserve areas of national importance—especially areas of scenic importance—that also contain substantial existing populations. Previously, there were not many examples from which to draw such lessons. Now there is an excellent one.

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125. *See supra* Part II.