Exhibit D

Washington I-502 and Oregon Measure 91
in the Columbia River Gorge National Scenic Area
Legal Briefing Paper
December 8, 2015

Issue and Reason for Action

In April 2014, the Commission heard a recommendation from staff that Washington's Initiative 502 (relating to regulation of production, processing, and sales of marijuana) should not apply in the National Scenic Area. During the Commission's discussion, most commissioners stated that the Commission had higher priority issues such that the Commission would not take action on I-502 at that time.

The issue is again before the Commission, only this time concerning Oregon's Measure 91, which similarly allows production processing and sales of marijuana in Oregon. Oregon counties are beginning to draft ordinances to implement Measure 91. Multnomah County has prepared a draft ordinance and will be holding hearings in December, 2015. Multnomah County's draft ordinance allows marijuana production and processing in some land use designations and subject to different types of review. Wasco and Hood River counties have asked the Commission for guidance on whether and how Measure 91 applies in the National Scenic Area so they may draft ordinances implementing Measure 91 accordingly. The Oregon Liquor Control Commission will begin accepting applications for marijuana business licenses on January 4, 2016 and will begin requesting land use compatibility statements from the counties soon after that date, so Commission action at this time will ensure the three Oregon counties provide a consistent response to the OLCC.

As the states' authorities stand at this time, none of the texts of I-502, M-91, the states' implementing statutes or the states' implementing regulations address the applicability of I-502 and M-91 in the Columbia River Gorge National Scenic Area. Hence, the Gorge Commission must address this issue.

The last section of this briefing paper gives several legal reasons that the Commission cannot interpret the National Scenic Area Act and Management Plan (expressly or impliedly) to allow marijuana land uses in the National Scenic Area. The land use issue is the only overlap between the National Scenic Area authorities and the states' marijuana laws; for example, the National Scenic Area authorities do not regulate personal use of any substance or product, so the National Scenic Area authorities do not regulate personal use of marijuana.

Relevant National Scenic Area Authorities and Law

In 1986, Congress enacted the Columbia River Gorge National Scenic Area Act (the Act), which created the National Scenic Area.[1] The Act sought to establish uniform land use standards for the Scenic Area, which

[1] 16 USC §§ 544 to 544p.

encompasses 292,500 acres within two states, six counties, and thirteen cities and communities. In the Act, Congress authorized Oregon and Washington to "establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission."[2]

In 1987, Oregon and Washington enacted the Columbia River Gorge Compact as contemplated in the Act.[3] Because Congress consented to the Gorge Compact in the Act and the Act was a proper subject for federal legislation, the Gorge Compact is federal law.[4] The Gorge Compact created the Commission, which adopts a regional land use management plan for the Scenic Area.[5] The U.S. Secretary of Agriculture must concur with the Commission's adoption of the management plan as a further check to ensure it is consistent with the Act.[6]

Courts in Oregon and Washington recognize that the Commission gets its authority from federal law and also treat the Commission's rules as mandated or required by federal law, and courts recognize that the Commission's rules preempt conflicting state laws.[7] Other courts have concluded that a compact agency's plans and rules are federal law.[8] The Supreme Courts of both Washington and Oregon have applied federal administrative law principles when reviewing the Commission's interpretation of the National Scenic Area Act and Management Plan.[9]

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[2] 16 USC § 544c(a)(1)(A).

[3] The Columbia River Gorge Compact is codified at ORS 196.150 and RCW 43.97.015.

[4] *Cuyler v. Adams*, 449 US 433, 440 (1981) (stating that a compact with Congress's consent and that is a proper subject for federal legislation is itself federal law); *Columbia River Gorge United v. Yeutter*, 960 F2d 110 (9th Cir 1992) (holding that the Gorge Compact would be appropriate for federal legislation under the Property and Commerce clauses in the U.S. Constitution); *Columbia River Gorge Comm'n v. Hood River County*, 210 Or App at 701 (following *Cuyler* for analysis of the Gorge Compact).

[5] Court decisions characterize and treat the Gorge Commission as separate from the states; the Gorge Commission is not a state agency. *Murray v. State*, 203 Or App 377, 379 (2005) ("The commission is a bistate entity made up of representatives of the states of Oregon and Washington."); *Columbia River Gorge Comm'n v. Hood River* County, 210 Or App at 700–01; *Friends of Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 215 Or App 557, 570 (2007) (The Commission "is a 'regional' agency that is generally recognized as a 'hybrid.'").

[6] 16 USC § 544d(f).

