

# **Wild & Scenic River Management Responsibilities**



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Council Contact: Jackie Diedrich  
U.S. Forest Service  
Portland, Oregon

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# Wild & Scenic River Management Responsibilities

## FOREWORD

Managing designated wild and scenic rivers (WSRs) requires a thorough understanding of the provisions of the Wild and Scenic Rivers Act (Act). An interagency interpretation of the Act was completed in 1982—the *Department of the Interior and Agriculture Interagency Guidelines for Eligibility, Classification and Management of River Areas* (Interagency Guidelines). Since issuance of these guidelines, several sections of the Act have been amended to clarify intent, most notably the requirement for the development of a comprehensive river management plan (CRMP). In addition, the courts have provided interpretation of various provisions of the Act as a result of litigation. This paper discusses those sections of the Act that relate to managing WSRs, including a detailed discussion of the contents and key elements of a CRMP.

## INTRODUCTION

The purpose of this paper is to aid in management of designated WSRs and provide a foundation for developing a CRMP commensurate with the requirements of the statute. It presents a section-by-section analysis of the Act relative to management of designated WSRs in the following format:

- Statutory Language
- Discussion of Intent
- Litigation
- Management Implications

Statutory direction is quoted for each section of the Act; each citation from the Act is followed by an interpretation of this direction (*Discussion of Intent*). The *Litigation* subsection summarizes challenges specific to the Act, although cases often include challenges under other statutes (e.g., the National Environmental Policy Act (NEPA)) not analyzed in this paper. Guidance for the river manager in managing a designated WSR or developing (revising) a CRMP is provided in the *Management Implications* subsection. This final subsection is informed by the discussion and legal opinion. For Section 3(d)(1) of the Act—developing a CRMP—the reader is provided a detailed appendix describing the contents and key elements of a CRMP, including requirements for its filing. Where appropriate, other technical papers included in the *Interagency Wild and Scenic Rivers Coordinating Council Reference Guide* are cited.

The purpose of the litigation subsections of this paper is to advise river managers of the implications of judicial decisions addressing the Act. The reader should be aware that the cases discussed have been decided based upon specific facts and that different facts may lead to different results. In addition, determining whether the conclusions reached by a particular court would be binding in other contexts or on other courts involves complex considerations. We suggest you consult with your legal advisors if it appears one of the cases discussed in this paper may be applicable to a situation you face.

## **MANAGEMENT IMPLICATIONS OF THE ACT**

### **Section 1(b) – Congressional Declaration of Policy**

*Section 1. (b) It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.*

### ***Discussion of Intent***

The purposes for which WSRs are added to the National Wild and Scenic Rivers System (National System) are made explicit in this section—specifically, to protect a river’s free-flowing condition, water quality, and outstandingly remarkable values (ORVs). Sections 7(a) and 10(a) make reference to these collective “values” for which rivers are added to the National System. A river’s ORVs are identified pre-designation through a study or, for an “instant river,” post-designation during preparation of a CRMP.

### ***Management Implications***

- Focus the CRMP and subsequent river management on protecting a river’s free-flowing condition and water quality in addition to the ORVs.
- Thoroughly define the ORVs to guide future management actions and to serve as the baseline for monitoring.



## **Sections 2(a) and 2(a)(ii) – Composition of System; Requirements for State-Administered Components**

*Section 2. (a) The national wild and scenic rivers system shall comprise rivers*  
*(i) that are authorized for inclusion therein by Act of Congress, or*  
*(ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned, that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this Act and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line. Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and management of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation [Fund] Act of 1965 or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).*

### ***Discussion of Intent***

Rivers are designated either by act of Congress or by the Secretary of the Interior at the request of a state governor. While a CRMP, as specified for congressionally designated rivers in Sections 3(d)(1) and 3(d)(2), is not required for a state-administered WSR, the petitioning state's proposed management is considered by the Secretary prior to designation. State-administered WSRs have the values as stated in Section 1(b) and receive protections afforded through Sections 7, 10(a), 12(a), and 13(c).

Refer to *Designating Rivers Through Section 2(a)(ii)*, a technical report of the Interagency Wild and Scenic Rivers Coordinating Council (Council; February 2002), for the prerequisites and conditions for addition of WSRs through this provision. This paper also describes in more detail the few differences in management between rivers designated by Congress under Section 3(a) and rivers designated by the Secretary of the Interior under Section 2(a)(ii). Refer also to Section 12(a) of the Act, directing federal agencies, where appropriate, to enter into written cooperative agreements with the state river-administering agency for the "planning, administration, and management of federal lands which are within the boundaries" of rivers added under Section 2(a)(ii).

## ***Litigation***

See discussion on *Control Data Employees Recreational Foundation v. Andrus (D. DC 1980)*, page 16.

*Wilderness Society v. Tyrell (9<sup>th</sup> Cir. 1990)*

On November 21, 1988, the U.S. District Court for the Eastern District of California enjoined the U.S. Forest Service (USFS) from proceeding with implementation of a fire-recovery timber salvage sale. The area of the proposed salvage activity was adjacent to the South Fork of the Trinity River, which was added to the National System by the Secretary of the Interior on January 19, 1981. The plaintiffs argued the USFS failed to establish appropriate management direction to protect river values and, further, that since a “significant likelihood exists that the timber harvest will not preserve the values embodied in the Act,” the sale should be limited or stopped. The USFS argued that no harvesting or road building would occur in the river corridor (1/4 mile on each side of the river) and that potential adverse effects could be mitigated. The Court granted the plaintiffs’ motion for preliminary injunction based on a significant likelihood of degradation of WSR values.

The USFS appealed this decision to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit. The Court found the Act does not require development of a CRMP for state-administered WSRs. However, the Court held that while a CRMP is not required, “the federal land must be managed so as to ensure that the purposes of the Act are not abrogated.” The 9<sup>th</sup> Circuit remanded the factual dispute on whether the USFS had met the intent of Sections 10(a) and 12(a) to the District Court. However, due to the length of the legal proceeding the proposed salvage sale became unharvestable and, at the request of the USFS, the case was dismissed as moot.

## ***Management Implications***

- Apply the protections of Sections 7 (water resources projects), 10(a) (nondegradation policy), 12(a) (management policies), and 13(c) (federal-reserve water rights) to state-administered WSRs. Section 2(a)(ii) does not require federal land managers to develop a CRMP in conformance with Section 3(d)(1); however, federal land managers are responsible for protecting river values in all agency planning and management actions.
- Implement the provisions of Sections 7 and 13(c) through the National Park Service (NPS) or appropriate adjacent federal land-managing agency.

## **Section 2(b) – Classification**

*Section 2. (b) A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in Section 1, subsection (b) of this Act. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following:*

*(1) Wild river areas – Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.*

*(2) Scenic river areas – Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.*

*(3) Recreational river areas – Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.*

### ***Discussion of Intent***

The classification system describes the type and intensity of development in existence at the date of the river’s designation. To be “administered” in a class means defining the river’s initial landscape character and, through development of the CRMP, establishing standards relative to future in-corridor land uses. For example, administering a wild river will require more restrictive decisions to protect the river’s character than on a scenic or recreational river. However, it must be emphasized that the intent of the Act, to preserve a river’s free-flowing condition (Section 7(a)) and to protect and enhance the values for which it was designated (Section 10(a)), applies equally to each of the three classifications.

A river’s classification does not represent the values for which it was added to the National System. For example, a “recreational” river segment denotes a level of in-corridor and water resources development and does not necessarily mean that the recreation resource has been determined an ORV. Similarly, a recreational classification does not imply that the river will be managed for recreational activities. For example, there are rivers in the National System paralleled by a road and hence classified as recreational for which the ORV is the fish resource. An appropriate intensity of recreation and other resource use will be allowed subject to an ability to protect and enhance those fish populations/habitats.

### ***Litigation***

*Wilderness Watch v. U.S. Forest Service (D. MT 2000)*

On September 19, 2000, the U.S. District Court for the District of Montana found “construction of permanent resort lodges in river corridors designated as *wild* is inconsistent with the Act.” This opinion is responsive to a specific set of facts on the Salmon WSR, i.e., the decision of the USFS to allow pre-designation hunting camps located on National Forest System lands and within a wild river corridor to be relocated and/or substantially modified under the agency’s special-use authority. The new facilities include a complex of permanent structures. The judge remanded the matter to the USFS to determine a remedy consistent with his opinion.

### ***Management Implications***

- Describe a river’s classification and landscape character at the date of designation in the CRMP to serve as the basis for evaluating proposed land uses and monitoring.

- Use classification to provide a general framework for the type and intensity of land management activities that may take place in the future.
- Consider allowing uses in existence at the date of designation that do not conform to the river's classification and that are not specifically addressed in the enabling legislation to continue, so long as the river's free-flowing condition, water quality, and ORVs are protected.
- Apply the protections under Sections 7 (water resources projects) and 10(a) (nondegradation policy) independent of classification.

### **Sections 3(b) and 3(c) – Establishment of Boundaries and Classification; Public Availability of Maps and Descriptions**

*Section 3. (b) The agency charged with the administration of each component of the national wild and scenic rivers system designated by subsection (a) of this section shall, within one year from the date of designation of such component under subsection (a) (except where a different date if [is] provided in subsection (a)), establish detailed boundaries therefore (which boundaries shall include an average of not more than 320 acres of land per mile measured from the ordinary high water mark on both sides of the river); and determine which of the classes outlined in section 2, subsection (b), of this Act best fit the river or its various segments. Notice of the availability of the boundaries and classification, and of subsequent boundary amendments shall be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and the Speaker of the House of Representatives.*

*Section 3. (c) Maps of all boundaries and descriptions of the classifications of designated river segments, and subsequent amendments to such boundaries, shall be available for public inspection in the offices of the administering agency in the District of Columbia and in locations convenient to the designated river.*

### ***Discussion of Intent***

Refer to *Establishment of WSR Boundaries*, a technical report of the Council (September 1998), for discussion of developing a boundary that provides necessary protection for identified values.

### ***Litigation***

*Sokol v. Kennedy (8<sup>th</sup> Cir. 2000)*

The Niobrara River was added to the National System in 1991, absent a pre-designation study. An adjacent landowner challenged the river boundary in the U.S. District Court for the District of Nebraska alleging that the NPS had violated the Act by failing to:

- Consider a bank-to-bank boundary;

- Use the river’s ORVs as the standard for determining a final boundary; and
- Physically post or fence the boundary.

The District Court rejected the plaintiff’s contention that a bank-to-bank alternative be considered in detail under the NEPA, deferring to the NPS’s contention that the intent of the Act is not merely to protect the water column. It also found the NPS’s argument that it had used “significant” or “important” as synonyms for ORVs acceptable. Relative to the allegation that the statute required physically posting the boundary, the District Court agreed with the NPS—the final boundary need not be posted on the ground.

