

**Report in Support of  
Columbia River Gorge Commission  
Administrative Rules**

**Chapter 350  
Divisions 11, 12, 13, 14, 15, & 16**

As Amended through [DATE]

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## Context and Background

This report summarizes contextual and background information on the following six divisions of the Columbia River Gorge Commission’s administrative rules required by the National Scenic Area Act at 16 U.S.C. § 544c(b):

- Division 11 – Open Meetings
- Division 12 – Public Records
- Division 13 – Financial Disclosure
- Division 14 – Conflicts of Interest
- Division 15 – Public Contracts
- Division 16 – Administrative Procedure

The context and background in this report include the legal requirements for these divisions; significant court decisions and attorneys general opinions concerning or relevant to these divisions; the form, style, and publication of these divisions; the adoption and amendment history of each division; and an explanation of which sections of each division are derived from which statutory provisions of Oregon or Washington law.

*Currency:* This report covers divisions 11 through 16 as amended on [DATE]. See [cite final rulemaking notices] and Oregon and Washington statutes as of the end of the 2024 legislative sessions.

### **Legal Requirements for Divisions 11, 12, 13, 14, 15, and 16**

The Columbia River Gorge Compact, art. I.g (ORS 196.150; RCW 43.97.015), requires the Gorge Commission to adopt rules:

“The commission shall adopt bylaws, rules, and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules and regulations. The commission shall publish its bylaws, rules and regulations in convenient form and shall file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states.”

The National Scenic Area Act, 16 U.S.C. § 544c(b), requires the Gorge Commission to adopt certain rules and requires that those rules must be consistent with the more restrictive statutory provisions of either state:

“For the purposes of providing a uniform system of laws, which, in addition to sections 544 to 544p of this title, are applicable to the Commission, the Commission shall adopt regulations relating to administrative procedure, the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Commission, advisory committees, and disclosure of information consistent with the more restrictive statutory provisions of either State.”

There are no court decisions providing guidance on what constitutes “the more restrictive statutory provisions of either state.” In a letter from the Washington Attorney General Office to Sen. Jim Honeyford (Dec. 27, 2000), an informal opinion whether the Gorge Commission must comply with Washington or federal public records disclosure laws, the Washington Attorney General’s Office wrote:

“There are numerous differences in the structure of the two states’ public disclosure laws. No court has compared the two states’ public records section of Washington’s Public Disclosure Act, RCW 42.17.250-348, and Oregon’s Public Records Act, O.R.S. 192.001-505. Which state has enacted the more restrictive public disclosure law remains an open question. No court has identified any principled basis upon which to decide whether RCW 42.17.260 and .280 are more or less restrictive than their Oregon counterparts or, conversely, whether O.R.S. 192.410, .420, .440, .501, and .502 are more or less restrictive than their Washington counterparts.”

## **Court Decisions Related to Gorge Commission Rules**

The following two court decisions concluded that the states’ laws on the administrative rule subjects required in the National Scenic Area Act, do not directly apply to the Gorge Commission. Although these court decisions only address open meetings and public records, the reasoning is the same for all the administrative rule subjects required in the National Scenic Area Act.

*ZP#5 v. Columbia River Gorge Comm’n*, No. 20-2-02402-06 (Clark Cnty. Super. Ct. Mar. 24, 2023). In this decision, the court concluded that the Washington Open Public Meetings Act does not directly apply to the Gorge Commission. The court did not explain its conclusion, but the Gorge Commission’s briefing argued (1) that the

Gorge Commission is not a public agency as defined in the Washington Open Public Meetings Act like the states' attorneys general had opined in prior letters regarding the Washington and Oregon public records disclosure laws, and (2) that Congress made a deliberate choice to have the Gorge Commission adopt its own open meetings rules rather than require the Gorge Commission to directly apply state law like Congress had done in its consent statutes for other interstate compacts.

*Zimmerly v. Columbia River Gorge Comm'n*, 663 F. Supp. 3d 1213, 1219 (W.D. Wash. 2023). In this decision, the court concluded that the Oregon and Washington public records disclosure laws do not directly apply to the Gorge Commission because the Gorge Commission is not a state agency as defined in those laws.

One court decision, *Handy v. Columbia River Gorge Comm'n*, No. 91-2-01139-4 (Thurston Cty. Super. Ct. July 29, 1991), questioned whether the Gorge Commission could establish a method of judicial review by rule. In this case, the plaintiffs sought to have the court take jurisdiction of the case under the Washington Administrative Procedure Act (APA). In the Transcript of Oral Opinion at 4-5, the court disagreed, explaining:

“As indicated in my question of counsel, I see some problems with having the Commission, which operates as a regional agency, both in Oregon and Washington, establish a method for review which would govern the courts in a sister state. . . .

“\* \* \* \* \*

“Quite frankly it makes more sense to leave the parties where they were where the Act, as written, requires the Commission to adopt administrative rules for its own internal operation . . . .”

The following court decisions involve the application of standards of review from one or both of the states' administrative procedure acts in Gorge Commission cases. The court decisions are inconsistent. The following list is illustrative and not complete.

The following litigation cases have directly applied the standards of review from the Washington APA:

*Reed v. Columbia River Gorge Comm'n*, No. 89-2-00224-3, slip op. at 4 (Klickitat Cnty. Super. Ct. Sept. 18, 1990) (applying the standards of review in the Washington APA).

*Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 126 Wn. App. 363; 369-70, 108 P.3d 134 (2005) (applying Washington APA after sua sponte and erroneously noting that the Gorge Commission did not comply with the Washington APA in rulemaking).

*Zimmerly v. Columbia River Gorge Comm'n*, 26 Wn. App. 2d 265, 284 527 P3d 84 (2023) (applying standards of review in the Washington APA, citing *Friends*, 126 Wn. App. at 369-70).

The following litigation cases have expressly not applied the standards of review from the Washington APA:

*Schaefco, Inc. v. Columbia River Gorge Comm'n*, No. 90-2-01833-8 slip op. at 2 (Clark Cnty. Super. Ct, July 2, 1991), *appeal dismissed*, No. 15298-3-II (Wn. Ct. App. Nov. 7, 1991); *appeal dismissed*, 121 Wn. 2d 366, 849 P.2d 1225 (1993) (concluding that the Gorge Commission is not subject to the states' APAs and applying the traditional standard for land use cases—arbitrary and capricious).

*Handy v. Columbia River Gorge Comm'n*, No. 91-2-01139-4 (Thurston Cty. Super. Ct. July 29, 1991) (Transcript of Oral Opinion at 6-7) (“[I]f the Washington APA applied, I would be taking jurisdiction here. I would only note that while Mr. Watters indicated the APA of Washington didn’t apply, somehow this Court could nevertheless look to the standard in the Washington APA for guidance, and I rejected that likewise. Either it applies and the standards apply or it doesn’t and that was my ruling the last time.”).

*Tucker v. Columbia River Gorge Comm'n*, 73 Wn. App. 74, 78, 867 P.2d 686 (1994) (applying the traditional standard of review for zoning decisions—arbitrary and capricious).

*Kielpinski v. CRGC*, No. 91-2-00119-9, Judgment at 3 (Skamania Cnty. Super. Ct. Feb. 23, 1998) (applying “willful and unreasoning action,” which is a common description of arbitrary and capricious but without explanation. The Gorge Commission’s brief discussed the *Schaefco* and *Tucker* cases.).

In some cases, the Gorge Commission has stipulated to apply a state APA standard of review to avoid a procedural dispute over the correct standard of review:

*GLW Ventures, LLC v. Skamania County*, No. 14-2-00071-7, Final Order & Judgment at 5 (Skamania Cnty. Super. Ct. Dec. 17, 2015).

*Norway Green v. Columbia River Gorge Comm'n*, No. 23-2-01222-06 (Clark Cnty. Super. Ct. May 1, 2024).

## **Attorneys General Letters and Opinions Related to Commission Rules**

The following Oregon and Washington Attorney General letters and opinions advised on the scope of the Gorge Commission’s rulemaking authority and opine that the states’ laws on the subjects in section 544c(b) of the National Scenic Area Act do not apply to the Gorge Commission:

Letter opinion from the Oregon Department of Justice to Governor Roberts (May 13, 1991), emphasizing that “the terms in [section 544c(b)] relate to how the commission will conduct its business[.]”

Letter from Oregon Department of Justice to Lex Loeb, re Petition for Public Records Disclosure Order (Feb. 25, 1992), concluding that the Gorge Commission is not a public body subject to the Oregon Public Records Law, that the Gorge Compact did not preserve the application of the Oregon Public Records Law, and the Gorge Commission's regulations on public records disclosure govern disclosure of the Gorge Commission's records.

Letter from Oregon Department of Justice to David Sauter, re Petition for Public Records Disclosure Order (Aug. 18, 2000), restating the reasoning in letter to Lex Loeb and stating, "we find no basis for changing our earlier conclusion."

Letter from Washington Attorney General Office to Sen. Jim Honeyford, re informal opinion whether the Gorge Commission must comply with Washington or federal public records disclosure laws (Dec. 27, 2000), concluding, "The Commission is not made subject to the public records disclosure laws of either Oregon or Washington but rather to the regulations adopted to be consistent with the more restrictive state law."

Although these court decisions only address public records, the same reasoning applies to all the administrative rule subjects required in the National Scenic Area Act.

## **Interpretation of Rulemaking Authority**

*"Consistent with the more restrictive statutory provisions of either state"* - The Gorge Commission interprets the requirement in the National Scenic Area Act that divisions 11 through 16 must be "consistent with the more restrictive statutory provisions of either state" to generally mean the state law provision that when compared to the other state's law results in greater transparency. Examples of statutory provisions that result in greater transparency are the provisions that:

- specify a broader range of Gorge Commission actions that constitute a meeting under open meetings laws;
- allow the greatest number of meeting types and formats;
- require greater notice requirements (persons to be noticed and content of notices);
- provide a longer period for public review and comment or for persons to act;
- specify a shorter response time for the Gorge Commission to provide public records;
- require more disclosure of ex parte communications, bias, and potential or actual conflicts of interest, and recording of disclosures;

Some provisions of one state's law do not have a corresponding provision in the other state's law; in this situation, the Gorge Commission has evaluated whether the silence in one state's law may be more restrictive than the other state's statutory provisions.

