

12-1-1979

The New River Controversy

Scott K. Goodell

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Water Law Commons](#)

Recommended Citation

Scott K. Goodell, *The New River Controversy*, 8 B.C. Env'tl. Aff. L. Rev. 405 (1979),
<http://lawdigitalcommons.bc.edu/ealr/vol8/iss2/7>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

BOOK REVIEW

THE NEW RIVER CONTROVERSY. By Thomas J. Schoenbaum. Winston-Salem: John F. Blair, 1979. Pp. 195. \$12.95

*Reviewed by Scott K. Goodell**

In 1968, Congress passed the Wild and Scenic Rivers Act.¹ The primary purpose of the legislation was protection of "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."² In essence, the rivers system sought to preserve those few environmentally significant, free-flowing waterways still existing throughout the country. To achieve this goal, the Act safeguarded designated rivers against diverse forms of unwanted development via land use restrictions, scenic easements and prohibitions against impoundments. Depending on its classification, a river included in the system would receive varying degrees of protection from destructive land use, industrialization and dams.

Because of the relatively severe restrictions placed on industrial development along rivers included in the wild and scenic rivers system, the preservation scheme has been the focal point of much criticism during its eleven year history. On a number of occasions the Act has been used to block proposed development, thereby creating confrontations between environmentalists and industry.

* Law Clerk, Superior Court of New Jersey. Former Managing Editor, Boston College Environmental Affairs Law Review. J.D. Boston College Law School, 1979.

¹ 16 U.S.C. §§ 1271-87 (1976).

² *Id.* § 1271.

For example, inclusion of Montana's Flathead River within the scenic rivers program was spurred by plans for a strip mining operation that would detrimentally affect the waterway.³ Similarly, the Snake River, flowing through Oregon and Idaho, was backed as a potential wild and scenic river amid Federal Power Commission (FPC) hearings to grant a license for construction of a major dam project on the waterway.⁴ Many of the Act's critics viewed the rivers system as little more than an "ace in the hole" for environmentalists who had exhausted all other conservation alternatives. The most notable clash between conservationists and big business involving the Wild and Scenic Rivers Act was the New River controversy. This dispute pitted a symbiotic environmental coalition consisting of the State of North Carolina, conservation groups nationwide, and innumerable individuals against the American Electric Power Company (AEP)—the nation's largest electric utility. The subject of the controversy was a proposed hydroelectric project to be built on North Carolina's New River.

Thomas J. Schoenbaum, author of *The New River Controversy*, is a Professor of Law at the University of North Carolina at Chapel Hill, where he teaches environmental and corporate law. Because of his extensive experience in environmental issues at the state, national and international level, North Carolina sought his assistance in the struggle to save the New River. Mr. Schoenbaum actively advocated preservation of the river and played a central role in the eventual victory for supporters of the New. *The New River Controversy*, based on Mr. Schoenbaum's participation in the defense of the waterway, offers an interesting and enlightening account of the uphill struggle against the proposed hydroelectric project. While clearly written from an advocacy perspective, it nonetheless presents an accurate account of the conflict. In addition, it provides illuminating information about the history, archaeology and sociology of the river and the surrounding New River Valley. As a result the book appeals to many interests, ranging from geology to political science.

Consistent with the basic tenets of sound advocacy, the author

³ *To Amend the Wild and Scenic Rivers Act: Hearings on S.3788 Before the Subcomm. on the Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2nd Sess. 15 (1976) (remarks by Lee Metcalf).

⁴ *Hells Canyon Recreation Area: Hearings on H.R. 30 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975).

first reviews the historic significance of the New River. By doing so, Mr. Schoenbaum lays the groundwork for his later argument that the waterway represents an archaeological, geologic and historic treasure which must be preserved at any cost. His presentation is compelling.

Geologically older than the Appalachian mountains through which it flows, the New River ranks as one of the oldest rivers in the world and the oldest river in North America. There is evidence that the New River Valley was occupied by man as early as 8000 B.C.. Burial mounds dating back to 1000 B.C. can still be found along the river today. A 1976 archaeological study of the valley revealed over 160 Indian sites, ranging from small encampments to large villages. Vestiges of early America are reflected in the valley's 19th century farm complexes with Victorian farmhouses. Mr. Schoenbaum notes that, as a result of the area's relative isolation and low population, 20th century intrusions have been minimal, thus preserving the New River Valley as a direct link to the geologic and historic development of North America.

Having established the significance of the New River Valley, Mr. Schoenbaum proceeds to "personalize" the area by discussing its various residents and businesses. The reader learns about Daniel Dougherty and his iron works, and can view photographs of the Greer-Parsons house, Roger Livesay house and John Jones house. Even Thompson's Bromine and Arsenic Springs receives mention. The author blends this "down home" review of the valley with a brief discussion of the river itself, paralleling the sylvan nature of the area with the virtually unpolluted water and unaltered ecosystem of the New River. Only after laying this foundation does Mr. Schoenbaum proceed to the principal topic of the book—the New River controversy.