Upon appeal, the U.S. Court of Appeals for the 8<sup>th</sup> Circuit was unconvinced that the NPS had applied the correct standard for determining ORVs and the boundary. It did not accept “significant” or “important” as synonyms for ORVs and reversed the District Court, requiring the NPS to “select boundaries that seek to protect and enhance the ORVs of the Niobrara Scenic River Area.” The 8<sup>th</sup> Circuit also opined that such boundaries need not encompass all ORVs (due in part to the acreage limitation) nor is “unremarkable land” barred from inclusion if necessary to provide buffers around ORVs or if the ORVs are discontinuous. It was in agreement with the District Court relative to posting of the final boundary, stating Section 3(b) is “completely satisfied by the detailing of boundaries on maps, made available to the public.”

### ***Management Implications***

- A bank-to-bank boundary is unacceptable (refer to *Establishment of WSR Boundaries* for a more detailed discussion).
- Use a river’s ORVs as the basis for boundary establishment. They must be sufficiently described and properly referenced in establishing a detailed boundary for the river.
- The final WSR boundary is not required to be posted or otherwise located on the ground.

### **Sections 3(d)(1) and 3(d)(2) – Management Plans; Review Requirements for Early Designations**

*Section 3. (d)(1) For rivers designated on or after January 1, 1986, the Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values. The plan shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this Act. The plan shall be coordinated with and may be incorporated into resource management planning for affected adjacent Federal lands. The plan shall be prepared, after consultation with State and local governments and the interested public within 3 full fiscal years after the date of designation. Notice of the completion and availability of such plans shall be published in the Federal Register.*

*Section 3. (d)(2) For rivers designated before January 1, 1986, all boundaries, classifications, and plans shall be reviewed for conformity within the requirements of this subsection within 10 years through regular agency planning processes.*

### ***Discussion of Intent***

Prior to 1986, Section 3(b) of the Act required the river-administering agency to “prepare a plan for necessary developments in connection with its administration in accordance with such classification.” Through a generic amendment of the Act in 1986, Section 3 was amended with a new subsection requiring a “comprehensive management plan . . . to provide for protection of the river values” (Section 3(d)(1)).<sup>1</sup> The CRMP must address:

- Resource protection;
- Development of lands and facilities;
- User capacities; and
- Other management practices necessary or desirable to achieve the purposes of the Act.

Refer to Appendix A for a detailed discussion of the contents and key elements of a CRMP.

Section 3(d)(1) allows the CRMP to be coordinated with, and incorporated into, a river-administering agency’s resource management plan. The CRMP for rivers designated on or after January 1, 1986, is to be completed within three full fiscal years after the date of designation with a notice of completion and availability published in the *Federal Register*. For rivers designated before this date, Section 3(d)(2) requires review of the CRMP to determine if it conforms to Section 3(d)(1). This provision allowed ten years to update pre-1986 plans through the planning processes of river-administering agencies. Note: This 10-year period expired January 1, 1996.

In some river study authorizations Congress has required the study agency to work with state and local governments and the public to develop a CRMP in concert with the study process to assist in determination of the river’s suitability. Such pre-designation CRMPs have, in some cases, been adopted in the legislation adding the river to the National System. Other agencies have taken the initiative to develop elements of the CRMP in the study report (pre-designation).

### ***Litigation***

*National Wildlife Federation v. Cosgriffe (D. OR 1998)*

The John Day and South Fork of the John Day Rivers were added to the National System via the Omnibus Oregon WSRs Act of 1988, with the Secretary of the Interior charged with their

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<sup>1</sup> As noted in the previous discussion of Section 2(a)(ii) on pages 3 and 4, this provision does not apply to state-administered WSRs designated through Section 2(a)(ii).

administration. In June of 1997, the National Wildlife Federation et al., sued the Bureau of Land Management (BLM) to:

- Establish detailed river corridor boundaries;
- Prepare CRMPs; and
- Change grazing practices.

Evaluating the complaint, the U.S. District Court for the District of Oregon dismissed the first issue since the BLM had established preliminary boundaries that became effective in 1990. The BLM's failure to complete a CRMP, however, was not in dispute. Although the BLM released a draft river plan and environmental impact statement (EIS) for the two rivers in October 1993, by the time of the Court's consideration they were six years beyond the statutory time frame for CRMP completion. The Court was unwilling to accept the BLM's promise to complete the CRMP, ordering it be completed by November 1, 1999.

Regarding the plaintiffs' request that the BLM be required to identify grazing lands within the river corridor in poor or fair range condition and rest those lands from grazing until conditions improved, the Court held the plaintiffs needed to bring challenge to the BLM's individual grazing decisions, not to the entire program. Further, the Court did not ban grazing on public lands within the river corridor because the plaintiffs failed to prove that the BLM's *current* practices with respect to allotment management were causing harm. If, however, riparian improvement does not take place, the Court allowed for the plaintiffs to renew their request to limit or ban grazing.

*Sierra Club v. U.S. Department of the Interior (N.D. CA 1998)*

The Merced WSR was added to the National System in 1987, with approximately 81 miles flowing through Yosemite National Park, including the El Portal Administrative Site. In January 1997 the Merced flooded, damaging or destroying public lodging facilities and employee housing units in the Yosemite Valley. In response, the NPS prepared the Yosemite Lodge Area Development Concept Plan (Lodge Plan) and environmental assessment (EA) to expedite the construction of new lodge facilities to accommodate the number of visitors determined through previous plans (General Management Plan, Concession Services Plan). The Lodge Plan also proposed to remove lodging facilities from the floodplain and reroute the access road and adjoining parking lots closer to the river, improving the views of Yosemite Falls from the roadway and moving traffic further from proposed new lodge facilities.

The Sierra Club sought an injunction of the lodge development proposal, challenging the Lodge Plan under the Act and NEPA. Specific to the Act, the plaintiff identified procedural and substantive concerns:

- Construction of the project should be halted because of the NPS's failure to adopt a CRMP.

- Failure of the NPS to establish a river corridor boundary resulted in a default boundary of one-quarter mile. Their contention was that the construction, now within the “default” boundary, was in violation of the substantive (protection) requirements of the Act.

Relative to the procedural issue, there was no dispute that the NPS had not adopted a CRMP. The Court, however, found “the Wild and Scenic Rivers Act provides no indication that a court may enjoin an agency’s land management activities with respect to a wild and scenic river area merely because the agency has failed to timely adopt a CRMP.” The Court recognized “a less drastic remedy” to force the NPS to complete the CRMP—the plaintiff could bring a new suit under the Administrative Procedures Act to compel compliance with the Act.

As to the boundary issue, the NPS responded it had established the boundary of the Merced River in the lodge area in the EA for the Lodge Plan and in an earlier draft NEPA document for the park-wide Yosemite Valley Housing Plan. Specifically, the boundary was delineated as the “100-year floodplain, all valley wetlands and meadows and one-eighth mile on both sides of major waterfall tributaries.” This boundary did not include the proposed lodge construction. In contrast to the direction in Section 3(b) of the Act, the river-specific legislation adding the Merced to the National System did not require publishing the boundary in the *Federal Register*, only that the boundary be made available for public inspection. Therefore, the Court found the inclusion of a boundary in NPS planning documents satisfied the requirement and was “controlling.”

Lastly, the plaintiff claimed that proposed facilities within the WSR corridor (the rerouted road and adjoining parking lots) violated the substantive requirements of the Act. The Court found the NPS had considered the effects of the road proposal on the scenic and recreation values of the Merced, concluding that both values would be improved by relocating housing facilities away from the river corridor. The proposal also resulted in the restoration of approximately seven acres of riparian habitat. Neither was the Court persuaded by the plaintiff’s suggestion that road construction in a scenic river is prohibited by the Act, basing its conclusion on the language in Section 2(b) and also the discretion afforded the administering agency in Section 10(a).

The Court concluded that the plaintiff failed to demonstrate “a substantial likelihood of success on its Wild and Scenic Rivers Act claims.” However, it did grant a preliminary injunction based on claims under the NEPA.

*Forest Guardians v. Glickman (D. NM 1999)*

In October 1998, the USFS was sued for its failure to prepare a CRMP and establish detailed boundaries for the Pecos and East Fork of the Jemez WSRs (added to the National System on June 6, 1990). This matter was settled with the USFS agreeing to prepare the CRMPs and to amend the Santa Fe National Forest Land and Resource Management Plan to incorporate direction to protect and enhance river resources.

*National Park and Conservation Association v. Stanton (D. DC 1999)*

On June 14, 1999, the U.S. District Court for the District of Columbia handed down a decision on the Niobrara WSR stating that, since Congress specifically charged the Secretary of the



Interior with administrative responsibility for the river, the NPS could not redelegate its authority to another management entity. At issue was language in the CRMP suggesting a local council would be managing the river with NPS assistance. While the Court accepted delegation of some agency responsibilities to nonfederal entities, it found that the river-administering agency must retain “sufficient final reviewing authority over Council actions . . .” The Court ordered the NPS to do a new CRMP and EIS in compliance with the NEPA. This case does not, however, preclude the federal river-administering agency from entering into partnerships to assist the agency in fulfilling its river-administering responsibilities.

*Sierra Club v. Babbitt (E.D. CA 1999)*

This case, known as the El Portal Road case, involved a challenge to the reconstruction of this access road to Yosemite National Park. The El Portal Road begins at the park’s western boundary and is one of the principal access roads into Yosemite Valley. For much of its length, the road parallels the Merced WSR. The Merced was added to the National System on November 2, 1987. The NPS completed an EA and finding of no significant impact for the road project in 1998, but at the time the project was approved, the NPS did not have a completed CRMP for the river. The NPS had, however, published boundaries and classifications and identified ORVs for the river in the 1996 Draft Yosemite Housing Plan EIS.

The plaintiffs filed their suit well after the road construction project began. By the time the suit was filed, the NPS had already graded and devegetated approximately 3/4 of the project area and had removed large portions of the historic rock wall along the road; the segment where no work had been done was referred to as Segment D. The plaintiffs alleged that the road reconstruction project violated both the Act and the NEPA.

The Court found that the NPS had violated the substantive provisions of Act by failing to predetermine, through the issuance of a CRMP, objective standards for the protection and enhancement of ORVs. In the absence of a CRMP, the Court found that the NPS’s determination that ORVs would be protected and enhanced was not entitled to deference, as there was no CRMP against which to evaluate the road project’s impacts. However, once the agency had a CRMP, the Court explained that a different standard for reviewing the agency’s determinations would apply. The court stated that pursuant to a CRMP, the NPS “might legitimately conclude that the occasional fragmentation of riparian habitat, the slightly extended height of the guard walls, and the increase of the footprint of the road by twenty percent with a small extension of the footprint into the river was acceptable because it was within the parameters of the [CRMP].” Thus, the court reaffirmed in this passage and in other parts of the opinion that the Act invests river-administering agencies with broad discretion, provided that the agency has completed its CRMP.

The Court rejected plaintiffs’ challenges under the Act’s procedural sections. The Court found that the NPS had complied with the procedural requirements of the Act by making the boundaries, classifications and ORVs available to the public in the Draft Yosemite Valley Housing Plan.

