

## LAND USE MANAGEMENT IN THE COLUMBIA RIVER GORGE: INTEGRATING ECOLOGICAL INSIGHTS

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Environmental protection presents a difficult problem: ecosystems do not have borders. The Columbia River Basin sprawls over six states and two countries. The area is thus subject to several jurisdictions, controlled by a variety of state and federal agencies, as well as local government action and international treaties. This has caused serious management problems. However, management of the area has evolved over the years through legislation, government compromise, and legal action. This evolution in management has followed a pattern noted by Robert B. Keiter: “Key ecological insights and understanding have been incorporated into federal law and are shaping an emerging commitment to ecosystem-based management, particularly in the public domain. These same insights are beginning to penetrate state and local law, which could reshape the fundamental principles governing property ownership.”<sup>1</sup> This paper examines two notable areas in change, focusing on the Columbia River Gorge, affecting land use management, particularly in terms of incorporating new ecological insights.

The Columbia River Gorge is a breathtakingly beautiful area creating the border between Oregon and Washington. Historically, Oregon and Washington have managed this area separately, without any comprehensive management plans or goals. The two states, in fact, had entirely different means of management: Oregon’s management of the area was done centrally, through Salem, while Washington left management of the area

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<sup>1</sup> Keiter, Robert B., “Ecosystems and the Law: Toward an Integrated Approach.” Ecological Applications 8 (May, 1998), 339.

to local governments. However, without any comprehensive goals, these separate management plans on either side of the river simply worked against each other, making it nearly impossible for any goals of environmental protection to be met. Without regulation, or, more importantly, a serious commitment to regulation, environmental protection is ignored for economic gain. These two bordering states have had a history in this region of competing against each other for business interests and making changes to land use policy in order to attract business that will add to the state's economy. A 1983 article discussed this problem in the management of the Columbia River Gorge (CRG):

...after forty-seven years of studies and proposals, no unified or effective management plan for the CRG exists. Current government entities lack the financial and technical resources, as well as the regional authority necessary to protect and enhance the Gorge. Thus, a continuing controversy over CRG management arises from efforts to design a management framework that preserves the historic natural wonders of the Gorge while minimizing harm to individual property rights in the area.<sup>2</sup>

By this point, it was clear that some type of comprehensive plan was imperative for any environmental protection to occur, therefore making the two states share the economic burden of environmental protection, rather than competing for short term economic gain though long term environmental sacrifice.

In response to this crisis of management, in 1983 two bills were submitted to Congress for action. The first bill, sponsored by Oregon Senator Bob Packwood, designated the Gorge as a National Scenic Area that would be administered by the Secretary of Agriculture through the Forest Service with the advice of a regional commission. The bill (S.B. 627) mandates preparation of a single land use management

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<sup>2</sup> Meyers, Gary D., and Jean Meschke. "Proposed Federal Land Use Management of the Columbia River." Environmental Law 15 (Fall, 1984).

plan for the Gorge and incorporates federal, state, and local government agencies in the is process. With a comprehensive land use plan, future economic development of the area can be consistent with preservation of the scenic and natural resources of the Gorge. The second bill was submitted to Congress by the governors of Washington in Oregon and proposed “a different balance between preservation and development” and the establishment of a fourteen-member regional commission independent of any other entity to manage the Columbia River Gorge.<sup>3</sup>

In 1986, the Columbia River Gorge National Scenic Area Act was passed, putting Senator Bob Packwood’s plan for the area into effect. The National Scenic Area Act created a comprehensive management structure for the Gorge as a region: one set of legal standards for managing the area and a regional or interstate agency to implement the law. Oregon and Washington adopted this legislation in the Columbia River Gorge Compact. The purpose of the Act is “to establish 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 “to protect and support the economy of the Columbia River Gorge by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner that is consistent with [the protection of the resources of the CRG].”<sup>4</sup> The Columbia River Gorge National Scenic Area Act provides for a uniform set of goals for the area. It also provides the framework for cooperative management of the area. Under the Act, the National Scenic Area is managed by the six Gorge counties, the states of Oregon and Washington, the US Forest Service (under the

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<sup>3</sup> Meyers.

<sup>4</sup> Columbia River Gorge National Scenic Area Act, §544a.

Department of Agriculture), and the Columbia River Gorge Commission. Additionally, tribal trust lands are managed by tribal entities.

The Columbia River Gorge National Scenic Area Act, however, simply controls zoning. No increased emphasis is placed on environmental protection; instead, most of the emphasis seems to be placed on economic development, particularly in the tourism sector. Thus, environmental protection with a direct and/or immediate impact on tourism (e.g., aesthetic beauty of the CRG) has a better success rate in being supported by the Commission. Because it is a regional agency, when the Commission decides to change zoning ordinances, however, it does not have to order an environmental impact statement (EIS). Environmental impact statements are required for actions taken by federal agencies under the National Environmental Policy Act (NEPA). Thus, the Commission has the ability to change a zoning area to and allow private interests to drastically alter an area of the Gorge, which would have a significant, negative impact on the ecology of the area, without having to complete an environmental impact statement. The only way that an EIS would be mandated would be if a federal agency acted in concurrence with this change.

