

Washington Law Review

Volume 59 | Number 3

7-1-1984

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Sally K. Fairfax

Barbara T. Andrews

Andrew P. Buchsbaum

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Recommended Citation

Sally K. Fairfax, Barbara T. Andrews & Andrew P. Buchsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 Wash. L. Rev. 417 (1984).

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FEDERALISM AND THE WILD AND SCENIC RIVERS ACT: NOW YOU SEE IT, NOW YOU DON'T

Sally K. Fairfax*
Barbara T. Andrews**
Andrew P. Buchsbaum***

I. INTRODUCTION

In July 1980, then Governor Edmund Brown, Jr. nominated 4000 miles of California's North Coast rivers for inclusion in the National Wild and Scenic River System.¹ It seemed an obvious ploy: in signing separate legislation that would complete the California Water Project by building a long-debated canal across the Sacramento-San Joaquin River Delta,² Governor Brown had offended the environmental community. He hoped that his proposal for additional protection for the North Coast rivers would placate environmentalists, while simultaneously giving the state a broader opportunity to administer federal lands adjacent to the rivers.³

By 1984, after expensive litigation and extensive campaigning, the North Coast river designations have stalled and the canal has at least temporarily evaporated.⁴ What looked like a casebook example of federal-state cooperation to achieve long-standing and well-defined state and national goals has turned into an unpredictable stewpot of shifting economic interests, changing government personnel, and conflicting public policies. As the laws and regulations have evolved, so have the alliances, their goals, and their tactics.

Governor Brown's 1980 proposal was based on an unfamiliar provision

* Associate Professor, University of California, Berkeley; B.S., 1965, Hood College; M.A., 1969, New York University; M.A., 1974, Duke University; Ph.D., 1974, Duke University.

** Associate, Davis, Graham & Stubbs; B.A., 1974, Brown University; M.S., 1978, University of Michigan; J.D., 1981, Stanford University.

*** Fellow, Institute for Public Representation, Georgetown University Law Center; A.B., 1979, Harvard University; J.D., 1983, Boalt Hall School of Law, University of California, Berkeley.

1. The National Wild and Scenic Rivers System was created in 1968 by the Wild and Scenic Rivers Act (WSRA), Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. §§ 1271-1287 (1982)), to protect rivers possessing "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." 16 U.S.C. § 1271 (1982).

2. Act of July 18, 1980, ch. 632, 1980 Cal. Stat. 1723 (codified in scattered sections of CAL. WATER CODE (West 1982)).

3. Editorial, Save Our Wild Rivers, San Francisco Chron., Aug. 19, 1980, at 40, col. 1; U.S. to Study Proposal on State Rivers, San Francisco Chron., July 29, 1980, at 9, col. 4.

4. The electorate rejected the canal, defeating Proposition 9 (Water Facilities Including a Peripheral Canal) on June 8, 1982. L.A. Times, June 10, 1982, at 16, col. 4; see *infra* notes 112-13.

of the Wild and Scenic Rivers Act (WSRA) that allows governors to request federal protection for state-protected rivers.⁵ The more usual method for including a river in the Wild and Scenic Rivers Systems has been by Act of Congress.⁶ The less frequently used "state proposal" method requires two basic conditions: first, the state legislature must have previously designated the rivers as wild or scenic and, second, the Secretary of the Interior must review and approve the proposed river according to federal criteria.⁷ These statutory criteria include a mandatory state commitment, particularly significant in the North Coast rivers case, to permanently administer proposed rivers as part of the national system.⁸ The governor's request came near the close of the Carter Administration; working in great haste and in close cooperation with the California State Resources Agency, the Department of the Interior completed its review of the request in January, 1981. Interior Secretary Andrus had literally but a few hours to act on Governor Brown's request before turning his office over to the incoming Reagan Administration.⁹ The tight timing suggested procedural irregularity and invited numerous court challenges.

A major congressional purpose behind WSRA was to control water development.¹⁰ However, water issues only partially motivated Governor Brown's request. A state effort to control federal land management was a major impetus behind his rather extraordinary use of the statute.¹¹ This was particularly true regarding the Smith River, the most pristine of the North Coast streams and the only one running almost entirely through national forest lands. Because the federal Act gives the state a role in managing federally designated rivers, inclusion of the Smith River in the system could enhance California's effort to push North Coast forest management more towards fisheries and aesthetic management and away from timber harvest.¹² If all 3100 miles of the Smith and its tributaries were included in the national system, huge acreages of forest land would be affected.¹³

5. 16 U.S.C. § 1273(a)(ii) (1982).

6. That method is set out in *id.* § 1273(a)(i). *See, e.g.*, WSRA, Pub. L. No. 90-542, § 3, 82 Stat. 903 (1968) (codified at 16 U.S.C.); Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174 (1972) (codified at 16 U.S.C. § 1274(a)); WSRA Amendments, Pub. L. No. 93-279, § 1(a), 88 Stat. 122 (1974) (codified at 16 U.S.C. § 1274(a) (1982)).

7. 16 U.S.C. § 1273(a)(ii) (1982).

8. *Id.*

9. Office of the Sec'y, U.S. Dep't of the Interior, Notice of Approval for Inclusion in the National Wild and Scenic Rivers System as State Administered Components (Jan. 19, 1981) (copy on file with the *Washington Law Review*).

10. Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707, 708 (1970).

11. *See infra* notes 187-91 and accompanying text.

12. *See infra* notes 122-23 & 187-91 and accompanying text.

13. *See infra* notes 140-43 and accompanying text.

Secretary Andrus' cliff-hanger decision, while appearing responsive to Governor Brown's initiative, left most of the Smith River out of the national system. As a result, Governor Brown's effort to use WSRA to influence federal land management was deflected. The implications of the program for future state sorties into federal land management are still unclear, and will continue to evolve on the North Coast with implications for similar state efforts elsewhere in the nation.

This article investigates the proposed designation of the North Coast rivers under WSRA. It chronicles developments in the legal controversy and relates them to the larger issues of land and water management. The shifting legal framework and changing economic and political interests in the North Coast controversy are particularly enlightening to students of federalism. Lawyers are among those who may be tempted to view the North Coast controversy in terms of federal-state conflict or intergovernmental cooperation run amuck, and to view the courts as an umpire in a dispute over authority.¹⁴

Unfortunately, such an approach would reveal very little that is useful about what has occurred. The details of the story challenge familiar notions: (1) that the federal-state conflict is the core of federalism; (2) that cooperation between governments is preferable to confrontation; and (3) that the role of the courts is to act (or to refrain from acting) as umpires in the conflict.

The traditional federal-state conflict model suggests implacable, clearly identifiable foes locked in battle over authority and control.¹⁵ The North Coast story is one of complex and shifting alliances that does not, except for temporary convenience, form around identifiable—let alone permanent—ties to a particular level of government or an institutional configuration. *Part* of the state—particularly the Resources Agency and the Governor—was initially at odds with *part* of the federal government—the United States Forest Service—over priorities for North Coast river management. There was, however, great cooperation between the Resources Agency and other federal entities, agencies in the Department of the Interior, in pressing for the controversial river designations. Neither the cooperation nor the conflict has been stable largely because the players are not stable. Moreover, the Forest Service, target of the initial action, regularly cooperates on other issues with the Resources Agency

14. For a general discussion of federalism theory, see R. LEACH, *AMERICAN FEDERALISM* 1–25 (1970); Fairfax, *Old Recipes for New Federalism*, 12 ENVTL.L. 945, 948–58 (1982); Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663 (1980).

15. See D. WRIGHT, *UNDERSTANDING INTERGOVERNMENTAL RELATIONS* (1978); Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

and with many other state agencies, who frequently sue their North Coast partners in the Department of the Interior.¹⁶ Changing coalitions of affected groups reflect the incomplete divisions between and among timber, fisheries, mineral, water, recreation, and aesthetic interest groups and their various state and county government allies. Evolving conditions shift alliances and alter both the "state" and the "federal" positions. This volatility is enhanced by the changing of administrations in both Washington and Sacramento. The insufficiency of the traditional federal conflict model is underscored by the tension between the designation controversy, which could be forced to fit fleetingly into the format, and the larger and more durable controversy about resource management priorities which involves significantly different players, issues, and interactions.

Cooperative federalism theorists will likewise find little succor in the North Coast controversy. Cooperation in the North Coast situation is less obviously a public virtue than standard theories of cooperative federalism¹⁷ would indicate, or than the elated environmental groups, thrilled by Governor Brown's flashy proposal, might lead one to believe.¹⁸ Moreover, the concept applies only momentarily to a small subset of the complex pattern of interactions which comprise the policy field.¹⁹

Finally, the role of the courts in this controversy is neither so pivotal nor so profound as one might anticipate on the basis of the "court as the umpire of federalism" concept.²⁰ Very few instances of litigated federal-state conflict actually involve state and federal parties or major constitutional principles.²¹ The North Coast situation is not an exception. Although it is possible that the state could become a plaintiff in a suit against the Secretary of the Interior, they began litigation as not-wholly-comfortable allies defending the designations. The basic dispute was among competing private groups. The litigants are a typical garden-crop of special interests seeking to defend an advantage or prevent a barrier to their own positions. Interestingly, it was a fragile coalition of California *counties*

16. See, e.g., *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

17. D. ELAZAR, *THE AMERICAN PARTNERSHIP. INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH CENTURY* (1962); M. GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (D. Elazar ed. 1966).

18. Resource industries generally would demur, see *infra* Parts IV & V, and so would the U.S. Forest Service, see *infra* notes 166-67 and accompanying text.

19. See *infra* notes 155-58 and accompanying text.

20. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in *FEDERALISM: MATURE AND EMERGENT* (A. McMahon ed. 1955).

21. The exceptions include *California v. United States*, 438 U.S. 645 (1978); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *Kansas v. Colorado*, 206 U.S. 46 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

which initially challenged Governor Brown's proposal.²² The legal issues include a rather confusing National Environmental Policy Act (NEPA)²³ compliance question, and an important but only slightly weightier statutory interpretation. Both are critical in the designation issue but are largely unrelated to the resource management disputes that are the heart of the conflict.

The following sections explore the complex federal-state relations surrounding Governor Brown's proposal for the North Coast and Secretary Andrus' qualified acceptance of it. The basic provisions of the federal and state river preservation acts are set out in Parts II and III, respectively. The discussions of the two statutes are accompanied by a brief introduction to competing governmental programs and institutions as they have evolved at each level during the "environmental decade." These discussions should underscore the ambiguity inherent in discussing "the" federal or "the" state position on any issue. The specifics of the North Coast designation controversy—still unresolved—are explored in Parts IV and V. These parts contrast the issues as they have been framed in the courts with their broader policy and management implications. They emphasize shifting coalitions of public and private interests as the core of intergovernmental relations. Part IV concentrates on a general chronology of events. Part V focuses primarily on the legal maneuvers which have frozen the terms of debate artificially. Part VI concludes briefly with speculation on the designation controversy and its implications for more fruitful ways to think about federalism.

II. THE WILD AND SCENIC RIVERS ACT OF 1968 IN THE CONTEXT OF FEDERAL PROGRAMS AFFECTING RIVER PRESERVATION

A. *The Institutional Context of the Wild and Scenic Rivers Act: Conflicting and Complementary Federal Positions on Water Policy*

The WSRA was essentially a reform measure. It was specifically designed to blend with not always compatible missions of established agencies while remedying inadequacies in long-established state and federal approaches to land and water management programs. As with any entrant into a crowded policy arena,²⁴ the Wild and Scenic Rivers Act was a compromise, sculpted to blend new interests with old. The final wording

22. See *infra* note 178 and accompanying text.

23. 42 U.S.C. § 4331 (1976).

24. A. WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* 66 (1979).

is ambiguous at precisely the points where advocates seek clarity. As a result, it is extremely difficult to identify "the" federal position on wild and scenic rivers specifically, or on water more generally.

The Sagebrush Rebellion²⁵ has reminded us that the federal government's role in river management evolved later than did the states' role. It appeared at the close of the 19th century as an apparent intruder in a field long dominated by state and private efforts; federal land and water programs grew unevenly and somewhat awkwardly over the established state framework.²⁶

Federal water programs in the West continue to be different from and theoretically less comprehensive than those of the states. The federal government does not allocate or adjust water rights among users, nor does it participate in the states' water allocation systems in a uniform way. Rather, it has selectively but haphazardly superimposed its presence upon the states, inaugurating resource management programs according to several enumerated constitutional powers.²⁷ By the mid-20th century, this incremental process of growth in federal involvement had produced diverse land and water management efforts spread among dozens of federal agencies and departments. The WSRA of 1968 is one part in this complex web of federal and state programs.

In passing a national WSRA, Congress was responding to three major concerns. The first was the apparent inadequacy of state systems for preserving and protecting rivers, especially in the West. More Western States have historically followed the water rights doctrine of prior appropriation which evolved to encourage private development of water. Traditionally, water left in place was not a "beneficial use" of water and, hence, was not protected under state law.²⁸ Even though several state legislatures have moved to include instream uses within their appropriation systems,²⁹ states still have the reputation of being poor guardians of

25. The Sagebrush Rebellion was a protest by private livestock operators and their allies in the states against federal "intervention," particularly against involvement by the Bureau of Land Management. See S. Fairfax, *Beyond the Sagebrush Rebellion: The BLM As Neighbor and Manager in the Western States* 3-7 (Mar. 1982) (paper presented at the Western Political Science Association Meeting) (copy on file with the *Washington Law Review*).

26. See generally Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 UTAH L. REV. 871 (1975); Comment, *Minimum Streamflows—Federal Power to Secure*, 15 NAT RESOURCES J. 799 (1975).

27. These enumerated powers include the power to regulate and develop navigable waters under the commerce clause, U.S. CONST. art. I, § 8, cl. 3; the power to tax and spend for the general welfare, *id.* cl. 1; the authority to retain and manage lands and to reserve water for them under the property clause, *id.* art. IV, § 3, cl. 2; and the power to enter into treaties with Indian tribes and foreign nations, *id.* art. II, § 2, cl. 2. U.S. CONST. amend. V.

28. See Tarlock, *supra* note 26, at 871-75.

29. *Id.* at 882. *E.g.*, COLO. REV. STAT. § 37-92-102(3) (Supp. 1983); IDAHO CODE § 67-4301 (1980); MONT. CODE ANN. § 85-2-316 (1983); see also Andrews & Fairfax, *Groundwater and Fed-*

these uses. A major goal of WSRA was to enhance both state and federal attention to protection of instream values.³⁰

Congress' second concern was to control federal water development. Section I of the Act declares that

the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.³¹

The federal presence in developing water, spread among numerous agencies, was piecemeal and poorly integrated, yet powerful.³² As the country's "environmental consciousness" evolved, it became highly controversial. In passing WSRA, Congress sought balance in the federal program.

A third congressional goal behind WSRA was to increase congressional control over the federal land management agencies.³³ In the 1960's and 1970's, "Congress took unprecedented steps in giving the land managing agencies specific directions for managing designated areas of the public lands" for environmental purposes.³⁴ The WSRA was part of this trend toward specialized, environmentally protective legislation. It affected the activities of the National Park Service,³⁵ the Bureau of the Land Management,³⁶ the Fish and Wildlife Service,³⁷ and the United States Forest Service.³⁸ Whether 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.

eralism in California's Southern San Joaquin Valley, 55 U. COLO. L. REV. n.560 and accompanying text (1984) (in press). See generally R. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

30. See Tarlock & Tippy, *supra* note 10, at 710-11; Comment, *supra* note 26.

31. 16 U.S.C. § 1271 (1982).

32. The major federal water construction agencies are the Army Corps of Engineers, which improves rivers and harbors and builds multiple-purpose flood control projects; the Federal Power Commission, an independent agency now called the Federal Energy Regulatory Commission (FERC), which licenses private hydroelectric projects on navigable waters; and the Bureau of Reclamation of the Department of the Interior, which builds multiple-purpose reclamation projects in the 17 western states. The Bureau of Indian Affairs, also of the Department of Interior, finances water projects under the federal trust responsibility to the Indians. The Department of Agriculture, through its Soil Conservation Service, for many years has constructed small watershed projects throughout the United States.

33. Tarlock & Tippy, *supra* note 10, at 711.

34. S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 224 (2d ed. 1980).

35. 16 U.S.C. § 1281(c) (1982).

36. *Id.* §§ 1280, 1281(c).

37. *Id.* § 1281(c).

38. *Id.* § 1281(d).

Although WSRA was a federal effort to moderate state and federal activities which had been focused for many decades on resource development goals, Congress passed the Act without specifically altering the substantial existing authority to manage land and water resources. Moreover, passage of WSRA in 1968 was but one congressional step toward altering the government's predominantly utilitarian approach to resource management. Federal law affecting river management and preservation continued to expand, and implementation of WSRA has been only one strand in a string of subsequent mandates to *state* as well as federal entities affecting environmental analysis, air and water quality, and federal land-use planning.

