

National Conservation Area Designation: When You Need a Shovel, Not a Backhoe

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I. INTRODUCTION

Designating areas for conservation purposes often causes conflict in communities with competing public and private interests, particularly when the federal government is involved. However, due to increasing population and a finite land base, conserving natural resources is important for this and future generations. Collaborative methods that encourage local input can help alleviate long-term problems, although the process itself may still be contentious. Communities may use collaborative resource management, a discourse-based process, to combine overall policy initiatives with local concerns, taking into account citizens' personal connections to land and water resources. The Lower Dolores Plan Working Group ("LDPWG") is a collaborative group proposing an alternative plan to protect the Lower Dolores River in Southwest Colorado as a National Conservation Area ("NCA") instead of a Wild and Scenic River ("WSR").¹ Surrounding communities fear that federally reserved water rights, often created in conjunction with WSR designation, could significantly harm existing water users. Federal reserved rights keep water in a stream for federal purposes such as instream flows, leaving less water available for private purposes like irrigation. The LDPWG and local communities, therefore, hope to avoid this conflict by working to pass federal legislation that would designate a less restrictive NCA, which could guard existing water rights while protecting environmental values.

Farmers and ranchers began settling in or near the Dolores River Valley in the late 1800s and have come to depend on the river's water for irrigation and domestic purposes.² Cities and towns grew around this agricultural economy and introduced competing water demands for municipal purposes. Additionally, fishermen and recreational boaters thrive on the natural values that the Dolores River provides. Increasing demands on the available water supply have resulted in low river flows, declining populations of native fish, and a rafting season contingent on "spill water," which only occurs in years when storage capacity is met

1. ALTERNATIVES TO WILD AND SCENIC RIVER DESIGNATION ON THE DOLORES RIVER: SUBMITTED BY THE DOLORES RIVER DIALOGUE TO THE CWCB (July 31, 2008), <http://ocs.fortlewis.edu/drd/handouts/Alternatives%20to%20Wild%20and%20Scenic%20River%20Designation%20on%20the%20Dolores%20River%20to%20CWCB%20Final%207-31-08.pdf> [hereinafter ALTERNATIVES].

2. ANN OLIVER ET. AL., *DOLORES RIVER – NONPOINT SOURCE POLLUTION WATERSHED PLAN: A PROJECT OF THE DOLORES RIVER DIALOGUE (DRD): APPENDIX 2: HISTORY OF DOLORES RIVER WATER USE, THE DOLORES PROJECT, THE RISE OF ENVIRONMENTAL CONSCIOUSNESS NATIONALLY AND LOCALLY, AND STAKEHOLDER COLLABORATION TO PROMOTE CONSERVATION OF LOWER DOLORES RIVER NATURAL RESOURCES* 3 (2013), <http://ocs.fortlewis.edu/drd/pdf/Dolores-Watershed-Plan-Appendix-2.pdf>.

and there is excess water to release.³ Furthermore, in the 1970s, the U.S. Forest Service (“USFS”) and U.S. Bureau of Land Management (“BLM”) determined that the Lower Dolores River was eligible for WSR suitability status, which concerned locals who have depended on this water for generations. WSR suitability, as explained further in Section II, can limit the uses and development of a designated river segment.

In order to improve downstream conditions for fish and riparian ecosystems within the context of available water supplies, the San Juan Citizens Alliance and Dolores Water Conservancy District (“DWCD”) developed a broad collaborative known as the Dolores River Dialogue (“DRD”) in 2014. Some of the impetus behind the collaborative was to counteract negative effects of McPhee Reservoir, which is managed by the U.S. Bureau of Reclamation (“BOR”) and the DWCD.⁴ Subsequently, in 2007, the San Juan Public Lands Draft Revised Resource Management Plan determined, as federal agencies had in the past, that 109 miles of the Lower Dolores River were “suitable” for WSR designation.⁵

Largely due to this suitability finding, in 2008 the Dolores Public Lands Office, admiring DRD’s collaborative process, suggested that the group take the lead in proposing alternatives to WSR suitability or designation that would protect the river’s ecological integrity while working within the current water rights scheme. Colorado operates under a prior appropriation system that gives preference to senior water rights, ensuring that those people who have put water to beneficial use for the longest amount of time continue to receive their full amount of water while it is available.⁶ Additionally, the DRD would make recommendations in anticipation of updating a then nineteen-year old Corridor Management Plan.⁷ The DRD accepted this responsibility and appointed a separate group (the LDPWG) to investigate various ideas, strategies and tools to protect ecological, recreational and water rights, and development values of the area. After exploring alternatives for over eighteen months, in March of 2010 the LDPWG arrived at a broad community consensus to pursue NCA designation and remove, through federal legislation, WSR suitability. The LDPWG then appointed an eleven-member Legislative Subcommittee (the “Subcommittee”) to

3. Chase Olivarius-Mcallister, *McPhee Puts a Plug in Dolores*, DURANGO HERALD (May 29, 2014), <http://www.durangoherald.com/article/20140528/NEWS06/140529542/McPhee-puts-a-plug-in-Dolores->.

4. *See id.*

5. LOWER DOLORES WORKING GROUP FACT SHEET: MEETING #1 (Dec. 15, 2008), <http://ocs.fortlewis.edu/drd/handouts/factsheetopeningMEET1.pdf>.

6. *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

7. ALTERNATIVES, *supra* note 1, at 2.

develop draft legislation that all communities and interests involved could approve. The draft bill was released in March of 2015 and is currently undergoing a thorough vetting process that spans four Colorado counties: Montezuma, Dolores, San Miguel, and Montrose.

Using the Lower Dolores as a case study, this Note compares WSRs with NCAs and discusses the benefits of using a collaborative process to protect competing ecological, economic, and community values in places where public and private interests are difficult to reconcile. Section II discusses NCA and WSR legislation, explains how NCAs can be more-flexible, and compares the amount of litigation generated in connection with NCAs and WSRs. Section III describes the DRD and the LDPWG and explores why the group is pursuing an NCA instead of a WSR. Section IV discusses collaborative resource management generally and details how the DRD has applied some of these techniques.

II. NATIONAL CONSERVATION AREAS ARE MORE FLEXIBLE AND SENSITIVE TO LOCAL CONCERNS THAN WILD AND SCENIC RIVERS.

NCAs provide a potentially collaborative regulatory tool that may be more politically feasible than WSRs or WSR suitability. For instance, NCAs can help in communities with conflicting interests, largely because they are created through individual acts rather than being subjected to more uniform rules like National Parks or Wilderness Areas. Both NCAs and WSRs are federal designations intended to protect areas with unique and remarkable natural resource values, but NCAs can be advantageous for two main reasons. First, NCA legislation is more-flexible than the Wild and Scenic Rivers Act (“WSRA”) because each NCA is created individually and can encompass restrictions and management approaches appropriate for the local community. Second, NCAs generate less litigation than WSRs, possibly because they consider more local concerns than WSRs. This section describes what makes NCAs more -flexible and less litigious than WSRs, beginning with a description of the WSRA.

A. *Wild and Scenic Rivers Act*

The WSRA, currently protecting 203 units encompassing 12,602.1 river miles, was enacted in 1968 to preserve pristine river segments, protect water quality, and “fulfill other vital national conservation

purposes.”⁸ Under the WSRA, a river segment is eligible to be included in the system if it is “free-flowing.”⁹ “Free-flowing” means the river exists or flows in a natural condition “without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway.”¹⁰ An eligible river segment must also have at least one “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values” to be suitable for inclusion.¹¹ When directed by Congress, the Secretary of Agriculture or Interior must conduct a study to determine whether a particular river segment is “suitable,” considering the segment’s characteristics, current land ownership and use, potential future land-use, and costs of administering the segment if included.¹² Once a river is found suitable under the WSRA, it is designated as wild, scenic, or recreational.¹³

The boundaries of the wild, scenic, or recreational river are determined by the Secretary of Agriculture or Interior and must not exceed 320 acres per mile of river.¹⁴ One of the four federal land management agencies, specifically the BLM, the USFS, the National Park Service, or the Fish and Wildlife Service (“FWS”), manages each WSR and must develop a comprehensive management plan to protect the outstandingly remarkable values (“ORVs”) for which it was created.¹⁵

In order to preserve ORVs, the WSRA includes land-use limitations and potential federal water rights, which generate some of the main concerns regarding WSR designation. Generally there are restrictions on water resources projects, so no dams, water conduits, reservoirs, powerhouses, or transmission lines may be constructed.¹⁶ These

8. 16 U.S.C. § 1271 (2012); SANDRA L. JOHNSON & LAURA B. COMAY, CONG. RESEARCH SERV., R42614, THE NATIONAL WILD AND SCENIC RIVERS SYSTEM: A BRIEF OVERVIEW 1 (2015).

