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The Wild and Scenic Rivers Act and the Oregon Trilogy

Charlton H. Bonham*

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I. INTRODUCTION

The passage of the Wild and Scenic Rivers Act was a watershed moment, helping to turn the tide toward a developing recognition that protection of our waterways is deeply bound up not only with protection of our wildlife and water quality, but with our connection to our natural landscape and heritage.¹

-- Secretary of Interior Bruce Babbitt

Our work is not done.²

-- Vice President Al Gore

The Wild and Scenic Rivers Act (WSRA),³ which seeks to protect the remarkable scenic, recreational, geologic, fish and wildlife, historic, and cultural values of designated rivers and river segments,⁴ recently celebrated its 30th anniversary.⁵ For most of its first thirty years, river conservation advocates and federal land management agencies⁶ have focused attention on the designation of wild and scenic rivers, not managing the rivers themselves.⁷ Now, however, a revolution may be taking place in the West that could serve to alter this focus.

1. M2 PRESSWIRE, *U.S. FWS: Babbitt Commemorates 30th Anniversary of Wild and Scenic Rivers Act*, Oct. 5, 1998, available in 1998 WL 16526107 (Comments of United States Secretary of Interior Bruce Babbitt).

2. *Id.* (Comments of United States Vice President Al Gore).

3. The Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287 (1994)) [hereinafter WSRA].

4. The WSRA declares a policy "that 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, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271; see also *Wilderness Soc'y v. Tyrrel*, 918 F.2d 813, 815 (9th Cir. 1990) ("purpose of the WSRA is to select and protect certain rivers which, with their immediate environments, possess outstanding remarkable scenic, recreational, geologic, fish and wildlife . . . or other similar values . . .") (internal quotations omitted).

5. President Lyndon Johnson signed the WSRA on October 2, 1968. See A. Dan Tarlock & Roger Tippy, *The Wild And Scenic Rivers Act Of 1968*, 55 CORNELL L. REV. 707, 711 n.25 (1970) [hereinafter Tarlock & Tippy].

6. The United States Forest Service (USFS) and the Bureau of Land Management (BLM) are the two primary federal land management agencies in the eleven Western states. See JOHN HORNING, NATIONAL WILDLIFE FEDERATION, *GRAZING TO EXTINCTION: ENDANGERED, THREATENED AND CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC LANDS* 3 (1994). The USFS and the BLM manage approximately 300 million acres of public lands. *Id.* In the context of wild and scenic rivers, the USFS manages 76 rivers including 4,084.90 river miles, and the BLM manages 15 rivers including 1,994.35 river miles. See 30th Anniversary Wild & Scenic Rivers Act <<http://www.nps.gov/rivers/30years/index.html>> (visited Sept. 21, 1999).

7. See Peter M.K. Frost, *Protecting And Enhancing Wild and Scenic Rivers In The West*, 29 IDAHO L. REV. 313, 315 (1992-93) (commenting that "[p]roposals for new river corridors may still cause controversy, but only a few appellate court decisions concern the Act Almost no litigation exists concerning the management of river corridors . . .").

In 1968, when the WSRRA became law, river conservation advocates argued for inventorying and designating potentially eligible rivers and river segments.⁸ Consequently, Congress, states, and federal agencies focused on designation issues and decisions.⁹ Clearly, the designation process is a fundamental element of the WSRRA because the Act's substantive mandates apply only to designated rivers. The campaign to designate wild and scenic rivers has been largely successful, as the Act applies to almost 11,000 river miles on 158 rivers.¹⁰ Thirty years after enactment, the WSRRA now governs many rivers but little attention has been paid to the equally crucial issue of how to manage designated river corridors consistent with the Act's mandate to protect and enhance the "outstandingly remarkable values" or ORVs of designated rivers in their free-flowing state.¹¹ Yet, the statute explicitly requires federal land management agencies to manage activities, even long-established activities like livestock grazing, within designated corridors to protect and enhance the river's outstandingly remarkable values.¹² In 1997, 1998, and 1999, the United States District Court for the District of Oregon consistently agreed with environmentalists' arguments that the Bureau of Land Management's grazing policies within designated river corridors violate the WSRRA. In *Oregon Natural Desert Association v. Green*,¹³ *National Wildlife Federation v. Cosgriffe*,¹⁴ and *Oregon Natural Desert Association v. Singleton*,¹⁵ the court relied on the WSRRA's overriding policy on managing designated river corridors to "protect and enhance" their "outstandingly remarkable values" to evaluate BLM's actions in

8. See TIM PALMER, ENDANGERED RIVERS AND THE CONSERVATION MOVEMENT 149-51 (1986) [hereinafter PALMER-RIVER MOVEMENT].

9. *Id.* at 147.

10. See American Rivers, *Wild and Scenic Rivers* <<http://www.amrivers.org/wswat.html>> (visited Aug. 31, 1999). The exact figure estimated by American Rivers, the leading national river conservation organization, is 10,391.2 miles. *Id.* Compare the protection of these miles to a National Park Service River Inventory, which estimates that more than 60,000 river miles qualify for Wild and Scenic River protection. *Id.*

11. Congress or the managing agency fixes the ORVs. See *infra* notes 88-92 and accompanying text. Default ORVs exist for situations where no values have been set. 16 U.S.C. § 1282(a).

12. Specifically, the WSRRA provides that:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

16 U.S.C. § 1281(a); see also discussion *infra* Parts III.C., IV.

13. 953 F. Supp. 1133 (D. Or. 1997).

14. 21 F. Supp. 2d 1211 (D. Or. 1998).

15. 47 F. Supp. 2d 1182 (D. Or. 1998) [hereinafter *Singleton I*].

the designated corridors.¹⁶ This trilogy of Oregon federal cases reveals that the WSRA contains judicially enforceable standards governing wild and scenic river management. Further, the cases show that the WSRA protect and enhance standard extends beyond just public lands grazing policies in eastern Oregon: the WSRA requires all federal agencies to manage river corridors to protect and enhance outstandingly remarkable river values.¹⁷ Widespread recognition of judicially enforceable river management standards should lead to the improved health of the nation's wild and scenic rivers.

This article examines the WSRA's protect and enhance management standard, which has existed in the WSRA from its inception thirty years ago, and explores its application to federal agency river management. The article begins, in Section II, with a brief description of the river preservation movement, including a sketch of the legislative history surrounding the enactment of the WSRA. Section III provides an overview of the Act's statutory scheme, procedures, and standards. Section IV analyzes the three WSRA cases decided by the Oregon district court during the last two years and argues that these cases confirm the judicial enforceability of the WSRA's management standard. Section V suggests several lessons from these cases for WSRA federal agency management policies and judicial review of those policies. In addition, Section V addresses the critical issue of injunctive relief, stressing that management practices conforming to the WSRA are unlikely to occur unless judges are willing to enjoin activities that violate the statute. Section V also shows that other courts are recognizing the Act's protect and enhance ORVs standard. The article concludes that the judicially enforceable river management standards recognized by the Oregon WSRA trilogy have the potential to revolutionize federal agency land management policies in designated river corridors.

II. HISTORY OF THE RIVER PRESERVATION MOVEMENT

A. *The Early Years*

Part of the nation's myth is that America is a land of dreams. Rivers have forever been inextricably connected to both the nation's and its citizens'

16. *Green*, 953 F. Supp. at 1137 ("The WSRA required BLM to issue a 'comprehensive management plan' to protect the river area's 'outstandingly remarkable values'"); see also *Cosgriffe*, 21 F. Supp. 2d at 1215 ("The BLM must administer the rivers primarily to 'protect and enhance' their 'outstandingly remarkable values'"); *Singleton I*, 47 F. Supp. 2d at 1192 ("The WSRA provides that each component of the national wild and scenic rivers system is to be administered in such a manner as to 'protect and enhance' its ORVs...").

17. See discussion *infra* Parts III.C.2., and 3.

dreams.¹⁸ Not surprisingly then, as the nation grew, so did dependence on rivers.¹⁹ Rivers were used for waterfront development, transportation corridors, and as water and food sources.²⁰ Very few questioned intense river usage, and no one considered a nation without free-flowing rivers possible.²¹

The federal government also endorsed exploitation of rivers.²² State and local conflicts erupted on rivers throughout the country in places like Hetch Hetchy and Owens River Valley in California.²³ All signs pointed towards nationwide river development as a pre-ordained end result with powerful and influential people contributing their vocal support.²⁴

A pro-river development theme characterized the first half of the 1900s. By the early 1960s, however, governmental and public opinion slowly began to accept river preservation and conservation.²⁵ The Echo Park controversy of the 1950s, involving the Green and Yampa Rivers in Colorado, marked the birth of the river conservation movement.²⁶ Conservationists there rallied public

18. Chief Seattle of the Squamish is claimed to have said in 1854 that: "The rivers are our brothers. They quench our thirst. The rivers carry our canoes, and feed our children." PALMER-RIVER MOVEMENT, *supra* note 8, at 11. In another book, Palmer reminds his readers that "America is a great story, and there is a river on every page of it." TIM PALMER, LIFELINES: THE CASE FOR RIVER CONSERVATION 4 (1994) (quoting Charles Kuralt) [hereinafter PALMER-LIFELINES]. Historian Bernard DeVoto called rivers "the conduits of national adventure." *Id.* at 23.

19. Consider that 130 of our 150 largest cities are located along rivers. *Id.* at 8.

20. For example, in 1824, the Army Corps of Engineers undertook its first job on rivers, clearing trees and sandbars from the Ohio River to facilitate steamboat passage. PALMER-RIVER MOVEMENT, *supra* note 8, at 13. As early as 1750 cities tapped rivers for drinking water. *Id.* at 16.

21. Public perception in the middle of the nineteenth century actually questioned leaving rivers in their free-flowing state. *Id.* at 16 (noting that one commentator remarking on the Hudson River opined that "[i]t would outrage one's sense of justice if that broad stream were to roll down to the ocean in mere idle majesty and beauty").

22. See Eric L. Hiser, Note, *Piloting the Preservation/Development Balance on The Wild and Scenic Rivers*, 1988 DUKE L.J. 1044, 1046 n.14 (citing Hearings on S. 119 and S. 1092 Before the Senate Comm. On Interior and Insular Affairs, 90th Cong., 1st Sess. 45 (1967)) (noting Secretary of Interior Udall's remarks that "[w]e saw a great decision made under President Teddy Roosevelt, in 1902 when the Reclamation Act was passed, and the Nation set out to reclaim the rivers of the West for purposes of irrigation"). A second federal endorsement of river development came "in the 1930s under President Franklin Roosevelt, when we appropriated money and went on the main stem of our great rivers, and began to build large river control structures." *Id.* at 1046 n.18 (quoting Secretary Udall); see also MARC REISNER, CADILLAC DESERT 115-24 (1986).

23. PALMER-RIVER MOVEMENT, *supra* note 8, at 46-53, 57-58.

24. A key architect of the reclamation program, Frederick Haynes Newell, wrote that "[t]he achievement of the national government in conserving flood or waste waters and in converting parts of the desert into prosperous farms is both proof and prophecy of what can and should be done on a larger scale . . ." *Id.* at 53. According to W.J. McGee, Roosevelt's chief advisor on water programs, man would become master of nature when he conquered water. *Id.*

25. In 1961, largely in response to concerted efforts by Bureau of Reclamation and the U.S. Army Corps of Engineers to dam the West, various individual river preservation battles were won, federal agency officials began to suggest studying river preservation, and the "idea of classifying and protecting rivers had matured" to the point where the "idea of national rivers gained support." *Id.* at 136-41.

26. See *id.* at 69 (commenting that Echo Park "became the conservation issue of the 1950s, bringing the question of national parks and wild rivers to the attention of more people than any earlier case."); see, e.g., Scott K. Miller, *Undamming Glen Canyon: Lunacy, Rationality, or Prophecy?*, 19 STAN. ENVTL. L.J.

outrage around the possible loss of Dinosaur National Monument in Colorado, which a proposed dam would have flooded.²⁷ Immediately following Echo Park, the Bureau of Reclamation constructed Glen Canyon Dam, on the main-stem Colorado, which created Lake Powell and covered Rainbow Bridge, the world's tallest natural arch, with water.²⁸ Drawing on the Echo Park experience, and intensely motivated by the Glen Canyon loss,²⁹ river conservationists succeeded in stopping the damming of the Grand Canyon by rallying public outrage around the loss of rivers themselves.³⁰ Importantly for river conservationists, as recreation boomed in post-war America, people, mostly for the first time, began to visit the rivers at the center of these disputes.³¹

B. *Wild & Scenic Rivers Act Legislative History*

The wild and scenic rivers idea first seriously appeared in late 1963 and early 1964 when recommendations from the Outdoor Recreation Resources

121, 123-24 (2000).

