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NO HOLIER TEMPLES: PROTECTING THE
NATIONAL PARKS THROUGH WILD AND
SCENIC RIVER DESIGNATION*

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I. INTRODUCTION

Among the various federal laws that govern the national parks, the National Wild and Scenic Rivers Act¹ (the "Act") is more a tiny rivulet than a stream or river. Few rivers within the parks have been designated as components of the national wild and scenic rivers system, and the management authority embodied in the Act is less extensive than that granted by other statutes, such as the National Park Service Organic Act² and the National Parks and Recreation Act of 1978.³ Nonetheless, the Wild and Scenic Rivers Act is potentially as significant to the water resources of the parks as the Wilderness Act⁴ is to their land resources. For the Wild and Scenic Rivers Act is a strong congressional directive that river areas designated pursuant to its authority be preserved in their natural, or at least existing, condition. Under the Act, the National Park Service must manage component rivers for the overriding purpose of preservation, rather than for the myriad uses that we have come to associate with the national parks, such as the promotion of tourism, the construction of housing accommodations, and the provision of amenities. Moreover, because an adequate supply of water obviously is necessary to accomplish the purpose of preserving the free-flowing condition of designated rivers, the Act stands as the clearest expression yet of Congress' intent to assert a federal right to water. The Act thus augments the authority of the Park Service to claim federal reserved water rights for the national parks.⁵

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To date, it does not appear that the Wild and Scenic Rivers Act has been invoked specifically to protect water resources within the national parks. Where rivers that flow through parks have been designated pursuant to the Act, the purpose generally has been to preserve the river itself rather than to expand the Park Service’s authority to manage the water resources and surrounding lands within the park as a whole. The protection of our remaining wild rivers is a laudable goal, and designation of a river as part of the national rivers system is the best means of ensuring its preservation. The objective of this article, however, is to suggest that the Wild and Scenic Rivers Act can serve the additional purpose of enhancing the statutory protections for the water resources—rivers, streams, aquatic life, watersheds, and riparian habitat—of the national parks themselves. Following a description of the Act and the regulations adopted by the Park Service to implement its directives, I will explore some of the ways in which the legislation may be used to complement the existing statutes that govern the national parks and recommend a few legislative revisions of the Act that would make it an even more effective source of protection for the parks.

II. AN OVERVIEW OF THE NATIONAL WILD AND SCENIC RIVERS ACT

In enacting the National Wild and Scenic Rivers Act of 1968, Congress declared it to be

the policy of the United States that certain 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.6

The purpose of the Act was to complement “the established national policy of dam and other construction at appropriate sections of the rivers of the United States” with “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.”7


Thus, in establishing the national wild and scenic rivers system, Congress' goals were decidedly preservationist. According to the Act, the lands and water resources that comprise the system must be managed essentially as wilderness. The Act vests primary management authority over designated rivers in the federal agency or department with jurisdiction over the lands through which the rivers flow. Thus, rivers that pass through the national parks are administered by the Secretary of the Interior, and the Park Service as the Secretary's delegate. The Act grants the Service broad, but focused, authority. It directs that "[e]ach component of the national wild and scenic rivers system shall be administered in such a 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." The Act also states that each federal agency with jurisdiction over land that includes or adjoins a component river shall take action "as may be necessary to protect such rivers in accordance with the

1. "Wild river areas" are those "rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds and shorelines essentially primitive and waters unpolluted." Id. § 1273(b)(1).
2. "Scenic river areas," a less restrictive classification, denominates those rivers or sections that "are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads." Id. § 1273(b)(2).
3. "Recreational river areas," the least restrictive category, includes "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." Id. § 1273(b)(3).

By using the phrase "sections of rivers," Congress made clear that portions of rivers or river systems may be included in the national rivers system. Indeed, Congress defined the term "river" very broadly. As used in the statute, "river" refers to any "flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes." Id. § 1286(a). Thus, designation of an entire watershed or river system neither is required by the Act nor is typical of the rivers that have been placed in the system to date.

8. Compare Section 11 of the Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (1982) (administration of rivers shall emphasize protection of "esthetic, scenic, historic, archeologic, and scientific features") with Section 4(b) of the Wilderness Act, 16 U.S.C. § 1133(b) (1982) (wilderness areas shall be managed so as to preserve "wilderness character" and "shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historic use").

10. See, e.g., id. § 1274(a)(56) (Cache La Poudre River). In general, rivers that flow through the national forests are managed by the Secretary of Agriculture, acting through the Forest Service. See, e.g., id. An exception is for rivers that are included in the National Wild and Scenic Rivers System by the Secretary of the Interior pursuant to section 2(a)(ii) of the Act. See infra note 28. Although the Act requires the state "to permanently administer[.] . . ." these rivers "without expense to the United States other than for the administration and management of federally owned lands," 16 U.S.C. § 1273(a), they are under the general jurisdiction of the Secretary of the Interior. See Swanson Mining Corp. v. FERC, 790 F.2d 96 (D.C. Cir. 1986).
purposes of [the statute]."\textsuperscript{12}

To protect and to enhance the values for which the national wild and scenic rivers system was established, Congress prohibited certain activities in and along designated rivers. The most important proscription is the directive that "[t]he Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works . . . on or directly affecting any river which is designated . . . as a component of the national wild and scenic rivers system."\textsuperscript{13} The Act also states that "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."\textsuperscript{14} Finally, the Act regulates, but does not necessarily prohibit, mineral development along designated rivers. Congress chose generally to allow mining to continue, but subjected it to regulatory restrictions to ensure that the adverse effects of the mining on the river area are minimized.\textsuperscript{15} In the case of rivers that are classified as "wild,"\textsuperscript{16} however, Congress directed that, "subject to valid existing rights," all minerals located in federal lands in and along the river be withdrawn from appropriation.\textsuperscript{17}

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\textsuperscript{12} Id. § 1283(a). Congress recognized that some component rivers may flow through federal reservations that themselves must be managed primarily for preservationist and compatible purposes. Thus, in cases of conflict between the Wild and Scenic Rivers Act and the other land management statute—for example, the Wilderness Act or the National Park Service Act—Congress specified that "the more restrictive provisions shall apply." Id. § 1281(b) & (c).
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\textsuperscript{13} Id. § 1278(a). In China Flat Co., 27 F.E.R.C. ¶ 61,024 (1984), the Commission ruled that the Act vests in the Secretary with responsibility for managing the designated river the authority to determine whether a proposed project either is on or directly affects the river. The Secretary's determination is binding on the Commission. See Swanson Mining Co. v. FERC, 790 F.2d 96, 103-05 (D.C. Cir. 1986).
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\textsuperscript{14} 16 U.S.C. § 1278(a) (1982). In this case, the Act expressly delegates to the Secretary charged with administering the river the determination of whether the project would impair the uses protected by the statute. Id. In Swanson Mining Co. v. FERC, 790 F.2d 96 (D.C. Cir. 1986), the court of appeals held that the prohibition against FERC licensing of a hydroelectric project "on or affecting" a component river, see supra text accompanying note 13, is more restrictive than the general limitation of federal assistance discussed in the text. Thus, FERC may not license a project that is located on or which would directly affect a designated river, even if the project would not adversely affect the values for which the river was included in the wild and scenic system. See 790 F.2d at 102-03.
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\textsuperscript{15} Id. § 1280(a)(1) (1982). The regulations apply only to mining claims that are not perfected as of the date on which the river was included in the national system. Mining activities pursuant to perfected claims are subject only to the general federal mining and mineral leasing laws. Id.
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\textsuperscript{16} See supra note 7.
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\textsuperscript{17} 16 U.S.C. § 1280(a)(iii) (1982). The phrase "subject to valid existing rights" is ambiguous. The Department of the Interior has interpreted it to mean that existing mining activities are allowed to continue, provided that they are "conducted in a manner that minimizes surface disturbance, sedimentation and pollution, and visual impairment." 1 U.S. Dep't of the Interior, Heritage Conservation and Recreation Serv., Final Environmental Impact Statement, Proposed Designation of Five California
Thus, the Act prohibits all federal agencies and departments from taking any action, either along a designated river or upstream or downstream from the protected segment, that would be inconsistent with Congress' primary objective of preserving the free-flowing, wilderness character of the river. The consequences of these provisions of the Act for both the Park Service and other agencies that have jurisdiction over designated rivers or their adjacent lands will be discussed in parts IIIA and IIIB.

In addition to these management directives, Congress expressly claimed unappropriated water in amounts and flow levels necessary to fulfill the purposes of the Wild and Scenic Rivers Act. Congress' assertion of a federal water right has passed with little notice or criticism. 18 Yet, the Act represents the only instance, to my knowledge, in which Congress explicitly has claimed a right to water based on federal, rather than state, law. 19 Unfortunately, Congress did so in a confusing, perhaps even elliptical, manner.

On one hand, the Act disclaims any effects on state water resources laws. According to Section 13(b), nothing in the Act should be read as "an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." 20 On

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18. Cf. Tarlock & Tippy, supra note 6, at 733-39 (discussing "federal rights to protect the flow of the river and control pollution").


the other hand, Section 13(c) provides:

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.\textsuperscript{21}

In addition, Section 13(d) states that the jurisdiction of the states over designated rivers shall be unaffected by their inclusion in the national rivers system, but only "to the extent that such jurisdiction may be exercised without impairing the purposes of this Act or its administration."\textsuperscript{22}

Making sense of these seemingly contradictory provisions is no easy task.\textsuperscript{23} My own view is that Congress intended to accomplish two not incompatible goals. First, as it has done throughout the nation's history,\textsuperscript{24} Congress deferred generally to state water law. This is the purpose of Section 13(b). Second, Congress also sought to ensure that there would remain enough water flowing in the rivers designated as components of the wild and scenic rivers system to fulfill the purposes of the Act and to protect the values for which the rivers were included in the system. This is the meaning of Sections 13(c) and 13(d). Congress proposed to reconcile these policies by creating a federal right to water to serve the enumerated purposes of the Wild and Scenic Rivers Act and by limiting the scope of the federal right to only that quantity necessary to accomplish the statutory purposes.\textsuperscript{25}

\begin{footnotes}
\item[21] Id. § 1284(c).
\item[22] Id. § 1284(d).
\item[23] I am not the first to express frustration over this statutory confusion. In his unjustly maligned opinion on federal water rights under the jurisdiction of the Department of the Interior, former Solicitor of the Interior Leo Krulitz called section 13(b) "a *non sequitur* roughly designed to preserve the status quo of federal-state relations in water law under 'established principles of law,' including the reserved water rights doctrine." Federal Water Rights of the National Park Serv., Fish and Wildlife Serv., Bureau of Reclamation and the Bureau of Land Management, 86 Int. Dec. 553, 607-08 n.99 (1979) ("Krlutz Opinion").
\item[24] See supra note 19.
\item[25] This reading of section 13(d) is consistent with the district court's interpretation in Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987) of identical language contained in section 4(d)(7) of the Wilderness Act. 16 U.S.C. § 1133(d)(6) (1982). There, the court held that these statutory terms are "simply a disclaimer." 661 F. Supp. at 1493. It noted that "[c]ourts often bear the responsibility of adjudicating the interaction between newly created congressional programs and pre-existing state law." *Id.* (footnote omitted). The court held that, in enacting section 4(d)(7) of the Wilderness Act,

Congress sanctioned this completely normal process by expressly disclaiming any decisional responsibility in this regard. . . . By its own terms, § 4(d)(7) does not purport to work any substantive change in the rights parties may acquire under the various doctrines of water law, including the [federal] reserved rights doctrine. Any decisions in that regard are properly left to case-by-case adjudication.

*Id.* at 1493-94.
\end{footnotes}
significance of this federal water right for those wild and scenic rivers that flow through the national parks is the subject of part IIIC.

To date, seventy-three rivers have been designated as components of the national wild and scenic rivers system. The original 1968 legislation included ten rivers. Since then, Congress has designated an additional fifty-four rivers. The other nine were included in the national rivers system by the Secretary of the Interior at the behest of the Governors of the states through which the rivers flow.

Of the seventy-three component rivers only twenty-two flow through national parks or other lands under the jurisdiction of the Park Service, and thirteen of these twenty-two are in Alaska. Thus, as stated at the outset, the Wild and Scenic Rivers Act has been used sparingly to protect the water resources, and their adjacent lands, of the national parks. Indeed, even in the Alaska National Interest

26. These rivers are listed at 16 U.S.C. § 1274(a)(1)-(10) (1982). In the 1968 Act and in subsequent legislation, Congress also has identified ninety rivers as candidates for inclusion in the national rivers system. Id. § 1276(a). For each of these “study rivers,” Congress directed the Secretary of the Interior— or, in the case of rivers flowing through national forest lands, the Secretary of Agriculture— to “study and submit to the President reports on the suitability or nonsuitability for addition to the national wild and scenic rivers system.” Id. § 1275(a); see id. § 1276(b). The Act requires the Secretary to conduct the studies “in as close cooperation with appropriate agencies of the affected State and its political subdivisions as possible.” Id. § 1276(c). Congress has included a few of the study rivers in the national rivers system. For the most part, however, it has declined to designate rivers from the study list.


