☐ EXPEDITE
☐ No Hearing Set
☑ Hearing is Set
Date: October 26, 2012
Time: 11:00 a.m.
The Honorable Judge James J. Dixon

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FRIENDS OF THE COLUMBIA GORGE, INC., and SAVE OUR SCENIC AREA, Petitioners, v. STATE ENERGY FACILITY SITE EVALUATION COUNCIL (EFSEC) and CHRISTINE O. GREGOIRE, Governor of the STATE OF WASHINGTON, Respondents, and WHISTLING RIDGE ENERGY LLC, SKAMANIA COUNTY, and KLICKITAT COUNTY PUBLIC ECONOMIC DEVELOPMENT AUTHORITY, Intervenors-Respondents.	NO. 12-2-00692-7 REPLY TO PETITIONERS' RESPONSE TO MOTION TO CERTIFY PETITION FOR REVIEW TO SUPREME COURT PURSUANT TO RCW 80.50.140

COMES NOW Governor Christine O. Gregoire, Energy Facility Site Evaluation Council ("EFSEC"), Whistling Ridge Energy LLC, Skamania County, and the Klickitat County Public Economic Development Authority

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(collectively, "Respondents") by and through its legal counsel set forth below and jointly reply to Friends of the Columbia Gorge ("FOCG") and Save Our Scenic Area's ("SOSA") (collectively, "Petitioners") response to Respondents' motion to certify the Petition for Review to the Washington Supreme Court pursuant to RCW 80.50.140.

I. ARGUMENT

A. Review Can Be Made on the Administrative Record; the Record Is Complete for Review

Upon rendering a decision on Petitioners' motion seeking judicial notice, the record will be complete, and review can be made on the record. There appears to be agreement between the parties that the requirements of RCW 80.50.140(1)(a) and (d) are satisfied.

B. Fundamental and Urgent Interests Affecting the Public Interest and Development Energy Facilities Are Involved That Require a Prompt Determination

The main dispute regarding direct certification to the Supreme Court involves RCW 80.50.140(1)(b). To be clear, while Petitioners contend that Respondents' motion to certify focuses only on 6 of the 32 claims made in the Petition for Review, that is a mischaracterization of the motion to certify. (Petitioners' Resp. at 17.) Essentially, each of the 32 claims has two components: (i) a factual component that will be promptly resolved through the application of the appropriate standard of review (because the Governor approved an EFSEC recommendation that has, in fact, fully adjudicated these factual issues with a massive environmental and adjudication record completely supporting its findings of fact and conclusions of law); and (ii) a legal component

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that is connected to a fundamental and urgent public interest that affects the development of energy facilities in the State of Washington.

This is not the time to respond to the merits, and brief, every one of Petitioners' 32 claims; that is not required for the Court to certify this case to the Supreme Court. However, every one of the 32 claims is addressed and catalogued below, and every claim is connected to a fundamental and urgent public interest requiring expeditious and final resolution available only through Supreme Court review.

Moreover, in considering whether this criterion was satisfied in *Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 302, 197 P.3d 1153 (2008), the Supreme Court reasoned that the

> legislature has recognized public interests in providing energy at a reasonable cost, RCW 80.50.010(3), and avoiding costly duplication in the siting process and ensuring that decisions are made timely and without unnecessary delay, RCW 80.50.010(5). Such public interests are present in this case, requiring prompt review.

This reasoning is equally applicable here. Washington voters have recognized a public interest in renewable energy by requiring that qualifying utilities purchase increasing quantities of renewable energy. RCW 19.285.040(2)(a). Petitioners have already brought two interlocutory appeals concerning the Project, and the application for the Project was submitted to EFSEC over three-and-a-half years ago. Furthermore, Skamania County's economic and fiscal constraints require immediate help, such as that which the Project could bring. (*See, e.g.*, AR 28485 (Project would increase Skamania County's property tax revenues by $731,500 per year).) These public interests require prompt review by the Supreme Court.

