



United States
Department of
Agriculture

Forest
Service

Columbia River Gorge
National Scenic Area

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541-308-1700
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File Code: 1900

Date: April 1, 2011

Dear Interested Party:

The Columbia River Gorge National Scenic Area will hold a public meeting on April 14th to present proposed revisions to the Management Plan for the Columbia River Gorge National Scenic Area. The proposed revisions are in response to the 2008 decision of the United States Court of Appeals for the Ninth Circuit Court and subsequent 2010 Settlement Agreement. The purpose is to revise the Management Plan for consistency with the standards and purposes of the Scenic Area Act in the Special Management Area. My staff and I will present the two mandatory revisions required by the United States Court and three other revisions that address prohibitions in recreational intensity class 2 campgrounds, cumulative effects, and definition of natural resources.

We will not take any public comments at this meeting. All comments submitted in writing by May 16, 2011. To facilitate your review of the proposed changes I have included a Staff Report and attachments that describe the proposed changes.

Comments should be submitted to Dan Harkenrider, Area Manager, Columbia River Gorge National Scenic Area, 902 Wasco Street, Hood River, OR 97031. Comments may also be submitted by email in word (.doc), rich text format (.rtf), text (.txt), and hypertext markup language (.html) to comments-pacificnorthwest-columbia-river-gorge-nsa@fs.fed.us. Please place SMA Management Plan Revision Comments in the subject line. Comments may also be hand delivered weekdays 8:00 am - 4:30 pm at the above stated address.

The public meeting will be held at the Rock Creek Hegewald Center at 710 SW Rock Creek Drive in Stevenson, WA from 6:30 p.m. to 8:30 p.m. All interested members of the public are encouraged to attend. For further information, please contact Lynn Oliver at 541-308-1716.

Sincerely,


DANIEL T. HARKENRIDER
Area Manager



Enclosures

Staff Report - Proposed Forest Service revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* for the Special Management Area in response to the decision of the United States Court of Appeals for the Ninth Circuit Court and the Settlement Agreement

Attachment 1 - United States District Court for the State of Oregon opinion and order (CV 04-1423-MO)

Attachment 2 - Settlement Agreement of October 15, 2010 between the Friends of the Gorge and Thomas Vilsack, Secretary of U.S Department of Agriculture

Attachment 3 – Staff report for Columbia River Gorge Commission revisions to the Management Plan - October 22, 2011.

Attachment 4 – Regional Forester concurrence to the Columbia River Gorge Commission revisions to the Management Plan – November 1, 2010.



File Code: 1900
Route : (1900)

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Subject: Staff Report - Proposed Forest Service revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* for the Special Management Area in response to the decision of the United States Court of Appeals for the Ninth Circuit Court and the Settlement Agreement

INTRODUCTION

The 2004 Revised Management Plan (RMP) for the Columbia River Gorge National Scenic Area (Scenic Area) was challenged by the Friends of the Gorge Inc. et al in the United States courts in October 2004 as inconsistent with the standards and purposes of the Columbia River Gorge National Scenic Area Act (1986). An opinion and order (CV 04-1423-MO) was issued on November 24, 2008 in the United States District Court for the State of Oregon (Attachment 1) that required the Forest Service to revise the RMP to be consistent with the standards and purposes of the Scenic Area Act in three areas for lands within the Special Management Area (SMA):

- (1) Provisions expressly requiring that any new dwelling listed in both of the categories below are sited on a parcel that is at least 40 acres in size:
 - (i) any new dwelling located within an SMA Residential land use designation and subject to the SMA provisions of the RMP (specifically the area known as Rowena Dell), or
 - (ii) any new farm labor dwelling located within the SMA, and subject to the SMA provisions of the RMP.
- (2) Provisions prohibiting the expansion of commercial and multifamily uses within the SMA and subject to the provisions of the RMP.

The Settlement Agreement of October 15, 2010 between the Friends of the Gorge and Thomas Vilsack, Secretary of U.S Department of Agriculture (Attachment 2) required the Forest Service:

- (3) Provisions expressly prohibiting recreational vehicle campgrounds in portions of the SMA classified as semi-primitive (Recreational Intensity Class 2).
- (4) Consideration of the submission of language for inclusion in the RMP to address the protection of scenic, natural, and cultural resources in the SMA from cumulative effects.

The Forest Service will also use this revision to adopt the Gorge Commission's definition of natural resources. The Settlement Agreement required that the revisions go through a public process, submittal to the Gorge Commission for incorporation without change, and concurrence by the United States Secretary of Agriculture to become final.



Proposed Revisions

The revision of the following guidelines in the RMP meets the direction of the Court and the Settlement Agreement. Deletions are shown in bold with strikeout. Additions are shown in bold with an underline.

Issue 1 - Provisions expressly requiring that any new dwelling or new farm labor dwelling is sited on a parcel that is at least 40 acres in size located within the SMA and subject to the SMA provisions of the RMP.

As described in the District Court's Opinion and Order, Friends of the Gorge argued that the RMP violates the Scenic Area Act by allowing new dwellings on parcels smaller than 40 acres in the SMA. The Scenic Area Act requires that the management plan "prohibit major development actions in special management areas," except for certain exceptions not applicable to the Court's decision (16 U.S.C. § 544d(d)(5)). Major development actions are defined as, among other things, "permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size" (*Id.* § 544(j)(4)). Friends of the Gorge identified three places where the RMP allegedly violates this provision of the Scenic Area Act. First, new single-family dwellings are allowed on any legally created lot, with no mention of parcel size (RMP II-4-11). Second, construction of "new dwelling units" is allowed at Rowena Dell, even though many of the lots are less than forty acres (RMP II-4-10). Third, the forty-acre minimum parcel size is not incorporated in a guideline allowing the construction of farm-labor dwellings (RMP II-1-23 to -24).

Revision 1.1 – Agricultural Land - SMA Guidelines (RMP II-1-24)

D. Farm labor housing on a parcel with an existing dwelling under the following conditions:

(4) Minimum parcel size of 40 contiguous acres

Revision 1.2 - Residential – Introductory Text (RMP II-4-2)

~~In the SMA, this is also the policy for Rowena Dell. At Latourell, contiguous lots under the same ownership at the time the Scenic Area Act was enacted may qualify for one single-family dwelling.~~

Revision 1.3 - Residential – SMA Policies (RMP II-4-10)

3. Any new dwelling within the SMA Residential land use designation shall be on a parcel at least 40 acres in size.

~~4. 3. **Existing uses of dwelling units in Rowena Dell will continue as allowed in Chapter 7 – General Policies and Guidelines, Existing Uses and Discontinued Uses. Construction of new dwelling units shall be allowed on privately owned existing subdivision lots at Rowena Dell. New structures shall not adversely affect scenic, cultural, recreation, or natural resources.**~~

~~5. 4.~~ At Latourell, contiguous lots under the same ownership as of November 17, 1986, are considered consolidated into a single parcel. Splitting of these consolidated parcels, including lot line adjustment, shall be prohibited.

~~6. 5.~~ New structures shall not adversely affect scenic, cultural, recreation, or natural resources.

~~7. 6.~~ All National Forest System lands shall be subject to the laws and regulations pertaining to the National Forest system, including the National Environmental Policy Act (NEPA), the Mt. Hood National Forest Land and Resource Management Plan, and the Gifford Pinchot National Forest Land and Resource Management Plan, as amended by the Northwest Forest Plan. The most protective standards of the National Scenic Area Management Plan or the respective Forest Land and Resource Management Plans (as amended by the Northwest Forest Plan) shall apply to National Forest System lands.

Revision 1.4 – Residential – SMA Guidelines – Review Uses (RMP II-4-11)

1. The following uses may be allowed on lands designated Residential subject to review for compliance with scenic, cultural, natural, and recreation resources guidelines.
 - A. One single-family dwelling per legally created lot or consolidate parcel **not less than 40 contiguous acres**. The place of a dwelling shall comply with fire protection standards developed by the county, in accordance with SMA Policy 13 in Part II, Chapter 2: Forest Land.

Issue 2 - Provisions expressively prohibiting the expansion of commercial and multifamily uses within the SMA and subject to the provisions of the RMP.

Review

As described in the District Court’s Opinion and Order, Friends of the Gorge argues that the RMP provision allowing expansion of existing commercial and multifamily residential uses in the SMA (RMP II-7-8), violates the Scenic Area Act because the provision allows major

development actions, which are expressly prohibited by the Act. As discussed above, the Act prohibits major development actions in SMA (*See* 16 U.S.C. § 544d(d)(5)). Major development actions include, "any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment." *Id.* § 544(j)(2). The RMP currently allows existing commercial and multifamily residential uses in the SMA to "expand as necessary for successful operation on the dedicated site" (RMP II-7-8). The dedicated site is defined as the "area actively devoted to the current use and as delineated on the site plan" (RMP Glossary at 6). Friends of the Gorge states that because the dedicated site plan can be larger than the area currently covered by the structure, the RMP guideline allows "construction" of commercial and multifamily residential facilities.

Revision 2.1 - RMP II-7-8

~~4. A.: Expansion of Existing Commercial and Multifamily Residential Uses: In the SMA, existing commercial and multifamily residential uses may expand beyond as necessary for successful operation on the dedicated site, subject to guidelines to minimize adverse effects on scenic, cultural, natural and recreation resources. Expansion beyond the dedicated site shall be prohibited.~~

Issue 3 – Provisions expressly prohibiting recreational vehicle campgrounds in portions of the SMA classified as semi-primitive (Recreational Intensity Class 2).

Review

As described in the District Court's Opinion and Order, Friends of the Gorge argued that the SMA Recreation Intensity Class 2 guidelines violated the Scenic Area Act by allowing recreational vehicle campgrounds in SMA Recreation Intensity Class 2 zones and fails to protect the recreation resources on lands zoned for semi-primitive use (RMP I-4-27). The RMP designates Recreational Intensity Classes (RIC) for land throughout the Scenic Area and the RIC level dictates the scope and intensity of allowed recreational uses. RIC 2 areas are restricted to "low intensity" uses, where "the emphasis is to provide opportunities for semi-primitive recreation," where people can "escape from noise and crowds (RMP I-4-27). Semi-primitive recreation opportunities are defined as "[a]reas accessible only by primitive transportation routes, with low to moderately infrequent human encounters and with only subtle modifications to the natural setting (RMP Glossary at 15)."

In the GMA, regulations of RIC 2 areas limit campgrounds to tents only and allow only cars, not "vehicles," which might include recreational vehicles (RMP I-4-17). In the SMA, regulations of RIC 2 areas allow for "vehicles," not just cars (RMP I-4-27). Friends of the Gorge argued that the SMA guidelines violate the Scenic Area Act because they adversely affect recreation resources, are inconsistent with the RMP definition of RIC 2 areas, and are less protective than the guidelines for the general management areas.

Revision 3.1 – Recreation Resources – SMA Guidelines (RMP I-4-27)

2. C. All uses permitted in Recreation Intensity Class 1 are permitted in Recreation Intensity Class 2. The following uses may also be permitted:

~~(1) — Campgrounds with vehicle access.~~

~~(1)~~(2) Boat anchorages designed for no more than 10 boats at one time.

~~(2)~~(3) Swimming areas

For continuity within the RMP the use of “campgrounds with vehicle access” must be added to the next higher level of recreation intensity class.

Revision 3.2 – Recreation Resources – SMA Guidelines (RMP I-4-28)

3. D. All uses permitted in Recreation Intensity Classes 1 and 2 are permitted in Recreation Intensity Class 3. The following uses may also be permitted:

(1) Campgrounds with improvements that may include vehicle access, water, power, sewer, and sewage dump stations.

Issue 4 – Consideration of the submission of language for inclusion in the RMP to address the protection of scenic, natural, and cultural resources in the SMA from cumulative effects.