The Commission, is, at least, given significant regulatory authority to manage land resources around the Gorge. This is significant because in 1980, another regional authority was created in the area to create “a long-range plan for electrical power in the Northwest and a program to restore fish and wildlife in the Columbia River Basin.”<sup>5</sup> The Northwest Power Planning Council, created through an agreement between Washington,

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<sup>5</sup> Watters, Laurence. “A Pacific Coast Perspective on Policy and Legal Issues to Reauthorization of the Magnuson Fisheries Conservation and Management Act.” Tulane Environmental Law Journal 9 (Summer, 1996).

Oregon, Idaho, and Montana, was never provided with direct authority for regulating salmon habitat protection. Instead, the agency is relegated to more of a consultant role, depending on other agencies, such as the National Marine Fisheries Service, the Fish and Wildlife Service, and the Bonneville Power Administration to implement advised regulations. The Columbia River Gorge Commission, however, the regional agency with regulatory power, was established without giving environmental protection any explicit priority.

It is for this reason that the Commission should be treated as a federal agency rather than as a regional one, if only in making it adhere to NEPA mandates. By amending the Columbia River Gorge National Scenic Area Act to state that “the Commission shall adhere to the same regulations incurred by NEPA, including, but not limited to, ordering environmental impact statements to evaluate land use decisions before action is taken,” it would allow for a more explicit and sustainable commitment to environmental to exist.

Regional management was not the only change in land use policy for the Columbia River Gorge; the 1990s brought another new opportunity for environmental protection through land use policy in the Columbia River Basin. Beginning in 1990 with the Shoshone-Bannock Tribe’s petition to list Snake River sockeye under the Endangered Species Act (ESA) and the subsequent groups who followed suit to add more salmonid species to the list, there is a new era of Pacific salmon restoration and protection through the ESA. Types of Columbia River fish protected by the ESA include Snake River Sockeye, Snake River Spring/Summer and Fall Chinook, West Coast Steelhead, Chum, Bull Trout, and Oregon Coho. According to Blumm:

Among other things, these listings have given NMFS, an agency with little regulatory experience in freshwater areas, effective regulatory control over a host of hydroelectric, hatchery, harvest, and habitat-damaging activities. This dramatic expansion in regulatory control has transformed NMFS into an agency with major land and water management decision-making authority throughout the coastal West. In addition, this expansion has made clear that notions that the ESA is all substance and no procedure, and all science and no economics, are myths. In truth, the salmon experience with the ESA reveals the statute to be procedurally complex and quite economically sensitive in its effects on land and water use decision-making.<sup>6</sup>

Specifically, it is the consultation process required by section 7 of the ESA that has given NMFS this new regulatory power. Section 7 states that “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat.”<sup>7</sup> NMFS and FWS are to take action using “the best scientific and commercial data available”<sup>8</sup>

Under the ESA, the agency (NWFS or FWS) “shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed... before any contract for construction is entered into and before construction is begun with respect to such action... [and] as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).” This assessment is referred to as either an environmental impact statement (EIS)

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<sup>6</sup> Blumm, Michael C., and Greg D. Corbin, “Salmon and the Endangered Species Act: Lessons From the Columbia Basin.” Washington Law Review (July, 1999).

<sup>7</sup> Endangered Species Act, § 7

<sup>8</sup> Ibid.

or a biological opinion (BiOp). These biological opinions provide a check for other government agencies by evaluating and blocking actions that will have negative effects on the habitat of endangered species. This is important in the Columbia River Basin because of the number of endangered fish. Because of these endangered fish, agencies such as NMFS and FWS have a significant amount of power in controlling land use policy in the area. Of course, their power is limited to regulation, as they can only block actions and cannot take action and write policy.

After the Snake River Chinook became protected under the ESA in 1992, federal agencies managing land use like the U.S. Forest Service and the Bureau of Land Management were ordered to evaluate whether the land management activities they had been participating in, or had allowed to occur, were, in fact, affecting listed salmon. However, although these agencies agreed to put future activities through a section 7 consultation and BiOp, they refused to subject their land management plans, which were already in effect or had recently been approved, to this same consultation. Blumm explains that these agencies “contended that the ESA did not apply to plans approved before the listing of a species because land management plans were not ‘ongoing’ activities subject to the ESA, but merely ‘programmatic’ documents.”<sup>9</sup> In response to this, a coalition of environmental groups filed suit in *Pacific Rivers Council v. Thomas* in order to challenge this interpretation of the ESA. However, after the district court handed down a split decision (essentially finding for the environmentalists but limiting enjoinder to new actions, leaving out ongoing projects), both parties appealed and the case went to the Ninth Circuit Court. Here, the court ruled that:

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<sup>9</sup> Blumm.

