

TALL FIRS, ZIP-LINES, AND RESERVED INTEREST DEEDS:  
AN ASSESSMENT OF THE EFFECTIVENESS OF FEDERAL  
CONSERVATION EASEMENTS IN THE COLUMBIA RIVER  
GORGE NATIONAL SCENIC AREA

BY

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*The federal government owns many thousands of conservation easements on private lands. Thus far, private landowners have challenged few of these federal easements in litigation. In the Columbia River Gorge National Scenic Area, the United States Forest Service has acquired more than two dozen conservation easements to protect scenic and other resources, and in recent years, landowners have tested several of these easements through litigation at the county, state, interstate, and federal levels. Scholars write extensively on conservation easement law, but few address whether federal conservation easements are effective in protecting resources in the face of landowner challenges. In this Article, we discuss three litigation case studies involving disputes over federal conservation easements in the Columbia River Gorge National Scenic Area. We argue that these conservation easements have been effective in protecting resources, primarily because government and citizen enforcement of zoning requirements have filled gaps left by ambiguous or silent easement terms. We also make several recommendations for improving the effectiveness of conservation easements in the National Scenic Area, some of which may be applicable in other jurisdictions.*

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### I. INTRODUCTION

The federal government has been acquiring conservation easements on private lands to protect the nation's resources for decades,<sup>1</sup> yet there has been little analysis of whether these easements have been effective at accomplishing their resource protection goals.<sup>2</sup> In particular, in the 1980s the United States Forest Service (Forest Service)—and later, other federal agencies—began using a special type of conservation easement: the reserved interest deed,<sup>3</sup> by which a landowner conveys all rights in a property to the

<sup>1</sup> See Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. PROP. & SOC'Y 107, 175 (2015) (explaining federal government funding for conservation easements); John H. Davidson, *The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands*, 39 ENVTL. L. REP. (ENVTL. L. INST.) 10,368, 10,373 (May 2009) (federal conservation easements are “a large and diverse category of public ownership covering millions of acres”); Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 468 (2013) (“[T]wo independent developments—the rise of private conservation easements and the critique of excessive public land use regulation—militate for the increased use of consensual conservation easements by governmental entities to achieve public land preservation goals.”).

<sup>2</sup> See Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV. 687, 722 (2013) (“The current state of confusion, uncertainty, and disagreement about what it means to protect land in perpetuity with a conservation easement, coupled with the inevitable pressures that will be brought to bear to develop protected lands, makes the widespread use of perpetual conservation easements a grand and hopeful experiment, but one that ultimately could prove to be unsuccessful.”); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1062–63 (2006) [hereinafter McLaughlin, *Myrtle Grove Controversy*] (discussing settlement of litigation over whether a property burdened by a conservation easement could be subdivided); Alyssa J. Domzal, Comment, *Preserving Preservation: Long Green Valley Association, Conservation Easements, and Charitable Trust Doctrine*, 73 MD. L. REV. 986, 997–99 (2014) (discussing a Maryland state court decision that a conservation easement did not create a charitable trust enforceable by the property's neighbors).

<sup>3</sup> See James B. Snow, *Reserved Interest Deeds: An Alternate Approach to Drafting Conservation Easements*, BACK FORTY: NEWSL. LAND CONSERVATION L. (Land Conservation Law Inst., Wash., D.C.) Jan./Feb. 1992, at 1, 5 (“[T]he U.S. Forest Service . . . pioneered the use of reserved interest deeds” and the agency’s “first major use of [them] was in 1986.”); BUREAU OF

federal government except for specific rights expressly reserved to the landowner.<sup>4</sup> The reserved interest type of easement has now been used by federal agencies for thirty years.<sup>5</sup> Early on, some commentators predicted that reserved interest deeds would be more favorable to the federal government's interests, and more protective of resources than other types of conservation easements.<sup>6</sup> Since then, there has been little analysis whether these predictions have held true.

One of the first places where the federal government began to regularly acquire conservation easements via reserved interest deeds was the Columbia River Gorge National Scenic Area (National Scenic Area or Scenic Area),<sup>7</sup> a bistate, federally protected area containing a mix of public and private lands in Washington and Oregon.<sup>8</sup> Between 1988 and 1998, the Forest Service purchased twenty-eight conservation easements on private lands in the Scenic Area<sup>9</sup> covering nearly two-thousand acres.<sup>10</sup> All of these

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LAND MGMT., USDI BUREAU OF LAND MANAGEMENT MANUAL/HANDBOOK H-2100-1 SUPPLEMENTAL TECHNICAL GUIDE: ACQUISITION AND STEWARDSHIP OF CONSERVATION EASEMENTS 14 (2006) (reserved interest deeds "are used regularly by the Forest Service in its Forest Legacy Program, and by the Natural Resources Conservation Service").

<sup>4</sup> See Snow, *supra* note 3, at 4 ("[A]nything not expressly reserved is considered transferred to the easement holder."); BUREAU OF LAND MGMT., *supra* note 3, at 13–14 (With reserved interest deeds "the burden of proof often shifts to the landowner to show that a particular use is reserved in the land. Another advantage to a reserved interest easement is that it reduces future ambiguities over land uses and activities that were not considered at the time the easement was originally acquired. Thus, when in doubt, a right is deemed acquired."). See *infra* notes 87–99 and accompanying text for comparisons of reserved interest deeds with other types of conservation easements.

<sup>5</sup> See Snow, *supra* note 3, at 4.

<sup>6</sup> See, e.g., *id.* (anticipating that reserved interest deeds would be more effective in protecting resources than traditional negative restrictive easements that prohibit only certain uses).

<sup>7</sup> *Id.* at 5 ("The first major use of reserved interest deeds by the Forest Service was in 1986 in the Oregon Dune[s] National Recreation Area. . . . In the [Columbia River Gorge National Scenic Area], the Forest Service has acquired over 26 reserved interest easements.").

<sup>8</sup> The National Scenic Area was designated by Congress in 1986. Columbia River Gorge National Scenic Area Act (Scenic Area Act), Pub. L. No. 99-663, 100 Stat. 4274 (codified as amended at 16 U.S.C. §§ 544–544p (2012)). It contains approximately 300,000 acres, nearly half of which is in private ownership. U.S. FOREST SERV., 25 YEARS LATER, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA MARKS ITS CREATION (2011) [hereinafter U.S. FOREST SERV., 25 YEARS LATER], available at [http://www.fs.fed.us/images/CRGNESA\\_25\\_years.pdf](http://www.fs.fed.us/images/CRGNESA_25_years.pdf); see also U.S. Forest Serv., *Columbia River Gorge National Scenic Area*, <http://www.fs.usda.gov/crgnsa> (last visited Nov. 19, 2016) ("The Columbia River Gorge National Scenic Area encompasses 292,500 acres, running from the mouth of the Sandy River to the mouth of the Deschutes River and spanning southern Washington and northern Oregon.").

<sup>9</sup> E-mail from Pam Campbell, Nat. Res. Specialist, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv., to Nathan Baker, Staff Attorney, Friends of the Columbia Gorge (Sept. 10, 2013) (on file with authors) ("The Forest Service . . . has acquired 28 [conservation easements in the Scenic Area] between 1988 and 1998 with the majority (16 cases) being purchased in 1988 & 1989."); see also *infra* Appendix (cataloging the Forest Service's conservation easements in the National Scenic Area).

<sup>10</sup> Nathan Baker, *Friends Legal Victory Will Help Protect Rural Gorge Landscapes*, FRIENDS OF THE COLUMBIA GORGE (Friends of the Columbia Gorge, Portland, Or.), Spring 2016, at 6, 7, available at [https://gorgefriends.org/assets/images/annual\\_reports\\_and\\_newsletters/spring2016](https://gorgefriends.org/assets/images/annual_reports_and_newsletters/spring2016).

easements were structured as reserved interest deeds,<sup>11</sup> vesting “[a]ll right, title and interest in [each] property . . . in the United States except that specifically and expressly reserved unto the [landowner].”<sup>12</sup>

The National Scenic Area’s complex legal framework<sup>13</sup>—and the constant development pressures it experiences because of its proximity to the Portland, Oregon and Vancouver, Washington metropolitan area<sup>14</sup>—make it an important location for studying the effectiveness of conservation easements styled as reserved interest deeds. As the Columbia River Gorge region has grown and continues to grow, landowners in the National Scenic Area whose properties are burdened by conservation easements have challenged and tested the limits of several of these easements, and will likely continue to do so.<sup>15</sup>

In hindsight, many of the conservation easements in the Scenic Area were not optimally drafted to accomplish their intended resource protection purposes. When owners of lands burdened by conservation easements in the Scenic Area have sought to develop or use their lands in manners contrary to the interests of the federal government, the easements have not always clearly prohibited the proposed uses, which has led to protracted litigation with surprising frequency. Indeed, three of the twenty-eight conservation easements in the National Scenic Area (more than 10%) have already been

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pdf (“In all, the Forest Service owns conservation easements on nearly thirty Scenic Area properties that total nearly two thousand acres . . .”); COLUMBIA RIVER GORGE COMM’N, MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATURAL SCENIC AREA, at IV-2-3 (2011) [hereinafter 2011 GORGE MANAGEMENT PLAN], available at [http://www.gorgecommission.org/images/uploads/pdfs/Management\\_Plan\\_as\\_amended\\_through\\_Sept\\_1\\_2011.pdf](http://www.gorgecommission.org/images/uploads/pdfs/Management_Plan_as_amended_through_Sept_1_2011.pdf) (“1,894 acres of partial interest acquisitions utilizing conservation easements” have been acquired in the Scenic Area).

<sup>11</sup> Snow, *supra* note 3, at 5.

<sup>12</sup> *E.g.*, Easement Deed by Sharleen Ann James, Grantor, and the United States through the U.S. Forest Serv., Grantee (Dec. 7, 1988) [hereinafter James Conservation Easement], recorded in 112 SKAMANIA COUNTY DEED RECORDS 213, 215 (on file with Skamania Cty., Wash. Auditor’s Office) (purchased for \$203,500).

<sup>13</sup> See generally Michael C. Blumm & Nathan J. Baker, *The Struggle Over the Columbia River Gorge: Establishing and Governing the Country’s Largest National Scenic Area*, 4 WASH. J. ENVTL. L. & POL’Y 287 (2015) (discussing the adoption and implementation of the Scenic Area Act); Michael C. Blumm & Joshua D. Smith, *Protecting the Columbia River Gorge: A Twenty-Year Experiment in Land-Use Federalism*, 21 J. LAND USE & ENVTL. L. 201 (2006) (outlining the mosaic of local, state, and federal jurisdictions within the National Scenic Area).

<sup>14</sup> 2011 GORGE MANAGEMENT PLAN, *supra* note 10, at II-1-1 (“In the Scenic Area, pressure to convert resource land is especially evident in the western and central parts of the Gorge. In the western Gorge, urban and suburban growth in the Portland/Vancouver metropolitan area is putting pressure on eastern Multnomah County in the Corbett area and on eastern Clark County and western Skamania County. In the central Gorge, growth associated with sailboarding and recreation homesites is impacting agricultural lands in the Underwood, Hood River, Lyle, and Mosier areas.”); see also Blumm & Baker, *supra* note 13, at 289 (noting that more than 75,000 people live in the National Scenic Area).

<sup>15</sup> See *infra* Part IV; Davidson, *supra* note 1, at 10,373–74 (“[A]s properties are transferred from one owner to another and across generations, landowners may have diminishing allegiance to the conservation goals of the easement and be tempted to take invasive actions. Unless easements are monitored frequently and conditions enforced diligently, the value of the easements to the public can easily be lost.”).

the subject of extensive litigation.<sup>16</sup> The disputes have ranged from the relatively mundane (a dispute over a proposed adjustment of parcel boundaries)<sup>17</sup> to the decidedly absurd (a proposed commercial zip-line park whose proponent at one point attempted to justify it as an agricultural use by deeming it a “U-pick pine cones business”).<sup>18</sup> All of these disputes involved properties in the Mount Pleasant area of western Skamania County, Washington, a bucolic landscape viewed by millions of people every year from the Oregon side of the Scenic Area.<sup>19</sup> Evaluating these cases reveals the kinds of disputes that have arisen over conservation easements in the Scenic Area, how the disputes were resolved, whether the conservation easements were effective at protecting resources in the context of these disputes, and what other resource protection tools can help accomplish the easements’ objectives.

Although the easements were in many cases inartfully drafted, their resource protection goals have nevertheless been accomplished, but often only after extensive litigation. A major factor in that result has been the zoning regulations in the National Scenic Area, which have worked in concert with the conservation easements to protect resources.<sup>20</sup> Each of the conservation easements in question expressly states that where a zoning ordinance is more restrictive than the easement in prohibiting land uses, the zoning ordinance will prevail.<sup>21</sup> By incorporating zoning restrictions directly into the conservation easements, the federal government wisely expanded the easements’ effectiveness. As a result, disputes involving these properties have typically been addressed first via the zoning and state court processes, before the Forest Service or any other interested party attempted to enforce or litigate the conservation easements in federal court.<sup>22</sup>

Zoning enforcement by governments in the Scenic Area—particularly Skamania County—and by the citizen group Friends of the Columbia Gorge (Friends) has been key to the success of federal conservation easements.<sup>23</sup> In

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<sup>16</sup> See *infra* Part IV.

<sup>17</sup> See *infra* Part IV.C.

<sup>18</sup> Patty Hastings, *Skamania Lodge Opening Zip Line Rides*, COLUMBIAN, Apr. 23, 2013, <http://www.columbian.com/news/2013/apr/24/zip-line-course-set-to-open-thrill-seekers-put-it/> (last visited Nov. 19, 2016); see also *infra* Part IV.B.

<sup>19</sup> Baker, *supra* note 10, at 6.

<sup>20</sup> See *infra* Part III.

<sup>21</sup> *E.g.*, James Conservation Easement, *supra* note 12, at 217.

<sup>22</sup> See *infra* Parts IV.B and IV.C.

<sup>23</sup> Friends has played a crucial role in the enforcement and implementation of the Scenic Area Act and related laws. Friends is “[t]he only non-profit organization dedicated entirely to protecting the Columbia Gorge. . . . With a staff of 17, offices in Portland and Hood River, OR, and Washougal, WA, and nearly 6,000 members, Friends of the Columbia Gorge is uniquely suited to ensuring that the beautiful and wild Columbia Gorge remains a place apart, an unspoiled treasure for coming generations.” Friends of the Columbia Gorge, *About Us*, <https://gorgefriends.org/who-we-are/about-us.html> (last visited Nov. 19, 2016) (describing the mission and goals of Friends); see also James L. Olmsted, *The Global Warming Crisis: An Analytical Framework to Regional Responses*, 23 J. ENVTL. L. & LITIG. 125, 143 (2008) (“Armed with its own attorney, full-time staff, and a board comprised of wealthy and influential citizens,

practice, reserved interest deeds have been effective at protecting resources in the Scenic Area because government and citizen enforcement of zoning requirements have filled gaps left by ambiguous or silent easement terms.

Finally, the Forest Service has seldom taken advantage of an important tool in its resource protection toolbox: amending existing conservation easements to clarify landowners' rights and/or improve resource protections in a manner mutually agreeable to the Forest Service and the landowners.<sup>24</sup> Federal agencies are generally reluctant to amend conservation easements because the amendment process might open the door to weakened resource protections and less effective terms.<sup>25</sup> On the other hand, if the Forest Service had used the amendment tool more frequently, it might have reduced the extent of litigation that has come to pass in the Scenic Area.

This Article examines several case studies in the Columbia River Gorge National Scenic Area to explore whether conservation easements styled as reserved interest deeds have been effective in protecting resources. Part II introduces the statutory and regulatory authority governing land use activities in the Scenic Area. Part III discusses the conservation easements that the Forest Service has acquired in the Scenic Area, including the Forest Service's choice to structure them as reserved interest deeds. Part IV examines three litigation case studies concerning disputes over conservation easements in the Scenic Area, determining that reserved interest deeds have generally been effective at protecting resources, but only because government agencies and citizens have enforced the easements in tandem with zoning requirements. Part V examines whether the Forest Service has the authority to amend conservation easements in the Scenic Area and under what circumstances it should do so. Part VI provides additional recommendations for improving the effectiveness of federal conservation easements in the Scenic Area. Part VII concludes that zoning requirements as well as government and citizen enforcement of these requirements have played critical roles in supplementing the terms of federal conservation easements in order to protect resources in the Scenic Area, and that the Forest Service and other implementing government agencies should further improve the effectiveness of federal conservation easements in the Scenic Area through several legislative and administrative measures.

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[Friends] not only helped get the Columbia River Gorge [National Scenic Area] Act enacted, it has spent years guiding it, and, when necessary, correcting its course.”).

<sup>24</sup> See *infra* Part V.

<sup>25</sup> See generally BUREAU OF LAND MGMT., *supra* note 3, at 16 (“Many [BLM] offices do not develop written amendment policies, feeling that they do not want to encourage landowners to ask for changes to their easements.”); McLaughlin, *Myrtle Grove Controversy*, *supra* note 2, at 1090–93 (noting that easement holders can face political and legal backlash when amending conservation easements because amendments can change the original easements’ terms and purposes).

## II. THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA

In 1986, Congress enacted the Columbia River Gorge National Scenic Area Act (Scenic Area Act).<sup>26</sup> The Act established the Columbia River Gorge National Scenic Area<sup>27</sup> in order “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 area by encouraging growth to occur in existing urban areas.”<sup>28</sup> The Scenic Area Act authorized Oregon and Washington to establish a thirteen-member Columbia River Gorge Commission (Gorge Commission) to “facilitate cooperation among the States of Oregon and Washington” in implementing the Act.<sup>29</sup> In 1987, the two states created the Gorge Commission via the interstate Columbia River Gorge Compact.<sup>30</sup> The Forest Service is the Gorge Commission’s partner agency in implementing the Scenic Area Act, and the states of Oregon and Washington, plus six county governments in the National Scenic Area, also play pivotal roles in carrying out the Act.<sup>31</sup>

The Act established three management classifications for the lands within the National Scenic Area. First, the Act established the boundaries for thirteen urban areas (UAs) within the Scenic Area,<sup>32</sup> within which the land use restrictions required by the Act do not apply.<sup>33</sup> Second, the Act also designated Special Management Areas (SMAs)<sup>34</sup> in portions of the National

<sup>26</sup> Pub. L. No. 99-663, 100 Stat. 4274 (1986) (codified as amended at 16 U.S.C. §§ 544–544p (2012)); see also KATHIE DURBIN, BRIDGING A GREAT DIVIDE: THE BATTLE FOR THE COLUMBIA RIVER GORGE 71 (2013) (noting that President Ronald Reagan literally signed the legislation “with one hand holding his nose”).

<sup>27</sup> 16 U.S.C. § 544b(a)(1) (2012).

<sup>28</sup> 16 U.S.C. § 544a (2012). The Scenic Area Act’s goal of economic development is subordinate to the goal of resource protection; the Act allows development outside of the designated urban areas only where consistent with resource protection goals. See *id.*; Blumm & Baker, *supra* note 13, at 298 (“The Act is an example of dominant use legislation.”).

<sup>29</sup> Scenic Area Act, 16 U.S.C. § 544c(a)(1) (2012). The Commission consists of one member appointed by each of the six Gorge counties, three Oregon members appointed by the Oregon governor, three Washington members appointed by the Washington governor, and one nonvoting Forest Service employee. *Id.* § 544c(a)(1)(C).

<sup>30</sup> OR. REV. STAT. § 196.150 (2015); WASH. REV. CODE ANN. § 43.97.015 (West 2015). In adopting the Scenic Area Act, Congress expressly provided advance consent to the states’ adoption of an interstate compact under certain specified conditions. See 16 U.S.C. §§ 544c(a)(1)(A), 554o(d) (2012). In an early challenge to the Scenic Area Act, opponents of the federal legislation argued that Congress had acted unconstitutionally by providing detailed standards for the terms of the compact in advance, rather than allowing the states to decide such details. *Columbia River Gorge United-Protecting People & Prop. v. Yeutter*, 960 F.2d 110, 114 (9th Cir. 1992). The United States Court of Appeals for the Ninth Circuit rejected this challenge, holding that Congress’s “[a]dvance consent with requirements attached is itself perfectly valid” under the Constitution’s Compact Clause, U.S. CONST. art I, § 10, cl. 3, and describing the Columbia River Gorge Compact as “an innovative solution to a difficult interstate land preservation problem.” *Yeutter*, 960 F.2d at 114–15.