28. Section 2(a)(ii) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1273(a)(ii) (1982), authorizes the Secretary of the Interior, upon the request of the Governor, to place into the national system rivers 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.” Before he may designate a river under Section 2(a)(ii), the Secretary must determine that (1) the river “meet[s] the criteria established in [the Act] and such criteria supplementary thereto as he may prescribe”; and (2) the state will be able permanently to administer the river “without expense to the United States other than for administration and management of federally owned lands.” Id.

The nine rivers that have been included in the national system pursuant to Section 2(a)(ii) are: the Upper and Lower Little Miami River and the Little Beaver Creek in Ohio; the Lower St. Croix River in Minnesota and Wisconsin; the New River in North Carolina; and the Smith, Klamath, Eel, Trinity, and Lower American Rivers in California.


29. The national wild and scenic rivers that are at least partly within a park are:
Lands Conservation Act of 1980, which designated as wild and scenic seventeen rivers within the newly established Alaska national parks, there is no indication that Congress included the rivers in the national system for the specific purpose of augmenting the Park Service’s management authority over the parks as a whole.

Congress’ neglect notwithstanding, the National Wild and Scenic Rivers Act is potentially of great significance to the national parks. For designation of rivers that flow through the parks as components of the national rivers system is an excellent means of protecting the water resources of the parks from activities, both within and without park boundaries, that threaten the integrity of the parks themselves. The balance of this article will explore the potential uses of the Act to enhance both the Park Service’s and the public’s authority over the rivers and riparian lands within the national parks.

III. THE SIGNIFICANCE OF THE NATIONAL WILD AND SCENIC RIVERS ACT FOR THE NATIONAL PARKS

This evaluation of the possible applications of the Wild and Scenic Rivers Act to the national parks will address four basic ques-

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<th>River</th>
<th>State</th>
<th>Park, Monument, Preserve, or Recreation Area</th>
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<tr>
<td>Alagnak</td>
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<td>Alatna</td>
<td>Alaska</td>
<td>Gates of the Arctic NP</td>
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<td>Aniakchak</td>
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<td>Beaver Creek</td>
<td>Alaska</td>
<td>White Mountains NRA</td>
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<td>Charley</td>
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<td>Yukon-Charley Rivers NPR</td>
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<td>Mulchatna</td>
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<td>Lake Clark NP &amp; PR</td>
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<td>Tinayuk</td>
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<td>Gates of the Arctic NP</td>
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<tr>
<td>Tuolumne</td>
<td>California</td>
<td>Yosemite NP</td>
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This list does not include the Skagit River, which flows through the North Cascades National Park in Washington, because the river corridor through the park is managed by the Forest Service as a National Recreation Area Easement. It does include the Klamath River in California, however, even though it only flows through one river mile of Redwood National Park.

tions: First, what are the purposes of the Act and what values does it
direct the Park Service to promote? Second, what uses of the parks,
and adjacent land within the watersheds of designated rivers, are con-
sistent with the policies and management directives of the Act? Third,
to what extent does the Act empower the Park Service to claim water
to fulfill the purposes of the designation of rivers within the national
parks? Fourth, what rights does the public have under the Act?

In considering each of these questions, it is important to re-
member that there have been but a handful of judicial opinions that have
interpreted the Act. Thus, the Wild and Scenic Rivers Act is some-
things of a rarity among federal statutes. For the most part, the Act
means precisely what it says; as yet, the words of the statute have not
been embellished by judicial interpretation. What follows then is an
analysis, not necessarily of how the Act has been construed, but of
how the statute should be interpreted to serve the purposes of the na-
tional park system.

A. The Purposes and Values of the Act

As mentioned in part II, the Wild and Scenic Rivers Act pro-
vides that each component river "shall be administered in such a man-
ner as to protect and enhance the values which caused it to be included
in [the national rivers] system without, insofar as is consistent therewith,
limiting other uses that do not substantially interfere with public
use and enjoyment of these values." This directive is significant for
two reasons. First, it makes clear Congress' intention that rivers
within the national system be used only in accordance with the various
purposes and values set forth in the statute. Although Congress could
have articulated more clearly its objectives, the purposes of the Act
appear to include:

1. Protection of fish and wildlife.
2. Preservation of geologic, historic, and cultural assets.
3. Maintenance of scenic views and aesthetic values.

32. With one exception, the few cases that have construed the Act have addressed matters that
are peripheral to the subject of this article. See e.g., Sierra Club v. FERC, 754 F.2d 1506 (9th Cir.
1985) (Congress intended to exempt tributaries of Tuolumne River from proscriptions of section 7(a) of
the Act); County of Del Norte v. United States, 732 F.2d 1462 (9th Cir. 1984) (Secretary did not violate
NEPA regulations or act arbitrarily or capriciously in designating rivers pursuant to Section 2(a)(ii) of
the Act), cert. denied, 469 U.S. 1189 (1985); United States v. Hells Canyon Guide Service, 660 F.2d 735
(9th Cir. 1981) (Forest Service's permit system for boating on Snake River is a valid exercise of discre-
tion under statute); Kiernan v. County of Chisago, 564 F. Supp. 1089 (D. Minn. 1983) (Act does not
generally preempt local land use laws). The exception is Swanson Mining Co. v. FERC, 790 F.2d 96
33. See supra text at note 11.
4. Promotion of recreational uses, such as fishing and whitewater boating and rafting.
5. Protection of water quality.
6. Preservation of the free-flowing character of the rivers for the benefit of present and future generations.35

Second, the directive also indicates that Congress did not propose to limit the uses of designated rivers to those purposes articulated in the statute. Rather, Congress intended that other, nonenumerated uses be permitted if, and to the extent that, such uses do not "substantially interfere" with the express purposes and values of the Act recited above.

According to well-established principles of administrative law, the decision whether to allow, and how to regulate, a particular use of a wild and scenic river rests almost exclusively with the Park Service. As the Supreme Court stated recently in a different context, the administration of a congressionally created program "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"36 In reviewing policy decisions made by an executive department, the courts must give "considerable weight" to the "department's construction of a statutory scheme it is entrusted to administer."37 If the department's decision "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,'" the courts will uphold the decision "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"38 Congress' use of the terms "substantially interfere" suggests that it intended to vest in the Park Service substantial discretion to determine which nonenumerated uses of wild and scenic rivers within the parks would be compatible with the express values of the Act and which would not. Members of the public aggrieved by a particular policy decision could not successfully challenge the Park Service's action unless the agency's judgment were clearly inconsistent with the words or purposes of the statute.39 Consequently, the important question is: What uses of wild and scenic rivers are consistent with the express purposes of the Wild and Scenic Rivers Act, and

35. See id. §§ 1271, 1273(b), 1282(a) & 1283(c).
37. Id. at 844 (footnote omitted).
38. Id. at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).
what uses substantially interfere with, and therefore are inconsistent with, those purposes?

B. Permissible and Impermissible Uses of Wild and Scenic Rivers Within and Without the National Parks

The various uses of wild and scenic rivers that flow through the national parks may be divided into two categories: (1) uses that occur along the designated portion of the river within the park, which are under the direct regulatory jurisdiction of the Park Service; and (2) uses that take place outside the parks and therefore are subject only to the indirect authority of the Park Service.

1. Uses Within the Parks

As discussed in part II, the inclusion of a river in the national wild and scenic rivers system means that the Park Service must manage the river essentially as a wilderness waterway. While the Park Service may permit activities that are compatible with preservation of the natural, wild condition of the river, it may not sanction uses that detract significantly from the public’s enjoyment of the wilderness character of the streamcourse. For the most part, the Park Service’s management guidelines for wild and scenic rivers are consistent with this principle.

The general management guideline provides:

Each component [river] will be managed to protect and enhance the values for which the river was designated, while providing for public recreation and resources uses which do not adversely impact or degrade those values. Specific management strategies will vary according to classification but will always be designed to protect and enhance the values of the river area.

The guidelines then focus on three interrelated topics: resource management, land management, and people management.

The guidelines state that the Park Service’s “[r]esource management practices will be limited to those which are necessary for protection, conservation, rehabilitation or enhancement of the river area resources.” Timber harvesting, perhaps the greatest potential threat to the scenic beauty and aesthetics of designated rivers, must “be con-

40. See supra text at note 8.
42. Id. at 39,458-59.
43. Id. at 39,459.
ducted so as to avoid adverse impacts on the river area values."44 Because commercial timber cutting is prohibited in the national parks,45 however, it is unlikely that there will be significant conflicts over this provision of the guidelines. The Act itself forbids hunting along a component river that flows through a national park,46 but the guidelines do not address the subject specifically. The Park Service generally permits recreational fishing in designated rivers. In rivers in which the native fish population is unstable—such as the mainstem of the Middle Fork of the Salmon River in Idaho—fishing is limited to "catch-and-release."47

In general, the land management provisions of the guidelines also are consistent with the purposes of the Wild and Scenic Rivers Act. The Park Service has stated that it will not construct "[m]ajor public use facilities such as developed campgrounds, major visitor centers and administrative headquarters" along a designated river corridor.48 The limitation of this guideline to "major" facilities is somewhat problematic. Preservation of a wild river area in its primitive state, or maintenance of the "largely primitive" and "largely undeveloped" shorelines of scenic river areas,49 would seem to preclude the construction of any structures for the convenience of visitors, because such facilities would detract from the natural, wilderness character of the river. It appears that in implementing the guideline, however, the Park Service has limited the erection of new facilities to structures such as toilets and refuse containers, which are necessary to minimize the cumulative effects of virtually continuous human use.50 In any

44. Id.
45. The National Park Service Organic Act authorizes the Park Service to sell or to dispose of timber only where "the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or historic objects in [the] park." 16 U.S.C. § 3 (1982).
47. The guidelines do not address the subject of mining in wild and scenic river areas. As discussed in note 17 supra, however, the Department of the Interior has set forth in other documents general principles to regulate mining. In wild river areas, existing mining may continue so long as it is "conducted in a manner that minimizes surface disturbance, sedimentation and pollution, and visual impairment." 1 U.S. Department of the Interior, Heritage Conservation and Recreation Serv., supra note 17, at App. D-13. New mining claims are prohibited, however, within one-quarter mile of wild rivers. Id. In scenic and recreational river areas, new and existing mining may take place subject to the same conduct requirements as for mining in wild river areas. Id. at App. D-15 & D-17.
50. Indeed, the guidelines state that park and river managers "may provide basic facilities to absorb user impacts on the resource." 47 Fed. Reg. 39,459 (1982). The guidelines specify that [w]ild river areas will contain only the basic minimum facilities in keeping with the "essentially primitive" nature of the area. If facilities such as toilets and refuse containers are necessary, they will generally be located at access points or at a sufficient distance from the river bank to minimize their intrusive impact. In scenic and recreational river areas, simple comfort and convenience facilities such as toilets, shelters, fireplaces, picnic tables and re-
event, the designation of a park river as wild and scenic certainly would prevent the Park Service from authorizing the construction of campgrounds, cabins, grocery stores, or fast-food facilities along, or within view of, the river. Indeed, if the Merced River had been protected by a statute like the Wild and Scenic Rivers Act since the early days of its inclusion in Yosemite National Park, the tragedy of Yosemite Valley[^1] could not have occurred.

Although the Wild and Scenic Rivers Act authorizes the Secretary of the Interior "to acquire lands and interest in land" within the boundaries of a designated river area[^2], the guidelines state that "[e]xisting patterns of land use and ownership should be maintained, provided they remain consistent with the purposes of the Act."[^3] Arguably, this decision to sanction and generally to preserve private inholdings is inconsistent with Congress' directive that wild river areas have shorelines that are "essentially primitive" and that scenic river areas be "largely primitive" with shorelines "largely undeveloped."[^4] Such an argument ignores, however, two competing policy considerations. First, the Park Service has limited resources, which in this era of high federal deficits and efforts at budget-balancing are likely to be reduced for the foreseeable future.[^5] Under these circumstances it is not unreasonable, and therefore should not be unlawful, for the Park

[^1]: Congressional hearings in 1974 revealed that Yosemite Valley contained 1498 lodging units, with sleeping accommodations for 4668 persons, and the following concession facilities:

3 restaurants; 2 cafeterias; 1 hotel dining room; 4 sandwich centers; 1 seven-lift garage; 2 service stations with a total of 15 pumps; 7 gift shops; 2 grocery stores; 1 delicatessen; 1 bank; 1 skating rink; 3 swimming pools; 1 pitch-and-putt golf course; 2 tennis courts; 33 kennels; 114 horse and mule stalls; 1 barber shop; 1 beauty shop; and 13 facilities for the sale of liquor.

[^2]: 16 U.S.C. § 1277(a) (1982). The Act provides, however, that the Secretary "shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river." *Id.* Congress also authorized the Secretary to condemn land for incorporation into the national wild and scenic rivers system. The Secretary may not condemn any lands, however, that "are located within an 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 [the Act]." *Id.* § 1277(c).


