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## The Wild and Scenic Rivers Act and Federal Water Rights

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# CRS Report for Congress

## The Wild and Scenic Rivers Act and Federal Water Rights

Updated January 14, 2008

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Prepared for Members and  
Committees of Congress

# The Wild and Scenic Rivers Act and Federal Water Rights

## Summary

During the 1960s, support grew for the idea that the development of our nation's rivers needed to be balanced by protecting certain rivers that possessed outstanding undeveloped qualities. This sentiment culminated in the enactment of the Wild and Scenic Rivers Act of 1968. Rivers may be designated for protection under the act by Congress or nominated for inclusion by a Governor and approved by the Secretary of the Interior. The act addresses the protection of the water flows of designated rivers, both expressly and by implication. This report examines the purposes, language, and legislative history of the act in order to analyze its effects on federal and state water rights. It also reviews specific water rights provisions within certain river designations.

The act states that the United States' policy is to preserve certain rivers possessing outstanding values in "free-flowing condition" and that the purpose of the act is to implement that policy. The act contains several paragraphs on water rights, stating that the jurisdiction of the states and United States over waters shall be determined by established principles of law; that any taking of water rights shall entitle the owner to just compensation; that the jurisdiction of the states over waters is unaffected by the act to the extent that such jurisdiction may be exercised without impairing the purposes of the act or its administration; and that the act shall not be construed to alter interstate compacts.

The act also indicates (albeit by reverse implication) the availability of federal water rights necessary to accomplish the purposes of the act:

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

This report discusses federal authority over water, and federal "reserved" and non-reserved water rights. Based on the language of the act and its legislative history, it appears that the act creates federal water rights. The act does not specify the quantity of the right. The amount of the federal right is likely to vary from river to river depending on the river's flows, the unappropriated flows in the river at the time of designation, and the values for which the river is being protected. In practice, federal reserved water rights have not always been claimed if alternative means are adequate. Necessary water flows sometimes have been secured under state law, through cooperative agreements, and by purchases from willing sellers.

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# The Wild and Scenic Rivers Act and Federal Water Rights

## Background

During the 1960s, support grew for the idea that the natural tendency toward development of our nation's rivers needed to be balanced by protection of certain rivers possessing outstanding undeveloped qualities. This sentiment culminated in the enactment of the Wild and Scenic Rivers Act of 1968 (WSRA).<sup>1</sup> Rivers may be designated by Congress, or, in some instances, be nominated by a Governor and approved by the Secretary of the Interior. Designation provides certain protections from development and from the adverse effects of water resources projects.

Section 1 of the act declares it to be the policy of the United States that certain rivers that possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition," and that the established national policy of dam and other construction be complemented by a policy that would preserve other selected rivers or sections "in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." Section 2 of the act states that it is the purpose of the act to implement the policy set out in section 1.

The act establishes three categories of rivers: wild, scenic, and recreational. A river will be classified as one of these categories depending on its characteristics and values at the time of designation and the desired level of protection. Rivers in the Wild and Scenic River System are managed by various federal agencies.<sup>2</sup> "River" and "free-flowing" are defined in 16 U.S.C. § 1286:

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

"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.

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<sup>1</sup> P.L. 90-542, 82 Stat. 906, codified at 16 U.S.C. §§ 1271 *et seq.*

<sup>2</sup> The National Park Service, the Bureau of Land Management, the Forest Service, and the Fish and Wildlife Service all manage designated rivers.

The act provides protection for a designated river or segment by limiting the licensing of dams, reservoirs and other water project works on, or adversely affecting, protected segments. As to the most vital protection of all, the protection of the *flow* of the river, the statute is convoluted, but appears to create federal water rights sufficient to carry out the purposes of the act. Section 13, codified at 16 U.S.C. § 1284, states:

(b) The jurisdiction of the States and the United States over waters of any stream included in a national wild, scenic, or recreation river area shall be determined by established principles of law. Under the provisions of this chapter, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation. Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws.

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

(d) The jurisdiction of the States over waters of any stream included in a national wild, scenic, or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.

(e) Nothing contained in this chapter 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 systems.

The interpretation of this language, its legislative history and the import for managing wild and scenic rivers is discussed in this report.

