



*As a deciduous conifer, the western larch has a contrary nature.*

## LARCH COMPANY OCCASIONAL PAPER #7

# OVERLAPPING WILDERNESS AND WILD & SCENIC RIVER DESIGNATIONS: OPTIMAL CONSERVATION PROTECTION FOR FEDERAL PUBLIC LANDS

by Andy Kerr and Mark Salvo

### *ABSTRACT*

*One of the strongest combinations of conservation protection for undeveloped federal public lands is overlapping Wilderness and Wild & 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 & Scenic Rivers. These overlapping designations provide a complimentary framework of maximum protection for federal lands today.*



George Wierthner

*The North Fork John Day River on the Umatilla National Forest, Grant County, Oregon. Congress saw fit to designate the North Fork John Day Wilderness in 1984 and the North Fork John Day Wild & Scenic River in 1988.*

## 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 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 & Scenic River* designation that flows through a *Wilderness* area in a *National Park*.<sup>1</sup> Administrative overlays, such as critical habitat designation under the Endangered Species Act,<sup>2</sup> may provide additional protection to any combination of Congressional designations. However, since 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 paper focuses on the benefits of overlapping Wilderness and Wild & Scenic River designations.

## THE STATUTES

### THE WILDERNESS ACT

The Wilderness Act of 1964<sup>3</sup> (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 Act, 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 Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (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 non-conforming uses and activities may continue in Wilderness, such as established livestock grazing<sup>6</sup> and salvage logging (such logging has only occurred in Wilderness a few times). There is even a provision in TWA that allows the President to authorize new water development in Wilderness, although this authority has never been exercised.<sup>7</sup>

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<sup>1</sup> See B. E. Gray. 1998. No Holier Temples: Protecting the National Parks through Wild and Scenic River Designation. U. Colo. L. Rev. 58: 551-598.

<sup>2</sup> 16 U.S.C. §§ 1531-1544.

<sup>3</sup> 16 U.S.C. §§ 1131-1136.

<sup>4</sup> 16 U.S.C. § 1133(b).

<sup>5</sup> 16 U.S.C. § 1133(c).

<sup>6</sup> 16 U.S.C. § 1133(d)(4)(2). For a political history of the allowance of livestock grazing in designated Wilderness, see A. Kerr and M. Salvo. 2002. Pillaged Preserves: Livestock in National Parks and Wilderness Areas. Pages 47-49 *in* G. Wuerthner and M. Matteson (eds.). WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST. Island Press. Covelo, CA.

<sup>7</sup> 16 U.S.C. § 1133(d)(4)(1).



## THE WILD & SCENIC RIVERS ACT

The Wild and Scenic Rivers Act of 1968<sup>8</sup> (WSRA) specifically proscribes only two activities on designated river segments: water resources projects licensed by the Federal Energy Regulatory Commission (FERC) (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>9</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 aesthetic, 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>10</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 in river corridors or adjacent lands only if they are consistent with protecting and enhancing the designated river’s specific outstandingly remarkable values.

## OVERLAPPING PROTECTION

Congress has on multiple occasions designated—simultaneously or at different times—overlapping Wilderness areas and Wild & Scenic River segments. Table 1 summarizes threats to Wilderness and Wild & Scenic River values and how each statute addresses them.

## ADDITIONAL PROTECTION

WSRA prohibits federal water projects or federal assistance to non-federal 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>11</sup>



Lesley Adams

*The Rogue River was one of the original rivers included in the 1968 Wild and Scenic Rivers Act. The BLM proposes to log old-growth forests in the headwaters of tributary streams that feed into the Wild and Scenic Rogue.*

<sup>8</sup> 16 U.S.C. §§ 1271-1287.

<sup>9</sup> 16 U.S.C. § 1280.

<sup>10</sup> 16 U.S.C. § 1281.

<sup>11</sup> 16 U.S.C. § 1278(a).

