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

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# The Wild and Scenic Rivers Act and Federal Water Rights

## Summary

During the 1960s, support grew for the idea that the development of our nation's rivers needed to be balanced by some means of protecting for future generations certain rivers that possessed outstanding undeveloped qualities. These sentiments culminated in the enactment of the Wild and Scenic Rivers Act of 1968. Rivers may be designated for protection by Congress or, in some cases, be nominated for inclusion by a Governor and approved by the Secretary of the Interior. The act addresses the protection of the water flows of designated rivers, both expressly and by implication. This report examines the purposes, language, and legislative history of the act in order to analyze its effects on federal and state water rights. It will be updated as circumstances warrant.

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

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

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

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

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# The Wild and Scenic Rivers Act and Federal Water Rights

## Background

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

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

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

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

"Free-flowing," as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion: Provided, That this shall

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

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

not be construed to authorize, intend, or encourage future construction of such structures within components of the national wild and scenic rivers system.

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

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

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

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

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

The interpretation of this language, its legislative history, and the import for management of wild and scenic rivers will be discussed.

## Federal Authority Over Water

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

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

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

## Water Rights Under the Wild and Scenic Rivers Act

### Background and Statutory Language

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

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

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

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

<sup>6</sup> *Id.*, § 35.04.

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

language of the statute in question, its purposes, and, on points as to which there is any ambiguity, its legislative history.

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

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

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

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

“Public domain” lands are federal lands (primarily in the West), that were obtained from a foreign sovereign rather than from a state or individual. These western lands developed an “appropriation” system of water rights that contrasts with the “riparian” rights systems of the eastern states — a system in which water rights depend on ownership of the lands adjacent to the water source.<sup>9</sup> As the original

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

<sup>9</sup> A discussion of the differences between appropriation and riparian systems of law is not necessary for the purposes of this paper. It can be noted, however, that under the riparian system, the right to use water is a right incident to the ownership of land that abuts the water source. The right is usually said to be to make “reasonable use” of the waters, although these uses may vary under state law. Each riparian owner has the same right, the right is not lost through disuse, and all share in times of shortage. In contrast, in an appropriation state the right to use water is not dependent on ownership of adjacent land, the right is for a particular quantity and use, and may be lost through disuse. Holders of water rights are  
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owner of the public domain lands before states were created, the federal government was vested originally with all proprietary and legislative authority predating the authority of states that were subsequently created. Therefore, there could not be any riparian owners for decades because the federal government was the only riparian owner. For this reason, and because water sources in the arid West were scarce and water typically needed to be moved to be used, the new appropriation system of water rights and priorities developed.

Throughout much of our nation's history, the public domain lands were generally available for entry and for perfection of private ownership. However, the government could withdraw certain lands from the operation of the disposal laws, and if such withdrawn lands were dedicated to a particular purpose or purposes, the lands were said to be a "reservation" — reserved for those purposes. As a factual happenstance, the cases to date on federal water rights in general have involved public domain lands and reservations created out of them.<sup>10</sup>

The Wild and Scenic Rivers Act speaks in terms of "reserved" water, yet also provides for the designation of rivers located among non-public domain lands in the East. Although the Art. IV property power speaks of the "Territory or other Property belonging to the United States" and does not distinguish between public domain lands and lands acquired from a state or individual, we know of no cases that required a court to interpret the use of the word "reservation" in the WSR Act as it applies to rivers in non-public domain states. However, the act also authorizes the acquisition by the federal government of a certain amount of lands within a designated river corridor. Therefore, federal property would adjoin a protected river. Perhaps a court would articulate a federal right related to acquired federal lands as a "non-reserved" federal right to distinguish such right from the historical meaning of the term "reserved." Or perhaps "reserved" rights would be interpreted to mean a federal water right associated with a congressional directive that federal lands, whether public domain or acquired, be used for a particular purpose.<sup>11</sup> Given the

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<sup>9</sup> (...continued)

ranked as to their entitlement with earliest users having "priority" over later users, such that the later users may not receive water in times of drought.

<sup>10</sup> *See too* In re: SRBA Case No. 39576, 12 P.3d 1256, 2000 Ida. LEXIS 111 (Id. 2000), in which case the Idaho Supreme Court affirmed a lower court decision in the Snake River Basin Adjudication holding that designation under the Wild and Scenic River Act gave rise to federal reserved water rights in the amount necessary to fulfill the purposes of the act.