The most important of these subsequent changes stem from the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977:³⁹ regulation of "point" discharges,⁴⁰ prescription of "best management practices" for "nonpoint" pollution sources such as timber harvesting (section 208),⁴¹ and their requirement of special "dredge and fill permits" for the Corps of Engineers (section 404).⁴² The Federal Water Pollution Control Act brought a new regulatory agency—the United States Environmental Protection Agency—into the field, and expanded the Corps' jurisdiction over "navigable waters" to include nearly every surface water feature.⁴³ A familiar aspect of the Federal Water Pollution Control Act and most other 1970's environmental legislation is the pattern of federal-state relationships mandated therein. The states were encouraged to define programs which would meet federally established goals and criteria. This interaction seemed appropriate to adapting achievement of national water quality goals to local economic and ecological conditions.⁴⁴ It also occasioned vast expansion of state capabilities in environmental management, and at critical junctures blurred the distinction between state and federal actions.⁴⁵

The complex interplay of federal and state water programs has multiplied authorities without integrating priorities or responsibilities. The situation has been further complicated by the new multiple-use mandates enacted by Congress for the national forests and the western public lands.

39. 33 U.S.C. §§ 1251–1376 (1976 & Supp. V 1981).

40. *Id.* § 1342.

41. *Id.* § 1288(b).

42. *Id.* § 1344 (Supp. V 1981).

43. *Id.* §§ 1341–1344; 33 C.F.R. § 323.2 (1983).

44. *See, e.g.*, CAL. ST. WATER RESOURCES CONTROL Bd., WATER RESOURCES CONTROL BOARD IN 1976–1977 ch. 3 (1978).

45. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS (ACIR), In Brief: STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM (B-6), Washington D.C., Nov., 1981, at 2 (citing ACIR, The Federal Role in the Federal System (B-4) (Dec. 1980)).

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The Resources Planning Act of 1974 (RPA),⁴⁶ the National Forest Management Act of 1976 (NFMA),⁴⁷ and the Federal Land Policy and Management Act of 1976 (FLPMA)⁴⁸ require the United States Forest Service and the Bureau of Land Management (BLM) to develop procedures to integrate inventory and planning for all resources. Although the federal land management statutes use a different format than the regulatory programs, they, too, rely significantly on federal-state interactions. Although the language regarding federal consultation in FLPMA is more expansive and specific than in the Forest Service statutes,⁴⁹ Congress has specifically directed that the federal agencies should manage the public resources in closest possible consultation and cooperation with the states.⁵⁰ Thus, in both land and water management, state and federal programs are deeply mixed, and it is increasingly difficult to identify national management priorities implemented without reference to state priorities and vice versa.⁵¹

These same land management mandates also attempt to balance wilderness preservation, wild and scenic river designation, and endangered species protection with commodity uses through careful analysis and planning. Nevertheless, their relationship to single-purpose statutes such as WSRA remains unclear. Although it is possible that comprehensive land-use planning could integrate the values expressed in those statutes and prevent further challenge based on them, the specific provisions of WSRA are not especially helpful in defining how land management and river preservation conflicts are to be resolved.

B. Basic Provisions of the National Wild and Scenic Rivers Act

The WSRA is a special-purpose statute designed to preserve “selected rivers,” along with their “immediate environments,” that possess one or more “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.”⁵² The rivers are to be protected for their “free-flowing” characteristics, which specifically in-

46. 16 U.S.C. §§ 1601–1610 (1982).

47. Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C.).

48. 43 U.S.C. §§ 1701–1782 (1976 & Supp. V 1981).

49. Compare *id.* § 1739(e) (1976) with 16 U.S.C. § 1601(c) (1982).

50. For a discussion of that directive as it applies to the Bureau of Land Management, see Achlterman & Fairfax, *The Public Participation Requirements of The Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979).

51. See *supra* note 45.

52. 16 U.S.C. § 1271 (1982).

clude water quality.⁵³ These values are imprecise, frequently sounding more hortatory than implementable.

The Act is more concrete in defining classifications of rivers, methods of including them in the system, and responsibilities for federal and state agencies involved in the intricate management process. Pristine *wild* rivers,⁵⁴ relatively undisturbed *scenic* rivers,⁵⁵ or developed *recreational* rivers⁵⁶ may be included in the federal system.⁵⁷ Congress also established a phased approach to river inclusion: in addition to *included*, fully protected rivers,⁵⁸ it identified *potential additions*⁵⁹ and administrative study rivers⁶⁰ in order to protect rivers under consideration.⁶¹ Rivers may

53. *Id.*

54. *Id.* § 1273(b)(1).

55. *Id.* § 1273(b)(2).

56. *Id.* § 1273(b)(3).

57. The relationship between river classification and river management is not as clear as might be presumed. Although it is arguable that the Act establishes management standards appropriate to the classification in which a river is placed, such is not self-evident: rivers are classified by the administering agency as part of its management responsibilities, not by Congress or otherwise during the designation process. *Id.* § 1275. Yet, the Act states that rivers are to be managed to preserve the values for which they are designated, thereby muddying the relationship between classification and management. *Id.* § 1281.

58. *Id.* § 1274(a).

59. *Id.* § 1276(a).

60. *Id.* § 1276(d).

61. In most respects, rivers under consideration are treated as included rivers. Before 1976 there was considerable confusion about whether or not "potential addition" protections applied to state proposed rivers. In 1976, the courts ruled that the Federal Power Commission could license a hydroelectric project on the New River in North Carolina which the governor and the legislature had tried to include in the national system. *North Carolina v. Federal Power Comm'n*, 533 F.2d 702 (D.C. Cir.), *cert. granted, judgment vacated and remanded*, 429 U.S. 891 (1976). Congress, which had been unresponsive to New River preservation advocates before the court's decision, acted afterwards to reverse its holding. Amendments enacted later in that year included protection for the New River in § 7(a) of WSRA, and changed the prohibition against federal water development to apply clearly to all state-proposed rivers while the Secretary of the Interior considered their eligibility. WSRA Amendments, Pub. L. No. 94-407, § 1(1), (2), 90 Stat. 1238, (1976) (codified at 16 U.S.C. § 1273(a) (1982)).

The administratively selected study rivers fall into a different category than either congressionally designated potential inclusions or state-nominated rivers. Section 5(d) of WSRA permits the Departments of Interior and Agriculture to identify and study rivers suitable for possible future inclusion in the national system. 16 U.S.C. § 1276(d) (1982). Once a river is judged a suitable candidate by the study agency, all federal agencies involved in "the use and development of water and related land resources" must consider the alternative of protecting that river in their project planning process. An initial inventory was being conducted by the Heritage Conservation and Recreation Service of the Interior Department when that agency was abolished in 1980. PACIFIC SOUTHWEST REGION, HERITAGE CONSERVATION & RECREATION SERV., U.S. DEPT OF THE INTERIOR, NATIONWIDE RIVERS INVENTORY PHASE I (1980) [hereinafter cited as PHASE I REPORT].

Although the U.S. Forest Service has a major stake in the results of the study, the National Park Service is continuing the project. The 1980 Phase I report of the Department of the Interior identified 53 California rivers and streams as part of the list. *See* PHASE I REPORT, *supra*, at 16-17. However, the list is an ever-changing one. The latest update in May 1981 added 11 California rivers to the list and deleted 19, and it is difficult at any point to tell which rivers are listed and which are not. *See*

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become included in one of two ways: by congressional action,⁶² or by request from a state governor to the Secretary of the Interior.⁶³ The state proposal route, which is the topic of this article, is described in section 2(a)(ii) of WSR. ⁶⁴ To qualify for federal inclusion, the river must have been previously designated as wild or scenic by the state legislature. The Secretary of the Interior must review the state proposal, find that the river is eligible under the federal criteria, and approve the river. Before Governor Brown proposed the North Coast rivers, this alternative had rarely been used.⁶⁵

PACIFIC SOUTHWEST REGION, U.S. FOREST SERV., U.S. DEPT OF AGRICULTURE, LAND MANAGEMENT PLANNING DIRECTION (1982).

Once a river is listed, the two departments must begin their suitability studies. Although § 5(d) of WSR states that the planning requirement is not triggered until a listed river is determined to be suitable, the U.S. Forest Service takes the position that listed rivers must be protected until they are assessed through the national forest planning process. *Id.* at 2–18.

This cautious approach on wild and scenic rivers has apparently been prompted by the U.S. Forest Service's frustrating experience with wilderness study. The Forest Service, although not required to do so by the 1964 Wilderness Act, undertook a two-phase review and evaluation of roadless areas in national forests. The agency agreed to protect such lands until their wilderness suitability was determined. *See* S. DANA & S. FAIRFAX, *supra* note 34, at 299–302. California later sued the agency on its decision to release certain study areas from protected status. In *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), California won a judgment that the Forest Service had not adequately assessed the environmental impacts of releasing roadless study areas from protected status. Such decisions are reflected in the agency's approach to potential wild and scenic rivers review. The 1978 amendments to the Federal Act extended land management protections to state proposed rivers during the secretarial evaluation phase. *See* 16 U.S.C. § 1283(a) (1982). For the rivers included in the original system, *see* WSR, Pub. L. No. 90-542, § 3, 82 Stat. 906–07 (1968) (codified at 16 U.S.C.); Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174 (1972) (codified at 16 U.S.C. 1274 (a)); WSR Amendments, Pub. L. No. 93-279, § 1(a), 88 Stat. 122 (1974) (codified at 16 U.S.C. 1274(a)). The potential additions were added by WSR, Pub. L. No. 90-542, § 5, 82 Stat. 906, 910 (1968) (codified as amended at 16 U.S.C.). For included rivers, *see* Hells Canyon National Recreation Area, Oregon—Idaho Establishment Act, Pub. L. No. 94-199, § 3(a), 89 Stat. 1117 (1975); WSR Amendments, Pub. L. No. 94-486, §§ 101, 201, 301, 601, 90 Stat. 2327, 2327, 2329, 2330 (1976); National Parks and Recreation Act of 1978, Pub. L. No. 95-625, §§ 701–704(a), 705–708, 92 Stat. 3467, 3521–23, 3527–30 (1978); Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, § 9(a), 94 Stat. 948, 952 (1980) (codified at 16 U.S.C. § 2174 (1982)). For potential additions, *see* WSR Amendments, Pub. L. No. 93-621, § 1(a),(b), 88 Stat. 2094, 2094–95 (1975); Hells Canyon National Recreation Area, Oregon—Idaho Establishment Act, Pub. L. No. 94-199, 89 Stat. 1118 (1975); WSR Amendments, Pub. L. No. 94-486, § 401, 90 Stat. 2327, 2330 (1976); National Parks and Recreation Act of 1978, Pub. L. No. 95-625, §§ 721–736, § 1108, 92 Stat. 3467, 3530–32, 3547–48 (1978); National Parks and Recreation Act of 1978 Amendments Pub. L. No. 96-199, § 102(a), 94 Stat. 67, 68 (1980) (codified at 16 U.S.C. § 1276 (1982)).

62. 16 U.S.C. § 1273(a),(c) (1982).

63. *Id.* § 1273(a)(ii).

64. *Id.*

65. The state-nominated alternative had been used for only a few rivers: the Upper and Lower Little Miami River in Ohio; the Little Beaver Creek in Ohio; the Lower St. Croix River in Minnesota and Wisconsin; and the New River in North Carolina. *See supra* note 61. For some theories on why the § 2(a)(ii) process is so sparingly used, *see* U.S. GEN. ACCOUNTING OFFICE, FEDERAL PROTECTION AND PRESERVATION OF WILD AND SCENIC RIVERS IS SLOW AND COSTLY, PUB. NO. CED-78-96, at 16–22 (May 22, 1978).

The section 2(a)(ii) procedure is not well integrated with the other provisions of WSRA. It is problematic because it allows states to propose rivers flowing through federal lands. Moreover, it places primary administrative review authority in the Department of the Interior even though the federal lands involved in the states' nominations may be national forests administered in the Department of Agriculture.⁶⁶ This format invites interest groups with conflicting goals to press for advantage in different agencies at both levels of government.⁶⁷

The potential for such conflict is enhanced by the fact that Congress has been very unclear regarding management criteria. The WSRA requires the administering agency⁶⁸ to protect each included river and enhance the

66. 16 U.S.C. § 1273(a)(ii) (1982).

67. Apparently Congress did not contemplate the possibility of conflict arising from aggressive efforts to use WSRA to enhance state control over federal lands. When the issue was presented, efforts to clarify the authority of the respective sovereigns through amending the Act were inconclusive.

Originally, § 2(a)(ii) allowed a state governor to propose rivers that were "to be permanently administered . . . by an agency or political subdivision of the State or States concerned without expense to the United States." WSRA, Pub. L. No. 90-542, § 2, 82 Stat. 906, 906-07 (1968) (codified as amended at 16 U.S.C.). The section made no reference to any alternate administration scheme when federal lands were involved. It thus could be interpreted to have sanctioned state-controlled management of state-designated rivers through federal lands. However, in 1978, during an early blush of Sagebrush-Rebellion-type state assertiveness, the governor of Oregon made the first attempt to propose rivers in national forests. Congress quickly amended § 2(a)(ii) both to facilitate such inclusions and to clarify federal-state relations concerning them. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 761, 92 Stat. 3467, 3533 (1978) (codified at 16 U.S.C. § 1273(a) (1982)). Congress specified that:

[e]ach river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States *other than for administration and management of federally owned lands*. . . . *Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).*

Id. (emphasis added).

At the same time, it also placed a specific mandate on all federal agencies whose lands bordered on state-proposed rivers. In a new provision, Congress required that federal agencies make formal arrangements for dealing with their state counterparts in a planning process.

Section 10(e) of WSRA gives federal agencies the authority to enter into cooperative management arrangements with the states. 16 U.S.C. § 1281(e) (1982). Section 5(c) goes somewhat further, requiring state participation in federal studies if a state so requests as well as "a determination of the degree to which the State or its political subdivisions might participate in the preservation and administration of the river should it be proposed for inclusion" in the system. *Id.* § 1275(a). Finally, under § 13(a), state jurisdiction over fish and wildlife is to remain unimpaired, except to the extent the administering federal agency designates special "zones" and establishes regulations for them. *Id.* § 1281(c).

This cooperative planning approach is not unlike FLPMA, RPA, and NFMA language on the same subject. *See supra* notes 46-51 and accompanying text. However, the approach simply recognizes the possibility that conflict may develop, such as that between the California Resources Agency and the U.S. Forest Service, it does not provide clear guidelines for resolving the conflict.

68. A river may have one administering agency, a different agency for different components, or jointly administered segments. The agency may be federal, state, local, or an intergovernmental com-

values which caused it to be included in the national system.⁶⁹ One might suppose that the degree of protection afforded a river would be based on the river's classification. However, one would be wrong: the Act specifies protections based on river classification *only* with regard to mining.⁷⁰ With this one exception, classification is not clearly linked either to designation or to management.⁷¹

The WSRA is much clearer when it moves from land management to agency programs affecting instream flow. This occurred partly because of the direct impact of streamflow manipulation on the "free flowing" qualities of protected streams, and partly because of the Act's specific prohibitions against federal water development activities. Section 7(a) of the Act forbids the Federal Energy Regulatory Commission (FERC) from licensing any project "on or directly affecting" any included river.⁷² All other federal agencies are forbidden from undertaking or assisting any water resources project "that would have a direct and adverse effect on the values for which such river was established."⁷³

Predictably, where the federal Act is clear, it creates equally clear potential conflicts with state water law. For example, the federal Act affects water development under state water rights systems in two ways. First, if

bination. The Act specifies that a federal agency shall be the administering agency when it dominates a particular segment. For example, § 4(a) requires that the Department of Agriculture be identified as the administering agency in federal studies of potential additions designated by Congress, whenever a river flows "wholly or substantially within a national forest." 16 U.S.C. § 1275(a) (1982). Section 10(c) specifies that river segments on land administered by the National Park Service or the Fish and Wildlife Service shall become part of the national park or national wildlife refuge systems. *Id.* § 1281(c).

69. 16 U.S.C. § 1281(a) (1982). The full provision reads:

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, archeologic, 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.

Id.

70. Subject to valid existing rights, *wild* rivers are protected from any further mining or mineral-leasing activity within one-quarter mile of their banks. 16 U.S.C. § 1280(a)(iii) (1982). In *scenic* and *recreational* rivers, mining activity can proceed, but it may be regulated by the managing agency and will result in federal title being granted only to the mineral resources and such surface resources as are reasonably necessary for conducting mining operations. *Id.* § 1280(a)(i), (ii).

71. Surface coal mining cannot occur in any included rivers regardless of classification, but this prohibition is part of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. V 1981), and not WSRA.

72. 16 U.S.C. § 1278(a) (1982).