Based on its findings regarding the Act, the Court ordered the NPS to complete a CRMP within one year. However, because most of the road project area had been disturbed by ongoing construction, the Court did not enjoin all remaining work. The Court recognized that it would

cause more harm to leave the area in a state of partial construction than to proceed with the slope stabilization, road realignment, and revegetation. The Court therefore allowed the NPS to complete work in all areas where work had begun, but the Court enjoined work in Segment D, where no construction activity had yet begun.

*American Rivers v. Towns (D. AZ 2001)*

The plaintiffs challenged the failure of the USFS to prepare and adopt a CRMP for the Verde WSR. The Verde, the only designated WSR in the state of Arizona, was added to the National System on August 28, 1984. The plaintiffs requested the CRMP be prepared and adopted within one year from the date of final judgment of this case. The USFS and plaintiffs negotiated a settlement agreement, filed on September 27, 2001. In the settlement, the USFS agreed to issue a decision under the NEPA approving the CRMP within 30 months and to a number of specific measures to guide interim management.

*Cases Addressing Management Activities Conducted Prior to Completion of a CRMP (Newton County Wildlife Association v. Rogers, 1997; National Wildlife Federation v. Cosgriffe, 1998; Sierra Club v. U.S. Department of the Interior, 1998; Sierra Club v. Babbitt, 1999)*

In these cases, parties have challenged the appropriateness of site-specific management activities (timber harvest, livestock grazing, road reconstruction) absent a CRMP from which to evaluate effects and judge the agencies' ability to protect river-related values. In these cases, the courts have considered both the procedural and substantive requirements of the Act. The procedural issue is readily resolved on the facts—either the river-administering agency has a CRMP or it does not. While the absence of a CRMP has not been interpreted to prevent site-specific activities by the river-administering agency, the evaluation of the substantive requirements of the Act (Section 10(a)—nondegradation principle—and Section 12(a)—management policies) may result in the activity being halted or limited through court injunction. Refer to the detailed description of each of these cases in this paper.

### ***Management Implications***

- A CRMP is required for all congressionally designated WSRs.
- Include a detailed description of the ORVs as a platform for development of necessary management direction in the CRMP.
- Address the types and amounts of public use the river area can sustain without adverse impact to other values in the CRMP (Interagency Guidelines).
- Review and revise, as necessary, pre-1986 CRMPs to include all elements described in Section 3(d)(1).
- Prior to the completion of a CRMP, thoroughly analyze the effects of a proposed activity on the values for which the river was designated.

## Sections 6(a)(1) through 6(g)(1)-(3) – Acquisition Procedures and Limitations

*Section 6. (a)(1) The Secretary of the Interior and the Secretary of Agriculture are each authorized to acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system designated in section 3 of this Act, or hereafter designated for inclusion in the system by Act of Congress, which is administered by him, but he shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river. Lands owned by a State may be acquired only by donation or by exchange in accordance with the subsection (d) of this section. Lands owned by an Indian tribe or a political subdivision of a State may not be acquired without the consent of the appropriate governing body thereof as long as the Indian tribe or political subdivision is following a plan for management and protection of the lands which the Secretary finds protects the land and assures its use for purposes consistent with this Act. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to the use of appropriations from other sources, be available to Federal departments and agencies for the acquisition of property for the purposes of this Act.*

*(2) When a tract of land lies partially within and partially outside the boundaries of a component of the national wild and scenic rivers system, the appropriate Secretary may, with the consent of the landowners for the portion outside the boundaries, acquire the entire tract. The land or interest therein so acquired outside the boundaries shall not be counted against the average one-hundred-acre-per-mile fee title limitation of subsection (a)(1). The lands or interests therein outside such boundaries, shall be disposed of, consistent with existing authorities of law, by sale, lease, or exchange.*

*Section 6. (b) If 50 per centum or more of the entire acreage outside the ordinary high water mark on both sides of the river within a federally administered wild, scenic or recreational river area is owned in fee title by the United States, by the State or States within which it lies, or by political subdivisions of those States, neither Secretary shall acquire fee title to any lands by condemnation under authority of this Act. Nothing contained in this section, however, shall preclude the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.*

*Section 6. (c) Neither the Secretary of the Interior nor the Secretary of Agriculture may acquire lands by condemnation, for the purpose of including such lands in any national wild, scenic or recreational river area, if such lands are located within any incorporated city, village or borough which has in force and applicable to such lands a duly adopted, valid zoning ordinance that conforms with the purposes of this Act. In order to carry out the provisions of this subsection the appropriate Secretary shall issue guidelines, specifying standards for local zoning ordinances, which are consistent with the purposes of this Act. The standards specified in such guidelines shall have the object of (A) prohibiting new commercial or industrial uses other than commercial or industrial uses which are consistent with the purposes of this Act, and (B) the protection of the bank lands by means of acreage, frontage, and setback requirements on development.*

*Section 6. (d) The appropriate Secretary is authorized to accept title to non-Federal property within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 3 of this Act or hereafter designated for inclusion in the system by Act of Congress and, in exchange therefore, convey to the grantor any federally owned property which is under his jurisdiction within the State in which the component lies and which he classifies as suitable for*

*exchange or other disposal. The values of the properties so exchanged either shall be approximately equal or, if they are not approximately equal, shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.*

*Section 6. (e) The head of any Federal department or agency having administrative jurisdiction over any lands or interests in land within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 3 of this Act or hereafter designated for inclusion in the system by Act of Congress is authorized to transfer to the appropriate Secretary jurisdiction over such lands for administration in accordance with the provisions of this Act. Lands acquired by or transferred to the Secretary of Agriculture for the purposes of this Act within or adjacent to a national forest shall upon such acquisition or transfer become national forest lands.*

*Section 6. (f) The appropriate Secretary is authorized to accept donations of lands and interests in land, funds, and other property for use in connection with his administration of the national wild and scenic rivers system.*

*Section 6. (g)(1) Any owner or owners (hereinafter in this subsection referred to as "owner") of improved property on the date of its acquisition, may retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a definite term not to exceed twenty-five years, or in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, or the death of either or both of them. The owner shall elect the term to be reserved. The appropriate Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such a date of the right retained by the owner.*

*(2) A right of use and occupancy retained pursuant to this subsection shall be subject to termination whenever the appropriate Secretary is given reasonable cause to find that such use and occupancy is being exercised in a manner which conflicts with the purposes of this Act. In the event of such a finding, the Secretary shall tender to the holder of that right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination. Such right of use or occupancy shall terminate by operation of law upon tender of the fair market price.*

*(3) The term "improved property", as used in this Act, means a detached, one-family dwelling (hereinafter referred to as "dwelling"), the construction of which was begun before January 1, 1967, (except where a different date is specifically provided by law with respect to any particular river), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the appropriate Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated.*

### ***Discussion of Intent***

This section describes procedures and limitations for acquisition of lands and interests in lands by federal managers on congressionally designated WSRs. Acquisition of lands (fee-simple) or interests in lands (easements) from willing sellers is an appropriate tool in select circumstances on some rivers. Note: The provisions of Section 6 do not apply to rivers added under Section 2(a)(ii). For consideration of nonacquisition strategies for protecting river values refer to

*Protecting Resource Values on Non-Federal Lands*, a technical report of the Council (October 1996).

### ***Litigation***

There have been a number of cases in which the government took action to require a landowner to meet the provisions of a conservation easement purchased by the government to protect river values. These cases are specific to a particular property and set of facts and do not serve to further define the intent of this section.

### ***Management Implications***

- Establish general principles for land acquisition in the CRMP (Interagency Guidelines), where appropriate. Consider acquisition of lands or interests in lands to provide resource protection and access and to facilitate appropriate recreation use.

### **Section 7(a) – Restrictions on Hydroelectric and Water Resources Projects on Designated Rivers**

*Section 7. (a) The Federal Power Commission [FERC] shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (41 Stat. 1063), as amended (16 U.S.C. 791a et seq.), on or directly affecting any river which is designated in section 3 of this Act as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the national wild and scenic rivers system. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this Act and would affect the component and the values to be protected by it under this Act. Any license heretofore 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 pursuant to section 2 of this Act and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.*

### ***Discussion of Intent***

Refer to the *Wild and Scenic Rivers Act: Section 7*, a technical paper of the Council (May 1997), for a discussion of standards and presentation of procedures to evaluate the effects of proposed water resources projects. The Department of Agriculture has regulations governing the applicability of Section 7 at 36 CFR Part 297.

### ***Litigation***

#### *Control Data Employees Recreational Foundation v. Andrus (D. DC 1980)*

The Control Data Employees Recreational Foundation challenged the authority of the Secretary of the Interior to evaluate and prevent the construction of a recreational harbor on the state-administered portion of the St. Croix WSR, an authority provided through Section 7(a) and triggered by issuance of a permit by the Army Corps of Engineers (ACOE). The plaintiff argued the language of Section 7(a) specifically directing the “Secretary charged with . . . administration” to make such a determination refers to the head of the state agency or agencies implementing the Act for state-administered, federally designated rivers. The Court disagreed, stating Congress was referring to either the Secretary of Agriculture or the Interior. The Court further clarified that this section did not delegate to the state the authority over federally assisted water resources projects. Unless the Secretary of Agriculture is specifically directed to administer a WSR, Section 7 was found to be the responsibility of the Secretary of the Interior given Interior’s role in evaluating and admitting state-administered WSRs.

#### *Swanson Mining Corporation v. Federal Energy Regulatory Commission (D.C. Cir. 1986)*

The plaintiff, Swanson Mining Corporation (Swanson), applied to the Federal Energy Regulatory Commission (FERC) for an exemption from licensing for a small hydroelectric facility located on the South Fork of the Trinity WSR. They proposed to renovate and operate a project that had ceased to be economical in 1942, including construction of new power lines and other project facilities. The Resources Agency of California and the California Department of Fish and Game both noted that the Act barred the FERC from issuing an exemption. They, however, provided two conditions necessary to protect fish and wildlife should the FERC determine it could license the project. The FERC granted Swanson’s exemption with the conditions proposed by the State agencies.

Swanson filed a timely petition for rehearing, challenging the conditions. The FERC revoked one of the conditions as not related to the environmental effects of the proposal. Swanson filed a second timely petition, challenging the imposition of the remaining condition that established a minimum flow. While the FERC was considering this petition, the Resources Agency of California filed a petition for late intervention, restating its objection to exempting a hydroelectric project “on or directly affecting” a WSR. The FERC granted the Resources Agency of California’s petition and vacated the exemption. Swanson challenged this order on substantive and procedural grounds. The FERC affirmed its previous order based on a Section 7(a) determination it had requested of the Secretary of the Interior. The Secretary’s conclusion mirrored that of the State—i.e., the project had a direct effect on the South Fork of the Trinity River and could not be exempted.