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1. Direct Certification Under RCW 80.50.140

Petitioners contend that a number of appeals of EFSEC-permitted energy facilities have been filed in Thurston County Superior Court since 1969, and only the appeal of the Kittitas Valley Wind Power Project was certified to the Supreme Court. This argument is misleading for a number of reasons. First, the legislature recognized the fundamental need for expeditious and final resolution of appeals of energy facility decisions and enacted RCW 80.50.140(1)'s provisions for direct certification to the Supreme Court in 1981. (Martin Decl., Ex. 1 (1981 Wash. Sess. Laws page nos. 276-77).) The resulting statutory directive does in fact fundamentally contemplate Supreme Court certification, although there may be many situations where litigants can cooperatively resolve appeals rapidly and conclusively without pursuing certification to the Supreme Court. Whatever projects were or were not appealed prior to 1981 are not relevant to the question now before this Court.

Second, Petitioners have not, and cannot, describe what actually occurred in post-1981 EFSEC appeals. Did the parties jointly agree to an accelerated review by the Superior Court? Was a remand considered the most expeditious means of addressing a discrete handful of factual issues? Did the parties settle these cases during the appeal? Who filed the petitions for review—applicants, environmental opponents, the appointed counsel for the environment, neighbors, competitors, or perhaps even state agencies? In essence, the fact that the Kittitas Valley appeal was the first to be certified to the Supreme Court says nothing about whether this appeal meets the criteria for direct certification to the Supreme Court.

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Third, despite a number of appeals of EFSEC-permitted energy facilities over the years, the Governor and EFSEC have only once sought direct certification to the Supreme Court. (Luce Decl. ¶ 1.) This indicates that the Governor and EFSEC carefully weigh whether to seek direct certification and only do so when an appeal likely involves fundamental and urgent interests affecting the public interest and development of energy facilities that require a prompt determination by the Supreme Court.

Here, the Governor, EFSEC, the applicant, and the county all jointly seek Supreme Court certification, and all concur that the prompt and final resolution of this case is essential, due to pressing and fundamental public interests that impact not only the Whistling Ridge Energy Project (the "Project"), but other permitted but un-built projects and future projects. (Luce Decl. ¶ 2; Spadaro Decl. ¶ 8.) In addition, Petitioners' history in this case and their litigious stance beyond these proceedings, coupled with the issues Petitioners have raised, demonstrate a genuine intention to cause the serial adjudication and litigation of this Project and would open the door for opponents of other energy facilities to do the same. Only an expeditious and final conclusion by the Supreme Court will resolve this situation.

2. The Issues Raised in This Appeal Require Prompt Resolution

Petitioners assert there is "no urgency whatsoever" to resolve this appeal because (i) the Applicant has not signed the Site Certification Agreement ("SCA"), (ii) the Project may not be economically viable, and (iii) there are no other applications pending before EFSEC such that this appeal "would be resolved long before the Governor would issue a decision on any new application." (Petitioners' Resp. at 7-9.) The Applicant has not signed the SCA

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because of the uncertainties this appeal has raised regarding the requirements and interpretation of the SCA, yet the Applicant continues to actively work to move the Project forward. (Spadaro Decl. ¶¶ 6, 10-12.) The Applicant testified on January 3, 2011, that the Project was not viable at that time if proposed turbine strings were eliminated, that the wind turbine market and technology changes, that wind turbines are selected based on site-specific performance considerations, and that there are other factors, such as the price for power, that determine economic viability. (AR 16732-33, 16756, 16760, 16781, 16805-06, 16811.) The fact that turbine string removal impacted Project viability nearly two years ago and that there is uncertainty in today's renewable energy market does not mean that there is not an urgent need to resolve this appeal. Indeed, it is critical for the Applicant that Petitioners' issues be resolved with finality.