73. *Id.* The "adversity" requirement may not have much practical effect since any project that benefits a river in some respects can almost always be found to conflict with other values. The possible exception would be recreational rivers on which some instream development may have already occurred.

a federal agency in any way assists in a state activity, the federal law will apply.⁷⁴ Second, section 13(d) of the Act contains a standard inconclusive preemption limitation: state jurisdiction over included streams is unimpaired *except* to the extent it interferes with “the purposes of this chapter or its administration.”⁷⁵

C. Summary

WSRA does not contain particularly intricate or controversial provisions; it therefore provides a clear demonstration of the futility of searching for “the” federal and state positions which are central to traditional theories of federalism. The national and congressional goal of river preservation is clear in WSRA even if management roles and criteria remain obscure. However, it is also clear that river preservation conflicts with other equally laudable and clearly stated congressional goals. This potential for conflict among diverse statutory definitions of congressional purpose is exacerbated by the understandable tendency of agencies to exploit the flexible language in their mandates to permit them to expand their programs and thereby their constituencies. In so doing, it is just as understandable that rival federal entities seek support from like-minded state agencies as well as among private groups. It is, indeed, difficult to conceive of a policy field so unsullied by past programs, and unrelated to similar ones, that it would not permit rival definitions of congressional intent and, hence, multiple and conflicting definitions of the federal position. And from the contours and setting of the California State Wild and Scenic Rivers Act the same observation, not suprisingly, emerges.

III. THE CALIFORNIA WILD AND SCENIC RIVERS ACT OF 1972 AND THE STATE'S INTEREST IN RIVER PRESERVATION

The mere existence of the California Wild and Scenic Rivers statute⁷⁶ could, and perhaps ought to, please any cooperative federalism theorist. The federal government identified a national goal and invited responsive action from the states. Clearly Congress anticipated subsequent enactment of similar state legislation, since before a governor could nominate a river for inclusion in the federal system, it had to be protected under state law.⁷⁷ And with virtually no delay at all, California responded with a nearly identical program. However, like the federal level, the state's pres-

74. *Id.* § 1282.

75. *Id.* § 1284(d).

76. Cal. WSRA of 1972, CAL. PUB. RES. CODE §§ 5093.50-.69 (West Supp. 1984).

77. 16 U.S.C. § 1273(a)(ii) (1982).

ervation programs must coexist with competing goals, interests, and agencies; they are only one part of the state position.

A. *The Institutional Context: Conflicting and Complementary State Authorities*

Like Congress, the California legislature passed its statute to balance a water development program. North-south water transfers have been at the heart of water planning and allocation activities in California. Northern water was first diverted southward by the Bureau of Reclamation's Central Valley Project.⁷⁸ That immense, multiple-unit project was originally planned by the state, but the federal government constructed it during the Depression and still operates it. In a 1960 referendum, California voters authorized the State Water Project to be built and operated by the California Department of Water Resources.⁷⁹ This Project parallels the federal Central Valley Project and shares some facilities with it but is basically run independently. By the early 1970's, both the federal and state projects were looking for new water supplies. The state facilities were only built so as to provide about half of the water they originally contracted to deliver, and pressure from southern water users to complete the planned system intensified. As the Corps of Engineers, Bureau of Reclamation, and California Department of Water Resources all began surveying new dam sites on the North Coast, a northern state senator successfully maneuvered a California Wild and Scenic Rivers bill through the legislature. The California statute was amended in 1982, in the heat of the North Coast controversy.⁸⁰ The legislative action substantially altered the stakes for several of the affected interests.

The passage of the 1972 California Wild and Scenic Rivers Act responded to interests and values regarding water management that parallel evolving national programs discussed above.⁸¹ California generally adheres to the traditional principles of prior appropriations. Historically, therefore, the state's water rights system has facilitated water develop-

78. Central Valley Project, CAL. WATER CODE §§ 11,100-11,925 (West 1971 & Supp. 1984).

79. California Water Resources Development Bond Act, ch. 1762, § 1, 1959 Cal. Stat. 4235 (codified at CAL. WATER CODE §§ 12,930-12,944 (West 1971 & Supp. 1984)) (adopted by vote of the people Nov. 8, 1960).

80. Senator Peter H. Behr is generally regarded as the prime sponsor of the state act. It was amended by Cal. WSRAs Amendments, ch. 1481, 1982 Cal. Stat. 262, 262-80 (codified at CAL. PUB. RES. CODE §§ 5093.50-.69 (West Supp. 1984)). Most of the events discussed in this article focus on the California WSRAs before the 1982 amendments. For a detailed discussion of the amendments, see *infra* notes 151-64 and accompanying text. Litigation surrounding the North Coast rivers revolved around the pre-1982 statute. Where the amendments are relevant, however, they are included.

81. See *supra* notes 28-38 and accompanying text.

ment.⁸² Under growing environmental pressure, the State Water Resources Control Board has increasingly administered the system to impose complex conditions on private, state, and federal water rights permittees which are designed to incorporate environmental goals. Indeed, the major emphasis of the state's water rights system in recent years has been water quality.⁸³ Nevertheless, the legislature has never recognized a right to appropriate water for instream flow.⁸⁴

The efforts⁸⁵ of the State Water Resources Control Board at achieving instream protection have been augmented, sometimes pushed, by the California Department of Fish and Game which participates directly in the water rights process. The Department recommends flow conditions, release requirements, and other features for State Water Resources Control Board consideration in awarding or conditioning water appropriations

82. See generally R. DUNBAR, *supra* note 29 (discussing the evolving system and the continuing importance of riparian doctrine in some areas).

83. See CAL. WATER CODE §§ 13,000–13,998 (West 1971 & Supp. 1984).

84. A state court recently ruled that to be valid in California an appropriation requires a diversion or some physical manipulation of water flow. *California Trout, Inc. v. State Water Resources Control Bd.*, 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979); *Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 153 Cal. Rptr. 518 (1979).

85. The legislature's primary purpose in creating the State Water Resources Control Board in 1967 was to integrate water quality concerns into the water rights process. See CAL. WATER CODE § 174 (West 1971). The legislature authorized the Board to deny an application on the grounds that no water was available for appropriation, that an appropriation was not in the public interest, or that an appropriator would have to make water releases—all in order to protect water quality. *Id.* §§ 1250–1266 (West 1971 & Supp. 1984). The water quality effects of the Central Valley Project and the State Water Project were a major reason why the State Water Resources Control Board tried to regulate the federal project through the water rights system. In 1978, this attempt led the Supreme Court to decide that Congress intended the Bureau of Reclamation to apply to the state for water rights permits and to be governed by their requirements to any extent not inconsistent with federal water project directives. See *California v. United States*, 438 U.S. 645 (1978). The authority of the State Water Resources Control Board to allow appropriations is limited by other aspects of California law. These include the "county of origin" statute, CAL. WATER CODE §§ 10,505–10,505.5 (West 1971), and the Delta Water Protection Act, *id.* §§ 11,454–11,460. Under these statutes, the areas of natural water occurrence in the state have a prior right to supplies necessary for their development or for preservation of certain baseline environmental conditions. These statutory limitations are expanded by the common-law concept of the "public trust," a controversial doctrine that obliges the state to protect public rights in flowing waters, tidelands, the beds of navigable lakes and streams, fisheries, and possible other resources. See generally *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, (Mono Lake decision, discussing purpose and scope of public trust doctrine and duties of state as trustee), *cert. denied*, 104 S. Ct. 413 (1983); *State v. Superior Court*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981) (applying public trust doctrine to navigable streams); *Marks v. Whitney*, 6 Cal. 3d 251, 259–60, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (expanding public trust doctrine to tidelands); *People v. Calfish Co.*, 166 Cal. 576, 598–99, 137 P. 799 (1913) (state retains right to enter land granted to private owners to preserve and advance public uses); *People v. Russ*, 132 Cal. 102, 106, 64 P. 111, 112 (1901) (public trust doctrine applies to non-navigable tributaries of navigable streams); *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 146–52, 4 P. 1152, 1155–57 (1884) (same). See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

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permits.⁸⁶ The Regional Water Quality Control Boards,⁸⁷ the Department of Forestry, and the Board of Forestry⁸⁸ are also important actors in this process. A 1977 order of the State Water Resources Control Board remarked on the disagreements which have arisen between state water quality and forestry regulation:

The method and manner of logging is specifically regulated by the California Division of Forestry pursuant to the Forest Practice Act and the Rules of Forest Practice. The [North Coast] Regional [Water Quality Control] Board should continue its cooperative efforts with the Division to provide water quality information in the timber harvest plan review process. However, when the rules of Forest Practice and timber harvest plan occasionally do not afford the degree of water quality protection required by the Porter-Cologne Water Quality Control Act, the Regional Board must act to provide such protection.⁸⁹

At the same time, the two agencies have cooperated to address the siltation effects of logging in North Coast streams, evincing generally the same spectrum of “state” goals and positions as was observed at the federal level.

Cooperation between state and federal land-managing agencies in water quality protection has also been administratively encouraged. Although the United States Supreme Court ruled in 1976 that a state could not require a federal installation to comply with its administration of the federal water pollution laws,⁹⁰ a 1978 Executive Order requires consultation and cooperation whenever “appropriate.”⁹¹ This order applies only

86. The California Department of Fish and Game has also been an antagonist to the water rights process by filing suit against the Board to compel it to issue a public permit for preserving instream flows. Although the Department lost this bid, it retains independent authority to review all alterations to stream channels and beds. No state or private applicant may proceed with construction until the Department determines that fish and wildlife will not be adversely affected or until the applicant agrees to adopt Department mitigation measures. CAL. FISH & GAME CODE §§ 1601–1607 (West 1971 & Supp. 1984).

87. The regional water quality boards operate under the authority provided by the 1969 Porter-Cologne Water Quality Act, CAL. WATER CODE §§ 13,000–13,998 (West 1958 & Supp. 1984), and implement the “point source” regulatory program required by the federal water pollution control laws. They are also involved in developing “best management practices” for timber harvesting and other “nonpoint” activities affecting water quality. *Id.* §§ 13370, 13377.

88. Under the Z’berg-Nejedly State Forest Practice Act of 1973, CAL. PUB. RES. CODE §§ 4511–4628 (West Supp. 1984), the Board of Forestry formulates “forest practice rules” which include sensitive logging practices for streamside protection zones and “special treatment areas.” *Id.* §§ 4551–4562.7. In addition, every state and private logger must submit a “timber harvesting plan” to the Department of Forestry for review. *Id.* §§ 4581–4582.

89. *In re* Petition of North Coast Environmental Center, Order of Cal. State Water Resources Control Board, No. WQ 77-1 (Jan. 6, 1977).

90. *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976).

91. “Whenever the [EPA] Administrator or the appropriate State, interstate, or local agency

to point source regulation under the state's discharge permit system; however, it also provides a firmer basis for state water quality criteria to influence national forest and other land management practices affecting the state's streams.⁹²

B. The California Wild and Scenic Rivers Act: Major Distinctions from the Federal Counterpart

The California WSRA⁹³ is a near carbon copy of its federal predecessor. There are, however, some potentially important differences.⁹⁴ For example, unlike the federal WSRA, the original state Act did not allow for a variety of responsible "administering agencies." The California WSRA originally gave sole administrative responsibility to the Secretary of Resources,⁹⁵ who delegated it to the Department of Fish and Game. Governor Brown's appointments for the Resources Secretary position⁹⁶ gave the program a predictable preservationist cast. It did not, however,

notifies an Executive agency that it is in violation of an applicable pollution control standard . . . the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance" Exec. Order No. 12,088, 14 WEEKLY COMP PRES DOC 1766, 1768 (Oct. 13, 1978).

92. In 1980, the California Water Resources Control Board said that "[c]oordinated planning by the [North Coast] Regional [Water Quality Control] Board, the State Board of Forestry and the U.S. Forest Service will ultimately lead to the development and implementation of better practices for timber harvesting." CAL. ST. WATER RESOURCES CONTROL BD. & REGIONAL WATER QUALITY CONTROL BODS, WATER QUALITY/WATER RIGHTS: 1978-80 REPORT 11. Besides forest practice regulations, other state land management programs protect instream values. These include the State Land Commission's control of trust lands, the State Department of Parks' administration of parks and recreational trails, and the Department of Boating and Waterways' support of water-based recreation. See generally B. ANDREWS & M. SANSOME, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST (forthcoming in 1984). In addition, the California Coastal Commission regulates local development along the coast, and the Williamson Act offers tax incentives for local farmland preservation. *Id.*

93. CAL. PUB. RES. CODE §§ 5093.50-.69 (West Supp. 1984).

94. There are also obvious differences which seem trivial. For example, the California legislation contained several "instant" rivers, but did not include provisions for study rivers that are found in the federal statute. 16 U.S.C. § 1275 (1982). The state Act provides no protection for designated or potential study rivers, nor does it require state agencies to consider potential wild and scenic rivers as alternative uses in their planning activities. The state law's only reference to ongoing study is the brief statement that "[o]ther rivers which qualify for inclusion in the system may be recommended to the Legislature by the [Secretary of the Resources Agency]." CAL. PUB. RES. CODE § 5093.54 (West Supp. 1984). Second, it does not specifically require state administrators to consider geological, historical, and cultural values. See *supra* note 52 and accompanying text. This omission could arguably limit the rivers which are eligible under the state system, but it probably has little practical effect.

95. Cal. WSRA, ch. 1259, § 1, 1972 Cal. Stat. 2510 (repealed by Cal. WSRA Amendments, ch. 1481, § 13, 1982 Cal. Stat. 275); see also *supra* note 86 and accompanying text. But see *infra* note 97.

96. Governor Brown's first Resources Secretary, Claire T. Dedrick, was a former Sierra Club officer and his second Secretary, Huey Johnson, was a founder of the Trust for Public Land.

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eliminate the need to coordinate with diverse agencies and interests:⁹⁷ the Act has a general consistency provision that requires all state and local agencies—not just water development and adjacent land management bodies as in the federal Act—to exercise their authority in accordance with the Act.⁹⁸

Second, the California WSR originally did not limit the acreage per mile of “river area” which could be protected, as the federal WSR did.⁹⁹ This feature encouraged the state to set expansive management boundaries in the North Coast region. These corridors, and the state’s recommended management practices for them, have been strongly opposed by the region’s private landowners and federal land-managing agencies, especially the United States Forest Service.¹⁰⁰

A final unique feature of the original California Act was the requirement that the legislature approve the Resources Agency’s management plans.¹⁰¹ California’s mandate for state legislative approval of plans became the major question in deciding whether the North Coast rivers met requirements in the federal Act pertaining to governor-nominated rivers.¹⁰²

97. Under the amended Act, the authority for administering the designated rivers resides with the state agencies that already manage those rivers. CAL. PUB. RES. CODE § 5093.58 (West Supp. 1984). The Secretary of the Resources Agency is reduced to a role of coordinating state and agency administrations and performing studies of the river systems. *Id.* § 5093.60. However, because most of the pertinent agencies are under the authority of the Secretary of the Resources Agency, this change may be merely cosmetic. The state Act itself poses specific requirements for state agency management, as well as a general guideline that state agencies manage designated rivers in a manner consistent with the values of the California WSR. *Id.* § 5093.61.

98. *Id.* § 5093.61.

99. Compare *id.* § 5093.50 with 16 U.S.C. § 1274(b) (1982).

100. The 1982 amendments define the “immediate environments” of the river area as land that is “immediately adjacent to” the river. CAL. PUB. RES. CODE § 5093.52(h) (West Supp. 1984). According to Patricia Wells, the Environmental Defense Fund (EDF) attorney who helped draft the bill, the framers intended the new language to make the management areas narrower than the Resources Agency’s existing guidelines, which included all land between the ridgetops on either side to a designated river. Telephone interview with Patricia Wells, EDF attorney (Jan. 11, 1983) (notes on file with the *Washington Law Review*). The 1982 amendments also reduce the importance of the management corridors. They modify the requirement that the Resources Agency use a management plan to administer the rivers, thereby making irrelevant the concept of a uniform management corridor. Each agency that administers the law under the revised Act will use its own discretion, and not the management areas defined by the Resources Agency to determine the reach of its management activities. See CAL. PUB. RES. CODE §§ 5093.60, .62 (West Supp. 1984).

101. Cal. WSR, Ch. 1259, § 1, 1972 Cal. Stat. 2510 (repealed by Cal. WSR Amendments, ch. 1481, § 10, 1982 Cal. Stat. 275). The 1982 amendments to the Act delete the requirement for *legislatively approved* management plans. The amendments themselves set out management guidelines for some areas, *see, e.g.*, CAL. PUB. RES. CODE § 5093.68 (West Supp. 1984) (restricting timber harvesting in “special treatment areas”); in others, the appropriate state and local agencies must administer the rivers in a manner consistent with the state Act. *Id.* § 5093.61.

102. The federal WSR has no comparable requirement: at least in the case of congressionally included rivers, the administering agency need only publish its plans in the Federal Register and wait

The California statute is distinguishable from its federal precursor. Although at first the differences appeared minor, some have grown in significance as they have provided leverage points in the battles between river protection and development priorities. Governor Brown's North Coast proposals have become entangled in the state's stormy water politics, the related jurisdictional disputes, and intense conflict among diverse state and federal resource management institutions and priorities.