The plaintiff argued the Act precludes the FERC from issuing an exemption only if the project would have an adverse effect on scenic values. The Court held otherwise, referring to the first clause in the first sentence of Section 7(a) as imposing a more restrictive provision to the FERC. While other federal permitting or assisting agencies are governed by whether a water resources project causes a “direct and adverse effect” on the values for which a river is added to the National System as determined by the Secretary charged with its administration, the FERC cannot issue a license or exemption for a hydropower project, or portion thereof, “on or directly affecting” a WSR.

*Coalition for Canyon Preservation v. Hazen (D. MT 1990)*

The Coalition for Canyon Preservation et al., sought to prevent the Federal Highway Administration, the ACOE, and a bridge contractor from constructing a replacement bridge across the North Fork of the Flathead WSR, near Polebridge, Montana. The original bridge, which served as a principal access point to Glacier National Park, and other structures were destroyed by fire in 1988. The NPS conducted an EA evaluating various alternatives for replacement of these structures and selected an alternative that replaced most of the structures, including the bridge. The bridge was to be constructed 350 feet upstream from the original location. The ACOE also conducted an EA related to its issuance of a Section 404 permit under the Clean Water Act. The plaintiffs argued that relocation of the new bridge had the potential to cause significant impacts to WSR values and also that the proposed two-lane bridge was inconsistent with the historic and natural qualities of the area.

Relative to Section 7(a), the plaintiffs challenged the failure of the ACOE to provide the USFS required notice under 36 CFR 297.4(b). This allegation was based on direction in the Flathead CRMP, specifically that the “USFS has been designated as the lead agency for river management activities in the classified Flathead River System. The NPS and the state of Montana retain management authority for their lands within the river corridor.” As the river forms the boundary between NPS and USFS-administered lands, the Court held it was appropriate for the ACOE to rely on the expertise of the NPS to ensure the project was compatible with WSR values. Further, the Court found that the ACOE had provided the USFS “actual notice” through its public notice describing the project well in advance of the 60-day notice required in 36 CFR 297.4(b).<sup>2</sup>

The Court concluded that the NPS and ACOE had adequately analyzed potential adverse impacts to river values through the NEPA process. The lawsuit was dismissed.

*United States v. Harris (S.D. OH 1992)*

A property owner on the state-administered Little Miami WSR discharged fill material to build a boat dock and overlook for his business without a permit from the ACOE. ACOE personnel noticed this activity during a routine inspection, and the landowner was issued a cease and desist order, prohibiting any further activity in the Little Miami WSR. The landowner then applied for an after-the-fact permit. The Secretary of the Interior, through the NPS, objected to issuing the permit as the activity had a direct and adverse effect on scenic, recreational and other values of

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<sup>2</sup> The USFS conducted an analysis and made a determination under Section 7(a) prior to bridge construction, although after completion of the NPS EA and issuance of the Section 404 permit by the ACOE. The USFS’s Section 7(a) determination relied upon, and agreed with, the prior analysis conducted by the NPS.

the Little Miami WSR. Under Section 7(a), the ACOE denied the landowner's application for a Section 404 permit, directing removal of fill material below the ordinary high water mark.

The landowner took no action to comply with this direction. Subsequently, the Department of Justice (DOJ) initiated a lawsuit for violations under Section 301 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and the WSRs Act. The parties entered into a consent decree specifying the work to be performed to the satisfaction of the ACOE. The Court assessed a civil penalty.

*Oregon Natural Resources Council v. Harrell (9<sup>th</sup> Cir. 1995)*

Congress authorized Elk Creek Dam in 1962 as one of three multiple-purpose dams in the Rogue River Basin. The project is located approximately 57 miles upstream of the Rogue WSR (one of the initial eight rivers designated in 1968 with segments managed by the BLM and USFS). The other two dams were completed in 1977 and 1980, respectively, with Elk Creek partially constructed in 1986-87 at approximately one-third of its planned height.

The project has been entangled in litigation for almost 20 years. In 1985, the Oregon Natural Resources Council and others filed a lawsuit in the U.S. District Court for the District of Oregon to enjoin the ACOE from proceeding with this project. The plaintiffs alleged the ACOE had not fully complied with provisions of the NEPA. The District Court rejected the injunction request, and the ACOE proceeded with (partial) construction of the dam. The District Court decision was appealed to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, which reversed parts of the decision and ordered the District Court to issue an injunction to halt construction. The injunction remained in effect pending completion of additional NEPA analysis and a decision by the ACOE.

The alternative selected by the ACOE was to complete construction of the dam. Following the ACOE Record of Decision (ROD), the BLM and USFS issued a Section 7(a) determination in November 1992. The two agencies concluded: "The unfinished Elk Creek dam results in unreasonable diminishment to the anadromous fisheries resource [within the designated area] because of impediments to migration and some loss of spawning and rearing habitat. The condition of diminishment will continue until such time as successful fish passage is assured." In 1994, the District Court held the BLM and USFS determination barred the ACOE from proceeding with the construction of Elk Creek Dam until it had secured the consent of the Secretaries of the Interior and Agriculture.

Upon appeal, the 9<sup>th</sup> Circuit, based on a reading of Section 7, created two types of federal projects—federally assisted and congressionally authorized—reversing the District Court's opinion. The 9<sup>th</sup> Circuit determined congressionally authorized projects to be subject to the third sentence of Section 7 only, with Congress as the decision maker. Importantly, the river-administering agency is still required to make an evaluation of a proposed water resources project under Section 7 and for such finding to be provided to Congress by the agency seeking the authorization. Thereafter, it is Congress, not the river-administering agency, who is responsible for "the decision whether to build a purely federal water resources project."



*Sierra Club North Star Chapter v. Pena (D. MN 1998)*

Under Section 7(a), the NPS analyzed a major new highway bridge proposed to span the state-administered segment of the Lower St. Croix WSR, determining the project would have a “direct and adverse effect” on the values for which the river was designated. This construction of piers in the bed of the river would involve dredge and fill below the ordinary high water mark that by its nature affects free flow. The applicability of Section 7 to highway and bridge construction was challenged in the U.S. District Court for the District of Minnesota. On April 13, 1998, the Court issued an opinion concluding that the Secretary’s interpretation of a water resources project to include “any type of construction which would result in any change in the free-flowing characteristics of a [wild and scenic] river” is a “reasonable and permissible construction of the term.” The Court further stated, “If projects that affect the free-flow of System rivers were not evaluated under Section 7, Congress’ policy of preserving the rivers in their free-flowing condition would clearly be frustrated.”

*High Country Resources v. Federal Energy Regulatory Commission (9<sup>th</sup> Cir. 2001)*

Applicants for several small hydroelectric projects proposed on tributaries to the Skagit WSR petitioned the Court for review of FERC orders dismissing their license applications based on a finding by the USFS that the projects would unreasonably diminish the fishery value of the Skagit WSR. The USFS made these determinations under the “invade the area or unreasonably diminish” standard of Section 7(a), concluding that the potential from mass soil failure and the deleterious effects such a failure would have on the fishery value of the Skagit WSR constituted unreasonable diminishment. This finding prevented FERC from licensing the projects.

Petitioners challenged the FERC’s orders on two grounds: 1) The statutory construction of Section 7(a) was flawed; and 2) the FERC should have relied on a previous (favorable) USFS determination. The Court dismissed the first challenge since this argument had not been raised in administrative proceedings or in the petitioners’ request for rehearing by the FERC. The Court considered the second issue because it had been raised in the FERC’s rehearing process. On this issue, the Court concluded that the challenge should have been with the USFS rather than the FERC and also that “it appears the existence of new information gave the USFS good reason to reevaluate the 1986 determination.” It therefore denied the challenge that the FERC erred by relying on the 1998 USFS determination rather than the previous (1986) determination.

***Management Implications***

- The Secretary of Agriculture or the Interior (or his/her designee) is responsible for making determinations under Section 7.
- Evaluate a water resources project based on its effects on the values for which a river is added to the National System, namely its free-flowing condition, water quality, and ORVs. The river’s classification is not a factor in this evaluation.
- FERC-licensed facilities are prohibited within a designated river corridor. Other federally assisted water resources projects within a designated river corridor are evaluated as to their potential “direct and adverse effect” on the values for which the

river was designated. Proposed water resources projects below, above, or on a stream tributary to a designated river are evaluated as to their potential to invade the designated river area or unreasonably diminish the scenic, recreational, fish or wildlife values of the designated river.

- Include direction in the CRMP to evaluate a water resources project under Section 7(a). It is also helpful to provide reference to, or include, the evaluation procedures in the CRMP (or appendix).

### **Section 8(a) – Limitations to Entry on Public Lands on Designated Rivers**

*Section 8. (a) All public lands within the authorized boundaries of any component of the national wild and scenic rivers system which is designated in section 3 of this Act or which is hereafter designated for inclusion in that system are hereby withdrawn from entry, sale, or other disposition under the public land laws of the United States. This subsection shall not be construed to limit the authorities granted in section 6(d) or section 14A of this Act.*

#### ***Discussion of Intent***

This section requires all public lands within a WSR corridor to be retained in federal ownership, with allowances for exchange as conditioned in Section 6(d) and lease of federal lands as described in Section 14(A).

#### ***Management Implications***

- Consider the potential for exchange in establishing general principles for land acquisition in the CRMP (refer to *Discussion of Intent* in Section 6.)

### **Section 9(a) – Limitations on Mineral Entry and Development on Public Lands on Designated Rivers**

*Section 9. (a) Nothing in this Act shall affect the applicability of the United States mining and mineral leasing laws within components of the national wild and scenic rivers system except that — (i) all prospecting, mining operations, and other activities on mining claims which, in the case of a component of the system designated in section 3 of this Act, have not heretofore been perfected or which, in the case of a component hereafter designated pursuant to this Act or any other Act of Congress, are not perfected before its inclusion in the system and all mining operations and other activities under a mineral lease, license, or permit issued or renewed after inclusion of a component in the system shall be subject to such regulations as the Secretary of the Interior or, in the case of national forest lands, the Secretary of Agriculture may prescribe to effectuate the purposes of this Act; (ii) subject to valid existing rights, the perfection of, or issuance of a patent to, any mining claim affecting lands within the system shall confer or convey a right or title only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or*

*mining operations and are consistent with such regulations as may be prescribed by the Secretary of the Interior, or in the case of national forest lands, by the Secretary of Agriculture; and (iii) subject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated a wild river under this Act or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto. Regulations issued pursuant to paragraphs (i) and (ii) of this subsection shall, among other things, provide safeguards against pollution of the river involved and unnecessary impairment of the scenery within the component in question.*

### ***Discussion of Intent***

In areas where mineral activity is permissible, the CRMP should address locatable, leasable and salable mineral materials. Locatable minerals are “valuable mineral deposits” located under the General Mining Law of 1872, as amended, and include, for example, gold, silver, copper and lead. Leasable minerals are defined by statute (e.g., oil, gas, coal, geothermal); a lease must be obtained from the government for their extraction. Salable minerals are disposed of by permit and consist, for example, of common varieties of sand, stone and gravel. Leasable and salable mineral activities are discretionary on the part of the administering agency.