<sup>11</sup> The Supreme Court has interpreted federal reserved rights as including those for any federal enclave, and the waiver of sovereign immunity in 43 U.S.C. § 666 as permitting the United States to be joined in proceedings adjudicating rights to the use of water of a river system, including appropriative rights, riparian rights, and reserved rights. *United States v. Eagle County*, 401 U.S. 520, 523-524 (1971). Another analysis, in speaking of the property power and water, stated: "It is important to understand that any water rights that may be asserted by the federal government outside of state law — whether called reserved, non-reserved or by some other name — rest on this same constitutional basis. Thus, federal reserved rights are not a unique species of federal rights that arise directly out of the reservation of federal lands, so that, absent a reservation of land, no federal water rights can exist." T. Olson, Memorandum for Assistant Attorney General, Land and Natural Resources

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basic constitutional authority of Congress to deal with property of the United States, the choice of terminology should not affect the otherwise clear intent to achieve certain purposes. Therefore, it is likely that a court will treat the water rights language in the Wild and Scenic Rivers Act as giving rise to water rights sufficient to carry out the purposes of the federal reservations and designations created by the act.

The quantity of a WSRA federal water right appears to be the amount necessary to achieve the purposes of the act; here that would appear to be that amount necessary to preserve the free-flowing condition of the river and to preserve the values for which a river was protected.<sup>12</sup> It is therefore arguable what quantity is sufficient in each instance, and the protected amount may or may not be the full flow of the river. The definition of free-flowing would seem to argue that the full unappropriated flow as of the time of designation (i.e., subject to those existing uses and diversions that do not impair the purposes for which the river is being protected) is protected. On the other hand, by referring to “necessary” water, § 1284(c) may indicate that the amount of the federal right may be less than the full amount of water available. In a river that is subject to heavy Spring flows, for example, the argument might be made that some peak water flows could be impounded or diverted upstream as long as sufficient flow was released to the protected segment to maintain the values for which it was protected.

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

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<sup>11</sup> (...continued)  
Division, June 16, 1982 at 48.

<sup>12</sup> Congress apparently has spoken directly to instream water levels in other statutes. In *United States v. New Mexico*, *supra*, at 710, the Supreme Court stated: “When it was Congress’ intent to maintain minimum instream flows within the confines of a national forest, it expressly so directed, as it did in the case of the Lake Superior National Forest:

In order to preserve the shore lines, rapids, waterfalls, beaches and other natural features of the region in an unmodified state of nature, no further alteration of the natural water level of any lake or stream ... shall be authorized.  
16 U.S.C. 577b (1976 ed.)”

traditional jurisdiction of states over waters *is* affected if its exercise impairs the federal purpose of protecting free-flowing streams.

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

To summarize, the WSRA appears on its face to protect designated rivers in a free-flowing state by a “reservation” of the waters of such streams, necessary to carry out the purposes of the act, to affirm existing principles of law as to federal/state authority over water, and to provide compensation for any taking of water rights that were vested under state law.

## Legislative History

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

H.R. 18260 contained only brief language on water rights. Section 13(b) stated:

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

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

Enactment of the bill would not in any way affect or impair any valid or existing water rights perfected under State law. In addition, further appropriations could be made and water rights perfected under State law so long

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

as the subsequent appropriations would not adversely affect the designated rivers.<sup>14</sup>

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

Enactment of the bill would reserve to the United States sufficient appropriated water flowing through federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill. It follows that all unappropriated and unreserved waters would be available for appropriation and use under State law for future development of the area.<sup>15</sup>

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

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

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

#### Water Rights

The language contained in subsection 6(f) is intended by the committee to preserve the status quo with respect to the law of water rights. No change is intended. The first sentence states that established principles of law will determine the Federal and State Jurisdiction over the waters of a stream that is

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

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

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

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

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

included in a wild river area. Those established principles of law are not modified. The third sentence states that with respect to possible exemption of the Federal Government from State water laws the act is neither a claim nor a denial of exemption. Any issue relating to exemption will be determined by established principles of law as provided in the first sentence. The second sentence would apply to this legislation the principle of compensation embraced by section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 390, found in 43 U.S.C. 383). This means that the Government must pay just compensation for a water right taken for wild river purposes if the water right is a vested property right under established principles of State or Federal law. See *U.S. v. Gerlach* (339 U.S. 725).