9. 16 U.S.C. § 1273(b) (2012).

10. 16 U.S.C. § 1286(b) (2012).

11. 16 U.S.C. §§ 1271, 1273(b).

12. JOHNSON & COMAY, *supra* note 8, at 4; 16 U.S.C. §§ 1273, 1275(a) (2012).

13. “(1) Wild river areas--Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America. (2) Scenic river areas--Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads. (3) Recreational river areas--Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.” 16 U.S.C. § 1273(b).

14. JOHNSON & COMAY, *supra* note 8, at 4.

15. *Id.* at 5; Tracy Bateman Farrell, Annotation, *Construction and Application of Wild and Scenic Rivers Act (WSRA)* 16 U.S.C.A §§ 1271 to 1287, 71 A.L.R. Fed. 2d 373, § 15 (originally published 2013).

16. Farrell, *supra* note 15, at § 2.

restrictions, for example, can include a bridge that impedes the free-flowing nature of the river.¹⁷

Although WSR management is intended to protect ORVs, the managing agency should not limit other land uses unless the use “substantially interfere[s] with public use and enjoyment of these values.”¹⁸ For instance, grazing can only be prohibited if it negatively impacts an ORV.¹⁹ Furthermore, ORVs are not limited to fish, wildlife, scenery, or natural values, but can encompass recreational uses including motorized boats.²⁰ Although the WSRA prioritizes public use and enjoyment, other activities that are frequently permitted in NCAs (like hunting) are also allowed along WSRs if they do not negatively impact ORVs. While WSR management can allow private activities, NCA plans are still more flexible because they are not necessarily constrained by designated ORVs and can integrate local concerns and uses into the enabling legislation.

In addition to land-use restrictions, another concern with the WSRA is that it grants the federal government power to condemn private property within the designated area. However, this power is rarely used and is subject to several limitations. For example, even when the government seeks to condemn private property in river corridors, it may not do so in cases where the federal government already owns at least fifty percent of the corridor.²¹ In these areas, the government may acquire easements as needed to maintain scenic values, clear title, and allow public access to the river.²² Moreover, when private property is condemned at the federal level, the owners have the right to occupy the condemned property for their lifetime.²³ Despite these limitations, the power to condemn private property worries local landowners, and most NCAs (as explained below) do not grant this power to the federal government.

The WSRA also creates a federal water right, which cannot exceed the quantity necessary for the purposes of the Act.²⁴ However, the federal government does not always claim a water right and will often secure rights through the state priority system or by purchasing water from willing sellers.²⁵ Furthermore, a federal water right would have a priority

17. *Id.* at § 22.

18. JOHNSON & COMAY, *supra* note 8, at 5.

19. Farrell, *supra* note 15, at § 54–56.

20. *Id.* at § 46.

21. JOHNSON & COMAY, *supra* note 8, at 4; 16 U.S.C. § 1277(b) (2012).

22. 16 U.S.C. § 1277 (b).

23. 16 U.S.C. § 1277 (g).

24. CYNTHIA BROUGHNER, CONG. RESEARCH SERV., RL30809, THE WILD AND SCENIC RIVERS ACT AND FEDERAL WATER RIGHTS 5 (2009).

25. *Id.* at 10.

date as of the date of reservation so would actually be junior to all existing rights.²⁶ Many of the concerns with the WSRA are somewhat unfounded, as the government tends not to exercise its primary powers of condemnation and reserving federal water rights.²⁷ However, as explored below, the Act still causes angst among community members and creates litigation.

B. National Conservation Areas

BLM administers sixteen NCAs and five other federally protected areas with similar designations.²⁸ NCAs currently encompass over four million acres of protected land.²⁹ Although all of the statutes designating the NCAs have similar land-use restrictions, each can be tailored to local conditions.³⁰ Additionally, the agency must create a management plan for each NCA, though the deadline for the completion of a plan after the NCA is created by congressional action varies.

Carefully drafted NCAs can protect environmental values while honoring existing private rights. Because Congress designates NCAs on an ad hoc basis, NCA plans vary widely, making it difficult to

26. *Id.* at 4.

27. *Id.* at 6.

28. BUREAU OF LAND MANAGEMENT, NATIONAL CONSERVATION AREAS AND SIMILARLY DESIGNATED LANDS,

http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/National_Conservation_Areas.html (last updated Oct. 30, 2014) [hereinafter BLM NATIONAL CONSERVATION AREAS].

29. *Id.*

30. 16 U.S.C. § 460ppp-2 (2012); 16 U.S.C. § 460www; 16 U.S.C. § 460xxx; Dominguez-Escalante National Conservation Area, 16 U.S.C. § 460zzz (2012); Fort Stanton-Snowy River Cave National Conservation Area, 16 U.S.C. § 460yyy (2012); Clark County Conservation of Public Land and Natural Resources Act of 2002, 16 U.S.C. § 460qqq (2012); An Act to Establish the Las Cienegas National Conservation Area in the State of Arizona, 16 U.S.C. § 460ooo (2012); Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000, 16 U.S.C. § 460mmm(2012); Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, 16 U.S.C. § 410fff (2012); Snake River Birds of Prey National Conservation Area, 16 U.S.C. § 460iii(2012); Arizona Desert Wilderness Act of 1990, 16 U.S.C. § 460ddd (2012); Red Rock Canyon National Conservation Area Establishment Act of 1990, 16 U.S.C. § 460ccc (2012); Arizona-Idaho Conservation Act of 1988, 16 U.S.C. § 460xx (2012); Act of Dec. 31, 1987, 16 U.S.C. § 460uu (2012); Alaska National Interest Lands Conservation Act, 16 U.S.C. § 460mm (2012); King Range National Conservation Area, 16 U.S.C. § 460y (1970); BUREAU OF LAND MANAGEMENT, FORT STANTON-SNOWY RIVER CAVE NATIONAL CONSERVATION AREA PROPOSED RESOURCE MANAGEMENT PLAN AMENDMENT AND ENVIRONMENTAL ASSESSMENT (Aug. 23, 2013), http://www.blm.gov/style/medialib/blm/nm/field_offices/roswell/rfo_planning/fort_stanton_snowy.Par.83126.File.dat/NCA%20Plan%20FINAL%208.23.13_full_bookmarked.pdf [hereinafter BLM, RESOURCE MANAGEMENT PLAN].

characterize the prototypical NCA.³¹ However, according to the BLM, all NCAs are created with the broad purpose to preserve public lands for future generations to use and enjoy.³² Some scholars believe that NCAs are created to avoid transferring land to a more conservation oriented agency than the BLM, or because NCAs are more politically palatable than, for instance, full designation as a WSR, a Wilderness Area, or a National Park.³³ Avoiding Wilderness or National Park status allows for multiple uses but can also reduce protections that other designations would provide. This cost might be outweighed by the benefit of more local support if the drafters of the NCA legislation consider public input.

Some argue that NCAs would more effectively protect public values if they included Wilderness and WSRs within them and prohibited activities like grazing entirely.³⁴ However, this might defeat the purpose of the more flexible and locally tailored option that NCAs offer. Depending on the particular circumstances, NCAs and WSRs can either restrict or permit certain land uses. However, WSRs are limited in what they can permit based on whether the use negatively impacts ORVs. For instance, common activities in NCAs include grazing, hunting, and the use of motor vehicles on designated roads.³⁵

In addition to the common uses listed above, some NCAs permit land uses that may not be allowed on WSRs, while others have specific restrictions.³⁶ For supplementary protection, six NCAs include Wilderness Areas within them, which are subject to more-restrictive

31. William G. Myers III & Jennifer D. Hill, *Along the Trammled Road to Wilderness Policy on Federal Lands*, 56 ROCKY MT. MIN. L. INST. 15, 15 (2010).