Furthermore, the lack of other applications pending before EFSEC at this time actually supports the need to promptly resolve this appeal and the uncertainty it has created for EFSEC's review process. (Spadaro Decl. ¶ 8.) There are currently 10 energy generation facilities seeking approval from the Oregon Energy Facility Siting Council and two transmission lines, which demonstrates a real demand for energy facilities in the Pacific Northwest. (Martin Decl., Ex. 2.) EFSEC's jurisdiction is not limited to wind energy facilities, but also includes solar, geothermal, landfill gas, wave or tidal, biomass, electric transmission lines, nuclear, thermal, LNG, and refineries. *See* RCW 80.50.020, 80.50.040(2). Issues raised in this appeal implicate EFSEC's ability to site all of these types of energy facilities. (Luce Decl. ¶¶ 1-2.)

Resolution of the issues raised in the appeal and the uncertainty created thereby is needed *before* energy facility developers will again be willing to

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submit applications to EFSEC. (Spadaro Decl. ¶ 8.) One cannot reasonably imagine an energy facility developer, reflecting on EFSEC's review of this Project and this appeal, will decide, "I don't know how the courts will resolve these many issues that affect EFSEC's review process, but nonetheless I'm going to expose my project to the EFSEC review process anyway because an answer will exist before the Governor makes a decision on my project." The state of affairs when permitting begins is a key consideration.

3. Resolution of Appeals

Petitioners claim that Supreme Court certification will be less expeditious than adjudication by the Superior Court. (Petitioners' Resp. at 9-10.) The legislature acknowledged the falsehood of this argument in 1981 when it added Supreme Court certification to RCW 80.50.140. The record is clear—Petitioners' repeatedly stated goal is to stop the Project.[1] Assuming Petitioners prevail at the Superior Court (and Respondents do not appeal), Petitioners will almost certainly return to Superior Court if EFSEC does not grant them the relief they desire (after what will inevitably be many months of hearings, motions, testimony and briefing costing the parties untold thousands of dollars for EFSEC expenses and attorney fees), and the entire judicial review process will recommence afresh. If they do not prevail at the Superior Court, Petitioners'

[1] *See* AR 16542 (Petitioners' Opening Statement to EFSEC: "The WREP would permanently harm internationally significant resources as well as local community interests . . . . Simply put, this is the wrong site for an industrial-scale wind energy facility."), AR 16561 (Petitioners' Opening Statement to EFSEC: "The application for site certification for this Project should be denied."), AR 28799 (SOSA Pet. for Reconsideration: "SOSA requests that the Council expand its elimination of part of the project and deny it in its entirely."), AR 28860 (FOCG's Pet. for Reconsideration: "[T]he Application for site certification should be denied.").

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record indicates that they will almost certainly continue to pursue a remand by appealing to the Court of Appeals and/or the Supreme Court. The likely result—regardless of whether Petitioners prevail in this Court—is *years* of additional process that continues until it is ultimately halted by a final judicial decision. In contrast, the Supreme Court fully and finally resolved the appeal of the Governor's decision regarding the Kittitas Valley Wind Power Project approximately *eight months* after it received the order certifying the petition for direct review. (Luce Decl. ¶ 1.) Moreover, even if the Supreme Court were to remand this matter to EFSEC, the Supreme Court, in full recognition of its role pursuant to RCW 80.50.140, could retain jurisdiction to ensure its expeditious resolution. There is simply no credible scenario that speeds a resolution *with finality* without Supreme Court certification. Certification to the Supreme Court is the only path to finality consistent with RCW 80.50.140(1)'s direction that judicial review of the Governor's decision be "expedite[d] . . . in every way possible."

4. Petitioners' Issues Raising Fundamental and Urgent Public Interests

a. Land Use Consistency (Pet. for Rev. Issues ¶¶ 7.1.1 to 7.1.6)[2]

Petitioners' arguments that their challenge to EFSEC's determination of

[2] Petitioners' land use consistency issues in Pet. for Rev. ¶¶ 7.1.2 to 7.1.5 share a common legal component that is tied to one of the certificate of land use consistency issues raised in Pet. for Rev. ¶ 7.1.1, namely the deference EFSEC affords a local government's certificate of land use consistency under WAC 463-26-090. In Pet. for Rev. ¶ 7.1.6, Petitioners allege that EFSEC concluded that "Skamania County's land use authorities should be preempted." This allegation is connected to the issues raised in Pet. for Rev. ¶¶ 7.1.1 to 7.1.5, because if (as EFSEC and Skamania County determined) the Project is consistent with Skamania County's land use regulations, preemption is unnecessary.