<sup>31</sup> See Blumm & Baker, *supra* note 13, at 289–90.

<sup>32</sup> 16 U.S.C. § 544b(e) (2012).

<sup>33</sup> *Id.* § 544d(c)(5)(B).

<sup>34</sup> *Id.* § 544b(b).

Scenic Area especially important for their sensitive and unique aesthetic and natural resources.<sup>35</sup> The Forest Service administers the SMAs.<sup>36</sup> Finally, all lands within the Scenic Area not designated as UA or SMA are part of the General Management Area (GMA), and are subject to the general terms of the Act.<sup>37</sup> The Gorge Commission administers the GMA.<sup>38</sup>

Today, nearly half of the lands within the Scenic Area are in private ownership,<sup>39</sup> and about a quarter of the Scenic Area is National Forest System land managed by the Forest Service.<sup>40</sup> The remaining lands are owned by a variety of governmental entities, including other federal agencies, Indian tribes, the states of Oregon and Washington, and county and city governments.<sup>41</sup>

Congress directed the Gorge Commission and the Forest Service to prepare and adopt a Gorge Management Plan,<sup>42</sup> which must include land use designations and resource protection guidelines for all lands outside the urban areas.<sup>43</sup> The Act also authorized the six counties in the National Scenic Area to each “adopt a land use ordinance consistent with the management plan,” subject to approval by the Gorge Commission.<sup>44</sup> In the event that any counties chose not to adopt Scenic Area ordinances, the Act authorized the

<sup>35</sup> Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 934 (1987) (“Special Management Areas are those areas within the Scenic Area with the most significant scenic, natural, recreational, and cultural values. Historically, these lands are the most vulnerable to development pressure.”).

<sup>36</sup> 16 U.S.C. §§ 544d(c)(5)(A), 544f(f) (2012); *see also* Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm’n, 171 P.3d 942, 958–59 (Or. Ct. App. 2007) (concluding that the Forest Service has “exclusive authority” over the SMAs), *rev’d in part on other grounds*, 213 P.3d 1164 (Or. 2009).

<sup>37</sup> OR. REV. STAT. § 196.105(2) (2015); *see also* Friends of the Columbia Gorge, Inc. v. Schafer, 624 F. Supp. 2d 1253, 1261 n.1 (D. Or. 2008) (noting that the term “General Management Area” does not appear in the Scenic Area Act, but is commonly used to refer to lands not within the UAs or SMAs).

<sup>38</sup> *See* 16 U.S.C. § 544e(a) (2012). Until 2001, landowners within the SMAs could opt out of the SMA designation by making a bona fide offer to sell their land at fair market value to the Forest Service. *Id.* § 544f(o). If the Forest Service did not purchase the offered land within three years, the land’s designation changed to GMA. *Id.* This statutory process for opting out of an SMA designation is often referred to as the section 8(o) process, after the applicable section of the Scenic Area Act. Pub. L. No. 99-663, § 8(o), 100 Stat. 4274, 4287 (1986) (codified as amended at 16 U.S.C. § 544f(o) (2012)). For further discussion of the section 8(o) process, *see* Blumm & Smith, *supra* note 13, at 218–21.

<sup>39</sup> U.S. FOREST SERV., 25 YEARS LATER, *supra* note 8. Most of the private lands are located in the UAs and GMA. *See* COLUMBIA RIVER GORGE COMM’N & U.S. FOREST SERV., MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA, at 3 (1992) [hereinafter 1992 GORGE MANAGEMENT PLAN]; COLUMBIA RIVER GORGE COMM’N, COLUMBIA RIVER GORGE NATIONAL SCENIC AREA: GENERALIZED OWNERSHIP [hereinafter GENERALIZED OWNERSHIP MAP], <http://www.gorgecommission.org/scenic-area/maps> (under “Static Maps” select “Generalized Ownership”).

<sup>40</sup> 2011 GORGE MANAGEMENT PLAN, *supra* note 10, at IV-2-2. Most of the federal lands are in the SMAs. *See* GENERALIZED OWNERSHIP MAP, *supra* note 39.

<sup>41</sup> *See* GENERALIZED OWNERSHIP MAP, *supra* note 39.

<sup>42</sup> 16 U.S.C. § 544d(c) (2012).

<sup>43</sup> *Id.* § 544d(b)–(c).

<sup>44</sup> *Id.* § 544e(b).



Commission to adopt its own ordinance for the Scenic Area portions of those counties.<sup>45</sup> Today, five of the six Gorge counties have adopted Scenic Area ordinances,<sup>46</sup> while the Gorge Commission administers its land use ordinance<sup>47</sup> in the remaining county, Klickitat County, Washington.<sup>48</sup>

Among other requirements, the Scenic Area Act requires the Gorge Management Plan and county zoning ordinances to include provisions for the protection and enhancement of agricultural lands, forest lands, and open spaces.<sup>49</sup> The Plan and ordinances must also prohibit industrial development outside the urban areas,<sup>50</sup> and must protect and enhance the scenic, natural, cultural, and recreational resources of the National Scenic Area.<sup>51</sup>

The Act supplemented local land use laws by conferring standing to parties adversely affected by county land use decisions in the National Scenic Area, authorizing any “person or entity adversely affected by any final action or order of a county” to appeal to the Gorge Commission, which acts as a quasi-judicial body in resolving such appeals.<sup>52</sup> Parties appealing Gorge Commission actions (including Commission decisions made on appeal of County actions) must file in the state courts,<sup>53</sup> while federal courts have jurisdiction over appeals of Forest Service actions.<sup>54</sup>

The Act authorized the Forest Service to purchase conservation easements to protect resources in the Scenic Area.<sup>55</sup> The Act also authorized the federal appropriation of \$40 million “[f]or the purpose of acquisition of lands, water and interests therein” consistent with the Act.<sup>56</sup> Several policies and guidelines in the Gorge Management Plan promote conservation easements as a resource protection measure—including conservation

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<sup>45</sup> *Id.* § 544e(c)(1).

<sup>46</sup> CLARK COUNTY, WASH., CODE ch. 40.240 (2015); HOOD RIVER COUNTY, OR., ZONING ORDINANCE art. 75 (2009); MULTNOMAH COUNTY, OR., CODE ch. 38 (2015); SKAMANIA COUNTY, WASH., CODE tit. 22 (2016); WASCO COUNTY, OR., NATIONAL SCENIC AREA LAND USE AND DEVELOPMENT ORDINANCE (2010).

<sup>47</sup> COLUMBIA RIVER GORGE COMM’N ADMIN R. ch. 350, div. 81 (2012), *available at* <http://www.gorgecommission.org/scenic-area/legal-authorities> (select “Commission Rule 350-81 – Land Use Ordinance for Klickitat County”).

<sup>48</sup> Blumm & Baker, *supra* note 13, at 299–300.

<sup>49</sup> 16 U.S.C. § 544d(d)(1)–(3) (2012). “Open spaces” are defined to include, among other things, lands with “outstanding scenic views and sites.” *Id.* § 544(j)(5).

<sup>50</sup> *Id.* § 544d(d)(6).

<sup>51</sup> *Id.* §§ 544a, 544d(d).

<sup>52</sup> *Id.* § 544m(a)(2); *see also* COLUMBIA RIVER GORGE COMM’N ADMIN R. 360-60-010 (2011), *available at* <http://www.gorgecommission.org/scenic-area/legal-authorities> (select “Commission Rule 350-60 – Appeals from County Ordinances”) (“The [Scenic Area Act] authorizes appeals to the Gorge Commission by a person or entity adversely affected by a final action or order of a county.”).

<sup>53</sup> 16 U.S.C. § 544m(b)(6) (2012).

<sup>54</sup> *Id.* § 544m(b)(5).

<sup>55</sup> *Id.* § 544g(a)(1) (“The Secretary is authorized to acquire any lands or interests therein within the special management areas and the Dodson/Warrendale Special Purchase Unit which the Secretary determines are needed to achieve the purposes of [the Act].”).

<sup>56</sup> *Id.* § 544n(a)(1).

easements owned not only by the Forest Service, but also by nongovernmental land trusts, timber companies, and others.<sup>57</sup>

In the Scenic Area, land use activities on properties burdened by conservation easements must comply not only with the terms of the easements, but also with county zoning requirements and any other laws or rules implementing the Scenic Area Act.<sup>58</sup> Given this legal framework, a wide range of interested parties—including the Gorge Commission<sup>59</sup> and public interest groups like Friends of the Columbia Gorge<sup>60</sup>—are able to challenge or support land use decisions affecting these properties. In addition, the Scenic Area Act includes a citizen suit provision<sup>61</sup> that potentially allows interested parties to challenge Forest Service actions or inactions in disputes involving conservation easements.<sup>62</sup>

State property law may also apply to conservation easement disputes in the National Scenic Area.<sup>63</sup> For example, Washington law classifies various

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<sup>57</sup> 2011 GORGE MANAGEMENT PLAN, *supra* note 10, at I-1-2 (“Encourag[ing] the establishment of a Scenic Area public land conservancy and/or nonprofit land trust to acquire fee interest, conservation easements, and other interests in properties whose preservation is important for protection of Gorge landscape settings and scenic values.”); *id.* at II-7-43, -45 (allowing certain lot line adjustments between parcels “provided the land . . . would be protected by a conservation easement or other similar property restriction that precludes future land divisions and development”); *id.* at III-3-4 (encouraging private timber operators to “protect scenic values in scenic travel corridors” by using “conservation easements to mitigate project impacts and recognize property values”); *id.* at IV-2-3 to -4 (discussing conservation easements in the Scenic Area acquired and held by the Forest Service).

<sup>58</sup> Each of the Forest Service’s conservation easements in the National Scenic Area recognizes the applicability of zoning requirements; they each contain a provision stating that uses of the property must comply with “any zoning ordinances which may apply to this property.” *See, e.g.*, James Conservation Easement, *supra* note 12, at 217.

<sup>59</sup> The Gorge Commission has the responsibility to assist counties against which takings claims are asserted, and also has the authority to appeal county land use decisions or participate in private parties’ land use appeals. 2011 GORGE MANAGEMENT PLAN, *supra* note 10, at IV-1-3 to -4; *see also* Skamania County v. Columbia River Gorge Comm’n, 26 P.3d 241, 252 (Wash. 2001) (commenting that the Gorge Commission has the authority to appeal county land use decisions, but cannot collaterally invalidate them after expiration of the appeal period).

<sup>60</sup> *See* cases discussed *infra* Part IV.

<sup>61</sup> 16 U.S.C. § 544m(b)(2) (2012) (authorizing interested persons and entities to bring actions against the Forest Service to compel compliance with the Act where the Forest Service is alleged to have violated the Act or its implementing authorities or failed to take action required by the Act).

<sup>62</sup> To date, no third party has attempted to unilaterally enforce the terms of a Scenic Area conservation easement against a landowner, nor sued the Forest Service for neglecting its enforcement duties as an easement holder. For a discussion of “backup enforcement” of conservation easements, see Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 2013 UTAH L. REV. 811, 822–25 (2013) (discussing the failure of most conservation easement statutes to address the issue of “backup enforcement” when easement holders neglect their enforcement duties, and suggesting that in these situations, the state attorney general should sue either the violating landowner or the delinquent easement holder).

<sup>63</sup> The extent to which state law applies to land use matters in the National Scenic Area is not completely settled and has yielded different results, depending on the specific laws involved. *See, e.g.*, Klickitat County v. Columbia River Gorge Comm’n, 770 F. Supp. 1419, 1426 (E.D. Wash. 1991) (holding that the Gorge Commission is not subject to Washington state

types of conservation easements, including federally held conservation easements, as “real property,”<sup>64</sup> which may give the Forest Service rights as a property owner under the counties’ zoning and land use procedures. In Oregon, the legislature has enacted a series of statutes that regulate conservation easements and highway scenic preservation easements,<sup>65</sup> but these provisions apparently do not apply to federally held conservation easements.<sup>66</sup>

### III. THE FOREST SERVICE’S CONSERVATION EASEMENTS IN THE NATIONAL SCENIC AREA

The federal government protects resources on private land by purchasing conservation easements from landowners.<sup>67</sup> In the Columbia

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statutory law unless the Gorge Compact specifically reserves application of the law); *Friends of the Columbia Gorge, Inc. v. Wash. State Forest Practices Appeals Bd.*, 118 P.3d 354, 358–61 (Wash. Ct. App. 2005) (holding that the Washington Forest Practices Act, WASH. REV. CODE ANN. §§ 76.09.010–.950, applies to forest practices within the Washington portions of the Scenic Area); *Skamania County v. Woodall*, 16 P.3d 701, 709 (Wash. Ct. App. 2001) (concluding that if neither the Scenic Area Act nor the Gorge Management Plan provides a solution to resolve a land use dispute in the Scenic Area, state common law must be applied); *Klickitat County v. Washington*, 862 P.2d 629, 634 (Wash. Ct. App. 1993) (concluding that because the Scenic Area Act and Gorge Management Plan are “federally mandated, and do not constitute a state program,” a Washington statute that required the State to reimburse counties for new state programs was inapplicable to the Scenic Area); *Columbia River Gorge Comm’n v. Hood River County*, 152 P.3d 997, 998 (Or. Ct. App. 2007) (determining that Oregon’s 2004 Ballot Measure 37 by its own terms does not apply to county-adopted Scenic Area ordinances).

<sup>64</sup> WASH. REV. CODE ANN. § 64.04.130 (West 2015) (“A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, federally recognized Indian tribe, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. Any such right or interest constitutes and is classified as real property. All instruments for the conveyance thereof must be substantially in the form required by law for the conveyance of any land or other real property.”); *see also id.* §§ 84.34.200–.250 (deeming conservation easements and similar interests in property to be “a public purpose for which public funds may properly be expended or advanced” and authorizing county tax levies and “conservation futures funds” for acquiring and maintaining such property rights).

<sup>65</sup> OR. REV. STAT. §§ 271.715–.795 (2015). Oregon’s statutory provisions closely mirror those of the Uniform Conservation Easement Act, which the National Conference of Commissioners on Uniform State Laws drafted in 1981. UNIF. CONSERVATION EASEMENT ACT (1982) (UNIF. LAW COMM’N, amended 2007).

<sup>66</sup> The Oregon laws define a “holder” of a conservation easement as the state, any county, any city, or any of various local districts, charitable corporations, or Indian tribes. OR. REV. STAT. § 271.715(3) (2015). Notably absent from this list is the federal government. In contrast, Washington expressly includes “federal agenc[ies]” in its list of easement holders. WASH. REV. CODE ANN. § 64.04.130 (West 2015).

<sup>67</sup> As of 2016, the federal government owned more than 25,000 conservation easements covering a total of more than five million acres across the nation. U.S. Endowment for Forestry & Cmty., *National Conservation Easement Database: All States and All Easements*, <http://www.conservationaleasement.us/reports/easements> (last visited Nov. 19, 2016).

River Gorge National Scenic Area, the Forest Service has used conservation easements to, among other purposes, protect scenic landscapes<sup>68</sup>—especially those highly visible from specific popular viewpoints.<sup>69</sup> These “key viewing areas” are designated vantage points “from which the public views Scenic Area landscapes.”<sup>70</sup> Among the most popular of these is Crown Point on the Oregon side of the Gorge;<sup>71</sup> the majority of Scenic Area properties burdened by Forest Service conservation easements are visible from Crown Point.<sup>72</sup>

The Forest Service’s twenty-eight conservation easements in the Scenic Area are all located in Washington<sup>73</sup>—none are in Oregon.<sup>74</sup> The majority are concentrated in the Mount Pleasant area, located in western Skamania County and eastern Clark County, directly across the Columbia River from Crown Point.<sup>75</sup> In all, the Forest Service’s easements in the Scenic Area cover

<sup>68</sup> See *supra* notes 49–51, 55–57, and accompanying text.

<sup>69</sup> 1992 GORGE MANAGEMENT PLAN, *supra* note 39, at IV-14 (“Scenic easements have been acquired in the Mt. Pleasant (Washington) area to enhance the prevalent agricultural theme of land use. With these easements, landowners . . . continue traditional land uses that have contributed to special landscape settings . . .”).

<sup>70</sup> 2011 GORGE MANAGEMENT PLAN, *supra* note 10, at Glossary-11.

<sup>71</sup> Crown Point includes the Vista House, a historic rest station and observatory. Friends of Vista House, *About*, <http://www.vistahouse.com/about/> (last visited Nov. 19, 2016). Crown Point attracts over one million visitors per year. *Id.* The groundbreaking ceremony for the Vista House was held on June 6, 1916, and “President Woodrow Wilson, unable to attend the celebration in person, participated by touching an electric button in Washington, D.C., which unfurled an American flag at the [highway] dedication site.” PEG WILLIS, *BUILDING THE COLUMBIA RIVER HIGHWAY: THEY SAID IT COULDN’T BE DONE* 126 (2014).

<sup>72</sup> See Email from Pam Campbell to Nathan Baker, *supra* note 9 (observing that many of the Forest Service’s conservation easements are concentrated to protect the pastoral landscape visible from Crown Point).

<sup>73</sup> *Id.* (explaining that there are four easements in Clark County totaling 170.02 acres, five easements in Klickitat County totaling 38.75 acres, and nineteen easements in Skamania County totaling 1,679.72 acres). See *infra* Appendix for a catalog of the Forest Service’s conservation easements in the Scenic Area.

<sup>74</sup> This disparity between the states in the numbers of Forest Service conservation easements within the National Scenic Area (none in Oregon, twenty-eight in Washington) was almost certainly influenced by the fact that in Oregon, a comprehensive statewide land use regulatory program had already been in place for more than a decade before the Scenic Area was created. See Blumm & Baker, *supra* note 13, at 291 n.21 (“In 1973, Oregon launched the most comprehensive land use planning program in the country.”). In contrast, Washington’s land use program was not nearly as robust, see *id.* (“Washington did not enact its Growth Management Act until 1990 . . .”), and thus its rural lands in the Gorge were under much greater threat of overdevelopment and warranting protection. See WILLIAM F. PAULUS, *OREGON CONSERVATION EASEMENT ASSESSMENT PROJECT* 8 tbls.1–2, 9 (2015), available at <http://oregonlandtrusts.org/wp-content/uploads/2015/06/Whitepaper-5-30-15-OCEAP-Partners-final-web.pdf> (noting that as of 2014, Oregon ranked 40th in the nation in the total number of conservation easements and 36th in the number of acres protected by them, and identifying Oregon’s comprehensive land use program as one of two main factors behind these low rankings).

<sup>75</sup> Email from Pam Campbell to Nathan Baker, *supra* note 9; see also DURBIN, *supra* note 26, at 138 (“One-third of the money the Forest Service spent in the first two years—about \$3.5 million—went toward buying land or development rights on 945 acres in the Mount Pleasant area, between Washougal and Cape Horn. Some people considered this area one of the most beautiful panoramas in the gorge as viewed from Crown Point on the Oregon side. The green

almost three square miles.<sup>76</sup> The Forest Service purchased most of them in the half-decade after the Scenic Area Act was passed in November 1986,<sup>77</sup> and before the United States Secretary of Agriculture approved the original Gorge Management Plan in early 1992.<sup>78</sup>

In language adopted in the original Gorge Management Plan in 1992, the Forest Service earnestly described its authority to acquire conservation easements in the Scenic Area:

In addition to fee purchase, the Forest Service may purchase partial interests in land, where less than fee ownership will protect and perpetuate certain landscape settings or resources. Scenic easements have been acquired in the Mt. Pleasant (Washington) area to enhance the prevalent agricultural theme of land use. With these easements, landowners retain certain property rights and they continue traditional land uses that have contributed to special landscape settings and complement other Scenic Area objectives. The public, through the Forest Service, acquires those property rights related to such activities as residential development, timber harvest, or mineral operations which, if exercised, would detract from the scenic or natural resource qualities of the Scenic Area.

