



THE LARCH COMPANY

ANDY KERR, CZAR

OFFICES IN ASHLAND, OREGON AND WASHINGTON, DC,
503.701.6298 CELL/TEXT

ANDYKERR@ANDYKERR.NET • WWW.ANDYKERR.NET

TO: Interested Parties
FROM: Andy Kerr
RE: Grandfathering Livestock Grazing in a Proposed Wild and Scenic River
DATE: 13 January 2020

Since first enacted in 1968, and amended many times since then, the *only* occurrence of the word “grazing” in the Wild and Scenic Rivers Act (WSRA; 16 U.S.C. 1271-1287) is one instance and in the context of specifying a particular grazing allotment as the terminus for a protected stream segment. “Livestock” is never mentioned.

Senator Ron Wyden’s (cosponsored by Senator Jeff Merkley) proposed “Malheur Community Empowerment for the Owyhee Act” ([S. 2828; 116th Congress](#)) would, for the first time, statutorily grandfather livestock grazing into a unit of the National Wild and Scenic Rivers System (hereafter the Wyden weakening language).

The Wyden weakening language would undermine the protections of the WSRA that require a managing agency to “protect and enhance” the outstandingly remarkable values (ORVs) for which a stream segment was include in the National Wild and Scenic Rivers System for 14.7 miles of the Owyhee River—if not also set a precedent for every new wild and scenic river established in the future.

The Wyden weakening language would undermine the very important WSRA caselaw. Ironically, most of the fine cases were brought by the Oregon Natural Desert Association (which heartily supports the legislation that contains the Wyden weakening language).

Since enactment of the WSRA thirty years ago, agencies have been subject to the duty to protect and enhance ORVs. The Oregon cases merely make clear that the statutory mandate to protect and enhance ORVs is judicially enforceable. Moreover, as evidenced in these cases, the Act’s standards are enforceable by citizens. (Bonham 2000)

Below I, a non-lawyer, first summarize the status of domestic bovines (and implicitly ovines, if not also equines) under the Wild and Scenic Rivers Act by liberally quoting from two important

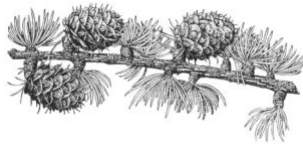
law review articles (Appendix A). Ironically, most the case law comes from a wild and scenic river designation along the same river, but upstream of the problematic 14.7 miles of the Owyhee River in play now.

Then I do a sentence-by-sentence evaluation of the Wyden weakening language pertaining livestock grazing (and related water rights and invasive species) language (Appendix B).

Recommendation

Either the offending livestock grazing and related (i.e. invasive species and water rights) language should be stricken from the bill or the entire proposed wild and scenic river should be dropped from the legislation.

Conservationists should not be interested in wild and scenic rivers that change the color on the map more than management on the ground.



DEDICATED TO THE CONSERVATION AND RESTORATION OF NATURE, THE LARCH COMPANY IS A NON-MEMBERSHIP FOR-PROFIT ORGANIZATION THAT REPRESENTS SPECIES THAT CANNOT TALK AND HUMANS NOT YET BORN, A DECIDUOUS CONIFER, THE WESTERN LARCH HAS A CONTRARY NATURE.

Appendix A

Livestock Grazing in Wild and Scenic Rivers

Known as the “Oregon Trilogy,” three lawsuits (pertaining to the Donner und Blitzen, John Day, Owyhee wild and scenic river respectively) are the caselaw pertaining to a managing agency’s obligation to “protect and enhance” the outstandingly remarkable value for which the unit of the National Wild and Scenic Rivers System was established,—including protection from livestock grazing:

- Oregon Nat. Desert Assoc. v. Green, 953 F. Supp. 1133, 1143-47 (D. Or. 1997);
- National Wildlife Federation v. Cosgriffe, 21 F.Supp. 2d 1211 (D. Or. 1998); and
- Oregon Nat. Desert Assoc. v. Singleton, 75 F.Supp.2d 1139, 1145-46 (D. Or. 1999)

A recent law review article (Blumm & Joklic 2019) summarizes litigation pertaining to livestock grazing in wild and scenic rivers.

In the late 1990s, the federal District of Oregon decided three significant cases concerning the effect of public land grazing on ORVs. The WSRA allows continued livestock grazing so long as it does not conflict with protection and enhancement of ORVs. In 1997, the court ruled that BLM’s decision to allow continued grazing practices, shown to adversely affect a vegetation ORV along the Donner and Blitzen Rivers, violated the WSRA by failing to protect and enhance the ORV. Similarly, proof that grazing was detrimental to ORVs for the Owyhee River convinced the reviewing court to enjoin BLM from continuing to issue grazing permits as an ongoing use. [citations omitted]

An earlier law review article (Bonham 2000) addresses livestock grazing in wild and scenic rivers in more detail.

