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WATERWAY PRESERVATION: THE WILD AND SCENIC RIVERS ACT OF 1968

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I. INTRODUCTION

The great rivers of this country represent vestiges of a frontier America where waterways were the highways to exploration and development. Today, these wondrous resources have fallen victim to excessive industrialization, abusive land use, and an overall move to commercialize the recreational value of free-flowing rivers.[1] As with many of the nation's resources these rivers have been taken for granted for too long and are now in danger of extinction.[2] In fact, there are relatively few waterways left across the country which flow unencumbered from head to mouth.

This erosion has, in some circles, aroused great concern over the future of our national waterways. Without adequate protection through legislation and increased public awareness, these assets will

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[1] For centuries Americans have drawn strength and inspiration from the beauty of our country. It would be a neglectful generation indeed, indifferent alike to the judgment of history and the command of principle, which failed to preserve and extend such a heritage for its descendents.

111 CONG. REC. 2085, 2245 (1965) (remarks of President Lyndon B. Johnson on Natural Beauty).

Every year more than 50 trillion gallons of human and industrial waste are dumped into the nation's rivers. Greenery is destroyed at a rate of one million acres per year; open space is paved at a rate of more than two acres every minute. *Hudson River Moratorium: Hearings on H.R. 13106 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 91st Cong., 2nd Sess. 6 (1970) (statement of Harrison A. Williams); *Wild and Scenic Rivers: Hearings on S. 1092 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 33 (1967) (statement of Walter F. Mondale).

[2] The historic significance of the nation's waterways will not be reviewed in this article. It is a topic that takes up shelf after shelf in any library. Suffice it to say that from the voyage of Henry Hudson, to the expedition of Lewis and Clark, to the invention of the steamboat, rivers have played an integral part in American history. "Nothing is a greater source of wonder and amazement than the power and majesty of American rivers. They occupy a central place in myth and legend, folklore and literature." 111 CONG. REC. 2086 (1965).

be lost forever. Congress, in the spirit of this newly kindled awareness, passed the 1968 Wild and Scenic Rivers Act,[3] an act intended to prevent the continued decay of free-flowing rivers. Many states responded to this federal legislation with similar "mini-wild and scenic river systems"[4] thereby creating a fairly comprehensive regulatory network with the potential to protect many of the valuable waterways currently existing throughout the nation.

This article will review the federal wild and scenic rivers system and examine its impact on waterway preservation over the last ten years. First, the article will analyze the mechanics of the legislation, with particular emphasis on two major problems which have become glaringly apparent in recent years: delays and increased costs. The causes of these problems will be discussed, and solutions suggested. Second, the article will survey various state systems, and in particular, examine the Oregon wild and scenic rivers program to consider the possible application of certain state preservation devices to the federal wild and scenic rivers system. Finally, the article will discuss the delicate balance which must be struck between the conservation efforts of the Act and countervailing private property interests. Specifically, it will examine the New River controversy—an example of the problems created when the equilibrium between these two interests is disturbed.

II. The Wild and Scenic Rivers Act

Congress responded to the continued erosion of the nation's free-flowing rivers by enacting the Wild and Scenic Rivers Act.[5] This legislation primarily seeks to protect "certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . . ."[6] To effectuate this undertaking the Act provides for the creation of a national wild and scenic rivers system. It is this system, with its attendant land use controls, which will identify and preserve free-flowing stretches of our scenic rivers before growth and development make the beauty

[3] 16 U.S.C. §§1271 *et seq.* (1974).

[4] These state systems have not arisen because of any disenchantment with the national wild and scenic rivers system. Rather, they provide a means of protecting those waterways which have not been accepted by the administrators of the national program, and also serve as a vehicle by which states can protect their waterways without burdening the federal system. State systems provide valuable support to the national wild and scenic rivers program.

[5] 16 U.S.C. §§1271 *et seq.* (1974).

[6] *Id.*, at §1271.

of the unspoiled waterway a mere memory.

Beginning in 1963, the Secretaries of the Interior and Agriculture, with the cooperation of a number of states, prepared a list of 650 or more rivers which were thought to be worthy of consideration for inclusion in a national wild and scenic rivers system.[7] From this list Congress initially designated eight rivers as components of the system.[8] Twenty-seven additional rivers and river segments were chosen for further study as potential components of the program.[9] Though projected plans for the national system extend far beyond this original number, Congress viewed eight waterways as the most reasonable foundation upon which to build this new and innovative program.[10]

A. Eligibility Requirements

Two prerequisites must be satisfied before a river is included in the national system. First, the waterway must be free-flowing.[11] Lakes, ponds, and stillwater basins, therefore, do not qualify for the program. Second, the river must possess one or more of the environmental values sought to be protected by Congress.[12] Study teams, composed of experts and supervised by the Secretary of the Interior

[7] The search for rivers began in 1963 because the process called for the input of federal and state agencies throughout the United States. Due to the immensity of the task a five year lead time was allotted for initial investigation. It should also be noted at this point that although the Secretary of the Interior is primarily responsible for the administration of the wild and scenic rivers system the Secretary of Agriculture supervises any component of the program which flows through national forest lands. 16 U.S.C. § 1275(a) (1974).

[8] These eight rivers were: Clearwater-Middlefork in Idaho, Eleven Point in Missouri, Feather in California, Rio Grande in New Mexico, Rogue in Oregon, Salmon Fork in Idaho, St. Croix in Minnesota and Wisconsin, and the Wolf in Wisconsin. 16 U.S.C. § 1274(a)(1974).

[9] "Study rivers" are not part of the national system. They undergo field investigation by teams of state and federal environmentalists to determine whether they are qualified for inclusion in the scenic rivers system. 16 U.S.C. § 1276(a)(1974). After such investigation public hearings are held, and finally, a detailed report is submitted to Congress either recommending or removing the river from consideration for inclusion in the national system. *Id.*

[10] The number of original rivers in the system was limited because:

> (a) the necessary studies had not yet been made, (b) it was desirable to gain operating experience before embarking on a more extensive list, and (c) the cost factor involved in any such system as this could not be ignored. . . .

[1968] U.S. CODE CONG. & AD. NEWS 3804.

[11] The Act defines "free-flowing" as "existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modifications of the waterway." 16 U.S.C. § 1286(b)(1974). The existence of low dams or other minor structures, at the time the river is nominated for protection will not, however, automatically bar it from the free-flowing category. *Id.*

[12] These environmental values include "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. . . ." 16 U.S.C. § 1271(a)(1970).

and Secretary of Agriculture, collect data from the rivers and make determinations concerning the existence of such natural values.[13]

Since the Act contains no limitation on the number of rivers that may be added to the national system,[14] it is theoretically possible that all free-flowing, environmentally significant rivers in the United States could eventually fall within the ambit of the wild and scenic rivers system. Despite the fact that this possibility is precluded by practical considerations such as cost, manpower, and maintenance, the Act is nonetheless intended to be all-encompassing.

Nomination for inclusion in the national system occurs either by an act of Congress or by an act of a state legislature.[15] Currently, acts of Congress account for approximately 90% of the rivers now in the national system or its study phase.[16] Despite this apparent abundance of federal action, states have also taken legislative action to nominate waterways for inclusion in the national system.[17] Under the state procedure the Governor of the state forwards a recommendation to the Secretary of the Interior who then determines whether the river satisfactorily meets the standards of the Act.[18] Once its environmental significance is established, the Secretary recommends that Congress include the river in the national system.[19]

Two distinct advantages inhere in the state nomination procedure. First, and foremost, the sponsoring state of any river added to the national system must permanently administer the waterway without expense to the federal government.[20] This significantly reduces the federal cost of maintaining the rivers system and also

[13] Study teams are comprised of biologists, geologists, ecologists and numerous other resource specialists. Initially the team spends a great deal of time in the library poring over books and maps which provide valuable information about the river to be studied. From this information they prepare a "dry lab" report which helps them determine how much is currently known about the waterway and what information will have to be gathered during the field study. Study teams then investigate the river itself, either by air, boat, on foot or by any other available means of transportation. The "dry lab" reports are updated continuously until the team has an accurate picture of the entire waterway. *Our Natural Resources: The Choices Ahead,* 10 U.S. DEPT. OF THE INTERIOR YEARBOOK 121 (1974).

[14] 16 U.S.C. § 1275(1974).

[15] 16 U.S.C. § 1273(a)(1974).

[16] *To Amend The Wild And Scenic Rivers Act: Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs,* 93rd Cong., 1st Sess. 24-29 (1973).

[17] The Allagash River in Maine is a state-nominated waterway as are the Upper Iowa River in Iowa, the Little Beaver River in Ohio, and St. Croix River in Minnesota and Wisconsin. *Id.* States can only nominate rivers or river segments that are within state boundaries. 16 U.S.C. § 1273(a)(ii)(1974).

[18] 16 U.S.C. § 1273(a)(1974).

[19] *Id.*

[20] *Id.*

distributes the overall expense of the system among the states. Second, unlike the time consuming review process required for an act of Congress, the state procedure is relatively short.[21] This greatly expedites the nomination process and offers more immediate protection for endangered waterways.

B. Conservation Features of the Act

1. River Classification

All components of the rivers system are classified as one of three "river areas": wild river area, scenic river area, or recreational river area.[22] The overall character of the river or river segment determines its classification. Classification, in turn, delineates the regulatory provisions, land use limitations, and water use controls applicable to the component. Wild river areas receive the most stringent regulation, while scenic and recreational river areas are subject to lesser restraints.

The wild river area generally encompasses those rivers which are inaccessible to the public except by path or trail, thereby leaving the scenic aspects of the adjoining land unmarred by man-made obstructions. The rivers in the "wild" category are unimpounded and virtually free of pollutants.[23] Rigorous regulations and close

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[21] Congressional nomination begins with a study report, compiled by the federal agency administering the river. This report must include:

> maps and illustrations . . . of the characteristics which do or do not make the area a worthy addition to the system; the current status of land ownership and use in the area; the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included in the wild and scenic rivers system. . . .

16 U.S.C. § 1275(a)(1974). Once completed the report must be submitted to the Secretary of the Army, the Chairman of the Federal Power Commission, the head of any other affected Federal department or agency and, unless the proposed lands are located totally within an area owned by the United States or have already been authorized for acquisition by Act of Congress, the Governor of the State or States in which they are located. These parties are given 90 days to comment on the report. The report then goes to the Office of Management and Budget where it is further reviewed before being forwarded to the President for presentation to Congress. This process can, and on occasion has taken years to complete. The state nomination procedure is generally shorter because the study report, or its equivalent is submitted by the state at the time the river is nominated, federal agencies are less interested in rivers which will be administered by state agencies and therefore make a more cursory review of the proposed waterway, and often times, state support is so strong that the river is given priority in the review process. As a result, state nomination of waterways has proved to be a faster method of inducting rivers into the national system than Congressional nomination.

[22] 16 U.S.C. § 1273(b)(1974). A river or river segment may be classified as one particular river area along its entirety, or designated as any combinations of the three. Thus, varying regulations may apply to segments of the same river. *See, To Amend The Wild And Scenic Rivers Act: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess. 41 (1973).