The Gorge Commission deviates from this general interpretation where it would not permit the Gorge Commission to fully implement the requirements of the National Scenic Area Act, where necessary to create a cohesive administrative rule, or where the provisions of one or both states conflict with the National Scenic Area Act. For example, where only one state's law treats certain records as confidential, the Gorge Commission's rules prohibit disclosure of those records. If the Gorge Commission would do so, then that state could choose to not provide material or information necessary for the Gorge Commission to implement the National Scenic Area Act.

*Enforcement of rules and remedies* - The Gorge Commission's rules do not include the enforcement provisions of the states' laws for several reasons, including: First, the *Handy* case discussed above expressed doubt whether the Gorge Commission has the authority to specify the manner of judicial review of Gorge Commission actions by rule. Second, the *Handy* case and the Oregon Department of Justice's 1991 letter emphasized that the Gorge Commission may only adopt rules governing its internal operation and its business. The enforcement provisions of the states' laws specify actions for third parties and courts, not how the Gorge Commission conducts its business. Finally, these provisions conflict with the enforcement provisions of the National Scenic Area Act because the National Scenic Area Act does not authorize those types of remedies against the Gorge Commission. *See, e.g., W. Birkenfeld Trust v. Bailey*, 827 F. Supp. 651, 665 (E.D. Wash. 1993) (stating, "The Act provides an elaborate set of administrative and judicial remedies" and denying a remedy not specified in the Act); *Broughton Lumber Co. v. Columbia River Gorge Comm'n*, 975 F.2d 616, 621 (9th Cir. 1992) (affirming dismissal of claim for declaratory judgment not specified in the Act); *Zimmerly v. Columbia River Gorge Comm'n*, No. 19-2-1896-06 (Clark Cnty. Super. Ct. Aug. 19, 2019) (slip op at 6), *aff'd*, 26 Wn. App. 265, 527 P.3d 84, *rev. den.*, 1 Wn. 3d 1028, 534 P.3d 734 (2023) ("[T]he National Scenic Area Act provides the exclusive remedies and does not provide for interlocutory review, declaratory judgment, or state statutory writs against the Gorge Commission"). The National Scenic Area Act provides for the enforcement of the Gorge Commission's rules and the available remedies. Early versions of the Gorge Commission's administrative rules contained some enforcement and remedies provisions derived from state law. There is no historical explanation for why this was. In 2024, the Gorge Commission removed references to enforcement and remedies from divisions 11 through 16 for the reasons expressed in this paragraph.

*Advisory committees* - "Advisory committees" is one of the rule subjects in the National Scenic Area Act; however, neither state's laws have general statutes that govern the creation or operation of advisory committees. There is no Oregon or Washington state equivalent to the Federal Advisory Committee Act (FACA). Instead, the states' open public meetings laws may apply to advisory committees depending on the composition of subject matter for a particular advisory committee. Court decisions have established when the open meetings laws might apply to an advisory committee. The Gorge Commission has never enacted a separate advisory committees rule. Instead, the rules use the same approach as the states, which is to govern advisory committees through open public meetings rules. The origin of the requirement for a rule on advisory committees seems to be that drafters of the National Scenic Area Act adapted the statutes authorizing the Northwest Power and Conservation Council, 16 U.S.C. § 839b(a)(4) which requires the

Council to use the federal laws for several subjects (including advisory committees) that are applicable to BPA and FERC to the extent appropriate.<sup>1</sup>

## Form and Style of Gorge Commission Rules

Generally, the Gorge Commission’s rules use Oregon form and style, and the Washington Code Reviser has agreed to accept the Gorge Commission’s rules for filing in Oregon form and style.<sup>2</sup> Using Oregon form and style is legacy because the Oregon Department of Justice drafted the first set of Gorge Commission rules. The Oregon Attorney General’s Administrative Law Manual specifies the form and several style conventions for writing rules.

For form, the Gorge Commission’s rules initially used only two digits (*e.g.*, 11, not 011) for rule division numbers and three digits for the rule number (*i.e.*, 350-00-000). In the 1990s, Oregon began using three-digit division numbers and four-digit rule numbers (*i.e.*, 350-000-0000). As of 2024, Washington continues to use a two-digit division number and three-digit rule numbers.

Oregon and Washington use different outlining for different parts of rules and different terminology to refer to rule parts (Washington term is “chapters”) sections and subsections of administrative rules. The Gorge Commission’s rules use Oregon’s numbering and terminology as specified in the Oregon Attorney General’s Administrative Law Manual, App. B (2019). The numbering and terminology are:

- xxx-xxx-xxxx Chapter-Division-Rule
- (1) Section
- (a) Subsection
- (A) Paragraph
- (I) Subparagraph

For style, the Gorge Commission starts with the Administrative Law Manual. Where the Administrative Law Manual does not specify a style, the Gorge Commission looks to the Oregon Legislative Counsel’s Bill Drafting Guide, the Oregon Appellate Court Style Guide, and the Chicago Manual of Style. The Gorge Commission uses these tools in the order listed

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<sup>1</sup> 16 U.S.C. § 839b(a)(4) states in relevant part, “For the purpose of providing a uniform system of laws, in addition to this chapter, applicable to the Council relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, advisory committees, disclosure of information, judicial review of Council functions and actions under this chapter, and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate, except that with respect to open meetings, the Federal laws applicable to open meetings in the case of the Federal Energy Regulatory Commission shall apply to the Council to the extent appropriate.”

<sup>2</sup> Email from Jennifer Meas to Jeff Litwak, RE: Questions about CR-102 (Aug. 23, 2021).

above. Thus, if the Administrative Law Manual does not specify a style, then the Gorge Commission next considered the Bill Drafting Guide, etc.

## **Publication of Gorge Commission Rules**

The Gorge Commission publishes its rules on its website. The versions on the website are the official rules. The Oregon Secretary of State chooses to publish the Gorge Commission's rules in the Oregon Administrative Rule compilation even though the Gorge Commission's rules are not Oregon state agency rules. The Gorge Commission's rules in the Oregon Administrative Rules compilation available on the Secretary of State website may differ from the Gorge Commission's adopted rules. In the past, the Secretary of State changed the numbering and outlining of the Gorge Commission's adoption to fit Oregon's numbering convention and some of the rule text was not provided, rather the Secretary of State provided a notice stating, "Text available via filing PDF that is stored in ORMS."

The Washington Code Reviser advised the Gorge Commission that it cannot publish the Gorge Commission's rules in the Washington Administrative Code compilation (WAC) because the rules are not Washington rules.

One court decision mistakenly noted that the Gorge Commission did not comply with the Gorge Compact's requirement to publish its rules in the WAC compilation of Washington administrative rules. *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 126 Wn. App. 363, 369 n.1, 108 P.3d 134 (2005). The Gorge Compact requires the Gorge Commission to publish its bylaws, rules and regulations in convenient form and to "file a copy thereof and of any amendment thereto, with the appropriate agency or officer in each of the party states." The tables of rulemaking actions below show the references to the published notices of proposed and final rules in both states. The Washington Code Reviser alone has control over publication in the compilation of Washington administrative rules. The Code Reviser's choice not to publish the Commission's rules in the WAC compilation cannot be imputed to the Commission.

## **Developing the Content of Gorge Commission Rules**

In developing the substantive content of the rules, the Gorge Commission principally used the two states' statutory laws, as the National Scenic Area specifies. The Gorge Commission also reviewed, considered, and adapted guidance from many other sources, including:

- Model administrative procedure rules in both states
- Court decisions from Oregon and Washington state courts
- Oregon Land Use Board of Appeals administrative rules
- Oregon Attorney General's Administrative Law Manual
- Oregon Attorney General Public Records and Open Meetings Manual
- Oregon Association of Counties and League of Oregon cities' various publications
- Washington Department of Ecology administrative rules

- Washington State Bar Association and WSBA Administrative Law Section's Administrative Law Practice Manual
- Washington State Bar Association Public Records and Open Public Meetings Deskbook
- Washington Municipal Research and Service Center's various publications

## Discussion of Division 11 – Open Meetings

### Table of Rulemaking Actions

<b>Division 11 – Open Meetings</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987		
NOPR	October 30, 1987 *	WSR 87-22-049
Notice of Adopted Rule	December 3, 1987	WSR 88-01-013
Amendment Effective Nov. 24, 1998		
NOPR	April 20, 1998	WSR 98-09-069
Notice of Adopted Rule	October 22, 1998	WSR 98-22-012
Amendment Effective Dec. 2, 2002		
NOPR	August 19, 2002	WSR 02-17-077
Notice of Adopted Rule	October 16, 2002	WSR 02-21-075
Corrected Notice		WSR 02-22-007
Amendment Effective June 1, 2004		
NOPR	March 2004	WSR 04-05-050
Notice of Adopted Rule	June 2004	WSR 04-10-039
Amendment Effective May 1, 2006		
NOPR	February 2006	WSR 06-03-067
Notice of Adopted Rule	May 2006	WSR 06-08-007
Amendment Effective Apr. 1, 2008		
NOPR	December 2007	WSR 07-22-052
Notice of Adopted Rule	April 2008	WSR 08-06-004
Amendment Effective		
NOPR		

\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

## Applicable State Statutory Provisions

The Oregon Public Meetings Law (generally ORS 192.610 - 192.695) and the Washington Open Public Meetings Act (generally chapter 42.30 RCW) are the principal statutory provisions governing open meetings in the states. Other statutory provisions apply to specific situations or to actions required in these laws. For example, ORS 276A.253(4) requires state agencies post meeting notices to the Oregon Transparency website and Washington state law procedures governing notices in the Washington State Register apply when implementing RCW 42.30.075.

## Section by Section Discussion

### 350-011-0010. Definitions for Commission Rule 350-011

*Corresponding State Statutory Provisions:* ORS 192.610; RCW 42.30.020.