32. BLM NATIONAL CONSERVATION AREAS *supra* note 28.

33. Andy Kerr & Mark Salvo, *Bureau of Land Management National Conservation Areas: Legitimate Conservation or Satan's Spawn?* 20 UCLA J. ENVTL. L. & POL'Y 67, 67-68 (2001).

34. *Id.* at 70.

35. Eleven NCAs allow grazing (16 U.S.C. § 460www; 16 U.S.C. § 460xxx; 16 U.S.C. § 460zzz; 16 U.S.C. § 460ppp-2; 16 U.S.C. § 460ooo; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; 16 U.S.C. § 460ii; 16 U.S.C. § 460xx; 16 U.S.C. § 460uu; 16 U.S.C. § 460y). One NCA specifically prohibits grazing (BLM, RESOURCE MANAGEMENT PLAN, *supra* note 30.). Thirteen NCAs allow motor vehicles on designated roads (*Id.*; 16 U.S.C. § 460xxx; 16 U.S.C. § 460www; 16 U.S.C. § 460zzz; 16 U.S.C. § 460yyy; 16 U.S.C. § 460qqq; 16 U.S.C. § 460ppp-2; 16 U.S.C. § 460ooo; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; § 201, 16 U.S.C. § 460ddd; 16 U.S.C. § 460ccc; § 101-107, 16 U.S.C. § 460xx; 16 U.S.C. § 460uu). Seven NCAs allow hunting (BLM, RESOURCE MANAGEMENT PLAN, *supra* note 30; 16 U.S.C. § 460ooo; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; 16 U.S.C. § 460ccc; 16 U.S.C. § 460uu; 16 U.S.C. § 460y). Two NCAs leave the hunting issue to the states (16 U.S.C. § 460qqq; 16 U.S.C. § 460ppp-2).

36. 16 U.S.C. § 460ooo (allowing continued military use); 16 U.S.C. § 460ii (allowing continued military use); 16 U.S.C. § 460y (allowing timber harvesting); BLM, RESOURCE MANAGEMENT PLAN, *supra* note 30 (requiring special permits for recreation); 16 U.S.C. § 460uu (prohibiting collection of green or dead wood).

regulations than NCAs generally.³⁷ For instance, under the Wilderness Act, no permanent roads or installations can be constructed in these areas.³⁸ By designating Wilderness Areas within NCAs, federal agencies can balance private interests while at the same time protecting the most sensitive ecological areas.³⁹

Because WSRs reserve an often-unexercised federal water right, this designation frequently generates opposition in places where all of the water is appropriated. Like land-use restrictions, federal reserved water rights are treated differently in the individual NCAs depending on the particular circumstances.⁴⁰ For example, two of the four NCAs that explicitly reserve water rights were created to protect riparian areas. Conversely, in Colorado, where water is viewed as an extremely scarce and valuable resource, all three NCAs specify that no federal water rights are reserved.⁴¹

Unlike WSRs, most NCAs do not allow involuntary acquisition of private land. Six NCAs, including all three NCAs in Colorado, specifically declare that private land can only be acquired with the owner's consent, as opposed to using eminent domain.⁴² Through the voluntary acquisition of private land, NCAs can ease development pressure and also provide a buffer zone for National Parks and Monuments.⁴³ As an example, private landowners can sell their land for

37. 16 U.S.C. § 460zzz; 16 U.S.C. § 460ppp-2; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; 16 U.S.C. § 460uu; 16 U.S.C. § 460y.

38. 16 U.S.C. § 1133(c) (2012).

39. See Kerr & Salvo, *supra* note 33 at 70.

40. Four NCAs reserve enough water for the purposes of the Act (16 U.S.C. § 460ddd; 16 U.S.C. § 460ccc; §§ 101-107, 16 U.S.C. § 460xx; 16 U.S.C. § 460uu); seven do not discuss water rights (16 U.S.C. § 460xxx; 16 U.S.C. § 460www; §§ 601-607, 16 U.S.C. § 460qqq; 16 U.S.C. § 460ppp-2; 16 U.S.C. § 460ooo; §§ 401-404, 16 U.S.C. § 460mm; 16 U.S.C. § 460y), and five state that no water rights are created (BLM, RESOURCE MANAGEMENT PLAN, *supra* note 30; 16 U.S.C. § 460zzz; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; 16 U.S.C. § 460ii).

41. Black Canyon of the Gunnison National Park and Gunnison Gorge National Conservation Area Act of 1999, 16 U.S.C. § 410fff-2 (2012); Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness Act of 2000, 16 U.S.C. § 460mmm (2012); Dominguez-Escalante National Conservation Area, 16 U.S.C. § 460zzz-1 (2012).

42. 16 U.S.C. § 460zzz; 16 U.S.C. § 460ooo; 16 U.S.C. § 460mmm; 16 U.S.C. § 410fff; § 201, 16 U.S.C. § 460ddd; §§ 101-107, 16 U.S.C. § 460xx; two NCAs state generally that the Secretary can acquire private land, but do not expand on whether this acquisition requires consent or not (16 U.S.C. § 460ii; 16 U.S.C. § 460uu); two NCAs are friendlier to resource protection, and specify that land can be acquired without consent if the use on the private property is incompatible with the purposes of the conservation area (16 U.S.C. § 460ccc; 16 U.S.C. § 460y); the remaining six are silent 16 U.S.C. § 460zzz; 16 U.S.C. § 460xxx; 16 U.S.C. § 460www; 16 U.S.C. § 460qqq; 16 U.S.C. § 460ppp-2; 16 U.S.C. § 460mm).

43. H.R. REP. NO. 108-344 (2003); 16 U.S.C. § 410fff.

an NCA adjacent to a park but negotiate to maintain grazing rights or other uses that are compatible with the values of the area.⁴⁴ This strategy protects landowners' economic interests while avoiding increased development.

C. National Conservation Areas as a Collaborative Process

Communities can use a collaborative process to successfully protect valuable resources while respecting private interests, as demonstrated by the establishment of the Dominguez-Escalante NCA in 2009.⁴⁵ This 209,610-acre NCA was designated to protect geological, cultural, scientific, recreational, historical, wilderness, and wildlife resources.⁴⁶ The statute also specifies that one purpose is to protect the water resources of the area in order to support aquatic and terrestrial species.⁴⁷ Then-Secretary of the Interior Ken Salazar called the Dominguez-Escalante NCA "one of the best examples of grassroots collaboration and local stewardship in our nation" because of the use of a public process, transparent procedure, and a flexible management approach considering the various interests.⁴⁸ Participants included local government, federal agencies, the boating community, ranchers, and other recreational and environmental groups.⁴⁹ The interested parties ultimately supported the designation, although some still expressed concerns such as increased population pressure, fear about limits on motorized travel and grazing, aversions to government regulations, and fear about restrictions on economic uses such as mining. In the end, the perceived need to increase recreational and economic opportunities, in addition to the need to protect wildlife, won most parties over.⁵⁰

A group of local stakeholders also considered proposals to designate eligible stream segments in the Dominguez-Escalante NCA as WSRs, illustrating the perception that the WSRA is heavy-handed government intrusion.⁵¹ The Gunnison Basin Wild and Scenic Rivers Stakeholder

44. H.R. REP. NO. 108-344; 42 U.S.C. § 410fff.

45. 16 U.S.C. § 460zzz-1.

46. 16 U.S.C. § 460zzz-1(b).

47. 16 U.S.C. § 460zzz-1(b)(2).

48. Press Release, DEP'T OF THE INTERIOR, Secretary Salazar Dedicates Dominguez-Escalante National Conservation Area, Emphasizes Economic Benefits of BLM's National Landscape Conservation System (Aug. 12, 2009) (2009 WL 2456846).

