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THE WILD AND SCENIC RIVERS ACT AT 50: OVERLOOKED WATERSHED PROTECTION

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The Wild and Scenic Rivers Act (WSRA) marked its fiftieth anniversary in 2018 without much fanfare. The WSRA has been somewhat overshadowed by the Wilderness Act, which preceded it by four years, and by the National Environmental Policy Act and the pollution control statutes which followed in the 1970s. But the WSRA was a significant conservation achievement, has now extended its protections to over 200 rivers, and has the potential to provide watershed protection to many more in the future. This article explains the statute and its implementation over the last half-century as well as a number of challenges to fulfilling its laudable goals of protecting free-flowing rivers, their water quality, and their "outstandingly remarkable values."

We make a number of suggestions to the managing agencies and to Congress if the WSRA's achievements over the next half-century are to match the last fifty years, including reviving congressional interest in study rivers, updating managing agencies' river plans to focus on non-federal lands within river corridors, and ensuring that those river plans provide the watershed protection Congress envisioned when it included a significant amount of riparian land within WSRA river corridors. We also call for a new emphasis on rivers that should be studied for their restoration potential and for more states to take advantage of the statute's unusual pathway for state-designated rivers to gain WSRA protections.

A postscript briefly explains a recent congressional proposal to expand the WSRA system, and an appendix catalogues all 226 WSRA river segments designated during the statute's first fifty years.

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> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."
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> —Oliver Wendell Holmes, Jr.,
> New Jersey v. New York,
> 283 U.S. 336, 342 (1931)

I. INTRODUCTION

In 1968, at the dawn of the modern environmental age and four years after it enacted the similarly path-breaking Wilderness Act,[1] Congress enacted and Presi-

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dent Lyndon Johnson signed the 1968 Wild and Scenic Rivers Act (WSRA).[2] Like the Wilderness Act, the WSRA aimed to revolutionize the nation's approach to natural resources. For at least a century and a half before 1968, national policy had been to dam, divert, channelize, and develop rivers to support navigation, irrigation, and other consumptive water uses.[3] This policy of consumption transformed the vast majority of the country's free-flowing rivers into reservoirs.[4] By 1982, the National Park Service estimated that there were nearly 300,000 dams in the United States, leaving only about two percent of the nation's rivers in a natural condition.[5] With the 1968 Act, Congress aimed to restore a measure of balance to the nation's approach to riverine resources by protecting some rivers in order to maintain their free-flowing characteristics. The WSRA was a bold attempt to preserve a rapidly vanishing heritage of wild rivers.

The statute put segments of eight rivers immediately into the Wild and Scenic Rivers System.[6] Congress reserved for itself the primary, although not exclu-

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1. Wilderness Act of 1964, Pub. L. No. 88-57, 16 U.S.C. §§ 1131-1136 (1964). Similar to the WSRA, Congress enacted the Wilderness Act "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a) (2012). *See also* Symposium, *The Wilderness Act at 50*, 44 ENVTL. L. 285, 287-694 (2014) (articles by Joseph Feller, Michael Blumm, John Copeland Nagel, Mark Squillace, Robert Glicksman, Sandra Zellmer, John Leshy, and Eric Biber).

2. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271-1287 (2012)).

3. *See* A. Dan Tarlock & Roger Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970); Michael P. Lawrence, *Damming Rivers, Damning Cultures*, 30 AM. INDIAN L. REV. 247, 257 (2005) ("The dam building boom got underway in 1902, when the federal government passed the Reclamation Act . . . to reclaim arid lands through 'construction and maintenance of irrigation works for the storage, diversion, and development of waters' in the sixteen western states." (quoting 43 U.S.C. § 391 (2000)).

4. *See, e.g.*, Jenny Rowland, *Aging Dams and Clogged Rivers, An Infrastructure Plan for America's Waterways*, CENTER FOR AM. PROGRESS 2 (Oct. 18, 2016), https://www.americanprogress.org/issues/green/reports/2016/10/18/146287/aging-dams-and-clogged-rivers/ ("[D]ams and reservoirs have modified the flow of 71 percent of Western rivers by length and Western rivers are 66 percent more fragmented than they would be in their natural state.").

5. *See* GEORGE C. COGGINS, ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 981 (7th ed. 2014) (noting that about 75,000 of those dams were at least six feet tall, storing almost one year's average run-off from the nation's surface).

6. Congress designated eight river systems in the 1968 statute: Idaho's Clearwater River, Missouri's Eleven Point River, California's Feather River, New Mexico's Rio Grande River, Oregon's Rogue River, the Saint Croix River in Minnesota and Wisconsin, Idaho's Salmon River, and Wisconsin's Wolf River. Pub. L. No. 90-542, 82 Stat. 906, 907-08 (1968); 16 U.S.C. § 1274(a)(1)-(8). Congress also identified 27 segments for potential addition. 82 Stat. 906, 910-911; 16 U.S.C. § 1276(a)(1)-(27).

sive, prerogative to add rivers to the system,[7] in an apparent effort to reassert congressional control over a part of federal land management.[8] The upshot of this choice was that additions to the system would be largely the product of political, rather than scientific or ecological, decisions.[9]

Congress established a management regime to govern designated rivers, although it decided not to create a separate agency responsible for implementing the Act. Instead, it merely superimposed WSRA obligations on existing land management agencies, as it had in the Wilderness Act.[10] The lack of a special agency with river expertise, coupled with vague statutory provisions that overlooked several management issues, would complicate WSRA implementation in the ensuing years. Congress proved unequal to the task of responding to these issues. Consequently, although both Congress and the states have added numerous rivers to the system during the past half-century, the management directives in the statute have hardly changed.[11] They now seem largely inadequate to protect the rivers in the system from the ecological, developmental, and political threats they face.

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7. *See infra* notes 80, 82-83, 109-40 and accompanying text. Rivers may be designated in their entirety or in segments. Segments are identified by geographical landmarks like dams, confluences with other rivers, state lines, and highways; *see* Pub. L. No. 90-542, 82 Stat. 906, 907 (1968). Every river or segment is classified as either "wild, scenic, or recreational," depending on its level of impoundment, physical accessibility, and state of development. *See* 16 U.S.C. § 1273(b) (2012).

8. *See* Tarlock & Tippy, *supra* note 3, at 711; 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, 423 (1984) ("A third congressional goal behind WSRA was to increase congressional control over the federal land management agencies.").

9. *See* 16 U.S.C. § 1273(a) ("The national wild and scenic rivers system shall comprise rivers . . . that are authorized for inclusion therein by Act of Congress."); 16 U.S.C. § 1273(a)(ii) (authorizing designations by an act of state legislature with the approval of the Secretary of Interior); Tarlock & Tippy, *supra* note 3, at 728-29 ("A common criticism of our natural resources management agencies is that neither their historic missions nor their current organizational structures are conducive to increased consideration of the ecological impact of important management decisions . . . . The National Environmental Policy Act of 1969 is a partial response to this criticism."). The political nature of Wild and Scenic River additions was inevitable given the fact that Congress or the Secretary of the Interior are the gatekeepers with plenary discretion unlike, say, listing species under the Endangered Species Act, which is subject not only to the standards of that statute but also those of the Administrative Procedure Act. *Compare* 16 U.S.C. § 1273 (WSRA listings) *with* 16 U.S.C. § 1533 (2011) (ESA listings, which can only be made by regulation, and are thus subject to the Administrative Procedure Act).

10. *Compare* the Wilderness Act of 1964, 16 U.S.C. §§ 1132(a)-(d), 1133(b) (delegating implementation authority to the Secretary of Agriculture and the Secretary of the Interior) *with* the Wild and Scenic Rivers Act of 1968 § 1283(a) (delegating management authority to the Secretary of Interior and the Secretary of Agriculture).

11. *Cf.* INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, EVOLUTION OF THE WILD AND SCENIC RIVERS ACT: A HISTORY OF SUBSTANTIVE AMENDMENTS 1968-2013, at 5-6, 35 (Nov. 2014) [hereinafter EVOLUTION OF THE WILD AND SCENIC RIVERS ACT]. In 1986, Congress addressed "management issues and opportunities" in the Act by replacing the requirement to prepare a "plan for necessary developments" with the more robust "comprehensive management plan" requirement, in an effort to "improve direction for the managing agencies." H.R. Rep. No. 99-503, at 2, 11, 18, 23 (1986); Pub. L. No. 99-590, 100 Stat. 3335 (Oct. 30, 1986). Earlier, in 1978, Congress amended the

In an era characterized by hostility to environmental protection across all branches of the federal government, it may no longer be realistic to hope for therapeutic statutory reforms.[12] Even without congressional action, though, the WSRA allocated sufficient discretion to land managers to enable comprehensive watershed protection.[13] Below, we suggest amendments to interagency guidance that would improve management of designated river corridors in the 21st century.[14]

There is much to celebrate from the WSRA's first fifty years, during which river designations expanded from 8 rivers and roughly 1,150 river miles[15] in 1968 to 226 rivers[16] and 13,391 river miles protected in 2019.[17] Rivers protected under the

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management policies in section 12 to require the federal agencies to administer federal lands adjacent to study rivers "in a manner consistent with the purposes of the act" and to allow the federal government to enter into cooperative agreements with the states to "manage federal lands consistent with approved State river objectives." EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra*, at 35 (citing H.R. Rep. No. 95-1166, at 88 (1978); Pub. L. No. 95-625, H.R. 12536, 95th Cong., Section 762 (1978)). Other than these two amendments, the management directives in the statute have undergone no significant substantive changes.

12. *See, e.g.,* Jeff Spross, et al., *The Anti-Science Climate Denier Caucus: 113th Congress Edition*, THINK PROGRESS (June 26, 2013), https://thinkprogress.org/the-anti-science-climate-denier-caucus-113th-congress-edition-82ef03690c02/ ("[O]ver 58 percent" of congressional Republicans refuse to accept climate change); Brad Plumer, *How Brett Kavanaugh Could Reshape Environmental Law From the Supreme Court*, N.Y. TIMES (July 10, 2018), https://www.nytimes.com/2018/07/10/climate/kavanaugh-environment-supreme-court.html ("Judge Brett M. Kavanaugh had already made a name for himself as an influential conservative critic of sweeping environmental regulations."); Michael C. Blumm, *The Trump Administration is Redefining the "Public" in "Public Lands*," L.A. TIMES (Jan. 12, 2018), http://www.latimes.com/opinion/op-ed/la-oe-blumm-public-land-grab-20180112-story.html ("Trump's disassembling of public lands protections include drastically slashing the size of national monuments in Utah . . . ending moratoria on coal and oil-and-gas leasing, terminating methane emission controls, scuttling hydraulic fracturing regulations and eviscerating federal consideration of the long-term costs of carbon emissions on the planet's environment."). *See generally* Symposium, *Environmental Law under Trump*, 48 ENVTL. L. 263, 263-407 (2018).

13. *See* Idaho Rivers United v. Probert, No. 3:16-CV-00102-CWD, 2016 WL 2757690, at *7 (D. Idaho May 12, 2016) ("Substantively, the WSRA requirements provide the agency with substantial discretion in its management of a Wild and Scenic River."); *see also* 16 U.S.C. § 1283(a) (directing managing agencies with "jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion" to "take such action respecting management policies, regulations, contracts, [or] plans, affecting such lands . . . as may be necessary to protect such rivers"); 16 U.S.C. § 1280(a) (granting authority to the Secretaries of Interior and Agriculture to promulgate regulations regarding mining activities on federal lands in designated corridors); 16 U.S.C. § 1284(a) (granting authority to the "administering Secretar[ies]" to promulgate hunting and fishing regulations not in conflict with state regulations and after consultation with state wildlife agencies).

14. *See infra* notes 323-29.

15. *See infra* Appendix entries 1-8.

16. The WSRA now protects segments of 226 streams, *see* Appendix, although Congress added some portions of the same rivers in different legislation, such as the Rogue River and Upper Rogue River. 16 U.S.C. § 1274(a)(1)-(230) (2012). An 84.5-mile segment of Oregon's Rogue River was one of the eight original rivers with additional segments later designated into the system. *See* Double R Ranch Trust v. Nedd, 284 F. Supp. 3d 21, 24 (D.D.C. 2018) (citing 16 U.S.C. § 1274(a)(5)). Congress desig-

WSRA span an immense geographic area of the United States, with designated rivers in 41 states and Puerto Rico.[18] But there is also cause for considerable caution due to ambiguous congressional management directives that have never been clarified. In particular, federal land managers' authority to ensure that actions on the substantial amount of private lands in WSRA river corridors do not undermine the "outstandingly remarkable values" of designated rivers remains an open question.[19] Further, since the process of adding river segments to the system is highly political, with protections afforded only to rivers that the local congressional delegation or state government supports,[20] future additions may be slow[21] and require widespread local support to pressure congressional delegations and state houses to propose adding new river segments.[22] Deliberate processes are not necessarily bad. But given the current administration and Congress's attitude towards environmen-

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nated an additional 40.3-mile segment of the Rogue in 1988. 16 U.S.C. § 1274(a)(104). The John D. Dingell, Jr. Conservation, Management and Recreation Act of 2019 added 17 streams to the national system. Pub. L. No. 116-9 (Mar. 12, 2019); 16 U.S.C. § 1274(a)(214)-(230).

17. As of April 2019, the WSRA protected 13,391 total river miles; in 2017, that number was 12,754. *See Celebrating 50 Years – Wild and Scenic Rivers System*, NAT'L WILD AND SCENIC RIVERS SYSTEM, https://www.rivers.gov/wsr50/ (last visited Jul. 28, 2017) ("Only 12,754 miles [of streams in the United States] are protected by the Wild & Scenic Rivers Act—only 0.35% of the rivers found here."). In 2018, Congress in the East Rosebud Wild and Scenic Rivers Act added 20 miles of Montana's East Rosebud Creek to the list of designated rivers, and in 2019, the John D. Dingell, Jr. Conservation, Management and Recreation Act of 2019 added 617 miles to the national system, for the present total of 13,391. Pub. L. 115-229, 132 Stat. 1629, 1630 (Aug. 2, 2018); 16 U.S.C. § 1274(a)(213); Pub. L. No. 116-9 (Mar. 12, 2019); 16 U.S.C. §§ 1274(a)(5), (76), (156), (196), (214)-(230); *see also infra* Appendix entries 5, 80, 150, 167, 210-26. By comparison, more than 75,000 dams have modified over 600,000 river miles. *A National System*, NAT'L WILD AND SCENIC RIVERS SYSTEM, https://www.rivers.gov/national-system.php (last visited Nov. 29, 2018).

18. States without any WSRA-designated rivers include Hawaii, Indiana, Iowa, Kansas, Oklahoma, Maryland, North Dakota, Nevada, Rhode Island, and Virginia. *Explore Designated Rivers*, NAT'L WILD AND SCENIC RIVERS SYSTEM, https://www.rivers.gov/map.php (last visited June 2018); *see also infra* Appendix.

19. 16 U.S.C. §§ 1271, 1278; *infra* notes 265-84 and accompanying text.

20. Rivers may be included in the national system by either one of two avenues: by an Act of Congress, or by state legislation and subsequent federal approval. 16 U.S.C. § 1273(a).

21. *See* TIM PALMER, THE WILD AND SCENIC RIVERS OF AMERICA 32 (1993) (citations omitted) ("The way the system has been set up makes it agonizingly slow . . . [because] wild and scenic rivers must make two trips [to Congress]—once for a study, then for designation."). Sizable increases of the Wild and Scenic Rivers System have been largely accomplished by omnibus legislation or statewide additions. *See infra* notes 85-87 and accompanying text. See also Sen. Wyden (D-Or), *infra* notes 338-39 and accompanying text.

22. *See infra* notes 88-93, 117-21 and accompanying text (discussing the political forces associated with designation); *see* John D. Dingell Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9 (Mar. 12, 2019) (adding 619.8 new miles to the national system, but recognizing the requisite "strong local support" for new designations in § 1301); Amy Souers Kober, *Biggest Advancement For River Protection in Nearly a Decade*, AM. RIVERS (Feb. 27, 2019), https://www.americanrivers.org/2019/02/biggest-advancement-for-river-protection-in-nearly-a-decade/ (the new "legislation is the result of years of hard work by local communities, businesses and advocates").

tal conservation,[23] the politicized nature of WSRA additions will likely overwhelm the scientific or ecological merits of adding rivers to the national system. This political reality is in keeping with the methods Congress chose for making additions to the system.[24]

Wild river advocates have devoted substantial resources toward lobbying Congress and the states for additions to the system, and relatively fewer resources to overseeing the implementation of WSRA segments by the land management agencies. This effort has produced a substantial expansion in the national system but may have been to the detriment of the management of designated rivers.[25] Perhaps it is time to redirect more conservation resources toward implementation of the WSRA's promises of comprehensive watershed protection in conjunction with increasing the size of the national system through river additions. One suggestion is to revive an interest in "restoration rivers," those rivers which would qualify for designation if their free-flowing nature could be restored.[26] As this article shows, there are numerous implementation issues, such as agency management guidance, non-federal land regulation, and restoration rivers worthy of administrative and legislative attention and increased judicial oversight.

This article examines the first half-century of the WSRA. Section I briefly surveys the history of the American laws that have influenced riverine development, as well as the ensuing national commitment to dam building that dominated the federal government's approach to rivers for most of the 20th century. Section II explores the evolution of events leading to the WSRA, including its legislative history and its high-minded purposes, which led the statute to represent the chief counterbalance to the nation's longstanding commitment to constructing "improvements" to its free-flowing rivers.[27] Section III proceeds to discuss a variety of WSRA implementation issues, including 1) additions to the system, 2) the geographic reach of the statute, 3) the "outstandingly remarkable values" (ORVs) of designated rivers the statute aims to protect, 4) the requirement of comprehensive river management plans (CMPs) to protect those ORVs, 5) whether and how those plans may regulate non-federal lands, and 6) the water rights possessed by designated rivers. Throughout, we explain the enormous discretion the WSRA's implementing agencies possess and suggest updating interagency guidance to better achieve the statutory goal of protecting and enhancing the values of designated free-flowing rivers. Updated guidance ought to include a national goal of restoring degraded rivers whose river values can become ORVs.

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23. *See supra* note 12 and accompanying text. On the hostility of the Trump Administration to public lands protection, *see, e.g.*, Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining 'The Public' in Public Land Law*, 48 ENVTL. L. 311 (2018).

24. *See infra* notes 85-94 and accompanying text.

25. *See supra* notes 15-19 and accompanying text.

26. *See infra* notes 311-14, 324 and accompanying text.

27. Tarlock & Tippy, *supra* note 3, at 707.

II. BACKGROUND

Developing the water resources of the nation for power, transportation, and irrigation has been a hallmark of U.S. water policy since westward expansion.[28] The water law inherited from England was the riparian rights doctrine, which originally promised landowners with streams running through or adjacent to their lands a "natural flow" of the stream.[29] The anti-developmental implications of that doctrine caused reviewing courts in America to modify it, beginning around the turn of the 19th century, to authorize all riparian owners to engage in reasonable uses.[30] This doctrinal evolution allowed for reasonable development of rivers, even including out-of-basin diversions under certain circumstances.[31] Mill Dam Acts, enacted throughout the northeastern states, also facilitated development by enabling grist mill owners to flood neighboring lands without being subject to common law trespass, nuisance, or takings claims.[32] These statutory and judicial innovations allowed American water law to accommodate the onset of the Industrial Revolution.

Later in the 19th century, beyond the 100th meridian in the arid West, some courts rejected the riparian doctrine as both monopolistic and anti-developmental and adopted an entirely different water law: the prior appropriation doctrine.[33]

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28. *See* Reed Benson, *Public on Paper: The Failure of Law to Protect Public Water Uses in the Western United States*, 1 INT'L J. RURAL L. & POL'Y (special edition) 1, 3 (2011) ("From the days of the 'Wild West,' water law in the western United States was overtly and intentionally pro-development.").

29. *See* Joseph W. Dellapenna, 1 WATERS AND WATER RIGHTS § 6.01(a)(3), (Amy K. Kelley, ed., 3d ed. 2009), LexisNexis ("At one time, courts commonly expressed riparian rights in terms that seemed to protect, with few exceptions, only non-consumptive uses: A riparian could make any use of the water so long [sic] the use did not materially alter the quantity or quality of the natural flow.").

30. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 37-39 (1977) (discussing the evolution of riparian rights law from "natural flow" to "reasonable use"); COGGINS ET AL., *supra* note 5, at 428 ("In the United States, the English 'natural flow' doctrine evolved into a 'reasonable use' doctrine . . . [permitting] consumptive uses if they are reasonable and do not unreasonably damage other riparian owners.").

31. *E.g.*, Stratton v. Mount Hermon Boys' Sch., 103 N.E. 83, 87, 88 (Mass. 1913) ("A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leave the current diminished by no more than is reasonable . . . .").

32. HOROWITZ, *supra* note 30, at 47-51 (explaining that the Mill Dam Acts replaced "just compensation," as determined by courts, with statutory compensation).

33. *See* DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER 36-39, 55-64 (2012) (discussing the historical transition from riparian rights to prior appropriation in Colorado territorial legislation through the Colorado Constitution and subsequent court opinions adopting the prior appropriation doctrine and "total rejection of common-law riparian rights"); COGGINS ET AL., *supra* note 5, at 428-29 (discussing the evolution of the prior appropriation doctrine emerging "out of the gold fields of California in the mid-nineteenth century to meet the demands of the miners," which was "not limited to riparian lands, not even to the watershed of origin, because miners and farmers often needed to transport far away from the stream").

Prior appropriation law allowed for out-of-basin diversions by non-landowners who put water to "beneficial uses," principally mining, irrigation, and municipal uses.[34] The new water law of the American West encouraged depleting streams and gave no recognition to in-stream uses or values.[35] In the late 19th century, John Wesley Powell—the legendary explorer of the Colorado River and the first head of the U.S. Geological Survey—advocated basin-wide planning as a prerequisite to opening arid regions to homesteading that would deplete the West's rivers.[36] But Powell's proposal was roundly rejected.[37] Instead, advocates of western development eventually convinced Congress to enact the Reclamation Act in 1902, which put the federal government in the business of dam building to expand water supplies, largely for irrigation.[38] Dam building soon became a federal priority.[39]

A. *Dam Building and Its Opponents*

In 1908, the Federal Inland Waterways Commission endorsed water projects for multiple purposes, including navigation.[40] The headlong pursuit of water projects soon extended to iconic places like the Yosemite Valley, where John Muir and the Sierra Club could not preserve Hetch Hetchy Valley from the O'Shaughnessy Dam on the Tuolumne River.[41] A few years later, in the 1920 Federal Water Pow-

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34. *See* 3 WATERS AND WATER RIGHTS, *supra* note 29, at § 57.07(a).

35. *E.g.,* Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine,* 24 LAND & WATER L. REV. 1, 16 (1989) (highlighting that classic prior appropriation doctrine ignored the value of maintaining instream flow); Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 676-77 (2012).

36. *See* DONALD WORSTER, A RIVER RUNNING WEST: A LIFE OF JOHN WESLEY POWELL 472-73 (2001) (discussing Powell's insistence to the Senate that detailed topographical maps and an overview of the region's drainage system should precede any irrigation and development plans).

37. *See id.* at 356-59 (explaining the introduction, and ultimate defeat, of two bills by Powell that would have governed irrigation districts in the West).

38. The Reclamation Act of 1902, 32 Stat. 388-89 (1902) (codified as amended at 43 U.S.C. §§ 391-404); Richard W. Wahl, *Redividing the Waters: The Reclamation Act of 1902*, 10 NAT. RESOURCES & ENV'T, SUMMER 31, 31-33 (1995) ("Although the reclamation program was conceived solely for providing irrigation water, once water storage facilities were in place, it was natural that people consider other uses of the water . . . .").

39. *See* Eric L. Hiser, *Piloting the Preservation/Development Balance on the Wild and Scenic Rivers*, 1988 DUKE. L. J. 1044, 1046 (1988) ("Congress initiated the pro-development policy in 1902 when it passed the Reclamation Act . . . [and] fixed the prominence of the prodevelopment policy in the 1930s when it authorized damming and control of the great Eastern rivers . . . .").

40. Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Northwest Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 184-85 (1983) [hereinafter cited as *Hydroelectric Heritage*] (discussing the Progressive conservationist approach to managing America's water resources).

41. In 1913, Woodrow Wilson signed the Raker Act into law, authorizing the city of San Francisco to construct the dam, which would inundate the Hetch Hetchy Valley of Yosemite National Park. Raker Act, Pub. L. No. 41, 38 Stat. 242, 63rd Cong., 2nd Sess. (1913). As legend has it, the O'Shaughnessy Dam broke John Muir's heart and led to his death. *See* John Muir, *The Hetch Hetchy*

er Act, Congress established a licensing system for non-federal dams producing electric power.[42] And in 1928, the Boulder Canyon Project Act authorized the damming of the lower Colorado River, creating the massive Lake Mead reservoir below the Grand Canyon and making water available for irrigated agriculture in California's Central Valley and for growing Southwest cities like Las Vegas, Los Angeles, and Phoenix.[43] The ensuing New Deal made clear that federal water project development was a national priority. With President Franklin Roosevelt's enthusiastic support,[44] federal dams proliferated, especially in the Pacific Northwest and the Tennessee Valley.[45]

By the 1950s there was, in short, an overwhelming commitment to dams, diversions, and other river "improvements," and no real protection for rivers not located in national parks.[46] That decade, however, saw the nascent environmental

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Valley, VI SIERRA CLUB BULLETIN 4 (Jan. 4, 1908) https://vault.sierraclub.org/ca/hetchhetchy/hetch_hetchy_muir_scb_1908.html ("Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals and churches, for no holier temple has ever been consecrated by the heart of man."). Prior to the Hetch Hetchy debate, Congress had reserved fourteen national parks for federal protection but had not established a nationwide park policy. Opposition to the Raker Act included statements by the Society for the Preservation of National Parks and the American Scenic and Historic Preservation Society, among others. *See Raker Act: Hearing on H.R. 7207 before the Senate Comm. on Public Lands, 63d Cong. 20-28, (Sept. 24, 1913)*; *Hetch Hetchy Environmental Debates*, NAT'L ARCHIVES: THE CTR. FOR LEGISLATIVE ARCHIVES (last reviewed Aug. 25, 2017), https://www.archives.gov/legislative/features/hetch-hetchy. The controversy over the dam's inundation of the Tuolumne River watershed led to the enactment of the 1916 National Park Service Organic Act and the banning of water projects in national parks. Act to Establish a National Park Service, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1-4 (2012)); Clark Bunting, *The 'Outrageous Evil' That Led to the Birth of the National Park Service*, NAT'L PARKS CONSERVATION ASSOC. (Aug. 25, 2015), https://www.npca.org/articles/470-the-outrageous-evil-that-led-to-the-birth-of-the-national-park-service.