(1), (3) Washington law and Oregon law differ in their use of “action” (Washington law) and “decisions” (Oregon law). Generally, the term “action” is broader in scope than “decision” and thus the Gorge Commission uses the term “action.” The Gorge Commission’s definition of “action” includes “decisions.” However, some specific provisions in Oregon law relating to decisions are more restrictive than Washington law relating to actions, so the Gorge Commission’s rule uses a definition of “decision” adapted from Oregon law.

(2) In 2023, Oregon added a definition of convening. Previously, Oregon law used this term without definition. Washington law does not use a similar term; instead, the concept of convening is embedded within Washington’s definitions and use of the terms “meeting” and “action.” Rules within division 11 use “convenes” or “convening” in instances where the text is derived from Oregon law, so division 11 includes this definition from Oregon law.

(4) In 2023, Oregon added a definition of “deliberation.” Previously, Oregon law used this term without definition. Washington’s defined term “action” includes the word “deliberation” but does not define the term. Division 11 uses “deliberation” in instances where the text is derived from Oregon law, so this section includes this definition from Oregon law.

(5) Washington law does not contain a definition of “executive session,” so the Gorge Commission’s rule adapts Oregon’s definition.

(6) Generally, the Gorge Commission’s rule uses the term “Gorge Commission” instead of “public agency” (Washington’s term) or “public body” (Oregon’s term). Both states use the term “governing body,” which the Gorge Commission’s rule does not use because the Gorge Commission is both the agency and the governing body. The elements of a “governing body” from the states’ definitions are incorporated into the definition of “Gorge Commission.” The Gorge Commission’s bylaws specify the appointment of committees, so

the definition of “Gorge Commission” incorporates those committee established in accordance with the bylaws. The requirement that the committee must have the authority to conduct hearings or take testimony is specified in RCW 42.30.020(2). Thus, commissioners that meet ad hoc without any authority to act on behalf of the Commission are not considered the “Gorge Commission.” This is consistent with *Citizens Alliance for Property Rights v. San Juan County*, 184 Wn. 2d 428, 359 P.3d 753 (2015). **ANY OREGON DECISIONS?**

(7) The Gorge Commission’s definition of meeting blends Washington’s and Oregon’s definitions, using the concept of a “quorum” from Oregon law and the term “action” from Washington law. The National Scenic Area Act uses the term “quorum” in 16 U.S.C. § 544c(a)(4). The definition also includes the term “meet,” which is used in other sections of the Gorge Commission’s open meetings rule.

### **350-011-0020. Policy**

*Corresponding State Statutory Provisions:* ORS 192.620; RCW 42.30.010.

(1) This section states the legal requirement for this rule in the National Scenic Area Act and that the states’ statutes do not directly apply to the Gorge Commission. This statement is consistent with two letters from the Oregon Attorney General and one letter from the Washington Attorney General, each of which explains that the reference to state statutory provisions in the National Scenic Area Act does not make the states’ public records laws directly applicable to the Gorge Commission. Additionally, in 2023, decisions from the Clark County Superior Court and U.S. District Court for the Western District of Washington concluded that the states’ open meetings and public records laws do not directly apply to the Gorge Commission. Copies of these letters and cases are attached to this report.

(2) This section adapts Oregon’s policy statement in ORS 192.620, which is similar to the first paragraph of Washington’s policy statement in RCW 42.30.010. The second paragraph of Washington’s policy statement is a legislative statement that is not contained in the National Scenic Area Act or Gorge Compact; however, the encouragement to accept public comment is contained in a requirement in Commission Rule 350-011-0120

### **350-011-0030. Meetings of Gorge Commission to be Open to Public; Location of Meetings; Accommodation for Person with Disability; Interpreters**

*Corresponding State Statutory Provisions:* ORS 192.630; RCW 42.30.030, 040, 060(2), 070.

(1) This section adapts ORS 192.630(1) and RCW 42.30.030(1).

(2) This section adapts RCW 42.30.040. There is no corresponding provision in Oregon law.

(3) This section adapts ORS 192.630(2). The Oregon provision specifies that a quorum may not meet. The Gorge Commission’s provision does not refer to a quorum because it is part of the definition of “Gorge Commission.” Section 544c(a)(4) of the National Scenic Area Act specifies that a quorum is a majority of commissioners, which the Gorge Commission

understands to mean a quorum is needed to transact business. (Bylaws Art. II). A meeting in Oregon law (the hook for the open meetings law to apply) is any convening of the body for which a quorum is required. Washington law does not use a quorum to determine when a governing body of a public agency “meets.” Washington’s open meetings law would seem to apply to more transactions of business, which could be “more transparent,” but would conflict with the Act’s requirement for the Gorge Commission to transact business only with a quorum.

(4) This section adapts ORS 192.630(3). There is no corresponding provision in Washington law.

(5) This section adapts ORS 192.630(4). RCW 42.30.070 only requires that unless other provided by law, a meeting need not be held within the entity’s jurisdiction. ORS 192.630(4)(a)(C) allows a meeting “at the nearest practical location.” The Gorge Commission’s rule adapts this to “a practical location within one of the National Scenic Area counties” to reflect that the county central administrative office for three of the National Scenic Area counties are outside the National Scenic Area and are probably not the “nearest” practical location to the National Scenic Area. This rule also allows meetings in “Indian country,” of the four Columbia River Treaty Tribes as allowed in ORS 192.630(4)(D) because the National Scenic Area Act gives specific roles to the tribes.

(6) This section adapts ORS 192.630(5). There is no corresponding provision in Washington law.

(7) This section adapts RCW 42.30.060(2). This section specifies that a vote taken in violation of this section is null and void. This is one of two situations in which an action is void under Washington law. Oregon law differs from Washington law. Oregon law makes all actions in violation the open meetings act voidable except that a court must void a decision if the violation was the result of intentional disregard of the law or willful misconduct by a quorum, unless other equitable relief is available. This section incorporates Washington’s remedy of making a vote in violation of this section void rather than voidable as it would be under Oregon law.

### **350-011-0040. Public Notice Required; Special Notice for Executive Sessions, Special or Emergency Meetings**

*Corresponding State Statutory Provisions:* ORS 192.630, 640; RCW 42.30.060, 070, 075, 077, 090.

(1) This section is adapted from the first sentence of RCW 42.30.070. There is no corresponding provision in Oregon law. The Commission’s rule does not include the third sentence of RCW 42.30.070 because the Commission schedules its meetings rather than rely on a “regular” meeting. **The Gorge Commission’s bylaws are updated to reflect this requirement.**

(2)(a) This subsection adapts RCW 42.30.075, which applies to state agencies. The Gorge Commission is not a state agency but believes that an annual publication of its regular meeting schedule is consistent with the spirit of Washington law.

(2)(b) This subsection is adapted from ORS 276A.253(4), which requires Oregon state agencies to post notices on the Oregon Transparency website. Oregon law does not require publication of a meetings schedule in the Oregon Bulletin. The Gorge Commission is not a state agency, nevertheless, posting notices of its meetings is consistent with the spirit of Oregon law.

(2)(c) **TALK TO WASHINGTON AG RE WHETHER 075 APPLIES ONLY TO CHANGES IN A REGULAR MEETING SCHEDULE OR TO CHANGES TO INDIVIDUAL MEETINGS.** The required notices in this section will direct persons to the Gorge Commission's website for changes to the date, starting time, and location of regular meetings rather than incorporating the Washington law requirement in RCW 42.30.075 to post changes to a regular meeting in the Washington State Register for distribution at least 20 days of any rescheduled meeting.

The Gorge Commission meets frequently enough so that the timing of a notice regarding changes to the date, starting time, or location of a regular meeting does not work. Notice must be submitted to the Washington Code Reviser two weeks before the publication date. That two week period plus the 20-day notice period in RCW 42.30.075 results in requiring a decision to change the date, time, or location of a meeting five weeks prior to that meeting. This five-week period exceeds the interval between the Gorge Commission's regular meetings, which occur monthly, thus compliance with this section of Washington law would cause the Gorge Commission to have to cancel a meeting if it needed to change the date, time, or location of a meeting. The Gorge Commission has historically had to make changes to meeting dates, locations, and starting times with one or just a few days notice because of weather, location unavailability, or an increase or decrease in agency business and gives email notice of meeting changes to its email list and posts changes on its own website.

No case law interprets or applies the notice requirement for changes to a regular meeting. The Washington State Bar Administrative Law Practice Manual states that any meeting that does not satisfy the requirements for a regular meeting is a special meeting. Thus, if the Gorge Commission would hold a meeting different from the date, location, or time of a regular meeting specified in the annual notice, that meeting would be proper if it meets the requirements of a special meeting. An unpublished case, *Center for Justice v. Arlington School District*, No. 67263-1-I (Wn. Ct. App. Sept. 4, 2012), discussed how the Legislature made deliberate choices for requirements to hold regular meetings and requirements to hold special meetings and that the Legislature did not establish a preference for one type of meeting over the other.

(3) The opening paragraph of this section adapts ORS 192.640(1). Subsections (a), (b), and (c) adapt RCW 42.30.077(1). RCW 42.30.077(2) applies to special districts and is not applicable to the Gorge Commission.

(4) This section adapts ORS 192.640(2). There is no corresponding provision in Washington law.

(5) This section is adapted from RCW 42.30.060(1). The first sentence of this provision in the RCW is redundant with the second sentence as the definition of “action” includes adoption of a motion, proposal, resolution, order, or ordinance. This subsection specifies that an action taken at a meeting that does not comply with this subsection is null and void. This is one of two situations in which an action is void under Washington law.

Oregon law differs from Washington law. Oregon law makes all actions in violation the open meetings act voidable except that a court must void a decision if the violation was the result of intentional disregard of the law or willful misconduct by a quorum, unless other equitable relief is available.

This section incorporates Washington’s remedy of making an action in violation of this subsection void rather than voidable as it would be under Oregon law.