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

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

This language was paraphrased on the floor. Senator Church engaged in a dialogue with Senator Allott who stated that he would like to “ask a few questions and perhaps make a little legislative history,” during the course of which some aspects of the bill appear to have been overstated:

Mr. Church: I would say to the Senator that whatever present law decrees with respect to the priority of rights, among appropriators, that law is left intact by this bill. It is true that the Federal Government can acquire rights by reservation, just as private citizens can acquire rights by appropriation. We sought not to interfere with water law, one way or another. We took great care in committee, as the Senator knows, to work out language that would make it clear that present water law is not altered by the provisions of this bill.

Mr. Allott: ... I think perhaps the legislative intent of the language shown at the bottom of page 5 of the committee report and the three paragraphs under the section entitled “Water Rights,” might be further clarified. First, I think it should be stated that the appropriate Secretary can only reserve unappropriated waters for the purposes of this act. I am sure the Senator from Idaho is in agreement with that.

Mr. Church: I am in agreement with that.

Mr. Allott: Second that the reservation is subject to prior water rights vested under State law, and therefore that the appropriate Secretary cannot insist upon any greater flow in the river than the amount of unappropriated water. I am sure the Senator would agree with that?

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

Mr. Church: Yes, I am in agreement with that.

Mr. Allott. Third, the only superior right the appropriate Secretary will have on the river is with regard to subsequent appropriations under State law.

Mr. Church: I find no difficulty with that.

Mr. Allott: I am sure that is true. We do have now in the report on page 5, and I think we should make a record of it, the concept of a reservation only of unappropriated waters, and that this reservation is subject to prior appropriations and paramount only to subsequent appropriations.<sup>19</sup>

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

In describing S. 1446 in the previous (89<sup>th</sup>) Congress, a bill that contained similar language preserving established principles of law, Senator Church had further stated that:

Precaution has been taken to fully protect established water rights, and to make certain that State water laws are not infringed in any way. The Senate Interior Committee hammered out amendments to the original language to make doubly sure that the status quo with respect to water law remains unchanged<sup>20</sup>

In responding to a question from Senator Kuchel as to whether it was not “the understanding of the Senator that there has been no substantive change in the presently established principles of Federal and State water rights law,” Senator Church stated:

The Senator is correct. The whole of the language in the sections to which the Senator has referred — sections, incidentally, which include the amendment the Senator proposes as subsection (i) under section 5 of the bill — was to maintain the status quo with respect to the whole complicated structure of water law.

We have tried diligently to write language which would not embark us upon any new departure in the field of water law.

We seek to leave the law as it stands, to establish a wild rivers system which will not impair or alter or in any way change existing State or Federal laws concerning water rights.<sup>21</sup>

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

<sup>20</sup> 112 Cong. Rec. 419 (1966).

<sup>21</sup> 112 Cong. Rec. 431 (1966).

Senator Church also quoted from an analysis of the bill by the Department of Agriculture, which he said reflected his own views: “The enactment of the bill is itself a reservation of water needed to carry out its purposes.”<sup>22</sup>

Senator Kuchel of California had expressly approved the ‘neither claim nor denial’ language in the 89<sup>th</sup> Congress;<sup>23</sup> he was the sponsor of amendments to clarify the section on water rights; and expressly approved of the final language on the floor.<sup>24</sup>

It appears from these comments that preserving the status quo of the law and not infringing on state water laws was nonetheless understood as allowing establishment of federal water rights for federal purposes. This conclusion also was made clear by a discussion that ensued after an amendment was proposed that would have required a federal water right for wild and scenic river purposes to be obtained under state law. The amendment was rejected on the grounds that it would frustrate the purpose of the legislation, that the current language protected both federal and state law within their respective spheres, and that the current language allowed both the federal and state governments to seek judicial determination of the respective rights of each. In urging rejection of the amendment, Senator Church introduced a legal analysis by the Department of the Interior that clearly indicated that the existing wording of the Wild and Scenic Rivers Act preserved the status quo as to current water law, and that the status quo permitted both federal and state rights.<sup>25</sup>

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<sup>22</sup> 112 Cong. Rec. 403, 433 (January 17, 1966).

<sup>23</sup> 112 Cong. Rec. 430 (1966).

<sup>24</sup> 112 Cong. Rec. 431 (1966).