[7] *Columbia River Gorge Comm'n v. Hood River County*, 201 Or App at 703 (the Management Plan and land use ordinances are required to comply with federal law); *Klickitat County v. State*, 71 Wn App at 767 ("The Commission's land management plan and the [federal] act's provisions relative to the plan are federally mandated, and do not constitute a state program.").

[8] *Stephans v. Tahoe Reg'l Planning Agency,* 697 F Supp 1149, 1152 (D Nev 1988), (Tahoe Regional Planning Agency's regional land use plan is federal law); *Rhode Island Fishermen's Alliance v. Rhode Island Dep't of Envtl. Mgmt.*, 585 F3d 42, 49 (1st Cir 2009) (referring to "federal law in the form of a fishery management plan promulgated under the [Atlantic States Marine Fisheries] Compact"); *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency,* 24 F Supp at 1068 (reasoning that because "the compact is federal law, it would seem that actions mandated thereunder would likewise have the force of federal laws," and holding that a TRPA ordinance prohibiting discharge of unburned fuel and oil by carbureted two-stroke engines is federal law).

[9] *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 366, 382–83, 410 (2009) (applying federal law methods for review of and deference to the Commission's interpretation of the National Scenic Area Act and the Management Plan); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn 2d 30,

The Management Plan must be consistent with the standards set forth in the Act.[10] The Commission, states and counties must exercise their responsibilities in a manner that is consistent with the National Scenic Area Act and land use regulations.[11]

In short, land use within the National Scenic Area must be consistent with the National Scenic Area Act, and under the Supremacy Clause of the U.S. Constitution, Oregon and Washington state laws do not apply where those laws conflict with the National Scenic Area land use standards.

Relevant State Regulations

The Washington State Liquor and Cannabis Board's regulations for marijuana licenses are in Chapter 314-55 WAC. The regulations specifically state that the board "will not approve any marijuana license for a location on federal lands."[12] The regulations do not define "federal lands." Oregon's temporary regulations prohibit approval of licenses and location of licensed premises on "federal property."[13] Oregon's temporary regulations do not define "federal property."

The Commission communicated the federal law nature of the National Scenic Area and NSA land use regulations to the two states. One of the Washington assistant attorneys general who advised the board on I-502 stated that "federal lands" refers to land owned, leased, etc. by the federal government, the Board did not consider whether it should issue licenses on private land within federally designated areas, such as the National Scenic Area, where the federal government must concur with land use policies, and the Gorge Commission could regulate production, processing and sales of marijuana pursuant to a local option. The local option is not express in I-502; however, the Washington State Attorney General issued an opinion stating that I-502 does not preempt local ordinances and that local governments could regulate or prohibit marijuana production processing or retail sales.[14] In meetings with the Oregon Governor's office in spring this year, the Governor's office stated that it was aware of the special nature of the National Scenic Area; however, the Oregon Liquor Control Commission did not address the National Scenic Area in its temporary regulations (enacted Oct. 22, 2015). Oregon's Measure 91 contains an express local option for local regulation of marijuana.

Land Use Issues

The management plan provides land use designations, goals, policies, and standards; resource protection requirements; and lists of review uses or development types that may be allowed in each designation. Because production and processing of marijuana could be considered agricultural use in the Management Plan,[15] below is a short introduction to regulation of agricultural uses in the National Scenic Area.

42–43 (2001) (applying federal law methods for review of and deference to the Commission's interpretation of the National Scenic Area Act).

[10] 16 USC § 544d(d).

[11] ORS 196.155 and RCW 43.97.025(1).

[12] WAC 314-55-015(6).

[13] OAR 845-025-1115 & 1230.

[14] *Whether Statewide Initiative Establishing System For Licensing Marijuana Producers, Processors, And Retailers Preempts Local Ordinances*, Wash. AGO 2014 No. 2 (2014).

[15] The Gorge Commission has not interpreted the Management Plan as such; however, sec. 34(1)(a) of Oregon HB 3400 (2015) states that marijuana is a farm use as defined in Oregon's land use planning statutes, and

The Management Plan defines "agricultural use" as:

> *The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops; or by the feeding, breeding, management, and sale of, or production of, livestock, poultry, fur-bearing animals or honeybees; or for dairying and the sales of dairy products; or any other agriculture or horticulture use, including Christmas trees. Current employment of land for agricultural use includes:*
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> 1. *The operation or use of farmland subject to any agriculture-related government program.*
> 2. *Land lying fallow for 1 year as a normal and regular requirement of good agricultural husbandry.*
> 3. *Land planted in orchards or other perennials prior to maturity.*
> 4. *Land under buildings supporting accepted agricultural practices.*[16]

