

# THE GORGE COMMISSION: AN ADEQUATE FORUM FOR STATES, COUNTIES, TRIBES, AND THE RAILROADS OPERATING IN THE COLUMBIA RIVER GORGE

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## Abstract

The Columbia River Gorge is host to some of the most biodiverse landscape on the planet. In addition to harboring unique species, the Gorge is also home to a unique jurisdictional landscape. The collaborative legislation that enacted the Gorge Act endowed governmental authority of the General Management Area of the Gorge within a compact agency: the Gorge Commission. Railroads running through the Gorge have contested the Gorge Commission’s jurisdiction over their operations, claiming preemption from the Commission’s authority. This article discusses the competing jurisdictional interests in the General Management Area of the Gorge and explains why the Gorge Commission is an adequate forum for all entities operating within the Gorge, including railroads.

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## I. THE FORMATION OF AN INTERSTATE COMPACT LIKE NO OTHER

President Reagan signed the Columbia River Gorge National Scenic Area Act (“Gorge Act”) in 1968.<sup>1</sup> The Gorge Act

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exercises federal authority to create a unique system for managing the land, resources, economy, and conservation of the Columbia River Gorge.<sup>2</sup> President Reagan held his nose as he signed the document, signaling his discomfort (or perhaps disgust) with the Gorge Act.<sup>3</sup> Passed by Congress in bipartisan times gone by, the Gorge Act gives the Forest Service, the states of Washington and Oregon, and the six counties bordering the Gorge a shared role in managing 292,500 acres of public and private land in the Columbia River Gorge.<sup>4</sup> To help facilitate the success of this Act, Congress provided advance consent for an interstate compact establishing a commission to oversee and develop a land use plan for the General Management Area (GMA) of the Gorge.<sup>5</sup> The Gorge Commission consists of three appointees from Washington and Oregon, one representative appointed by each of the six counties within the Gorge Act boundaries, and one non-voting representative of the Forest Service appointed by the Secretary of Agriculture.<sup>6</sup> The Commission has been party to a variety of litigation regarding its oversight of the GMA, including disputes over the Commission's management plans,<sup>7</sup> takings claims,<sup>8</sup> zoning regulations,<sup>9</sup> and residential construction.<sup>10</sup>

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Gorge Commission, and Katie Gargan, J.D. Candidate '19, Lewis & Clark Northwestern School of Law, for sharing insight, critique, and support to make this article possible.

1. See Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544 (2012).

2. For further discussion on the one-of-a-kind nature of the Gorge Act, see generally Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty-Year Experiment in Land Use Federalism*, 21 J. LAND USE & ENVTL. L. 201 (2006).

3. Nathan J. Baker & James A. Fraser, *Tall Firs, Zip-Lines, and Reserved Interest Deeds: An Assessment of the Effectiveness of Federal Conservation Easements in the Columbia River Gorge National Scenic Area*, 46 ENVTL. L. 759, 765 (2017).

4. See 16 U.S.C. § 544b(a) (2012); *Columbia River Gorge National Scenic Area: About the Forest*, FOREST SERV., U.S. DEP'T OF AGRIC., <https://www.fs.usda.gov/main/crgnsa/about-forest> [<https://perma.cc/YDJ5-WLNB>] (last visited Jan. 3, 2018). For more background on the political dynamics surrounding the formation of the Gorge Act, see generally KATHIE DURBIN, *BRIDGING A GREAT DIVIDE: THE BATTLE FOR THE COLUMBIA RIVER GORGE* (2013).

5. Michael C. Blumm & Nathan J. Baker, *The Struggle over the Columbia River Gorge: Establishing and Governing the Country's Largest National Scenic Area*, 4 WASH. J. ENVTL. L. & POL'Y 287, 299–300 (2015).

6. 16 U.S.C. § 544c(a)(1)(C) (2012).

7. See, e.g., *Klickitat Cty. v. Columbia River Gorge Comm'n*, 770 F. Supp. 1419 (E.D. Wash. 1991).

These cases have considered, but never resolved, the question of whether the Gorge Act endows the Commission with the authority to regulate railroads within the GMA.<sup>11</sup>

Determining whether the Gorge Act endows an interstate compact body to regulate railroads is of great importance to the assets the Gorge Act aims to protect. Railroads require infrastructure to operate, which can only be obtained by developing natural areas or expanding existing structures. But infrastructure development can have a negative impact on local plant life, and the Gorge is home to over 800 species of flowers—fifteen of which are endemic.<sup>12</sup> Railroads operating in the Columbia River Basin transport hazardous goods, including coal and crude oil used to power trains, vessels, and trucks.<sup>13</sup> An increasing human population in the Columbia River corridor means more frequent oil spills and accidents are likely to occur,<sup>14</sup> affecting the natural landscape and health of

8. *See, e.g.*, *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616 (9th Cir. 1992); *Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 867 P.2d 686 (Wash. Ct. App. 1994); *Murray v. Columbia River Gorge Comm'n*, 865 P.2d 1319 (Or. Ct. App. 1993); *Miller v. Columbia River Gorge Comm'n*, 848 P.2d 629 (Or. Ct. App. 1993).

9. *See, e.g.*, *Columbia River Gorge Comm'n v. Clark Cty.*, No. 01-2-04155-3 (Wash. Clark Cty. Super. Ct. dismissed May 15, 2002).

10. *See, e.g.*, *Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (Wash. 2001).

11. In 2013, the Sierra Club and several other environmental groups challenged BNSF Railway Company in the court of Western Washington, alleging that the discharge of coal debris from trains violated the Clean Water Act. Complaint at 2, *Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC (W.D. Wash. June 4, 2013). The Gorge Commission's regulatory authority may have become a litigated point in this case, but, after presiding Judge John Coughenour dismissed BNSF's request to exclude certain evidence of dustfall and video evidence, BNSF agreed to settle the case out of court. *See Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC, 2014 U.S. Dist. LEXIS 1035 (W.D. Wash. Mar. 12, 2014) (order denying motion to dismiss); Order at 1, *Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC (W.D. Wash. Aug. 10, 2017) (order awarding \$3,151,113.61 in attorney's fees to plaintiffs as a result of the parties' stipulation to settle).

12. *Flowers*, COLUMBIA RIVER GORGE, <http://www.columbiarivergorge.info/flowers.html> [<https://perma.cc/3T4C-P529>] (last visited Feb. 2, 2018).

13. Daniel Jaffe et al., *Diesel Particulate Matter and Coal Dust from Trains in the Columbia River Gorge, Washington State, USA*, 6 ATMOSPHERIC POLLUTION RES. 946, 946 (2015); *see also* INDEP. SCI. ADVISORY BD., NW. POWER & CONSERVATION COUNCIL, NO. ISAB 2007-3, HUMAN POPULATION IMPACTS ON COLUMBIA RIVER BASIN FISH AND WILDLIFE 37 (2007), <https://www.nwcouncil.org/fw/isab/isab2007-3/> [<https://perma.cc/Q8TG-5R2V>].

14. INDEP. SCI. ADVISORY BD., *supra* note 13, at 37.

the ecosystem, as well as its inhabitants. The Gorge is host to many threatened and endangered species, including thirteen stocks of anadromous salmonids.<sup>15</sup> Hazardous debris and spills from railroads may have a negative effect on these protected species.<sup>16</sup>

In addition to being a keystone species in the Columbia River,<sup>17</sup> salmon provide economic, cultural, and spiritual value to Columbia River tribes. The right for Columbia River tribes to fish in all “usual and accustomed places” is a heavily negotiated treaty right that preserves the ability of tribes to access salmon in the Columbia River.<sup>18</sup> If railroads operating in the Gorge release contaminants that impact the habitat of salmon runs, the railroads may be interfering with the implied tribal treaty right of equitable apportionment.<sup>19</sup> The potential violation of tribal treaty rights adds another layer to the complicated local, state, and federal jurisdictional considerations at play in the Gorge Act.<sup>20</sup>

Columbia River tribes and others who rely on the Gorge to provide sustenance and economic, recreational, and spiritual value need clarity regarding which decision-making body is authorized to issue rulings related to railroads in the Gorge. This clarity would also help the railroads avoid frivolous, time-consuming, and costly proceedings in the incorrect forum.