[^5]: See *U.S. Parks Chief Warns of Funds Cutback Impact*, N.Y. Times, June 17, 1986, at 11, col. 1 (nat'l ed.) ("some big parks might have to close by 1988 if funds are cut from the park system to help balance the national budget").
Service to spend its available funds on projects such as maintenance of existing facilities and resources, rather than the relatively expensive acquisition of private in-holdings. Second, the private ownership and use of some land—indeed, perhaps most such land along rivers that were sufficiently pristine to have been included in the national rivers system—is compatible with the “esthetic, scenic, historic, archeologic, and scientific” values which led to the designation of the river in the first place.\footnote{See 16 U.S.C. § 1281(a) (1982).} For many, the experience of traveling on a wild and scenic river may be enhanced by the view of a few cattle ranches, small gold mining sites, and rustic private homes scattered along the shore.\footnote{Professor Joseph Sax has had similar thoughts about the value of preserving some communities within the newer national parks, such as the Buffalo National River in Arkansas. Sax, \textit{Do Communities Have Rights? The National Parks as a Laboratory of New Ideas}, 45 U. PITT. L. REV. 499 (1984). In his usual fashion, Professor Sax eloquently summarizes the reasons to maintain certain in-holdings: Diversit\[y\] is a good thing, in human settlements as well as nature. Or, to put it another way, eclecticism is not a bad thing. There is a strong inclination, in parks as elsewhere, to be intolerant of things and practices that do not conform to some preconceived plan. . . . There is nothing incongruous in having a few human settlements remain within newer type parks such as the Buffalo National River, even though the parks are principally devoted to maintaining natural systems. . . . The reason diversity is interesting is precisely because it reveals differences, variety and the range of the human spirit. \textit{Id.} at 509.}

The guidelines regulate human uses of wild and scenic river areas principally through a permit system that limits the number of persons and boats using the rivers at any one time.\footnote{47 Fed. Reg. at 39,459 (1982). The Forest Service’s authority to regulate the use of designated rivers through a permit system was upheld in United States v. Hells Canyon Guide Serv., Inc., 660 F.2d 735 (9th Cir. 1981).} This system appears to be an effective means of dispersing rafters and other boaters along the river, thus enhancing each group’s enjoyment of the scenery and solitude of the river.

Unfortunately, however, the benefits of limiting the number of persons who may use a wild and scenic river area at one time are substantially undermined by the guideline that defines what uses may take place. This guideline provides that “[m]otorized travel on land or water is generally permitted in wild, scenic and recreational river areas, but will be restricted or prohibited where necessary to protect the values for which the river area was designated.”\footnote{47 Fed. Reg. 39,459 (1982).} As a result, companies that run motorized rafts and, even worse, jet boats that are capable of navigating upstream at 20 knots or so\footnote{Several years ago, while padding the scenic portion of the Rogue River in Oregon, I had the unpleasant experience of being nearly swamped by the wake of these boats. This experience, along with having to endure the noise of their motors for several miles in each direction, convinced me that such boats are absolutely incompatible with the scenic, aesthetic, and wilderness values of the Wild and Scenic Rivers Act.} may be permitted to use...
the wild and scenic rivers. Such uses are wholly inconsistent with the Wild and Scenic Rivers Act. As discussed above, the principal purpose of the Act was to preserve rivers in their natural, free-flowing condition as "vestiges of primitive America" and to protect the scenic, recreational, fish and wildlife, aesthetic, and other related values of such rivers. Human-powered craft can run the wild and scenic rivers without interfering with or detracting from these values. An oar or paddle dipping into the current is silent and unobtrusive. In contrast, motorized boats pollute the air and water with their exhaust, disturb the solitude of the river canyon with their noise, and generally detract from the aesthetic value of the wilderness river environment.

With this one exception, the Park Service's guidelines for the management of the wild and scenic rivers under its jurisdiction conform to the policies and directives of the Wild and Scenic Rivers Act. One may quibble with a particular Park Service decision—such as to permit in-holdings within the river corridor—but it must be remembered that the Park Service has substantial managerial discretion over designated river areas, limited only by the specific directives of the statute and the mandate that a particular use "not substantially interfere with public use and enjoyment" of the values of wild and scenic rivers. Only the decision to permit the use of motorized boats on component rivers clearly violates this stricture. The remaining guidelines fall within the administrative prerogatives granted by the Act.

2. Uses Outside the Park

While the Wild and Scenic Rivers Act establishes rather broad regulatory policies for the Park Service's management of designated rivers inside the parks, it defines much more precisely the restrictions that it places on the activities of other agencies outside the parks. In

61. See supra note 7 and accompanying text.
63. See id. §§ 1271 & 1281(a).
64. The Park Service's decision to allow motorized travel on land should not be too significant. The off-road use of vehicles generally is prohibited in the national parks, 36 C.F.R. § 4.19 (1986), and wild river areas are, by definition, inaccessible by roads. 16 U.S.C. § 1273(b)(1) (1982). While scenic and recreational river areas may contain some roads, see id. § 1273(b)(2)-(3), neither the Act nor the guidelines would permit the construction of new roads along such rivers. Although the Act does not expressly prohibit the building of new roads, such construction would be contrary to Congress' directive that the aesthetic, scenic, historic, and other values of component rivers be protected and enhanced. Id. § 1281(a). It also would be inconsistent with the "nondegradation and enhancement policy for all designated river areas" set forth in the guidelines. 47 Fed. Reg. 39,458 (1982). The use of existing roads by motorized vehicles of course would be consistent with the original designation of the river as "scenic" or "recreational." See id. at 39,459.
this respect, the Act offers substantial protections for the parks against external threats to their land and water resources.

As noted in part II,65 the strongest management directive contained in the Act is section 7(a), which prohibits the Federal Energy Regulatory Commission from licensing any water resources project "on or directly affecting" a national wild and scenic river and forbids all other federal agencies from providing any form of assistance to a water resource project that would adversely affect a component river.66 This provision is of vital importance to the national parks, because it prevents the construction of any water supply, flood control, or hydroelectric project that could be harmful to designated rivers within the parks.

The Federal Power Act prohibits the licensing or authorization of any "dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within . . . any national park or national monument . . . without specific authority of Congress."67 But nothing in that statute or in the other laws that govern the national parks prevents the construction or operation of a water project located upstream of the boundaries of the park that diminishes the flow of water below the level needed to fulfill the purposes of the park.68 Nor do those laws prohibit the construction of a project located downstream of the park that threatens to inundate the river valley within the park. Consequently, designation of park rivers as components of the national wild and scenic rivers system is the best, and in some instances the only, means of ensuring that water projects located outside the parks do not degrade the resources of the park itself.69

Apart from section 7(a), perhaps the most important provision of the Wild and Scenic Rivers Act for the parks is the directive that all federal agencies with jurisdiction over lands that adjoin a designated river "shall take such action respecting management policies, regulations, contracts, plans, affecting such lands . . . as may be necessary to protect such rivers in accordance with the purposes of [the Act]."70 In

65. See supra notes 13-14 and accompanying text.
67. Id. § 797a (1982).
68. The use of the federal reserved water rights doctrine to protect the parks from upstream uses of water that threaten the instream flows and other needs of the parks is discussed in detail in part IIIC infra.
69. It is for this reason that various environmental groups interested in protecting the lower Yosemite Valley in Yosemite National Park sought to have Congress designate the Merced River as wild and scenic. Congress included the Merced River in the national rivers system in 1987. See Pub. L. No. 100-49, 101 Stat. 879 (1987).
this regard, Congress specified that "[p]articular attention shall be
given to scheduled timber harvesting, road construction, and similar
activities that might be contrary to the purposes of [the Act]." 71

One of the most substantial external threats to some parks is the
siltation and pollution of their rivers and streams from logging, min-
ing, and agricultural activities in the watershed upstream of the park
boundaries. The debris from timber harvesting generally is carried by
rainfall and surface runoff into the rivers of the watershed, and logging
activities such as clear-cutting can leave the hillside unprotected
against soil erosion, which in turn causes siltation of the streams and
increases the turbidity of the water. Placer mining washes large
amounts of earth and rock into adjacent rivers, and the tailings from
hardrock mining can pollute neighboring waters. Herbicides and pes-
ticides used in agriculture also contribute to the pollution of streams
and rivers. 72

These activities, to the extent that they pollute a designated river
downstream, are flatly inconsistent with the Wild and Scenic Rivers
Act. One of the statutory definitions of a wild river area is one in
which the waters are unpolluted. 73 Congress mandated that the wa-
ters of wild rivers remain free from pollution and that contaminant
in less pristine component rivers be eliminated or diminished. 74
Moreover, the siltation and chemical degradation of wild and scenic rivers
is contrary to the policies of preserving the scenic views and aesthetic
values of the rivers and of promoting recreational use. 75 A river that
contains mine tailings, sediment and logging debris, or the waters of
which are undrinkable because of pollution, is neither aesthetically en-
joyable nor suited for wilderness recreational use. And, perhaps most
important, siltation and pollution are deleterious to the fish and wild-
life that inhabit the river. 76 Activities that degrade the aquatic and
riparian habitat are inconsistent with the protections afforded by the
Act for fish and wildlife, not to mention recreational fishing. 77

Thus, the Wild and Scenic Rivers Act stands as a clear congres-

71. Id. Congress augmented these provisions by directing the manager of each component river
to "cooperate with the Administrator, Environmental Protection Agency and with appropriate State
water pollution control agencies for the purpose of eliminating or diminishing pollution of waters of the
river." Id. § 1283(c).
72. See generally 1 U.S. Dep't of the Interior, Heritage Conservation & Recreation Serv., supra
note 17, at III-34 to III-49.
74. Id. § 1283(c).
75. See id. §§ 1271 & 1281(a).
76. See 1 U.S. Dep't of the Interior, Heritage Conservation and Recreation Serv., supra note 17,
at III-37 to III-51.
sional mandate to the Park Service and other federal agencies not to sanction any forestry, mining, or agricultural activities that "might be contrary" to the purposes of the Act.\textsuperscript{78} To the extent that these activities occur on federal land, the Act affords the parks substantial protections. Unfortunately, however, not all external threats to the parks take place on federal land or are subject to the jurisdiction of federal land management agencies. As with the other statutes that govern the parks, the Wild and Scenic Rivers Act does not expressly regulate private activities on nonfederal land that are inconsistent with the purposes of the statute. It is for this reason that Professor Joseph Sax has characterized the national parks as "helpless giants," vulnerable to a variety of activities outside their boundaries because "Congress has given [the Park Service] very little explicit authority to regulate private lands."\textsuperscript{79}

The solution to the external threats dilemma is complex. To a certain extent, the federal water right created by the Act\textsuperscript{80} addresses the problem. Among other things, this water right grants to the Park Service the authority to demand from upstream water users and landowners water in sufficient quantity and of adequate quality to accomplish the purposes of the Wild and Scenic Rivers Act.\textsuperscript{81} But the federal water right is only a partial solution. For, as discussed in the following section, the water right for wild and scenic rivers does not confer on the Park Service any direct authority to regulate external threats that arise outside the water rights system.\textsuperscript{82} Accordingly, full protection for the wild and scenic river areas of the parks will require the amendment of the Wild and Scenic Rivers Act to provide the Park Service with express jurisdiction over private land use that is inconsistent with the purposes and directive of the Act. The nature of this additional legislation is the subject of part IV.

\textbf{C. A Federal Water Right for Wild and Scenic Rivers}

As described in part II, the Wild and Scenic Rivers Act expressly—albeit obliquely—creates a federal right to enough water to accomplish the various purposes of the Act.\textsuperscript{83} This federal water right is not yet well understood. There has been very little scholarly discussion of the subject, and the right has been recognized and quantified

\textsuperscript{78} Id. § 1283(a).
\textsuperscript{80} 16 U.S.C. § 1284(c) (1982); see supra notes 18-25 and accompanying text.
\textsuperscript{81} See supra note 25 and accompanying text.
\textsuperscript{82} See infra notes 133-34 and accompanying text.
\textsuperscript{83} 16 U.S.C. § 1284(c) (1982); see supra notes 18-25 and accompanying text.
for but one of the nation’s seventy-three wild and scenic rivers.\textsuperscript{84} As water users become better acquainted with the federal water right for wild and scenic rivers, however, and as the right is quantified for additional rivers, it is likely to become extremely controversial. For the federal right can be asserted to preempt consumptive uses of water that are junior in time to the designation of the river to the extent that such uses interfere with the instream flows needed to fulfill the purposes of the Wild and Scenic Rivers Act.

Before examining the significance of the federal water right for the wild and scenic rivers within the parks, five preliminary questions must be answered. First, what are the water rights of the national parks independent of the Wild and Scenic Rivers Act? Second, what kind of water right does the Act create? Third, what quantity of water has Congress claimed pursuant to the Act? Fourth, what is the priority date of the water right? Fifth, does the federal right preempt state-created water rights that are senior-in-time?