...land management plans, which it described as "comprehensive management plans governing a multitude of individual projects," had "an ongoing and long-lasting effect even after adoption" and therefore represented ongoing actions subject to section 7. The court noted that one of the forest plans under review allocated 60,000 acres of public lands surrounding spawning grounds for Snake River Chinook by establishing guidelines for logging, grazing, and road-building activities; setting allowable sale quantities of timber; and fixing schedules for forage, road-building, and other economic activities. Given their importance "in establishing resource and land use policies for the forests," the Ninth Circuit concluded that the ESA required previously approved plans to undergo consultation.<sup>10</sup>

This decision made section 7 consultation an integral and legally mandated part of land use management in the Columbia River Basin. Because of this, agencies can no longer authorize activities governed by a land management plan without considering the effects it would have on salmon habitat. This added pressure and focus on environmental effects of land use has driven land use managing agencies to look for new, innovative approaches to land management that integrate environmental (particularly biological) interests into land use planning. ESA regulations "offered the prospect of designing a restoration program that would address all major sources of salmon mortality, including public land and water use decision-making, not just hydropower [which was addressed in the Northwest Power Act]."<sup>11</sup>

However, management systems are able to function properly only if there is universality; everyone has to abide by the management rules. Even under the regulations of the ESA, this does not happen. Instead, two federal agencies, the Federal Energy Regulatory Commission (FERC) and the Bureau of Reclamation get to bypass the

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

regulations placed by the ESA through the NMFS. The Endangered Species Act states that, “Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.”<sup>12</sup> However, because of legal precedence, the FERC can re-license a dam without a section 7 consultation, despite the fact that it is the type of legal action that undoubtedly *should* trigger such a consultation. The Federal Power Act’s provision to authorize judicial review of FERC actions (such as the re-licensing of dams) has been interpreted to allow this judicial review to be bypassed. According Blumm and Corbin, this interpretation was caused by two important (and curious) judicial decisions:

First, a district court ruled that environmental plaintiffs could not challenge FERC's failure to consult on the ongoing effects of a licensed dam because section 313 of the Federal Power Act reserved exclusive jurisdiction over FERC decision-making to the circuit courts of appeal. Second, the Ninth Circuit refused to allow another group of environmentalists to challenge FERC's failure to consult on ongoing license operations because it construed section 313 to require a FERC order to trigger judicial review, and FERC refused to act on the environmentalists' request.<sup>13</sup>

Federally licensed dams should be held to the same consultation requirements imposed on federally owned dams; however, by allowing the FERC to exempt itself from ESA procedures through inaction, the courts have effectively taken away this regulatory tool.

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<sup>12</sup> Endangered Species Act, §7.

<sup>13</sup> Blumm.

Additionally, the Bureau of Reclamation has managed to avoid the imposition of an ESA consultation. The Bureau operates several dams in Idaho, Oregon and Wyoming (storing a total of 6.5 million acre-feet of water), but neither the operation of these dams nor its water management practices (particularly the use of the water for irrigation purposes) have been subject to any review by NMFS. The Bureau has engaged in activities that undoubtedly have had adverse effects on fish listed on the ESA list, which the consultation process is supposed to protect. The major problem with these exceptions is that it severely limits the regulatory enforcement powers of the NMFS as a federal agency. Instead, the only recourse for preventing this type of abuse of power by the FERC and the Bureau of Reclamation in their avoidance of consultations under ESA is through legal action taken outside the government bureaucracy. Blumm explains that, “Since the ESA does not authorize NMFS to make recalcitrant agencies consult, the burden to ensure compliance is apparently left to environmentalists using the ESA citizen suit provision.”<sup>14</sup>

Clearly, there are still significant problems in integrating ecological insights within land use management. The movement toward ecosystem management is underway, but the legislation that has begun this movement is limited. The Columbia River Gorge National Scenic Area Act created a comprehensive management plan for the area that moves land use management in the right direction. With a comprehensive management plan for the area, long-term goals can be set and met integrating both development and environmental protection. Goals “to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia

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<sup>14</sup> Blumm.

River Gorge; and...to protect and support the economy,” provides the framework for an integrated approach to land use management. By looking at land use planning from the perspective of balancing these interests, the Commission has the opportunity to make planning decisions that are sustainable. However, on the other hand, the commitment to the environment is still too easily set-aside in favor of other goals. It is for this reason that a mandate for the preparation of environmental impact statements should be written into the Columbia River Gorge National Scenic Area Act.

Biological assessments are what make the NMFS and FWS able to protect ecosystems through regulation. However, Keiter points out that, “Even some of the most environmentally protective laws are not entirely consistent with ecosystem management principles. The Endangered Species Act requires preservation of single species, not entire ecosystems; it has not been administered very aggressively; and it is often only invoked after significant environmental harm has been done to important ecosystems.”<sup>15</sup> The Endangered Species Act provides a mode for regulation of land use policy for protection of ecosystems, but it is certainly not enough. Environmental protection cannot occur simply through regulation. Instead, a more active role must be taken by state, regional, and federal agencies to *create* land use policy with a commitment to ecosystem protection, changing the status quo in an active manner. Land use planning in the Columbia River Basin, particularly in the Gorge, is on the right track, but still far from where it should be.

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<sup>15</sup> Keiter, 335.

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