The Gorge Commission was created solely to address the complicated task of governing and preserving a unique

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15. John Harrison, *Endangered Species Act and Columbia River Salmon and Steelhead*, NW. POWER & CONSERVATION COUNCIL (Nov. 22, 2011), <https://www.nwcouncil.org/history/EndangeredSpeciesAct> [https://perma.cc/FES2-RB86].

16. See Daniel Jaffe et al., *supra* note 13, at 946; see also JOSEPH TAYLOR, MAKING SALMON: AN ENVIRONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS 59 (2009).

17. Ann Garibaldi & Nancy Turner, *Cultural Keystone Species: Implications for Ecological Conservation and Restoration*, ECOLOGY & SOC'Y, Apr. 13, 2004, <https://www.ecologyandsociety.org/vol9/iss3/art1/>.

18. O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 293 (2002).

19. *Id.* at 281–83. The right of equitable apportionment holds that Columbia River treaty tribes are owed a reasonable share of the beneficial uses of the usual and accustomed areas in which they have historically fished. *Id.*

20. For an analysis of the complication surrounding federal-tribal jurisdiction, see generally Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989).

landscape with many different stakeholders. The perimeters of the Gorge Commission's power are vague—penciled in with grey lines—and it is within these ambiguous lines that railroads run through the majestic Gorge.<sup>21</sup> However, because the Gorge Act has endowed the Gorge Commission with jurisdiction over the GMA of the Gorge, the Gorge Commission has the authority to enforce provisions within the GMA. As a result, railroads running through the Gorge are subject to its authority and jurisdiction.

## II. BACKGROUND

### A. *Factual Background*

The Gorge Act's complex cooperative jurisdictional framework is the product of a political compromise engineered to dispel constitutional concerns expressed by the Reagan administration and some conservative U.S. Senators.<sup>22</sup> The administration and Senators worried that the Gorge Act gave the federal government too much control over state and local governments.<sup>23</sup> As a result, the Gorge Commission must consider local, state, federal, and tribal impacts when evaluating issues that arise under the Commission's jurisdiction.<sup>24</sup>

The Gorge Act endows the Gorge Commission with authority over the 149,400 acre GMA of the Gorge.<sup>25</sup> The Columbia River

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21. See PHILLIP J. COOPER, CTR. FOR PUB. SERV., *THE GORGE COMMISSION AND PUBLIC LAW: WHY IS IT SO COMPLEX, WHY DOES IT MATTER, AND WHAT DOES IT MEAN IN THE LIFE AND WORK OF THE COMMISSION?* 36–37 (2014), [http://www.gorgecommission.org/images/uploads/amendments/Legal\\_Assessment.pdf](http://www.gorgecommission.org/images/uploads/amendments/Legal_Assessment.pdf) [<https://perma.cc/P2FE-TEBA>]. Interstate compact law is a complex and developing area of law. *See id.* at 36. Interpretation of interstate compacts is a case-specific inquiry. *See id.* at 8. As such, there are often ambiguities intertwined in the text of compacts that require judicial interpretation to bring their penciled-in grey lines into black letter law. *See id.* at 37.

22. Blumm & Smith, *supra* note 2, at 206.

23. Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 920–22 (1987).

24. The Gorge Commission has five committees developed to facilitate relationships with the array of stakeholders in the Gorge. *Committees & Duties*, COLUMBIA RIVER GORGE COMM'N, <http://www.gorgecommission.org/about-crgc/committees> [<https://perma.cc/MRG2-BT3H>] (last visited Mar. 22, 2018).

25. FOREST SERV., *supra* note 4.

comprises 31,500 of these acres.<sup>26</sup> There are six separate counties included in the GMA of the Gorge.<sup>27</sup> The Gorge Commission is the principal policy authority for the GMA of the Gorge—in contrast to the Special Management Areas, over which the U.S. Forest Service holds principal policy authority.<sup>28</sup> In order to ensure that the public interest is served and the purposes of the Gorge Act are fulfilled, the Forest Service is also responsible for distributing funds authorized for continuing land acquisitions and overseeing the \$32.8 million allocated for economic and recreation development programs.<sup>29</sup>

The Gorge Act provides for residential and commercial development within the GMA of the Gorge, but new industrial development in the entire National Scenic Area<sup>30</sup> is prohibited, except in urban areas.<sup>31</sup> The Gorge Act also directs the Gorge Commission to adopt a management plan in the GMA of the Gorge.<sup>32</sup> The management plan must include land use designations for non-federal lands within the Scenic Area.<sup>33</sup> Each of the counties included in the GMA must present their proposed land use ordinances to the Gorge Commission for review.<sup>34</sup> Upon receiving the proposed land use ordinance, the Commission has ninety days to decide whether the ordinance is consistent with the management plan for the Gorge as a

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26. *Id.*

27. *Id.*

28. *Id.* Special Management Areas are more environmentally or visually sensitive, so many activities allowed in the GMA are restricted in Special Management Areas by the Forest Service. *Id.*

29. COLUMBIA RIVER GORGE COMM'N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA, at IV-2-2 (2011), <http://www.gorgecommission.org/images/uploads/pdfs/Y-Part%20IV%20Ch%202.pdf> [<https://perma.cc/9AT7-KWGB>].

30. The Columbia River Gorge National Scenic Area is comprised of lands in urban areas, the Special Management Area, and the General Management Area. FOREST SERV., U.S. DEP'T OF AGRIC., BUILDING IN THE SCENIC AREA: SCENIC RESOURCES IMPLEMENTATION HANDBOOK 5 (2005), [http://www.gorgecommission.org/images/uploads/amendments/Scenic\\_Handbook\\_-\\_FINAL\\_12-05.pdf](http://www.gorgecommission.org/images/uploads/amendments/Scenic_Handbook_-_FINAL_12-05.pdf) [<https://perma.cc/7AAE-JK92>]; see also *About: National Scenic Area*, COLUMBIA RIVER GORGE COMM'N, <http://www.gorgecommission.org/scenic-area/about-the-nsa/> [<https://perma.cc/55AU-TYHQ>] (last visited Mar. 22, 2018).

31. 16 U.S.C. § 544d(d)(6) (2012).

32. *Id.* § 544d(c).

33. *Id.* § 544d(c).

34. *Id.* § 544f(h).

whole before sending it to the Secretary of Agriculture for approval.<sup>35</sup>

The Gorge Commission also hears appeals of decisions made under the land use ordinances for the National Scenic Area.<sup>36</sup> Five counties (Multnomah, Hood River, Wasco, Clark, and Skamania) included in the Gorge administer their own land use ordinances while the Executive Director of the Gorge Commission administers the Scenic Area land use ordinance for Klickitat County, Washington.<sup>37</sup> The Commission reviews appeals from county decisions on the record, meaning that parties may not present new evidence or arguments for Commission consideration.<sup>38</sup> Conversely, if a party appeals a Klickitat County decision made by the Executive Director of the Commission the appeal is reviewed “de novo” and the parties may present new evidence.<sup>39</sup>

Congress adopted this mixed-management system to address many of the initial concerns decision-makers held around the Gorge Act and the Gorge Commission, but it did not placate everyone. Specifically, local residents and environmentalists criticized the planning system developed by the Gorge Act for differing reasons.<sup>40</sup> Many residents resent the implied message that they are unable to manage their own communities and protect what they also see as a valuable resource.<sup>41</sup> Meanwhile, environmentalists who want to see a powerful agency take control of the Gorge feel burdened by the task of watch-dogging county seats, the Gorge Commission, and Forest Service officers.<sup>42</sup> Environmentalists have been particularly concerned about the ability of this mixed-jurisdictional system to meet the conservation goals of the

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35. *Id.* § 544f(i)–(k).