42. Federal Power Act of 1920, 41 Stat. 1063-66 (1920) (codified at 16 U.S.C. § 791a (2012)); *see Hydroelectric Heritage*, *supra* note 40, at 188-89 (discussing the events leading to the enactment of the statute).

43. Boulder Canyon Project Act, 45 Stat. 1057 (1928) (codified at 43 U.S.C. § 617 (2012)); *see* David L. Wegner, *Looking Toward the Future: The Time Has Come to Restore Glen Canyon*, 42 ARIZ. L. REV. 240, 243 (2000) ("Hoover Dam was completed in 1935, creating a reservoir capable of storing more than two years of Colorado River flows . . . and provid[ing] subsidized water and power for the Southwest. Federal dams quickly cultivated a society that depended upon, and in many places expected, cheap power, free water, and the ability to sustain the American dream.") (citations omitted).

44. *See generally* DOUGLAS BRINKLEY, RIGHTFUL HERITAGE, FRANKLIN D. ROOSEVELT AND THE LAND OF AMERICA 424-27 (2016), reviewed in Michael C. Blumm, *The Nation's First Forester-in-Chief: The Overlooked Role of FDR and the Environment*, 33 J. LAND USE & ENVTL. L. 25 (2017).

45. *See* BRINKLEY, *supra* note 44, at 203-05, 424 ("A geographer would be hard pressed to find a major western river that Roosevelt didn't want to dam."); *Hydroelectric Heritage*, *supra* note 40, at 241 (describing the impetus for and development of federal dam projects in the Pacific Northwest).

46. *See* Wahl, *supra* note 38, at 31-34 (discussing the evolution of federal water resource development policy from the inception of the Reclamation Act in 1902 through the 1950s); Wegner, *supra* note 43, at 244 (discussing buildup of political and bureaucratic support for "economically questionable water projects" between 1902 and the 1950s).

movement successfully resist the Echo Park Dam on the Yampa River in Dinosaur National Monument,[47] although environmentalists were unable to stop the Glen Canyon Dam on the Colorado River above the Grand Canyon.[48] The political winds seemed to be shifting toward preservation when the 1962 Outdoor Recreation Review Commission (ORRC) supported protecting free-flowing rivers.[49] Within a few years, the nation would erect systematic river protection in the form of the WSRA.

Even before the ORRC and its eventual endorsement by President Johnson,[50] the National Park Service in 1960 recommended preserving some free-flowing rivers.[51] A year after enacting the Wilderness Act, Congress passed the 1965 Land and Water Conservation Act that funded preservation efforts, although mostly on land.[52] The next year, Congress enacted the forerunner to the modern Endangered Species Act.[53] Then, in a momentous 1967 decision authored by Justice William O.

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47. The opposition of the first director of the National Park Service, Stephen T. Mather, to irrigation and water development projects in Yellowstone National Park influenced the Park Service's policy of resisting water project developments in other national parks. That policy led to a campaign to prevent a dam at Echo Park in Colorado's Dinosaur National Park, proposed as part of the Colorado River Storage Act. *See* A. Dan Tarlock, *Protection of Water Flows for National Parks*, 22 LAND & WATER L. REV. 29, 31 (1987).

48. *See* COGGINS, ET AL., *supra* note 5, at 981 ("Dam opponents . . . did not vigorously contest an even larger dam (Glen Canyon), authorized in the same legislation, that flooded the heart of southern Utah's canyon country with Lake Powell.").

49. *Id.* The Outdoor Recreation Resources Review Act of 1958 established the ORRC and charged it with assessing contemporary recreation goals. Pub. L. 85-470, 72 Stat. 238 (1958) ("[I]n order to preserve, develop, and assure accessibility to all American people . . . such quality and quantity of outdoor recreation resources as will be necessary and desirable for individual enjoyment, and to assure the spiritual, cultural, and physical benefits that such outdoor recreation provides . . . there is hereby authorized and created a bipartisan Outdoor Recreation Resources Review Commission.").

50. *See* Special Message to the Congress on Conservation and Restoration of Natural Beauty, Lyndon B. Johnson, 1 PUB. PAPERS 160 (Feb. 8, 1965) ("[T]he time has . . . come to identify and preserve free flowing stretches of our great scenic rivers before growth and development make the beauty of the unspoiled waterway a memory.").

51. *See* COGGINS, ET AL., *supra* note 5, at 981; SELECT COMMITTEE ON NATIONAL WATER RESOURCES, S. Rep. No. 29, at 103-04 (1st Sess. 1961) ("[T]he Park Service suggests that consideration should be given to . . . preservation in their free-flowing condition of certain streams because their natural scenic, esthetic and recreational values outweigh their value for water development purposes now and in the future." (citing NAT'L PARK SERV., WATER RECREATION NEEDS IN THE UNITED STATES, 1960-2000, COMM. PRINT NO. 17 (May 1960))).

52. Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1964). *See* Andrew J. Lewis, *Congress Must Act to Fund the Land and Water Conservation Fund*, 43 ECOLOGY L.Q. 1, 2-4 (2016) (briefly discussing the history of the statute and arguing for congressional authorization of full funding). Congress recently reauthorized the Land and Water Conservation Act for an indefinite period of time in the Conservation, Management and Recreation Act of 2019. Pub. L. No. 116-9, §3001 (Mar. 12, 2019); 54 U.S.C. § 200302(b).

53. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973). *See* Rudy R. Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium*, 5

Douglas, the Supreme Court rejected a federal license for the High Mountain Sheep Dam on the Salmon River that would have destroyed salmon runs in central Idaho.[54] As Bob Dylan presciently forecast, "the times, they [were] a-changin'."[55] The stage was set for the enactment of the extraordinary Wild and Scenic Rivers Act.

B. *The Evolution of the WSRA*

The antecedent of the WSRA was the National Park Service's 1960 endorsement of preserving certain rivers in their free-flowing condition for their water quality and scenic, scientific, aesthetic and recreational values.[56] In 1962, the ORRC reported that certain rivers should be preserved in their natural setting.[57] President Johnson put that recommendation into action by signing into law the Ozark National Scenic Riverways Act, which established the Current River and Jack's Fork River as the first federally protected rivers and laid the foundation for the WSRA.[58]

ENVTL. L. 29, 31-34 (1974) (discussing the history of the Endangered Species Act, beginning with the 1966 Act).

54. Udall v. Federal Power Comm'n, 387 U.S. 428 (1967). *See* Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 676-77 (1992) (discussing the *Udall* case).

55. Bob Dylan, *The Times They Are A-Changin'* (Columbia Records 1964).

56. H. Rep. No. 90-1623, at 2 (2d Sess. 1968) ("[T]he inception of the idea that special attention should be given to the dwindling number of American streams that are still in relatively natural state dates back at least as far as 1960 . . . [when] the National Park Service recommended '[t]hat certain streams be preserved in their free-flowing condition[.]'" (citing WATER RECREATION NEEDS IN THE UNITED STATES 1960-2000, Comm. Print No. 17, at 2 (1960))).

57. *Id.* ("These recommendations were reinforced by the Outdoor Recreation Resources Review Commission—a body created by the 85th Congress and composed of four Members of the House, four from the Senate, and seven appointed by the President—when it concluded in its final report dated January 31, 1962, that 'Certain rivers should be preserved in their free-flowing condition and natural setting' and that 'Recreation should be recognized as a beneficial use of water[.]'").

58. Pub. L. No. 88-492, 78 Stat. 608 (1964) ("[F]or the purpose of conserving and interpreting unique scenic and other natural values and objects of historic interest, including preservation of . . . free-flowing streams, preservation of springs and caves, management of wildlife, and provisions for use and enjoyment of the outdoor recreation resources . . . ."). The statute directed the Secretary of Interior to designate and acquire land for the establishment of the Ozark National Scenic Riverway, and to formulate and implement "comprehensive plans" for land use, development, preservation and conservation of "outdoor resources in the watersheds of the Current and Jacks Fork Rivers." *Id.* at 78 Stat. 609. The statute also stymied a proposed flood control dam. *See* Susan Flader, *A Legacy of Neglect: The Ozark National Scenic Riverways*, 28 THE GEORGE WRIGHT F. 114, 114 (2011). Flood control had been a favored federal policy since the 1930s. The Federal Flood Control Act of 1936, 33 U.S.C. §§ 701(a)-(f), (h), required flood control projects to meet a cost-benefit test, but that criterion proved to be an easily satisfied hurdle. *See* Tarlock & Tippy, *supra* note 3, at 709. The environmental movement, skeptical of federal agencies' ability to manipulate cost-benefit analyses, decided to pursue river protection based on the parks and wilderness concept, in effect zoning certain river segments for no development. *See id.* at 709-10. Insufficient funding to acquire lands or scenic easements hampered protection of the Ozark

Congress held numerous hearings on wild river protection throughout 1964 and 1965.[59] In the latter year, Idaho Senator Frank Church introduced the Wild Rivers Act to prohibit dam construction on a number of rivers in order to preserve their recreational and ecological values.[60] Criticism over the bill's approach to federal land acquisition through federal condemnation to protect the identified rivers led to the bill's eventual death in the House of Representatives after it passed the Senate.[61]

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river corridors, comprised largely of private lands, leading to considerable litigation and widespread landowner opposition to federal acquisition, particularly if it involved condemnation. *See* Flader, *supra,* at 116-17.

59. *See Hearings Before a Special Subcommittee of the Committee on Public Works*, *United States Senate*, 88th Cong., HRG-1964-PWS-0009 (Dec. 10-11, 1964) [hereinafter *Special Subcommittee Hearing*] (concerning the controversy over the proposed construction of the Allen S. King Power Plant on the St. Croix River); *Hearing Before the Committee on Interior and Insular Affairs on S. 1446 and S. 897, Part 1*, 89th Cong., HRG-1965-INS-0005 (Apr. 22-23, 1965) [hereinafter cited as *Wild Rivers Hearing*] (debating the terms of the Wild Rivers Act of 1965); *Hearing Before the Committee on Interior and Insular Affairs on S. 1446, Part 2*, 89th Cong., HRG-1965-INS-0006 (May 17-18, 1965); Pub. L. 89-605 & Pub. L. 89-616 (calling for studies for potential protection of the Connecticut and Hudson Rivers). A bill sponsored by Senators Nelson (D-Wis.) and Mondale (D-Minn.) to protect the St. Croix River, tributary to the Mississippi River that forms the state boundary between Wisconsin and Minnesota, was a response to a proposal to build what would become the coal-fired Allen S. King Power Plant that residents feared could produce chlorine and thermal pollution. Jay Krienitz & Susan Damon, *The Rivers Belong to the People: The History and Future of Wild and Scenic River Protection in Minnesota*, 36 WM. MITCHELL L. REV. 1179, 1182-83 (2012); *Special Subcommittee Hearing*, HRG-1964-PWS-0009, *supra*, at 15, 129. While certain provisions of the bill originally introduced in the Senate in January 1965—authorizing the Secretary of Interior to acquire land by donations and including restrictions on constructing water resource projects—were eventually incorporated in the WSRA's organic act, the St. Croix National Scenic Waterway bill contemplated protection of the river and embankments through only federal zoning authority, not acquisition of fee title or scenic easements. *See* Krienitz & Damon, *supra*, at 1183-85 ("A portion of [Senators Nelson and Mondale's] stand-alone bill to protect the St. Croix was eventually merged with the bill that became the Wild and Scenic Rivers Act of 1968."); *Wild Rivers Hearing*, *supra*, at 208 (statement of U.S. Senator Gaylord Nelson) ("Zoning, rather than land acquisition and easements, would be used to protect the intensive outdoor recreation area" on the Lower St. Croix near the power plant). The bill failed to pass the House, and the express federal zoning died along with it. The Upper St. Croix eventually became one of the original rivers in the WSRA. *See St. Croix National Scenic Riverway Map*, NAT'L PARK SERV., https://www.nps.gov/sacn/planyourvisit/maps.htm (last visited May 2, 2018). In 1965, the state of Wisconsin simultaneously enacted the first state equivalent to protect wild rivers. *See* Assembly Bill 673 Ch. 363 (Wis. 1965) (adding § 30.26); Wis. Stat. 30.26 (2019). Implementation of the state law led to the Supreme Court's decision in Murr v. Wisconsin, 137 S. Ct. 1933 (2017), concluding that a requirement that two adjacent lots on the St. Croix River be considered as a single lot for zoning purposes was not a takings requiring government compensation because of the Court's broad view of the "whole property," sometimes referred to as the "denominator issue."

60. S. 1446, 89th Cong. (1965) (proposing designation of segments of the Salmon, Clearwater, Rogue, Rio Grande, Green, and Suwannee rivers as "national wild river areas"); *Wild Rivers Hearing*, *supra* note 59, at 3, 53 (Senator Church explaining that proposed prohibitions on damming and "adverse uses . . . merely refers to the objective of the bill, which is to prohibit dam construction on the rivers in order that they may remain wild rivers"); *see* Tarlock & Tippy, *supra* note 3, at 710.

61. *See* Tarlock & Tippy, *supra* note 3, at 710-11.

In the next Congress, the logjam in the House broke when Wayne Aspinall (D-Colo.), the powerful chair of the House Interior Committee,[62] supported a bill to protect four "instant" rivers and to include other rivers in the system after detailed studies and recommendations.[63] Building on previous bills,[64] and in response to conservation organization comments, Aspinall proposed a classification system to clarify the types of activities and developments that would be allowed on designated rivers.[65] The majority of the provisions in Aspinall's bill concerning policy, river classification, and agency duties became part of the WSRA.[66]

On October 2, 1968, President Johnson signed the Wild and Scenic Rivers Act into law.[67] The Act announced that designated rivers "shall be preserved in free-flowing condition, and . . . shall be protected for the benefit and enjoyment of present and future generations . . . to protect the water quality of such rivers and to fulfill other vital national conservation purposes."[68] The Act designated eight "instant" river segments and identified twenty-seven other rivers to study for poten-

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62. *See* MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER, 290-92 (1986) (discussing Aspinall's championing of the Colorado River Basin Act, which originally would have flooded the Grand Canyon, although Congress later pared the bill down, promising Aspinall five projects in his western Colorado district, three of which were eventually built).

63. H.R. 8416, 90th Cong., 1st Sess. (1967) (proposing protection of segments of the Rogue River, the Rio Grande, the Salmon River, and the Clearwater River). *See* Tarlock & Tippy, *supra* note 3, at 710-11. "Instant" rivers would receive immediate protection.

64. Representative Saylor (R-Penn.) introduced a bill earlier the same year featuring a three-part classification system, H.R. 90, 90th Cong. § 2(b) (1967), eventually adopted almost verbatim into the WSRA. 16 U.S.C. § 1273(b).

65. H.R. 8416, 90th Cong. § 2(b)-(c) (1967) (Aspinall's bill); *see* Wild Rivers System: Hearing on S. 1446 Before the Senate Comm. on Interior and Insular Affairs, 89th Cong., 1st Sess., pt. 2, at 23-25 (1965); Tarlock & Tippy, *supra* note 3, at 710-11.

66. *Compare* H.R. 8416, 90th Cong. (1967) *with* Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271-87 (2012). Notable changes in the WSRA include: (1) adding language clarifying that the existing "national policy of dam and other construction" on rivers needed to be complemented with a "policy that would preserve other selected rivers or sections thereof in their free-flowing condition[;]" (2) replacing Aspinall's four-part classification system (wild rivers, natural environment rivers, pastoral rivers, and historic and cultural rivers) and reinserting Congressman Saylor's "wild, scenic, or recreational river" classification system; and (3) adding section 3(b) requiring the administering agencies to issue a report establishing boundaries, classification, and management plans within one year of designation. *Id.*

67. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§ 1271-87 (2012)); Tarlock & Tippy, *supra* note 3, at 711 n.25. By 1968, Congress considered over twenty bills with river protection provisions. *See* Legislative History, Wild and Scenic Rivers Act, PROQUEST LEGISLATIVE INSIGHT, https://congressional-proquest-com.library.lcproxy.org/legisinsight?id=PL90-542&type=LEG_HIST (search "PL90-542").

68. Pub. L. No. 90-542, 82 Stat. 906, § 1(b) (1968) (codified as amended at 16 U.S.C § 1271).

tial addition.[69] To expand the Wild and Scenic Rivers System, the Act allowed Congress, federal agencies, and states to propose additions of new river segments.[70]

Each protected river segment receives one of three classifications—wild, scenic, or recreational—reflecting the amount of shoreland development and determining the types of permitted recreational uses.[71] Unless established otherwise by legislation, river classification must occur within one year of the date of designation.[72] The deadline aims to ensure that development pressure will not adversely affect the river's "outstandingly remarkable . . . values" (ORVs) during the pendency of the plan's preparation.[73]

The WSRA protects rivers with "scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."[74] Those ORVs[75] may be identified by Congress in enabling legislation[76] or by the agency administering the river corridor when developing the river segment's management plan.[77] Once established,

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69. Wild and Scenic Rivers Act, Pub. L. No. 90-542, §§ 3(a), 5(a), 82 Stat. 906, 907-11 (1968) (codified as amended at 16 U.S.C §§ 1274(a), 1276(a) (2017)); *see supra* note 6 and accompanying text (listing the eight "instant" rivers); *infra* Appendix entries 1-8.

70. *See infra* notes 88-97, 117-18 and accompanying text.

71. 16 U.S.C. § 1273(b) ("Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as" either wild, scenic, or recreational); Tarlock & Tippy, *supra* note 3, at 719. Classification may affect the amount of protection the river management plan provides. 16 U.S.C. § 1273(b). *See infra* notes 221-28 and accompanying text (discussing comprehensive river management plans).

72. If not designated by Congress, rivers included in the national system "shall be classified, designated, and administered" as wild, scenic, or recreational by the agency charged with the administration of each component within a year of designation. 16 U.S.C. §§ 1273(b), 1274(b).

73. 16 U.S.C. § 1271 (2017); *see* Tarlock & Tippy, *supra* note 3, at 720.

74. 16 U.S.C. § 1271.

75. *Id*. Legislation designating a river segment generally announces the ORVs which qualified the river for protection, although the agency may identify additional ORVs in its comprehensive river management plan. NAT'L PARK SERV., WILD AND SCENIC RIVERS PROGRAM FACT SHEET: OUTSTANDINGLY REMARKABLE VALUES (Sept. 2011), https://www.nps.gov/orgs/1912/upload/ORV_9_2011.pdf; *see* Charlton H. Bonham, *The Wild and Scenic Rivers Act and the Oregon Trilogy*, 21 PUB. LAND & RESOURCES L. REV. 109, 122 (2000).

76. Congress may establish ORVs by specifying values in the enabling act. For example, when Congress designated Oregon's Chetco River, the Senate Report noted that the Chetco had outstanding "anadromous fisheries and water quality." Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 IDAHO L. REV 313, 322 (1992) (quoting 134 Cong. Rec. 29,449 (1988)).

77. *Id.* ("The agency that administers the river corridor may also establish river values. After a river is designated, the agency prepares a comprehensive management plan that confirms river values and specifies how they will be protected."). If no values have been established in enabling legislation, the agency charged with administering the corridor "shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values." 16 U.S.C. § 1274(d)(1). Agencies must protect river values prior to completion of the comprehensive management plan by giving "primary emphasis" to "esthetic, scenic, historic, archeologic, and scientific features." 16 U.S.C. § 1281(a).

the ORVs determine how the managing agency will manage lands in the river corridor.[78]

III. WSRA IMPLEMENTATION ISSUES

Fifty years after enactment, the WSRA's substantive provisions remain largely unamended.[79] Meanwhile, several issues plague the statute's implementation. These include 1) how new rivers are added to the system; 2) the size and scope of river corridors and the geographic reach of the statute; 3) the establishment and protection of ORVs; 4) the requirement of comprehensive river management plans to protect those ORVs; 5) whether and how those plans may regulate private lands; and 6) the water rights possessed by designated rivers. We address each of these issues in turn.

A. *Establishing Designated River Segments*

In addition to the eight rivers originally designated by the WSRA in 1968, the statute authorized the addition of other rivers through two different processes. Congress, or states with the approval of the Secretary of the Interior, may designate rivers for inclusion in the system.[80] Both pathways qualify designated segments for protection from Federal Energy Regulatory Commission (FERC) hydroelectric licensing, federal water resource development projects, and federally-assisted water resource projects that would alter the river's natural characteristics.[81]

B. *Additions to the System*

As with the Wilderness Act, Congress maintained significant control over the scope of the national system. Unlike the Wilderness Act, Congress did not reserve exclusive control over designation, providing the alternative of state-initiated additions.[82] That opportunity has been underused, however, as states have designated

78. *See* Frost, *supra* note 76, at 322.

79. *See* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11 (outlining all major substantive amendments to the WSRA through 2013); Eric L. Hiser, *Piloting the Preservation/Development Balance on the Wild and Scenic Rivers*, 37 DUKE L. J. 1044, 1052 & nn.47-48 (1988) ("Despite frequent amendments to the WSRA, the contours of the wild and scenic rivers concept have remained essentially unchanged." (footnotes omitted)). The last major substantive amendment was the 1988 Omnibus Oregon Wild and Scenic Rivers Act, proposed by Oregon's Senator Hatfield. Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557, 102 Stat. 2782, 2782 (1988); *see* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11, at 46.

80. 16 U.S.C. § 1273(a)(i) (congressional designation); § 1273(a)(ii) (state designation).

81. 16 U.S.C. § 1278 (a)-(b) (giving both designated and study rivers protection from all three actions).

82. *Compare* 16 U.S.C. § 1273(a)(ii) (2017) *with* 16 U.S.C. § 1132(b) (2017).

only twenty-one rivers in the last half-century.[83] Congress has designated the vast majority of the 226 protected rivers as of 2019.[84]

1. Congressional Additions

Congressional action is the primary means of adding new rivers to the system.[85] Major additions to the system occurred either through omnibus legislation, as in 1978, 2009, 2014, and 2019[86] or through designation of single-state systems, such as in Oregon in 1988 and Michigan and Arkansas in 1992.[87]

Congress established a rather cumbersome process for adding a new river segment, anticipating that either it or federal agencies would first identify "study" rivers as potential additions to the WSRA system.[88] The statute then directs the

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83. Wild & Scenic River Act Amendments, NATIONAL WILD AND SCENIC RIVERS SYSTEM, https://www.rivers.gov/act.php, (last visited July 2, 2018).

84. *See supra* notes 16-18 and accompanying text.

85. 16 U.S.C. § 1273(a) ("The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress . . . .").

86. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467, 3469, 95th Cong. (Nov. 10, 1978); Pub. L. No. 111-11, 123 Stat. 991, 111th Cong. (Mar. 30, 2009); Pub. L. No. 113-291, 128 Stat. 3791, 113th Cong. (Dec. 19, 2014).

87. Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557, 102 Stat. 2785 (Oct. 28, 1988) (codified at 16 U.S.C. § 1274(a)(74)) (designating multiple segments on each of 37 Oregon rivers, which at the time doubled the size of the national system); Pub. L. No. 102-249, 106 Stat. 45, 102d Cong. (Mar. 3, 1992) (designating multiple segments of 13 Michigan rivers); Pub. L. No. 102-275, 106 Stat. 123, 102d Cong. (Apr. 22, 1992) (designating multiple segments of 8 Arkansas rivers).

88. 16 U.S.C. §§ 1275(a), 1276(d)(1) ("In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials."). Bureau of Land Management recognizes the duty to "[c]omply with the WSRA and the Federal Land Policy and Management Act (FLPMA), subject to valid existing rights, by identifying, evaluating, and managing potential additions to the National System[]" in their WSRA implementation manual. BUREAU OF LAND MGMT., WILD AND SCENIC RIVERS – POLICY AND PROGRAM DIRECTION FOR IDENTIFICATION, EVALUATION, PLANNING, AND MANAGEMENT, at 1-1 (July 13, 2012) [hereinafter cited as BLM IMPLEMENTATION MANUAL]. The agencies must provide the report to the Secretary of Energy, the Secretary of the Army, and "any other affected Federal department or agency . . . ." 16 U.S.C. § 1275(b). Joint studies may be conducted in appropriate cases. *Id.* Congressionally identified study rivers receive statutory protection from water resources projects, land disposition, and mining and mineral leasing. 16 U.S.C. § 1278(b) (2012) (FERC "shall not license [water resources development projects] on or directly affecting any river which is listed in section 1276(a) [rivers constituting potential additions to national wild and scenic rivers system]."); 16 U.S.C. § 1279(b) (2012) ("All public lands which constitute the bed or bank, or are within one-quarter mile of the bank, of any river which is listed in section 1276(a) of this title are hereby withdrawn from entry, sale, or other disposition under the public land laws of the United States" for 3 years.); 16 U.S.C. § 1280(b) (2012) ("The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed in section 1276(a) of this title are hereby withdrawn from all forms of appropriation under the mining laws" for three years.). Congress preliminarily identifies study rivers as either wild, scenic, or recreational and protects them as such for three years until completion and publication of the agency report. *Id.* The statute does not,

Secretary of the Interior, or the Secretary of Agriculture when national forest lands are involved, to draft a report on the suitability of adding the river to the national system based on a set of qualifying characteristics.[89] Other federal agencies and states have 90 days to submit comments on the report before it is published in the Federal Register and delivered to the President.[90]

After considering the report, the President issues a recommendation and proposal to Congress.[91] Presidents have sometimes recommended against including otherwise qualified river segments on the grounds that the river would be more appropriately protected by a state program or a different federal program, or that the costs of federal land acquisition would be disproportionate to the benefits of designation.[92] Congress is bound by neither the President's recommendation nor the prescribed administrative process, as it can designate WSRA rivers on its own motion. The Act does protect the identified study rivers from federal water development projects for up to three years after the President submits the study to Congress.[93] Because the WSRA designates and protects only individual river seg-

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however, protect river segments identified for potential inclusion by federal agency studies, although agencies may protect their free flow, water quality, and ORVs through discretionary management. A notice of study report or draft environmental impact statement is typically published in the federal register. INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, THE WILD & SCENIC RIVER STUDY PROCESS 24 (Dec. 1999), https://www.rivers.gov/documents/study-process.pdf.