**TABLE 1:**  
**Conservation of Wild Lands and Waters under the Wilderness Act and the Wild & Scenic Rivers Act**

Threat	Wilderness Act	Wild & Scenic Rivers Act		
		Wild Classification*	Scenic Classification	Recreational Classification
New Roads	Generally prohibited. <sup>12</sup>	Prohibited. <sup>13</sup>	Permitted only if compatible. <sup>14</sup>	
Logging	Commercial logging prohibited; salvage logging allowable under strict guidelines. <sup>15</sup>	Implicitly prohibited.	Permitted only if compatible.	
Location for Mining (hardrock)	New claims prohibited.	New claims prohibited in stream bottoms and within ¼ mile of bank, existing claims regulated, and only mineral resource, not land, may be transferred to private ownership.	New claims allowed and all claims are regulated, and only mineral resource, not land, may be transferred to private ownership.	
Leasable Mining (including geothermal)	New leases prohibited.	Prohibited in stream banks and within ¼ mile of stream banks.	Permitted only if compatible and subject to regulation.	
Livestock Grazing	Grandfathered as permitted use where established prior to designation. <sup>16</sup>	Implicitly prohibited. <sup>17</sup>	Permitted only if compatible.	
Water Developments	Prohibited, but a Presidential exception exists, although it has never been exercised.	Prohibited. Federal agencies may authorize water development projects, upstream or downstream from designated segments only if certain conditions are met.		
Water Withdrawal	Ambiguous; lower courts have ruled both yes and no to an expressed reserved federal water right.	Expressed federal reserved water right.		
Water Quality	No explicit protections, but Wilderness management tends to protect water quality.	Requires managing agency to cooperate with appropriate state and federal agencies to eliminate or reduce water pollution.		

<sup>12</sup> 16 U.S.C. § 1133(c) (“...subject to existing private rights, there shall be...no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act [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>13</sup> The WSRA defines “wild” rivers as “[t]hose rivers or sections of rivers that are...generally inaccessible except by trail...” 16 U.S.C. § 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”). 47 Fed. Reg. 39457. Bureau of Land Management regulations also allow that agency to close existing roads, if necessary, to comply with the WSRA. 43 C.F.R. § 8351.2-1(a); *see also Oregon Natural Desert Association v. Green*, 953 F.Supp 1133, 1148 (D. Or. 1997).

<sup>14</sup> “Scenic” designated segments may have an occasional road crossing, while “recreational” designated segments usually include a road paralleling the river or stream. 16 U.S.C. §§ 1273(b)(2)-(3).

<sup>15</sup> 16 U.S.C. § 1133(d)(1) has been interpreted to allow salvage logging in limited circumstances (“...such 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.”).

<sup>16</sup> *See Kerr and Salvo, Pillaged Preserves*, note 6.

<sup>17</sup> *See Oregon Natural Desert Association v. Green*, 953 F.Supp 1133, 1144 (D. Or. 1997) (the Bureau of Land Management has authority to exclude cattle grazing in river corridors designated as “wild” under the WSRA).

Commercial Activities	Generally prohibited. <sup>18</sup>	Regulated.	
Motorized Use	Generally prohibited. <sup>19</sup>	Implicitly prohibited. <sup>20</sup>	Permitted only if compatible.
Mechanized Transport	Generally prohibited. <sup>21</sup>	Permitted only if compatible.	
Private Inholdings	Use of eminent domain to acquire private inholdings not allowed.	Use of eminent domain to acquire private property allowed if the majority of land along the river segment is not federally owned; agency may also use condemnation when necessary to acquire scenic easements through private property.	

\* A designated Wild & Scenic River flowing through designated Wilderness area would usually be classified as “Wild.”

## QUALIFICATIONS FOR WILDERNESS/WILD & SCENIC RIVER DESIGNATION

In general, a proposed Wilderness must be roadless and undeveloped, but the area need not be pristine.<sup>22</sup> A proposed Wild & Scenic River must be free-flowing and exhibit at least one outstandingly remarkable value.<sup>23</sup>

Overlapping Wilderness and Wild & Scenic River designation is 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 & Scenic River may originate above and/or extend below a proposed Wilderness area.



George Sexton

*Unprotected forests above the Wild & Scenic Rogue River, Medford BLM.*

<sup>18</sup> Existing commercial enterprise may be grandfathered into Wilderness (16 U.S.C. § 1133(c); “subject to existing private rights, there shall be no commercial enterprise...within any wilderness area” [emphasis added]) and 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.” 16 U.S.C. § 1133(d)(5).

<sup>19</sup> See note 11.

<sup>20</sup> Implementing 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.” 47 Fed. Reg. 39459. Since roads are usually absent from designated “wild” rivers (see note 13), it follows that no motorized use occurs on land in those segments.

<sup>21</sup> See note 11.

<sup>22</sup> See A. Kerr. 2007. “Persuading Congress to Establish a Wilderness and/or Wild & Scenic River: A Checklist.” Occasional Paper #1. The Larch Company. Ashland, OR: Appendix B, “Wilderness: What It Is, What It Can Be” (available at [www.andykerr.net/downloads](http://www.andykerr.net/downloads)).

<sup>23</sup> See A. Kerr. 2007. “Persuading Congress to Establish a Wilderness and/or Wild & Scenic River: A Checklist.” Occasional Paper #1. The Larch Company. Ashland, OR: Appendix C, “Wild and Scenic River: What It Is, How Long and How Wide It Can Be” (available at [www.andykerr.net/downloads](http://www.andykerr.net/downloads)).