27. The Bureau of Reclamation, in 1943, proposed the Upper Colorado River Storage Project in the vicinity of the Green River and Yampa River confluence, just upstream of Echo Park. See PALMER-RIVER MOVEMENT, *supra* note 8, at 68. Nine proposed dams and at least two major reservoirs would have flooded the Park. *Id.*

28. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 275 (1992); see also PALMER-RIVER MOVEMENT, *supra* note 8, at 78. River conservationists in fact struck a deal to save Echo Park that spared what is now Dinosaur National Monument, but resulted in the Glen Canyon project construction just downstream below the Utah and Arizona border. See WILKINSON, *supra* at 275. David Brower, then executive director of the Sierra Club, considers the loss of Glen Canyon the personal defeat of his life. See Miller, *supra* note 26, at 149. The completion of Glen Canyon Dam and creation of Lake Powell foreclosed the public's chance to ever see the majestic red-rock wonders of the Utah-Arizona corner. See WILKINSON, *supra* at 275-76.

29. Professor Wilkinson has noted that "many people visited Glen Canyon just before and during its gradual inundation in the 1960s" and that as people realized what was now lost "[r]age grew and spread, but it was too late, much too late." *Id.* at 276.

30. See PALMER-RIVER MOVEMENT, *supra* note 8, at 82-86. Echo Park taught the river conservation movement how to mobilize support, generate political pressure, raise technical and legal arguments, and sway public opinion through the press. *Id.* at 72-73. In total though, the battle "was still to save a park." *Id.* at 73-74 (commenting that at that time "few people fought the philosophy of big water development or the loss of wild rivers outside the national park system"). With the Grand Canyon, of course, a national monument and park were once again involved. This battle, however, received nationwide support to save not just the park but also the Colorado river itself. *Id.* at 86.

31. In fact, to mobilize opposition against the Echo Park Dam preservationists began rafting people down the river to show what would be lost, increasing the number of rafters from 47 in 1950 to 912 in 1954. *Id.* at 71-72.

Review Commission³² spurred studies on the nation's rivers.³³ By 1965 Lyndon Johnson's State of the Union address and other White House communications began to discuss wild and scenic rivers.³⁴ The stage was set for Congress to act, and key legislators like Senator Frank Church and Representative John Saylor did.³⁵

The first wild and scenic rivers act emerged from the Senate in 1966.³⁶ Opponents, however, succeeded in weakening the bill by effectively restricting its scope.³⁷ This compromised effort died immediately in the House's Interior

32. The Outdoor Recreation for America Report released by the Commission stated that "[c]ertain rivers of unusual scientific, esthetic, and recreation value should be allowed to remain in their free-flowing state and natural setting without man-made alterations." *Id.* at 141. Two years earlier, the National Park Service had voiced support for a wild scenic rivers program, which prompted a Senate Select Committee on National Water Resources to recommend that "certain streams be preserved in their free-flowing condition." CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION 172-73* (1982).

33. Responding to suggestions from the Outdoor Recreation Resources Review Commission, Secretary Udall formed the Bureau of Outdoor Recreation, which, under the Department of Agriculture, organized a wild and scenic rivers study team. See PALMER-RIVER MOVEMENT, *supra* note 8, at 143. Udall also commissioned U.S. Fish and Wildlife Service employees to prepare a paper on river classification. *Id.* These 1964 studies proposed 650 rivers for consideration. *Id.* Ultimately, planners reduced the 650 number to 67 then finally 22 rivers, which they earmarked for detailed study. *Id.*; see also ALLIN, *supra* note 32, at 173.

34. ALLIN, *supra* note 32, at 173. President Johnson succinctly commented that "[t]hose who first settled this continent found much to marvel at. Nothing was a greater source of wonder and amazement than the power and majesty of American rivers." *Id.* at 174. Johnson concluded in the address that: "We will continue to conserve the water and power for tomorrow's needs with well-planned reservoirs and power dams. But the time has also come to identify and preserve free-flowing stretches of our great rivers before growth and development have made the beauty of the unspoiled waterway a memory." PALMER-RIVER MOVEMENT, *supra* note 8, at 144.

35. Secretary of Interior Stewart Udall, recently transformed from a dam supporting western congressman to a river preservationist secretary, staked out a position in the river preservation camp after seeking to ban additional dams on Idaho's Clearwater River. PALMER-RIVER MOVEMENT, *supra* note 8, at 142. Others followed his lead. Senators Frank Church of Idaho and Gaylor Nelson of Minnesota and Representative John Saylor of Pennsylvania galvanized their forces, rallied around river preservation, and ultimately went to work passing a wild and scenic rivers bill. No greater political commitment came than Frank Church's early support of the first wild and scenic rivers bill in the Senate. In short, "he decided to take his life into his own hands and sponsor the wild and scenic rivers bill in the Senate. He was bold; he was from Idaho, and this was controversial." *Id.* at 144 (quoting Stewart Udall). Gaylor Nelson aided the movement, in 1963, by introducing one of the first serious bills to designate a national river, the Saint Croix. *Id.* at 143-44. The bill passed the Senate but stalled in the House. *Id.* In the House, building on Nelson's groundwork, John Saylor led a movement that successfully designated, in 1964, the Ozark National Scenic Riverways as the first national rivers. *Id.*

36. The first wild and scenic rivers bill showcased Western rivers and was called the "Wild Rivers Act." See PALMER-RIVER MOVEMENT, *supra* note 8, at 144-45.

37. Although Church's original draft was innovative because it proposed a national policy prohibiting dams in designated areas, the bill did not survive attack. See ALLIN, *supra* note 32, at 173-74. Church had proposed immediate designation of six rivers. Each senator that suddenly realized a proposed river ran through his state objected to the bill because it would foreclose a senator's ability to ensure construction of future dams for local constituents. *Id.* Not surprisingly, Church's bill lost preservation strength because each senator whittled out interest. Thus, even though the Senate voted 71-to-1 in favor of the bill, wild and scenic river preservation under Church's first legislative effort remained subject to powerful special interests. *Id.*

Committee.³⁸ A cat-and-mouse dance between various factions, and between the two houses, on a final wild and scenic rivers act began with Congressman Saylor's proposed bill requiring fifteen immediate river designations, sixty-one possible future designations, and withdrawal of the Federal Power Commission's hydroelectric dam licensing power from the relevant areas.³⁹ Saylor's bill cut no preservation corners.⁴⁰

On August 8, 1967, the Senate, on an eighty-four-to-zero vote, passed the Wild and Scenic Rivers Act.⁴¹ Almost a year later, the House voted on September 12, 1968 overwhelmingly in favor of the bill.⁴² President Johnson's signature less than a month later resulted in a National Wild and Scenic Rivers Act that designated parts of eight rivers, set twenty-seven others aside for study, and established a river classification system.⁴³ Thus, more than thirty years ago, the 1968 Act established a national river management directive to "protect and enhance" designated rivers.

III. WILD & SCENIC RIVERS ACT PROCEDURES AND MANDATES

A. Overview

The WSRA protects America's free-flowing rivers. The Act achieves this purpose by establishing detailed designation procedures, classification structures, and river value protection mandates.⁴⁴ For WSRA inclusion, however, a potential river need only satisfy two straightforward *prima facie* require-

38. See *id.*; see also Tarlock & Tippy, *supra* note 5, at 711.

39. See ALLIN, *supra* note 32, at 174.

40. *Id.* (noting that "[i]t was, by any standard, the strongest river preservation bill ever introduced in Congress"). The legislative process of the WSRA originally focused on slowing dam construction and evolved into a process that created a system to protect and enhance rivers for their innate values. *Id.* at 175-76. During that process, the Act gained a classification structure, the language found in the Act today, and more instant designated rivers. *Id.* Each of these results reflects Congress' river preservation intent.

41. *Id.* at 174-75.

42. The House voted two-hundred-sixty-five to seven in favor. See PALMER-RIVER MOVEMENT, *supra* note 8, at 147.

43. *Id.*

44. 16 U.S.C. §§ 1273-81 (designation, classification, values components).

ments. First, the river must be free-flowing.⁴⁵ Second, the river must possess an “outstandingly remarkable value.”⁴⁶

The Act defines ORVs as river characteristics that are “scenic, recreational, geologic, fish and wildlife, historic, cultural” in nature.⁴⁷ The WSRA list of ORVs is not inclusive, though, because the Act provides for designation and protection of rivers that exhibit “other similar” ORVs as well.⁴⁸ In 1982, the Departments of Interior and Agriculture promulgated revised WSRA guidelines in response to a 1979 request from President Carter.⁴⁹ The 1982 revisions clarified that ecological values are outstandingly remarkable values.⁵⁰ The policy of the WSRA is to protect designated rivers’ ORVs for present and future generations.⁵¹ Additionally, in order to qualify for inclusion in the wild and scenic rivers system, a river must possess at least one ORV.⁵²

The WSRA divides rivers into three categories: wild, scenic, and recreational.⁵³ A river’s classification hinges on its natural status.⁵⁴ Classification, however, does not necessarily determine river management.⁵⁵ In fact, classifi

45. 16 U.S.C. § 1271 (1994); *see also* Frost, *supra* note 7, at 316. Generally, a free-flowing river is one that flows in its natural condition. *See* 16 U.S.C. § 1286(b) (1994). Specifically, a free-flowing, natural condition river physically lacks any impoundments, diversions, or other modifications that alter the flow. *Id.* Even if such flow altering structures did exist on an otherwise eligible-for-inclusion river, those non-natural structures do not automatically bar a river from consideration for WSRA designation. *Id.* Moreover, designating a WSRA river that does contain free-flowing obstacles in no way condones any future construction and development “of such structures within components of the national wild and scenic rivers system.” *Id.* Note that the act defines river to mean “a flowing body of water or estuary or a *section, portion, or tributary thereof*, including rivers, streams, creeks, runs, kills, and small lakes.” 16 U.S.C. § 1286(a) (emphasis added).

46. 16 U.S.C. § 1271, 1273(b).

47. 16 U.S.C. § 1271.

48. *Id.*; *see also* 47 Fed. Reg. 39,454 at 39,457 (Sept. 7, 1982) (“[i]n addition to the specific values listed in Section 1(b) of the Act, other similar values, . . . if outstandingly remarkable, can justify inclusion of a river in the national system”) [hereinafter WSRA Guidelines].

49. *Id.* at 39,455.

50. *Id.*

51. 16 U.S.C. § 1271.

52. WSRA Guidelines, *supra* note 48, at 39,456.

53. The Act’s classification provision defines the three categories as:

- (1) Wild river areas – Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.
- (2) Scenic river areas – Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.
- (3) Recreational river areas – Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past. 16 U.S.C. § 1273(b).

54. “[T]he degree of naturalness, or stated negatively, the degree of evidence of man’s activity in the river area” determines the appropriate classification. WSRA Guidelines, *supra* note 48, at 39,458. Classification, however, may be aspirational. In other words, Congress or the managing agency may classify a river according to what improved status it would like for the river. Frost, *supra* note 7, at 319 n. 26.

55. Sally K. Fairfax et al., *Federalism And The Wild And Scenic Rivers Act: Now You See It, Now You Don’t*, 59 WASH. L. REV. 417, 426 n. 57 (1984) (“[t]he relationship between river classification and river management is not as clear as might be presumed”) [hereinafter *Federalism and the WSRA*]. Statutorily,

cation specifies management protections in only one case – mining.⁵⁶ Therefore, although classification is a key consideration for agency river management decisions, the river must be managed according to its ORVs not its classification.⁵⁷ Thus, the mandate to protect and enhance the river's ORVs defines the agency's river management scheme.

The WSRA is comprised of distinct designation and preservation categories. Scholarly analysis of the WSRA often refers to the Act's designation procedures as concrete, while relegating the preservation mandates to a hortatory pigeonhole.⁵⁸ One purpose of this article is to show that the WSRA's preservation provisions create specific, concrete, and judicially enforceable mandates.