As part of the Settlement Agreement, the Forest Service has agreed to consider amending the RMP as it pertains to cumulative effects within the SMA. The Forest Service considers that the Columbia River Gorge National Scenic Area Act (1986) and the Revised Management Plan (2004) provide appropriate direction to prevent cumulative effects to scenic, natural, and cultural resources and only minor modifications are required to ensure consistency with recent RMP revisions in the GMA completed by the Gorge Commission. The rationale to support this decision is described in the following discussion.

The Council of Environmental Quality (CEQ) defines "Cumulative impact" as *the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (40 CFR 1508.7).* The Scenic Area Act defines “adversely effect” or “adversely effecting , *except as used in section 15, as a reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on: the context of a proposed action; the intensity of a proposed action, including the magnitude and duration of an impact and likelihood of its occurrence; the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts; and proven mitigation*

measures which the proponent of an action will implement as part of the proposal to reduce otherwise significant affects to an insignificant level (Section 2). The protection of scenic, natural, and cultural resources from cumulative effects are addressed in the Act as well as in the Management Plan.

The protection from adverse effects are a requirement of the Act and include:

- The designated the boundaries for the GMA and SMA. Within the SMA major development actions are prohibited, new commercial activity is prohibited, forestry activities must meet an approved Stewardship Plan; and the Forest Service has acquisition authority to bring private land into Federal ownership.
- Land use designations are based in part on resource inventories for recreation, farm, forest, open space, residential, and commercial designations in the GMA and SMA (Section 6 (b)).
- Standards for the Management Plan (Section 6 (d)) require protection and enhancement of areas with farm, forest, recreation and open space land use designations; and prevent adverse effects to resources from residential and commercial development.

The Management Plan serves as a cumulative effects analysis. The RMP defines the size and types of activities that can occur in each land use designation. Resources are also protected through a series of different buffers, thresholds, or restrictions to protect specific resources. The combination of strictly defined land use designations and resource protection work cooperatively to ensure no adverse effects to scenic, natural, cultural, and recreation resources.

The resource inventories used in the development of the land use designations and resource protections accounted for past actions within the Scenic Area. Reasonably foreseeable future actions are restricted by allowable uses and scenic, natural resources, cultural protections. All proposed projects are reviewed to ensure consistency with the RMP. Implementation of applicable plan requirements ensures that all projects have no adverse effect to resources.

One example that illustrates how the Management Plan protects resources from adverse effects is the minimum lot size in residential land use designations in the SMA. New land divisions are prohibited; new multifamily dwellings are prohibited; minimum lot size of 40 acres for a single-family dwelling (proposed revision 1.3 and 1.4); and new structures shall not adversely affect scenic, cultural, recreation, or natural resources (MP II-4-10). Minimum lot size controls land use fragmentation and limits development densities. Development restrictions in the form of resource protections that include mandatory mitigations, buffers, and other restrictions will protect floral and wildlife habitat. This example illustrates the regional and long-term protection provided by the Management Plan to prevent adverse effects from the cumulative actions of individual development. As long as each individual proposal is consistent with the Management Plan there will be no cumulative impacts from residential development.

The Gorge Commission has previously addressed this issue in the GMA as part of the response to litigation on cumulative effects. After an extensive public process the Gorge Commission decided to use the existing direction in the scenic resources in the GMA for cumulative effects and apply it to cultural and natural resources. These changes received final approval by the

Regional Forester for consistency with the Management Plan on November 1, 2010 (Attachment 3 and 4).

Approximately 70 percent of the SMA (78,758 acres) is in Federal ownership. The Forest Service will continue to complete a cumulative effects analysis as described in 40 CFR 1508.7 and 1508.8; and FSH 1909.10 section 15.1 for all federal actions within the SMA and all actions specifically identified for review by the Forest Service in the Scenic Area Act and RMP. The remaining ownership within the SMA includes 18 percent of State and State Parks (19,955 acres) and 12 percent of private, City, and County land (13,747 acres).

In order to ensure consistency between the GMA and SMA the Forest Service will adopt similar clarifying language developed by the Gorge Commission to address cumulative effects for cultural and natural resources. This will allow local counties and the Gorge Commission to use the same methodology for cumulative effects analysis in the GMA as well as the SMA. The addition of the following guidelines to the RMP meets the direction of the Settlement Agreement to consider cumulative effects and no further revision to the RMP is required.

Revision 4.1 –Cultural Resources – SMA Guidelines (I-2-26)

5. Determination of potential effects to significant cultural resources shall include consideration of cumulative effects of proposed developments that are subject to any of the following: 1) a reconnaissance or historic survey; 2) a determination of significance; 3) an assessment of effect; or 4) a mitigation plan.

Revision 4.2 –Wildlife and Plants – SMA Guidelines –Water Resources (Section 2) – (I-3-36)

F. Determination of potential natural resources effects shall include consideration of cumulative effects of proposed developments within the following area: wetlands, streams, ponds, lakes, riparian areas and their buffer zones.

Revision 4.3 –Wildlife and Plants – SMA Guidelines – Wildlife and Plants (Section 3) - (I-3-40)

I. Determination of potential natural resources effects shall include consideration of cumulative effects of proposed developments within the following areas: 1) sites within 1000 feet of sensitive wildlife areas and site; and 2) sites within 1000 feet of rare plants.

Issue 5 – Other Revisions - Definition of Natural Resources

The issue of competing definitions of natural resources was litigated in the Oregon State Court but not the United States Court. The Oregon Supreme Court (2009) observed that it was unclear

if geologic features and geologic hazards were covered in the Management Plan because of the competing definitions of natural resources. The requirement to review this issue is not part of the Settlement Agreement but is considered here to ensure consistency in the RMP between the GMA and SMA.

As described in the Gorge Commission staff report of February 26, 2010 the Oregon Supreme Court ruling required: “Clarify competing definitions of natural resources to determine if geologic features and geologic hazards are ‘natural resources’ as the term is used in the Act. The Supreme Court observed “that the glossary definition is sufficiently broad (specifically, in its use of the word, “land”) that geological features and geological hazards fall within it, but that the introduction to the Natural Resource Chapter of the Management Plan contains a narrower definition, which does not include geological features or hazards. The Court stated that either definition was a permissible interpretation of the Act. The Court directed the commission to clearly specify which of the two definitions it relied on when it did not regulate geological features and hazards as natural resources in the Management Plan.”

The Gorge Commission approved the deletion of the glossary definition (MP Glossary12) of “natural resources”: *Naturally occurring features including land, water, air, plants, animals (including fish), plant and animal habitat, and scenery.* The Gorge Commission approved the use of the definition from the Introduction to the Natural Resources chapter: *Wetlands, streams, ponds and lakes, riparian areas, wildlife and wildlife habitat, rare plants, and natural areas.* This change was concurred by the Regional Forester on November 1, 2010 for the GMA. The Forest Service will adopt the same glossary definition of “natural resources” for the SMA as approved by the Gorge Commission for the GMA.

Revision 5.1 –Definition Natural Resources – (Glossary -12)

~~Natural Resources (SMA):Naturally occurring features including land, water, air, plants, animals (including fish), plant and animal habitat, and scenery~~

Natural Resources (GMA **& SMA**): Wetlands, streams, ponds and lakes, riparian area, wildlife and wildlife habitat, rare plants, and natural areas.

Attachments

Attachment 1 - United States District Court for the State of Oregon opinion and order (CV 04-1423-MO)

Attachment 2 - Settlement Agreement of October 15, 2010 between the Friends of the Gorge and Thomas Vilsack, Secretary of U.S Department of Agriculture

Attachment 3 – Staff report for Columbia River Gorge Commission revisions to the Management Plan - October 22, 2011.

Attachment 4 – Regional Forester concurrence to the Columbia River Gorge Commission revisions to the Management Plan – November 1, 2010.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

FRIENDS OF THE COLUMBIA
GORGE, INC. et al.,

Plaintiffs,

v.

EDWARD T. SCHAFER, Secretary of
the U.S. Department of Agriculture et al.,

Defendants.

No. CV 04-1423-MO

OPINION AND ORDER

MOSMAN, J.,

For at least the last 18,000 years, since its scouring by the Lake Missoula Flood, the Columbia River Gorge has been one of the most unusual and beautiful places on earth. Its centerpiece, of course, is the mighty Columbia River, a 2000 kilometer jewel that divides much of Oregon and Washington. But trimming that river on either side are dozens of waterfalls, river canyons, basalt cliffs, and volcanoes that make up this remarkable area. In addition to its natural beauty, it is also a major shipping route connecting the Pacific Northwest with its markets in all directions. In many places in the Gorge it is possible to stand in the spray of a moss covered waterfall, visually removed from the modern world, and be just a few hundred feet from an interstate freeway, a major rail line, and river and air traffic. It is also home to many vibrant communities and major tourist attractions, including world famous windsurfing. Finally, the

river itself is crossed by as series of dams, making it the largest producer of hydroelectric power of any river in North America.

Against this backdrop of competing interests and features, Congress designated a portion of the Gorge as a National Scenic Area. This case concerns the Columbia River Gorge National Scenic Area ("Scenic Area") and its management. The Friends of the Columbia Gorge, Inc. and other organizational and individual plaintiffs (collectively "Friends of the Gorge") challenge the decision by Regional Forester Linda Goodman, acting on behalf of Edward Schafer, Secretary of Agriculture (collectively "Secretary"), to concur with the Columbia River Gorge Commission ("Commission") that the Revised Management Plan ("RMP") for the Scenic Area is consistent with the standards and purposes of the Columbia River Gorge National Scenic Area Act ("Scenic Area Act"), 16 U.S.C. §§ 544-544p. Friends of the Gorge alleges that the Secretary's decision was arbitrary and capricious or in violation of the law because provisions of the RMP violate the Scenic Area Act.

The matters now before the court are Friends of the Gorge's Motion for Summary Judgment (#76), the Secretary's Cross-Motion for Summary Judgment (#91), and the Secretary's Motion for a Stay (#97). The majority of Friends of the Gorge's claims are not ripe for judicial review; in particular claims 1.1, 1.2, 2.1, 2.2, 4, 5, and 6. Claims 2.3, 2.4, 7, and 8 require the court to determine whether the Secretary's action was arbitrary and capricious or not in accordance with the law. The court holds that the Secretary's concurrence was not in accordance with the law as to the Rowena Dell portion of claim seven and as to claim eight. Friends of the Gorge's motion for summary judgment is therefore DENIED as to claims one through six, GRANTED IN PART and DENIED IN PART as to claim seven, and GRANTED as to claim

eight. Accordingly, the Secretary's cross-motion is GRANTED as to claims one through six, GRANTED IN PART and DENIED IN PART as to claim seven, and DENIED as to claim eight. The Secretary's motion for a stay pending a decision by the Oregon Supreme Court is DENIED.

BACKGROUND

I. The Columbia River Gorge National Scenic Area Act

In 1986, President Reagan signed the Scenic Area Act into law, creating the Scenic Area. The Scenic Area falls within two states, Oregon and Washington, and six counties, Hood River, Multnomah, and Wasco counties in Oregon, and Clark, Klickitat, and Skamania counties in Washington. It also includes federal land, primarily the Mt. Hood and Gifford Pinchot National Forests.

The Act creates rules and procedures for managing the Scenic Area to further the goals of:

- (1) establish[ing] a national scenic area to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge; and
- (2) protect[ing] and support[ing] the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with paragraph (1).

16 U.S.C. § 544a. It also divides the land in the Scenic Area into three categories: (1) special management areas, (2) urban areas, and (3) general management areas.¹ The special management areas are specifically identified in the Act and are largely considered the most vulnerable areas.

Id. § 544b(b). They are generally subject to the most stringent regulations. The urban areas are

¹The term "general management area" does not appear in the Scenic Area Act; however, the term is used throughout the management plan to identify lands not within either the special management or urban areas.

also specifically identified in the Act. *Id.* § 544b(d). The general management areas are all the remaining lands within the Scenic Area not designated as special management or urban areas.