89. This suitability report, which must be conducted "in close cooperation" with affected states, must be submitted to their governors, unless the lands at issue are federally owned or authorized for acquisition by an Act of Congress. 16 U.S.C. § 1275(b). Section 1275(a) allows for joint federal-state studies "in appropriate cases." 16 U.S.C. § 1275(a). The Forest Service's guidance on suitability includes an assessment of the "interest in designation or nondesignation by other Federal agencies; State, local and Tribal governments; national and local publics; and the State's Congressional delegation . . . ." Forest Service Handbook, FSH 1909.12, 83.21 (Jan. 30, 2015) (Land Management Planning Handbook – Wild and Scenic Rivers). The guidance suggests a kind of political veto over suitability studies seemingly in conflict with the statute's preservation purpose and its commitment to studying river resources.

90. 16 U.S.C. § 1275(b)-(c).

91. 16 U.S.C. § 1275(a).

92. *See* U.S. GEN. ACCOUNTING OFF., GAO 131926, RCED 87-39, WILD AND SCENIC RIVERS, CERTAIN RIVERS NOT IN NATIONAL SYSTEM GENERALLY RETAIN ORIGINAL VALUES 2 (Dec. 1986). President Carter recommended against including a 13.6-mile segment of the Big Thompson River in Colorado because it is located entirely within Rocky Mountain National Park, and eighty percent of the river was in a wilderness proposal then before Congress. Message to the Congress Transmitting Reports and Proposed Legislation, James E. Carter, 15 WEEKLY COMP. PRES. DOC. 40, at 1814 (Oct. 2, 1979). President Clinton recommended against designation of the Pemigewasset River in New Hampshire "in deference to the wishes of local adjoining communities, six of seven of whom voted against designation[.]" Message to the Congress Transmitting a Report on the Pemigewasset River, William J. Clinton, 1 PUB. PAPERS, 693-94 (May 5, 1998).

93. 16 U.S.C. § 1278(b).

ments, a single river may have sections that are federally-administered and others that are state-administered.[94]

2. Study Rivers

Most rivers are added to the Wild and Scenic Rivers System by congressional legislation after study by a federal agency.[95] Congress can authorize a study river,[96] or the Secretaries of Agriculture or the Interior may identify potential additions during land and water resource planning.[97] The study process and standards are the same for both congressionally-mandated and agency-identified study rivers: the agency must determine that the study river is eligible and suitable for inclusion and suggest a classification before recommending that Congress add the river to the Wild and Scenic Rivers System.[98] After listing a river for potential addition, Congress may direct a federal agency to study the river's suitability for inclusion in the national system.[99]

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94. Fitzgerald v. Harris, 549 F.3d 46, 49 (1st Cir. 2008) (citing 16 U.S.C. § 1274(a)(9), and stating that "[a] single river may have zones that are state-administered and others that are federally-administered").

95. THE WILD & SCENIC RIVER STUDY PROCESS, *supra* note 88, at 1.

96. 16 U.S.C. § 1275(a) ("The Secretary of the Interior or, where national forest lands are involved, the Secretary of Agriculture or, in appropriate cases, the two Secretaries jointly shall study and submit to the President reports on the suitability or nonsuitability for addition to the national wild and scenic rivers system of rivers which are designated herein or hereafter by the Congress as potential additions to such system.").

97. 16 U.S.C. § 1276(d)(1) (requiring consideration of WSRA potential in "all [federal agency] planning for the use and development of water and related land resources," including any planning reports considering "potential alternative uses of the water and related land uses involved.").

98. THE WILD & SCENIC RIVER STUDY PROCESS, *supra* note 88, at 12-19.

99. 16 U.S.C. § 1275(a) (the Secretaries of Interior and Agriculture "shall study and submit to the President reports on the suitability or nonsuitability for addition to the national wild and scenic rivers system of rivers which are designated herein or hereafter by the Congress as potential additions to such system."). Congress requires agency studies through authorizing study rivers under section 5(b) of the Act. 16 U.S.C. § 1276(b). Congress has listed 144 study rivers over the years for potential addition to the Wild and Scenic Rivers System. 16 U.S.C. § 1276(a)(1)-(144). Prior to 2019, only four congressionally-mandated studies remained in effect on (1) five rivers in the Oregon Caves National Monument and Preserve; (2) the Beaver, Chipuxet, Queen, Wood, and Pawcatuck rivers in Rhode Island and Connecticut; (3) the Nashua river in Massachusetts; and (4) the York River in Maine. 16 U.S.C. §§ 1276(b)(20)-(21); Pub. L. No. 113-291, 128 Stat. 3791 (Dec. 19, 2014). Congress called for both studies as part of the Carl Levine and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015. H.R. 3979, 113th Cong., (Dec. 19, 2014) (enrolled bill). The National Park Service published a draft study of the five Oregon rivers in 2017. *See* Vicki Snitzler, *Public is Invited to Provide Input to the Oregon Caves Preserve Management Plan and Wild and Scenic River Study*, NAT'L PARKS SERV., (Apr. 8, 2018) https://www.nps.gov/orca/learn/news/public-is-invited-to-provide-input-to-the-oregon-caves-preserve-management-plan-and-wild-and-scenic-river-study.htm. After the 2019 Conservation, Management and Recreation Act, which added many of those rivers to the statute, it is unlikely that any studies remain active. *See* Pub. L. No. 116-9 (Mar. 12, 2019).

Federal agencies may also identify study rivers. The WSRA directs "all Federal agencies" to consider potential additions in all "planning for the use and development of water and related land resources . . . and all river basin and project plan reports submitted to the Congress."[100] In their land and water plans, agencies first identify which streams may be "suitable" for addition to the national system.[101] The agency has discretion as to when to send these selected "suitable" streams to Congress for consideration as congressionally designated study rivers.[102]

Congressionally-approved study rivers receive identical protections as designated rivers for three years; in addition, federally assisted water resources projects above or below study segments cannot diminish the values qualifying the river for

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100. 16 U.S.C. § 1276(d)(1).

101. 16 U.S.C. § 1275(a). Four agencies prepare land and water management plans that may implicate the WSRA: the Bureau of Land Management's resource management plans, the National Park Service's general management plans, the U.S. Forest Service's land and resource management plans, and the U.S. Fish and Wildlife Service's refuge plans. THE WILD & SCENIC RIVER STUDY PROCESS, *supra* note 88, at 9. According to a district court, in considering rivers suitable for study rivers, the agencies need not study "ephemeral" streams in arid areas; they must, however, study "intermittent" streams. Southern Utah Wilderness Alliance v. Burke, 981 F. Supp. 2d 1099, 1103 (D. Utah 2013).

In *Southern Utah Wilderness Alliance v. Burke*, BLM's Richfield Resource Management Plan, governing 2.1 million acres of public land in south-central Utah, recommended that Congress designate the Fremont Gorge as a wild and scenic river segment for inclusion in the national system but suggested that numerous other streams in the area did not qualify for wild and scenic designation due to their "ephemeral" characteristics. *Id.* Environmentalists alleged that BLM's failure to consider streams based on "its new definition of ephemeral flows" violated the WSRA. But the court deferred to BLM's interpretation of "free-flowing" streams, citing *Chevron*, because the WSRA is silent on whether ephemeral streams are "free-flowing" within the intent of the statute, and because BLM's interpretation of "ephemeral" as a "[d]ry wash flowing water only during or immediately after a storm with little or no evidence of riparian vegetation," was reasonable. *Id.* at 1116, 1119; Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (instructing courts to defer to the reasonable interpretations of agencies concerning congressional ambiguities). On the other hand, BLM defined "intermittent streams" as having "[f]lowing water in at least part of the segment most of the year and evidence of riparian vegetation." *Burke*, 981 F. Supp. at 1115-16. *See also Streams*, U.S. ENVTL. PROTECTION AGENCY, https://archive.epa.gov/water/archive/web/html/streams.html (last visited Oct. 19, 2018) (defining ephemeral streams, or "rain-dependent streams," as those that flow only after precipitation where "runoff from precipitation is the primary source of water").

Section 1286(b) of the WSRA defines "free-flowing" as "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway [but] [t]he existence . . . of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion . . . ." 16 U.S.C. § 1286(b). This definition seems to authorize agency recommendations to Congress for inclusion of rivers in the national system that are in need of restoration.

102. *See* BUREAU OF LAND MGMT., WILD AND SCENIC RIVERS – POLICY AND PROGRAM DIRECTION FOR IDENTIFICATION, EVALUATION, PLANNING, AND MANAGEMENT 1-2 (2012), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual6400.pdf.

designation.[103] On the other hand, agency-identified study rivers receive no protection under the Act.[104]

In a case involving Oregon's Rogue River, the Bureau of Land Management (BLM) conducted an eligibility and suitability study of rivers in western Oregon and identified a segment on the Rogue River suitable for WSRA designation as a recreational river. A group of landowners challenged BLM's suitability determination, alleging that the statutory protections extended to designated rivers would injure them by preventing the Army Corps of Engineers from issuing water resource development permits.[105] The court dismissed the claim for lack of standing, deciding that although the WSRA extends protections to congressionally-mandated study rivers, "the statute is silent as to any protection for *agency*-identified study rivers."[106]

In 1988, as part of the Omnibus Oregon Wild and Scenic Rivers Act, Congress amended the WSRA to recognize the Nationwide Rivers Inventory, which collects rivers that are eligible and suitable for potential addition to the Wild and Scenic Rivers System.[107] The National Park Service continues to maintain this inventory, which now includes over 3,200 free-flowing river segments potentially eligible for inclusion in the national system because they possess one or more outstandingly remarkable value.[108] The inventory remains a largely untapped source of potential additions to the WSRA.

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103. 16 U.S.C. § 1278(b)(i) (protecting congressionally-approved study rivers for three years after identification); 16 U.S.C. § 1278(b)(iii) (exempting only projects "which will not invade the area or diminish" ORVs).

104. Double R Ranch Trust v. Nedd, 284 F. Supp. 3d 21, 24 (D.D.C. 2018). The court explained that, although agency-identified study rivers do not receive protection under the Act, "agencies can use their pre-existing authorities—such as those under the Federal Land Management and Planning Act, the Endangered Species Act, or the Clean Water Act—to try to preserve the free-flowing nature, water quality, and outstanding values of the river so that it remains suitable or eligible for designation." *Id.*

105. *Id*. at 24-25 (citing 16 U.S.C. §§ 1278(a), 1279(a), 1280(a)).

106. *Id*. at 27 (emphasis in original). The landowners lacked standing to challenge BLM's decision as arbitrary and capricious under the APA because their alleged injury could occur only after Congress designated the segment under the protections of the WSRA. *Id.*

107. Pub. L. No. 100-557, 100th Cong., 102 Stat. 2782, 2790 (1988) (codified at 16 U.S.C. § 1276(d)(2)). The Bureau of Outdoor Recreation and the Heritage, Conservation, and Recreation Service compiled a draft National Rivers Inventory ("NRI") from 1976 to 1980. The NPS updated, published, and first distributed the NRI in 1982. INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, TECHNICAL REPORT, A COMPENDIUM OF QUESTIONS & ANSWERS RELATING TO WILD & SCENIC RIVERS 19 (Aug. 2018) [hereinafter cited as A COMPENDIUM OF QUESTIONS].

108. *Nationwide Rivers Inventory*, NAT'L PARK SERV., https://www.nps.gov/subjects/rivers/nationwide-rivers-inventory.htm (last visited October 16, 2018) (data sets available at https://irma.nps.gov/DataStore/Reference/Profile/2233706); A COMPENDIUM OF QUESTIONS, *supra* note 107, at 19 ("The NRI is maintained and revised as necessary by the NPS."). BLM and Forest Service contribute to the NRI by identifying and recommending additions as part of their land use planning process. *Id.* NRI listing "does not represent an official determination of eligibility, and conversely,

3. State Additions

The Act's cooperative federalism structure creates a carrot-and-stick approach to encourage states to designate and administer segments under the national system, offering three incentives: protection from specified federal actions, technical assistance, and federal funding. The statute protects state-administered segments from FERC licensing, prevents federal agencies from taking action that would adversely affect ORVs,[109] and requires agencies requesting appropriations for water resource projects to provide notice to the Secretaries of Agriculture and the Interior and inform Congress of any foreseeable effects on ORVs.[110] The WSRA also commits federal agencies to assist states in creating comprehensive statewide outdoor recreation plans, and to cooperate with states, private organizations, and individuals to plan, protect, and manage river resources.[111] The Secretary of the Interior must assist states in identifying opportunities to establish state and local wild and scenic river areas.[112]

Failure to properly administer designated rivers theoretically punishes states with the stick—reclassification or withdrawal of the segment from the federal system.[113] No state has had this stick used against it during the WSRA's first half-

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absence does not indicate a river's ineligibility." *Id.* Nevertheless, the inventory should serve as a primary source of study rivers, of which there are currently few, as well as restoration rivers.

109. Congress prohibited federal agencies from aiding in the construction of water resources projects that would have "a direct and adverse effect" on the values that qualify a river for designation. 16 U.S.C. § 1278(a) (2012) ("[N]o department or agency of the United States shall assist by loan, grant, license or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established . . . ."). Also, to encourage state programs, Congress made financial aid available under the Land and Water Conservation Fund Act, Pub. L. No. 88-578, 78 Stat. 897 (1964), *see supra* note 52 and accompanying text, and assured the states that the federal agencies (including FERC and the Army Corps of Engineers) would take no actions adverse to state river protection without the "full knowledge and consent" of Congress. H.R. Rep. No. 1623, *supra* note 56, at 3; 16 U.S.C. § 1277(a)(1) (2012) ("Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to the use of appropriations from other sources, be available to Federal departments and agencies for the acquisition of property for the purposes of this chapter.").

110. 16 U.S.C. § 1278(a).

111. 16 U.S.C. § 1282(a), (b)(1) (2012). In 2008, thirty-three states had state river protection programs: Arkansas, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See* David Moryc & Katherine Luscher, *Celebrating 40 Years: The Wild and Scenic Rivers Act*, RIVER NETWORK RIVER VOICES, 2008, at 1, 9, https://www.rivernetwork.org/wp-content/uploads/2016/04/River-Voices-v18n3-2008_The-Wild-and-Scenic-Rivers-Act.pdf.

112. 16 U.S.C. § 1282(a).

113. *See* Fitzgerald v. Harris, 549 F.3d 46, 50 (1st Cir. 2008) ("The Departments of the Interior and Agriculture have recognized the power of the Secretary of the Interior to reclassify or withdraw a mismanaged section 2(a)(ii) river from the wild and scenic rivers system." (citing U.S. Dep'ts of the Interior & Agric., *Guidelines for Evaluating Wild, Scenic and Recreational River Areas Proposed for Inclusion*

century. But Congress envisioned that states would play an active role in river protection alongside the federal government.[114] Consequently, Congress made financial aid available under the Land and Water Conservation Fund Act to encourage states to protect worthy rivers[115] and provided an avenue for states to independently identify and propose adding river segments deserving of protection.[116]

The state designation route requires a state to first designate a river as wild, scenic, or recreational under state law and provide for its administration by state agencies.[117] The state's Governor then must notify the Secretary of the Interior of the state's desire to include the river in the national system. If the Secretary finds that the state river meets the criteria established by the WSRA, and that its designation will not result in any expense to the federal government, she must notify FERC and other agencies of the application, consider their comments, and publish a decision to approve or deny the state application in the Federal Register.[118] An additional criteria for state designation requires states to demonstrate the ability to "permanently administer" the river.[119] Both state river protection programs and other state laws may satisfy the "permanent administration" requirement.[120] There

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in the National Wild and Scenic Rivers System Under Section 2, Public Law 90-542, at 6 (1970))); *see also infra* note 203 and accompanying text.

114. The House Report on the 1968 statute declared that preserving and administering wild and scenic rivers is not a task that "can or should be undertaken solely by the Federal Government." H.R. Rep. No. 1623, *supra* note 56, at 3. *See also* INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, TECHNICAL REPORT, DESIGNATING RIVERS THROUGH SECTION 2(A)(II) OF THE WILD & SCENIC RIVERS ACT, at 5 (June 2007) [hereinafter cited as DESIGNATING RIVERS THROUGH SECTION 2(A)(II)] ("[O]ne of the key principles in the House of Representatives version of the final bill clearly contemplated extensive participation by the states in protecting rivers under the Act . . . ." (citing H.R. Rep. No. 1623, 90th Cong., 2d Sess., at 3 (1968))). The WSRA directs federal agencies to pursue river studies in "close cooperation" with state agencies. 16 U.S.C. § 1276(c) ("The study of any of said rivers shall be pursued in as close cooperation with appropriate agencies of the affected State and its political subdivisions as possible . . . ."). The act requires the federal agency to pursue the study "jointly" if requested by the state. *Id.*

115. 16 U.S.C. § 1277(a)(1) (2012).

116. 16 U.S.C. § 1273(a)(ii) (2012).

117. *Id.* The court in the Klamath River case interpreted an "act of state legislature" to include an initiative passed by the Oregon voters. City of Klamath Falls v. Babbitt, 947 F.Supp. 1, 9 (D.D.C. 1996) ("Because initiatives are direct legislation by the voters, it is clear that the Klamath River initiative is an 'act of the legislature,'" which the WSRA authorizes in section 1273(a)(ii)). *See infra* note 131 and accompanying text.

118. 16 U.S.C. § 1275(c) (2012).

119. 16 U.S.C. § 1273(a)(ii). States must administer those segments "without expense" to the federal government. *Id.*

120. *See* County of Del Norte v. United States, 732 F.2d 1462, 1467-68 (9th Cir. 1984) (concluding "that sufficient other state law protections" outside the California Wild and Scenic Rivers Act, Cal. Pub. Res. Code §§ 5093.50-5093.70 (2018), "existed to satisfy the permanent administration requirement under the federal act.").

are, in 2019, only twenty-one state-administered segments in the system, perhaps due to administrative and land acquisition costs.[121]

Disagreement between states and local residents over the scope of the state-designated route to WSRA protection has generated some litigation. For example, in 1981, California Governor Brown and Secretary of the Interior Andrus collaborated on an eleventh-hour designation of six north-coast rivers at the end of the Carter Administration.[122] Several California counties and water and timber interest groups challenged the designation[123] because the hurried process failed to comply with the Council on Environmental Quality's National Environmental Policy Act (NEPA) regulations. NEPA prohibits any federal action for thirty days after the filing of an environmental impact statement (EIS) with the U.S. Environmental Protection Agency (EPA).[124] The Ninth Circuit upheld the designation despite the agency's error in publishing notice that an EIS on the designation had been filed with the EPA in the Federal Register at the same time, rather than one week after the EIS was distributed to agencies and the public. The court found the agency's

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121. *See* DESIGNATING RIVERS THROUGH SECTION 2(A)(II), *supra* note 114, at 6 ("[O]fficials in some states held the view that national designation under 2(a)(ii) would be too costly . . . [because of] administrative costs of a national river, including land acquisition costs.") (internal quotation marks omitted). Perhaps as a result of a 1978 GAO report that concluded that states viewed the administrative and land acquisition expenses associated with state designation as overly burdensome, Congress amended the WSRA that year to provide for expenditure of federal funds for management and administration of federally-owned lands within state-administered river segments. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 761, 92 Stat. 3436 (Nov. 10, 1978) (amending provision of the 1968 statute requiring state-administration "without expense to the United States"); 16 U.S.C. § 1273(a) (2012) ("Each 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.").

States designated only five rivers during the first ten years of the WSRA: the Allagash River (Maine), the Little Miami River and Little Beaver Creek (Ohio), the New River (North Carolina), and the lower St. Croix River (Wisconsin and Minnesota). DESIGNATING RIVERS THROUGH SECTION 2(A)(II), *supra* note 114, at 6. In the ten years following the 1978 amendment to administration of state-administered river segments, states added eight segments to the national system: the Westfield River (Massachusetts) in 1993; Big and Little Darby Creeks (Ohio), upper Klamath River (Oregon), and Cossatot River (Arkansas) in 1994; the Wallowa River (Oregon) in 1996; and the Lumber River (North Carolina) in 1998. The following decade saw only seven designations through the state designation pathway. Between 1998 and 2019, there was only one state-initiated designation: a 35-mile segment of the Westfield River in Massachusetts in 2004. *Id.* at 7.

122. *Cty. of Del Norte*, 732 F.2d at 1464 ("Secretary of the Interior Cecil Andrus designated the rivers in January, 1981, during the waning hours of the Carter administration . . . . [T]he State of California . . . favored expeditious completion of all NEPA requirements so that action could be taken on the proposal before the Carter administration left office.").

123. Earlier, a similar group of plaintiffs unsuccessfully sought to enjoin Governor Brown from seeking federal protection under the WSRA. *Id.* at 1467 (citing County of Del Norte v. Brown, No. 292019 (Cal. Super. Ct. Sacramento Cty. 1980) (memorandum decision)).

124. 40 C.F.R. § 1506.10(b) (2019) ("No decision on the proposed action shall be made or recorded . . . by a Federal agency until . . . [t]hirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement).

error to be an unenforceable "trivial" violation of NEPA because it did not actually affect the required thirty-day public comment period.[125]

A case involving the state of Oregon's designation of the Klamath River clarified the scope of state designations.[126] According to the statutory language, state designations must be first declared as part of a state river protection program by an "act of [state] legislature."[127] In 1988, Oregon voters passed an initiative designating a portion of the Klamath River as a state scenic waterway.[128] Thereafter, the Oregon governor sought inclusion in the national WSRA system.[129] But the city of Klamath Falls, which had plans for a hydroelectric project on the Klamath River and had applied for a license from FERC, claimed that the Klamath could not be added to the system because voters, rather than the state legislature, added the river to the state system.[130] The court decided that the voter initiative was equivalent to an act of state legislature, reading the WSRA to allow states to incorporate rivers into the system using any of the law-making processes available to them.[131]

Although states may choose to have rivers protected under the WSRA, the states retain control over state-designated river segments.[132] State agencies are not

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125. *Cty. of Del Norte*, 732 F.2d at 1466-67. The question in the case was "whether the violation of the regulations, by publishing notice in the Federal Register on the day circulation of the EIS was complete rather than during the following week, [was] 'trivial.'" *Id.* at 1466. The court held that the violation was trivial because the "integrity of the decision making process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way." *Id.* at 1466-67.

126. City of Klamath Falls v. Babbitt, 947 F.Supp. 1, 1 (D.C.C. 1996) (interpreting 16 U.S.C. § 1273(a) (2012)).

127. *Id.*; *see infra* Appendix entry 52.

128. *City of Klamath Falls*, 947 F.Supp. at 3.

129. *Id.* ("In April 1993, Oregon Governor Barbara Roberts requested that the Secretary of the Interior designate the section of the Klamath River into the federal Wild and Scenic Rivers System.").

130. *Id.* Designation as a *state* scenic waterway did not interfere with development of the Salt Caves Hydroelectric Project, for which the state had applied for a FERC license in 1986, because "[s]tate designation does not prevent FERC from licensing a hydroelectric project on the river." (citing 16 U.S.C. § 1278(a) (2012)) (emphasis added). Once the river segment was added by the Secretary of Interior to the national system in 1994, however, the statute forbade FERC from licensing the proposed hydroelectric project. 16 U.S.C. § 1278(a).

131. *City of Klamath Falls*, 947 F.Supp. at 8-9. The court limited the ability of states to designate rivers by an "act of [state] legislature" to processes that "actually create[] law" including voter initiatives. *Id.* at 8. Because "initiatives are direct legislation by the voters," an initiative qualifies as an "act of the legislature." *Id.* at 9. Somewhat curiously, the court suggested that a voter referendum, "in which citizens vote on a law that has been passed by the elected legislature" would not qualify because it does not create law. *Id.* at 8 n.1.

132. *Cf.* DESIGNATING RIVERS THROUGH SECTION 2(A)(II), *supra* note 114, at 6 ("By the early 1990s, more than thirty states had enacted statutes creating state river protection systems, protecting in excess of 13,500 river miles, a figure which exceeds the total river miles currently protected in the National System."). The structure of the state designation pathway does not logically require all state rivers to be designated into the national system because rivers protected under state programs must meet additional requirements to qualify for WSRA designation.

responsible for achieving the management and protection standards required by the WSRA when managing non-federal lands in river segments designated by state initiative,[133] and the WSRA does not preempt state authority to manage state-designated rivers.[134] In a case involving Maine's Allagash River, the court dismissed a claim that the WSRA preempted Maine's state program.[135] The WSRA establishes no specific standards for state management; instead, the statute leaves to states' discretion how best to administer their river protection programs.[136]

River segments designated through the state designation pathway receive the same federal protections as river segments designated by congressional initiative, with a few significant differences. Except where a segment runs through federal lands, state or local agencies manage state-designated rivers.[137] The Act also forbids any state or local management agency from administering the state management plan with federal funds.[138] State managing agencies are not subject to the Act's boundary acreage limitations or procedural timelines and, depending on state law, may set boundaries smaller or larger than federal standards.[139] For example, the statute establishing New York's Wild, Scenic, and Recreational River System limits its corridor boundaries to one-half mile from the river bank, rather than the federal standard of one-quarter mile.[140] Because the agency administering the relevant riv-

133. *See infra* notes 136, 139 and accompanying text.

134. *See* 16 U.S.C. § 1273(a)(ii).

135. Fitzgerald v. Harris, 549 F.3d 46, 52 (1st Cir. 2008) ("Nothing in the text of the federal statute expressly preempts state law regulation of rivers administered under section 2(a)(ii) of the WSRA . . . .").

136. *Id*. at 54. The *Fitzgerald* court also stated that the "WSRA defines a limited role for the federal government, a role primarily of cooperation with and assistance to the states in the management of section 2(a)(ii) rivers." *Id*. at 55. The court in *Sierra Club North Star Chapter v. LaHood*, 693 F.Supp.2d 958, 982-84 (D. Minn.), agreed with the result in *Fitzgerald*, concluding that the federal agencies' obligations under the WSRA to apply the "protect and enhance" standard did not apply to a bridge construction proposal on the Lower St. Croix River because the river was designated through state initiative and administered by the state.

137. 16 U.S.C. § 1273(a).