## Federal Authority Over Water

Congress derives authority to regulate water from several constitutional sources, among them the commerce power (including the navigation power), the spending power, the war power, the treaty power and the property power.<sup>3</sup> Furthermore, under the “Supremacy Clause” (art. VI, cl. 2) of the Constitution, when the federal government exercises legitimate authority, the federal law may preempt state law.<sup>4</sup> However, the point at which federal law preempts state law is not always clear.

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<sup>3</sup> See 4 WATERS AND WATER RIGHTS, Ch. 35: *Constitutional Foundations of Federal Water Law*, Robert E. Beck, Editor-in-Chief (1991 Ed., 2004 replacement volume).

<sup>4</sup> *Gibbons v. Ogden*, 9 Wheat. (922 U.S.) 1, 210-211 (1824). See *Perez v. Campbell*, 402 U.S. 637 (1971); *Lee v. Florida*, 392 U.S. 378 (1968); *Nash v. Florida Industrial Comm.* 389 U.S. 235 (1967); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

The Supreme Court has recognized the federal power to regulate water under various constitutional powers and resultant statutes. For example, pursuant to the “Commerce Clause” (art. I, § 8, cl.2), Congress may regulate water and water use, and, pursuant to the authority to regulate navigation, may even abrogate state sanctioned water rights without paying compensation.<sup>5</sup> Also, the authority for Congress to tax and spend for the general welfare has been said to provide the federal government powers in connection with water and water projects beyond those under the Commerce Clause.<sup>6</sup>

Considering that the act also provides for the acquisition of lands by the federal government in the river corridor, another source of constitutional authority for the Wild and Scenic Rivers Act is the “Property Clause” (art. IV, § 3, cl. 2), which authorizes Congress to make “needful rules and regulations” regarding federal property.

## **Water Rights Under the Wild and Scenic Rivers Act**

### **Background and Statutory Language**

Although Congress has repeatedly deferred to state law in the area of regulation of water use,<sup>7</sup> and a court is likely to be cautious in concluding that a federal water right is created, whether reserved or non-reserved, the power of the federal government to do so cannot be denied. Therefore, the critical factor is whether Congress intended that such rights be created, as indicated either by express language, or by implication from a congressional purpose, reservation, or directive for which water is necessary. A court will derive evidence of that intent from the language of the statute in question, its purposes, and, on points as to which there is any ambiguity, its legislative history.

The purpose of the Wild and Scenic Rivers Act is stated as being to implement the policy set out in section one of the act — to preserve rivers “in free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.” “Free-flowing” is defined as “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway.” It seems likely that Congress intended to create a federal right to some or all of the instream flows of designated rivers or river segments in order to carry out the purposes of the act.

This conclusion is reinforced by the express, though negatively stated, reference to the creation of water rights in section 1284(c), that

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<sup>5</sup> 4 WATER AND WATER RIGHTS, § 35.02(c), Robert E. Beck, Editor-in-Chief, (1991 Ed., 2004 replacement volume).

<sup>6</sup> *Id.*, § 35.04.

<sup>7</sup> See *United States v. New Mexico*, 438 U.S. 696, n.5 at 702 (1978).

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

The words “reserve” and “reservation” also appear in the few Supreme Court cases relating to federal water rights. Although the nature and extent of federal power over water generates perpetual debate, the Supreme Court has held that the federal government may, at the least, “reserve” unappropriated water (water not subject to a right vested under state law) for federal purposes from federal “public domain” lands.<sup>8</sup> This reservation may be express, but typically is inferred from the congressional purposes in reserving lands for some purpose. The federal right vests and has a priority date as of the date of the reservation, whether or not the water is put to immediate use. Hence, the federal right is junior to rights existing on the date of the establishment of the federal right but senior to all rights vesting after that date. A brief history and discussion of the elements of these rights follows.

“Public domain” lands are federal lands (primarily in the West), that were obtained from a foreign sovereign rather than from a state or individual. These western lands developed an “appropriation” system of water rights that contrasts with the “riparian” rights systems of the eastern states — a system in which water rights depend on ownership of the lands adjacent to the water source.<sup>9</sup> As the original owner of the public domain lands before states were created, the federal government was vested originally with all proprietary and legislative authority predating the authority of states that were subsequently created. Therefore, there could not be any riparian owners for decades because the federal government was the only riparian owner. For this reason, and because water sources in the arid West were scarce and water typically needed to be moved to be used, the new appropriation system of water rights and priorities developed.