[23] 16 U.S.C. § 1273(b)(1)(1974).

supervision help preserve the primitive nature of the river and surrounding land. No development, private or commercial, is permitted in these wild areas. In many instances regulations even prohibit the use of motorized water vehicles.[24] Maintenance of topographic integrity and sylvan setting is of primary importance in the wild river area.

In scenic river areas, natural setting is also emphasized to the greatest degree possible. Limited forms of development are allowed within the scenic river area,[25] but in order to preserve the aesthetic value of the waterway they must be minimally visible from the river. Water use controls are not as stringent as those found in the wild river area; motorboats are usually allowed, and in some instances hydroplanes may land on the waterway.[26] The scenic river area strives to blend limited forms of development with the pristine setting in the least obtrusive manner possible.[27]

Concern for the natural beauty, though still evident, is least prevalent in the recreational river area. Various types of preexisting development encumber the shores of these areas, and the waterway itself may have some impoundments.[28] The emphasis in this classification is primarily on providing vacation facilities for large numbers of people. Picnic areas, rest rooms, and other vacation aids exist within and on the outskirts of these areas.[29] Inevitably such conveniences detract from the wilderness character of the area. Consequently, some conservationists complain that the deemphasis of preservation concepts has resulted in the creation of over-crowded, poorly managed areas which bear little semblance to the unencumbered beauty sought to be protected.[30]

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[24] In Maine, the Allagash River (a state administered waterway in the national system) has restrictions on motor boats at certain points along the river. Laws, Rules and Regulations For The Allagash Wilderness Waterway (Maine, 1976). Similarly, no power boats are allowed on the Middle Salmon River, also a component of the national program. *To Amend The Wild And Scenic Rivers Act: Hearings Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 1st Sess. 36 (1973).

[25] 16 U.S.C. § 1274(b)(2)(1974).

[26] Allagash Wilderness Waterway Concept Plan, Maine Bureau of Parks and Recreation 14 (1973).

[27] For example, additions to a home, supervised timber cutting, or agricultural uses are all permitted in this area. However, large development projects such as condominiums or industrial facilities are strictly prohibited.

[28] 16 U.S.C. § 1273(b)(3)(1974).

[29] Conversation with Doug Shenkyr, Staff Member, Division of Land Management Planning, Forest Service, Washington, D.C. (February 6, 1978).

[30] Such conditions do not arise solely in the recreational area. The Allagash River, a wild river area, has been described by some as a "wilderness slum" due to its extensive use during peak vacation months. While by no means a "slum," the Allagash has experienced a marked

In brief, the three river area categories provide varying degrees of protection for rivers included in the national system. All regulations are geared toward preserving the beauty of the rivers and adjoining land by controlling the uses to which the lands may be subjected.

Of the 19 rivers presently included in the national system, wild rivers far exceed both scenic and recreational rivers.[31] The large wild river area classification demonstrates a Congressional belief that, at present, many of the nation's rivers require the strictest protection.[32] Unfortunately, when rivers become part of the national system the subsequent publicity and notoriety usually results in a marked increase in public use. This fact, coupled with the overall rise in public participation in water-related activities over the past few years makes strict protection of sylvan waterways very difficult. Garbage, noise, and a general deterioration of the river's natural state are all unavoidable products of overuse. In many river areas demand is so great that permits are required of travelers in order to minimize overcrowding and allow all to fully appreciate the wild and undeveloped nature of the waterway.[33] Moreover, as development pressures increase in the private sector, pressure to reduce wild river classification in favor of the more lenient scenic or recreational designation will undoubtedly mount proportionally on the administrative arena.[34]

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increase in use subsequent to its inclusion in the national system and must deal with such overcrowding. *See, Designation Of The Obed River Segment As A Wild And Scenic River: Hearings on H.R. 13067 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 2nd Sess. 21 (1976); *National Outdoor Recreation Programs And Policies: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 81 (1975).

[31] Of the 1622.6 miles currently within the rivers system, 681.5 miles are "wild," 452.7 "scenic," and 488.4 "recreational." Conversation with Robert Eastman, Chief of Division Resource Studies, Bureau of Outdoor Recreation, Washington, D.C. (February 8, 1978) (hereinafter cited as Eastman).

[32] The Act originally designated 274.65 miles as "wild," 267.60 "scenic," and 241.40 "recreational." This one to one ratio changed as many of the subsequent rivers were classified as "wild." This emphasis on wild rivers can be explained by the fact that rivers in the most natural state are given initial priority to prevent any destruction of their natural beauty. As a result, the newest additions to the system are primarily wild rivers. Over time the one to one balance should be restored as the most primitive rivers receive their much needed protection. *See, To Amend The Wild And Scenic Rivers Act: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 93rd Cong., 1st Sess. 41 (1973).

[33] *National Outdoor Recreation Programs And Policies: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 81 (1975).

[34] The Act does not expressly deal with the question of declassification, and consequently, federal agencies are doubtful that any right to declassify river areas exists. Eastman, *supra*

2. Acquisition of Lands

Government acquisition of privately owned land must be combined with river area classification to ensure effective control of land use within the area.[35] The Act recognizes this need and gives both the Secretary of the Interior and Secretary of Agriculture authority to acquire interests in land located within the boundaries of any designated component of the national system.[36] Initially, it was proposed that this authority be open-ended, limited only by the discretion of the Secretaries. However, strong criticism was leveled against this power of eminent domain. Many landowners viewed the legislation as a guise under which the government intended to condemn vast amounts of privately owned land.[37] Despite the fact that the government would pay for any lands condemned, landowners resented the "forced sale" element underlying the Act.[38]

In an attempt to appease private interests, Congress restricted acquisition powers granted by the Act. Presently, overall fee title acquisition cannot exceed "an average of 100 acres per mile on both sides of the river."[39] This includes both voluntary sale in fee and fee title resulting from eminent domain action. Lesser interests in land such as access easements, and other less-than-fee acquisitions face similar limitations.[40] The net result of these restrictions is the formation of a corridor, approximately one-quarter mile in width, along either side of the designated river. This boundary represents the parameters within which the government may purchase land

note 31. Such authority would have to come from Congress. However, even if river areas cannot be declassified, subsequent rivers may be designated only as scenic or recreational as a result of external pressures.

[35] The federal government must compensate for the taking of such interests in land pursuant to the U.S. Constitution. U.S. CONST. amend. V. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973); United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Sittenfeld v. Tobriner, 459 F.2d 1137 (D.C. Cir. 1973); United States v. Sowards, 370 F.2d 87 (1966); Walker v. United States, 64 F. Supp. 135 (Ct. Cl. 1946); Foss v. Maine Turnpike Authority, 309 A.2d 339 (Me. 1973).

[36] 16 U.S.C. § 1277(a)(1974).

[37] *Wild And Scenic Rivers: Hearings on S. 1092 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2nd Sess. 178-187 (1967).

[38] Because the tax base would be reduced as the federal government acquires private land, landowners also contended that they would face greater property taxes. *Id.*

[39] 16 U.S.C. § 1277(a)(1974). The Act is somewhat ambiguous with respect to this limitation because the section really only applies to the eight initial river components, and does not restrict acquisition along subsequent additions to the program. Federal agencies have, however, limited all land acquisition to one-quarter mile corridors on either side of the river. *Id.*

[40] *Id. See also Hells Canyon National Recreation Area: Hearings on H.R. 30 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 45 (1975).

and exercise its regulatory controls.

In addition to this corridor concept the Act sets forth two further acquisition limitations. First, if 50% or more of the entire acreage within a federally administered wild, scenic, or recreational river is owned by the United States, by the state or states in which it lies, or by political subdivisions of these states, neither Secretary may obtain fee title to any privately owned lands by way of condemnation.[41] Congress decided that 50% ownership, when combined with less-than-fee interests over the remaining half of the area provided adequate regulatory control over the river area. Second, condemnation cannot be exercised if the sought after land is located within any incorporated city, village, or borough which has in force a duly adopted, valid zoning ordinance which conforms to the purpose of the Act and is applicable to the river area.[42] Each of these acquisition limitations is aimed at minimizing cost, encouraging public participation, and reducing public opposition to the preservation system.

Consistent with these three objectives, the Act also provides certain acquisition incentives. The Secretaries are empowered to accept donations of land, funds, and other property for use in connection with the administration of the national system.[43] Also, landowners who donate interests in land receive tax benefits.[44] Further, an exchange program exists whereby private landowners may trade land situated within a river area for comparably priced, federally owned land located outside the area.[45] Although no figures are available on exactly how much land has been donated or exchanged, these incentives have not been overwhelmingly successful.[46] If Congress is truly committed to reducing costs, encouraging public participation, and reducing opposition to the acquisition aspects of the Act these incentives must be made more appealing.

While acquisition provisions are indeed important, they apply only to land surrounding the rivers. Comprehensive regulation of the river area requires additional protection of the waterway itself. The Act achieves this coverage by restricting water projects which may be undertaken along protected waterways.

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[41] 16 U.S.C. § 1277(b)(1974).
[42] 16 U.S.C. § 1277(c)(1974).
[43] 16 U.S.C. § 1277(f)(1974).
[44] 16 U.S.C. § 1285 (1974).
[45] 16 U.S.C. § 1277(d)(1974).
[46] See text at notes 24-25, *supra*.

3. Water Project Restrictions

To protect the free-flowing nature of environmentally significant rivers, the Act prohibits the Federal Power Commission (FPC) from licensing the construction of "any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act . . . on or directly affecting any river . . . designated in § 1274 as a component of the national wild and scenic rivers system."[47] This limitation permanently safeguards those rivers currently included in the rivers system. However, it does not extend to those waterways undergoing investigation for possible inclusion in the system at a later date. The 27 study rivers originally designated in 1968 have a shorter, ten year moratorium on any FPC licensing of construction which would impair the value of the area.[48] Significantly, this ten year moratorium provides protection for waterways during the study phase of the nomination process. Thus, no FPC authorized water projects may adversely affect these rivers before October, 1978, despite the fact that they are not, and may not become a part of the national system.[49]

This FPC prohibition prevents only direct interference with free-flowing waterways. It is not applicable to licensing development above or below a designated or potential river area which would not "invade or unnecessarily diminish the scenic, recreational, and fish and wildlife value present in the [wild, scenic, or recreational river] area."[50] Consequently, water projects are capable of coexisting with the goals of the Act as long as they do not adversely affect protected rivers or river segments.[51]

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[47] 16 U.S.C. § 1278(a)(Supp. 1977).

[48] 16 U.S.C. § 1278(b)(1) (Supp. 1977).

[49] Once the Secretary determines that a river should not be included in the national wild and scenic rivers system, the Federal Power Commission prohibition is lifted, even if the decision comes prior to the expiration of the moratorium. 16 U.S.C. § 1278(b)(i)(1974).

Thirty-one additional study rivers were nominated for possible inclusion in the system in 1975. Studies on these waterways are to be completed by October, 1979. The Act establishes an FPC ban:

> [d]uring the ten-year period following October 2, 1968 or for a three complete fiscal year period following any Act of Congress designating any river for potential addition to the national wild and scenic rivers system, whichever is later . . . *Provided,* That if any Act designating any river or rivers for potential addition to the national wild and scenic rivers system provides for a period of study or studies which exceeds such three complete fiscal year period the period provided for in such Act shall be substituted for the three complete fiscal year period. . . ."