B. Designation Procedures

The WSRA established explicit methods to designate rivers.⁵⁹ Either Congress or a state, with Secretary of Interior approval, can designate a river for inclusion in the wild and scenic rivers system.⁶⁰ Congress can designate a river at its own initiative⁶¹ or at the recommendation of a federal agency.⁶² If an agency seeks to protect a river or river segment with WSRA designation, it must provide studies supporting its recommendation.⁶³

the classification of the river does not determine management of the river as much as the river's ORVs. 16 U.S.C. § 1281(a). The classification, instead, is part and parcel of the federal land management agencies' duties after Congress designates the river and the river ORVs. *Federalism and the WSRA*, at 426 n. 57.

56. In scenic and recreational rivers, mining activity can occur subject to federal regulation whereas in wild rivers mining is excluded from the river corridor—within one-quarter mile of the bank on either side—subject to valid existing rights. 16 U.S.C. § 1280(a)(i)-(iii); *see also Federalism and the WSRA*, *supra* note 55, at 429 (commenting that to think the degree of protection relates to classification is wrong because “the Act specifies protections based on river classification only with regard to mining”).

57. Frost, *supra* note 7, at 320 (opining that “no reported decision discusses a challenge to how an agency has administered a river corridor on the ground that it authorized an activity that is inconsistent with the corridor's classification”).

58. *See, e.g.*, Hiser, *supra* note 22, at 1048-51; *see also Federalism and the WSRA*, *supra* note 55, at 425-26.

59. *See, e.g.*, The Agricultural Law/Economics Research Program, *Can North Dakota Grazing Survive A Wilderness Or Wild And Scenic Designation – Are There Cattle In Nature?*, 70 N.D. L. REV. 509, 517 (1994) (two methods for inclusion); Douglas L. McHoney, *The Wild And Scenic River Act's Mandatory Comprehensive Management Plans: Are They Really Mandatory?*, 5 MO. ENVTL. L. & POL'Y REV. 155, 157 (1998) (two methods); *but see* Frost, *supra* note 7, at 316-17 (stating that “[r]ivers may be included in the system through three methods”). In sum, two entities, Congress or a State, can designate a river in one of three ways.

60. 16 U.S.C. § 1273(a); *see also Wilderness Soc'y*, 918 F.2d at 815; *Swanson Mining Corp. v. FERC*, 790 F.2d 96, 98 (D.C. Cir. 1986).

61. 16 U.S.C. § 1273(a)(i).

62. 16 U.S.C. § 1275(a).

63. *Id.*; *see also* Frost, *supra* note 7, at 316-17. The agency must show in its report “to Congress and other relevant federal agencies characteristics which do or do not make the area a worthy addition to the system; the current status of land ownership and use in the area; [and] the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included.” 16 U.S.C. § 1275(a).

State-initiated WSRA designations must adhere to a lengthier formula. The state must first designate the river under state law, then petition the Secretary of Interior for inclusion in the federal wild and scenic rivers system.⁶⁴ The Secretary subsequently determines whether the proposed river meets the Act's criteria for inclusion.⁶⁵ State-designated rivers are the responsibility of the state to manage at no cost to the federal government, except for costs associated with management of any federal lands in the river corridor.⁶⁶ States may even propose inclusion for rivers within a state that flow entirely through federal lands.⁶⁷ State designation, however, does not change federal jurisdiction over federal lands.⁶⁸

After designation, the appropriate Secretary fixes river corridor boundaries, which may not exceed an average of more than 320 acres in a sample river mile segment on either side of the river from the high water mark.⁶⁹ Interestingly, these limits do not apply to state-initiated designated rivers.⁷⁰ Consequently, the state may create larger boundaries if it so desires.⁷¹ After designation and boundary establishment, the Secretary with jurisdiction must classify the corridor as wild, scenic, or recreational.⁷² Sometimes though, Congress chooses to classify the river to settle the issue of how the river should be administered.⁷³

Once referred to as the macro-focus of the statute,⁷⁴ the designation process allows states, federal agencies, and Congress to gather information about the

64. Section 1273(a)(ii) of the Act details the state designation method. The National Park Service (NPS), acting as the Department of Interior's representative, processes the request and makes recommendations for inclusion, if the studies indicate that the river is worthy of inclusion in the wild and scenic rivers system. Frost, *supra* note 7, at 317 n.16.

65. See 16 U.S.C. § 1273(a).

66. *Id.*

67. Frost, *supra* note 7, at 317.

68. *Id.* The Secretary of Interior retains jurisdiction over state-designated rivers. See *Swanson Mining Corp.*, 790 F.2d at 103 n.5. But, the Act only directs the Secretary to cooperate with the state to manage the WSRA lands. 16 U.S.C. § 1283(a).

69. 16 U.S.C. § 1274(b). Boundaries must be fixed within one year from the date of designation. *Id.* Section § 1275(d) sets interim boundaries at a distance of one-quarter mile on either side for the entire river corridor. Importantly, this boundary is an average. Thus, it is possible for the boundary to extend farther than one-quarter mile from the high water mark in certain places. Frost, *supra* note 7, at 318 n.22. The actual physical boundaries of the river corridor fix the actual physical boundaries within which the Act's substantive measures most clearly apply. Hiser, *supra* note 22, at 1051 n.44 (arguing that "Congress's use of 'invade the area' suggests that WSRA section 7 applies only to activities that take place within the boundaries of a wild and scenic river area").

70. 16 U.S.C. § 1273(a)(ii).

71. Frost, *supra* note 7, at 318 n.22.

72. 16 U.S.C. § 1274(b).

73. Frost, *supra* note 7, at 319 n.27 (citing 16 U.S.C. § 1274(a)(61), where Congress designated and classified Washington State's White Salmon River as a scenic river). Different segments of a river can also be classified differently. For example, the Metolius River in eastern Oregon has 17.1 scenic and 11.5 recreation protected miles. See Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub.L. No. 100-557, 102 Stat. 2785 (Oct. 28, 1988); see also River Mileage Classifications for Components of the National Wild and Scenic Rivers System <<http://www.nps.gov/rivers/wildriverstable.html>> (visited Dec. 4, 1999).

74. Hiser, *supra* note 22, at 1048 ("Designation of Rivers Under the WSRA – The Macro Balance").

proposed river. The relevant state, federal agencies, and ultimately Congress analyze the effects of the proposed designation from various perspectives, including from the development perspective.⁷⁵ This information-gathering focus serves the designation process's preservation objective because a primary purpose of studying a proposed river is to determine whether a river has ORVs qualifying it for inclusion in the system.⁷⁶ In effect, the designation process is a gatekeeper for the Act's preservation mandates.⁷⁷ After designation, the Act focuses on the remaining objective: how to protect and enhance the river's ORVs.

C. *Preservation Mandates*

Sections Seven, Ten, and Twelve of the WSRA comprise the core of the Act's preservation goal. Taken collectively, these sections reflect the WSRA objectives to (1) control federal water development,⁷⁸ (2) place federal land and river management agencies under new congressional mandates,⁷⁹ and (3) create a system for preserving and protecting rivers and their values.⁸⁰ River management plans, discussed below, are mandated by Congress⁸¹ and provide the management blueprint for achieving the Act's preservation objectives.

75. *Id.* at 1049 (noting that "Congress sought to ensure full consideration of both the preservation and development values of each proposed wild and scenic river before permanently including it in the system"). All relevant federal agencies must weigh in on the potential designation; specifically, Interior, Agriculture, Army, and FERC. *Id.* at 1049 (citing 16 U.S.C. § 1275(b)). State input must also be sought. *Id.*

76. When a river reaches the level of consideration for inclusion in the wild and scenic rivers system, Congress is at least willing to consider preserving that particular river or river segment. Designation of a river provides for protection of that river. *See, e.g., Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499, 1505-06 (9th Cir. 1995) (citing Act's legislative history indicating that designation invokes preservation sections of the Act).

77. *See Hiser, supra* note 22, at 1050 (stating that "[w]hen it designates a river for inclusion, Congress has already set the balance in favor of preservation."). In other words, when Congress designates a river it, at the same time, decides to protect that river. Conversely, the designation process also weeds out rivers Congress believes are not worthy of protection because Congress can simply choose to not designate a river.

78. 16 U.S.C. § 1278(a).

79. 16 U.S.C. § 1281(a) (providing that each land management agency "shall" administer the river according to Congress' protect and enhance standard); *see also Federalism and the WSRA, supra* note 55, at 422-23; discussion *infra* Part III. As the authors of *Federalism and the WSRA* noted, the Act had immediate effects on no less than four federal land management agencies: the BLM, the Fish and Wildlife Service, the National Park Service, and the U.S. Forest Service. *Id.* at 422-23 (concluding that "[w]hether these agencies were preservation or multiple-use entities made little difference; Congress intended to control federal agency activities affecting land along designated wild and scenic river corridors").

80. 16 U.S.C. § 1271 (policy of Act).

81. 16 U.S.C. § 1274(d).

1. Section Seven

Section Seven prohibits the Federal Energy Regulatory Commission⁸² (FERC) from licensing any water project under the Federal Power Act (FPA)⁸³ “on or directly affecting” any designated river.⁸⁴ It also prohibits any “department or agency of the United States” from assisting in the construction of any water project that would directly and adversely affect a designated river’s ORVs.⁸⁵ In 1986, the District of Columbia Circuit concluded that section 7 limits FERC’s licensing of hydroelectric projects even if FERC did not explicitly determine that project construction would adversely affect the river.⁸⁶ Put simply, this section is the manifestation of the WSR’s free-flowing river concept.

2. Section Ten

Section Ten of the WSR obligates the federal agency with jurisdiction over the river corridor to manage the river corridor to “protect and enhance” its values.⁸⁷ This language places federal land management agencies under

82. FERC is an independent agency within the Department of Energy. FERC authorizes, oversees, and administers the licensing and relicensing of non-government hydroelectric projects and dams. 16 U.S.C. §§ 791-825 (1994).

83. *Id.*

84. 16 U.S.C. § 1278(a) (WSRA § 7(a)).

85. *Id.* Section 7(a) applies specifically to FERC in parts one and two and generally to all U.S. departments or agencies in part two. *Swanson Mining Corp.*, 790 F.2d at 102 (mining company petition to construct hydroproject on the South Fork of the Trinity River in California). Congress further restricted the ability of federal agencies to recommend water projects that would adversely affect ORVs because it required proposed projects to pass review first by the appropriate Secretary and second by Congress. 16 U.S.C. § 1278(a); *see also* Hiser, *supra* note 22, at 1051. Congress reviews the proposed project pursuant to a detailed report provided by the proposing agency on the recommended project’s adverse effects. 16 U.S.C. § 1278(a). This provision responded to preservationists’ fears about “agencies’ prodevelopment actions.” Hiser, *supra* note 22, at 1051. Congress did not entirely overlook developers though because it tweaked § 7 by stating:

Nothing contained in the [first sentence of WSR section 7(a)], however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic, or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of approval of this Act. 16 U.S.C. § 1278(a). Section 1278(a) gives the Secretary with jurisdiction over the river corridor the responsibility of deciding if a project would directly affect the river and its ORVs.

Id.; *see also Swanson Mining Corp.*, 790 F.2d at 104.

86. *See id.* at 102.

87. 16 U.S.C. § 1281(a) (WSRA § 10(a)), provides:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

controlling congressional mandates that are uniquely directed at preservation. If Congress establishes a river's ORVs, it does so by specifying values in the enabling act.⁸⁸ When Congress designates a study river as a potential addition to the system, the managing agency has an opportunity to suggest ORVs.⁸⁹ Under that process, the managing agency identifies any river ORVs that support designation in its report to Congress.⁹⁰ If for some reason either process does not generate ORVs, the Act requires the managing agency to give "primary emphasis" to "esthetic, scenic, historic, archeologic, and scientific" values.⁹¹ In situations where, for whatever reason, no designated ORVs exist, Congress ensured that the Act protects default "esthetic, scenic, historic, archeologic, and scientific" ORVs.⁹²

The importance of ORVs – whether established by Congress through an enabling act or in default, or established by the managing agency – is evidenced in the case of the Smith River. The Smith River in California is classified as a recreational river.⁹³ Under Forest Service guidelines, logging can occur in recreational river corridors as long as timber harvesting does not cause adverse impacts on ORVs.⁹⁴ But the Smith River's ORVs include its anadromous fish runs.⁹⁵ Therefore, the Forest Service could only allow logging activities that were consistent with the statutory requirement to "protect and enhance" anadromous fishery values, and under its guidelines could not permit logging that adversely affected the anadromous fishery ORV.⁹⁶ In sum, the classification of the river does not restrict the managing agency's actions; instead, the substantive statutory directives provided by Section Ten narrow the agency's discretion.