While the appraised value of these easements varies with the specific property rights being acquired, it is less than the cost of acquiring the fee ownership. The property also remains on local tax rolls. Administering these easements becomes a partnership; the landowner and the Forest Service jointly manage the property to achieve objectives of both the landowner and the Scenic Area Act.<sup>79</sup>

But by 2004, the Forest Service's enthusiasm for acquiring new conservation easements had significantly dampened. At that time, the Gorge Management Plan underwent its first major review and revision (as required by the Scenic Area Act),<sup>80</sup> and the Forest Service deleted the above-quoted passage from the Plan and replaced it with the following passage:

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quilt of fields and forests was dotted with small farms, but it was still sparsely developed. The fear was that it would not remain that way for long. By buying development rights, the Forest Service could block subdivisions and preserve rural farm use without buying the land outright.”)

<sup>76</sup> Email from Pam Campbell to Nathan Baker, *supra* note 9.

<sup>77</sup> See *infra* Appendix (twenty-two of the twenty-eight easements were purchased in the period from 1988 through 1990).

<sup>78</sup> The Gorge Commission adopted the Management Plan on October 15, 1991, and the Secretary of Agriculture approved it on February 13, 1992. 1992 GORGE MANAGEMENT PLAN, *supra* note 39.

<sup>79</sup> *Id.* at IV-14 to -15.

<sup>80</sup> The Gorge Commission must review the Management Plan and decide whether to revise it at least every ten years. Scenic Area Act, 16 U.S.C. § 544d(g) (2012). During this periodic review process the Forest Service retains its exclusive authority over the SMA provisions of the Management Plan, and also has authority to review and concur as to whether the GMA provisions are consistent with the Scenic Area Act. See *id.* §§ 544d(c)(5)(A), (f)–(g), 544f(f); Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 171 P.3d 942, 958–59 (Or. Ct. App. 2007).

[Real property can be purchased by a method] known as partial interest acquisition in which only a specified group of rights is acquired and legal title remains vested with the private landowner. These acquisitions are commonly known as conservation easements or scenic easements. *Very limited use will be made of this . . . method* due to the perpetual costs of administration of the easements and the lesser public benefits derived from only owning a limited set of rights to a property.<sup>81</sup>

The agency's newly diminished enthusiasm was not unique to conservation easements, but applied to all types of federal land acquisitions in the Scenic Area. According to one commentator, the Forest Service began to slow its rate of land acquisition in the Scenic Area in 1999, even "though there was no shortage of willing sellers."<sup>82</sup> There are several likely reasons behind the Forest Service's slowing of land acquisitions at that time. First, by that point the federal government had already acquired and protected some of the Scenic Area's most sensitive resources, treasured landscapes, and prime farmland, either through easements or outright purchases. Second, there was a growing feeling within the Forest Service that it had already acquired *too much* land, given the lack of assurances that the agency would continue to receive sufficient funding to manage the land it had already acquired.<sup>83</sup> Finally, with the adoption of the Gorge Management Plan and county ordinances in the 1990s,<sup>84</sup> for the first time there were strong regulations in place to protect Scenic Area lands, particularly lands in the SMAs.<sup>85</sup> Once these regulations were in place, the Forest Service likely saw less need for new protective acquisitions of property.<sup>86</sup>

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<sup>81</sup> COLUMBIA RIVER GORGE COMM'N & U.S. FOREST SERV., REVISIONS TO THE MANAGEMENT PLAN FOR THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA, at IV-4 to -5 (2004) (emphasis added). This language remains in the current Gorge Management Plan. 2011 Gorge Management Plan, *supra* note 10, at IV-2-4; *see also id.* at IV-2-3 ("Use of scenic or conservation easements is another method that can be used to protect or enhance a particular resource.").

<sup>82</sup> DURBIN, *supra* note 26, at 135.

<sup>83</sup> *Id.* at 137 (noting a Forest Service staffer's viewpoint that "one-third of the land the agency had acquired between 1987 and 1994 should not have been purchased"); Blumm & Baker, *supra* note 13, at 301 n.65 (discussing conflicting viewpoints within the Forest Service about land acquisition strategies); CARL ABBOTT ET AL., PLANNING A NEW WEST: THE COLUMBIA RIVER GORGE NATIONAL SCENIC AREA 165 (William Lang ed., 1997) (noting Gorge Commission staff statement that "lands acquired by the Forest Service have not clearly reflected the standards of the Act or the land use designations and guidelines in the Management Plan").

<sup>84</sup> By January 1997, five of the six counties had adopted Scenic Area ordinances. Hood River County, Oregon was the fifth and final county to do so. *See* Columbia River Gorge Commission, *Legal Authorities: Columbia River Gorge NSA*, <http://www.gorgecommission.org/scenic-area/legal-authorities/> (last visited Nov. 19, 2016).

<sup>85</sup> Before the Gorge Management Plan and implementing ordinances became effective, the Forest Service and then the Gorge Commission managed land use activities in the Scenic Area pursuant to the Final Interim Guidelines (FIGs), which the Forest Service adopted on June 30, 1987. U.S. FOREST SERV., COLUMBIA RIVER GORGE NATIONAL SCENIC AREA FINAL INTERIM GUIDELINES (1987); *see also* 16 U.S.C. § 544h (2012); DURBIN, *supra* note 26, at 79–80; Blumm & Baker, *supra* note 13, at 299. As the "interim" in their name implies, the FIGs were only a temporary placeholder; they consisted of only eleven pages of very general guidelines that gave significant discretion to agency decision makers to exercise on a case-by-case basis. ABBOTT ET

The conservation easements acquired by the Forest Service in the Scenic Area are a unique type of conservation easement. They do not follow the familiar form of conservation easement, sometimes called a “negative restrictive easement,” which expressly allows and precludes certain property uses.<sup>87</sup> Nor are they properly classified as “result-oriented deeds,” which establish specific conservation purposes for a property coupled with the easement holder’s “right to say no” to land use activities that might conflict with such purposes.<sup>88</sup> Instead, the Forest Service’s conservation easements in the Scenic Area are distinctively styled as reserved interest deeds.<sup>89</sup>

In a 1992 article, former Deputy Assistant General Counsel to the United States Department of Agriculture James B. Snow highlighted the use of reserved interest deeds as a response to difficulties the federal government had experienced in enforcing traditional negative restrictive and “result-oriented” conservation easements.<sup>90</sup> Snow defined reserved interest deeds as “the acquisition by the easement holder of all rights, title and interests in a property except those rights specifically reserved by the landowner,”<sup>91</sup> and he explained that reserved interest deeds might “afford a more definitive and objective statement” of the uses landowners could make of their burdened properties.<sup>92</sup> This clarity was important to Snow because, before the advent of reserved interest deeds, courts typically resolved ambiguities about which land uses were allowed in favor of landowners.<sup>93</sup> Snow expected that structuring conservation easements as reserved interest deeds would favor the government in future disputes by shifting the burden to landowners to prove that desired uses had been reserved in the

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AL., *supra* note 83, at 117–18; *see also id.* at 164–67 (discussing the political considerations that went into the preparation and adoption of the FIGs).

<sup>86</sup> The fact that Skamania County’s National Scenic Area ordinance has been used to resolve several disputes on lands burdened by conservation easements buttresses the notion that resources on private property are now protected via a robust layer of land use regulations. *See, e.g.*, cases discussed *infra* Part IV.A–C.

<sup>87</sup> Snow, *supra* note 3, at 3.

<sup>88</sup> *Id.* at 4; *see also* Nancy A. McLaughlin, *Interpreting Conservation Easements*, PROB. & PROP., Mar./Apr. 2015, at 30, 32 (2015) (the “typical” conservation easement states a purpose, prohibits inconsistent uses, and reserves to the grantor the right to engage in uses consistent with the purpose).

<sup>89</sup> Snow, *supra* note 3, at 5.

<sup>90</sup> *Id.* at 5–6. According to Snow, drafting negative restrictive easements that expressly allowed and prohibited uses required too much “clairvoyance,” given constantly changing technology and land use patterns. *Id.* at 3. In addition, the prior use of result-oriented deeds, intended to protect certain conservation purposes in unknown future circumstances, resulted in easements with sweeping and general terms, gray areas, and a “constant battle” between wealthy landowners, consultants, and federal easement holders. *Id.* at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* (“In most easement enforcement cases, the easement holder must show that the easement was lawfully acquired and recorded, that it proscribes certain activities, and that the owner in possession has undertaken a proscribed action. The Forest Service has found that courts usually resolve questions of intention in the favor of the owner in possession.”).

easements.<sup>94</sup> In theory, this burden shift would better protect the American taxpayers' investments in resource preservation on private lands.

The Forest Service began using the reserved interest form of conservation easement extensively in the Pacific Northwest in the 1980s.<sup>95</sup> In the National Scenic Area, the Forest Service structured all of its conservation easements as reserved interest deeds, anticipating that doing so would make the easements easier to negotiate,<sup>96</sup> value,<sup>97</sup> and enforce.<sup>98</sup> Mr. Snow wrote about reserved interest deeds in a hopeful tone, noting that the "reserved interest approach" might be "more efficient, enforceable, and cost-effective" than traditional conservation easements, and thereby "best achieve our conservation objectives."<sup>99</sup>

In hindsight, many of the conservation easements in the National Scenic Area suffered from unclear drafting, for example, by including unsurveyed sketches to depict critical reserved rights like future building sites, development areas, and parcel boundaries.<sup>100</sup> Some of the easements failed to properly incorporate attached drawings and documents into the text of

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<sup>94</sup> *Id.* ("With a reserved interest deed, the easement holder owns the unreserved bundle of rights in the property. Therefore, in theory, the easement holder must establish only that the owner in possession is engaging in activities not reserved in the deed. The owner in possession will bear more of the burden to establish an affirmative reservation of right. This reasoning is speculative since we have yet to have an enforcement action on a reserved interest deed."). The more favorable position for the federal government that Snow anticipated for reserved interest deeds is similar to the canon of construction in public land law "that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957). However, courts apply this canon to resolve ownership rights when the federal government is the *grantor* of rights, not the *grantee*. *See, e.g., Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 616–17 (1978) (holding that water is not a mineral conveyed via property grants under the General Mining Law, in part because Congress did not state whether water was meant for location by miners); *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 59–60 (1983) (holding that gravel extraction is a right reserved to the United States in land grants under the Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified as amended at 43 U.S.C. §§ 291–302 (2012))), because Congress intended the grants for surface uses only and gravel extraction is not a farming or ranching use).

<sup>95</sup> Snow, *supra* note 3, at 4–5 (the Forest Service began using reserved interest deeds in the Oregon Dunes National Recreation Area in 1986, and shortly thereafter in the Columbia River Gorge National Scenic Area).

<sup>96</sup> *Id.* at 5 ("If properly presented by a knowledgeable negotiator, reserved interest deeds may be easier to negotiate with landowners. This is primarily because the listing of affirmative rights stresses the positive elements of landownership.").

<sup>97</sup> *Id.* ("Appraising [the traditional form of conservation easement] has many subjective elements and one of the most subjective is determining how restrictions on land use will affect its market value. Reserved interest deeds may afford a more definitive objective statement of the actual uses that may be made of a property.").

<sup>98</sup> *Id.* ("Reserved interest deeds shift the burden of proof in an enforcement action from the easement holder to the owner in possession.").

<sup>99</sup> *Id.* at 6. At the time Snow's article was published, the Forest Service had not yet been involved in an enforcement action involving a reserved interest conservation easement. *Id.* at 5. Snow contemplated whether this was because most enforcement issues do not occur until successor landowners acquire the burdened properties, or because "landowners are unwilling to challenge an inherently stronger position of the [reserved interest] easement holder." *Id.*

<sup>100</sup> *See infra* notes 243–47 and accompanying text.



the easements.<sup>101</sup> In other cases, easements reserved to landowners rights that were no longer consistent with county zoning laws by the time the landowners attempted to exercise them.<sup>102</sup> Finally, several easements contained technical mistakes that required future corrections and amendments.<sup>103</sup> In several instances, disputes have arisen between landowners and the Forest Service about which uses were allowed under the easements, leading to litigation.

#### IV. LITIGATION CASE STUDIES

To date, three Scenic Area properties burdened by Forest Service conservation easements have been the subject of litigation. All three properties were in Skamania County.<sup>104</sup> First, in 2000, the Perry family sought to relocate an existing dwelling and build a second dwelling and barn on their burdened property.<sup>105</sup> Second, in 2008, Derek Hoyte, the successor landowner to the Grams easement, undertook a number of development and land use activities on his burdened property—including tree removal, roadbuilding, and the construction and operation of a commercial zip-line operation—without first securing government permission.<sup>106</sup> Third, in 2012, GLW Ventures, LLC, the successor landowner to the James easement, sought to reconfigure the existing parcels composing the subject property in a manner contrary to the terms of the easement and applicable zoning ordinances.<sup>107</sup>

In each of these three cases, the Forest Service opposed the landowners' proposals in whole or in part, and the Forest Service's positions ultimately prevailed. Yet, none of the cases were resolved solely by applying the terms of the conservation easements. In each case the Forest Service might have been able to protect the federal government's investments in resources solely by litigating in federal court on the conservation easement terms alone. But that is not the way the disputes played out; instead, the resolution of each case relied to some extent on vigilant enforcement of the Scenic Area land use regulations in administrative proceedings and/or state

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<sup>101</sup> See *infra* notes 243–47 and accompanying text.

<sup>102</sup> See *infra* notes 212–15, 224–25, and accompanying text (discussing a recent dispute in which a conservation easement reserved to the landowner the right to break up the ownership of the property into two new ownership tracts, but when the subsequent landowner attempted to exercise this right nearly twenty-five years later, the requisite property line adjustment to create the new ownership tracts was prohibited by Scenic Area zoning requirements).

<sup>103</sup> See *infra* notes 231–33 and accompanying text.

<sup>104</sup> It is perhaps not surprising that Skamania County has been ground zero for disputes over federal conservation easements in the Scenic Area; the county has been described as a “land of stubborn loggers, fierce defenders of private property, and eager land developers.” FLOYD MCKAY, REPORTING THE OREGON STORY: HOW ACTIVISTS AND VISIONARIES TRANSFORMED A STATE 208 (2016). When Congress enacted the Scenic Area Act in 1986, the Skamania County commissioners protested by flying the American flag at the county courthouse at half-mast. *Id.* at 210.

<sup>105</sup> See *infra* Part IV.A.

<sup>106</sup> See *infra* Part IV.B.

<sup>107</sup> See *infra* Part IV.C.

court by Friends of the Columbia Gorge, Skamania County, the Forest Service, and/or the Gorge Commission. In this way, the federal conservation easements and the Scenic Area land use regulations have worked in tandem to protect Scenic Area resources.

*A. The Perry/Parsons Case*

The Perry/Parsons case was the first case involving a Scenic Area property burdened by a Forest Service conservation easement to be litigated. However, the dispute was resolved under Skamania County's zoning regulations, rather than the terms of the easement.<sup>108</sup> The Perry conservation easement<sup>109</sup> covers 62.95 acres and is located within an SMA in the Mount Pleasant landscape, directly across the Columbia River from the Crown Point key viewing area.<sup>110</sup> When the Forest Service purchased the easement in 1988, the property contained a two-bedroom dwelling and several accessory buildings.<sup>111</sup> The Perry family reserved the right in the conservation easement to move the existing dwelling to the southern end of the property for use by a "farm manager or other farm employee"<sup>112</sup> and replace it with a second, larger dwelling in the same location as the existing dwelling.<sup>113</sup> The conservation easement notes that Congress established the Scenic Area to protect scenic and other resources<sup>114</sup> and that the federal government acquired the easement to achieve these purposes.<sup>115</sup> The easement also states that all land uses on the property must comply with any applicable zoning regulations that might be in effect.<sup>116</sup>

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<sup>108</sup> Skamania Cty. Dep't of Planning & Cmty. Dev., Director's Decision on Application of Dale and Sandy Perry, No. NSA-00-02, at 1-2 (July 27, 2000) [hereinafter Planning Department Decision on Perry Application] (on file with authors).

<sup>109</sup> Easement Deed by Dale P. Perry & Sandra M. Perry, Grantors, and the United States through the U.S. Forest Serv., Grantee (May 13, 1988) [hereinafter Perry Conservation Easement], recorded in 109 SKAMANIA COUNTY DEED RECORDS at 463, refiled in *id.* at 922 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$200,800).

<sup>110</sup> See Perry, No. NSA-00-02, slip op. at 1, 6 (Skamania Cty. Bd. of Adjustment Sept. 21, 2000).

<sup>111</sup> Perry Conservation Easement, *supra* note 109, at 922-23.

<sup>112</sup> *Id.* at 924, 928 exhibit A ("The [rights of] removal and installation of the modular home for use as an additional dwelling in the vicinity of the original homestead dwelling, the general location being indicated on said "EXHIBIT A", [and] the intent being that use of the modular dwelling be limited to housing for a farm manager or other farm employee.").

<sup>113</sup> *Id.* at 923 ("The right [reserved] to replace the existing 2-bedroom modular home with a 3-bedroom modular home on the same location. Information on the design and appearance of the substitute modular dwelling is to be submitted in advance of placement for review and approval by the Forest Service.").

<sup>114</sup> *Id.* at 922 ("[T]he Act established the Columbia River Gorge National Scenic Area in order to protect and provide for the enhancement of scenic, cultural, recreational, and natural resources of the Columbia River Gorge.").

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 926 ("All uses of the property, including those rights reserved in Part II by the Grantors, shall conform with all provisions which are or may be in effect of the Interim Guidelines promulgated by the Forest Service pursuant to section 10 of the [Scenic Area] Act, Guidelines for Land Use Ordinances issued pursuant to section 8 of the Act, and any zoning

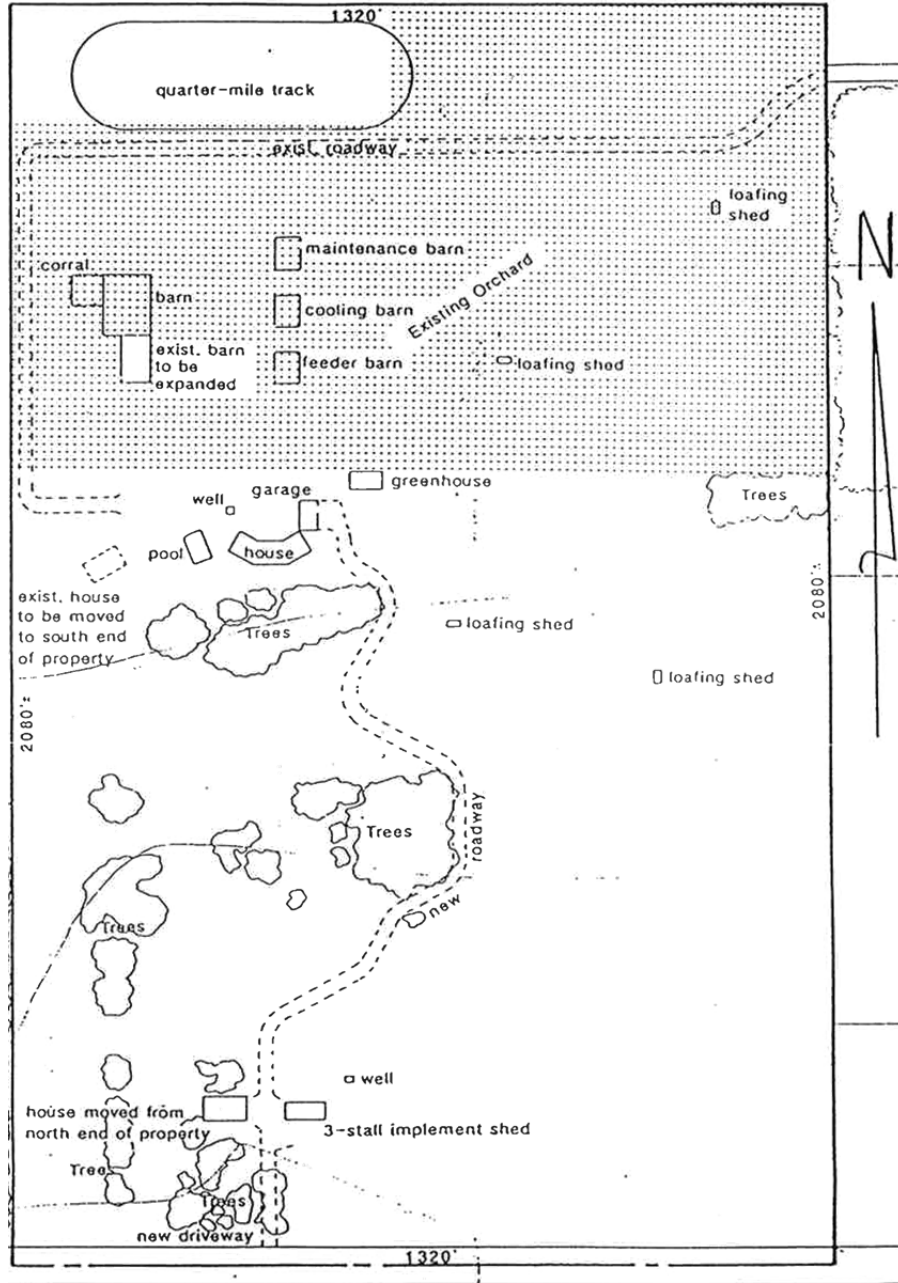


Figure 1. Perry Conservation Easement Map<sup>117</sup>

ordinances which may apply to this property. In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail.”)

