The Columbia River Gorge and the Development of American Natural Resources Law: A Century of Significance

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The Columbia River Gorge, site of the nation’s first national scenic area and the only near sea level passage through the Cascade Mountains, is home to the longest continuously occupied site of human habitation in North America. The Gorge has served as a major transportation corridor between the Pacific and the Great Basin for hundreds of years, is home to spectacular scenery, dozens of waterfalls, many sacred sites, and abundant recreational activities, including world-class kite boarding and wind surfing. The Gorge has also been the location of over a century of legal battles that have made major contributions to American natural resources law. From judicial interpretations of 19th Indian treaties, to the development of the largest interconnected hydroelectric system in the world, to ensuing declines in what were once the world’s largest salmon runs—ultimately resulting in endangered species listings—to innovative federal statutes concerning electric power planning and conservation and land use federalism, to compensation schemes for landowners burdened with regulation, to dam removal and conflicts between sea lions and salmon, the Gorge has spawned a legal history as rich as its geography. This article surveys these developments and suggests that no area of the country has produced more varied and significant contributions to natural resources law.

The Columbia River Gorge was formed sometime between 700,000 and 2 million years ago, when the mighty Columbia River, seeking sea level, carved its way to the ocean—producing the only near-sea level passage that exists through the Cascade Mountains.1 Dividing the states of Oregon and Washington, the Gorge is a spectacular canyon, roughly eighty miles long and up to 4000 feet deep, extending from the mouth of the Deschutes River westward to the outskirts of the Portland, Oregon metropolitan area.2

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*Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Adapted from remarks delivered to the Rocky Mountain Mineral Law Foundation’s fifteenth biennial Natural Resources Law Teacher’s Conference held May 25-27, 2011, at Skamania Lodge in Stevenson, Washington. Until I accepted this assignment, I had not realized how much of my academic career involved the Columbia River Gorge. I am grateful to Fred Cheever and Mark Holland for the opportunity to revisit these diverse issues in one place but apologize for all the citations to my earlier writings. Andrew Erickson, 2L, Lewis and Clark Law School, provided expert research assistance.


The Gorge is one of the oldest inhabited places in North America, with evidence of human habitation going back at least 10,000 years. Natives fished the Gorge’s rivers for salmon for millennia. Since white settlement, the Gorge has served as a major transportation corridor, with highways and railroads connecting the Columbia River Plateau with the Pacific Ocean. With over three million people living within an hour’s drive, the Gorge now serves as a major recreational area, a mecca for windsurfers and kite boarders, and home to over ninety waterfalls on the Oregon side alone. In 1986, in recognition of the Gorge’s natural resources, recreational opportunities, and spectacular scenery, Congress designated the Gorge as the nation’s first national scenic area.

The Gorge has thus been an important place geographically, culturally, spiritually, and economically since virtually time immemorial. It has also been the scene of numerous disputes over its natural resources over the last century. In fact, the Gorge has arguably been the scene of more important and varied natural resources disputes than any other confined geographic area in the country. One could easily teach a natural resources law course just from the law emanating from the Columbia River Gorge. So, taking a page from the natural resources law case book authored by Christine Klein, Fred Cheever, and Brett Birdsong, this article offers a “placed-based” view of natural resources law, examining nine different ways the Gorge and its resources have contributed to the development of American natural resources law, mostly in chronological order.

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3 C. MELVIN AIKENS, ARCHAEOLOGY OF OREGON 41 (2d ed. 1986).
4 See infra notes 9-10 and accompanying text.
5 For a list of waterfalls, see http://www.waterfallsnorthwest.com/nws/database.php?z=l&st=OR&cat=region&subj=cgo.
6 See infra § V. See also PETER MARBACH, THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA: 25TH ANNIVERSARY COMMEMORATIVE EDITION (2011).
I. Indian Treaty Fishing Rights and *United States v. Winans*

The place to begin is with a salmon dispute that was characteristic of disputes along the Columbia River in the late 19th century. The disputes grew out of the Indian treaties of the 1850s in which several Columbia Basin tribes reserved “the right of taking fish at all usual and accustomed fishing places . . . in common with” white settlers.⁸ Although there were “usual and accustomed” fishing sites throughout the Columbia Basin, the most valuable place was Celilo Falls on lower Columbia in the heart of the Gorge, where natives had fished for thousands of years.⁹ In fact, Celilo Village is the oldest continuously occupied site in North America.¹⁰

In the decades following the signing of the treaties, white settlers established a commercial salmon fishery, erected numerous salmon canneries, and employed technologies like fish wheels to physically preempt tribal fishers, spawning numerous disputes along the Columbia, some of which ended up in court.¹¹ With the encouragement of Indian agents, one notable case ended up in the Washington Territorial Supreme Court, which reversed a lower court and ruled that a white shoreland owner could not fence tribal fisheries out their historic fishing places at Tumwater, rapids below Celilo Falls.¹² The court presciently employed canons of treaty to liberally construed the Treaty with the Yakima in favor of the Indians and in the way they understood.¹³

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⁸ *E.g.*, Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 953 (1855) (ratified Mar. 8, 1859).
¹⁰ *William Dietrich, Northwest Passage: The Great Columbia River* 52 (1995) (noting that the area around the falls was inhabited for roughly 13,000 years).
¹³ *Taylor*, 13 P. at 334-35.
This precedent did not prevent the Winans brothers, shoreland owners with a fee patent from the federal government and a state license to operate a fish wheel, from fencing out Indian fishers at the same Tumwater fishery a few years later. In response to their obstructing access to the fishery, the local district attorney filed suit and obtained a temporary injunction against the brothers from interfering with Indian fishing in 1895. But after extended proceedings before the trial court, Judge Cornelius Hanford dissolved the injunction eight years later in 1903, ruling that since the Winans’ could fence out whites, they could fence out Indians.

In a memorable decision, the U.S. Supreme Court reversed in an opinion by Justice Joseph McKenna, who wrote for an 8-1 Court that the lower court result “was an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of a Nation for more.” In words that echo down through the generations, McKenna wrote: The Court decided that the tribes—for whom the right “to take fish” was “part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary than the atmosphere they breathed”—had a treaty-based “servitude,” “a right in land” that burdened the Winans’ land title. This property-rights recognition of treaty rights is one of the key decisions in Indian natural resources law, for it meant that federal and state regulatory processes had to respect Indian

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14 See Blumm & Brunberg, supra note 9, at 523-24.
15 See id. at 524-29. For vivid account of the case, called “the White Swan” case after the lead plaintiff, see Si’lailo Way, supra note 9, at 73-83.
17 Id. at 381.
treaty fishing rights. It also meant that the treaties the treaties preserved rights for the tribes not possessed by non-Indians.18

Most significantly, the Winans decision made the critical distinction that “the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”19 This was the foundation of the reserved rights doctrine, which three years later was applied by Justice McKenna to water rights in the famous Winters v. United States case20 and has been influential ever since.21 The concept of reserved rights in natural resources law extends beyond Indian law and beyond water law.22

The property right the tribes reserved in the treaties was “the right of taking fish,” known by common law property lawyers as a piscary profit a prendre.23 The piscary profit established in the Winans decision evolved over the years to include historic fishing sites that were not expressly reserved in treaties,24 an insulation for tribes from state license fees,25 protection against discriminatory state regulation,26 an equal harvest share27 and, most recently,

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18 See Si’laiło Way, supra note 9, at 83.
19 Winans, 198 U.S. at 381.
21 See 2 WATERS AND WATER RIGHTS, chap. 37 (Robt. E. Beck & Amy K. Kelley, eds, 2009 ed.).
protection of fish habitat. The *Winans* legacy is therefore considerable: the first great contribution of the Gorge to natural resources law.