Thirty years after enactment, the WSRA now governs many rivers but little attention has been paid to the equally crucial issue of how to manage designated river corridors consistent with the Act’s mandate to protect and enhance the “outstandingly remarkable values” or ORVs of designated rivers in their free-flowing state.” Yet, the statute explicitly requires federal land management agencies to manage activities, even long-established activities like livestock grazing, within designated corridors to protect and enhance the river’s outstandingly remarkable values. In 1997, 1998, and 1999, the United States District Court for the District of Oregon consistently agreed with environmentalists’ arguments that the Bureau of Land Management’s grazing policies within designated river corridors violate the WSRA. In Oregon Natural Desert Association v. Green, National Wildlife Federation v. Cosgriffe, and Oregon Natural Desert Association v. Singleton,” the court relied on the WSRA’s overriding policy on managing designated river corridors to “protect and enhance” their “outstandingly remarkable values” to evaluate BLM’s actions in the designated corridors. This trilogy of Oregon federal cases reveals that the WSRA contains judicially enforceable standards governing wild and scenic river management. Further, the cases show that the WSRA protect and enhance standard extends beyond just public lands grazing policies in eastern Oregon: the WSRA requires all federal agencies to manage river corridors to protect and enhance outstandingly remarkable river values. Widespread recognition of

judicially enforceable river management standards should lead to the improved health of the nation's wild and scenic rivers....

Environmental groups have been attacking BLM grazing management practices across the West and in eastern Oregon for years with little success. Environmentalists are particularly concerned with grazing's impacts on riparian zones. Cattle gravitate naturally to water and riparian grasses. In fact, ranchers often direct their cattle toward river corridors

Adverse effects of cattle grazing include destruction of riparian habitat, degradation of fish habitat, and introduction of fecal matter into riverine systems, which causes increased sediment loads and water temperature increases.

Grazing is, in short, a significant contributor to the degraded status of western public lands in wild and scenic river corridors. Therefore, it is not surprising that the core of each of the three Oregon cases is a challenge by environmental plaintiffs to the Bureau of Land Management's (BLM) management of cattle grazing in wild and scenic river corridors.

What is unique about the Oregon trilogy is that for the first time plaintiffs challenged BLM grazing practices by employing the WSRA. What is significant is that each court in the Oregon trilogy concluded that the "protect and enhance" standard of the Act governed BLM's management of grazing practices in wild and scenic river corridors. [citations omitted]

Bonham details *ONDA v. Singleton* (two cases actually), which pertained the Owyhee Wild and Scenic River:

*In 1984 and 1988, Congress included Oregon's Owyhee River and its forks in the wild and scenic rivers system as wild rivers. BLM's 1993 river plan described the river's ORVs as scenic, geologic, recreation, wildlife, and cultural for the Main Owyhee, recreation, scenic, and cultural for the West Little, and scenic, recreation, and fish and wildlife for the North Fork. BLM's plan for the Owyhee stated that livestock grazing was to continue to "the extent currently being practiced." ONDA challenged BLM's management plan, arguing that the plan allowed grazing to continue in the Owyhee river corridor despite BLM's own findings and reports indicating that grazing was detrimental to the river's ORVs. ONDA argued that this rationale was inconsistent with the WSRA's protect and enhance mandate. The court agreed in *ONDA v. Singleton*.*

The Singleton I court took special notice of the river's wild classification.' The court also observed that "sensitive" federal and state plant species, and redband trout, a species petitioned for listing on the Endangered Species Act, existed in the river corridor. Moreover, the court noted that BLM's own 1993 river plan determined that cattle grazing negatively impacted the scenic and recreational ORVs for the mainstem, West Little, and North Fork Owyhee. Because "[t]he WSRA provides that each component of the... system is to be administered in such a manner as to protect and enhance its ORVs," the court concluded that BLM had a duty to ban cattle from the corridor if necessary to meet its protect and enhance obligation. The court's conclusion rejected BLM's historical deference to cattle grazers in the Owyhee River corridor. The Singleton I court, however, postponed

deciding ONDA's injunctive relief request to ban cattle from the river corridor, and instead ordered BLM to conduct another environmental review considering alternatives to continued grazing within the river corridor.