36. Columbia River Gorge Commission Rule 350-60 (2011), [http://www.gorgecommission.org/images/uploads/rules/Commission\\_Rule\\_350-60\\_20110501.pdf](http://www.gorgecommission.org/images/uploads/rules/Commission_Rule_350-60_20110501.pdf) [<https://perma.cc/B338-F5AS>].

37. *Land Use Appeals*, COLUMBIA RIVER GORGE COMM'N, <http://www.gorgecommission.org/land-use/appeals> [<https://perma.cc/75F6-9R3S>] (last visited Feb. 2, 2018).

38. OR. ADMIN. R. 350-60-060 (2017).

39. *Compare id. with* OR. ADMIN. R. 350-70-070 (2017); *see also* COLUMBIA RIVER GORGE COMM'N, *supra* note 37.

40. CARL ABBOTT ET AL., *PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA* 186, 188–89 (William Lang ed., 1997).

41. *See id.*

42. *Id.*

Gorge Act.<sup>43</sup> Shortly before the Gorge Commission assumed jurisdictional responsibility of the GMA, the Executive Director of the environmental non-profit Friends of the Columbia Gorge desperately wrote:

If development continues at the rate of the past 11 months the impact on the [G]orge would be devastating. At the very least key areas of the [G]orge will have been lost forever before the management plan and implementing ordinances are even adopted[.]<sup>44</sup>

Because the delegation of decision-making authority under the Gorge Act affects an expansive spectrum of competing interests, it is of little surprise that opposing sides of regulated parties have challenged both the legal validity and the interpretation of the Gorge Act's jurisdictional allocations of authority.

### B. *Legal Background*

The growing pains of navigating the Gorge Act's jurisdictional system have been alleviated in part by judicial interpretation of the Gorge Act. Because the Gorge Act creates a unique compact agency—the Gorge Commission<sup>45</sup>—many courts have interpreted the scope of the Commission's authority under the Act. For example, the Supreme Court of Oregon held that the Gorge Commission holds power to speak “with the force of law” to address ambiguities and gaps in the Gorge Act's text.<sup>46</sup> The Court further held that the Gorge Commission's interpretations of the Gorge Act are to be reviewed with *Chevron* deference.<sup>47</sup>

Although both the Gorge Act and the Gorge Commission

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43. *Id.*

44. See Sy Adler, *Environmental Movement Politics, Mandates to Plan, and Professional Planners: The Dialectics of Discretion in Planning Practice*, 7 J. ARCHITECTURAL & PLAN. RES. 315, 322 (1990).

45. 16 U.S.C. § 544c (2012).

46. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1175 (Or. 2009).

47. *Id.* Courts give *Chevron* deference to an administrative agency's reasonable interpretation of its own authority when the enacting statute is silent or ambiguous on the issue. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).

have survived a litany of legal challenges, landowners have eroded the Commission's ability to invalidate local land use decisions outside of the normal appeals process,<sup>48</sup> showing that the Commission's power in the Gorge is not absolute. Both Union Pacific and Burlington Northern Santa Fe railway companies have litigated claims relating to railroad jurisdiction within the Gorge, but courts have never fully fleshed out or decided on the merits of these claims.<sup>49</sup> In 2017, Union Pacific challenged both the Wasco County Board of Commissioners and the Gorge Commission,<sup>50</sup> arguing that the Interstate Commerce Commission Termination Act (ICCTA)<sup>51</sup> preempted Wasco County's permitting process.<sup>52</sup> Union Pacific also claimed that Wasco County's permitting decision prohibiting the construction of new railroad tracks violated the Commerce Clause.<sup>53</sup> The Confederated Tribes of the Umatilla, Warm Springs, and Yakima Nation moved to dismiss, citing Union Pacific's failure to join the sovereign tribal nations as required parties pursuant to Federal Rule of Civil Procedure 12(b)(7).<sup>54</sup> Because of the fishing treaty rights held by the tribes and the possible effect an additional railroad track may have on the fish of the Columbia, the Court granted the tribes' motion to dismiss with prejudice but did not decide the merits of ICCTA preemption.<sup>55</sup> Although silent on a direct preemption

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48. Blumm & Smith, *supra* note 2, at 211.

49. *See, e.g.*, *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017). In another example, seven environmental organizations brought a Clean Water Act claim against Burlington Northern Santa Fe Railway Company claiming that railcars discharging coal and related pollutants into protected waterways violated federal law. *See Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC, 2016 U.S. Dist. LEXIS 147786 (W.D. Wash. Oct. 25, 2016). The case was ultimately settled out of court. Order at 1, *Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC (W.D. Wash., Aug. 10, 2017).

50. *Union Pac.*, 320 F.R.D. at 245.

51. Pub. L. No. 104-88, 109 Stat. 803 (1995) (codified as amended in scattered sections of 49 U.S.C.). The ICCTA endowed the Surface Transportation Board with exclusive jurisdiction (preempting state and federal law) over: (1) transportation by rail carriers and the remedies provided with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state. 49 U.S.C. § 10501(b) (2012). The ICCTA will be discussed further in Part IV.

52. *Union Pac.*, 320 F.R.D. at 248.

53. *Id.*

54. *Id.* at 249.

55. *Id.* at 253–55.

ruling, the court held that the Gorge Commission is an “adequate alternative forum” for the appeals process,<sup>56</sup> signaling that the Gorge Commission has the authority to decide matters related to railroads operating within the GMA of the Gorge.

### III. INTERSTATE COMPACT LAW AND THE IMPLICATIONS OF THE GORGE ACT DISPUTE

One of the qualities that makes the Gorge Commission so unique is that it is the product of an Interstate Compact. Compact agencies derive their authority from the Compact Clause of the U.S. Constitution.<sup>57</sup> These agencies are regional or multi-state organizations whose authority is congressionally delegated and beholden to the specific language of an agreement.<sup>58</sup> The District Court of New York has held that the hybrid origins of Compact Clause entities gives them an unusual position in the federal system, elaborating:

As the Supreme Court has observed, a Compact Clause entity is really the creation of multiple sovereigns: the compacting states whose actions are its genesis, and the federal government, whose approval is constitutionally required when the agency will operate in an area affecting the national interest.<sup>59</sup>

A troublesome result of the Compact Clause, however, is that states often end up creating an “orphan of the federal system, subservient only to the original organic agreement and left to fend for itself on important substantive law issues.”<sup>60</sup> The case law interpreting the Compact Clause is limited; the Clause enables state agreements to become federal law, leaving room for much confusion on judicial relief relating to compact

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56. *Id.* at 255.

57. “No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . .” U.S. CONST., art. I, § 10, cl. 3.

58. *Cf.* JEFFREY B. LITWAK, INTERSTATE COMPACT LAW: CASES & MATERIALS 201 (2d ed. 2014) (discussing the case *Green v. Biddle*, 21 US (8 Wheat.) 1 (1823)).

59. *Brooklyn Bridge Park Coal. v. Port Auth.*, 951 F. Supp. 383, 393 (E.D.N.Y. 1997).