<sup>25</sup> 112 Cong. Rec. 488 (1966). The analysis of the Department stated:

1. The amendment assumes erroneously that under the terms of the bill the Secretary of the Interior or the Secretary of Agriculture is required to take some affirmative action in order to reserve water for the purposes of the act. The bill neither requires nor permits the Secretary to take such action. The enactment of the bill is itself a reservation of the water needed to carry out its purposes.

2. The amendment assumes that a water right could be perfected under State law for the purposes of the wild rivers program. In fact, however, State laws do not provide for the appropriation of water for the purpose of maintaining the natural flow of a stream. It would therefore normally not be possible to comply with State law, and the amendment would defeat the purpose of the Federal legislation.

3. It is settled law that Federal legislation authorizing Federal lands to be used for a particular purpose reserves sufficient unappropriated water flowing through the Federal lands to accomplish that purpose. This reservation does not affect prior valid rights under State law, but it does establish a priority that is good against subsequent appropriators. This principle of law is recognized and applied by section 5(h) of the bill which provides:

Designation of any stream or portion thereof shall not be construed as a reservation of the waters of such stream for purposes other than those specified in this act, or in quantities greater than necessary to accomplish these purposes. The amendment would reverse this established principle of law by requiring the Secretary to acquire an appropriation right under State law to carry out the Federal

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## Cases and WSRA Water Rights in Practice

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

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

Section 13(c) makes little sense unless the legislation reserves water to fulfill the purposes of the Act. It would be anomalous to logic to say that the Act which was expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers. Such a result would run contrary to the language of section 13(c) and the Congressional declaration of policy.<sup>26</sup>

This case was decided in the context of a congressionally designated river, rather than a state-nominated river. Because rivers that enter the National System through the state application process must be managed by the state in question, protection of their free-flowing nature and values is accomplished under state law. However, § 13 refers to designation of “any” stream or portion thereof in connection with the reservation of necessary water, and the argument can be made that a federal water right is available to protect state-nominated rivers as well as those Congress designates. However, we know of no instances in which a federal water right has been invoked to protect a state-nominated river.<sup>27</sup>

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

Although federal reserved water rights appear to be available under WSRA, they have not always been claimed.<sup>28</sup> Agency materials<sup>29</sup> indicate that in instances where

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<sup>25</sup> (...continued)

program — a requirement with which it would probably be impossible to comply.

4. One of the major premises of the wild rivers bill, as stated in section 5(d) is that “the jurisdiction of the States and the United States over waters of any stream included in a wild river area shall be determined by established principles of law.” The amendment is inconsistent with this premise and purports to write new water law. The wild rivers bill is not an appropriate vehicle for undertaking a major revision of Federal-State water jurisdiction. The wild rivers bill maintains the status quo with respect to water law, and we believe that such action is highly desirable. It would be a mistake, in our judgment, to imperil the wild rivers program by injecting a new and highly controversial change in established water law.

<sup>26</sup> *Potlatch Corp. v. United States*, 134 Idaho 912, 914; 12 P. 3d 1256, 1258 (Idaho 2000).

<sup>27</sup> The Rivers, Trails, and Conservation Assistance Program of the National Park Service maintains information on state-nominated rivers and conducts reviews of state applications and § 7 studies of the possible adverse impacts of proposed water resources projects on such rivers.

<sup>28</sup> Circumstances may arise in which the United States may be obliged to rely on the federal reserved right, as e.g. in a general water adjudication or to carry out the federal purposes if (continued...)

another underlying federal right (e.g. national forest reserves) exists and appears adequate to provide sufficient water, a WSRA federal right might not be asserted.<sup>30</sup> Similarly, if a right to adequate instream flows is available under state law, the United States has applied for necessary water by that route. Adequate flows may also be obtained under a specific state statute, through cooperative agreements, by filing defensive protests objecting to possibly harmful water right applications by others, or through purchase of necessary water from willing sellers. As noted above, the United States has never condemned water rights for WSRA purposes.

## Discussion and Conclusions

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

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

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

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

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

no other means are available.

<sup>29</sup> *A Compendium of Questions and Answers Relating to Wild and Scenic Rivers*, Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council, Revised January, 1999, at 48-52.

<sup>30</sup> In some circumstances, such as a general water adjudication, the United States may have to claim whatever federal reserved rights exist in order not to have that option precluded by a final judgment that omits them.