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land use consistency do not raise fundamental and urgent issues are an unfortunate "shell game." To avoid Supreme Court certification, they appear to trivialize their own assignments of legal error and contend that the purported defect in Skamania County's certificate of land use consistency can be resolved simply by changing the words a local government ascribes to its land use certification document. However, Petitioners' own actions and legal arguments illustrate the fundamental and urgent implications of the result they seek.

If Petitioners prevail on their claim that certificates of land use consistency must be land use decisions, there is no case law that prevents them or any other opponent from arguing that a local government's adoption of a certificate of land use consistency requires a public process and is separately appealable outside the EFSEC process. The two-sentence 2007 Cowlitz County Superior Court decision cited by Petitioners is not binding precedent, and opponents in future energy facilities could argue that *Lathrop v. EFSEC*, 130 Wn. App. 147, 121 P.3d 774 (2005), only concerns appeals of EFSEC decisions rather than local government's issuance of a certificate of land use consistency. Indeed, that is *exactly* what Petitioners themselves argued before the Columbia River Gorge Commission when they appealed Skamania County's second certificate of land use consistency for this Project.

> [T]he court held that the Kittitas County Superior Court did not have jurisdiction. *Lathrop*, 121 P.3d at 777. Appellants fully agree that under the plain language of RCW 80.50.140, a party may challenge *an EFSEC decision* only in Thurston County Court. The present

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> appeal, however, challenges *a decision made by Skamania County*, not a decision made by EFSEC.[3]

In fact, Petitioners *twice* appealed Skamania County's certificates of land use consistency to the Columbia River Gorge Commission. Before the Columbia River Gorge Commission, Petitioners argued that their substantial rights had been prejudiced because Skamania County had adopted a "final" land use decision without public notice and an opportunity to comment, seeking remand of the certificate of land use consistency to Skamania County for further review.[4] Petitioners also argued that the certificate of land use consistency was not supported by substantial evidence in the County record. FOCG continued these arguments before EFSEC claiming that Skamania County had developed the certificate of land use consistency "behind closed doors, and expressly avoided undertaking the public processes required for government decisions." (AR 21863.) FOCG also claimed that the Cowlitz County Superior Court decision decided that "certificates of consistency . . . are land use decisions under the Land Use Petition Act ('LUPA'), RCW Chapter 36.70C." (AR 28814.)

Respondents have not manufactured these issues out of thin air. If a certificate of land use consistency must be a "land use decision" as Petitioners' claim, the door will open wide for the type of interlocutory appeals that Petitioners filed twice here, and the desired local government process with opportunity for public comment on proposed certificates of land use consistency

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[3] Martin Decl., Ex. 3, page 7 (emphasis in original). Interestingly, when appealing the Cowlitz County Superior Court decision, FOCG's own counsel argued that "[s]imply because EFSEC has a separate administrative process does not mean that the County's decision is not reviewable under LUPA." (Martin Decl., Ex. 4, page 6.)

[4] Martin Decl., Ex. 3, pages 8-14. The Columbia River Gorge Commission dismissed Petitioners' appeal for lack of subject matter jurisdiction. (AR 18813.)

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could be used to derail EFSEC's review process. Such an outcome will ensure endless litigation over local land use compliance for energy facilities being reviewed by EFSEC. This issue needs the finality and certainty of Supreme Court review, and because this issue impacts any energy facility seeking certification before EFSEC, it requires prompt and final Supreme Court review.

b. EFSEC's Authority to Manage Projects Following Approval by the Governor (Pet. for Rev. Issues ¶¶ 7.2.5 to 7.2.7, 7.5.1, 7.6.1, 7.7.1, 7.7.2, 7.8.1, 7.8.2 and 7.9.3)