49. MESA STATE C. NATURAL RES. & LAND POLICY INST., DOMINGUEZ-ESCALANTE NATIONAL CONSERVATION AREA PROPOSAL 4 (Aug. 2007), http://www.blm.gov/style/medialib/blm/co/field_offices/denca/pictures_new/rmp/fact_sheets_and_other.Par.26104.File.dat/Dominquez-Escalante%20Final%20report_NRLPI.pdf.

50. *Id.* at 2.

51. See GUNNISON BASIN WILD & SCENIC RIVERS STAKEHOLDER GRP., FINAL LETTER

Group consisted of landowners, ranchers, recreationalists, water managers, local governments, the state of Colorado, and other interest groups.⁵² Citing concerns similar to those of the LDPWG, such as protecting private water rights, the group sent a letter to the BLM recommending that all segments be found unsuitable for WSR designation.⁵³ However, a group of environmental organizations that participated in the stakeholder process sent another letter to the BLM indicating that some participants refused to even consider suitability status.⁵⁴ These groups recommended that three of the seven eligible segments be found suitable for WSR status.⁵⁵ Apparently some participants felt that their voices were not heard, and the group failed to reach a consensus that satisfied all interests. This unresolved conflict illustrates the importance of fostering open communication and understanding in order to reach consensus through a collaborative process. Ultimately, the Dominguez-Escalante NCA Advisory Council recommended less politically contentious protections for the river segments than WSR designation, much like the LDPWG.

D. Potential Disadvantages of National Conservation Areas

The BLM administers NCAs, which can be a problem because BLM lands are “severely under-resourced.”⁵⁶ For instance, in 2007 the whole National Landscape Conservation System including NCAs, WSRs, and Wilderness only received \$2 per acre and assigned one ranger for every 200,000 acres of land.⁵⁷ As a result, BLM lands are

OF RECOMMENDATION TO BLM (April 29, 2011), http://www.blm.gov/style/medialib/blm/co/field_offices/denca/D-E_NCA_RMP/wildandscenicstakeholders.Par.76986.File.dat/GWSR-NCAletterFINALDRAFTSigned.pdf.

52. *Id.* at 1.

53. *Id.* at 5–6.

54. The ten organizations are: Audubon Colorado, Center for Native Ecosystems, Colorado Environmental Coalition, Colorado Mountain Club, Colorado Wild, San Juan Citizens Alliance, Sheep Mountain Alliance, The Wilderness Society, Western Colorado Congress, and the NWWERC/NFRIA/WSERC Conservation Center. Letter from Steve Smith, Assistant Reg'l Dir., the Wilderness Soc'y, to Barbara Sharrow, Manager Uncompahgre Field Office, Bureau of Land Mgmt, (Feb. 22, 2011), http://www.blm.gov/style/medialib/blm/co/field_offices/uncompahgre_field/rmp/wsr_docs.Par.86105.File.dat/2011-0222%20Gunnison%20Basin%20Suitability%20Proponents%20Letter.pdf.

55. *Id.* at 7.

56. Craig L. Shafer, *The Unspoken Option to Help Safeguard America's National Parks: An Examination of Expanding U.S. National Park Boundaries by Annexing Adjacent Federal Lands*, 35 COLUM. J. ENVTL. L. 57, 102 (2010).

57. *Id.*

plagued by issues like vandalism and the impacts of off-road vehicles.⁵⁸ As noted above, because NCAs are generally more permissive than other federal designations, they may not protect public values as well as a WSR.⁵⁹ For instance, water shortages can occur in areas with population growth and increased competition for water, such as in the San Pedro Riparian NCA in Arizona.⁶⁰ Roads and fences constructed for multiple uses (like motorized vehicles) also disrupt wildlife movement and fragment wildlife corridors.⁶¹

Another potential issue with NCAs is that passage of such legislation requires congressional action, which is hard to achieve in the current partisan atmosphere. Recently, Senators Udall and Bennett of Colorado attempted to push a bill through Congress that would have designated a National Monument and Wilderness Area in Browns Canyon in Colorado.⁶² Despite broad local support and provisions protecting existing grazing and hunting rights (similar to many NCA permissions),⁶³ the bill failed to pass through a gridlocked Congress. In this case, a top-down approach rose to the challenge of protecting the area as President Obama used his executive authority to declare the same location a National Monument in 2015.⁶⁴ Executive authority, however, cannot be counted upon to turn all proposed NCAs stagnating in congressional gridlock to national monuments.

E. Potential Advantages of National Conservation Areas

Despite the potential problems, site-specific legislation like NCAs can be useful for several reasons. First, it “provides both Congress and the agencies an opportunity to experiment with new ecological standards in discrete areas without risking the potentially more disruptive and

58. *Id.*; THE SONORAN INSTITUTE, WESTERN LANDSCAPES IN THE CROSSFIRE: URBAN GROWTH AND THE NATIONAL LANDSCAPE CONSERVATION SYSTEM 19 (June 2009), <http://www.sonoraninstitute.org/nlcs-conservation-system/389-nlcs-profiles.html>.

59. Kerr & Salvo, *supra* note 33, at 69–70.

60. THE SONORAN INSTITUTE, *supra* note 58, at 19.

61. *Id.* at 18–19.

62. Browns Canyon National Monument and Wilderness Act of 2013, S. 1794 113th Cong. (2013).

63. See Krista Langlois, *Could the Fight for Colorado's Browns Canyon Finally Be Over?*, HIGH COUNTRY NEWS (Dec. 5, 2013), <http://www.hcn.org/blogs/goat/could-the-fight-for-browns-canyon-finally-be-over>; Brittany Messinger, *Udall Introduces Browns Canyon National Monument and Wilderness Act*, CONSERVATION LANDS FOUNDATION (July 24, 2014), <http://conservationlands.org/udall-introduces-browns-canyon-national-monument-and-wilderness-act>.

64. Mark K. Matthews, *Obama to Declare Browns Canyon in Colorado a National Monument*, THE DENVER POST (Feb. 18, 2015), http://www.denverpost.com/politics/ci_27547814/obama-declare-browns-canyon-colorado-national-monument.

controversial effects of systemic reforms.”⁶⁵ Second, NCAs can be more politically palatable, and should be considered when communities lack the appetite for other, more-restrictive designations.⁶⁶ Third, NCAs can actually be made more restrictive than even Wilderness Areas by prohibiting certain activities when necessary.⁶⁷ These potential advantages, particularly the second, may contribute to the lack of NCA litigation.

F. National Conservation Areas generate less litigation than Wild and Scenic Rivers.

WSRs have generated much more litigation than NCAs, even though both designations were created around the same time. The WSRA was passed in 1968, while the first NCA, King Range NCA, was designated by Congress in 1970 in California. An initial Westlaw search returned forty three cases involving “National Conservation Area” between 1983 and 2015. However, only twelve cases actually involved controversies about restrictions in the NCA legislation. An initial Westlaw search for “Wild and Scenic River” returned 476 cases, with 170 cases in just the last ten years (December 21, 2005 to December 21, 2015). Even considering the greater number of WSRs, this vast difference in the number of cases indicates that WSRs are more-controversial and produce more litigation-related expenses than NCAs.

I. National Conservation Area Litigation

NCAs generate less litigation than WSRs, possibly because their creation process is often bottom-up and not top-down. They incorporate more public input and therefore better reflect community values than WSRs. The twelve cases involving NCAs actually reflect even fewer controversies, as three involved appeals of the same controversy,⁶⁸ and two were appeals of another matter.⁶⁹ In the *Masto* case, the courts found that a state law limiting development in an area adjacent to the Red Rock

65. Robert B. Keiter, *Ecological Concepts, Legal Standards, and Public Land Law: An Analysis and Assessment*, 44 NAT. RESOURCES J. 943, 958–59 (2004).

66. Kerr & Salvo, *supra* note 33, at 69.

67. John D. Leshy, *Legal Wilderness: Its Past and Some Speculations on Its Future*, 44 Envtl. L. 549 (2014); Act of Dec. 31, 1987, 16 U.S.C. § 460uu (2012) (prohibiting collection of green or dead wood).

68. Gypsum Res. LLC v. Masto, 672 F. Supp. 2d 1127 (D. Nev. 2009); Gypsum Res. LLC v. Masto, 671 F.3d 834 (9th Cir. 2011); Masto v. Gypsum Res. LLC, 294 P.3d 404 (Nev. 2013).