(6) This section adapts RCW 42.30.090, except that this subsection does not require posting a notice of adjournment or postponement on the door where the meeting occurred because when the Gorge Commission holds an in-person meeting, it uses public spaces, which do not permit the Gorge Commission to leave a notice posted on the door after the meeting ends. Instead, this section requires notice of the adjournment or continuance in accordance with the requirements for noticing a meeting.

### **350-011-0045. Special and Emergency Meetings**

*Corresponding State Statutory Provisions:* ORS 192.640(3); RCW 42.30.077; RCW 42.30.080.

This rule adapts RCW 42.30.080. Oregon law addresses special and emergency meetings in just two sentences. Both states treat emergency meetings as a form of a special meeting in which less than 24 hours notice may be given.

(2)(d) Washington and Oregon law each require at least 24 hours notice for a special meeting.

(4) For an emergency meeting, Oregon law requires notice “as is appropriate for the circumstances” and Washington law only allows for dispensing the required 24 hour notice in certain circumstances, so section (4) reflects the Washington approach. Section (4) also incorporates the Oregon law and that the meeting minutes justify less than 24 hours notice. Washington law does not include this requirement.

### **350-011-0050. Recording or Written Minutes Required; Content; Content of Minutes for Executive Sessions**

*Corresponding State Statutory Provisions:* ORS 192.650(1), (2); ORS 192.672(3); RCW 42.30.035; RCW 42.30.220

(1), (3) These sections adapt ORS 192.650(1) and (2). RCW 42.30.035 is much less detailed; it simply requires minutes and that the minutes be open to public inspection.

(2) This section adapts RCW 42.30.22, which encourages public agencies to make an audio or video recording of provide online streaming of regular meetings and make those recordings available online for at least six months. This section also incorporates and adapts ORS 192.672(3).

### **350-011-0060. Executive Sessions Permitted on Certain Matters; Procedures; News Media Representatives' Attendance; Limits**

*Corresponding State Statutory Provisions:* ORS 192.660; RCW 42.30.110.

This rule lists the most common situations that the Gorge Commission uses or could use an executive session. Many of the executive session subjects listed in ORS 192.660 and RCW 42.30.110 are outside the Gorge Commission's scope of authority.

The Gorge Commission interprets 16 U.S.C. § 544c(b) to allow an executive session for a subject that either state permits. If the Gorge Commission could only hold an executive session on a subject matter that both states permit, then the Gorge Commission could disclose information that one state treats as confidential, and entities in that state might not provide information that the Gorge Commission needs to fully implement the National Scenic Area Act. This is consistent with ORS 192.660(2)(f), which permit executive sessions for consideration of information and records that are exempt by law from public inspection. Washington's list of subjects that may be discussed in an executive session, RCW 42.30.110 does not have a similar provision allowing executive session to discuss information and records that are exempt by law from public inspection.

(1)(a) This subsection blends ORS 192.660(2)(a) and (7) and RCW 42.30.110(1)(g).

(1)(b) This subsection blends ORS 192.660(2)(b) and (8) RCW 42.30.110(1)(g).

(1)(c) This subsection comes from Oregon law, ORS 192.660(2)(d). Washington law, RCW 42.30.140(4), states that the Washington Open Public Meetings Act does not apply to collective bargaining sessions. The Gorge Commission chose to include this executive session subject to avoid confusion whether the Gorge Commission's open meetings rules apply.

(1)(d) This subsection blends ORS 192.660(2)(e) and RCW 42.30.110(1)(b).

(1)(e) This subsection comes from Oregon law, ORS 192.660(2)(f).

(1)(f) This subsection comes from Washington law, RCW 42.30.110(1)(i). Washington law gives a more detailed scope of what constitutes consultation with legal counsel. Washington law permits an executive session to discuss agency enforcement actions. This is not within the scope of Oregon law (ORS 192.660(1)(h)); however, the Gorge

Commission believes it should be included in the rule to avoid discussing information protected by Washington law.

(1)(g) This subsection comes from Oregon law.

(1)(h) This subsection recognizes that the Gorge Commission may on occasion need to hold an executive session for a subject matter that one state treats as confidential, even if the other state does not do so subsection (g) thus allows executive sessions for other purposes authorized by either Oregon or Washington law.

(2) This section comes from Oregon law, ORS 192.660(4) and (5). Washington law does not specify that news media must be allowed to attend executive sessions.

(3) This section mirrors ORS 192.660(6)

### **350-011-0070. Meetings by Means of Telephone, or Electronic, or Internet Communication, or Other Means of Remote Access**

*Corresponding State Statutory Provisions:*

This rule adapts ORS 192.670. This rule is consistent with the requirements in Washington law, RCW 42.30.230, for remote meetings during declared emergencies and provides the opportunity for persons who have difficulty attending a meeting due to disability to provide oral comments as required by RCW 42.30.240.

### **350-011-0080. Interruptions**

*Corresponding State Statutory Provisions:*

This rule adapts RCW 42.30.050. There is no similar provision in Oregon's public meetings statutes.

### **350-011-0090. Regular Meeting to Include Time for Public Comment**

*Corresponding State Statutory Provisions:*

This rule adapts RCW 42.30.240. There is no similar requirement in Oregon's public meetings statutes that requires an agency provide time on its agenda for public comment; however, ORS 192.670(3) specifies that if oral or written comment is permitted at an in-person meeting, then the agency must permit persons attending the meeting remotely the opportunity to provide comment in the same manner. Subsections (2) and (3) are consistent with ORS 192.670(3) by expressly allowing written comment at all regular meetings and requiring the Gorge Commission to provide an opportunity for persons attending remotely to provide oral comment.

**Note on enforcement:**

The Washington Open Public Meetings Act does not provide for administrative agency enforcement of the Act. Enforcement is exclusively in superior court. The many standards in ORS 192.660, 192.680, and 192.685 applicable to the Oregon Government Ethics Commission, courts, and others are not incorporated into the Gorge Commission's rules. These state law remedies do not apply to the Gorge Commission and are not included in division 14. Enforcement of the Gorge Commission's rules and remedies are exclusively provided in the National Scenic Area Act.

## Discussion of Division 12 – Public Records

### Table of Rulemaking Actions

<b>Division 12 – Public Records</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987 (Or)		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987 (Or)		
NOPR	October 30, 1987 *	WSR 87-22-049
Notice of Adopted Rule	December 7, 1987	WSR 88-01-013
Amendment Effective Nov. 24, 1998 (Or)		
NOPR	April 20, 1998	WSR 98-09-069
Notice of Adopted Rule	October 22, 1998	WSR 98-22-012
Amendment Effective Dec. 2, 2002 (Or)		
NOPR	August 19, 2002	WSR 02-17-075
Notice of Adopted Rule	October 16, 2002	WSR 02-21-073
Corrected Notice		WSR 02-22-007A
Amendment Effective June 1, 2004 (Or)		
NOPR	March 2004	WSR 04-05-049
Notice of Adopted Rule	June 2004	WSR 04-10-038
Amendment Effective May 1, 2006		
NOPR	February 2006	WSR 06-03-067
Notice of Adopted Rule	May 2006	WSR 06-08-007
Amendment Effective Apr. 1, 2008		
NOPR	December 2007	WSR 07-22-052
Notice of Adopted Rule	April 2008	WSR 08-06-004
Amendment <b>Effective</b>		
NOPR		

\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

## Applicable State Statutory Provisions

The Oregon Inspection of Public Records laws (generally ORS 192.311 - 192.431) and the Washington Public Records Act (generally chapter 42.56 RCW) are the principal statutory provisions governing disclosure of information in the states. Other statutory provisions apply to specific situations or to actions required in these laws. For example, many other statutes specify exemptions from public disclosure. Additionally, federal copyright law may permit only inspection, but not copying of records protected under that law.

## Section by Section Discussion

### 350-012-0010. Definitions for Commission Rule 350-012

*Corresponding State Statutory Provisions:* ORS 192.311; RCW 42.56.010

- (1) This definition is adapted from ORS 192.311(1).
- (3) This definition is adapted from ORS 192.311(3).
- (4) This definition is adapted from RCW 42.56.010(3) and ORS 192.311(5)(b).
- (5) This definition is from RCW 42.56.010(4), which uses more terms to identify writings than ORS 192.311(7).

This division does not use the term “custodian” as that term is used in Oregon law. The Oregon Attorney General’s Public Records and Meetings Manual (2019) explains, “In general, any public body that possesses or owns a public record for purposes related to one or more of its particular functions is a custodian of that record.” (Manual at 12). Oregon law specifies that a public agency that only holds a record as an agent for another agency is not a custodian. The Gorge Commission does not hold records as an agent for any other agency. Additionally, Washington law does not limit disclosure to only the custodian of a record. This division also does not use the terms “public body,” or “state agency” as used in Oregon law or “agency” as that term is used in Washington law. The discussions above of court decisions and attorneys general letters explain that the Gorge Commission is not a “public body,” “state agency,” or an “agency” as those terms are used in the states’ laws.

### 350-012-0020. Right to Inspect Public Records; Personal Privacy Interests

*Corresponding State Statutory Provisions:* ORS 192.314, ORS 192.318; RCW 42.56.070, RCW 42.56.050

- (1) This section is adapted from ORS 192.314(1) and RCW 42.56.070(1). The exemptions in 350-012-0070 include information and records for which any Oregon, Washington, or federal statute or regulation that prohibits disclosure.

(2) This section adapts a portion of ORS 192.318(1). The portion of this statute relating to electronic records are adapted in 350-012-0040(4)(f).

(3) This section is adapted from RCW 42.56.070(1). Determining when privacy interests are invaded is adapted from RCW 42.56.050. There are no similar statutory provisions in Oregon law.

(4) This section is adapted from RCW 42.56.070(2). There is no similar statutory provision in Oregon law.

### **350-012-0030. Index of Certain Records**

*Corresponding State Statutory Provisions:* RCW 42.56.070

This rule is adapted from RCW 42.56.070(2). There is no similar requirement in Oregon law to maintain an index of records.

