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Section 2(a)(ii) of the Wild and Scenic Rivers Act of 1968: An Underutilized Tool to Designate National Wild and Scenic Rivers

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I.

INTRODUCTION

The primary means of designating segments of America's rivers as National Wild and Scenic Rivers has been Congressional action, as provided by the landmark Wild and Scenic Rivers Act of 1968 (the "Act"). Through October 1998, the thirtieth anniversary of the Act, approximately 9,129 miles of rivers have been included in the National Wild and Scenic Rivers System by Act of Congress and now enjoy the statutory protections set forth in the Act.

This paper addresses a separate and independent means of including rivers in the national system, through the procedures set forth in section 2(a)(ii) of the Act. Subject to certain prerequisites and conditions, section 2(a)(ii) authorizes the Secretary of the Interior to include a river already protected by a state river protection program in the national system upon request by a state's governor. This paper describes those prerequisites and conditions, cites examples of the successful use of section 2(a)(ii), and notes certain limitations and opportunities for the future use of this river conservation tool. It also provides an updated appraisal of a critical 1978 report by the General Accounting Office ("GAO") describing the lack of progress in expanding the national rivers system both by Congressional and Secretarial action.

At the time the Wild and Scenic Rivers Act passed, Congress expected the states to undertake "as much of the job as possi-

* American Rivers, Washington, D.C. This paper was produced in cooperation with the Rivers, Trails, and Conservation Program of the National Park Service. Nothing contained herein reflects the official position of the National Park Service or the U.S. Department of the Interior.

ble.”¹ But, the scorecard on state participation under the Act during the first thirty years shows this goal has not been achieved. Segments of only eighteen rivers have been included in the system pursuant to section 2(a)(ii), representing approximately 1,773 river miles.² This represents only 12% of the total number of rivers and 16% of total river miles designated under the Act.³

However, several recent trends make it much more likely that the use of section 2(a)(ii) will assume the significant role Congress originally envisioned for it. These include the broad shift in authority from federal to state and local government; the new emphasis on community-based river conservation activities; and the growing awareness of the economic benefits to the state or states of a national “designation” of a river. Thus, expanded use of section 2(a)(ii) deserves renewed attention by state governments and the river conservation community in the Act’s thirtieth anniversary year.

II.

SECTION 2(a)(ii) REQUIREMENTS AND CONGRESSIONAL INTENT

Section 2(a)(ii) has several requirements that must be met for a river to be designated and protected within the “national wild and scenic rivers system”.⁴ First, the river segment must be protected within a state’s river protection program by act of a state’s legislature, and must be permanently administered as such by an agency or political subdivision of that state.⁵ Second, the river must be found to meet the Act’s criteria by the Secretary of the

1. H.R. REP. NO. 90-1623, at 2 (1968), *reprinted* in 1968 U.S.C.C.A.N. 3801, 3802.

2. A summary of these actions is set forth as Attachment 1.

3. Indeed, approximately three quarters of all these river miles protected under section 2(a)(ii) came about in one single action: designation of segments of five major California rivers, the Klamath, Trinity, Eel, Smith and Lower American, by order of Secretary Andrus in the last hours of the Carter administration. TIM PALMER, *THE WILD AND SCENIC RIVERS OF AMERICA*, 35-36 (1993) (“Palmer”). Palmer does indicate that these designations may be “the most significant ever” under the Act, because of “the great mileage and large number of streams included, their extraordinary value, and the potential threats their designation averted.” *Id.*, at 36-37.

4. Wild and Scenic Rivers Act of 1968, 16 U.S.C. §1271 et seq. (1968).

5. A U.S. District Court has held that a voter initiative, by which a section of the Klamath River was designated into Oregon’s state system of wild and scenic rivers, constitutes “direct legislation” by the voters and hence serves as an act of the legislature as required under the Act. *City of Klamath Falls, Or. v. Babbitt*, 947 F. Supp. 1 (D.D.C. 1996)

Interior, upon proper application by the state Governor. Third, the costs of administering the river, excluding costs associated with administering and managing federally owned lands, must be borne by the state or political subdivision.