II. The Bonneville Dam and the Transformation of the Columbia River

The second great contribution of the Gorge to natural resources law began in the 1930s when the federal government, through the New Deal, began to transform the mighty Columbia into the largest interconnected hydroelectric system in the world. Bonneville Dam was begun in 1933 with funds under the National Industrial Recovery Act, but the Supreme Court halted construction in 1935, when it ruled that that statute was not sufficient authority for the dam. Congress soon responded by specifically directing completion of the dam in the 1937 Bonneville Project Act.

The 1937 statute not only authorized completion of the dam, it created the Bonneville Power Administration (BPA) to market electricity from the dam, from the giant Grand Coulee Dam being constructed upstream on the Columbia upstream of the Gorge, and eventually all of the thirty-one federal dams in the Columbia Basin. Even though none of these projects

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29 Northwest Power Planning Council, 1 Northwest Conservation and Electric Power Plan 1-1, 5-1 (1986). According to William Dietrich, the Columbia is the “quintessential river of the twentieth century, the river of the dynamo.” Dietrich, supra note 10, at 46.
33 Grand Coulee, the largest concrete structure ever built and located some 450 miles upstream of Bonneville Dam, has roughly six times the generating capacity of Bonneville. See Wikipedia (entries for Grand Coulee Dam and Bonneville Dam).
were principally authorized for hydropower,\textsuperscript{35} marketing low-cost electricity eventually began to dominate river operations, and BPA became the dominant agency in the region, even though it was not the nominal project operator.\textsuperscript{36}

In line with New Deal policies,\textsuperscript{37} the Act gave preference to sales to public agencies,\textsuperscript{38} which led to years of public versus private power wrangling.\textsuperscript{39} Today, the region is split: with some cities like Seattle and Eugene and most rural areas served by public power, while most urban areas are served by large privately owned power companies like Pacificorp, Puget Sound Power and Light, and Portland General Electric.\textsuperscript{40} However, unlike the Tennessee Valley Authority,\textsuperscript{41} Congress never gave BPA the authority to construct plants, leaving that authority with the project operators—the U.S. Army Corps of Engineers (Corps) and the Bureau of Reclamation (BuRec)—and of course the congressional appropriations process.\textsuperscript{42} These institutional arrangements, with BPA as the power marketer, and the Corps and BuRec as the project operators, became the hallmarks of the Federal Columbia River Power System (FCRPS).\textsuperscript{43}

Development of the FCRPS continued far upriver from the Gorge throughout the post-World War II era to include fourteen major federal dams in the Columbia Basin, concluding when the last of four lower Snake River dams were completed in the mid-1970s.\textsuperscript{44} A notable

\textsuperscript{36} The project operators of the federal dams in the Columbia Basin are the U.S. Army Corps of Engineers and the Bureau of Reclamation. \textit{See BPA Inside Story, supra} note 34.
\textsuperscript{37} \textit{See Hydroelectric Heritage, supra} note 30, at 191-202.
\textsuperscript{38} 16 U.S.C. § 832c.
\textsuperscript{39} \textit{See Hydroelectric Heritage, supra} note 30, at 206-14.
\textsuperscript{40} \textit{See BPA Inside Story, supra} note 34.
\textsuperscript{41} TVA was authorized by 48 Stat. 32 (1933), chap. 32, codified at 16 U.S.C. § 831 et seq.
\textsuperscript{42} \textit{See Hydroelectric Heritage, supra} note 30, at 195-200 (discussing the debate over the Bonneville Project Act), 207-09 (discussing the defeat of the proposed Columbia Valley Authority).
\textsuperscript{43} \textit{See Hydropower vs. Salmon, supra} note 35, at 223-49 (discussing the evolution and components of the FCRPS).
\textsuperscript{44} On the building of the lower Snake Dams, see KEITH C. PETERSON, \textit{RIVER OF LIFE, CHANNEL OF DEATH: FISH AND DAMS ON THE LOWER SNAKE} (2001).
addition was The Dalles Dam in 1957, becoming the second major federal dam within the Gorge.\textsuperscript{45} That project drowned the great Indian fishery at Celilo Falls, the site of the controversy in the \textit{Winans} case.\textsuperscript{46} By the mid-1960, the FCRPS was being operated as a single entity, including even some utility-owned dams.\textsuperscript{47} These operating practices cemented the hydropower dominance on the Columbia and its major tributary, the Snake, sending the basin’s salmon runs on a decline that would lead to Endangered Species Act listings in the 1990s.\textsuperscript{48}

BPA’s lack of authority to expand the electric power system would cause problems in meeting the perceived mushrooming electric demand of the Northwest in the 1960s and 1970s.\textsuperscript{49} With virtually all the large dam sites developed, the agency attempted to expand the system by adding coal and nuclear plants, with disastrous results.\textsuperscript{50} Congress eventually had to step in and re-write the region’s electric policies in the Northwest Power Act.\textsuperscript{51}

The developed FCRPS now supplies one-third of the Northwest’s electricity, carbon free.\textsuperscript{52} The dams also irrigate some eight million acres of farmland.\textsuperscript{53} They also are the principal reason for the listing of seven species of upriver salmonids under the Endangered Species Act.\textsuperscript{54} Moreover, one of the most pernicious effects of the hydropower dominance of the Columbia

\textsuperscript{45} The Dalles Dam was authorized by the Rivers and Harbors Act of 1950, 64 Stat. 163, 179. \textit{See} Richard White, \textit{The Organic Machine: The Remaking of the Columbia River} 50 (1995) (noting that The Dalles Dam generates electricity 13 times the demand of the city of Portland).
\textsuperscript{46} \textit{See supra} § I.
\textsuperscript{47} \textit{See Hydroelectric Heritage}, \textit{supra} note 30, at 217-19.
\textsuperscript{48} \textit{See infra} § VI.
\textsuperscript{49} \textit{See Hydroelectric Heritage}, \textit{supra} note 30, at 221-22.
\textsuperscript{50} The chief economic calamity resulting from the program was the default of the Washington Public Power Supply System, a BPA preference customer, which had four of its five nuclear plants stillborn, at a cost of roughly $2 billion. \textit{See} Charles P. Alexander, et al., \textit{Whoops! A Two Billion Dollar Blunder}, Time, Aug. 8, 1983, available at http://www.time.com/time/magazine/article/0,9171,955183,00.html.
\textsuperscript{51} \textit{See infra} § IV.
\textsuperscript{53} \textit{See BPA Inside Story}, \textit{supra} note 34, at 53.
\textsuperscript{54} \textit{See infra} § VI.
Basin concerns the mitigation that accompanied the dams, as hatchery salmon now dominate, weakening wild runs while masking the true effect of the dams on wild salmon runs for decades. 55