138. 16 U.S.C. § 1273(a)(ii) (rivers added by state designation "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"). Congress amended the statute in 1978 to authorize federal expenditures for administration and management of federally owned lands within state-administered, federally designated rivers. National Parks and Recreation Act of 1978, Pub. L. No. 95-625 (1978) (amending the statute); *see* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11, at 3.

139. Agency guidance acknowledges that the boundary-setting and publication requirements do not apply to rivers designated through the state designation pathway. INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, TECHNICAL REPORT, ESTABLISHMENT OF WILD AND SCENIC RIVER BOUNDARIES, at 1 n. 1 (Aug. 1998) [hereinafter cited as ESTABLISHMENT OF WILD AND SCENIC RIVER BOUNDARIES] ("Neither the requirement for establishing a boundary nor the acreage limitation for federally administered rivers applies to rivers designated pursuant to Section 2(a)(ii) of the Act.").

140. N.Y. ENVTL. CONSERV. LAW § 15-2711 (Consol. 2017).

er segment sets the boundaries of the river corridor, whether the segment was designated through state or congressional action may have a considerable effect on the size of the corridor. The size of the river corridor and geographic reach of designation remain issues of some contention.

C. *The Size and Scope of River Corridors*

River segments eligible for federal designation in the national system include "free flowing stream[s] and the related adjacent land area that possesses one or more of the [outstandingly remarkable] values" outlined in the statute.[141] River corridors of designated segments are generally limited to "one-quarter mile from the ordinary high water mark on each side of the river."[142] The establishment of corridor boundaries by the agency is a prerequisite to land acquisition to protect ORVs.[143] Congress may, of course, choose to set boundaries, impose land acquisition limits, prescribe acceptable uses, or establish study periods for individual WSRA segments that are unique to that segment.[144]

1. Boundary Setting

The WSRA requires federal managing agencies to delineate the boundaries of the corridor within one year from the time of designation.[145] Federal managing agencies must publish boundary proposals in the Federal Register, which become effective ninety days after the proposal is forwarded to the President of the Senate and the Speaker of the House of Representatives, allowing an opportunity for public and congressional comment.[146] Prior to publication of the boundary, the Act

141. 16 U.S.C. § 1273(b) (2012).

142. 16 U.S.C. § 1275(d).

143. 16 U.S.C. § 1277(a)(1) ("The Secretary of the Interior and the Secretary of Agriculture are each authorized to acquire lands and interests in land *within the authorized boundaries* of any component of the national wild and scenic rivers system . . . .") (emphasis added).

144. *See, e.g.*, Cassie Thomas, *Wild, Scenic and Beyond!: Special Legislative Provisions for WSRS* (presentation at the River Management Society 50th Anniversary Symposium, Oct. 22, 2018) (on file with author) (noting congressional decisions to (1) limit boundaries on the Middle Delaware to the river bank; (2) prevent land acquisition on certain rivers; (3) deny condemnation authority on the Lamprey; (4) restrict condemnation on the Niobrara to two percent of the segment; and (5) permit continued operation of preexisting hydroelectric projects on the Upper Farmington, among many others).

145. 16 U.S.C. § 1274(b).

146. *Id.* These procedures do not apply to state-managed rivers proposed for WSRA protection. *See supra* note 133-36 and accompanying text. Congressional comment on agency-proposed boundaries is not binding on the agency; Congress would have to pass an overriding law to set boundaries that differ from the agency's proposal. *See* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11, at 7 ("publishing notice of the availability of boundaries and classifications and making maps and description [sic] available to that [sic] public" as required in sections 3(b) and (c) "will provide the same level of public notice as was previously provided by publication of such information in the *Federal Register*." (citing H.R. Rep. No. 99-503, 11 (1986)).

sets an interim boundary of one-quarter mile from the ordinary high water mark.[147] Federal managing agencies may amend initial boundary lines during the planning process if they determine that the boundaries do not protect the ORVs for which the segment was established, or upon discovery of new ORVs,[148] but they must comply with the notice requirement.[149] Boundaries for designated rivers may not, however, include more than 320 acres of land per mile, "measured from the ordinary high-water mark on both sides of the river,"[150] except in Alaska,[151] or as otherwise determined by Congress.[152]

Boundaries must be adequate to achieve the purposes of the Act and may include lands that serve as buffers where necessary to protect and enhance ORVs. In a case involving Nebraska's Niobrara River, the reviewing court ruled that the WSRA authorized agencies to include so-called "unremarkable lands" as a buffer zone to protect ORVs, or where geographic value locations are discontinuous.[153]

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147. 16 U.S.C. § 1275(d).

148. A COMPENDIUM OF QUESTIONS, *supra* note 107, at 55. Compliance with NEPA is also required. *Id.* The Bureau of Land Management's guidance on boundary-setting suggests that the agency include, at minimum, a quarter mile of riverbank land from the ordinary high-water mark on either side of the river. BLM IMPLEMENTATION MANUAL, *supra* note 88, at 2.2. However, the agency has discretion to exceed the quarter-mile standard if necessary to protect the river's ORVs. *Id.*

149. *See* 16 U.S.C § 1274(b).

150. 16 U.S.C. § 1274(b). The 320-acre limit is equivalent to one-quarter mile (1,320 feet) applied uniformly along a mile-long segment. Boundaries may include areas adjacent to the river beyond the one-quarter mile mark "if their inclusion could facilitate management of the resources of the river" including "historical, archeological, or ecological resource areas which may extend beyond the boundaries of the mandated study area, but could be better managed by inclusion in the river area." Dep't of Interior & Dep't of Agric., National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification, and Management of River Areas, 47 Fed. Reg. 39,454, 39,456 (Sept. 7, 1982) [hereinafter cited as Final Revised Guidelines for Eligibility, Classification, and Management of River Areas]. The ordinary high-water mark is the starting point for measuring boundaries. 16 U.S.C. § 1275(d) (2012).

151. 16 U.S.C. § 1274(b). In Alaska, the maximum boundary for rivers located outside of national parks is 640 acres per mile and may not engulf private lands. 16 U.S.C. § 1285(b) (2012). In the legislative history to the Alaska Lands Act, the Senate Committee on Energy and Natural Resources recommended doubling the boundary size for designated rivers because the "flexibility to establish a [larger] buffer zone [was] needed because of the expansive vistas, unique fish and wildlife resources and ecological systems associated with these rivers." Comm. on Energy and Nat. Res., Alaska National Interest Lands, S. Rep. No. 96-413, 96th Cong., 1st Sess., 216 (Nov. 14, 1979); *see* Alaska National Interest Lands Conservation Act, Pub. L. 96-487, 94 Stat. 2371, 2416 (Dec. 2, 1980).

152. For example, when designating Elkhorn Creek in Oregon, Congress extended the maximum boundary to 640 acres per mile. 16 U.S.C. § 1274(a)(159)(B).

153. Simmons v. Jarvis, 8:13-CV-98, 2016 WL 4742256, *3 (D. Neb. 2016) (holding that the National Park Service is not required to include only land possessing ORVs because including "unremarkable" lands as a buffer zone might be necessary to protect ORVs). The WSRA's authorization of buffer-zone protection stands in contrast to wilderness areas, where Congress has frequently forbade the creation of buffer zones, such as in the Arkansas Wilderness Act, 98 Stat. 2352, § 7 (1984), construed in *Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998) (rejecting a challenge to federal timber sales nearby wilderness areas); *see also* Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture,

Federal agencies may set boundaries smaller than the suggested one-quarter mile minimum,[154] and private landowner concerns over potential federal land acquisition and regulation have led managing agencies to consider setting "bank-to-bank" boundaries in the past.[155] But agency guidance suggests that an agency is "unlikely . . . to demonstrate that adoption of such a [narrow] boundary will provide necessary protection and, therefore, compliance with law" because "land uses immediately adjacent to the river have the highest potential for affecting water quality" and other ORVs.[156] And the Eighth Circuit, affirming the District Court in the Niobrara River case, stated that agencies are "not required to include only land with outstandingly remarkable values" as long as the boundary decision is "rationally connected" to ORV protection.[157]

Courts interpreting WSRA boundary requirements have consistently required agencies to establish river corridor boundaries sufficient to "protect and enhance the values" that qualified the segment for designation.[158] Agency boundary decisions that demonstrate protection and enhancement of identified ORVs will usually receive deference from courts.[159] However, in a separate case involving a land-

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18 F.3d 1468, 1480 (9th Cir. 1994) (upholding a Forest Service decision to ban off-road vehicle use adjacent to a wilderness area because the agency's reasoning was based on a number of resource management concerns and user conflicts other than establishing a buffer zone).

154. 16 U.S.C. § 1275(d) ("The boundaries of any river proposed in section 1276(a) of this title for potential addition to the National Wild and Scenic Rivers System shall generally comprise that area measured within one-quarter mile from the ordinary high-water mark on each side of the river.")

155. *See, e.g.*, Sokol v. Kennedy, 210 F.3d 876, 879 n.8 (8th Cir. 2000) (rejecting the defendant's argument that the WSRA lacked a meaningful standard for boundary selection because it allegedly conflicted with the statutory language and because the National Park Service previously interpreted the statute to reject a "bank-to-bank" boundary alternative as inconsistent with the statutory duty to protect ORVs on lands adjacent to designated rivers).

156. ESTABLISHMENT OF WILD AND SCENIC RIVER BOUNDARIES, *supra* note 139, at 3.

157. Simmons v. Smith, 888 F.3d 994, 1000-01 (8th Cir. 2018), *petition for cert. denied*, 139 S. Ct. 807 (Jan. 7, 2019) (citing *Sokol v. Kennedy*, 210 F.3d at 879). After NPS adopted revised boundaries for Nebraska's scenic Niobrara River, determining that geologic, fish, and wildlife ORVs existed "rim to rim" across the entire designated segment, a landowner challenged the boundary which included a substantial portion of his property. *Id.* at 996-98. NPS had revised the Niobrara River boundaries in response to the Eighth Circuit's earlier decision in *Sokol v. Kennedy*. *See Simmons,* 888 F.3d at 996-97 (citing *Sokol,* 210 F.3d at 881). The court affirmed the agency's revised boundary and rejected landowner's argument that the "rim-to-rim" boundary was arbitrary and capricious because it did not identify *specific* ORVs in the river corridor. *Id.* at 1001 (emphasis added).

158. 16 U.S.C. § 1281(a). Courts have yet to clarify the corridor establishment method or standards agencies must follow to remain within the purposes of the WSRA. Interagency guidance documents state that boundaries should be based on legally identifiable lines like survey or property lines, on-the-ground physical features like topography, and natural or man-made markers like canyon rims or roads. A COMPENDIUM OF QUESTIONS, *supra* note 107, at 55.

159. *See, e.g.*, Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074, 1103 (E.D. Cal. 2006), *aff'd sub nom*. Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024 (9th Cir. 2008) (deferring to the National Park Service's boundary determination on the Merced River demonstrating protection and enhancement of ORVs).

owner challenge to the boundary of the Niobrara River in 2000, the Eighth Circuit held that the agency's failure to ascertain and preserve the ORVs within the designated corridor violated the WSRA.[160] Although the court did not require the National Park Service to physically mark the boundaries of the corridor,[161] it decided that the agency's analysis of the river's "significant and important values" failed to fulfill the statutory directive requiring the agency to consider the river's "outstandingly remarkable values."[162]

In 2003, the Ninth Circuit agreed with the Eighth Circuit's emphasis on ORVs in a case upholding an environmentalist challenge to an overly narrow corridor boundary for the Merced River.[163] The National Park Service's boundary for the segment of the river within Yosemite National Park included the "greater of" the 100-year floodplain or 100-150 feet from the ordinary high water mark.[164] The district court upheld NPS's boundary decision, observing that it complied with BLM guidance documents by marking the boundary from the ordinary high water mark, as defined by the Army Corps of Engineers. It concluded that the agency did not have to identify and locate every ORV when drawing the boundary.[165] But the Ninth Circuit reversed, pointing out that the boundary "could not possibly have been promulgated to protect and enhance" the ORVs because the Park Service entirely failed to consider identified ORVs in its boundary decision.[166]

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160. *Sokol v. Kennedy*, 210 F.3d at 879-80 (deciding that the agency's application of a "significant-values" standard failed to meet the "outstandingly remarkable values" standard required by the act).

161. *Id.* at 881 ("Section 1274(b) makes no mention of physical posting, and its language is completely satisfied by the detailing of boundaries on maps, made available to the public.").

162. *Id.* at 878 (The "Park Service failed to apply the relevant statutory authority . . . [by] select[ing] land for inclusion in the Niobrara Scenic River area without identifying and seeking to protect outstandingly remarkable values, as required by the Wild and Scenic Rivers Act."). Since Congress did not expressly delegate legislative authority to the agency to interpret the WSRA, the court refused to grant *Chevron* deference to the agency's "significant and important values" interpretation of the corridor boundary. *Id.* at 879 ("The Act allows the administering agency discretion to decide which boundaries would best protect and enhance the outstandingly remarkable values in the river area, but it must identify and seek to protect those values, and not some broader category."); *see* Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842-43 (1984) (courts must defer to an agency's reasonable interpretation of a statute when the statute is silent or ambiguous on the issue).

163. Friends of Yosemite Valley v. Norton, 348 F.3d 789, 797-98 (9th Cir. 2003); *infra* Appendix entry 67.

164. *Friends of Yosemite Valley*, 348 F.3d at 795, 797-98.

165. Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d 1066, 1097, 1100 (E.D. Cal. 2002), *aff'd in part, rev'd in part*, 348 F.3d 789 (9th Cir. 2003), *opinion clarified*, 366 F.3d 731 (9th Cir. 2004).

166. *Friends of Yosemite Valley*, 348 F.3d at 798-99. Although managing agencies must draw boundaries that protect and enhance all identified ORVs, the Ninth Circuit clarified that the WSRA did not require inclusion of "the absolute maximum number of acres on every part of the designated river," nor did it require agencies to justify a boundary less than the absolute maximum average. *Id.* at 799.

2. Land Acquisition

The Secretaries of Agriculture and the Interior have authority to "acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system designated [under the Act]," but may not "acquire fee title to an average of more than 100 acres per mile on both sides of the river."[167] The WSRA prohibits condemnation where fifty percent or more of the acreage outside the high-water mark is already publicly owned in fee title, unless condemnation is necessary to clear title, acquire scenic easements, or to ensure public access.[168] The Government Accountability Office interpreted congressional intent to limit condemnation to "as little land as possible," preferably "accomplished principally by taking scenic easements."[169] Scenic easements do not give the public a right of access unless specifically included in the terms of the easement.[170]

According to a 1996 interagency report, even "as a resource protection tool, the federal land acquisition authority . . . is inadequate to fulfill the Act's resource-

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167. 16 U.S.C. § 1277(a)(1) (2012). Tracts of land lying partially inside and partially outside the established boundary may be acquired in their entirety with the consent of the landowner, and the lands acquired outside the boundary do not count against the average 100-acre-per-mile fee title limitation. 16 U.S.C. § 1277 (a)(2). The House of Representatives amended the Senate version of the 1968 bill to limit the power of the federal government to acquire lands by reducing the maximum fee title acquisition authority from 320 to 100 acres per river-mile. Scenic Rivers, CQ Almanac (2019), House of Representatives Conference Report No. 1917, 90th Cong. 2d Sess., 16 (Sept. 24, 1968); 16 U.S.C. § 1277(a)(1) (2012) (The Secretaries of Interior and Agriculture "shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river."). The Interior Department concluded that these limitations "apply only to the land extending back from both sides of the river, and that islands and the riverbed itself may be excluded in calculating the 100 and 320 acre limitations." U.S. GOV'T ACCOUNTABILITY OFF., WILD AND SCENIC RIVERS ACT—INTERPRETATION OF CONDEMNATION LIMITS, Rep. No. 125035-O.M., at 2 (May 21, 1979). The National Park Service relied on that interpretation in developing the management plan for the Lower St. Croix River. *Id.* at 2-3. Legislative history interpreting the acquisition provision, which includes the power to condemn property in limited circumstances, envisioned "fee acquisition of a strip of land generally not more than 400 feet from either side of the river." H.R. Rep. No. 90-1623, *supra* note 56, at 3824.

168. 16 U.S.C. § 1277(b).

169. U.S. GOV'T ACCOUNTABILITY OFF., WILD AND SCENIC RIVERS ACT—INTERPRETATION OF CONDEMNATION LIMITS, *supra* note 167 at 5. The statute defines "scenic easement" as "the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area, but such control shall not affect, without the owner's consent, any regular use exercised prior to the acquisition of the easement." 16 U.S.C. § 1286(c). An agency cannot condemn a scenic easement to terminate any "regular use exercised prior to the acquisition." 16 U.S.C. § 1286(c). In *United States v. 2.17 Acres of Land*, the court ruled that "regular use" does not mean that future intended uses cannot be condemned. No. CIV. 4-86-556, 1988 WL 31768, at *2 (D. Minn. Apr. 5, 1988).

170. A COMPENDIUM OF QUESTIONS, *supra* note 107, at 61 ("Depending upon the terms and conditions of each easement, public access rights may or may not be involved. For example, a scenic easement may only involve the protection of narrowly defined visual qualities with no provisions for public use. A trail or road easement by necessity may involve public use provisions.").

protection mandate . . . ."[171] Because of the availability of arguably more cost-effective ways of ensuring ORV protection in Wild and Scenic Rivers System corridors, managing agencies rarely use condemnation.[172]

3. The Geographic Reach of the WSRA

Although the WSRA aims to protect ORVs within the boundaries of designated corridors, Congress sought to minimize restrictions on resource development outside those boundaries.[173] The Act prohibits FERC licensing of development projects "on or directly affecting" the river, since a prerequisite to designation is that a river must be "free-flowing."[174] The WSRA also prohibits federally assisted "water resources project[s]" from having a "direct and adverse effect" on those values,[175] or adversely affecting water quality.[176] Whether the WSRA's development

171. INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS 7 (Oct. 1996), https://www.rivers.gov/documents/non-federal-lands-protection.pdf [hereinafter PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS].

172. *See id.* The 1996 interagency guidance suggested cost-effective measures of ORV protection other than condemnation were local, state, and federal laws and regulations; local, state and federal incentive programs; and voluntary programs. *Id.* at 28-31. WSRA condemnation authority was rarely invoked during the 20th century. The Forest Service invoked its condemnation authority just once: to acquire 656 acres along the Eleven Point River in Missouri. The Bureau of Land Management also only condemned land once: to acquire 44 acres along the Rogue River in Oregon in 1972. *See* Frost, *supra* note 76, at 318 n.25. The guidance maintained that expanding acquisition authority would not necessarily increase protection of ORVs because (1) the statute limits the outer boundaries of the corridor; (2) political and institutional factors discourage federal land acquisition; and (3) land use factors outside the corridor also influence river values such as wildlife habitat, water quality, and scenery. PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS, *supra* note 171, at 6-7. The identified political and institutional factors included the slow and expensive purchase process and the limited availability of adequate funding. *Id.* at 7.

173. *See* 16 U.S.C. § 1278(a) (the protections for designated rivers, "shall [not] preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area . . . which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation"); 16 U.S.C. § 1278(b)(iii) (the protections for study rivers "shall [not] preclude licensing of, or assistance to, developments below or above a potential wild, scenic or recreational river area . . . which will not invade the area or diminish the scenic, recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area on the date of designation of a river for study"); H.R. Rep. No. 1917, *supra* note 167, at 16 (explaining that "the established national policy of developing rivers by construction of dams and other water resources projects needs to be complemented with a policy of preserving certain rivers in free-flowing condition").

174. 16 U.S.C. § 1278(a); 16 U.S.C. § 1273(b).

175. The WSRA prohibits assistance "by loan, grant, license, or otherwise" but does not define "assistance." 16 U.S.C. § 1278(a). Federal agencies agree that issuing a permit constitutes "federal assistance." *See* 36 C.F.R. § 279.3 (DOI regulations); Riette van Laack, *Protection of a Wild and Scenic River Against Nonfederally Funded, Nonpower Water Projects Reducing the Volume of Water Feeding Into That River*, 72 TENN. L. REV. 875, 882 (2005). Although the Act did not define "water resources project," Department of Interior guidance interpreted the term to include dams, reservoirs, power projects, and "any project or construction activity that would affect free-flowing characteristics." 63 Fed. Reg. 67,836-37

limitations extend to particular in-river actions upstream or downstream from the designated segment that may jeopardize ORVs is not entirely clear.[177] The Act's prohibitions on FERC licensing and federal assistance to projects adversely affecting identified values do not extend to actions "below or above" a designated river or "stream tributary thereto" if they would not "invade the area" and only "reasonably diminish" the values qualifying the segment for designation.[178] Courts have interpreted the statute's allowance of actions outside designated corridors "reasonably diminishing" river values to countenance actions like logging and roadwork that the managing agency determined would not adversely affect identified ORVs.[179] But where ORVs are unreasonably affected by actions outside designated corridors, the WSRA directs managing agencies "to take . . . action" to protect ORVs.[180]

Although the statute protects "free-flowing" characteristics against water resource developments within designated segments,[181] actions outside those segments can affect river flows, water levels, and produce increased turbidity and siltation within protected rivers.[182] Whether the prohibition against federal agencies in as-

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(1998) ("Water resources project means any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act of 1995 . . . or any project or construction activity that would affect free-flowing characteristics, as that term is defined in the Act . . . ."). In *Sierra Club North Star Chapter v. Pena*, involving construction of a bridge over the WRSA-designated St. Croix River, a district court upheld the National Park Service's determination that the bridge was a "water resource project," giving *Chevron* deference to the agency's interpretation and observing that the bridge construction required a Clean Water Act section 404 dredge and fill permit due to its disturbance of the riverbed in constructing piers. 1 F. Supp. 2d 971, 980-81 (D. Minn. 1998).

176. 16 U.S.C. § 1271 (setting out the WSRA's policy goals of protecting water quality in wild and scenic rivers).

177. To adequately manage off-reservation actions affecting ORVs, the agency must be aware of impending upstream or downstream projects potentially affecting the WSRA segment, but the statute does not require notice to the managing agency. Van Laack, *supra* note 175, at 884 (citing 36 C.F.R. § 297.4(a)).

178. 16 U.S.C. § 1278(a) (statutory restrictions on FERC dam development "shall [not] preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area").

179. *See, e.g.,* Newton Cty. Wildlife Ass'n v. Rogers. 141 F.3d 803, 808-09 (8th Cir. 1998) (environmentalists failed to establish that "the Forest Service acted arbitrarily and capriciously in finding that logging and road work [would] have an insignificant effect on WSRA-designated river components.").

180. 16 U.S.C. § 1283.

181. *See* 16 U.S.C. § 1278(a) (providing protection from federal water resource developments).

182. Hiser, *supra* note 39, at 1072 (noting downstream effects from dam construction); Phillip M. Bender, *Restoring the Elwha, White Salmon, and Rogue Rivers: A Comparison of Dam Removal Proposals in the Pacific Northwest*, 17 J. LAND RESOURCES & ENVTL. L. 189, 198-99 (1997) (dam removal may "increase turbidity and . . . sediment load downstream"); *See* Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designation*, 58 U. COLO. L. REV. 551, 567 (1988) (upstream logging "causes siltation of the streams and increases the turbidity of the water," upstream placer

sisting such projects extends to actions that jeopardize their free-flowing character is unclear unless they "invade" the designated river, and the Ninth Circuit construed that prohibition of federal assistance to not apply to congressionally authorized dams.[183] Thus, it seems possible that federal assistance to a project outside a designated river might undermine the river's WSRA protections.

The WSRA requires managing agencies to cooperate with the EPA and appropriate state water pollution control agencies to eliminate or reduce water pollution in WSRA rivers.[184] The Eighth Circuit interpreted this "cooperation" requirement to not give pollution control agencies a veto over activities outside WSRA river corridors.[185]

Where their actions outside the corridor might adversely affect protected values, federal agencies must consider ORV degradation,[186] although neither the Act nor federal regulations prescribe procedures for consulting with the segment's managing agencies to ensure WSRA compliance.[187] Section 12, the "sleeping giant"

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mining "can pollute" downstream waters, and "herbicides and pesticides used in agriculture" contribute to downstream pollution); A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 14 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 1059, 1084 (2008) ("Grazing causes erosion and siltation.").

183. Oregon Nat. Res. Council v. Harrell, 52 F.3d 1499, 1505 (9th Cir. 1995). The court interpreted the WSRA to not reach construction of the previously approved, congressionally authorized Elk Creek Dam on a tributary to the protected segment of the Rogue River, stating that "7(a) is concerned with two different types of projects: those that are federally assisted on the one hand . . . and those that are congressionally authorized on the other . . . . [Because the] Corps was not acting to license, permit or otherwise authorize a third party to take action, but rather was acting to record its own choice of operating mode for a congressionally authorized dam . . . the ROD was not 'assistance' within the meaning of WSRA § 7(a)." *Id.*

184. 16 U.S.C. § 1283(c). The WSRA also directs managing agencies to "enter into written cooperative agreements with the appropriate State or local official for the planning, administration, and management of Federal lands which are within the boundaries" of segments designated by state initiative. 16 U.S.C. § 1283(a).

185. Newton Cty. Wildlife Ass'n v. Rogers, 141 F.3d 803, 809 (8th Cir. 1998) (determining that the Forest Service did not violate its obligation to cooperate with state water pollution control agencies when it proceeded with timber sales outside the corridor but potentially affecting the water quality of a designated river because it "considered the State's objections," noting specifically that the WSRA did not give the state agencies a veto authority over the timber sales); 16 U.S.C. § 1283(c) ("The head of any agency administering a component of the national wild and scenic rivers system shall cooperate with the Administrator, Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.").

186. *See* Wilderness Soc'y v. Tyrrel, 918 F.2d 813, 819 (9th Cir. 1990) (rejecting the Forest Service's argument that a timber sale one-quarter mile from the South Fork of the Trinity River was outside the scope of the statute, interpreting 16 U.S.C. § 1278(a), which stipulates that "[n]o department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established.").