This framework, which provides a key role to the states in obtaining the full benefits of the Act, was the result of considerable evolution in thinking by Congress and the Administration during the critical 1967-68 legislative period.⁶ Indeed, one of the key principles in the House version of the final bill clearly contemplated extensive participation by the states in protecting rivers under the Act:

A second [principle] is that, since the task of preserving and administering such streams is not one that can or should be undertaken solely by the Federal Government, the states ought to be encouraged to undertake as much of the job as possible and that such encouragement can be given not only by giving the financial aid for which the Land and Conservation Fund Act already provides but by assuring them that such Federal agencies as the Federal Power Commission and the Corps of Engineers will not upset their plans by taking adverse action without the full knowledge and consent of the Congress.⁷

The House report expresses the still unfulfilled hope that “. . . all the states will become active partners in the development of the national Scenic Rivers System.”⁸

III.

DEVELOPMENT OF STATE RIVER PROTECTION SYSTEMS

In the decades prior to passage of the Act, a few states had initiated protection of certain rivers,⁹ but only Wisconsin had enacted a comprehensive legal framework for protecting designated state rivers.¹⁰ But with the stimulus of the Act, many state legislatures enacted legal frameworks for state supervision of wild and scenic rivers. In some instances, the provisions of the state

6. The evolution of section 2(a)(ii) is addressed in Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707, 713 n. 32 (1970).

7. H.R. REP. NO.90-1623 (1968), reprinted in 1968 U.S.C.C.A.N. 3801.

8. *Id.* at 7.

9. Several states, including Wisconsin, California, Oregon and Washington, implemented river protection actions to protect specific rivers prior to the 1960s. The earliest action took place in 1905, when Wisconsin banned construction of hydro-power dams on the Brule river. See PALMER, *supra* note 3, at 268-69.

10. *Id.* at 271.

frameworks bore a striking resemblance to the 1968 federal Act, with the notable exception that state designation offered no protection against federal assisted water projects, including federally licensed hydroelectric dams. In other cases, state law provided only minimal protections.¹¹ By the early 1990s, more than thirty states had enacted statutes creating state river protection systems, and the total number of river miles covered in state managed systems exceeded 13,500,¹² which exceeds the total river miles protected in the national wild and scenic rivers system. As noted above, however, the level of protection offered under the state systems varies widely.

IV.

THE FIRST 2(a)(ii) RIVER

The first river to be designated under section 2(a)(ii) of the Act was ninety-two miles of the Allagash Wilderness Waterway in northern Maine, one of the country's most popular wild canoeing rivers. In 1963, five years before the enactment of the Wild and Scenic Rivers Act, the U.S. Bureau of Outdoor Recreation (later incorporated into the National Park Service) completed a study of this river segment and recommended that an "Allagash National Riverway" be established by Act of Congress, to be acquired and administered by the U.S. Department of the Interior. This proposal, however, was not acceptable to the state of Maine, and a compromise emerged that provided for state management and increased protection for the river.¹³ In 1966, the Maine legislature enacted a strong framework for preserving the Allagash in its "natural condition," including a program for land acquisition.¹⁴ After passage of the federal Wild and Scenic Rivers Act, the Governor of Maine requested federal designation under section 2(a)(ii), and the Secretary of the Interior approved the request in 1970.

11. For example, the legislatures of Alabama, Colorado and Mississippi merely barred surface coal mining along river segments that had been designated under the Act. ALA. CODE §9-16-96(e)(1) (1981); COLO. REV. STAT. ANN. §§ 34-32-115(4)(f)(I) and 34-33-114(2)(g)(I) (West 1998); MISS. CODE ANN. §53-9-71(4)(a) (1998).