III. Sharing Salmon Harvests Fairly: Sohappy v. Smith

Indian fishers not only fact the habitat loss and passage problems that the dams presented, they were also burdened with discriminatory state conservation regulations which often imposed the entire conservation burden on them. 56 Although the Supreme Court would eventually outlaw discriminatory regulations in 1973 in its second Puyallup decision, 57 it was hardly clear what constituted impermissible discrimination, and the Court called for “a fair apportionment” of salmon harvests. 58

That apportionment had already been decreed by District Judge Robert Belloni in a case challenging the state of Oregon’s ban on net fishing above The Dalles Dam. The ban effectively closed the upriver to Indian harvesters and sent offending tribal fishermen like David Sohappy to jail. Sohappy successfully challenged his conviction in federal court, 59 and federal government eventually filed a separate suit, a case that continues to allocate salmon harvests

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57 Dept. of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II) (striking down a ban on net fishing because although facially nondiscriminatory, the ban affected only Indian fishers). Earlier, in Dept. of Game v. Puyallup Tribe, 391 U.S. 392, 401-03 (1968), the Court allowed state conservation regulations to apply to tribal fishing so long as they were non-discriminatory and “reasonable and necessary,” a standard that Professor Ralph Johnson accurately predicted would prove to be too vague for the state to apply fairly. Ralph W. Johnson, The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L Rev. 207 (1972).
58 Puyallup II, 414 U.S, at 48-49.
on the Columbia forty-five years later in what may be the longest-running federal case in the

country.60

In the most notable of many decisions in the case, Judge Belloni responded to the state’s

claim that the treaties entitled the tribes only to the same rights as other citizens in memorable

words, writing “[s]uch a reading would not seem unreasonable if all history, anthropology,

biology, prior case law, and the intention of the parties to the treaties were to be ignored.”61

The judge saw through the states conservation regulations for what they were: attempts not

only to preserve salmon but also to conserve harvest opportunities for state-licensed

commercial and sport fishers.62 Consequently, he ruled that the state had to provide “a fair

share” for tribal harvesters and set substantive and procedural standards for achieving that fair

share.63

Judge Belloni’s decision revolutionized salmon management on the Columbia. He later
defined “a fair share” to be half the harvests, incorporating the historic decision of Judge

George Boldt in the context of Puget Sound salmon harvests.64 Both Judge Belloni and Judge

Boldt were upheld by the Ninth Circuit and ultimately the Supreme Court in 1979.65 The case
continues today in the court of District Judge Garr King.

60 The case is now known as United States v. Oregon; see Timothy Weaver, Litigation and Negotiation: The History

of Salmon in the Columbia Basin, 24 Ecology L.Q. 677 (1997); Penny Harrison, The Evolution of a New

Comprehensive Plan for Managing Columbia River Anadromous Fish, 16 Envtl. L. 705 (1986).
61 Sohappy, 302 F.Supp. at 905.
62 Tribal fishers paid no state license fees under the Supreme Court’s Tulee decision, supra note 25 and

accompanying text.
63 Sohappy, 302 F.Supp. at 908-11. See Sacrificing the Salmon, supra note 55, at 78-79, discussing the standards
Judge Belloni set in unpublished opinions (including providing meaningful participation of the tribes in the
development of harvest regulations and ensuring that regulations were the “least restrictive which can be imposed
consistent with assuring the necessary escapement [spawning] of fish for conservation purposes).

Gillnetters v. U.S. District Court, 573 F.2d 1123 (9th Cir. 1978), sub. nom. Washington v. Passenger Vessel Fishing
Ass’n, 443 U.S. 676 (1979). See Sacrificing the Salmon, supra note 55, at 80-86, discussing the Boldt and Belloni
IV. The Northwest Power Act: Electric Power Planning, Conservation, and Attempted Salmon Restoration

A decade after the Belloni decision, the Northwest faced an electric power crisis whose origins can be traced to the FCRPS system reaching its developmental limits and to a grand plan to add some twenty-six coal and nuclear plants to the hydroelectric system. BPA, by this time the dominant federal agency in the region, proposed this ill-fated initiative, termed the “Hydro-Thermal Power Program.” But the plan foundered first when its creative financing scheme was rejected by the Internal Revenue Service, and second on injunctions imposed by the courts on BPA because the agency had not satisfied the National Environmental Policy Act (NEPA). Among the catastrophic results were the bankruptcy of one of BPA’s customers, the Washington Public Power Supply System, which scrapped four of its five planned nuclear plants, some of which had federal underwriting.

BPA and local utilities and industries turned to Congress for relief from the NEPA injunctions. But the statute that resulted, the Northwest Power Act (NPA) of 1980, produced decisions and their aftermath, including the 9th Circuit’s statement comparing the state of Washington’s resistance to the Boldt decision to Southern states’ resistance to desegregation and the Supreme Court’s ruling that the tribe’s allocated share “secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.” 443 U.S. at 686-87.

66 The origins of the Northwest electric power crisis of the 1970s are traced in Hydroelectric Heritage, supra note 30, at 214-22.
67 See Hydroelectric Heritage, supra note 30, at 223 (discussing the IRS’s rejecting of BPA’s financing scheme, termed “net billing”).
68 The injunctions were a result of Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979) (affirming a lower court injunction of a BPA contract under the program); and Natural Resources Defense Council v. Munro, 626 F.2d 134 (9th Cir. 1980) (affirming a lower court injunction on implementation of the program).
69 On the WPPSS saga, see Alexander, supra note 50; Hydroelectric Heritage, supra note 30, at 220-21, 240 n. 383.
70 16 U.S.C § 839b.
much more than relief from the injunctions. The statute contains innovations that, thirty years later, make it worthy careful study.\textsuperscript{71}

The NPA authorized BPA to acquire the output of new electric power sources, this allowing for an expansion of the federal electric system but only consistent with a plan approved by a new interstate compact agency, now called the Northwest Power Planning and Conservation Council.\textsuperscript{72} The statute specified that the Council’s plan had to treat electricity conservation as the equivalent of power generation,\textsuperscript{73} a policy worthy of emulation elsewhere. Also, the Act established a priority scheme for the Council’s plan to follow, with conservation as the first priority, renewable resources as the second priority, and coal and nuclear plants as the lowest priority.\textsuperscript{74}

Implementation of the statute survived a constitutional attack, as the Ninth Circuit upheld the Council’s authority to exert some control over federal agencies like BPA as an interstate compact agency without federal members.\textsuperscript{75} Over the last thirty years, the Council’s plans have led remarkable success in conservation measures,\textsuperscript{76} helping to keep the Northwest’s

\textsuperscript{71} Although there have been symposia devoted to the NPA’s power and conservation provisions, see, e.g., 13 Envtl.L. 593 (1983), 58 Wash. L. Rev. 175 (1983), these are dated. These provisions and their implementation are understudied, and may hold valuable lessons for other regions of the country.

\textsuperscript{72} Id. § 839b(a).

\textsuperscript{73} Id. § 839b(e)(1).

\textsuperscript{74} Id. All power sources had to be “cost effective,” including life-cycle costs. Id. § 839a(4)(B) (defining “system cost” to include all life-cycle costs).