A unique aspect of the Scenic Area Act is the division of management authority it creates between the Secretary, the Commission, and various local governments.

A. *The Commission*

The Commission is a bi-state agency created by Oregon and Washington through an interstate compact. Or. Rev. Stat. § 196.150; Wash. Rev. Code § 43.97.015. Congress ratified the states' agreement and provided specifications for the Commission in the Act. Congress specified that the Commission is to be composed of one member from each of the counties, appointed by the governing body of the counties; three members from each state, at least one of whom lives within the Scenic Area, appointed by the respective state governor; and one non-voting member from the Forest Service appointed by the Secretary of Agriculture, for a total of thirteen members. 16 U.S.C. § 544c(a)(C). Congress also specified that the Commission was to adopt regulations to govern its affairs so that there would be a uniform system of laws governing the Commission's actions, in addition to the Scenic Area Act itself. *Id.* § 544c(b). The Commission has management authority over the non-federal land within the Scenic Area. *Id.* §§ 544e(a); 544d(b).

B. *The Secretary*

The Secretary has primary authority over the federal lands within the Scenic Area. *Id.* §§ 544d(c)(4); 544f(a)(1). He also has increased authority over non-federal lands in the special management areas. *Id.* § 544f(f)(1) ("[T]he Secretary shall, in consultation with the

Commission, develop guidelines to assure that non-Federal lands within the special management areas are managed consistent with [the management plan] and the purposes of [the Act].").

C. *Local Governments and Other Entities*

Other governing entities within the Scenic Area, including local governments and Indian tribes, also play a management role. For example, section 544d(e) provides that the Commission and the Secretary "shall exercise their responsibilities pursuant to [the Scenic Area Act] in consultation with Federal, State, and local governments having jurisdiction within the scenic area or expertise pertaining to its administration and with Indian tribes." The counties are also permitted to adopt land use ordinances consistent with the management plan. However, if a county fails to do so within the time provided by the Scenic Area Act, the Commission "shall make and publish a land use ordinance setting standard for the use of non-Federal lands in such county within the boundaries of the national scenic area, excluding urban areas." *Id.* § 544e(c)(1).

D. *The Management Plan*

The Scenic Area Act mandates that the Commission adopt a Scenic Area management plan within three years of the Commission being formed. *Id.* § 544d(c). The terms of the plan relating to federal land and special management areas are to be provided by the Secretary and incorporated without change by the Commission. *Id.* §§ 544d(c)(4), (c)(5)(a). Once the Commission adopts a management plan, including the provisions provided by the Secretary, it forwards the plan to the Secretary for review. *Id.* § 544d(f)(1). The Secretary then has three options: he can (1) expressly concur, (2) do nothing for ninety days, which is then deemed a concurrence, or (3) deny concurrence and submit suggested modifications to the Commission.

Id. § 544d(f)(1)-(2). If concurrence is denied, the Commission can either revise and resubmit the plan or override the Secretary's denial with a two-thirds vote of its membership, including a majority from each state, in favor of adopting the plan without the Secretary's proposed modifications. *Id.* § 544d(f)(3).

After a plan is adopted, the Commission must review it to determine whether it should be revised, "[n]o sooner than five years after adoption . . . but at least every ten years." *Id.* § 544d(g). When the Commission adopts a revised management plan, it must be submitted to the Secretary for "review and concurrence," using the process described above. *Id.*

II. The Revised Management Plan

The Commission adopted the initial management plan for the Scenic Area in October 1991. The Secretary concurred that the plan was consistent with the purposes and standards of the Scenic Area Act in early 1992, and the management plan has been in effect since that time. In 1997, the Commission and the Forest Service began the first review of the plan and the Commission adopted the final RMP in April 2004. The RMP was then sent to the Secretary for review, and the Secretary delegated his authority to review the plan to the Regional Forester for the Pacific Northwest Region of the Forest Service, Linda Goodman. Friends of the Gorge filed a complaint in Oregon state court in June 2004, challenging the Commission's adopted revisions. In August, Regional Forester Goodman issued a written decision expressing the Secretary's concurrence with the RMP. Friends of the Gorge filed this action in October 2004.

The Secretary filed a motion to dismiss, a motion for partial summary judgment, and a motion to stay the case pending a decision by the Oregon Court of Appeals in the concurrent state case. In December 2005 the court denied the motion to dismiss and granted the motion to stay

the case. In March 2006 the court denied the motion for partial summary judgment, with leave to refile. The stay ended in January 2008 after the Oregon Court of Appeals issued its decision in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 171 P.3d 942 (Or. Ct. App. 2007).² The parties then filed cross-motions for summary judgment.

Friends of the Gorge seeks (1) a declaration that the Secretary's concurrence and the challenged portions of the RMP violate the Scenic Area Act, and (2) an injunction against implementation of the challenged portions of the RMP until they comply with the Act.

In his cross-motion for summary judgment, the Secretary counters that: (1) Friends of the Gorge lacks standing to pursue their claims; (2) the claims are not ripe for adjudication; and (3) the Secretary's concurrence was not arbitrary or capricious and was in accordance with a reasonable interpretation of the Scenic Area Act.

STANDARD OF REVIEW

For cross-motions for summary judgment, the court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006) (quoting *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003)). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The Scenic Area Act provides for judicial review, 16 U.S.C. § 544m(b), but does not provide a standard of review; therefore, the Administrative Procedure Act ("APA") standards

² The decision of the Oregon Court of Appeals was appealed to the Oregon Supreme Court, which allowed review in July 2008. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 189 P.3d 749 (Or. 2008).

apply. See *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193-94 (9th Cir. 2000). Under the APA, a court may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Generally, "review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* The Ninth Circuit, in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc), reiterated the importance of granting deference to the agency, stating that the court is to ensure only that the agency has "made no 'clear error of judgment' that would render its action 'arbitrary and capricious.'" *Id.* at 993 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)). However, in order for agency action to be upheld, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The Secretary argues that because Friends of the Gorge made facial challenges to the RMP, they bear the burden of demonstrating that no set of circumstances exists under which the challenged portions of the plan may be lawfully applied. (Defs.' Mem. in Supp. of Summ. J.

(#92) at 29 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Reno v. Flores*, 507 U.S. 292, 301 (1993) (extending the "no set of circumstances" standard to agency regulations reviewed for inconsistency with the authorizing statute).) However, the Ninth Circuit has recently called the "no set of circumstances" standard into question. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007) (stating that Supreme Court jurisprudence is divided on whether the standard is dicta or a generally applicable rule, collecting cases, and refusing to apply the standard to the Forest Service's establishment of National Environmental Policy Act ("NEPA") categorical exclusions). Therefore, this court will apply the traditional arbitrary and capricious standard in this case.

When a court reviews an agency's construction of a statute it administers, it must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). When Congress has expressed its clear and unambiguous intent both the court and the agency must give effect to that intent. *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Thus, deference is due to the agency's interpretation of a statute only when a statute is silent or ambiguous as to the question at issue.

DISCUSSION

I. Justiciability

The Secretary's motion for summary judgment argues that the court lacks subject matter jurisdiction over the case because (1) Friends of the Gorge lacks standing and (2) the case is not ripe for adjudication. (Defs.' Mem. in Supp. of Summ. J. (#92) at 25, 27.) "The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court." *In re Ford Motor Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001).

A. *Standing*

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)). To establish constitutional standing, the "plaintiff must show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The Secretary does not challenge the causation element of standing, therefore it is not analyzed below.

Where the plaintiff is an organization, as several of the plaintiffs are here, it has standing to sue on behalf of its members where the "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the

lawsuit." *Laidlaw Env'tl. Servs.*, 528 U.S. at 181. Friends of the Gorge, Columbia Riverkeeper, and 1000 Friends of Oregon are non-profit organizations dedicated to the protection and enhancement of the resources of the Scenic Area or of Oregon as a whole, making the interests at stake in this case germane to the purposes of the organizations. Participation by individual plaintiffs is not necessary in this case. Thus, if at least one member of Friends of the Gorge, Columbia Riverkeeper, or 1000 Friends of Oregon has standing, standing is established.

1. Injury in Fact

To establish an injury-in-fact, plaintiffs must allege that they have suffered a concrete, particularized harm as to each individual claim. *See id.* at 185 ("Standing is not dispensed in gross." (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996))). Harm to the environment in general is not sufficient. *Id.* at 181.

In *Laidlaw*, the defendant was given a permit to discharge treated water into a nearby river. Testing showed that Laidlaw was exceeding the allowable pollution levels under its permit. An environmental action group sued the company for failing to comply with the permit standards. Plaintiffs asserted they were harmed by Laidlaw's actions because they had used the river for various recreational activities, but were now afraid to do so because of the smell and pollution caused by Laidlaw. The Supreme Court held the group had standing because "they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw Env'tl. Servs.*, 528 U.S. at 183 (internal quotations and citation omitted).

The fact that an injury has not yet occurred does not defeat a finding of standing. *See Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir. 2005) (holding that "[o]ne does not have to await

the consummation of threatened injury before challenging" an action and seeking declaratory relief (quoting *Canatella v. California*, 304 F.3d 843, 852 (9th Cir. 2002))). In *Wilbur*, plaintiffs alleged they would suffer injury from a compact between the state and an Indian Tribe.

However, because the compact had not yet been enacted, the district court held the injury was only "likely," not "actual or imminent." *Id.* The Ninth Circuit reversed, holding that where the complaint stated that the compact would be enacted "within the near future," plaintiffs' alleged injury was "sufficiently imminent to satisfy the requirement of an injury in fact." *Id.*

Here, Friends of the Gorge has alleged sufficient injury for standing. They allege that their purpose is to protect and enhance the resources of the Scenic Area and that their members use the land at issue for "hiking, wildlife viewing, photography, camping, bird watching, and other recreational pursuits." (Gorman Decl. (#101) at 2.) Further, there are several individual plaintiffs who live, do business, or own property in the Scenic Area. Collectively, Friends of the Gorge asserts implementation of the plan revisions will have a direct negative impact on their activities and interests.³ Some of the plaintiffs have also alleged potential financial injury due to the Secretary's action. (Third Am. Compl. (#73) at 4.) The RMP has been adopted by the Commission and ratified by the Secretary, thus the potential injury is sufficiently imminent under *Wilbur*.

2. Redressability

To have standing, plaintiffs must show that there is a substantial likelihood that the requested relief, if granted, will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Scenic Area Act grants plaintiffs the right to bring suit challenging a final

³ Plaintiffs have filed individual declarations (##100-109) to this effect.

action of the Secretary "requesting such action . . . be modified, terminated, or set aside." 16 U.S.C. § 544m(b)(4)(A). Here, Friends of the Gorge seeks three types of relief relevant to this inquiry: (1) a declaratory judgment that the Secretary's actions violated the Act, (2) a declaratory judgment that the revised plan violates the Act, and (3) an injunction prohibiting implementation of the challenged portions of the revised plan "until such time as the Plan is corrected to comply with the . . . Act." (Third Am. Compl. (#73) at 14.) The first request for relief relates specifically to the Secretary's concurrence, requesting that it be set aside by this court. The second and third requests for relief relate to the rest of Friends of the Gorge's claims regarding injuries allegedly caused by specific provisions of the RMP with which the Secretary concurred.

The Secretary argues that Friends of the Gorge's claims are not redressable because the Secretary's concurrence is not required for the RMP to go into effect. (Defs.' Reply (#112) at 7.) He further argues that this court does not have the power to require the Secretary to deny his concurrence because the Scenic Area Act expressly states that the Secretary need not act at all. (*Id.*) Under the Act, the Secretary has ninety days to concur or deny his concurrence with the Commission regarding the management plan's consistency with the Scenic Area Act; if no action is taken within ninety days, the Secretary is deemed to have concurred. 16 U.S.C. § 544d(f)(1). If the concurrence is denied by the Secretary, the Commission has 120 days to revise and resubmit the plan to the Secretary or to pass the management plan over the dissent of the Secretary by a two-thirds vote of the Commission membership, including a majority from each state. *Id.* § 544d(f)(3).