12. See PALMER, *supra* note 3, at 271. Palmer also indicates that there are five states – California, Louisiana, Maine, Michigan and New York – each of which have designated more than 1,000 river miles in their state river systems. *Id.*

13. ME. REV. STAT. ANN., tit. 12, §§ 401-07 (West 1998); CHRISTOPHER CURTIS, GRASSROOTS RIVER PROTECTION 35-37 (1992).

14. See CURTIS, *supra* note 13, at 34-36.

V.

THE FIRST TEN YEARS (1968-78)

Very limited use of section 2(a)(ii) occurred in the first ten years after passage of the Act. Only four other river segments, the Little Miami and Little Beaver in Ohio, the New River in North Carolina, and the lower St. Croix River in Wisconsin and Minnesota, completed the 2(a)(ii) process and were designated by the Secretary of the Interior during this decade.¹⁵

A report issued by GAO in 1978, the Act's tenth anniversary, asserted that Congress "envisioned a prominent state role" and expected that states would become "active partners in developing the national system."¹⁶ But the GAO found that while 190 rivers were included in twenty-six state river systems as of 1978, only five states had added rivers to the national system through the 2(a)(ii) process.

The GAO concluded that the 2(a)(ii) process was "not working as intended"¹⁷ for two primary reasons. First, officials in some states believed that national designation under 2(a)(ii) would be "too costly."¹⁸ The principal concern was the ability of states to fund the development and administrative costs of a national river, including land acquisition costs. For example, the GAO cited studies by the Interior Department that recommended inclusion of the Suwanee River¹⁹ in Florida and Georgia and the Upper Iowa River²⁰ in Iowa in the national system with state administration pursuant to section 2(a)(ii). The GAO noted, however, that none of these states had sought such a designation because of concern with acquisition and administrative costs.

Second, repeated requests by the Governor of Oregon for inclusion of a segment of the Deschutes River in the national system were denied on the basis of a 1973 legal opinion from the

15. RIVER MILEAGE CLASSIFICATIONS FOR COMPONENTS OF THE NATIONAL WILD AND SCENIC RIVERS SYSTEM, 1-2 (National Park Service, Nov. 1996) (hereinafter "NPS Statistics"). Two other segments of the St. Croix River, with substantially great mileage, were designated by Act of Congress.

16. COMPTROLLER GENERAL OF THE U.S., FEDERAL PROTECTION AND PRESERVATION OF WILD AND SCENIC RIVERS IS SLOW AND COSTLY, 17 (1978) (hereinafter "GAO REPORT").

17. GAO REPORT, at 16.

18. *Id.*, at 17-18.

19. Report transmitted to Congress on March 15, 1974.

20. Report transmitted to Congress on May 11, 1972.

Solicitor of the Interior Department.²¹ The opinion stated that the presence of substantial federal lands along the banks of the proposed rivers would be “contrary to the stipulation that administration of the rivers must be at no expense to the Federal Government.”²² The Solicitor’s “negative” opinion was applied to various exploratory requests from other states.

The GAO recommended that Congress amend the Act to remove this obstacle to use of section 2(a)(ii).²³ Congress promptly did so, and in 1978 amended the Act to provide that rivers designated under section 2(a)(ii) are to be administered by the state without expense to the federal government “other than for administration and management of federally owned lands.” Congress also added a further clarifying sentence to the effect that use of 2(a)(ii) would not transfer to the state involved any authority to administer federally owned lands within the boundaries of the newly-designated river segment.²⁴ The Congressional action thus increased the potential for successful 2(a)(ii) designation requests.

VI.

YEARS 11 – 25 UNDER SECTION 2(a)(ii) (1978-1993)

The next fifteen years saw significant growth in river miles protected under section 2(a)(ii). Eight new river segments were added, increasing the number of river miles protected under section 2(a)(ii) by nearly 1,288 miles.²⁵ However, these actions occurred in episodic intervals, with the historic designation of five major California rivers providing the greatest addition of protected river miles.