\textsuperscript{75} Seattle Master Bldrs. v. Northwest Power Planning Council, 786 F.2d 1359 (9th Cir. 1985) (Congress could authorize creation of a non-federal Council, that the states could later form, to exert control over federal agencies). See Symposium, 17 Envtl. L. 791 (1987); Michael C. Blumm, The Appointments Clause, Innovative Federalism, and the Constitutionality of the Northwest Power Planning Council, 8 J. Energy L. & Pol'y. 1 (1987). The relevant BPA control provision in the NPA is 16 U.S.C. § 839b(h)(10)(A) (BPA to use its financial and legal authorities “in a manner consistent” with the Council’s plan); see also id. § 839b(h)(11)(A(ii) (federal water managers to take the Council’s fish and wildlife program into account “to the maximum extent practicable” at each relevant stage of their decisionmaking).

electric rates among the lowest in the country.\textsuperscript{77} The Council’s effectiveness concerning renewable resources development has been more mixed, but lately there has been more investments, particularly in wind power, where some 3000 megawatts have been installed in the last two years, a number expected to double in just two more years.\textsuperscript{78} The infusion of wind power has posed interesting problems, as the system now has much more renewable hydropower and wind power than the transmission system can handle, at least in a high water year spring, like 2011.\textsuperscript{79} BPA has claimed that when it cannot accommodate both sources of renewable electricity, it must prefer hydropower because it has limited ability to spill water, as it must protect ESA-listed salmon and state water quality standards.\textsuperscript{80} There is some irony here, as BPA also claims it should not have to spill water in the summer to protect listed salmon due to its expense, a claim that has been rejected by the reviewing court in ongoing ESA proceedings.\textsuperscript{81}

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\textsuperscript{79} See e.g., Ted Sickinger, BPA throws a wrench in the wind works, Oregonian, May 14, 2011, at A1.


\textsuperscript{81} See infra notes 123-24 and accompanying text.
\end{footnotesize}
The 1980 Act also called for the Council to develop a Columbia Basin Fish and Wildlife Program that would restore salmon runs damaged by the FCRPS. Although the Ninth Circuit agreed with arguments that the statute required “parity” between hydropower generation and salmon protection in the mid-1990s, there has been no parity in river operations, as evidenced by the ESA listing of several upriver runs of Columbia Basin salmonids and persistent injunctions ordering BPA to spill water to facilitate fish passage. In retrospect, it was naïve for Congress and certain commentators to think that an interstate compact agency comprised of eight gubernatorial appointees could chart a clear path to salmon restoration when that path required powerful federal agencies like BPA and the Corps to change old ways of doing business. These agencies have proved to be masters at defending the status quo of river operations, except when a federal judge orders them to do otherwise.

V. The Columbia Gorge National Scenic Act: Innovation in Land Use Regulation

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83 Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994) (faulting the Council’s fish and wildlife program for failing to give appropriate deference to the views of federal, state, and tribal fish and wildlife agencies); see Michael C. Blumm, Columbia Basin Salmon and the Courts: Reviving the Parity Promise, 25 Envtl. L. 351 (1995).
84 See infra note 128 and accompanying text.
The Columbia River Gorge is a spectacularly beautiful place, with diverse plant and animal life, sacred sites, and natural resources in abundance. But the Gorge is hardly a pristine environment: highways and railroads run along both sides of the river and two large federal hydroelectric dams lie within it. Over 50,000 people reside within the Gorge in thirteen cities, six counties, and two states. Roughly sixty percent of the land in the Gorge is privately owned; only about forty percent is managed by the U.S. Forest Service.

Efforts to protect the Gorge’s natural resources and scenery have been longstanding. Since the 1930s, there have been initiatives aimed at imposing development controls and overcoming the developmental bias of local jurisdictions that imposed costs on surrounding communities. Because of the predominance of private land within the Gorge, the area was not thought to be suitable for national park designation, yet greater-than-local protection seemed necessary. Under the leadership of Oregon Senator Mark Hatfield, after years of deliberation, Congress enacted the Columbia River Gorge National Scenic Area Act in 1986, establishing the nation’s first national scenic area in an eighty-five-mile long corridor along the Columbia. The Act sought to both 1) preserve the Gorge’s natural resources and scenery, and

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88 See supra notes 30-32 (Bonneville), 45 (The Dalles).
90 See infra note 98 and accompanying text.
92 See id. at 896-922.
2) encourage economic growth in existing urban areas in the Gorge and other compatible growth.\textsuperscript{93}

In many respects the 1986 Gorge Act resembles the 1980 NPA, creating an interstate compact agency to plan for future development. The Gorge’s compact agency is slightly larger than the Northwest Power Planning and Conservation Council,\textsuperscript{94} with twelve members instead of eight, three appointed by each governor and one each representing the six counties of the Gorge.\textsuperscript{95} Like the NPA, the Act survived constitutional attack, with the Ninth Circuit upholding congressional authority authorize an interstate compact agency to regulate private land use.\textsuperscript{96} But unlike the NPA, the Gorge Act was focused on controlling local agencies, not federal agencies. In fact, under the Gorge Act the Gorge Commission shares regulatory authority with the U.S. Forest Service.\textsuperscript{97}

The statute divided the lands in the Scenic Area up into three classifications: 1) the special management area (SMA), governed by the Forest Service, consisting of about 114,600 acres, or about 39 percent of the area; 2) the general management areas (GMA), governed by the Commission’s plan, consisting of about 149,000 acres, or about 51 percent of the area, and urban areas, of which there are nine, consisting of about 28,500 acres, or ten percent of the area.\textsuperscript{98} Land use in the GMA has received the most attention. The Commission promulgated its

\begin{itemize}
  \item \textsuperscript{93} 16 U.S.C. § 544a.
  \item \textsuperscript{94} See supra note 72 and accompanying text and text following note 85.
  \item \textsuperscript{95} 16 U.S.C. § 544c(a)(1)(C).
  \item \textsuperscript{96} Columbia River Gorge United v. Yeutter, 960 F.2nd 110 (9th Cir. 1992) (upholding the statute against commerce, compact, and takings clause attacks, see Blumm & Smith, supra note 89, at 212-13).
  \item \textsuperscript{97} See infra note 98 and accompanying text.
  \item \textsuperscript{98} See Blumm & Smith, supra note 89, at 205-06.
\end{itemize}
first management plan in 1992 and revised it 2004,\textsuperscript{99} which county zoning ordinances may implement, if they receive Commission approval.\textsuperscript{100} Five of the six counties in the Gorge have received Commission approval, but the Commission acts as a zoning board for lands within the Scenic Area for the unapproved Klickitat County in Washington.\textsuperscript{101}

Despite considerable controversy over the Commission’s land use restrictions, there have been no successful takings claims under the Scenic Act.\textsuperscript{102} One reason is a rule that requires the Commission to ensure that all landowners have an economically viable use, even when implementation of Commission regulations might not otherwise allow one.\textsuperscript{103}

An interesting provision of the Scenic Act, section 8(o), allowed landowners in the SMA to “opt out” of Forest Service regulation (opting into regulation by the Gorge Commission) if they made a \textit{bona fide} offer to sell to the Forest Service.\textsuperscript{104} Before section 8(o) expired in 2001,\textsuperscript{105} landowners filed about 500 claims with the Forest Service, which made some 350 purchases, totaling about 19,000 acres; the remaining 150 claims, totaling around 3000 acres, resulted in releases to GMA status and regulation by the Gorge Commission.\textsuperscript{106}