Except for new cultivation, agricultural uses have been allowed without review in all but a few sensitive land use designations and buffered resource areas.[17] Cultivation is defined as:

> *Any activity that prepares the land for raising crops by turning, breaking, or loosening the soil. Cultivation includes plowing, harrowing, leveling, and tilling.*[18]

New cultivation requires review because it disturbs previously undisturbed land. Once an area has been cultivated, the Management Plan does not currently require another review for changing the type of crop; however, new buildings, other structural development, and new uses associated with a change in crop production do require review. The Management Plan defines "agriculture structure/building" as:

> *A structure or building located on a farm or ranch and used in the operation for the storage, repair, maintenance, of farm equipment and supplies or for the raising and/or storage of crops and livestock. These include, but are not limited to: barns, silos, workshops, equipment sheds, greenhouses, wind machines (orchards), processing facilities, storage bins and structures.*[19]

For example, review is required for the structures to support vines and for processing of grapes into wine, bottling and aging of wine, packaging, labeling, and retail sales. Other examples of agriculture buildings that have been approved in the National Scenic Area include cold storage warehouses used in conjunction with apple, pear and cherry orchards, barns for livestock, and farm equipment storage. Specific standards for winery buildings and wine sales and tasting rooms address the particular issues with those uses.

Skamania County's resolution (discussed below) states that marijuana production and processing are agricultural uses.

[16] Management Plan, page Glossary-1.
[17] Management Plan, page II-7-11.
[18] Management Plan, page Glossary-5.
[19] Management Plan, page Glossary-1.

Retail sales of agricultural products are limited to fruit and produce stands, and wine sales at an approved winery. Other stores and retail outlets selling agricultural products are limited to commercial and rural center zones.

Considerations for the Commission

Uniformity of Land Use Regulation in the National Scenic Area

As the bi-state agency for the National Scenic Area, the Commission should be concerned that land use regulation of marijuana-related businesses should be uniform throughout the National Scenic Area. Currently, the Washington counties are not handling I-502 uniformly and there is no requirement that they do so under I-502. The Oregon counties are still drafting their marijuana land use ordinances, and there is no requirement that the Oregon counties must allow marijuana uses uniformly between each other. The status of marijuana regulation in the three Washington counties is:

On May 27, 2014, the Clark County Board of Commissioners approved an ordinance that regulates marijuana production, processing and retail sales.[20] The ordinance does not allow marijuana-related businesses in the National Scenic Area,[21] and the ordinance is not applicable "until such time that marijuana is no longer listed as a federally controlled substance in accordance with 21 U.S.C. § 812(c)."[22]

On March 25, 2014, the Skamania County Board of Commissioners approved a Resolution adopting a policy that "marijuana may be grown and/or processed similar to other agricultural crops on land in the National Scenic Area (NSA), if zoned for similar agricultural uses." The resolution also allows retail sales of marijuana on land in the National Scenic Area if zoned to allow similar retail sales. A person proposing these uses would need a full NSA review.[23] Commission staff believes this resolution is not effective in the National Scenic Area because Skamania County did not submit the resolution to the Commission as required for amendments to National Scenic Area land use ordinances, so the Commission has not reviewed and approved the resolution and the Secretary of Agriculture has not concurred with the ordinance for its application in the special management areas.

On June 30, 2015, Klickitat County enacted an ordinance prohibiting the production, processing, and sales of marijuana effective through June 30, 2017.[24] Klickitat County staff will report on the ordinance every six months.

Consistency with Other Federal Law and Maintaining the Federal Law Status of the National Scenic Area Land Use Standards

Since its creation, the Commission has carefully guarded its unique legal status in implementing its two federal statutes—the National Scenic Area Act and the Columbia River Gorge Compact—and in adopting the Management Plan and land use ordinances, which have the force and effect of federal law. All of the National

[20] Clark County, Wash., Ord. No. 2014-05-07 (amending several sections of the Clark County Code (CCC) and adding CCC 40.260.115).
[21] Clark County's National Scenic Area ordinance is at CCC chapter 40.240. Ord. No. 2014-05-07 does not amend any section within this chapter.
[22] CCC 40.260.115(B)(4).
[23] Skamania County, Wash., Res. No. 2014-22.
[24] Klickitat County, Wash., Ord. No. O063015.

Scenic Area authorities preempt conflicting state law by the Supremacy Clause in the U.S. Constitution and by other court crated principles applicable specifically to interstate compacts. The Commission's guidance to the counties and decision on marijuana uses should continue this approach to ensure that the Commission maintains its legal status in the future.