Perhaps the single biggest obstacle to the Secretary's position on redressability is that the Scenic Area Act specifically provides for judicial review—review that is presumably designed to

redress errors in the implementation of the Act. If the Secretary were correct regarding the power of this court, he would effectively be insulated from suit under the statute. This was not the intent of Congress in creating the citizen suit and judicial review provisions of the Scenic Area Act. *See id.* §§ 544m(b)(2) (citizen suit provision), 544m(b)(4) (judicial review provision), 544m(b)(5) (giving federal courts jurisdiction over "any civil action brought against the Secretary pursuant to this section").⁴

In any event, it is purely speculative whether the Commission would have chosen (or would choose in the future) to overrule a denial of concurrence by the Secretary. Furthermore, the Secretary's failure to act (which becomes a concurrence after ninety days) is subject to review, because Friends of the Gorge would be adversely affected by that final inaction of the Secretary. *See id.* § 544m(b)(4).

The Secretary also argues that this court does not have the power to set aside portions of the RMP as a remedy because the "agency action" involved was a concurrence indicating that the Secretary found the plan to be consistent with the Scenic Area Act, rather than the actual adoption or implementation of the plan. (Defs.' Reply (#112) at 7.) This is somewhat disingenuous because the Secretary is charged with developing guidelines applicable to the special management areas. 16 U.S.C. § 544f(f)(1). The Scenic Area Act states that the Secretary

⁴ The Oregon Court of Appeals determined that the management of the special management areas was entrusted solely to the Secretary of Agriculture and the Forest Service, not to the Commission. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 171 P.3d 942, 958-59 (2007) (citing 16 U.S.C. § 544d(c)(4)). Therefore, the court rejected all the special management area related claims. *Id.* This issue does not appear to be before the Oregon Supreme Court on appeal. *See* Or. S. Ct. Media Release (July 2, 2008) at 1-5. Review of actions taken regarding the special management areas is therefore not available in the Oregon courts and would be completely unavailable if this court did not have jurisdiction.

"shall promptly transmit the guidelines to the Commission for inclusion in the management plan," *id.*, and the management plan "shall incorporate without change the management direction for the use of Federal lands within and the land use designations for the special management areas adopted by the Secretary," *id.* § 544d(c)(4). Friends of the Gorge's claims relate solely to the special management areas.

This unusual piece of legislation is grounded in the idea of cooperation among different levels of government. It seems out of character with the terms of the Scenic Area Act to suggest that any order by this court will simply be ignored, rather than taken into account, in implementing the RMP.

B. *Ripeness*

The Secretary also asserts that this court lacks jurisdiction because the case is not ripe. "[T]he ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In deciding whether a case is ripe, courts consider the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 733 (internal quotations and citations omitted). The Court, in *Ohio Forestry*, considered: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.*

In *Ohio Forestry*, the Secretary of Agriculture had developed a land and resource management plan under the National Forest Management Act of 1976 for a national forest in Ohio. *Id.* at 728-29. As part of the plan, the Forest Service set logging goals for the forest, but did not authorize the cutting of any trees. *Id.* at 729. Rather, before the Forest Service could issue a logging permit, it had to propose a specific project, ensure that it fit within the bounds of the management plan, and provide due process to those affected by the proposal. *Id.* at 729-30. Adopting the general management plan did, however, make the occurrence of logging activities more likely. *Id.* at 730. Before the Forest Service issued any logging permits or identified a specific logging project, the Sierra Club filed suit challenging the management plan. *Id.* The Supreme Court held that the case was not ripe. First, withholding immediate review would not cause the Sierra Club significant hardship because the management plan itself did not create or alter any legal rights or obligations, or grant, withhold, or modify any formal legal license. *Id.* at 733. The plan did not impose a practical harm on the Sierra Club's interests because before logging could occur, the Forest Service would have to go through the process outlined above. *Id.* at 733-34. The plan did not force the Sierra Club to alter its behavior. *Id.* at 734. Second, an immediate decision would interfere with agency efforts to refine its policies through application of the plan in practice. *Id.* at 735. Third, the court would benefit from further factual development because the claims were currently abstract and required the court to predict "consequences that may affect many different parcels of land in a variety of ways." *Id.* at 736.

Finally, the Court noted that Congress had not provided for pre-implementation review of forest plans.⁵ *Id.* at 737.

Friends of the Gorge attempts to distinguish *Ohio Forestry*, pointing out that in that case the Forest Service, the agency who adopted the plan, would have significant future involvement before any ground-disturbing activity would occur. They state that in the present case the Secretary will have no further involvement in implementing the revised plan except with regard to special management area forest practices and decisions regulating uses of federal land. (Pls.' Reply (#98) at 13.) However, federal land comprises the vast majority of the special management areas of concern in this case, therefore the Secretary and the Forest Service will be involved in the future management of the majority of the relevant land.⁶

Friends of the Gorge argues that if this court finds some or all of the claims unripe it will merely delay review to a less advantageous time, after the harm has already occurred. In essence, this argument proves too much. Whenever a court determines that a case is not ripe for adjudication, review is delayed until the alleged injury has become more concrete. They also

⁵ Friends of the Gorge also argues that the Scenic Area Act expressly contemplates pre-implementation judicial review of the management plan's consistency with the standards and purposes of the Act. (Pls.' Reply (#98) at 13.) The citizen suit provision of the Scenic Area Act does not allow challenges to the consistency of the draft management plan prior to the certification or adoption of the plan. 16 U.S.C. § 544m(b)(3)(A)(iii). The court declines to adopt Friends of the Gorge's argument that it "logically follows that those challenges are allowed *after* the Secretary's concurrence determination" but before the plan is implemented. (Pls.' Reply (#98) at 14.) The court holds that Congress has not explicitly provided for pre-implementation review, therefore ripeness is governed by the *Ohio Forestry* analysis.

⁶ In the Scenic Area, 115,000 acres are designated as special management areas, *Friends of the Columbia Gorge*, 171 P.3d at 948, and as of fall 2005, 27,376 of those acres are not federally owned, (Blosser Decl. (#105) at 2.), leaving 87,624 acres of federal land within the control of the Secretary and the Forest Service. Of the non-federal land, 8,012 acres are privately owned and 19,364 acres are owned by the states and counties. (Blosser Decl. (#105) at 2.)

argue that the counties will not "flesh-out" the regulations, therefore any flaws in the RMP will be carried down into the county ordinances. This prediction by Friends of the Gorge illustrates the ripeness problem in this case. This court has no way to know whether or not this prediction is true because the counties will not write their ordinances until the RMP goes into effect. More fundamentally, even if Friends of the Gorge is correct and the regulations stay the same, a future court would have the benefit of a more specific factual scenario on which to base a decision.

Because a ripeness analysis varies based on the facts and circumstances involved in a particular claim, the ripeness of each of Friends of the Gorge's claims is analyzed below. Due to the complexity of the case and the difficulty of resolving the question of ripeness for some of the claims the court has also taken the opportunity to discuss the merits of each claim.

II. Cross-Motions for Summary Judgment

Friends of the Gorge brought twelve claims challenging the Secretary's concurrence with several different elements of the RMP. Generally, the claims argue that implementation of the RMP will cause adverse effects on the scenic, natural, and cultural resources of the Scenic Area by allowing development, grazing, and other potentially disruptive activities to occur.

A. *Claims 1.1, 2.1, and 6: Cumulative Adverse Effects on Scenic, Natural, and Cultural Resources*

The Scenic Area Act requires that the management plan protect the Gorge's scenic, natural, and cultural resources from adverse effects. *See, e.g.*, 16 U.S.C. §§ 544d(d)(7)-(9).

Adverse effects are defined as:

[A] reasonable likelihood of more than moderate adverse consequences for the scenic, cultural, recreation or natural resources of the scenic area, the determination of which is based on: (1) the context of a proposed action; (2) the intensity of a proposed action, including the magnitude and duration of an impact and the

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

16 U.S.C. § 544(a).

In claims 1.1, 2.1, and 6, Friends of the Gorge asserts that the RMP fails to protect the scenic, natural, and cultural resources in the special management areas from adverse cumulative effects.⁷ Generally, Friends of the Gorge claims that the Scenic Area Act requires that the management plan contain "standards" with a sufficient degree of specificity to prevent adverse cumulative impacts and that the RMP does not contain such standards. (Pls.' Reply (#98) at 22.)

1. Ripeness of the Cumulative Adverse Effects Claims

The court holds that claims 1.1, 2.1, and 6 are not ripe. First, there is no hardship to the plaintiffs if review is delayed because there is no identified project that is going forward, no resource identified by name that will be harmed, and no identified agency action that is proceeding because of delayed review. Second, the challenged portions of the RMP related to scenic, natural, and cultural resources contemplate future review, either by the Forest Service or by some other administrative body. *See, e.g.*, RMP I-3-33 ("All new developments and uses . . . shall be evaluated . . ."); I-2-23 ("An assessment shall be undertaken to determine whether any cultural resources . . . are present . . ."). Third, the court would benefit from further factual

⁷ The Oregon Court of Appeals found for the Secretary on a similar claim related to the general management areas. *Friends of the Columbia Gorge*, 171 P.3d at 960-61, 964, 967 (assignments of error 2.1, 3.1, and 4.1). The Oregon Supreme Court may review this on appeal. Or. S. Ct. Media Release (July 2, 2008) at 3.

development because it is impossible to know today what regulations might allow or successfully prevent adverse cumulative effects in the future.

2. The Secretary's Concurrence with the Cumulative Adverse Effects Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claims 1.1, 2.1, and 6. The Scenic Area Act does not define what is necessary to prevent adverse effects to scenic, natural, and cultural resources, leaving this to the Secretary, Forest Service, and Commission. Cumulative effects are addressed when adverse effects are addressed because the definition of adverse effects includes cumulative effects. *See* 16 U.S.C. § 544(a)(3). The RMP contains provisions designed to protect the scenic, *see* RMP I-1-36 to -43, natural, *see* RMP I-3-30 to -45, and cultural, *see* RMP I-2-22 to -26, resources of the Scenic Area. Thus, the Secretary has not "entirely failed to consider an important aspect of the problem" and his decision was not arbitrary and capricious. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

B. Claim 1.2: Compatible Development

In claim 1.2, Friends of the Gorge states that the RMP violates the Scenic Area Act because it contains no standards requiring that the height, overall mass, and other exterior dimensions of new development in the special management areas to be compatible with that of existing development (a requirement that is found in the general management area portion of the RMP). *See* RMP I-1-3 (general management area provision); RMP I-1-36 to -43 (special management area provisions).

1. Ripeness of the Compatible Development Claim

The court holds that claim 1.2 is not ripe. Again, the RMP does not create any legal rights or obligations. Further agency action will occur before any new development in special management areas is allowed because permits, either state or federal, are required before any building can occur. As noted, most of the land in the special management areas is federal land, so that a decision by a federal agency would be required before a specific project could go forward. That decision would allow for review of the compatible development claim in a much clearer factual context. The same basic rationale applies on non-federal land. Given the unique co-operative nature of the Scenic Area Act, the *Ohio Forestry* analysis applies even when, as here, the subsequent administrative action is by a different government agency. For these reasons, additional factual development is required to determine whether the failure to include this requirement would actually allow building to occur in violation of the Scenic Area Act.