IV. THE FEDERALIZATION OF CALIFORNIA'S NORTH COAST RIVERS: TRADING OFF RESOURCES VALUES AT THE STATE AND FEDERAL LEVELS

Midstream in the environmental decade of the 1970's, the federal and California river programs coexisted easily. For the most part, they covered different rivers. The federal system included only two: the middle fork of the Feather, whose main stem had been dammed by the State Water Project, and the north fork of the American, in portions not dammed by the federal Central Valley Project. The United States Forest Service administered the Feather River, while Congress ordered that both the Departments of the Interior and Agriculture administer the north fork of the American River.¹⁰³

Until Governor Brown's proposal, there were no federally designated rivers on the North Coast. The immense streams of the region were administered entirely under the state system. These rivers included the Eel, Trinity, Klamath, Smith, and their numerous tributaries. These rivers carry twenty-five million acre-feet of surface water annually—nearly half of the state's total—to the Pacific Ocean.¹⁰⁴ They drain humid, forested country characterized by steep slopes and highly erodible soils, and carry naturally high sediment loads.¹⁰⁵

90 days after they have been sent to Congress before they become effective. 16 U.S.C. § 1274(a)(3), (21) (1982).

103. The federal system also contained two designated study rivers, the Kern, above an Army Corps of Engineers dam, and the Tuolumne, which is also being considered for further hydroelectric development by the City of San Francisco. In March 1983, FERC granted a preliminary permit for investigation of the feasibility of constructing three dams in the last free running stretch (30 miles through Tuolumne Canyon) of this 158-mile, heavily developed river. Personal interview with Brian E. Gray, EDF attorney (Aug. 19, 1983) (notes on file with the *Washington Law Review*); see also EDF, Testimony of the EDF Before the Subcommittee on Public Lands and Reserved Water of the U.S. Senate Committee on Energy and Natural Resources in regard to S. 5 and S. 1515 (Aug. 10, 1983) (copy on file with the *Washington Law Review*).

104. I HERITAGE CONSERVATION & RECREATION SERV., U.S. DEP'T OF THE INTERIOR, FINAL EIS: PROPOSED DESIGNATION OF FIVE CALIFORNIA RIVERS IN THE NATIONAL WILD AND SCENIC RIVERS SYSTEM III-1 to III-3 (1980) [hereinafter cited as FINAL EIS].

105. *Id.* at III-34.

All of the rivers except the Smith have been dammed. Because of this, only specified portions of the Klamath, Trinity, and Eel Rivers were designated under the California Act. That same statute also ordered the Department of Water Resources to reevaluate the water development potential of the Eel in 1984 and report to the legislature which “shall hold public hearings to determine whether legislation should be enacted to delete all or any segment of the river from the system.”¹⁰⁶ The Smith River, because of its pristine status, was included in the state system *in toto* with “all its tributaries, from the Oregon-California state boundary to the Pacific Ocean.”¹⁰⁷

By the end of the 1970's, resource conflicts throughout California intensified along all fronts. Public support for environmental protection crystallized in the state and remained strong into the 1980's. This sentiment was often portrayed in the context of the state's environmental activists struggling against the opposite inclinations of federal agents.¹⁰⁸ The scenario unfolded in conflicts over water development, forestry, offshore oil development, energy facility siting, and elsewhere.¹⁰⁹ How-

106. CAL. PUB. RES. CODE § 5093.54(d) (West Supp. 1984).

107. *Id.* § 5093.54(c). The state system also included two components not on the North Coast. One was the north fork of the American River, which was also protected by WSRA. The other was the lower American River which had been dammed by the Central Valley Project and was slated for further development by the Bureau of Reclamation's controversial Auburn Dam. The lower American was included for its high recreation potential, which only existed because of flows created by an upstream federal dam. Clearly, the lower American's inclusion reflects the same extension of preservationist goals to lower priority environments as occurred in the wilderness movement. See S. DANA & S. FAIRFAX, *supra* note 92, at 300-01. On the other hand, the designation reflects changes in both public values and in the availability of natural areas for recreation uses.

108. See, e.g., San Francisco Chron., May 17, 1981, at A19, col. 1 (U.S. Interior Secretary James Watt's opposition to environmental groups increases public support for those groups); Editorial, San Francisco Chron., June 4, 1981, at 54, col. 1 (commenting on Secretary Watt's stand on northern California's rivers). This image of the Reagan Administration may not be affected by the change of Secretaries, from Watt to Clark, in the Department of the Interior.

109. In water development, the state challenged the Bureau of Reclamation through its water rights process and tried to regulate numerous Central Valley Project units. These included Auburn Dam on the lower American River; New Melones Dam on the Stanislaus River; and the Trinity River Division, Shasta Dam, and other northern California units affecting water quality in the Delta. The United States sued California, claiming that the federal reclamation laws did not allow the State Water Resources Control Board to set conditions on water rights permits for the Bureau's New Melones Dam on the Stanislaus River. *United States v. California*, 403 F. Supp. 874 (E.D. Cal. 1975), *aff'd*, 558 F.2d 1347 (9th Cir. 1977), *rev'd*, 438 U.S. 645 (1978), *on remand*, 509 F. Supp. 867 (E.D. Cal. 1981). The EDF tested essentially the same issue against a local Bureau water contractor under state law. *EDF v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), *rev'd*, 439 U.S. 811 (1978), *on remand*, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980). Trinity County tested both state and federal law when it sued the Department of the Interior directly, alleging environmentally destructive operation of the Trinity River Division during the 1976-77 drought. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977). In forestry, California challenged the Forest Service on wilderness study procedures. *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980).

ever, awareness of resource shortages was growing: the 1976–77 drought, the economic woes of the timber industry, and unemployment altered the context of the state's recreation and preservation programs. California's legislature, although it had passed some of the country's toughest environmental legislation in the 1970's,¹¹⁰ refused to support, and occasionally directly thwarted, a number of Brown Administration maneuvers designed to save rivers.¹¹¹

Nowhere were these conflicting public priorities more deeply felt by Californians than in the debate over completion of the State Water Project. A water development compromise approved by the legislature in 1980 authorized construction of the controversial Peripheral Canal to transport water around the Sacramento-San Joaquin River Delta.¹¹² The Canal was widely opposed by environmental and northern California groups for two reasons: it symbolized the continued diversion of northern California's water to the south while also potentially disturbing the ecology and existing water supply of the Delta. Other groups, including several putative beneficiaries, opposed the measure as well. Some major agricultural interests argued that the Canal cost too much and still would not deliver adequate water.¹¹³

The state legislature worked out a compromise which provided that the Peripheral Canal and certain northern California dams would be permitted in exchange for state constitutional language intended to provide protection for the Delta and the North Coast rivers.¹¹⁴ Governor Brown signed the compromise legislation on July 8, 1980.¹¹⁵

110. See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21,000–21,176 (West 1977 & Supp. 1984); Cal. WSR, CAL. PUB. RES. CODE §§ 5093.50–.69 (West Supp. 1984).

111. Even the public as a whole failed to follow the Administration's lead. For example, despite the State Water Resources Control Board's position against the Bureau of Reclamation on the New Melones Dam, a 1974 effort to vote the Stanislaus River into the state's Wild and Scenic Rivers System by public initiative failed. L.A. Times, Nov. 7, 1974, at 24, col. 8 (failure of the Wild Rivers Initiative, Cal. Proposition 17).

112. Act of July 18, 1980, ch. 632, 1980 Cal. Stat. 1723 (codified in scattered sections of CAL. WATER CODE). The Sacramento River from the north and the San Joaquin River from the south flow into the delta and then westward to the Pacific Ocean through San Francisco Bay.

113. Andrews & Fairfax, *supra* note 29. Although it was originally a co-sponsor, the high costs and deep divisions led Congress to withdraw authority for federal participation in the Peripheral Canal. Environmental groups found themselves in court arguing against the state on the basis of federal law. The Sierra Club had claimed that the 1899 Rivers and Harbor Act required the state to get a federal permit for the Peripheral Canal from the Army Corps of Engineers. In 1981, the United States Supreme Court denied the group standing under the Act, and the controversy remained a political one. *Sierra Club v. California*, 451 U.S. 287 (1981).

114. The state's water development statute, Act of July 18, 1980, ch. 632, 1980 Cal. Stat. 1733 (codified in scattered sections of CAL. WATER CODE), was accompanied by a constitutional amendment which would require a public vote before any existing safeguards for the Delta and the rivers could be weakened. A two-thirds legislative vote would be required for alterations which did not diminish existing levels of protection. "A resolution to propose to the people of the state of Califor-

A. *California's Request for Federal Designation*

At the same time that Governor Brown embraced the compromise, he threw it away. Immediately after ceremoniously signing the compromise bill, he asked Secretary Andrus to consider an administrative proposal placing 4000 miles of state-protected rivers into the national wild and scenic rivers system. Governor Brown made no mention of this pending move in his speech at the signing of the compromise legislation.¹¹⁶

Governor Brown's request was a total surprise; it was preceded by no consultation with affected resource users of localities and, therefore, appeared underhanded. More importantly, it affected an immense range of human lives and resource values in the North Coast region. It was greeted by an immediate public stir. Although it appeared that different interests were lining up to support different levels of government, the conflict between federal and state laws was confused by the fact that initially the federal and state governments were on the same side. The conflicting laws simply provided the format in which traditionally opposed and allied groups vied.

1. *The Private Interests*

The timber industry led the opposition. Timber interests feared that federal designation would create another layer of restrictions on logging activities while, at the same time, tightening the timber management requirements on federal lands.¹¹⁷ Mining ventures were also threatened by the designation.¹¹⁸ However, because state laws already greatly restricted

nia an amendment to the Constitution of the state, by adding Article A relating to water," A.C.A. 90 (Apr. 10, 1980).

115. Governor Brown lavishly praised the key legislators who "steered this bill through its very tortuous passage. It's been a long time in coming. I think it is a reasonable balance of the competing interests." Remarks by Governor Edmund G. Brown, Jr., at the signing of Cal. S. 200, July 18, 1980, reprinted in CAL. DEPT OF WATER RESOURCES, THE CAL. STATE WATER PROJECT—CURRENT ACTIVITIES AND FUTURE MANAGEMENT PLANS, Bull. 132-80, at 33, 36 (1980). A diverse group of opponents to the bill disagreed. See *supra* text accompanying note 113. They were successful in having it put on the ballot for public consideration in June 1982. Proposition 9, supporting the canal and attendant measures, was defeated by a two-to-one majority. For a full discussion of Proposition 9 and attendant phenomena, see B. ANDREWS & M. SANSOME, *supra* note 92.

116. Governor Brown's only mention of federal involvement in the state's programs was that he was "expressly asking the Federal Government to join in a massive conservation program" involving water resources throughout the state. Remarks by Governor Edmund Brown, Jr., *supra* note 115, at 36. In the final paragraph of his speech, he made a cryptic reference to "federal guarantees of our wild rivers." *Id.*

117. Written statement of Robert B. Hoover, President, Cal. Forest Protective Ass'n reprinted in 2 FINAL EIS, *supra* note 102, at VI-238, -240, -246.

118. The federal WSRA restricted mining pursuant to Interior of Agriculture regulations and

mining in the area,¹¹⁹ the mining industry was less actively opposed than the timber companies. The timber interests were supported by the local North Coast counties of Del Norte, Trinity, Siskiyou, and Humboldt, all of which feared the economic impacts and loss of local tax base which might result from further decline of the timber industry.¹²⁰ Rounding out the opposition were water developers from the southern part of the state who feared that federal designation would foreclose use of the enormous untapped water resources of the region, particularly the Eel River.¹²¹

Lining up in favor of designation were the fishing industry, recreation groups, and environmentalists. Fishing groups wanted the designation in order to restrict timber operations in the area,¹²² which they believed had contributed to erosion, water pollution, and the subsequent decline in the region's fisheries.¹²³ Recreation and environmental groups favored federal designation because they hoped it would slow or stop development in riparian areas and enhance protection of the natural beauty of the area.¹²⁴

Electric power interests have been conspicuous by their absence from the controversy. Public utilities and small energy entrepreneurs alike have flooded state and federal licensing agencies with applications to build or extend hydroelectric power plants in northern California.¹²⁵ In response to federal laws requiring utilities to buy locally generated power at the replacement rate,¹²⁶ investors with one to five million dollars began to construct their own hydroelectric facilities. This enthusiastic response to the new statutory goals may abate as experience repeatedly demonstrates

prohibited mining within one-quarter mile of any river designated as "wild" or considered for potential inclusion in the national system. 16 U.S.C. § 1280 (1982).

119. CAL. PUB. RES. CODE § 5093.66 (West Supp. 1984).

120. See *infra* notes 201–02 and accompanying text.

121. Reporter's transcript at 49–54 (June 16, 1981), *Del Norte v. United States*, No. C-81-0567WAI (N.D. Cal.); see *infra* notes 198–200 and accompanying text.

122. Although a significant local industry, fishing, would be enhanced by wild and scenic river designation, the local counties were initially moved to side with the timber companies for two reasons. First, timber companies own land and pay property tax. Second, when federal lands are harvested, the Forest Service distributes 35% of the gross revenues to the states and localities under a variety of revenue sharing programs. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ADEQUACY OF FEDERAL COMPENSATION TO LOCAL GOVERNMENTS FOR TAX EXEMPT FEDERAL LANDS 19 (1978).

123. DEPARTMENT OF FISH & GAME, CAL. RESOURCES AGENCY, SMITH RIVER DRAFT MANAGEMENT WATERWAY PLAN 192–96 (1980) [hereinafter cited as SMITH RIVER DRAFT PLAN].

124. See generally comments from representative conservation groups published in 2 FINAL EIS, *supra* note 104, pt. VI.

125. Telephone interview with David Sabiston, Supervising Engineer, Division of Water Rights, State Water Rights Control Bd., Sacramento, California (Nov. 15, 1982) (notes on file with the *Washington Law Review*).

126. The Public Utility Regulatory Policy Act of 1978, 16 U.S.C. §§ 2601–2645 (1982).

that licensing still takes considerable time and expense,¹²⁷ or as changes in the energy economy discourage small investors. Nevertheless, the absence of electric power interests from the dispute is noteworthy. One official at the Water Rights Division of the State Water Resources Control Board has suggested that both large and small hydrodevelopers have agreed not to build any plants on state-designated streams.¹²⁸ This exhibition of coherence and forbearance is surprising for such a diverse group. Because it is not clear that FERC licensing authority would be impeded by state designations alone,¹²⁹ the activity of hydropower developers and their apparent hands-off policy is difficult to explain.

2. *The Federal Reaction*

Governor Brown's request to Secretary Andrus shifted many wheels into high gear. The adversely affected resource interests went to court. Less predictable perhaps, the Department of the Interior and the California Resources Agency worked in an unusually cooperative spirit. Both state and federal proponents foresaw that the designation process might have to be completed before a possible change of federal administration in January 1981. In July 1980, reelection of President Carter was unsure, and a new administration might not continue to grease the skids under the designation proposal.¹³⁰

Work on the draft environmental impact statement (EIS) began on August 1 and was completed within a month.¹³¹ The Heritage Conservation and Recreation Service (HCERS) coordinated the Department of the Interior effort. It included in the draft a ninety-page river management proposal which had been prepared by the California Resources Agency. It was part of an effort to demonstrate that California in fact had authority to "permanently administer" the rivers as required for inclusion under the

127. See Rios, *California's Love Affair with Small Hydropower Plants*, CAL. J., Feb. 1981, at 82.

128. Telephone interview with David Sabiston, *supra* note 125.

129. FERC authority to license projects on state wild and scenic rivers presents complex issues, discussed *infra* at notes 212–15 and accompanying text.

130. Under § 2(a)(ii) of the federal WSRA, the Secretary of the Interior had to find that the North Coast rivers met federal eligibility criteria and that the state had a commitment to permanently administer them. 16 U.S.C. § 1273(a)(ii) (1982). Secretary Andrus also had to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) before he could act. The California Resources Agency had already prepared draft waterway management plans for the Smith River, several tributaries of the other North Coast rivers, and the lower American and north fork American rivers. Although none of these had been approved by the legislature, they provided a sizable data base on which federal river evaluation and impact analysis could proceed. The California Resources Agency's data and zeal gave it a major role in the federal NEPA process.

131. The National Park Service has assumed the functions of the abolished Heritage Conservation and Recreation Service (HCERS).

federal Act despite the absence of legislative approval of management plans¹³² specified by the state statute. Public meetings on the draft were held in late October of 1980, and a final environmental impact statement was filed with the Environmental Protection Agency (EPA) on December 12, 1980.¹³³ Federal regulations require a thirty-day waiting period after the EPA publishes notice of a final environmental impact statement in the Federal Register before a decision can be made on the analyzed action.¹³⁴ Any delay would foreclose action by the defeated Carter Administration.

3. *The Designation Decision*

The environmental impact statement was reformulated into a briefer issue document for the Secretary and the Assistant Secretaries to assess.¹³⁵ The debate within the department was similar to the controversy elsewhere,¹³⁶ for participants therein reflected virtually all the affected interests in the North Coast controversy.¹³⁷ For example, the Assistant Secretary for Energy and Minerals looked to the minerals potential of the Smith River area and opposed the federal designation altogether,¹³⁸ while

132. CAL RESOURCES AGENCY. CALIFORNIA ADMINISTRATION OF THOSE RIVERS INCLUDED IN THE STATE'S REQUEST FOR NATIONAL WILD AND SCENIC RIVERS DESIGNATION (1980), reprinted in FINAL EIS, *supra* note 104 app. E.

