

MEMORANDUM

DATE: June 17, 2013

TO: David Schumacher, Director– State of Washington Office of Financial Management

FROM: Darren Nichols, Executive Director – Columbia River Gorge Commission

SUBJECT: **Response to Request for Contingency Planning for Agency Operations on July 1**

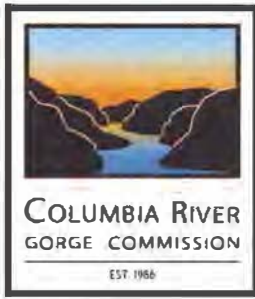
On June 12, 2013, the Office of Financial Management (OFM) asked agencies to identify activities that may be authorized in the absence of appropriations. All of the Columbia River Gorge Commission's (CRGC) activities fall within the category of "[s]ervices to continue based on . . . federal law."

The State of Washington is obligated under federal law and by interstate compact to provide funding for the Gorge Commission, notwithstanding the state's constitutional limitation on appropriations. For a detailed analysis of the applicable law, please see the attached legal memorandum drafted by the Commission's general counsel with concurrence from the Assistant Attorney General assigned to the CRGC.

The CRGC is established by and operates under a congressionally enacted Columbia River Gorge National Scenic Area Act and under the Columbia River Gorge Compact jointly enacted by Washington and Oregon. Together, these authorizations institute in federal law Washington's responsibility to provide funding necessary for the Gorge Commission to establish and maintain facilities, staff, and fulfill the powers and duties that the states imposed upon and entrusted to the Commission.

Providing such funding is a requirement of federal law that supersedes state statutes and the state's constitution and, because the Gorge Commission does not carry out a state program, the Commission's budget cannot be segregated by or delegated to non-federal operations.

Since 2009 the states have cut the Commission's funding by nearly 30%, including a 50% staff reduction and a 70% reduction in core program staff. As a result, the Commission is left with just 5.6 FTE to fill the full responsibilities and mandates of the Act and the Compact. On a short-term interim basis, current funding may be marginally sufficient to maintain core agency operations. On an ongoing basis, current funding levels are wholly inadequate to accomplish the states' and the Commission's mandates under federal law.



MEMORANDUM

DATE: June 14, 2013

TO: Darren Nichols, Executive Director

FROM: Jeffrey B. Litwak, Counsel

SUBJECT: Legal Analysis of Whether the Gorge Commission's Services are Based on Federal Law

Question Presented:

On June 12, 2013, Washington's Office of Financial Management asked agencies to identify activities that may be authorized in the absence of appropriations. You asked me to advise you about whether the Gorge Commission's services are based on federal law.

Short Answer:

The State of Washington is obligated under federal law and by its interstate compact with Oregon to provide funding for the Columbia River Gorge Commission.

Brief Analysis:

There are two federal laws. The first is the congressionally enacted Columbia River Gorge National Scenic Area Act.¹ The second is the Columbia River Gorge Compact, which Washington and Oregon jointly enacted in 1987.² Even though the states enacted the Gorge Compact, the compact is federal law in accordance with U.S. Supreme Court precedent.³ The Washington Court of Appeals has also specifically

¹ 16 U.S.C. § 544 to 544p.

² The compact is codified at RCW 43.97.015 and ORS 196.150.

³ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (holding that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter . . . is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." Congress granted its consent in the Scenic Area Act, 16 U.S.C. § 544c(a), and the Ninth Circuit Court of Appeals concluded the compact is a matter appropriate for congressional legislation under the Commerce and Property clauses of the U.S. Constitution. *Columbia River Gorge United v. Yeutter*, 960 F.2d 110, 113-14 (9th Cir. 1992).

held that the Commission's actions to implement the National Scenic Area Act are "federally mandated, and do not constitute a state program."⁴

The Gorge Compact created the Columbia River Gorge Commission, an interstate compact agency, and specifies the states' commitment to provide funding to the Gorge Commission necessary to establish and maintain facilities, staff, and fulfill the powers and duties that the states imposed upon and entrusted to the Commission.⁵ Providing such funding to the Gorge Commission is a requirement of federal law.

In addition to being federal law, the Gorge Compact is binding on Washington State.⁶ Washington State must continue to provide funding to the Gorge Commission pursuant to its compact obligation even if doing so would contradict another state statute⁷ or a restriction in the state constitution.⁸

Because the Gorge Commission only administers federal law, there are no non-federal services to separate out.

⁴ *Klickitat County v. State*, 71 Wn. App. 760, 767 (1993).

⁵ Columbia River Gorge Compact, art. IV.3 (codified at RCW 43.97.015 and ORS 196.150).

⁶ *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823) (enforcing a compact over conflicting state laws); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (West Virginia "bound itself" by entering into the compact); *The Gillette Co. v. Franchise Tax Bd.*, 209 Cal. App. 4th 938, 950 (2012), *review granted and opinion superseded sub nom.*, 291 P.3d 327 (Cal. Jan. 16, 2013). (citing Jeffrey B. Litwak, *Interstate Compact Law: Cases and Materials* 5, 12 (Semaphore Press 2011) (stating that the compacts are "legislatively enacted, binding and enforceable agreements between two or more states"); *see also* *Anheuser-Busch, Inc. v. Michigan Dep't of Treasury*, No. 11-85-MT, slip op. 5-8 (Mich. Cl. Ct. June 6, 2013) (Multistate Tax Compact is binding).

⁷ State law applies only when specifically preserved in the compact. *Klickitat County v. State*, 71 Wn. App. 760, 767 (1993) (holding that SEPA does not apply to the Gorge Commission because it was not preserved in the compact) (citing *Salmon for All v. Dep't of Fisheries*, 118 Wn.2d 270, 278 (1992) and *Seattle Master Builders Ass'n v. Pac. Nw Elec. Power & Cons. Planning Council*, 786 F.2d 1359, 1371 (1986)).

⁸ *Hinderlider v. La Plata River & Cherry Ditch Co.*, 304 U.S. 92 (1938), superseded by legislation on other grounds, overruled on other grounds (Colorado's obligation to deliver water to New Mexico superseded a water right that was vested pursuant to Colorado Constitution); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) (compact funding mechanism superseded spending limit in West Virginia Constitution); *Washington Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312 (4th Cir. 1983) (allowing federal quick-take condemnation procedures not allowed in Maryland Constitution); *Stephans v. Tahoe Regional Planning Agency*, 697 F. Supp. 1149 (D. Nev. 1988) (stating TRPA's regional plan preempts state law and state constitutional provisions, and dismissing a taking claim based on the Nevada Constitution); *Alcorn v. Wolfe*, 827 F. Supp. 47 (D.D.C. 1993) (compact's provision that appointments are made for a specific term superseded the Virginia constitution, under which political appointees are removable at will); *Frontier Ditch Co. v. Southeastern Colo. Water Cons. Dist.*, 761 P.2d 1117 (Colo. 1998) (vesting jurisdiction in Kansas where Colorado Constitution specified differently); *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1984) (state constitutional and statutory laws apply only to water which has not been committed to other states by interstate compact or United States Supreme Court decree). No case has yet raised the question of whether the Gorge Compact supersedes the Oregon and Washington constitutions.