### **350-012-0040. Agency Description; Contact Information**

*Corresponding State Statutory Provisions:* RCW 42.56.040

In addition to the ORS and RCW provisions cited below, the Gorge Commission used WAC chapter 173, division 03 (Department of Ecology’s public records rules) as an exemplar for this section.

(1) - (2) These sections provide information specified in RCW 42.56.040(1)(a). There is no similar requirement in Oregon law. The Washington Code Reviser publishes the Gorge Commission’s filings of rules and procedures specified in RCW 42.56.040(1)(b) – (e) in the Washington State Register but does not publish the Gorge Commission’s rules and procedures in the Washington Administrative Code. The Gorge Commission maintains its rules and procedures on its website.

### **350-012-0050. Procedure for Requesting Public Records**

*Corresponding State Statutory Provisions:* RCW 42.56.040; RCW 42.56.080; ORS 192.314; ORS 192.324

(1) This section is adapted from RCW 42.56.040(1)(a). This Washington statute and ORS 192.324(1) both require a written request. Use of the term “identifiable public records” in subsection (1)(b) is adapted from RCW 42.56.080. Oregon law does not use the term “identifiable.”

(2) This section is adapted from ORS 192.314(2). There is no similar statutory provision in Washington law. Oregon’s law only specifies civil judicial proceedings and notices of intent to sue; the Gorge Commission’s rule includes administrative proceedings before the Gorge Commission because an administrative proceeding is frequently a prelude to a civil judicial proceeding. Additionally, inclusion of administrative proceedings before the Gorge Commission is included to ensure that the Gorge Commission’s attorney can ensure the request does not lead to fairness issues with the administrative proceeding.

### **350-012-0060. Response to Public Record Requests**

*Corresponding State Statutory Provisions:* As noted below.

(1) This section is adapted from RCW 42.56.520(1). Subsection (1)(a) is also adapted from ORS 192.324(1). The five-day requirement in this subsection is also consistent with ORS 192.324(2) and 192.329(5), which require an acknowledgment within five days and a response with the requested records or an estimate of time to produce the records within 10 days after the acknowledgment.

(2) This section is not adapted from either Washington or Oregon law; however, it is consistent with advice about the states' laws. The Oregon Attorney General Public Records Handbook recommends that agencies may negotiate with requestors to reduce the cost of fulfilling requests. The Washington State Bar Association and WSBA Administrative Law Section Public Records Act Deskbook similarly recommends that sometimes a thorough response will require significant interaction between the requestor and that the agency may work with the requestor to focus or narrow a request or assist the requestor to formulate a request sufficient to fulfill the requestor's objectives.

(3) This section is adapted from RCW 42.56.520(2) and (3) and is generally consistent with ORS 192.324(4).

(4) This section is generally consistent with ORS 192.329(6)(c) and RCW 43.56.520(2).

(5) This section is adapted from RCW 42.56.080(2) and 42.56.120(4). Oregon law does not specifically authorize or prohibit installment productions of public records. The Gorge Commission believes Washington law is more restrictive because installment productions provide quicker access to records when there is a large request.

(6) This section adapts the requirements in ORS 192.318(2) and ORS 192.324(3) to provide reasonable access to and copies of electronic records. The Gorge Commission does not maintain records in other "machine readable" format. Subsection (a), adapts the requirement in ORS 192.324(3) to provide electronic records in the format requested if available. Washington law does not expressly require this, but RCW 42.56.120(1) allows translating the record into an alternative format at the request of a requestor. Subsection (b) incorporates direction from Washington Court of Appeals decisions involving disclosure of metadata; *e.g., O'Neill v. City of Shoreline*, 145 Wn. App. 913, 187 P.3d 822 (2008). Subsection (c) adapts a portion of RCW 42.56.120(1). Subsection (D) is adapted from RCW 42.56.080(2).

(7) This section is adapted from 42.56.080. Oregon law does not use the term "overbroad," but this section is generally consistent with ORS 192.329(4)(a), which allows agencies to clarify requests. RCW 42.56.520(2) also allows agencies to clarify a request.

(8) This section is adapted from RCW 42.56.100. There is no similar provision in Oregon law.

(9) This section is adapted from RCW 42.56.120. ORS 192.324 permits agencies to charge costs associated with searching and compiling public records and for an attorney to review

records and redact material or segregate the public records into exempt and nonexempt records., but RCW 42.56.120 does not permit such costs. Thus, this section only specifies charges for providing the record—by copying and shipping or by electronic media.

(10) This section adapts ORS 192.329(2)(b) and RCW 42.56.520(4), both of which require a statement specifying the exemption asserted.

(11) This section provides a way for requestor to allege error prior to initiating litigation in accordance with 16 U.S.C. § 544m of the National Scenic Area Act. This section is adapted from ORS 192.411 and RCW 42.56.530, both of which allow, but do not require requestors to seek review of a denial by the state’s attorney general.

(12) This section is adapted from requirements in RCW 42.56.100 and ORS 192.318(2) for agencies to adopt and enforce reasonable rules to allow access to records while protecting the records from damage or disorganization. Subsections (e) and (f) are adapted from advice in the Oregon Attorney General’s Public Records Manual (2019).

### **350-012-0070. Public Records Exempt from Disclosure**

*Corresponding State Statutory Provisions:* ORS 192.345, ORS 192.355; Several sections in RCW title 42, chapter 56.

The exempt records listed in this rule generally follow Oregon law. This list includes only the most common records requested, but subsections (1)(n) and (2)(j) include a general reference to any record that is conditionally exempt or exempt by any Oregon or Washington law. The record need only be exempt by one of the states’ laws, even if not considered exempt by the other state’s law. This general statement is necessary because each state’s law contain many exemptions (more than 600 specific exemptions in Washington law alone as of 2024). A list of statutes containing exemptions is on the Washington Attorney General’s website at <https://www.atg.wa.gov/sunshine-committee> (scroll down to “Public Disclosure Exemptions”).

(1)(b) trade secrets. This section is adapted from ORS. This section is generally consistent with RCW 42.56.270(11).

(2)(d) This section expands on information considered confidential to tribes.

### **350-012-0080. Public Records Officer**

*Corresponding State Statutory Provisions:* 42.56.580; ORS 192.105

This rule is adapted from RCW 42.56.580(1).

#### **Note on enforcement:**

The many standards applicable to the Attorney General (Washington), District Attorney (Oregon), courts, and others are not incorporated into the Gorge Commission’s rules. These state law remedies do not apply to the Gorge Commission and are not included in division

12. Enforcement of the Gorge Commission's rules and remedies are exclusively provided in the National Scenic Area Act.

## Discussion of Division 13 – Financial Disclosure

### Table of Rulemaking Actions

<b>Division 13 – Financial Disclosure</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987		
NOPR	October 30, 1987	WSR 87-22-049
Notice of Adopted Rule	December 3, 1987	WSR 88-01-013
Permanent Amendment Effective May 1, 2006		
NOPR	February 2006	WSR 06-03-067
Notice of Adopted Rule	May 2006	WSR 06-08-007

### Applicable State Statutory Provisions

ORS 244.050 to 244.110 are the financial disclosure statutes in Oregon. ORS 244.040(1)(q)(Z) specifically requires the members of the Gorge Commission to file a statement of economic interest with the Oregon Government Ethics Commission. RCW 42.17A.700 to 42.17A.715 are the financial disclosures statutes in Washington. Beginning January 1, 2026, these statutory provisions are recodified at RCW 29B.55.010 to 29B.55.040.

### Section by Section Discussion

#### **350-013-0001. Financial Disclosure**

The Gorge Commission adopted financial disclosure rules in 1987 when it adopted its other rules required in the National Scenic Area Act. The initial rule required members of the Gorge Commission to file financial disclosure forms in both states. In 2008, Staff responded to several Gorge Commissioners’ concerns with filing financial disclosure statements with both states. Staff contacted the Oregon Government Standards and Practices Commission and the Washington Public Disclosure Commission to discuss the issue. In these

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\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

discussions, the Gorge Commission learned that Gorge Commissioners are not on the list of mandatory filers under Washington law, and that Oregon only requires Oregon Commissioners to file statements . Oregon would request but did not believe it could require statements from Washington Commissioners. Based on these discussions and consultation with the state commissions, the Gorge Commission changed its rule to require members of the Gorge Commission to only file financial disclosure forms in the state where they are appointed.

## Discussion of Division 14 – Conflicts of Interest

### Table of Rulemaking Actions

<b>Division 14 – Conflicts of Interest</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987		
NOPR	October 30, 1987	WSR 87-22-049
Notice of Adopted Rule	December 3, 1987	WSR 88-01-013
Temp./Emergency Rule Effective Nov. 17, 1988		
Notice of Adopted Rule	November 17, 1988	WSR 88-23-074
Amendment Effective Nov. 24, 1998		
NOPR	April 20, 1998	WSR 98-09-069
Notice of Adopted Rule	October 22, 1998	WSR 98-22-012
Amendment Effective Dec. 2, 2002		
NOPR	August 19, 2002	WSR 02-17-076
Notice of Adopted Rule	October 18, 2002	WSR 02-21-074
Corrected Notice		WSR 02-22-007B
Amendment <b>Effective</b>		
NOPR		
Notice of Adopted Rule		

### Applicable State Statutory Provisions

ORS chapter 244 contains Oregon’s statutory provisions relating to conflicts of interest. Chapter 42.52 RCW contains Washington’s statutory provisions relating to government ethics and conflicts of interest for state agencies and officials and chapter 42.23 RCW

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\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

contains Washington’s statutory provisions for ethics and conflicts of interest for municipal officials. The Gorge Commission did not consider statutes uniquely governing specific agencies.

## **Section by Section Discussion**

### **350-014-0010. Definitions for Commission Rule 350-014**

*Corresponding State Statutory Provisions:* RCW 42.52.010; ORS 244.020

The definitions in ORS 244.020 are generally more specific than the definitions in RCW 42.52.010 and thus the definitions in this rule are principally based on Oregon law. The definitions based on Oregon law incorporate elements of Washington law. Some of the definitions are based on Washington law; these relate to provisions in this division that derive from Washington law.