133. FINAL EIS, *supra* note 104.

134. 40 C.F.R. § 1506.10 (1983) (timing of agency action for EPA).

135. U.S. DEP'T OF THE INTERIOR, SECRETARIAL ISSUE DOCUMENT, CALIFORNIA RIVERS APPLICATION (1981) [hereinafter cited as SECRETARIAL ISSUE DOCUMENT].

136. Fairfax & Andrews, *Debate With and Debate Without: NEPA and the Redefinition of the "Prudent Man" Rule*, 19 NAT. RESOURCES J. 505 (1979).

137. The positions of the different Assistant Secretaries of the Interior ranged from conservative to moderate views. None endorsed California's proposal to include all 4000 river miles. The Assistant Secretary for Energy and Minerals favored the *status quo*. If any rivers would be designated, this Assistant Secretary wanted the Smith River entirely excluded due to its mineral potential. He also wanted all other river segments involving the national forests left out. Memorandum from Assistant Secretary—Energy and Minerals, U.S. Dep't of the Interior, to Director, Executive Secretariat (Jan. 8, 1981) (copy on file with the *Washington Law Review*). Three Assistant Secretaries (Fish, Wildlife, and Parks; Land and Water; and Policy, Budget, and Administration) preferred protecting 1018 river miles and putting 228 miles of the Smith River in study status. Memorandum from Robert L. Herbst, Assistant Secretary for Fish and Wildlife and Parks, U.S. Dep't of the Interior, to Executive Secretary (Jan. 9, 1981) (copy on file with the *Washington Law Review*); Memorandum from Assistant Secretary—Policy, Budget and Administration, U.S. Dep't of the Interior, to Executive Secretariat (Jan. 12, 1981) (copy on file with the *Washington Law Review*). The Assistant Secretary for Indian Affairs, who came closest to the Brown concept favored excluding much of the Smith River but protecting 1246 total North Coast river miles. Memorandum from Assistant Secretary—Indian Affairs, U.S. Dep't of the Interior, to Executive Secretary (Jan. 9, 1981) (copy on file with the *Washington Law Review*).

138. Memorandum from Assistant Secretary—Energy and Minerals, U.S. Dep't of the Interior, to Director, Executive Secretariat, *supra* note 137.

the Assistant Secretary for Indian Affairs supported the most expansive designation alternative.¹³⁹

The United States Forest Service was only indirectly involved in the decision. The Secretary of Agriculture, whose responsibilities include the Forest Service, participated in the Department of the Interior's internal deliberations.¹⁴⁰ Regional and local Forest Service personnel charged with managing the vast majority of the effected land felt estranged from a process which took place primarily in Sacramento, California.¹⁴¹ Predictably, the Secretary of Agriculture supported his own "team" and voted for the option which excluded all river segments bordering on national forests. The Department of Agriculture couched its opposition to the Interior Department's activities¹⁴² as a concern for planning. The Secretary of Agriculture argued that the rapid environmental impact statement process had completely shortcircuited the mandatory United States Forest Service planning and environmental impact procedures. The Secretary of Agriculture wrote to the Secretary of Interior on January 12, 1981:

The proposal would likely have major impacts on output from the National Forests in northern California [T]he impacts on the multiple resources of the National Forest lands could not be adequately assessed in the abbreviated time The planning now underway on the National Forest System lands, in accordance with the National Forest Management Act of 1976, will comprehensively examine all resources tributary to the rivers in the context with the adjacent public and private lands. Any action to fragment the decision resulting from the Forest planning process would be premature and undesirable.¹⁴³

The Secretary of the Interior took a moderate path and embraced the alternative recommended by the interdisciplinary team which drafted the environmental impact statement.¹⁴⁴ All of the state's requested rivers

139. Memorandum from Assistant Secretary—Indian Affairs, U.S. Dep't of the Interior, to Executive Secretary, *supra* note 137.

140. Under the congressional inclusion procedure of WSRA, the Department of Agriculture would have been the lead river study agency. This is because national forest lands were so heavily involved in designations, particularly along the Smith. However, under the state-proposed option (§ 2(a)(ii) of WSRA), the Department of the Interior is the lead agency regardless of how much national forest land is involved. 16 U.S.C. § 1273(a)(ii) (1982). Because Governor Brown proposed the North Coast inclusions, it was the HCRS which conducted the EIS process and the Secretary of the Interior who judged the rivers' eligibility.

141. Telephone interview with Jon Kennedy, U.S. Forest Serv., Pacific Southwest Region (Mar. 15, 1982) (notes on file with the *Washington Law Review*).

142. For a discussion of long standing Agriculture/Interior friction, see S. DANA & S. FAIRFAX, *supra* note 92, at 151–55.

143. Letter from Bob Bergland, Secretary, U.S. Dep't of Agriculture, to Cecil D. Andrus, Secretary, U.S. Dep't of the Interior (Jan. 12, 1981) (copy on file with the *Washington Law Review*).

144. 1 FINAL EIS, *supra* note 104, at IV-90 to -104.

were fully included in the national system except for the Smith and a minor alteration on the Klamath.¹⁴⁵

The major feature of the Secretary's decision was exclusion of most of the Smith River. The environmental impact statement had found 2760 miles of the Smith and its tributaries *ineligible* for inclusion in the national system. These extensive segments were not ineligible because they lacked wild and scenic values. Rather, they were deemed ineligible in the environmental impact statement because of the effects which inclusion would have on timber harvesting in the Six Rivers National Forest.¹⁴⁶ The Secretary chose to agree with the environmental impact statement and to include only 376 miles of the Smith. Those miles were chosen on the basis of their outstanding anadromous fishery values. The Secretary went a significant step further, however: not only did he exclude much of the Smith but he also classified many of the included segments as *recreational*. Administration of the segments classified as wild would preclude timber harvesting and mining, while a recreational classification would not. The Secretary even avoided the middle "scenic" category which, under the federal guidelines then being polished for proposal, could have imposed special silvicultural and road-building requirements.¹⁴⁷

In rejecting most of the Smith River as ineligible, the Secretary did not judge wild and scenic values on the basis of the river's present, undeveloped status. Some segments were excluded because of imminent development, such as the California Nickel Company's cobalt mining operation along Hardscrabble Creek. For the most part, however, the Secretary looked to the resource development potential of the river. He then justified deletion on the basis of the fishery values of the included miles, implying that the deletions lacked such superlative assets. At the same time, in his letter of decision to Governor Brown, he acknowledged that:

With regard to the smaller tributaries of the Smith River which were not deemed eligible for the National System, but which California chose to put into its State system, we recognize that the high water quality of those tributaries is essential to maintaining the outstandingly remarkable anadromous fishery resource *of the river system*. We expect that the State and the U.S.

145. The Klamath alteration simply started the designation about half a mile further downstream from a FERC project than the state had requested. Office of the Sec'y, U.S. Dep't of the Interior, Notice of Approval for Inclusion in the Wild and Scenic Rivers System as State Administered Components 2 (Jan. 19, 1981).

146. 1 FINAL EIS, *supra* note 104, at IV-90.

147. HCRS., U.S. Dep't of the Interior, National Wild and Scenic Rivers System: Draft Revised Guidelines For Eligibility, Classification and Management of River Areas, 46 Fed. Reg. 9148, 9154 (1981) [hereinafter cited as HCRS Draft Guidelines].

Federalism and the Wild and Scenic Rivers Act

Forest Service will take all necessary steps to sustain and possibly improve their present quality.¹⁴⁸

The Secretary's decision was a careful political compromise. It satisfied the state and the environmental groups without overly disrupting the timber and mining industries. The Smith deletions were surprisingly well-masked by the overall enormity of the North Coast inclusions. Popular accounts made little distinction between including some or all of the Smith. They also failed to appreciate the fact—too fine for the public eye, yet potentially critical for on-the-ground resource management—that the Secretary had classified many of the Smith's included segments as recreational. What hit the press was the flashy story that the Secretary had decided to put five rivers, the Smith, Klamath, Trinity, Eel, and lower American, into the national wild and scenic rivers system.

The inclusions did impose costs on the resource development side. The north fork of the Eel—the only other river region where the United States Forest Service estimated adverse effects on timber harvesting—was included in full, with most of its mileage classified as wild. Inclusion of the middle fork of the Eel also put water users' long-shot hopes for developing that river¹⁴⁹ virtually beyond reach. These were all real impacts of federal designation which angered resource interests and made the move appear bold in the aggregate. The Secretary of the Interior signed his decision letter to Governor Brown only hours before he left office. The magnitude of the decision and the unusually rapid environmental impact statement process which preceded it opened the federal designation to court attack.

Although the successful effort to produce a draft EIS in a month and a final decision in five months is just short of astounding, it is difficult to point to the process as a touchstone of federal-state cooperation. Key participants were absent. That raises doubts about the future of river management and points again to weaknesses in federalism theory when it is not possible to identify the federal or state position.

The most notable cooperation took place between the California Resources Agency and the Department of the Interior regarding the analysis of the Governor's proposal. However, the United States Forest Service, which manages a vast proportion of the affected river corridors, was excluded—one could almost say conspired against. That marginal players could and did cooperate to file papers seems less important than the fact

148. Letter from Cecil D. Andrus, Secretary, U.S. Dep't of the Interior, to Governor Edmund G. Brown, Jr. (Jan. 19, 1981) (emphasis added) (copy on file with the *Washington Law Review*). Again, the emphasis on the Forest Service and the absence of a reference to FERC is surprising. See *infra* notes 212–15 and accompanying text.

149. See *infra* note 198 and accompanying text.

that the single most important agency in the conflict did not. Indeed, it could be argued that the major result of the cooperation was to minimize or evade procedures laboriously evolved during the last decade to facilitate thorough analysis and public evaluation of resource management programs.¹⁵⁰

This does not demonstrate that cooperation is bad, but suggests that it is not necessarily good either. The North Coast Rivers EIS also gives hope to those who fear that such undertakings must by their very nature take years; that is clearly not the case. But neither is the speedy production of a bureaucratic boilerplate the touchstone of federal-state interaction. Further, although there was obvious cooperation between selected agencies, that did not mean that federal and state levels of government were cooperating. River preservation is too complex, encompassing too many overlapping and conflicting mandates and too many agencies at all levels of government, to be usefully characterized as cooperative. Like the idea of federal-state conflict, the idea of cooperation rests on the assumption that there are federal and state positions which can be represented each by an agency and which can be harmonized by their mutual efforts. The North Coast rivers conflict, once again, suggests the contrary. The pattern of priorities and interactions is complex and constantly evolving.

B. Beyond Designation: The Constantly Changing Meaning of Inclusion

Not unexpectedly, therefore, the meaning of the North Coast designation has also been continually shifting. Governor Brown's original proposal did not look like the final designation approved by Secretary Andrus. But Secretary Andrus' decision did not freeze the issue; the target is still moving. Each of the interested parties pressed its claims in institutional arenas where it believed that it held an advantage: in the courts, in federal and state legislatures, and in the regulation writing process. All of this advocacy was further complicated by the changes in the executive branches: first in Washington, D.C. and then in Sacramento. None of this shifting, multifaceted debate fits usefully into traditional models of federalism: neither the alliances nor the antagonisms are stable, and govern-

150. Industry, at least, claims that NEPA 42 U.S.C. §§ 4321-4370 (1976 & Supp. V 1981), has been circumscribed. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 60, *County of Del Norte v. United States*, No. C-81-0567 WAI (N.D. Cal. filed Mar. 1981). Plaintiffs in *Del Norte* also assert that federal-state cooperation has shortcircuited requirements in WSRA, 16 U.S.C. §§ 1271-1287 (1982); see *infra* notes 237-45 and accompanying text.

ment agencies and officials frequently resemble private sector advocates. They pursue their own unique priorities and do not act as exemplars of broader state or national interests.

1. *California: The Wild and Scenic Rivers Amendments*

One by-product of the North Coast designation controversy was that the California legislature finally moved to amend its statute.¹⁵¹ It has already been noted that there was never a single state position on the issue. Throughout eight years of the Brown Administration, the wild rivers program was intensely controversial. The Resources Agency battled the state assembly, the timber industry, and the North Coast counties in order to try to draft and implement management plans. The Agency produced four plans, all of which appeared to cut back severely on timber harvest. Only one went to the legislature, and that was flatly rejected. The other three engendered so much opposition from the counties that they were never submitted to the assembly for approval.¹⁵²

Long before the North Coast designation controversy erupted, several legislators were at work on amendments. Three years of intensive negotiations among timber interests, the counties, the Governor, and the Resources Agency led to California Assembly Bill 1349,¹⁵³ popularly known as the Bosco Bill for its major sponsor. Environmentalists initially opposed the bill because they feared it would open up more land to harvest and endanger the North Coast rivers designation.¹⁵⁴ However, the bill passed after another year of protracted negotiations in the full heat of the North Coast controversy.¹⁵⁵ Environmentalists, led by the Environmental Defense Fund, recognized the need to make the California wild and scenic rivers program less antagonistic toward the forest products industry. In part, the environmentalists hoped that the timber industry would conclude that state administration under the Act was less threatening than before and would drop the lawsuit that the industry had initiated on North Coast river designation. Environmentalists also realized that some form of the bill would pass, and they wanted to make it as palatable as they could.¹⁵⁶

151. See *infra* note 155.

152. See Berthelson, *Bill to Alter Wild Rivers Act to Face Troubled Waters*, Sacramento Bee, June 1, 1981, at A12, col. 1.

153. Cal. A.B. 1349, 1981–82 Reg. Sess. (1981).

154. See Berthelson, *Panel OKs Revised State Wild Rivers Act*, Sacramento Bee, June 3, 1981, at A12, col. 1.

155. Ch. 1481, §§ 1–20, 1982 Cal. Stat. 262–80 (codified at CAL. PUB. RES. CODE §§ 5093.50–.69 (West Supp. 1984)).

156. Telephone interview with Patricia Wells, *supra* note 100. It also seems reasonable to sup-

The amendments, as enacted, made three basic changes in the California Act. First, they eliminated the requirement for management plans by the Secretary of Resources.¹⁵⁷ It is not clear which, if any, of the contenders were advantaged by that provision. Under Governor Brown's administration, the management plans were highly protective of the rivers and posed a threat to timber companies and the North Coast counties.¹⁵⁸ But the legislature's longstanding refusal to approve management plans when presented constituted a strong argument that federal inclusion of the North Coast rivers was not authorized; hence, elimination of plans from the state program could affect the outcome of litigation. Moreover, if the state was ever again to propose federal designation for its rivers, the absence of a state requirement for management plans might ease federal approval.

The different groups' calculations of their advantages under the new provision were altered by changes in both federal and state administrations. After President Reagan took office, the timber industry was perhaps less concerned about federal approval of additional state-proposed rivers. Conversely, when Governor Brown was replaced by the apparently more pro-development Governor George Deukmejian two years later, the environmentalist perception of state management priorities may have become less optimistic.

The Bosco Bill's second major alteration of the original Act was to remove authority for river administration from the Secretary of Resources. The amendments give the legislature, not the Resources Secretary, the power to classify rivers as wild, scenic, or recreational.¹⁵⁹ The bill also deleted all references to the Secretary administering the Act, leaving administrative responsibility with agencies that already manage the rivers.¹⁶⁰ Under the amended Act, the Secretary's duties are limited to studying the rivers and the California system, and to coordinating the efforts of state and federal agencies.¹⁶¹

The impact of these provisions on the contenders may not be as sweeping as it seemed when they were first passed. Most of the state agencies that manage rivers and their adjacent land areas are contained within the Resources Agency; therefore, the Secretary still has ultimate authority

pose that the Andrus decision had refocused the environmentalists' efforts somewhat, away from an effort to control timber harvesting and increasingly toward thwarting FERC efforts to authorize hydro developments in the area. See *infra* notes 212-15 and accompanying text.

157. CAL. PUB. RES. CODE §§ 5093.58-.60 (West Supp. 1984) (repealing ch. 1259, § 1, 1972 Cal. Stat. 2510, 2513).

158. See, e.g., SMITH RIVER DRAFT PLAN, *supra* note 123.

159. CAL. PUB. RES. CODE §§ 5093.546, .58 (West Supp. 1984).

160. *Id.* §§ 5093.60-.62 (repealing ch. 1259, § 1, 1972 Cal. Stat. 2510, 2513).

161. CAL. PUB. RES. CODE §§ 5093.60, .69 (West Supp. 1984).

over river administration in spite of the change. Governor Deukmejian chose a Resources Secretary who has a less explicitly defined orientation than former Secretary Huey Johnson. As Resources Secretaries and their approaches to river management continue to vary, prediction of the amendment's long-term and short-term consequences will become exceedingly risky.

The final change in the Act is the redefinition of management boundaries. Under the original Act, state agencies sought to preserve the rivers and their "immediate environments."¹⁶² Governor Brown's Resources Secretary interpreted this language broadly as authority to administer all land between the ridgetops on either side of the rivers. The new language narrows this definition: "immediate environments" means "the land immediately adjacent to" the designated river segments.¹⁶³ Participants in the process assumed that the change would limit the scope of state management to the same extent as federal management under the federal Act, or about 320 acres per river mile.¹⁶⁴

This provision should please the timber industry and the counties, but, once again, the immediate impact may be minor. With a change of administration in the Resources Agency, the timber industry would probably have found the state's management policies more acceptable, even without the narrower river corridors.