Legal Analysis

There are compelling legal reasons supporting a conclusion that marijuana land uses cannot be not allowed in the National Scenic Area. There is no compelling legal argument that the Commission must or could allow marijuana land uses. Some of the applicable legal arguments include:

1. To the extent the Washington and Oregon's marijuana laws authorize land uses or authorize counties to approve specific land uses in the National Scenic Area, the land use standards for the National Scenic Area from the National Scenic Area Act, Management Plan and land use ordinances preempt those laws. There is precedent from Oregon and Washington courts for preemption in the National Scenic Area this situation.[25]

2. State law may apply only as specifically preserved in the Act or Gorge Compact.[26] The Act preserves certain state laws through "savings provisions" in Sec. 17 and in other references, such as in Sec. 5(b) (certain state procedural statutes). Neither the Act nor Gorge Compact preserves state substantive standards generally; hence state law authorizing approval of marijuana land uses is not applicable. Many cases have involved arguments that the Commission must apply state statutory law, but the Commission and Washington courts have consistently not applied state statutes.[27] Oregon courts have never addressed the application of new law to an existing interstate compact; however, Oregon courts frequently follow other courts' application of an interstate compact.[28]

3. The Commission has interpreted and applied the Management Plan to prohibit land uses that the Management Plan does not specifically authorize. The Commission first expressed this interpretation of the Management Plan in an appeal decision in 1995. Because marijuana uses were not legal land uses at the time the Commission adopted the Management Plan, counties may not interpret their land use ordinances to allow marijuana uses unless the Commission approves such a change of interpretation.

4. Washington and Oregon statutes administering the Columbia River Gorge Compact specifically require the Gorge Commission, state agencies and counties to carry out their responsibilities in accordance

[25] *E.g.*, *Columbia River Gorge Comm'n v. Hood River County*, 201 Or App 689, 703 (2007) (the Management Plan and land use ordinances are required to comply with federal law); *Klickitat County v. State*, 71 Wn App 760, 767 (1993) ("The Commission's land management plan and the [federal] act's provisions relative to the plan are federally mandated, and do not constitute a state program.").

[26] *Seattle Master Builders Ass'n v. Pac. Nw Elec. Power & Conserv. Planning Coun.*, 786 F2d 1359, 1371 (9th Cir 1986) (stating, "A state can impose state law on a compact organization only if the compact specifically reserves its right to do so").

[27] *E.g.*, *Klickitat County v. State*, 71 Wn App at 767 (applying *Seattle Master Builders*).

[28] *See, e.g., Powerex v. Dep't of Revenue*, 357 Or 40, 70–71 (2015) (applying two factor test for interpreting a uniform law required by the Multistate Tax Compact consistent with other states' application of uniform law).

with the compact and the federal National Scenic Area Act.[29] Thus the states should not be issuing licenses to operate land uses that the National Scenic Area authorities do not specifically authorize.

5. Finally, allowing production, processing, and sales of marijuana in the National Scenic Area would create an irreconcilable conflict between the National Scenic Area authorities, which are federal law, and the federal Controlled Substances Act. Quite simply, the National Scenic Area Act and Management Plan cannot authorize land uses that another federal law expressly prohibits. No court has addressed a conflict between the National Scenic Area authorities and other federal law; in this situation in other cases, courts apply traditional conflict of law principles.[30] It is unlikely that a court would hold the Commission's application of the states' marijuana laws would prevail in a conflict over the federal Controlled Substances Act.

I recommend the Commission express its interpretation of the National Scenic Area Act and Management Plan. It can do so in multiple ways. At this time, the Commission could give oral guidance. Formal action could take the form of rulemaking or decisions on county land use ordinances (including review of Skamania County's Resolution, which as noted above, Skamania County has not yet transmitted to the Commission for review pursuant to the Act).

[29] RCW 43.97.025(1); ORS 196.155. The National Scenic Area Act specifically requires this provision, 16 USC § 544c(a)(1)(C).

[30] *See, e.g.*, *NYSA-ILA Vacation and Holiday Fund v. Waterfront Comm'n of N.Y. Harbor*, 732 F2d 292 (2d Cir 1984) (compact that had received congressional consent was not preempted or superseded by federal ERISA statute); *American Sugar Refining Co. v. Waterfront Comm'n of N.Y. Harbor*, 55 NY2d 11, 29–30 (1982) (because a compact is "federal law," conflicts between compact provisions and federal statutes cannot be resolved by "preemption" analysis, but by an analysis of whether one "impliedly repeals" another); *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F Supp 2d 1062, 1073 (ED Cal 1998); *City of South Lake Tahoe v. Tahoe Reg'l Planning Agency*, 664 F Supp 1375, 1378 (ED Cal 1987).