Throughout much of our nation’s history, the public domain lands were generally available for entry and for perfection of private ownership. However, the government could withdraw certain lands from the operation of the disposal laws, and if such withdrawn lands were dedicated to a particular purpose or purposes, the lands were said to be a “reservation” — reserved for those purposes. As a factual

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<sup>8</sup> *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1973); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908).

<sup>9</sup> A discussion of the differences between appropriation and riparian systems of law is not necessary for the purposes of this paper. It can be noted, however, that under the riparian system, the right to use water is a right incident to the ownership of land that abuts the water source. The right is usually said to be to make “reasonable use” of the waters, although these uses may vary under state law. Each riparian owner has the same right, the right is not lost through disuse, and all share in times of shortage. In contrast, in an appropriation state the right to use water is not dependent on ownership of adjacent land, the right is for a particular quantity and use, and may be lost through disuse. Holders of water rights are ranked as to their entitlement with earliest users having “priority” over later users, such that the later users may not receive water in times of drought.



happenstance, the cases to date on federal water rights in general have involved public domain lands and reservations created out of them.<sup>10</sup>

The Wild and Scenic Rivers Act speaks in terms of “reserved” water, yet also provides for the designation of rivers located among non-public domain lands in the East. Although the Art. IV property power speaks of the “Territory or other Property belonging to the United States” and does not distinguish between public domain lands and lands acquired from a state or individual, we know of no cases that required a court to interpret the use of the word “reservation” in the WSRA as it applies to rivers in non-public domain states. However, the act also authorizes the acquisition by the federal government of a certain amount of lands within a designated river corridor. Therefore, federal property would adjoin a protected river. Perhaps a court would articulate a federal right related to acquired federal lands as a “non-reserved” federal right to distinguish such right from the historical meaning of the term “reserved.” Or perhaps “reserved” rights would be interpreted to mean a federal water right associated with a congressional directive that federal lands, whether public domain or acquired, be used for a particular purpose.<sup>11</sup> Given the basic constitutional authority of Congress to deal with property of the United States, the choice of terminology should not affect the otherwise clear intent to achieve certain purposes. Therefore, it is likely that a court will treat the water rights language in the Wild and Scenic Rivers Act as giving rise to water rights sufficient to carry out the purposes of the federal reservations and designations created by the act.

The quantity of a WSRA federal water right appears to be the amount necessary to achieve the purposes of the act; here that appears to be that amount necessary to preserve the free-flowing condition of the river and to preserve the values for which the river was protected.<sup>12</sup> It is therefore arguable what quantity is sufficient in each

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<sup>10</sup> See also *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (Idaho 2000), in which case the Idaho Supreme Court affirmed a lower court decision in the Snake River Basin Adjudication holding that designation under the Wild and Scenic River Act gave rise to federal reserved water rights in the amount necessary to fulfill the purposes of the act.

<sup>11</sup> The Supreme Court has interpreted federal reserved rights as including those for any federal enclave, and the waiver of sovereign immunity in 43 U.S.C. § 666 as permitting the United States to be joined in proceedings adjudicating rights to the use of water of a river system, including appropriative rights, riparian rights, and reserved rights. *United States v. Eagle County*, 401 U.S. 520, 523-524 (1971).

Another analysis, in speaking of the property power and water, stated:

It is important to understand that any water rights that may be asserted by the federal government outside of state law — whether called reserved, non-reserved or by some other name — rest on this same constitutional basis. Thus, federal reserved rights are not a unique species of federal rights that arise directly out of the reservation of federal lands, so that, absent a reservation of land, no federal water rights can exist.