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\textsuperscript{99} The 1992 plan survived a challenge by Klickitat County, which unsuccessfully argued that the plan should be the subject of a state environmental impact statement. \textit{See} Klickitat County v. Columbia River Gorge Comm’n, 770 F.Supp. 1419 (E.D. Wash. 1991) (concluding that it would be “incongruous” for Congress to expressly exempt the Commission from National Environmental Policy Act requirements only to have the courts require compliance with Washington State Environmental Policy Act requirements).
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\textsuperscript{100} 16 U.S.C. \textsection 544e(c).
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\textsuperscript{101} \textit{See} Blumm & Smith, \textit{supra} note 89, at 210-11 \& nn. 49, 52.
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\textsuperscript{102} Conversation with Jeff Litwak, Counsel for the Columbia River Gorge Commission, May 15, 2011. \textit{See also} the case law discussed in Blumm & Smith, \textit{supra} note 89, at 215-18.
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\textsuperscript{103} \textit{COLUMBIA RIVER GORGE COMMISSION RULES} \textsection 350-60-090(2)(d), \textit{available at} http://www.gorgecommission.org/client/Commission Rule 350-60 20110501.pdf.
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\textsuperscript{104} 16 U.S.C. s. 544f(o)(1) (the Forest Service had three years to accept the offer or release the land to GMA status). For details, see Blumm & Smith, \textit{supra} note 89, at 218-21.
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\textsuperscript{105} Congress terminated the “opt out” provision in amendments to the statute passed in 2000 that became effective April 1, 2001. \textit{Id.} \textsection 544f(o)(2).
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\textsuperscript{106} Email from Pam Campbell, U.S. Forest Service, to Michael Blumm (May 17, 2011).
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VI. ESA Salmon Listings and Their Disappointing Results

The sixth contribution of the Gorge to natural resources law concerns the ESA listing of upriver salmon runs which pass through the Gorge on the way to their spawning grounds. Since the first listings in the early 1990s, there has been a mountain of commentary on this issue and, as of this writing, it is hardly clear what the changes the ESA might require in hydroelectric operations. But the results over the last two decades have been, it is safe to say, disappointing to salmon advocates.

In fact, the case has been made that the listing of Columbia River salmon on the ESA has done more to change the implementation of the statute than it has done to improve the fate of the species. For example, the implementing agency, the National Marine Fisheries Service (NMFS), created the “evolutionarily significant unit” to define a distinct population segment, which is the lowest population for which the statute allows listing. This concept arguably

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107 For an article anticipating the salmon listings, see F. Lorraine Bodi, Protecting Salmon Under the Endangered Species Act, 10 Envtl L. 349 (1980); see also Symposium on Salmon Recovery, 74 Wash. L. Rev. 511 (1999). The initial salmon listings, like most of the ensuing ones, have been the result of the ESA’s citizen petition provision, 16 U.S.C. 1533(b)(3)(A), an underappreciated statutory innovation.


109 See, e.g., Practicing Deception, supra note 86.


111 See R.S. Waples, Pacific salmon: Oncorhynchus spp. and the definition of “species” under the Endangered Species Act, 53 (3) Marine Fish Rev. 11 (1991) (explaining that an ESU requires the population to be “substantially reproductively isolated” from other populations and represent “an important component in the evolutionary legacy” of the species).

112 16 U.S.C. § 1532(16) (defining “species” to include subspecies and “any distinct population segment”).
overemphasizes genetics at the expense of ecological considerations.\textsuperscript{113} Other changes that the listings meant for ESA implementation included multi-year biological opinions (BiOps), a continuously evolving definition of what constitutes “jeopardy” to the species, and the transformation of NMFS from an agency that was a salmon advocate in the 1980s into an agency that is now a defender of the hydroelectric system status quo.\textsuperscript{114}

All the while, the condition of wild upriver Columbia River salmon runs has not materially improved, and in some cases declined. Several upriver wild runs remain less than forty percent of recovery goals.\textsuperscript{115} This decline has been masked by the effect of heavy reliance on Columbia River hatcheries, which have accompanied the basin’s dam building as the preferred mitigation, and which have masked the effect of the dams while working more damage on the wild salmon runs.\textsuperscript{116} For example, BPA consistently mentions hatchery returns in an effort to minimize the effect of dam operations.\textsuperscript{117} The ESA has, however, subjected hatchery operations to ecological scrutiny.\textsuperscript{118} In fact, the ESA has subjected all phases of the


\textsuperscript{114} See Blumm & Corbin, \textit{supra} note 110, at 591-92.

\textsuperscript{115} See Scott Learn, \textit{Is Salmon Plan a Leap of Faith?}, Oregonian, May 8, 2011, at A1, A12 (Snake River spawners average less than 40% of recovery goal, with reproductive rates declining between 2008 and 2010 and several populations of spring chinook having fewer than 50 spawners; Salmon River spawners are just 20% of recovery levels, with a similar decline between 2008 and 2010; upper Columbia wild steelhead spawners are 40% of their recovery goal, while upper Columbia wild spring chinook are at 20% of their recovery goal).

\textsuperscript{116} See \textit{Sacrificing the Salmon}, \textit{supra} note 55, ch. 6 (discussing “the false hope of salmon hatcheries”).


\textsuperscript{118} See \textit{Sacrificing the Salmon}, \textit{supra} note 55, at 23, 177-78.
salmon life-cycle to scrutiny, moving far beyond the NPA’s exclusive focus on hydropower to include also harvest management and habitat—but that scrutiny has not led to materially less reliance on hatcheries in the Columbia system. Moreover, an increased focus on habitat rehabilitation is being used by BPA and NMFS as a defense against changing hydroelectric operations to benefit salmon.

The focus of ESA attention in recent years has centered on the federal BiOp on Columbia Basin hydroelectric operations. In the 1990s, there were two substantial challenges to hydroelectric operations BIs and one injunction. Then Judge James Redden assumed jurisdiction over a challenge to the 2000 BiOp promulgated by the Clinton Administration and struck it down because it too narrowly defined the “action area” of FCRPS operations and failed to assure that its “off-site mitigation measures” were reasonably certain to occur. Judge Redden also struck down a 2004 Bush Administration because it 1) defined “jeopardy” to exempt most existing operations from scrutiny as non-discretionary actions, 2) used a degraded baseline to evaluate proposed actions, and 3) ignored species recovery altogether. The Ninth Circuit affirmed, finding the 2004 BiOp to be “structurally flawed.”

Surprisingly, the Obama Administration largely adopted the Bush Administration’s BiOp, although it did propose to employ adaptive management to make adjustments if the results...
prove less than forecasted. However, opponents claimed that the triggers for taking adaptive management action are actually higher than are required to re-initiate consultation, so the promise of mid-course corrections is chimerical. One change that has occurred is in the latest round of litigation the number of plaintiffs have been reduced, as BPA has reached settlements with the state of Washington and several tribes in which they agreed to drop their opposition to the BiOp in return for a promised $900 million in salmon habitat restoration work over a ten-year period. Environmentalists, the Nez Perce Tribe, and the state of Oregon refused to settle.