The Act affects the development of federal minerals in several ways. First, subject to valid existing rights (i.e., subject to existing mining claims and mineral leases), the minerals located on federal lands within the bed or banks or 1/4 mile of the banks<sup>3</sup> of any designated *wild* river are withdrawn from all forms of appropriation under the mining laws and from the operation of the mineral leasing laws. Second, subject to valid existing rights (i.e., subject to mining claims where the claimant has filed a proper patent application and paid the required fees prior to the river’s designation), mining claimants may only obtain title to the mineral deposits and such rights to the use of the surface and surface resources as are reasonably required for prospecting or mining. Third, the Act requires regulations be developed to govern mining and mineral leasing activities in WSR corridors. While the Secretaries of the Interior and Agriculture have not issued these regulations, the BLM and USFS use their existing regulations (43 CFR 3809 and 36 CFR 228, respectively) to meet, to the extent possible, the nondegradation standard of Section 10(a).

### ***Litigation***

#### *Dinning v. Babbitt (E.D. CA 2000)*

At issue in this case is whether the estate of John M. Lighthill (Estate), by patenting its claim in a WSR, was entitled to the mineral and surface rights, or mineral rights only. Mr. Lighthill located his placer claim in 1933; in 1988, the Estate filed for a patent with the BLM. However, on January 19, 1981, the Scott River (a tributary to the Klamath) was added to the National System, and the claim was in the designated river corridor. The BLM found the claim met the

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<sup>3</sup> For rivers designated under the Alaska National Interest Lands Conservation Act (ANILCA), this boundary is 1/2 mile.

requirements for a patent and issued one for the mineral resource. The BLM also allowed limited rights to the surface uses required for prospecting and mining. However, the Estate argued that the phrase “subject to valid existing rights” in Section 9(a)(ii) required the government to issue a patent conveying full title to the surface, rather than the limited rights that were actually conveyed.

The U.S. District Court for the Eastern District of California agreed with an earlier decision by the Department of the Interior’s Interior Board of Land Appeals (IBLA) that the Estate—although it owned a valid claim that pre-dated the river’s designation—had no valid existing right to a patent conveying full title to the surface.

### ***Management Implications***

- Provide direction for discretionary mineral activity in the CRMP, as appropriate.
- Consider the opportunity to recommend a withdrawal of scenic and recreational river segments from the General Mining Law of 1872, as amended through the river planning process, as appropriate. Such a recommendation, however, will require a detailed analysis of the values to be protected and rationale for the recommendation. This proposal should be closely coordinated with the BLM, the agency responsible for the mineral withdrawal.

### **Section 10(a) – Management Direction**

*Section 10. (a) Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its aesthetic, scenic, historic, archaeological, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.*

### ***Discussion of Intent***

The Interagency Guidelines interpret Section 10(a) as a “nondegradation and enhancement policy for all designated river areas, regardless of classification.” Existing uses on federal lands may continue where they do not conflict with river protection. Adverse effects to the values made explicit in Section 1(b) of the Act on federal and nonfederal lands must be identified in development of the CRMP, with appropriate strategies detailed for their resolution. To achieve a nondegradation standard, the river-administering agency must document baseline resource conditions and monitor changes to these conditions.

## ***Litigation***

### *Oregon Natural Desert Association v. Green (D. OR 1997)*

The Oregon Natural Desert Association (ONDA) et al., charged that the CRMP prepared by the BLM for the Donner und Blitzen WSR (completed May 1993) violated the Act; they sought to enjoin the BLM from further activities authorized in the CRMP. The plaintiffs argued the CRMP “fail[ed] to protect and enhance native plants, plant communities and fisheries.” Their allegation was based on the results of BLM’s contracted and in-house sensitive plant and aquatic habitat inventories, both of which indicated the riparian area had been adversely impacted by grazing. The ONDA also charged that the BLM was barred from building parking lots and improving roads in the wild river corridor as this represented a clear violation of the definition of “wild.”

The BLM argued the management framework of the CRMP was adequate to protect and enhance river values and further that 40 of the 74.8 miles of the designated WSR corridor had already been excluded from grazing. Interveners in the case argued that the legislative history of the Omnibus Oregon Wild and Scenic Rivers Act grandfathered existing uses, including grazing. The Court found these arguments unpersuasive, stating that cattle grazing may continue “but only in accordance within the strictures of the Act to protect and enhance.” Further, the Court concluded the record established that grazing activities were degrading several of the ORVs. It ordered that the BLM could not authorize grazing in the river corridor until a new river plan and EIS were prepared. (Presumably the ban would be lifted only if the BLM demonstrated that grazing would “protect and enhance the values” for which the river was designated.) Also, until a new management plan and EIS were completed, the BLM was precluded from building parking lots, improving roads, and constructing water diversions (for stock watering) in the river corridor.

See previous discussion on *National Wildlife Federation v. Cosgriffe (D. OR 1998)*, page 8.

### *Oregon Natural Desert Association v. Singleton (D. OR 1999)*

This case involves a challenge to the BLM’s administration of the Owyhee WSR. Portions of the main stem and South Fork were designated on October 19, 1984, and two tributaries, the West Little Owyhee and North Fork of the Owyhee, were added on October 28, 1988. The BLM completed an EA and CRMP to guide management of these segments in September 1993.

The ONDA et al., challenged the BLM’s CRMP and ongoing management of these rivers on the basis that they allowed continuation of livestock grazing under BLM permit and that this grazing was damaging the ORVs in violation of Section 10(a) of the Act. The plaintiffs also challenged the BLM’s failure to prepare an EIS and analyze alternatives to fully protect and enhance river values. At the time of planning, the BLM identified 18 of the 67 miles where cattle had access to the river as “areas of livestock concern.” The EA identified grazing as an issue, describing negative impacts more specifically as conflicts with recreationists where livestock congregate, visual impacts from livestock trailing and grazing, and effects to ecological conditions.

The BLM and Oregon Cattleman’s Association (Intervenor/Defendant) countered the plaintiffs’ complaint by arguing cattle grazing was permitted at the date of the river’s designation and

therefore was compatible with the ORVs. The support for this claim rested, in part, on the 1979 pre-designation river study that accepted the continuation of grazing at a level that would protect river values. They also argued that the BLM's in-place mitigation plan was leading to improvement of vegetative conditions, conditions related to the ORVs.

On November 3, 1998, the U.S. District Court for the District of Oregon ruled "that the BLM had violated the Act by adopting a management plan which fails to consider whether cattle grazing is consistent with [protecting] the river's ORVs." Further, the Court continued that the BLM has the authority to eliminate, not just regulate, livestock grazing within the river area and that this alternative should have been considered in an EIS. It therefore ordered the BLM to prepare an EIS considering a full range of alternatives. The Court also found that: 1) the direction in Section 10(a) to protect and enhance "cannot reasonably be interpreted to permit any use so long as it does not substantially degrade the river system's values;" and 2) no uses are "grandfathered" unless stated explicitly in river-specific legislation.

On November 18, 1999, following a failed attempt by the BLM, Oregon Cattleman's Association, and ONDA to reach agreement on reasonable grazing restrictions, the Court ordered livestock removed from the 18 miles of the Owyhee WSR that the BLM identified as being adversely impacted by grazing. The Court expressed a willingness to allow grazing to continue if the "BLM's current practices could lead to restoration of the areas of concern." Absent demonstration of "significant improvement," the Court concluded it had no choice but to close the areas of concern to livestock grazing. The Court modified its injunction in April 2000 to allow livestock trailing and the construction of drift fences and water sources. The BLM was also directed to conduct periodic compliance checks and to report the results and its progress toward completion of an EIS in an annual report.

*Hells Canyon Alliance and Hells Canyon Preservation Council v. U.S. Forest Service (9<sup>th</sup> Cir. 2000)*

In 1975, Congress established the Hells Canyon National Recreation Area (HCNRA), adding 67.5 miles of the Snake River to the National System. In the early 1990's, the USFS proposed to establish recreation use allocations on the Snake WSR based on user survey information showing a 147 percent increase in visitor use during the primary season in the period 1979 to 1991. Establishing this visitor capacity was tied to protecting the desired recreation experience (recreation is an ORV). The ROD for the Recreation Management Plan (1994)<sup>4</sup> established use levels for private and commercial motorized and nonmotorized boaters. It also included nonmotorized periods in the wild segment of the river during July and August.

The decision was challenged administratively (USFS administrative appeals process)<sup>5</sup> and legally in a number of separate lawsuits by groups primarily representing motorized (Hells Canyon Alliance; HCA) and nonmotorized (Hells Canyon Preservation Council et al.; HCPC)

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<sup>4</sup> Other programmatic direction necessary for in-corridor values and uses is being developed through revision of the HCNRA Comprehensive Management Plan.

<sup>5</sup> The Deputy Regional Forester affirmed aspects of the Recreation Management Plan, including the decision to provide a nonmotorized period to achieve more primitive conditions in the wild river segment. He directed a new analysis and decision regarding commercial use and access to private lands.

users. While there were various aspects to each party's complaints, the principal concern of the HCA was the alleged inadequacy of the USFS's analysis to support the nonmotorized period in the wild river segment. The HCPC was concerned about overall recreation use levels—specifically that such use should approximate 1975 use levels (i.e., the date of the river's designation) and that the wild river segment be closed to motorized rivercraft. The principal issues before the Court were the regulations established for motorized users (nonmotorized use had been regulated through previous decisions) and adequacy of the USFS analysis.

The pending cases were consolidated in the U.S. District Court for the District of Oregon by the same judge who handled HCPC's 1996/97 lawsuits. The Court found in favor of the USFS, concluding, "the voluminous record supports the contention that it collected sufficient data and adequately supported its plan." This decision was challenged by both the HCA and the HCPC.

The opinion of the U.S. Court of Appeals for the 9<sup>th</sup> Circuit upheld the District Court decision and thus supported the USFS. Specifically, the Court recognized:

- Motorized craft as a valid use of the Snake WSR based on the HCNRA Act;
- The direction in the HCNRA Act to promulgate regulations necessary to control the use and numbers of motorized and nonmotorized craft;
- No requirement in the HCNRA or WSRs Acts directing a "particular numeric level or ratio of motorized and nonmotorized uses;" and
- The nondegradation policy of Section 10(a).

Based on a review of the record, the Court concluded the "USFS took a 'hard look' at the environmental impacts of motorized water craft on the various values of the Snake River. The Agency devoted 145 pages of the final EIS to exploring the possible environmental consequences of seven alternatives on each of the Snakes ORVs."