187. Forest Service regulations require federal agencies to "provide a notice of intent to issue such license, permit, or other authorization" for federally assisted water resources projects no less than 60 days prior to the date of proposed action, but only for projects located "*on* [a] portion of" designated

of the WSRA, directs federal agencies with jurisdiction over "any lands which include, border upon, or are adjacent to" designated river segments "to take action" necessary to protect the river's ORVs, paying "[p]articular attention" to timber and road construction activities.[188] This provision applies to activities within or near any study or designated river.[189] Although agencies enjoy substantial discretion to determine whether the effect of their activities impermissibly degrade a segment's ORVs, section 12's reach clearly extends to activities beyond a river's corridor boundaries.[190] Managing agencies can and should protect ORVs by anticipating the kind of bordering or adjacent activities that may adversely affect the river segment in their CMPs.

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rivers. Wild and Scenic Rivers, Water Resources Projects, 36 CFR § 297.4 (emphasis added); *see also* van Laack, *supra* note 175, at 884 n.57, 901 ("Perhaps the primary failure of the WSRA is that it provides no mechanism to ensure that Wild and Scenic River administrators receive notice of upstream water resources projects."). The Secretary of Interior "will consent" to the issuance of a license, permit, or other authorization if "[t]he effects of the water resources project will neither invade nor unreasonably diminish the scenic, recreational, and fish wildlife values of a Wild and Scenic River, when any portion of the project is located above, below, or outside the Wild and Scenic River, [or the] effects of the water resources project will neither invade nor diminish the scenic, recreational, and fish and wildlife values of a Study River when the project is located above, below, or outside the Study River during the study period." 36 CFR § 297.5(a).

188. 16 U.S.C. § 1283(a) (requiring the agency to consider "scheduled timber harvesting, road construction, and similar activities which might be contrary to the terms" of the Act). Actions necessary to protect ORVs must be taken with respect to "management policies, regulations, contracts, [and] plans." *Id.*

189. INTERAGENCY WILD AND SCENIC RIVERS COORDINATING COUNCIL, WILD & SCENIC RIVER MANAGEMENT RESPONSIBILITIES 32 (Mar. 2002), https://www.rivers.gov/documents/management.pdf [hereinafter MANAGEMENT RESPONSIBILITIES] (Section 12 "applies to activities conducted by a federal department or agency that are within or proximate to a WSR designated under Sections 2(a)(ii) or 3(a) . . . [as well as] to rivers under study pursuant to Section 5(a) and to rivers being considered pursuant to Section 2(a)(ii)."). Congress's stated intent for amending section 12 in 1978 was "to require Federal agencies to manage federal lands adjacent to any river under consideration as a Wild and Scenic River in a manner consistent with the purposes of the Act." H.R. Rep. No. 95-1165, 95th Cong., 2d Sess. 88 (May 15, 1978); *see also* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11, at 36 ("[T]he intent of this amendment was to apply the broad protections of the act to all rivers in the National System, including those administered by the states." (internal quotation and citation omitted)).

190. *See* Gray, *supra* note 182, at 586 ("although [section 12] direct[s] the Park Service and other federal departments to protect wild and scenic rivers within or affected by their jurisdiction, the methods and extent of protection are left largely to the judgment and discretion of the agency [and in] general, deference to administrative decisionmaking is sound judicial policy."). For example, the statute does not prohibit federal timber sales outside but affecting the designated corridor without an approved river management plan absent an adverse effect on ORVs. *Newton County*, 141 F.3d at 808-09 (8th Cir. 1998) (declining to enjoin approval of Forest Service timber sales near the designated Buffalo River and Richland Creek in the Ozark National Forest, even though the Forest Service failed to prepare a timely river management plan, because the agency determined that the sales would not adversely affect the segment's water quality).

IV. PROTECTING OUTSTANDINGLY REMARKABLE VALUES

Both Congress and the managing agencies may identify ORVs for designated rivers.[191] Agency guidance attempts to foster consistency in federally-administered corridors,[192] stating that ORVs must "contribute substantially to the functioning of the river ecosystem" or "owe its location or existence to the presence of the river."[193] Specific ORVs not only qualify a river for designation, but serve as a benchmark for evaluating projects potentially affecting a designated river.[194]

A. *River Classification*

The WSRA's three-tiered classification system assigns to each designated river segment a classification of wild, scenic, or recreational, which affects agency management and the level of protection the statute provides.[195] For study rivers, the agency must determine which of the classifications best fits the river or its var-

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191. Congress may identify ORVs when designating a segment into the national system. *See, e.g.*, Michigan Scenic Rivers Act of 1991, Pub. L. No. 102-249, 106 Stat. 45, 102nd Cong. (1992) (designating segments of Michigan rivers into the national system and identifying, inter alia, fisheries and historic sites as ORVs); Farmington Wild and Scenic Rivers Act, Pub. L. No. 103-313, 108 Stat. 1699 (1994) (designating segments of Connecticut's Farmington River and identifying fisheries, recreation, wildlife, and historic ORVs based on DOI study report); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754, 798 (2008) (designating segments of Connecticut's Eightmile River and identifying cultural landscape, water quality, watershed hydrology, unique species and natural communities, geology, and watershed ecosystem as ORVs). For rivers designated as potential additions to the system, the administering agency must conduct a study and issue a report that must, among other things, show "the characteristics which do or do not make the area" qualify for addition to the system. 16 U.S.C. § 1275(a). This process gives the agency an opportunity to identify ORVs in its report to Congress. *See* Frost, *supra* note 76, at 322-23; Bonham, *supra* note 75, at 122.

192. NAT'L WILD AND SCENIC RIVER SYSTEM, THE WILD & SCENIC RIVER STUDY PROCESS 13 (Dec. 1999), https://www.rivers.gov/documents/study-process.pdf.

193. NAT'L PARK SERV., WILD AND SCENIC RIVERS PROGRAM FACT SHEET: OUTSTANDINGLY REMARKABLE VALUES (2011) ("ORVs must be river related [meaning] the value must [b]e located in the river or on its immediate shorelands . . . [c]ontribute substantially to the functioning of the river ecosystem; and/or [o]we its location or existence to the presence of the river.").

194. Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1027 (9th Cir. 2008) (ORVs "both justify the initial designation of a river as a WSRA component, and provide the benchmark for evaluating a proposed project affecting a designated river."); *see also* PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS, *supra* note 171, at 8 ("[C]lassification(s) may help provide benchmarks against which potential [land use] changes can be measured . . . [and] protection standards should ensure that a segment's appropriate classification would not change from wild to scenic, or from scenic to recreational, if a new assessment were to be performed.").

195. 16 U.S.C. § 1273(b) (river segments are "classified, designated, and managed" as either wild, scenic, or recreational). The three-part classification system originated in a 1967 precursor to the WSRA titled the "National Scenic Rivers Act." *See* Tarlock & Tippy, *supra* note 3, at 711. Classifications are non-exclusive, and some designations specify two categories or do not expressly establish any category of classification. *See* CYNTHIA BROUGHER, CONG. RESEARCH SERV. R41081, THE WILD AND SCENIC RIVERS ACT (WSRA): PROTECTIONS, FEDERAL WATER RIGHTS, AND DEVELOPMENT RESTRICTIONS, 2 (Dec. 22, 2010), https://www.everycrsreport.com/reports/R41081.html.

ious segments within one-year of designation, notifying Congress and the public.[196]

Although classification does not dictate management,[197] it may affect the management and protection decisions implemented by state or federal agencies. Classification establishes a river's baseline characteristics on which agencies build their management plans and provides a framework for determining whether the managing agency fulfilled the statutory requirement of establishing "management practices necessary or desirable to achieve the purposes" of the WSRA.[198]

The managing agencies view river classification as a reflection of the "degree of naturalness" of a river determined by conditions within the surrounding area at the time of designation.[199] Although conditions within the river area generally determine classification, agencies may consider conditions outside river areas, "such as developments which could impact air and water quality, noise levels or scenic views within the river."[200] Only "wild" rivers receive statutory protection from mining on federal lands within designated corridors, as the Act forbids new federal

196. 16 U.S.C. § 1274(b). Agencies must publish classifications in their D.C. office and in "locations convenient to the designated river." 16 U.S.C. § 1274(c). The notice requirement means that agency classifications are not necessarily final. In Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1249 (E.D. Cal. 1999), the court concluded that the National Park Service complied with the notice requirement of the WSRA by including classification, boundaries, and ORV identification for the Merced River in a draft EIS because "[s]ection 1274(c) also directly contemplates the possibility that designations under section 1274(b) may not be final by providing that the public and Congress be notified of any changes or amendments to descriptions of boundaries or classifications." Congress may modify the procedural description and notice requirements as part of the designating act. *See, e.g.*, *id.* at 1248 ("The provisions of 1274(b) were modified by [Congress in] the provisions of section 1274(a)(62)(A) . . . ."); *see also* 16 U.S.C. § 1274(a)(62)(A) (requiring the Secretary of Interior to address boundary and classification description and notice requirements by modifying the general management plan of Yosemite National Park).

197. *See* Ctr. for Biological Diversity v. Lueckel, 248 F. Supp. 2d 660, 662 n.1 (W.D. Mich. 2002), *aff'd*, 417 F.3d 532 (6th Cir. 2005) ("The classification does not determine river management; it simply describes the degree of naturalness found at a particular river at the time of designation. With the exception of mining, the WSRA's mandate to 'protect and enhance' a river's Outstandingly Remarkable Values defines the Forest Service's management regime[.]"); Sally Fairfax et al., *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417, 429 (1984) ("[Assuming] that the degree of protection afforded a river would be based on the river's classification . . . would be wrong [because] the Act specifies protection based on river classification *only* with regard to mining.").

198. 16 U.S.C. § 1274(d).

199. *Final Revised Guidelines for Eligibility, Classification, and Management of River Areas*, *supra* note 150, at 39,458 (1982).

200. *Id.* ("[T]here may occasionally be exceptions to some of the criteria. For example, if [the managing agency] finds that strict application of the statutory classification criteria would not provide the most appropriate classification for a specific river segment, the study report may recommend for congressional consideration an exception to the classification criteria.").

mining claims on, or within one-quarter mile of, the bed or bank of any designated "wild" river, subject to valid existing rights.[201]

Agencies may have authority to alter classifications, at least when not established by Congress. One court noted a lack of "authority forbidding an agency from changing the classification of a river segment," based on the language of the statute and agency guidance, even though the statute does not explicitly grant that authority.[202] Another court suggested that the only recourse for the state's failure to preserve the Allagash River's "wild" characteristics was to "downgrade" the river's classification to scenic or recreational or to remove it from the WSRA altogether.[203]

After decades of river resource development and private landowner use of river corridors, recent WSRA additions tend to designate segments, rather than entire river systems, as "wild" or "scenic."[204] Regardless of classification, the WSRA re-

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201. The statute grandfathers mining claims within WSRA corridors established prior to a river's designation. 16 U.S.C. § 1280(a)(iii) ("[S]ubject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated a wild river under this chapter or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto."). A plain reading of the statute suggests that this prohibition extends one-quarter mile from the riverbank, even where the agency's boundary corridor is less than one-quarter mile, but case law has yet to consider the issue. *See, e.g.*, Skaw v. United States, 740 F.2d 932, 934 (Fed. Cir. 1984) (avoiding the issue because the statute designating the St. Joe River imposed a flat ban on mining in the river corridor). Legislative history supports the plain reading. In July 1968, the House Interior Committee stated that the mining withdrawal extended to "all public lands constituting the bed and banks of a ['wild'] river" without reference to the agency boundaries. H.R. REP. No. 90-1623, at 3812 (1968).

202. Friends of Yosemite Valley v. Norton, 194 F. Supp. 2d 1066, 1113 (E.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 348 F.3d 789 (9th Cir. 2003), *opinion clarified*, 366 F.3d 731 (9th Cir. 2004).

203. Fitzgerald v. Harris, No. CIV 07-16-B-W, 2007 WL 2409679, at *13 (D. Me. Aug. 20, 2007), *report and recommendation adopted*, No. CIV. 07-16-B-W, 2008 WL 375252 (D. Me. Feb. 11, 2008), *aff'd*, 549 F.3d 46 (1st Cir. 2008) ("[T]he consequence of the State's failure to adequately preserve the area per the standards of a wild riverway would be a downgrading of its status or a removal of the Allagash from the auspices of the WSRA."). Maine's failure to protect the Allagash, a state-designated "wild" river, included allowing eleven motor vehicle access points and six permanent water crossings, resulting in the river "no longer [qualifying] as a wild river, generally inaccessible except by trail." *Id.*

204. For example, according to a recent study, 79 percent of major Oregon rivers have been modified, limiting "wild" status eligibility. *Restoring Balance: Healthier Rivers and Secure Water Supplies in the American West*, Table 1, CTR. FOR AM. PROGRESS (2018), https://www.americanprogress.org/issues/green/reports/2018/04/09/448986/restoring-balance/. Similarly, 49 percent of all Western river miles have been modified from their original state. *Id.* Upstream dams impede over 20 percent of the West's river miles, including nearly all major rivers, inhibiting "free-flowing" characteristics. *Id.* at ¶ 6. Modifications range from dams and dikes to floodgates and other artificial barriers. BLM IMPLEMENTATION MANUAL, *supra* note 88, at G-2.

quires managing agencies to "protect and enhance" a river segment's ORVs, which interagency guidance has interpreted to impose a non-degradation standard.[205]

B. *Recognizing ORVs*

Identifying a river segment's ORVs plays an integral role in WSRA protections because the statute requires managing agencies to administer each river corridor "in such manner as to protect and enhance the values which caused it to be included [in the national system]" without "limiting other uses that do not substantially interfere with public use and enjoyment of these values."[206] This "substantial interference" standard obviously does not forbid all activities adversely affecting ORVs. Courts often give deference to an agency's interpretation as to whether a federal action "substantially interferes" with the public's use and enjoyment of a river.[207] But federal court interpretations of wild and scenic river management in Oregon confirm that federal agencies must consider ORVs when undertaking or approving actions affecting designated rivers.[208]

In 2000, the Ninth Circuit ruled that regulations allowing motorized boats on the Snake River did not impermissibly degrade the river's ORVs because "the mere existence of some decline" in ORVs was not a "substantial interference," giving deference to the Forest Service's negative determination.[209] In 2013, a district court decided that the "substantial interference" standard allowed the National

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205. 16 U.S.C. § 1281(a) (2012); Final Revised Guidelines for Eligibility, Classification and Management of River Areas, *supra* note 150, at 39,458 (section 1281(a) "is interpreted as stating a nondegradation and enhancement policy for all designated river areas regardless of classification [and] [e]ach component will be managed to protect and enhance the values for which the river was designated.").

206. 16 U.S.C. § 1281(a).

207. In *Riverhawks v. Zepeda*, the court deferred to the Forest Service's determination that commercial boat tours enhance the recreational value of Oregon's Rogue River without substantially interfering with other fish and wildlife ORVs. 228 F. Supp. 2d 1173, 1184-85 (D. Or. 2002) ("Absent evidence that the current levels of commercial motorboat use actually degrade river values of the Rogue WSR, 'the Forest Service's decisions with respect to what uses are inconsistent with protection and enhancement and 'substantially interfere' with the river corridor's values must be accorded substantial deference'" (quoting Hells Canyon All. v. U.S. Forest Serv., 227 F.3d 1170, 1178 (9th Cir. 2000), *as amended* (Nov. 29, 2000))). In *American Whitewater v. Tidwell*, the court upheld a Forest Service determination that boating on the headwaters of the Chattooga River did interfere with other recreational ORVs. 959 F. Supp. 2d 839, 852-54 (D. Ga. 2013) ("[T]he Forest Service's determinations about which uses are inconsistent with protecting and enhancing rivers values, and which uses substantially interfere with those values, must be accorded substantial deference." (citing *Hells Canyon*, 227 F.3d at 1178)). But in *Or. Nat. Desert Ass'n v. Green*, the court did not defer to BLM's assertion that continued cattle grazing on the Donner and Blitzen Rivers would not "substantially interfere" with public use and enjoyment because cattle grazing degraded several of the ORVs in the river area. 953 F. Supp. 1133, 1145 (D. Or. 1997).

208. *See infra* notes 212-20 and accompanying text (discussing the so-called "Oregon trilogy" cases).

209. *Hells Canyon*, 227 F.3d at 1178-79.

Park Service to authorize construction of a transmission line across the "scenic" Middle Delaware River. The court deferred to the agency's determination, since the new line would cross the river at the same location as an existing line.[210] Other decisions indicate that if the managing agency determines that a use or development does not "substantially interfere" with a river's ORVs, and supports that decision with an administrative record, a court is likely to grant that decision deference.[211]

In the late 1990s, the federal District of Oregon decided three significant cases concerning the effect of public land grazing on ORVs.[212] The WSRA allows continued livestock grazing[213] so long as it does not conflict with protection and enhancement of ORVs.[214] In 1997, the court ruled that BLM's decision to allow continued grazing practices, shown to adversely affect a vegetation ORV along the Donner and Blitzen Rivers, violated the WSRA by failing to protect and enhance the ORV.[215] Similarly, proof that grazing was detrimental to ORVs for the Owyhee River convinced the reviewing court to enjoin BLM from continuing to issue grazing permits as an ongoing use.[216] However, where BLM managed a "relatively small amount" of grazing lands along the John Day River, the Oregon federal district court refused to enjoin grazing, despite the fact that BLM had failed to promulgate a river management plan.[217] Although recognizing the agency's duty to

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210. Nat'l Parks Conservation Ass'n v. Jewell. 965 F. Supp. 2d 67, 89 (D.D.C. 2013) ("In evaluating whether new construction or modifications would create a substantial interference, an agency may consider the existing structures and uses of a river, including those that pre-date the river's protection under the WSRA." (citing Rivers Unlimited v. U.S. Dep't of Transp., 533 F.Supp.2d 1, 5 (D.D.C. 2008))).

211. *See, e.g.*, *supra* note 207 and accompanying text.

212. *See, e.g.*, Bonham, *supra* note 75, at 126-32.

213. Section 15 of the Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (Jun. 28, 1934) (codified as amended 43 U.S.C. § 315 *et seq.*), authorized the Secretary of the Interior to issue grazing permits on public lands without providing a right, title, or interest in the land. 48 Stat. 1271; 43 U.S.C. § 315b (2012). The court in *Or. Nat. Desert Ass'n v. Green*, implied that the WSRA's authorization to allow continued livestock grazing was not preempted by FLPMA. 953 F. Supp. 1133, 1147 (D. Or. 1997) (enjoining cattle grazing within the WSRA corridor despite the fact that the area was managed under a Resource Area Management Framework Plan promulgated pursuant to FLPMA). *See also* United States v. Shenise, 43 F. Supp. 2d 1190, 1195 (D. Colo. 1999) (holding that FLPMA does not preempt the Taylor Grazing act and is instead "reviewed in conjunction with the Taylor Grazing Act, as it embodies Congressional recognition that previous legislation did not provide adequately for the protection and enhancement of federal public lands.").

214. BLM IMPLEMENTATION MANUAL, *supra* note 88, at 7-8.

215. Or. Nat. Desert Ass'n v. Green, 953 F. Supp. 1133, 1143-47 (D. Or. 1997). Local counties unsuccessfully argued that "Congress intended existing livestock grazing, as well as other commercial uses, to continue in designated wild and scenic river areas . . . [to] maintain the status quo and specifically recognized that existing uses and facilities were 'grandfathered' under" the Omnibus Oregon WSRA. *Id.* at 1144 (internal quotation marks omitted). *See also infra* Appendix entry 78.

216. Or. Nat. Desert Ass'n v. Singleton, 75 F. Supp. 2d 1139, 1145-46 (D. Or. 1999).

protect and enhance ORVs in the river corridor, the court noted that BLM managed only a "relatively small amount" of public lands along the corridor.[218] Therefore, the court reasoned, enjoining public lands grazing might cause ranchers to "simply move their cattle to private land over which the BLM cannot implement grazing regulations," resulting in more damage to ORVs than BLM's current policy.[219] This assumption that private land grazing was beyond the control of WSRA regulation might be fairly questioned, at least where damage to ORVs is clear.[220]

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217. Nat'l Wildlife Fed'n v. Cosgriffe, 21 F. Supp. 2d 1211, 1222 (D. Or. 1998). The WSRA corridor along the John Day, the largest unimpounded river in the Columbia Basin, with prime wild salmon spawning habitat, contains a considerable amount of private lands. *Id.* ("[P]rivate land makes up the majority of the John Day WSRs . . . ."). Congress designated over 200 miles of the river as "recreational" as part of the Omnibus Oregon Wild and Scenic Rivers Act of 1988. Omnibus Oregon Wild and Scenic Rivers Act of 1988, Pub. L. No. 100-557, 102 Stat. 2782, 2786 (Oct. 28, 1988) (codified as amended in 16 U.S.C. §§ 1271-1284). Designated ORVs include vegetation, fisheries, scenery, and recreation. *See generally* 134 Cong. Rec. 29,437-61 (Oct. 7, 1988) (debate on the Omnibus Oregon Wild and Scenic Rivers Act).

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

219. *Id.* at 1221-22 (observing that BLM's failure to timely promulgate a plan meant that BLM had no framework for analyzing grazing's adverse effects on ORVs).

220. *See infra* note 227 and accompanying text. The managing agencies' guidance dances around the issue of regulating non-federal land, suggesting such regulation to protect ORVs may vary depending on 1) "a river's status as a congressionally authorized study river or a river designated without the benefit of a Section 5(a) or (d) study; 2) . . . the extent of institutional support for cooperative river-protection efforts that already existed when the river was designated or the study was authorized; and 3) local and regional experience with, and attitudes toward, land use controls." PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS, *supra* note 171, at 11. Because the act leaves ORV management and protection on private lands to various state and federal agencies, there is potential for inconsistency. *Id.* at 2 ("There is a need for improved guidance to enable federal river managers, state and local governments, and private landowners to work cooperatively towards resource protection goals."). But all four agencies adhere to the following standards concerning private land management. First, "patterns of ownership and land use that exist when a river is designated . . . which in turn determine the river's character, should be used to help establish limits for acceptable land use changes. In other words, new buildings along a segment that already has some development are not necessarily unacceptable, provided they are similar in scale and location to pre-existing structures." *Id.* at 8. "The river's classification(s) may help provide benchmarks against which potential changes can be measured . . . [and] should ensure that a segment's appropriate classification would not change." *Id.* Second, "the suitability for designation of so-called 'private lands' study rivers should be based in part on the adequacy of resource protection that is either already in place or reasonably expected to be provided through means other than federal land acquisition." *Id.* Third, "[t]o help establish any additional resource protection measures that may be needed, a 'vulnerability analysis' of a river's ORVs, water quality, and free-flowing character can be performed during the study, comparing existing levels of protection to desired future conditions for these resources." *Id.*

V. COMPREHENSIVE RIVER MANAGEMENT PLANS

The WSRA accomplishes river protection primarily through agency-created comprehensive management plans (CMPs)[221] designed to preserve the river's ORVs.[222] Section 3(d) of the Act requires managing agencies to prepare and adopt CMPs within three years of designation for segments designated after 1986.[223] The WSRA Amendments of 1986 extended the CMP requirement to all previously designated rivers, directing managing agencies to review all preexisting "boundaries, classifications, and plans" for conformity with the new planning requirement within ten years.[224]

CMPs must protect and enhance ORVs by addressing resource protection, development of land and facilities, user capacities, and "other management practices" necessary to achieve the goals of the WSRA.[225] Examples of "other management practices" include minimum buffer zones, management zones for lands with-

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221. *See, e.g.*, U.S. FOREST SERV., RIVER PLAN, ROGUE, SISKIYOU NATIONAL FOREST, OREGON (Sept. 1969) *revised* Rogue National Wild and Scenic River, Oregon, Notice of Revised Development and Management Plans, 37 Fed. Reg. 13,408 (July 7, 1972), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5315373.pdf; NAT'L PARK SERV. TUOLUMNE WILD AND SCENIC RIVER FINAL COMPREHENSIVE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT (Feb. 2014), https://www.rivers.gov/documents/plans/tuolumne-plan-eis.pdf. For a compilation of CMPs, see MANAGEMENT PLANS, NATIONAL WILD AND SCENIC RIVERS SYSTEM, https://www.rivers.gov/management-plans.php (last visited Nov. 22, 2018). CMPs amend federal land management agency's land plans. MANAGEMENT RESPONSIBILITIES, *supra* note 189, at 41. The National Bureau of Land Management River Database contains "all floatable, boatable sections of rivers and creeks for which BLM has management responsibilities." SARA J. ZEGRE & ANNE HEREFORD, NATIONAL RIVER DATA INVENTORY AND RIVER DATABASE PLAN 11 (Feb. 2012), https://www.river-management.org/assets/Database/nps%20national%20river%20data%20inventory%20and%20database%20%20plan_2_21_12_final_email.pdf.

222. 16 U.S.C. § 1271 (2012).

223. 16 U.S.C. § 1274(d)(1). CMPs must be prepared for any designated river, regardless of designation pathway. *Id. See also* BLM IMPLEMENTATION MANUAL, *supra* note 88, at 1-4 (district and field managers are responsible for "[d]eveloping and implementing land use plans and the associated comprehensive river management plans (CRMPs) for all congressionally designated WSRs.").

224. The 1968 version of the WSRA did not require agency adoption and implementation of CMPs, requiring only "a plan for necessary developments" and publication of a legal description of the boundaries, classification, and plan in the Federal Register. *See* EVOLUTION OF THE WILD AND SCENIC RIVERS ACT, *supra* note 11, at 5-6; The Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968). The 1986 amendments replaced this language and called for the development of CMPs. Pub. L. No. 99-590, 100 Stat. 3330, 3335 (1986) (codified in various sections including 16 U.S.C. § 1274(d)(1)).