60. Matthew S. Tripolitsiotis, *Bridge Over Troubled Waters: The Application of State Law to Compact Clause Entities*, 23 YALE L. & POL’Y REV. 163, 164 (2005).

agreements.<sup>61</sup>

The first Supreme Court case to interpret the Compact Clause was *Virginia v. Tennessee*,<sup>62</sup> which held that an agreement between states could be implicitly approved by subsequent actions of Congress without specific legislative action.<sup>63</sup> Almost half a century later, Justice Felix Frankfurter continued the Court's analysis of the Compact Clause when he wrote for a unanimous Court in the case of *West Virginia ex rel. Dyer v. Sims*.<sup>64</sup> The Court's opinion in *Dyer* identified the advantages of interstate compacts, noting that compacts can provide a means of resolving disputes between states.<sup>65</sup> Additionally, the Court observed that compacts serve as a vector for uniformly and cooperatively managing problems of an inherently interstate nature by eliminating the inconsistency that arises when the laws of individual states conflict.<sup>66</sup> Lastly, the Court recognized that interstate compacts provide the potential to safeguard national interests.<sup>67</sup>

Only about two-thirds of compacts create an agency charged with administering the compact,<sup>68</sup> and the unique genesis and purpose of every compact agency requires that each agency's authority be evaluated on a case-by-case basis. The Gorge Commission is an agency with dual enforcement and quasi-judicial roles under the Gorge Act.<sup>69</sup> This quasi-judicial role comes from the Commission's ability to hear appeals of County decisions.<sup>70</sup> Additionally, the Gorge Act explicitly states that the Gorge Commission "shall not be considered an agency or instrumentality of the United States for the purpose of any

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61. See, e.g., *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245 (D. Or. 2017) (describing the complicated process by which state agreements become federal law which then preempt state law).

62. 148 U.S. 503 (1893).

63. *Id.* at 522.

64. 341 U.S. 22 (1951).

65. *Id.* at 28.

66. *Id.* at 27.

67. *Id.*

68. LITWAK, *supra* note 58, at 83.

69. *Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 51, 26 P.3d 241, 251 (Wash. 2001).

70. See COLUMBIA RIVER GORGE COMM'N, *supra* note 37.

Federal law.”<sup>71</sup> Oregon and Washington have both enacted statutory provisions implementing the Gorge Act and the Gorge Commission’s authority to act under the Columbia River Gorge Compact.<sup>72</sup> As a result of the diverse jurisdictional and stakeholder interests involved in the Gorge, the Commission must take applicable federal, local, tribal,<sup>73</sup> and state law into account when developing plans and acting in its quasi-judicial capacity.<sup>74</sup>

Although the Gorge Commission is not a federal agency of the United States, the existence of the Commission is still a product of federal law and, therefore, a proper administrator of federal law. In a 2013 opinion delving into the Compact Clause, Justice Sotomayor shed light on the federal status of a bi-state compact, explaining that once Congress approves a compact, it is transformed into federal law and pre-empts any conflicting state law.<sup>75</sup> By placing its stamp of approval on the compact, Congress endows the compact with the mighty power of the Supremacy Clause.<sup>76</sup>

The legal implications of the Gorge Act railroad dispute are not confined to railroads operating in the Columbia River

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71. 16 U.S.C. § 544c(a)(1)(A) (2012).

72. OR. REV. STAT. 196.155 and WASH. REV. CODE 43.97.025 grant authority to and direct states and state agencies to carry out their respective functions under the Act. *Legal Authorities*, COLUMBIA RIVER GORGE COMM’N, <http://www.gorgecommission.org/scenic-area/legal-authorities> [https://perma.cc/WUZ9-FXFQ] (last visited Feb. 2, 2018). In Oregon, procedures for judicial review of Gorge Commission decisions are outlined in OR. REV. STAT. 196.115. *Id.* Washington statutes require county commissioners, under WASH. REV. CODE 36.32.550, and planning commissioners, under WASH. REV. CODE 35.63.150, to act in accordance with the National Scenic Area Act and management plan regulations and ordinances. *Id.* Additionally, Washington requires planning to be consistent with the Gorge Act and management plan, and has enacted the Planning Enabling Act, WASH. REV. CODE 36.70.980, and the Shoreline Management Act, WASH. REV. CODE 90.58.600, to outline these statutory obligations. *Id.*

73. The Gorge Act mandates that the Secretary ensure tribal members’ access to the Scenic Area for traditional cultural and religious purposes and that tribal consultation be utilized to define these historical uses. *See* 16 U.S.C. § 543f (2012).

74. *See generally* COLUMBIA RIVER GORGE COMM’N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA (2011), [http://www.gorgecommission.org/images/uploads/pdfs/Management\\_Plan\\_as\\_amended\\_through\\_Sept\\_1\\_2011.pdf](http://www.gorgecommission.org/images/uploads/pdfs/Management_Plan_as_amended_through_Sept_1_2011.pdf) [https://perma.cc/3TLB-2YZE] (describing the respective roles of federal, local, tribal, and state stakeholders).

75. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 627 n.8 (2013) (quoting *Virginia v. Maryland*, 540 U.S. 56, 66 (2003)).

76. *Id.* at 631 n.10.

Gorge. While legislation such as the Clean Air Act has endowed state actors with the ability to create federal law,<sup>77</sup> there is no precedent for a compact agency creating federal law that trumps the ICCTA. Railroads operating in all areas of the country could be exempt from federally-created compacts if the Gorge Commission were determined to be an inadequate forum for disputes involving railroads. For this reason, it is important to view the Gorge Act and the federal jurisdiction it endows upon a state agreement with a wide lens rather than on an issue-specific basis.

#### IV. RECONCILING THE GORGE ACT AND THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT

The Gorge Commission does not have to be a federal body to create or implement federal law, and compacts are not the only way that states can create federal law. An additional example of the transformation from non-federal authority to federal authority is demonstrated by the State Implementation Plans (SIP) required by the Clean Air Act (CAA).<sup>78</sup> Under the CAA, each state must develop a SIP describing how the state will attain or maintain the primary and secondary National Ambient Air Quality Standards (NAAQS) set forth in Section 109 of the CAA and its associated regulations.<sup>79</sup> The developmental structure of a SIP allows for individual states to have flexibility within the developmental process of attainment or maintenance of NAAQS. Each state must provide public notification and hearings regarding control measures and strategies before formally adopting the SIP.<sup>80</sup> Once a SIP has been formally adopted, it becomes federally enforceable law if approved by the Environmental Protection Agency (EPA).<sup>81</sup> The NAAQS standards that a SIP must address are not the ceiling, but rather the floor; if an individual state chooses to do so, it may develop a state SIP that goes beyond the minimum requirements of the CAA and

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77. See *Union Elec. Co v. EPA*, 427 U.S. 246 (1976) (holding that State Implementation Plans may be stricter than the requirements of the Clean Air Act).

78. 42 U.S.C. § 7410(a)(1) (2012).

79. *Id.* § 7409; 40 C.F.R. § 50 (2017).

80. 42 U.S.C. § 7410(a)(2) (2012).

81. *Id.* §§ 7410, 7413.

still have the SIP enacted as federal law.<sup>82</sup>

The Clean Air Act is testament to the ability of non-federal bodies to create federal law, and there is little doubt that, similarly, the Gorge Commission is a non-federal body that creates federal law. Railways operating in the Gorge have not contested the Gorge Commission's ability to create federally enforceable law. Instead, their claims have rested upon an argument of preemption that advocates for escaping jurisdiction of the Gorge Commission altogether.<sup>83</sup>

Jurisdictional federal control over railroads has only strengthened over time.<sup>84</sup> In order to provide increased federal protections for a struggling railway industry, in 1995 Congress enacted the Interstate Commerce Commission Termination Act (ICCTA).<sup>85</sup> This Act abolished the Interstate Commerce Commission (which previously handled railway disputes) and established the Surface Transportation Board (STB) under the U.S. Department of Transportation.<sup>86</sup> The STB exercises federal jurisdiction over all rail commerce and preempts state law.<sup>87</sup> Courts have interpreted the ICCTA's preemption clause as evidence of clear congressional intent to broadly preempt state and local regulation of integral rail facilities.<sup>88</sup> Still, state and local agencies play a significant role under many federal environmental statutes.<sup>89</sup> The Gorge Compact's fusion of state, federal, local, and tribal roles is a prime example of this type of cooperative effort.