*Northwoods Wilderness Recovery v. U.S. Forest Service (W.D. MI 2001)*

The Ontonagon WSR was added to the National System on March 3, 1992, through the Michigan Scenic Rivers Act. *Northwoods Wilderness Recovery et al.*, challenged proposed timber harvest activities on the Ottawa National Forest and, specific to the Act, the portions of the Debutante Pine Salvage Vegetation Management Project within the recreational segment of the East Branch of the Ontonagon WSR. The specific challenge under the Act was whether the USFS proposal to harvest timber within the designated river corridor would protect and enhance its values and was consistent with USFS direction in the Ottawa National Forest Land and Resource Management Plan. The Court found the USFS had adequately considered potential adverse effects to river-related values and complied with direction in its plan—to use vegetative management to enhance the recreational experience while maintaining scenery management objectives.

### ***Management Implications***

- This section is interpreted as a nondegradation and enhancement policy for all rivers, regardless of classification (Interagency Guidelines). The river manager must seek to protect existing river-related values and, to the greatest extent possible, enhance those values.
- Provide for public recreation and resource uses that do not adversely impact or degrade the values for which the river was designated (Interagency Guidelines).
- Protect rivers by documenting and eliminating adverse impacts on values (free-flow, water quality, ORVs), including activities that were occurring on the date of designation. Enhance rivers by seeking opportunities to improve conditions.

### **Section 10(b) – Management of WSRs in Wilderness**

*Section 10. (b) Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system, as established by or pursuant to the Act of September 3, 1964 (78 Stat. 890; 16 U.S.C., ch. 23), shall be subject to the provisions of both the Wilderness Act and this Act with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of these Acts the more restrictive provisions shall apply.*

### ***Discussion of Intent***

Section 10(b) removes the potential for conflict on WSRs flowing in designated wilderness by applying the more restrictive provisions of the WSRs or Wilderness Acts in any situation of conflict. This section recognizes the importance of designating river systems by removing any potential for conflict in dual designations.

### ***Management Implications***

- River managers must be familiar with provisions of both acts when developing the CRMP.

### **Section 10(c) – WSRs Administered by the National Park Service or U.S. Fish and Wildlife Service**

*Section 10. (c) Any component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system, and any such component that is administered by the Secretary through the Fish and Wildlife Service shall become a part of the national wildlife refuge system. The lands involved shall be subject to the provisions of this Act and the Acts under which the national park system or national wildlife refuge system, as the case may be, is administered, and in case of conflict between the*



*provisions of these Acts, the more restrictive provisions shall apply. The Secretary of the Interior, in his administration of any component of the national wild and scenic rivers system, may utilize such general statutory authorities relating to areas of the national park system and such general statutory authorities otherwise available to him for recreation and preservation purposes and for the conservation and management of natural resources as he deems appropriate to carry out the purposes of this Act.*

### ***Discussion of Intent***

Through this section, Congress directs WSRs administered by the NPS and the U.S. Fish and Wildlife Service (USFWS) to be managed as part of the National Park System<sup>6</sup> or the National Wildlife Refuge System, respectively. In situations of conflict between laws and regulations governing park units and wildlife refuges and the Act, managers are to apply the most restrictive (i.e., the most protective) regulations.

In addition, this section allows the NPS and USFWS to use their general statutory authorities to protect WSR values. Some of the most important laws applicable, in whole or part, to the NPS are the Act of 1916 (the Organic Act), General Authorities Act, National Parks and Recreation Act of 1978, National Parks Omnibus Management Act, and Mining in Parks Act. For the USFWS, some of the most important laws applicable, in whole or part, include the National Wildlife Refuge Improvement Act of 1997 (USFWS equivalent of an organic act), National Wildlife Refuge System Act of 1966, Refuge Recreation Act of 1962, and ANILCA. Congressional intent is that WSRs managed by the NPS or USFWS be protected to the same standard as other units in the National Park System or the National Wildlife Refuge System, in addition to the protections provided by the Act.

The BLM may also apply its general statutory authorities relating to the public lands in such manner as deemed appropriate to protect WSR values. Some of the most important laws applicable, in whole or part, to the BLM are the Federal Land Policy and Management Act of 1976 (BLM equivalent of an organic act), and ANILCA.

There are many environmental statutes that apply to all federal land-managing agencies, such as the Endangered Species Act, NEPA, Clean Air and Clean Water Acts, and National Historic Preservation Act. These are sometimes referred to as “cross-cutting acts” and apply in administration of all WSRs.

### ***Management Implications***

- Apply general statutory authorities, in addition to the requirements of the Act, to protect WSR values.

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<sup>6</sup> In certain instances, where Congress has directed the Secretary of the Interior (in effect, the NPS) to administer a WSR through a cooperative agreement with local government, it has also specified that the river not be considered a part of the National Park System.

## **Section 10(d) – WSRs Administered by the U.S. Forest Service**

*Section 10. (d) The Secretary of Agriculture, in his administration of any component of the national wild and scenic rivers system area, may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this Act.*

### ***Discussion of Intent***

This section provides the USFS the authority to use its general statutory authorities to protect WSR values. Some of the most important laws applicable to the USFS include the Organic Administration Act, Multiple Use-Sustained Yield Act, and National Forest Management Act.

This section also allows the USFS to require special-use permits for all commercial guiding services on WSRs flowing through federal or private lands. The authority is codified in regulation (36 CFR, Part 261), with its scope defined as “an act or omission . . . within the designated boundaries of a component of the National Wild and Scenic Rivers System.” Specifically, Section 261.10(c) prohibits conducting any business activity within the boundaries of a WSR “unless authorized by federal law, regulation, or special-use authorization.” If use regulation is necessary to protect river values, Section 261.58(z) allows the USFS to prohibit by order “entering or being on lands or waters within the boundaries of a component of the National Wild and Scenic Rivers System.”

Requiring special-use permits for commercial guides and, as appropriate, nonregulatory or regulatory permits for private on-river and/or in-corridor river use allows the USFS to provide a level of public safety, to maintain a desired recreation experience, and to protect biological and physical values. On-river limitations may include, for example, restrictions on the numbers of private and commercial boaters, timing of use, and type and size of craft. In-corridor limitations may include, for example, restrictions on party size, timing of use, and type of activities.

### ***Litigation***

*United States v. Lindsey (9<sup>th</sup> Cir. 1979)*

The defendants were charged with violating regulations issued by the Secretary of Agriculture (through the USFS) on the Snake WSR that prohibited camping and use of a campfire without a permit. The campsite where this infraction occurred was located below the river’s ordinary high water mark and, therefore, legally on the state-owned portion of the river. The U.S. District Court for the District of Idaho dismissed the complaint since the activities occurred on State property. The United States appealed. The U.S. Court of Appeals for the 9<sup>th</sup> Circuit reversed the decision based on the power of the federal government to “regulate conduct on nonfederal land when reasonably necessary to protect adjacent federal property or navigable waters.”

*United States v. Richard (8<sup>th</sup> Cir. 1980)*

The defendant operated a campground on private land located near the Mark Twain National Forest and, as a part of his business, offered canoe outfitting on the Eleven Point WSR. He was

cited for conducting his canoe livery and transportation services without a permit and with full knowledge that such a permit was required, having been cited and fined previously for conducting this activity. He was convicted by a magistrate of violations of Section 10(d) of the Act, 16 USC 551 and 36 CFR 261.2(h) and 261.1(c).

The U.S. District Court for the Western District of Missouri reversed the magistrate's decision based on an unpublished opinion in another case, one in which an individual operated a canoe livery outside the boundaries of the Ozark National Scenic Riverways. (The Ozark National Scenic Riverways is an area administered by the NPS, although not a WSR. In this case, the individual delivered canoes to a State highway easement and did not charge for hauling.)

The U.S. appealed the District Court's decision. The U.S. Court of Appeals for the 8<sup>th</sup> Circuit compared the two cases and found them distinguishable, i.e., the defendant was clearly engaged in providing an outfitting service on National Forest System lands and within the boundaries of the Eleven Point WSR. Thus they reversed the District Court's opinion.

*United States v. Hells Canyon Guide Service (9<sup>th</sup> Cir. 1981)*

The defendant conducted commercial float boat and jet boat operations on the Snake WSR without a permit for outfitting services. In addition to a permit for commercial activities, the USFS requires every person using the Snake WSR to obtain a day-trip permit. The government sought an injunction to prevent the defendant from:

- 1) Operating any motorized or nonmotorized river craft on the Snake WSR (and on the Snake River within the HCNRA) without required permits;
- 2) Conducting business activities within the Snake WSR corridor and Wallowa-Whitman National Forest; and
- 3) Advertising or providing "improvements" on National Forest System lands without required permits. The defendant would also be required to remove all existing advertisements and improvements.

The defendant argued that the government had no authority to regulate use and administer use or occupancy on lands below the high water mark of the Snake River. Citing to U.S. v. Lindsey (see previous discussion) and other cases, the U.S. District Court for the District of Oregon permanently enjoined the defendant from engaging in these activities. The Court found "the Forest Service regulations . . . reasonably necessary to promote the purposes of the federal lands within the Snake River and Hells Canyon Areas."

The defendant appealed this decision to the U.S. Court of Appeals for the 9<sup>th</sup> Circuit, arguing the USFS permit system was invalid because the agency had not developed area-specific regulations as required in the HCNRA Act. The 9<sup>th</sup> Circuit disagreed, finding the authority granted in the HCNRA Act was "cumulative, not independent and exclusive." Thus, the authority conferred to the Secretary of Agriculture (USFS) in 16 USC 551 and Section 10(d) of the WSRs Act "is more than sufficient to validate the use of a permit system by the Forest Service to regulate activities."

### ***Management Implications***

- Apply general statutory authorities, in addition to the requirements of the Act, to protect WSR values.

### **Section 10(e) – Cooperative Agreements**

*Section 10. (e) The Federal agency charged with the administration of any component of the national wild and scenic rivers system may enter into written cooperative agreements with the Governor of a State, the head of any State agency, or the appropriate official of a political subdivision of a State for State or local governmental participation in the administration of the component. The States and their political subdivisions shall be encouraged to cooperate in the planning and administration of components of the system which include or adjoin State-or county-owned lands.*

### ***Discussion of Intent***

This section encourages a federal-state partnership in WSR administration. It recognizes the benefits from collaborative development and implementation of a CRMP and the role of state and local government in directing activities on nonfederal lands (e.g., water pollution abatement, zoning). Refer also to Section 12(a) of the Act that directs federal agencies to, where appropriate, enter into written cooperative agreements with the state river-administering agency for the management of federal lands within the boundaries of a state-administered (Section 2(a)(ii)) river.

### ***Litigation***

See previous discussion on *National Park and Conservation Association v. Stanton (D. DC 1999)*, page 10.

### ***Management Implications***

- Identify opportunities in the CRMP for the river-administering agency to effect specific written cooperative agreements in administration of a WSR.

