

## OVERLAPPING WILDERNESS AND WILD & SCENIC RIVER DESIGNATIONS PROVIDE MAXIMAL CONSERVATION PROTECTION FOR FEDERAL PUBLIC LANDS

BY

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*One of the strongest combinations of conservation protection for undeveloped federal public lands is overlapping wilderness and wild and scenic river designations. Each congressional designation offers protections that the other does not. To most fully ensure public lands are protected for current and future generations, Congress should designate roadless areas as wilderness and any associated free-flowing streams with outstandingly remarkable values as wild and scenic rivers. These overlapping designations provide a complimentary framework for maximum protection of federal lands today.*

### I. INTRODUCTION

No one statute or congressional designation perfectly protects undeveloped federal public lands from development or damaging uses. Combinations of congressionally authorized federal land designations may provide broader, stronger protection for federal lands from development and exploitation than individual designations can provide. The strongest possible combination of congressional designations to protect federal lands may include a *wild and scenic river* designation within a *wilderness area* inside a *national park*.<sup>1</sup> Administrative overlays, such as critical habitat designation under the Endangered Species Act,<sup>2</sup> may afford additional protection to any combination of congressional designations. However, since the creation of new national parks may not be optimal policy or a viable political option for a given wild area, and administrative designations are the purview of (politically influenced) administrative agencies, this article focuses only on the benefits of overlapping wilderness and wild and scenic river designations.

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<sup>1</sup> See generally Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designation*, 58 U. COLO. L. REV. 551, 551–52, 561–62, 566, 596–97 (1988) (describing how wild and scenic river designation enhances the statutory protections for water resources in national parks, much as wilderness designation protects the land resources in national parks, and suggesting additional measures for further enhancing protections).

<sup>2</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

## II. THE STATUTES

### A. *The Wilderness Act*

The Wilderness Act<sup>3</sup> of 1964 (TWA) generally proscribes (forbids) activities that are incompatible with wilderness protection. Roads, logging, mining, mechanized transport, commercial activities, etc. are generally prohibited in designated wilderness:

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.<sup>4</sup>

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.<sup>5</sup>

TWA provides that some nonconforming uses and activities may continue in wilderness, such as established livestock grazing<sup>6</sup> and salvage logging (logging has only occurred in wilderness a few times).<sup>7</sup> There is even a provision in TWA that allows the President to authorize new water development in wilderness,<sup>8</sup> although this authority has never been exercised.<sup>9</sup>

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<sup>3</sup> 16 U.S.C. §§ 1131–1136 (2000).

<sup>4</sup> *Id.* § 1133(b).

<sup>5</sup> *Id.* § 1133(c).

<sup>6</sup> *Id.* § 1133(d)(4)(2). For a political history of the allowance of livestock grazing in designated wilderness, see Andy Kerr & Mark Salvo, *Pillaged Preserves: Livestock in National Parks and Wilderness Areas*, in WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST 47–49 (George Wuerthner & Mollie Matteson eds., 2000) [hereinafter Kerr and Salvo, *Pillaged Preserves*].

<sup>7</sup> 16 U.S.C. § 1133(d)(1) (2000); Mark Woods, *Federal Wilderness Preservation in the United States: The Preservation of Wilderness?*, in THE GREAT NEW WILDERNESS DEBATE 131, 145, 152 n.22 (J. Baird Callicott & Michael P. Nelson eds., 1998). See *infra* note 19.

<sup>8</sup> 16 U.S.C. § 1133(d)(4)(1) (2000).

<sup>9</sup> THE WILDERNESS SOCIETY, THE WILDERNESS ACT HANDBOOK 50 (5th ed. 2004), available at <http://www.wilderness.org/Library/Documents/upload/Wilderness-Act-Handbook-2004-complete.pdf>.

*B. The Wild & Scenic Rivers Act*

The Wild and Scenic Rivers Act<sup>10</sup> of 1968 (WSRA) specifically proscribes only two activities on designated river segments: licensing by the Federal Energy Regulatory Commission (FERC) of a water resources project (e.g., dams, diversions, pipelines, etc.) on or directly affecting a designated river segment; and new entry and location for a mining claim in river corridors classified as “wild.”<sup>11</sup> The WSRA also generally requires that:

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.<sup>12</sup>

This provision and others have been interpreted by courts to mean that activities such as logging, livestock grazing, mining, and recreational uses may occur within river corridors or on adjacent lands only if they are consistent with protecting and enhancing the designated river’s specific outstandingly remarkable values.<sup>13</sup>

*C. Overlapping Protection*

Congress has on multiple occasions designated—simultaneously or at different times—overlapping wilderness areas and wild and scenic river segments.<sup>14</sup> Table 1 summarizes threats to wilderness and wild and scenic river values and how each statute addresses them.