<sup>117</sup> *Id.* at 928 exhibit A.

In 2000, the Perrys applied to Skamania County for permission to move the existing dwelling and convert it to “agriculture labor housing,” construct a second new dwelling, and build a new barn on the property.<sup>118</sup> Friends of the Columbia Gorge objected to the Perrys’ application on the grounds that the proposed development was inconsistent with applicable zoning ordinances.<sup>119</sup> In a comment letter to Skamania County, Friends noted a number of the applicable zoning requirements, including provisions requiring the Perrys to demonstrate that the existing buildings on the property qualified as legally existing uses, minimize the scenic impacts of new development, and demonstrate a physical and economic need for the proposed agricultural labor housing.<sup>120</sup> The Forest Service also commented on the Perrys’ application, but apparently did not object to an alternative that would locate new development on the northern part of the property (Site C),<sup>121</sup> in an area not reserved as a building site in the conservation easement.<sup>122</sup> After receiving these comments, the Skamania County Planning Department approved all of the Perrys’ development proposals, with the condition that all new development must be located at Site C.<sup>123</sup>

Although the county planning department approved development in an area not allowed in the Perry conservation easement, the Forest Service did not appeal the county’s decision. Similarly, although the Perry conservation easement explicitly made future land uses subject to county regulations,<sup>124</sup> the Forest Service did not appeal the planning department decision to raise any issues concerning consistency with the Skamania Scenic Area regulations.

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<sup>118</sup> Planning Department Decision on Perry Application, *supra* note 108.

<sup>119</sup> Friends of the Columbia Gorge, Comment Letter on Skamania Cty., Wash. Application No. NSA-00-02, at 2–4 (Apr. 7, 2000) (on file with authors).

<sup>120</sup> *Id.* at 1–3.

<sup>121</sup> Letter from Arthur J. Carroll, Area Manager, Columbia River Gorge Nat’l Scenic Area, U.S. Forest Serv., to Sandra and Dale Perry (May 24, 2000), (on file with authors) (consenting to a new log house in the northwest corner of the property, with design and landscape conditions); U.S. Forest Serv., Comment Letter on Skamania Cty., Wash. Application No. NSA-00-02 (Apr. 12, 2000) (on file with authors) (reviewing the potential effects of new development on scenic resources and recommending that development be located at the northern end of the property).

<sup>122</sup> The parties discussed the merits of three potential building sites on the property. U.S. Forest Serv., Comment Letter, *supra* note 121, at 34 (mapping and describing the three potential development sites); Planning Department Decision on Perry Application, *supra* note 108. Site A was the location of a two-bedroom dwelling that existed on the property at the time of the conservation easement purchase, and was also the site reserved in the easement for a new dwelling; Site B was at the south end of the property, and was the location reserved in the easement for relocating the existing dwelling; Site C was located at the north end of the property, and was not reserved in the easement as a building site. *See* U.S. Forest Serv., Comment Letter, *supra* note 121, at 34 (mapping and describing Sites A, B, and C); Perry Conservation Easement, *supra* note 109, at 928 exhibit A (property map of reserved development sites).

<sup>123</sup> Planning Department Decision on Perry Application, *supra* note 108 (“All new development shall be located at Site C, except the modular house which can be relocated to Site C or remain at Site A as labor housing.”).

<sup>124</sup> Perry Conservation Easement, *supra* note 109, at 926.

Although the Forest Service did not appeal, both the Perrys and Friends of the Columbia Gorge appealed the planning department's decision to the Skamania County Board of Adjustment (BOA), each for different reasons.<sup>125</sup> The Perrys' appeal objected to the planning department's requirement to site the development at Site C.<sup>126</sup> Friends intervened in the Perrys' appeal.<sup>127</sup> In Friends' appeal, Friends alleged multiple violations of Skamania County's Scenic Area land use regulations.<sup>128</sup> The Forest Service participated in the BOA proceedings by providing technical assistance and oral testimony about the property and the proposed development.<sup>129</sup>

The BOA ultimately allowed the Perrys to build a new dwelling and garage at a site reserved in the conservation easement (Site A), as well as to relocate the existing dwelling and construct a barn at Site C (the site not reserved for such development in the conservation easement).<sup>130</sup> The BOA reasoned that the property was highly visible from designated key viewing areas on the Oregon side of the National Scenic Area, and that development at Site C would have the least effect on scenic resources.<sup>131</sup> The conservation easement reserved Site C for use only as a "quarter-mile track,"<sup>132</sup> but the Forest Service did not argue against siting a dwelling or other buildings there.<sup>133</sup>

Friends appealed the BOA decision to the Columbia River Gorge Commission, and the Forest Service intervened in Friends' appeal.<sup>134</sup> After the Forest Service intervened, but before the Gorge Commission decided the case, the Perrys sold the property to the Parsons family.<sup>135</sup> The Parsons

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<sup>125</sup> Perry, No. NSA-00-02, slip op. at 1 (Skamania Cty. Bd. of Adjustment Sept. 21, 2000).

<sup>126</sup> Settlement Agreement Between Friends of the Columbia Gorge, Scott Parsons, Teresa Wilson, & U.S. Forest Service (May 8, 2002) [hereinafter Parsons Settlement Agreement], recorded in 237 SKAMANIA COUNTY DEED RECORDS 1, 2 (on file with Skamania Cty., Wash. Auditor's Office).

<sup>127</sup> Letter from Beth Englander, Staff Attorney, Friends of the Columbia Gorge, to Harpreet Sandhu, Dir., Skamania Cty. Dep't of Planning & Cmty. Dev. (Aug. 17, 2000) (on file with authors) (requesting permissive intervention in the Perrys' appeal because although "Skamania County does not have a formal process for intervention in an appeal before the County Board of Adjustment," Friends had previously submitted comments to the Planning Department, thereby preserving standing).

<sup>128</sup> Friends of the Columbia Gorge, Comment Letter for Skamania Cty. Bd. of Adjustment Hearing on Appeal of NSA 00-02 (Sept. 21, 2000) (on file with authors).

<sup>129</sup> Perry, slip op. at 1-2 (Skamania Cty. Bd. of Adjustment Sept. 21, 2000).

<sup>130</sup> *Id.* at 13-14 ("The modular house and 3-stall barn/shed shall be located at site C . . .").

<sup>131</sup> *Id.* at 6-7.

<sup>132</sup> Perry Conservation Easement, *supra* note 109, at 928 exhibit A.

<sup>133</sup> The Forest Service repeatedly suggested Site C as the best area for development, without acknowledging that this site would directly conflict with the conservation easement it held on the property. U.S. Forest Serv., Comment Letter, *supra* note 121, at 8 (listing under "Recommendations" to the Planning Department the siting of "the new log home, farm labor housing, and accessory structures on Site C"); Perry, slip op. at 9 (Skamania Cty. Bd. of Adjustment Sept. 21, 2000) (approving development of labor housing and new barn at Site C in part because "the Forest Service determined that the retention of 4 orchard rows and the mature fir trees would amply screen the labor house and barn/shed and that no additional plantings . . . at Site C would be necessary").

<sup>134</sup> Parsons Settlement Agreement, *supra* note 126, at 2.

<sup>135</sup> *Id.* at 2-3.

family then settled the appeal with Friends and the Forest Service, agreeing to remove the existing two-bedroom dwelling from the property and to adopt a prohibition against agricultural housing on the property, in exchange for an agreement by Friends and the Forest Service to not challenge a replacement dwelling at Site A (the site originally reserved in the conservation easement) if built under certain mitigating conditions detailed in the settlement agreement.<sup>136</sup> However, the Parsons family never constructed the replacement dwelling allowed by the settlement,<sup>137</sup> and Skamania County's land use approval for that dwelling has now expired.<sup>138</sup>

The Perry case shows how properties burdened by conservation easements can be subject to multiple and sometimes conflicting bodies of law; the Perrys had a contractual agreement with the Forest Service reserving the right to a second homesite, but this agreement was expressly subject to county zoning, which in this case arguably did not allow it. In effect, the Skamania County ordinances protected scenic and agricultural resources on this property from additional development because the county ordinances were more restrictive in 2000 than the 1988 conservation easement.<sup>139</sup> In addition, although the conservation easement would have allowed relocating an existing dwelling on the property, the county initially authorized that relocation to a different site than had been reserved in the conservation easement. Neither the Forest Service nor any other party pursued enforcement of the conservation easement in federal court. Instead, much of the development sought by the landowners was blocked not by the conservation easement, but rather by citizen enforcement of the county zoning ordinances and by the resulting settlement agreement.

### B. The Hoyte Case

The Hoyte case, which involved the Grams easement,<sup>140</sup> serves as an example of a conservation easement and zoning regulations that worked together to ultimately protect a property against permanent development, but not before the landowner had caused significant damage to natural resources. The Grams easement covers 80 acres within an SMA on the

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<sup>136</sup> *Id.* at 3–6.

<sup>137</sup> Skamania County's public records show no building permits issued for the subject parcels of land through the relevant time period.

<sup>138</sup> See SKAMANIA COUNTY, WASH., CODE § 22.06.150.A.1.a (describing that Skamania County land use approvals become void if and when the approved development action is not undertaken within two years of approval).

<sup>139</sup> Compare Letter from Beth Englander to Harpreet Sandhu, *supra* note 127, at 1–4 (listing the controlling ordinance provisions), with Perry Conservation Easement, *supra* note 109, at 2–5 (placing less stringent restrictions on development while also permitting development otherwise prohibited by Skamania County ordinances).

<sup>140</sup> Easement Deed by Richard E. Grams & Helen D. Grams, Grantors, and the United States through the U.S. Forest Serv., Grantee (Mar. 31, 1995) [hereinafter Grams Conservation Easement], recorded in 149 SKAMANIA COUNTY DEED RECORDS 255 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$456,000).

Washington side of the Scenic Area,<sup>141</sup> in the same Mount Pleasant landscape as the Perry easement.<sup>142</sup> The Grams easement was designed to allow the landowner to continue farming the land,<sup>143</sup> but to discontinue the harvesting of live timber.<sup>144</sup> The easement acknowledges that uses of the property must comply with all applicable Scenic Area regulations,<sup>145</sup> and specifies that courts should resolve ambiguities about reserved rights and permissible land uses in furtherance of the purposes of the Scenic Area Act.<sup>146</sup>

In 2008, Derek Hoyte, the successor to the Grams easement, began installing recreational zip-lines, using the zip-lines for commercial purposes, removing trees, grading and filling, and building roads and trails on the property—all in violation of the conservation easement.<sup>147</sup> Soon after the Forest Service demanded that Mr. Hoyte cease these activities,<sup>148</sup> Skamania County and Hoyte stipulated to a temporary restraining order, enjoining Hoyte from further construction, development, and commercial recreational activities on the property until he acquired county permits.<sup>149</sup>

Hoyte then requested the Forest Service's permission to develop the land as a zip-line and suspension bridge recreational park,<sup>150</sup> but the Forest

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<sup>141</sup> Letter from Daniel T. Harkenrider, Area Manager, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv., to Derek Hoyte (Mar. 11, 2009) [hereinafter March 2009 Letter from Daniel T. Harkenrider to Derek Hoyte] (on file with authors).

<sup>142</sup> See *supra* notes 71–75 and accompanying text.

<sup>143</sup> Grams Conservation Easement, *supra* note 140, at 257 (reserving to the landowner “[t]he right to use the Subject Property in ways that are consistent with the current or past agricultural uses of the Subject Property, provided that any or all use(s) shall not violate the conservation spirit and intent of the easement conveyance and are in accordance with all applicable laws, regulations, ordinances, and orders set forth in [the Gorge Management Plan]. All proper permits and licenses shall be obtained and approved when necessary in accordance with County Ordinances and with concurrence of the Grantors, their successors and assigns.”).

<sup>144</sup> *Id.* (reserving “[t]he right to gather and cut naturally dead and down timber for firewood and domestic uses and to eliminate direct safety hazards to existing structures”).

<sup>145</sup> *Id.* at 259 (“All uses of the property, including those rights reserved in Part II by the Grantor, shall conform with all provisions which are or may be in effect of the Interim Guidelines promulgated by the Forest Service pursuant to section 10 of the [Scenic Area] Act, Guidelines for Land Use Ordinances issued pursuant to section 8 of the Act, and any zoning ordinances which may apply to this property. In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail.”).

<sup>146</sup> *Id.* (“The Grantor and the United States agree that any ambiguities regarding the terms and conditions of this easement shall be resolved in a manner which best effects the overall conservation and public purpose of [the Scenic Area Act].”).

<sup>147</sup> Letter from Daniel T. Harkenrider, Area Manager, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv., to Derek Hoyte 1–3 (Jan. 16, 2009) [hereinafter January 2009 Letter from Daniel T. Harkenrider to Derek Hoyte] (on file with authors).

<sup>148</sup> *Id.* at 1–5 (detailing numerous land uses that violated specific conservation easement terms).

<sup>149</sup> *Skamania County v. Hoyte*, No. 08-2-00202-2 (Wash. Super. Ct. Feb. 12, 2009) (stipulated order granting temporary restraining order).

<sup>150</sup> Permit Application Narrative from Derek Hoyte to U.S. Forest Serv. 2 (Mar. 5, 2009) (on file with authors) (“A cable supported suspension bridge at Canyon Creek Ranch would provide one of the most outstanding viewpoints anywhere in the Columbia River Gorge and it would also be a brand new viewpoint, previously only seen by birds floating on the wind and more recently the occasional passerby securely attached to a zip-line cable.”).

Service informed him that the conservation easement prohibited these uses.<sup>151</sup> Hoyte also attempted to submit land use applications to the Skamania County Planning Department for county land use approval, but the county planning director denied his applications because they were incomplete,<sup>152</sup> lacking the necessary signatures of a Forest Service official indicating the agency's consent to the proposed uses.<sup>153</sup>

Undeterred by his failure to obtain the requisite government approvals, Hoyte continued to operate the zip-line park as a "U-pick pine cones business"<sup>154</sup> in violation of the County's restraining order, upon which the Skamania County Superior Court held him in contempt of court.<sup>155</sup> Following a short jail sentence for violating the restraining order,<sup>156</sup> Hoyte continued to seek county permission for his desired land use activities, arguing that he needed zip-lines and trails on the property for agricultural purposes in order

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<sup>151</sup> March 2009 Letter from Daniel T. Harkenrider to Derek Hoyte, *supra* note 141, at 1 (advising Hoyte that "[t]he activities proposed in your letter fall outside of the reserved rights held by the landowner. To allow these uses would be to in effect give away real property interests acquired by the United States.").

<sup>152</sup> Letter from Karen A. Witherspoon, Dir., Skamania Cty. Cmty. Dev. Dep't, to Derik [sic] Hoyte 1 (Mar. 24, 2009) (on file with authors) ("You have submitted portions of two applications and various 'narrative addendums' which are all lacking the basic application requirements . . ."); *see also* SKAMANIA COUNTY, WASH., CODE § 22.06.110.A.4 (2016) ("No application shall be accepted as complete until all documented omissions and deficiencies have been corrected by the applicant.").

<sup>153</sup> Letter from Karen A. Witherspoon to Derik [sic] Hoyte, *supra* note 152, at 1 ("The March 11, 2009 letter from the Forest Service indicated that your proposals were found to be outside of the rights you hold under the Scenic Area Conservation Easement owned by the Forest Service and have denied your proposal to construct a suspension bridge and undertake any commercial recreation use on the property. Since the Forest Service has denied these proposed uses and will not sign the applications as conservation easement owner the incomplete applications with Skamania County cannot be processed and are denied."); *see also* SKAMANIA COUNTY, WASH., CODE § 22.06.060.A.1.a.ix (2016) (requiring the signatures of property owners on land use applications).

<sup>154</sup> Hastings, *supra* note 18; *see also* Associated Press, *Zip-line Stays in Columbia Gorge, Owner Cited*, SEATTLE TIMES, Apr. 22, 2009, <http://www.seattletimes.com/seattle-news/zip-line-stays-in-columbia-gorge-owner-cited/> (last visited Nov. 19, 2016) ("Last weekend Derek Hoyte of Washougal opened his Canyon Creek Ranch for pine cone picking. For \$45 dollars per adult or \$30 for children up to age 17, visitors could pick pine cones—and ride on the zip lines for free."); Matt Wastradowski, *Washougal Landowner's Zip-line Fight to go to Trial*, SEATTLE TIMES, July 13, 2009, <http://www.seattletimes.com/life/travel/washougal-landowners-zip-line-fight-to-go-to-trial/> (last visited Nov. 19, 2016).

<sup>155</sup> *Skamania County v. Hoyte*, No. 08-2-00202-2 (Wash. Super. Ct. May 13, 2009) (order of contempt).

<sup>156</sup> *Skamania County v. Hoyte*, No. 08-2-00202-2 (Wash. Super. Ct. Aug 27, 2009) (order imposing jail sentence); *Skamania County v. Hoyte*, No. 08-2-00202-2 (Wash. Super. Ct. Sept. 1, 2009) (order releasing Hoyte from jail) ("It is hereby ordered that Mr. Derek Hoyte be released from the Skamania County Jail as the zip-lines on his property are all down on the ground as of 9:15 am, Tuesday September 1, 2009. The balance of the 30 days imposed on August 27, 2009 is suspended so long as the defendant does not violate the order of contempt issued on 5-13-09."); *Gorge Zip Line Dispute Ends With Jail Time for Landowner*, KGW, Sept. 17, 2009, <http://legacy.kgw.com/story/news/nation/2014/07/18/11609238/> (last visited Nov. 19, 2016); Matt Wastradowski, *Washougal Landowner Jailed in Zip-line Case*, DAILY NEWS, Aug. 28, 2009, [http://tdn.com/news/washougal-landowner-jailed-in-zip-line-case/article\\_db3aec44-fde6-5644-9b15-e56d624aad6.html](http://tdn.com/news/washougal-landowner-jailed-in-zip-line-case/article_db3aec44-fde6-5644-9b15-e56d624aad6.html) (last visited Nov. 19, 2016).



to “provide a convenient and safe way to get from the upper end of [the property] to the lower end.”<sup>157</sup> In November 2010, he reinstalled the zip-lines.<sup>158</sup> Site visits by the Forest Service the following month revealed that Hoyte had also begun unauthorized construction of a suspension bridge, and that unauthorized roads and culverts were causing erosion on the property.<sup>159</sup>

Soon thereafter, the Forest Service sought and received another temporary restraining order, this time from the United States District Court for the Western District of Washington, which enjoined Hoyte from conducting any land uses not reserved in the conservation easement.<sup>160</sup> In early 2011, the federal district court granted the Forest Service’s request for a preliminary injunction.<sup>161</sup> Ultimately, the district court approved a consent decree in 2014 that permanently enjoined Hoyte from violating the terms of the conservation easement<sup>162</sup> and that required him to restore the property and compensate the federal government for the resource and property damage he had caused.<sup>163</sup>

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<sup>157</sup> Permit Application Narrative from Derek Hoyte to U.S. Forest Serv. 1 (Sept. 16, 2009) (on file with authors).

<sup>158</sup> *United States v. Hoyte*, No. 2:10-cv-02044-BHS, 2010 WL 5394922, at \*3 (W.D. Wash. Dec. 22, 2010) (order granting temporary restraining order).