### **Section 11(b)(1) – Federal Assistance to Others**

*Section 11. (b)(1) The Secretary of the Interior, the Secretary of Agriculture, or the head of any other Federal agency, shall assist, advise, and cooperate with States or their political subdivisions, landowners, private organizations, or individuals to plan, protect, and manage river resources. Such assistance, advice and cooperation may be through written agreements or otherwise. This authority applies within or outside a federally administered area and applies to rivers which are components of the national wild and scenic rivers system and to other rivers. Any agreement under this subsection may*

*include provisions for limited financial or other assistance to encourage participation in the acquisition, protection, and management of river resources.*

### ***Discussion of Intent***

This section authorizes the Secretary of the Interior, the Secretary of Agriculture, or the head of any federal agency to provide technical (i.e., nonmonetary) assistance and the use of agency funds to states, their political subdivisions, private organizations, and individuals to “plan, protect, and manage river resources.” This authority applies to projects/activities on nonfederal lands within and proximate to a WSR corridor. It provides a mechanism to effect partnerships for projects/activities distant from the designated WSR yet with the potential to affect designated WSR values. Opportunities for such partnerships should be identified in the CRMP and implemented through a properly documented written agreement to assure the public’s interests and the private landowner’s rights are protected.

This section, along with the Outdoor Recreation Act of 1963, also serves to authorize the river-related activities of the NPS Rivers, Trails and Conservation Assistance Program (RTCA). The RTCA provides technical assistance to citizen groups and local and state governments working to implement community-based river conservation and recreation projects. Under Section 11(b)(1), rivers eligible for such assistance include all rivers, not merely components of the National System or those located on federal lands.

### ***Management Implications***

- Identify opportunities in the CRMP for the river-administering agency to effect specific written cooperative agreements in administration of a WSR.

### **Section 12(a) – Management Policies**

*Section 12. (a) The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion, in accordance with section 2(a)(ii), 3(a), or 5(a), shall take such action respecting management policies, regulations, contracts, plans, affecting such lands, following November 10, 1978, as may be necessary to protect such rivers in accordance with the purposes of this Act. Such Secretary or other department or agency head shall, where appropriate, enter into written cooperative agreements with the appropriate State or local official for the planning, administration, and management of Federal lands which are within the boundaries of any rivers for which approval has been granted under section 2(a)(ii). Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this Act.*

### ***Discussion of Intent***

This section applies to activities conducted by a federal department or agency that are within or proximate to a WSR designated under Sections 2(a)(ii) or 3(a). It also applies to rivers under study pursuant to Section 5(a) and to rivers being considered pursuant to Section 2(a)(ii). Through the language of this section, Congress directs other federal agencies to protect river values in addition to meeting their agency mission. Refer to *Implementing the Wild and Scenic Rivers Act: Authorities and Roles of Key Federal Agencies*, a technical report of the Council (January 1999), for a description of the authorities of other federal agencies in river protection.

### ***Litigation***

#### *The Steamboaters v. U.S. Forest Service and Bureau of Land Management (D. OR 1996)*

The North Umpqua River was added to the National System in 1988, with segments administered by the BLM and USFS. The jointly developed CRMP, completed in July of 1992, was the subject of several administrative appeals, with the Regional Forester (USFS) and the IBLA (BLM) affirming respective agency decisions. The Steamboaters (one of the appellants) challenged implementation of the CRMP in the U.S. District Court for the District of Oregon, citing its failure to manage activities on federal lands within and adjacent to the river corridor to protect and enhance water quality and the fishery (both ORVs).

The plaintiff argued the CRMP did not provide direction for logging and other activities outside of, but adjacent to, the WSR corridor. They further argued that the CRMP implemented a strategy that it acknowledged as continuing to adversely impact the fishery resource by allowing, in part, increasing recreation use. Their final allegation under the Act focused on the agencies' failure to provide specific direction relating to operation of the North Umpqua Hydroelectric Project to protect water quality and the fishery. (Note: The lowermost facility of the North Umpqua Hydroelectric Project is located at the upper terminus of the WSR).

Based on the language in Section 3(d)(1), to coordinate the CRMP with "resource management planning for affected federal lands," the Court found the Act contemplates a cooperative relationship and "not a system of Wild and Scenic River Act primacy over other federal land management law." More specifically, the Court accepted the agencies' direction in the CRMP to evaluate the effects of activities outside the river corridor in a project-specific analysis, focused on protecting the river's ORVs. On the issue of relicensing of the North Umpqua Hydroelectric Project, the CRMP provided direction for the agencies to participate in the relicensing process and maintain the river's ORVs. The Court recognized Section 7 of the Act as the opportunity to evaluate the project at relicensing; it opined that "for the CRMP to specify policies and standards for Pacific Power and Light facilities would usurp the relicensing process."

#### *Newton County Wildlife Association v. Rogers (8<sup>th</sup> Cir. 1997)*

In 1992, six rivers on the Ozark National Forest were added to the National System. Prior to completion of the CRMPs, the USFS evaluated and approved four timber sales located adjacent to, but outside, the boundaries of the rivers. The plaintiffs sought judicial review of these sales,

arguing that logging and road building must be halted until the agency completed the CRMPs. The U.S. District Court for the Eastern District of Arkansas denied the plaintiffs' request for an injunction, but in the written order held that "the defendants failed to complete a CRMP as required by law and that such plan was required to encompass all areas affecting river segments designated by the Act."

Subsequent to this order, the USFS completed the CRMPs for these rivers, including management direction for only those areas within the boundary. In a motion for contempt filed by the plaintiffs, the Court reaffirmed its earlier opinion, specifically that Congress had not limited the scope of the CRMP to the area within the boundary. The Court recognized that river values "could certainly be affected by activities which fall beyond the boundaries of the component."

Parties favoring timber harvesting intervened to support the USFS. On May 6, 1997, the U.S. Court of Appeals for the 8<sup>th</sup> Circuit made two findings:

- 1) The Act does not require completion of a CRMP before an action (in this case, timber harvest) may take place.
- 2) CRMPs need only include the lands within the designated segment.

The 8<sup>th</sup> Circuit addressed only the procedural issue relative to approving the timber sales and not the issue of whether the USFS met "Wild and Scenic Rivers Act compliance obligations." It afforded the USFS "substantial discretion in deciding procedurally how it will meet those obligations." The USFS argued that their Land and Resource Management Plan took into account the rivers' 1992 designations, and an EA prepared for the timber sales met its compliance with WSR protection.

### ***Management Implications***

- In addition to preparing a CRMP for lands within the river corridor, the river-administering agency must consider actions on lands it administers adjacent to this area and make certain such actions protect WSR values.
- Other federal agencies must protect WSR values in actions for which they are responsible within and adjacent to a WSR corridor.

### **Section 12(b) – Existing Rights**

*Section 12. (b) Nothing in this section shall be construed to abrogate any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party.*

### ***Discussion of Intent***

Section 12(b) qualifies that nothing in Section 12(a) is to be construed to eliminate existing rights or privileges affecting federal lands without the owner's consent.

### ***Litigation***

*Haas v. Leavell (D. OR 1982)*

The plaintiff owned property within the wild segment of the Rogue WSR accessible only by boat (power) or air. He was granted the right of ingress/egress but, based on regulations published by the BLM in 1980, was prevented from using a powerboat for fishing and recreational purposes as he had historically done. The plaintiff appealed to the IBLA; the IBLA affirmed the decision of the BLM State Director.

The argument upon judicial review by the U.S. District Court for the District of Oregon focused on the intent of Section 12(b), specifically whether the plaintiff's prior use of his powerboat for fishing and recreational purposes was an existing right or privilege protected under this section. The Court agreed with the earlier IBLA opinion, i.e., Section 12(b) is concerned with "any existing right or privilege affecting federal lands. The State authorized use of a powerboat on the river for recreational purposes is not protected by 12(b)." The Court also concluded that the plaintiff's argument that his pre-existing use was a "vested property right protected by the Constitution and by 12(b)" was incorrect based on the Commerce and Property Clauses—specifically, "the federal government's power to regulate the river is paramount, and the State cannot create any rights superior to those of the federal government."

### ***Management Implications***

- Consider existing rights or privileges affecting federal lands when evaluating management actions on lands within or adjacent to the river corridor administered by the river-administering agency or other federal agency.
- Consult legal counsel regarding the relationship between Sections 10(a) and 12(b).

### **Section 12(c) – Water Pollution**

*Section 12. (c) The head of any agency administering a component of the national wild and scenic rivers system shall cooperate with the Administrator, Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.*

### ***Discussion of Intent***

Section 12(c) directs the river-administering agency to cooperate with the U.S. Environmental Protection Agency (EPA) and state water quality agencies in addressing water quality concerns



in WSRs. Cooperation requires active participation by the river-administering agency in evaluation of existing water quality, identification of limitations, and development of the often long-term strategies necessary to address water quality-related problems.

### ***Management Implications***

- Seek enforcement of water quality laws through the EPA and state water-quality agencies.
- Work in cooperation with the EPA and state water quality agencies to establish baseline conditions, identify water-quality related issues, and develop a strategy to improve/protect water quality.

### **Section 13(a) – Jurisdiction and Responsibilities of State with Respect to Fish and Wildlife**

*Section 13. (a) Nothing in this Act shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife. Hunting and fishing shall be permitted on lands and waters administered as parts of the system under applicable State and Federal laws and regulations unless, in the case of hunting, those lands or waters are within a national park or monument. The administering Secretary may, however, designate zones where, and establish periods when, no hunting is permitted for reasons of public safety, administration, or public use and enjoyment and shall issue appropriate regulations after consultation with the wildlife agency of the State or States affected.*

### ***Discussion of Intent***

This section clarifies that the role of the states in management of fish and wildlife is unaffected by the Act. The river-administering agency remains responsible, however, for evaluation of components of fish or wildlife restoration or enhancement projects that are also water resources projects and subject to Section 7(a) of the Act. In most instances, such projects would have a beneficial effect on WSR values; however, they must be designed to avoid adverse effects on free flow and other river-related values.

### ***Management Implications***

- Develop an effective partnership with state fish and wildlife agencies to achieve mutual goals in river protection.

### **Section 13(c) – Federal Reservation of Water**

*Section 13. (c) Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such*

*streams for purposes other than those specified in this Act, or in quantities greater than necessary to accomplish these purposes.*

### ***Discussion of Intent***

This section expressly reserves the quantity of water necessary to achieve the Act's purposes, including protecting the values for which a river is designated.

### ***Litigation***

The United States entitlement to a federal reserved water right for rivers designated under the Act has been addressed in two recent adjudications, with both finding the Act creates an express reservation of water necessary to achieve the purposes of the Act. (*Memorandum Decision Granting, in Part, and Denying, In Part, the United States' Motion for Summary Judgment on Reserved Water Rights Claims*; Idaho District Court, 1998, affirmed *Potlatch Corp. v. United States*; Idaho Supreme Court, 2000); (*In the Matter of the Relative Rights of the Waters of the Klamath River, Order on Motions for Ruling on Legal Issues, and for Summary Disposition*, State of Oregon Water Resources Department Hearings Officer Panel, 2001). Both decisions recognize that preserving the values identified in Section 1(b) of the Act are among the purposes for which water was reserved. The decision in the Klamath Basin went on to explain that where Congress has not identified the values to be protected by designation, the task of identifying the designated rivers' ORVs is delegated to the administering agency.