This action in January 1981 represented an early “dividend” from the removal of the obstacle discussed above by the Congress in 1978, since the segments of the four North Coast rivers designated under section 2(a)(ii) included substantial federally owned lands.²⁶ Indeed, earlier in 1978 the U.S. Interior Department had informed the state of California of the Solicitor’s legal opinion and noted that the North Coast rivers might be ineligible

21. Memorandum from Bernard R. Meyer, Assistant Solicitor, Parks and Recreation, U.S. Department of the Interior, to Director, Bureau of Outdoor Recreation, dated March 21, 1973.

22. GAO REPORT, at 19.

23. *Id.* at 21.

24. National Parks and Recreation Act of 1978, Pub. L. 95-625, §761 (1978).

25. NPS Statistics, at 2, 4, 6-8, and 13.

26. *See* CURTIS, *supra* note 13, at 50.

for secretarial designation under 2(a)(ii), since substantial federal lands were involved.²⁷ Thus enactment of the 1978 amendments cleared the way for the largest single designation under section 2(a)(ii), in terms of total river miles protected.

The entire process from California Governor Jerry Brown's request to its approval by Secretary Andrus in the last hours of the Carter administration took less than six months, a far shorter period of time than for most previous requests. By contrast, the legal challenges promptly filed by opponents to designation, ultimately unsuccessful, would last more than five years.²⁸

VII.

YEARS 26-30: THE PACE QUICKENS (1993-98)

The volume and frequency of designations under section 2(a)(ii) has increased somewhat during the past five years, demonstrated by the designation of the Westfield River (Mass.) in 1993, a segment of the Cossatot River (Ark.) together with Big and Little Darby Creeks (Ohio) and the Upper Klamath River (Or.) in 1994, the Willowa River (Or.) in 1996,²⁹ and the Lumber River (N.C.) on September 28, 1998, days before the thirtieth Anniversary of the Act.

VIII.

PAST AND FUTURE ARGUMENTS FOR USING SECTION 2(a)(ii)

Any consideration of using section 2(a)(ii) as a tool to protect rivers must include utilizing an understanding of Governors' motivations in seeking designation under section 2(a)(ii) and an assessment of how important these factors may be in the future. In the past, at least some of the 2(a)(ii) designations have occurred as a response to a proposed dam. This was clearly the case with the 1981 designation of the Eel and other California rivers.³⁰ Section 2(a)(ii) was also used to protect the New River in North Carolina from a proposed hydroelectric dam after an

27. GAO Report, at 19.

28. See CURTIS, *supra* note 13, at 50-53. Ultimately the U.S. Court of Appeals for the Ninth Circuit upheld the Secretary's designation. *County of Del Norte v. United States*, 732 F.2d 1462 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). The legal challenges mounted by the opponents of designation are discussed at length in Fairfax, Andrews and Buchsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417 (1984).

29. NPS Statistics, at 16.

30. See PALMER, *supra* note 3, at 35.

effort to obtain Congressional designation failed.³¹ Other 2(a)(ii) designations, such as the Allagash, came about as a result of a desire within the state to prevent federal control of the river.³² In at least six cases, the recommendation for use of section 2(a)(ii) and for resulting state management of a river, originated with a study performed by the federal government.³³ Finally, the most recent 2(a)(ii) designation, the Lumber River (N.C.), appears to have been motivated at least in part by a desire to promote increased tourism through additional public recognition.

Some of these factors had greater influence in the past than they are likely to have in the future. The era of federal dam building is waning, though the protection against federally assisted water resources projects may still be a strong motivation to seek federal Wild and Scenic river status. Also, states are approaching river protection today in more ways than they did twenty years ago, including providing technical assistance for watershed management, flood plain management, riparian area protection, and utilizing the Clean Water Act.

However, other forces may promote increased use of 2(a)(ii) and state, rather than federal, administration of protected rivers. There is a pervasive trend to shift authority from the federal government to state and local governments.³⁴ Since the early 1990s, there has been an increasing emphasis on community-based river conservation activities, including the development of river management plans. The trend is reflected even with the case of Congressionally designated rivers, such as the Farmington River (Conn.), the Lamprey River (N.H.), the Great Egg Harbor River (N.J.), and the Niobrara River (Neb.).