<sup>159</sup> *Id.* at \*4. Mr. Hoyte had also installed an unauthorized culvert on Canyon Creek, a Columbia River tributary on the property. January 2009 Letter from Daniel T. Harkenrider to Derek Hoyte, *supra* note 147, at 1–2 (“[U]nauthorized roads constructed across and along the bottom of Canyon Creek are a clear violation of [the conservation easement section reserving the right to maintain only existing roads]. This unauthorized road crosses Canyon Creek with an unauthorized culvert, and [is] causing resources damage and active erosion on the site.”). The federal district court later ruled that Hoyte had also violated section 404 of the Federal Water Pollution Control Act (Clean Water Act), 13 U.S.C. § 1344 (2012), by discharging fill material into navigable waters without a permit. Consent Decree Between Plaintiff United States & Defendants Derek Hoyte, Columbia Crest Partners, LLC, & Columbia Pacific Enterprises at 4–5, *United States v. Hoyte*, No. 2:10-cv-02044-BHS (W.D. Wash. Feb. 28, 2014) [hereinafter Consent Decree].

<sup>160</sup> *See Hoyte*, WL 5394922, at \*3–4 (reasoning that a temporary restraining order was warranted because the United States was likely to prevail on the merits, resources were likely to suffer irreparable harm, the balance of equities was in favor of the United States, and an injunction was in the public interest).

<sup>161</sup> *United States v. Hoyte*, No. 2:10-cv-02044-BHS (W.D. Wash. Feb. 7, 2011) (order granting preliminary injunction).

<sup>162</sup> Consent Decree, *supra* note 159, at 9–15. The court permanently enjoined Mr. Hoyte from altering the natural drainage on the property, opening the property to the public, operating commercial enterprises on the property, building any roads or trails, undertaking any ground-disturbing activity, “making any use of any standing tree” without the approval of the United States, and accessing adjacent National Forest property. *Id.* at 9–11, 13.

<sup>163</sup> The court-approved consent decree required Mr. Hoyte to restore and mitigate all damage to the property and adjacent Forest Service land, to pay \$90,000 in damages, and to pay \$10,000 in civil penalties for violating section 404 of the Clean Water Act. *Id.* at 16, 19. On August 8 and August 11, 2016, respectively, the Forest Service and the Washington Department of Natural Resources issued decisions reviewing and approving the road and culvert removal activities on the property to implement the consent decree. Removal of Unauthorized Road and Culvert, No. CD-16-05-S (U.S. Forest Serv. Aug. 8, 2016) (Columbia River Gorge National Scenic Area consistency determination); Forest Practices Application/Notification No. 2932104 (Wash. Dep’t of Nat. Res. Aug. 11, 2016) (notice of decision).

At first, the federal conservation easement did not play a central role in the Hoyte litigation. The first restraining order, issued against Hoyte in state court, never even mentioned the conservation easement, instead relying on the fact that Hoyte lacked the required Skamania County permits.<sup>164</sup> The county then rejected Hoyte's land use applications as incomplete because the Forest Service, as a property owner, was unwilling to sign them. Eventually, however, the conservation easement became the primary focus of the dispute over allowable uses on the property.

Letters exchanged between the Forest Service and Skamania County during the Hoyte dispute reveal conflicting government views about whether Skamania County was obligated to—or even had the authority to—enforce the conservation easement, and whether the County could process Mr. Hoyte's land use applications absent the Forest Service's consent.<sup>165</sup> Although the local and federal agencies in this case apparently disagreed about the appropriate procedures, they managed to cooperate to prevent the property from being used as a commercial zip-line park.<sup>166</sup> Ultimately, the Forest Service steered the litigation to its conclusion by filing suit and prevailing in federal court, successfully enjoining damage to scenic and natural resources on the property.<sup>167</sup>

The Hoyte dispute took five years to resolve. The protracted nature of this litigation indicates that James Snow's 1992 article may have placed too much trust in the capability of reserved interest deeds to prevent nonreserved uses. Snow suggested that “reserved interest deeds shift the burden of proof in an enforcement action from the easement holder to the owner in possession,” as distinguished from the usual conservation easement enforcement action, in which “the easement holder must show that the easement was lawfully acquired and recorded, that it proscribes certain activities, and that the owner in possession has undertaken a proscribed action.”<sup>168</sup> But as the Hoyte litigation unfolded, the practical result was that the Forest Service was not relieved of any of these traditional burdens. In addition, Hoyte made little attempt to prove that the right to

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<sup>164</sup> See *Skamania County v. Hoyte*, No. 08-2-00202-2 (Wash. Super. Ct. Feb. 12, 2009) (ordering Hoyte to cease and desist from developing, constructing, and advertising public recreation on the property until he acquired Skamania County permits).

<sup>165</sup> See Letter from Daniel T. Harkenrider, Scenic Area Manager, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv., to Karen A. Witherspoon, Dir., Skamania Cty. Cmty. Dev. Dep't (Oct. 1, 2009) (arguing that the county should not approve any land use application filed by Mr. Hoyte that would conflict with the conservation easement); Letter from Peter S. Banks, Prosecuting Attorney, Skamania Cty., to Daniel T. Harkenrider, Scenic Area Manager, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv. (Oct. 6, 2009) (“The United States, through the U.S. Attorney's office has the right, power, and duty to enforce the terms of [the] easement. Skamania County has neither the right, the power, nor the duty to do so.”); Letter from Daniel T. Harkenrider, Scenic Area Manager, Columbia River Gorge Nat'l Scenic Area, U.S. Forest Serv., to Peter S. Banks, Prosecuting Attorney, Skamania Cty. (Nov. 13, 2009) (arguing that if the county were to “process the Hoyte application [it would] amount[] to the County contemplating the authorization of uses of real property not owned by [Mr. Hoyte]”).

<sup>166</sup> Consent Decree, *supra* note 159, at 12, 21.

<sup>167</sup> *Id.* at 9–15.

<sup>168</sup> Snow, *supra* note 3, at 5; see also *supra* note 94 and accompanying text.

operate a zip-line or commercial recreation park had been reserved to him in the conservation easement. Eventually, after several years of litigation by the federal and county governments, the Forest Service convinced the federal court that such commercial uses had not been reserved to the landowner.<sup>169</sup>

The Hoyte case illustrates that enforcing conservation easements can be time-consuming, even in the face of obvious easement violations. It also illustrates the benefit of having strong zoning ordinances that support conservation easements, as well as vigilant governmental enforcement. The complementary litigation efforts of Skamania County and the Forest Service played critical roles in stemming the damage caused by the landowner to the property.

### C. The GLW Ventures Case

The GLW Ventures case is the most recent litigation involving a property in the Scenic Area burdened by a federal conservation easement. At its heart, the case concerned a dispute over the landowner's proposal to modify the sizes and boundaries of the burdened parcels via a boundary line adjustment. The case, which was litigated before the Skamania County Hearing Examiner,<sup>170</sup> Columbia River Gorge Commission,<sup>171</sup> Skamania County Superior Court,<sup>172</sup> and eventually the United States District Court for the Western District of Washington,<sup>173</sup> provides an opportunity to analyze the interplay between county zoning ordinances and conservation easement terms in protecting resources on private lands in the Scenic Area, as well as enforcement of these authorities by both government and citizen interests.

The James easement covers approximately 109 acres of land in Skamania County located adjacent to and directly north and east of the Perry/Parsons property.<sup>174</sup> In this easement, the landowner at the time, Sharleen James, reserved the right to break the ownership of the property into two new tracts, "Tract 1 being 62 acres in farm and woodlot and 5 acres in homesite, and Tract 2 being 38 acres in farm and woodlot and 5 in

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<sup>169</sup> Consent Decree, *supra* note 159, at 4, 12–13.

<sup>170</sup> GWL [sic] Ventures, LLC's Boundary Line Adjustment Within the National Scenic Area (*GLW Ventures*), No. NSA-12-32 (Skamania Cty. Hearing Exam'r May 13, 2013) (findings, conclusions, and decision).

<sup>171</sup> GLW Ventures, LLC, No. COA-S-13-02 (Columbia River Gorge Comm'n May 5, 2014), *corrected* (May 13, 2014) (final opinion and order).

<sup>172</sup> GLW Ventures, LLC v. Skamania County, No. 14-2-00071-7 (Wash. Super. Ct. Dec. 17, 2015) (final order and judgment affirming Gorge Commission decision).

<sup>173</sup> GLW Ventures, LLC v. U.S. Forest Serv., No. 3:12-cv-05140-RBL, 2016 WL 3364896 (W.D. Wash. June 17, 2016) (order granting Forest Service's motion for summary judgment).

<sup>174</sup> James Conservation Easement, *supra* note 12, at 213; *see also* Perry Conservation Easement, *supra* note 109.

homesite.”<sup>175</sup> The conservation easement also includes a sketch depicting the two reserved ownership tracts, as reproduced below.

Ms. James, however, failed to exercise the reserved right to create two ownership tracts before allowing the property’s zoning to be changed to GMA Large-Scale Agriculture with a minimum parcel size of 80 acres.<sup>176</sup> After allowing this zoning change, Ms. James sold all of her interests in the property to GLW Ventures, LLC (GLW).<sup>177</sup> Like the other Forest Service reserved interest deeds in the Scenic Area,<sup>178</sup> the James easement states that all uses on the property must comply with all applicable land use regulations.<sup>179</sup>

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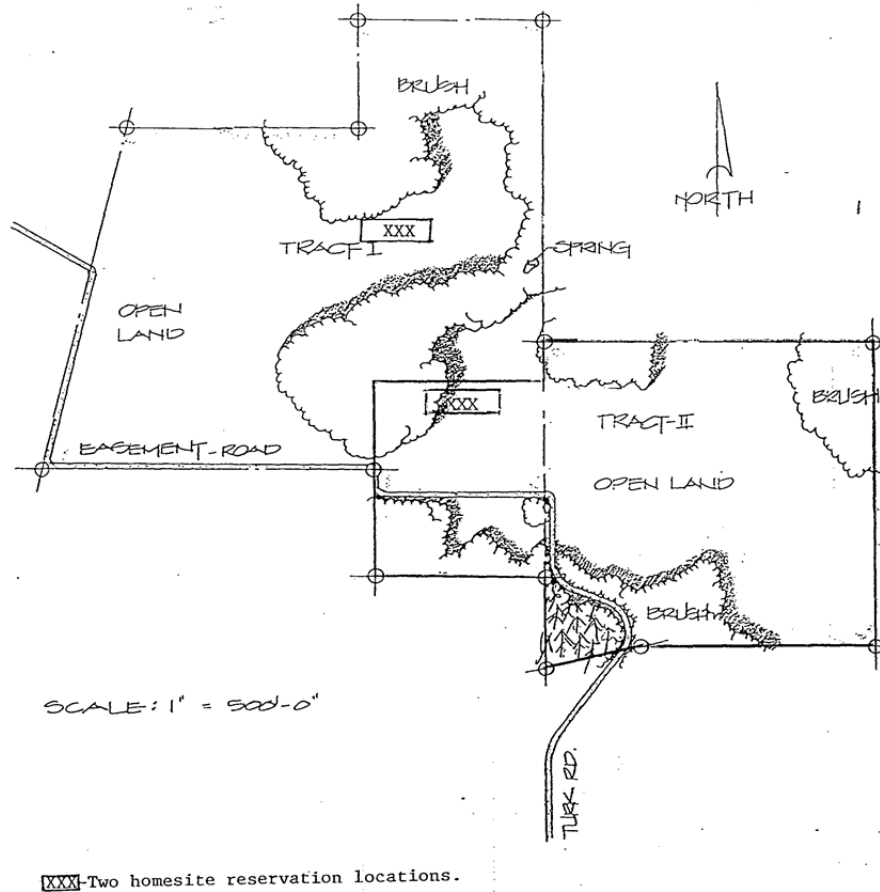
<sup>175</sup> James Conservation Easement, *supra* note 12, at 215. The easement further stated that the property “shall not be subdivided . . . or disposed of as smaller tracts other than the previously stated Tracts 1 and 2.” *Id.* at 216.

<sup>176</sup> The GLW property was originally designated SMA, but Ms. James made a bona fide offer to sell her interests in the property to the Forest Service per the Scenic Area Act’s section 8(o) “opt-out” provision, and because the Forest Service did not accept Ms. James’s offer, the property became subject to GMA zoning requirements and an 80-acre minimum parcel size. *GLW Ventures*, slip op. at 3 (Wash. Super. Ct. Dec. 17, 2015); *see also* Pub. L. No. 99-663, § 8(o), 100 Stat. 4274, 4287 (1986) (codified as amended at 16 U.S.C. § 544f(o) (2012)); *supra* note 38.

<sup>177</sup> Ms. James sold her interests in the property to GLW on July 12, 2005. *GLW Ventures, LLC*, No. COA-S-13-02, slip op. at 7 (Columbia River Gorge Comm’n May 13, 2014).

<sup>178</sup> *E.g.*, Perry Conservation Easement, *supra* note 109, at 926.

<sup>179</sup> James Conservation Easement, *supra* note 12, at 217 (“All uses of the property, including those rights reserved in Part II by the Grantor, shall conform with all provisions which are or may be in effect of the Interim Guidelines promulgated by the Forest Service pursuant to section 10 of the [Scenic Area] Act, Guidelines for Land Use Ordinances issued pursuant to section 8 of the Act, and any zoning ordinances which may apply to this property. In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail.”).



**Figure 2. James Conservation Easement Map**<sup>180</sup>

The property burdened by the James easement consisted of four legal parcels.<sup>181</sup> In 2011, GLW applied to Skamania County for a boundary line adjustment to reconfigure the four legal parcels into two new parcels and to construct several buildings on the property.<sup>182</sup> When the Forest Service objected, asserting that GLW's proposal conflicted with the terms of the conservation easement, Skamania County placed the application on hold.<sup>183</sup> GLW then sued both the Forest Service and Skamania County in federal

<sup>180</sup> *Id.* at 219 exhibit A.

<sup>181</sup> *GLW Ventures*, No. NSA-12-32, at 8 (Skamania Cty. Hearing Exam'r May 13, 2013).

<sup>182</sup> *Id.* at 7.

<sup>183</sup> *Id.*

court, seeking declaratory and injunctive relief.<sup>184</sup> This lawsuit, as well as a second federal lawsuit filed by GLW against the Forest Service, were eventually stayed by the district court so that parallel administrative and state court litigation could be resolved first.<sup>185</sup>

In 2012, GLW again applied to Skamania County,<sup>186</sup> this time limiting its request to the same boundary line adjustment as in its prior application, but not including the proposed buildings.<sup>187</sup> The Skamania County Planning Department approved GLW's second application,<sup>188</sup> even though it would have reduced an existing 96-acre legal parcel below the 80-acre minimum parcel size required by the county zoning ordinance.<sup>189</sup>

The Forest Service appealed the county planning department decision to the Skamania County Hearing Examiner on the grounds that the proposal would violate the 80-acre minimum parcel size and that Skamania County's Scenic Area ordinance prevented the county from processing GLW's application without the Forest Service's consent.<sup>190</sup> Friends of the Columbia Gorge participated in support of the Forest Service's appeal.<sup>191</sup> The county hearing examiner ruled that the proposed adjustment would violate the 80-acre minimum parcel size imposed by county zoning ordinances,<sup>192</sup> but

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<sup>184</sup> Amended Complaint for Declaratory Judgment & Injunctive Relief at 4–5, GLW Ventures, LLC v. U.S. Forest Serv., No. 3:12-cv-05140-RBL, 2016 WL 3364896 (W.D. Wash. June 17, 2016).

<sup>185</sup> See GLW Ventures, LLC v. U.S. Forest Serv., No. 3:12-cv-05140-RBL, 2013 WL 5406207, at \*2 (W.D. Wash. Sept. 25, 2013) (order denying motions for summary judgment) (“The County’s initial approval of the Boundary Line Adjustment and the Forest Service’s successful appeal of that determination are now on appeal in Skamania County. The Forest Service argues that the outcome of that litigation could moot this case. The Court agrees. . . . This case is STAYED pending the outcome of the County litigation.”); GLW Ventures, LLC v. U.S. Forest Serv., No. 3:14-cv-05806-RBL (W.D. Wash. Apr. 13, 2015) (order granting stay) (staying GLW’s second federal suit because a state court ruling might moot GLW’s claim, and noting that if the second federal suit proceeded, it would “likely be consolidated with the first federal lawsuit because [both cases] involve common questions of law and fact”).

<sup>186</sup> Skamania Cty., Wash. Application, No. NSA-12-32, at 1–2 (Oct. 3, 2012) (on file with authors) [hereinafter Application No. NSA-12-32].

<sup>187</sup> *GLW Ventures*, slip op. at 7 (Skamania Cty. Hearing Exam’r May 13, 2013) (citing Application No. NSA-12-32, *supra* note 186).

<sup>188</sup> GLW Ventures, LLC, No. NSA-12-32, slip op. at 2 (Skamania Cmty. Dev. Dep’t Dec. 31, 2012).

<sup>189</sup> See *infra* note 204 and accompanying text. In addition, the boundary line adjustment approved by Skamania County did not match the property boundaries and acreages mapped and described in the conservation easement. The easement reserved the right to create one parcel approximately 67 acres and one parcel approximately 43 acres. James Conservation Easement, *supra* note 12, at 215. The County instead approved a boundary line adjustment that would have created one parcel approximately 56 acres and one parcel approximately 52 acres. *GLW Ventures*, slip op. at 1 (Skamania Cmty. Dev. Dep’t Dec. 31, 2012). Thus, GLW’s proposed parcels would have shifted approximately ten acres from one of the tracts reserved in the easement to the other.

<sup>190</sup> *GLW Ventures*, slip op. at 1–2 (Skamania Cty. Hearing Exam’r May 13, 2013); see also SKAMANIA COUNTY, WASH. CODE § 22.06.060.A.1.a.ix (2016) (requiring the signatures of property owners on land use applications to make them complete).

<sup>191</sup> *GLW Ventures*, slip op. at 15 (Skamania Cty. Hearing Exam’r May 13, 2013).

<sup>192</sup> *Id.* at 17 (“Zoning in effect on the date of [GLW’s] application required an 80-acre minimum lot size. Because it would change a lot that conforms to the minimum lot size into a nonconforming lot, [GLW’s proposal] violates SCC 22.08.040.A.”); SKAMANIA COUNTY, WASH.,

also that the Forest Service was not a property owner whose signature or consent to the application was necessary.<sup>193</sup> Given the violation of the 80-acre minimum, the hearing examiner denied GLW's application.<sup>194</sup>

GLW and the Forest Service both appealed the county hearing examiner's decision to the Gorge Commission,<sup>195</sup> having each prevailed on one of the two main issues decided by the hearing examiner. Friends intervened on the Forest Service's side in both appeals.<sup>196</sup>

In 2014, the Gorge Commission affirmed the hearing examiner's decision in part and remanded in part.<sup>197</sup> The Gorge Commission first rejected all of GLW's assignments of error, holding that the hearing examiner had properly denied GLW's proposed boundary line adjustment because it violated the county's 80-acre minimum parcel size requirement.<sup>198</sup> The Gorge Commission then addressed the Forest Service's appeal, ruling that the hearing examiner had erred in concluding that the Forest Service was not a property owner whose consent was necessary for Skamania County to process GLW's land use application.<sup>199</sup> The Gorge Commission reasoned that the term "property owner" in Skamania County's ordinance was ambiguous as to whether it included holders of conservation

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CODE § 22.08.040.A.3 (2016) ("[A proposed] lot line adjustment shall not allow a parcel that is equal to or larger than the minimum lot size before the lot line adjustment to become less than the minimum lot size after the lot line adjustment, except to allow a public or nonprofit entity to acquire land for the purpose of protecting and enhancing scenic, cultural, recreation or natural resources, provided the land to be acquired would be protected by a conservation easement or other similar property restriction that precludes future land divisions and development.").

<sup>193</sup> *GLW Ventures*, slip op. at 17 (Skamania Cty. Hearing Exam'r May 13, 2013) ("[A]n easement holder's signature is not required for application completeness."). The hearing examiner also reasoned that she lacked authority to resolve conservation easement disputes, and therefore purported to limit her decision to the Skamania County Code. *Id.*

<sup>194</sup> *Id.* at 17–18.

<sup>195</sup> *GLW Ventures, LLC*, No. COA-S-13-02, slip op. at 8 (Columbia River Gorge Comm'n May 13, 2014).