In 1963, the Appalachian Power Company, a subsidiary of AEP, began studying the feasibility of erecting a two-dam hydroelectric and pumped storage facility on the New River. In 1965 Appalachian applied to the FPC for a license to build the Blue Ridge Project, thereby initiating a conflict that was to remain unresolved for the next ten years.

Couched in terms of "progress," the impoundment promised substantial topographic and economic changes in the New River Valley. Approximately 42,000 acres of farmland would be flooded, twenty-seven hundred inhabitants forced to leave their homes and entire towns inundated. In return the Blue Ridge Project

would supply 3,900,000 megawatt-hours of peak-use electricity for large population centers in the Northeast. Closer to home, Appalachian claimed that the twin-reservoir hydroelectric facility would provide two large lakes capable of generating enormous recreation revenues. These revenues would then filter down through the business community and greatly benefit the overall economic outlook of the area. Unfortunately, the reservoirs would be subject to periodic drawdowns,⁵ drastically diminishing their predicted recreation potential.

Ironically, it was the Department of the Interior, the eventual supervisor of the wild and scenic rivers system, that touched off the first serious cries of discontent over the planned impoundment by requesting larger reservoirs and drawdowns so the dam could be used to flush pollutants discharged by chemical plants 300 miles downstream. Until this recommendation was submitted, the Blue Ridge Project was moving smoothly toward licensing, supported by the department of the Interior, as well as North Carolina, Virginia, and West Virginia. As a result of the proposed changes, North Carolina withdrew its support for the facility. Even with this newly recorded disapproval, however, it took a series of three events to prevent the FPC from swiftly granting an unopposed license to Appalachian.

First, North Carolina's objections to the larger reservoirs necessitated additional hearings and carried the licensing proceedings into the early 1970s. Next, the National Environmental Policy Act (NEPA) was enacted, requiring preparation of an environmental impact statement before further hearings could be held on the Project. Finally, the decision in *Greene County Planning Board v. FPC*,⁶ handed down in January 1972, compelled the FPC to carry out its environmental impact studies prior to holding hearings on a proposed project. Since the FPC had not followed this procedure for the Blue Ridge Project, the agency had to hold a new round of hearings. As a result of these delays, opponents of the hydroelectric facility were able to gather support for the New

⁵ "Drawdowns" are reductions of the water level in the reservoir above the pumped-storage facility. The hydroelectric project generates power by releasing large amounts of water from the storage reservoir, thereby creating a man-made waterfall. This process enables the facility to supply tremendous amounts of electricity in a relatively short period of time. However, until water is pumped back into the reservoir the water level remains low and often leaves a ring of sludge around the perimeter of the basin.

⁶ 455 F2d 412 (2d Cir. 1972).

River and more effectively plan its defense.

Review of the actual defense of the New River is greatly enhanced by Mr. Schoenbaum's personal involvement in the contest. Not only does his involvement make for a more interesting account of the proceedings, but it helps develop two important themes. The first, and most obvious, is a portrayal of the dedicated attempt to salvage the waterway from possible impoundment. Throughout, the book stresses the pride, perseverance and never-say-die attitude of the New River proponents. Second, the book presents a paradigm for successful conservation efforts. In recounting the varied undertakings of the river supporters, Mr. Schoenbaum provides a blueprint, or "game plan," for environmental activism. While the author may not have intended to make this point, his first person account offers an excellent example of the essential ingredients required for effective environmental advocacy.

Massing a constituency that included the Washington-based Izaak Walton League, the Conservation Council of Virginia, the Allegheny Farm Bureau, and other conservation-oriented groups, North Carolina launched a four-pronged assault against the Blue Ridge Project, attacking it on legislative, legal, administrative, and public fronts.

The river proponents first moved to designate a segment of the New as a North Carolina scenic river. With this objective accomplished, bills were simultaneously introduced in the United States Senate and House of Representatives to study the waterway for possible inclusion in the national wild and scenic rivers system. As a "study river" the New would be protected from impoundments until a decision was rendered on its eligibility for the federal system. While the proposed legislation would not permanently restrain licensing or construction of the dam, it would stall the project for at least two years.

After Senate passage by a vote of 49 to 19, the "study river" bill faced a ferocious lobbying effort by its opponents prior to consideration by the House. Ultimately, the Rules Committee, under intense pressure from AEP and the AFL-CIO, refused to allow the bill to come to the House floor. As a result, assault on the legislative front was temporarily thwarted. Mr. Schoenbaum noted, somewhat sardonically, that a secondary factor underlying the delay in the House Rules Committee was the refusal by chairman Ray J. Madden from Indiana to permit a vote on the bill

until the Senate Interior Committee reported favorably an unrelated bill to enlarge the Indiana Dunes National Park.