69. Ctr. for Biological Diversity v. U.S. Dep’t. of Hous. and Urban Dev., 541 F. Supp.2d 1091 (D. Ariz. 2008); Ctr. for Biological Diversity v. U.S. Dep’t. of Hous. and Urban Dev., No. 08-16400, 2009 WL 4912592 (9th Cir. Nov. 25, 2009).

Canyon NCA was unconstitutional, as zoning decisions should be in the purview of the county. In the *United States Department of Housing and Urban Development* controversy, an environmental group claimed that groundwater pumping was harming endangered species in the San Pedro Riparian NCA. Furthermore, the group alleged that Housing and Urban Development, Small Business Association, and Department of Veterans Affairs loan guarantees counted as agency action under the Endangered Species Act (“ESA”).

Generally, cases involving NCAs revolve around activities that are allowed in the designated areas, and courts have deferred to agency decisions.⁷⁰ However, in *Center for Biological Diversity v. Salazar*, the court declined to defer to the agency, stating that the FWS’s biological opinion regarding the San Pedro NCA violated the ESA, as did the Army’s reliance on it.⁷¹

2. *Wild and Scenic River Litigation*

Cases involving WSRs, like NCAs, largely stem from objections to agency actions in designated areas, either because agencies are regarded as too restrictive or too lenient to protect a river’s ORVs. One popular contention is that comprehensive management plans, which are required by the WSR Act, are not issued fast enough or are too limiting. For instance, some cases involved the requirement that the government agency create a comprehensive management plan in managing the WSR, and courts seem willing to issue injunctions against agency actions until management plans are adopted.⁷² However, in other cases, courts showed deference to agency management actions, including managing WSRs for multiple uses.⁷³ As an example, some designated WSR lands even allow limited logging.⁷⁴

Resource management plans created and amended by federal agencies seem to provide a ripe area for litigation revolving around WSRs. For instance, Western Watersheds Project (WWP), an environmental group, sued the BLM on the grounds that its revised management plan violated the ESA and the National Environmental Policy Act (“NEPA”).⁷⁵ WWP claimed that the BLM failed to properly

70. *See, e.g.,* Wilderness Watch, Inc. v. Bureau of Land Mgmt., 799 F. Supp. 2d 1172 (D. Nev. 2011); Oberdorfer v. Bureau of Land Mgmt., No. 07-16840, 2009 WL 2573774 (9th Cir. Aug. 21, 2009).

71. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987 (D. Ariz. 2011).

72. *See, e.g.,* Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024 (9th Cir. 2008).

73. *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988 (9th Cir. 2013).

74. *See, e.g.,* Newton Cnty. Wildlife Ass’n v. Rogers, 131 F.3d 803, 808 (8th Cir. 1998).

75. *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113, 1113 (D.

describe the baseline conditions of two WSRs located in its management area in its Environmental Assessment.⁷⁶ The court sided with BLM.⁷⁷

Generally, as long as agencies protect the appropriate ORVs along WSRs, courts seem to uphold agency actions. For example, agencies may allow bridges to be built over recreational segments of rivers if the bridges do not interfere with the ORVs for which the river was designated.⁷⁸ Agencies may also allow transmission lines if they do not substantially interfere with ORVs.⁷⁹ Other controversies include agency decisions to close roads for off-highway vehicles⁸⁰ and enact new floating restrictions.⁸¹ Flexibility in decisions like siting transmission lines is beneficial because it allows for multiple uses, however, NCAs also provide for this flexibility and are less controversial.

Different ORVs might compete with each other, even in one designated area, requiring courts to balance incompatible interests. In *American Whitewater*, the court upheld floating restrictions even though recreation was a designated ORV, reasoning that the agency's Environmental Assessment supported its regulations. The agency determined that floating needed to be limited in order to protect other recreational uses as well as non-recreational ORVs and private property rights adjacent to the river.⁸² The WSRA also leaves room for states to continue managing lands within their boundaries, which has generated some controversy. For instance, the First Circuit held that the WSRA does not trump state law regarding land adjacent to a WSR.⁸³ This outcome is similar to lands surrounding NCAs. In *Masto*, the courts held that zoning decisions on lands adjacent to an NCA remain under local control.⁸⁴

G. *Reasons for Controversy Related to the Wild and Scenic Rivers Act*

Although the WSRA has generated more litigation than NCA legislation, in reality the protections are often quite similar. Examination of the text and implementation of the WSRA offers little insight into the

Nev. 2008).

76. *Id.* at 1127.

77. *Id.* at 1141.

78. *Rivers Unlimited v. U.S. Dep't. of Transp.*, 533 F. Supp. 2d 1 (D.D.C. 2008); *but see* *Sierra Club N. Star Chapter v. LaHood*, 693 F. Supp. 2d 958 (D. Minn. 2010).

79. *Nat'l. Parks Conservation Ass'n. v. Jewell*, 965 F. Supp. 2d 67 (D.D.C. 2013).

80. *Williams v. Bankert*, No. 2:05CV503DAK (D. Utah Oct. 18, 2007).

81. *Am. Whitewater v. Tidwell*, 770 F.3d 1108 (4th Cir. 2014).

82. *Id.*

83. *Fitzgerald v. Harris*, 549 F.3d 46, 57 (1st Cir. 2008).

84. *Masto v. Gypsum Res. LLC*, 294 P.3d 404, 411 (Nev. 2013).

emergence of so much controversy. For instance, the WSRA specifies that “nothing in this section shall be construed to abrogate any existing rights, privileges, or contracts affecting federal lands held by any private party without the consent of said party.”⁸⁵ While federal agencies are allowed to condemn property within the adjacent land area, they are limited to one hundred acres per mile of river on both sides, must pay fair market value, and the owner retains the right of use and occupancy if such use complies with the purposes of WSR designation.⁸⁶ Like private property rights, the WSRA also protects states’ rights. States retain jurisdiction over fish and wildlife, including hunting and fishing along the WSR as long as the river is not in a national park or national monument.⁸⁷ Furthermore, existing state rights to access navigable streams are not affected by WSR designation.⁸⁸

Some regulations are strict within the WSRA but are not too different from the protections within most NCAs. For instance, no water resources projects are allowed on WSRs but are allowed above or below the designated reaches as long as they will not adversely affect the values for which the river was designated.⁸⁹ Moreover, lands within the designated boundary are withdrawn from entry, sale, or other disposition, including mining.⁹⁰ However, this restriction is subject to valid existing rights, including mining rights, which protects some private property interests.⁹¹ As discussed above, most NCAs carry similar restrictions to WSRs. For example, while only four specifically reserve federal water rights for the purposes of the NCA, it seems likely that the others could claim federal reserved rights for the proper purposes.⁹² Additionally, even in WSRs, most water rights are acquired under state law, not condemned as federal reserved rights.⁹³

Some of the disagreements created by WSRs could easily occur in NCAs as well. For instance, in *Western Watersheds Project v. Bureau of Land Management*, an environmental group claimed that the BLM violated various environmental laws in amending its management plan.⁹⁴ Similar groups could easily sue federal agencies under the same laws for management plans in NCAs. Perhaps there is less litigation in NCAs because local stakeholders, including environmental groups, have more

85. 16 U.S.C. § 1283(b) (2012).

86. 16 U.S.C. §§ 1277(a), (g).

87. 16 U.S.C. § 1284(a) (2012).

88. 16 U.S.C. § 1284(f).

89. 16 U.S.C. § 1278(a) (2012).

90. 16 U.S.C. §§ 1279, 1280 (2012).

91. *Id.*

92. *See, e.g.,* Cappaert v. United States, 426 U.S. 128 (1976).

93. BROUGHER, *supra* note 24, at 8.

94. *W. Watersheds Project v. Bureau of Land Mgmt.*, 552 F. Supp. 2d 1113 (2008).

voice in the process of creating the protected area and determining appropriate management actions. Therefore, using a collaborative process when designating a protected area might prevent litigation and satisfy diverse local interests, as demonstrated by the DRD in its pursuit of a National Conservation Area.