Throughout the negotiations on the Bosco Bill, affected interests had to balance their long-term goals for the wild and scenic rivers programs against the immediate concerns of the North Coast litigation. These complex assessments were confounded by the fact that the state program was not the only one in flux. A new administration in Washington, D.C., picked up the loose ends of long-pending changes in federal wild and scenic river management guidelines and put a new emphasis on long-discussed amendments to the federal Act.

2. *The Federal Agencies: New Regulatory Guidelines*

The new final guidelines for wild and scenic river management promulgated in late 1981 by the Reagan Administration essentially reorganize old guidelines in force since 1970.¹⁶⁵ However, the new guidelines are

162. *Id.* § 5093.50.

163. *Id.* § 5093.52(h).

164. Telephone interview with Patricia Wells, *supra* note 100.

165. For the original guidelines, see U.S. Dep'ts of the Interior and Agriculture, Guidelines for Evaluating Wild and Recreational River Areas Proposed for Inclusion in the National Wild and Scenic Rivers System Under Section 2, Pub. L. No. 90-542 (as amended) (1970) [hereinafter cited as 1970 Guidelines]. For the new guidelines, see Guidelines for Eligibility, Classification and Manage-

very different from a set drafted over a two-to-four-year period by the Carter administration and published for public comment just after Secretary Andrus left the Department. Thus, the changes in guidelines between 1970 and 1981 were slight. However, the changes from 1978–80 to 1981 were dramatic, demonstrating once again how difficult it is to speak about “the” federal position.

The Reagan revisions simply finished an effort begun under President Carter to revise the program. The Heritage Conservation and Recreation Service (HCRS) worked for two years developing draft guidelines which would tighten the 1970 version.¹⁶⁶ Those proposed Carter guidelines were published in draft form on January 28, 1981, less than ten days after the Reagan Administration took office. After extensive public comments, the Departments of the Interior and Agriculture revised the final guidelines so that they were similar to the 1970 version.

The Reagan guidelines rejected the Carter Administration’s effort to redefine “wild” rivers to include areas where minor dams and other inconspicuous or “historical” or “cultural” structures existed.¹⁶⁷ Moreover, the new guidelines follow the 1970 regulations by relying on the language of the Act to define river management criteria.¹⁶⁸ Specific water quality standards, mining prohibitions, restrictions on dams, and controls on federal appropriation of land and water included in the Carter team draft were eliminated in the final version. The Carter language also allowed “selective timber harvest”¹⁶⁹ in scenic river areas, while the final allows “timber harvest.”¹⁷⁰ Although the regulations are ostensibly a joint product of the Departments of Agriculture and the Interior, it would be a serious error to assume that the guidelines presage a uniform federal approach to the program. The provisions are suggestive rather than binding, and offer ample room for exercise of discretion by diverse agencies operating under significantly different mandates.

ment of River Areas, 47 Fed. Reg. 39,454 (1982) [hereinafter cited as 1982 Guidelines].

166. HCRS Draft Guidelines, *supra* note 145, 46 Fed. Reg. at 9149.

167. *Id.* at 9152–53.

168. 1982 Guidelines, *supra* note 163, 47 Fed. Reg. at 39,458. The management section of the 1982 Guidelines begins with General Management Principles, § 10(a). The HCRS Draft Guidelines, *supra* note 147, however, incorporated management principles that “are found in or stem from” WSRA, 46 Fed. Reg. at 9154, as well as § 10(a)’s General Management Principles, 46 Fed. Reg. at 9155.

169. HCRS Draft Guidelines, *supra* note 147, 46 Fed. Reg. at 9156.

170. 1982 Guidelines, *supra* note 165, 47 Fed. Reg. at 39,459.

3. *The Reagan Administration: Amending the Federal Act*

Reagan Administration efforts to put its own stamp¹⁷¹ on long-pending proposals to amend the federal Act constitute a final impediment to identifying the federal position on wild and scenic rivers. The proposed legislative amendments are in keeping with major administration policies. For example, they may reduce the federal government's ability to purchase land for river protection,¹⁷² and allow the federal government to sell the land as long as the Interior Department includes in the sale restrictions preserving the values under the Act.¹⁷³

The proposed amendments also address state requests to designate rivers, the issue raised by the North Coast controversy. They would require concurrent resolution by the state governor and the state legislature before the Secretary could consider a designation proposal under section 2(a)(ii) of the Act,¹⁷⁴ and would allow a state legislature to request the Secretary of the Interior for a revocation of designation.¹⁷⁵ Proposed changes in the Act would also require federal agencies with jurisdiction over five percent of the lands adjacent to the proposed rivers to approve the designation decision.¹⁷⁶

4. *Summary*

In a very short period of time, the North Coast controversy became extremely complex. Standard federalism models are misleading because the basic ingredients are missing; it is impossible to identify either a federal or a state position. An initial complication was the fact that the extraordinary cooperation between the California Resources Agency and the Department of the Interior was motivated, in significant part, by conflict between the same state agency and a different federal one—the United States Forest Service.¹⁷⁷ In addition, many of the significant players and almost all the ground rules were in a constant flux. Exploiting and creating these changes, the interest groups are an important part of changing the pattern. Although a fairly standard split between preservation and development is obvious, it is only slightly more useful in describing the interactions than the federal sovereign versus state sovereign concept. It

171. WSRA Amendments, White House Press Release (Sept. 13, 1982) [hereinafter cited as Press Release] (copy on file with the *Washington Law Review*).

172. Compare 16 U.S.C. § 1277(a) (1982) with Press Release, *supra* note 171.

173. Press Release, *supra* note 169, § 313.

174. *Id.* § 401.

175. *Id.*

176. *Id.* § 305.

177. See *supra* notes 10–13; *infra* notes 219–33 and accompanying text.

is clear that the private groups define their positions vis-a-vis levels of government expediently, exploiting the confusion by seeking allies, quite appropriately, where they can find them. It is also true that significant cooperation between the major antagonists led to passage of amendments to the state Act which met mutual goals. The relationships between and among interest group advocates and their allies in government shifted constantly as federal and state administrations changed and the interests were altered and adapted to the priorities of the new incumbents.

Thus far, the only constant in the controversy is the litigation which is examined in the next part. In going to court, the interest groups were forced to stake out positions which were, in the context of shifting federal and state programs, artificially rigid. This, in itself, suggests important limitations on the court's ability to arbitrate federal-state disputes. Moreover, although most of the litigants have held fast thus far, there is ample evidence to demonstrate that none of the parties considered their alliances stable from the outset. Indeed, there are growing indications that some of the federal defendants may have worked quietly to undermine their own case.

V. THE NORTH COAST RIVER DESIGNATIONS IN THE COURTS

Action in the courts began in October 1980, about a month after the Secretary of the Interior formally accepted California's application to include the North Coast rivers and after the draft environmental impact statement was released. Varying combinations of resource development interests filed at least four different lawsuits in both state and federal courts against state and federal defendants.

The first case, *County of Del Norte v. Brown*,¹⁷⁸ was filed in state court in October, 1980. Four North Coast counties challenged Governor Brown's authority under the California Act to propose rivers to the Secretary of the Interior when no state management plans had been approved by the legislature. Simultaneously, the same counties and several timber companies filed a second suit in federal district court in San Francisco—this time against Secretary of the Interior Andrus.¹⁷⁹ This suit claimed that the Secretary had prepared an inadequate environmental impact statement on the designations and had violated the timing requirements of NEPA. It also alleged that the Secretary had violated the requirement under section 2(a)(ii) of the federal Act that he accept only rivers "that

178. *County of Del Norte v. Brown*, No. 292,019 (Cal. Super. Ct., memorandum decision, Dec. 5, 1980).

179. *County of Del Norte v. Andrus*, No. C-80-3964-WAI (N.D. Cal. filed Jan. 16, 1981).

are to be permanently administered as wild, scenic, or recreational . . . by an agency or political subdivision of the State.”¹⁸⁰ In April 1981, the water developers filed a third suit on essentially the same grounds.¹⁸¹ A week later, to add to the confusion, several southern Oregon counties, timber companies, and lobbyists sued Secretary Andrus in federal district court in Oregon to protect their interests in the Six Rivers National Forest.¹⁸² All the federal suits were eventually dismissed on ripeness grounds.¹⁸³ Two of the cases were refiled after Secretary Andrus made his final decision and left office.¹⁸⁴ The decision in the state suit left the substantive questions to the federal courts.¹⁸⁵

A. *The Parties*

1. *The Plaintiffs*

The timber industry led the opposition to wild and scenic rivers designation. Its activities were already restricted by the state management of state-designated lands.¹⁸⁶ But it feared that state administration would be extended by the proposal to include the management of federal land along the North Coast rivers, especially the timber-rich land adjacent to the Smith River.¹⁸⁷ Reasons for the industry’s concerns were amply documented in the record. The state in its Smith River Draft Waterway Management Plan, prepared in accordance with the state WSRA, was highly critical of federal agencies’ administration of the land.¹⁸⁸ The plan

180. 16 U.S.C. § 1273(a)(ii).

181. *Association of Cal. Water Agencies v. United States*, No. C-81-1457-WAI (N.D. Cal. filed April 8, 1981).

182. *County of Josephine v. Andrus*, No. C-81-34 (D. Or. filed Jan. 15, 1981).

183. The 9th Circuit dissolved the preliminary injunctions of the two district courts, holding that the suits could not be brought until there was final agency action. *County of Josephine v. Andrus*, No. 81-3036, (9th Cir. Jan. 19, 1981) (consolidated with *County of Del Norte v. Andrus*).

184. *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. decided Feb. 11, 1983). Soon thereafter, two of the counties withdrew from the case. Siskiyou County dropped out and took a neutral position on the designations, while Trinity County withdrew because it decided to support the designations. Del Norte County, the first named plaintiff in at least half the cases, continued to lead the effort to minimize timber harvest reductions along the Smith River. Any subsequent change in the designations or some other political or economic event could easily have juggled the plaintiffs further. For example, a decision to drop the Eel or lower American Rivers from the national system might have caused the water interests to drop their case, leaving Del Norte County to fight for the Smith on its own.

185. See *County of Del Norte v. Brown*, No. 292,019 (Cal. Super. Ct. April 7, 1981) (memorandum decision); *County of Josephine v. Watt*, 539 F.Supp. 696 (N.D. Cal. 1982).

186. Cal. WSRA, ch. 1259, § 1, 1972 Cal. Stat. 2510 (repealed by ch. 1451, § 14, 1982 Cal. Stat. 275).

187. Written statement of Robert B. Hoover, President, Cal. Forest Protective Ass’n, *reprinted in* 2 FINAL EIS, *supra* note 104, at VI-247.

188. According to the plan, Forest Service management of federal lands has favored timber har-

delineated broad zones of the Smith River's watershed which should not be logged at all, or in which logging should be carefully controlled to minimize erosion and water quality effects.¹⁸⁹ The state recommended that the United States Forest Service conform substantially with national forest regulations and the California WSRA.¹⁹⁰ It also endorsed state supervision of national forest management activities including review of USFS timber sales within the Smith River drainage or watershed. The state also recommended that disapproval or modification recommendations should be made whenever the California WSRA requirements are not met.¹⁹¹

The timber industry concerns, while substantial, have a price, expensive lobbying and litigation costs. The price of fighting the North Coast designations appears particularly high in light of Secretary Andrus' designation decision and its evolving significance. Relatively little timberland is actually affected by Secretary Andrus' final designation.¹⁹² Most of the timber-rich Smith River is exempt.¹⁹³ Of those parts that are included, many are classified as recreational and not wild or scenic, thus keeping open the possibility of future loss in the area. Second, the amendments to the California Act narrow the management corridors for state administration.¹⁹⁴ Third, the federal management and eligibility guidelines did not turn out to be nearly as stringent as the timber industry had feared.¹⁹⁵ Finally, the timber industry has been hard hit by the economic decline. Many companies are actively trying to cancel or extend existing contracts to harvest forests;¹⁹⁶ few if any are in a position to buy more federal timber. Indeed, an industry attorney in a closed hearing before the federal

vesting at the expense of recreation and the environment. The Forest Service allowed clear-cutting and road construction that threatened the Smith River and its tributaries with erosion, stream channel aggradation, landsliding, loss of vegetation, and a possible decline in fish counts. SMITH RIVER DRAFT PLAN. *supra* note 123, at 104-06.

189. *Id.* at 256-59. It found that '[e]xtreme or high erosion hazards exist for over 70 percent of the Smith's forested drainage. In addition, 15 of the 19 timber sales proposed in the Smith river drainage are rated as high or extreme erosion hazard potential over most (80%-100%) of the sale area. . . .' *Id.* at 271.

190. *Id.* at 14.

191. *Id.* at 295.

192. According to the Secretarial Issue Document, the timber industry's potential loss totaled 8.5 MMBF annually, as compared to 27.5 MMBF per year under Governor Brown's original proposal. SECRETARIAL ISSUE DOCUMENT, *supra* note 135, at 10-11.

193. The total number of river miles protected by designation was 1246, as compared to 4006 under Governor Brown's proposal. *Id.*

194. CAL PUB RES CODE § 5093.52(c) (West Supp. 1984).

195. See *supra* notes 165-70 and accompanying text.

196. See, e.g., H.R. 4932, 97th Cong., 1st Sess. (1981) (Renewable Resources Emergency Act of 1981) (proposed permitting the termination or extension of timber sales contracts between timber companies and the Forest Service); H.R. 5012, 97th Cong., 1st Sess. (1981) (Emergency Timber Sale Act of 1981) (same).

district judge presiding over *Del Norte v. United States*, the northern California case, stated that the designations would not harm the timber industry in the foreseeable future.¹⁹⁷

If the timber industry's stake seems marginal, the water users' could be viewed as even more so. Dating back to 1960, the water developers have contracts with the state that they claim include water from the North Coast rivers, particularly the Eel River.¹⁹⁸ The state will not deliver that water to the south in the near future, but the contracts run for at least fifty more years. Although the California WSRA already provides state safeguards against water developments for the rivers that are similar to federal WSRA protections, the water agencies feared that the federal designation would be an additional barrier to future development.¹⁹⁹

While these fears are not wholly groundless, neither are they an obvious justification for the political and economic costs incurred in fighting the designations. With or without Governor Brown's proposal, as modified by subsequent activities, the rivers are already included in the state system. Hence, water development by state agencies is precluded. If California amended its Act to permit water development by the state, federal designation would forestall that development. But such an amendment is unlikely. Historically, California has regulated water and its use at least as stringently as the federal government. It is true that federal designation prevents *federal* water development, but federal water development loses its charm as both Congress and the Executive push to reduce the subsidies which water users have long enjoyed.²⁰⁰ It is difficult to identify a convincing threat which water users could guard against by opposing the designations.

It may be that both the water and timber interests oppose the designations on procedural grounds: they were cut out of the first stages of the proposal by apparent government side-stepping. The fact that subsequent events—Secretary Andrus' decision to exclude the Smith River, plus

197. Telephone interview with Patricia Wells, *supra* note 100.

198. Reporter's Transcript of Proceedings at 45–62 (June 16, 1981). *County of Del Norte v. United States*, No. C-81-567WAI, (N.D. Cal.).

199. Further protection from state action was part of the water policy package agreed to in Apr. 1980, and was slated for inclusion in the state constitution. These amendments were defeated, along with the Peripheral Canal proposition, in a June 1981 referendum. See *supra* notes 4, 112–14 and accompanying text.

200. See Andrews & Fairfax, *supra* note 29, at nn. 611–19 & 671 and accompanying text; see also J. McCarthy, *The Reclamation Reform Act of 1982: An Investigation of Section 203(b)*, nn. 17–30 and accompanying text (Sept. 1983) (unpublished manuscript) (copy on file with the *Washington Law Review*); A. Paulden, Legal Authority for Recommendations on Rules for Implementation of Section 203(b) of the Reclamation Reform Act of 1982 (as supplemented July 17, 1983) (Mr. Paulden is General Counsel, Arvin-Edison Water Storage District, and Special Counsel, San Luis Water District) (copy on file with the *Washington Law Review*).

changes in federal and state programs, the designation process, and in management criteria—altered the stakes in the particular instance of the North Coast case may not wholly allay water and timber interests' concerns about the future.

The most obvious concern on the plaintiffs' side was expressed by the North Coast counties. If federal designation would forestall timber development along the Smith River, as the timber industry claimed, then the economies of these counties could be harmed. Existing jobs and federal revenues depend on timber harvesting. As one local council noted:

Sixty-five percent of all employment in Humboldt County and eighty-five percent in Del Norte County is directly tied to the forest industry. . . . Timber production on the Six Rivers National Forest [through which the Smith River runs] is the single most important factor affecting the . . . strength of the general economy in the North Coast area.²⁰¹

However, the persistent recession in the timber economy has affected each county differently. Whereas Del Norte County continues to defend the suit it initiated in cooperation with Humboldt, Siskiyou, and Trinity Counties, the other three localities have withdrawn.²⁰² The presently strapped timber industry may appear less attractive than the fishing and recreation industries as a county economic base. Finally, some northern county supervisors' support for the litigation²⁰³ may have been cooled by the fact that they found themselves allied in the dispute with their traditional rivals, the water importers.