2. The Secretary's Concurrence with the Compatible Development Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim 1.2. The RMP contains several pages of policies and guidelines related to the protection and enhancement of scenic resources through limits on new development. *See* RMP I-1-36 to -43. In particular, the RMP requires that "scenic standards shall be met by blending new development with the adjacent natural landscape elements rather than with existing development." RMP I-1-39. A difference of opinion between Friends of the Gorge and the Secretary regarding the best way to control new development does not demonstrate a "clear error in judgment" on the part of the Secretary. *See Lands Council, 537*

F.3d at 993. Because there is a rational basis for the Secretary's concurrence, his decision was not arbitrary, capricious, or in violation of the law. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

C. Claim 2.2: Water Resource Buffers

In claim 2.2, Friends of the Gorge argues that the RMP's special management area water resource buffer policies and guidelines violate the Scenic Area Act by failing to protect natural resources in the special management areas from the individual and cumulative adverse effects of land uses and development.⁸ The RMP requires a buffer of 200 feet for wetlands, ponds, lakes, and perennial fish-bearing streams and fifty feet for non-fish-bearing intermittent and ephemeral streams.⁹ RMP I-3-33 to -34. Incursion into the buffer area is allowed with a mitigation plan that requires that adverse effects on the natural resources of the Scenic Area be avoided. RMP I-3-33 to -36. The RMP provides for enlargement of water resource buffers when necessary to protect resource values. RMP I-3-34.

Friends of the Gorge contends that the water resource buffer policy violates the Scenic Area Act for three reasons. First, they argue that the buffers are too small, thus failing to protect natural resources. (Pls.' Mem. in Supp. of Summ. J. (#78) at 16.) Second, they state that allowing any incursions into the buffer areas is a violation of the Scenic Area Act. (*Id.* at 17-18.) Third, they suggest that the special management area guidelines violate the Act by being less

⁸ The Oregon Court of Appeals found for the Secretary on a similar claim related to the general management areas. *Friends of the Columbia Gorge*, 171 P.3d at 964-65 (assignment of error 3.3). The Oregon Supreme Court does not appear to be reviewing this on appeal. Or. S. Ct. Media Release (July 2, 2008) at 3.

⁹ Ephemeral streams are those "that contain flowing water only during, and for a short duration after, precipitation events." RMP Glossary at 7.

protective of natural resources than the general management area guidelines, which include a public interest test missing from the special management area guidelines. (*Id.* at 18.)

1. Ripeness of the Water Resource Buffer Claim

The court holds that claim 2.2 is not ripe. I look first at the argument that the buffer zones are too small. There is no hardship to Friends of the Gorge if review is delayed because there is no identified stream, pond, or wetland that will be harmed by the proposed buffer zones. Furthermore, a decision regarding the size of the buffer zones today would interfere with the Secretary's further review of the buffer zones under the RMP, which provides for enlargement of buffers where necessary to protect resource values. RMP I-3-34. Finally, the court would benefit from further factual development because the proper width of a buffer zone will vary for each pond, wetland, lake, and stream in the Scenic Area.

As for the claim that the RMP improperly allows incursions into the buffer zones, similar concerns exist. Again, there is no particular water resource that Friends of the Gorge can state will be harmed if this court does not decide this issue today. Incursions are only allowed "subject to compliance with guidelines for the protection of scenic, natural, cultural, and recreation resources," therefore the Secretary will have further involvement before any incursions occur. RMP I-3-30. And finally, this court does not have the benefit of knowing the nature of the incursion or the nature of the water resource, both of which are necessary for an understanding of the what, if any, adverse effects may be caused by an incursion.

Finally, the difference between the special and general management area water resource guidelines does not make this claim ripe. If it were true that the general management area guidelines were more protective than those for the special management area, there would be an

argument that the Secretary's concurrence was irrational. However, that is not the case here. The special and general management areas have different schemes for the protection of water resources. The public interest test does not necessarily make the general management area guidelines more protective. In fact, once the guidelines are implemented, the special management area guidelines may prove to be more protective, even without the public interest test. Nothing in the language of the two sets of guidelines dictates that the general management areas will get more protection. Therefore, the above ripeness concerns are applicable to this challenge as well. Friends of the Gorge is not immediately harmed by the existence of these guidelines. The Secretary will have further involvement in the development of the buffer zones on a case by case basis. And if, in the future, Friends of the Gorge believes that the failure to conduct a public interest test causes a water resource buffer to violate the Scenic Area Act, the hypothetical future court would have the benefit of a specific factual scenario upon which to base a decision.

2. The Secretary's Concurrence with the Water Resource Buffer Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim 2.2. There is evidence in the record that the Washington Department of Fish and Wildlife, among others, argued for larger buffer areas. (*See* Kahn Decl. in Supp. of Mot. for Summ. J. (#79) at Ex. K.) However, two Forest Service scientists conducted a "Biological Evaluation of the Potential Impacts to Sensitive Flora and Fauna" to determine the efficacy of the chosen buffers and determined that the buffers were sufficient so that there would be a "no effects' call." (Defs.' Reply (#112) at Ex. F.) "When specialists express conflicting

views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Lands Council*, 537 F.3d at 1000 (quoting *Marsh*, 490 U.S. at 378). The Forest Service experts indicated that the Biological Evaluation was based on a review of the original management plan and the changes made in the RMP. (Defs.' Reply (#112) at Ex. F.) They found that because the RMP allows the exact buffer size to be determined by a biologist, on a case by case basis, that the RMP adequately protected water resources. (*Id.*) This is a reasonable opinion. Therefore, it is not arbitrary and capricious for the Secretary to base his concurrence on the Forest Service scientists' opinions, even though it was contrary to evidence presented by other experts.

D. Claim 2.3: Livestock Grazing

In claim 2.3, Friends of the Gorge argues that the RMP provision allowing agricultural uses in the special management areas as "uses allowed outright" violates the Scenic Area Act by failing to protect natural resources from the individual and cumulative adverse effects of livestock grazing.¹⁰ See RMP II-7-11. Agricultural uses, including livestock grazing, are allowed within the special management areas only on land that has been "previously disturbed and regularly worked." *Id.* The RMP defines "previously disturbed" as "[a]n area of land where the natural surface has been graded, excavated, paved and/or graveled." RMP Glossary at 14. Grazing is not allowed in areas designated as "open spaces,"¹¹ see RMP II-7-16 to -20, and any

¹⁰ The Oregon Court of Appeals found for the Secretary on a similar claim related to the general management areas. *Friends of the Columbia Gorge*, 171 P.3d at 965-66 (assignment of error 3.4). The Oregon Supreme Court may review this on appeal. Or. S. Ct. Media Release (July 2, 2008) at 3.

¹¹ "Open spaces represent some of the most significant and sensitive resources in the Scenic Area." RMP II-3-1. The open space designation protects these resources from "uses that

new grazing on federal land must be reviewed under NEPA and the National Forest Land and Resource Management Plan. (Def.' Mem. in Supp. of Summ. J. (#92) at 38.)

1. Ripeness of the Livestock Grazing Claim

Although livestock grazing is a "use allowed outright," the parties seem to agree that before it occurs on any federal, state, or county owned land in the special management area, further review will occur. (Summ. J. Hr'g Tr. at 26-29.) This leaves about 8,000 acres, out of 115,000 acres in the special management areas, where immediate grazing might occur without further review. A claim that allowing such grazing fails to protect natural resources from adverse effects seems to be an exercise in speculation. Key questions like how much grazing, on what land, with what sort of adverse effects, are left unanswered. There remains substantial uncertainty, however, about the nature of any subsequent agency review of specific grazing applications, at least on public land. And it appears to be possible that grazing could occur on private land without any further review—albeit only on land that has been previously disturbed. Because the parties were unable to clarify this issue, the court will assume the claim is ripe.

2. The Secretary's Concurrence with the Livestock Grazing Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim 2.3. Friends of the Gorge states that "scientific research shows that grazing has a high potential to adversely affect water resources, fish and wildlife habitat, rare plants, and native plant communities." (Pls.' Mem. in Supp. of Summ. J. (#78) at 19 (citing Exs. Q and R).) However, livestock grazing is only allowed on land that has been "regularly worked" and graded, excavated, paved, and/or graveled. *See* RMP Glossary at 14. It does not appear

could adversely affect them." RMP II-3-2.

likely that grazing would be possible on much land meeting this description, or even that rare plants or other wildlife will be found in such an area. Furthermore, a goal of the Scenic Area Act is to "protect and support the economy of the Columbia River Gorge" in a way that is consistent with the "enhancement of the scenic, cultural, recreational, and natural resources" of the Gorge. 16 U.S.C. § 544a. Thus, allowing this very modest economic use of land is in keeping with the purposes of the Act. Considering the goals of the Act and the restrictions on the type of land that can be grazed, the Secretary's concurrence was not arbitrary and capricious, at least in the abstract sense involved in this facial challenge.

E. *Claim 2.4: Replacement of Culverts on Ephemeral Streams*

In claim 2.4, Friends of the Gorge claims that the RMP provision allowing the replacement and expansion of existing culverts for ephemeral streams and ditches in the special management areas, including areas zoned open space, as "uses allowed outright" violates the Scenic Area Act by failing to protect natural resources from individual and cumulative adverse effects.¹² See RMP II-7-13 (all land use designations except open space and agricultural-special), -17 (areas designated open space). The visible ends of the new culverts are required to be "dark and non-reflective." *Id.* Replacement of culverts on perennial streams is allowed only after review for impacts to protected resources. See RMP I-3-30 ("Uses that may impact wetland, streams, ponds, lakes, and riparian areas acreage and functions, water quality, natural drainage, or wildlife habitat may be allowed in their buffer zones, subject to compliance with guidelines for

¹² The Oregon Court of Appeals found for the Secretary on a similar claim related to the general management areas. *Friends of the Columbia Gorge*, 171 P.3d at 968 (assignment of error eight). The Oregon Supreme Court does not appear to be reviewing this on appeal. Or. S. Ct. Media Release (July 2, 2008) at 3.

the protection of scenic, natural, cultural, and recreation resources and the approval criteria in this section.")

1. Ripeness of the Culvert Replacement Claim

Like livestock grazing, culvert replacement on ephemeral streams seems to be very limited in scope, but the record is unclear as to whether any meaningful administrative action will occur before a specific culvert is replaced. The challenged provision is limited in scope because it allows only for replacing culverts, not the building of new culverts, and only in ephemeral streams. Some further review appears to be necessary, at least at the county level, because county, state, and federal regulations as to air and water quality must be followed in all actions taken in the special management areas. *See* RMP I-3-31. Permits are probably necessary for construction on federal, state, or county land and may be necessary on private land, depending on county ordinances not before the court. However, the permitting processes, even those on federal land, would not necessarily take into account the concerns of the Scenic Area Act in protecting the scenic, natural, and cultural resources of the Gorge. It is worth comparing this action with an action challenging replacement of a culvert on a perennial stream—a portion of the RMP not challenged by Friends of the Gorge. In such a hypothetical future case, the reviewing court would know which culvert was at issue, on what sort of land, having what sort of alleged impacts. None of those questions are answered here.

As with the livestock grazing claim, the court has serious concerns regarding the ripeness of this claim because further factual development would be helpful to determine whether the regulations in the RMP allow adverse effects in the Scenic Area. Any hardship to the Friends of the Gorge results only from a chain of hypothetical events that the court cannot know will happen

because it is possible that culverts can and will be replaced without creating the relevant adverse effects. But because the record is not clear as to the nature or even the availability of any subsequent administrative review, the court will assume ripeness.

2. The Secretary's Concurrence with the Culvert Replacement Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim 2.4. The RMP requires that all county, state, and federal regulations for air or water quality be followed at all times within the special management areas. *See* RMP I-3-31. Therefore, culverts cannot be replaced if the replacement would cause the water quality of the ephemeral stream, ditch, or other water source, to fall below the relevant standards. Because of the ratio of public to private land, in almost all imaginable cases ensuring the maintenance of water quality would be the subject of some permitting process.

Further, culverts in ephemeral streams and ditches are in locations that have already been disturbed by building the road, digging the ditch, and placing the original culvert. The Secretary also notes that failing to replace an undersized culvert can cause extensive resource damage. (Defs.' Mem. in Supp. of Summ. J. (#92) at 39.) Taking these factors into account, the Secretary's explanation does not run "counter to the evidence" and his concurrence is not arbitrary and capricious or contrary to law. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

F. Claim 3

Friends of the Gorge appears to have dropped this claim as it is not discussed in the pleadings.