16 U.S.C. §1278(b)(i)(Supp. 1977). In more succinct terms, the 1975 study rivers are protected for four years.

[50] 16 U.S.C. § 1278(a)(Supp. 1977).

[51] In some instances a water project may beneficially affect a waterway. For example, a

4. State Participation

State participation in the wild and scenic rivers system is critical to the effective preservation of waterways. Cooperation among federal, state, and local government is required to realize the comprehensive coverage intended by the legislation. Therefore, the Act attempts to give the states a prominent role in the development and administration of the wild and scenic rivers program. States may designate rivers for inclusion in the national system, participate in the study of rivers, and also administer components of the national system.[52]

III. Operation of the System

This brief summary of the Act sets forth the foundation upon which Congress launched its program to protect the fast disappearing river resources of the nation.[53] Review of the system's nine-year development and its current status will serve to provide an insight into the future viability of the legislation.

An examination of past performance under the Act reveals two potentially devastating shortcomings: substantial delays in the study and eventual inclusion of rivers into the program; and concommitantly, increased costs in operating and maintaining the rivers system. Effective application of the Act depends upon the resolution of these two basic defects.

A. Delays

A 1975 summary of the status of the wild and scenic rivers program presented by the Bureau of Outdoor Recreation (BOR)[54]

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reservoir located upstream from a river segment could reduce peak flood flows and maintain flows adequate to support recreational activities during periods of the year when the river might be deficient in water. In addition, small watershed projects and stockponds constructed in the headwaters area could improve water quality by retention of soil erosion with resultant reduction in sedimentation. *To Amend the Wild And Scenic Rivers Act: Hearings Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong., 1st. Sess. 23 (1973).

[52] Rivers may be designated for inclusion in the system by an act of a state legislature. 16 U.S.C. § 1273(a)(ii)(1974). States may partake in the study of rivers earmarked for inclusion in the national system. 16 U.S.C. § 1276(b)(1974). In addition, the Act expressly recommends cooperative efforts between state and local agencies to administer and maintain river areas. 16 U.S.C. § 1281(e)(1974). *See also* 16 U.S.C. §§ 1275(b), 1277(c), 1282, 1284 (1974).

[53] For a comprehensive review of the 1968 Act, *see* Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 Cornell L. Rev. 707 (1970); Doyle, *Rivers Wild and Pure: A Priceless Legacy*, 152 National Geographic Magazine 2 (1977).

[54] *Outdoor Recreation Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (1977).

showed that eleven rivers or river segments have been added to the national system since 1968, thereby increasing the total number of components to 19.[55] Of the 27 rivers initially identified for study by the Act, 18 were assigned to the Department of the Interior. The remaining nine studies were undertaken by the Department of Agriculture. By 1975 the Department of the Interior had completed seven of the 18 studies, the Department of Agriculture one of nine.[56] The remaining 19 studies were reportedly still on schedule, with all studies projected for completion by 1977, well in advance of the October 2, 1978 Congressional deadline.[57]

However, a subsequent status report in February, 1977 showed that 15 of the remaining 19 studies had not yet completed the "study phase" of the induction process.[58] These studies had either not been transmitted to the Office of Management and Budget (OMB) for final review, returned from OMB, or finalized in a BOR report to the President.[59] Three of these 15 rivers had not even been subject to the initial stage of the study process-a complete field study by the supervising agency.[60]

Though the river studies, at present, remain within and are still projected to be completed by the October, 1978 deadline, a marked backlog has arisen between 1975 and 1977. This trend strongly suggests that certain study rivers, originally designated for investigation as potential additions to the national system in 1968 will remain greatly unprotected for almost ten years after recognition of their potential value as wild, scenic or recreational rivers, primarily because land use controls cannot be applied.[61] This belies the sup-

[55] Of these eleven additions, seven rivers were chosen from the 1968 list of study rivers. The remaining rivers selected include two state nominated waterways, the Allagash in Maine, and the New in North Carolina, and two rivers nominated for study in 1975. *Id.*, at 23-30.

[56] *Housatonic River: Hearings on S.10 Before the Subcomm. on Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 22-23 (1975).

[57] "Our present schedule calls for completion of the studies of the rivers on the initial study list by April 1977. . . ." *Id.*, at 21 (letter from James G. Watt, Bureau of Outdoor Recreation).

[58] *Outdoor Recreation Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 25-27 (1977).

[59] *Id.* Completion of the study phase occurs when a river is removed from the list of potential additions, either by inclusion in the national system, or rejection.

[60] The study reports were not projected to be prepared for the Moyie River and Priest River until Fall 1977. The Youghiogneny River study report was not scheduled for transmittance to OMB until May, 1978. *Outdoor Recreational Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 25-27 (1977).

[61] All rivers are protected from FPC authorized water projects during this wait, but land

posed prophylactic intent of the Act.

Undoubtedly, delays create a hardship on the Act. Either studies will not be completed by the deadline date, thereby leaving the rivers open to FPC licensing and private land development, or agencies will undertake abbreviated field investigations to complete the studies on time. Any sacrifice of comprehensive field studies is not only a disservice to the Act, but also detracts from the efficacy of the overall program. If superficial studies are to be determinative of eligibility, environmental significance cannot remain the primary characteristic of the Act. As a result, the standards of the legislation will be compromised.

No one would deny that it is in the best interest of the rivers system to eliminate the delay problem. Thirty-one additional rivers have supplemented the study list since 1968,[62] making agency efficiency even more important. Numerous factors are responsible for delays and each must be dealt with before the problem can be resolved. Four distinct elements can be identified as part of the delay problem: 1) overly-long deadlines; 2) inadequate funding; 3) bureaucratic inefficiency; and 4) extended review procedures.

1. Overly-long Deadlines

The ten year study period allotted by Congress in 1968 for potential additions to the national system is a primary reason for delays.[63] Although this extended time period may have been necessary in the initial stages of the Act,[64] it can no longer be viewed as an acceptable time span within which the purposes of the legislation can be realized.

The study phase can be divided into five basic stages—actual

use controls cannot be implemented until land acquisitions are made. 16 U.S.C. § 1278 (1974).

[62] 16 U.S.C. § 1276 (Supp. 1977); Pub. L. No. 93-621, 88 Stat. 2094 (1974) added 29 rivers, Pub. L. No. 94-199, 89 Stat. 1117 (1975), added one river, and Pub. L. No. 94-486, 90 Stat. 2327 (1976) added one river. The Bureau of Outdoor Recreation has slated most of the studies for completion no later than June, 1979 despite the fact that the Congressional deadline allows until October, 1979. However, 13 of the 31 rivers were given no completion date, suggesting that the river studies may not be completed by the October, 1979 deadline despite Congressional mandate. *Outdoor Recreation Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 27-28 (1977).

[63] 16 U.S.C. § 1275(a)(1974) provides, "Such studies shall be completed and such reports shall be made to the Congress with respect to all [study] rivers . . . no later than October 2, 1978."

[64] Initiating a program of such a unique and extensive character naturally entails a significant amount of time clarifying roles, establishing responsibilities and generally meeting the varied demands of the program.

field study, compilation of the initial study report, 90-day review by interested agencies, subsequent review by OMB, and transmittance of a formal report to Congress. Total time for completion of all five stages should be much shorter than ten years. The extended deadline fosters agency procrastination which, in turn, inevitably leads to delays. This attitude was most prevalent in the actual field investigation of river areas where one critic noted that the "studies have taken three or four years when they should be able to wrap one up in 18 months."[65] Administering agencies simply have not viewed studies as top priority items until the deadline date is upon them.

A reduction of study deadlines to four years is not unreasonable and is certainly within the capabilities of all agencies involved.[66] Not only would rivers move more quickly into the national system, but agencies would be forced to become more efficient. This sentiment was reflected in the 1975 legislation adding 31 rivers to the list of potential wild, scenic, and recreational rivers which required all studies to be completed within four years.[67]

2. Inadequate Funding

Protracted deliberation is not the only factor responsible for delays. In part, the problem also concerns Congressional failure to furnish the funds necessary to conduct river studies. Many waterways have remained in the study phase for almost ten years because there was no money with which to fund investigative teams. In 1968, the Act had the support of a conservation-oriented Congress and Administration. Congress allocated funds for projected fee acquisitions of land, and river studies moved on the assumption that fee ownership would be the primary regulatory mechanism.[68] However, the subsequent Administration was less supportive of the program and reduced funding initially earmarked for acquisition and field studies. This funding problem, when combined with the past history of bureaucratic inefficiency, comprises the core of the delay dilemma.

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[65] New York Times, September 2, 1975, at 49, col. 1.

[66] Evidence of the speed with which a field study can be concluded was presented in 1972 when BOR completed investigation of 28 Alaskan rivers within a period of 16 months. *Our Natural Resources: The Choices Ahead,* 10 U.S. DEPT. OF THE INTERIOR YEARBOOK 120-122 (1974).

[67] 16 U.S.C. § 1276 (Supp. 1977).

[68] Eastman, *supra,* note 31.

3. Bureaucratic Inefficiency

During the ten year history of the wild and scenic rivers system there have been a number of rivers which have undergone two, and sometimes three studies before all necessary data has been collected. This not only requires added study time, but also necessitates more funds. When Congress moved to reduce the overall cost of implementing the system it requested that less expensive land control alternatives such as scenic easements and state zoning be considered in the river studies.[69] Accordingly, all completed studies had to be reinvestigated. Further, the National Environmental Policy Act,[70] passed in 1970, required environmental impact statements to be filed with study reports, again compelling study teams to return to the field and gather supplemental data.[71] Original estimates of a 24 month study time gradually expanded to 54 months as more and more investigation had to be redone. For each river study which must be reinvestigated, valuable time and money is wasted.

One possible solution to both the funding and bureaucratic problems can be found in another piece of federal legislation also designed to encourage preservation. The Wild and Scenic Rivers Act is patterned in many respects after the Wilderness Act,[72] an attempt by Congress in 1964 to protect various wilderness areas throughout the United States.[73] Both place a ten year deadline on river and wilderness studies. However, the Wilderness Act, unlike the waterways legislation, has strictly adhered to the study schedule. The underlying reason for this efficiency is the fact that the President is charged with recommending the designation of wilderness areas to Congress.[74] As deadlines draw near, attention, both public and political, focuses on the Executive. Presidential priorities include the public exhibition of administrative efficiency so the President pressures all agencies to complete the study on time. The agencies, as a result of Presidential scrutiny, are given a strong impetus to maximize study efficiency. Congress is also more inclined to advance funds

[69] *Id.*

[70] 42 U.S.C. §§ 4321 *et seq.* (1977).

[71] *See* 16 U.S.C. § 4332(c)(1977) which requires an environmental impact statement for all "major federal actions significantly affecting the quality of human development. . . ." Environmental impact statements, along with the litigation that often accompanies such a requirement, add substantially to the problem of delays. Taylor, *NEPA Pre-Emption Legislation: Decisionmaking Alternative for Crucial Federal Projects,* 6 ENV. AFF. 373 (1978).