The BiOp critics fault the Obama BiOp for not including summer spills necessary to facilitate dam passage. Judge Redden has repeatedly ordered such spills in the past, but BPA and NMFS oppose them because of their economic costs. The BiOp’s critics also challenge the latest definition of “jeopardy,” which is that a proposal need only to be “trending toward recovery” to avoid species jeopardy. Under this interpretation, any improvement in the

degraded condition of wild salmon runs would satisfy the ESA. Finally, the critics contest the 
BiOp’s use of uncertain future habitat measures to avoid jeopardy, fault the BiOp’s climate 
change analysis and its failure to include a jeopardy analysis for Snake River sockeye, and 
maintain that the BiOp fails to analyze new evidence showing the effects of depressed Columbia 
River Chinook on endangered southern resident killer whales.131 Nor does the BiOp contain 
systemwide survival standards,132 and a prerequisite for any successful salmon recovery plan 
would seem to be survival goals linked to the salmon life-cycle.

As of this writing, Judge Redden has all these issues before him. If the federal 
government loses again, it has suggested it will likely take another appeal to the Ninth Circuit.

VII. Compensating Landowners For Land Use Regulations: The Oregon Revolution 
(Measure 37) and Its Correction (Measure 49)

Another contribution of the Gorge to natural resources law is concerns landowner 
compensation for restrictive land use regulations. Although this issue ultimately produced two 
statewide votes, arguably its genesis lies in a land use dispute originating near the Gorge, where 
restrictions imposed on land development are commonplace. In a case involving land within a 
forest use zone, prohibited buildings unless “necessary and accessory” to forest use when the 
Dodds purchased their forty-acre parcel in 1983, Hood River County denied a building permit to 
the Dodds in 1990.133 The Dodds unsuccessfully appealed to the state land use board of

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131 *Id.* at 4-13 (uncertain habitat measures), 16-21 (climate change effects), 31-32 (lack of analysis of Snake River 
sockeye), 32-35 (effects on southern resident killer whales). On the effect of declining Columbia Basin chinook on 
the southern resident killer whale populations, *Steven Hawley, Recovering a Lost River: Removing Dams, 

132 See *Learn,* *supra* note 115, at A13 (noting also that the influential Western Division of the American Fisheries 
Society backs the challengers to the BiOp, calling the Obama plan “inadequate and short on concrete action”).

133 See *Dodd v. Hood River County,* 136 F.3d 1219, 1223 (9th Cir. 1998). The county planning commission and the 
county board of commissioners upheld the denial in 1991. *Id.* The court noted that the county ordinance in 1983
appeals and then to the courts, seeking compensation under the state constitution’s taking clause.\textsuperscript{134} Denied relief in the state courts,\textsuperscript{135} the Dodds appealed to federal court, alleging a taking under the federal constitution. The Ninth Circuit affirmed a district court determination that the Dodds had already litigated the amount of economic loss at stake, which was less than a complete wipeout. The court concluded that the Dodds could bring a federal takings claim without suffering a complete economic loss, but that there was in fact no taking because the forest use zone regulations served a legitimate governmental interest, and the Dodds did not possess a reasonable investment-backed interest. The federal district court had ruled that the Dodds had already litigated the basic issue in state court, since there was no “fundamental distinction” between the state and federal takings clauses.\textsuperscript{136} The Ninth Circuit affirmed, but suggested that Oregon takings law was different than federal taking law because it seemed to deny compensation for any regulation not producing a complete economic wipeout, while on under the federal test a taking could occur without loss of all economically beneficial uses of land.\textsuperscript{137}

Helping to litigate the *Dodd* case was the Pacific Legal Foundation, a libertarian property rights group well known for pursuing takings claims.\textsuperscript{138} The foundation is philosophically aligned with a local Oregon group—Oregonians in Action (OIA)—that won the *Dolan v. City of Tigard* case in the U.S. Supreme Court, enabling the Dolans to eventually settle the case for over a

\begin{footnotesize}
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  \item\textsuperscript{134} See *id.* at 1224 (discussing the administrative and state court decisions).
  \item\textsuperscript{135} *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993), affirming *Dodd v. Hood River County*, 836 P.2d 1373 (Or. Ct. App. 1992).
  \item\textsuperscript{136} *Dodd v. Hood River County*, 136 F.3d 1219, 1224 (9th Cir. 1998) (citing an unpublished district court order).
  \item\textsuperscript{137} *Id.*, at 1228.
  \item\textsuperscript{138} See the Pacific Legal Foundation’s website, which lists a substantial caseload under “Defending the Right to Use and Protect Private Property,” available at http://www.pacificlegal.org/page.aspx?pid=269.
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million dollars in compensation due to a city requirement that they provide a public bike lane flood plain in return for a permit to double the size of their hardware store. In the wake of the adverse result of Dodd decision, OIA decided to begin a campaign to change Oregon takings law.

Two years after Dodd, OIA spearheaded an initiative to revolutionize Oregon land use law. In 2000, Ballot Measure 7 promised 100 percent landowner compensation for any reduction in market value due to any land use regulation “adopted or first applied” after the landowner acquired the property, subject to a few exceptions. After the voters approved Measure 7, a trial court struck it down, and the Oregon Supreme Court affirmed, ruling that the measure violated the Oregon Constitution’s requirement that each constitutional change be voted on separately.

Undaunted, OIA sponsored a separate, statutory initiative that would not be bound by the constitutional requirement of a separate vote. Like Measure 7, this measure—which would become known as Measure 37—promised 100 percent landowner compensation for any market value declines due to an after-acquired regulation, subject to the same exemptions, although it also gave the responsible government the authority to modify or rescind the offensive

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139 Dolan v. City of Tigard, 512 U.S. 684 (1994) (requiring an "essential nexus" between a legitimate government interest and a permit condition imposed by a local government and a "rough proportionality" between the exaction and the effect of the proposed development). The Dolan’s collected $1.4 million in a 1998 settlement, including $100,000 in attorneys’ fees and a plaque commemorating their victory along the bike path. See Walt Albro, Dolan v, Tigard: Owner Gets $1.4 Million From City—At Last!, Today’s Realtor (July 1998), available at http://www.realtor.org/tr.nsf/241f480c172098e60625602300770444/135b656a2075e3b686256620000653cb5?OpenDocument.


141 See id. at 300 (discussing three exemptions for nuisance laws, requirements of federal law, and shops selling pornography, nude dancing, alcohol, or gambling).

142 See id. at 302 (noting that in November 2000 the Oregon electorate approved Measure 7 by a 54-46% vote).

143 League of Oregon Cities v. Oregon, 56 P.3d 892 (Or. 2002).
regulation instead of providing monetary compensation.\textsuperscript{144} Measure 37 passed overwhelmingly in 2004, 61-39 percent.\textsuperscript{145} And unlike Measure 7, Measure 37 survived judicial attack, with the Oregon Supreme Court reversing a lower court injunction in 2006.\textsuperscript{146} But ironically, considering its origins, Measure 37 had no effect at all within the Gorge Scenic Area, since the Oregon Court of Appeals ruled that Scenic Act regulation was exempt from the measure as a federal law requirement in 2007.\textsuperscript{147}

Measure 37 proved not to be the final word of the Oregon land use regulation, however. In 2007, the Oregon legislature referred to the voters an amendment, known as Measure 49, which limited the availability of compensation or regulatory waivers largely to three houses,\textsuperscript{148} thus eliminating the prospect for windfall recoveries for large landowners.\textsuperscript{149} Measure 49 also eliminated claims for commercial development and allowed the transfer of claims upon the sale of the property.\textsuperscript{150} Measure 49 was overwhelmingly approved by the voters, by the same 61-39 percent margin that approved Measure 37 three years earlier.\textsuperscript{151}