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82. *Union Elec. Co. v. EPA*, 427 U.S. 246, 265 (1976).

83. *E.g.*, *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 248 (D. Or. 2017).

84. Railroads were one of the first industries to be enveloped in Congress's power to regulate instrumentalities of interstate commerce. In 1887 Congress created the Interstate Commerce Commission to shield shippers from the dominant power of the railroad industry; the ICC was the first independent agency that Congress created. S. REP. NO. 104-176, at 2 (1995); *see also* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (repealed 1995).

85. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (codified as amended in scattered sections of 49 U.S.C.).

86. 49 U.S.C. § 1301 (2012).

87. *Id.* § 10501(b)(2) ("Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."); *see also id.* §§ 10502, 11321.

88. *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 202 (1st Cir. 2000); *Wis. Cent. Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1013 (W.D. Wis. 2000).

89. *Union Pac. R.R. Co.*, 3 S.T.B. 646, 654, 1998 STB LEXIS 227, \*18 (1998).

The federal authority of the Gorge Commission's Management Plan has been reaffirmed by the Washington Court of Appeals, which held that the provisions of the Gorge Act "relative to the [Management Plan] are federally mandated, and do not constitute a state program."<sup>90</sup> Similar to the CAA requirement that a state must have its SIP approved by the EPA before it becomes federal law, the Gorge Commission must submit its Management Plan to the Forest Service before the plan moves on to the Secretary of Agriculture and becomes federal law.<sup>91</sup>

Interestingly, railroad companies in the Gorge have not consistently claimed that the Gorge Commission's authority is preempted by the ICCTA, but rather have accepted the Gorge Commission's jurisdiction in the past. In 2006, the Gorge Commission reviewed BNSF's proposal for a new rail expansion project and approved the request.<sup>92</sup> BNSF had initially filed a land use application for the project in 1999, but eventually withdrew this application because of concerns unrelated to the Gorge Commission's authority.<sup>93</sup> BNSF did not claim ICCTA preemption at any point during the process, suggesting an acceptance of Gorge Commission authority.

Additionally, Congress has spoken on the authority of the Gorge Commission to oversee all permitting decisions within the GMA. The Gorge Act explicitly states that disputes involving National Scenic Area Act permitting decisions are to be appealed first to the Gorge Commission, with further appeal to state court.<sup>94</sup> In determining whether a railroad is subject to the Gorge Act's jurisdictional provisions, the necessary inquiry is whether the railroad runs through the Scenic Area of the Gorge. For example, the Wasco County permitting decision involved the Scenic Area because the area to be permitted was directly within its boundaries.<sup>95</sup> A further appeal in state court is also not automatically preempted, as both state and federal courts have the authority to resolve disputes involving federal

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90. *Klickitat Cty. v. State*, 862 P.2d 629, 634 (Wash. Ct. App. 1993).

91. 16 U.S.C. § 544d(f)(1) (2012); Blair, *supra* note 23, at 942–44.

92. COLUMBIA RIVER GORGE COMM'N, DIRECTOR'S DECISION FOR BNSF'S LAND USE APPLICATION, No. COS-0011-K-G-21 (Feb. 16, 2006).

93. *See id.* BNSF withdrew its application due to impacts on cultural resources and a reduction in the size of the project. *Id.* at 1.

94. 16 U.S.C. § 544m(a)(2), (b)(4), (b)(6) (2012).

95. *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 248 (D. Or. 2017).

law.<sup>96</sup>

The 2017 District Court of Oregon permitting decision regarding Wasco County provides one of the strongest and most direct judicial rulings on the Gorge Commission's ability to exercise authority over railroads.<sup>97</sup> Although Union Pacific claimed that the Gorge Commission was preempted by the ICCTA from reviewing its Wasco County permit appeal, the court concluded that the Gorge Commission is an "adequate alternative forum" to the STB to hear the appeal.<sup>98</sup> The court went on to state that the fact that not all Gorge Commission members were lawyers was not indicative of a lack of competency, noting that federal courts regularly hold that administrative proceedings provide an adequate opportunity to raise questions of federal law.<sup>99</sup>

Although the ICCTA preempts state law, it does not preempt federal environmental statutes.<sup>100</sup> The STB's *Boston and Maine Corp. and Town of Ayer*<sup>101</sup> decision explains that when a federal environmental law conflicts with the ICCTA, the appropriate analytical framework is to: 1) review each individual action for the impact on interstate commerce and 2) determine whether a statute or regulation is applied in a discriminatory manner or used as a pretext for frustrating or preventing a particular activity.<sup>102</sup> Further, when the ICCTA conflicts with a federal law, the Ninth Circuit has held that the two are to be harmonized, if possible, giving effect to both laws.<sup>103</sup> Because the Gorge Act is a federal law, it follows that railroad regulation in the GMA of the Gorge is not automatically preempted by the ICCTA.

Existing precedent excludes compact agencies from preemption. For example, in *City of South Lake Tahoe v. Tahoe Regional Planning Agency*,<sup>104</sup> the District Court of California

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96. *Id.* at 255.

97. *Id.* at 245.

98. *Id.* at 255.

99. *Id.* (citing *Plaine v. McCabe*, 797 F.2d 713, 719 (9th Cir. 1986)).

100. See *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

101. 5 S.T.B. 500, 2001 WL 458685 (2001), *aff'd*, *Boston & Me. Corp. v. Town of Ayer*, 206 F. Supp. 2d 128 (D. Mass. 2002).

102. *Id.* at \*5.

103. *Ass'n of Am. R.R.*, 622 F.3d at 1097.

104. 664 F. Supp. 1375 (E.D. Cal. 1987).

held that:

Even though the [Airline Deregulation Act] includes a preemption clause prohibiting states and interstate agencies from airline regulation, that clause does not affect the [Tahoe Regional Planning Agency (TRPA)] because TRPA's powers are derived from a federal compact ratified by Congress pursuant to [the Compact Clause] of the U.S. Constitution.<sup>105</sup>

This decision reaffirms the supremacy of compact clause entities over inconsistent state and federal law.

To give effect to both the Gorge Act and the ICCTA, the two jurisdictional conflicts can be harmonized by using an approach that requires an exhaustion of remedies. The traditional exhaustion of remedies doctrine requires that all administrative avenues of possible relief must be exhausted before judicial review of an agency action.<sup>106</sup> This doctrine could be applicable to the Gorge Commission, even though it is a compact agency, because the Gorge Commission enjoys many of the same functions as a state or federal administrative agency. The Gorge Commission has adopted a series of administrative rules outlining procedures and requirements for open meetings, disclosure of public records, financial disclosure, conflicts of interest, public contracts, and administrative procedures.<sup>107</sup> These rules must adopt the more restrictive of either Washington or Oregon's interpretation of these subjects and are reviewed after each legislative session to ensure compliance.<sup>108</sup> The leading Supreme Court case on exhaustion, *McCarthy v. Madigan*,<sup>109</sup> explains that exhaustion is grounded in the understanding that Congress's delegation of

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105. *Id.* at 1377. See also *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062, 1073 (E.D. Cal. 1998) ("As a federal law, the Ordinance is not subject to preemption under the Supremacy Clause.") (citing *City of S. Lake Tahoe v. Tahoe Reg'l Planning Agency*, 664 F. Supp. 1375, 1378 (E.D. Cal. 1987)).