225. 16 U.S.C. §§ 1274(d)(1), 1281(a). Management plans must also address "[g]eneral principles for any land acquisition which may be necessary; the kinds and amounts of public use which the river area can sustain without impact to the values for which it was designated, and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features." Final Revised Guidelines for Eligibility, Classification and Management of River Areas, *supra* note 150, at 39,458-59 (declaring the management principles that agencies shall use in CMP preparation).

in selected boundaries, or visitor experience and resource protection frameworks.[226] These management policies certainly do not exclude regulation of non-federal lands.[227]

A CMP must delineate "objective pre-determined criteria" for describing, addressing, and protecting ORVs.[228] Although there are cases suggesting that failure to promulgate a timely CMP could result in an injunction preventing timber sales on adjacent federal lands,[229] the weight of authority is to the contrary. For example, in 1997, after the Merced River flooded the Yosemite Valley, destroying fifty percent of the public lodging facilities, the National Park Service proposed constructing new lodging facilities and roadways.[230] The Sierra Club challenged that proposal, alleging that the agency failed to establish a CMP over twelve years after the river's designation.[231] The reviewing court declined to issue an injunction because "[t]he WSRA provides no indication that a court may enjoin an agency's land management activities with respect to a wild and scenic river area merely because the agency has failed to adopt a [CMP]."[232] Similarly, after Congress added six rivers in the Ozark National Forest to the WSRA system in 1992, requiring the

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226. Recreational ORVs have dominated, suggesting that non-recreational ORVs like resource protection may warrant additional attention. *See* Murray Feldman, William McLaughlin & Jennifer Hill, *Learning to Manage Our Wild and Scenic River System*, NAT. RESOURCES & ENV'T, Fall 2005, at 10, 15-16, 70 (reporting a telephonic survey of over 100 wild and scenic river managers and finding that recreational ORVs "were the vast majority of river management issues reported," a trend persisting since the 1970s when "management for public enjoyment and recreation access, as opposed to management directed at protecting and enhancing [ORVs]" dominated managing agency focus and concern).

227. *See infra* notes 265-84 and accompanying text.

228. *See* Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1256-57 (E.D. Cal. 1999) (rejecting an NPS argument that a road construction project satisfied WSRA requirements without a CMP because "absent some objective, pre-determined criteria for describing and assessing [adverse] impacts, [NPS's] assertions [are] merely a post hoc justification for project outcomes" and observing that the agency's "persistent and protracted failure to develop a comprehensive management plan" is "an important factor in determining whether the agency acted in an arbitrary and capricious manner in the planning and execution of land management activities in Wild and Scenic areas"); *see also* Idaho Rivers United v. Probert, 2016 WL 2757690, at *10 (D. Idaho May 12, 2016).

229. In 2014, the Forest Service acknowledged that its plan for the Middle Fork of the Clearwater and Selway Rivers—original 1968 rivers with an unrevised pre-1986 plan—did not comply with the post-1986 WSRA because it lacked "sufficient detail in several areas, including monitoring, user capacities, and development plans." *Idaho Rivers United,* 2016 WL 2757690 at *3, *7, *9 (citing Forest Service, Nez Perce Forest Plan Assessment FS1515, FS32417 (2014)). The court noted that Forest Service could not "effectively analyze, nor [could] the public and Court crosscheck, the Forest Service's analysis, without a River Plan that delineates objective standards, or predetermined criteria, for describing, assessing, and protecting the Wild and Scenic values of the Rivers." *Id.* at *10.

230. Sierra Club v. United States, 23 F. Supp. 2d 1132, 1133 (N.D. Cal. 1998).

231. *Id.* at 1137-38. To comply with NEPA, NPS issued a Finding of No Significant Impact (FONSI) on the project. *Id.* at 1134-35.

232. *Id.* at 1138. The court did suggest the availability of a "less drastic" remedy of challenging of the agency's failure to adopt a CMP under the Administrative Procedure Act. *Id.* at 1137 (citing APA § 706(1)).

Forest Service to prepare CMPs within three years of designation,[233] neither the district court nor the Eighth Circuit would enjoin the Forest Service from proceeding with timber sales on adjacent federal lands without approved CMPs.[234]

A. *User Capacities*

Section 4(d) of the WSRA requires CMPs to address a number of factors, including establishing user capacities and other "management practices necessary or desirable to achieve the purposes" of the Act.[235] User capacity limits were a point of considerable contention concerning the Merced River. In 1999, a district court held that the National Park Service violated the WSRA by failing to adopt a CMP.[236] Four years later, the Ninth Circuit decided that the CMP the agency adopted in response to the district court's order inadequately addressed user capacities by failing to set a maximum quantity of public use.[237] The Park Service had established a "minimum buffer zone" that it called a "River Protection Overlay," created special management zones, and instituted a "Visitor Experience and Resource Protection" (VERP) framework,[238] none of which the WSRA mentions or requires.[239] The reviewing court decided that the plain meaning of "user capacities"[240] meant that a "CMP must deal with or discuss the maximum number of people that can be received" at a designated segment.[241] The court consequently invalidated the agency's CMP because the VERP framework lacked any "concrete

233. 16 U.S.C. § 1274(d) (1992); Arkansas Wild and Scenic Rivers Act of 1992, Pub. L. No. 102-275, 106 Stat. 123-25 (Apr. 22, 1992).

234. Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 112, 114 (8th Cir. 1997) (The "WSRA does not mandate completion of [comprehensive management] plans before timber sales may be approved. Therefore, the Forest Service did not violate WSRA by approving timber sales during the planning process.").

235. 16 U.S.C. § 1274(d)(1) (1992) ("The plan shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter.").

236. Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1263 (E.D. Cal. 1999).

237. Friends of Yosemite Valley v. Norton, 348 F.3d 789, 792 (9th Cir. 2003).

238. The RMP described the VERP as the "primary mechanism" for addressing user capacities. But rather than placing specific numerical limits on visitor numbers, the VERP aimed only to select and monitor desired conditions and react "when the desired conditions [were] not being realized." *Id.* at 795-96.

239. The WSRA requires CMPs only to "address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter." 16 U.S.C. § 1274(d)(1) (1992).

240. *Id.*

241. Friends of Yosemite Valley v. Norton, 348 F.3d at 796-97. The court cited 1982 Secretarial Guidelines on CMPs, recognizing that "the kinds and amounts of public use which the river area can sustain without impact to the [ORVs]" and requiring ongoing studies to "determine the quantity and mixture of recreation and other public use which can be permitted without adverse impact on the resource values of the river area." *Id.* (citing 47 Fed. Reg. at 39,458-59).

measure" of use, and ordered the agency to revise or replace the CMP, including the "specific limits" on user capacity.[242] Although the Park Service was not required to follow "one particular approach" nor "cap" the number of visitors,[243] it had to adopt "quantitative measures" sufficient to effectively measure capacity."[244]

Environmentalists challenged the revised CMP again in 2005 not only for failing to set a numerical limit on visitor use, but also for allowing the status quo to continue by relying on "desired conditions" and failing to "commit to take any particular management action once degradation has occurred."[245] The reviewing court agreed, explaining that the Park Service merely approved "a tentative plan of uncertain duration which adopt[ed] temporary limits applicable for an unknown length of time."[246] The court decided that this approach was inconsistent with its earlier directive to "describe an actual level of visitor use that w[ould] not adversely impact the Merced's ORVs."[247] The agency again appealed to the Ninth Circuit, which affirmed, explaining that the VERP directive was a "reactionary," after-the-fact response to already-occurring degradation, whereas the WSRA required the agency to adopt a standard triggering management action before the degradation occurred.[248]

In another case involving user capacities, a district court addressed the types of activities a CMP may allow, other than setting quantitative limits on visitors. Forest Service regulations on the Chattooga River originally allowed non-motorized boating on the lower two-thirds but prohibited all boating on the headwaters.[249] However, in 2012, the Forest Service adopted a CMP allowing non-motorized, non-commercial boating on the headwaters for five months of the year at sufficient flow levels and capping group-size at a maximum of six people on two boats.[250] The court upheld the plan against a challenge by recreational boating en-

242. *Id.* at 797.

243. *Id.* at 796-97.

244. *Id.* at 797. On remand, the district court enjoined portions of the development project but allowed others pending completion of a new or revised CMP. Friends of Yosemite Valley v. Scarlett, 439 F. Supp. 2d 1074, 1079, 1081 (E.D. Cal. 2006), *aff'd sub nom.* Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024 (9th Cir. 2008). In 2005, the court lifted the injunction after the NPS issued a revised CMP. *Id.* at 1082. The revised plan altered the VERP framework by adding "a number of other methods for addressing user capacity, some of which set limits on the number of people allowed in the river corridor." *Id.* at 1095. These "other methods" of addressing user capacity relied primarily on user limits instituted in the 1970s, like a wilderness "trailhead quota system," which limited visitors in wilderness areas, and five year "interim limits" on lodging, parking, and visitors. *Id.* at 1095-97.

245. *Id.* at 1098.

246. *Id.* at 1100.

247. *Id.*

248. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d at 1034-35.

249. *See* 16 U.S.C. § 1274(a)(10) (designating the Chattooga); *see infra* Appendix entry 11.

250. Am. Whitewater v. Tidwell, 959 F. Supp. 2d 839, 848 (D. S.C. 2013), *aff'd* 770 F.3d 1108 (4th Cir. 2014).

thusiasts, observing that the Forest Service properly addressed quantitative user capacities.[251]

When a WSRA river is located within a wilderness area, national park, or national forest, the WSRA assimilates the regulations of those statutes, stating that when there is a conflict, "the more restrictive provisions shall apply."[252] Managing agencies can expect judicial deference if they undertake a detailed analysis of user apportionment on WSRA rivers concerning types of uses and permitting allocation. Because of the WSRA's assimilative directive, courts have often analyzed use apportionment issues under other statutes.

In Hells Canyon National Recreation Area, the Federal District Court of Oregon enjoined a river guide service on the Snake River from conducting boating operations without permits.[253] The company appealed, but the Ninth Circuit rejected its argument that the Forest Service's failure to promulgate area-specific regulations required by the Hells Canyon National Recreation Area Act[254] invalidated the boating permit system. The court decided that the WSRA "assimilated" the Organic Act of the Forest Service, giving the Forest Service sufficient authority to regulate the use and occupancy of components of the Wild and Scenic Rivers System, partly because Congress intended the authority granted under the Hells Canyon Act "to be cumulative, not independent and exclusive."[255]

Nearly a half-century ago, the Park Service apportioned river use on the Colorado River in the Grand Canyon National Park, allotting 92 percent to commercial

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251. *Am. Whitewater*, 959 F. Supp. 2d at 855-58 (citing *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d at 1029-30, and noting that the agency also properly addressed the "*amount and type*" of permitted uses by considering "use-impact relationships, use information, administrative concerns, and multiple sources of data" in connection with other ORVs") (emphasis in original). After a court invalidates or requires a CMP revision, protective provisions are not enforceable until the managing agency promulgates a valid CMP that withstands legal challenges. In the interim, designated rivers receive only statutory protections, and managing agencies ought to be particularly cognizant of their duty to protect ORVS in anticipation of the revised CMP.

252. 16 U.S.C. § 1281(b) (2012) ("Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system, as established by or pursuant to the Wilderness Act, shall be subject to the provisions of both the Wilderness Act and this chapter."); 16 U.S.C. §1281(c) ("Any component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system, and any such component that is administered by the Secretary through the Fish and Wildlife Service shall become a part of the national wildlife refuge system. The lands involved shall be subject to the provisions of this chapter and the Acts under which the national park system or national wildlife system, as the case may be, is administered, and in case of conflict between the provisions of this chapter and such Acts, the more restrictive provisions shall apply"); 16 U.S.C. § 1281(d) ("The Secretary of Agriculture, in his administration of any component of the national wild and scenic rivers system area, may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this chapter.").

253. United States v. Hells Canyon Guide Serv., 660 F.2d 735, 736-37 (9th Cir. 1981).

254. 16 U.S.C. § 460gg(a) (1975).

255. *Hells Canyon Guide Serv.*, 660 F.2d at 738.

guides and just eight percent to non-commercial users.[256] The Ninth Circuit affirmed, rejecting a challenge to the agency's apportionment by non-commercial river runners who claimed the allocation violated the National Park Service Organic Act's directive of ensuring "free access" by the public.[257] The court upheld the agency on the ground that it was not an abuse of its discretion to allocate between commercial and non-commercial users as a method of recognizing, accommodating, and protecting the right of "free access" for both groups.[258]

In 2009, environmental groups levied another challenge to the Park Service's revised plan for Grand Canyon boating that authorized continuation of motorized trips. The environmentalists claimed that the plan was inconsistent with a 1979 plan that called for a "phase out" of motorized boating in the Grand Canyon corridor of the Colorado River.[259] The court decided against that argument because the agency's management plan adequately determined the type and level of river traffic "necessary and appropriate" to protect public use and enjoyment,[260] and because motor noise was temporary and motorized boats gave that part of the public without gear and limited time an opportunity to access the river.[261] The court rejected arguments that the agency failed to sufficiently limit the amount of motorized uses, deferring to NPS because its management plan allocated motorized uses after extensive consideration of various alternatives.[262] The court also dismissed a "free access" argument based on the fact that non-commercial users are required to wait longer for a permit than commercial users,[263] finding that the record showed that the Park Service adopted its permit lottery system after careful consideration.[264]

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256. Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1251-52 (9th Cir. 1979) (explaining that the NPS limited river use to a total of 96,600 users per day: 89,000 user-days to commercial, 7,600 user days to non-commercial users).

257. *Id.* at 1253.

258. *Id.* at 1253-54. The court also decided that the challenge to NPS' methodology in determining allocation was moot, because NPS promulgated a final plan concurrent with litigation which reallocated uses to seventy percent commercial and thirty percent non-commercial users. *Id.* at 1254.

259. River Runners for Wilderness v. Martin, 593 F.3d 1064, 1075 (9th Cir. 2010).

260. *Id.* at 1078-80. The court determined that the NPS complied with the requirements of the Concessions Act, 16 U.S.C. § 5951(b) (2006). *Id.* at 1076.

261. *Id.* at 1080, 1083 ("[I]f a cumulative analysis were to result in the elimination of all sounds . . . then all human activity in the Park would be eliminated.").

262. *Id.* at 1079 ("Commercial user days were held essentially level at 115,500, while non-commercial user days were more than doubled to an estimated 113,486.").

263. *Id.* at 1081-82.

264. *Id.*

B. *Regulating Non-Federal Lands in River Corridors*

Protecting ORVs from activities on non-federal lands is perhaps the chief challenge facing WSRA managers.[265] While the WSRA provides no specific standards to protect ORVs from activities on non-federal lands,[266] it does not exempt non-federal lands from the statutory goal of protecting and enhancing established ORVs.[267] The WSRA attempts to mitigate the resulting "protection gap," evident on river corridors containing significant amounts of non-federal lands by authorizing the federal acquisition of land or easements within a congressionally designated river's boundaries.[268] Where water rights and water quality are key issues, the statute authorizes land acquisition.[269]

The WSRA appears to recognize the potentially adverse effect that actions on non-federal lands may have on WSRA rivers. The Act instructs managing agencies, when conducting studies of rivers identified by Congress as potential additions, to "give priority to those rivers . . . which possess the greatest proportion of private lands within their areas."[270] On the other hand, the statute protects private landowners' "valid existing rights."[271] Protecting valid existing rights, however, is hardly a promise of unregulated use.[272]

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265. *See* Tarlock, *supra* note 182, at 1081 ("The WSRA works best when the rivers are located on public lands."). Unfortunately, many designated river corridors contain substantial amounts of private lands. *See, e.g.*, PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS *supra* note 171, at 14, 24 ("Approximately 23 percent of land along the Upper Deschutes is in private ownership . . . . The Lower White Salmon is an 'instantly designated' WSR" in the sense that no study was performed on the river prior to designation "that was entirely in private ownership at the time of its designation.").

266. Section 6(c) contains the only standards concerning private land management in the Act, prohibiting private land condemnation where lands are located within an incorporated municipality with "duly adopted, valid zoning ordinance that conforms with the purposes" of the WSRA. 16 U.S.C. § 1277(c). Section 14b(1) sets boundary standards for WSRA rivers in Alaska, prohibiting corridor boundaries engulfing private lands. 16 U.S.C. §§ 1285b(1), 1274(a)(38)-(50). The WSRA's relative silence on private land management reflects Congress's focus on federal lands and licensing, and agency guidance has failed to adequately inform land managers as to how to manage private lands located within WSRA river corridors. *See infra* notes 270-76 and accompanying text.

267. 16 U.S.C. § 1283(a).

268. PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS *supra* note 171, at 6; 16 U.S.C. § 1277.

269. PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS *supra* note 171, at 4, 6; 16 U.S.C. § 1277. Agency guidance on techniques for managing non-federal lands necessary to protect ORVs suggests using locally adopted zoning laws, donations of easements to land trusts, and cooperative agreements. INTERAGENCY WILD AND SCENIC COORDINATING COUNCIL, TECHNICAL REPORT – ESTABLISHMENT OF WILD AND SCENIC RIVER BOUNDARIES 3 (Aug. 1998). Although condemnation serves as an alternative path to ensuring protection of ORVs, Congress suggested that condemnation should only be invoked after all other attempts to resolve the problem have failed. *Id.* at 6-7, 13. And in fact, condemnation is rarely employed. *See supra* note 172 and accompanying text.

270. 16 U.S.C. § 1275(a).

271. 16 U.S.C. § 1279(b) (withdrawing public lands from entry, sale, or disposition on WSRA-designated rivers in Alaska, "subject only to valid existing rights"); 16 U.S.C. § 1280 (withdrawing WSRA river segments from mining and mineral appropriation, leasing, licensing, and permitting, "sub-

Although interagency guidance instructs land managers to allow continuation of existing land uses, new land uses must be "evaluated for their compatibility" with the requirements of the Act.[273] And although the guidance recommends employing a "full range of land-use control measures including zoning, easements and fee acquisition" where necessary to protect ORVs,[274] agencies have been wary of exercising eminent domain authority.[275] But the WSRA's preservation of preexisting non-federal land uses not conflicting with protecting and enhancing ORVs does not prevent managing agencies from regulating non-federal land uses to prevent adverse effects on ORVs.[276]

Reviewing courts have consistently required managing agencies to "protect and enhance" ORVs,[277] prioritizing the overriding goal of the statute over any inference that the WSRA lacks intent to authorize regulation of non-federal lands.[278] Where actions on non-federal lands within river corridors substantially threaten

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ject to valid existing rights); 16 U.S.C. § 1283(b) (limiting § 12 authority to take actions "as may be necessary to protect [designated] rivers" to not abrogating "any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party").

272. *See, e.g.*, Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003) (ruling that valid existing mine claims are subject to regulation to prevent "undue degradation" of public lands, as directed by the Federal Land Policy Act); Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702 (D.C. Cir. 2008) (deciding that valid existing mining right required 1) a legally binding document recognizing a right to mine, and 2) a good faith effort on the part of the miner to obtain all necessary permits).

273. PROTECTING RESOURCE VALUES ON NON-FEDERAL LANDS, *supra* note 171, at 3.

274. *Id.* at 3-4 ("Land uses and developments on private lands within the river area which were in existence when the river was designated may be permitted to continue [but] [n]ew land uses must be evaluated for their compatibility with the purposes of the Act.").

275. *See supra* note 172 and accompanying text.

276. Legislative history supports the authority of managing agencies to regulate private land uses that adversely affect ORVs. *See* COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, REPORT ON H.R. 4164, Rep. No. 100-1053, Part 1, at 9 (Oct. 4, 1988) ("[S]uch activities as grazing, timber harvest, mining, agriculture, utility, transportation, and residential uses will continue to take place on private and public lands within the wild and scenic river corridors . . . insofar as they do not conflict with the policies and purposes of the Wild and Scenic Rivers Act."). *See also* United States v. Hanten, 500 F.Supp. 188, 191 (D. Or. 1980) (upholding the condemnation of a scenic easement to forbid logging).

277. *See supra* notes 158-66, 215-20 and accompanying text.

278. *See id. But cf. Cosgriffe*, 21 F. Supp. 2d at 1222 (inferring that BLM could not effectively regulate grazing on private lands). Failure to keep CMPs up-to-date could equate to a failure to protect and enhance ORVs. For example, on the White Salmon River, the Forest Service has not updated and revised the CMP, even though the 2001 revision deadline passed 18 years ago. In promulgating the CMP, the agency rejected an EIS alternative which would have included a broader corridor encompassing adjacent timber lands, due to opposition of the timber owner. See Lower White Salmon National Wild and Scenic River Management Plan (1991). Nearly 30 years later, the timber has been cut, and the owner has the land for sale. The overdue CMP revision might require an expanded corridor boundary and perhaps adoption of the EIS alternative rejected in 1991 in order to protect and enhance the ORVs.

the protection and enhancement of ORVs, managing agencies possess sufficient regulatory power to avoid those effects.[279]

The John Day River case showed that enforcement can become an issue where non-federal landowners control considerable amounts of land within and adjacent to designated corridors.[280] Although the Act protects lands within one-quarter mile of WSRA rivers[281] regardless of whether those lands are privately or federally owned, the court thought that the authority of the managing agency is diminished on non-federal lands.[282] But section 12 of the Act requires managing agencies "to take such action," including regulation, "as may be necessary to protect such rivers" from activities on "any lands which include, border upon, or are adjacent to" protected rivers.[283] This directive arguably authorizes non-federal land regulation within or nearby WSRA river corridors, and specifically calls for regulation of activities like "scheduled timber harvesting, road construction, and similar activities that might be contrary to the [protective] purposes of the Act."[284] To fulfill the section 12 directives, agency CMPs should discuss the kinds of non-federal land activities that pose a threat to the preservation and enhancement of a river's ORVs in advance of any proposed use threatening ORVs.

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279. *See infra* note 283 (discussing federal agencies' extraterritorial authority under the Constitution's Property Clause), 285 (concerning protecting the water quality of WSRA rivers), 286 (concerning protecting water quality). Reviewing courts generally will defer to managing agencies as to what activities adversely affect the protection and enhancement of ORVs. *See* Lori A. Becker, Sokol v. Kennedy *the Boundaries of Administrative Agency Discretion: Statutory Interpretation under the Wild and Scenic Rivers Act*, 5 GREAT PLAINS NAT. RESOURCES J. 195, 207-08 (2001) (discussing the judicial deference usually granted to managing agencies in interpreting the meaning of terms ambiguously defined by the WSRA but explaining that *Sokol v. Kennedy*, 201 F.3d at 879-81, was a "victory for private landowners" because the court did not defer to the agency in invalidating its boundary determination); *supra* notes 160-62 and accompanying text (discussing *Sokol*).

280. *See Cosgriffe*, 21 F. Supp. 2d at 1216, 1221-22.

281. 16 U.S.C. §§ 1279(b), 1280(a)(iii), (b).

282. *See, e.g.*, *Cosgriffe*, 21 F. Supp. 2d at 1221-22.

283. 16 U.S.C. § 1277(a); *see supra* notes 188-90 and accompanying text (discussing § 12). The WSRA also authorizes the Forest Service to regulate uses on the water or riverbed of rivers designated within national forests because § 10(d) directs the Secretary of Agriculture to "utilize such general statutory authorities relating to national forests" as necessary to carry out the purposes of the WSRA. 16 U.S.C. § 1281(d); *see* MANAGEMENT RESPONSIBILITIES, *supra* note 189, at 37. An example of WSRA non-federal lands regulation concerned the Forest Service's regulating campfires in the bed of the Snake River, owned by the state of Idaho, which the Ninth Circuit upheld in United States v. Lindsey, 595 F.2d 5, 6 (9th Cir. 1979) (deciding that the agency had sufficient regulatory authority to regulate fires below the high water mark under 36 C.F.R. §§ 261.1(c), 261.52(a) because the Constitution's Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters" (citing U.S. CONST. art. IV, § 3, cl. 2).

284. 16 U.S.C. § 1277(a).

VI. RESERVED WATER RIGHTS

Protection and enhancement of ORVs and water quality may require assertion of federally reserved water rights for designated WSRA river segments.[285] Section 13 of the WSRA explicitly reserves federal water rights where necessary to preserve ORVs:

> Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes *other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes*.[286]

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285. When Congress or the President reserve land for a federal purpose, the reserved water rights doctrine implicitly reserves sufficient water to fulfill the purposes of the reservation. *See, e.g.*, WATERS AND WATER RIGHTS, *supra* note 29, at § 37.01. On the reserved water rights possessed by Wild and Scenic Rivers, *see id.* at § 37.03(a)(4); CYNTHIA BROUGHER, CONG. RESEARCH SERV., RL30809, THE WILD AND SCENIC RIVERS ACT AND FEDERAL WATER RIGHTS (Jan. 14, 2008), https://www.rivers.gov/documents/crs-water-rights-2008.pdf; Gray, *supra* note 182, at 575, 579-80 ("The federal water right also may be used to ensure that the quality of the water flowing in park rivers is sufficient to fulfill the purposes of the Wild and Scenic Rivers Act . . . [and] to control private uses of land that adversely affect the wild and scenic rivers of the parks."). Congress may, of course, choose to disclaim reserved water rights when designating WSRA river segments. *See* CYNTHIA BROUGHER, CONG. RESEARCH SERV., R41081, THE WILD AND SCENIC RIVERS ACT (WSRA): PROTECTIONS, FEDERAL WATER RIGHTS, AND DEVELOPMENT RESTRICTIONS, 4 (Feb. 23, 2010), https://www.everycrsreport.com/files/20100223_R41081_f52b58240b3330d14c7a946ba16bb3218a3c0428.pdf.

286. 16 U.S.C. § 1284(c) (emphasis added). The statute limits the recognition of state water rights by declaring that state jurisdiction over waters designated in the WSRA "shall be unaffected . . . to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration." 16 U.S.C. § 1284(d). In other words, states retain jurisdiction over water rights only to the extent that exercising those rights will not adversely affect ORVs. Although congressional designation under the WSRA may "bar most dams and other diversion works from being constructed on the designated section, often limiting the exercise of state water rights," the result would not be "an improper intrusion on state water rights[.]" Riverside Irr. Dist. v. Andrews, 568 F. Supp. 583, 587 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985) ("Although the defendant's actions may have a substantial effect on state water rights, such is the case with many federal laws which particularly preempt state water laws."); *see also* Fitzgerald v. Harris, 549 F.3d 46, 55 (1st Cir. 2008) ("With respect to state water rights, the WSRA is neither a claim nor denial on the part of the federal government of state jurisdiction over the waters of any included river."). Section 13(b) states that jurisdiction between states and the federal government "shall be determined by established principles of law . . . [and that] any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation." 16 U.S.C. § 1284(b). In Sierra Club v. Lyng, the court examined the reserved water rights provision of the Wilderness Act, which contains identical reserved water rights language as the WSRA. 661 F. Supp. 1490, 1493 (1987) (the "Wild and Scenic Rivers Act, 16 U.S.C. § 1284(b)-(d) . . . incorporated the identical wording of section 4(d)(7) of the Wilderness Act with language that recognizes the possible federal taking of privately-held water rights[.]") (comparing 16 U.S.C. § 1284(b) (WSRA), with 16 U.S.C. § 1133(d)(6) (Wilderness Act))). The court determined that Congress "meant to do nothing more than maintain the status quo of basic water law," and that the language in the Wilderness Act "does not purport to work any substantive changes in the rights parties may acquire under the various doctrines of water law, including the reserved rights doctrine[.]" *Id.* at 1493-94. Therefore,

Both managing agencies and reviewing courts have recognized that WSRA designations reserve federal water rights from the date of designation.[287] For study rivers that are subsequently designated as WSRA segments, the priority date may relate back to the date of study because the statute grants study rivers identical protections as designated rivers.[288] For example, in *Arizona v. California*, the Supreme Court upheld a priority date for Lake Mead National Recreation Area as the date of executive order withdrawing those lands for study,[289] although Congress did not designate the Lake Mead National Recreation Area until sixteen years later.[290]

"federal water rights were impliedly reserved when wilderness areas were designated within the State of Colorado[.]" That reasoning logically extends to reserved water for WSRA-protected rivers.