The Wild and Scenic Rivers Act aside, the national parks are entitled to water under the federal reserved rights doctrine. In a nutshell, the doctrine holds that

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 which vests on the date of the reservation and is superior to the rights of future appropriators.\textsuperscript{85}

To date, the United States Supreme Court has applied the federal reserved rights doctrine to Indian reservations, national recreation areas, national wildlife refuges, national monuments, and national forests.\textsuperscript{86}

Drawing on these decisions, Professor Charles Wilkinson argues that the doctrine establishes a federal claim to water for a broad spectrum of uses of the national parks, including maintenance of instream flows, ecosystem management, protection of fish and wildlife, recreation, consumptive uses at Park Service facilities, and preservation of the natural and historic treasures of the parks.\textsuperscript{87} Professor Wilkinson makes a convincing case that the Park Service should be awarded fed-

\textsuperscript{86} See supra note 19 and cases cited therein.
\textsuperscript{87} Wilkinson, supra note 5. In defining broadly the scope of the reserved water right applicable to the national parks, Professor Wilkinson finds himself in substantial agreement with the conclusions of former Solicitor Krulitz. See Krulitz Opinion, supra note 23, at 596-97.
eral reserved rights to water in quantities sufficient to fulfill all of these purposes, and the courts ought to follow his suggestions. There are indications, however, that the Supreme Court may not construe the purposes of the national parks, and thus the scope of the reserved water rights for the parks, quite so broadly.

The Court has made clear in its most recent opinion on the subject that it will interpret the reserved rights doctrine narrowly to minimize conflicts between federal water rights and state law. In *United States v. New Mexico*, the Court held that the reserved rights doctrine is applicable to the national forests. It emphasized, however, that the doctrine is a judicially created exception to Congress' historical deference to state water law. The Court also observed that "[i]n the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." From these facts, the Court reasoned that when Congress withdraws land from the public domain to create a national forest—or a national park, for that matter—and does not state whether it also claims water for such land, Congress probably intended to reserve only that amount of water necessary to serve the primary purposes of the reservation.

The Court identified two "primary purposes" for which the national forests were established: preserving timber and "secur[ing] favorable water flows for private and public uses under state law." It recognized that the forests have long been administered to permit uses other than these two statutory purposes, such as for recreation and protection of fish and wildlife. Indeed, the Multiple-Use Sustained-Yield Act of 1960 expressly directed the Forest Service to manage the forests for these additional purposes. The Court characterized recreation and fish and wildlife protection, however, as merely "secon-

89. *Id.* at 702 (footnote omitted): "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."
90. *Id.* at 699.
91. *Id.* at 702. The Court explained that
[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.
92. *Id.* at 718.
dary uses” or “secondary purposes” of the forests. Without legislative history to the contrary, the Court held, it must conclude that Congress did not intend to reserve water for these secondary uses.

In the course of its opinion, the Court contrasted the two primary purposes of the national forests with the broader purposes of the national parks. Quoting from section 1 of the National Park Service Organic Act, the Court defined the purposes of the parks as being “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations.” This reference, together with the long history of the reserved rights doctrine, strongly indicates that the Court would hold that there exists a federal reserved water right for the national parks. The harder question, though, is: What purposes or uses of the parks are entitled to receive water pursuant to this reserved right?

Two aspects of the Court’s opinion in New Mexico render it doubtful that the Court would apply the reserved rights doctrine to serve the panoply of uses recommended by Professor Wilkinson. First, the Court was unwilling to confer reserved water rights for any uses other than the purposes of the national forests explicitly set forth in the Forest Service Act. If the Court were to follow this approach in assigning water rights to the national parks, it would apply the reserved rights doctrine only to those purposes set forth in the National Park Service Organic Act, rather than to the broader purposes identified by Professor Wilkinson. Indeed, notably absent from the Supreme Court’s recitation in New Mexico of the purposes of the national parks were uses such as ecosystem management, recreation, and provision of Park Service facilities, not to mention an explicit directive to maintain instream flows in park rivers, all of which Professor Wilkinson contends are entitled water under the federal reserved right. Second, the Court emphasized throughout its opinion that it was bound to inter-

94. 438 U.S. at 702.
95. Id. at 715.
96. Id.
97. Id. at 709 (quoting 16 U.S.C. § 1 (1982)).
98. See supra note 19.
99. Indeed, the Court refused even to apply the reserved rights doctrine to the express purpose of “improv[ing] and protect[ing] the forest” set forth in the Forest Service Organic Administration Act, 16 U.S.C. § 475 (1982), or to the explicit purposes of the Multiple-Use Sustained-Yield Act of 1960, which include “outdoor recreation, range, timber, watershed, and wildlife and fish.” Id. § 528. The Court dismissed the latter by characterizing them as “secondary purposes” of the forests. New Mexico, 438 U.S. at 713-15. And, in an impressive legerdemain, the Court held that the former was subsumed within the other two purposes of the Organic Administration Act of “securing favorable conditions of water flows” and “furnish[ing] a continuous supply of timber.” Id. at 706-08.
pret the scope of the reserved rights doctrine narrowly, because the
docrine is "built on implication and is an exception to Congress' ex-
plicit deference to state water law in other areas." Moreover, the
Court stressed that, when a river is fully appropriated, the assertion of
federal water rights "will frequently require a gallon-for-gallon redu-
ction in the amount of water available for water-needy state and private
appropriators." Consumptive uses of water at Park Service facili-
ties will reduce, to some extent, the water available to users down-
stream of the parks. Although maintenance of instream flows and
ecosystem management do not consume water, and therefore do not
take water away from downstream users, they do create demands for
water that can limit the rights of junior consumptive users upstream of
the parks. In view of these potential conflicts between the reserved
rights doctrine and the rights of state water users, and the Court's
professed discomfort with the doctrine, it is unlikely that the Supreme
Court would adopt the broad definition of reserved water rights for the
national parks advocated by Professor Wilkinson.

I may well be overly pessimistic in my assessment of how the
Supreme Court will define the scope of the reserved rights doctrine for
the parks. Indeed, my own views on the subject, both as a lawyer

100. 438 U.S. at 715.
101. Id. at 705.
102. For most parks, there can be no conflict with upstream water users, because the parks are
located at the top of their respective watersheds. But this is not true for all parks, some of which are
located downriver of significant state-regulated water use. Examples include Big Bend National Park in
Texas, Everglades National Park in Florida, Glacier National Park in Montana, Grand Canyon Na-
tional Park in Arizona, Grand Teton National Park in Wyoming, Redwood National Park in Califor-
nia, and Zion National Park in Utah. See Tarlock, supra note 5, at 34-37, 45-46.
103. In fact, the only case that actually has applied the reserved rights doctrine to the national
parks tends to support Professor Wilkinson's analysis. In United States v. City and County of Denver,
656 P.2d 1 (Colo. 1982), the Colorado Supreme Court held that Rocky Mountain National Park is
entitled to water under the reserved rights doctrine, but remedied the case to the water court for
quantification of the right without discussing the purposes or uses of the park entitled to receive water.
Id. at 30-31. In the course of its analysis of reserved rights for Dinosaur National Monument, however,
the court discussed briefly the subject of instream flows in the national parks. It rejected the United
States' claim to reserved rights to water flows for recreational boating through the national monument.
The government had argued that the National Park Service Organic Act, which governs both national
parks and monuments, has as one of its purposes the public enjoyment of the scenery and natural
included recreational use, that recreational uses included boating, and that boating required water, the
government contended that the Act implicitly reserved water for adequate instream flows for recrea-
tional boating through the monument. See 656 P.2d at 27-28. The court stated that it could not
accept the federal government's assertion that the National Park Service Act expands the
purposes for which national monuments are granted reservations of water. Acceptance of
this argument would mean that Congress has, sub silentio, eliminated all basic distinctions
between national monuments and national parks. We are, in effect, asked to treat monu-
ments as having the same recreational and aesthetic purposes as national parks. Our review
of the statutory and legislative record convinces us that Congress intended national monu-
ments to be more limited in scope and purpose than national parks.
and as a citizen interested in the national parks, are virtually identical to those of Professor Wilkinson. As stated earlier, I hope the courts will follow his lead and use the reserved rights doctrine to grant the Park Service enough water to serve the myriad uses that he describes. If so, the federal water right established by the Wild and Scenic Rivers Act would be less significant for the parks, because the purposes for which the parks would receive water under the reserved rights doctrine would be largely coextensive with the purposes of the Wild and Scenic Rivers Act. If the courts are not so forthcoming, however, then designation of park rivers as wild and scenic would become very important. Under those circumstances, the federal water right established by the Wild and Scenic Rivers Act would be the only means by which the United States could ensure that sufficient water remains available to fulfill those purposes of the Act that do not receive water under the reserved rights doctrine.

Before turning to the analysis of the wild and scenic rivers water right, though, we must first determine what kind of right the Act creates. Probably because the Act characterizes the designation of wild and scenic river areas as "a reservation of the waters of such streams," \(^{104}\) the water right typically is referred to as a "federal reserved water right." \(^{105}\) This characterization is not quite accurate, however, and could lead to an unduly circumscribed judicial interpretation of the scope of the right.

As discussed above, \(^{106}\) the reserved right is premised on the withdrawal or reservation of land from the public domain. When Congress or the Executive withdraws public land, the courts have reasoned, the United States must have intended implicitly to claim enough unappropriated water to serve that land and to fulfill the purposes of the reservation. \(^{107}\) In contrast, the water right for wild and scenic rivers has little to do with the withdrawal or reservation of land. Rather, when the United States designates a river as a component of the national rivers system, it claims water primarily to benefit the river itself—to

\(^{Id.}\) at 28.

Although the court did not come right out and say it, it certainly implied that one of the broader purposes for which Congress established the national parks was recreational boating. Thus, Denver could well be read as standing for the principle that the federal reserved right for the national parks includes water to provide adequate instream flows for boating and rafting. All this from a court that has been at the vanguard of states' rights to their natural resources!

106. See supra note 85 and accompanying text.
107. See supra note 19.
preserve its wild and free-flowing character; to maintain its fisheries and wildlife habitat; to protect its historic, archeologic, and scientific features; and to facilitate recreational uses of the river. While most of the nation’s wild and scenic rivers flow through federal lands, and of course benefit the public’s enjoyment and aesthetic appreciation of those lands, a few designated rivers do not serve federal land in any way. The Lower American River in California, for example, flows entirely through state and privately owned lands. Yet, the Wild and Scenic Rivers Act creates a federal water right for the Lower American just as it does for the component rivers that flow across the federal lands.

If the water right established by the Act is not a reserved right, then, what is it? Following the current fashion, it might be termed a “federal non-reserved water right.” I have always found this title rather awkward, however. Therefore, I prefer to call the water right for wild and scenic rivers simply a “federal water right”—one that is based on Congress’ express assertion of its powers under the Commerce and Supremacy Clauses of the Constitution. Thus defined, it is analogous to, and rests on the same foundations as, the federal water right held by the Secretary of the Interior in the waters of the Lower Colorado River, which the Supreme Court recognized in Arizona v. California.

One might wonder why it is necessary to classify the federal water right for wild and scenic rivers separately from the various federal reserved water rights, such as the one for the national parks. In my view, it is important to distinguish clearly between the two because of the doctrinal foundations and history of the reserved right. Unlike the reserved right, the water right for wild and scenic rivers is express. Congress stated in the Act itself—although in a back-handed man-


110. 373 U.S. 546 (1963). The Court held that, in the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617-617t (1982), Congress apportioned the water of the Lower Colorado among Arizona, California, and Nevada and vested in the Secretary of the Interior exclusive authority to allocate water to the various contracting parties within each state. 373 U.S. at 575-90. Whether this authority is characterized as a federal water right or simply as federal power over the water is immaterial. For all practical purposes the two are the same. Rather, what is important for the present analysis is the Court’s conclusion that the Secretary is not bound by state law in contracting for the sale of Colorado River water. For like the Boulder Canyon Project Act, the Wild and Scenic Rivers Act is an express congressional claim to the use of water for specific federal purposes, notwithstanding any state laws to the contrary.
ner\textsuperscript{111}—that it was reserving the water of component rivers for the purposes specified in the statute.\textsuperscript{112} The difference between such an express claim to water and the implied claim that forms the basis of the reserved rights doctrine may not seem overly significant at first blush. Recall, however, that in \textit{New Mexico} the Supreme Court declared itself bound to construe narrowly the scope of the federal reserved water right, because the doctrine is "built on implication and is an exception to Congress' explicit deference to state water law in other areas."\textsuperscript{113} It was for this reason that the Court distinguished between Congress' "primary purposes" for the reservation and the "secondary uses" or "secondary purposes" of the reservation, and held that only the former were entitled to receive water under the reserved rights doctrine.\textsuperscript{114}

The water right created by the Wild and Scenic Rivers Act is every bit as much an exception to Congress' traditional deference to state water law as is the federal reserved right. But it is an explicit exception, rather than an implicit one. Unlike in the reserved rights cases, the courts should have no misgivings about whether they are correctly inferring a congressional intent to reserve water independent of state water law. Nor would the courts be justified in distinguishing between primary purposes and secondary uses or purposes of the national wild and scenic rivers system. The Act itself expressly defines the purposes of the system and provides that, for each component river, the United States reserves for itself enough water to fulfill all such statutory purposes.