[72] 16 U.S.C. §§ 1131 *et seq.* (1974).

[73] [1968] U.S. CODE CONG. & AD. NEWS 3822.

[74] 16 U.S.C. § 1132(b)(1974).

when a program receives Presidential priority. When the wilderness studies began to lag in the late 1960's, the problem was immediately singled out and the studies given higher priority by both the President and Congress. In his environmental message to Congress on February 8, 1970, the President firmly committed himself to meeting the 1974 deadline.[75]

A similar stance should be taken with regard to the studies undertaken pursuant to the Wild and Scenic Rivers Act. While a 1975 amendment redirected study river recommendations to the President, the effects of this move are still unclear.[76] The President now has the power to remove current delays by giving the program higher priority, thus encouraging Congress to release funds necessary to move study rivers into the national system as quickly as possible. In January, 1978, BOR was assimilated into a larger agency known as the Heritage, Conservation, and Recreation Service.[77] Responsibility for study rivers has been moved to the National Park Service (NPS), supposedly with increased priority.[78] Hopefully, this reorganization will provide the incentive needed to resolve the bureaucratic and funding dilemmas.

4. Review Procedures

The fourth factor affecting the speed with which study rivers become components of the national system is the number of federal agencies which must review the recommendations of the Secretary of Interior. Before final reports reach the President, the Secretary of the Army, Chairman of the Federal Power Commission, the head of any other affected federal agency, and, at times, the Governor of

[75] *To Amend The Wild And Scenic Rivers Act: Hearings Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs,* 93rd Cong., 1st Sess. 53 (1973). *See also Land and Water Conservation Fund Act Amendments: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 91st Cong., 2nd Sess. 55-83 (1970).

[76] 16 U.S.C. § 1275(a) (Supp. 1977) provides that "The President shall report to the Congress his recommendations and proposals with respect to [study rivers]." This provision does not give the President authority to reject rivers from the system, it merely focuses attention on the executive branch.

[77] Secretarial Order number 3017 issued by Secretary of the Interior on January 25, 1978. 43 Fed. Reg. 7482 (1978). President Carter successfully administered a similar state agency during his governorship of Georgia. The move was not a complete surprise, as reorganization plans were hinted at in the President's May 23, 1977 environmental message to Congress. 123 CONG. REC. 8363 (1977).

[78] While NPS may give higher priority to current study rivers, there is some suggestion that NPS oversight of the scenic rivers system would mean a deemphasis of state involvement in the national program. Conversation with Herbert Hartman, Director, Maine Bureau of Parks and Recreation (February 6, 1978).

the state involved must receive copies of the Department recommendations. These parties have three months to make comments or furnish additional recommendations.[79] Although, theoretically, this process is a laudible recognition of the diverse interests accompanying any river proposal, the practical result is a prolongation of the period during which an environmentally significant river remains unprotected. The actual value of the review procedure is questionable, and, in view of its delay potential, should be substantially shortened.

The function of the OMB adds to this extended review process. After multi-party examination of the Department reports and recommendations, OMB scrutinizes the information.[80] The purpose of this review is to ensure that all "policy concerns" have been adequately covered,[81] a goal which the 90-day review period supposedly achieved. This process in and of itself has been a primary contributor to delays. Noting the constant procrastination, one member of the House of Representatives remarked, "[H]ow do we justify OMB, which is always, it seems, withholding [study reports] beyond these [deadline] dates."[82]

This overlap of review between interested agencies and OMB is unnecessary and without justification. The three months allotted for agency examination, when combined with the eight months usually taken by OMB,[83] leaves the study process dormant for over one year.[84] Much of this procedure should be excised by shorter and more strictly enforced deadlines. It would not be impractical for a centralized agency such as OMB to conduct a comprehensive review within a period of 40-60 days. Failure to meet this deadline should result in an automatic adoption of the Department recommendation by the President. Error at this point, because of unattended policy

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[79] 16 U.S.C. §1275(b)(1974).

[80] Though the Act does not explicitly set forth this requirement it is a necessary step prior to Presidential presentation. *See, To Amend The Wild And Scenic Rivers Act: Hearings on S. 3788 Before the Subcomm. on the Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs,* 94th Cong., 2nd Sess. 27 (1976).

[81] *Id.*

[82] *Designation of the Missouri River Segment As A Wild And Scenic River: Hearings on S. 1506 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 2nd Sess. 16 (1976) (remarks by Keith Sebelius).

[83] OMB has, on occasion, taken up to two years to return study reports to the Department of the Interior. Eastman, *supra* note 31.

[84] Of the 15 studies not completed as of February, 1977, eight were in the hands of OMB. *Outdoor Recreation Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources,* 95th Cong., 1st Sess. 25-27 (1977).

considerations, is *de minimus* when compared to irreversible destruction of free-flowing waterways.

In short, changes must be undertaken to alleviate the delay problems experienced under the Act. If deadlines are not met FPC licensing might well undermine the character of any number of free-flowing rivers. More importantly, land acquisition cannot begin until a river or river segment becomes part of the national system.[85] As a result, regulatory controls lie dormant until the river is included in the program. Designation of a river for study as a potential addition to the national system does not prevent private landowners, owning land within a proposed river area, from exercising their property rights in derogation of the natural beauty of the river.[86] If landowners, as they have in the past, press ahead with destructive land development before a determination as to the environmental value of a river can be made, attempts to protect water resources can easily be thwarted.[87] This "legislation by chainsaw"[88] can only be remedied by a more efficient implementation process. The river must move as quickly as possible from the study phase to the national system.[89]

B. Increased Costs

The problem of spiralling costs accompanies implementation delays. Extended delays, along with other factors, have created a program which is more expensive than originally anticipated. The De-

[85] 16 U.S.C. § 1277(a) (1974). This section only authorizes land acquisition along components of the national system, and is silent regarding study rivers.

[86] In 1975, the United States Court of Appeals for the Ninth Circuit upheld the right of a lumber company to continue logging operations on its privately owned land despite the fact that this activity significantly diminished the wilderness characteristics of the area and effectively removed it from consideration for inclusion in the wilderness preservation system. Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975).

After weighing the equities of the situation the court denied plaintiff's prayer for injunctive relief. Defendant persuasively argued that removal of the timber was necessary, because of insect infestation, to salvage profits as well as protect against the spread of disease to neighboring national forest lands. *Id.* at 1090.

[87] Similar problems exist on the perimeter of the Redwood National Forest where lumber companies are clearcutting so extensively that some of the oldest trees in the world are endangered. *See,* H. REP. No. 95-106, 95th Cong., 1st Sess. (1977); *Forest Management And The Redwood National Park: Hearings Before a Subcomm. of the House Comm. on Government Operations,* 95th Cong., 1st Sess. (1977).

[88] *Alpine Lakes Management Act: Hearings on H.R. 3977 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 105-107 (1975).

[89] Not only are land acquisition powers withheld until river acceptance, but development plans—the administrative guidelines which dictate permissible land use within a river area—are similarly postponed.

partment of the Interior has experienced drastic increases in implementation and acquisition costs during the last decade. Originally the Department projected study costs to be approximately $50,000 per river.[90] Current estimates for study alone range anywhere from two to eight times this original amount.[91] Acquisition costs reflect an even greater increase. In 1968, Congress expected expenditures to total $19 million for acquisition of privately owned lands along the first eight rivers of the national system.[92] By 1974 an amendment to the Act had increased this figure to more than $37 million.[93] In subsequent years, few rivers have required appropriations of less than $4 million.[94]

At present the system cannot bear the tremendous financial burden created by study and acquisition needs. By March, 1975 $775 million in expenditures had been authorized to obtain federal recreation lands.[95] However, authorizations far exceed current funding levels, and it would take eight years to acquire all of these lands authorized for federal purchase.[96] In an attempt to cut down this lag, Congress passed Public Law 94-422[97] which increased, through 1980, the amount of federal dollars available for such acquisitions.[98] Addi-

[90] [1968] U.S. CODE CONG. & AD. NEWS 3809.

[91] *Housatonic River: Hearings on S. 10 Before the Subcomm. on the Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 28-29 (1975).

[92] Despite this projected figure, original authorization was only for $17 million. 16 U.S.C. § 1287 (1974).

[93] 16 U.S.C. §1287 (Supp. 1977).

[94] The Obed River in Tennessee was projected to cost $45 million; the Snake River area $10 million; the Lower St. Croix $19 million. *See, Designation of The Obed River Segment As A Wild And Scenic River: Hearings on H.R. 13067 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 2nd Sess. 30-36 (1976); *Hells Canyon National Recreation Area: Hearings on H.R. 30 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 2 (1975); *To Amend The Wild And Scenic Rivers System: Hearings on H. 3022 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs,* 93rd Cong., 2nd Sess. 546-549 (1974).

[95] *National Outdoor Recreation Programs And Policies: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 41 (1975).

[96] Simply because land acquisitions are authorized does not mean that the money is available for purchases. Consequently, there is often a marked lag between authorization and actual acquisition. *Id.*

[97] *Outdoor Recreation Briefing: Hearings Before the Subcomm. on National Parks and Recreation of the Senate Comm. on Energy and Natural Resources,* 95th Cong., 1st Sess. 4 (1977).

[98] Pub. L. No. 94-422, 90 Stat. 1313 (1976) increased the level of the land and water conservation fund to $600 million for fiscal year (FY) 1978, $750 million for FY 1979, and $900 million in FY 1980 and each subsequent year through 1989. *Id.* It should be noted that this fund applies to all federal, state, and local recreational lands, not just the wild and scenic

tional funding, however, should not be viewed as a solitary solution. Internal cost reduction mechanisms must be employed to keep expenditures at a minimum. Such devices would not only reduce the overall expense of maintaining the rivers system, but also would free a maximum amount of funds for acquisition purposes.

1. Cost Reduction Alternatives Found in the Act

a. Scenic Easements

One cost reduction alternative already incorporated in the Act deserves greater emphasis by those involved in administration of the program: the relatively innovative concept of the scenic easement.[99] Acquisition of this type of interest in land allows private ownership while providing government control over land development. Further, the cost of obtaining this type of easement should be less than the cost of fee acquisition, thereby reducing the overall price of implementing an efficient and comprehensive conservation plan within each river area. Moreover, use of the scenic easement minimizes the need to relocate landowners. Such an alternative, from the public relations standpoint is much more attractive than condemnation.

Despite the benefits offered by the scenic easement, the government has not used this device extensively. One possible reason for this was offered by an administrator in BOR, who noted that in some instances the scenic easement costs almost as much as fee title acquisition.[100] If fee interests cost the same as an easement, it is difficult to argue in favor of the lesser interest. Fortunately, this phenomenon is not found in all cases.[101] Yet even with its cost benefits, the easement is little used.

Another reason for minimal use of easements is that no incentive,

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rivers program. As of March, 1977 the fund had contributed more than $1.3 billion to state recreation projects. *Id.*

[99] 16 U.S.C. § 1277(b)(1970). A scenic easement is defined 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. . . .

16 U.S.C. § 1286(c)(Supp. 1977).

[100] *Alpine Lakes Area Management Act: Hearings on H.R. 3977 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 54 (1975).