(8) The Gorge Commission notes that the definition of “Gift” in ORS 244.020 refers to a token or award of appreciation with a resale value of less than \$25, but ORS 244.042(3)(a) allows such a token or award with a value of \$50 or less. Washington law only uses the \$50 gift limit. The Gorge Commission’s definition of “Gift” uses the \$50 value to reflect the regulatory limitation in the states’ laws.

### **350-014-0020. Application**

*Corresponding State Statutory Provisions:* As noted below

(1) This section is added for clarity and is not adapted from either state’s law.

(2) This section is adapted from ORS 244.390(3). This provision of the ORS seems a bit out of place. It is within an enforcement section for the Oregon Government Ethics Commission, but applies more generally to “this chapter” of the ORS (meaning ORS chapter 244).

(3) This section is adapted from RCW 42.52.060. There is no corresponding provision in ORS chapter 244.

(4) There are many limitations and exceptions to limitations on former public officials in RCW 42.52.080, RCW 42.52.090, ORS 244.040, and ORS 244.045, and the application of those limitations may vary depending on the location of the former official, the location of their actions, and specific situations. This rule thus refers former public officials to seek their own legal advice rather than try to address the different situations.

### **350-014-0030. Activities incompatible with official duties**

*Corresponding State Statutory Provisions:* RCW 42.52.020; RCW 42.23.030; ORS 244.040

(1) this section adapts RCW 42.52.020

(2) this section adapts ORS 244.040(1)

**350-014-0040. Financial interests in transactions**

*Corresponding State Statutory Provisions:* RCW 42.52.030; RCW 42.23.030; ORS 244.040

(1) This section adapts RCW 42.52.030(1).

(2) This section adapts RCW 42.52.030(2).

(3) This section adapts ORS 244.040(3).

**350-014-0050. Assisting in transactions**

*Corresponding State Statutory Provisions:* RCW 42.52.040; ORS 244.040

The entirety of this rule adapts RCW 42.52.040. ORS 244.040(6) is a similar prohibition, but less specific.

**350-014-0060. Confidential Information – Improperly concealed records**

*Corresponding State Statutory Provisions:* RCW 42.52.050; ORS 244.040

The entirety of this rule adapts RCW 42.52.050, but also makes the prohibitions in that statute applicable to former public officials as provided in ORS 244.040(4) and (5).

**350-014-0070. Compensation for official duties or nonperformance.**

*Corresponding State Statutory Provisions:* RCW 42.52.110; ORS 244.040

This rule adapts RCW 42.52.110. The phrase “an official compensation package as determined by” is from ORS 244.040(2)(a).

**350-014-0080. Compensation for outside activities.**

*Corresponding State Statutory Provisions:* RCW 42.52.120; ORS 244.040(2)(a).

This rule adapts RCW 42.52.120. The statute specifies that it does not apply to “officers and employees who, in accordance with the terms of their employment or appointment, are serving without compensation from the state of Washington or are receiving from the state only reimbursement of expenses incurred or a predetermined allowance for such expenses.” This exclusion includes the appointed members of the Gorge Commission. All other persons that could be “officers and employees” are employees of the Gorge Commission; thus the Gorge Commission’s rules uses the term “employee.”

**350-014-0090. Honoraria.**

*Corresponding State Statutory Provisions:* RCW 42.52.130; ORS 244.042

This rule adapts RCW 42.52.130. RCW 42.52.130 applies to public officials; ORS 244.042 prohibits honoraria to members of the public official’s household and thus this rule also prohibits honoraria to members of the public official’s household.

RCW 42.52.130 allows an agency to authorize honoraria, but not in circumstances where persons offering an honoraria have or would have a contractual relationship with, are regulated by or would oppose legislative or rulemaking by the agency. This generally captures the limitation in ORS 244.042 that honoraria may not be connected with the official duties of the public official. The exceptions in ORS 244.042(3)(a) and 244.042(4)(b) are equivalent to exceptions to the gifts rule under Washington law and are listed in 350-014-0100(3), and the exception in ORS 244.042(3)(b) is suggested in RCW 42.52.130(2).

**350-014-0100. Gifts.**

*Corresponding State Statutory Provisions:* RCW 42.52.140; 42.52.150; ORS 244.025; 244.040

RCW 42.52.140 prohibits any gift if it could reasonably be expected to influence a public official’s vote or action. ORS 244.040(2)(g) prohibits gifts not excluded in the definition of “gift.” RCW 42.52.150(1) then only allows gifts that do not exceed \$50 from a single source, which is the same as ORS 244.025(1). RCW 42.52.150 further contains a list of items that do not constitute a gift in addition to the long definition of gift. The specificity in Washington law refines the more general statements in Oregon law. The Gorge Commission thus believes Washington’s law relating to gifts is generally more restrictive than Oregon law.

**350-014-0110. Use of person, money or property for private gain**

*Corresponding State Statutory Provisions:* RCW 42.52.160; ORS 244.020(1), (3), (7), (13).

This rule is adapted from RCW 42.52.160. The corresponding restrictions in Oregon law are embedded in the definitions in ORS 244.020 and requirements for and restrictions on actual and potential conflicts of interest, “business with which the person is associated,” and gifts. The specificity in Washington law refines the more general approach in Oregon law, although application of either state’s statutory provisions would result in substantially similar outcomes. The Gorge Commission chooses to use Washington’s law relating to use of person, money or property for private gain for its specificity.

**350-014-0120. Declaration of Potential Conflicts – Methods of Handling Potential Conflicts**

*Corresponding State Statutory Provisions:* ORS 244.120

Oregon law requires disclosure of potential conflicts of interest. There are no corresponding Washington statutory provisions for potential conflicts. This rule adapts Oregon’s requirement for disclosing potential conflicts.

### **350-014-0130. Recording of Notice of Conflict; Effect of Failure to Disclose Conflict**

*Corresponding State Statutory Provisions:* ORS 244.130

Oregon law requires recording disclosures of actual and potential conflicts of interest in Commission records (in practice, in the minutes of Gorge Commission meetings and final orders). There is no corresponding Washington statutory provision requiring such recording of disclosures. This rule adapts Oregon's requirement for recording conflicts.

### **350-014-0140. Ex Parte Communications, Bias, and Appearance of Fairness**

This rule refers to division 16 of the Gorge Commission's rules for handling ex parte communications, bias and appearance of fairness matters.

#### **Note on enforcement:**

ORS chapter 244 provides for a complaint and adjudication by the Oregon Government Ethics Commission for violations of chapter 244. ORS 244.130 also specifies that a court may not void an action solely because a public officials did not disclose a conflict of interest. In contrast, Chapter 42.52 RCW provides a broad range of enforcement and various remedies, including action by the ethics board and the Attorney General and potential cancellation or rescission of an action where there is a violation of chapter 42.52. These state law remedies do not apply to the Gorge Commission and are not included in division 14. Enforcement of the Gorge Commission's rules and remedies are exclusively provided in the National Scenic Area Act.

# Discussion of Division 15 – Public Contracts

## Table of Rulemaking Actions

<b>Division 15 – Public Contracts</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987		
NOPR	October 30, 1987	WSR 87-22-049
Notice of Adopted Rule	December 3, 1987	WSR 88-01-013
Temp./Emergency Rule Effective Nov. 17, 1988		
Notice of Adopted Rule	November 17, 1988	WSR 88-23-074
Permanent Amendment Effective Dec. 15, 2008		
NOPR	January 18, 1989	WSR 89-04-004
Notice of Adopted Rule	Dec. 2008	WSR 89-07-011

## Applicable State Statutory Provisions

RCW title 39 generally contains Washington’s public contracting statutes. ORS chapters 279, 279A, 279B, and 279C are Oregon’s public contracting statutes. Other statutes may govern contracting in specific situations.

## Section by Section Discussion

### 350-015-0100. Public Contracts

The Gorge Commission adopted public contracts rules in 1987 when it adopted its other rules required in the National Scenic Area Act; however, the Gorge Commission did not maintain or use the rule. Instead, the Gorge Commission’s practice was to use Washington’s public contracting standards, because Washington required that of the Gorge Commission

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\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

and the Gorge Commission contracts with the state for financial management services, including for contracts.

In 2008, the Gorge Commission repealed all of the former sections of this division, noting in a staff report to the Gorge Commission that the Gorge Commission's "only contracts are simple personal services contracts and the states' provisions for seeking bids, etc. are very similar. While there are differences between the states' standards, staff recommends that on balance, the Washington standards are at least as restrictive as Oregon's standards and using Washington's standards is thus consistent with the Act. The proposed new rule references Washington's public contracting law and includes a finding about Washington and Oregon law."

The Gorge Commission consulted with the Washington Attorney General's Office and Oregon Department of Justice, and both concurred with this approach, recommending that the Gorge Commission deem Washington law to be equivalently restrictive to Oregon law. A copy of the email thread with this advice is in the Gorge Commission's records for this rule division.

## Discussion of Division 16 – Administrative Procedure

### Table of Rulemaking Actions

<b>Division 16 – Administrative Procedure</b>		
<b>Rule Action and Effective Date *</b>	<b>Oregon Bulletin Notices</b>	<b>Washington State Register Notices</b>
Temp./Emergency Rule Effective Sept. 10, 1987		
Notice of Adopted Rule	September 10, 1987	WSR 87-19-017
Initial Permanent Rule Effective Dec. 8, 1987		
NOPR	October 30, 1987	WSR 87-22-049
Notice of Adopted Rule	December 3, 1987	WSR 88-01-013
Temp./Emergency Rule Effective Nov. 17, 1988		
Notice of Adopted Rule	November 17, 1988	WSR 88-23-074
Permanent Amendment Effective Mar. 7, 1989		
NOPR	January 18, 1989	WSR 89-04-004
Notice of Adopted Rule	March 1, 1989	WSR 89-07-011
Temp./Emergency Rule Effective Oct. 4, 1989		
Notice of Adopted Rule	October 4, 1989	WSR 89-21-003
Permanent Amendment Effective Jan. 16, 1990		
NOPR	December 4, 1989	WSR 89-24-069
Notice of Adopted Rule	January 11, 1990	WSR 90-03-058
Amendment Effective May 21, 1990		
NOPR	April 4, 1990	WSR 90-08-089
Notice of Adopted Rule	May 21, 1990	WSR 90-11-085
Amendment Effective Dec. 2, 2002		
NOPR	Aug. 19, 2002	WSR 02-17-074
Notice of Adopted Rule	October 16, 2002	WSR 02-21-072
Corrected Notice		WSR 02-22-007C

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\* The effective dates for some rules differ in Oregon and Washington records because of different filing dates (dates received by the Oregon Secretary of State and Washington State Register) and different default effective dates after filing.