G. Claim 4: Forest Practices

In claim four, Friends of the Gorge argues that the RMP's special management area forest practices policies and guidelines violate the Scenic Area Act because they fail to ensure that forest practices in the special management areas will not adversely affect the scenic and natural resources of the Scenic Area. *See* RMP II-2-16–27.

The RMP contains new rules allowing "vegetation management" to promote "forest health," subject to review for compliance with scenic, cultural, natural, and recreational resources guidelines, *see* RMP at II-3-12, and deviations from forest practices guidelines to promote "forest health" and "ecosystem function," *see, e.g.*, RMP at II-2-25, -26. "Forest health" is defined as: "A measure of the robustness of forest ecosystems. Forests are deemed healthy when they have capacity across the landscape for renewal, for the maintenance of wildlife habitats, for recovery from a wide range of disturbances, and for retention of their resilience." RMP Glossary at 8.

1. Ripeness of the Forest Practices Claim

The court holds that claim four is not ripe. This claim is almost identical to the question before the Supreme Court in *Ohio Forestry*. *See* 523 U.S. 726. First, withholding immediate review would not cause Friends of the Gorge significant hardship. As with the management plan at issue in *Ohio Forestry*, the RMP does not create any rights or liabilities with regard to forest stands. *See id.* at 733. A site plan must be prepared by an applicant before any forest practice may occur. The site plan will then be reviewed by the Forest Service, in collaboration with county and/or state regulatory agencies. RMP II-2-16. Second, an immediate decision would interfere with the Forest Service's ability to revise its policies with regard to particular forest stands and ensure forest health across the Scenic Area. *See Ohio Forestry*, 523 U.S. at 735.

Third, the court would benefit from further factual development. A future court would have the benefit of knowing exactly what "vegetation management" was proposed, how many trees would be cut, where the cutting would occur, and how the cutting would occur, none of which is before the court today.

2. The Secretary's Concurrence with the Forest Practices Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim four. The management plan guidelines direct the Forest Service to review a site plan for all special management area forest practices for compliance with the RMP regarding protection of scenic, natural, and cultural resources. RMP II-2-16. To aid in the required review, the RMP contains quantitative metrics for use in designing treatments so as to achieve the desired forest structure and pattern. RMP II-2-27. Further, the Secretary argues that the definition of "forest health" must be somewhat elastic because all forest stands are different. (Defs.' Mem. in Supp. of Summ. J. (#92) at 40.) Finally, Congress delegated development of the management plan to the Commission, Secretary, and Forest Service, and the Forest Service has significant expertise in the area of forest practices, therefore deference to the agency's opinion is appropriate. *See Chevron*, 467 U.S. at 843-44.

H. Claim 5: Recreation Guidelines

In claim five, Friends of the Gorge argues that the special management area Recreation Intensity Class 2 guidelines violate the Scenic Area Act by allowing recreational vehicle campgrounds in special management area Recreation Intensity Class 2 zones, thereby failing to protect recreation resources on lands zoned for semi-primitive use. *See* RMP I-4-27. The RMP designates Recreational Intensity Classes ("RICs") for land throughout the Scenic Area and the

RIC level dictates the scope and intensity of allowed recreational uses. RIC 2 areas are restricted to "low intensity" uses, where "the emphasis is to provide opportunities for semi-primitive recreation," where people can "escape from noise and crowds." RMP I-4-27. "Semi-primitive" recreation opportunities are defined as "[a]reas accessible only by primitive transportation routes, with low to moderately infrequent human encounters and with only subtle modifications to the natural setting." RMP Glossary at 15.

In the general management areas, regulations of RIC 2 areas limit campgrounds to tents only and allow only cars, not "vehicles," which might include recreational vehicles. RMP I-4-17. In the special management areas, regulations of RIC 2 areas allow for "vehicles," not just cars. RMP I-4-27. Friends of the Gorge argues that the special management area guidelines violate the Scenic Area Act because they adversely affect recreation resources, are inconsistent with the RMP definition of RIC 2 areas, and are less protective than the guidelines for the general management areas. (Pls.' Mem. in Supp. of Summ. J. (#78) at 24-26.)

1. Ripeness of the Recreation Guidelines Claim

The court holds that claim five is not ripe. First, the court would benefit from further factual development because it is impossible to know today whether the use of the word "vehicle" will adversely affect recreation resources in violation of the Scenic Area Act. Second, further review will occur before any potential for injury to Friends of the Gorge. The development of new and the retrofitting of current recreation areas is done by county, state, and federal agencies. In implementing the RMP, those agencies could choose to further refine the regulations, as was the case in *Ohio Forestry*. For example, while recreational vehicles are not expressly prohibited in these RIC 2 areas under the RMP, it may be the case that they are never

actually allowed. Even if they are allowed in some RIC 2 areas, a later court could make a determination on whether allowing recreational vehicles violates the Scenic Area Act or is inconsistent with the definition of RIC 2 areas, based on location specific facts. Third, the difference in the use of "car" versus "vehicle" does not necessarily mean that the RIC 2 campgrounds in general management areas are more protective of recreation resources. Agencies may never allow recreational vehicles, or they may limit the size or allow only handicapped visitors to enter with such vehicles.

2. The Secretary's Concurrence with the Recreation Guidelines

The court holds that the Secretary's concurrence was not arbitrary and capricious or contrary to law as to claim five. There is no evidence in the record that the use of the word vehicle will adversely affect recreation resources in violation of the Scenic Area Act. In the absence of such evidence, the Secretary's concurrence was not arbitrary and capricious. The second argument appears to arise out of a disagreement over the definition of terms used in the RMP, specifically "semi-primitive recreation." Internally inconsistent definitions within the RMP would be evidence that the Secretary had acted in an arbitrary and capricious manner. However, an "*emphasis* [on providing] opportunities for semi-primitive recreation" does not so limit the Secretary that allowing recreational vehicles is inconsistent with the definition of a RIC 2 zone. RMP I-4-27 (*emphasis added*). Finally, although it would be logical for the RIC 2 areas to have similar guidelines for general and special management areas, it does not follow that it is arbitrary and capricious for the guidelines to have minor differences in wording. Because there is no evidence that the use of the term "vehicle" will cause special management area RIC 2 zones to

be less protected than those in the general management areas, the Secretary's concurrence was not arbitrary and capricious or contrary to law.

I. Claim 7: New Dwellings

In claim seven, Friends of the Gorge argues that the RMP violates the Scenic Area Act by allowing new dwellings on parcels smaller than forty acres in the special management areas. The Scenic Area Act requires that the management plan "prohibit major development actions in special management areas," except for certain exceptions not applicable to this case. 16 U.S.C. § 544d(d)(5). "Major development actions" are defined as, among other things, "permits for siting or construction within a special management area of any residence or other related major structure on any parcel of land less than forty acres in size." *Id.* § 544(j)(4).

Friends of the Gorge points to three places where the RMP allegedly violates this provision of the Scenic Area Act. First, new single-family dwellings are allowed on any legally created lot, with no mention of parcel size. RMP II-4-11. Second, construction of "new dwelling units" is allowed at Rowena Dell, even though many of the lots are under forty acres. RMP II-4-10. Third, the forty-acre minimum parcel size is not incorporated in a guideline allowing the construction of farm-labor dwellings. RMP II-1-23 to -24.

1. Ripeness of the New Dwellings Claim

The court holds that the claim is ripe as to the Rowena Dell guideline and not ripe as to the single-family and farm-labor dwelling guidelines. Applications for development must be reviewed by county agencies before any building may occur. There is no way to know whether the agencies will allow building to occur on parcels that are less than forty acres, outside of Rowena Dell. Friends of the Gorge argues that because counties generally draft their ordinances

based on the management plan, if the management plan is not specific regarding the limitation it will not be incorporated in the agency's decision making process. (Pls.' Reply (#98) at 42.) However, a ripeness analysis does not ask the court to guess at how likely a result will be, rather it asks whether review at a later time is more appropriate. In this case, Friends of the Gorge can bring suit if and when a county approves plans to construct a single-family or farm-labor dwelling on a lot that is less than forty acres. The question of Rowena Dell is different because the parcels have already been created and the RMP specifically allows development, therefore the counties would be in violation of the management plan if they refused to allow construction on the Rowena Dell lots.

2. The Secretary's Concurrence with the New Dwellings Guidelines

The court holds that the Secretary's concurrence was contrary to law as to the Rowena Dell guideline. The Secretary argues that allowing building on less than forty acres is a "reasonable accommodation of the other purposes" of the Scenic Area Act, namely that the Act should protect and support the economy of the Gorge and the agricultural lands for agricultural uses, *see* 16 U.S.C. § 544a, particularly as to Rowena Dell, which was approved before the Scenic Area Act was passed. (Defs.' Mem. in Supp. of Summ. J. (#92) at 43.) He argues that his interpretation of the statute should receive deference in the absence of a manifest "plain meaning" of the statute. (Defs. Mem. in Supp. of Summ. J. (#92) at 43 (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).) The Secretary states that the meaning is not plain because there is tension between the goals of the statute: not allowing development on parcels less than forty acres and supporting the economy and agricultural uses. (Defs.' Reply (#112) at 21.)

The court holds that the Scenic Area Act's ban on major development actions is plain and unambiguous. Specifically, the prohibition against residences on "less than forty acres" is about as unambiguous as a statute can get. The Secretary's contrary interpretation is not entitled to deference. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The Rowena Dell guideline at issue, *see* RMP II-4-10, is in direct contradiction of the plain language of the statute. Therefore, the Secretary's concurrence was contrary to law.

J. Claim 8: Expansion of Commercial and Multifamily Uses

In claim eight, Friends of the Gorge argues that the RMP provision allowing expansion of existing commercial and multifamily residential uses in the special management areas, *see* RMP II-7-8, violates the Scenic Area Act because the provision allows major development actions, which are expressly prohibited by the Act.¹³ As discussed above, the Act prohibits major development actions in the special management areas. *See* 16 U.S.C. § 544d(d)(5). "Major development actions" include, "any permit for siting or construction outside urban areas of multifamily residential, industrial or commercial facilities, except such facilities as are included in the recreation assessment." *Id.* § 544(j)(2).

The RMP allows existing commercial and multifamily residential uses in the special management areas to "expand as necessary for successful operation on the dedicated site." RMP

¹³ The Oregon Court of Appeals found for Friends of the Gorge on a similar claim related to the general management areas. *Friends of the Columbia Gorge*, 171 P.3d at 971-72 (assignment of error thirteen). The Oregon Supreme Court does not appear to be reviewing this on appeal. Or. S. Ct. Media Release (July 2, 2008) at 3.

II-7-8. The "dedicated site" is defined as the "area actively devoted to the current use and as delineated on the site plan." RMP Glossary at 6. Friends of the Gorge states that because the dedicated site plan can be larger than the area currently covered by the structure, the RMP guideline allows "construction" of commercial and multifamily residential facilities. (Pls.' Mem. in Supp. of Summ. J. (#78) at 28.) The Secretary contends that allowing expansion of the applicable existing uses under narrowly tailored conditions is a reasonable interpretation of the Scenic Area Act. (Defs.' Mem. in Supp. of Summ. J. (#92) at 44.)

1. Ripeness of the Expansion of Commercial and Multifamily Uses Claim

The court holds that claim eight is ripe. As with the Rowena Dell portion of claim seven, Friends of the Gorge's claim here requires only that the court look at the language of the RMP and the language of the Scenic Area Act to determine whether there has been a violation. No further factual development is necessary. It is not necessary, for example, to know which particular site is being developed, with what sort of business. Nor is it merely speculative whether a county would approve such a project, because the county must conform to the requirements of the RMP.