[101] Some reasons for variations in the cost of an easement are: 1) attitude of landowners toward such interests in land, 2) purpose for which the easement will be used, and 3) location of the land. DEPARTMENT OF COMMUNITY AFFAIRS, COMMONWEALTH OF PENNSYLVANIA, EASEMENTS FOR RECREATION AND CONSERVATION (1977).

other than retention of land, exists for private landowners to grant or sell a less-than-fee interest. Encumbered by a scenic easement, the market value of the land is reduced.[102] In addition, landowners believe that government ownership of land causes a greater tax burden on property owners.[103] Such drawbacks may well be reflected in the inflated price of the easement. If this is the case, alternatives, such as tax benefits, should be considered to make the scenic easement more attractive to the landowner.[104]

Once landowner incentives are devised, the easement will be a valuable conservation tool. As its popularity increases, changes should be introduced in the nature of the easement to make it more comprehensive. First, the easement should be extended to include not only visual aspects of the river area, but noise, air, and odor infringements as well, since these factors also detract from the beauty of the river and adjoining land.[105] Any condition which substantially alters the character of the river should be prohibited. Second, the 100 acre per mile limitation on land acquisition should be expanded to accomodate those situations where extension of the river corridor is warranted. Indeed, proponents of expansion have recommended wider boundaries on the Missouri River, and on most of the Alaskan rivers proposed for inclusion in the national system.[106]

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[102] When development rights are forfeited, subsequent buyers will not be overly anxious to pay full market value for encumbered property. R.L. BRENNEMAN, SHOULD EASEMENTS BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? (1975) (National Park Service Study).

[103] Because federally owned property is not taxed, federal acquisition arguably increases the tax burden on local communities. The burden, if it does indeed exist, is less than that created by fee acquisition. The entire argument lessens in importance when one realizes that in rural areas, property values are traditionally under-estimated. Consequently, acquisition of an easement has little effect on the assessed value of property. Sax, *Takings, Private Property, and Public Rights,* 81 YALE L. J. 149 (1971); U.S. DEPARTMENT OF AGRICULTURE, CONSERVATION EASEMENTS (1976).

[104] Certain tax benefits are provided for the contribution of easements. *See* I.R.C. §§ 170, 501(c). For a general discussion of scenic easements, *see* NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE AND VALUATION PROBLEMS AND PROCEDURES (1968); Note, *Progress And Problems In Wisconsin's Scenic And Conservation Program,* 1965 WISC. L. REV. 352 (1965); Jordahl, *Conservation And Scenic Easements: An Experience Resume,* 39 LAND ECONOMICS No.4 (1963).

[105] The Redwood National Forest is subject to noise pollution by chainsaws from nearby logging operations. Similar problems might well be encountered along wild, scenic, or recreational rivers. H.R. REP. No. 95-106, 95th Cong., 1st Sess. 13 (1977).

[106] *Hells Canyon National Recreation Area: Hearings on H.R. 30 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 38-45 (1975).

b. Exchange Program

A second cost reduction mechanism under the Act is the exchange of non-federal property for federally owned land.[107] However, the exchange process itself is not particularly popular with landowners primarily because few truly equal exchange situations exist. Most landowners want to retain their land for various intangible reasons that are impossible to compensate. As a result, private landowners have not exhibited any marked willingness to participate in the exchange program.[108] To encourage more exchanges, consideration should be given to making the procedure more attractive.[109]

c. Tax Incentives for Cost-Reduction

Tax incentives are potentially the most efficient cost reduction mechanism available to the government. Variations in tax treatment directly affect the landowner and can easily be manipulated by Congress to meet the regulatory needs of any river area. The Act provides certain tax benefits for the contribution of easements, but does not foster a tax policy designed to encourage continuing conservation awareness.[110]

The difficulty in formulating a tax treatment for conservation awareness is that such a policy necessarily encompasses incentives for non-use. The goal would be to encourage the nondevelopment of certain land for the benefit of wilderness preservation. This approach, similar to that used by the Department of Agriculture to deter farmers from overplanting certain crops, is potentially expensive and unpopular. Convincing the public that payment to landowners who do nothing is more economical than outright government purchase of land would be a major obstacle.

A tax disincentive, forcing those who develop land to pay a greater price, might be more effective than subsidies for non-use. A tax

[107] 16 U.S.C. § 1277(d)(1974). Since the federal government owns roughly 33 percent of the nation's land area, exchange opportunities are abundant. *Wild And Scenic Rivers: Hearings on S. 1092 Before the Senate Comm. on Interior and Insular Affairs,* 90th Cong., 1st Sess. 180 (1967) (remarks by Dr. John A. Wettington Jr.).

[108] *See Alpine Lakes Area Management Act: Hearings on H.R. 3977 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs,* 94th Cong., 1st Sess. 59 (1975).

[109] Though no proposals have been made to alter the present exchange program, the government might consider taking a slight loss on the transfer of land to encourage landowners to use the plan.

[110] 16 U.S.C. § 1285 (1974). The tax provision in the Act only provides a deduction for charitable gifts and does nothing to generate any continued conservation awareness. *Id.*

proposal originally introduced in Congress to encourage preservation of coastal lands,[111] could be applied effectively to the scenic rivers system. This proposed package would permit only straightline depreciation on private improvements in coastal areas; require any gain on the sale of such improvements to be treated as ordinary income rather than capital gain; disallow deductions for draining, dredging, or filling estuary areas; and provide that deductions for interest and taxes paid on improvements could not exceed income therefrom.[112]

Ironically, this proposal's best feature is also its weak point. The tax stance will surely deter large developers, those interested only in making profits. It is doubtful, however, that these disincentives would discourage private landowners looking only to make additions to a house or barn, primarily because such individuals are for the most part unaffected by such tax treatment. From one perspective, a single barn is just as damaging to the river area as extensive strip mining.[113] Despite this shortcoming, it would certainly be feasible to construct an effective tax package for the wild and scenic rivers system.

d. State Participation

Congress recognizes the cost reduction potential of cooperative programs between state and federal agencies, and encourages such relationships throughout the legislation.[114] The Act implicitly acknowledges the value of zoning ordinances as a primary cost-cutting mechanism by prohibiting condemnation of land subject to a state or local zoning ordinance which is consistent with the purposes of the Act.[115] Because the United States Constitution does not authorize zoning,[116] it cannot be used as an environmental tool at the federal level. However, zoning as a cost reduction mechanism is particularly useful at the state level. Such regulation falls within the

[111] *National Outdoor Recreation Programs and Policies: Hearings Before the Subcomm. on National Parks And Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 34 (1975).

[112] *Id.*

[113] In practical terms the large scale developer represents the primary threat to river areas. However, construction of a single building could, at times, be sufficient to remove a river from consideration as a wild river. *See* 16 U.S.C. § 1273(b)(1)(1974).

[114] *Supra*, note 41.

[115] 16 U.S.C. § 1277(c) (1974).

[116] The U.S. Constitution does not provide zoning authority for federal agencies. Also, the Fifth Amendment requires just compensation for the taking of any private property rights. United States v. Reynolds, 397 U.S. 14, 15 (1970); United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 282 (1943).

police power of the state and requires no compensation.[117] Maine has used zoning restrictions along the Allagash River with satisfactory results.[118] Other states have also begun to zone, and the federal agencies administering the wild and scenic rivers system are encouraging the continuation of this practice.

Even more beneficial than state zoning applied in conjunction with federal administration of river areas is the implementation of independent, self-sufficient state waterway programs. The large number of mini-wild and scenic rivers systems which have flourished during the 1970's evidence the willingness of states to support federal conservation efforts. As of March, 1975, approximately 19 states had established state scenic rivers systems. An additional five states had created scenic rivers programs.[119] The emergence of state rivers systems makes the prognosis for waterway preservation much more optimistic.

IV. State Wild and Scenic Rivers Systems

The overall effectiveness of the state systems varies greatly. In many instances, state legislation lacks effective land use controls, sufficient funds, and suffers from administrative ambiguities. For example, federal funds are available to states on a matching basis for use toward state waterway systems. Maine, however, has never generated sufficient funds to match its total allowable federal allotment. Consequently, the state receives federal support but does not exhaust its available federal resources. Thus, comprehensive regulation of the existing state system and expansion to include other qualified waterways is very difficult.[120]

The Kentucky Wild and Scenic Rivers System[121] is plagued by both administrative inadequacies and fiscal deficiencies. Rules have not yet been promulgated which clearly delineate the corridors to be regulated on either side of protected rivers. The Kentucky Supreme Court held, in *Commonwealth v. Stevens*,[122] that until river

[117] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971). *See also* Rubin, *Architecture, Aesthetic Zoning And The First Amendment*, 28 Stanford L. Rev. 179 (1975).

[118] Allagash Wilderness Concept Plan, Maine Bureau of Parks and Recreation (November 1973).

[119] *National Outdoor Recreation Programs and Policies: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 82 (1975).

[120] Conversation with Herbert Hartman, Director, Maine Bureau of Parks and Recreation (February 6, 1978).

[121] Ky. Rev. Stat. §§ 146.200-146.350 (Supp. 1976).

[122] 539 S.W.2d 303 (Ky. 1976).

areas are designated, no violation of the wild and scenic river statute can occur. Consequently, the State cannot effectively control land use. Compounding this problem is the fact that large amounts of coal deposits lie within proposed river areas. Once boundaries are established, reserve mineral rights would be "taken" by the State,[123] and compensation of millions of dollars would be required.[124] As a result of this financial roadblock Kentucky cannot implement strict administrative guidelines to protect its wild and scenic rivers.

In contrast, a number of states have passed effective waterway legislation whose contribution to preserving valuable water resources is exceptional.[125] Such programs should be models for future state conservation planning. A paradigm of excellent state legislation is the Oregon "Scenic Waterways" Act.[126]

A. The Oregon Act

The policy of the Oregon legislation parallels that of the federal Act.[127] The State Department of Transportation, along with the Board of Forestry, Department of Agriculture, and Water Policy Review Board, are in charge of adopting management plans and principles that will protect and enhance the aesthetic value of the waterways.[128] This includes regulations which bar commercial building, outdoor advertising visible from the waterway, parallel roads, railroads, or other utilities. Further, the Act expressly provides for pollution control, applicable to all owners of land adjacent to scenic waterways.[129]

Implementation of the program is well detailed by the legislation and is further buttressed by comprehensive administrative rules.[130] Agencies are given specific, clearly delineated duties which mini-

[123] KY. REV. STAT. § 146.290(3)(Supp. 1976) prohibits mining within protected wild and scenic river areas.

[124] Conversation with Allan Harrington, Office of General Counsel, State of Kentucky (February 9, 1978). The statute clearly states, "Nothing in KRS 146.200 to 146.350 shall be construed to deprive a landowner of his property or any interest or right therein without just compensation." KY. REV. STAT. § 146.280 (Supp. 1976).

[125] For a list of states which have instituted wild and scenic rivers programs *see National Outdoor Recreation Programs and Policies: Hearings Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 82 (1975).

[126] OR. REV. STAT. §§ 390.805-390.925 (1971).