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<sup>10</sup> 16 U.S.C. §§ 1271–1287 (2000).

<sup>11</sup> *Id.* §§ 1278, 1280.

<sup>12</sup> *Id.* § 1281(a).

<sup>13</sup> *See* *Or. Natural Desert Ass’n v. Singleton*, 47 F. Supp. 2d 1182, 1191–92 (D. Or. 1998) (interpreting 16 U.S.C. § 1281(a) to require protection and enhancement of the outstandingly remarkable values enumerated in the WSRA, but not limiting uses consistent with such protection and enhancement of these values).

<sup>14</sup> For example, two segments of the “wild” and “scenic” Eel River flow through designated wilderness areas in California. The Middle Fork of the Eel River flows through the Yolla Bolly-Middle Eel Wilderness, designated by Congress in 1964. The Eel River’s North Fork flows through the North Fork Wilderness, designated by Congress in 1984. *See* *Wilderness.net*, The National Wilderness Preservation System: Yolla Bolly-Middle Eel Wilderness, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=wildView&WID=661> (last visited May 31, 2008); *Wilderness.net*, The National Wilderness Preservation System: North Fork Wilderness, <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=wildView&WID=417> (last visited May 31, 2008).

TABLE 1 CONSERVATION OF WILD LANDS AND WATERS UNDER THE WILDERNESS ACT AND THE WILD & SCENIC RIVER ACT				
Threat	Wilderness Act	Wild & Scenic River Act <sup>i</sup>		
		Wild Classification*	Scenic Classification	Recreational Classification
New Roads	Generally prohibited. <sup>ii</sup>	Prohibited. <sup>iii</sup>	Permitted only if compatible. <sup>iv</sup>	
Logging	Commercial logging prohibited; salvage logging may be allowed. <sup>v</sup>	Implicitly prohibited. <sup>vi</sup>	Permitted only if compatible. <sup>vii</sup>	
Location for Mining (hardrock)	New claims prohibited. <sup>viii</sup>	New claims prohibited in stream bottoms and within one-quarter mile of stream bank, existing claims regulated, and only mineral resource, not land, may be transferred to private ownership. <sup>ix</sup>	New claims allowed, all claims are regulated, and only mineral resource, not land, may be transferred to private ownership. <sup>x</sup>	
Leasable Mining (including geothermal)	New leases prohibited. <sup>xi</sup>	Prohibited in stream banks and within one-quarter mile of stream banks. <sup>xii</sup>	Permitted only if compatible and subject to regulation. <sup>xiii</sup>	
Livestock Grazing	Grandfathered as permitted use where established prior to designation. <sup>xiv</sup>	Implicitly prohibited. <sup>xv</sup>	Permitted only if compatible. <sup>xvi</sup>	
Water Development	Prohibited, but a Presidential exception exists, although it has never been exercised. <sup>xvii</sup>	Prohibited. Federal agencies may authorize water development projects upstream or downstream from designated segments only if certain conditions are met. <sup>xviii</sup>		
* A designated wild and scenic river flowing through a designated wilderness area would generally be classified as “Wild.”				

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Water Reservation	Ambiguous; lower federal courts have both upheld and denied an expressed reserved federal water right. <sup>xxi</sup>	Expressed federal reserved water right. <sup>xxii</sup>		
Water Quality	No explicit protections, but management within wilderness tends to protect water quality. <sup>xxiii</sup>	Requires managing agency to cooperate with appropriate state and federal agencies eliminate or reduce water pollution. <sup>xxiv</sup>		
Commercial Activities	Generally prohibited. <sup>xxv</sup>	Regulated. <sup>xxvi</sup>		
Motorized Use	Generally prohibited. <sup>xxvii</sup>	Implicitly prohibited. <sup>xxviii</sup>	Permitted only if compatible. <sup>xxix</sup>	
Mechanized Transport	Generally prohibited. <sup>xxx</sup>	Permitted only if compatible. <sup>xxxi</sup>		
Private Inholdings	Use of eminent domain to acquire private inholdings not allowed. <sup>xxxii</sup>	Use of eminent domain to acquire private property allowed if the majority of land along the river segment is <i>not</i> federally owned; agency may also use condemnation when necessary to acquire scenic easements through private property. <sup>xxxiii</sup>		
The Appendix contains the citations referenced in this table.				