T. Olson, Memorandum for Assistant Attorney General, Land and Natural Resources Division, June 16, 1982 at 48.

<sup>12</sup> Congress apparently has spoken directly to instream water levels in other statutes. In  
(continued...)

instance, and the protected amount may not be the full flow the river. The definition of free-flowing would seem to argue that the full unappropriated flow as of the time of designation (i.e., subject to those existing uses and diversions that do not impair the purposes for which the river is being protected) is protected. On the other hand, by referring to “necessary” water, § 1284(c) may indicate that the amount of the federal right may be less than the full amount of water available. In a river that is subject to heavy Spring flows, for example, the argument might be made that some peak water flows could be impounded or diverted upstream as long as sufficient flow was released to the protected segment to maintain the values for which it was protected.

Section 1284(b) states that “established principles of law” apply to the respective jurisdiction of the States and the United States over waters of streams included in the system, and that “[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the federal government as to exemption from state water laws.” This latter sentence seems ambiguous in view of the fact that the act creates federal rights. In light of the federal rights and the legislative history as is set out below, the best interpretation of this provision seems to be that Congress was reiterating that it did not intend to expound a new general position as to exemption from state water laws, but rather wanted the courts to apply the usual principles — which would include the federal rights necessary to accomplish the Congressional purposes. This reading is borne out by subsection (d) that states that “[t]he jurisdiction of States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.” Again, this provision has the converse meaning that the traditional jurisdiction of states over waters *is* affected if its exercise impairs the federal purpose of protecting free-flowing streams.

Lastly, section 1284(b) states that “[u]nder the provisions of this chapter, any taking by the United States of a water right which is vested under either state or federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation.” In other words, if any existing water right were ever condemned for federal purposes, compensation would be paid. However, representatives of the Departments of the Interior and Agriculture inform us that no water right has ever been condemned under WSRA.

To summarize, the WSRA appears on its face to protect designated rivers in a free-flowing state by a “reservation” of the waters of such streams, necessary to carry out the purposes of the act, to affirm existing principles of law as to federal/state

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<sup>12</sup> (...continued)

*United States v. New Mexico*, *supra*, at 710, the Supreme Court stated:

When it was Congress’ intent to maintain minimum instream flows within the confines of a national forest, it expressly so directed, as it did in the case of the Lake Superior National Forest: In order to preserve the shore lines, rapids, waterfalls, beaches and other natural features of the region in an unmodified state of nature, no further alteration of the natural water level of any lake or stream ... shall be authorized. 16 U.S.C. 577b (1976 ed.).

authority over water, and to provide compensation for any taking of water rights that were vested under state law.

## Legislative History

Although it seems evident from the face of the statute that Congress intended to create federal water rights, in view of the historical sensitivity of water rights issues a court might nonetheless review the legislative history of the act for confirmation, clarification, or contradiction of that apparent intent. The legislative history might also be examined for possible clarification of particular points such as the quantity of the federal right. Different courts, however, give different weight to legislative history. A court usually gives more weight to the committee reports and to floor explanations by a bill's sponsors or managers, than to the comments of any other Member.

The language in the various bills proposing this legislation differed. H.R. 18260 contained only brief language on water rights. Section 13(b) stated:

Nothing in this Act shall constitute an express or implied claim or denial on the part of the United States with respect to the applicability to it of, or to its exemption from state water laws, and nothing in this Act shall be construed to alter, amend, or repeal any interstate water compact which has heretofore been entered into by States which contain any portion of the national scenic rivers system and to which the consent or approval of the Congress has been given.

The committee report merely paraphrased this language with no additional explanation,<sup>13</sup> but also noted that H.R. 18260 was similar to a bill submitted by the Department of Interior. Representative Aspinall, then chairman of the House Committee on Interior and Insular Affairs, when asked about the effect of the legislation on water rights acquired under state law quoted comments from the Department of the Interior:

Enactment of the bill would not in any way affect or impair any valid or existing water rights perfected under State law. In addition, further appropriations could be made and water rights perfected under State law so long as the subsequent appropriations would not adversely affect the designated rivers.<sup>14</sup>

As to the “reservation of water” created by the act, Representative Aspinall continued to quote the Department:

Enactment of the bill would reserve to the United States sufficient appropriated water flowing through federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill. It follows that

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<sup>13</sup> H.Rept. 90-16 at 13 (1968).