The upshot of the combination of Measures 37 and 49 is that slightly over 6000 homes will be built over the ensuing ten-twenty years than would otherwise be built under Oregon

\textsuperscript{144} See Enacting Libertarian Property, supra note 140, at 308-10 (discussing Measure 37’s provisions, including an exemption for health, safety, and pollution control regulations ).
\textsuperscript{145} See id. at 304-07 discussing the Measure 37 campaign and its results).
\textsuperscript{146} MacPherson v. Dep’t of Admin. Serv., 130 P.3d 308 (Or. 2006) (rejecting claims that the measure impaired the plenary power of the state legislature, violated the state constitution’s guarantee of equal privileges and immunities, and separation of powers, unlawfully suspended laws, or violated due process).
\textsuperscript{147} Columbia River Gorge Comm’n v. Hood River County, 152 P.3d 997 (Or. Ct. App. 2007).
\textsuperscript{148} See Enacting Libertarian Property, supra note 140, at 360-65 (discussing Measure 49’s provisions, which allow for up 10 homes within urban areas and also cap at 20 homes the number of exemption any owner may obtain).
\textsuperscript{149} See id. at 358 (reporting claims of $10-19 billion in compensation by spring 2007).
\textsuperscript{150} See id. at 361 (limiting claims to residences), 363 (allowing waivers to be transferred).
\textsuperscript{151} See id. at 361 n. 466.
This increase represents approximately a 37-75 percent increase in residential development, depending on whether the development occurs within ten or twenty years. Only one compensation claim has ever been paid, so the effect of the Oregon land use revolution, which began in the Gorge area, was not widespread compensation to landowners; it was instead a deregulatory scheme, which Measure 49 limited to a relatively minor regulatory rollback. But future land use controls will no doubt be chilled by the threat of 100 percent compensation for any decline in developmental value. This result is celebrated as victory for liberty by the Pacific Legal Foundation and the OIA.

VIII. Removing the Condit Dam: A Milestone in Environmental Remediation

Another contribution of the Gorge to natural resources law concerns environmental remediation through dam removal. There have been several dam removals in the Northwest in recent years, but the poster-child for dam removal might be the Condit Dam on the White Salmon River less than four miles from its confluence with the Columbia. When it comes out in this October, it will be the largest dam removed in the country to date. But it has taken a dozen

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155 See Enacting Libertarian Property, supra note 140, at 365.
156 Notably, three dams have been removed from the Rogue River: Savage Rapids, Gold Hill, and Gold Ray Dams, meaning that the Rogue now flows over 150 miles to the Pacific. See American Whitewater, Restoring the Rogue, available at https://www.americanwhitewater.org/content/Project_view_id_rogue. Also, two Sandy Basin dams have been removed: the Marmot and Little Sandy Dams, which collectively made up the Bull Run project, were removed in 2007 and 2008. See Michael Milstein, Sandy River successfully reinvents itself after dam removal, Oregonlive.com (July 30, 2008), available at http://www.oregonlive.com/outdoors/oregonian/index.ssf?/base/news/1217390121239080.xml&coll=7&thispage=1 (discussing the removal of the Marmot Dam, which at 50 feet high, was the largest dam removal in the Northwest before Condit).
years between federal licensee’s agreement to remove the dam and its actual removal, so it the process involved in its removal is worth studying.

Condit was built in 1913 to generate electric power before the enactment of the Federal Power Act in 1920. The dam was never equipped with fish passage, despite its location in the lower basin on a salmon stream. Nor did it have a federal license until 1968. When that twenty-five year term expired, the licensee—PacifiCorp—sought a new license from the Federal Energy Regulatory Commission. But when the NEPA process produced fishway conditions under section 18 of Federal Power Act that called for construction of upstream and downstream fish passage, the price of a new license increased by about $30 million. This was far more expensive than the revenues the dam could produce, so PacifiCorp, federal, state and tribal agencies, as well as environmentalists began what turned out to be a half-dozen years of negotiations, culminating in a 1999 settlement. The agreement called for the dam to be removed in seven years, in 2006, to enable PacifiCorp to amortize the cost of dam removal, which the agreement capped at $17 million.

But as of this writing, five years after its scheduled removal, Condit Dam is still in place, generating power and blocking salmon migration. The delay was due in part to the steadfast opposition of two local counties, in part to an uncharted FERC process for license surrender, and in part to the need to comply with requirements like section 401 of the Clean Water Act and the

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158 See id. at 817-18 (describing the effects of Condit Dam on salmon migration).
159 See id. at 825-26.
160 See id. at 827 (describing the settlement agreement, which called for an end to project operations in 2006 and complete dam removal in 2007).
Washington State Environmental Policy Act.\(^{161}\) In order to issue the water quality certification required by section 401 for dam removal, the state of Washington had to amend its water quality standard to allow longer short-term exceedances of its turbidity standards.\(^{162}\) Somewhat surprisingly, EPA, which had to approve the change, proved to be difficult and has yet to approve a generic waiver of water quality standard for dam removal projects.\(^{163}\) And worried about potential litigation from the counties, the state also decided to do its own EIS on dam removal.\(^{164}\)

Last December, FERC finally accepted PacifiCorp’s license surrender.\(^{165}\) But after all this time and trouble FERC surprisingly deemed the 401 certification waived by the state,\(^{166}\) an action which all parties appealed. Then, in April 2011, on rehearing FERC reversed itself and included the 401 conditions.\(^{167}\) Finally, the Corps of Engineers issued a federal 404 permit for

\(^{161}\) See id. at 828-33 (opposition of the counties and the effect on FERC), 838-40, 846-49 (water quality certification), 839 (state SEPA).

\(^{162}\) Becker, supra note 157 at 846.


\(^{166}\) Under section 401, state certification is deemed waived if the state does not act within one year. 33 U.S.C. s. 1341(a)(1). Throughout the extended Condit Dam removal process, PacifiCorp had been submitting and withdrawing its surrender application each year to avoid the 401 waiver. The last time it did so, it made the withdrawal request within the one-year period electronically, but the hard copy was dated one day late, occasioning FERC’s declaration of waiver. See Fed. Energy Regulatory Comm’n, Order on Rehearing, Denying Stay, and Dismissing Extension of Time Request 4 (Apr. 21, 2011), available at http://www.ferc.gov/whats-new/comm-meet/2011/042111/H-3.pdf (noting that “Washington DOE had not acted on the May 12, 2009 certification request within the statutory one-year period, and the new request was received by the agency after the period expired, we concluded that certification had been waived”).