The two decisions diverge on the question of how much water to which the United States is entitled. The Idaho courts found that the United States is entitled to the "minimum quantity necessary" to fulfill the purposes of the Act, while the Klamath decision held that the United States is entitled to the amount of water "reasonably necessary" to accomplish the purposes of the Act.

### ***Management Implications***

- Describe the dependency of ORVs to flow in the CRMP.
- Establish baseline conditions, identify water-quantity related issues, and develop a strategy to protect flow-dependent ORVs.
- Consult with legal counsel in development of a strategy to address issues related to water quantity.

### **Section 13(e) – Interstate Compacts**

*Section 13. (e) Nothing contained in this Act shall be construed to alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States which contain any portion of the national wild and scenic rivers system.*

### ***Discussion of Intent***

This section clarifies that interstate compacts are unaffected by the Act.

### ***Management Implications***

- Determine if an interstate compact exists and identify its tenets.

### **Section 13(f) – Navigable Rivers**

*Section 13. (f) Nothing in this Act shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area.*

### ***Discussion of Intent***

Section 13(f) clarifies that nothing in the Act affects a state's rights to navigable waterways. A body of water is determined to be navigable under federal law when, at the time of statehood, it was used or was capable of being used as a public highway for transporting goods or for travel in the customary modes of trade and travel on water (the Daniel Ball case, U.S. Supreme Court). State ownership of the underlying riverbed does not, however, preclude the river-administering agency from regulating uses (e.g., private and commercial boating) on the water column as necessary to meet the purposes of the Act. The need to regulate on-water use includes providing a level of public safety, maintaining a desired recreation experience, and protecting biological and physical values. On-river limitations may include, for example, restrictions on the numbers of private and commercial boaters, timing of use, and type and size of craft.

### ***Litigation***

See previous discussions on *United States v. Lindsey* (9<sup>th</sup> Cir. 1979) and *United States v. Hells Canyon Guide Service* (9<sup>th</sup> Cir. 1981), page 28.

### ***Management Implications***

- Work in partnership with the state to assure that the state's public trust interest in navigability and the purposes of the Act are met.
- Consult with legal counsel early in the deliberative process if regulating use is being considered in development of the CRMP or via a separate management action.

## **Section 13(g) – Easements and Rights-of-Way**

*Section 13. (g) The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic rivers system in accordance with the laws applicable to the national park system and the national forest system, respectively: Provided, That any conditions precedent to granting such easements and rights-of-way shall be related to the policy and purpose of this Act.*

### ***Discussion of Intent***

An easement or right-of-way may be granted within the boundary of a WSR, subject to conditions to protect values.

### ***Management Implications***

- Evaluate any component of a project proposal requiring an easement or right-of-way that is a water resources project under Section 7(a) of the Act prior to further consideration of the easement/right-of-way.
- Grant an easement or right-of-way subject to the nondegradation policy of Section 10(a) and if it is in accordance with all laws applicable to the area.

## **Sections 14 and 14A(a) and (b) – Land Donations and Lease of Federal Lands**

*Section 14. The claim and allowance of the value of an easement as a charitable contribution under section 170 of title 26, United States Code, or as a gift under section 2522 of said title shall constitute an agreement by the donor on behalf of himself, his heirs, and assigns that, if the terms of the instrument creating the easement are violated, the donee or the United States may acquire the servient estate at its fair market value as of the time the easement was donated minus the value of the easement claimed and allowed as a charitable contribution or gift.*

*Section 14A. (a) Where appropriate in the discretion of the Secretary, he may lease federally owned land (or any interest therein) which is within the boundaries of any component of the national wild and scenic rivers system and which has been acquired by the Secretary under this Act. Such lease shall be subject to such restrictive covenants as may be necessary to carry out the purposes of this Act.*

*Section 14. (b) Any land to be leased by the Secretary under this section shall be offered first for such lease to the person who owned such land immediately before its acquisition by the United States.*

### ***Discussion of Intent***

Section 14 explains the process for acquiring lands in fee where the terms of an easement donated earlier have been violated. It also provides direction for the lease of federal lands within the river corridor.

### ***Management Implications***

- Coordinate the acquisition of lands in fee (specific to the circumstances described in Section 14) and the leasing of lands (or interest in lands) with appropriate agency staff and, as necessary, legal counsel.
- Develop restrictive covenants for federally leased lands as necessary to protect river values.

### **Section 15 – Exceptions for Alaska (Under ANILCA)**

*Section 15. Notwithstanding any other provision to the contrary in sections 3 and 9 of this Act, with respect to components of the national wild and scenic rivers system in Alaska designated by paragraphs (38) through (50) of section 3(a) of this Act — (1) the boundary of each such river shall include an average of not more than six hundred and forty acres per mile on both sides of the river. Such boundary shall not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private lands adjoining the river in such manner as to surround or effectively surround such private lands; and (2) the withdrawal made by paragraph (iii) of section 9(a) shall apply to the minerals in Federal lands which constitute the bed or bank or are situated within one-half mile of the bank of any river designated a wild river by the Alaska National Interest Lands Conservation Act.*

### ***Discussion of Intent***

Section 15 provides exceptions for rivers added to the National System under the ANILCA. Specifically, the boundary is increased to one-half mile and excludes lands owned by the state of Alaska or its political subdivisions. The boundary may not surround or effectively surround private land. Subsection 2 makes this one-half mile boundary the area withdrawn from all forms of appropriation under the mining laws and from the operation of the mineral leasing laws (subject to valid existing rights).

### ***Management Implications***

Apply a one-half mile boundary to rivers added to the National System under the ANILCA, subject to the qualifications of this section.

## **Section 16 – Definitions**

*Section 16. As used in this Act, the term —*

*(a) “River” means a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.*

*(b) “Free-flowing”, as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion: Provided, That this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the national wild and scenic rivers system.*

*(c) “Scenic easement” means the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area, but such control shall not affect, without the owner’s consent, any regular use exercised prior to the acquisition of the easement. For any designated wild and scenic river, the appropriate Secretary shall treat the acquisition of fee title with the reservation of regular existing uses to the owner as a scenic easement for purposes of this Act. Such an acquisition shall not constitute fee title ownership for purposes of section 6(b).*

### ***Discussion of Intent***

This section defines key terms.

### ***Management Implications***

- Apply these definitions in management of WSRs.

## *Appendix A: Comprehensive River Management Plans – Contents and Key Elements*

The principal purpose of this section is to describe the recommended contents and key elements of a CRMP. The Act provides specific direction; a CRMP should:

- Describe the existing resource conditions including a detailed description of the ORVs;
- Define the goals and desired conditions for protecting river values;
- Address development of lands and facilities;
- Address user capacities;
- Address water quality issues and instream flow requirements;
- Reflect a collaborative approach, recognizing the responsibilities of, and opportunities for, partnership with all stakeholders;
- Identify regulatory authorities of other governmental agencies that assist in protecting river values; and
- Include a monitoring strategy to maintain desired conditions.

### **Relationship of a CRMP and the NEPA**

A CRMP is developed in compliance with the NEPA. The purpose and need for the proposed action is to develop a plan to protect and enhance the values for which the river was designated (free-flowing condition, water quality, and ORVs). Issues are identified that prevent or impede the protection and enhancement of river values. Alternative courses of actions are developed and analyzed relative to achieving overall goals and desired future conditions within the WSR corridor. A “no action” alternative, representing the existing situation, is described as the basis for comparison of the action alternatives. Management direction and actions, as more fully described in the section below, typically vary by alternative. The resultant CRMP describes the management direction/actions of the selected alternative at a programmatic level. Identified management actions generally require a site-specific NEPA analysis prior to implementation.

The CRMP amends an agency’s broader land management plan (BLM—Resource Management Plan; NPS—General Management Plan (GMP); USFWS—Resource Plan; USFS—Land and Resource Management Plan). For designated rivers that are separate NPS units, the CRMP is the GMP (e.g., St. Croix National Scenic Riverway). In some cases, the CRMP is developed prior to designation as part of the suitability study and adopted via act of Congress. A CRMP typically includes high-intensity public involvement in recognition of the impossibility (and undesirability) of protecting rivers without partners.

## **Key Elements of a CRMP**

The following outline is not a suggested table of contents for a CRMP. Rather, it identifies the key elements specific to river planning that should be developed in the context of each agency's planning framework and under the NEPA. Further, the outline purposely does not include the components specific to the NEPA process, e.g., description of issues, alternatives, environmental consequences, or decision document.

### ***Description of River Setting and Resource Values***

- Regional River Setting
- Description of River Corridor (by resource)
  - Basic hydrology
  - Type/amount of recreation use (private and commercial)
  - Type/amount of other uses permitted uses (e.g., livestock grazing, mineral activities)
- Land Ownership and Land-Use Description
- Outstandingly Remarkable Values (sufficiently detailed to serve as baseline for desired management direction and monitoring)
- River Classification
- Landscape Character (description of existing development level by segment)

### ***Planning Context (Coordination with Others)***

- Legislative Direction Specific to the River
- Relationship to Other Federal Regulatory Agencies
- Relationship to Tribal Governments
- Relationship to Other Federal, State and Local Government Plans
- Relationship to Other Regional Coordinating Bodies

### ***Management Direction***

- Goals and Desired Future Conditions
- Standards and Guidelines by Resource



- River Corridor Boundary
- Principles for Land Acquisition (as appropriate)

### **Management Actions**

This section includes the criteria developed to guide subsequent site-specific agency decisions and a description of probable management actions, including the objectives/intent of an action. For example, this section might include criteria for evaluating proposed river events conducted under agency special-use authorization or, based on management direction, describe priority areas for restoration and likely treatments.

### ***Monitoring Strategy***

- Standards
- Indicators for Management Actions
- Process (intensity, frequency, personnel needs, and other costs)

### ***Potential Appendix Material***

- Annotated WSRs Act and River-Specific Enabling Legislation
- Resources Assessment (ORVs)
- Documented Inventory Information (e.g., water quality)
- Instream Flow Studies
- Visitor Capacity Studies
- Water Resources Project Evaluation Process
- State/Local Regulation Specific to Protecting Resource Values

### **Filing of Detailed Boundaries and CRMP**

Section 3(b) requires establishing detailed boundaries (an average of not more than 320 acres per river mile, 640 acres for rivers added under the ANILCA) and, if not established in the river-specific legislation, the classification of various segments within one year of designation. Quoting from Section 3(b): “Notice of the availability of the boundaries and classification, and of subsequent boundary amendments shall be published in the Federal Register and shall not

become effective until 90 days after they have been forwarded to the President of the Senate and the Speaker of the House of Representatives.”

Section 3(d)(1) requires the CMRP “shall be prepared, after consultation with state and local governments and interested publics within three full fiscal years after the date of designation. Notice of completion and availability of such plans shall be published in the Federal Register.”