#### *D. Additional Protection*

The WSRA prohibits federal water projects or federal assistance to nonfederal projects proposed above or below designated wild and scenic river segments if the project may “unreasonably diminish” the values for which the segment was designated.<sup>15</sup>

### III. QUALIFICATIONS FOR WILDERNESS AND WILD & SCENIC RIVER DESIGNATION

In general, a proposed wilderness must be roadless and undeveloped, but the area need not be “pristine.”<sup>16</sup> A proposed wild and scenic river must be free-flowing and exhibit at least one outstandingly remarkable value.<sup>17</sup>

Overlapping wilderness and wild and scenic river designations are possible wherever a proposed or designated wilderness also contains a free-flowing river that with at least one outstandingly remarkable value. Wilderness is almost always the larger designation, although a designated wild and scenic river may originate above or extend below an existing or proposed wilderness area.<sup>18</sup>

### IV. STATE PROTECTIONS FOR WILDERNESS AND WILD & SCENIC RIVERS

State statutes and regulations may exist that provide additional protection for designated wilderness or wild and scenic rivers on federal lands, or both. For example, the Oregon Department of Environmental Quality promulgated administrative rules that state:

Wilderness areas represent a natural resource of unique importance. Congress has protected such areas by enacting the Wilderness Act, Public Law 88-577, 16 U.S.C. Sec. 1131, et seq. Those wilderness areas located within the geographical limits of the state are a major part of the cultural heritage of the citizens of Oregon and are a key element in developing and maintaining tourism and recreation as a viable industry. Thus, the environment of wilderness areas is deserving of the highest level of protection and safeguarding by the state in order to preserve Oregon's unique primitive and natural land areas. The Wilderness Act allows certain activities in wilderness areas. Most of these have minimal present impact on the environment. However, mining and some other activities allowed by the Wilderness Act pose a serious threat of a substantial harm to the unique environment of wilderness areas. Therefore, it is declared to be the policy and purpose of the Department of

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<sup>15</sup> 16 U.S.C. § 1278(a) (2000).

<sup>16</sup> See ANDY KERR, PERSUADING CONGRESS TO ESTABLISH A WILDERNESS AND/OR WILD & SCENIC RIVER: A CHECKLIST, app. B at 11 (2007), available at [www.andykerr.net/downloads/Larch1WildernessLarge.pdf](http://www.andykerr.net/downloads/Larch1WildernessLarge.pdf) (citing 16 U.S.C. § 1131(c)).

<sup>17</sup> See *id.* app. C at 12; see also 16 U.S.C. § 1273(b) (2000); *Sokol v. Kennedy*, 210 F.3d 876, 878 & n.5 (8th Cir. 2000) (describing the outstandingly remarkable values of a free flowing stream and the land adjacent to it as those that support designation of a wild and scenic river).

<sup>18</sup> See, e.g., U.S. Forest Service, Hells Canyon Nat'l Recreation Area: Hells Canyon Recreation Map, [http://www.fs.fed.us/hellscanyon/things\\_to\\_see\\_and\\_do/recmap.shtml](http://www.fs.fed.us/hellscanyon/things_to_see_and_do/recmap.shtml) (last visited June 8, 2008) (showing wild and scenic rivers extending outside of designated wilderness areas).

Environmental Quality to maintain the environment of wilderness areas essentially in a pristine state and as free from air, water, and noise pollution as is practically possible and to permit its alteration only in a manner compatible with recreational use and the enjoyment of the scenic beauty and splendor of these lands by the citizens of Oregon and of the United States.<sup>19</sup>

The rules require permits for “any activity other than emergency or recreational in a wilderness area which causes the emission of air contaminants, water pollutants or noise in excess of the standards . . . .”<sup>20</sup> The referenced standards are:

(1) Except as provided in section (2) of this rule, no person engaged in an activity other than emergency or recreational within a wilderness area shall:

(a) Cause, suffer, allow, or permit any emission of air contaminants greater than five percent opacity;

(b) Discharge any waste into waters or conduct any activity which causes or is likely to cause:

(A) Any measurable increase in color, turbidity, temperature, or bacterial contamination;

(B) Any measurable decrease in dissolved oxygen;

(C) Any change in hydrogen ion concentration (pH); or

(D) Any toxic effect on natural biota.

(c) Cause, suffer, allow or permit the emission of noise from any source or sources which noise causes the maximum ambient sound pressure level to exceed 50 dBA at any point at least 50 feet from any source.