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *Id.* at 26.

<sup>198</sup> *Id.* at 15–16 (rejecting GLW's argument that a provision in the Skamania County Code allowing exceptions to the 80-acre minimum applied). The Commission also ruled that the hearing examiner did not abrogate the conservation easement by denying the proposed boundary line adjustment. *Id.* at 17 (noting that "the easement deed and the County's Scenic Area Ordinance work in concert" because both provide that the more restrictive provision applies).

<sup>199</sup> *Id.* at 21–22 ("[B]ased on the particular facts of this case, the Forest Service did need to sign the land use application. First, we note that the conservation easement in this case gave all interest in the property to the USDA Forest Service, except the rights specifically reserved to James in the easement deed. . . . We also note that the magnitude of the Forest Service's interest in this property suggests that it [is] a property owner. When it acquired the conservation easement, the Forest Service paid more than 60 percent of the fair market value of the property when purchased."). The Commission decided that the hearing examiner had also erred in applying equitable factors to decide that the Forest Service was not a property owner for the purposes of whether GLW's land use application was complete. *Id.* at 25–26 (ruling that the record did not support the hearing examiner's conclusion that requiring Forest Service approval on land use applications where it holds conservation easements would create an "untenable burden" on the landowner).

easements,<sup>200</sup> that Skamania County historically had required the Forest Service's signature or consent for land use applications involving properties burdened by conservation easements,<sup>201</sup> and that the Forest Service was a property owner in this case, in part based on the fact that the agency had paid Ms. James more than 60% of the assessed value of the property in exchange for the easement.<sup>202</sup> The Gorge Commission therefore remanded the matter to Skamania County, reiterating that the application could not be processed without the Forest Service's consent.<sup>203</sup>

A recurring theme in litigation involving Scenic Area conservation easements has been that the most restrictive provision controls, whether found in the easement, a county ordinance, the Gorge Management Plan, or some other source of law. In the GLW litigation, the Gorge Commission interpreted and applied a provision in the conservation easement that expressly states that the more restrictive provision controls.<sup>204</sup> GLW argued that the county zoning ordinances would allow it to build a dwelling on each of its four legal parcels, while the conservation easement limited the property to no more than two dwellings, and therefore the easement was more restrictive and should control GLW's application for a boundary line adjustment.<sup>205</sup> The Gorge Commission disposed of GLW's argument as a red herring by noting that the dispute over the boundary line adjustment involved the county's minimum parcel size, not the number of parcels nor the number of dwellings,<sup>206</sup> and by observing that "the easement deed and the County's Scenic Area Ordinance work in concert. Whichever contains the more restrictive standard, the more restrictive standard controls."<sup>207</sup> Consequently, the Gorge Commission held that the county's 80-acre

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<sup>200</sup> *Id.* at 20–21.

<sup>201</sup> *Id.* at 23 (referencing the Hoyte case); *see supra* notes 152–53 and accompanying text.

<sup>202</sup> *GLW Ventures*, slip op. at 22 (Columbia River Gorge Comm'n May 13, 2014).

<sup>203</sup> *Id.* at 26.

<sup>204</sup> *Id.* at 17–18 (discussing section III.G of the easement, which declares that "[i]n the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail." (quoting James Conservation Easement, *supra* note 12, at 217)).

<sup>205</sup> Brief for Appellant GLW Ventures, LLC at 19, *GLW Ventures* (Columbia River Gorge Comm'n May 13, 2014) (No. COA-S-13-02); *GLW Ventures*, slip op. at 17 (Columbia River Gorge Comm'n May 13, 2014) ("GLW argues that the easement deed is more restrictive because the current configuration for the land is four buildable lots and the easement deed allows only two buildable lots.").

<sup>206</sup> *GLW Ventures*, slip op. at 15 (Columbia River Gorge Comm'n May 13, 2014) ("While GLW identifies some elements of the conservation easement that are more restrictive than the Skamania County Code, the material issue is the minimum parcel size restriction for boundary line adjustments. In this regard, the 80-acre minimum parcel size in the Skamania County Code is more restrictive than the smaller lot sizes that the easement deed allowed.").

<sup>207</sup> *Id.* at 17. As the Gorge Commission noted, the more restrictive provision controlled, pursuant to the express terms of both the conservation easement and the applicable provisions of the county ordinance. *Id.* at 13–14, 17 (citing James Conservation Easement, *supra* note 12, at 217; SKAMANIA COUNTY, WASH., CODE § 22.02.080(B) (2016)). But even if the conservation easement and county ordinance had not contained these provisions, the zoning likely still would have controlled over any conflicting language in the conservation easement. *See infra* note 214 and accompanying text.



minimum parcel size controlled in the appeal because it was more restrictive than the smaller ownership tract sizes reserved in the easement.<sup>208</sup> The Gorge Commission concluded that the county hearing examiner had properly denied GLW's proposed boundary line adjustment because it would have reduced an approximately 96-acre parcel below the county's 80-acre minimum parcel size.<sup>209</sup>

GLW appealed the Gorge Commission's decision to the Skamania County Superior Court, asserting, among other claims, that the Gorge Commission's decision resulted in an unconstitutional taking.<sup>210</sup> The Gorge Commission then intervened in the Superior Court case on the side of Skamania County, the Forest Service, and Friends.<sup>211</sup>

The Superior Court upheld the Gorge Commission's ruling in its entirety.<sup>212</sup> On the lot size issue, the court held that the proposed boundary line adjustment was impermissible because it would reduce a 96-acre parcel below the 80-acre minimum parcel size, even though GLW's predecessor had reserved the right in the conservation easement to break the ownership into two new tracts each smaller than 80 acres.<sup>213</sup> Key to the Superior Court's holding was the fact that the zoning regulations always apply to a proposed use, as expressly acknowledged in the conservation easement.<sup>214</sup> The Superior Court also affirmed the Gorge Commission's holding that the 80-acre minimum parcel size in Skamania County's ordinance was more restrictive than the conservation easement on the issue of parcel size, and thus controlled on that issue.<sup>215</sup>

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<sup>208</sup> *GLW Ventures*, slip op. at 17–18 (Columbia River Gorge Comm'n May 13, 2014).

<sup>209</sup> *Id.* at 15–16.

<sup>210</sup> *GLW Ventures, LLC's Amended Petition for Judicial Review of Final Opinion & Order of the Columbia River Gorge Comm'n at 7, GLW Ventures, LLC v. Skamania County*, No. 14-2-00071-7 (Wash. Super. Ct. Dec. 17, 2015).

<sup>211</sup> Columbia River Gorge Commission's Motion to Intervene at 2, *GLW Ventures*, No. 14-2-00071-7 (Wash. Super. Ct. Dec. 17, 2015). The Gorge Commission argued for intervention as of right to ensure uniform administration of National Scenic Area land use ordinances in all counties, and for permissive intervention because the case involved the Scenic Area Act, which the Commission administers. *Id.* at 5–6, 8; *see also* *GLW Ventures, LLC v. Skamania County*, No. 14-2-0071-7 (Wash. Super. Ct. Jan. 29, 2015) (ruling granting Gorge Commission's motion to intervene and denying GLW's motion to stay proceedings).

<sup>212</sup> *GLW Ventures*, slip op. at 14 (Wash. Super. Ct. Dec. 17, 2015).

<sup>213</sup> *Id.* at 10–12 (“As long as the minimum parcel size for this property remains 80 acres, the 96.06-acre parcel cannot be reduced below that minimum, and the reserved right in the [conservation easement] potentially allowing the property to be broken into two new ownership tracts cannot be exercised.”).

<sup>214</sup> *Id.* at 10–11. The Superior Court's holding is consistent with other state court decisions that easements may not subvert applicable zoning laws. *See, e.g.,* *Baccouche v. Blankenship*, 65 Cal. Rptr. 3d 659, 663 (Cal. Ct. App. 2007) (easement granting the right to keep horses on a residential lot was “unenforceable because it would allow a use not permitted by the zoning ordinance”); *Teachers Ins. & Annuity Ass'n v. Furlotti*, 83 Cal. Rptr. 2d 455, 460–61 (Cal. Ct. App. 1999) (reciprocal easement granting commercial building tenants the right to use residentially zoned alley was unenforceable); *cf. Martin v. Rasmussen*, 334 P.3d 507, 510–12 (Utah Ct. App. 2014) (settlement offer to transfer land between neighboring landowners was enforceable even though it would violate city's minimum parcel size because landowners could seek a variance under city's procedures).

<sup>215</sup> *GLW Ventures*, slip op. at 11–12 (Wash. Super. Ct. Dec. 17, 2015).

The Superior Court also held that, for properties in Skamania County where the Forest Service holds a conservation easement, the Forest Service is a property owner whose signature or consent is necessary to complete land use applications.<sup>216</sup> This ruling is consistent with at least one prior Washington appellate decision, in which the Washington Court of Appeals held that a person claiming to have adversely possessed land had an “ownership interest” in the land pursuant to a Washington state platting statute that required the signatures of “all parties having any ownership interest in the lands subdivided,” and therefore a final plat that purported to divide the subject property was invalid because it lacked the signature of the adverse possession claimant.<sup>217</sup>

Because Skamania County was a party to the Superior Court judgment, the court’s ruling that the Forest Service is a property owner under the county’s zoning ordinance will be binding on the county in future cases involving Forest Service conservation easements.<sup>218</sup> This ruling has substantial implications for land uses in the Scenic Area: it strengthens the resource protections provided by Forest Service conservation easements because landowners will need to receive Forest Service consent to proposed uses before beginning the county land use application process.<sup>219</sup> Moreover, the Superior Court’s ruling that county zoning requirements trump reservations of uses in conservation easements will further protect resources by restricting some land use and development activities that might have been allowable under the applicable zoning rules when the Forest Service originally acquired the easements.

Rather than appeal the Superior Court ruling to the state appellate courts, GLW resumed its litigation in federal court.<sup>220</sup> In GLW’s second federal action<sup>221</sup>—filed as a citizen suit under the Scenic Area Act—GLW claimed that the Forest Service had violated the conservation easement by opposing GLW’s proposed boundary line adjustment, and that GLW was entitled to a court ruling that the proposed adjustment was consistent with

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<sup>216</sup> *Id.* at 9 (“The Court concludes that, for properties in the Scenic Area where the Forest Service holds a conservation easement, the Forest Service is a ‘property owner’ within the meaning of [Skamania County’s Scenic Area ordinance].”).

<sup>217</sup> *Halverson v. City of Bellevue*, 704 P.2d 1232, 1233–35 (Wash. Ct. App. 1985) (quoting WASH. REV. CODE ANN. § 58.17.165 (West 2015)). *But see* *Harrison v. County of Stevens*, 61 P.3d 1202, 1205–06 (Wash. Ct. App. 2003) (where county and state law both required the consent of all parties with “any ownership interest in the lands subdivided,” but where the mineral estate had been severed from the surface estate, the mineral estate owner did not have an ownership interest in the *lands* and therefore his signature was not required (citing WASH. REV. CODE ANN. § 58.17.165 (2015))).

<sup>218</sup> Nineteen of the Forest Service’s twenty-eight conservation easements in the Scenic Area are located in Skamania County. *See* Email from Pam Campbell to Nathan Baker, *supra* note 9.

<sup>219</sup> Baker, *supra* note 10, at 7 (“The court’s decision will bolster the Forest Service’s ability to protect resources on other properties in the Scenic Area where it owns conservation easements.”).

<sup>220</sup> *GLW Ventures, LLC v. U.S. Forest Serv.*, No. 3:12-cv-05140-RBL (W.D. Wash. Feb. 18, 2016) (order lifting stay and consolidating cases); *see also supra* notes 184–85 and accompanying text.

<sup>221</sup> *See supra* note 185.

both the conservation easement and Skamania County's zoning ordinances.<sup>222</sup> In the alternative, GLW sought a court judgment that the Forest Service had "repudiated" the conservation easement and that GLW was therefore "entitled to rescission" of the easement.<sup>223</sup>

The federal court quickly dismissed GLW's two federal lawsuits for lack of subject matter jurisdiction, holding that collateral estoppel precluded GLW from relitigating the boundary line adjustment issue, which had already been decided in state court.<sup>224</sup> In addition, the federal court held that GLW's federal claims in pursuit of its proposed boundary line adjustment were moot because the adjustment had already been declared illegal by the state court, "mak[ing] it impossible for the [federal] court to grant GLW effective relief."<sup>225</sup> The court further held that it could not "enjoin the Forest Service from litigating claims it ha[d] already litigated, [could not] declare GLW's proposal lawful, and [could not] compel the Forest Service to sign" GLW's land use application.<sup>226</sup> Finally, the court declined to rescind the conservation easement as requested by GLW because "[r]escission would defy the [Scenic Area] Act's objectives, leaving the area's resources vulnerable."<sup>227</sup>

The federal court's decision in the GLW matter demonstrates that federal courts are reluctant to meddle in local land use and zoning disputes, which are usually best left to the state courts—even if the disputes involve

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<sup>222</sup> Complaint for Declaratory Judgment & Injunctive Relief at 11–12, *GLW Ventures, LLC v. U.S. Forest Serv.*, No. 3:14-cv-05806-RBL (W.D. Wash. Oct. 10, 2014). GLW asserted that the conservation easement itself was an "action taken by the Secretary" pursuant to the Act, and that the Forest Service had violated it by refusing to sign GLW's land use application and by appealing Skamania County's initial decision approving the boundary line adjustment. *Id.* at 11. The Scenic Area Act authorizes citizen suits against the Forest Service, among other types of claims, "where there is alleged a violation of [an] action taken by the Secretary . . . pursuant to or . . . under [the Act]." 16 U.S.C. § 544m(b)(2)(A) (2012).

<sup>223</sup> Complaint for Declaratory Judgment & Injunctive Relief, *supra* note 222, at 11.

<sup>224</sup> *GLW Ventures, LLC v. U.S. Forest Serv.*, No. 3:12-cv-05140-RBL, 2016 WL 3364896, at \*3–4 (W.D. Wash. June 17, 2016).

<sup>225</sup> *Id.* at \*4.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* Following the federal court's decision in the GLW case, one commentator queried whether GLW might be able to "characterize [the conservation easement] as a government contract" and obtain relief under the Tucker Act, 28 U.S.C. § 1491 (2012), as well as whether "a federal court [could] draw upon its equitable powers to rescind a conservation easement." Jessica Owley, *Can the Forest Service Change its Mind about a Conservation Easement Agreement?*, LAW PROFESSOR BLOGS NETWORK: LAND USE PROF BLOG (July 11, 2016), [http://lawprofessors.typepad.com/land\\_use/2016/07/can-the-forest-service-change-its-mind-about-a-conservation-easement-agreement.html](http://lawprofessors.typepad.com/land_use/2016/07/can-the-forest-service-change-its-mind-about-a-conservation-easement-agreement.html). However, GLW would not have been able to obtain rescission under the Tucker Act, because federal court jurisdiction under the Tucker Act does not encompass equitable relief, including rescission. *See Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 608 (D.C. Cir. 1992) (cited with approval in *N. Star Alaska v. United States*, 14 F.3d 36, 38 (9th Cir. 1994)). In addition, "what are 'in essence' claims for breach of contract cannot circumvent the Tucker Act and its prohibition on equitable relief by being artfully pled as something else." *McKay v. United States*, 516 F.3d 848, 851 (10th Cir. 2008) (citing *Friedman v. United States*, 391 F.3d 1313, 1315 (11th Cir. 2004); *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375–77 (2d Cir. 1999); *N. Star Alaska*, 14 F.3d at 37; *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982)).

federal conservation easements. This decision sets a strong precedent favoring resource protection on properties with Forest Service conservation easements,<sup>228</sup> especially in combination with the counterpart state court decision that proposed uses can be prohibited under county zoning ordinances even if they were previously reserved to landowners in conservation easements.<sup>229</sup>

As in the prior cases discussed above, the GLW litigation involved the interplay between the regulatory and property law systems in the Scenic Area. The Scenic Area Act requires a regulatory system of zoning in the Gorge counties, and this regulatory system works in partnership with the property law system of conservation easements. In the GLW litigation, the Superior Court's holding that Forest Service consent is a prerequisite for new land uses on properties burdened by federal conservation easements reinforces this relationship by requiring that the Forest Service and landowners attempt to cooperatively resolve disputes first under the conservation easement before invoking the county regulatory system. Because the Forest Service holds considerable property rights in its easements, requiring Forest Service involvement early in the process safeguards the American public's investments in resource protection on these lands.

#### V. AMENDING FEDERAL CONSERVATION EASEMENTS

The high frequency of litigation involving Scenic Area properties with conservation easements suggests there may be occasions when the Forest Service should work with landowners to amend conservation easements in mutually satisfactory ways. Amendments could clarify which interests are reserved to the landowner and which interests are held by the United States. Use of such amendments could reduce unnecessary litigation and facilitate mutually agreeable resolutions when it is unclear which party holds a disputed right.<sup>230</sup>

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<sup>228</sup> Nathan Baker, *Friends Defends Conservation Easement in Federal Court*, FRIENDS OF THE COLUMBIA GORGE (Friends of the Columbia Gorge, Portland, Or.), Fall 2016, at 8, [https://gorgefriends.org/assets/images/annual\\_reports\\_and\\_newsletters/Fall2016\\_News\\_final.pdf](https://gorgefriends.org/assets/images/annual_reports_and_newsletters/Fall2016_News_final.pdf) ("This ruling will likely serve as useful precedent for other properties in the National Scenic area protected by conservation easements.")

<sup>229</sup> See *supra* notes 215–218 and accompanying text.

<sup>230</sup> See Gerald Korngold et al., *An Empirical Study of Modification and Termination of Conservation Easements: What the Data Suggest About Appropriate Legal Rules*, 24 N.Y.U. ENVTL. L.J. 1, 58 (2016) (reviewing consensual conservation easement amendments between landowners and land trusts, and concluding that many "perpetual" easements have been amended, mostly with "conservation neutral or positive" results); PAUL DOSCHER ET AL., *AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS* 3–10, available at <http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf> (discussing amendment procedures when a conservation easement does not contain an amendment provision).

To date, the Forest Service has amended four of the twenty-eight conservation easements it holds in the Scenic Area,<sup>231</sup> even though the Forest Service does not have an official policy on amending its conservation easements. Three of these amendments corrected minor drafting errors in the property descriptions stated in the original easement deeds,<sup>232</sup> while the other amendment was a substantive change that removed two sentences from the rights reserved to the grantor.<sup>233</sup> Each of the amendments stated that both the landowner and the United States agreed to the amendment.<sup>234</sup> These past amendments suggest that the Forest Service holds the power to amend its existing conservation easements, subject to landowner agreement.

In the Hoyte case, there was no reason for the Forest Service to consider amending the conservation easement because Hoyte was brazenly and repeatedly violating multiple easement terms.<sup>235</sup> In the GLW case, amending the conservation easement would not have changed the fact that the county zoning ordinances prohibited the right reserved in the conservation easement to break the landowner's ownership into two new tracts;<sup>236</sup> any amendment involving that right would have been either futile or less protective of resources than the current easement.<sup>237</sup> However, in the

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<sup>231</sup> Abbuehl Agreement to Correct Easement Deed (Feb. 19, 1999), *recorded in* 186 SKAMANIA COUNTY DEED RECORDS 969 (on file with Skamania Cty., Wash. Auditor's Office); Johnson Agreement to Correct Easement Deed (Mar. 18, 1999), *recorded in* 187 SKAMANIA COUNTY DEED RECORDS 496 (on file with Skamania Cty., Wash. Auditor's Office); Pacific Rim Builders Correction Easement Deed (Nov. 17, 1992), *recorded in* 289 KLICKITAT COUNTY DEED RECORDS 718 (on file with Klickitat Cty., Wash. Auditor's Office); Girl Scout Agreement to Correct Deed (Dec. 10, 1993), *recorded in* 140 SKAMANIA COUNTY DEED RECORDS 124 (on file with Skamania Cty., Wash. Auditor's Office). See *infra* Appendix for full citations to these conservation easements.

<sup>232</sup> Abbuehl Agreement to Correct Easement Deed, *supra* note 231, at 969; Johnson Agreement to Correct Easement Deed, *supra* note 231, at 497; Pacific Rim Builders Correction Easement Deed, *supra* note 231, at 718.