The plaintiffs are a shaky team in terms of the relationship between their unique and changing interests and alliances. It is easy to see why each started the case, but the basis for their continuing involvement is increasingly difficult to discern.

Although their concerns may justify their initial joint reaction, the timber and water plaintiffs might part company. Changing economic conditions are unlikely to sway the water developers because their interests arise from contracts that extend fifty years into the future. The water developers, as they have done in the past, may continue to try to protect those contracts against any eventuality, even one that seemingly is remote. The timber industry, on the other hand, has been hard hit by the economy. Moreover, the shifts in federal and state law and in decisionmakers have

201. Six Rivers Resource Council, *FACTS To help you Understand the Six Rivers National Forest Problem 1* (Mar. 6, 1981). *But see* SECRETARIAL ISSUE DOCUMENT, *supra* note 135, at 11 (estimates loss of 62 timber industry jobs and \$1.075 million in county revenues).

202. *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. decided Feb. 11, 1983).

203. Remarks made at speech by Professor Sally Fairfax, Forestry Forum, University of California, Berkeley (May 2, 1983) (notes on file with the *Washington Law Review*).

reduced the harm that federal river designation could cause the timber industry in the foreseeable future. If economic conditions in the timber business do not recover more rapidly than the rest of the economy, the timber interests may find that the high costs of the litigation outweigh the speculative and distant threats that designation poses.

More significant for federalism theory is the alignment of government parties. A disintegrating coalition of counties is defending the full letter of a state statute. The coalition is opposed in that effort by the state itself, plus the federal and state governments working together in a similarly unstable union. The conflicting sovereign model falls far from reality in the present instance.

2. *The Defendants*

The state and federal governments were at least temporarily comrades in court. This was initially because the federal law gave the state's system a role which both levels of government were trying to effectuate. Indeed, under section 2(a)(ii) of WSR, both levels were necessary to implement the authority at issue.²⁰⁴ When the Reagan Administration took office, the nature of the federal-state bond changed; the federal government had to defend the EIS in spite of minute defects.²⁰⁵

Despite the compatibility of the federal and state interests regarding the Secretary's decision, it was clear from the outset that subsequent administrations at either level could oppose it or undermine efforts to defend it in the courts. The North Coast rivers became controversial precisely because the Department of the Interior officials rushed the process so that the Carter Administration could make the decision. When Secretary Andrus left office, with the legality of the action unsettled, the Reagan Administration had to determine its own policy regarding the case. President Reagan's appointee, James Watt, was widely expected to oppose the designations or to urge the Justice Department to concede the federal defense.

204. This situation was unlike the statutory concession to state law under the 1902 Reclamation Act, ch. 1093, 32 Stat. 388 (1902) (codified as amended in scattered sections of 43 U.S.C.), which had spurred *United States v. California*, 438 U.S. 645 (1978). Section 8 of the 1902 Act, which required the Secretary of the Interior to "proceed in conformity with" state law in carrying out the federal reclamation program, 43 U.S.C. § 383 (1976), could be invoked by the unilateral action of either level of government. The *United States v. California* case arose when California tried to regulate several units of the federal Central Valley Project through its water rights process for environmental protection purposes. Just as in WSR case, the state used an explicit congressional provision to assert its authority to protect rivers from federal activity. Unlike in the WSR case, however, the state exercised its authority unilaterally, met with federal resistance, and found itself opposed by the federal government in court. See generally B. ANDREWS & M. SANSOME, *supra* note 92.

205. See *infra* note 241 and accompanying text.

While the new administration assessed its position, the California Attorney General filed a motion to intervene in the case. The court granted the motion and thus ensured that there would be a defendant in the case should the Reagan Administration decide to withdraw.²⁰⁶

Although the state took an early aggressive position in court, there was by no means unanimity within the state on the issue. Bills were introduced in the legislature to rein in the Resources Agency by cutting its wild and scenic rivers budget, curtailing its management authority, and other means.²⁰⁷ These efforts evince considerable opposition within the state and the legislature to the substance and procedure of Governor Brown's proposed inclusions.²⁰⁸ The proposals did not pass for two years, but even at the outset of the dispute, the state was not speaking with one voice on the issue.²⁰⁹

The environmental groups were understandably concerned lest their own interests be submerged in this pastiche of conflicting litigation goals. The Environmental Defense Fund (EDF), therefore, joined the federal and state defendants to assure that there would be at least one defendant if the federal and/or state governments dropped out.²¹⁰

The goals of the environmentalists in the suit seem fairly standard. The beauty and natural features of the North Coast have attracted nationwide attention. A Forest Service wilderness study was a major issue on the North Coast and, in many instances, geographically overlapped with wild and scenic river corridors. The United States Bureau of Land Management was also in the process of studying a 17,187-acre wilderness area through which the middle fork of the Eel River flowed.²¹¹

But the environmentalists' enthusiasm for the river designation was altered by the narrow scope of the designation. Secretary Andrus included less than one-fourth of the initially proposed land and river areas, and most of the designated areas received recreational status, the least protective. While environmentalists have won something by designation, they have gained much less than they hoped. Moreover, in pursuing the designation via lawsuit, they have explicitly attacked Forest Service programs and authorities. With or without designation, the Forest Service manages

206. State of California's Memorandum of Points and Authorities in Support of Motion to Intervene, at 5-6 (Feb. 6, 1981), *Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. 1981).

207. See, e.g., Cal. A.B. 1349, 1981-82 Reg. Sess. (1981), discussed in *supra* notes 153-64 and accompanying text.

208. See Letter from Cal. Assemblyman Douglas H. Bosco and 85 California assemblymen to Cecil Andrus, Secretary, U.S. Dep't of the Interior (Aug. 18, 1980) (copy on file with the *Washington Law Review*).

209. San Francisco Chron., June 3, 1981, at 3, col. 3.

210. The EDF intervened under FED R. CIV. P. 24(a). See Environmental Defense Fund's Motion to Intervene at 4, *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. 1981).

211. 1 FINAL EIS, *supra* note 104, at I-5.

the national forest lands around the Smith River. What environmentalists gain by assuring strong state voice in national forest management could be lost in Forest Service hostility to the process and its advocates. Finally, the environmentalists' expectations regarding the results of state participation were altered by the change in the political leadership of California.

The most reasonable argument favoring continued environmentalist defense of federal designation is the fear that a state designation alone would be found by some future court to be inadequate to prevent the FERC from licensing a power development. FERC believes its authority to license large and small hydropower developments is not compromised by state wild and scenic rivers designations.²¹² The Supreme Court has supported FERC's interpretation of its authority as against the requirements of state law.²¹³ Moreover, recent Vermont litigation suggests that this interpretation continues to be applicable, at least insofar as FERC's

212. See letter from FERC Chairman C.M. Butler III to Joseph E. Brennan, Governor, State of Maine (Aug. 3, 1982) (copy on file with the *Washington Law Review*), stating that "[i]n light of our responsibilities under the Federal Power Act, I cannot assure you that the Commission will not authorize hydropower development on one or more of the sixteen rivers designated in Executive Order IFY 82/43." *Id.* at 2; see also *supra* note 64 (discussion of the New River, North Carolina litigation and legislation). FERC licensed a dam on the New River while the Secretary of the Interior weighed a North Carolina § 2(a)(ii) application. See Memorandum in Opposition to Motion of United States to Dismiss Appeal of Environmental Defense Fund, County of Del Norte v. United States, No. 83-1761 (9th Cir. July 1, 1983); Memorandum in Support of Motion for Reconsideration and Application for Stay Pending Appeal, County of Del Norte v. United States, No. C-81-0567-WAI (N.D. Cal. March 9, 1983) at 13 n.5 and accompanying text.

213. *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), held that procedural compliance rather than state approval meets the requirements of §§ 9 and 27 of the Federal Power Act, 16 U.S.C. §§ 802, 821 (1982). Section 9 requires that:

Each applicant for a license under this [Act] shall submit to the commission—

.....

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water . . . and in any other business necessary to effect the purposes of a license under this [Act].

Id. § 802. Section 27 states that:

Nothing contained in this [Act] shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Id. § 821. Nevertheless, the *First Iowa* Court held that federal authority over the licensing of hydroelectric projects preempts state law. The Court found that § 9 did not "require compliance with any state laws." *First Iowa*, 328 U.S. at 177 (emphasis added). Thus, § 9 will be satisfied when state procedural requirements are met, even if a state turns down an application under state law, that was sufficient information to present the Commission of a "national policy for water power development." *Id.* at 183 (Frankfurter, J., dissenting); see also *id.* at 180 n. 23 (relying on testimony depicting the conservation movement sired by Gifford Pinchot and Theodore Roosevelt as unflinchingly national and comprehensive in focus). For a contrary, and generally more respected discussion, see S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY, *passim* (1959).

authority to license facilities not in conformity with local land use plans.²¹⁴

Recent litigation combined with the special historical circumstances of federal deference to state water law and the fact that WSRA specifically modifies the Federal Power Act, could support an argument that FERC's general policy statements are insufficient to displace specific state and federal preservation projects.²¹⁵ Nevertheless, EDF may have concluded

214. *Town of Springfield v. McCarren*, 549 F. Supp 1134, 1154 (D. Vt. 1982). *Springfield* suggests that one important key to the relationship between FERC and WSRA is the relationship between *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), and *California v. United States*, 438 U.S. 645 (1978); 549 F. Supp. at 1154-57. *California v. United States* interpreted § 8 of the Reclamation Act of 1902, which provides that:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws

43 U.S.C. § 383 (1976). In *California v. United States*, the Supreme Court arguably came to a conclusion significantly different from that in *First Iowa*, breaking a long chain of § 8 cases by holding that state law was operative and bound the Bureau of Reclamation unless it directly contravened congressional intent as expressed in the 1902 Reclamation Act or in subsequent legislation.

The *Springfield* court inquired whether *California v. United States* implicitly overturned *First Iowa* and concluded "that it has not. . . . Notwithstanding some similarity in the wording of the statutes, they serve different objectives, and relate to federal actions fundamentally dissimilar in nature." *Springfield*, 549 F. Supp. at 1154. The unifying theme in both decisions, reasoned the court in *Springfield*, is that duplicate regulations are avoided. *Id.* at 1156. States have primary jurisdiction over western water rights under *California v. United States*, whereas the federal government has exclusive jurisdiction over licensing of hydropower projects under *First Iowa*. *See id.* at 1156. This view appears to depend on an excessively narrow view of water resources and water management policies and the stylized notions of federal-state conflict which are the focus of this article's attention.

215. Recent litigation suggests an alternative to the *Springfield* court's juxtaposition of *First Iowa* and *California v. United States*. In *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 103 S. Ct. 1713 (1983), the Supreme Court upheld California's carefully tailored state program regulating nuclear power plants, rejecting PG&E's assertions that it was preempted by federal law. The Court noted with approval its holding in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (one year after *First Iowa*), that because Congress had legislated in an area traditionally occupied by the states, the Court would "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Pacific Gas*, 103 S. Ct. at 1723 (quoting *Rice*, 331 U.S. at 230). The Court noted that although a state law is necessarily preempted if it is an obstacle to the accomplishment of the "full purposes and objectives of Congress," *Pacific Gas*, 103 S. Ct. at 1722 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), the congressional goal is not to be accomplished at any costs. *Pacific Gas*, 103 S. Ct. at 1731. The holding in *California v. United States* states that only "specific congressional directives which were contrary to state law . . . would override that law." *California v. United States*, 438 U.S. 645, 672 n.25 (1978) (emphasis added). That discussion, plus the holding in the *Pacific Gas* case encouraged state advocates to think that FERC might be containable. Some of the basis for that position may have been lost when the *New Melones* case, *California v. United States*, 694 F.2d 1171 (9th Cir. 1982), was reargued on remand. The State of California argued "that only explicit federal statutory policies . . . are sufficient to preempt the operation of inconsistent state law." *Id.* at 1176. The Ninth Circuit Court of Appeals held that California's "broad contentions must be rejected," and concluded that "a state limitation or

that it is better to defend the designations now than to risk losing in a subsequent confrontation with FERC. Finally, leadership in this matter may be seen as serving important public relations goals for EDF. Increasingly involved in rather esoteric economic discussions of environmental issues, EDF's prominent role in the more traditional forms of advocacy keeps it in touch with important support groups.²¹⁶

B. *The Litigation*

Litigation began in the North Coast controversy well before Secretary Andrus' decision initially altered the effected interest groups' calculation of costs and benefits. The plaintiffs' arguments alleged that Governor Brown and Secretary Andrus had acted prematurely in two respects: (1) before the California legislature had approved management plans for the North Coast additions to the state wild and scenic rivers; and (2) before an adequate EIS had been prepared and circulated under NEPA.

The case in state court, *County of Del Norte v. Brown*,²¹⁷ focused primarily on the first issue. The court held that, in the absence of legislatively approved river management plans required by the state act, the governor did not have the authority to commit the state to permanently administer the rivers.²¹⁸ However, the state court deferred to the federal court to interpret the significance of that holding in light of the federal requirement for that commitment.²¹⁹ Because the Supreme Court decision did not appear to resolve the North Coast controversy, it was bypassed in the suspenseful drama created by the trio of federal cases.

condition on the federal management or control of a federally financed water project is valid unless it clashes with *express or clearly implied* congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." *Id.* at 1177 (emphasis added). However, the state's argument is strengthened in the WSRA context, and distinguished from *Springfield* in which FERC's licensing powers rose above local zoning requirements, by three factors: first, the federal government has a long history of arguable deference to state water law, as noted in *Springfield*; see *supra* note 214; second, the state river preservation program is clearly a part of implementing the federal statute; finally, the federal WSRA was specifically intended to modify and balance FERC's missions and authorities. This paper enters the fracas obliquely, arguing that there is no single federal interest and that in a crowded policy arena it is difficult to identify "the" pertinent congressional scheme. This would seem to provide aid and comfort to advocates of specific preemption criteria. For a long list of articles discussing preemption, see Fairfax, *supra* note 14, at 950 n.18. For a related discussion, see J. MASHAW, BUREAUCRATIC JUSTICE 52-64 (1983) (administration of social security disability claims).

216. See Emshwiller, *Environmental Group, In Change of Strategy, Is Stressing Economics*, Wall St. J., Sept. 28, 1981, at 1, col. 1.

217. *County of Del Norte v. Brown*, No. 292,019 (Cal. Super. Ct. April 7, 1981) (memorandum decision).

218. *Id.* at 5.

219. *Id.* at 7.

The NEPA arguments were given closer attention by the federal courts at the early stages of the litigation. In January 1981, before the close of the Carter Administration, federal district courts both in San Francisco and Portland issued injunctions and temporary restraining orders against Secretary Andrus on NEPA grounds. The Oregon district court ruled that the multivolume environmental impact statement, prepared by the HCRS and the Resources Agency, was inadequate because it failed to consider timber impacts in the southern part of the state.²²⁰ Therefore, Secretary Andrus could not act on Governor Brown's proposal.

Similarly, the northern California district court held that a decision by Secretary Andrus would interfere with the mandatory waiting period between the filing of a final environmental impact statement and when a decision is made.²²¹ The regulations require a thirty-day period after the government publishes notice of the environmental impact statement in the Federal Register²²² before an agency can render a decision. The court found that the thirty-day period could not have begun before December 22, 1980, and therefore would not end until two days after President Reagan was inaugurated.²²³ Secretary Andrus, therefore, was barred under NEPA from making the designation decision before leaving office. The decision would have to be made by Secretary Watt. That appeared to end the matter.

Four days later, one day before the Carter Administration left office, the Ninth Circuit Court of Appeals reversed summarily, ruling that Secretary Andrus could indeed act.²²⁴ The court did not reach the merits of the NEPA claim; it only held that the issue was not ripe for judicial review.²²⁵ The designations could be challenged on exactly the same legal grounds, but only *after* the Interior Secretary made the designations and "final agency action" occurred. The court dismissed the actions, giving the plaintiffs the right to refile the suits once the decision was made.²²⁶ Secre-

220. County of Josephine v. Andrus, No. C-81-34 (D. Or. filed Jan. 15, 1981).

221. County of Del Norte v. Andrus, No. C-80-3964-WAI (N.D. Cal. filed Jan. 16, 1981). The merits of this issue revolved around the minute details of when the environmental impact statement was delivered to the Environmental Protection Agency and when the earliest Federal Register notice possible under NEPA regulations could have occurred. Federal Defendants' Opposition to Plaintiff's Motions for Summary Judgment at 41 (June 1, 1981), County of Del Norte v. United States, No. C-81-0567-WAI (N.D. Cal.).

222. 40 C.F.R. § 1506.10 (1983).

223. Del Norte v. Andrus, No. C-80-3964-WAI (N.D. Cal. filed Jan. 16, 1981), at 7-8. For a full discussion of the regulations and the court's reasoning, see *infra* note 269 and accompanying text.