[127] *Id.* § 390.815. Both the national and state acts seek to protect the outstanding scenic, fish, wildlife, geological, botanical, historical, archeological, and outdoor recreation values for the benefit of the public. 16 U.S.C. § 1271 (1970); OR. REV. STAT. § 390.815 (1971).

[128] OR. REV. STAT. § 390.845(2)(1971).

[129] *Id.* § 390.345(2)(a)-(c) (1971).

[130] Oregon Administrative Rules, c.734, §§ 50-005—50-040 (1971).

mize confusion, misunderstanding, and overlap within the multi-agency structure of the system. Expansion of the system is encouraged, and the Department of Transportation maintains a continuing study for potential additions to the program.[131] While the implementation aspects of the system are clearly defined and well organized, the real strength of the Oregon statute lies in its regulatory provisions regarding adjacent land use along the scenic waterways.

Unlike the national system, Oregon does not immediately obtain a right to acquire lands adjacent to the waterways included in the state system. Instead, the state gives private landowners unfettered use of their property so long as they do not go beyond the restrictions set by the planning and development regulations. Before an owner may develop land in violation of the statute, notice must be given to the Department of Transportation. This notice must provide a detailed description of the proposed use, and be submitted at least one year in advance of such use.

Upon receipt of the notice, the Oregon Department of Transportation makes a determination as to whether the proposal would substantially impair the scenic beauty of the waterway. If such a determination is made, the Department notifies the landowner that no steps may be taken to carry out the proposal until one year after the original notice was given. During this year long moratorium, the Department and owner enter into negotiations with hopes of reaching some agreeable alternative or modification to proposed development plans.[132] Three months after negotiations have begun, either the Department or landowner may give written notice that negotiations are terminated without agreement. Nine months after notice of termination the land may be developed as originally planned.[133]

However, at any time after the year long hiatus, in the absence of an agreement between the parties, the Department, with the concurrence of the Water Review Board, may institute condemnation proceedings and acquire the land in question.[134] Condemnation proceedings can also be undertaken where violation of the administrative rules occurs, or when the one-year notice is not given to the Department.[135] This, in effect, nullifies any chance for development by the landowner which is not consistent with the rivers system.

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[131] OR. REV. STAT. § 390.855 (1971).

[132] *Id.* §§ 390.845(3)(6), (3)(7).

[133] If the two parties *do* reach an agreement during this time, it is terminable on at least one year notice by the Department or landowner. OR. REV. STAT. §390.845(5) (1971).

[134] OR. REV. STAT. § 390.845(6)(1971). Scenic easements, however, cannot be acquired by condemnation. *Id.* § 390.845(7) (1971).

[135] *Id.* § 390.845(6)(a)-(c).

This acquisition plan has three distinctive features. First, it automatically imposes a year long moratorium on any proposed development within the system, enabling the State to predict where land regulation will have to be directed. Also, this wait allows the State to accumulate sufficient funds to purchase the endangered land. Third, it encourages cooperative interplay between state conservation agencies and private landowners. Acquisition costs are greatly reduced, and the administering agency continues to control land use. In effect, the burden of protecting the scenic value of the river is shifted to the private sector. Since condemnation is not a popular mechanism to save valuable waterways, such cooperation could only promote positive relations between private owners and environmentalists.

Challenges to the constitutionality of the Oregon statute have been launched, particularly with regard to the state's right to control land use along scenic rivers.[136] The Oregon courts have not only upheld the statute in its entirety but have narrowly construed the concept of "taking" as defined in the State Constitution, thereby indicating that the state may so extend its regulatory power without violating the constitutional rights of private landowners. Before reviewing the impact of one of these decisions, it must be noted that Oregon is an environmentally progressive state whose conservation-minded legislation is supported by the courts. Such judicial support cannot be expected in all states.

In *Scott v. State,*[137] the Oregon Appellate Court rendered its most expansive interpretation of the Scenic Waterways Act. In that case, a resident of Oregon was originally granted permission to build on private land within the river area, provided construction was to begin within one year and all exterior construction finalized within six months thereafter. The landowner brought suit against the State claiming that these restrictions constituted a scenic easement under the state Act and required compensation.

Initially, the court distinguished the waterways act from the regulations promulgated under the Oregon Administrative Rules.[138] Because the State did not automatically acquire an interest in lands adjacent to protected waterways, the court concluded that landown-

[136] For judicial interpretation of the constitutionality of the Oregon regulatory scheme, *see* Scott v. State, 23 Or. App. 99, 541 P.2d 516 (1975); State Highway Comm. v. Chapparel Recreation Assoc., 13 Or. App. 346, 510 P.2d 352 (1973).

[137] 23 Or. App. 99, 541 P.2d 516 (1975).

[138] *Id.* at 105, 541 P.2d at 519. This distinction was made to emphasize the fact that the State did not acquire an interest in related adjacent land merely by the adoption of the Act.

ers were not denied full use of their property. If no developments were ever proposed on the land, the State would never place any restrictions on private owners. Additionally, since the owner could use the land in any desired manner after a one year period, it was concluded that no scenic easement had been acquired.[139] On this basis, the claim of invalid taking was distinguished from the acceptable exercise of police power. Using an analogy to zoning ordinances, the court reasoned that the power to limit use of land through a one year notice requirement was within the police power of the state.[140]

The court in *Scott* emphasized the regulatory provisions accompanying the state Act rather than the condemnation aspects of the legislation and noted that its restrictions were reasonable in light of the objectives sought by the State.[141] Unquestionably, compensation must be provided when condemnation proceedings are instituted.[142] However, Oregon courts refused to characterize the regulations as an unjust taking and allowed State control of land use for a one year period without requiring purchase of an interest in the affected land. The federal government might consider incorporating the Oregon "hearing process" to alleviate the financial burdens inherent in the rivers system. Granted, such a process is closely related to zoning, a power not within the domain of the federal government, but temporary restraint is not zoning *per se* and should at least be evaluated as a cost reduction device for the federal wild and scenic rivers system.[143]

The Oregon Act epitomizes the delicate balance which must be struck between private property interests and environmental concerns. Other states wishing to establish similar systems should model their legislation after the Oregon program.

The federal government must also weigh these countervailing interests. Unfortunately, however, the federal wild and scenic rivers system has not fared as well in the balancing of private and environ-

[139] *Id.* at 109-110, 541 P.2d at 521-22.

[140] *See* Scott v. State, 23 Or. App. 99, 107, 541 P.2d 516, 520 (1975). Zoning is not contemplated under the national act except under § 1277(c), where reference is made to state zoning ordinances.

[141] Further, the court held that aesthetic values alone were sufficient to warrant exercise of police powers. *Id.* at 108. *See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Confederacion de la Raza Unida v. City of Morgan Hall, 2 ERC 1420 (N.D. Cal. 1971).

[142] ORE. CONST. art. 1, § 18 states: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation. . . ."

[143] While the Oregon system protects only those rivers which are included in the system, the federal program might move to protect study rivers. This would not resolve delay problems but would certainly decrease the importance of delays by allowing the administering agency to focus in on areas subject to immediate development.

mental interests. On a number of occasions waterways have been inducted into the federal system just steps ahead of development plans. The major factor underlying the inclusion of Montana's Flathead River in the scenic rivers program was a proposed strip-mining operation by a Canadian mining firm which would have detrimentally affected a branch of the waterway. The State, while interested in preserving the beauty of the River, was also seeking to "better the bargaining position of the state of Montana and the U.S. State Department,"[144] by placing the waterway under the protection of the federal government.[145] Similarly, the Snake River in Oregon and Idaho was backed for inclusion in the national system amidst Federal Power Commission hearings on a major dam project to be constructed on the River. Its eventual inclusion in the waterways system led to the deauthorization of the Asotin Dam[146] and prohibited future water projects along a 101 mile stretch of the Snake River.[147]

While no claims were lodged against the United States as a result of these actions, federal agencies came very close to "taking" private property interests from the developers who had prepared to build on the rivers. This is not to say that the Wild and Scenic Rivers Act is being misused. On the contrary, the Secretaries are specifically ordered to "give priority to those rivers with respect to which there is the greatest likelihood of developments, which, if undertaken, would render the rivers unsuitable for inclusion in the national wild and scenic rivers system."[148] However, the priority mandate must not be mistaken as a directive to undermine private property interests. It is this issue which came to the fore in the New River controversy, a dispute involving the largest public utility in the nation, American Electric Power Corporation, the State of North Carolina, and the federal government.

V. THE NEW RIVER CONTROVERSY

Presently, American Electric is suing the United States in the United States Court of Claims, alleging that the federal government

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

[145] *Id.*

[146] 16 U.S.C. § 1274(a)(Supp. 1977).

[147] *See Hells Canyon National Recreation Area: Hearings on H.R. 30 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975); H. REP. No. 94-607, S. REP. No. 94-153, 94th Cong., 1st Sess. (1975); N.Y. Times, August 30, 1974, at 14, col.5.

[148] 16 U.S.C. § 1275(a) (1970).

is liable for voiding an FPC license issued to the corporation in January, 1975.[149] The New River controversy is important for three reasons. First and foremost, the resolution of the problems presented in this dispute will define the limits of the Act in relation to private property interests. More specifically, it will clearly delineate when the federal government will have to compensate private landowners for interfering with development plans by including a river in the national system. Second, an award of damages, particularly a large award, will have an adverse financial effect on an already hardpressed program. Finally, a decision against the federal government would open the floodgates for additional litigation by other parties who feel similarly aggrieved. Even if these other claims do not prevail they would nonetheless undermine the stability of the rivers system by causing delays at all levels of the program, and again, increasing financial burdens. For these three reasons, the legal issues surrounding the dispute warrant further examination.

The New River, flowing primarily through North Carolina, West Virginia, and Virginia, is one of the oldest rivers in North America. As part of the preglacial Teays River System, the river channel itself is estimated by geologists to be one of the oldest in the western hemisphere.[150] Many archeological and scenic wonders lie within the river bed and along adjacent lands. Also, several rare species of wildlife can be found within this area.[151] Despite these qualities, the New River was not included in the original Wild and Scenic Rivers Act.[152] No objections were raised by North Carolina, West Virginia, or Virginia regarding its absence. In fact, it was not until years after a hydroelectric project was proposed on the New River that North Carolina considered the resource important enough to be protected by the national system.

In 1962 the Appalachian Power Company (APC), a subsidiary of the American Electric Power Corporation, sought and received per-

[149] Appalachian Power Co. v. United States, No. 6278 (Ct. Cl., filed Feb. 14, 1978).

[150] [1976] U.S. CODE CONG. & AD. NEWS 2166-2168.