287. BLM IMPLEMENTATION MANUAL, *supra* note 88, at 7-9 ("Section 13(c) of the WSRA creates a Federal reserved water right for each WSR *at the time of designation* . . . for the minimum amount of water necessary to achieve the purposes of the WSRA [therefore] the CRMP should include a detailed description of outstandingly remarkable values, including the importance of instream flow in maintaining these values, and should identify appropriate actions to protect and manage the timing, location, and quantity of water necessary to support the identified outstandingly remarkable values.") (emphasis added). Federal lands reserved for national parks, forests, wildlife refuges, or wilderness areas have federal water rights sufficient to fulfill their purposes: *see* 16 U.S.C. § 1 ("[T]he fundamental purpose of said parks . . . is to conserve the scenery and the natural and historic objects and the wild life therein . . . to leave them unimpaired for the enjoyment of future generations."); 16 U.S.C. § 475 ("[N]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . ."); 16 U.S.C. § 1311 ("'[W]ilderness areas' . . . shall be administered . . . in such manner as will leave them unimpaired for future use and enjoyment as wilderness."); *see generally* WATERS AND WATER RIGHTS, *supra* note 29, at § 37.03 (discussing the reserved rights of a variety of federal reservations, including parks, forests, wildlife refuges, and wilderness areas). The WSRA's reserved water rights can also supplement other reserved water rights. *See* CYNTHIA BROUGHER, CONG. RESEARCH SERV., RL30809 THE WILD AND SCENIC RIVERS ACT AND FEDERAL WATER RIGHTS 9 (Jan. 14, 2008), https://www.rivers.gov/documents/crs-water-rights-2008.pdf.

288. On the protections the WSRA provides to study rivers, *see supra* notes 88, 103-06 and accompanying text. *Compare* 16 U.S.C. § 1278(a) (listing protections for designated rivers), *with* 16 U.S.C. § 1278(b) (listing the same protections for study rivers for a three-year period). The federal government acquires unappropriated water, vested on the date of reservation and superior to subsequent appropriations under the doctrine established by *United States v. Winters*, 207 U.S. 564, 576 (1908).

289. Arizona v. California, 373 U.S. 546, 623 (1963), *judgment entered sub nom.* Arizona v. California, 376 U.S. 340 (1964), *amended sub nom.* Arizona v. California, 383 U.S. 268 (1966), *and amended sub nom.* Arizona v. California, 466 U.S. 144 (1984).

290. *See* Frost, *supra* note 76, at 340. *See also* United States v. Walker River Irrigation Dist., 104 F.2d 334, 338 (9th Cir.1939) (establishing priority date of reserved water rights for an Indian reservation as the date "initiat[ing] the establishment" of the reservation); Nevada v. United States, 463 U.S. 110, 115, 117 (1982) (reserving water rights with priority date of withdrawal of land by Department of Interior for Indian reservation).

Even the Idaho Supreme Court, generally unfriendly to recognizing federal reserved water rights,[291] concluded that, though "awkwardly stated," the WSRA "is clear that Congress intended to reserve water to fulfill the purposes of the Act" because it would be "anomalous . . . to conclude that an act 'expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers.'"[292] The federal district court in the Rio Chama case agreed with the Idaho Supreme Court, concluding that the quantification of the river's two WSRA segments had to include federal reserved water sufficient to meet the purposes of the river segments.[293] Although the Act limits reserved water rights to the minimum amount necessary to preserve the purposes of the statute,[294] designated WSRA rivers clearly possess reserved water rights, including instream flows, in sufficient quantities to support the river's "free-flowing" condition and to protect and enhance water quality and its ORVs.[295] Water may even be reserved to support the

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291. *See* Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and its Implications*, 73 U. COLO. L. REV. 173, 189-200, 211-16 (2005) (discussing the Idaho Supreme Court's hostility to recognizing federally reserved water rights).

292. Potlach Corp. v. United States, 12 P.3d 1256, 1258 (Idaho 2000). This case upheld reserved water rights in the Snake River Basin Adjudication for four wild and scenic rivers, interpreting the WSRA to expressly reserve water. *Id.* at 1258-59. After the court's decision, the case was settled in a manner to threaten no existing diversions and to allow some limited future ones. *See* Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 IDAHO L. REV. 369, 378 & nn.54-55 (2016); Laird J. Lucas, *Wild, Scenic, and Beyond!* (presentation at the River Management Society 50th Anniversary Symposium, Oct. 22, 2018) (on file with author).

293. New Mexico v. Aragon, No. 69-cv-7941 (D. N.M. 2004) (unreported); *see infra* Appendix entry 113.

294. Cappaert v. United States, 426 U.S. 128, 141 (1976) ("The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."); 16 U.S.C. 1284(c) ("Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter . . . ." *See* BROUGHER, *supra* note 287, at 4.

295. Although the statute also states that "[n]othing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area," 16 U.S.C. § 1284(a), neither that savings clause, nor a disclaimer of any "claim or denial" to an exemption from state water law, *id.* § 1284(b), foreclosed reserved rights in either the Snake River or Rio Chama cases. *See supra* notes 292-93 and accompanying text.

Wild and scenic rivers may also receive protection from so-called bypass flows which may be required as conditions for federal permits. In *Trout Unlimited v. U.S. Dep't. of Agric.*, the court ruled that a Forest Service right-of-way permit necessary for the diversion of water from a reservoir on a headwater tributary of the Cache la Poudre River did not violate the WSRA by failing to include a "minimum bypass flow" requirement which would prevent the tributary from "drying up" in winter months and affecting threatened and endangered fish species recognized as one of the ORVs. 320 F. Supp. 2d 1090, 1095, 1114-15. (D. Colo. 2004). The court noted that Congress expressly protected existing water uses by stating that the designation of the river "shall not interfere with the exercise of existing decreed water rights to water which has heretofore been stored or diverted by means of the present capacity of storage, conveyance, or diversion structures that exist as of the date of enactment of this title, or opera-

restoration of conditions necessary to have a river be included in the national system, given the WSRA's restoration purpose.[296]

VII. CONCLUSION

The Wild and Scenic Rivers Act is a landmark achievement of natural resources law, perhaps underappreciated during its first half-century. From its legislative origins in a National Park Service study in 1960[297] and in the Outdoor Recreation Review Commission's report two years later,[298] to President Johnson's signing the statute into law in 1968,[299] the Act has made preservation and enhancement of free-flowing rivers for their water quality and for their "scenic, recreational, geologic, fish and wildlife, historic, cultural, or similar values" a national priority.[300] These "outstandingly remarkable values" are the driving force behind designating WSRA rivers and managing their watersheds.[301]

As was the case in the Wilderness Act enacted four years earlier, Congress retained control over the WSRA's gatekeeping function: federally designated rivers must be approved by Congress.[302] Unlike national wildlife refuges or national monuments, WSRA rivers cannot be designated through federal administrative action alone.[303] On the other hand, the WSRA does provide a path to designation for states, though that designation path has been underused.[304] Despite the statutory incentives to encourage state participation, such as help acquiring federal funding, assistance creating comprehensive statewide outdoor recreation plans, and protection of state-designated rivers from specified federal actions, few states have taken this path to protect their rivers.[305] Still, the system has grown over twenty-fold since its inception,[306] a remarkable achievement.

During the WSRA's first half-century, river advocates devoted substantial resources to lobbying Congress to add rivers to the system—and their efforts pro-

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tion and maintenance of such structures." *Id.* On the bypass flow issue, *see* WATERS AND WATER RIGHTS, *supra* note 29, at §37.06(c)(2).

296. The purposes of the WSRA are "to protect and enhance" the values which caused rivers to be designated. 16 U.S.C § 1281.

297. *See supra* note 56 and accompanying text.

298. *See supra* note 57 and accompanying text.

299. *See supra* note 67 and accompanying text.

300. *See supra* notes 68, 74, 82 and accompanying text.

301. *See supra* notes 191-220 and accompanying text.

302. *See supra* notes 80, 85-94 and accompanying text. In this respect, the WSRA reflects congressional decisions to retain control over designations of national parks, forests, and wilderness areas.

303. *See supra* notes 80, 117-21 and accompanying text.

304. There are only 21 state-sponsored WSRA segments. *See supra* note 83 and accompanying text.

305. *See supra* notes 109-13 and accompanying text (discussing state incentives).

306. *See supra* notes 15-17.

duced a significant expansion of protected rivers—but between 2009 and 2018, Congress designated only four rivers.[307] Then, in the John D. Dingell, Jr. Conservation, Management and Recreation Act of 2019,[308] Congress added 17 new rivers to the national system, increasing total river protection by nearly 620 miles.[309] However welcome these additions are, the statute failed to authorize any additional rivers for study, ignoring one of the WSRA's primary directives.[310]

Going forward, managing agencies and Congress should devote attention to restoration rivers—that is, rivers which would possess ORVs if their free-flowing nature could be restored through, for example, dam removal.[311] The statute's text and purpose are broad enough to include restoration rivers, and Congress clearly has the authority to designate them.[312] Interagency guidance should encourage their identification and study.[313] Restoration rivers could become a centerpiece of the WSRA of the next half-century.[314]

Another suggestion would be to invigorate the state-designation process. Only twenty-one state-designated rivers in over fifty years shows that the incentives Congress supplied for state participation in the WSRA designation process have

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307. The Omnibus Public Lands Management Act of 2009 added thirty-seven rivers segments to the Wild and Scenic River System. Pub. L. No. 111-11, 123 Stat. 911, 111th Cong. (Mar. 30, 2009). Between 2009 and 2019, only four rivers were added. Oregon's River Styx—the 208th river added out of 212 total rivers in the system before the 2019 additions—was added in 2014. Pub. L. 113-291, 128 Stat. 3791(e) (Dec. 19, 2014).

308. Pub. L. 116-9, 133 Stat. 580 (Mar. 12, 2019).

309. *Id.*

310. *See supra* notes 16-17, 22 and accompanying text (discussing the 2019 legislation), *infra* notes 330-332 (discussing the importance of study rivers and identifying their ORVs). Congress authorized four studies in 2014. Pub. L. No. 113-291 (Dec. 19, 2014); 16 U.S.C. § 1276(a)(141)-(144). Congress designated many of the rivers authorized for study in 2014 in 2019. See *supra* note 99; *see also infra* Appendix entries 210-26. *See also* Sen. Wyden's effort to expand WSRA. rivers in Oregon, *infra* notes 338-39 and accompanying text.

311. *See infra* note 324. A prominent example of a restored watershed due to dam removal is Washington's White Salmon River, where salmon runs have been restored and a vibrant recreational boating economy enhanced as a result of the removal of the Condit Dam in 2011. *See* Michael C. Blumm & Andrew B. Erickson, *Dam Removal in the Pacific Northwest: Lessons for the Nation*, 42 ENVTL. L. 1043, 1058-66 (2012). This emphasis on restoration rivers would not necessarily require an amendment to the WSRA itself, only congressional ratification of restoration rivers as study rivers, perhaps in an appropriation statute. Study rivers have been the product of appropriation statutes. *See, e.g.*, Pub. L. No. 113-291, 128 Stat. 3791-92 (Dec. 19, 2014) (directing study of river segments in the Oregon Caves National Monument and Preserve as part of the Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015).

312. *See supra* note 296 and accompanying text.

313. The WSRA interagency guidance, is over two decades old and in need of updating. Final Revised Guidelines for Eligibility, Classification and Management of River Areas, *supra* note 150.

314. *See* supra notes 26, 101, 296 and accompanying text (discussing restoration rivers); 16 U.S.C. § 1273(b) (directing consideration of rivers eligible for inclusion "upon restoration" to wild, scenic, or recreational quality).

been insufficient to achieve the goal of active state involvement.[315] Reauthorization of the Land and Water Conservation Fund Act in the 2019 Dingell law could free up money for states to study and manage rivers that could become part of the WSRA system.[316] River advocates should encourage states to seek LWCFA money earmarked for river study, including restoration rivers.

Beyond seeking additions to the national system, river advocates should step up monitoring of WSRA implementation, particularly use of the managing agencies' section 12 authority, both within and outside of river corridor boundaries.[317] Given the vagueness of many WSRA provisions, such as "substantial interference,"[318] "direct and adverse impact,"[319] and "reasonably diminish,"[320] both the agencies and river advocates should urge reviewing courts to emphasize the preservation and restoration purposes of the statute in interpreting Congress' primary intent.[321]

Although managing agencies have no ability to add rivers to the system, they have enormous discretion in evaluating the merits of study rivers and in managing designated rivers.[322] Agency management guidance is dated and in need of revision.[323] Among the revisions should be directives that managing agencies fulfill all promises made to revisit any existing CMP and update CMPs whenever land management plans undergo revision, including reviewing rivers for their suitability for study designation by Congress. These studies should include rivers that would be suitable for study if restored to free-flowing condition by dam removal, so long as removal were feasible and practicable.[324]

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315. *See supra* notes 83, 109-12, 121 and accompanying text.

316. *See supra* note 52 and accompanying text.

317. *See supra* notes 188-90 and accompanying text (discussing the so-called "sleeping giant" of the WSRA).

318. *See supra* notes 206-11 and accompanying text.

319. *See supra* notes 175-77 and accompanying text.

320. *See supra* notes 178-79 and accompanying text.

321. 16 U.S.C. § 1271 (declaring the purpose of the statute to preserve rivers "in free-flowing condition," to protect "their immediate environments," and to "protect the water quality of such rivers."). River advocates should note that the section 12 directives, *supra* notes 188-90 and accompanying text, aim to ensure that the managing agencies observe the Act's preservationist purposes, requiring them to consider activities on non-federal lands which could adversely affect ORVs.

322. *See supra* notes 95-103 and accompanying text.

323. BLM issued a revised WSRA management guide in 2012, BLM IMPLEMENTATION MANUAL, *supra* note 88, but the other managing agencies have not published a management guide since 1982, Final Revised Guidelines for Eligibility, Classification and Management of River Areas, *supra* note 150.

324. Congress endorsed "restoration rivers" in early versions of the WSRA. A 1967 version defined "wild river area" as an area that "is free flowing and unpolluted," or that "*should be restored* to such condition, in order to promote sound water conservation, and promote the public use and enjoyment of" its ORVs. 113 Cong. Rec. 16, 2189 (1967) (emphasis added); *see also Wild Rivers Hearing*, HRG-1965-INS-0005, *supra* note 59, at 178 (explaining that S. 1446 would "provide for the restoration of other rivers which have been damaged through pollution and various encroachments that have sacrificed sce-

Updated interagency guidance should also instruct managing agencies to evaluate the effectiveness of CMPs in protecting a river's ORVs and to use their section 12 authority to manage all land uses within designated corridors, as well as "adjacent, bordering, and neighboring lands."[325] Further, CMPs should anticipate potential uses that may threaten ORVs, including uses on non-federal lands.[326] Anticipatory CMPs could prove persuasive to courts when reviewing WSRA regulation of adjacent and non-federal lands, given the deference which courts have consistently accorded managing agencies.[327]

Concerning the overlooked WSRA command that managing agencies protect and enhance the water quality of designated segments, revised interagency guidance should specify that the agencies must participate in triennial review of state water quality standards under the Clean Water Act[328] and claim reserved water rights where upriver diversions could threaten ORVs.[329] The ability of the WSRA to provide adequate watershed protection during the next half-century may be a function of how well CMPs anticipate these sorts of potential conflicts.

One of the WSRA's central purposes has been largely overlooked: to study rivers in order to understand their ORVs.[330] This study purpose has been undermined by the recent lack of congressional interest in designating study rivers. There are numerous candidates for suitability studies Congress and the managing agencies could consider, including over 3000 river segments in the National Rivers Inventory alone.[331] Moreover, thirty-three states have river protection programs, covering some 13,500 river miles,[332] most of which are not yet WSRA-protected rivers. Between the National Inventory and the state-protected rivers, there is fer-

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nic and recreational values"). The Conference Report on the WRSA endorsed restoration rivers, stating that "[e]very wild, scenic or recreational river in its free-flowing condition, *or upon restoration to this condition*, shall be considered eligible for inclusion . . . ." H.R. REP. No. 1917, 90th Cong. 2d Sess., 28010 (Conf. Rep. Sept. 25, 1968) (emphasis added).

325. *See supra* notes 186-90 and accompanying text (discussing 16 U.S.C. §1283(a)).

326. The guidance should also update the notice requirements to managing agencies when federal off-stream actions have potentially adverse effects on stream. *See supra* note 187 (discussing the absence of a notice procedure).

327. *See, e.g.*, *supra* notes 159, 209-211, 262-64 and accompanying text (discussing instances of judicial deference).

328. 33 U.S.C. § 1313(c)(1) (requiring triennial state water quality standard review); 33 U.S.C. § 1313(d)(1) (requiring states to establish total maximum daily load of pollutants); 40 C.F.R. § 130.7 (federal regulations implementing total maximum daily load standards); 40 C.F.R. § 130.8 (requiring states to submit biennial water quality reports to the Regional Environmental Protection Agency Administrator).

329. *See supra* notes 285-96 and accompanying text (explaining the reserved water rights of WSRA rivers).

330. 16 U.S.C. §§ 1275(a), 1276(c), 1276(d)(2); *see also supra* notes 191-220 and accompanying text.

331. *See supra* notes 107-08 and accompanying text.

332. *See supra* note 132.

tile ground for additional WSRA protections. There are probably at least as many potential restoration rivers, which managing agencies and Congress could use for a revived program of study rivers.

The WSRA remains a signature reflection of a national revolution that began in the latter half of the 20th century to preserve and restore the natural environment. This commitment came only after a sustained effort to develop those riverine resources it now sought to protect.[333] Consequently, the statute has been able to salvage only a small part of the nation's river resources.[334] Since the WSRA's preservation purpose includes "enhancement,"[335] the Act should be recognized to include rivers whose ORVs can be restored, especially through dam removal.[336] Systematic study of river resources and their watersheds is as central a purpose of the WSRA as the preservation and enhancement of the ORVs of designated rivers.[337] River advocates, managing agencies, and Congress should recognize that the landmark 1968 statute was as much about learning about outstandingly remarkable values as protecting and enhancing them. Reviving the study purpose of the WSRA will be the first challenge over the next half-century.

POSTSCRIPT

After this article went to press, on October 2, 2019, Senator Ron Wyden (D-Or.) announced that he was soliciting public nominations for rivers deserving of WSRA status, explaining that while Oregon had over 2,000 miles of designated WSRA rivers, those rivers represented only a fraction of the over 110,000 river miles in the state[338]—less than two percent of the state's rivers. Senator Wyden explained that outdoor recreation in the state supports 172,000 Oregon jobs and generates $16.4 billion annually and urged the state's residents to nominate riv-

333. *See supra* notes 28-46 and accompanying text.

334. *See, e.g., Celebrating 50 Years – Wild and Scenic Rivers System*, *supra* note 17 ("Only 12,754 miles [of streams in the United States] are protected by the Wild & Scenic Rivers Act—only 0.35% of the [total river miles in the United States].").

335. 16 U.S.C. § 1281 ("Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values[.]").

336. *See, e.g.*, Michael C. Blumm & Andrew B. Erickson, *Dam Removal in the Pacific Northwest: Lessons For the Nation*, 42 ENVTL. L. 1043 (2012).

337. 16 U.S.C. § 1275(a) (directing the federal agencies to study potential additions for "suitability or nonsuitability" of designation); 16 U.S.C. § 1276(d)(1) (directing federal agencies to "make specific studies . . . to determine which additional wild, scenic and recreational river areas" could be designated, "[i]n all planning for the use and development of water and related land resources[.]"); *see also supra* notes 100-02 and accompanying text.

338. Press Release, Sen. Ron Wyden, Wyden Announces Statewide Effort for Wild and Scenic Rivers (Oct. 2, 2019), https://www.wyden.senate.gov/news/press-releases/wyden-announces-statewide-effort-for-wild-and-scenic-rivers.

ers.[339] This kind of congressional leadership has not characterized Congress in recent years but is perhaps a hopeful harbinger of the future.

339. *Id.*

APPENDIX: DESIGNATED WILD AND SCENIC RIVERS 1968-2018

River	Administering Agency	Miles by Classification[340]			
		Wild	*Scenic*	*Rec.*	*Total Miles*
1. Clearwater (Middle Fork), Idaho (P.L. 90-542—October 2, 1968)	Forest Service	54.0	–	131.0	185.0
2. Eleven Point, Missouri (P.L. 90-542—October 2, 1968)	Forest Service	–	44.4	–	44.4
3. Feather, California (P.L. 90-542—October 2, 1968)	Forest Service	32.9	9.7	35.0	77.6
4. Rio Grande, New Mexico (P.L. 90-542—October 2, 1968)	Forest Service	3.9	–	0.4	4.3
	Bureau of Land Management	51.0		0.4	51.4
Rio Grande, New Mexico (P.L. 103-242—May 4, 1994)	Bureau of Land Management	–	12.0	–	12.0
Rio Grande, Texas (P.L. 95-625—November 10, 1978)	National Park Service	95.2	96.0	–	191.2
Rio Grande Total		*150.1*	*108.0*	*0.8*	*258.9*
5. Rogue, Oregon	Forest Service	13.0	7.5	17.0	37.5
(P.L. 90-542—October 2, 1968)	Bureau of Land Management	20.6	–	26.4	47.0
(P.L. 116-9—March 12, 2019).	Departments of Interior and Agriculture	91.4	25.7	1.9	119.0
Rogue River Total		*125.0*	*33.2*	*45.3*	*203.5*
6. Salmon (Middle Fork), Idaho (P.L. 90-542—October 2, 1968)	Forest Service	103.0	1.0	–	104.0
7. St. Croix, Minnesota & Wisconsin (P.L. 90- 542—October 2, 1968)	National Park Service	–	181.0	19.0	200.0
St. Croix (Lower) Minnesota & Wisconsin (P.L. 92- 560—October 25, 1972)	National Park Service	–	12.0	15.0	27.0

340. Originally compiled by the WILD & SCENIC RIVERS INTERAGENCY COORDINATING COUNCIL (Aug. 2018), https://www.rivers.gov/documents/rivers-table.pdf. Edited by the Authors. Entries from the Dingell Conservation, Management and Recreation Act, Public Law 116-9 (March 12, 2019), have not been assigned to a specific agency within the Departments of Interior and Agriculture.