Amendment Effective May 1, 2006		
NOPR	March 3, 2006	WSR 06-03-067
Notice of Adopted Rule	March 21, 2006	WSR 06-08-007
Amendment Effective Apr. 1, 2008		
NOPR	December 2007	WSR 07-22-052
Notice of Adopted Rule	April 2008	WSR 08-06-004
Amendment Effective		
NOPR		
Notice of Adopted Rule		

## Applicable State Statutory Provisions

The Oregon Administrative Procedures<sup>3</sup> Act (generally ORS chapter 183) and the Washington Administrative Procedure Act (generally chapter 34.05 RCW) are the statutory provisions governing administrative procedure in the states. In addition, chapter 42.36 is Washington’s statutory provisions for the appearance of fairness doctrine. The Gorge Commission did not consider statutes uniquely governing specific agencies.

Additionally, each state’s Attorney General has adopted model rules for administrative procedure at OAR chapter 137 and WAC title 10, division 8. The Gorge Commission considered whether to adapt the model rules for rulemaking and contested cases and adjudications; however, many of the rule sections, subsections, and paragraphs referred to state statutes and ultimately it was not possible to develop a coherent division of administrative procedure rules by blending the model rules. Nevertheless, these rules do adapt the model rules in two instances discussed below. Where these rules adapt the states’ model rules, the Gorge Commission considered and used the more restrictive of the states’ model rules in the spirit of 16 U.S.C. § 544c(b).

The Gorge Commission also considered information about the appearance of fairness doctrine on the website for the Municipal Research and Services Center (MRSC), including examples of local government ordinances procedures for compliance with the appearance of fairness doctrine.

## Section by Section Discussion

### 350-016-0010. Application of division; general provisions

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<sup>3</sup> Note that the Oregon Administrative Procedures Act uses the plural “Procedures.” The Washington Administrative Procedure Act uses the singular “Procedure,” as does the federal APA.

*Corresponding State Statutory Provisions:* As noted below.

(1) This section does not appear in either state’s APA, except the last sentence in paragraph (b), which adapts RCW 34.05.410(2).

(2) This section adapts ORS 183.750. There is no similar provision in the Washington APA. The Gorge Commission has reviewed its rules for compliance with RCW 44.040.280 regarding respectful language, and no instances of rule text needed to be changed.

(3) This section adapts ORS 183.411. There is no similar provision for delegation in the Washington APA. The Gorge Commission is not delegating authority to a hearings officer. If the Gorge Commission chooses to use a hearings officer in the future, it will need to adopt additional rule provisions for doing so, or if an emergency exists that requires a hearings officer, it can adopt rule provisions using the emergency rule procedures in 350-016-0040.

(4) This section is not found in the Oregon or Washington APAs. This section is adapted from OAR 661-010-0012 of the Oregon Land Use Board of Appeals and is consistent with Oregon and Washington rules of practice for attorneys and pro hac vice appearance requirements in Oregon and Washington law.

### **350-016-0020. Definitions for Commission Rule 350-016**

*Corresponding State Statutory Provisions:* ORS 183.310; RCW 34.05.010

The definitions in this rule are largely adapted from ORS 183.310. Washington’s corresponding terms (some terms are the same and some are different) are substantially similar.

Two Oregon definitions are not included in the Gorge Commission’s rules: “economic effect” and “small business.” Those are terms used in rulemaking provisions that this division does not incorporate, and the definitions are not necessary in this division. The rulemaking provisions in this division require use of the state’s rulemaking forms, which incorporate those terms and require the Gorge Commission to address each state’s law concerning those terms as part of filing the rulemaking form.

This rule incorporates two definitions from OAR 137-004-0037 (the Oregon Attorney General’s model rules for interpreters), “individual with a disability” and “non-English speaking person,” to support 350-016-0110 (Interpreter for individuals with a disability and non-English speaking persons in contested case), which adapts OAR 137-004-0037 and WAC 10-08-150 (Washington’s model rules for interpreters).

This division uses the Oregon term “contested case” rather than Washington’s term “adjudicative proceeding.” The terms describe substantially similar actions. *Compare* ORS 183.310(2) *with* RCW 34.05.010(1). The decision to use Oregon’s term is legacy, dating back to the original Gorge Commission’s rules adopted in 1987. Additionally, many of the contested case rules in this division principally adapt Oregon law to correspond with this basic Oregon term, so using the Oregon term makes sense.

### **350-016-0030. Rules coordinator; rulemaking agenda; rulemaking docket**

*Corresponding State Statutory Provisions:* ORS 183.330; RCW 34.05.270, 34.05.312, 34.05.314, and 34.05.315

(1) This section is adapted from ORS 183.330(2). RCW 34.04.312 similarly requires a rules coordinator and specifies substantially similar tasks for the rules coordinator as in ORS 183.330(2).

(2) & (3) These sections adapts RCW 34.05.270, 34.05.314 and 34.05.315. The Gorge Commission added a sentence to section (2) noting that a rules agenda is not required if there are no rules under development or anticipated. The requirement in (3) to post for twelve months comes from RCW 34.05.270, which conflicts with RCW 34.05.315. The latter only requires a rulemaking docket containing a list of pending rulemaking proceedings until a rule is withdrawn or adopted.

### **350-016-0040. Notice; content; public comment; expedited rule adoption; emergency rule adoption; amendment or repeal; substantial compliance required**

*Corresponding State Statutory Provisions:* ORS 183.335; RCW 34.05.350; RCW 34.05.353

(1) This section directs the Gorge Commission to use the forms, time periods, and other manner in each state's notice requirements.

(2) This section adapts a portion of ORS 183.335(3)(a). The rule is not using the portion of ORS 183.335(3)(a) requiring an oral hearing only if 10 people request a hearing because this section requires a hearing unless a rule is adopted using expedited rulemaking in section (4) or emergency rulemaking in section (5).

(3) This section adapts Washington's procedure for expedited rulemaking (adoption without a hearing) in RCW 34.05.353, except this section blends the types of rules that qualify for expedited adoption in RCW 34.05.353 and ORS 183.335(7). Washington law is generally more restrictive because it allows adoption without a hearing in more limited circumstances and allows one person (not 10 as specified in Oregon law) to object to expedited rulemaking and request a hearing.

(4) This section adapts the relevant portions of ORS 183.335(5) and RCW 34.05.350 to authorize the Gorge Commission to adopt emergency rules (Washington's term). Oregon law does not use the term emergency, but Oregon agencies commonly use the term "temporary" rulemaking. This section specifies that the emergency rule may only be valid for 120 days as specified in Washington law, which is shorter and thus more restrictive than Oregon law, which allows a temporary rule to be effective for 180 days. The Gorge Commission chose the term "emergency" to reflect this difference in Washington law. The public interest test for a temporary rule in Oregon is substantially similar to the public interest test for an emergency rule in RCW 34.05.350.

(5) - (10) These sections generally adapt miscellaneous provisions in ORS 183.335.

### **350-016-0050. Incorporation by reference**

*Corresponding State Statutory Provisions:* RCW 34.05.365; ORS 183.355(2)

This rule adapts RCW 34.05.365. ORS 183.335(2) has some of the same requirements as Washington law, but the Oregon APA does not require an agency to make incorporated standards available to the public.

### **350-016-0060. Filing and taking effect of rules; copies**

*Corresponding State Statutory Provisions:* RCW 34.05.380; ORS 183.355

(1) This section adapts 183.355(2)(a) and RCW 34.05.380(1), which are substantially similar.

(2) This section adapts 183.355(3), which is substantially similar to RCW 34.05.380(2) - (4), except for the date that a rule becomes effective. Oregon law provides that a rule is effective upon filing unless a statute or the rule specifies a later date. Washington law provides that rules are effective 30 days after filing unless otherwise specified. The 30-day period is more restrictive and thus this section uses Washington law. In subsection (c), RCW 34.05.350(2) specifies that an emergency rule is effective upon filing with the code reviser. The Oregon APA does not specify an effective date for temporary rules. Washington law, which requires filing is more restrictive than Oregon law and thus this subsection (c) section adapts RCW 34.05.350(2).

(3) This section adapts 183.355(4).

(4) This section adapts 183.355(6).

### **350-016-0070. Petitions requesting adoption of rules**

*Corresponding State Statutory Provisions:* ORS 183.390; RCW 34.05.330

(1) ORS 183.390 and RCW 34.05.330 are similar, except that Washington law requires agency action within 60 days and Oregon law requires agency action within 90 days. The shorter time to respond in Washington law is more restrictive and thus used in this section.

(2) This section blends the considerations from ORS 183.390 and RCW 34.05.330.

(3) This section is not part of either state's APA, but is added here to ensure that the processes for amending the Management Plan and the Gorge Commission's land use ordinance occur in accordance with the National Scenic Area Act.

### **350-016-0080. Notice to party before hearing of rights and procedure; failure to provide notice**

*Corresponding State Statutory Provisions:* ORS 183.413, 183.415(2); RCW 34.05.434

Overall, this rule adapts ORS 183.413 and 183.415(2). RCW 34.05.434 contains the same as several of the requirements in the Oregon statutes.