[151] *Id.*

[152] Of the more than 650 rivers originally studied by the Department of the Interior for possible nomination in the initial rivers system, the New River was not even designated as a study river. *Designation Of The New River Segment As A Component Of The Wild And Scenic Rivers System: Hearings on H.R. 13372 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 94th Cong., 2nd Sess. 95 (1976) (remarks by A. Joseph Dowd). North Carolina did, however, nominate the river in 1969 for inclusion in its proposed state rivers system. Conversation with Robert L. Buckner, North Carolina Department of Natural Resources and Community Development (March 9, 1978) (hereinafter cited as Buckner).

mission from the FPC to study the New River as a potential site for a hydroelectric dam. In 1965, on the basis of this study, APC applied to the FPC for a license to build a dam, the Blue Ridge Project, on the New River.[153]

Hearings on the application began in May, 1967 and continued for two years. In October, 1969, the Administrative Law Judge rendered a decision recommending the issuance of the license.[154] Both North Carolina and Virginia, the two states principally affected by the proposed dam, generally supported the action but objected to one aspect of the plan; water level in the reservoir, at certain times of the year, would be subject to drawdowns[155] of up to twelve feet.[156] These objections led the FPC to order further administrative hearings. The judge issued a "Supplemental Initial Decision" recommending limitation of drawdowns to ten feet, and reduction of periodic water releases for downstream water pollution dilution. Again, North Carolina and Virginia objected and were granted permission to argue before the FPC regarding the acceptability of the supplemental decision.[157]

By this time, North Carolina had withdrawn its public support from the proposed project. To halt the dam proposal, the state enacted legislation supporting the New River for inclusion in the national wild and scenic rivers system.[158] Nonetheless, in January, 1974, the Administrative Law Judge recommended issuance of a license to APC. However, the effective date of the license was postponed in light of the pending legislation in North Carolina until January 2, 1975.[159] If Congress by that date had not acted to protect the waterway, the license was to become automatically effective.

In addition to its legislative action, North Carolina petitioned the United States Court of Appeals in the District of Columbia to review

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[153] Appalachian Power Co., Project No.2317, 29 FPC 445 (1963).

[154] "[T]he modified Blue Ridge Project represents the maximum utilization of the applicable reach of the New River sub-basin above Galax, Virginia with optimum project benefits . . . . No alternative site or source would provide the needed power more economically." Appalachian Power Co., Project No.2317, 51 FPC 1906, 1966-1967 (1974).

[155] "Drawdowns" are reduction in the water level of the basin above the pumped-storage project. The hydroelectric project generates power by releasing large amounts of water from the storage basin thereby creating a man-made waterfall. This process enables the power plant to supply tremendous amounts of electricity in a very short time. However, until water is pumped back into the basin the water level remains low.

[156] Both states objected to drawdowns of up to 12 feet because it would render the reservoir virtually useless for recreational purposes due to the ring of sludge left around its perimeter.

[157] North Carolina v. FPC, 533 F.2d 702, 705-707 (D.C. Cir. 1976).

[158] N.C. GEN. STAT. §§ 113A-33—113A-42(1977).

[159] 51 FPC 1906, 1907 (1974).

the order of the FPC issuing the license to APC.[160] The State contended, *inter alia*, that the FPC was prohibited by the Wild and Scenic Rivers Act from licensing a water project on the New River while recommendations from the Governor of North Carolina were pending before the Secretary of the Interior.[161] In overriding this claim, the court narrowly construed § 1278(b) (the FPC licensing restriction) of the Act to apply only to those rivers originally included in the system as components or as study rivers. Supplemental rivers, those added after October 2, 1968, were not accorded § 1278(b) protection until they became components of the waterways system. The Court stated,

> The New River is not one of those designated by Congress in 16 USC § 1274 as a component of the wild and scenic rivers system. That section offers no comfort to the petitioners. Moreover, the New River is not designated by 16 USC § 1276(a) as a potential addition to the system. Since in our view § 1278(b) applies to only those rivers designated by section 1276(a) it follows that section 1278(b) does not prohibit the licensing of the New River project.[162]

Congress, however, was not content to see the Act so limited. To counter the court decision, bills were proposed in both the House and Senate recognizing the 26.5 mile segment of the New River as part of the wild and scenic rivers system.[163] Both amendments specifically prohibited any water projects which would adversely affect the river segment. H.R. 13372 was passed in June, 1976 and §1278(a) of the Act now includes the following caveat:

> Any license heretofore issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 1273 of this title and no project or undertaking so licensed shall be permitted to invade, innundate or otherwise adversely affect such river segment.[164]

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[160] North Carolina v. FPC, 533 F.2d 702, 705-707 (D.C. Cir. 1976).

[161] *Id.*, at 708.

[162] *Id.*, at 709. In support of this position the court noted that the legislative history of the Act strongly suggested that rivers not included in the original Act received no protection against water projects until they became part of the national system. *Id.* at 709 n.2 citing H.R. REP. No. 1623, 90th Cong., 2nd Sess. 8 (1968). The court did modify the license to require the FPC to research, excavate, and salvage all significant archaeological areas to be affected by the proposed project.

[163] H.R. 13372, 94th Cong., 2nd Sess. (1976); S. 158, 94th Cong., 2nd Sess. (1976). *See* 122 CONG. REC. H8607 (daily ed. Aug. 10, 1976); 122 CONG. REC. S14968 (daily ed. Aug. 30, 1976).

[164] 16 U.S.C. § 1278(a) (Supp. 1977).

North Carolina, after over 11 years of utilizing all possible avenues, had finally put the Blue Ridge Project to rest.[165]

Two legal issues initially surrounded the 1976 amendment. The first, whether Congress had the right to vacate a license properly granted by the FPC, was resolved by the United States Supreme Court. The second and more critical question, whether APC is entitled to compensation under the Fifth Amendment for nullification of the license, remains unanswered, and forms the basis for the present suit.

A. The Right of Congress to Void the FPC License

The legislative action which brought forth the 1976 amendment to the wild and scenic waterways system is quite rare. Seldom has Congress taken the initiative to void specific acts of an administrative agency within the government. Such legislation raised questions of improper infringement upon the powers of the FPC. This question was resolved by both the Supreme Court of the United States and the United States Court of Appeals.

Subsequent to the Court of Appeals decision upholding the FPC license, North Carolina sought a writ of certiorari from the Supreme Court.[166] Pending resolution of this petition, Congress passed Pub. L. No. 94-407,[167] thereby nullifying the Blue Ridge license. On October 18, 1976, after enactment of the amendment, the Supreme Court granted North Carolina's petition for certiorari, vacated the judgment below, and remanded the case to the Court of Appeals for further consideration in light of the September, 1976 amendment.[168] The Court of Appeals in a *per curiam* order, held the case moot and dismissed the petition for review.[169]

Unquestionably, Congress can enact legislation which supercedes an agency determination. Both the Supreme Court and Court of Appeals implicitly recognized this power in upholding the 1976 amendment.[170] Two longstanding principles provide the basis for

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[165] Currently, the New River is subject to management under the North Carolina Park Service. A master regulatory plan has been developed and land acquisition is underway. Several additional rivers are undergoing study for possible inclusion in the state system. Buckner, *supra* note 152.

[166] North Carolina v. FPC, ___ U.S. ___, 97 S.Ct. 250 (1976).

[167] Act of September 11, 1976, 90 Stat. 1238 (amending 16 U.S.C. § 1278(b)(1970)).

[168] North Carolina v. FPC, ___ U.S. ___, 97 S.Ct. 250 (1976).

[169] North Carolina v. FPC, unpublished opinion of the Court of Appeals, District of Columbia, No.74-1941 (Jan. 4, 1977).

[170] Both courts handed down summary decisions with no discussion of the legal issues involved. Neither the United States Supreme Court nor the Court of Appeals specifically addressed the constitutionality of the 1976 amendment.

these decisions. First, the commerce clause grants Congress regulatory authority over all navigable waters of the nation;[171] and second, Congress has the authority to alter the powers of an administrative agency.[172]

B. The License: An Unjust Taking?

Despite the fact that the 1976 amendment was upheld in the courts, the most critical legal question remains unresolved: whether the license constitutes a vested property right entitling APC to just compensation.

In February, 1978, American Electric, the parent corporation of APC, filed a complaint in the United States Court of Claims alleging damages as a result of the 1976 amendment.[173] The gravamen of the complaint was that the FPC license had created a vested property right protected by the Fifth Amendment. Alternatively, American Electric alleged breach of contract, based on the "agreement" inherent in the issuance of a license under the Federal Power Act.[174]

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[171] The Commerce Clause, U.S. CONST. art. I, §9, cl. 3, grants Congress the power to regulate all navigable waters of the United States. The United States Supreme Court has stated that this power is one of the primary powers of national government, and that Congressional dominance over navigable waterways is supreme. United States v. Grand River Dam Authority, 363 U.S. 229 (1960); Monongahela Navigation Co. v. United States, 148 U.S. 312, 335 (1893); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1887); Miller v. New York, 109 U.S. 385, 392 (1883); Bridge Company v. United States, 105 U.S. 470, 482 (1881); County of Mobile v. Kimball, 102 U.S. 691, 696 (1880).

The fact that the amendment is aimed at protecting the wild, scenic, and recreational value of the river does not detract from the commerce power of Congress. Courts have long acknowledged that "commerce" extends beyond mere commercial navigation on rivers, and includes such uses as boating, swimming, fishing, sailing and other water related activities. Consequently, the amendment protecting the New River is a legitimate exercise of Congressional power under the Commerce Clause. *See* Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (1936); Lamprey v. State, 52 Minn. 181, 53 N.W. 1129 (1893).

In a controversy similar to the New River question, the United States Supreme Court, in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), held that an act of Congress, declaring certain structures on the Ohio River not to be obstructions to navigation effectively overruled a previous court ruling which declared the bridges to be obstructions. Similarly, despite the fact that an FPC license had already issued, Congress was not prevented from protecting the New River.

[172] Congress has frequently delegated regulatory responsibility to administrative agencies, but never has this allocation of authority been viewed as irretrievable. In *Arizona v. California*, 373 U.S. 546 (1963), the United States Supreme Court held that the Secretary of the Interior was entitled to exercise the discretionary powers accorded him by Congress to resolve water rights disputes, but that Congress, if it wished, could reduce or enlarge the Secretary's power. Analogously, the 1976 amendment merely retrieves certain powers previously delegated to the FPC.

[173] Conversation with A. Joseph Dowd, Senior Vice-President and General Counsel, American Electric Power Corp., New York, New York (February 12, 1978).

[174] Plaintiff's Complaint at 8, Appalachian Power Company v. United States, ___ Ct. Cl. ___ (1978).

1. The License as Property

Issuance of the FPC license to APC conferred the right to build certain structures on the New River. In general, licenses are not recognized by courts as "property."[175] Rather, they are characterized as a personal privilege entitling the licensee to do something that he lacks authority to undertake without the license. Thus, no vested right arises merely because a license has been issued.[176]

However, as judicial interpretation of licenses developed, a distinction arose between revocable and nonrevocable grants. Courts have adopted the view that holders of revocable licenses assume the risk of revocation and are, therefore, not entitled to compensation upon discontinuance of the grant.[177] The Supreme Court followed this reasoning in *Acton v. United States,*[178] where it denied a claim for compensation by the holders of revocable uranium prospecting permits stating, "[w]hile it is unfortunate from the appellants' standpoint, that they lost whatever they may have gambled, it is clear that they were made fully aware of the uncertainty which was incident to their enterprise."[179]

In contrast, courts have recognized that licenses or franchises which contain no provision for revocation constitute property protected by the Fifth Amendment.[180] Because of this dichotomy, the issue of compensation turns largely on the characterization of the FPC license as revocable or nonrevocable.