To comply with the Act's protect and enhance ORVs directive, federal river management agency actions must meet an anti-degradation minimum because the WSRA federal guidelines, promulgated jointly by the National Park Service and the Forest Service,⁹⁷ interpret the Act as codifying "a nondegradation

88. For example, Congress stated that Idaho's Clearwater River's ORVs included recreational values like "fast flowing with alternating stretches of riffles and pools." H.R. Rep. No. 1623, *reprinted in* 1968 U.S.C.C.A.N. 3,801, 3,804.

89. Frost, *supra* note 7, at 322.

90. 16 U.S.C. § 1275(a).

91. 16 U.S.C. § 1281(a).

92. 16 U.S.C. § 1281.

93. *See* Frost, *supra* note 7, at 319 n.28.

94. *See* WSRA Guidelines, *supra* note 48, at 39,459. In recreational river areas, forestry practices are less restricted than in either wild or scenic rivers areas. *See id.* Most assuredly though, logging cannot increase in a recreational river area more than its traditional intensity because "forestry practices should be similar in nature and intensity to those present in the area at the time of designation." *Id.*

95. *See* Frost, *supra* note 7, at 319 n.28.

96. 16 U.S.C. § 1281(a). This example employing the Smith River is merely an example. No court has ruled on this matter.

97. *See* WSRA Guidelines, *supra* note 48, at 39,454.

and enhancement policy for all designated river areas.”⁹⁸ That non-degradation and enhancement standard applies to all designated river areas regardless of the river’s classification.⁹⁹ The anti-degradation benchmark for agency WSRA management is merely a baseline for federal management policies, and the WSRA calls for more proactive federal river management because the Act also contains an enhancement directive.¹⁰⁰ However, any action producing degradation to a river’s ORVs violates Section Twelve of the WSRA.¹⁰¹ Federal agencies must not only ensure that their WSRA management structure satisfies the twin objectives of anti-degradation and enhancement, but any management structure adopted by the agency must “always be designed to protect and enhance the values of the river area.”¹⁰² Section Ten of the Act, in short, defines agency river management principles.¹⁰³

3. Section Twelve

Section Twelve of the WSRA extends the administrative and geographical reach of Section Ten’s substance because it applies to federal lands beyond the immediate confines of the river corridor, and to federal agencies other than river managing agencies.¹⁰⁴ Section Twelve states that “any lands which include, border upon, or are adjacent to” a designated river must be managed so that the river is protected according to the Act’s purposes.¹⁰⁵ Geographically, Section Twelve extends the protect and enhance standard to riverbeds, lands that border the river corridor, and lands that are adjacent to but not bordering the corridor.¹⁰⁶ Whereas Sections Seven and Ten of the Act focus

98. *Id.* at 39,458.

99. *See id.*

100. *See id.* According to guidelines issued by the Secretaries of Agriculture and Interior in 1982, a river is never required to remain in the condition existing at the time of its designation. *See Frost, supra* note 7, at 320.

101. Agency guidelines interpret the “protect and enhance” management directive as containing an “anti-degradation” standard. *See supra* notes 97-98. Therefore, any action causing degradation to an ORV violates the Guidelines’ anti-degradation standard and thus section 10 as well.

102. *See WSRA Guidelines, supra* note 48, at 39,459.

103. The WSRA Guidelines note that the management principles contained in the guidelines “stem from section 10(a)” of the Act. *Id.*

104. The Secretary of the Interior, the Secretary of Agriculture, and the head of any other federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 1273(a)(ii), 1274(a), or 1276(a) of this title, shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following November 10, 1978, as may be necessary to protect such rivers in accordance with the purposes of this chapter....Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter. 16 U.S.C. § 1283(a) (emphasis added).

105. *Id.*

106. *Id.* Sections 3 and 4 of the Act reinforce § 12’s broader geographical scope because those sections: (a) require that river plans be coordinated with adjacent federal land resource plans; and (b) allow study reports on potential WSRA rivers to address federal lands outside the physical river corridor. 16

on the river corridor and federal river management agencies,¹⁰⁷ Section Twelve addresses non-river managing federal agencies because “any other federal department or agency having jurisdiction over” Section Twelve lands must manage to protect the designated river.¹⁰⁸ The non-river managing agency must incorporate WSRAs management purposes into all policies, regulations, contracts, and any plans that affect the designated river.¹⁰⁹ Timber harvesting and road construction projects are activities with the potential to put agencies at risk of violating Section Twelve of the Act.¹¹⁰

The Ninth Circuit has concluded that Section Twelve prohibits federal actions outside the river corridor that “will impact protected values.”¹¹¹ In other words, non-river corridor agencies responsible for lands “bordering and adjacent” to a designated river must abide by the WSRAs mandate to protect and enhance ORVs. Section Twelve requires all federal agencies to ask whether any activity may adversely affect the river’s ORVs, and ensure that the ORVs are protected and enhanced.¹¹²

Section Twelve attempts a watershed perspective for the protect and enhance mandate because it forces management agencies in the river corridor and beyond to address broader watershed issues and concerns by recognizing that actions outside the river corridor itself have the potential to affect the health of the river’s ORVs. Section Twelve promotes coordinated management to protect and enhance ORVs between agencies responsible for the river corridor and agencies responsible for lands outside the river corridor.¹¹³ The Act reflects a watershed approach in other portions of the statute as well. For example, study reports¹¹⁴ that identify areas adjacent to a river area as eligible

U.S.C. §§ 1274(d), 1275(d); see also Frost, *supra* note 7, at 330 n.74.

107. See Frost, *supra* note 7, at 330; see also discussion *supra* Parts III.C.1, 2.

108. 16 U.S.C. § 1283(a).

109. *Id.*

110. *Id.*

111. *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 819 (9th Cir. 1990) (motion to enjoin timber sale on Forest Service land adjacent to the South Fork of the Trinity River in California). The question presented in *Tyrrel* required the Ninth Circuit to determine whether the WSRAs directed the adjacent agency to prepare a WSRAs management plan. The court concluded that the Act did not place that mandate on the adjacent agency. See *id.* But, the court did state that “Section 1283 [§ 12] requires that any federal agency with jurisdiction over lands within or adjacent to . . . [a WSRAs river] take such action . . . as may be necessary to protect such rivers . . .” *Id.* (internal quotations omitted).

112. See *supra* note 104. The WSRAs Guidelines do not define “bordering and adjacent.” But, in *Tyrrel*, the Forest Service argued that the proposed timber sale did not implicate the Act because “the timber at issue rests on lands a quarter of a mile from the river.” *Tyrrel*, 918 F.2d at 819. The Ninth Circuit concluded that the land was either within or adjacent to the designated area. *Id.* The Ninth Circuit also referred to those bordering and adjacent lands as areas “near the boundaries of the protected river” and areas “around designated rivers.” *Id.* at 816-17.

113. Clearly, coordination between agencies would further each agency’s respective ability to fulfill its WSRAs duties. See Frost, *supra* note 7, at 330.

114. Either the National Park Service or the Forest Service prepares a study report on potential inclusions in the system, which is given to the President who passes the report with his recommendations to Congress. See WSRAs Guidelines, *supra* note 48, at 39,455.

for inclusion can propose expansions of the original study area "to preserve and facilitate management of the river ecosystems."¹¹⁵ In addition, in 1979, President Carter directed the Secretaries of Interior and Agriculture to revise the WSRA guidelines so that the WSRA evaluation process emphasized "consideration of river ecosystems."¹¹⁶ Section Twelve furthers Congress' intent to create an effective protection system for wild and scenic rivers by extending the protect and enhance mandate beyond the designated river corridor to the river ecosystem.¹¹⁷

4. River Management Plans

In 1986, Congress amended the WSRA to require that federal agencies responsible for management of rivers designated after January 1, 1986 prepare comprehensive river management plans designed to enumerate management practices necessary for protection of ORVs.¹¹⁸ The directive to prepare comprehensive river management plans is a crucial component of the Act's protect and enhance structure because the management plan specifies how the river managing agency will protect and enhance ORVs.¹¹⁹ Preparation of such plans furthers management agencies' ability to subsequently comply with the Act's substantive protect and enhance standard.¹²⁰ Federal agencies can craft a WSRA structure that satisfies the protect and enhance ORVs standard by basing that management structure on river plans that incorporate anti-degradation and enhancement criteria.

The comprehensive river management plan requirement directs agencies to develop plans based on the management standards detailed in sections 7, 10, and 12 of the Act.¹²¹ Specifically, the river managing agency must prepare a plan that provides "for the protection of the river values."¹²² Collectively, these sections ensure that designated rivers remain free-flowing, establish the controlling protect and enhance standard, and apply that standard broadly. A river management plan's purpose is to inform the public and the agency that agency land management actions, decisions, and policies will protect and

115. *Id.* at 39,458.

116. *Id.* at 39,455. Watersheds capture the basic ecological, hydrological, and geomorphic relationships of rivers as "a hydrologic unit and as an ecosystem." United States Environmental Protection Agency, *A Watershed Primer* at 6 (1994).

117. The WSRA also contributes to the creation of a general preservation category by allowing for land and easement acquisition, and by giving the relevant Secretary powers to withdraw lands from public entry and sale. See 16 U.S.C. §§ 1279-81; see also Hiser, *supra* note 22, at 1050.

118. 16 U.S.C. § 1274(d); see also Pub. L. No. 99-590, 100 Stat. 3330 (1986).

119. 16 U.S.C. § 1274(d)(1).

120. 16 U.S.C. § 1274(d); see also discussion *infra* Part V.A.

121. 16 U.S.C. § 1274(d).

122. *Id.*

enhance river ORVs.¹²³ By developing a comprehensive river management plan that satisfies the mandate to protect river values, the agency meets the Act's substantive management standards. In short, a river management plan is the agency's expression of how it proposes to meet the Act's concrete and judicially enforceable management standards. The mandate to create a comprehensive river management plan is as concrete and judicially enforceable as the very management standards relied on by the plan.¹²⁴

IV. THE OREGON TRILOGY

Environmental groups have been attacking BLM grazing management practices across the West and in eastern Oregon for years with little success.¹²⁵ Environmentalists are particularly concerned with grazing's impacts on riparian zones.¹²⁶ Cattle gravitate naturally to water and riparian grasses.¹²⁷ In fact, ranchers often direct their cattle toward river corridors.¹²⁸ Adverse effects of cattle grazing include destruction of riparian habitat, degradation of fish habitat, and introduction of fecal matter into riverine systems, which causes increased sediment loads and water temperature increases.¹²⁹ Grazing is, in short, a significant contributor to the degraded status of western public lands in wild and scenic river corridors.¹³⁰ Therefore, it is not surprising that the core of each of the three Oregon cases is a challenge by environ-

123. See *Cosgriffe*, 21 F. Supp. 2d at 1219.

124. *Id.* at 1217-18.

125. See, e.g., Karl N. Arruda & Christopher Watson, *The Rise And Fall Of Grazing Reform*, 32 LAND & WATER L. REV. 413, 424-26 (1997) (describing various calls for grazing reform); see also Jonathan Brinckman, *Judge Bars Grazing Along Parts of Owyhee River*, OREGONIAN, Nov. 20, 1999, at D1 (noting that the *Singleton* case "is the latest skirmish in the battle between conservationists, who say grazing is damaging . . . rangeland across the West, and ranchers, who say their traditional way of life is being attacked").

126. For example, plaintiffs in *Singleton I* focused their argument against BLM and grazing on the riparian zone of the Owyhee because "[t]he areas most affected by livestock grazing were trail crossings and "water gaps," the places where livestock come to the river to drink." *Singleton I*, 47 F. Supp. 2d at 1185.

127. See, e.g., Joseph M. Feller, *What Is Wrong With The BLM's Management Of Livestock Grazing On The Public Lands?*, 30 IDAHO L. REV. 555, 562 (1993/94) (stating that "livestock congregate in riparian areas, [thereby] removing the vegetative cover necessary to slow and spread floodwaters and stabilize streambanks against erosion").