106. William Funk, *Exhaustion of Administrative Remedies - New Dimensions Since Darby*, 18 PACE ENVT'L L. REV. 1, 1 (2000).

107. See COLUMBIA RIVER GORGE COMM'N, *supra* note 72.

108. 16 U.S.C. § 544c(b) (2012).

109. 503 U.S. 140 (1992) (holding that exhaustion was not required in a *Bivens* dispute).

decision-making authority to an agency gives the agency, and not the courts, the primary responsibility to interpret directed legislative guidance.<sup>110</sup>

Because Congress has clearly delegated decision-making authority within the Gorge GMA to the Gorge Commission,<sup>111</sup> railroads may not completely skip over the jurisdictional power of the Gorge Commission. Instead, railroads must first appeal the applicability of Wasco County's zoning ordinance to the Gorge Commission. Requiring railroads to exhaust their remedies with an appeal to the Gorge Commission provides the Commission the ability to meet the goals of exhaustion: to correct any potential errors, encourage adherence to agency procedures, and foster judicial efficiency.<sup>112</sup> Exhaustion before the Gorge Commission also satisfies the precedential requirement that two conflicting laws be harmonized by giving effect to the Gorge Act.<sup>113</sup> The ICCTA can then be given effect by allowing an appeal of Gorge Commission decisions to be heard before the STB.

Although some may view an appeal to two agencies as cumbersome and inefficient, exhaustion often requires an additional step in order to preserve a greater jurisdictional good. For example, certain cases involving tribal lands, citizens, or governments must be tried through the appropriate tribal court before they can be appealed to federal courts.<sup>114</sup> This ensures that the reviewing federal authority maintains judicial sovereignty and has a proper record of the separate judicial system's decision-making process. Additionally, in Columbia River Gorge railroad jurisdictional disputes, exhaustion would allow the railroads to bypass a state appeal (Washington or Oregon) of a Gorge Commission decision and stay exclusively under federal jurisdiction. If either of the

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110. *Id.* at 144–45.

111. 16 U.S.C. § 544c (2012).

112. *See* *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

113. *Bos. & Me. Corp. & Town of Ayer*, 5 S.T.B 500, 2001 WL 458685, at \*6 n.28 (2001).

114. For example, tribes have the inherent authority to exercise criminal jurisdiction over member and non-member Indians. 25 U.S.C. § 1301 (2012). The Violence Against Women Reauthorization Act of 2013 extended tribal jurisdiction to certain non-Indians who commit acts of domestic violence on tribal lands. Pub. L. No. 113-4, 127 Stat. 120, 120–23 (2013). Moreover, unless Congress has unequivocally authorized suit, tribes also enjoy sovereign immunity and may choose only to waive that immunity if within the appropriate tribal court. *Kiowa Tribe v. Mfg. Tech.*, 523 U.S. 751, 754 (1998).

parties are dissatisfied with the decision of the STB, an appeal of a final STB decision may be brought before a federal appeals court pursuant to the Hobbs Act.<sup>115</sup> Utilizing an exhaustion of remedies doctrine facilitates the ability of railroads operating in the Gorge to adhere to the jurisdictional framework established by the Gorge Act as well as the jurisdictional preference they enjoy through the ICCTA.

## V. LESSONS FOR THE FUTURE

With a likely increase in fossil fuel exports due to a number of decisions facilitating the process, railroads may be more inclined to push for judicial precedent declaring ICCTA preemption as a means of avoiding the Gorge Commission's jurisdiction because the Commission may prioritize other values over fossil fuel transport. Increased rail infrastructure to accommodate heavier train car traffic and loads will likely be needed if the Trump Administration's goals of increasing exports are to be obtained, requiring development of undeveloped land. However, this increase in exports and the threat to the Commission's authority creates a number of health and environmental risks.

BNSF operates open-top rail cars, which transport coal and petroleum coke ("petcoke") through the GMA of the Gorge, while Union Pacific operates oil trains in the area.<sup>116</sup> When burned, petcoke emits five to ten percent more carbon dioxide than coal on a per-unit-of-energy basis.<sup>117</sup> The reason petcoke emits between thirty and eighty percent more CO<sub>2</sub> than coal per unit of weight is because petcoke has a high energy content, being comprised of over ninety percent carbon.<sup>118</sup> Petcoke is a byproduct of the oil refining process, made increasingly available by the construction of new pipelines and an upturn in rail delivery.<sup>119</sup>

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115. 28 U.S.C. § 2321(a) (2012).

116. See *Maps of the Union Pacific*, UNION PAC., <https://www.up.com/aboutup/reference/maps/> [https://perma.cc/3E58-YWJQ] (last visited Mar. 2, 2018) (mapping Union Pacific's routes through the Gorge).

117. LORNE STOCKMAN, OIL CHANGE INT'L, PETROLEUM COKE: THE COAL HIDING IN THE TAR SANDS 6 (Jan. 17, 2013), <http://priceofoil.org/content/uploads/2013/01/OCI.Petcoke.FINALSCREEN.pdf>.

118. *Id.*

119. See Joseph A. Caruso et al., *Petroleum Coke in the Urban Environment: A Review of Potential Health Effects*, 12 INT'L J. ENVT'L. RES. & PUB. HEALTH 6218, 6219

In *Sierra Club v. Burlington Northern Santa Fe Railway Co.*,<sup>120</sup> the court noted that it was undisputed that “[a]ll [BNSF] coal trains generate coal dust during various periods while in transit.”<sup>121</sup> BNSF has described the amount of coal that escapes from coal trains as “surprisingly large,” with internal studies indicating that anywhere from 500 to 2,000 pounds of coal can escape from a single loaded coal car.<sup>122</sup> In 2005, an accumulation of coal dust in the ballast area of the train tracks caused two trains transporting Powder River Basin coal through Wyoming and Montana to derail.<sup>123</sup> Accumulations of coal dust are responsible not just for train derailments, but also for fires resulting from spontaneous combustion.<sup>124</sup> Coal dust is also harmful to human health; the dust is a form of particulate matter that contains heavy metals such as mercury, arsenic, and lead.<sup>125</sup> Human health risks from exposure to particulate matter, including coal dust, include an increase in asthma, emphysema, heart disease, pneumonia, childhood bronchitis, and a reduction in lung capacity.<sup>126</sup>

Escaped coal dust and petcoke can also have a negative impact on the health and environment of surrounding areas. Coal dust may cover the leaves of surrounding vegetation, impairing photosynthesis capabilities,<sup>127</sup> have toxic effects on

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(2015).

120. No. C13-967-JCC, 2016 U.S. Dist. LEXIS 147786 (W.D. Wash. Oct. 25, 2016).

121. *Id.* at \*31.

122. Cienna Madrid, *Stop the Coal Trains*, THE STRANGER (Jan. 9, 2013), <https://www.thestranger.com/seattle/stop-the-coal-trains/Content?oid=15701054> [<https://perma.cc/U45C-9X3Q>].

123. Josh Voorhees, *Railroads, Utilities Clash Over Dust from Coal Trains*, N.Y. TIMES (Jan. 25, 2010), <http://www.nytimes.com/gwire/2010/01/25/25greenwire-railroads-utilities-clash-over-dust-from-coal-55265.html>.

124. See, e.g., *Combustible Dust: An Explosion Hazard*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dsg/combustibledust/> [<https://perma.cc/7233-EKG9>] (last visited Feb. 2, 2018); see also William Atkinson, *Combustible Coal Dust: An Explosion Waiting to Happen*, PUB. POWER, June 2009, at 70.