St. Croix (Lower), Minnesota & Wisconsin (Secretarial Designation—June 17, 1976) (*Federal Register* Volume 41, Number 124)	States of Minnesota and Wisconsin	–	–	25.0	25.0
St. Croix River Total		–	*193.0*	*59.0*	*252.0*
8. Wolf, Wisconsin (P.L. 90-542—October 2, 1968)	National Park Service	–	24.0	–	24.0
9. Allagash Wilderness Waterway, Maine (Secretarial Designation—July 19, 1970) (*Federal Register* Volume 35, Number 138)	State of Maine	92.5	–	–	92.5
10. Little Miami, Ohio (Secretarial Designation—August 20, 1973) (*Federal Register* Volume 39, Number 22)	State of Ohio	–	18.0	48.0	66.0
Little Miami, Ohio (Secretarial Designation—January 11, 1981) (*Federal Register* Volume 46, Number 7)	State of Ohio	–	–	28.0	28.0
Little Miami River Total		–	*18.0*	*76.0*	*94.0*
11. Chattooga, Georgia, North and South Carolina (P.L. 93- 279—May 10, 1974)	Forest Service	41.6	2.5	14.6	58.7
12. Little Beaver, Ohio (Secretarial Designation—October 23, 1975) (*Federal Register* Volume 41, Number 40)	State of Ohio	–	33.0	–	33.0
13. Snake, Idaho & Oregon (P.L. 94-199—December 31, 1975)	Forest Service	31.5	36.0	–	67.5
14. Rapid, Idaho (P.L. 94-199—December 31, 1975)	Forest Service	26.8	–	–	26.8
15. New, North Carolina (Secretarial Designation—April 13, 1976) (*Federal Register* Volume 41, Number 76)	State of North Carolina	–	26.5	–	26.5
16. Flathead, Montana (P.L. 94-486—October 12, 1976)	Forest Service	97.9	–	17.8	115.7
	Forest Service and National Park Service	–	40.7	62.6	103.3
Flathead River Total		*97.9*	*40.7*	*80.4*	*219.0*
17. Missouri, Montana (P.L. 94-486—October 12, 1976)	Bureau of Land Management	64.0	26.0	59.0	149.0
Missouri, Nebraska & South Dakota (P.L. 95- 625—November 10, 1978)	National Park Service	–	–	59.0	59.0
Missouri, Nebraska & South Dakota (P.L. 102- 50—May 24, 1991)	National Park Service	–	–	39.0	39.0

Missouri River Total		*64.0*	*26.0*	*157.0*	*247.0*
18. Obed, Tennessee (P.L. 94-486—October 12, 1976)	National Park Service	43.3	2.0	–	45.3
19. American (North Fork), California	Forest Service	26.3	–	–	26.3
(P.L. 95-625—November 10, 1978)	Bureau of Land Management	12.0	–	–	12.0
American River (North Fork) Total		*38.3*	–	–	*38.3*
20. Delaware (Upper), New York & Pennsylvania (P.L. 95- 625—November 10, 1978)	National Park Service	–	23.1	50.3	73.4
Delaware (Middle), New Jersey & Pennsylvania (P.L. 95-625—November 10, 1978)	National Park Service	–	35.0	5.0	40.0
Delaware (Lower), New Jersey & Pennsylvania (P.L. 106 418—November 1, 2000)	National Park Service and Local Government	–	25.4	41.9	67.3
Delaware River Total		–	*83.5*	*97.2*	*180.7*
21. Pere Marquette, Michigan (P.L. 95-625—November 10, 1978)	Forest Service	–	66.4	–	66.4
22. Saint Joe, Idaho (P.L. 95-625—November 10, 1978)	Forest Service	26.6	–	39.7	66.3
23. Skagit, Washington (P.L. 95-625—November 10, 1978)	Forest Service	–	100.0	58.5	158.5
24. Salmon, Idaho (P.L. 96-312—July 23, 1980)	Forest Service	79.0	–	46.0	125.0
25. Alagnak, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	67.0	–	–	67.0
26. Alatna, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	83.0	–	–	83.0
27. Andreafsky, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	262.0	–	–	262.0
28. Aniakchak, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	63.0	–	–	63.0
29. Beaver Creek, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	16.0	–	–	16.0
	Bureau of Land Management	111.0	–	–	111.0
Beaver Creek Total		*127.0*	–	–	*127.0*
30. Birch Creek, Alaska (P.L. 96-487—December 2, 1980)	Bureau of Land Management	126.0	–	–	126.0

31. Charley, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	208.0	–	–	208.0
32. Chilikadrotna, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	11.0	–	–	11.0
33. Delta, Alaska (P.L. 96-487—December 2, 1980)	Bureau of Land Management	20.0	24.0	18.0	62.0
34. Fortymile, Alaska (P.L. 96-487—December 2, 1980)	Bureau of Land Management	179.0	203.0	10.0	392.0
35. Gulkana, Alaska (P.L. 96-487—December 2, 1980)	Bureau of Land Management	181.0	–	–	181.0
36. Ivishak, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	80.0	–	–	80.0
37. John, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	52.0	–	–	52.0
38. Kobuk, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	110.0	–	–	110.0
39. Koyukuk (North Fork), Alaska (P.L. 96-487—December 2, 1980)	National Park Service	102.0	–	–	102.0
40. Mulchatna, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	24.0	–	–	24.0
41. Noatak, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	330.0	–	–	330.0
42. Nowitna, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	225.0	–	–	225.0
43. Salmon, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	70.0	–	–	70.0
44. Selawik, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	160.0	–	–	160.0
45. Sheenjek, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	160.0	–	–	160.0
46. Tinayguk, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	44.0	–	–	44.0
47. Tlikakila, Alaska (P.L. 96-487—December 2, 1980)	National Park Service	51.0	–	–	51.0
48. Unalakleet, Alaska (P.L. 96-487—December 2, 1980)	Bureau of Land Management	80.0	–	–	80.0
49. Wind, Alaska (P.L. 96-487—December 2, 1980)	Fish and Wildlife Service	140.0	–	–	140.0

50. American (Lower), California (Secretarial Designation—January 19, 1981) (*Federal Register* Volume 46, Number 15)	State of California	–	–	23.0	23.0
51. Eel, California (Secretarial Designation—January 19, 1981) (*Federal Register* Volume 46, Number 15)	State of California Forest Service Bureau of Land Management Round Valley Indian Reservation	36.0 35.0 21.0 5.0	22.5 – 4.5 1.0	250.5 – 6.5 16.0	309.0 35.0 32.0 22.0
Eel River Total		*97.0*	*28.0*	*273.0*	*398.0*
52. Klamath, California (Secretarial Designation—January 19, 1981) (*Federal Register* Volume 46, Number 15) Klamath, Oregon (Secretarial Designation—September 22, 1994) (*Federal Register* Volume 59, Number 201)	State of California Forest Service Bureau of Land Management Hoopa Valley Indian Reservation National Park Service State of Oregon and Bureau of Land Management	– 11.7 – – – –	3.0 20.5 – – – 11.0	12.2 190.1 1.5 46.0 1.0 –	15.2 222.3 1.5 46.0 1.0 11.0
Klamath River Total		*11.7*	*34.5*	*250.8*	*297.0*
53. Smith, California (Secretarial Designation—January 19, 1981) (*Federal Register* Volume 46, Number 15) Smith, California (P.L. 101-612—November 16, 1990)	State of California Forest Service	– 78.0	0.5 30.5	28.5 187.9	29.0 296.4
Smith River Total		*78.0*	*31.0*	*216.4*	*325.4*
54. Trinity, California (Secretarial Designation—January 19, 1981) (*Federal Register* Volume 46, Number 15)	State of California Forest Service Bureau of Land Management Hoopa Valley Indian Reservation	2.0 42.0 – –	11.0 22.0 – 6.0	24.0 71.0 17.0 8.0	37.0 135.0 17.0 14.0
Trinity River Total		*44.0*	*39.0*	*120.0*	*203.0*
55. Verde, Arizona (P.L. 98-406—August 28, 1984)	Forest Service	22.2	18.3	–	40.5
56. Tuolumne, California (P.L. 98-425—September 28, 1984)	Forest Service National Park Service Bureau of Land Management	7.0 37.0 3.0	6.0 17.0 –	13.0 – –	26.0 54.0 3.0

Tuolumne River Total		*47.0*	*23.0*	*13.0*	*83.0*
57. Au Sable, Michigan (P.L. 98-444—October 4, 1984)	Forest Service	–	23.0	–	23.0
58. Illinois, Oregon (P.L. 98-494—October 19, 1984)	Forest Service	28.7	17.9	3.8	50.4
59. Owyhee, Oregon (P.L. 98-494—October 19, 1984)	Bureau of Land Management	120.0	–	–	120.0
60. Loxahatchee, Florida (Secretarial Designation—May 17, 1985) (*Federal Register* Volume 50, Number 100)	State of Florida	1.3	5.8	0.5	7.6
61. Horsepasture, North Carolina (P.L. 99-530—October 26, 1986)	Forest Service	–	3.6	0.6	4.2
62. Black Creek, Mississippi (P.L. 99-590—October 30, 1986)	Forest Service	–	21.0	–	21.0
63. Cache la Poudre, Colorado (P.L. 99-590—October 30, 1986)	Forest Service National Park Service	18.0 12.0	– –	46.0 –	64.0 12.0
Cache la Poudre River Total		*30.0*	–	*46.0*	*76.0*
64. Saline Bayou, Louisiana (P.L. 99-590—October 30, 1986)	Forest Service	–	19.0	–	19.0
65. Klickitat, Washington (P.L. 99-663—November 17, 1986)	Forest Service	–	–	10.8	10.8
66. White Salmon, Washington (P.L. 99-663—November 17, 1986) White Salmon, Washington (P.L. 109-44—August 2, 2005)	Forest Service Forest Service	– 6.7	7.7 13.3	– –	7.7 20.0
White Salmon River Total		*6.7*	*21.0*	–	*27.7*
67. Merced, California (P.L. 100-149—November 2, 1987) Merced, California (P.L. 102-432—October 23, 1992)	Forest Service National Park Service Bureau of Land Management Bureau of Land Management	15.0 53.0 3.0 –	2.0 14.0 – –	12.5 14.0 1.0 8.0	29.5 81.0 4.0 8.0
Merced River Total		*71.0*	*16.0*	*35.5*	*122.5*
68. Kings, California (P.L. 100-150—November 3, 1987)	Forest Service National Park Service	16.5 49.0	– –	9.0 6.5	25.5 55.5
Kings River Total		*65.5*	–	*15.5*	*81.0*
69. Kern, California (P.L. 100-174—November 24, 1987)	Forest Service National Park Service	96.1 27.0	7.0 –	20.9 –	124.0 27.0

Kern River Total		*123.1*	*7.0*	*20.9*	*151.0*
70. Bluestone, West Virginia (P.L. 100-534—October 26, 1988)	National Park Service	–	10.0	–	10.0
71. Big Marsh Creek, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	–	15.0	15.0
72. Chetco, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	25.5	8.0	11.0	44.5
73. Clackamas, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	20.0	27.0	47.0
74. Crescent Creek, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	–	10.0	10.0
75. Crooked, Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	–	–	15.0	15.0
76. Crooked (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	– 11.1	8.0 1.5	6.7 5.0	14.7 17.6
Crooked River (North Fork) Total		*11.1*	*9.5*	*11.7*	*32.3*
77. Deschutes, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	– –	11.0 20.0	43.4 100.0	54.4 120.0
Deschutes River Total		–	*31.0*	*143.4*	*174.4*
78. Donner und Blitzen, Oregon (P.L. 100-557—October 28, 1988) Donner und Blitzen, Oregon (P.L. 106-399—October 30, 2000)	Bureau of Land Management Bureau of Land Management	72.7 14.8	– –	– –	72.7 14.8
Donner und Blitzen River Total		*87.5*	–	–	*87.5*
79. Eagle Creek, Oregon (Wallowa-Whitman National Forest) (P.L. 100-557—October 28, 1988)	Forest Service	4.5	6.0	18.4	28.9
80. Elk, Oregon (P.L. 100-557—October 28, 1988) Elk, Oregon (P.L. 111-11—March 30, 2009) Elk, Oregon (P.L. 116-9—March 12, 2019).	Forest Service Forest Service Department of Agriculture	2.0 7.7 29.6	– 1.5 6.9	17.0 – 9.5	19.0 9.2 46.0
Elk River Total		*39.3*	*8.4*	*26.5*	*74.2*
81. Grande Ronde, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	17.4 9.0	– –	1.5 15.9	18.9 24.9
Grande Ronde River Total		*26.4*	–	*17.4*	*43.8*
82. Imnaha, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	15.0	4.0	58.0	77.0

83. John Day, Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	–	–	147.5	147.5
84. John Day (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Forest Service	27.8	10.5	15.8	54.1
85. John Day (South Fork), Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	–	–	47.0	47.0
86. Joseph Creek, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	8.6	–	–	8.6
87. Little Deschutes, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	–	12.0	12.0
88. Lostine, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	5.0	–	11.0	16.0
89. Malheur, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	6.7	7.0	–	13.7
90. Malheur (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	25.5	–	25.5
91. McKenzie, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	–	12.7	12.7
92. Metolius, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	17.1	11.5	28.6
93. Minam, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	39.0	–	–	39.0
94. North Powder, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	6.0	–	6.0
95. North Umpqua, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	– –	– –	25.4 8.4	25.4 8.4
North Umpqua River Total		–	–	*33.8*	*33.8*
96. Owyhee (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	.8.0	–	–	8.0
97. Powder, Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	–	11.7	–	11.7
98. Quartzville Creek, Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	–	–	12.0	12.0
99. Roaring, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	13.5	–	0.2	13.7
100. Rogue (Upper), Oregon (P.L. 100-557—October 28, 1988)	Forest Service	6.1	34.2	–	40.3
101. Salmon, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	15.0 –	– 4.8	10.5 3.2	25.5 8.0

Salmon River Total		*15.0*	*4.8*	*13.7*	*33.5*
102. Sandy, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	4.5 –	– 3.8	7.9 8.7	12.4 12.5
Sandy River Total		*4.5*	*3.8*	*16.6*	*24.9*
103. Smith (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Forest Service	8.5	4.5	–	13.0
104. Sprague (North Fork), Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	15.0	–	15.0
105. Squaw Creek, Oregon (*aka* Whychus Creek) (P.L. 100- 557—October 28, 1988)	Forest Service	6.6	8.8	–	15.4
106. Sycan, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	–	50.4	8.6	59.0
107. Wenaha, Oregon (P.L. 100-557—October 28, 1988)	Forest Service	18.7	2.7	0.2	21.6
108. West Little Owyhee, Oregon (P.L. 100-557—October 28, 1988)	Bureau of Land Management	51.0	–	–	51.0
109. Sipsey Fork West Fork, Alabama (*aka* Sipsey Fork of the Black Warrior River) (P.L. 100- 547—October 28, 1988)	Forest Service	36.4	25.0	–	61.4
110. White, Oregon (P.L. 100-557—October 28, 1988)	Forest Service Bureau of Land Management	– –	6.5 17.5	15.6 6.9	22.1 24.4
White River Total		–	*24.0*	*22.5*	*46.5*
111. Wildcat, New Hampshire (P.L. 100-554—October 28, 1988)	Forest Service	–	13.7	0.8	14.5
112. Willamette (North Fork Middle Fork), Oregon (P.L. 100- 557—October 28, 1988)	Forest Service	8.8	6.5	27.0	42.3
113. Rio Chama, New Mexico (P.L. 100-633—November 7, 1988)	Forest Service Bureau of Land Management	10.4 11.2	3.0 –	– –	13.4 11.2
Rio Chama Total		*21.6*	*3.0*	–	*24.6*
114. Vermilion (Middle Fork), Illinois (Secretarial Designation—May 11, 1989)	State of Illinois	–	17.1	–	17.1
115. Jemez (East Fork), New Mexico (P.L. 101-306—June 6, 1990)	Forest Service	4.0	5.0	2.0	11.0
116. Pecos, New Mexico (P.L. 101-306—June 6, 1990)	Forest Service	13.5	–	7.0	20.5
117. Yellowstone (Clarks Fork), Wyoming (P.L. 101- 628—November 28, 1990)	Forest Service	20.5	–	–	20.5

118. Niobrara, Nebraska (P.L. 102-50—May 24, 1991)	National Park Service Fish and Wildlife Service	–	70.0 8.0	25.0 –	95.0 8.0
Niobrara River Total		–	*78.0*	*25.0*	*103.0*
119. Bear Creek, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	6.5	–	6.5
120. Black, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	14.0	–	14.0
121. Carp, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	12.4	9.3	6.1	27.8
122. Indian, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	12.0	39.0	51.0
123. Manistee, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	–	26.0	26.0
124. Ontonagon, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	42.9	41.0	73.5	157.4
125. Paint, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	–	51.0	51.0
126. Pine, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	25.0	–	25.0
127. Presque Isle, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	19.0	38.0	57.0
128. Sturgeon, Michigan (Hiawatha National Forest) (P.L. 102-249—March 3, 1992)	Forest Service	–	21.7	22.2	43.9
129. Sturgeon, Michigan (Ottawa National Forest) (P.L. 102- 249—March 3, 1992)	Forest Service	16.5	8.5	–	25.0
130. Tahquamenon (East Branch), Michigan (P.L. 102- 249—March 3, 1992)	Forest Service	3.2	–	10.0	13.2
131. Whitefish, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	–	31.5	2.1	33.6
132. Yellow Dog, Michigan (P.L. 102-249—March 3, 1992)	Forest Service	4.0	–	–	4.0
133. Allegheny, Pennsylvania (P.L. 102-271—April 20, 1992)	Forest Service	–	–	85.0	85.0
134. Big Piney Creek, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	–	45.2	–	45.2
135. Buffalo, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	9.4	6.4	–	15.8

136. Cossatot, Arkansas (P.L. 102-275—April 22, 1992) Cossatot, Arkansas (Secretarial Designation—January 14, 1994) (*Federal Register* Volume 59, Number 22)	Forest Service Army Corps of Engineers State of Arkansas	– – –	11.3 4.6 10.7	4.2 – –	15.5 4.6 10.7
Cossatot River Total		–	*26.6*	*4.2*	*30.8*
137. Hurricane Creek, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	2.4	13.1	–	15.5
138. Little Missouri, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	4.4	11.3	–	15.7
139. Mulberry, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	–	19.4	36.6	56.0
140. North Sylamore Creek, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	–	14.5	–	14.5
141. Richland Creek, Arkansas (P.L. 102-275—April 22, 1992)	Forest Service	5.3	11.2	–	16.5
142. Big Sur, California (P.L. 102-301—June 19, 1992)	Forest Service	19.5	–	–	19.5
143. Sespe Creek, California (P.L. 102-301—June 19, 1992)	Forest Service	27.5	4.0	–	31.5
144. Sisquoc, California (P.L. 102-301—June 19, 1992)	Forest Service	33.0	–	–	33.0
145. Great Egg Harbor, New Jersey (P.L. 102-536—October 27, 1992)	National Park Service	–	30.6	98.4	129.0
146. Westfield, Massachusetts (Secretarial Designation—November 2, 1993) (*Federal Register* Volume 58, Number 219) Westfield, Massachusetts (Secretarial Designation—September 28, 2004) (*Federal Register* Volume 69, Number 209)	State of Massachusetts State of Massachusetts	– 2.6	18.9 24.0	24.4 8.2	43.3 34.8
Westfield River Total		*2.6*	*42.9*	*32.6*	*78.1*
147. Maurice, New Jersey (P.L. 103-162—December 1, 1993)	National Park Service	–	28.9	13.5	42.4
148. Red, Kentucky (P.L. 103-170—December 2, 1993)	Forest Service	9.1	–	10.3	19.4
149. Big and Little Darby Creeks, Ohio (Secretarial Designation—March 10, 1994) (*Federal Register* Volume 59, Number 66)	State of Ohio	–	85.9	–	85.9

150. Farmington (West Branch), Connecticut (P.L. 103- 313—August 26, 1994) (P.L. 116-9—March 12, 2019).	National Park Service and State of Connecticut and Local Government	–	–	15.1	15.1
151. Wallowa, Oregon (Secretarial Designation—July 23, 1996) (*Federal Register* Volume 61, Number 157)	State of Oregon and Bureau of Land Management	–	–	10.0	10.0
152. Elkhorn Creek, Oregon (P.L. 104-208—September 30, 1996)	Forest Service Bureau of Land Management	5.8 –	– 0.6	– –	5.8 0.6
Elkhorn Creek Total		*5.8*	*0.6*	–	*6.4*
153. Clarion, Pennsylvania (P.L. 104-314—October 19, 1996)	Forest Service	–	17.1	34.6	51.7
154. Lamprey, New Hampshire (P.L. 104-333—November 12, 1996) Lamprey, New Hampshire (P.L. 106-192—May 2, 2000)	National Park Service and Local Government National Park Service and Local Government	– –	– –	11.5 12.0	11.5 12.0
Lamprey River Total		–	–	*23.5*	*23.5*
155. Lumber, North Carolina (Secretarial Designation—September 25, 1998) (*Federal Register* Volume 63, Number 193)	State of North Carolina	–	60.0	21.0	81.0
156. Sudbury, Assabet, Concord, Massachusetts (P.L. 106- 20—April 9, 1999)	National Park Service and State of Massachusetts and Local Government	–	14.9	14.1	29.0
157. Wilson Creek, North Carolina (P.L. 106-261—August 18, 2000)	Forest Service	4.6	2.9	15.8	23.3
158. Wekiva, Florida (P.L. 106-299—October 13, 2000)	National Park Service and State of Florida	31.4	2.1	8.1	41.6
159. White Clay Creek, Delaware & Pennsylvania (P.L. 106- 357—October 24, 2000) White Clay Creek, Delaware & Pennsylvania (P.L. 113- 291—December 19, 2014)	National Park Service and Local Government National Park Service and Local Government	– –	24.0 7.4	166.0 1.6	190.0 9.0

White Clay Creek Total		–	*31.4*	*167.6*	*199.0*
160. Wildhorse and Kiger Creeks, Oregon (P.L. 106- 399—October 30, 2000)	Bureau of Land Management	13.9	–	–	13.9
161. Rio de la Mina, Puerto Rico (P.L. 107-365—December 19, 2002)	Forest Service	–	1.2	0.9	2.1
162. Rio Icacos, Puerto Rico (P.L. 107-365—December 19, 2002)	Forest Service	–	2.3	–	2.3
163. Rio Mameyes, Puerto Rico (P.L. 107-365—December 19, 2002)	Forest Service	2.1	1.4	1.0	4.5
164. Black Butte, California (P.L. 109-362—October 17, 2006)	Forest Service	17.5	3.5	–	21.0
165. Musconetcong, New Jersey (P.L. 109-452—December 22, 2006)	National Park Service	–	3.5	20.7	24.2
166. Eightmile, Connecticut (P.L. 110-229—May 8, 2008)	National Park Service and Local Government	–	25.3	–	25.3
167. Amargosa, California (P.L. 111-11—March 30, 2009) (P.L. 116-9—March 12, 2019)	Bureau of Land Management	7.9	19.6	6.3	33.8
168. Battle Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	23.4	–	–	23.4
169. Bautista Creek, California (P.L. 111-11—March 30, 2009)	Forest Service	–	–	9.8	9.8
170. Big Jacks Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	35.0	–	–	35.0
171. Bruneau, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	38.7	–	0.6	39.3
172. Bruneau (West Fork), Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	0.4	–	–	0.4
173. Clackamas (South Fork), Oregon (P.L. 111-11—March 30, 2009)	Forest Service	4.2	–	–	4.2
174. Collawash, Oregon (P.L. 111-11—March 30, 2009)	Forest Service	–	11.0	6.8	17.8
175. Cottonwood Creek, California (P.L. 111-11—March 30, 2009)	Forest Service Bureau of Land Management	17.4 –	– –	– 4.1	17.4 4.1
Cottonwood Creek Total		*17.4*	–	*4.1*	*21.5*
176. Cottonwood Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	2.6	–	–	2.6

177. Deep Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	13.1	–	–	13.1
178. Dickshooter Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	9.3	–	–	9.3
179. Duncan Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	0.9	–	–	0.9
180. Eagle Creek, Oregon (Mt. Hood National Forest) (P.L. 111-11—March 30, 2009)	Forest Service	8.3	–	–	8.3
181. Fifteenmile Creek, Oregon (P.L. 111-11—March 30, 2009)	Forest Service	10.5	0.6	–	11.1
182. Fish Creek, Oregon (P.L. 111-11—March 30, 2009)	Forest Service	–	–	13.5	13.5
183. Fossil Creek, Arizona (P.L. 111-11—March 30, 2009)	Forest Service	9.3		7.5	16.8
184. Fuller Mill Creek, California (P.L. 111-11—March 30, 2009)	Forest Service	–	2.6	0.9	3.5
185. Hood (East Fork), Oregon (P.L. 111-11—March 30, 2009)	Forest Service	–	–	13.5	13.5
186. Hood (Middle Fork), Oregon (P.L. 111-11—March 30, 2009)	Forest Service	–	3.7	–	3.7
187. Jarbidge, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	28.8	–	–	28.8
188. Little Jacks Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	12.4	–	–	12.4
189. Owens River Headwaters, California (P.L. 111- 11—March 30, 2009)	Forest Service	6.3	6.6	6.2	19.1
190. Owyhee, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	67.3	–	–	67.3
191. Owyhee (North Fork), Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	15.1	–	5.7	20.8
192. Owyhee (South Fork), Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	30.2	–	1.2	31.4
193. Palm Canyon Creek, California (P.L. 111-11—March 30, 2009)	Forest Service	8.1	–	–	8.1
194. Piru Creek, California (P.L. 111-11—March 30, 2009)	Forest Service	4.3	–	3.0	7.3
195. Red Canyon, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	4.6	–	–	4.6

196. Roaring (South Fork), Oregon (P.L. 111-11—March 30, 2009)	Forest Service	4.6	–	–	4.6
197. San Jacinto (North Fork), California (P.L. 111- 11—March 30, 2009)	Forest Service	7.2	2.3	0.7	10.2
198. Sheep Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	25.6	–	–	25.6
199. Snake River Headwaters, Wyoming (P.L. 111- 11—March 30, 2009)	Forest Service National Park Service	184.0 45.3	97.1 53.3	33.8 –	314.9 98.6
Snake River Headwaters Total		*229.3*	*150.4*	*33.8*	*413.5*
200. Taunton, Massachusetts (P.L. 111-11—March 30, 2009)	National Park Service	–	26.0	14.0	40.0
201. Virgin, Utah (P.L. 111-11—March 30, 2009)	National Park Service Bureau of Land Management	123.6 21.8	11.3 –	12.6 –	147.5 21.8
Virgin River Total		*145.4*	*11.3*	*12.6*	*169.3*
202. Wickahoney Creek, Idaho (P.L. 111-11—March 30, 2009)	Bureau of Land Management	1.5	–	–	1.5
203. Zigzag, Oregon (P.L. 111-11—March 30, 2009)	Forest Service	4.3	–	–	4.3
204. Illabot Creek, Washington (P.L. 113-291—December 19, 2014)	Forest Service	4.3	–	10.0	14.3
205. Missisquoi & Trout, Vermont (P.L. 113-291—December 19, 2014)	National Park Service and Local Government	–	–	46.1	46.1
206. Pratt, Washington (P.L. 113-291—December 19, 2014)	Forest Service	9.5	–	–	9.5
207. River Styx (Cave Creek), Oregon (P.L. 113- 291—December 19, 2014)	National Park Service	–	0.4	–	0.4
208. Snoqualmie (Middle Fork), Washington (P.L. 113- 291—December 19, 2014)	Forest Service	6.4	21.0	–	27.4
209. East Rosebud Creek, Montana (P.L. 115-229—August 2, 2018)	Forest Service	13.0	–	7.0	20.0
210. Franklin, Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Agriculture	4.5	–	–	4.5
211. Wasson Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior Department of Agriculture	4.2 5.9	– –	– –	4.2 5.9
Wasson Creek Total		10.1	–	–	10.1

212. Molalla, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	21.3	21.3
213. Nestucca, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	15.5	15.5
214. Walker Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	2.9	2.9
215. Silver Creek (North Fork), Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	6.0	6.0
216. Jenny Creek, Oregon (P.L. 116-9—March 12, 2019)	Department of Interior	–	17.6	–	17.6
217. Spring Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	1.1	–	1.1
218. Lobster Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	5.0	5.0
219. Elk Creek, Oregon (P.L. 116-9—March 12, 2019).	Department of Interior	–	7.3	–	7.3
220. Green, Utah (P.L. 116-9—March 12, 2019).	Department of Interior	5.3	8.5	49.2	63.0
221. Lower Farmington, Salmon Brook, Connecticut (P.L. 116-9—March 12, 2019).	Department of Interior	–	–	61.7	61.7
222. Wood-Pawcatuck Watershed, Rhode Island, Connecticut (P.L. 116-9—March 12, 2019).	Department of Interior	24.0	52.0	34.0	110.0
223. Nashua, Squannacook, Nissitissit, Massachusetts, New Hampshire (P.L. 116-9—March 12, 2019).	Department of Interior	–	52.8	–	52.8
224. Surprise Canyon Creek, California (P.L. 116-9—March 12, 2019).	Department of Interior	5.3	–	1.8	7.1
225. Deep Creek, California (P.L. 116-9—March 12, 2019).	Department of Agriculture	22.5	1.0	11.0	34.5
226. Whitewater, California (P.L. 116-9—March 12, 2019).	Department of Agriculture and Interior	23.5	–	4.6	28.1