Petitioners argue that the important legal issue of whether and by what means EFSEC can regulate and manage this Project and any other EFSEC-permitted energy facility following the Governor's approval cannot satisfy RCW 80.50.140(1)(b), because "[t]here are no other new applications before EFSEC, and this Court will likely render a decision before EFSEC reaches any decision-making point on any future applications."[5] (Petitioners' Resp. at 12.) Petitioners' response ignores that a judicial holding concerning EFSEC's authority to manage this Project could arguably apply to the other existing and permitted energy facilities over which EFSEC has jurisdiction. Furthermore, until this important legal issue is resolved by a final judicial decision (*i.e.*, by the Supreme Court), the uncertainty created by this issue will discourage energy facility developers from submitting their projects to EFSEC. (Spadaro Decl. ¶ 8.) For these reasons, this is a fundamental and urgent issue that requires prompt resolution by the Supreme Court.

[5] Petitioners inaccurately claim that resolution of forest practice issues is one of the important legal issues Respondents identified. (Petitioners' Resp. at 12.) Respondents' motion to certify clearly communicates that this is one "example" of Petitioners' challenge to EFSEC's post-approval authority. (Respondents' Motion to Certify at 10.)

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c. Appeal of EFSEC's Adjudication of Environmental Issues Without Appeal of the SEPA/NEPA EIS (Pet. for Rev. Issues ¶¶ 7.2.1 to 7.2.11, 7.3.1 to 7.3.3, 7.4.1, 7.5.1 and 7.6.1)

EFSEC considered environmental issues (including wildlife, aesthetic, heritage, and recreational resources and noise and transportation considerations) in both the adjudicatory proceeding and the NEPA/SEPA EIS, and EFSEC's recommendation and the Governor's decision relied on the record developed in both processes. (AR 28633, 36687.) Petitioners' claims regarding these environmental issues are focused solely on the adjudicative record. (*See* Petitioners' Resp. at 12.) However, the EFSEC order concluding the adjudicative proceeding expressly noted that,

> [t]he conclusion of this order [No. 828] regarding approval or denial of the Application is *preliminary* and subject to the Council's later concurrent consideration of the results of this order and the FEIS. If the Council recommends approval, it will forward to the Governor a separate Site Certification Agreement (SCA). *Any SCA will be based upon both this Order and the FEIS to ensure compliance with requirements and mitigation found necessary as conditions of facility construction and operation.*

(AR 28653 (footnote omitted; emphases added).) Petitioners effectively seek judicial review of "preliminary" environmental conclusions but not the ultimate environmental conclusions that were based on both the adjudicative and SEPA records.

This raises the important issue of whether Petitioners can narrow judicial review of environmental determinations, so as to exclude consideration of the

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FEIS in judicial review of EFSEC's final decision.[6] This would be a precedent-setting decision by the court, disrupting not only judicial review of EFSEC's business under RCW 80.50, but also judicial review of the environmental decision-making on land development applications in cities and counties throughout the state. This issue needs the finality and certainty of Supreme Court review. This is an extremely important issue to Whistling Ridge, Skamania County, and the Governor and requires prompt and final resolution by the Supreme Court.

RCW 80.50.140(1)(b) is satisfied.

d. SCA's Effective Date and Expiration Date and the Governor's Discretion to Stay the SCA's Timing Until Final Permits Are Secured and Appeals Are Exhausted (Pet. for Rev. Issues ¶¶ 7.9.1 and 7.9.2)

Seeking to avoid certification to the Supreme Court, Petitioners attempt to trivialize the importance of these issues by assuming the SCA will be remanded and claiming that if the SCA is amended or reissued on remand the 10-year clock "*may* restart" at that time. (Petitioners' Resp. at 14 (emphasis added).) Respondent Whistling Ridge concurs that the SCA is not clear about the commencement of the 10-year timeframe and accordingly has declined to execute the SCA until this appeal is resolved. (Spadaro Decl. ¶ 11.) Petitioners

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[6] Further, Petitioners admit that the alleged SEPA violations in the Kittitas Valley appeal were fundamental and urgent issues of statewide importance. (Petitioners' Resp. at 14 n.25.) However, the SEPA issues in that appeal simply concerned evaluation of two mitigation measures specific to wind energy facilities and EFSEC's use of evidence outside the FEIS in its decision to recommend approval of the SCA. *Residents Opposed to Kittitas Wind Turbines v. EFSEC*, 165 Wn.2d 275, 311-13, 197 P.3d 1153 (2008). As these alleged SEPA violations were sufficient to satisfy RCW 80.50.140(1)(b) in that appeal, certainly this criterion must also be satisfied by the issue Petitioners have raised concerning whether judicial review of environmental determinations must consider the analysis and determinations in the FEIS.