(2) Subject to the permit requirements in OAR 340-013-0015, the Department may permit the emission of air contaminants greater than five percent opacity, but not to exceed ten percent opacity and noise from any source or sources causing the maximum ambient sound pressure level to exceed 50 dBA at any point at least 50 feet from any source, but not to exceed 75 dBA at such distance.<sup>21</sup>

Given these Oregon DEQ wilderness rules, one could still theoretically mine in an Oregon wilderness area under a valid existing claim, but may be limited to using a broken pick and a three-legged ass (which may well have to wear a diaper). Every other mining technology could be prohibited by the state’s strict wilderness pollution protection regulations.

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<sup>19</sup> OR. ADMIN. R. 340-013-0005 (2008).

<sup>20</sup> OR. ADMIN. R. 340-013-0015 (2008).

<sup>21</sup> OR. ADMIN. R. 340-013-0020 (2008).

#### V. CONCLUSION

The Wild and Scenic Rivers Act, which was enacted into law just over four years after the Wilderness Act, anticipates overlapping wilderness and wild and scenic river designations:

Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system, as established by or pursuant to the Wilderness Act [16 U.S.C. 1131 et seq.], shall be subject to the provisions of both the Wilderness Act and this chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply.<sup>22</sup>

Each congressional designation is superior to the other in certain respects. Where undeveloped wildlands and free-flowing streams exist on federal public land, they should be designated as wilderness and wild and scenic rivers, respectively, to provide maximal protection to both resources.

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<sup>22</sup> 16 U.S.C. § 1281(b) (2000).



## APPENDIX

<sup>i</sup> 16 U.S.C. § 1273(b) (2000) (providing that wild, scenic, or recreational rivers are eligible for inclusion in the national wild and scenic rivers system, and if designated, shall be classified as either “wild,” “scenic,” or “recreational” river areas).

<sup>ii</sup> *Id.* § 1133(c) (“[S]ubject to existing private rights, there shall be . . . no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or . . . no other form of mechanical transport . . .”).

<sup>iii</sup> The WSRA defines “wild” rivers as “[t]hose rivers or sections of rivers that are . . . generally inaccessible except by trail . . .” *Id.* § 1273(b)(1). Federal Wild and Scenic Rivers Guidelines interpret “generally inaccessible except by trail” as limiting wild river segments to those without “roads, railroads, or other provisions for vehicular travel within the river area” (except that “[t]he existence of a few inconspicuous roads leading to the boundary of the river area . . . will not necessarily bar wild river classification.”). Nat’l Wild and Scenic Rivers System Guidelines for Eligibility, Classification, and Mgmt., 47 Fed. Reg. 39,454, 39,457 (Sept. 7, 1982). Bureau of Land Management regulations also allow the agency to close existing roads, if necessary, to comply with the WSRA. 43 C.F.R. § 8351.2-1(a) (2007); *see also* Or. Natural Desert Ass’n v. Green, 953 F. Supp. 1133, 1148 (D. Or. 1997) (noting that federal regulations allow road closure, if necessary, to comply with the WSRA).

<sup>iv</sup> “Scenic” designated river segments may have occasional road access, while “recreational” designated segments usually include a road paralleling the river or stream. 16 U.S.C. § 1273(b)(2)–(3) (2000). *See supra* note 13 and accompanying text (discussing consistency of uses in wild and scenic river corridors).

<sup>v</sup> 16 U.S.C. § 1133(d)(1) has been interpreted to allow salvage logging in limited circumstances (“[S]uch measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.”). *See* Sierra Club v. Lyng, 663 F. Supp. 556, 558 (D.D.C. 1987) (discussing a beetle control action within wilderness areas that contemplated spot control techniques to confine cutting in the wilderness areas to edges contiguous to neighboring property; but noting that an earlier case in that court held that “although it grants the Secretary wide discretion in managing [w]ilderness [a]reas considered in isolation, that discretion is limited where [w]ilderness [a]reas are being adversely affected solely for the benefit of adjacent property interests.”).

<sup>vi</sup> Sally K. Fairfax et al., *Federalism and the Wild and Scenic River Act: Now You See It, Now You Don’t*, 59 WASH. L. REV. 417, 444 (1984).

<sup>vii</sup> *Id.* *See supra* note 13 and accompanying text (discussing consistency of uses in wild and scenic river corridors).

<sup>viii</sup> 16 U.S.C. § 1133(d)(3) (2000).

<sup>ix</sup> *Id.* § 1280(a)(i)–(iii).

<sup>x</sup> *Id.* § 1280(a)(i)–(ii).

<sup>xi</sup> *Id.* § 1133(d)(3).

<sup>xii</sup> *Id.* § 1280(a)(iii).

<sup>xiii</sup> *Id.* § 1280(a)(i).