## STATE PROTECTIONS FOR WILDERNESS/WILD & SCENIC RIVERS

State statutes and/or regulations may exist that provides additional protection for designated Wilderness and/or Wild & Scenic Rivers on federal lands. 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 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>24</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>25</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>26</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

<sup>24</sup> Oregon Administrative Rules (OAR) 340-013-0005.

<sup>25</sup> OAR 340-13-0015.

<sup>26</sup> OAR 340-013-20.

pollution protection regulations. Unfortunately, Oregon does not adequately enforce its rules, nor are conservation organizations making productive use of them.

## CONCLUSION

The Wild and Scenic Rivers Act, which was enacted into law just over four years after The Wilderness Act, anticipates overlapping 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 Act of September 3, 1964 (78 Stat. 890; 16 U.S.C., ch. 23) shall be subject to the provisions of both the Wilderness Act and this Act with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of these Acts the more restrictive provisions shall apply.<sup>27</sup>*

Each Congressional designation is superior to the other in certain respects. Where undeveloped wildlands and free-flowing streams exist together on federal public land, they should be designated as Wilderness and Wild & Scenic Rivers, respectively, to provide optimal protection for both resources.

## ADDITIONAL RESOURCES

### BOOKS

- The Wilderness Society. 2004. *The Wilderness Act Handbook*. The Wilderness Society. Washington, DC.
- Kerr, A. 2007. "Persuading Congress to Establish a Wilderness and/or Wild & Scenic River: A Checklist." Occasional Paper #1. The Larch Company. Ashland, OR (available at [www.andykerr.net/downloads](http://www.andykerr.net/downloads)).

### WEBSITES

- [www.wilderness.net](http://www.wilderness.net). A comprehensive resource for designated Wilderness, The Wilderness Act and wilderness management jointly operated by the Arthur Carhart National Wilderness Training Center, Aldo Leopold Wilderness Research Institute and the Wilderness Institute at the University of Montana College of Forestry and Conservation.
- [www.rivers.gov](http://www.rivers.gov). A comprehensive website for Wild & Scenic Rivers hosted by the National Park Service, including a list of designated segments, the Wild & Scenic Rivers Act and wild & scenic river management operated by the National Park Service.
- [wilderness.org](http://wilderness.org). The Wilderness Society.
- [leaveitwild.org](http://leaveitwild.org). Campaign for America's Wilderness.
- [americanrivers.org](http://americanrivers.org). American Rivers.

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<sup>27</sup> 16 U.S.C. § 1281(b).

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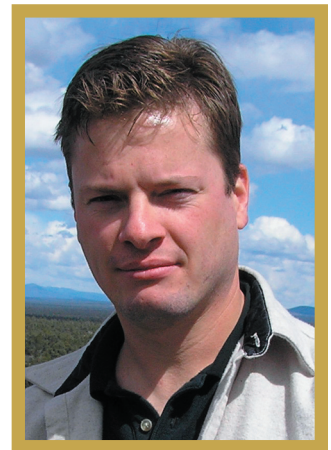
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Andy Kerr ([andykerr@andykerr.net](mailto:andykerr@andykerr.net)) is Czar of The Larch Company ([www.andykerr.net](http://www.andykerr.net)). A professional conservationist for over three decades, he has been involved in the enactment of over 25 pieces of state and federal legislation, scores of lawsuits, dozens of endangered species listing petitions and countless administrative appeals of Forest Service and Bureau of Land Management timber sales and other decisions. He is best known for his three decades with Oregon Wild (formerly Oregon Natural Resources Council), the organization best known for having brought you the northern spotted owl. He has lectured at all of Oregon's leading universities and colleges, as well as at Harvard and Yale. He is a dropout of Oregon State University. Kerr has appeared numerous times on national television news and feature programs and has published numerous articles on environmental issues. Kerr is author of *Oregon Desert Guide: 70 Hikes* (The Mountaineers Books, 2000) and *Oregon Wild: Endangered Forest Wilderness* (Timber Press, 2004). *The Oregonian* named Kerr one of the 150 most interesting Oregonians in the newspapers 150-year history. He serves as Senior Counselor to Oregon Wild and is an advisor to the Sagebrush Sea Campaign. He also consults for non-profit conservation organizations. Clients have included Campaign for America's Wilderness, The Wilderness Society, Conservation Northwest, Idaho Conservation League, Klamath-Siskiyou Wildlands Center, Soda Mountain Wilderness Council and others. A fifth-generation Oregonian, Kerr was born and raised in Creswell, a recovered timber town in the upper Willamette Valley. He now lives in Ashland, a recovered timber town in the upper Rogue Valley. He lives with one wife, one dog, one cat, one horse, 20 odd tropical fish and no vacancies. In his free time, Kerr likes to canoe, hike, raft, read, and work on projects that move his home and business toward energy self-sufficiency and atmospheric carbon neutrality.



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