The question of injunctive relief requires a court to engage in a balancing test and find that injunctive relief is in the public interest. In an opinion issued on November 18, 1999, one year and fifteen days after the court's original ruling, the Singleton II court conducted such an analysis in response to plaintiffs' earlier requests to enjoin cattle grazing from the Owyhee River corridor. The court determined that the public interest in BLM adhering to WSRA management standards, and the public interest in protecting and enhancing the Owyhee River ORVs, warranted ordering BLM to exclude cattle grazing from areas of concern in the river corridor. In the context of balancing the competing claims of injury to determine the injunctive relief question in Singleton II, degradation of river ORVs trumped rancher's loss of economic livelihood. The court specifically directed BLM to eliminate the grazing permits at issue, not shift the permits thus grazing to less degraded areas. This decision represents the most explicit judicial application of the protect and enhance management standard because the Singleton II court balanced competing interests so that the mandate to protect and enhance a wild and scenic river finally overcame the historical dominance of cattle grazing over federal land management schemes.

Singleton II exemplified the full force of the WSRA's protect and enhance standard as applied to BLM grazing management because the court went further than either the Green or Cosgriffe courts, ordering BLM to exclude cattle from the river corridor to comply with the WSRA. The Green court had merely ordered the parties to reach agreement on relief after noting that BLM had the authority to exclude cattle from a river corridor, which resulted in BLM agreeing to fence the river corridor. The Cosgriffe court, on the other hand, explicitly declined to order BLM to exclude cattle, and only ordered BLM to create a river plan. Singleton II, as a representation of the judicial enforceability of the WSRA's protect and enhance management standard, however, rests largely on the foundation created by Green and Cosgriffe. Singleton II completes the Oregon trilogy because the Singleton II court's order compelling BLM to remove cattle from the river corridor is the application of the WSRA's protect and enhance management standard that Green recognized and Cosgriffe affirmed. [citations omitted]

Sources

Bonham, Charlton H. 2000. [The Wild and Scenic Rivers Act and the Oregon Trilogy](#). 21 Pub. Land & Resources L. Rev. 109 (2000)

Blumm, Michael c. and Max M. Joklic. 2019. [The Wild and Scenic Rivers Act at 50: Overlooked Watershed Protection](#). 9 Michigan Journal of Environmental and Administrative Law 1 (2019).

Appendix B

Line-By-Line Analysis of Wild and Scenic River Livestock Grazing Grandfathering Language

S.2818IS (116 th Congress), Section 5:	Commentary by Kerr
(d) WILD AND SCENIC RIVER DESIGNATIONS.—	In 1984, paragraph (55) was added to this subsection that established the “Owyhee” Wild and Scenic River from the Idaho border downstream to China Gulch (~2 miles above Rome) and then from Crooked Creek (~5 miles below Rome). As drafted this would establish an “Owyhee River Wild and Scenic River, which could be somewhat confusing and also awkward in naming.
(1) IN GENERAL.—Section 3(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1274(a)) is amended by adding at the end the following:	
“(231) OWYHEE RIVER, OREGON.—The approximately 14.7-mile segment of the Owyhee River from the base of Owyhee Dam in sec. 18, T. 22 S., R. 45 E., downstream to W1/4 SW1/4 sec. 13, T. 21 S., R. 45 E., to be administered by the Secretary of the Interior as a recreational river.”.	
(2) MANAGEMENT.—	The legislative language above is standard boilerplate to establish a wild and scenic river, while the language below has never been done before (save for the mineral withdrawal provision)
(A) IN GENERAL.—The Secretary shall manage the covered segment in accordance with section 6400 of the Bureau of Land Management Manual (Wild and Scenic Rivers) (as in effect on the date of enactment of this Act).	This proposed statutory language is unprecedented and dangerous. While nominally a statutory statement affirming the status quo, if the BLM Manual 6400 is ever revised for the better by a more sympathetic administration, the Owyhee River Wild and Scenic River would be statutorily limited to the agency manual provision in effect upon the date of enactment.
B) LIVESTOCK GRAZING.— (i) IN GENERAL.—The Secretary shall manage domestic livestock grazing in the vicinity of the covered segment in a manner that protects the identified values of the covered segment, including maintaining existing structures used for livestock management.	This proposed statutory language is unprecedented and dangerous. While livestock grazing is ongoing in the segment to be designated, this language would statutorily grandfather in livestock grazing and existing <i>forever</i> . The courts have found livestock grazing that harms the values for which a stream segment was established as a wild and scenic river, then the livestock grazing must end. Ironically, one of the cases was the Owyhee Wild and Scenic River upstream from this proposed addition to the National Wild and Scenic Rivers System