128. Despite clear evidence indicating that grazing caused riparian degradation on the Owyhee, and in contradiction to BLM pasture rotation plans to prevent "undue grazing pressure around water locations," a BLM rangeland specialist concluded that Owyhee grazers were manipulating and abusing the flexibility [in pasture rotation] . . . allowed. *Singleton I*, 47 F. Supp. 2d at 1187-88. A possible explanation for the Owyhee grazer's resistance to exclusion from the river's riparian zone is geomorphologic. The Owyhee area is so arid that the only economically feasible area to graze cattle is the riparian zone. See Brinckman, *supra* note 125 (noting that recent decision banning cattle from corridor "would be devastating to ranchers" because the areas subject to the ban and "crucial because they are used to water cattle or cross the river").

129. See, e.g., Frost, *supra* note 7, at 321 n.39.

130. Feller, *supra* note 127, at 560-62.

mental plaintiffs to the Bureau of Land Management's (BLM) management of cattle grazing in wild and scenic river corridors.

What is unique about the Oregon trilogy is that for the first time plaintiffs challenged BLM grazing practices by employing the WSRA. What is significant is that each court in the Oregon trilogy concluded that the "protect and enhance" standard of the Act governed BLM's management of grazing practices in wild and scenic river corridors. Consequently, BLM must now reevaluate decades-old deference to cattle grazers, establish new grazing management policies, and act affirmatively to comply with the WSRA mandate in an area covering at least 455.3 river miles and 50,000 acres of public lands.¹³¹ Most importantly, BLM must recognize that the protect and enhance standard applies to any activity occurring in the river corridor.

A. Oregon Natural Desert Association v. Green

In 1988, Congress designated the Donner and Blitzen River in Oregon as a wild river,¹³² and established the river's ORVs to include geology, recreation, scenery, fisheries, and vegetation values.¹³³ In 1991, BLM contracted with scientists to inventory the river corridor's native and unique flora.¹³⁴ Based on their studies, which found that the vegetation ORVs of the river corridor existed in extraordinary number and diversity, the scientists "unanimously recommended that BLM remove grazing from the river corridor."¹³⁵ The BLM, however, did not remove grazing from the corridor at that time, apparently on the belief that it lacked power to exclude grazing from the corridor.¹³⁶

In 1997, the Oregon Natural Desert Association (ONDA) asked the district court to find that BLM's management plan for the river violated the WSRA because it failed to protect and enhance the river's ORVs by allowing contin-

131. *O.N.D.A. v. Green*, 953 F. Supp. 1133, 1137 (D. Or. 1997) (74.8 river miles and 19,353 acres) (Donner and Blitzen River); *National Wildlife Federation v. Cosgriffe*, 21 F. Supp.2d 1211, 1215 (D. Or. 1998) (147.5 mainstem river miles, 47 South Fork miles and in total 31,490 acres) (John Day Mainstem and South Fork Rivers); *Singleton I*, 47 F. Supp. 2d at 1184-85 (120 mainstem miles, 57 West Little miles, and 9 North Fork miles) (Owyhee Mainstem, West Little, and North Fork Rivers).

132. Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557, § 102, 102 Stat. 2782 (Oct. 28, 1988) (codified at 16 U.S.C. § 1274(a)(74) (1994)).

133. 134 Cong. Rec. S15236-03 (Oct. 7, 1988) (Proceedings and Debate of the 100th Congress Second Sess. on the Omnibus Oregon Wild and Scenic Rivers Act) (Characteristics and Outstandingly Remarkable Values of Rivers Designated in Omnibus Oregon Wild and Scenic Rivers Act) [hereinafter Oregon Omnibus Values]; see also *Green*, 953 F. Supp. at 1137.

134. *Id.*

135. *Id.* at 1137.

136. *Id.* at 1146.

ued grazing.¹³⁷ ONDA claimed that cattle grazing continued to degrade vegetation ORVs. In response, BLM argued that, although degradation might have been occurred in the past, present-day vegetation ORVs were stable and on an upward trend.¹³⁸ In its defense, BLM highlighted the fact that, pursuant to the river plan, it previously excluded cattle from 40 of the 74.8 river miles of the corridor.¹³⁹ The court noted, however, that BLM had not actually closed an entire forty-miles to grazing; instead, the topography of the area made grazing physically impossible in a portion of that forty-miles.¹⁴⁰ Moreover, the court commented that BLM had not excluded, nor did it have any plans to exclude, cattle from any new river areas outside the forty-mile segment.¹⁴¹

The court reviewed the river plan's measures to evaluate grazing impacts and determined that BLM relied on a management objective of simply improving the riparian conditions.¹⁴² This plan objective "improving riparian conditions" became the center of ONDA's case. Relying on the statute's protect and enhance mandate, ONDA argued that managing to achieve solely an upward trend of improvement did not protect and enhance the river's ORVs.¹⁴³ More specifically, ONDA's connected each of its ecological concerns to the argument that the plan's improvement-trend standard could not and would not protect and enhance the river's cultural, geology, recreation, scenery, wildlife, fisheries, and vegetation values. The court agreed.

The court concluded that BLM's management plan failed to protect and enhance the river values because it failed to adequately consider excluding

137. *Id.* at 1143-44. ONDA alleged that the WSRA management plan violated the Act by (1) allowing continued cattle grazing; (2) incorporating construction of new parking lots; (3) scheduling secondary access road improvements; and, (4) authorizing the implementation of a water diversion resource project. *Id.*

138. *Id.* at 1138 (BLM's insisted that "changes in grazing management . . . including reduced stocking levels, changes in season of use and pasture rotation, and periodic rest, will produce an upward trend in areas that are currently stable and will accelerate the improvement in areas that already show upward trend").

139. Generally, the geographic topography of the corridor and fencing excluded cattle from some portions of the river. *Id.* Specifically, BLM offered observational and photographic evidence that the status of the largest enclosure, a 6.5 mile stretch of the mainstem, "was closed to grazing in 1981, [and] has improved significantly." *Id.*

140. *Id.*

141. *Id.* at 1139.

142. *Id.*

143. *Id.* BLM defined its "trend in range condition" "as meaning a movement toward or away from the climax or potential natural community." *Id.* Indicators of trend in riparian condition can include ground cover increases, herbaceous species compositional changes, increase in woody species, and changes in stream depth or width. *Id.* BLM's river plan established that "grazing will not exceed in riparian areas 45 percent utilization of herbaceous plants and 20 percent utilization of woody plants." *Id.* ONDA challenged those scientific bases and their validity in light of the protect and enhance standard. In addition, ONDA viewed the health of aquatic species in the river as imminently threatened because BLM's recent aquatic habitat survey on 40 of the river's 74.8 protected miles found that "[f]orty-five percent of the surveyed habitat was in 'poor' or 'fair' condition." *Id.* Finally, ONDA challenged the river's water quality figures produced by BLM, the plan's lack of a management standard for instream fish conditions, and the plan's approval of motorized vehicle operation in more than seven miles of the corridor area. *Id.* at 1140.

cattle from the river area, and thus did not implement actions necessary to protect and enhance vegetative ORVs.¹⁴⁴ According to the court, the plain language of the WSRA required BLM to manage the river to protect and enhance the river's ORVs.¹⁴⁵ Since the record unequivocally showed that cattle grazing was degrading the river's ORVs, the court rejected BLM's position that it could both protect and enhance river values while simultaneously allowing grazing to continue.¹⁴⁶ The court therefore ordered the parties to craft the scope and terms of a permanent injunction.¹⁴⁷ Subsequently, BLM agreed to construct protective fencing for the WSRA designated portions of the river.¹⁴⁸

Green represented the first judicial application of the enforceable WSRA protect and enhance standard to BLM grazing practices. *Green* was also the first WSRA case to indicate the Act's ability to curtail activities that traditionally operated inconsistently with statutory management directives. Thus, *Green* was the foundation for the other Oregon trilogy cases.

B. National Wildlife Federation v. Cosgriffe

Nineteen months after losing *Green*,¹⁴⁹ BLM faced another challenge to its grazing management practices, this time on Oregon's John Day River.¹⁵⁰ In 1988, Congress added 147.5 mainstem miles and 47 south fork miles of the John Day to the wild and scenic rivers system as recreational rivers.¹⁵¹ Five years later, in 1993, BLM had set no river boundaries, nor had it begun the WSRA management plan process.¹⁵² This delay plainly violated sections

144. *Id.* at 1144. In response, BLM argued that it had authority to exclude cattle from the river corridor but that its plan provided for management changes, which the agency claimed would adequately protect and enhance the ORVs. *Id.* The proposed changes included requiring "fencing, development and protection of alternative water sources, or elimination of livestock grazing." *Id.*

145. *Id.* (citing 16 U.S.C. § 1281(a)). The court stated that "[a]bsent ambiguity or an absurd result, the plain meaning of the statute must control." *Id.* Indeed, the later parts of § 1281(a) provide that the agency's management of the river should protect and enhance "in so far as is consistent" without limiting other uses that "do not substantially interfere." However, the court directly ruled that it is not left to BLM's judgment to overlook facts showing that grazing is "substantially interfering." *Id.* at 1145.

146. *Id.* at 1145-46 ("[t]he court disagrees with BLM's assertion that the River Plan strikes the appropriate balance between continued grazing and protecting and enhancing the river values"). *Id.* at 1145.

147. *Id.* at 1149.

148. See Interview with Stephanie Parent, Attorney for the Pacific Environmental Advocacy Center and ONDA (Sept. 24, 1999).

149. The *Green* court announced its decision in January 1997. The *Cosgriffe* court announced its decision in August 1998.

150. *Cosgriffe*, 21 F. Supp. 2d at 1211. The John Day River, in northeastern Oregon, flows for over 500 miles without any dams. *Id.* at 1215. Consequently, the John Day and its three forks are the longest unimpounded river in the Columbia River Basin. *Id.* Draining nearly 8,100 square miles, the John Day system is "one of the most important river systems in the Columbia River Basin for wild salmon, especially spring chinook and winter steelhead." *Id.*

151. 16 U.S.C. §§ 1274(a)(79), (a)(101).

152. *Cosgriffe*, 21 F. Supp. 2d at 1215.

1274(b) and (d) of the Act, which require BLM to set boundaries within one year of river inclusion and prepare a plan within three years.¹⁵³ The plaintiffs asked the court to order BLM to prepare a river plan for the WSRA-designated portions of the mainstem and south fork of the John Day River. The court ordered BLM to do exactly that.¹⁵⁴

The plaintiffs also sought removal of cattle from degraded river corridor areas arguing that BLM-authorized grazing harmed the John Day's ORVs.¹⁵⁵ In 1988, Congress established the mainstem John Day ORVs to include fisheries, scenic, recreation, geological, archaeological, and paleontology values.¹⁵⁶ The South Fork ORVs, established at the same time, included vegetation, fisheries, scenic, and recreation.¹⁵⁷ As in *Green*, the *Cosgriffe* court prefaced its discussion of cattle grazing with a recognition of BLM's WSRA duty to manage the river pursuant to the protect and enhance standard.¹⁵⁸ Thus, if BLM allowed river corridor activity that did not protect and enhance any one of the John Day's ORVs, the agency violated the Act.

The court concluded, however, that the plaintiffs presented no facts that connected current grazing practices to degradation of the John Day's ORVs.¹⁵⁹ BLM had not produced a management plan for the river, suggesting that BLM had no framework to monitor grazing's impact on the agency's substantive compliance with the Act.¹⁶⁰ BLM-authorized grazing had caused riparian degradation in the past.¹⁶¹ But, the court did not enjoin grazing on John Day wild and scenic river areas that were in poor or fair condition in order to protect and enhance the river's ORVs.¹⁶² Rather, the court ordered BLM to

153. *Id.* at 1217-18 (citing 16 U.S.C. §§ 1274(b), (d)). Section 1274(d) applies only to post-1986 designated rivers. 16 U.S.C. § 1274(d).

154. *Cosgriffe*, 21 F. Supp. 2d at 1224. According to the court's calculation, "BLM should have prepared the comprehensive management plans by October 28, 1992." *Id.* at 1219. The court concluded that the creation of a management plan will allow BLM to meet its protect and enhance duty because "[a] comprehensive management plan will ensure the public that the BLM is properly managing the river to enhance such important values as wildlife, scenery, cultural resources, and recreational opportunities." *Id.* The court's equating a management plan to an agency's greater likelihood of protecting and enhancing ORVs is crucial because it stresses the important connection between the Act's procedural mandate to create a plan and its substantive management standard to protect and enhance. See discussion *infra* Part V.A. Note that each of the Oregon cases involved BLM violations of the WSRA management plan procedures. See *infra* note 189 and accompanying text.

155. *Cosgriffe*, 21 F. Supp. 2d at 1216.