<sup>233</sup> Girl Scout Agreement to Correct Deed, *supra* note 231, at 124 (removing the following language involving participation by the Forest Service in the landowner's use and management of the property's timber resources: "Such participation by the United States shall consist of the application and implementation of the rules, regulations, and statutory authorities pertaining to administration of the National Forests. No action shall be taken by the Grantor that does not conform to those rules, regulations, and general statutory authorities.").

<sup>234</sup> Abbuehl Agreement to Correct Easement Deed, *supra* note 231 at 969; Johnson Agreement to Correct Easement Deed, *supra* note 231, at 496; Pacific Rim Builders Correction Easement Deed, *supra* note 231, at 718; Girl Scout Agreement to Correct Deed, *supra* note 231, at 124.

<sup>235</sup> See *supra* Part IV.B.

<sup>236</sup> See *supra* Part IV.C.

<sup>237</sup> In theory, it might have been possible in the GLW case to change the sizes of the two reserved ownership tracts so that the largest existing parcel would remain above the ordinance's 80-acre minimum parcel size, but that would make the other ownership tract less than 30 acres. The Forest Service had little reason to agree to such a result because it would directly conflict with the conservation easement. The net result is that so long as the minimum parcel size remains 80 acres under applicable zoning, GLW will not be able to exercise its reserved right to break the ownership into two new tracts, and the entire burdened 109-acre property must remain under a single ownership. Keeping the property under one ownership is more protective of resources than breaking the ownership into two new tracts, because it likely

Perry case, an amendment modifying the development sites reserved in the easement might have resolved the issues in dispute and avoided litigation.<sup>238</sup> In that case, the Forest Service advocated siting some of the development at a site not reserved to the landowner in the conservation easement.<sup>239</sup> The Forest Service and the landowner might have agreed to amend the reserved building sites to include portions of the property where development would not violate county zoning ordinances.<sup>240</sup>

The Forest Service does not have express authority to amend its Scenic Area conservation easements, but has implicit authority, as evidenced by its previous amendments.<sup>241</sup> Other federal agencies claim they possess the authority to amend conservation easements; for example, the Bureau of Land Management claims it has amendment authority, although the agency has been cautious in pursuing amendments.<sup>242</sup> In the future, the Forest Service should consider amendments as an available tool for resolving future uncertainties and disputes.

For example, many existing conservation easements in the Scenic Area use only basic sketches to depict reserved parcel configurations and building sites, and fail to incorporate these drawings into the conservation easement terms. The Young and MacDonald Conservation Easement, for instance, reserves the right to construct three dwellings and accessory buildings on the property and includes a map with three stars denoting *potential* building locations that are confusingly labeled as “*reserved* homesite locations,” and also fails to reference these locations in the easement text.<sup>243</sup> The James Conservation Easement reserves the right to

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results in less development potential on the property and less fragmentation of agricultural lands.

<sup>238</sup> See *supra* Part IV.A. The Perry easement reserved the right to relocate an existing dwelling and build a second new dwelling. Perry Conservation Easement, *supra* note 109, at 923–24; see also DOSCHER ET AL., *supra* note 230, at 7 (discussing amendments to conservation easements that relocate “reserved rights, such as reserved house sites,” but characterizing such amendments as involving “more risk”).

<sup>239</sup> See *supra* notes 121–22, 133, and accompanying text.

<sup>240</sup> Note, however, that the county must still review any proposed development under its zoning ordinance, and other interested parties, including Friends of the Columbia Gorge, would still have the ability to appeal any resulting land use decision. See *supra* note 52 and accompanying text. Alternatively, amendments to a conservation easement may constitute federal actions that could be challenged by landowners or interested parties, including Friends, under the citizen suit and/or judicial review provisions in the Scenic Area Act, 16 U.S.C. § 544m(b)(2), (b)(4) (2012). See *supra* notes 61–62 and accompanying text.

<sup>241</sup> See *supra* notes 231–34 and accompanying text.

<sup>242</sup> See, e.g., BUREAU OF LAND MGMT., *supra* note 3, at 16 (“Amending easements is a sensitive issue and must be entered into with careful analysis and consideration. Many offices do not develop written amendment policies, feeling that they do not want to encourage landowners to ask for changes to their easements. However[,] an amendment policy can actually discourage landowners from seeking changes to an easement by explaining the strict criteria BLM will follow and the thorough procedures it will use in evaluating proposed amendments.”).

<sup>243</sup> Easement Deed by Leo A. Young & Jeanette M. Young, and Douglas MacDonald, Grantors, and the United States through the U.S. Forest Serv., Grantee (June 1, 1989) [hereinafter Young & MacDonald Conservation Easement] (emphasis added), *recorded in* 114

“break the ownership into two tracts,” but fails to include a legal description of the exact locations of the new property lines for these tracts;<sup>244</sup> instead, the easement includes a sketch of the potential tracts without incorporating that sketch into the easement text.<sup>245</sup> The Nelson Conservation Easement reserves the right to build a new barn and pond “within the existing homesite area,” but fails to show the exact boundaries of this area on the map or describe the allowable pond size.<sup>246</sup> The Thompson Conservation Easement reserves the right to build a dwelling and barn but defines the potential locations of these buildings only by placing circles on a hand-drawn schematic of the property.<sup>247</sup> The Forest Service could amend these and other easements to incorporate accurate, surveyed depictions of property boundaries and building areas, and to cross-reference such maps and expressly specify all reserved uses within the text of the easements.<sup>248</sup>

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SKAMANIA COUNTY DEED RECORDS 361, 363, 368 exhibit A (on file with Skamania Cty., Wash. Auditor’s Office) (map reproduced *infra* as Figure 3).

<sup>244</sup> See James Conservation Easement, *supra* note 12, at 215.

<sup>245</sup> See *supra* note 180 (Figure 2).

<sup>246</sup> Easement Deed by Ross Nelson & Dolores P. Nelson, Grantors, and the United States through the U.S. Forest Serv., Grantee (June 25, 1990) [hereinafter Nelson Conservation Easement], recorded in 121 SKAMANIA COUNTY DEED RECORDS 359, 360, 364 exhibit A (on file with Skamania Cty., Wash. Auditor’s Office) (map reproduced *infra* as Figure 4).

<sup>247</sup> Easement Deed by Stephen C. Thompson & Elsie B. Thompson, Grantors, and the United States through the U.S. Forest Serv., Grantee (Oct. 6, 1988) [hereinafter Thompson Conservation Easement], recorded in 111 SKAMANIA COUNTY DEED RECORDS 356, 357, 361 exhibit A (on file with Skamania Cty., Wash. Auditor’s Office) (map reproduced *infra* as Figure 5).

<sup>248</sup> Any parcel configuration or building area reserved in a conservation easement, however, would still be subject to review for consistency with all applicable zoning regulations. See *GLW Ventures, LLC v. Skamania County*, No. 14-2-00071-7, slip op. at 10–11 (Wash. Super. Ct. Dec. 17, 2015).

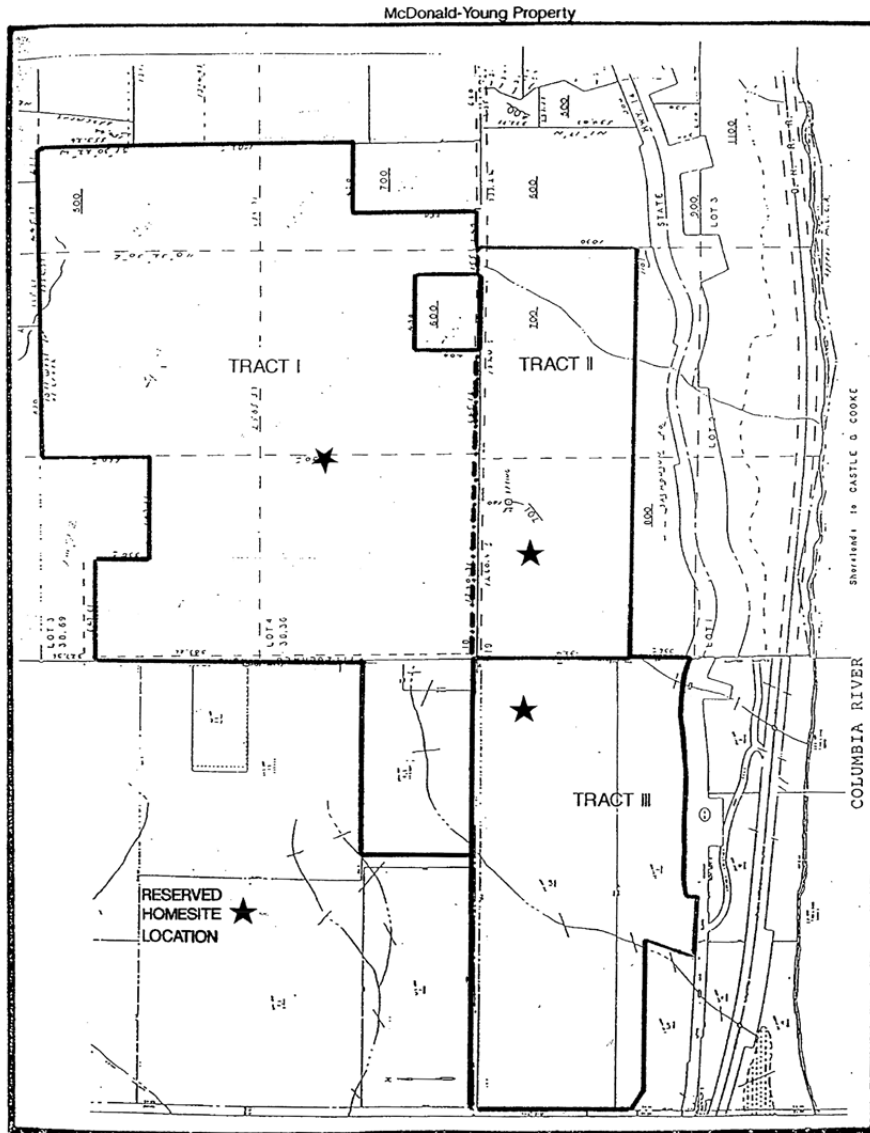
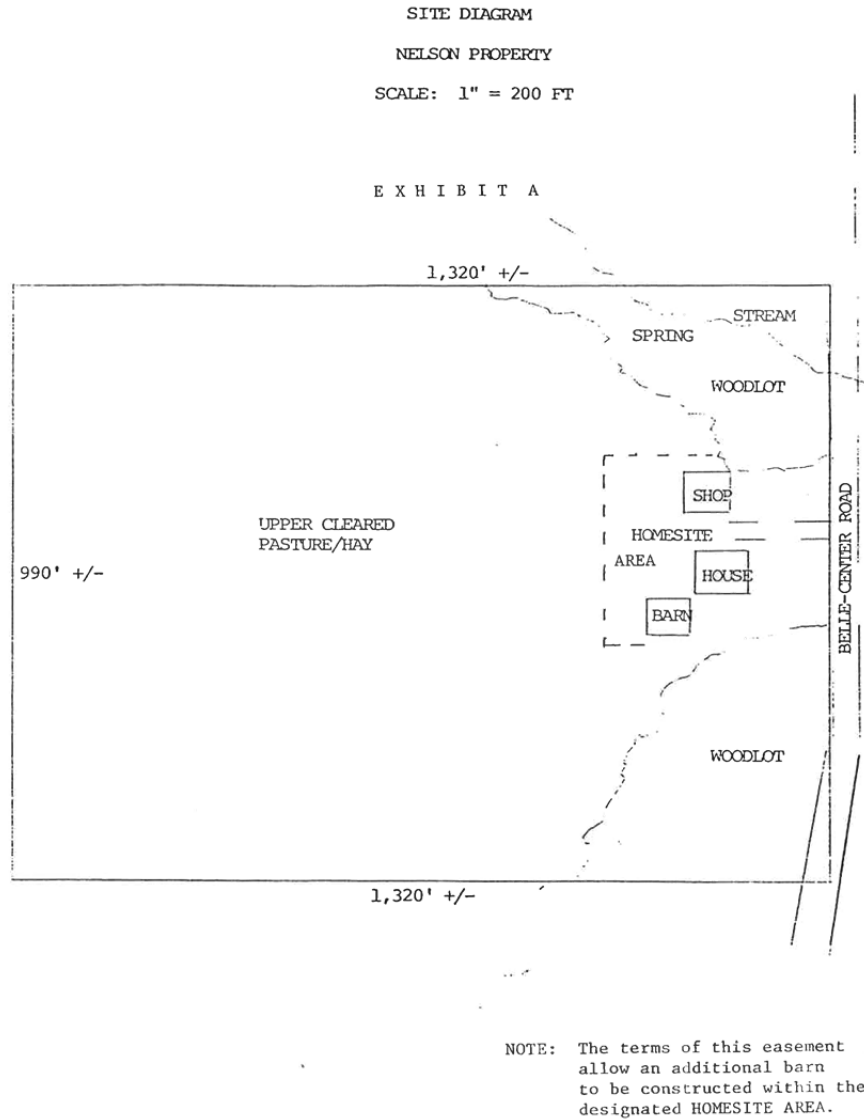


Figure 3. Young & MacDonald Conservation Easement Map<sup>249</sup>

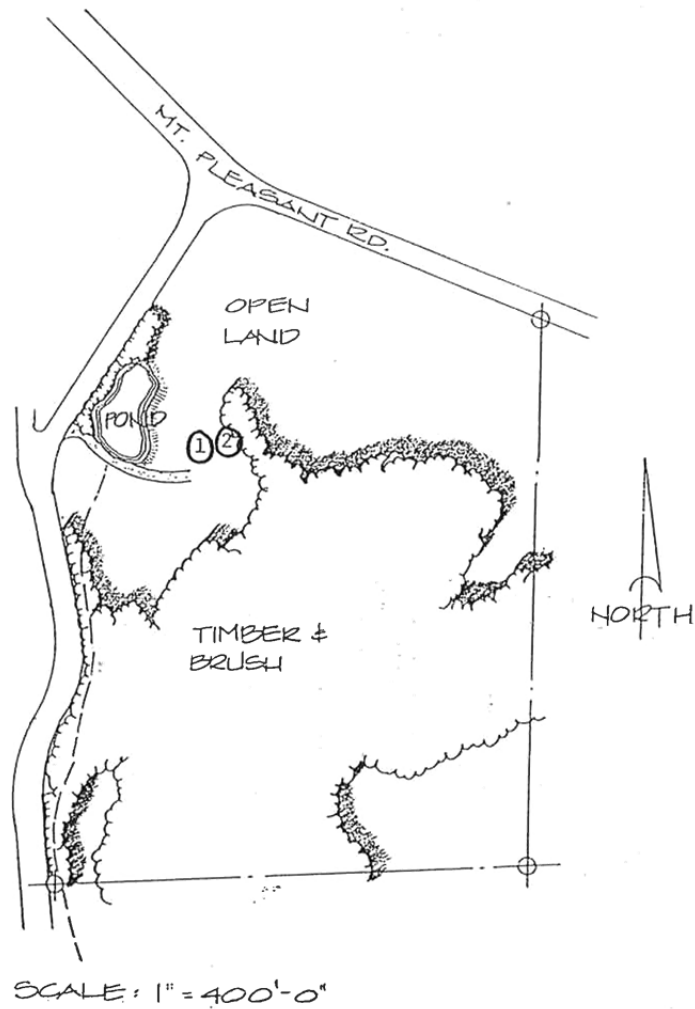
<sup>249</sup> Young & MacDonald Conservation Easement, *supra* note 243, at 368 exhibit A.





**Figure 4. Nelson Conservation Easement Map<sup>250</sup>**

<sup>250</sup> Nelson Conservation Easement, *supra* note 246, at 364 exhibit A.



## EXHIBIT A

Exhibit A to a Scenic Easement for real property in the SW1/4NE1/4, Section 8, T. 1 N., R. 5 E., W.M., Skamania County, Washington. Rights reserved include future construction of a HOMESITE-①, and a BARN-② as shown above.

**Figure 5. Thompson Conservation Easement Map**<sup>251</sup>

<sup>251</sup> Thompson Conservation Easement, *supra* note 247, at 361.

Clarifying imprecise reserved rights through mutually agreeable amendments may prevent time-consuming and resource-draining litigation in the future when landowners fairly pursue development rights that were arguably reserved in the conservation easement, are still lawful under current zoning, and would not harm resources.<sup>252</sup> To date, the Forest Service has generally been reluctant to entertain amendments to its existing easements, especially to resolve substantive disputes.<sup>253</sup> However, since a relatively high percentage of Scenic Area properties with conservation easements have already been the subject of litigation,<sup>254</sup> the Forest Service should reasonably expect future litigation over ambiguities in its conservation easements, and should acknowledge that amendment is an available tool for attempting to resolve such conflicts.

#### VI. OTHER RECOMMENDATIONS FOR IMPROVING THE EFFECTIVENESS OF FEDERAL CONSERVATION EASEMENTS IN THE NATIONAL SCENIC AREA

In addition to the suggestions for amending the Forest Service conservation easements discussed above, the agencies that implement the Scenic Area Act could improve the effectiveness of federal conservation easements in several other ways. Some of these suggestions may also be applicable in other jurisdictions where federal conservation easements are employed, especially in any other areas that, like the Columbia River Gorge National Scenic Area, contain a mix of public and private land and multiple agencies with decision-making authority.

First, the Gorge Commission should amend the Gorge Management Plan to adopt the Skamania County requirement that all property owners must sign or consent to land use applications.<sup>255</sup> This requirement in fact originated with the Gorge Commission in 1993, when it adopted its original

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<sup>252</sup> On the other hand, amending conservation easements can prompt strong backlashes by the public, as well as suits against the easement holders for breaching their fiduciary obligations. See McLaughlin, *Myrtle Grove Controversy*, *supra* note 2, at 1094 (“Had the [easement holder] consulted with [the] interested parties, it would have discovered that the requested amendments were extremely controversial and, after reconsideration (and before triggering a series of unfortunate events), likely would have realized that agreeing to such amendments would constitute a breach of its fiduciary duties to the easement grantor and the public.”).

<sup>253</sup> The Forest Service did not use amendments to resolve any of the three litigation case studies discussed in this article. See *generally supra* Part IV. Amending conservation easements is also controversial in the nongovernmental land trust arena. Jane Ellen Hamilton, *Understanding the Debate about Conservation Easement Amendments*, SAVING LAND, Winter 2014, <http://www.landtrustalliance.org/news/understanding-debate-about-conservation-easement-amendments> (last visited Nov. 19, 2016) (“The extent to which land trusts can amend their easements without oversight from an outside party is perhaps the most controversial subject in the field of land conservation today.”).

<sup>254</sup> Three out of twenty-eight. See *supra* Part IV (analyzing the litigation surrounding the three contested easements).

<sup>255</sup> See *GLW Ventures, LLC v. Skamania County*, No. 14-2-00071-7, slip op. at 9 (Wash. Super. Ct. Dec. 17, 2015); see also *supra* Part IV.C.

Scenic Area ordinance,<sup>256</sup> which applied to all counties in the Scenic Area until each county could adopt its own Scenic Area ordinance.<sup>257</sup> Since 1993, several of the Scenic Area counties have adopted this Gorge Commission requirement for property owners to sign applications—each with slightly different language<sup>258</sup>—while one county is completely silent on any requirements for signatures on land use applications.<sup>259</sup> The Commission should reinstitute a uniform requirement that applies throughout the Scenic Area by inserting directly into the Gorge Management Plan a requirement for property owners to sign or consent to land use applications. Doing so would promote uniformity, fairness, and efficiency in the land use review processes by recognizing the rights of property owners, including conservation easement holders, and requiring their consent to land use applications that would affect these rights.

Further, the Gorge Commission should also amend the Gorge Management Plan to expressly define the term “property owner” to include holders of conservation easements, similar to the holdings of the Gorge Commission and the Skamania County Superior Court in the GLW case.<sup>260</sup> Although it is now the rule of law in Skamania County that the Forest Service is a property owner in the land use review context for properties where the Forest Service holds a conservation easement,<sup>261</sup> the issue has not yet been decided in the other Scenic Area counties. The Forest Service has invested millions of dollars acquiring conservation easements on private

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<sup>256</sup> COLUMBIA RIVER GORGE COMM’N ADMIN R. 350-80-080(3)(m) (1993) (“Applications for the review and approval of a proposed use or development shall provide . . . [t]he signature of the applicant and property owner or a statement from the property owner indicating that he is aware of the application being made on his property.”). This language remains unchanged in the Gorge Commission’s current land use ordinance. COLUMBIA RIVER GORGE COMM’N ADMIN R. 350-81-032(5)(n) (2012), *available at* <http://www.gorgecommission.org/scenic-area/legal-authorities> (select “Commission Rule 350-81 – Land Use Ordinance for Klickitat County”).