<sup>14</sup> 114 Cong. Rec. 26594 (1968).

all unappropriated and unreserved waters would be available for appropriation and use under State law for future development of the area.<sup>15</sup>

The “similar” departmental bill, however, contained additional express language on the reservation of water and the taking of state recognized rights, so these comments were not fully appropriate to the language then being considered.<sup>16</sup>

The Senate bill, S. 119, had retained more of the departmental language, although the critical language as to the federal right was changed from an affirmative statement to a negative implication. The Senate language was adopted at conference as the final language.<sup>17</sup>

Section 6 of S. 119 contained the water law related items, numbered differently but worded as they ultimately were in the final language. The Senate Committee Report explained the provisions as follows:

#### Water Rights

The language contained in subsection 6(f) is intended by the committee to preserve the status quo with respect to the law of water rights. No change is intended. The first sentence states that established principles of law will determine the Federal and State Jurisdiction over the waters of a stream that is included in a wild river area. Those established principles of law are not modified. The third sentence states that with respect to possible exemption of the Federal Government from State water laws the act is neither a claim nor a denial of exemption. Any issue relating to exemption will be determined by established principles of law as provided in the first sentence. The second sentence would apply to this legislation the principle of compensation embraced by section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 390, found in 43 U.S.C. 383). This means that the Government must pay just compensation for a water right taken for wild river purposes if the water right is a vested property right under established principles of State or Federal law. See *U.S. v. Gerlach* (339 U.S. 725).

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<sup>15</sup> *Id.*

<sup>16</sup> As set out in H.Rept. 90-1623, *supra*, at 19, the Departmental version read:

(f) The designation of any stream or portion thereof as a national scenic river area in accordance with the provisions of this Act shall have the effect of reserving, subject to rights vested under either State or Federal law at the time of such designation which are compensable under the next following sentence, the waters of such stream for the purposes of this Act, but in quantities no greater than necessary to accomplish such purposes. Any taking by the United States, under the provisions of this Act, of a water right that is vested under State or Federal law, that is beneficially used at the time a national scenic river area is established, and that prior to the date of this Act, would have been compensable if taken or interfered with by the United States for purposes not related to the exercise of the commerce power, shall entitle the owner of such right to just compensation.

<sup>17</sup> H.Rept. 90-1917 (1968).

Subsection 6(j) makes it clear that designation of a stream or its portion thereof is not to be considered a reservation of unappropriated waters other than for the purposes of this act — and in no greater quantities than are necessary for those purposes.

It should be made clear that it is the intention of the committee that the Federal Government may reserve only such unappropriated waters as may be required for the purposes specified in this act. The establishment of a National Wild and Scenic Rivers Systems is not intended to affect or impair any prior valid water right vested under State or Federal law.<sup>18</sup>

This language was paraphrased on the floor. Senator Church engaged in a colloquy with Senator Allott, who stated that he would like to “ask a few questions and perhaps make a little legislative history,” during the course of which some aspects of the bill appear to have been overstated. Senator Church responded to Senator Allott’s concern over the effect of the proposal on the priority of water rights, noting that the committee “took great care ... to work out language that would make it clear that present water law is not altered by the provisions of this bill.”<sup>19</sup>

When Senator Allott sought to clarify the “Water Rights” section of the bill, Senator Church agreed with his understanding of the language. The senators noted that only unappropriated waters could be reserved for the purposes of the act.<sup>20</sup> They also noted that “the reservation is subject to prior water rights vested under State law, and therefore the appropriate Secretary cannot insist upon any greater flow in the river than the amount of unappropriated water.”<sup>21</sup> Finally, the senators noted that the federal right would be superior only to subsequent appropriations under state law.<sup>22</sup>

This exchange may be somewhat incomplete. Although it is correct to say that the federal water rights created by the act are only for the unappropriated water in the source and are subject to prior water rights vested under state law, this discussion failed to note that the act included language permitting federal condemnation of state recognized rights if needed for the purposes of the act.

## Cases and WSRA Water Rights in Practice

Although very few cases have involved water rights under the act, the Idaho Supreme Court has held that §13(c) does reserve federal water rights:

The legislative intent is awkwardly stated in the negative in section 13(c) of the Wild and Scenic Rivers Act, but it is clear that Congress intended to reserve water to fulfill the purposes of the Act ....

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<sup>18</sup> S.Rept. 90-491 at 5 (1967).