125. See Viney P. Aneja et al., *Characterization of Particulate Matter (PM<sub>10</sub>) Related to Surface Coal Mining Operations in Appalachia*, 54 ATMOSPHERIC ENV'T. 496, 498 (2012).

126. See Robert D. Brook et al., *Particulate Matter Air Pollution and Cardiovascular Disease: An Update to the Scientific Statement from the American Heart Association*, 121 CIRCULATION 2331 (2010).

127. EPA, ENVIRONMENTAL ASSESSMENT OF COAL TRANSPORTATION 77 (1978), <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=9100T7M9.TXT>

wildlife that forage in this vegetation,<sup>128</sup> and also may be absorbed by filter-feeders such as mussels that live within the Gorge.<sup>129</sup> In an effort to contain particulate matter and dust from escaping from railcars, chemical surfactants may be sprayed atop coal and petcoke trains, but the efficacy of these surfactants is contested.<sup>130</sup> Further, because surfactants themselves are chemicals, groups such as the Sierra Club, Columbia Riverkeeper, and Friends of the Columbia Gorge have argued that surfactants present an environmental and human health hazard in addition to the coal dust.<sup>131</sup> The nearby Multnomah County Health Department developed an analysis of the literature pertaining to health effects of coal trains.<sup>132</sup> The Department found that coal transportation could produce negative health outcomes, which include heart and lung problems, cancers, growth and development problems, stress and mental health problems, injury, and even death.<sup>133</sup>

The Trump administration has recently asserted the need for the United States to become “energy dominant” through an increase in foreign export of U.S. natural gas, oil, and coal.<sup>134</sup> Specifically, President Trump declared that his administration would put “an end to the war on coal.”<sup>135</sup> In December 2015,

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[<https://perma.cc/S8NB-ULKL>].

128. *Id.*

129. Ashley Ahearn, *Coal Dust's Environmental Impacts*, OR. PUB. BROAD. (March 11, 2013, 11:00 PM), <https://www.opb.org/news/article/coal-dusts-environmental-impacts/> [<https://perma.cc/W8RG-PTV3>].

130. Jan Hasselman, Columbia Riverkeeper et al., Comment Letter on Draft Environmental Impact Statement for Millennium Bulk Terminals Longview (June 13, 2016), <http://columbiariverkeeper.org/wp-content/uploads/2017/04/Columbia-Riverkeeper-et-al-June-2016-Comments-on-MBT.pdf> [<https://perma.cc/SLK2-62TM>].

131. *Id.*

132. *See generally* MULTNOMAH CTY. HEALTH DEP'T, THE HUMAN HEALTH EFFECTS OF RAIL TRANSPORT OF COAL THROUGH MULTNOMAH COUNTY, OREGON: A HEALTH ANALYSIS AND RECOMMENDATIONS FOR FURTHER ACTION (2013), <https://multco.us/file/9977/download> [<https://perma.cc/J57G-UAXZ>].

133. *Id.* at 5.

134. Erica R. Hendry, *Trump Lays Out Plan for 'Energy Dominance'*, PBS NEWSHOUR (June 29, 2017, 2:57 PM), <http://www.pbs.org/newshour/rundown/watch-live-trump-lay-plan-energy-dominance/> [<https://perma.cc/KF37-4B83>]. Department of Energy Secretary Rick Perry explained: “An energy dominant America will export to markets around the world, increasing our global leadership and our influence.” *Id.*

135. Jennifer A. Dlouhy, *Trump Sweeps Away Climate Rules Vowing 'New Energy Revolution'*, BLOOMBERG (Mar. 27, 2017, 8:00 PM), <https://www.bloomberg.com/news/articles/2017-03-28/trump-to-cancel-obama-s-policies-aimed-at-paris-climate-pledge> [<https://perma.cc/CM4G-UR5R>].

the Obama administration paved the way for this increase in fossil fuel exports when former President Barack Obama lifted the decades-old ban on most crude exports.<sup>136</sup> In the near future, these federal policies prioritizing fossil fuel exports rather than renewable energy infrastructures may have a strong influence on railroads transporting fossil fuels through the Gorge.

Many of the tribal, state, and local stakeholders in the Gorge are resisting the Trump Administration's call for an increased domestic focus on fossil fuel extraction and infrastructure. This resistance comes from experience with the dangers of fossil fuel transport. For example, a 2016 Union Pacific train derailment and fire in Mosier, Oregon released concentrations of benzene into groundwater near the derailment site that were ten times higher than the screening level of concern for animals living in a wetland.<sup>137</sup> Volatile organic compounds (VOCs) were also released into the groundwater.<sup>138</sup> The Mosier derailment prompted local residents and environmental organizations to call for a decrease in fossil fuel infrastructure (including railroads) operating through the Gorge.<sup>139</sup> Then, on September 2, 2017, the Eagle Creek Fire was ignited near the town of Cascade Locks, Oregon, compounding concerns over the dangers of anthropogenic fires in the Gorge.<sup>140</sup> Nearly three months passed before the fire was fully contained, and

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136. Jennifer A. Dlouhy, *Trump to Call for U.S. 'Dominance' in Global Energy Production*, BLOOMBERG (June 25, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-06-25/trump-to-call-for-u-s-dominance-in-global-energy-production> [https://perma.cc/3TN9-UWTW].

137. Kate Davidson, *Mosier Groundwater Contaminated After Oil Train Derailment*, OR. PUB. BROAD. (July 19, 2016, 1:45 PM), <http://www.opb.org/news/series/oil-trains/mosier-groundwater-contaminated-oil-train-derailment/> [https://perma.cc/RD24-UN4Z].

138. *Id.*

139. Citing concerns over the Trump administration's plans to roll back safety protections for rail trains transporting oil, Mosier Mayor Arlene Burns stated: "These rules were made to help protect communities against catastrophic events . . . . If it would have been our normal Gorge winds when this derailment event happened, it would have wiped out our town and the community downwind, wherever that was." Kelsey Watts, *Mosier Residents Wary of Trump Decision to Roll Back Oil Train Safety Plans*, FOX 12 OR. (Dec. 7, 2017, 6:11 PM), <http://www.kptv.com/story/37021426/mosier-residents-wary-of-trump-decision-to-roll-back-oil-train-safety-plans>.

140. *Eagle Creek Fire Update 10-11-2017*, INCIWEB (Oct. 11, 2017), <https://inciweb.nwcg.gov/incident/article/5584/42103/> [https://perma.cc/CZG7-29HU].

the blaze ultimately burned close to 49,000 acres.<sup>141</sup> The risk of fire exists anywhere that significant amounts of coal are being used or stored,<sup>142</sup> and thus the likelihood of a coal train-induced fire in the Gorge increases consistent with the amount of coal being transported through the Gorge. Railroads increasing coal and petcoke travel through the Gorge will substantially magnify the fire hazard, noise, scenic and air pollution, and water and soil contamination throughout the area.