III. THE DOLORES RIVER DIALOGUE IS USING A COLLABORATIVE PROCESS TO CREATE A NATIONAL CONSERVATION AREA, PROTECTING PUBLIC AND PRIVATE INTERESTS.

The Subcommittee is pursuing National Conservation Area legislation in its community, as opposed to accepting a federally mandated WSR designation. This initiative demonstrates how a collaborative land management approach potentially satisfies more interests and prevents future conflicts that top-down approaches often ignite. One catalyst of the LDPWG's efforts was the Dolores River Project (the "Project"), or McPhee Dam, which many believe created problems affecting multiple stakeholders along the river. Because these problems (such as negatively impacting native fish) are not unique to this area, the DRD is a good illustration of a story that is told in other communities with competing environmental, economic, and social values.⁹⁵

A. *History of the Dolores River Project*

In the late 1800s, farmers and ranchers settled in the Montezuma Valley near the Dolores River where there was ample arable land but an unreliable water supply.⁹⁶ Early water entrepreneurs constructed a three-mile long flume to carry water from the Dolores River to supply these farmers and the growing city of Cortez. This water supply formed the basis for the Montezuma Valley Irrigation Company ("MVIC"), which now owns some of the oldest water rights on the Dolores River.⁹⁷ In the 1960s, MVIC's diversions left the river dry starting in June, and failed to provide enough water for late season irrigation.⁹⁸ Due to these water

95. See, e.g., Nathan Matthews, *Rewatering the San Joaquin River: A Summary of the Friant Dam Litigation*, 34 *ECOLOGY L. Q.* 1109, 1113 (2007).

96. OLIVER ET. AL., *supra* note 2.

97. *Id.*

98. *Id.* at 19.

shortages, in 1961, the DWCD was formed in order to contract with the Bureau of Reclamation (“BOR”) to construct the Project.⁹⁹

Recognizing the need to capture spring runoff for farms, provide consistent water to towns, and satisfy longstanding federal reserved water rights for the Ute Mountain Ute Tribe (the “Tribe”), the BOR began constructing the Project.¹⁰⁰ In addition to providing water to MVIC, the City of Cortez, and the Tribe, the Project also delivers water for fish.¹⁰¹ The Project’s success is illustrated by a number of examples, including doubling irrigated acreage, adding 14 million dollars in economic revenue, and eliminating the need for 1,000 Ute Mountain Ute tribal members to supply water by hand.¹⁰² Additionally, the Project supplied funding for an archeological investigation and recovery of Anasazi artifacts.¹⁰³

Whereas many BOR projects focus specifically on local irrigation and municipal water needs, the Project is unique in its focus on tribal and fishery issues. However, the benefits and good intentions of the Project have come at a cost.¹⁰⁴ Despite a fishery release that was incorporated into the design plans, the Dam has harmed the downstream trout fishery. The reservoir’s release of unnaturally cold water and non-native fish species continue to negatively impact native fish downstream.¹⁰⁵ The Dam also negatively impacted commercial boating on the Lower Dolores River, and mitigation efforts have been ineffective, especially in low-water years.¹⁰⁶

Although the Project changed the character of the Dolores River, the river was found suitable for WSR status in the 1970s, which created much uncertainty and concerns among various interest groups. Some stakeholders are worried about the federal reserved right that accompanies WSR designation because all of the water in the system is appropriated.¹⁰⁷ Another concern is that the WSR includes one-quarter mile from the center of the stream, and some individuals have private property rights (land, water, or minerals) that they perceive could be altered by the designation. For example, someone with the right to mine gravel might be apprehensive about having to navigate extra red tape and

99. *Id.* at 21.

100. *Id.* at 10.

101. *Id.* at 22.

102. *Id.*

103. *Id.* at 25.

104. *Id.*

105. *Id.* at 26.

106. *Id.* at 26–27.

107. Telephone Interview with Marsha Porter-Norton, Facilitator, Dolores River Dialogue (Oct. 1, 2014).

an extensive review process to exercise that right.¹⁰⁸ Many stakeholders have also expressed a general dissatisfaction with the federal government and top-down land management.¹⁰⁹ However, other stakeholders, including conservation groups, would prefer a federal tool because they perceive federal designations as having more longevity.¹¹⁰

B. *The Dolores River Dialogue's Role*

Stakeholders involved in the DRD, the LDPWG, and its Subcommittee represent a variety of interests, some compatible but others competing. Key members of the collective efforts include the major water rights holders such as the DWCD, the MVIC, and the Tribe.¹¹¹ A smaller amount of water is allocated for municipal use, so cities are also among the participants. Additionally, a contingent of conservation groups represent the interests of native fish populations.¹¹² As discussed above, rafters and boaters are concerned about water flows, as the Lower Dolores River no longer supports guaranteed healthy recreational boating opportunities. Currently, the main priority of the project is to fill the reservoir, reflecting a “fill then spill” policy that leaves too little water in the system for floating.¹¹³ Other stakeholders include landowners, people with grazing rights, and government agencies (including four different counties, Colorado Parks and Wildlife, BLM, and USFS) each with different priorities and interests.¹¹⁴

Ranchers and recreational boaters in Colorado are traditionally at odds, as they frequently take adverse positions over the right to float down a stream flowing through private property.¹¹⁵ For instance, one rancher on the Dolores River erected barbed-wire fences for his cattle, which nearly ensnared several rafters.¹¹⁶ However, that rancher and the Dolores River Boating Advocates came to a collaborative solution. In July 2014, a group of volunteers and the rancher built a boater-friendly fence across the river that keeps cattle out but allows boaters through.¹¹⁷ The DRD, LDPWG, and Subcommittee embrace creative solutions like

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See, e.g.*, DOLORES RIVER DIALOGUE, CORE SCIENCE REPORT FOR THE DOLORES RIVER DIALOGUE (2005), <http://ocs.fortlewis.edu/drd/pdf/coreScienceReport.pdf>.

113. Telephone Interview with Marsha Porter-Norton, *supra* note 107; Olivarius-Mcallister, *supra* note 3.

114. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

115. *See, e.g.*, *People v. Emmert*, 597 P.2d 1025 (Colo. 1979).

116. Shannon Livick, *Rafter-Rancher Conflict Makes for Troubled Waters*, FOUR CORNERS FREE PRESS (Nov. 1, 2013), <http://fourcornersfreepress.com/?p=1738>.

117. *Id.*

this to satisfy conflicting interests on the river, and the group's existence facilitates dialogue among different stakeholders.

The DRD created the LDPWG in order to study the issues in the area and report back potential solutions to the broader group and community. The group held meetings attended by forty-five to fifty people, and despite the large number of attendees, the meetings were not contentious as members worked to reach a mutually acceptable solution.¹¹⁸ Group members expressed strong and varied opinions but were also willing to listen and work together.¹¹⁹ This collective effort included a neutral facilitator, which may have aided the process. The group looked at competing issues including rafting, archeological sites, WSR suitability, and private land rights, and chose to pursue the option of designating an NCA.¹²⁰

Following the LDPWG's recommendation, the group selected pursuing special legislation, an NCA, as preferable to supporting WSR designation for the Lower Dolores River.¹²¹ The LDPWG reasoned that an NCA would provide certainty regarding land and water rights that do not exist now. It would also protect identified ORVs, private property rights, and existing water rights in the Dolores River.¹²² Additionally, the LDPWG stated that an NCA would permanently remove the possibility of a federally reserved water right by removing WSR suitability, which some stakeholders viewed as reducing certainty. As the river is completely allocated, a federally reserved water right would require water to be left in the river to satisfy the ORVs for which the WSR was established. The reality that a federal water right would be junior to all existing rights does not alleviate many stakeholders' concerns, and they would prefer to avoid any possibility of a federal water right. Additionally, as some NCAs also include a federally reserved water right, the NCA would have to be specifically drafted to not include this right to support this part of the DRD's reasoning.