156. Oregon Omnibus Values, *supra* note 133; *Cosgriffe*, 21 F. Supp. 2d at 1221.

157. *Id.*

158. *Cosgriffe*, 21 F. Supp. 2d at 1215 (citing 16 U.S.C. § 1281(a)).

159. *Id.* at 1222.

160. See *supra* note 152 and discussion *infra* Part V.A.

161. *Cosgriffe*, 21 F. Supp. 2d at 1222.

162. The court reasoned that "an injunction speaks only to future actions, it is the BLM's current practices extrapolated into the future, rather than its abandoned past practices" that are relevant. *Id.*

prepare a WSRA plan by November 1, 1999,¹⁶³ a deadline that BLM missed.¹⁶⁴

Cosgriffe was a restrained application of the protect and enhance standard first invoked in *Green* because although the court expressly recognized that BLM river management must adhere to the Act's protect and enhance standard,¹⁶⁵ the court refused to apply that standard to BLM grazing management, even though it determined that BLM-authorized grazing historically had "clearly contributed to the degradation of the John Days" ORVs.¹⁶⁶ The court instead chose to distinguish between those past management practices and the likelihood of better BLM river management in the future.¹⁶⁷ *Cosgriffe*, however, is an important component of the Oregon trilogy because for the second time in a relatively short period a federal court stated explicitly that BLM's overriding duty under the WSRA is to protect and enhance ORVs.¹⁶⁸ *Cosgriffe* reaffirmed *Green's* recognition of the "protect and enhance" management standard.

163. *Cosgriffe*, 21 F. Supp. 2d at 1224.

164. On October 8, 1999, BLM filed a motion for relief from judgment asking for additional time to complete the management plan. *National Wildlife Federation v. Cosgriffe*, Civ. No. 97-853-ST at 1-2. The court granted BLM's motion on October 21, 1999.

165. *Cosgriffe*, 21 F. Supp. 2d at 1215.

166. *Id.* at 1222. As the *Cosgriffe* court noted, more persuasive evidence existed in *Green*. *Id.* at 1221-22. But, the general tone of the *Cosgriffe* court appears more flexible towards grazing. For example, the *Cosgriffe* court found important the fact that "BLM . . . introduced evidence which establishes that riparian areas may be able to recover despite limited grazing." *Id.* at 1222 (emphasis added). "May be able to recover" is a standard that is a far cry from the only WSRA standard at issue—protect and enhance. Here, the court found sufficient BLM's decisions to limit grazing and negotiate with private landowners whereas in *Green* the court effectively said "enough is enough" to delay and balancing efforts designed to maintain grazing.

167. *Id.* Citing *Green*, plaintiffs argued that the court only need ask whether "prohibiting grazing would be an appropriate remedy for the BLM's established WSRA violation" and not decide whether the individual grazing permits violated the Act. *Id.* at 1221-22. The court distinguished the facts in *Green*, however, from the facts presented. In *Green*, BLM-contracted scientists concluded that grazing should be banned in the WSR corridor. No similar recommendation existed in *Cosgriffe*. *Id.* Interestingly, the court commented that "although the BLM's past grazing practices clearly contributed to the degradation of the John Days [sic] WSRs, many of the facts relied on by plaintiffs fail[ed] to link the BLM's current grazing practices to the health of the John Day WSRs." *Id.* at 1222 (emphasis added). The court placed great faith in BLM's new-found ecological direction for its grazing management in the John Day River, which consisted of BLM assurances of future compliance with the Act by "limiting grazing and negotiating with private landowners." *Id.* The court struck an even friendlier tone when it noted that BLM improvement "will take time." *Id.* This respect is curious considering that the court had just admonished BLM for not "changing" its management structure enough to prepare a management plan within the statutory deadlines. *See id.* at 1219. The court even stated that "BLM's actions up to this point inspire little confidence." *Id.* The court apparently concluded that BLM's lack of change controlled in one context but overlooked that lack of change in another.

168. "The BLM must administer the rivers primarily to 'protect and enhance' their 'outstandingly remarkable values.'" *Id.* at 1215 (citing 16 U.S.C. § 1281(a)).

C. Oregon Natural Desert Association v. Singleton

In 1984 and 1988, Congress included Oregon's Owyhee River and its forks in the wild and scenic rivers system as wild rivers.¹⁶⁹ BLM's 1993 river plan described the river's ORVs as scenic, geologic, recreation, wildlife, and cultural for the Main Owyhee, recreation, scenic, and cultural for the West Little, and scenic, recreation, and fish and wildlife for the North Fork.¹⁷⁰ BLM's plan for the Owyhee stated that livestock grazing was to continue to "the extent currently being practiced."¹⁷¹ ONDA challenged BLM's management plan,¹⁷² arguing that the plan allowed grazing to continue in the Owyhee river corridor despite BLM's own findings and reports indicating that grazing was detrimental to the river's ORVs.¹⁷³ ONDA argued that this rationale was inconsistent with the WSRA's protect and enhance mandate.¹⁷⁴ The court agreed in *ONDA v. Singleton*.

The *Singleton I* court took special notice of the river's wild classification.¹⁷⁵ The court also observed that "sensitive" federal and state plant species, and redband trout, a species petitioned for listing on the Endangered Species Act, existed in the river corridor.¹⁷⁶ Moreover, the court noted that BLM's own 1993 river plan determined that cattle grazing negatively impacted the scenic and recreational ORVs for the mainstem, West Little, and North Fork Owyhee.¹⁷⁷ Because "[t]he WSRA provides that each component of the . . . system is to be administered in such a manner as to protect and enhance its

169. 16 U.S.C. § 1274(a)(91). Congress classified and included the Main in 1984, the West Little and North Fork in 1988. *Id.* Like the Donner and Blitzen and John Day Rivers, the West Little and the North Fork are a product of the Oregon Omnibus Wild and Scenic Rivers Act of 1988. *Singleton I*, 47 F. Supp. 2d at 1184-85.

170. *Id.* at 1188; see also Oregon Omnibus Values, *supra* note 133.

171. *Singleton I*, 47 F. Supp. 2d at 1186. Relying on an early 1979 National Park Service report indicating that grazing would continue, BLM argued that "it has the authority to restrict cattle grazing as necessary to protect river values, but that it cannot eliminate grazing altogether." *Id.* at 1191. BLM claimed that Congress recognized grazing was consistent with the Owyhee's ORVs, and that Congress intended for grazing to continue in the Owyhee corridor. *Id.* at 1191. The court concluded that the WSRA "gives no support to the notion that Congress specifically intended cattle grazing to occur in the Owyhee Rivers" reasoning that Congress knows how to grandfather in uses of a wild and scenic river and chose not to in this case. *Id.*

172. *Id.* at 1184.

173. *Id.* at 1186. A 1991 BLM draft plan on the Owyhee River additions of the West Little and North Forks determined that "in the river area accessible to livestock – 67 miles, or 36%, of the 186-mile river system – grazing was creating noticeable negative effects on about 10%, or 18 miles." *Id.* In addition, "at least seven of 11 grazing allotments and one trail area showed negative effects from grazing, and that these negative effects had a direct impact on the scenic, recreational, and watershed ORVs of the Owyhee Rivers." *Id.*

174. *Singleton I*, 47 F. Supp. 2d at 1184.

175. *Id.* at 1185 (noting that "[t]he 'wild' classification is the most restrictive of the three possible classifications").

176. *Id.*

177. See *supra* note 173.

ORVs,¹⁷⁸ the court concluded that BLM had a duty to ban cattle from the corridor if necessary to meet its protect and enhance obligation.¹⁷⁹ The court's conclusion rejected BLM's historical deference to cattle grazers in the Owyhee River corridor.¹⁸⁰ The *Singleton I* court, however, postponed deciding ONDA's injunctive relief request to ban cattle from the river corridor, and instead ordered BLM to conduct another environmental review considering alternatives to continued grazing within the river corridor.¹⁸¹

The question of injunctive relief requires a court to engage in a balancing test and find that injunctive relief is in the public interest.¹⁸² In an opinion issued on November 18, 1999, one year and fifteen days after the court's original ruling, the *Singleton II* court conducted such an analysis in response to plaintiffs' earlier requests to enjoin cattle grazing from the Owyhee River corridor.¹⁸³ The court determined that the public interest in BLM adhering to WSRA management standards, and the public interest in protecting and enhancing the Owyhee River ORVs, warranted ordering BLM to exclude cattle grazing from areas of concern in the river corridor.¹⁸⁴ In the context of balancing the competing claims of injury to determine the injunctive relief question in *Singleton II*, degradation of river ORVs trumped rancher's loss of economic livelihood.¹⁸⁵ The court specifically directed BLM to eliminate the grazing permits at issue, not shift the permits thus grazing to less degraded areas.¹⁸⁶ This decision represents the most explicit judicial application of the

178. *Singleton I*, 47 F. Supp. 2d at 1192 (internal quotations omitted). In the court's words, the WSRA contained unambiguous statutory language. *Id.* The court reasoned that it "determines the importance of a problem by determining what the statute in question makes important," and that the WSRA makes the protect and enhance mandate important. *Singleton I*, 47 F. Supp.2d at 1190 (citing *Lake Mohave Boat Owners Ass'n v. National Park Service*, 138 F.3d 759, 763 (9th Cir. 1998)).

179. The court stated: "[T]o the extent that the 1979 ES [environmental statement] appears to assume that grazing will continue, that assumption is overridden by the explicit 'protect and enhance' language of the WSRA and the designation of the Owyhee Rivers as 'wild,' which under the terms of the statute requires that watersheds be maintained in a primitive condition and the waters kept unpolluted. Regardless of whether cattle grazing was a permitted use when the rivers were first designated, if grazing proves to be detrimental to soil, vegetation, wildlife, or other values, or is inconsistent with the 'wild' designation, then clearly the BLM has the right - indeed, the duty - not only to restrict it, but to eliminate it entirely." *Singleton I*, 47 F. Supp. 2d at 1192. In addition, the court concluded that plaintiffs do not have a burden of proof to show that grazing causes a "substantial likelihood" of "substantial degradation" to ORVs. *Id.*

180. Cattle grazing permit holders in the Owyhee corridor argued that grazing predated the WSRA designation, that Congress intended for it to continue, and that BLM had consistently allowed them to graze in the corridor. *Id.* at 1186.

181. *Id.* at 1195-96.

182. *See, e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987).

183. *See O.N.D.A. v. Singleton*, 75 F. Supp. 2d 1139 (D. Or. 1999) [hereinafter *Singleton II*].

184. *Id.* at 1152.

185. *Id.* at 1150-52. The court determined that exclusion of cattle from the corridor reduced the grazers subsidized grazing privileges, thereby adversely affecting individual permit holders, not the overall economy of the area. *Id.* at 1152. Excluding cattle from the Owyhee corridor for all intents and purposes assures that individual ranchers cannot turn an economic profit on grazing. Exclusion from the river corridor is exclusion from by far the best source of grass and water in the immediate area. *See supra* notes 127-28.

186. *Singleton II*, 75 F. Supp. 2d at 1145.

protect and enhance management standard because the *Singleton II* court balanced competing interests so that the mandate to protect and enhance a wild and scenic river finally overcame the historical dominance of cattle grazing over federal land management schemes.

Singleton II exemplified the full force of the WSRA's protect and enhance standard as applied to BLM grazing management because the court went further than either the *Green* or *Cosgriffe* courts, ordering BLM to exclude cattle from the river corridor to comply with the WSRA. The *Green* court had merely ordered the parties to reach agreement on relief after noting that BLM had the authority to exclude cattle from a river corridor, which resulted in BLM agreeing to fence the river corridor.¹⁸⁷ The *Cosgriffe* court, on the other hand, explicitly declined to order BLM to exclude cattle, and only ordered BLM to create a river plan.¹⁸⁸ *Singleton II*, as a representation of the judicial enforceability of the WSRA's protect and enhance management standard, however, rests largely on the foundation created by *Green* and *Cosgriffe*. *Singleton II* completes the Oregon trilogy because the *Singleton II* court's order compelling BLM to remove cattle from the river corridor is the application of the WSRA's protect and enhance management standard that *Green* recognized and *Cosgriffe* affirmed.