<sup>xiv</sup> *See* Kerr and Salvo, *Pillaged Preserves*, *supra* note 6, at 49.

<sup>xv</sup> Grazing is impliedly not permitted because it is not compatible with protecting and enhancing the values of designated river segments. *See Green*, 953 F. Supp. 1133, 1144 (D. Or. 1997) (concluding the Bureau of Land Management has authority to exclude cattle grazing in a river corridor designated as “wild” under the WSRA and, in this case, finding that a management plan permitting grazing on a “wild” river segment did not strike the necessary balance between “continued grazing and protecting and enhancing river values.”).

<sup>xvi</sup> *See Singleton*, 47 F. Supp. 2d 1182, 1191–92 (D. Or. 1998) (interpreting 16 U.S.C. § 1281(a) to require protection and enhancement of the outstandingly remarkable values enumerated in the WSRA, and stating the phrase “enhance and protect” does *not* permit uses that “substantially degrade the river system’s values” but *does* permit uses “which are consistent with such protection and enhancement and do not substantially interfere with the public use and enjoyment of the river ORVs”).

<sup>xvii</sup> 16 U.S.C. § 1133(d)(4) (2000). *See supra* note 9 and accompanying text.

<sup>xviii</sup> 16 U.S.C. § 1278(a) (2000). *See also supra* table note iii and accompanying text.

<sup>xix</sup> 16 U.S.C. § 1133(d)(4) (2000). *See supra* note 9 and accompanying text.

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<sup>xx</sup> 16 U.S.C. § 1278(a) (2000). *See also supra* table note iii and accompanying text.

<sup>xxi</sup> *See, e.g.,* *Sierra Club v. Block*, 622 F. Supp. 842, 862 (D. Colo. 1985) (stating “[i]t is implied from the Wilderness Act that Congress reserved water rights in the wilderness areas to the extent necessary to accomplish the purposes specified in the act.”); *see also* *Sierra Club v. Yeutter*, 911 F.2d 1405, 1414 (10th Cir. 1990) (stating that the Wilderness Act does not directly address the question of reserved water rights).

<sup>xxii</sup> *See* 16 U.S.C. § 1284(c) (2000) (reserving the waters of designated waters for the purposes of this chapter, but not in quantities greater than necessary to accomplish these purposes).

<sup>xxiii</sup> *See Block*, 622 F. Supp. at 862 (noting that preservation of wilderness areas protects water quality).

<sup>xxiv</sup> 16 U.S.C. § 1283(c) (2000).

<sup>xxv</sup> Existing commercial enterprise may be grandfathered into wilderness. *Id.* § 1133(c) (stating “subject to existing private rights, there shall be no commercial enterprise . . . within any wilderness area” [emphasis added]). Certain limited commercial services (outfitting) is permitted in wilderness “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” *Id.* § 1133(d)(5).

<sup>xxvi</sup> *Id.* § 1277(c)(A).

<sup>xxvii</sup> *Id.* § 1133(c). *See supra* table note ii (quoting relevant statutory text).

<sup>xxviii</sup> Federal Wild and Scenic Rivers Guidelines “generally permit” “motorized travel on land or water in wild, scenic and recreational river areas,” except that motorized travel “will be restricted or prohibited where necessary to protect the values for which the river area was designated.” Nat’l Wild and Scenic Rivers System Guidelines for Eligibility, Classification, and Mgmt., 47 Fed. Reg. 39,454, 39,459 (Sept. 7, 1982). Since roads are usually absent from designated “wild” rivers, it follows that no motorized use occurs on land in those segments. 16 U.S.C. § 1273(b)(1) (2000); *see supra* table note iii (quoting relevant text).

<sup>xxix</sup> *See, e.g.,* *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000) (indicating motorized use is allowed to the extent that it is consistent with the values motivating designation of the river as wild and scenic).

<sup>xxx</sup> 16 U.S.C. § 1133(c) (2000). *See supra* table note ii (quoting relevant statutory text).

<sup>xxxi</sup> *See, e.g., Hells Canyon Alliance*, 227 F.3d at 1177.

<sup>xxxii</sup> 16 U.S.C. § 1134(c) (2000) (providing for acquisition of state and private lands within wilderness areas by the Secretary of Agriculture only if 1) the landowner concurs, or 2) the acquisition is specifically authorized by Congress).

<sup>xxxiii</sup> JACKIE DIEDRICH ET AL., *WILD & SCENIC RIVERS AND THE USE OF EMINENT DOMAIN 2* (1998), available at <http://www.rivers.gov/publications/eminent-domain.pdf>.