224. County of Del Norte v. United States, No. 83-1761 (9th Cir. Dec. 26, 1980).

225. *Id.*

226. County of Josephine v. Andrus, No. C-81-34 (D.Or. filed Jan. 15, 1981); County of Del Norte v. Andrus, No. C-80-3964-WAI (N.D. Cal. filed Jan. 16, 1981).

tary Andrus designated the rivers the following morning, during his final hours in office.

After Secretary Andrus designated the rivers, two of the four cases were refiled. The Oregon action, *County of Josephine v. Watt*,²²⁷ was the first case decided. Plaintiffs alleged that the Department of the Interior failed to allow sufficient participation of Oregon interests in the preparation of the EIS.²²⁸ They also claimed that the EIS failed to analyze sufficiently how the river designations would impact Oregon interests.²²⁹ Finally, the plaintiffs asserted that the entire process was not conducted in good faith and that the Department of the Interior sped through NEPA procedures to allow Secretary Andrus to make the decision before the new President could be inaugurated.²³⁰

The district court granted the defendants summary judgment on all causes of action except that the issue concerning the adequacy of the EIS was reserved for trial.²³¹ Of the alleged procedural violations the court found that, although several had occurred, none prejudiced the interest of the plaintiffs or invalidated the EIS. Oregon residents did receive actual notice of, and had input into, the EIS production.²³² The court found that the Department of the Interior made significant efforts to obtain comments from Oregon and northern California residents, and had carefully considered what the “secondary” impact designation would have on timber interests in southern Oregon.²³³ The court also found that the Department’s desire to speed through the process did not injure plaintiffs or evidence bad faith on the part of the government.²³⁴ Therefore, the court declared that the Interior Department did conduct NEPA process in good faith.²³⁵

The second case, brought by North Coast local governments, endures as the major focus of contention. It considers substantially the same issues as *County of Josephine v. Watt* and, on similar facts, may ultimately reach an opposite conclusion. In *County of Del Norte v. United States*, the plaintiffs also alleged substantive deficiencies in the EIS and proce-

227. 539 F. Supp. 696 (N.D. Cal. 1982).

228. *Id.* at 698–99. The specific allegations were that the Department failed to invite organizations to the “scoping” process (a process to set forth the issues the EIS will address) and that the agency failed to send copies of the draft EIS to the Oregon parties.

229. *Id.* at 699.

230. *Id.*

231. *Id.*

232. *Id.* at 704–06.

233. The court found that while the designation might affect the local economies in southern Oregon, the primary impact would be on the areas in northern California. *Id.* at 705. This is the subject of the *County of Del Norte v. United States* litigation. See *infra* note 236.

234. See *supra* notes 224–231.

235. *City of Josephine v. Watt*, 539 F. Supp. at 706.

dural irregularities under NEPA in the preparation of the document.²³⁶ The plaintiffs also reasserted that the designation violated the federal WSRA because in the absence of state legislative approved management plans, the governor could not guarantee permanent administration of the designated rivers as required by the federal Act.²³⁷

The district court opinion in the *Del Norte* case came in two stages. In October 1982, the judge circulated for comment a proposed decision.²³⁸ The Memorandum of Intended Decision focused on the alleged problems in the EIS; the court ignored the issue of whether the governor could commit the state to permanent administration of the river in the absence of a legislatively approved management plan.²³⁹ The final decision reconsidered many of the previously discussed NEPA issues and, at last, indirectly addressed the ambiguities around the permanent administration issue which arise from differences between the federal and state laws.

The NEPA component of the decision is unusual. The court concluded that several of the alleged inadequacies in the EIS were too complex to be resolved on summary judgment and that several might be worth evaluation at a trial.²⁴⁰ The key issue discussed—whether the government had harmed the plaintiffs by illegally shortening the comment period by two days—is also unusual. A fairly straightforward problem of counting days elapsed since EIS filing was complicated by the fact that the government official signed a standard form which inaccurately stated that “complete distribution to all agencies and parties” was made at the time the impact statement was filed with the EPA. In fact, although the plaintiffs had the statement for more than thirty days prior to the Secretary’s decision, they did not have it for the mandatory thirty days after “proper” notice.²⁴¹

236. Memorandum of Decision at 4, 9, *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. filed Feb. 11, 1983).

237. Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment, at 46–60, *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. filed Mar. 24, 1981).

238. Memorandum of Decision, *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. filed Feb. 11, 1983).

239. *Id.* at 14–17.

240. *Id.* at 10.

241. *Id.* at 5–9. The factual situation central to the dispute was exceedingly complex. The Department of the Interior submitted the Final EIS to the EPA, as required by NEPA regulations, on Friday, December 12, 1980. The following week the Department distributed copies to all interested parties, including plaintiffs. The following Wednesday, December 17, 1980, the same day the plaintiffs received their copies, the Department published notice of the EIS completion in the Federal Register, again pursuant to regulations requiring publication the week after filing. This publication should have allowed Secretary Andrus to make a decision after 30 days, or on January 16, five days before he left office.

A problem arose, however, with the document signed by an employee of the Interior Department

One interpretation of the *Del Norte* decision is that the court concluded that false verification was the crucial factor because the Department of the Interior had not acted in good faith in its conduct of the NEPA process. The court testily noted that “[i]t ill-becomes the federal defendants . . . to characterize as trivial that which admittedly arises from the false verification of an employee of the defendants.”²⁴²

The other legal question in the designation controversy is the permanent administration issue. As noted above, under the federal Act state rivers cannot be federally included unless the state is committed to permanently administer them. The state Act required the administering agency, the Resources Agency, to submit management plans to the legislature for approval.²⁴³ The California Assembly, however, refused to give that approval. The Resources Agency, through its departments, continued to manage the rivers as set out in the California Act and in other California statutes. The designation advocates argued that this management authority satisfies the permanent administration requirement in the federal Act.²⁴⁴ The plaintiffs insisted that, absent a legislatively approved state plan, the federal provision is not met.²⁴⁵

These cases present an instance of federal-state cooperation and conflict which results in the classic issue of which law—federal or state—is controlling. The fact that a county was defending the minutiae of the state Act against the combined arguments of the federal and state governments confounds the model somewhat, but the conflict of laws question was, nonetheless, before the court. The *Del Norte* court conceded that the Resource Agency plans submitted to the Secretary were indeed “more detailed and comprehensive than plans submitted *and approved* with respect

on December 12, 1980. The document incorrectly verified that the employee had mailed copies of the EIS to interested parties. In fact, the employee did not do so until three days later, on Monday, December 15, 1980.

The issue was whether the false verification damaged the plaintiffs. Officials from the EPA submitted affidavits stating that the employee signed the wrong form and that the agency does not normally and need not *verify* that copies have been provided before the publication in the Federal Register. Thus the false verification was irrelevant, since no verification was necessary. The court held otherwise. In its Memorandum of Decision, it found that true verification could not have been made before Monday, December 15, and therefore, publication in the Federal Register could not occur before the following week, the week of Dec. 22. Memorandum of Decision, *supra* note 236, at 7, *County of Del Norte v. United States*, No. C-81-0567-WAI (N.D. Cal. filed Feb. 11, 1983). Thus, Secretary Andrus could not have made the decision before January 21, which was after his term ended.

242. *Id.* at 10.

243. CAL. PUB. RES. CODE § 5093.58 (repealed by ch. 1481, § 10, 1982 Cal. Stat. 275).

244. California Resources Agency, California Administration of Those Rivers Included in the State's Request for National Wild and Scenic Rivers Designation (1980), *reprinted in* FINAL EIS, *supra* note 102, app. E.

245. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 237, at 46-60.

to the application for designation of” previous governor-nominated rivers.²⁴⁶ The court stated that, “[i]n those cases, however, there was no question of the [governor’s] legal right to make the representation of the ability and willingness [of the state] to permanently administer the rivers.”²⁴⁷ Then to resolve the issue, the court chose to ignore the intervening amendments to the state act.²⁴⁸ Instead, it pointed to the conclusion of the *state* court regarding the same question. Invoking the holding in *County of Del Norte v. Brown*, which had previously seemed to be inconsequential, the court concluded: “[w]hen a state court has determined that the state has no legal right to make a representation because of non-compliance with state law, I think that the Secretary of the Interior needs to consider whether a necessary and relevant precedent to his exercise of discretion has been lawfully fulfilled.”²⁴⁹

The state court’s decision was not, according to the court, adequately presented to the Secretary.²⁵⁰ The designation decision was, therefore, remanded to the Secretary for consideration of “all relevant factors.”²⁵¹

The impact of the long awaited *Del Norte* decision is both unclear and presently in limbo. If it stands, it invalidates former Secretary Andrus’ North Coast rivers designation. It is not clear, however, what its effect will be. Specifically, it is difficult to identify the status quo ante to which the district court opinion would return the process. The Secretary of the Interior would have several options. The Secretary could simply order an extended comment period and then redecide the issue. This would resolve the false verification issue and could end the proposal entirely. The Secretary could find the application invalid on the grounds proffered by the court—the absence of a legislatively approved state management plan. That holding would be, however, subject to appeal, and another court might not ignore the new state legislation as did the district court. Alternatively, because the court has strongly hinted that the EIS analyses are inadequate, the Secretary might, before proceeding, decide to order the preparation of a new EIS on Governor Brown’s original application to designate 4000 miles of the rivers. Although a new EIS could provide grounds to deny or restrict federal designation, all 4000 miles of the rivers would be protected while the application was pending.²⁵²

246. Memorandum of Decision, *supra* note 233, at 12 (emphasis added).

247. *Id.*

248. *Id.* at 2.

249. *Id.* at 13.

250. “Its full import was not set forth, and secretarial consideration may thereby have been unduly limited.” *Id.* at 14.

251. *Id.*

252. Some environmentalists would prefer to see Secretary of the Interior Clark reconsider the 1600 miles designated by Secretary Andrus rather than the state-proposed 4000 miles.

The Governor's position on a reapplication may have been indicated by his announcement that the state will no longer defend the designations as a participant in a *Del Norte* decision appeal.²⁵³ The federal government decision on whether to appeal the *Del Norte* decision was complicated by the fact that the river designations may be viewed as a minor aspect of the case. The *Del Norte* court's interpretation of procedural injury under NEPA could have serious negative consequences for many future government actions. Government agencies regularly violate EIS procedures in minor ways, inadvertently or not. Relying on *Del Norte* challengers of agency programs could overturn decisions on the basis of similar minor technical violations. This would make all agency actions vulnerable. Therefore, it may make sense for the federal defendants to vigorously defend the process, regardless of their opinion on the North Coast designations.

To allay those concerns with technical violations, but without yielding on the river designation issue, the plaintiffs indicated, on the basis of the district court's Memorandum of Intended Opinion, that the decision will only invalidate agency action where false verification occurs.²⁵⁴ The district court's decision can be read to support that position, but other readings are inevitable as well.

Given the apparent hostility of the state to the designations and the federal defendants waffling on the false-verification issue, the EDF was anxious to prevent the district court order from becoming effective. The EDF feared that the new governor would simply ask that the nominations be returned for reconsideration, hence ending the matter.²⁵⁵ Therefore the EDF applied for and was granted a stay pending appeal. Meanwhile, the federal position continues to be ambivalent. Apparently unable to resolve internal disputes on the matter, the Department of Justice first moved to have the EDF appeal (and its own) dismissed;²⁵⁶ when that effort failed,²⁵⁷ it joined the appeal. The hearing was set for October 1983, and the decision of the appeals court will probably not be announced within a year. Meanwhile, of course, President Reagan's initial appointment as Secretary of the Interior has departed and a new Secretary with little or no established record on resource issues has been confirmed. By the time the

253. Sacramento Bee, Apr. 27, 1983, at A-1, A-14, col. 1.

254. Telephone interview with Patricia Wells, *supra* note 100.

255. Memorandum in Opposition to Motion of the United States to Dismiss Appeal of Environmental Defense Fund, at 14, *County of Del Norte v. United States*, No. 83-1761 (9th Cir. 1980).

256. Motion to Dismiss Appeal of Environmental Defense Fund and Concurrently to Dismiss Appeal of the United States of America, *County of Del Norte v. United States*, No. 83-1761 (9th Cir. 1981).

257. *County of Del Norte v. United States*, No. 83-1761 (9th Cir.) (order entered July 11, 1983).

appeal is decided there will be another presidential election; and who can say what will take place hurriedly in anticipation of its outcome.

C. *The Implications of the Litigation*

The North Coast rivers litigation highlights the difficulty the courts have in resolving federal-state conflicts generally, and over resource management. Part of this problem is of the courts' choosing. Throughout this dispute, the federal court embraced the procedural questions raised by NEPA and ignored, until the very last round in *Del Norte*, the federal-state issues posed by WSRA. It is not surprising, therefore, that its discussions seem stylized, tedious, and trivial. The courts, however, should not take all the blame. The interests involved are broader and more complex than the traditionally conceived federal-state relationships. In many ways, the federal and state governments are not even the major stakeholders in the controversy. The private interests—the timber, water, and mineral industries; the environmentalists; and the counties themselves—have more to gain or lose than either the Department of the Interior or the governor. Moreover, federal and state players in this area have been in constant flux. Because WSRA leaves most of the designation decisionmaking with the governor and cabinet-level secretaries on both the federal and state levels, their positions on the controversy are likely to be transient.

While the private parties to the conflict are less likely to be tied to electoral change, their goals will vary depending on where they can find allies for their interests. Certainly, both timber and water groups will feel threatened by what they view as the government's rushed procedures. However, between the depressed economy, the California legislature's management corridor restrictions, and the decision to exclude 2400 miles of timber land on the Smith River from designation, the timber industry's economic interest is minimal. The concerns of the water developers, on the other hand, remain unabated, and they may someday seek water from the Eel River to meet their goals. The whole question of FERC's future involvement could be raised if the designations fail, bringing with it fascinating potential for continuing the litigation into the 1990's.

Of all the parties, however, the environmentalists may be the most stable in the controversy. Their concern, in some ways, may be less intense than that of the timber and water groups because their livelihoods do not depend on the outcome; however, their interests are not likely to be redefined by changes in the economy. Of course, their own resources and the political climate may force them to alter their priorities. But in this case, the EDF may outlast the state and federal governments as well as the tim-

ber industry and wind up confronting the still unheard-from hydropower interests.

The present case suggests that litigation is neither a clear path to resolution of federal-state conflicts nor an alternative to other approaches. While a legal dispute winds its tortuous way through months and years of adjudication, different, more fluid aspects of river management are inching along in a variety of equally incremental forums.

The federal and state agencies involved in the North Coast rivers litigation already interact extensively with each other and with private interests on the basis of cooperative patterns established in other resource areas. In the specific case of the North Coast rivers where federal lands are involved, Congress has, both in WSRA and in the National Forest Management Act, defined an extensive planning process based on a cooperation and negotiation approach to dispute settlement. The designation issue may have been one with which the courts could deal, although their record to date has been less than inspiring. Long-term balancing of conflicting uses would seem even less amenable to adjudication, especially where Congress has so emphatically granted management discretion to the United States Forest Service.

This does not, however, presage federal dominance of the issue. The future complexion of federal-state relations under WSRA is hard to predict. The strong position of the states in Western water has etched into federal policy the general theme that, interstate situations aside, water is the business of the states. The North Coast experience shows that conflicts and solutions are not that simple, particularly when land management concerns are approached obliquely through the water statutory framework. There is no "federal" or "state" position in complex policy arenas characterized by numerous government entities exercising conflicting authorities to achieve diverse, and frequently incompatible public goals.

Most emphatically, therefore, the North Coast controversy is neither a federal-state conflict nor a cooperative undertaking. Which levels of government will advocate which causes and to what extent they will clash or mutually accommodate are important components of the ongoing dispute. However, central to the inquiry will be the diverse and intense conflict over resource values of the North Coast: the timber, water, and minerals industries contending with aesthetic, recreation, and fisheries groups in varying, unpredictable, and frequently impenetrable degrees of discord and harmony. They will embrace one level of government in preference to another on an opportunistic basis, depending on where and when they can find support for their goals.

Federalism emerges from all this neither as inevitable conflict nor de-

sirable cooperation; rather, it is a part of the format in which the opposing forces contend. In our federal system, advocates have diverse options and, thwarted at one level with one set of rules and administrators, they will seek a more sympathetic hearing at another. The courts' less flexible approach may appear as a stabilizing or fundamental factor. In the North Coast designations controversy, however, it appears tangential to the dispute over land and water management.

Author's Note—As this article was in press, the Ninth Circuit Court of Appeals handed down a decision in *County of Del Norte v. United States*, No. 81-1761 (9th Cir. decided May 11, 1984). The Ninth Circuit reversed the district court's finding that the premature filing notice of the EIS invalidated the Secretary's river designations. *Id.* at 2191. The procedural irregularity was held to be "trivial" by the Ninth Circuit. *Id.* at 2193. The court also held that Secretary Andrus had adequately considered whether California could "permanently administer" the designated rivers as required by WSRA. *Id.* at 2194. The Del Norte decision leaves many issues remaining unresolved. See *supra* page 466. More notably, the decision represents another chapter in the continuing chaotic and confusing saga of this federalism controversy.