Having identified the nature of the federal water right for wild and scenic rivers, definition of the scope of the right is relatively simple. The Act requires the United States to claim water in sufficient quantities to accomplish the various purposes of the statute. As discussed in part IIIA, these purposes include protection of fish and wildlife; preservation of the geologic, historic, and cultural values of the river area; maintenance of scenic views and aesthetic values; promotion of recreational uses such as fishing and whitewater boating; protection of water quality; and preservation of the natural (or at least the existing) free-flowing character of the river for the benefit of present and future generations.\textsuperscript{115} Inasmuch as these express statutory purposes are considerably broader than the explicit purposes of the Na-

\textsuperscript{111} See supra notes 18-25 and accompanying text.
\textsuperscript{112} 16 U.S.C. § 1284(c) (1982).
\textsuperscript{113} 438 U.S. at 715.
\textsuperscript{114} See id. at 702, 715.
\textsuperscript{115} See supra note 35 and accompanying text; see generally 16 U.S.C. §§ 1271, 1273(b), 1281(a) & 1283(c) (1982).
national Park Service Organic Act, the quantity of water withdrawn from appropriation under state law by the Wild and Scenic Rivers Act is potentially far greater than that reserved implicitly by the National Park Service Act. This is especially true for the statutory purposes that require the greatest amounts of water, such as maintaining in-stream flows for fish and wildlife, recreational boating and fishing, dilution of pollutants, and scenic and aesthetic values.

Other than to identify the purposes of wild and scenic rivers for which the United States may claim water, the scope of the federal water right cannot be defined in the abstract. Quantification of the right for individual rivers will depend on a host of considerations peculiar to the river in question, such as the average annual and monthly natural water supply, the flow under peak runoff and drought conditions, the availability of releases from upstream impoundment facilities to augment the natural flow, and the variety of expected uses of the designated segment of the river. Depending on the river, these uses could demand large quantities of water. Most wild and scenic rivers are enjoyed by whitewater rafters, kayakers, and other boaters. Because recreation is an explicit purpose of the Act, the federal water right includes sufficient quantities to enable such craft to navigate and to enjoy the river. A certain river may contain a scenic waterfall. Inasmuch as the Act specifies that scenic and aesthetic values are among its purposes, the water right ensures that water will be available to maintain the flow over the falls. In addition, a particular river may provide the spawning grounds for salmon and other anadromous fish. Since protection of fish and wildlife, as well as recreational fishing, are express statutory purposes, the federal water right requires the provision of minimum stream flows to maintain the water temperature of the river and the release of spring flood runoff to flush sand and silt from gravel bars to allow the fish to spawn.

The Act provides that it does not reserve from appropriation under state law water “in quantities greater than necessary to accomplish” the statutory purposes. Thus, as the Solicitor of the Interior has observed, “river designation does not automatically reserve the entire unappropriated flow of the river.” But the Act also states that it does reserve whatever quantities are required to fulfill its purposes. Substantial amounts of water could well be needed to accomplish purposes such as providing in-stream flows for fish and wildlife, recreational uses of the river, and preservation of scenic views and aesthetic

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116. 16 U.S.C. § 1 (1982); see supra note 97 and accompanying text.
117. 16 U.S.C. § 1284(c) (1982); see supra notes 20-22 and accompanying text.
values. The reservation of such flows would have no adverse effects on—indeed, it could only benefit—downstream users, who would be able to appropriate the water for their own consumptive uses outside the designated river segment. The federal water right could have significant consequences for upstream users, however, because the right empowers the Park Service to demand that such users allow enough water to flow downriver to supply the instream needs and other authorized uses of the designated segment. The exact contours of the relationship between the federal water right and the rights of state water users necessarily depend on the priority date of the federal water right and the effect of the Wild and Scenic Rivers Act on state users that are senior-in-time to the federal right.

In establishing a federal water right for the national wild and scenic rivers, Congress failed to specify a priority date for the right. As a consequence, the courts will be forced to fill the statutory void. To date, only one court has been asked to do so. In New Mexico ex rel. Reynolds v. MolyCorp,119 pursuant to a stipulation among the parties, the district court ruled that the priority date for the wild and scenic rivers water right is the date on which the Congress included the river in the national rivers system.120 This holding follows the recommendation of the Solicitor of the Interior121 and is consistent with the logic of the prior appropriation system.122

The primary function of the priority date is to provide notice to prospective users that there is a preexisting claim to the water of the stream that, by virtue of the prior appropriation doctrine, is legally superior to the proposed use. This notice serves to warn the new claimants that there might not be enough water left in the river following the senior appropriations to satisfy their proposed uses. The date on which the river was included in the national wild and scenic rivers system is the appropriate priority date of the federal water right, because the designation places other potential water users on notice that, pursuant to its powers over interstate commerce, the United States has claimed as much water of the river as is necessary to fulfill the purposes of the Wild and Scenic Rivers Act.123

120. Id. at 9.
121. Krulitz Opinion, supra note 23, at 608-09.
122. For the uninitiated, a concise description of the prior appropriation doctrine may be found in J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 278-79 (1986).
123. It is arguable that the priority date of the federal water right should be the date on which the United States first published notice in the Federal Register that it was considering the addition of the river to the national rivers system, see, e.g., Heritage Conservation and Recreation Serv., Intent to Prepare Environmental Impact Statement, 45 Fed. Reg. 52,459 (1980), or in the case of a river that is designated from the list of study rivers, 16 U.S.C. § 1276 (1982), the date on which Congress placed the
The question then becomes whether the Act establishes a federal claim limited to water that is unappropriated at the time of the designation of the river or instead requires the United States to assert the right to all water needed to accomplish the statutory purposes, even if this means interfering with preexisting water rights. Although the Act states that it reserves "the waters of [component] streams,"124 the legislative history indicates that Congress intended only to reserve unappropriated water. As Senator Gaylord Nelson reported to the full Senate following the passage of the Act out of the Conference Committee, "[e]nactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation."125 Yet, in its only discussion of existing water rights, the Act provides that "any taking by the United States of any water right which is vested under either State or Federal law at the time [a] river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation."126 This provision clearly grants legal recognition to water rights that predate the designation of the river. It also demonstrates, however, Congress' expectation that it might be necessary in some instances for the United States to purchase or to condemn existing water rights in order to ensure that there is enough water available to accomplish the purposes of the designation.

How can Congress' intention to claim only unappropriated water be reconciled with its provision for acquisition of vested water rights? As I read these directives, Congress' overriding purpose was to ensure that the United States would be able to administer "[e]ach component of the national wild and scenic rivers system. . . in such manner as to protect and enhance the values which caused it to be included in said system."127 If there is enough unappropriated water available in the river at the time of the designation, then there will be no need to interfere with vested water rights. If there is not, however, Congress appears to have directed the Park Service to purchase or to condemn

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125. 114 Cong. Rec. 28,313 (1968); see Krulitz Opinion, supra note 23, at 608-09.
127. Id. § 1281(a).
existing water rights to the extent necessary to provide the required water. Thus, the federal water right extends only to unappropriated water. Congress "claimed" or "reserved" only that water not already appropriated by someone else at the time of the designation. If the federal water right proves incapable of providing sufficient water to accomplish the purposes of the wild or scenic river area, then the government will have to acquire the balance independently of its statutory water right.

With this understanding of the meaning and scope of the federal water right in mind, we now may discuss the significance of the right for wild and scenic rivers within the national parks. The most obvious application of the federal water right would be to prevent upstream junior users from diminishing the flow of the river below the level needed to supply the various purposes for which the river was included in the national rivers system. Thus, consistent with traditional prior appropriation law, the federal water right empowers the Park Service to place a call on the river to demand from junior users sufficient water to supply its senior rights. Moreover, the water right grants the Park Service the legal authority to defeat proposals for new diversion projects upstream of the parks that threaten the values of the wild or scenic river area. In this case, the federal water right complements the explicit prohibition in the Act against the federal licensing of or provision of assistance to any water or power project that "would have a direct and adverse effect" on a designated river.128

The federal water right also may be used to ensure that the quality of the water flowing in park rivers is sufficient to fulfill the purposes of the Wild and Scenic Rivers Act. It is well-established that a water right confers on the holder not just a certain quantity of water, but also water of adequate quality to fulfill its demands.129 Thus, if a junior upstream water user unreasonably diminishes the quality of water available to a senior downstream user—for example, by increasing the salinity of the river from irrigation run-off—the senior appropriator has the right to require the junior to alter its practices to enhance the quality of the return-flow. This right is important for the national parks, because it enables the Park Service to protect park rivers from the upstream uses of water that threaten to impair the fish habitat, aesthetics, or recreational uses of the rivers by diminishing water quality. In so doing, the federal water right provides a means of enforcing

128. Id. § 1278(a); see supra notes 13-14 and accompanying text.
129. See C. MEYERS, A.D. TARLOCK, J. CORBRIDGE & D. GETCHES, WATER RESOURCE MANAGEMENT 314-22 (3d ed. 1988). In resolving disputes between competing users over water quality, the courts usually apply the ubiquitous reasonable use test. Id. at 319.
Congress' directive in the Wild and Scenic Rivers Act to eliminate or to diminish the pollution of waters of component rivers.\textsuperscript{130}

The water right embodied in the Act thus helps to redress one of the deficiencies of the regulatory provisions of the statute—Congress' failure expressly to regulate private activities on nonfederal land that are inconsistent with the purposes of the Act.\textsuperscript{131} When the private activity is the diversion of water by a junior appropriator to the detriment of the wild or scenic river area downstream, the Park Service may assert the federal water right to enjoin the diversion. This is true despite the Park Service's lack of direct regulatory jurisdiction over the upstream water user.

A related but more problematic application of the federal water right would be to control private uses of land that adversely affect the wild and scenic rivers of the parks. A variety of land use practices can threaten the integrity of a park river. As discussed above, the most significant are timber harvesting and mining upstream of the park boundaries. These activities deposit debris and sediment in the river, which increase the turbidity of the river and can harm its fisheries and aquatic habitat.\textsuperscript{132}

Just as the Wild and Scenic Rivers Act itself does not expressly regulate these uses of private land,\textsuperscript{133} neither does the federal water right created by the Act apply directly to such activities. A water right confers on the holder legal authority to enjoin the exercise of junior water rights that unreasonably injure the senior user. The right does not grant the power, however, to enjoin the use of private land that affects water quality, but which is not undertaken pursuant to a water right permit. In other words, while timber cutting and mining upstream of the national parks can severely degrade the water quality of park rivers, and thereby infringe upon the federal water right embodied in the Wild and Scenic Rivers Act, that right does not confer on the Park Service the direct authority to enjoin or otherwise to complain about such practices.

Of course, the federal water right does create certain legal rights against upstream users of private land, but they are not rights that can be asserted in a water rights adjudication. The Park Service might be able, for example, to bring a nuisance action against timber cutting or mining that is harmful to park rivers. The use of nuisance law to protect the parks against external threats has been the subject of several

\textsuperscript{130} 16 U.S.C. § 1283(c) (1982).
\textsuperscript{131} See supra note 79 and accompanying text.
\textsuperscript{132} See supra notes 71-72 and accompanying text.
\textsuperscript{133} See supra note 79 and accompanying text.
recent articles, and therefore I will not venture a complete analysis here. There at least two problems, however, in relying on the common law of nuisance to regulate upstream activities that pollute wild and scenic rivers that flow through the parks.

First, it is not clear whether federal or state law would govern the nuisance action. Professor Sax has recommended that Congress authorize the Park Service to enact regulations to govern external activities that threaten the parks and to bring federal common law "nuisance-type" claims to enjoin any other such private activities that cannot be anticipated in the regulations. But Congress has not yet done so, and the Supreme Court's opinion in City of Milwaukee v. Illinois suggests that, in the absence of such enabling legislation, the courts might be reluctant to create a federal common law nuisance claim to redress external threats to the water resources of the parks. If the courts were to hold that they are precluded from applying federal common law, then the only source of "nuisance-type" protection for park rivers would be state law.

This would not necessarily be a bad thing, were it not for the content of most state nuisance doctrines. For the second problem with relying on nuisance law to protect park rivers is that the hallmark of nuisance adjudication is to balance the competing property rights and interests involved in the case. This does not provide much security for the wild and scenic rivers water right and the values that it serves. A state court, or federal judge applying state law, could well find that the economic benefits to the region of continued mining or timber cutting upriver of a national park would outweigh the environmental or aesthetic harm that it caused. The court then would be justified in denying the Park Service's nuisance claim despite the undeniable deg-

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137. In Milwaukee, the Court held that the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1982), comprehensively regulate the field of water pollution and therefore preempt the federal common law remedy that the Court previously had recognized in Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972). Milwaukee, 451 U.S. at 317-26. Based on this conclusion, and the judicial assumption that "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," id. at 317 (footnote omitted), it is certainly possible that the courts would hold that the Wild and Scenic Rivers Act comprehensively addresses the subject of wild river protection and therefore preempts the judicial creation of a supplementary federal common law nuisance claim. For contrary speculation about the preclusive effects of Milwaukee, see Note, supra note 134, at 1195-97.
radation of the wild and scenic river water right. Such a result would be inconsistent with what the Supreme Court has told us about the nature of federal water rights—that they are not to be balanced against competing interests. 139 Yet, because the water right is enforceable against private land practices only indirectly through the doctrine of nuisance, the values served and protected by the right would be balanced against those private activities. This is a very poor means of guarding the wild and scenic rivers of the parks against degradation from external threats.