<sup>19</sup> 113 Cong. Rec. 21747 (1967).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Section 13(c) makes little sense unless the legislation reserves water to fulfill the purposes of the Act. It would be anomalous to logic to say that the Act which was expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers. Such a result would run contrary to the language of section 13(c) and the Congressional declaration of policy.<sup>23</sup>

This case was decided in the context of a congressionally designated river, rather than a state-nominated river. Because rivers that enter the National System through the state application process must be managed by the state in question, protection of their free-flowing nature and values is accomplished under state law. However, § 13 refers to designation of “any” stream or portion thereof in connection with the reservation of necessary water, and the argument can be made that a federal water right is available to protect state-nominated rivers as well as those Congress designates. However, we know of no instances in which a federal water right has been invoked to protect a state-nominated river.<sup>24</sup>

In addition, the individual legislation designating a wild and scenic river may address particular water flows and facility situations.

Although federal reserved water rights appear to be available under WSRA, they have not always been claimed.<sup>25</sup> Agency materials<sup>26</sup> indicate that in instances where another underlying federal right (e.g. national forest reserves) exists and appears adequate to provide sufficient water, a WSRA federal right might not be asserted.<sup>27</sup> Similarly, if a right to adequate instream flows is available under state law, the United States has applied for necessary water by that route. Adequate flows may also be obtained under a specific state statute, through cooperative agreements, by filing defensive protests objecting to possibly harmful water right applications by others, or through purchase of necessary water from willing sellers. As noted above, the United States has never condemned water rights for WSRA purposes.

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<sup>23</sup> Potlatch Corp. v. United States, 134 Idaho 912, 914, 12 P. 3d 1256, 1258 (Idaho 2000).

<sup>24</sup> The Rivers, Trails, and Conservation Assistance Program of the National Park Service maintains information on state-nominated rivers and conducts reviews of state applications and § 7 studies of the possible adverse impacts of proposed water resources projects on such rivers.

<sup>25</sup> Circumstances may arise in which the United States may be obliged to rely on the federal reserved right, as in a general water adjudication or to carry out the federal purposes if no other means are available.

<sup>26</sup> *A Compendium of Questions and Answers Relating to Wild and Scenic Rivers*, Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council, Revised January 1999, at 48-52.

<sup>27</sup> In some circumstances, such as a general water adjudication, the United States may have to claim whatever federal reserved rights exist in order not to have that option precluded by a final judgment that omits them.

## Water Rights Provisions Within Specific Designations

Since the Wild and Scenic Rivers Act was enacted in 1968, dozens of rivers have been added to the list of protected waterways. There are 167 designations in the act, some of which include multiple bodies of water. Designating a river under the act is not intended to change the amount of water it receives, but simply to protect the river from future changes. However, the lack of specificity in water rights protection under the act, and an unclear priority date for the rivers, has led some to include water rights protections within specific legislation designating a river, especially in the West, where water is dear. The vast majority of wild and scenic River legislation does not address water rights. The few designations that do reference water rights, and their different forms, are discussed here.

### Issues Regarding Water Rights

Generally, concerns have been raised as to the appropriate nature of water rights under wild and scenic designations. Upstream landowners and development interests, including state and local governments, may be concerned about whether new downstream wild and scenic segments may limit their water use and future water diversions. Conversely, downstream landowners and others may fear that upstream designations will limit their future water development options.

Several factors may be considered when evaluating the water rights for a proposed river. One consideration is the type of designation of the river — wild, scenic, or recreational. The amount of water needed to protect the values of each section may vary depending upon the type of designation and its placement in the watershed. For example, water usage related to a protected waterway presumably would be most restricted if the river were designated as *wild*. Development or water usage near wild rivers cannot change the essential characteristics of primitive watersheds and shorelines, and unpolluted waters. (16 U.S.C. § 1273(b)(1).) A *recreational* river would have the fewest restrictions of the three types, as that designation allows rivers that already have some access by roads, some development along their shorelines, and some impoundment or diversion of waters in the past. (16 U.S.C. § 1273(b)(3).) However, future restrictions on development, including on water resource projects, apply even to recreational rivers.