The treaty-reserved fishing rights held by Columbia River tribes mandate that tribal concerns regarding railroad impacts on fishing runs be given unique consideration.<sup>143</sup> The need for local and federal governments to meaningfully consult with tribes will continue to rise as increases in fossil fuel debris and impacts infringe on sovereign treaty rights. Federal government actors have a legal responsibility to proactively protect tribal treaty rights, and if railroad operations violate tribal treaty rights, the federal government has the responsibility to act as a guardian to a ward and prohibit the violation.<sup>144</sup> Columbia River tribes have a 9,000-year history of sustainably managing salmon throughout the Gorge<sup>145</sup>; the importance of access to fishing in the Columbia River is reflected in the heavily-bargained treaty rights reserved by each of the Columbia River tribes.<sup>146</sup> As the Gorge Commission observed in *Union Pacific Railroad Co. v. Wasco County Board of Commissioners*,<sup>147</sup> the Gorge Act specifies that nothing in the Act shall “affect or modify any treaty or other rights of any

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141. *Id.*

142. U.S. DEP'T OF ENERGY, DOE BULL. NO. 93-4, THE FIRE BELOW: SPONTANEOUS COMBUSTION IN COAL 1 (1993).

143. See generally Lewis III, *supra* note 18.

144. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

145. See 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 (2006).

146. See generally Treaty with Indians in Middle Oregon, U.S.-Tribes of Middle Or., art. 1, June 25, 1855, 12 Stat. 963; Treaty with the Nez Percés, U.S.-Nez Percé Tribe, art. 3, June 11, 1855, 12 Stat. 957; Treaty with the Walla-Wallas, Cayuses, and Umatilla Tribes, U.S.-Tribes in Wash. and Or., art. 1, June 9, 1855, 12 Stat. 945; Treaty with the Yakamas, U.S.-Yakama Nation, art. 3, June 9, 1855, 12 Stat. 951.

147. No. COA-16-01 (Columbia River Gorge Comm'n Sept. 8, 2017) (final opinion and order).

Indian Tribe.”<sup>148</sup> The Gorge Commission went on to hold that the entirety of the Columbia River area is encompassed in the Columbia River Treaty Tribes’ fishing rights to the extent described in the tribes’ *amici* briefs.<sup>149</sup> This holding is consistent with the maxims of treaty interpretation, which provide that treaty interpretation is a form of contract interpretation.<sup>150</sup>

Despite its obligations to Columbia River Tribes, the United States has built dams along the Columbia and supported development, which has negatively affected the ability of salmon to thrive in the region.<sup>151</sup> Alarming, a representative from the Washington Department of Fish and Wildlife stated that only approximately 1.5 million salmon will return to the Columbia Basin in 2018, a marked decrease from the previous year’s salmon runs.<sup>152</sup> The additional burden that railroads

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148. *Id.* at 35 (citing 16 U.S.C. § 544o(a)(1) (2012)).

149. *Id.* at 30–31. Pursuant to the 1918 Columbia River Compact, the States of Oregon and Washington collaborated with Columbia River tribes to adopt a zone system described in *A Plan for Managing Fisheries on Stocks Originating from the Columbia River Basin and Its Tributaries Above Bonneville Dam* (Jan. 20, 1977). *Id.* at 30. In interpreting both the plan and Ninth Circuit precedent in *United States v. Oregon*, 718 F.2d 299 (9th Cir. 1983), the Gorge Commission held that Zone 6, which is located in the main stem of the Columbia River, is an “exclusive tribal commercial fishery where Indian treaty rights apply” and is “solely for Indian fishing.” *Id.* at 31. The zone system was developed in order to help identify the usual and accustomed fishing places of Columbia River tribes. *Id.*

150. Robert J. Miller, *Treaty Interpretation: Judicial Rules and Canons of Construction*, in THE ENCYCLOPEDIA OF UNITED STATES INDIAN POLICY AND LAW 2 (Lewis & Clark L. Sch. Paper No. 2009-24, 2009). The treaties negotiated by Governor Stevens with Puget Sound and Columbia River tribes were negotiated in Chinook jargon, a makeshift slang of 300–500 English, French, and Indian words. *Id.* at 1. The agreed-upon provisions were then written in English, which most Columbia River tribal representatives could not fluently speak or read. *Id.* at 3. Contract law stipulates that contracts are to be construed against the drafter. *Id.* at 2. Thus, the Supreme Court has consistently held that Columbia River tribes’ treaty provisions should be interpreted in favor of the signatory tribes. *Id.* at 1–3.

151. *Fisheries Timeline*, COLUMBIA RIVER INTERTRIBAL FISH COMM’N, <http://www.critfc.org/about-us/fisheries-timeline/> [<https://perma.cc/6M5S-VN6K>] (last visited Mar. 22, 2018). In addition to devastating salmon runs, the Grand Coulee, Bonneville, and Dalles Dams have flooded sacred spiritual and economic tribal sites. *See id.*

152. John Harrison, *Fish Forecast: ‘Not Very Good’*, NW. POWER & CONSERVATION COUNCIL (Mar. 15, 2017), <https://www.nwcouncil.org/news/blog/columbia-river-salmon-and-steelhead-runs-forecast-for-2017/> [<https://perma.cc/GA8N-VEQK>]. For up-to-date and historical salmon run statistics, see *2018 Adult Salmon Counts*, FISH PASSAGE CTR., [http://www.fpc.org/currentdaily/HistFishTwo\\_7day-ytd\\_Adults.htm](http://www.fpc.org/currentdaily/HistFishTwo_7day-ytd_Adults.htm) [<https://perma.cc/7C9V-FRVD>] (last visited Mar. 22, 2018).

place on the Columbia's salmon ecosystem invokes the tribes as necessary parties to all litigation, and the Columbia River Intertribal Fish Commission (representing the Confederated Tribes of Warm Springs, Umatilla, Yakama, and Nez Perce) strongly opposes new or expanded fossil fuel transport and expansion projects throughout the Columbia River basin.<sup>153</sup> Austin Greene, Chairman of the Confederated Tribes of Warm Springs, elaborates: "Tribal members have a right to access the Columbia River to exercise their treaty fishing rights in a safe manner . . . [E]xpansion would hinder our ability to access the river, jeopardize the safety of our tribal fishers, and put the health of the treaty-protected fishery at risk."<sup>154</sup> Prioritizing the preservation of natural resources over the extraction of these resources is a common theme for Columbia River tribes. In 2014, the Confederated Tribes of the Umatilla helped to defeat a requested permit for a proposed coal terminal, turning down an offer for \$800,000 to support the project, citing environmental concerns to an important tribal fishery.<sup>155</sup> Because of the dangers coal and oil trains pose to tribal resources, it is unlikely that Columbia River tribes will be amenable to any type of fossil fuel expansion in the foreseeable future.

If the federal government's policy of increased energy exports takes effect in the Columbia River Gorge, the results will violate tribal sovereignty, treaty rights, and Congress's policies of conservation and preservation intended by the Gorge Act. Because of these potentially conflicting policies and the time and cost that may be involved in litigating them, it is crucial that actors in the Gorge have clarity on the appropriate forum for a claim regarding railroad activity in the Gorge. In the future, compacts between states should reflect the preemption challenges for claims brought under the Gorge Act

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153. *Tribal Leaders Respond to Gorge Commission Decision on Columbia River Rail Expansion*, COLUMBIA RIVER INTERTRIBAL FISH COMM'N, <http://www.critfc.org/blog/press/tribal-leaders-respond-to-gorge-commission-decision-on-columbia-river-rail-expansion/> [<https://perma.cc/P3WL-8X78>] (last visited Feb. 3, 2018).

154. *Id.*

155. Rob Davis, *5 Things You Should Know About Oregon's Coal Terminal Permit Rejection*, THE OREGONIAN (Aug. 19, 2014, 4:01 PM), [http://www.oregonlive.com/environment/index.ssf/2014/08/5\\_things\\_you\\_should\\_know\\_about\\_1.html](http://www.oregonlive.com/environment/index.ssf/2014/08/5_things_you_should_know_about_1.html) [<https://perma.cc/7KW2-KBVE>].

and provide specific clarifying language for any jurisdictional preemption issues that may arise within agreement boundaries.

The purposes of the Gorge Act are to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River, as well as to support and protect the economy of the Gorge.<sup>156</sup> These purposes are only met if the Gorge Commission is upheld as a legitimate authority, authorized by Congress to create and oversee a management plan that accommodates tribal treaty rights and implement local, state, and federal law.

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156. 16 U.S.C. § 544a (2012).