In the instant case, neither the Federal Power Act nor the license itself explicitly reserves the right to revoke the license at will, or without compensation. Under the Power Act, a license may be revoked for a "violation of its terms,"[181] but such action is not possible without proof of violation. Further, the Power Act allows the government to take over and operate the Blue Ridge Project upon expiration of the 50 year license, or upon institution of condemnation

[175] *E.g.,* Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365, 373 (1882); Union Pass R. Co. v. Philadelphia, 101 U.S. 528, 539 (1879); Boston Elevated Ry. Co. v. Commonwealth, 310 Mass. 528, 39 N.E.2d 87 (1942).

[176] *See* Hodge v. Muscatino Co., 196 U.S. 276 (1904); City of Carbondale v. Wade, 106 Ill. App. 654 (1902).

[177] Sinclair Pipe Line Co. v. United States, 287 F.2d 175 (Ct.Cl. 1961); McNeil v. Seatrain, 281 F.2d 931 (D.C.Cir. 1960).

[178] 401 F.2d 896 (1968).

[179] *Id.* at 899.

[180] Los Angeles v. Los Angeles Gas And Electric Corp., 251 U.S. 32, 39-40 (1919); Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893); United States v. Brooklyn Union Gas, 168 F.2d 391 (2d Cir. 1948).

[181] Federal Power Act, 16 U.S.C. § 820 (1970).

proceedings, but requires compensation in both instances.[182]

Two inferences can be drawn from the absence of an express provision reserving revocation rights. First, that the license is irrevocable and, consequently, should be construed as vesting a property interest. The second, and more plausible interpretation, however, is that the absence of an express revocation clause, standing alone, is not conclusive as to the true nature of the license. In *Louisville Bridge Co. v. United States,*[183] the Supreme Court held that despite the apparent grant of an "irrevocable" franchise to build a bridge over the Ohio River, compensation need not be provided for government taking of the structure. The absence of an express reservation of power to alter or amend the grant did not deter the Court from concluding that it "was not natural that Congress, in enacting a regulation of such commerce, should intend to put shackles upon its own power in respect of future regulation" over navigable waters.[184]

This interpretation is consistent with the right of Congress to regulate the navigable water of the United States. Navigational servitude has long been recognized as a property interest held by the United States in all navigable waterways. This interest entitles Congress to pass all legislation deemed necessary to protect such rivers or streams.[185] When this right is exercised there is no compensable taking because the subservience precludes any private ownership of the river or its flow.[186]

However, the above interpretation is difficult to reconcile with § 28 of the Federal Power Act[187] which provides as follows:

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[182] Federal Power Act, 16 U.S.C. § 791(a) *et seq.* (1970). The fifty year license is the maximum grant allowed under the Power Act.

[183] 242 U.S. 409 (1917).

[184] *Id.* at 419.

[185] Gilman v. Philadelphia, 70 U.S.(3 Wall) 713, 724-725 (1865). Congressional power under this doctrine is dominant and can be asserted to the exclusion of any competing or conflicting claims. The fact that the FPC license was granted prior to the application of navigational servitude does not affect the no compensation rule. United States v. River Rouge Co., 269 U.S. 411, 419 (1926); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); Gibson v. United States, 166 U.S. 269 (1897). Compensation was required in *International Paper Co. v. United States*, 282 U.S. 399 (1931), when the government took property rights under the War Powers Act rather than the Commerce Clause.

In short, "[a] license to obstruct navigable waters may be denied [or] revoked by Congress according to what Congress determines to be in the public interest." United States v. Appalachian Power Co., 311 U.S. 377, 426-429 (1940). *See also* Sanitary District of Chicago v. United States, 226 U.S. 405, 427 (1925); Louisville Co. v. United States, 242 U.S. 409 (1917); Union Bridge Co. v. United States, 204 U.S. 364 (1907).

[186] Zabel v. Tabb, 430 F.2d 199, *cert. denied,* 401 U.S. 910 (1970); Borough of Ford City v. United States, 345 F.2d 645, *cert. denied,* 382 U.S. 902 (1964); Scozzafava v. United States, 199 F. Supp. 43 (D.C.N.Y. 1961).

[187] Federal Power Act, 16 U.S.C. §§ 791-828 (1970).

> The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall effect any license theretofore issued under the provisions of this chapter, or the rights of any license thereunder.[188]

This section reflects the fact that a major goal of the act was to provide "the inducement for the investment of private capital in the improvement of navigable streams. . . ."[189] Section 28 ensures the security of investors by prohibiting alteration and repeal of licenses validly issued under the Power Act. In essence, the APC's argument is that § 28 protects the investment capital underlying the license from any *ex post facto* legislation. Though the government unquestionably has the power to nullify the license, APC asserts that § 28 imbues the license with a property-like quality, requiring compensation for its nullification. Past judicial treatment of § 28 must be examined to determine if this contention is indeed correct.

Varying interpretations have been handed down by the courts regarding the exact impact of § 28. In *Scenic Hudson Preservation Conference v. Calloway*[190] it was held that this provision was intended only to protect licenses from *ex post facto* lawmaking specifically related to licensing requirements, and was not meant to serve as an interface between licenses and the general consequences of federal legislation.[191] Thus, because the 1976 amendment did not alter licensing requirements, § 28 does not provide immunity to the Blue Ridge license. However, in another court decision, *Montana Power Co. v. FPC*[192] the Court of Appeals for the District of Columbia stated,

> We do not think it is the fair intendment of Congressional will to read § 28 so broadly as to constitute a general prohibition against changes in the procedure or machinery applicable to a license, changes that do not have the quality of changing *substantive* rights or obligations.[193]

Because the New River amendment affected the substantive rights of APC, i.e., its right to build the hydroelectric project, the Court of Appeals decision would appear to prohibit the legislation as a result of § 28.[194] In short, judicial interpretation of § 28 provides no

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[188] *Id.* § 822.

[189] S. REP. No. 179, 65th Cong., 2nd Sess. 1 (1917).

[190] 370 F. Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974).

[191] *Id.* at 171.

[192] 445 F.2d 739 (D.C.Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971). *See also* Pennsylvania Power and Light Co. v. FPC, 139 F.2d 445 (3rd Cir. 1943), *cert. denied*, 321 U.S. 798 (1944).

[193] 445 F.2d 739, 748 (D.C.Cir. 1970) (Emphasis added).

[194] 16 U.S.C. § 1278(a)(Supp. 1977). A close look at the 1976 amendment reveals that there

clear resolution to the issue of revocability.[195]

A compensation question of this nature, based on § 28 of the Federal Power Act, has never before been heard by the courts. Navigational servitude must be weighed against the prohibitions of § 28—a novel task whose outcome lies solely with the Court of Claims.

2. Recovery Under a Contract Theory

Alternatively, APC contends that the license contains sufficient contractual elements to entitle the Company to compensation under the Fifth Amendment. It is clear that contractual rights against the United States fall within the ambit of the Fifth Amendment,[196] and in a situation analogous to the Blue Ridge controversy the Court of Claims stated,

> When Congress delegates to an agency of the Government the right to enter into a contract under certain terms and conditions, and these terms and conditions are fully carried out and a contract entered into, it becomes a valid, binding agreement of the Government, and such valid contract is protected by the Fifth Amendment and cannot be taken away without making just compensation.[197]

APC maintains that it has fulfilled all conditions required by the Federal Power Act. In consideration for the license, APC agreed to construct, operate and maintain the project, and make certain payments to the United States. Moreover, the United States agreed, under § 28 to protect the license from subsequent legislation. The New River amendment, in the opinion of APC, was a breach of this contract by the federal government.

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is no express revocation of the FPC license. In the words of Congress, "Any license heretofor or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System. . . ." *Id.* Nonetheless the amendment does affect the substantive rights of the parties involved.

[195] It has long been recognized that one Congress cannot bind the legislative authority of a subsequent Congress, except by amendment to the Constitution. Columbia v. J.R. Thompson, 346 U.S. 100, 114 (1953); Reichelderfer v. Quinn, 287 U.S. 315 (1932); King v. Finch, 429 F.2d 709, 713 (5th Cir. 1970). However, it is also agreed that, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative. . . ." 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 46.06 (4th ed., C. Sands, 1973). There is no clear-cut interpretation of § 28.

[196] *See Hearing On Water Power Before The Joint Water Power Comm.*, 65th Cong., 2nd Sess. 465 (1917); Lynch v. United States, 292 U.S. 571, 574 (1934); Coombes v. Getz, 285 U.S. 51 (1921); Ettor v. City of Tacoma, 228 U.S. 148 (1913); Johnson v. United States, 111 Ct.Cl. 750 (1948).

[197] Seatrain Lines, Inc. v. United States, 99 Ct.Cl. 272, 315 (1943).

The Government, on the other hand, is subject to liability only for express or implied-in-fact contracts.[198] To recover under a theory of breach of contract, APC must prove that there was an agreement between the parties prohibiting alteration or revocation of the license through subsequent legislation. Again, this issue turns on interpretation of § 28 which, to date, has not been construed in this context. If APC cannot present adequate proof of an express or implied-in-fact contract, it cannot recover damages resulting from the 1976 amendment.

In short, there is a possibility that the Wild and Scenic Rivers Act will be subject to a court decision mandating compensation for nullification of the FPC license. In the future, not only should administering agencies be more conscious of potential "taking" situations, but guidelines should be enacted to define when a river is no longer eligible for inclusion in the national system due to proposed development along the waterway. Possibly, settlement powers could be vested in the Secretary of the Interior and Secretary of Agriculture, similar to acquisition powers, whereby private claims of unjust taking are settled at the administrative level. This would reduce litigation delays and excessive court costs. In any event it is imperative that the priority clause found in the Act not be interpreted as a command to actively compete with private developers.

VI. Conclusion

The Wild and Scenic Rivers Act is, undoubtedly, a solid piece of legislation; the current rivers system evidences this fact. However, before the Act may provide the extensive protection originally planned by the designers of the system there must be changes in the implementation phase of the program. Delays and costs must be reduced, and a greater effort must be made to achieve optimum study efficiency. In addition, state participation must continue to be an integral part of the national system. Creation of state wild and scenic rivers systems, and the aggressive use of zoning ordinances are critical to the success of the preservation effort. The federal government should also continually monitor state systems for innovations which might be adaptable to the federal system. Finally,

[198] A contract implied in fact is one based on a "meeting of the minds" which, although not embodied in an express agreement, is inferred from the conduct of the parties, evidencing their tacit understanding. Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923). Equitable or moral considerations such as reasonable reliance do not create liability on the part of the government. Merrit v. United States, 267 U.S. 338, 340 (1925); Sutton v. United States, 256 U.S. 575, 581 (1921); Tempel v. United States, 248 U.S. 121 (1918).

there must be a greater awareness of the countervailing interests involved in administering the rivers system, and the balance which must be struck between these forces. The intent of the Act is to preserve the nation's waterways, not to harass industry. If agencies decide to battle private developers they may well end up losing the war against waterway erosion. In light of this possibility, the Act must be applied as originally intended—to preserve the environmentally significant free-flowing rivers throughout the country.