Another key factor is the type of land through which the river flows. National parks, national forests, and wilderness areas have established water rights for waters within their boundaries to protect their resources.<sup>28</sup> In each of these areas, the rivers

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<sup>28</sup> See, e.g., *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908) (when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water that vests on the date of the reservation and is superior to the rights of future appropriators); *United States v. New Mexico*, 438 U.S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) (the federal (continued...))

themselves are an important resource.<sup>29</sup> The implied water rights conferred by the Wild and Scenic Rivers Act for a specific river designated inside one of these land areas would be an overlay to those existing rights, that is, a second layer of rights reserving water to the extent needed to accomplish the purpose of the designation. In many areas protection of wild and scenic values may be accomplished with the original reserved water right. However, the implied priority date created with the designation of the federal land may create a conflict when a river designation includes a specific priority date. Arguably, the more specific priority date could supersede the more general implied priority date, effectively eliminating the more senior priority right the river once enjoyed. This conflict has not been tested.

## Examples of Water Rights Provisions

Water rights provisions can address different purposes. One goal can be to quantify the extent of the new water right under state law. Another goal can be to establish a priority date for any new water rights created by the designation. For example, the enacting legislation for the Clarks Fork Wild and Scenic River in Wyoming, which is designated as a wild river, has this language about water rights:

The Secretary of Agriculture is directed to apply for the quantification of the water right reserved by the inclusion of a portion of the Clarks Fork in the Wild and Scenic Rivers System in accordance with the procedural requirements of the laws of the State of Wyoming: *Provided*, That, notwithstanding any provision of the laws of the State of Wyoming otherwise applicable to the granting and exercise of water rights, the purposes for which the Clarks Fork is designated, as set forth in this chapter and this paragraph, are declared to be beneficial uses and the priority date of such right shall be November 28, 1990. (16 U.S.C. § 1274(a)(116)).

This provision has the benefit of clearly establishing a priority right, as well as the date and quantity of that priority. The Clarks Fork River is in a national forest. It is not clear whether this water rights designation provides a second, albeit junior, water right, or whether it has the effect of thwarting the existing water rights that

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<sup>28</sup> (...continued)

government may acquire rights to unappropriated water on federal lands when the land has been reserved pursuant to congressional authorization for a specific federal purpose that requires the use of water); *Cappaert v. United States*, 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) (same); *Sierra Club v. Lyng*, 661 F. Supp. 1491 (D. Colo. 1987) (holding that Wilderness Act impliedly established federal water rights in Wilderness Areas).

<sup>29</sup> The National Parks Organic Act, 16 U.S.C. § 1: “the fundamental purpose of said parks ... is to conserve the scenery and the natural and historic objects and the wild life therein ... to leave them unimpaired for the enjoyment of future generations.”

The National Forests Organic Act, 16 U.S.C. § 475: “no national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber...”

The Wilderness Act, 16 U.S.C. § 1131: “‘wilderness areas’ ... shall be administered ... in such manner as will leave them unimpaired for future use and enjoyment as wilderness.”



exist due to the land designation, giving the river a lower priority than it would have had had the statute been silent.

A water rights provision can also establish that the river designation does not interfere with established water rights. An example of this type of water rights language is found in the statute protecting the Cache la Poudre River in Colorado. (16 U.S.C. § 1274(a)(57).) This wild river is in both a national park and a national forest. Its water rights language is as follows:

Inclusion of the designated portions of the Cache la Poudre River... shall not interfere with the exercise of existing decreed water rights to water which has heretofore been stored or diverted ... as of the date of enactment of this title.... The reservation of water established by the inclusion of portions of the Cache la Poudre River in the Wild and Scenic Rivers System shall be subject to the provisions of this title, shall be adjudicated in Colorado Water court, and shall have a priority date as of the date of enactment of this title. (P.L. 99-590, § 102; 100 Stat. 3331.)

This water right provision recognizes existing water rights for stored and diverted water. It also establishes a priority date as of the date of the act for each river segment within the designation. Additionally, it establishes jurisdiction for any disputes over water. However, the section preserving existing water rights refers only to those waters “stored or diverted.” As noted above, it could be argued that this provision undercuts the existing priority water rights the Cache la Poudre segments had in Rocky Mountain National Park and Roosevelt National Forest and gives those segments a more junior priority as of the date of the act.<sup>30</sup> It could also be claimed the language creates an overlay. The legislative history of the clause could be read as indicating that the House of Representatives believed they were providing a priority right for the first time for the river.<sup>31</sup> In any event, when a priority is specifically created within a designation, any existing priorities should be addressed to avoid ambiguity as to their status.