Despite this initial congressional setback, proposed legislation was again submitted in 1975. Persistence paid off as Congress acted to include the New as a wild and scenic river, effectively negating any possibility of an impoundment on the waterway. The conservation coalition had no way of knowing that the legislative battle would eventually win the preservation war, and had previously maneuvered to save the river in other areas as well.

During the initial legislative foray in Congress, North Carolina also explored possible legal solutions to the problem. Initially, the State requested the United States Court of Appeals to enjoin construction of the proposed dam. In addition, a second lawsuit, seeking essentially the same remedy, was instituted in federal district court. While no injunctions resulted from either action, the FPC felt sufficiently pressured to delay the effective date of the Blue Ridge license.

At the administrative level, the Governor of North Carolina undertook an alternative procedure to designate the New River as a federal wild and scenic river. Under a provision of the Wild and Scenic Rivers Act the governor of a state may apply to the Department of the Interior for inclusion of a state river within the federal waterways system, provided the river is currently a designated state scenic river and a management plan is adopted under which the river will be supervised by the state without cost to the United States.⁷ The Secretary of the Interior is then required to carry out a study of the river to determine whether it qualifies for the national system. If all criteria are met, the Department of the Interior can include the river in the system without congressional action. While this was not the undertaking that ultimately saved the river, it nevertheless provided a great deal of exposure for the preservation effort and generated key support, which aided the subsequent legislation when presented to Congress.

The final phase of the New River defense, and probably the most far-reaching, was the unification of public support for the river. The Committee for the New, an interstate organization later known as the National Committee for the New River, held numerous hearings to inform the public about the proposed Blue Ridge Project and elicit support for its cause. The Committee also

⁷ 16 U.S.C. § 1273(a) (1976).

published a newsletter, made a slide presentation of the New available on request, and organized a lobbying effort in Washington when it appeared that a possible legislative victory was in sight. Bumper stickers proclaiming, "The New River Like It Is," were distributed by the thousands to counter the opposition's slogan, "Dam The New." In addition, a number of luminaries gave their support to the campaign. Earl Hammer, Jr., creator of the television series, "The Waltons," wrote a moving piece about the New River, and former Senator Sam Ervin proved to be an invaluable asset when the river legislation came before Congress. Even the media followed the controversy. Bill Moyers featured a town that was to be inundated by the project in a documentary entitled, "A Requiem for Mouth of Wilson" on National Educational Television. Newsmen Dan Rather, Jack Anderson, Walter Cronkite and others highlighted the fight to save the river. And publications such as *Newsweek* and *The New York Times* featured articles about the New River and proposed dam. All of these elements combined to produce unprecedented media coverage of the controversy. In the end, it was the pro-conservation sentiment generated by these forces that helped carry the New River legislation through Congress.

The successful defense of the New River is attributable in large part to the multi-front strategy. By undertaking four different avenues of opposition, the river's supporters maximized their chances for success while minimizing the possibility of an outright defeat. The varied levels of attack blended to provide what proved to be an insurmountable obstacle to the licensing of the project. While this defense strategy is applicable to any area of the law, it is particularly appropriate in environmental issues because of the irreversible nature of the decisionmaking process and because, when fighting a conservation battle, defeat in any one battle will not result in loss of the war. In addition, this strategy encourages delay, thus favoring the "status quo" conservationist position.

While the author's advocacy perspective gives the book its special appeal, this point of view also creates the work's most notable shortcomings. It is somewhat disconcerting to note that there is no mention of the fact that the New River, although one of the many rivers reviewed in an exhaustive federal study, was not nominated as a possible study river for the national wild and scenic rivers system at its inception in 1968. In addition, the au-

thor makes light of the \$500 million damages claimed by American Electric as a result of the legislation passed to protect the New River. Yet, a suit was instituted in the United States Court of Claims alleging just that amount in damages.⁸

However, the book clearly is not offered solely as an objective account of the clash between AEP and conservationists. Its message is much more substantial than that. On one level it supplies a model for successful environmental confrontation—gather all the ammunition you can collect and fire from all sides. But more importantly, Mr. Schoenbaum seeks to depict the spirit and unerring dedication of those who worked to protect the New River. He has succeeded admirably in portraying the strength and tenacity of the people who inhabit its environs. Today the river stands (or more appropriately, flows) as a tribute to the pride and dignity of all who refused to accept anything less than “The New River Like It Is.”

⁸ A recent discussion with an AEP official revealed that the Court of Claims complaint was dismissed and a petition for rehearing denied. At present a petition for certiorari is pending before the United States Supreme Court.