<p>(ii) NEW STRUCTURES.—To maintain the identified values of the covered segment, the Secretary shall ensure that any structures constructed after the date of enactment of this Act to facilitate livestock management in the vicinity of the covered segment are unobtrusive, as determined by the Secretary</p>	<p>This proposed statutory language is unprecedented and dangerous.</p> <p>New structures to facilitate grazing would be allowed, despite any harm to the outstandingly remarkable values, as on as the Secretary (actually local BLM) found them to be “unobtrusive.” Unobtrusive to humans? Unobtrusive to native wildlife, rare plant species, and/or water quality?</p>
<p>(C) INVASIVE SPECIES MANAGEMENT.—</p>	
<p>(i) IN GENERAL.—In administering the covered segment, the Secretary shall carry out any activities that the Secretary determines to be necessary to prevent or control the spread of terrestrial invasive species and aquatic invasive species, consistent with the applicable land use plan and applicable law, including using manual and chemical prevention and control methods, in accordance with—</p>	<p>The proposed statutory language is unprecedented and dangerous.</p> <p>While non-native invasive species are a major problem, the protections of the Wild and Scenic Rivers Act (WSRA) would be subservient to attacking the invasives problem, even though the methods may harm the outstandingly remarkable values for which the wild and scenic river was established.</p>
<p>(I) the applicable land use plan;</p>	
<p>(II) section 9011 of the Bureau of Land Management Manual (Chemical Pest Control) (as in effect on the date of enactment of this Act);</p>	<p>Land use plans should be conformed to wild and scenic river statutes, not vice versa.</p>
<p>(III) section 9014 of the Bureau of Land Management Manual (Control Use of Biological Control Agents on Public Lands) (as in effect on the date of enactment of this Act);</p>	<p>If these various BLM manual provision were ever to improve under a more favorable administration, such would not apply to the Owyhee River Wild and Scenic River.</p>
<p>(IV) section 9015 of the Bureau of Land Management (Integrated Weed Management) (as in effect on the date of enactment of this Act);</p>	<p>One could read “required evaluation” (by the way it would have a “(i)” preceding it) as a saving clause that effectively negates the preceding language. One also could not read it that way.</p>
<p>(V) section H-1740-2 of the Bureau of Land Management Handbook (as in effect on the date of enactment of this Act); and</p>	
<p>(VI) any applicable Federal law. (ii)</p>	
<p>REQUIRED EVALUATION.—Before using a chemical prevention or control method authorized under clause (i), the Secretary shall carefully evaluate the proposed use to ensure that the proposed use would not adversely affect water quality and the identified values of the covered segment.</p>	<p>If the “required evaluation” below does negate the previous increased statutory authority above to do mischief in a wild and scenic river, then the entire provision is unnecessary. BLM can go after invasives in wild and scenic rivers now, but they must protect river values.</p> <p>If the “required evaluation” does not so negate, then the language is dangerous.</p> <p>In either reading, the provision is politically dangerous.</p>

(3) WITHDRAWAL AND USE.—	
(A) WITHDRAWAL.—Subject to valid existing rights, all Federal land within a covered segment is withdrawn from—	The proposed statutory language is necessary and wonderful and has become the Wyden standard for all wild and scenic rivers he designates in Oregon, which is better than the default setting of WSRA.
(i) entry, appropriation, or disposal under the public land laws;	
(ii) location, entry, and patent under the mining laws; and	
(iii) disposition under all laws pertaining to mineral and geothermal leasing or mineral materials.	Without the language, the Owyhee River Wild and Scenic River would remain open to mining.
(B) WATER RIGHTS.—Nothing in this subsection or an amendment made by this subsection affects—	
(i) valid existing water rights; or	The proposed statutory language is unprecedented and <i>not</i> dangerous. It is merely a restatement of existing law and does not change anything to the better or the worse (politically, it is called “reassurance language”).
(ii) existing rights to access water from the river segment, if the access does not permanently impede the qualities for which the covered segment was designated.	The proposed statutory language is unprecedented and dangerous. Rights to access water (e.g. cross BLM land with livestock to access a water right) is not necessarily the same as a right to water (issued by the state). Temporary (which can be a very long time or even seasonally chronic) harm to river values would be sanctioned.
(C) WATER RESOURCES.—The Secretary shall authorize the continued use and maintenance of diversions and water infrastructure in or adjacent to the covered segments as of the date of enactment of this Act, in accordance with section 6400 of the Bureau of Land Management Manual (Wild and Scenic Rivers—Policy and Program Direction for Identification, Evaluation, Planning, and Management) (as in effect on the date of enactment of this Act).	The proposed statutory language is unprecedented and somewhat dangerous. This is not merely reassurance language but locks in such use to the current manual provision, which if ever improved by a favorable administration would not apply to the Owyhee River Wild and Scenic River.