Thus, the federal water right created by the Wild and Scenic Rivers Act affords mixed protections for the national parks. It can be used effectively to prevent the construction or operation of upstream water diversion facilities that threaten to diminish the quantity of water flowing to the parks. And it may be applied to protect the parks against upstream uses of water that impair the quality of the water that does make its way downstream to the parks. But, because the right does not operate directly against uses of private land that are not undertaken pursuant to a water permit, such as mining or timber harvesting, it is inadequate to the task of providing complete protection to the parks against external threats to their water resources. As will be discussed in the last part of this article, the use of the Wild and Scenic Rivers Act to regulate comprehensively the myriad private activities that potentially diminish the values protected by the Act will require further congressional action.

IV. IMPROVING THE WILD AND SCENIC RIVERS ACT: SUGGESTED LEGISLATIVE REFORMS

As the discussion in part III indicates, the Wild and Scenic Rivers Act is a powerful but incomplete tool for protecting rivers that flow through the national parks. In its present form, the Act is fundamentally sound; there is no need to repeal or to amend any of its existing provisions. To enable the Park Service and the public to fulfill the various purposes of the Act, however, further congressional action is needed to supplement the regulatory and enforcement authority that the statute presently provides.

The Act could be improved with only three amendments. First, Congress should grant the Park Service the direct authority to regu-

139. Cappaert v. United States, 426 U.S. 128, 138-39 (1976). Of course, Cappaert involved a federal reserved right rather than a federal water right created by statute, see supra notes 104-109 and accompanying text, but this should not make a difference. The federal water right embodied in the Wild and Scenic Rivers Act should be at least as protective of federal interests vis-a-vis state law as is the judicially created reserved water right.
late, and if necessary to prohibit, private activities that threaten to harm the values protected by wild and scenic designation. Second, Congress should expressly direct the Park Service to take whatever action is necessary to fulfill the purposes of the statute, including the issuance of regulations, the commencement of litigation, and the assertion of the federal water right embodied in the Act. Third, Congress ought to augment the enforcement powers of the Park Service and the Department of Justice by including an express private right of action in the statute.

A. Regulation of Private Activities That Threaten the Integrity of Park Rivers

The greatest inadequacy of the Wild and Scenic Rivers Act is its failure directly to regulate those private activities on nonfederal land that diminish or degrade the water flowing into component rivers.\textsuperscript{140} As discussed in the previous section, the federal water right created by the Act partially redresses this omission.\textsuperscript{141} Because the water right may be asserted directly only against other water users, however, it does not confer on the Park Service authority to control a number of the more significant external threats to the parks, especially upstream mining and timber cutting.\textsuperscript{142}

To fill this gap, Congress should amend the Act to authorize the Park Service to regulate, and if necessary, to prohibit, any use of land or water by public agencies or private individuals that threatens to interfere with the accomplishment of any of the purposes of the statute.\textsuperscript{143} This amendment, which undoubtedly would be controversial, would extend the Park Service's existing jurisdiction over private activities that take place on federal land to activities that occur on nonfederal land. For example, the Act presently requires all federal land management agencies to regulate mining, timber cutting, and all other private uses of the federal lands "as may be necessary to protect" the wild and scenic rivers in accordance with the purposes of the Act.\textsuperscript{144} It also forbids the Federal Energy Regulatory Commission, the Army Corps of Engineers, and all other federal agencies with juris-

\textsuperscript{140} See supra notes 78-82 and accompanying text.
\textsuperscript{141} See supra notes 128-131 and accompanying text.
\textsuperscript{142} See supra notes 132-133 and accompanying text.
\textsuperscript{143} In the case of river areas managed by the Secretary of Agriculture, Congress should grant the Forest Service equivalent regulatory authority.
\textsuperscript{144} 16 U.S.C. § 1283(a) (1982). Indeed, the Act requires that "[p]articular attention be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of [the Act]." \textit{Id}. The Act also directs all federal land management agencies to issue mining regulations that "among other things, provide safeguards against pollution of the river involved and unnecessary impairment of the scenery within the component in question." \textit{Id}. § 1280(a).
diction over the use of watercourses from licensing or assisting any water project that would have "a direct and adverse effect" on the values and purposes of a designated river area.\textsuperscript{145} The proposed amendment would direct the Park Service to apply these same restrictions to private uses of land and water that presently fall just beyond the purview of the statute because they take place on private land and do not require a federal permit or federal assistance.\textsuperscript{146}

If this amendment were enacted, the Park Service would be able directly to regulate all of the private uses of land and water that threaten the wild and scenic rivers of the national parks. For example, it could promulgate regulations that forbid mining or timber cutting in a manner that allows tailings or sediment to be deposited in the river. The regulations also might prohibit the clear-cutting of timber on state or private forest land along certain slopes where the practice could cause soil erosion and siltation of the river. Moreover, the Park Service could regulate directly various uses of water that it presently can control only through the water rights system. For example, it could declare unlawful any upstream diversions by senior appropriators that reduce the flow of the river below that which is needed to serve the purposes of the Act. The Park Service also could regulate agricultural runoff and return flow or municipal discharges of effluent that threaten the water quality of component rivers.

Under the proposed amendment, the Park Service's authority over these private activities would not be unbridled. First, it would have jurisdiction over only those uses of land and water outside the parks that threaten to harm one or more of the values for which the wild or scenic river area was established.\textsuperscript{147} Absent a finding that a particular use of land or water endangers one or more uses of the river area and is inconsistent with a specific purpose of the statute, the Park Service could not apply its regulations. Second, the Park Service's authority would not extend to private activities that take place on federal land managed by some other department, such as the Forest Service, or that are directly regulated by another federal agency, such as the Federal Energy Regulatory Commission. The Act currently requires

\textsuperscript{145} Id. § 1278(a).

\textsuperscript{146} Any lingering doubts about the constitutionality of this kind of extraterritorial regulation should have been put to rest a decade ago by Professor Sax's persuasive and influential analysis of the issue. Sax, supra note 79, at 250-258; see Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981) (Congress may regulate use of snowmobiles and motorboats on nonfederal lands and waters in order to protect the Boundary Waters Canoe Area), cert. denied, 455 U.S. 1007 (1982); see also Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

\textsuperscript{147} As with the Park Service's authority to manage the designated river areas themselves, I would expect that the decision whether to regulate a particular external activity would be left to the broad administrative expertise of the agency. See supra notes 36-39 and accompanying text.
these agencies to exercise their regulatory and management authority in accordance with the statutory purposes. Accordingly, it is not necessary to expand the Park Service's jurisdiction to include private activities that are already subject to federal regulation under the Wild and Scenic Rivers Act. Third, any action taken by the Park Service to guard its rivers against external threats would be subject to the takings clause of the Fifth Amendment. If, in a particular case, the protection of the river required that a conflicting land or water use be terminated or severely restricted, and the regulation infringed upon vested property rights, then the regulated party would have the right to sue the United States for taking its property and for payment of just compensation.

If enacted, the proposed amendment would provide the Park Service with all of the statutory authority it needs to regulate external activities that threaten the integrity of the wild and scenic river areas within the parks. Federal agencies do not always see fit to exercise the powers granted to them by Congress, however, and the Park Service is no exception. What is needed in addition to regulatory authority broad enough to fulfill the purposes and goals of the Wild and Scenic Rivers Act is a clear congressional directive to the Park Service to protect park rivers and some means of ensuring that it pursues its statutory duties.

B. A Clear Statutory Directive to Protect Park Rivers

The Wild and Scenic Rivers Act, as presently written, is not without expressions of Congress' intent as to how the Park Service and other federal agencies are to accomplish the purposes of the statute. For example, section 10 provides that

[Each component of the national wild and scenic rivers system shall be administered in such a 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

149. While it certainly would be possible to devise a management system that vested plenary authority in the Park Service to regulate private activities over which other federal agencies also have jurisdiction, the potential for inter-agency conflicts and turf fights probably outweighs the benefits of placing integrated, but overlapping, management authority in one agency.
150. U.S. CONST. amend. V.
151. Injured parties may sue the United States under the Tucker Act. 28 U.S.C. § 1491 (1982). For a collection of the most important Supreme Court cases on the takings clause, see J. Dukeminier & J. Krier, supra note 138, at 1093-1211.
values.\textsuperscript{153}

In addition, section 12 states that the Department of the Interior, the Department of Agriculture, and all other federal agencies with jurisdiction over designated river areas or adjacent lands "shall take such action respecting management policies, regulations, contracts, [and] plans affecting such lands . . . as may be necessary to protect such rivers in accordance with the purposes of [the Act]."\textsuperscript{154}

As discussed previously,\textsuperscript{155} although these provisions direct the Park Service and other federal departments to protect wild and scenic rivers within or affected by their jurisdiction, the methods and extent of protection are left largely to the judgment and discretion of the agency. In general, deference to administrative decisionmaking is sound judicial policy. Federal agencies such as the Park Service, which have developed unparalleled expertise over their regulatory subject area and are accountable to Congress and to the public for their policy decisions, are far better suited than the courts to the task of managing federal resources. The scope of this administrative discretion, however is limited by the legislation that defines the agencies' jurisdiction and responsibilities. As the Supreme Court has stated recently, an executive agency or department "may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter."\textsuperscript{156} Thus, it is appropriate for the courts to intervene in the administrative process to ensure that federal agencies act in accordance with Congress' statutory directives.

In an effort to accommodate this responsibility with the general principle of deference to administrative policymaking, the courts have decided not to compel an executive agency to perform a specific action within its statutory jurisdiction unless Congress clearly and expressly has directed the agency to do so.\textsuperscript{157} Indeed, in several well-known

\textsuperscript{153} 16 U.S.C. § 1281(a) (1982).
\textsuperscript{154} Id. § 1283(a).
\textsuperscript{155} See supra notes 36-39 and accompanying text.
\textsuperscript{156} Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2867 (1986).
\textsuperscript{157} The Supreme Court reaffirmed this doctrine last Term in Japan Whaling Ass’n v. American Cetacean Soc’y, 106 S. Ct. 2860 (1986). The facts of the case are complex. In the Packwood Amendment to the Magnuson Fishery and Conservation Act, enacted to enforce the International Convention for the Regulation of Whaling ("International Whaling Convention" or "IWC"), Congress directed the Secretary of Commerce to monitor and to investigate whether "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention." 16 U.S.C. § 1821(e)(2)(A)(i) (1982). If the Secretary concludes that such activities are taking place, he may certify his findings to the President. Congress then provided that, on the basis of the certification, the Secretary of State must reduce, by at least fifty
decisions involving the Park Service's and Forest Service's duty to protect parks, wilderness areas, and other lands within their jurisdiction, the courts have expressed great reluctance to choose for the agency how best to accomplish that duty and accordingly have refused to compel specific agency action.

The two most recent of these cases provide the best examples of the courts' reluctance to order the Park Service or the Forest Service to take specific steps to protect its land and water resources. In 1984, the Secretary of Commerce determined that Japan was in violation of the International Whaling Convention, but decided to negotiate with the Japanese rather than to certify the violation to the President, which would have triggered the mandatory quota reduction. The agreement between the United States and Japan provided that, between 1984 and 1988, Japan would adhere to certain whaling restrictions and would cease commercial whaling by 1988. 106 S. Ct. at 2864-65. In return, the Secretary of Commerce agreed not to certify Japan to the President under the Packwood Amendment. Id. at 2865. Several days before the consummation of the agreement, however, a coalition of wildlife protection groups filed suit seeking a writ of mandamus to compel the Secretary to certify Japan. The district court granted summary judgment in favor of the plaintiffs and issued the writ. On appeal, the court of appeals affirmed, but the Supreme Court reversed.

The Court observed that, while the Packwood Amendment clearly directs the Secretary of State to reduce the import quota of a country certified by the Secretary of Commerce to be in violation of the fishing restrictions, the law does not require the Secretary of Commerce to issue the certificate. Rather, Congress mandated only that the Secretary monitor and investigate foreign whaling practices and reach a decision with respect to the investigation. Id. at 2864 (citing 22 U.S.C. § 1978(a)(3)(A)-(C) (1982)). Nothing in the statute or its legislative history, according to the Court, takes the next logical step of expressly directing the Secretary to certify a foreign country's violation of the International Whaling Convention. Id. at 2867-68. The Court acknowledged that the language of the Packwood Amendment might reasonably be construed to mandate issuance of the certificate. In the absence of a clear congressional directive requiring the Secretary to do so, however, the Court held that it must defer to the Secretary's interpretation of the statute as allowing him to withhold certification despite his finding that Japan had disobeyed the IWC. Id.

The Court concluded its opinion by emphasizing that when a statute directs an executive agency to pursue a particular policy, but is silent as to the specific means of accomplishing the task, the agency has broad discretion to choose among the various methods of fulfilling the statutory purposes. According to the Court, Congress' primary goal in enacting the Packwood Amendment was to protect and conserve whales and other endangered species. The Secretary furthered this objective by entering into the agreement with Japan. . . . Given the lack of any express direction to the Secretary that he must certify a nation whose whale harvest exceeds an IWC quota, the Secretary reasonably could conclude, as he has, that, "a [cessation] of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development."

Id. at 2871-72 (quoting Affidavit of Secretary of Commerce Malcolm Baldridge).