V. LESSONS FROM THE OREGON TRILOGY

The Oregon trilogy established that courts will enforce the WSRA protect and enhance standard, requiring review of land management practices in an area encompassing 455.3 river miles and more than 50,000 acres of public land in these cases.¹⁸⁹ The protect and enhance standard, as interpreted in *Green*, *Cosgriffe*, and *Singleton I* and *II* applies to any river activity, even ones supported by history like BLM's grazing practices in eastern Oregon. The courts specifically scrutinized BLM's actions on all three rivers in light of the WSRA's overriding policy on managing designated river corridors to protect and enhance their ORVs. The Oregon cases indicate that all actions occurring in a river corridor must be judged against their effects on ORVs. Agencies must fulfill the Act's protect and enhance directive. This statutory responsibility is the essential lesson that should be drawn from these cases for both federal agency river management actions and judicial review of those actions under the WSRA.

187. See *supra* notes 147-48 and accompanying text.

188. See *supra* notes 162-64 and accompanying text.

189. See *supra* note 131.

A. Federal Agency River Management

Since enactment of the WSRa thirty years ago, agencies have been subject to the duty to protect and enhance ORVs. The Oregon cases merely make clear that the statutory mandate to protect and enhance ORVs is judicially enforceable. Moreover, as evidenced in these cases, the Act's standards are enforceable by citizens.

The WSRa now governs almost 11,000 river miles on 158 rivers.¹⁹⁰ To comply with the protect and enhance mandate, the federal river managing agencies for these rivers must understand how actions occurring in their river corridor affect designated rivers' ORVs. This understanding, of course, requires an agency to be familiar with a variety of issues, including the Act's substantive requirements, the river corridor's ORVs, and the actual uses occurring in the corridor. Familiarity with these issues should arise as the agency prepares a river management plan to protect and enhance the river's ORVs.¹⁹¹ *Cosgriffe* highlights the importance of a river plan designed to protect and enhance ORVs.¹⁹² As the *Cosgriffe* court noted, preparation of a river plan furthers the agency's fulfillment of its WSRa responsibilities as the implementing agency of the statute.¹⁹³

The directive to prepare comprehensive river plans exposes agency management structures that rely on outdated plans prepared under different mandates, or prior to a river's inclusion in the wild and scenic river system.¹⁹⁴ The plaintiffs' main purpose in *Cosgriffe* was to force BLM to create a comprehensive river management plan.¹⁹⁵ Plaintiffs' claims in *Green* and *Singleton I* attacked the insufficiency of existing BLM river plans.¹⁹⁶ Forcing agencies to either create a plan or reformulate a plan to adhere to the Act's management standards furthers the Act's protect and enhance standard because a comprehensive river plan prevents agency policies from overlooking the nexus between a river's ORVs, the protect and enhance standard, and the activities allowed by the agency in the river corridor.¹⁹⁷

190. See *supra* note 10.

191. 16 U.S.C. § 1274(d).

192. *Cosgriffe*, 21 F. Supp. 2d at 1219.

193. *Id.*

194. In *Green*, BLM argued that it did not have to prepare a river plan environmental assessment (EA) because it previously prepared EAs on the Andrews Resource Area Management Framework Plan (MFP). *Green*, 953 F. Supp. at 1147. The court noted that "the Andrews Resource Area MFP was a general plan written 14 years ago" and "it makes no mention of the WSRa." *Id.* at 1147.

195. See *supra* note 154 and accompanying text.

196. See *supra* notes 137, 172-73 and accompanying text.

197. For example, in *Green*, BLM continued to allow grazing in the river corridor, where grazing did not protect and enhance, and the river's ORVs suffered as a result. 953 F. Supp. at 1147-48. In *Singleton I*, BLM likewise did not consider the interplay between ORVs, the protect and enhance standard, and river corridor activities. The *Singleton I* court concluded that "by adopting a management plan which fails to consider whether cattle grazing is consistent with the rivers' ORVs" the BLM "failed to consider an impor-

A California federal court has also concluded that lack of a WSRA management plan suggests that the river managing agency cannot evaluate its substantive compliance with the Act's protect and enhance mandate. In July 1999, the Eastern District for the District of California determined in *Sierra Club v. Babbitt*,¹⁹⁸ that where an agency has failed to produce a WSRA management plan "that procedural violation lends great weight to assertions that the substantive requirement to preserve and enhance the values for which river was included in the wild and scenic river system has been violated."¹⁹⁹ Thus, the National Park Service's failure to develop a plan for the Merced River, like BLM's failure to develop a plan in *Cosgriffe*, meant that the agency had no method to delineate either the protection that must be given to the river ORVs, or the level of ORV degradation that could permissibly exist.²⁰⁰ Unlike *Cosgriffe* where the court declined to enjoin grazing, the California District Court enjoined ongoing activities, including the Park Service's attempts to erect stream-side walls and implement dam removal plans.²⁰¹

The Eastern District of California ruled that agency failure to develop a WSRA management plan by itself does not automatically result in injunctive relief stopping ongoing river activities,²⁰² a result similar to that in *Cosgriffe* where BLM's failure to develop a river plan did not necessarily require injunctive relief banning cattle from the river corridor. *Sierra Club v. Babbitt*, however, established that agency failure to produce a management plan, which effectively eliminates the framework necessary to judge substantive WSRA compliance, surely must weight the balancing scale heavily in favor of an injunction because the lack of a management plan greatly restricts agency compliance with the Act's protect and enhance standard.²⁰³ Without a river plan, the managing agency lacks a guiding management document that details the Act's substantive requirements, the river corridor's ORVs, and the actual uses occurring in the corridor. Without that knowledge, the agency's ability to comply with the Act's protect and enhance ORV standard is severely limited.

WSRA implementing agencies like the BLM are subject to the Act's management standards. They always have been. That those standards are also clearly judicially enforceable should indicate to river managing agencies that

tant aspect of river management which implicates the policy objectives of the WSRA" where BLM must consider the effects of river activities on the ORVs. *Singleton I*, 47 F. Supp. 2d at 1195.

198. 69 F. Supp. 2d 1202 (E.D. Cal. 1999).

199. *Id.* at 1252. In other words, "[t]he WSRA imposes both procedural and substantive requirements on the agencies responsible for administering designated areas." *Sierra Club v. United States*, 23 F. Supp. 2d 1132, 1136 (N.D. Cal. 1998).

200. *See Babbitt*, 69 F. Supp. 2d at 1252.

201. *Id.* at 1264.

202. *Id.* at 1251.

203. *Id.* at 1252.

they must begin developing, perfecting, and implementing management systems to avoid violating the Act.²⁰⁴

B. Judicial Review of Federal Agency River Management

Sometimes judicial review of federal agency management actions under the WSRA centers on whether a management plan has been created, as in *Cosgriffe*. In those cases, the court's review is comparatively simple because the Act sets mandatory timelines.²⁰⁵ The Act provides that the responsible agency must prepare a plan within three years of the river's designation.²⁰⁶ In other cases, judicial review analyzes the effects river corridor activities cause to the river's ORVs.²⁰⁷ The dispositive question for judicial review then is whether the agency is complying with its statutory mandate to manage the river area to protect and enhance its ORVs.²⁰⁸ This type of review is problematic because courts have yet to definitively interpret the protect and enhance standard.²⁰⁹ But, like federal agencies, the courts should interpret the WSRA to require the agency to prohibit activities that degrade river ORVs and act to enhance or improve the ORVs.²¹⁰

Two separate but dependent inquiries are relevant to judicial review of agency river management when the analysis concerns river corridor activities, river ORVs, and the protect and enhance standard. The first inquiry is simple – what are the river's outstandingly remarkable values?²¹¹ Here, the court need only look to enabling legislation, agency river plans, or the Act's default ORVs.²¹² The second inquiry is not as simple – is the managing agency protecting and enhancing the ORVs?²¹³ Defining what “degrades” a river's ORVs is not self-evident. Similarly, judicial review designed to determine whether or not the agency is managing to protect and enhance those values is sometimes a complex proposition. Plaintiffs seeking to enforce the Act's

204. Put simply, these cases indicate to federal river management agencies their legal management duties. The agency can comparatively analyze its existing management system to the holdings in *Green*, *Cosgriffe*, and *Singleton I*, and adjust accordingly.

205. 16 U.S.C. § 1274(d); see also *supra* notes 152-53 and accompanying text.

206. 16 U.S.C. § 1274(d); see also *supra* note 118 and accompanying text.

207. *Green*, 953 F. Supp. at 1144-45.

208. See, e.g., *Singleton I*, 47 F. Supp. 2d at 1191.

209. In the early stages of judicial review of federal land management standards courts tend to set broad rules and tests to avoid prematurely creating strict judicial interpretations. See Interview, with Stephanie Parent, *supra* note 148. Ms. Parent is a lead attorney in both the *Cosgriffe* and *Singleton* cases. She suggests that what the Oregon courts did when interpreting the WSRA management standard was “set broad parameters—then determine whether [the] agency's action falls within or without.” *Id.*

210. The WSRA incorporates an anti-degradation and enhancement directive. WSRA Guidelines, *supra* note 48 at 39,454; see also *supra* notes 99-105 and accompanying text.

211. See Frost, *supra* note 7, at 322 (stating that “[t]he values of a river underpin how it is administered and how lands in the watershed should be managed”); see also 16 U.S.C. §§ 1278(a), 1281(a), 1283(a).

212. See *supra* notes 88-92 and accompanying text.

213. See discussion *supra* Part III.C.

management standards must also ask whether the agency is protecting and enhancing the river's ORVs, because if the agency is protecting and enhancing the ORVs, no basis for a claim exists.

Whether the burden to prove if an agency is managing to protect and enhance ORVs rests with the agency or plaintiffs is unclear. *Green* and *Singleton I* indicate that the burden of proof should, however, ultimately rest with the federal agency. In *Green*, the court concluded that the "WSRA sets forth affirmative duties on the part of federal agencies charged with managing river" and that once a river is designated, "intervening duties were imposed on the agency's decision-making process with respect to management activities."²¹⁴ Indeed, plaintiffs must always make a prima facie case of non-compliance to bring a WSRA failure to "protect and enhance" claim. But, once plaintiffs make an initial showing of non-compliance, the burden should shift to the agency to prove that it has not violated the protect and enhance directive because the agency has clear, intervening, and affirmative management duties to ensure the protect and enhance directive is paramount in the agency's management decision-making process.

The *Singleton I* court addressed the question of burdens of proof and concluded that plaintiffs did not have to produce a showing of "substantial degradation" to overcome a presumption in favor of cattle grazing.²¹⁵ Specifically, the *Singleton I* court disagreed with BLM that the burden of proof rests with plaintiffs to establish an actionable violation of the WSRA by proving that BLM-authorized grazing caused a "substantial degradation" to ORVs.²¹⁶ The *Singleton I* court then reiterated that BLM must manage rivers to protect and enhance ORVs.²¹⁷ Thus, the court in *Singleton I* not only discounted that plaintiffs bear the burden of proof, but also stressed that the agency has a statutory responsibility to manage to protect and enhance ORVs. In addition, the federal agency is clearly responsible for documenting in a comprehensive river plan its proposals and actions for complying with the Act's protect and enhance ORVs directive.²¹⁸

Environmental plaintiffs are more likely to be successful in wild and scenic river litigation when the administrative record contains evidence that the detrimental effect of river corridor activities and agency management decisions, plans, and actions differ from scientific evidence and recommendations.²¹⁹ In fact, in cases like *Green* and *Singleton I*, where the administrative

214. *Green*, 953 F. Supp. at 1147.

215. *Singleton I*, 47 F. Supp. 2d at 1192.

216. *Id.*

217. *Id.*

218. 16 U.S.C. § 1274(d); *Cosgriffe*, 21 F. Supp. 2d at 1219.

219. See *Green*, 953 F. Supp. at 1137-38, 1149 (scientists unanimously recommended banning cattle from corridor and court granted plaintiffs injunctive relief); see also *Singleton I*, 47 F. Supp. 2d at 1192. (BLM actions had not improved river conditions and court ordered BLM to prepare an EIS addressing

record contained such evidence, the burden of proof question for agency compliance with the protect and enhance standard is easily satisfied. In *Singleton I*, for example, the court acknowledged that although BLM's argument that it was plaintiffs' burden to show BLM's river plan allowed degradation of ORVs had merit, "BLM's own findings of impacts in violation of the WSRA" meant that the plaintiffs did not need to establish that BLM-approved activities degraded the ORVs.²²⁰ Of course, the burden of proof question is less straightforward when the administrative record does not contain evidence incriminating the agency or examples of an agency ignoring scientific recommendations.