<sup>257</sup> Scenic Area Act, 16 U.S.C. § 544e(b)(1) (2012). The Gorge Commission’s current land use ordinance now applies just in Klickitat County. *See supra* notes 45–48 and accompanying text.

<sup>258</sup> *See, e.g.*, CLARK COUNTY, WASH., CODE § 40.240.050.A.4.u (2016) (requiring “[t]he signature of the applicant and property owner or a statement from the property owner indicating that he is aware of the application being made on his property”); HOOD RIVER COUNTY, OR., ZONING ORDINANCE § 75.080(3)(m) (2009) (requiring “[t]he signature of the applicant and property owner or a *signed* statement from the property owner indicating that he is aware of the application being made on his property” (emphasis added)); SKAMANIA COUNTY, WASH., CODE § 22.06.060.A.1.a.ix (2016) (requiring the “[s]ignature of the applicant and property owner, including a statement that authorizes the Department reasonable access to the site in order to evaluate the application”); WASCO COUNTY, OR., NATIONAL SCENIC AREA LAND USE & DEVELOPMENT ORDINANCE § 14.020(A)(8) (2016) (requiring the “[s]ignatures of the *owners* or authorized representatives” (emphasis added)).

<sup>259</sup> *See* MULTNOMAH COUNTY, OR., CODE § 38.0045 (2016) (county’s land use application submittal requirements, none of which require the signatures or consent of a property owner or any other person).

<sup>260</sup> GLW Ventures, No. COA-S-13-02, slip op. at 21–22 (Columbia River Gorge Comm’n May 13, 2014); GLW Ventures, LLC v. Skamania County, No. 14-2-00071-7, slip op. at 9 (Wash. Super. Ct. Dec. 17, 2015).

<sup>261</sup> *GLW Ventures*, slip op. at 9 (Wash. Super. Ct. Dec. 17, 2015).

lands in the Scenic Area<sup>262</sup> as a direct implementation of the Scenic Area Act's authorizations for protecting resources.<sup>263</sup> These investments should be protected in the Scenic Area land use processes. As with the signature requirement discussed above, the Gorge Commission should promote resource protection and uniformity throughout the Scenic Area by expressly defining property owner to include holders of conservation easements such as the Forest Service, rather than potentially requiring this issue to be litigated on a case-by-case, or county-by-county, basis.<sup>264</sup>

Third, the Forest Service should institute a protocol requiring formal federal consistency review of any land use and development activities proposed by private landowners on lands burdened by Forest Service conservation easements. Section 14(d) of the Scenic Area Act requires all federal actions to be reviewed by the Forest Service for consistency with the Act and its implementing authorities before such actions may proceed.<sup>265</sup> In addition, the Forest Service's conservation easements in the Scenic Area typically include clauses giving the Forest Service authority to review land use and development activities proposed by landowners.<sup>266</sup> Implementing these clauses arguably triggers the section 14(d) federal consistency review requirement because it involves the Forest Service exercising its "responsibilities within the [S]cenic [A]rea."<sup>267</sup> After the Hoyte litigation was resolved, the Forest Service prepared and issued a formal consistency determination evaluating Mr. Hoyte's proposal to remove roads from the property as required by the federal consent decree.<sup>268</sup> The Forest Service should perform similar reviews for future land use and development activities proposed on properties where the Forest Service holds conservation easements. Doing so will promote transparency and uniformity by ensuring that all proposed activities undergo a formal public process pursuant to the Forest Service's Scenic Area review procedures,<sup>269</sup> and will also allow the Forest Service to identify and address any concerns it may

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<sup>262</sup> See Email from Pam Campbell to Nathan Baker, *supra* note 9 (noting that the Forest Service paid a total of \$5,073,215 for its twenty-eight conservation easements).

<sup>263</sup> See *supra* notes 55–57 and accompanying text.

<sup>264</sup> As an alternative to incorporating these suggestions into the Gorge Management Plan, the Gorge Commission and each of the five county governments with Scenic Area ordinances could incorporate the suggestions into their Scenic Area land use ordinances.

<sup>265</sup> 16 U.S.C. § 544(d) (2012) ("Except as otherwise provided in [16 U.S.C. §§ 544(e) or 544o], Federal agencies having responsibilities within the scenic area shall exercise such responsibilities consistent with the provisions of this Act *as determined by the Secretary.*" (emphasis added)).

<sup>266</sup> See, e.g., James Conservation Easement, *supra* note 12, at 215–16; Perry Conservation Easement, *supra* note 109, at 924–25.

<sup>267</sup> 16 U.S.C. § 544(d) (2012).

<sup>268</sup> See *supra* note 163.

<sup>269</sup> See, e.g., U.S. Forest Serv., Columbia River Gorge Nat'l Scenic Area Office, Federal Consistency Review Policy (Dec. 1, 1996); U.S. Forest Serv., Columbia River Gorge Nat'l Scenic Area Office, Consistency Determination Decision Review Process (Dec. 1, 1996). Forest Service consistency determinations trigger public notice and comment periods, and are appealable. See *Friends of the Columbia Gorge, Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1099 (D. Or. 2008) (discussing an administrative challenge to a Forest Service consistency determination).

have with the proposed activities via the Forest Service's own process before the activities are processed by the county governments or Gorge Commission.

Fourth, the Forest Service should include provisions in its conservation easements to expressly allow enforcement of the easements by third parties, such as beneficiaries of the easements like Friends of the Columbia Gorge and other government agencies with oversight, including the Gorge Commission and county governments.<sup>270</sup> Presumably, third-party enforcement of existing federal conservation easements in the Scenic Area is allowed—especially given the fact that each easement was acquired as a direct implementation of the Scenic Area Act—but this question has never been definitively decided.<sup>271</sup> Landowners are unlikely to agree to amend existing easements to include third-party enforcement clauses, but the Forest Service should consider including such clauses in future easements. Doing so would bolster the ability of the Forest Service's agency partners like the Gorge Commission and the counties, as well as nongovernmental resource protection organizations like Friends of the Columbia Gorge, to cooperatively enforce and promote the protection of resources in the Scenic Area.

Finally, the Gorge Commission and county governments should amend their zoning ordinances to expressly allow issues involving conservation easements to be raised and decided at the administrative level. For example, if a landowner proposes a land use activity that would violate a Forest Service conservation easement, the Forest Service should have the right to raise its objections in the local jurisdiction's land use review process and in any administrative appeals thereof. It is currently unsettled whether the Forest Service has the right to do so at the county administrative level—at least in Skamania County<sup>272</sup>—but issues involving conservation easements can be raised once county decisions are appealed to the Gorge Commission

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<sup>270</sup> See McLaughlin & Pidot, *supra* note 62, at 135–39 (discussing the related issue of “backup enforcement”).

<sup>271</sup> In the GLW cases, both the state and federal courts allowed Friends of the Columbia Gorge to join in the Forest Service's arguments and present its own arguments pertaining to the conservation easement. See *supra* Part IV.C. In addition, Friends was permitted to intervene in the federal GLW litigation in part based on its arguments that “Friends has a distinct and substantial interest in [the landowner's] proposed land use activities and in the strict application of . . . the Easement to such activities.” Motion to Intervene of Friends of the Columbia Gorge, Inc. & Memorandum in Support Thereof at 6, *GLW Ventures, LLC v. U.S. Forest Serv.*, No. 3:14-cv-05806-RBL (W.D. Wash. Jan. 16, 2015).

<sup>272</sup> On the one hand, the Skamania County Scenic Area ordinance states that “[i]t is not the intent of [the ordinance] to repeal, abrogate or impair any existing . . . easement,” which would seemingly allow for arguments that a conservation easement should not be impaired in a land use permitting process. SKAMANIA COUNTY, WASH., CODE § 22.02.080(B) (2016). On the other hand, in the GLW litigation the Skamania County Hearing Examiner held that she lacked jurisdictional authority to consider arguments made under the Forest Service's conservation easement. *GLW Ventures*, No. NSA-12-32, slip op. at 16 (Skamania Cty. Hearing Exam'r May 13, 2013).

and to the state courts.<sup>273</sup> The implementing jurisdictions should improve judicial efficiency by expressly authorizing such issues to be raised and decided at the local level, rather than delaying the resolution of such issues to subsequent appeals.

## VII. CONCLUSION

Reserved interest conservation easements in the Columbia River Gorge National Scenic Area have been effective at safeguarding scenic, natural, agricultural, and other resources. This success is evidenced by the fact that, thirty years after the passage of the Scenic Area Act, visitors to the Scenic Area still enjoy unparalleled scenic views of pastoral landscapes on properties protected by conservation easements.

The Forest Service acquired twenty-eight conservation easements in the Scenic Area between 1988 and 1998, but has not acquired any since then. A likely major reason why the Forest Service reduced its acquisitions of conservation easements was because the adoption of the Gorge Management Plan and county land use ordinances in the 1990s put in place strong regulatory protections within the SMAs, thus supplementing the Forest Service's existing easements and alleviating some of the need for new easements. Today, in many instances, the current county ordinances for the Scenic Area are more restrictive than the provisions of the Forest Service's conservation easements. The practical result has been that the county ordinances have filled gaps left in the easements, and government and citizen enforcement of these ordinances have played crucial roles in protecting resources on properties with conservation easements. Recent cases have seen the nongovernmental organization Friends of the Columbia Gorge as well as governmental entities such as Skamania County and the Columbia River Gorge Commission successfully litigating disputes involving conservation easements alongside the Forest Service.

In the future, the Forest Service should consider and, where appropriate, exercise its ability to amend its existing conservation easements, subject to landowner consent. For example, amendments can resolve ambiguities about which rights were intended to be reserved to landowners. In some situations, amendments may clarify rights and avoid litigation, while furthering the easements' original resource protection goals.

In addition, the agencies that implement the Scenic Area Act should make several regulatory and policy changes to improve the effectiveness of federal conservation easements. The Gorge Commission should amend the Gorge Management Plan to adopt a Scenic Area-wide requirement that the signatures of property owners are a necessary element to complete land use applications, and to expressly define the term "property owner" to include the holders of conservation easements. The Forest Service should adopt a

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<sup>273</sup> In the GLW litigation, both the Gorge Commission and the Skamania County Superior Court heard and decided arguments under the terms of the conservation easement. *See supra* notes 198, 213–215, and accompanying text.

protocol requiring federal consistency determinations for land use and development activities proposed by landowners on properties burdened by conservation easements, and should include provisions in its conservation easements allowing third-party enforcement. Finally, the Gorge Commission and county governments should amend their zoning ordinances to expressly allow issues involving conservation easements to be raised and decided at the administrative level, rather than requiring parties to wait to raise such issues on appeal before the Gorge Commission or in state court.

The use of reserved interest deeds in the National Scenic Area has not completely shifted the burden to landowners in conservation easement enforcement actions, as James Snow anticipated in 1992. However, the Forest Service's Scenic Area conservation easements continue to serve an important purpose by protecting critical Gorge resources in perpetuity, despite erratic politics, changeable land use regulations, and a growing Pacific Northwest.

#### APPENDIX

##### *Catalog of Forest Service Conservation Easements in the Columbia River Gorge National Scenic Area*

1. Easement Deed by the Trust for Public Land, Grantor, and the United States through the U.S. Forest Serv., Grantee (Mar. 31, 1988), *recorded in* 112 SKAMANIA COUNTY DEED RECORDS 533 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$201,000).
2. Easement Deed by Caroline I. Stovner, Grantor, and the United States through the U.S. Forest Serv., Grantee (Apr. 23, 1988), *recorded in* 109 SKAMANIA COUNTY DEED RECORDS 484 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$158,500).
3. Easement Deed by Dale P. Perry & Sandra M. Perry, Grantors, and the United States through the U.S. Forest Serv., Grantee (May 13, 1988), *recorded in* 109 SKAMANIA COUNTY DEED RECORDS 463, *refiled in id.* at 922 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$200,800).
4. Easement Deed by Alan R. Deming & Bonnie J. Deming, Grantors, and the United States through the U.S. Forest Serv., Grantee, (Aug. 24, 1988), *recorded in* CLARK COUNTY DEED RECORDS (on file with Clark Cty., Wash. Auditor's Office, No. 8809260172) (purchased for \$36,000).
5. Easement Deed by Scott A. Hall & Tami M. Hall, Grantors, and the United States through the U.S. Forest Serv., Grantee (Aug. 26, 1988), *recorded in* 110 SKAMANIA COUNTY DEED RECORDS 868 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$59,800).



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6. Easement Deed by Stephen C. Thompson & Elsie B. Thompson, Grantors, and the United States through the U.S. Forest Serv., Grantee (Oct. 6, 1988), *recorded in* 111 SKAMANIA COUNTY DEED RECORDS 356 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$52,700).
7. Easement Deed by Carlo V. Carlson, Grantor, and the United States through the U.S. Forest Serv., Grantee (Oct. 14, 1988), *recorded in* CLARK COUNTY DEED RECORDS (on file with Clark Cty., Wash. Auditor's Office, No. 8810210198) (purchased for \$113,000).
8. Easement Deed by Sharleen Ann James, Grantor, and the United States through the U.S. Forest Serv., Grantee (Dec. 7, 1988), *recorded in* 112 SKAMANIA COUNTY DEED RECORDS 213 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$203,500).
9. Easement Deed by Pacific Rim Builders Inc., Grantor, and the United States through the U.S. Forest Serv., Grantee (Feb. 1, 1989), *recorded in* 252 KLICKITAT COUNTY DEED RECORDS 230, *as amended by* Correction Easement Deed (Nov. 17, 1992), *recorded in* 289 KLICKITAT COUNTY DEED RECORDS 718 (on file with Klickitat Cty., Wash. Auditor's Office) (purchased for \$19,000).
10. Easement Deed by Alvin Fred Heany Jr., Grantor, and the United States through the U.S. Forest Serv., Grantee (Mar. 3, 1989), *recorded in* 252 KLICKITAT COUNTY DEED RECORDS 334 (on file with Klickitat Cty., Wash. Auditor's Office) (purchased for \$37,000).
11. Easement Deed by Alvin Fred Heany Jr, Grantor, and the United States through the U.S. Forest Serv., Grantee (Mar. 3, 1989), *recorded in* 252, KLICKITAT COUNTY DEED RECORDS 344 (on file with Klickitat Cty., Wash. Auditor's Office) (purchased for \$25,500).
12. Easement Deed by Pacific Rim Builders Inc., Grantor, and the United States through the U.S. Forest Serv., Grantee (Mar. 3, 1989), *recorded in* 252 KLICKITAT COUNTY DEED RECORDS 339 (on file with Klickitat Cty., Wash. Auditor's Office) (purchased for \$30,000).
13. Easement Deed by Amber B. Heany, Grantor, and the United States through the U.S. Forest Serv., Grantee (Apr. 4, 1989), *recorded in* 253 KLICKITAT COUNTY DEED RECORDS 165 (on file with Klickitat Cty., Wash. Auditor's Office) (purchased for \$16,000).
14. Easement Deed by Charles W. Lawson & Nellie A. Lawson, Grantors, and the United States through the U.S. Forest Serv., Grantee (May 18, 1989), *recorded in* 114 SKAMANIA COUNTY DEED RECORDS 123 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$27,000).

15. Easement Deed by Carlo V. Carlson, Gary Michael Reinhart, James H. Hambleton & Anita M. Hambleton, Curtis J. McDowell & Nadine McDowell, and Melvin W. Evans & Charlotte L. Evans, Grantors, and the United States through the U.S. Forest Serv., Grantee (May 23, 1989), *recorded in* CLARK COUNTY DEED RECORDS (on file with Clark Cty., Wash. Auditor's Office, No. 8809260171) (purchased for \$332,000).
16. Easement Deed by Leo A. Young & Jeanette M. Young, and Douglas MacDonald, Grantors, and the United States through the U.S. Forest Serv., Grantee (June 1, 1989), *recorded in* 114 SKAMANIA COUNTY DEED RECORDS 361 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$958,000).
17. Easement Deed by Della B. Miller, Grantor, and the United States through the U.S. Forest Serv., Grantee (Jan. 24, 1990), *recorded in* 117 SKAMANIA COUNTY DEED RECORDS 794 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$73,000).
18. Easement Deed by Karl Abbuehl, Virginia Alexander, and Mary Cowan, Grantors, and the United States through the U.S. Forest Serv., Grantee (Jan. 29, 1990), *recorded in* 117 SKAMANIA COUNTY DEED RECORDS 696, *as amended by* Agreement to Correct Easement Deed (Feb. 19, 1999) *recorded in* 186 SKAMANIA COUNTY DEED RECORDS 968 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$469,000).
19. Easement Deed by Earl W. Jackson & Joset L. Jackson, Peter K. Jackson & Connie J. Jackson, and Jill R. Kurtz & David S. Kurtz, Grantors, and the United States through the U.S. Forest Serv., Grantee (May 4, 1990), *recorded in* CLARK COUNTY DEED RECORDS (on file with Clark Cty., Wash. Auditor's Office, No. 9005040229) (purchased for \$308,000).
20. Easement Deed by Columbia River Girl Scout Council Inc., Grantor, and the United States through the U.S. Forest Serv., Grantee (June 13, 1990), *recorded in* 119 SKAMANIA COUNTY DEED RECORDS 578, *as amended by* Agreement to Correct Deed (Dec. 6, 1993), *recorded in* 140 SKAMANIA COUNTY DEED RECORDS 124 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$412,000).
21. Easement Deed by Ross Nelson & Dolores P. Nelson, Grantors, and the United States through the U.S. Forest Serv., Grantee (June 25, 1990), *recorded in* 121 SKAMANIA COUNTY DEED RECORDS 359 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$68,500).
22. Easement Deed by Norris J. Johnson & Carmen S. Johnson, Grantors, and the United States through the U.S. Forest Serv., Grantee (Sept. 13, 1990), *recorded in* 120 SKAMANIA COUNTY DEED RECORDS 678 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$168,000).

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23. Easement Deed by Rickey Lynn Drake, Grantor, and the United States through the U.S. Forest Serv., Grantee (Nov. 19, 1991), *recorded in* 126 SKAMANIA COUNTY DEED RECORDS 189 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$29,600).
24. Easement Deed by Kerry Milton Yule, Grantor, and the United States through the U.S. Forest Serv., Grantee (May 18, 1992), *recorded in* 128 SKAMANIA COUNTY DEED RECORDS 736 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$61,015).
25. Easement Deed by Keith D. Johnson & Wanell Johnson, and Norris H. Johnson & Carmen S. Johnson, Grantors, and the United States through the U.S. Forest Serv., Grantee (Aug. 24, 1992), *recorded in* 130 SKAMANIA COUNTY DEED RECORDS 618, *as amended by* Agreement to Correct Easement Deed (Mar. 11, 1999) *recorded in* 187 SKAMANIA COUNTY DEED RECORDS 496 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$102,300).
26. Easement Deed by the Trust for Public Land, Grantor, and the United States through the U.S. Forest Serv., Grantee (Mar. 30, 1994), *in* Bk. 142, at 254 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$240,000).
27. Easement Deed by Richard E. Grams & Helen D. Grams, Grantors, and the United States through the U.S. Forest Serv., Grantee (Mar. 31, 1995), *recorded in* 149 SKAMANIA COUNTY DEED RECORDS 255 (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$456,000).
28. Easement Deed by Richard A. Bea & Sally R. Bea, Grantors, and the United States through the U.S. Forest Serv., Grantee (Nov. 6, 1997), *recorded in* 171 SKAMANIA COUNTY DEED RECORDS 246, *as re-recorded to include exhibits in* 176 SKAMANIA COUNTY DEED RECORDS 996 (May 8, 1998), *as re-recorded in* 182 SKAMANIA COUNTY DEED RECORDS at 295 (Aug. 12, 1998) (on file with Skamania Cty., Wash. Auditor's Office) (purchased for \$216,000).