2. The Secretary's Concurrence with the Commercial and Multifamily Uses Guidelines

The court holds that the Secretary's concurrence was contrary to law as to claim eight. The Secretary argues that the guideline is a reasonable interpretation of the Scenic Area Act, which accommodates existing uses, and that this court should defer to the Secretary's reasonable interpretation. (Defs.' Mem in Supp. of Summ. J. (#92) at 44.) However, as discussed in relation to claim seven, Congress was clear in the Scenic Area Act that major development actions, as

defined, are prohibited in special management areas. The Secretary is not entitled to deference in interpreting a plain and unambiguous statutory provision. *See Chevron*, 467 U.S. at 842-43.

Here, the Secretary essentially contends that expansion of existing structures would not necessarily involve "siting or construction," as those words are used in the Act. I disagree. The language of the RMP is in direct violation of the plain and unambiguous language of the Scenic Area Act, therefore the Secretary's concurrence was contrary to law, as to this claim.

III. The Secretary's Motion for a Stay

The court denies the Secretary's motion for a stay pending the decision of the Oregon Supreme Court in the appeal taken from the Oregon Court of Appeals decision, *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 171 P.3d 942 (Or. Ct. App. 2007). The Oregon Court of Appeals has stated that Oregon courts do not have jurisdiction over claims relating to the special management areas of the Scenic Area and that issue was not appealed to the Oregon Supreme Court, therefore there is no risk of inconsistent decisions.

CONCLUSION

Based on the foregoing, Friends of the Gorge's Motion for Summary Judgment (#76) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Rowena Dell in claim seven and as to claim eight and DENIED as to the remainder of claim seven and as to claims one through six. The Secretary's Cross-Motion (#91) is therefore GRANTED IN PART and DENIED IN PART. The motion is DENIED as to Rowena Dell in claim seven and as to

claim eight and GRANTED as to the remainder of claim seven and as to claims one through six.

The Secretary's Motion for a Stay (#97) is DENIED.

IT IS SO ORDERED.

Dated this 24th day of November, 2008.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF THE COLUMBIA GORGE,
INC.;COLUMBIA RIVERKEEPER, 1000
FRIENDS OF OREGON; CLAUDIA
CURRAN; ERIC LICHTENTHALER;
PHIL PIZANELLI; DIXIE STEVENS;
BRIAN WINTER; and CYNTHIA
WINTER,

Plaintiffs-Appellants,

vs.

THOMAS VILSACK, Secretary of the
U.S.Department of Agriculture; MARY
WAGNER, Regional Forester, Pacific
Northwest Region, U.S. Forest Service,

Defendants-Appellees

No. 09-35414

D.C. No. 3:04-CV-01423-MO

District of Oregon, Portland

STIPULATED MOTION TO
VOLUNTARILY DISMISS
APPEAL WITHOUT
PREJUDICE

The parties in the above-captioned appeal have entered into a settlement agreement and, therefore, pursuant to Fed. R. App. P. 42(b), respectfully and jointly move the Court to dismiss the above-captioned appeal without prejudice to

reinstatement, and subject to reinstatement in accordance with and solely to the extent authorized under the terms of the parties' Settlement and Joint Dismissal Agreement, a copy of which is attached hereto.

DATED: October 15th, 2010

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(503) 777-5473

Of Attorneys for Plaintiffs

/s/ Stephen J. Odell
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Assistant U.S. Attorney
(503) 727-1024

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing STIPULATED MOTION TO VOLUNTARILY DISMISS APPEAL WITHOUT PREJUDICE by filing the documents with the Court, on October 15, 2010, through use of its CM/ECF system, which will automatically send notification of and effect electronic service upon the following counsel of record in this action:

Stephen J. Odell
Assistant U.S. Attorney
U.S. Attorney's Office
1000 SW Third Avenue, Suite 600
Portland OR 97204-2902

DATED: October 15, 2010

REEVES, KAHN & HENNESSY

/s/ Gary K. Kahn
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UNITED STATES COURT OF APPEALS
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FRIENDS OF THE COLUMBIA GORGE, INC.;
COLUMBIA RIVERKEEPER, 1000 FRIENDS
OF OREGON; CLAUDIA CURRAN; ERIC
LICHTENTHALER; PHIL PIZANELLI; DIXIE
STEVENS; BRIAN WINTER; and CYNTHIA
WINTER,

Plaintiffs-Appellants,

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THOMAS VILSACK, Secretary of the U.S.
Department of Agriculture; MARY WAGNER,
Regional Forester, Pacific Northwest Region,
U.S. Forest Service,

Defendants-Appellees.

No 09-35414

D.C. No. 3:04-CV-01423-MO

District of Oregon,
Portland

SETTLEMENT AND JOINT
DISMISSAL AGREEMENT

Pursuant to Fed. R. App. P. 42(b), Plaintiffs and Defendants hereby jointly submit this Agreement reflecting the settlement they have reached of the above-referenced appeal that provides, among other things, for dismissal of the appeal under the terms set forth below. The parties hereby jointly agree as follows:

SETTLEMENT AND JOINT DISMISSAL AGREEMENT

1 This appeal shall be dismissed without prejudice to reinstatement, and may be reinstated only to the extent authorized under the terms set forth within this Agreement. Within 14 days after execution of this Agreement by all parties, as reflected on the signature lines below, Plaintiffs will prepare and the parties will file a stipulated motion to dismiss the appeal without prejudice to reinstatement, with a copy of this Agreement attached to the motion.

2 Following consultation with the Columbia River Gorge Commission ("Commission") pursuant to 16 U.S.C. § 544f(f)(1), Defendants will submit to the Commission for adoption revisions to the Special Management Area (SMA) provisions of the Revised Management Plan for the Columbia River Gorge National Scenic Area ("RMP") so as to make the RMP consistent with the final Judgment of the District Court entered on February 19, 2009 (Docket #122) and the District Court's Opinion and Order dated November 28, 2008 (Docket #120) with respect to that court's rulings regarding residences in Rowena Dell and commercial and multi-family residential uses in the Special Management Areas, with the understanding that such revisions must go through a public process before they will become final, including adoption by the Commission and concurrence by the U.S. Secretary of Agriculture

3. Following consultation with the Commission pursuant to 16 U.S.C. § 544f(f)(1), Defendants will submit to the Commission for adoption the following proposed revisions for inclusion in the RMP, with the understanding that such revisions must go through a public process before they will become final, including adoption by the Commission and concurrence by the U.S. Secretary of Agriculture:

- a Provisions expressly prohibiting recreational vehicle campgrounds in portions of the SMAs classified as semi-primitive (*i.e.*, Recreational Intensity Class 2) (Claim #1 2).

b. Provisions expressly requiring that any new dwelling in both of the two categories listed below is sited on a parcel that is at least 40 acres in size (Claim #7):

i Any new dwelling located within an SMA Residential land use designation and subject to the SMA provisions of the RMP.

ii Any new farm labor dwelling located within an SMA and subject to the SMA provisions of the RMP

4. Defendants agree to consider submitting to the Commission language for inclusion in the RMP to address the protection of scenic, natural, and cultural resources in SMAs from cumulative adverse effects (Claims #1, 2, 6, respectively).

5. If the SMA provisions of the RMP are revised pursuant to this Agreement, and the adopted revisions do not include any revision for any specific claim(s) listed in paragraph 4 above, then Plaintiffs may reinstate the corresponding claim(s) for which no revision(s) were made by filing a notice of reinstatement with the Ninth Circuit within 28 days after the 90-day period for Secretarial concurrence provided in 16 U.S.C. § 544d(f) ends.

6. If the SMA provisions of the RMP are revised pursuant to this Agreement, and any revision(s) referred to in paragraphs 2 and 3 above are not included, then Plaintiffs may reinstate the corresponding claim(s) and/or any or all of the claims set forth below by filing a notice of reinstatement with the Ninth Circuit within 28 days after the 90-day period for Secretarial concurrence provided in 16 U.S.C. § 544d(f) ends:

a. The RMP fails to ensure that new development in the SMAs is compatible in size and scope with existing development, and thereby fails to protect scenic resources (Claim #1, 2).

- b. The SMA water resource buffers are insufficient to avoid adverse effects to natural resources (Claim #2.2)
- c. The RMP fails to protect natural resources in the SMAs from the individual and cumulative adverse effects of new livestock grazing uses (Claim #2.3)
- d. The RMP fails to protect and enhance natural and open space resources in the SMAs by allowing "without review" the replacement and expansion of existing culverts in areas zoned SMA Open Space (Claim #2.4)
- e. The SMA forest practices rules fail to protect and enhance scenic and natural resources (Claim #4)

7. If the public process utilized by Defendants for implementing this Agreement is not complete within 270 days from the date this Agreement becomes effective, then Plaintiffs may reinstate any claim by filing a notice of reinstatement with the Ninth Circuit within 28 days of the expiration of the 270-day period. For purposes of this paragraph, completion of the public process shall mean that the RMP has been revised pursuant to this Agreement, including adoption of such revisions by the Commission and concurrence by the U.S. Secretary of Agriculture. If the public process described in this paragraph is not complete within 270 days from the date this Agreement becomes effective, and if Plaintiffs do not reinstate any claim as described in this paragraph, then this Agreement expires 60 days after the expiration of the 270-day period.

8. Nothing in this Agreement shall bar Plaintiffs from challenging any revisions made to the RMP or any concurrence or denial of concurrence by Defendants and/or their agents or successors.

9. Defendants agree to pay to Plaintiffs, and Plaintiffs agree to accept, the sum of \$30,000.00 as the full amount due and owing for attorneys' fees and costs incurred in this case.

Defendants will submit the necessary paperwork to process the payment within 30 days of receiving written notice from Plaintiffs that Plaintiffs do not intend to reinstate any of the claims as described in this Agreement. The check shall be made payable to Friends of the Columbia Gorge, Inc (Federal Tax Identification Number 93-0782467) and mailed to the following address:

Friends of the Columbia Gorge
ATTN: Nathan Baker
522 SW 5th Avenue, Suite 720
Portland, Oregon 97204-2100

The undersigned counsel for Plaintiffs represents that he has obtained from all of the Plaintiffs the necessary authorization for payment to be made in accordance with this paragraph's terms.

10. This Agreement shall not constitute an admission of liability or fault on the part of the Defendants or their agents or employees.

11. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the United States is obligated to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provisions of law.

12. This Agreement shall be binding on the parties and their successors, agents, designees, employees, and all those acting by and through their authority.

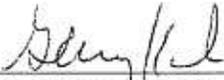
13. The undersigned representatives of each party certify that they are fully authorized by the party they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

14. The terms of this Agreement shall become effective upon this Court's dismissal of the above-referenced appeal pursuant to the terms of this Agreement and Fed. R. App. 42(b).

15. Before filing any action to enforce the terms of this Agreement, a party shall provide at least 30 days' written notice of any alleged breach or dispute with respect to its execution to all

other parties, and the parties shall attempt to resolve the matter without the need for litigation during that period, provided, however, that the expiration date of this Agreement as stated in paragraph 7 shall be extended by 30 days if the Agreement would otherwise expire during the 30-day notice period as provided in this paragraph.

DATED: October 15, 2010



Gary K. Kahn, OSB No 81481
Reeves, Kahn & Hennessy
(503) 777-5473

Of Attorneys for Plaintiffs



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Forest
Service

Columbia River Gorge
National Scenic Area

902 Wasco Ave., Suite 200
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541-308-1700

File Code: 1900
Route To: (1900)

Date: October 22, 2010

Subject: Concurrence with Columbia River Gorge Commission revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* for the General Management Area

To: Regional Forester, R6

INTRODUCTION

The Columbia River Gorge Commission (Gorge Commission) submitted revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* (Management Plan) for concurrence review by the Secretary of Agriculture. This review decision has been delegated to the Regional Forester.

The revisions were received by the Regional Forester on October 15, 2010. Per Section 6(f) and (g) of the Columbia River Gorge National Scenic Area Act (Act), the Regional Forester has 90 days to make a decision regarding concurrence for plan revisions. This 90-day period expires January 13, 2011.

