December 16, 2015

To: **Columbia River Gorge Commission**

From: **Jeff Litwak, Counsel**

Subject: **Application of Oregon and Washington State Marijuana Laws in the Columbia River Gorge National Scenic Area**

Background:

In 2012, Washington voters approved Initiative 502 and in 2014, Oregon voters approved Measure 91, both of which decriminalized marijuana under state law and authorized state licensing programs for the production, processing, and sales of marijuana in the respective state. None of the ballot actions, legislative clarifications, or administrative rules implementing the states' laws addressed the application of those laws in the federally designated Columbia River Gorge National Scenic Area.

In 2014, the Commission heard an agenda item about the application of Washington I-502 in the National Scenic Area but took no action. In December 2015, three Oregon counties asked the Commission for guidance on applying the states' marijuana laws in the National Scenic Area. Following a lengthy discussion about the legal issues, the Commission concurred with Counsel that the unique nature of the National Scenic Area authorities could not legally permit marijuana land uses in the National Scenic Area and asked Counsel for a concise memo summarizing the legal issue.

Scope of Legal Issue:

The legal issue relates to production, processing, and sales of marijuana (including related land uses, such as propagating, drying, storage, packaging, labeling and testing facilities) in the general management area and special management areas in the National Scenic Area, which are activities for which the states require a marijuana license. The National Scenic Area authorities do not regulate personal use of any product or substance in the National Scenic Area, and do not directly regulate land uses in the urban areas of the National Scenic Area. Thus, the Commission took no position on personal use of marijuana in the National Scenic Area or marijuana land uses in urban areas.

Legal Analysis:

This memo provides a brief discussion of the principal legal points in a December 8, 2015 Briefing Paper, but without the lengthy citations to legal authorities in that paper. The Briefing Paper is available on request.

In 1986, Congress enacted the Columbia River Gorge National Scenic Area Act (the Act), which created the National Scenic Area and authorized Oregon and Washington to enact an interstate compact. In 1987, Oregon and Washington enacted the Columbia River Gorge Compact, and pursuant to U.S. Supreme Court precedent, the Gorge Compact is federal law. The Gorge Compact created the Gorge Commission, which adopts a regional land use management plan for the National Scenic Area. 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.

Courts in Oregon and Washington recognize that the Commission gets its authority from federal law and also treat the Commission's rules in the same manner as they treat federal law, including preempting conflicting state laws.

The Commission's December 8, 2015 Briefing Paper gave numerous legal points. The two primary points are:[1]

1. 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. The National Scenic Area Act and Management Plan cannot authorize land uses that another federal law expressly prohibits. Because marijuana is not legal under the federal Controlled Substances Act, the National Scenic Area authorities cannot expressly authorize or be interpreted or applied to allow production, processing, and sales of marijuana in the National Scenic Area.

2. 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 land uses were not legal land uses at the time the Commission adopted the Management Plan in 1991, land use ordinances cannot be interpreted or applied to allow marijuana land uses unless the Commission approves a change to the Management Plan (which as noted above, the Commission may not do consistently with the federal law status of the National Scenic Area authorities).

Conclusion:

For these reasons, the Gorge Commission cannot expressly allow marijuana land uses in the Management Plan for the National Scenic Area and cannot approve county land use ordinances or other legislative or permitting actions that expressly allow marijuana land uses in the National Scenic Area, or that interpret or apply existing provisions of a land use ordinance to allow marijuana land uses in the National Scenic Area. This includes, but is not limited to allowing marijuana land uses as agricultural use without review in the National Scenic Area or allowing marijuana production or processing within agricultural structures or buildings.

[1] The other legal points in the December 8, 2015 Briefing Paper are variations on these points based on specific National Scenic Area authorities and principles of interstate compact law.