C. *The Subcommittee and Draft Legislation*

From the preliminary work done by the LDPWG, the Subcommittee was formed.¹²³ This group has worked for over five years on a legislative

118. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

119. *Id.*

120. *Id.*

121. DOLORES RIVER DIALOGUE, REPORT TO THE DOLORES PUBLIC LANDS OFFICE (USFS/BLM) FROM THE LOWER DOLORES PLAN WORKING GROUP 21 (2010), <http://ocs.fortlewis.edu/drd/pdf/WorkingGroupFINALREPORT.pdf> [hereinafter FINAL REPORT].

122. *Id.* at 21; BROUGHER, *supra* note 24, at 3.

123. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

proposal for an NCA. In March of 2015, the Subcommittee released a draft bill to establish an NCA, which is currently being widely vetted by stakeholders.¹²⁴ Although the individual group members do not agree on every topic, the collaborative techniques used at these meetings have proven respectful and productive.¹²⁵

The goals of the legislation are to create an alternative to WSR designation while ensuring protection of the identified ORVs, protecting private property rights, and permanently removing WSR suitability to promote certainty.¹²⁶ The Subcommittee also established a method for drawing the boundary of the proposed NCA. While the final boundary requires more effort, the group's proposal also includes changing a current Wilderness Study Area to full Wilderness status.¹²⁷

Once the NCA is established through legislation, the BLM will need to create a management plan (the "Management Plan") for the area within three years, incorporating recommendations from stakeholders. Additionally, the Secretaries of Interior and Agriculture would be required to appoint a thirteen-member advisory council composed of diverse stakeholders including county representatives, private landowners, grazing permit holders, water users, tribal members, and conservation and recreation groups.¹²⁸ The appointed advisory council will work with the Secretaries to develop and implement the Management Plan for the NCA, manage and monitor identified natural resource values, and consider scientific information in its decision-making process.¹²⁹

The proposed draft legislation is crafted to prevent private property acquisitions without willing sellers or voluntary exchanges.¹³⁰ As discussed above, this type of language protecting valid existing property rights has been included in other NCAs. It is expected that this premise would also be included in the drafting of the Management Plan, if the bill is passed by Congress. Specifically, the Management Plan only applies to public land in the designated area. This provision specifies that adequate access to private lands within the area must be provided, and the government can acquire easements for recreation or conservation but

124. *Id.*

125. See LEGISLATIVE SUBCOMMITTEE, DRAFT AND PROPOSED BILL TO ESTABLISH A NATIONAL CONSERVATION AREA ON THE LOWER DOLORES RIVER (March 2015) (on file with author) [hereinafter DRAFT BILL].

126. LEGISLATIVE SUBCOMMITTEE, DOLORES RIVER NATIONAL CONSERVATION AREA – A PROPOSAL (September 2014) (on file with author) [hereinafter FRAMEWORK].

127. *Id.* at 5.

128. DRAFT BILL, *supra* note 125, at 3–5.

129. *Id.*

130. *Id.* at 9.

only from willing sellers.¹³¹

The Subcommittee also agreed on some land-use restrictions. Like the majority of NCAs, motorized use will only be allowed on designated routes acknowledged in the Management Plan.¹³² Grazing will be allowed under current management practices. Preexisting grazing will also be allowed in the NCA and Wilderness Area, including historical motorized access for activities such as stock pond maintenance.¹³³ Land within the NCA will be withdrawn from mineral development, subject to valid, existing rights.¹³⁴ Finally, the existing Dolores River Canyon Wilderness Study Area may be protected as Wilderness Areas, but the boundaries and specific protections are not finalized.¹³⁵

Several contentious issues related to protection of the Dolores Project, private property rights, and water rights were laid out in the draft bill and are being vetted by the community.¹³⁶ These include that the NCA is subject to valid existing rights under Colorado water law and that water rights holders should not be injured by the legislation. Additionally, the Dolores River and its tributaries should be removed from WSR suitability, and the NCA legislation will reserve no federal water rights.¹³⁷ The draft bill states that the development of new, large water facilities like hydroelectric dams should be prohibited, but small diversion dams and stock ponds should be allowed.¹³⁸ The Secretaries should protect all of the ORVs, including scenery, rafting, archeology, geology, native fish, and ecology, without negatively impacting private property rights.¹³⁹ The draft bill reflects the community's overall goal of preserving the unique natural resources of the Lower Dolores River while protecting existing rights. The Subcommittee composed the principles for the proposed legislation after considering the concerns and interests expressed by local stakeholders, and it seems likely that the end product will satisfy the affected community.

131. *Id.*

132. *Id.* at 8.

133. *Id.* at 7, 9.

134. *Id.* at 9.

135. *Id.* at 6; FRAMEWORK, *supra* note 126, at 5.

136. DRAFT BILL, *supra* note 125, at 10–12.

137. *Id.* at 12.

138. *Id.* at 11.

139. FRAMEWORK, *supra* note 126, at 1.

IV. COLLABORATIVE RESOURCE MANAGEMENT CAN PROTECT MULTIPLE VALUES AND PREVENT FUTURE CONFLICT.

An NCA can provide protection for a designated area through a less contentious process than WSR status. WSR designation is a top-down conservation measure, and people are increasingly irritated with federal regulation.¹⁴⁰ This irritation has actually turned to physical conflicts in some situations.¹⁴¹ Traditionally, Westerners are fiercely independent, and a small contingent of people feel that federal land regulations are not only oppressive but illegal.¹⁴² Some specific recorded incidents include shooting at federal employees, throwing firebombs into campgrounds, and threatening government employees with physical violence.¹⁴³ Although similar incidents have been occurring since the advent of the environmental laws in the 1970s, agencies did not previously report them regularly. Now, the USFS reports 400 or 500 incidents each year.¹⁴⁴ There have been no recent laws or events like the 1970s environmental laws that would stoke this anti-government fire, but probable causes include political opportunism and resource scarcity.¹⁴⁵ For instance, in southwest Colorado, water is a scarce and extremely valuable resource with competing interests.

Collaborative resource management is a method and tool that has the potential to provide solutions to resource problems without angering as many private interests and by creating a sense of shared responsibility for stewardship of finite resources. Collaboration may also avoid litigation, develop solutions that meet a variety of interests, and solve associated natural resource problems at the community level. For example, in 2013 the DRD completed a watershed plan with funds from the U. S. Environmental Protection Agency funneled through the State of Colorado's Department of Public Health and Environment.¹⁴⁶ Natural resource management in the twentieth century was driven by what some scholars call "TechnoReg;" A focus on the assumption that there is a technically correct solution to a natural resource problem, and

140. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

141. Ray Ring & Marshall Swearingen, *Defuse the West*, HIGH COUNTRY NEWS, (Oct. 27, 2014), at 12 (recently BLM and USFS employees have faced harassment and threats of violence in an "ominous pattern of hostility.")

142. *Id.* at 12.

143. *Id.* at 13.

144. Tay Wiles, *Roots of Rebellion*, HIGH COUNTRY NEWS (Oct. 27, 2014), at 9.

145. *Id.*

146. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

regulations can implement the solution uniformly.¹⁴⁷ Although TechnoReg had many successes including acts like NEPA, it requires agencies to devote huge budgets to the cycle of “planning-disclosure-appeals-litigation-legislation” that ignores some citizens’ personal connections to land and natural resources.¹⁴⁸ WSR designations often take the TechnoReg form, as reflected by the abundant litigation. Conversely, discourse-based approaches try to combine overall policy with individual concerns about land and water. Using these approaches, collective action and communication can result in increased trust, mutual commitment, and reciprocity.¹⁴⁹ Scholars have identified nine key factors that help collaborative approaches attain success, and the DRD seems to have embraced at least some of these. The factors are:

1. Define common purpose.
2. Actively search for new ways to frame and re-frame the situation.
3. Strive for an open and inclusive process.
4. Encourage broad participation rather than formal representation.
5. Develop multiple approaches for interactive communication among all parties.
6. Work at a scale appropriate to the community or place.
7. Start with a level playing field.
8. Use third-party neutral facilitators.
9. Emphasis on mutual learning before arriving at judgments.¹⁵⁰

A. *The DRD’s Approach to Collaboration*

Although as of the writing of this Note the Lower Dolores effort has not finalized its proposal, a draft bill is in place and being vetted very widely across four counties. The proposal is for an NCA, a Special Management Area (on USFS lands), and taking the Dolores River Canyon Wilderness Study Area to full Wilderness status. The success of this effort will be based on wide-spread buy-in.¹⁵¹ The group started with

147. Steven E. Daniels & Antony S. Cheng, *Collaborative Resource Management: Discourse-based Approaches and the Evolution of TechnoReg*, in *SOCIETY AND NATURAL RESOURCES: A SUMMARY OF KNOWLEDGE* 127, 128 (Michael J. Manfredo et al. eds., 2004).