The proposed plan revisions to the Management Plan address four specific issues requested by the Oregon court: (1) eliminate the provisions for expansion of existing industrial uses; (2) clarifying which definition of 'natural resources' the Commission relies upon in the Management Plan; (3) ensure provisions are in place to prevent adverse effects to natural resources; (4) and ensuring there are provisions to prevent adverse cumulative effects to cultural resources. All changes apply only to lands within the General Management Area (GMA).

Section 6 (f) (1) and (2) of the Act provide three options for concurrence:

- Option 1. Concurrence that the plan revisions are consistent with the management plan.
- Option 2. Denial of concurrence. The plan revisions would be found inconsistent with the management plan. Suggested modifications must be submitted to the Gorge Commission.
- Option 3. Silence. Failure to act (deny or grant concurrence) within 90 days shall be deemed as concurrence.

The Act provides only one measure or criteria for determining concurrence. According to Section 6 (f) (1) and (2), the determination is based on consistency of the ordinance with the Management Plan. This is the sole basis for making the determination.



THE REVIEW

The Forest Service NSA staff used briefing papers and meeting notes by Gorge Commission staff completed in 2009 and 2010 for this review. The NSA staff reviewed the proposed changes to the Management Plan to ensure: 1) there were no omissions from the guidelines and necessary policies of the Plan; and 2) there were no misstatements or errors in interpretation of direction from the Plan.

Findings of the Oregon Court – July 16, 2009

Issue 1 – Expansion of Existing Industrial Uses

The Oregon Court of Appeals (2007) concluded the provision to allow Expansion of Existing Industrial Uses (MP-II-7, B) contradicts the provisions of the Scenic Area Act requirement that the Management Plan prohibit industrial development in the scenic area outside urban areas. The Commission did not appeal this decision to the Oregon Supreme Court.

Issue 2 – Definition of Natural Resources

The Oregon Supreme Court (2009) observed that it was unclear if geologic features and geologic hazards were covered in the Management Plan. The Court felt that the glossary definition was sufficiently broad that geologic features and geologic hazards fall within it, but that the Introduction to the Natural Resources Chapter of the Management Plan contains a more narrow definition, which does not include geological features or hazards. The Court stated that either definition was a permissible interpretation of the Act. The Court directed the Gorge Commission to clearly specify which of the two definitions it relied on when it did not regulate geologic features and hazards as natural resources in the Management Plan.

Issues 3 and 4 - Cumulative Effects to Natural and Cultural Resources

The Oregon Supreme Court concluded that the land use and cultural resource policies did not adequately eliminate the potential for adverse cumulative effects. The Court concluded that the Act does not require a case-by-case approach to address cumulative effects. The Act focuses on the result that the development will have no adverse effect, rather than on any particular method for achieving the result. The Court upheld the provisions in Scenic Resources section that require agencies to make cumulative impacts determination each time that they are presented with a development application and to prohibit development that would adversely affect scenic resources. The scenic resource provisions were felt as fulfilling the Act's requirements to address cumulative effect. The commission had the choice of either adopting a case-by-case analysis of cumulative effects or clarify Management Plan policies to eliminate adverse effects to natural and cultural resources.

Chronology of the Gorge Commission Response

The discussions and deliberations concerning the proposed Management Plan revisions have been an ongoing topic at the Columbia River Gorge Commission meetings in 2009 and 2010. The Gorge Commission meetings are open to the public and public testimony is accepted at each

public meeting. Listed below is a chronology of the Gorge Commission's response to the Oregon Court:

November 10, 2009 – Gorge Commission staff present a summary of the Oregon Court ruling and staff's recommended responses. The Commissioner's reviewed and discussed all four issues.

February 9, 2010 – Staff led a work session on cumulative effects for the Commissioner's. The Commissioner's decided to respond to the court decision through a management plan revision rather than an amendment. During this meeting they reaffirmed that Issue 1 was straight forward and did not require further discussion or staff time. The Commissioner's requested a clarification of competing definitions of natural resources in the Management Plan to determine if geological features are "natural resources" as that term is used in the act for Issue 2. For Issue's 3 and 4 the Commissioner's discussed how the current Management Plan eliminates adverse effect to natural and cultural resources or whether to adopt new plan guidelines requiring a case-by-case analysis. The Commission directed the staff to use the case-by-case analysis using the cumulative effect review in scenic resources as a template.

March 9, 2010 - Gorge Commission staff presented a report on how the Management Plan protects geologic resources and summarized how the six counties have responsibilities for geologic hazards. During this meeting the planning directors for Wasco, Hood River, Skamania, and Multnomah counties provided public testimony in support of Gorge Commission staff recommendations to address the Oregon court's decisions. The Commissioner's voted and unanimously approved an Action Plan to addressing the Oregon court's decisions.

June 8, 2010 – Gorge Commission staff presented a summary of public comments for the proposed plan revisions. All of the comment letters requested the enactment of clear standards to prevent cumulative effects, the updating of resource inventories, monitoring development impacts, and establishment of thresholds. The Friends of the Gorge recommended replacing the current cumulative effect guideline for scenic resources and add specific language to the plan for scenic, cultural, and natural resources. They also supported adding a definition of geologic features and guidelines for protecting significant geologic features in the next plan review, and emphasized the importance of having a definition of natural resources in the glossary. The Commission also received letters from three counties supporting the Staff's recommended changes; supported the Vital Signs Indicator project; and raised concerns that adding new criteria will introduce vague standards that will be difficult for the counties to implement.

July 13, 2010 – The Commissioner's heard public comments from 22 members of the public. The Planning Director for Hood River County said he and the other planning director's within the National Scenic Area expressed strong support for the approving Staff's recommended changes to the Management Plan. The Commissioner's deliberated on the four issues identified in the Oregon Supreme Court ruling. The Commissioner's voted and approved Staff's recommendations for each issue.

Review of Issues

Issue 1 – Expansion of Existing Industrial Uses

The Gorge Commission has approved the deletion of the following guideline from the Management Plan: *B. Expansion of Existing Industrial Uses in the GMA: Existing industrial uses in the GMA may expand as necessary for successful operation on the dedicated site. Expansion beyond the dedicated site shall be prohibited (MP II-7-8).*

Review

Deletion of the guideline meets the requirements of the Oregon Appeals Court. This change is consistent with the Management Plan and the Act and can be approved by the Regional Forester.

Issue 2 – Definition of Natural Resources

The Gorge Commission has approved the deletion of the glossary definition (MP Glossary12) of “natural resources”: *Naturally occurring features including land, water, air, plants, animals (including fish), plant and animal habitat, and scenery.* The Gorge Commission approved the use of the definition from the Introduction to the Natural Resources chapter: *Wetlands, streams, ponds and lakes, riparian areas, wildlife and wildlife habitat, rare plants, and natural areas.*

Review

Neither the Act nor the Management Plan defines geologic features or geologic hazards. Within the Gorge the geologic features are of many different sizes and scales ranging from glacial erratic boulders to large geologic features such as the Bonneville Landslide and Beacon Rock. Geologic features are a primary component of wetlands, streams, ponds and lakes, riparian areas, wildlife and wildlife habitat, rare plants, and natural areas, all of which are regulated to various degrees in the Natural Resources chapter. The Act requires protection and enhancement of Gorge resources and prevention of adverse effects and indirectly includes geologic features. The continued use of the definition in the Natural Resources chapter, while not explicit, includes most geologic features and ensures their protection. The Commission did not decide to enact any changes to address geologic hazards. The deletion of the glossary definition of “natural resources” and use of the definition from the Introduction to the Natural Resources chapter meets the requirements of the Oregon Supreme Court and is consistent with the Management Plan and the Act. This change can be approved by the Regional Forester.

Issue 3 - Cumulative Effects to Natural Resources

The Gorge Commission has approved the use of similar language to the scenic resources cumulative effects guidelines and will add new Guideline 1 to the Natural Resources chapter for the GMA, directly under “GMA Provisions” (MP 1-3-3):

1. Determination of potential natural resources effects shall include consideration of cumulative effects of proposed developments within the following area: 1) wetlands, streams, ponds, lakes, riparian area and their buffer zones; 2) rare plants and their buffer zones; 3) sites within 1000 feet of sensitive wildlife areas and site; and 4) sites within 1000 feet of rare plants.

Review

The Oregon Supreme Court found that the Act did not specify any particular methodologies to address cumulative effects on natural or cultural resources. The Court found that the scenic resources approach is consistent with the Act. The adoption of cumulative effects guidelines that are similar to scenic resources, when used in conjunction with plans and policies to protect natural resources, meets the requirement of the Court and is consistent with the Act. These changes are consistent with the Management Plan and can be approved by the Regional Forester

Issue 4 – Cumulative Effects to Cultural Resources

The Gorge Commission has approved the use of similar language to the scenic resources cumulative effects guidelines and will add new Guideline 1 to the Cultural Resources chapter for the GMA, directly under “GMA Provisions” (MP 1-2-8):

1. Determination of potential natural resources effects to significant cultural resources shall include consideration of cumulative effects of proposed developments that are subject to any of the following: 1) a reconnaissance or historic survey; 2) a determination of significance; 3) an assessment of effect; or 4) a mitigation plan.

Review

The proposed addition to the Management Plan for Cultural Resources meets the same requirements as described for Natural Resources. These changes are consistent with the Management Plan and can be approved by the Regional Forester.

CONCLUSION

The Columbia River Gorge Commission has submitted four proposed changes to the Management Plan for lands within the GMA to address the findings of the Oregon Court of Appeals and Oregon Supreme Court. The public has had an opportunity to comment and presented their requests and findings to Gorge Commissioners in writing and through public meetings. The Forest Service staff have reviewed the proposed changes and found no misstatements or errors in interpretation of direction from the *Management Plan for the Columbia River Gorge National Scenic Area*. I recommend implementation of Option 1 for concurrence and I have drafted a letter for your signature and included it as an attachment. If you have further questions please feel free to contact myself at 541-308-1706 or Lynn Oliver at 541-308-1716.

/s/ Daniel T Harkenrider

DANIEL T HARKENRIDER

Area Manager

cc: Daniel T Harkenrider; Lynn K Oliver; Philip J Mattson

Enclosure: Draft Letter of Concurrence from Regional Forester



United States
Department of
Agriculture

Forest
Service

Pacific
Northwest
Region

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503-808-2468

File Code: 1900/1920

Date: November 1, 2010

Ms. Jill Arens
Executive Director
Columbia River Gorge Commission
PO Box 730
White Salmon, WA 98672

Dear Ms. Arens:

The Columbia River Gorge Commission (CRGC) submitted plan revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* for concurrence review by the Secretary of Agriculture. The Secretary, through the Chief of the Forest Service, has delegated this authority to me as Regional Forester. The amended ordinance was received in my office on October 15, 2010. Per Section 6(f) and (g) of the Columbia River Gorge National Scenic Area Act, the Regional Forester has 90 days to make a decision regarding plan revisions. This 90-day period expires January 13, 2011.

The proposed plan revisions to the Management Plan address four specific issues requested by the Oregon Supreme Court (2009) and Oregon Court of Appeals (2007) because of plan review litigation. The revisions include: (1) eliminate the provisions for expansion of existing industrial uses; (2) clarifying which definition of 'natural resources' the Commission relies upon in the Management Plan; (3) ensure provisions are in place to prevent adverse effects to natural resources; (4) and ensuring there are provisions to prevent adverse cumulative effects to cultural resources. All changes apply only to lands within the General Management Area (GMA).

I concur that the four proposed plan revisions to the *Management Plan for the Columbia River Gorge National Scenic Area* are consistent with the Management Plan and the Scenic Area Act.

Sincerely,

/s/ *Mary Wagner*

MARY WAGNER
Regional Forester

Enclosures (2)

cc: Philip J Mattson
Daniel T Harkenrider
Lynn K Oliver