\(^{167}\) Id.
the dam removal in May.\textsuperscript{168} The dam is now scheduled to be removed in October 2011, a dozen years after the settlement and eighteen years after the license expired.\textsuperscript{169} Condit’s removal will be second-largest in the nation to date, assuming the scheduled removal of the federal Glines Canyon Dam on Elwha River in September 2011 actually occurs.\textsuperscript{170}

**IX. Salmon vs. Sea Lions: Endangered Species vs. Marine Mammals**

The final contribution of the Gorge to natural resources law concerns an ongoing conflict between California sea lions and salmon below Bonneville Dam. The sea lions were not a problem for salmon before around a decade ago, but in recent years predation has become more prevalent.\textsuperscript{171} The Corps of Engineers estimates sea lion predation of 0.4 percent to 4.2 percent of adult salmon migrating in the spring, or up to 5000 chinook and 600 steelhead.\textsuperscript{172}

In 2006, the states of Oregon, Washington, and Idaho applied to NMFS for a permit to lethally remove sea lions below Bonneville Dam under section 120 of the Marine Mammal Act, which allows for the legal taking of pinnipeds have a “significant negative impact on the decline or recovery” of ESA-listed salmon.\textsuperscript{173} As required by the Act,\textsuperscript{174} NMFS appointed a task force to

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\textsuperscript{169} See Green light to remove dam in Washington, Oregonian, June 15, 2011 (reporting FERC’s approval of the removal of the Condit Dam).

\textsuperscript{170} See Utility sets Condit Dam removal for Oct. in Washington, The Columbian (June 14, 2011), available at http://www.columbian.com/news/2011/jun/14/utility-sets-condit-dam-removal-for-oct-in-wash (noting that Glines Canyon, at 210 feet high, was larger than Condit, at 125 feet, and also observing that the removal price tag, originally estimated at $17 million, is now $32 million, which apparently PacifiCorp will pay, perhaps due to the profits it earned in the extra five years of Condit Dam’s operation).

\textsuperscript{171} The California sea lion population is at a healthy 238,000 and is hardly eligible for ESA protection. See Quinton Smith, States OK’d to kill sea lions, Oregonian, May 14, 2011, at B1.

\textsuperscript{172} See Humane Society v. Locke, 626 F.3d 1040, 1045 (9th Cir. 2010).

\textsuperscript{173} 16 U.S.C. § 1389(b)(1) (authorizing the “intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks” listed under the ESA).

\textsuperscript{174} Id. § 1389(c).
ascertain whether the sea lions were having the statutorily required effect, and seventeen of the eighteen members concluded that the threshold had been met. Only the representative of the Humane Society dissented.

NMFS issued the permit in 2008, authorizing the killing of selected sea lions that met certain criteria for five years, up to eighty-five per year. Under this permit, eleven sea lions were euthanized in 2009, fourteen in 2010. The Humane Society challenged the permit unsuccessfully in district court, but in 2010 the Ninth Circuit reversed. The court faulted NMFS for failing to explain why a four percent sea-lion harvest rate was a “significant negative effect” in light of several earlier NFMS determination that human harvests (both native and non-native) of up to seventeen percent—or over four times as many—had no such effect. The court therefore enjoined the permit.

But in May 2011, NMFS reissued the permit, explaining that new research indicated that the sea lions actually consume nearly thirteen percent of salmon in low-flow years, and that one researcher found sea-lion-inflicted injuries on twenty-nine percent of listed salmon. NMFS also asserted that the Marine Mammal Act does not require that “predation be comparable to other sources of mortality” but instead authorizes NMFS to “balance the management and conflict between species.” Because sea lion numbers are down in 2011,

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175 See Humane Society, 626 F.3d at 1045-46.
176 See id. at 1046.
177 See id. at 1046-47 (authorizing the lethal taking of either 85 sea lions per year or “the number required to reduce the observed predation rate to 1 percent of the salmonid run at Bonneville Dam”).
178 See Smith, supra note 171, at B8.
179 Humane Society v. Locke, 626 F.3d 1040 (9th Cir. 2010).
180 Id. at 1048-52.
182 Smith, supra note 171, at B8; see NAT’L MARINE FISHERIES SERVICE, QUESTIONS & ANSWERS ON NOAA FISHERIES’ AUTHORIZATION FOR THE STATES OF OREGON AND WASHINGTON TO LETHALLY REMOVE CALIFORNIA
Oregon estimates that under the new permit it will euthanize no more than around ten sea lions this year.  

Of course, if one were to take a life-cycle view at all takes of listed Columbia River salmon that NMFS has authorized under the ESA, the dams would also be scrutinized. They harvest many times more salmon than both sea-lion and human harvesters combined. A life-cycle analysis would argue for taking out the four lower Snake River dams, which would substantially reduce hydropower mortalities at small economic costs.

Conclusion

The Columbia River Gorge, the site of the Supreme Court’s recognition that 19th century Indian treaties recognize important reserved property rights in salmon that burden both private landowners and state regulators—has over the last century been the site of epic conflicts over natural resources and important innovations in natural resources law doctrine. The Gorge was at the center of the Columbia dam building in the early 20th century and remains today at the

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183 See Smith, supra note 171, at B8 (noting that the states have a list of 78 sea lions eligible for killing). A problem on the horizon concerns stellar sea lions which, unlike California sea lions, are listed and tend to be year-round residents, have begun preying on Columbia River sturgeon in the pool below Bonneville Dam, reducing opportunities to fish for this ancient species, the largest and longest-lived of all freshwater fish species. See Oregon Dept. of Fish and Wildlife, Fish Div., California Sea Lion Questions and Answers, at 2, available at http://www.dfw.state.or.us/fish/SeaLion/faqs.asp.

184 See, e.g., Glen Spain, Pacific Coast Federation of Fishermen’s Associations, The Battle Over the Columbia, Fisherman’s News (Oct. 1997), available at http://www.pcffa.org/fn-oct97.htm (“The Oregon Dept. of Fish and Wildlife officially estimates that all Tribal, commercial and recreational fishing combined accounts for less than 5% of all human-caused immediate salmon mortality within the Columbia River Basin, and that roughly 90% of the remaining mortality is caused by the dams by killing baby salmon migrating downstream or as returning adults.”).


186 See supra §§ I & III.

187 See supra § II.
hub of the struggle between hydropower versus salmon,\textsuperscript{188} the conflict between wind energy and hydropower,\textsuperscript{189} and the controversy over sea lion predation on salmon.\textsuperscript{190}

The Gorge was ground zero in the Oregon landowner compensation revolution and its reaction, which reduced but did not eliminate the revolution, and which has produced a limited rollback in land use regulation in the state and promises to chill regulation in the future.\textsuperscript{191} It also is in the forefront of dam removal, although some of the lessons for dam-removal advocates may be how to avoid the delays that accompanied the Condit Dam removal.\textsuperscript{192} The Gorge is also home to the first National Scenic Act, a statute that bifurcated regulatory authority between the U.S. Forest Service an interstate compact agency, the latter regulating land use previously left to local governments; the statute also calls for preservation of the Gorge’s natural resources while promoting only “compatible” economic development, a dominant use paradigm that continues a trend in public land law.\textsuperscript{193}

Thus, the Gorge’s contributions to American natural resources law are many, varied, and significant. Perhaps no discrete area in the country can claim a larger legacy. Those of us who teach natural resources law would do well to find space in our classes to examine some of the lessons the rich legal history of the Columbia River Gorge teaches. Our students would be the beneficiaries because, as the Klein casebook maintains,\textsuperscript{194} context matters.

\textsuperscript{188} See supra §§ IV & VI.
\textsuperscript{189} See supra notes 78-80 and accompanying text.
\textsuperscript{190} See supra § IX.
\textsuperscript{191} See supra § VII.
\textsuperscript{192} See supra § VIII.
\textsuperscript{193} See supra § V.
\textsuperscript{194} See Klein, supra note 7.