In addition, in view of past history, the growing recognition that rivers can be protected through management plans and regu-

31. See CURTIS, *supra* note 13, at 46-47.

32. *Id.*, at 35.

33. According to Curtis, the first four were the Loxahatchee River (Fla.), the Lower St. Croix River (Minn., Wis.), and the Little Miami and Little Beaver Rivers (Ohio). See CURTIS, *supra* note 13, at 56. Subsequently, the Willowa River (Or.) and a segment of the Klamath River in Oregon were also designated after use of a similar process.

34. Even this trend has its limits when it comes to making a designation under section 2(a)(ii), due to the widely varying levels of protection afforded by state river systems. In one very recent case, the Department of the Interior refused to designate some 34 miles on the Lumber River (N.C.) (of the 115 miles proposed for designation by the Governor), on grounds that the National Park Service "...cannot find any real protection in place to warrant wild and scenic river designation." NPS Lumber River 2(a)(ii) Wild & Scenic River Study Report, at 35 (1998).

lation rather than by land acquisition, should also make section 2(a)(ii) actions less controversial and more affordable. The growing trend of community based conservation efforts, exemplified by President Clinton's American Heritage River Initiative, may also provide fertile ground for section 2(a)(ii) initiatives. As groups are actively involved in the regulatory efforts, much stronger support for the conservation ethic exists among the general public today than existed at the time the Act was passed. A much clearer understanding has emerged that national designation for a river will bring increased recognition, a probable increase in private land values, and increased recreational usage, with corresponding economic benefits to the state or states involved. All these factors indicate a need to "take the case to the people" and move forward with a more systematic and focused approach to promoting designations under section 2(a)(ii) of the Act.

IX.

CONCLUSION

The GAO has reported that Congressional expectations when approving the Wild and Scenic Rivers Act in 1968 were that section 2(a)(ii) would provide an important approach to protecting rivers. However, the record over the past thirty years indicates that results have fallen short of those expectations. A number of very important rivers have gained protection under this section, but the total number of river miles involved is small compared to the number of river miles that have been protected by Congress. However, trends outlined above indicate that expanded use of section 2(a)(ii) deserves renewed attention by state governments and the river conservation community in the Act's thirtieth anniversary year.

Attachment 1

**RIVER SEGMENTS DESIGNATED UNDER
SECTION 2(a)(ii)
OF WILD & SCENIC RIVERS ACT OF 1968**

<u>Name</u>	Number of Miles Designated				<u>Total</u>
	<u>Date</u>	<u>Wild</u>	<u>Scenic</u>	<u>Recreational</u>	
Allagash Wilderness Waterway (Me.)	07/19/70	92.5			92.5
Little Miami (Ohio)	08/20/73		18	48	66
	01/28/80		28		28
Little Beaver (Ohio)	10/23/75		33		33
New (N.C.)	04/13/76		26.5		26.5
St. Croix (lower) (Mn/Wi)	06/17/76			25	25
American (lower)(Cal.)	01/19/81			23	23
Klamath (Cal.)	01/19/81	12	24	250	286
Trinity (Cal.)	01/19/81	44	39	120	203
Eel (Cal.)	01/19/81	97	28	273	398
Smith (Cal.)	01/19/81	78	31	216.35	325.35
Loxahatchee (Fla.)	05/17/85	1.25	5.75	0.5	7.5
Vermilion, Middle Fork (Ill.)	05/11/89	17.1			17.1
Westfield (Mass.)	11/02/93	18.9	24.4		43.3
Cossatot (Ark.)	02/02/94		10.7		10.7
Big & Little Darby Creeks (Ohio)	03/10/94		85.9		85.9
Klamath (Ore.)	09/22/94		11		11
Wallowa (Ore.)	07/23/96			10	10
Lumber (N.C.)	09/28/98		60	21	81
					<u>1,772.85</u>