(1) The notice requirements in this section blend the requirements of ORS 183.413 and 183.415 for notices of a proceeding and of a hearing. A separate notice of a right to a hearing in ORS 183.415 is not needed because the Gorge Commission's rules for enforcement provide for requesting a hearing. The Gorge Commission's rules for appeals, plan amendments, and urban area boundary revisions provide for a hearing without any person needing to request a hearing. The notice requirements in RCW 34.05.434(2) are the same as several requirements in the Oregon statutes. The 20-day notice requirement is part of the Gorge Commission's initial administrative procedure rule (350-16-009(1)) and is not found in either state's APA. ORS 183.415(2) requires "reasonable notice" and RCW 34.05.434(1) requires seven days notice. 20 days notice is appropriate in the Gorge Commission's experience.

(2) This section adapts ORS 183.413(3).

(3) This section adapts RCW 34.05.434(6).

### **350-016-0090. Procedure in contested case hearing; informal dispositions; default; record of proceeding**

*Corresponding State Statutory Provisions:* ORS 183.417; RCW 34.05.440; RCW 34.05.476

(1) This section adapts ORS 183.417(1).

(2) This section adapts ORS 183.417(3).

(3) Subsection (a) section blends and adapts RCW 34.05.440 and ORS 183.417(4). Subsection (b) adapts RCW 34.05.440.

(4) This section adapts ORS 183.417(5).

(5) This section adapts ORS 183.417(6).

(6) This section adapts ORS 183.417(7).

(7) This section adapts ORS 183.417(8).

(8) The list of items in the record in this section adapts RCW 34.05.476(2), except paragraph (b)(E), which is from ORS 183.417(9)(c). The requirement for a recording or transcript adapts ORS 183.417(10). RCW 34.05.476(2)(h) similarly requires a recording or transcript.

### **350-016-0100. Disqualification of member of the Gorge Commission**

*Corresponding State Statutory Provisions:* RCW 34.05.425; ORS 183.645

(1) This section is adapted from RCW 35.05.425(4). The Gorge Commission holds hearings as a multi-member body, which is different from the provision for a single presiding officer in the statute. ORS 183.645 differs from RCW 34.05.425. ORS 183.645 allows a party to make one request to the chief ALJ to appoint a different ALJ without cause and may only object to the different ALJ upon a showing of good cause. RCW 34.05.425 is not so limited and thus is the basis for this section.

(2). This section adapts RCW 34.05.425(5). This section adds the requirement that a disqualified member of the Gorge Commission must leave the hearing room and may not participate in the proceeding. This is a best practice to demonstrate to the parties that the member will not influence the proceeding or show partiality. The MRSC recommends this practice as a manner of avoiding an appearance of fairness issue. MRSC, *The Appearance of Fairness Doctrine in Washington State* 20 (2011).

(3) Neither state's APA provides for the rule of necessity for a multi-member body. Oregon's conflict of interest statute, ORS 244.120(2)(b)(B) allows for the rule of necessity. Washington's appearance of fairness statutes, RCW 42.36.090, also allows for the rule of necessity. The rule of necessity is added to this rule to ensure compliance with section 544c(a)(4) of the National Scenic Area Act, which specifies that a quorum is a majority of the appointed members of the Gorge Commission. The rule of necessity is appropriate only when no alternative exists for a hearing without invoking the rule of necessity. The rule provides that the presiding officer (as determined by the Commission's bylaws), must appoint one member to participate giving consideration to roughly equal representation between the states and between governor and county appointees. This consideration may not be possible where only one member is disqualified and other members are not present at the hearing. The limitation on the member appointed under the rule of necessity to just vote and not ask questions of the parties or participate in deliberation or motions comes from ORS 244.120(2)(b)(B) and *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

### **350-016-0110. Interpreter for individuals with a disability and non-English speaking persons in contested case**

*Corresponding State Statutory Provisions:* ORS 45.275; ORS 45.285; Chapter 2.42 RCW

The states' APAs do not provide for interpreters; however, interpreters are required by other state laws governing judicial proceedings and the states' model rules for contested cases (Oregon's term) and adjudications (Washington's term) specify when an agency must provide an interpreter. These model rules are OAR 137-003-0037 and WAC 10-08-150. The Gorge Commission chose to adapt those model rules to ensure due process, equity, and inclusion. On balance, WAC 10-08-150 is more restrictive than OAR 137-003-0037 because it specifies a list of interpreters that an agency must use, the methods of interpretation in different situations, and that the agency must pay the cost of interpretation. In contrast, Oregon law does not specify a list of interpreters that an agency must use, does not specify methods of interpretation, and requires the agency to pay the cost of interpretation only

when an individual demonstrates that they are unable to pay. Thus, this rule principally adapts Washington’s model rule, except as discussed below.

(1) This section includes assistive communication device from Oregon’s model rule, which Washington’s model rule does not expressly mention.

(2)(e) blends OAR 137-003-0037(4)(b) and WAC 10-08-150(7). Subsection (d) uses the phrase “contested cases or adjudicative proceedings” to reflect that an interpreter may have experience in interpreting for such proceedings in either Oregon or Washington.

(3) adapted from OAR 137-003-0037(4)(c).

(4) - (7) These sections are adapted from various provisions in WAC 10-08-150.

### **350-016-0120. Depositions; site visits; subpoenas of material witnesses; other forms of discovery**

*Corresponding State Statutory Provisions:* ORS 183.425;183.440; RCW 34.05.446; RCW 34.05.588

(1). This section adapts ORS 183.425(1).

(2) This section is not found in either state’s APA, but is a common form of discovery in land use proceedings.

(3) This subsection adapts ORS 183.440. This subsection refers enforcement to the states’ statutes providing for enforcement of subpoenas in administrative proceedings rather than restate those processes here. RCW 34.05.446 is generally consistent with ORS 183.440.

(4) This subsection allows other forms of discovery as permitted by ORS 183.425(2) and RCW 34.05.446(2). The states allow different forms of discovery and thus this section specifies that the state law of the state where the property is located governs the forms and manner of discovery allowed.

(5) This subsection adapts RCW 34.05.446(3).

(6). Neither state’s APA addresses protective orders, but both states’ model rules address protected evidence in OAR 137-003-0568(5) and WAC 10-08-140. This section adapts OAR 137-003-0568(5) because it specifically authorizes protective orders. This section adds a sentence that specifically gives tribes control over their sensitive information. The Gorge Commission sought input from the tribes’ attorneys on the scope of this section.

### **350-016-0130. Evidence in contested cases**

*Corresponding State Statutory Provisions:* ORS 183.450; RCW 34.05.452

This rule adapts ORS 183.450. RCW 34.05.452 is generally similar to ORS 183.450. RCW 34.05.452(5) allows official notice of codes or standards that have been adopted by an

agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Oregon law does not mention such other law and thus this rule does not include that.

### **350-016-0140. Ex parte communications**

*Corresponding State Statutory Provisions:* ORS 183.462; RCW 34.05.455; RCW 42.36.060

Overall, this rule is adapted from RCW 34.05.455. The states' laws are substantially similar, except that Washington law requires a 10-day period for parties to rebut disclosures of ex parte communications and for the Chair of the Commission to make a recommendation and for the Commission to request the member step down or participate in the appeal. This procedure does not work for the Gorge Commission, which meets only once a month, thus the Gorge Commission adapts Oregon's law in section (6), which provides more generally for the parties to respond to a disclosure of ex parte communication. Section (6), however, also specifically allows for rebuttal of the substance of a communication in accordance with RCW 34.05.060, one of Washington's Appearance of Fairness statutes. This rebuttal may occur at the hearing.

### **350-016-0150. Conflicts of interest; appearance of fairness**

*Corresponding State Statutory Provisions:* RCW 42.36.010 - 110

(1) This section refers to division 14 of the Gorge Commission rules ensuring compliance with the rules in that division in contested case proceedings.

(2) This section ensures compliance with Washington's Appearance of Fairness doctrine, which is the one of the statutes listed in 16 U.S.C. § 544c(b). Oregon does not have any statutory provisions specifically referred to as "appearance of fairness." The appearance of fairness doctrine in Washington is both statutory and court-developed.

Subsection (a) notes that the appearance of fairness doctrine applies only when a public hearing is required and the general rule that hearings must be procedurally fair and must appear fair.

Paragraph (A) specifies that the statutory provisions in chapter 42.36 RCW largely prohibit ex parte communications and require disclosure of inadvertent communications. The prohibitions against and requirements for disclosure of ex parte communications in the states' administrative procedure acts are as restrictive as the statutory appearance of fairness provisions in Washington law. Commission Rule 350-016-0140 adapts these APA prohibitions and requirements and are not further addressed in this appearance of fairness section.

Paragraph (B) addresses the court-developed doctrine, which ensures that decision makers are not biased through personal interest, prejudgment of issues, and partiality.

Subparagraph (i) refers to division 14 of the Gorge Commission's rules relating to personal interest bias. Subparagraphs (ii) and (iii) state the general rules for avoiding prejudgment

and partiality bias. Appearance of fairness cases are fact-specific, so further definition of prohibitions is not useful in the Gorge Commission's rules.

In addition, Gorge Commission Rule 350-016-100(2) requires that a recused member of the Gorge Commission must leave the room and not participate in the proceeding, which is a recommendation of the MRSC to avoid partiality.

Subsections (b) through (e) adapt several provisions of Washington's statutory appearance of fairness doctrine.

### **350-016-0160. Orders in contested cases**

*Corresponding State Statutory Provisions:* ORS 183.330; ORS 183.470, RCW 34.05.471.

(1) This section adapts ORS 183.470(1).

(2) This section adapts RCW 34.05.461(3) and (4). ORS 183.470(2) is similar but less specific.

(3) This section blends and adapts ORS 183.470(3) and RCW 34.05.471(8)(a).

(4) This section blends and adapts ORS 183.470(4) and RCW 34.05.471(3)

(5) This section adapts ORS 183.330(3).

(6) This section adapts ORS 183.330(4).

### **350-016-0170. Judicial review of rule or order**

*Corresponding State Statutory Provisions:* none

Section 15 of the National Scenic Area Act, 16 U.S.C. § 544m, governs judicial review of Gorge Commission final actions and decisions.

## Attachments

[add references used that are not readily findable]