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seek multiple "processes for interested persons to participate" as EFSEC makes ministerial decisions, such as approving final engineering and design decisions, thereby exposing implementation of the SCA to serial adjudication and further delay. (Pet. for Rev. ¶ 7.8.1.) These issues need the finality and certainty of Supreme Court review. These are profoundly important issues, both to Whistling Ridge and the Governor, and require prompt and final resolution by the Supreme Court.

e. "Order of Precedence" Concerning Federal and State Law (Pet.for Rev. Issues ¶¶ 7.10.1 and 7.10.2)

Petitioners similarly trivialize this issue by claiming that "there does not appear to be any current identified conflict between federal and state law." (Petitioners' Resp. at 14.) This response, though, is belied by the Petition for Review's assertion that it identifies issues that "adversely affected and aggrieved" Petitioners. (Pet. for Rev. ¶ 6.) Petitioners cannot be aggrieved by a lack of conflict.

This is an extremely important legal issue that implicates how EFSEC conducts its business in the context of overlapping, sometimes inconsistent, and sometimes inapplicable (or separately applicable) federal law. This issue involves constitutional jurisprudence, including the extent and applicability of federal preemption under the Commerce Clause, and its eventual review by the Supreme Court is likely inevitable. This is a profoundly important issue, both to Whistling Ridge and the Governor, and requires prompt and final resolution by the Supreme Court.

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C. Review by the Supreme Court Would Likely Be Sought Regardless of the Determination of the Thurston County Superior Court

Petitioners claim this criterion is not satisfied for several reasons. First, Petitioners assert they have not decided whether to appeal an adverse decision and they are less likely to appeal that if they prevail on some claims. (Brown Decl. ¶¶ 4-5; Drach Decl. ¶¶ 4-5.) Petitioners' self-serving assertions must carry little, if any, weight because otherwise every opponent seeking to avoid direct certification would simply make the same assertions thereby effectively nullifying RCW 80.50.140's provision for direct certification. Further, Petitioners have been using the legal system to stop wind energy development in Skamania County, and this Project specifically, for at least the past five years. (*See* AR 16864; Drummond Decl. ¶ 4.) Again, their repeatedly stated goal is to stop the Project.[7] If Petitioners did not prevail in this Court and/or in the Court of Appeals, the record indicates that Petitioners will likely seek review by the Supreme Court to subject the Project to further proceedings and expenses in the hope of ultimately stopping the Project. (*See* Drummond Decl. ¶ 3.)

Second, Petitioners claim they are not litigious organizations. However, their litigious history is a matter of record. In just the past five years, federal and state courts have published 14 opinions in 9 cases involving FOCG.[8] FOCG was

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[7] *See* footnote 1 *supra.*

[8] *Friends of the Columbia Gorge, Inc. v. Elicker*, 598 F. Supp. 2d 1136 (D. Or. 2009), *vacated by* 2011 U.S. Dist. LEXIS 82833 (D. Or., July 26, 2011); *Friends of the Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253 (D. Or. 2008); *Friends of the Columbia Gorge, Inc. v. United States Forest Serv.*, 546 F. Supp. 2d 1088 (D. Or. 2008); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 248 Or. App. 301, 273 P.3d 267 (2012); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 215 Or. App. 557, 171 P.3d 942 (2007), *aff'd in part and rev'd in part*, 346 Or. 366, 213 P.3d 1164 (2009); *Friends of the Columbia Gorge, Inc. v. Columbia River*

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