Only one example was found where the existing priority rights of the designated water body were acknowledged. That language is found in the proposed legislation to change Black Canyon of the Gunnison National Monument into a national park and make the Gunnison River a wild and scenic river. It states,

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<sup>30</sup> In one case a federal court held that the Department of the Interior had broken the law by surrendering its priority right. *See High Country Citizens’ Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006).

<sup>31</sup> *See H.Rep. 99-503* (March 20, 1986) (“The language also recognized that inclusion of segments of the Cache la Poudre River in the Wild and Scenic River system creates a federal reserved water right in those segments and that this water right shall be adjudicated in the Colorado court system, and shall have a priority date as of the date of passage of this section.”).

No water rights or the reservation of water which would expand on the existing reserved water right for the Black Canyon of the Gunnison National Monument, shall be created by this designation. (H.R. 1321, 102<sup>nd</sup>.)<sup>32</sup>

This language appears to address the Gunnison River's water rights adequately, and should assuage concerns from upstream and downstream owners that their water usage not be changed or limited by the designation, even if not expressly stated.

Other water rights provisions focus on protecting existing rights, rather than establishing a priority date. For example, the proposed legislation for Northern Rockies ecosystem protection included this language:

Nothing in this Act may be construed as a relinquishment or reduction of any water rights reserved, appropriated, or otherwise secured by the United States in the State of Idaho, Montana, Wyoming, Oregon, or Washington on or before the date of enactment of this Act. (H.R. 488, 107th.)

This language has the advantage of protecting any water rights that exist at the time of the designation, including any water rights that the designated rivers may have.

A different version of water rights language clarifies that a river's designation as recreational will not interfere with adjacent landowners' water supply.<sup>33</sup> The Missouri River segments protected under the act have this language regarding water rights:

In administering such river, the Secretary shall ... permit access for such pumping and associated pipelines as may be necessary to assure an adequate supply of water for owners of land adjacent to such segment and for fish, wildlife, and recreational uses outside the river corridor established pursuant to this paragraph. (16 U.S.C. § 1274(a)(22).)

To the extent a water rights provision is needed, it could simply address existing water rights, including those of the designated water body, and state that no modification of those rights would occur as a result of the designation.

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<sup>32</sup> While this bill did not pass, the Black Canyon of the Gunnison became a National Park in 1999. The Gunnison River was not designated as a Wild and Scenic River as part of that act. P.L. 106-76, § 2; 113 Stat. 1126; as codified at 16 U.S.C. § 410fff.

<sup>33</sup> For another example, see 16 U.S.C. § 1274(a)(62)(B)(ii): "the Secretary of the Interior shall permit the construction and operation of such pumping facilities and associated pipelines ... known as the 'Saxon Creek Project', to assure an adequate supply of water from the Merced River to Mariposa County."

## Discussion and Conclusions

To summarize, the Wild and Scenic Rivers Act appears to create federal water rights to flows of protected river segments necessary to carry out the purposes of the act. The text and legislative history support this interpretation. The right appears to be to water not otherwise obligated under state law, but with the additional power in the federal government to condemn rights vested under state law if necessary to accomplish the federal purposes. To date, this condemnation power has never been used.

As discussed, the quantity of the water right is the amount sufficient to carry out the purposes of the act and no more. Probably, the quantity of a particular protected river or segment would depend on the existing flows, the values for which the river was being protected, and its classifications.

It also is not totally clear as of what date the federal right takes “priority” where that analysis is relevant, especially in those instances where the designating language includes a specific water rights provision. Ordinarily, the relevant date would appear to be the effective date of the reservation or designation. However, some protections of the act begin when a river is designated for study, and it might be argued that this is the proper priority date with respect to a river that later is successfully included in the system.

In practice, in addition to claiming federal reserved rights for some protected rivers, the federal agencies managing wild and scenic rivers have sought to safeguard the necessary river flows under state law through cooperative agreements and through purchases from willing sellers.