Cosgriffe raises the possibility that plaintiffs must establish more than a prima facie case of agency non-compliance, and link agency actions to ORV degradation. In *Cosgriffe*, plaintiffs lacked a persuasive administrative record like in *Green* and *Singleton I*.²²¹ The *Cosgriffe* plaintiffs were not successful in convincing the court to ban grazing from the river largely because the record did not show that banning cattle would correct the John Day's degradation.²²² This distinction is crucial because the plaintiffs in *Cosgriffe* argued that the court should ban grazing while BLM remedied its failure to prepare a river plan.²²³ The plaintiffs argued that because BLM had not completed a river plan, BLM could not evaluate whether or not site-specific grazing decisions harmed the river's ORVs, and that therefore the court should ban grazing until a plan was in place.²²⁴ The *Cosgriffe* plaintiffs did not attempt to argue that BLM-authorized grazing violated the Act's protect and enhance standard apparently because they lacked a convincing administrative record for showing the link between agency authorized actions and ORV degradation.²²⁵

The *Cosgriffe* court never directly ruled on whether plaintiffs had a burden to prove BLM actions failed to protect and enhance; instead, the court concluded plaintiffs did not prove that banning grazing from the corridor was an appropriate remedy for BLM's failure to prepare a river plan.²²⁶ Therefore, the *Cosgriffe* court considered banning cattle as a remedy question, not as a question of whether the agency satisfied the statute's protect and enhance ORVs directive. Agencies have an affirmative duty under the WSRA to

problems associated with grazing); but see *Cosgriffe*, 21 F. Supp. 2d at 1222 (no similar evidence and court refuses to ban cattle).

220. *Singleton I*, 47 F. Supp. 2d at 1192.

221. *Cosgriffe*, 21 F. Supp. 2d at 1222.

222. *Id.*

223. Citing *Green*, plaintiffs argued that the court only need ask whether "prohibiting grazing would be an appropriate remedy for the BLM's established WSRA violation[.]" and not decide whether the individual grazing permits violated the Act. *Id.* at 1221-22.

224. *Cosgriffe*, 21 F. Supp. 2d at 1221.

225. *Id.* at 1221-22.

226. *Id.*

protect and enhance river ORVs and document their actions and proposals designed to achieve that statutory command.²²⁷ Once plaintiffs make an initial showing of agency non-compliance with the Act, future judicial review of river managing agency authorized actions should require agencies to prove compliance with the Act's protect and enhance ORVs standard.

C. Wild and Scenic River Act: Judicial Review, Injunctive Relief, and the Status Quo

In *Green*, *Cosgriffe*, and *Singleton I*, environmental plaintiffs sought to enjoin cattle grazing in wild and scenic river corridors.²²⁸ BLM-approved grazing practices had contributed greatly to the degradation of each corridor,²²⁹ but the courts expressed a reluctance to enjoin on-going grazing from the river corridors. The courts either did not enjoin grazing along the river (*Cosgriffe*),²³⁰ delayed deciding the injunction question to a later date while cattle grazing continued in the corridor (*Singleton I*),²³¹ or ordered the parties to create a settlement plan while grazing continued (*Green*).²³²

History largely explains this reluctance. In the West, resource-use intensive practices like grazing, mining, and timber harvesting traditionally controlled land management policies, and significantly influenced western culture.²³³ Consequently, rural western communities have resisted outside impositions on their ability to use and misuse public lands as they saw fit.²³⁴ Times and perceptions are changing, but locally concentrated western communities that rely on resource exploitative practices like grazing still exert great influence over public affairs generally and public lands management specifically.²³⁵ Exposure to these influences surely creates some level of judicial hesitancy

227. 16 U.S.C. §§ 1281(a), 1274(d) (1994).

228. *Green*, 953 F. Supp. at 1137; *Cosgriffe*, 21 F. Supp. 2d at 1221; *Singleton I*, 47 F. Supp. 2d at 1184.

229. *Green*, 953 F. Supp. at 1145; *Cosgriffe*, 21 F. Supp. 2d at 1222; *Singleton I*, 47 F. Supp. 2d at 1192.

230. *Cosgriffe*, 21 F. Supp. 2d at 1222-24.

231. *Singleton I*, 47 F. Supp. 2d at 1195-96.

232. *Green*, 953 F. Supp. at 1149.

233. See WILKINSON, *supra* note 28, at 3-27. Professor Wilkinson calls these practices and the laws solidifying them "the Lords of Yesterday." *Id.* at 3-27.

234. See CHARLES F. WILKINSON, *THE EAGLE BIRD: MAPPING A NEW WEST* at 43-61 (1992) (foreword by then Arizona Governor Bruce Babbitt).

235. See Michael C. Blumm, *Public Choice Theory And The Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994). Professor Blumm described the process where "Public Choice theory predicts that small, well-organized special interest groups will exert a disproportionate influence on policy making." *Id.* (internal quotations omitted).

in altering the myth of western life,²³⁶ agency-authorized activities, and public lands management policies.²³⁷

The Oregon trilogy demonstrates the crucial importance that injunctive relief plays in environmental litigation because without judicial willingness to grant injunctive relief for clear agency violation of management standards, status quo public land management will continue to the detriment of designated ORVs. The status quo in federal land management systems can be described as a process where management systems cry out for major overhauls and the federal agencies act to effectuate minimal disruption.²³⁸ The status quo is marked by two interdependent characteristics: (1) resistance to change; and, (2) spiraling natural resources degradation. For example, as early as 1991, BLM recognized that grazing in the Owyhee corridor was "creating noticeable negative effects."²³⁹ But, the agency did nothing until ONDA's 1998 lawsuit, which resulted in years of delay, no agency alteration of the river management structure, and multiplied adverse river impacts.²⁴⁰ The status quo, put simply, destroys by delay.

Regrettably, federal land management agencies and the courts often prolong the status quo due to a reluctance to question historical land-use activities, when the status quo is the very reason for the request for injunctive relief and management system change. Compare *Green* and *Singleton I*, where plaintiffs challenged BLM's inadequate WSRA planning, to *Cosgriffe*, where plaintiffs challenged BLM's complete failure to draft a WSRA plan.²⁴¹ In *Green* and *Singleton I*, pragmatically at least, BLM had completed some level of planning. In *Cosgriffe*, however, BLM had done nothing and was over five years late with its plans.²⁴² When an agency has so clearly failed to undertake a plan required by the statute, injunctive relief designed to stop the ongoing activities' detrimental effects on natural resources seems more warranted, not

236. The West is no longer a land of cowboys riding the range. In fact, urbanization is the West's contemporary defining characteristic. See Dan A. Tarlock, *Can Cowboys Become Indians? Protecting Western Communities As Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 540-43 (1999).

237. See Arruda and Watson, *supra* note 130, at 423 (noting judicial deference to BLM); see also Charles Davis, *American Federal Lands And Environmental Politics: Politics As Usual Or A New Ball Game?* 19 PUB. LAND & RES. L. REV. 5, 5-31 (1998).

238. See, e.g., *Idaho Dep't of Fish and Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886, 900 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

239. *Singleton I*, 47 F. Supp. 2d at 1186.

240. Addressing the systematic problems of an agency with a status quo mentality, the *Singleton II* court concluded that: "The court might be more inclined to maintain the status quo if it were persuaded that continuation of the BLM's current grazing practices could lead to restoration of the areas of concern. However, the BLM has not demonstrated that its current practices could have led to any significant improvement in the areas of concern over the past seven years, and the court concludes that the continued degradation of the areas of concern can be remedied only by closing these areas entirely to cattle grazing." *Singleton II*, 75 F. Supp. 2d at 1141.

241. See discussion *supra* part IV.

242. *Cosgriffe*, 21 F. Supp.2d at 1219.

less.²⁴³ Yet, in *Cosgriffe*, the court refused to grant injunctive relief barring cattle from the corridor, while BLM prepared a court-ordered river plan.²⁴⁴ That refusal operates in stark contrast to the court's language indicating that without a plan an agency cannot gauge its substantive compliance with the Act, nor protect and enhance important and compelling public interest needs.²⁴⁵

Of course, the results of each case in the context of grazing varied. For example, the *Green* court ordered the parties to develop a program to address grazing's negative effects, which resulted in BLM erecting a protection fence for the Donner and Blitzen river corridor to exclude cattle.²⁴⁶ The *Cosgriffe* court, on the other hand, avoided affecting cattle grazing on the John Day, but ordered preparation of a management plan.²⁴⁷ The *Singleton I* court delayed ruling on the injunctive relief question for one-year, then banned cattle permanently, unless BLM developed an otherwise satisfactory alternative remedy.²⁴⁸

One apparent reason for the difference between the decisions in *Green*, *Singleton I* and *II* and the decision *Cosgriffe* is that in the former cases the administrative record, physical evidence, and BLM's own admissions illustrated grazing's detrimental effect on river ORVs.²⁴⁹ The plaintiffs, in *Cosgriffe*, presented no similar proof, according to the court.²⁵⁰ The upshot of each case, however, is that cattle grazers were able to continue grazing either during the period the court considered enjoining grazing or permanently because the court declined to enjoin grazing. Until agencies like BLM believe

243. See *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998) (agency must document, understand, and consider the impacts from its actions "before the action takes place") (emphasis original); see also *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-16 (9th Cir. 1998), cert. denied, 119 S.Ct. 2337 (1999) (NEPA challenge to Forest Service's cursory and inconsistent compliance with Act's procedural requirements, and subsequent cutting and removal of significant amounts of timber without meaningful analysis; court noted that: "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis." *Id.* In both cases, the Ninth Circuit directed the injunctions against the Forest Service to remain "in full force and effect until the Forest Service satisfies" its obligations. *Blue Mountain*, 161 F.3d at 1216; *Cuddy Mountain*, 137 F.3d at 1382.

244. *Cosgriffe*, 21 F. Supp. 2d at 1222-24.

245. In *Cosgriffe*, the court concluded that: "[T]he public has a significant interest in the preparation of a comprehensive management plan. The WSRA is intended to enhance designated rivers' 'outstandingly remarkable' values. A comprehensive management plan will ensure the public that BLM is properly managing the river to enhance such important values as wildlife, scenery, cultural resources, and recreational opportunities." *Cosgriffe*, 21 F. Supp.2d at 1219 (emphasis added). Finally, courts have "greater power to fashion equitable relief in defense of the public interest than . . . when only private interests are involved." *People ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F. 2d 1319, 1324 (9th Cir. 1985).

246. *Green*, 953 F. Supp. at 1149; see *supra* note 155 and accompanying text.

247. *Cosgriffe*, 21 F. Supp. 2d at 1122-24.

248. *Singleton II*, 75 F. Supp. 2d at 1153 (including provision that if the parties can reach agreement on an "alternative method for eliminating the negative impact of domestic livestock grazing in the areas of concern" the court will order the plan implemented).

249. See *supra* notes 230-32 and accompanying text.

250. *Cosgriffe*, 21 F. Supp. 2d at 1222.

courts are at least willing to consider altering the agency's management structure by enjoining ongoing agency-authorized activities that degrade the natural resources under the agency's care, no incentive exists for management change, and the status quo continues.²⁵¹

Courts have broad discretion to grant or deny injunctive relief. However, judicial unwillingness to enjoin grazing from the river corridors is difficult to justify when plaintiffs prove irreparable environmental harm and explicit WSRA management directives exist. Failure to grant injunctive relief and ban cattle grazing in river corridors when continued grazing does not protect and enhance the river's ORVs and does not satisfy the WSRA. The same is true for courts addressing other river corridor activities that do not protect and enhance river ORVs.

VI. CONCLUSION

Recognition of judicially enforceable river management standards should lead to the improved health of the nation's wild and scenic rivers. Judicially enforceable standards, however, must be coupled with injunctive relief to truly produce federal land management change. The protect and enhance standard of the WSRA has existed since 1968, when President Lyndon Johnson signed the WSRA into law. Only now, over thirty years later, are courts, federal agencies, and interested parties beginning to understand the meaning of that standard. This nation's rivers are among its greatest treasures. The Oregon trilogy represents the opportunity to enter a new era in federal agency wild and scenic river management that will better protect and enhance those great treasures and their "outstandingly remarkable values."

251. For example, the *Cosgriffe* court had ordered BLM to develop a WSRA management plan for the John Day by November 1, 1999. 21 F. Supp. 2d at 1224. BLM, however, apparently emboldened because the court has shown no inclination to enjoin grazing, filed a motion for an extension of the deadline, which the court granted. *See supra* note 171.