148. *Id.* at 130.

149. *Id.* at 131.

150. *Id.* at 131–132.

151. FINAL REPORT, *supra* note 121, at 24–27.

a common purpose to protect the Lower Dolores River while respecting existing private property rights.¹⁵² Additionally, the DRD, LDPWG, and the Subcommittee utilize a third-party neutral facilitator to aid in the planning process.¹⁵³ The group approached the situation as an opportunity to reach mutually agreeable solutions and management approaches for the river, rather than accepting WSR suitability status and dealing with the ensuing conflicts and uncertainty. During the April 20, 2009 LDPWG meeting, the members considered a number of potential river protection tools.¹⁵⁴ The tools included state mechanisms such as Colorado's instream flow program, federal tools such as BLM Land Management Plans, conservation easements, and county land-use codes.¹⁵⁵

The DRD, LDPWG, and the Subcommittee each consist of a diverse collection of members and during meetings encourage participants to voice their opinions openly.¹⁵⁶ Members include recreational interests such as American Whitewater, federal agencies like the BOR, state agencies like Colorado Parks and Wildlife, and environmental organizations like The Nature Conservancy. Additionally, Dolores County, Montezuma County, the MVIC, the Tribe, and other locals like private landowners are members.¹⁵⁷

The Subcommittee, which is tasked with drafting the document for the proposed NCA, also consists of diverse interests. The eleven members include Dolores and Montezuma Counties, private landowners, DWCD, the MVIC, San Juan Citizens Alliance, The Wilderness Society, and The Nature Conservancy. Additionally, Senator Bennet's local staff,

152. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

153. *Id.*

154. *Meeting Handouts*, DOLORES RIVER DIALOGUE, <http://ocs.fortlewis.edu/drd/handouts.htm> (last visited Sept. 21, 2015); RIVER PROTECTION WORKGROUP, INITIAL RIVER PROTECTION TOOLS/MECHANISMS, <http://ocs.fortlewis.edu/drd/pdf/rivertoolsinitialgbdkgjune32008FINAL.pdf>.

155. INITIAL RIVER PROTECTION WORKGROUP TOOLS/MECHANISMS, *supra* note 154, at 1–2.

156. Telephone Interview with Marsha Porter-Norton, *supra* note 107.

157. The full list of DRD Stakeholder Members is: American Whitewater, Bureau of Reclamation, Tres Rios Field Office (BLM), Colorado Division of Water Resources, Colorado Division of Natural Resources, Colorado Parks and Wildlife, Colorado Water Conservation Board, Dolores County, Dolores Public Lands (USFS), Dolores River Boating Advocates, Dolores River Coalition, Dolores Water Conservancy District, Federal Army Corps of Engineers, Montezuma County, Montezuma Valley Irrigation Company, San Juan Basin Farm Bureau, San Juan Citizens Alliance, San Miguel County, Southwestern Colorado Livestock Association, The Nature Conservancy, Trout Unlimited, US Fish and Wildlife Service, Ute Mountain Ute Tribe, and Public-At-Large. DOLORES RIVER DIALOGUE: STAKEHOLDERS & COMMUNITY (2015), <http://ocs.fortlewis.edu/drd/pdf/DRDorgchart-june-2015.pdf>.

the BLM, and the USFS are involved.¹⁵⁸ Although the Subcommittee uses representatives rather than direct broad participation, as espoused by the factors, it based the Draft on opportunities and concerns identified by the larger DRD and local community.

The LDPWG considered issues, opportunities, and concerns related to topics important to all of its members.¹⁵⁹ Some concerns and solutions overlapped, while others were competing. For instance, under the broad topic of recreation, the group pondered apprehensions voiced by boaters, hunters, fishermen, and off-road vehicle users.¹⁶⁰ Fishermen are interested in healthy trout fisheries. Conservation groups, such as The Nature Conservancy, are interested in the declining population of native species below McPhee Dam, a topic that overlaps with environmental organizations. Some groups are concerned about the impacts of grazing, recreation, and mineral extraction on fish and wildlife.¹⁶¹ For example, poor grazing practices can cause erosion and increase sediment in the river. However, opportunities exist for good grazing management practices that create profits for ranchers and mitigate wildfire risk by reducing fuel. Grazing and wildlife also have overlapping interests, as ranches provide open space for wildlife habitat.¹⁶²

Oil and gas drilling interests want to increase jobs and improve the economy in the area, but concerns include impact on scenic values, infrastructure, and water use. Proper planning can mitigate some of these impacts, and the community may decide that benefits like tax revenue and energy security are worth the costs.¹⁶³ A major benefit of this collaborative process is that it can help diverse parties understand each other's interests and work together to create a balance appropriate for the local area. Environmental groups and the oil and gas industry often have trouble suspending judgment of the other side's activities, but the meetings of the various groups working on the Lower Dolores ask that people to listen to and consider all concerns and opportunities.

Collaborative approaches also have problems like inefficiency, unresolvable missions and goals, strategic behavior, limiting participation to those who have the skills to effectively participate, and undermining the legitimacy of the courts, legislation, and adjudication.¹⁶⁴

158. *Id.*

159. LOWER DOLORES PLAN WORKING GROUP, ISSUES, OPPORTUNITIES AND CONCERNS (2009), http://ocs.fortlewis.edu/drd/handouts/Issues_Opportunities_and_Concernsasofjune261.pdf.

160. *Id.* at 1.

161. *Id.* at 1–2.

162. *Id.* at 4.

163. *Id.*

164. Daniels & Cheng, *Collaborative Resource Management: Discourse-based*

However, an NCA shaped by the community rather than a federal act like the WSRA is more-flexible and responsive to local needs. Groups like the LDPWG make policy determinations about how to effectively balance public and private interests. Instead of reserving a federal water right in an over-appropriated river, NCA legislation can prescribe managing releases from McPhee Dam to improve flows for recreation and fisheries, while supplying water for irrigation and cities, and the Tribe. Instead of condemning property, the statute can require agencies to work with landowners to manage their land in a way that comports with the purposes of the NCA while respecting their property rights. Additionally, instead of prohibiting grazing in the NCA, the statute can affirm grazing as a historic use as long as it is appropriately managed under BLM guidelines. Although a WSR could also incorporate some of these options, local support can dictate the ultimate success of a protected area, and as demonstrated by the DRD and Dominguez-Escalante, stakeholders may be more open to an NCA. This flexibility can also improve the local economy by allowing commercial activities to operate while promoting best management practices for public interests in the NCA.

V. CONCLUSION

Designating the Lower Dolores River as an NCA has the potential to provide long-term protection in an area with multiple and conflicting interests and may be less restrictive than WSR designation. Although the collaborative process of exploring alternatives and drafting legislation is time-consuming, it might ultimately avoid expensive litigation. As demonstrated by the Dominguez-Escalante experience, this approach allows the local community to continue participating in the management of the area that their collaboration helped to protect. Additionally, this process presents an opportunity to maintain community accord and meet the needs of many stakeholders. Particularly in an arid and populous state like Colorado, water rights are a valuable and contentious resource. Water rights holders want to continue to beneficially use their water but also want to protect the surrounding environment that most feel personally connected to. NCA designation can provide certainty that water rights will be protected, while also fostering an environment of open communication and understanding among multiple interest groups. Solutions such as changing releases from the Dam can help native fish populations while not impairing other water rights. People can engage in

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economic opportunities such as grazing or mineral development but use best management practices and maintain other values such as scenery and wildlife habitat. In a state like Colorado with a growing population and divergent demands on the natural resources, this collaborative approach has the potential to work in other areas, as demonstrated by the experience of the Lower Dolores River as well as other NCAs.