158 The third case, Sierra Club v. Dep't of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974) (order denying defendants' motion to dismiss), 398 F. Supp. 284 (N.D. Cal. 1975) (order directing defendants to comply with statutory duties to protect Redwood National Park), 424 F. Supp. 172 (N.D. Cal. 1976) (order expunging previous directive), is commonly viewed as the strongest authority yet for judicial intervention into the area of national park administration. See Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. Davis L. Rev. 269, 284-90 (1980). In that litigation, the Sierra Club asked the court to order the Park Service to use its statutory powers to protect Redwood National Park from the adverse effects of logging upstream along Redwood Creek. 376 F. Supp. at 92-93. The district court ruled in its first opinion that the National Park Service Organic Act, 16 U.S.C. § 1 (1982), and the
Sierra Club v. Andrus, the Sierra Club alleged that the Secretary of the Interior, the Park Service, and the Bureau of Land Management had a statutory duty to determine, to assert, and to defend the federal reserved water rights for Grand Canyon National Park, Glen Canyon National Recreation Area, and various BLM land in southern Utah and northern Arizona. The United States moved to dismiss the complaint on the ground that, while Congress had required the Secretary "to take whatever actions and seek whatever relief as will safeguard the units of the National Park System" and BLM land under his jurisdiction, Congress had not specified that the Secretary pursue any particular course of action, such as asserting federal reserved

Redwood National Park Act of 1968, id. 79a-79j, imposed on the Park Service a duty to protect the resources of the park, which was subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). 376 F. Supp. at 95-96. In its second opinion, the court held that the Park Service had not fulfilled that duty and ordered the defendants to "take reasonable steps within a reasonable time to exercise the powers vested in them by law . . . . in order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the Redwood National Park." 398 F. Supp. at 294. The court directed the Park Service, "if reasonably necessary," to acquire interests in land upstream of the park, to enter into land use agreements with upstream landowners, to modify the boundaries of the park, and to seek from Congress additional funding for the park. Id. Up to this point, the Redwood Park litigation established strong precedent for active judicial enforcement of the Park Service's statutory responsibilities over the parks. The court even directed the Park Service to take specific actions to protect Redwood Park that were not expressly set forth in the statutes. In its third opinion, however, the court eviscerated its prior rulings. The court held that the defendants had discharged their obligations under the previous order by submitting a report to Congress, which set forth five alternatives for the protection of the park. Based on the Department of Interior's representations that it was without funds to undertake any of the five options, the court excused the defendants from acting on their own recommendations. 424 F. Supp. at 173. The court also ruled that its previous directive that the Department seek additional funding for the park from Congress was not "mandated by existing law." Id. at 175 n.2. In concluding its opinion, the court emphasized the limits of the authority of the courts—at least in the absence of a specific directive from Congress—to compel executive departments to take specific actions within their jurisdiction. According to the court, it was Congress, rather than the Executive or the Judiciary, that had primary responsibility for the protection of Redwood National Park:

To a lesser extent—some responsibility rests upon the Executive, acting through the President's Office of Management and Budget, to decide whether and to what extent it will make recommendations to the Congress for such new legislation and/or additional funds; also it is up to the Executive to decide whether litigation should be commenced . . . . against the timber owners. Such recommendations are obviously desirable—but they are not mandated by existing law.

. . . .
It is beyond the province of this court to say whether and, if so, to what extent the Congress or the Executive should act—much less to order such action.

Id. at 175.
Thus, in the end, the most activist judicial enforcement of the Park Service's statutory duties amounted only to a requirement that the Service submit a list of alternatives to Congress. Beyond that, a very well-intentioned court found itself powerless to act.

For a thorough analysis of the Redwood National Park litigation and its subsequent history, see Hudson, supra note 152.

160. Id. at 445.
water rights.\textsuperscript{161} The court agreed and dismissed the complaint. It observed that there were no present threats to the various water resources at issue in the case and noted that the Department of the Interior was participating in an interagency task force established by presidential order to formulate principles and standards for the identification and quantification of federal reserved water rights. The court concluded that the Secretary had broad discretion to determine how best to accomplish his statutory responsibilities and ruled that the task force was an acceptable means of protecting the lands and water resources in question.\textsuperscript{162}

\textit{Sierra Club v. Block}\textsuperscript{163} makes this point even more forcefully. The Sierra Club sued the Secretary of Agriculture and the Forest Service, alleging that the defendants violated the Administrative Procedure Act\textsuperscript{164} by failing to claim federal reserved water rights for the wilderness areas in Colorado under their jurisdiction. In an important and controversial opinion, the district court held that the reserved rights doctrine applies to wilderness areas.\textsuperscript{165} The court refused, however, to direct the defendants to claim or to exercise their reserved water rights. According to the court, there was no question that the Wilderness Act “impose[d] a duty on the administering agencies to protect and preserve all wilderness resources, including water.”\textsuperscript{166} It noted, however, that Congress created “no specific \textit{statutory} duty to claim reserved water rights in the wilderness areas even though Congress impliedly reserved such rights in order to effectuate the purposes of the [Wilderness] Act.”\textsuperscript{167} In the absence of such a congressional directive, the court concluded, it could not “say that federal defendants unlawfully withheld agency action under § 706(1) [of the Administrative Procedure Act].”\textsuperscript{168}

The significance of this holding is underscored by the fact that the district court was overtly disturbed by the Forest Service’s failure to claim reserved water rights for wilderness areas in Colorado and frustrated by its inability to remedy the situation. The court stated that it was

dismayed by federal defendants’ benign neglect of this issue of fed-

\begin{footnotesize}
\begin{enumerate}
\item\textit{Id.} at 448.
\item\textit{Id.} at 451-52.
\item \textit{Block}, 622 F. Supp. at 862.
\item \textit{Id.} at 864.
\item \textit{Id.} (emphasis in original).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
eral reserved water rights in wilderness areas as well as their failure to take any kind of action to determine whether they existed. To the extent that this benign neglect may have fostered an improper understanding of the law, federal defendants have not acted with the degree of responsibility rightfully to be expected of them. Just as clearly as judges should not inject themselves into the prerogatives of the Executive, that same Executive should not ignore or disregard the intent and policy established by Congress.\footnote{169} Nevertheless, the court held that, without an express congressional directive, it had no authority to command the Forest Service to claim reserved water rights.\footnote{170}

Cases like Andrus and Block illustrate the desirability of authorizing and encouraging suits by interested private parties to ensure that the Park Service and other federal resource management agencies fulfill their statutory responsibilities. These cases also highlight, however, the fundamental flaw with such litigation. In the absence of an explicit directive from Congress, the courts will not intervene in what they regard as a discretionary executive decision to decide how best to

\footnote{169} Id. at 865.

\footnote{170} Id. The court did order the defendants, however, to submit a memorandum that explains the specific alternatives to asserting federal reserved water rights that they plan to pursue in order “to comply with their statutory obligations regarding protection and preservation of wilderness water resources.” Id. The “Report on Methods For Protecting Wilderness Water Resources on Lands Administered by the Forest Service, United States Department of Agriculture” is reprinted as an attachment to Sierra Club v. Lingle, 661 F. Supp. 1990, 1502 (D. Colo. 1987). In it the Forest Service declared that “[b]ecause the assertion of federal reserved rights claims in ongoing litigation is within the plenary discretion of the Attorney General of the United States, the Forest Service can only recommend that any claims for such rights be asserted.” Id. at 1503. The Forest Service concluded, however, that because there exist no “identified present threats to wilderness water resources, it is unnecessary . . . to make any recommendation at this time.” Id. It also stated that “claiming wilderness reserved rights is at best, only a marginally effective means of protecting national forest wilderness water resources in Colorado.” Id. Thus, the Forest Service instead proposed six alternative means of preserving adequate stream flows in Colorado wilderness areas. These ranged from the regulation of the uses of Forest Service land “outside of, but in a position to affect, water resources in any designated wilderness area,” id. at 1503-04, to the acquisition of land or water rights “where necessary to eliminate any threat of adverse effect upon wilderness water resources.” Id. at 1504.

As in its previous opinion, the district court vented its frustration with the Forest Service, characterizing the Report as “glib,” “facile,” “grossly inadequate,” and “completely deficient in the kind of detail necessary for the court to conduct a review of agency action.” Id. at 1499, 1501, 1502. The court also reiterated its view that prompt assertion of federal reserved water right would be the best means of protecting the water resources of the wilderness areas and of removing what it terms the “Damoclean uncertainty concerning the allocation of water rights among the interest groups involved in this litigation.” Id. at 1500. “Nevertheless, despite the promising nature of such a course of action,” the court held, “I am without power to order the Attorney General to instigate litigation.” Id. (quoting Block, 622 F. Supp. at 864). It concluded that the “[c]reation of any such duty lies with the Congress.” Id. Thus, instead of directing the Forest Service to claim federal reserved rights, the court simply ordered the Service to revise its Report to address in detail the consequences and relative benefits of the six alternatives noted therein as compared to the assertion of federal reserved rights or other alternatives such as “the possibility of using non-reserved federal water rights.” Id. at 1502.
manage wild and scenic river areas to accomplish the various purposes of the Wild and Scenic Rivers Act. The effect of such judicial deference is to allow succeeding administrations to flout the will of the various Congresses and prior administrations that have placed rivers in the national wild and scenic rivers system by simply failing to take certain actions that are necessary to protect such rivers. According to the cases just considered, as long as the Park Service can demonstrate that there are several ways to fulfill the mandates of the Act—such as acquiring upstream water rights instead of asserting the federal water right for wild and scenic rivers—the courts will not compel the Service to undertake any other specific action, even if it would much more effectively accomplish the purposes of the statute.

As suggested at the outset of this subsection, in general the Park Service is far better able than the courts to decide how best to manage the national parks and the wild and scenic river areas within its jurisdiction. But by the same token, Congress is much better suited to determine which of the purposes of the Wild and Scenic Rivers Act are sufficiently important that they ought to be protected and promoted under all circumstances and in a particular manner. Congress therefore ought to amend the Act expressly to direct the Park Service to take certain specific actions necessary to fulfill the purposes of the statute.

Based on the previous discussion of the existing failings of the Act, two such directives come to mind. First, Congress should require the Park Service, through the Department of Justice, to assert and to have quantified federal water rights for all wild and scenic rivers for which there exists the possibility of upstream water claims. This directive would be applicable to those designated rivers that originate in or pass through nonfederal land or federal land on which water development projects are permitted. The proposed amendment would benefit the national interest by ensuring that the Park Service employs the most effective tool available to it to guard the rivers within its jurisdiction against upstream developments that could reduce the instream flow of water below the level needed to serve the uses protected by the Wild and Scenic Rivers Act. For if the Park Service failed to follow Congress' directive, the courts would be authorized to compel the United States to institute litigation in accordance with the clear

172. See Andrus, 487 F. Supp. at 448.
173. See Block, 622 F. Supp. at 865.
174. See supra notes 155-156 and accompanying text.
terms of the statute.\textsuperscript{176} The amendment also would be in the interest of the states—and private water users under their authority—because it would require the United States to quantify its federal water rights. This would benefit all water users by providing notice of the existence of the federal water right for wild and scenic rivers and by informing all prospective junior users of the precise seasonal minimum flows that the United States would be claiming to serve the purposes of the Act. The proposed amendment thus would help to eliminate the uncertainty commonly associated with federal water rights.\textsuperscript{177} Moreover, by directing the Park Service to claim federal water rights only for those rivers on which there is the possibility of upstream development, the amendment would avoid unnecessary litigation. Federal water rights for wild and scenic rivers that have their headwaters wholly within a national park or other federal lands in which water development projects are prohibited need not be adjudicated, because there is no possibility of impairment of the instream flows for such rivers.

Second, Congress should amend the Wild and Scenic Rivers Act to require the Park Service to promulgate regulations governing all uses of nonfederal land outside the parks that potentially diminish the quantity or degrade the quality of the water that flows into component rivers. The purpose of this directive would be to ensure that the Park Service implemented the amendment proposed in the preceding section, which would empower the Service to regulate the external threats to the parks that currently fall outside its jurisdiction.\textsuperscript{178} To provide guidance to the courts, which inevitably would be asked to review the agency’s compliance with this directive, Congress should specify which activities are to be covered by the regulations. At a minimum, this noninclusive list should include:

1. Rules governing mining, timber-cutting, and agricultural practices within the watershed of any designated river.
2. A permit requirement for the discharge of any mine tailings, logging debris, herbicides, pesticides, fungicides, or other pollutants into any component river, including its upstream nondesignated segments and tributaries, whether from point or nonpoint sources.\textsuperscript{179}
3. A permit requirement for any activities, such as clear-cutting,

\textsuperscript{176} The proposed amendment thus would overcome the district court’s apprehension in Block that, in the absence of a “specific legal duty on the part of federal defendants to claim reserved water rights,” it could not “order the Attorney General to instigate litigation to claim these rights.” 622 F. Supp. at 864.


\textsuperscript{178} See supra note 4.

\textsuperscript{179} For a discussion of the differences between point and nonpoint sources under the Clean Water Act, see F. Anderson, D. Mandelker & A.D. Tarlock, ENVIRONMENTAL PROTECTION:
that might cause erosion of hillsides within the watershed of component rivers and sedimentation of the rivers themselves.

4. Civil enforcement authority, including civil penalties for permit violations and damages and injunctive relief to redress non-compliance with the regulations.

To a large extent, this statutory directive could be modeled on the provisions of the Clean Water Act that establish the National Pollutant Discharge Elimination System and "dredge and fill" permit systems,\textsuperscript{180} as well as the enforcement provisions of that statute.\textsuperscript{181} Unlike the Clean Water Act, however, because the object of the wild and scenic river regulations—the national parks—is of paramount federal interest, enforcement authority ought to be vested principally in the United States.

With the amendments discussed in this and the preceding section in place, the Wild and Scenic Rivers Act would contain both adequate regulatory authority to permit the Park Service to control all external activities that have threatened the water resources of the national parks and a means of ensuring that the Park Service exercises that authority. The final piece in the puzzle is the creation of a private right of action, which would augment the Park Service's enforcement powers by granting interested private parties the right to take direct legal steps to protect the parks from external threats.

\textbf{C. A Private Right of Action}

In general, decisions by the Park Service and other federal agencies that affect the national parks, or the failure of such agencies to take action to protect the parks, are subject to legal challenge by private parties and are reviewable by the courts under the Administrative Procedure Act.\textsuperscript{182} Members of the public may not sue to remedy actions taken by private parties that violate the various laws that protect the parks, however, unless the relevant statutes create a private right of action. The Wild and Scenic Rivers Act does not contain an express private right of action, and it is unlikely that the courts would hold that the Act creates such a right by implication.\textsuperscript{183} Thus, unlike

\textsuperscript{180} 33 U.S.C. §§ 1311, 1341-1345 (1982).

\textsuperscript{181} Id. §§ 1319 & 1365.

\textsuperscript{182} 5 U.S.C. §§ 701-706 (1982). The Act provides for judicial review of agency action unless the relevant statutes preclude such review or the action is committed to agency discretion by law. Id. § 701(a); see Heckler v. Chaney, 470 U.S. 821 (1985). The Supreme Court has held that the latter exception to judicial review is not applicable unless there is "no law to apply." Id. at 830; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

\textsuperscript{183} After struggling for several years over the appropriate standard for determining whether to
most of the major environmental statutes enacted during the 1970s, the Wild and Scenic Rivers Act does not provide any means for private litigants to assist the Park Service and the Department of Justice in enforcing the regulatory provisions of the Act.

The addition of an express private right of action to the Wild and Scenic Rivers Act would be desirable for several reasons. First, it would enable interested private litigants to supplement the enforcement authority of the Park Service, which may be limited by budget constraints. The benefits of this "private attorneys general" concept have long been recognized by the courts and by Congress. Second, a private right of action would allow interested citizens to ask the courts to redress violations of the Act by regulated private parties when the Park Service or the Department of Justice fails to exercise its enforcement authority in accordance with Congress' stated objectives. Third, the inclusion of such a private right in the Act could

recognize an implied private right of action in statutes that, by their terms, are silent on the subject, see Frankel, Implied Rights of Action, 67 VA. L. REV. 553, 559-70 (1981), the Supreme Court seems to have concluded not to do so unless it appears from the text of the statute or its legislative history that Congress intended to create a private cause of action even though it did not do so explicitly. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979). There is nothing in either the text or the legislative history of the Wild and Scenic Rivers Act that evinces such an intention. Even if the courts applied the more liberal test for ascertaining the existence of an implied right of action announced in Cort v. Ash, 422 U.S. 66, 78 (1975), it is unlikely that they would find such an implied right in the Wild and Scenic Rivers Act. For, like the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-416 (1982), the Wild and Scenic Rivers Act is a general regulatory measure rather than a statute enacted "for the especial benefit of a particular class." California v. Sierra Club, 451 U.S. 287, 294 (1981).


185. As Professors Richard Stewart and Cass Sunstein have pointed out, private enforcement also will be limited by budgetary considerations. Thus, private litigants will "enforce a statute beyond the level permitted by an agency's limited budget only if they believe that the benefits of additional enforcement outweigh its costs." Stewart & Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1193, 1289-90 (1982). This method of enforcement is desirable, they conclude, because "private litigants—who are often closer to local controversies than are public officials—may know more about the costs and benefits of particular enforcement initiatives." Id. (footnote omitted).


187. See infra note 188.

188. This was a primary reason for Congress' inclusion of "citizen suits" provisions in the major environmental statutes of the 1970s. See supra note 184. As authors of the House Committee Report on the Federal Water Pollution Control Act Amendments of 1972 commented:

There can be little question based on the increasing number of public works projects which are being litigated that individual citizens and environmental groups have turned and are continuing to turn to legal action as a remedy for what they consider to be errors on the part of the Government. They are no longer willing to rely on the administrative process to work but instead have taken the initiative in having the forum for decision-making be in the court room.

help to enhance the public's awareness of the national wild and scenic rivers system and of their responsibilities to protect and to preserve the resources within the system. 189

The private right of action for the Wild and Scenic Rivers Act should be modeled on the "citizen suits" provisions of the Clean Air Act, 190 the Clean Water Act, 191 and the Resource Conservation and Recovery Act. 192 In general, these acts confer standing and a cause of action on persons or entities that have an interest that may be adversely affected by the challenged action to sue the United States and parties regulated by the statutes to enforce the defendants' legal obligations. The wild and scenic rivers private right of action would grant to such interested plaintiffs the right to sue to enjoin private activities that violate the statute, the regulations described above in part IVB, 193 or the terms of any permit issued by the Park Service to regulate external activities that threaten the wild and scenic river areas of the parks. 194 The private right of action also should permit the plaintiffs to seek civil penalties and damages from the defendants for injuries to the wild and scenic river areas caused by their illegal conduct. 195 All such awards would be payable to the Park Service, which would be required to use the funds to repair the damage to the parks caused by

189. As stated in the House Committee Report on the Federal Water Pollution Control Act Amendments of 1972: "The Committee was impressed during the hearings with the intensity of feeling generated by the apparent growing reliance on legal actions as a means of controlling pollution and environmental problems. . . . The Committee appreciates the growing citizen awareness of their rights to utilize the courts." Id.; see generally J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971), which remains the classic study of the benefits of direct public participation in legal decisions that affect the environment.

193. See supra notes 178-181 and accompanying text.
194. Id. As discussed previously, the Administrative Procedure Act presently authorizes private litigants to seek judicial review of actions taken by the Park Service and other federal agencies with respect to the national parks and the national rivers system. Thus, there would be no need to amend the Wild and Scenic Rivers Act to include a private right of action against the United States.

195. The citizen suits provisions of the existing environmental statutes do not authorize private litigants to claim damages. Nor do they permit citizen plaintiffs to sue for civil penalties "for wholly past" violations of the statutes. Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 108 S. Ct. 376, 384 (1987). Rather, a private litigant must establish that the defendant's violations of the statute are on-going. Id. The Clean Water Act and the Resource Conservation and Recovery Act do provide, however, that private litigants may seek to compel the Environmental Protection Agency to impose civil penalties against the defendants. 33 U.S.C. § 1365(a) (1982); 42 U.S.C. § 6972(a) (1982). The Supreme Court has held that EPA has authority under its enforcement powers to obtain civil penalties for past, as well as continuing violations. Swaltney, 108 S. Ct. at 381-82. All three statutes preserve whatever rights the plaintiffs also possess under any other state or federal statute and under the common law. Clean Air Act, § 304(e), 42 U.S.C. § 7604(e) (1982); Clean Water Act, § 505(e), 33 U.S.C. § 1365(e) (1982); Resource Conservation and Recovery Act, § 7002(f), 42 U.S.C. § 6972(f) (1982).
the defendants' illegal activities.\textsuperscript{196}

V. CONCLUSION

The Wild and Scenic Rivers Act offers attractive legal possibilities for those interested in protecting and enhancing the aesthetic beauty and ecological integrity of our national parks, for the designation of park rivers as components of the national rivers system would both clarify and significantly augment the Park Service's authority to regulate the array of activities that presently threaten the resources of the parks. According to the directives of the Act, the Park Service must manage component rivers, and their surrounding lands, essentially as wilderness.\textsuperscript{197} Thus, the Park Service must regulate human uses of wild and scenic river areas—which include mining, motorized transportation, boating, fishing, camping, and hiking—so as to enhance the values which caused the areas to be included in the national wild and scenic rivers system.\textsuperscript{198} Because the values protected by the Act are dominantly and comprehensively preservationist,\textsuperscript{199} the designation of additional park rivers would greatly improve upon the existing statutes and regulations that permit the Park Service to manage the national parks for a much broader set of purposes, including the promotion of tourism and the provision of amenities.\textsuperscript{200}

Of perhaps even more importance to advocates of park preservation is the protection afforded by the Wild and Scenic Rivers Act against external threats to the resources of the parks. The strongest directive contained in the Act is that the Federal Energy Regulatory Commission, and other federal agencies that fund or have jurisdiction over water development and hydroelectric projects, take no action that would impair the values for which a river was placed in the national rivers system.\textsuperscript{201} This directive effectively prohibits the construction or operation of upstream projects that would diminish the quantity or quality of water needed to serve the values of wild and scenic river areas within the parks and of downstream projects that, by their impoundments of water, threaten to inundate the watershed within the park.\textsuperscript{202} In addition, the Act requires all federal agencies with juris-

\textsuperscript{196} In recent years both Congress and the courts have recognized "damages for injury to, destruction of, or loss of natural resources." Comprehensive Environmental Response, Compensation, and Liability Act, § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) (1982); see Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981).
\textsuperscript{197} See supra notes 6-12 and accompanying text.
\textsuperscript{198} 16 U.S.C. § 1281(a) (1982).
\textsuperscript{199} See supra note 35 and accompanying text.
\textsuperscript{200} See generally J. Sax, supra note 51, at 11-15.
\textsuperscript{201} 16 U.S.C. § 1278(a) (1982); see supra notes 11-12 and 65-69 and accompanying text.
\textsuperscript{202} See supra note 12 and accompanying text.
diction over land that is adjacent to designated rivers to manage their land "as may be necessary to protect such rivers in accordance with the purposes of [the Act]."\textsuperscript{203} This mandates strict regulation of activities such as timber harvesting and mining that potentially impair the scenic beauty of the watershed surrounding wild and scenic river areas or pollute the water that flows into designated rivers.\textsuperscript{204}

Although the Wild and Scenic Rivers Act does not directly regulate private activities that take place on nonfederal land and are neither licensed nor assisted by the United States, the federal water right created by the Act does grant the Park Service indirect authority over such activities. Through the water rights system, the Park Service can compel junior appropriators to release water needed downstream to fulfill the purposes of the Act and to curtail uses of water that unreasonably diminish water quality.\textsuperscript{205}

Together, these direct and indirect controls over external threats offer substantial benefits for the national parks. For they empower and direct the Park Service and other federal agencies to manage the lands and other resources within their jurisdiction so as to promote the broad preservationist purposes of the Wild and Scenic Rivers Act. In this way, designation of park rivers as components of the national rivers system extends the statutory protections for the parks beyond their borders, creating a buffer zone along vital river corridors to stand between the parks and at least some of the external threats to their continued well-being.

Unfortunately, these extraterritorial protections currently are available to only a few of the national parks in the lower forty-eight states.\textsuperscript{206} To redress this problem, Congress should direct the Park Service to study and to report on those parks that may be adversely affected by activities beyond their borders and therefore could benefit from the inclusion of one or more of their rivers in the national wild and scenic rivers system. Moreover, to ensure that the Park Service and the public have adequate authority to regulate effectively the myriad uses of land and water that threaten the resources of the parks, Congress also should amend the Wild and Scenic Rivers Act as recommended in part IV.

I began this essay with the observation that, for the national parks, the Wild and Scenic Rivers Act is more a rivulet than a stream or river. This is true in part because few rivers within the parks have

\textsuperscript{203} 16 U.S.C. § 1283(a) (1982).
\textsuperscript{204} See supra notes 70-77 and accompanying text.
\textsuperscript{205} See supra notes 128-131 and accompanying text.
\textsuperscript{206} See supra note 29 and accompanying text.
been included in the national rivers system and because the Act is considerably narrower than other statutes that govern the parks. Yet, it is also the case that the full powers and implications of the Act have not been comprehended, let alone implemented in the service of park protection. When this is achieved, the Wild and Scenic Rivers Act may be more aptly described as a collection of rivulets, with each rill representing a value enshrined in the Act, a source of authority for the Park Service to protect the water resources of the parks, or a private right to enjoy and to preserve the wild and scenic river areas within the parks.

As anyone who has spent time in the Southwest knows, far down-stream the waters of these tiny rivulets join, and together they become the Green, the Paria, or the Virgin Rivers, capable of sculpting the great wonders of the Canyonlands, Bryce Canyon, and Zion. Ultimately, these waters converge to form the Colorado. There, they may give us the Grand Canyon, or they may become Lake Mead, the Coachella Canal, and Laguna Salada.

The time has passed to save the lower reaches of the Virgin and Grand Canyons or to restore the jaguar and green lagoons of the Colorado River Delta. But it is not too late to preserve our greatest of wonders—the national parks. As with our other water resources, the many rivulets of the Wild and Scenic Rivers Act may be used for alternative purposes. We can have Glen Canyon, or we can have Lake Powell. May we choose wisely, and may we learn from our past mistakes.