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**“THE RIVERS BELONG TO THE PEOPLE!”: THE  
HISTORY AND FUTURE OF WILD AND SCENIC RIVER  
PROTECTION IN MINNESOTA**

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The views and opinions expressed in this article are those of the authors, and do not represent the views of the Minnesota Department of Natural Resources.

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#### AUTHORS’ NOTE

This paper discusses issues that draw attention to the complexities of a participatory democracy with separate branches of government. For any good piece of legislation to succeed, and the staff in the executive branch to succeed in carrying out those legislative objectives, strong *and continued* leadership is needed at all levels of government and civic organizations. This paper’s highest purpose is to tell the story of the little-known Minnesota wild and scenic rivers program, to dispel the mystery of its history for those who know about it, and to give people the tools to decide the future of river protection in Minnesota.

The paper, in its entirety, is the authors’ most earnest attempt to objectively re-construct the story of a very complicated and often politically contentious river conservation program. Much of the information presented in the second half of the paper is from the dedicated staff who worked within the Rivers Program and were responsible for carrying out this challenging piece of legislation. The authors thank these and other Minnesota Department of Natural Resources staff for all the time and hard work they have put into this program, one that initially had ample support and resources, and eventually had little budget or political or

administrative support. We challenge the reader to give credit to staff when success is celebrated here, and also to understand that there are incredible and complicated political and budgetary circumstances that do not always support the staff's ability to carry out the highest objectives of this program's implementation. In the end, it will be necessary for readers to draw their own conclusions on what the future can hold for the wild and scenic rivers program.

## I. BACKGROUND

President Johnson in his 1965 Special Message to the Congress declared, "We will continue to conserve the water and power for tomorrow's needs with well-planned reservoirs and power dams. But the time has also come to identify and preserve free-flowing stretches of our great scenic rivers before growth and development make the beauty of the unspoiled waterway a memory."<sup>1</sup> A national sense of scarcity, the growing environmental movement, increasing participation in outdoor recreation, a weak economy, and an evolution of science and understanding of ecology fueled a strong movement for river conservation in the late 1960s and 1970s.<sup>2</sup> This national sentiment was expressed strongly through environmental conservation laws in Minnesota, with river conservation at its heart.

Protection of Minnesota's wild and scenic rivers grew, ironically, from plans that would have largely destroyed the majestic Upper St. Croix River, and from construction of a power plant that still impacts the Lower St. Croix today. By the 1920s, Northern States Power Company (NSP) had acquired about 30,000 acres of land along the St. Croix, owning most of both banks of the river for about seventy miles above Taylors Falls, Minnesota.<sup>3</sup> NSP originally intended to build a series of dams and reservoirs along the river, but the plan never materialized.<sup>4</sup> As of the mid 1960s, the company still owned the

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1. President Lyndon B. Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty (Feb. 8, 1965), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON BAINES JOHNSON, CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, BOOK I, Jan. 1–May 31, 1965, at 160 (1966).

2. See TIM PALMER, *ENDANGERED RIVERS AND THE CONSERVATION MOVEMENT* 95 (Rowman & Littlefield 2d ed. 2004).

3. See *Wild Rivers System—St. Croix Waterway: Hearings Before the S. Comm. on Interior and Insular Affairs*, 89th Cong. 286 (1965) (statement of J.W. Hoffman, Vice President, Northern States Power Co.).

4. See Ron Way, '10 Most Threatened' Designation a Long Time Coming for Lower St. Croix, MINNPOST, Apr. 8, 2009, <http://www.minnpost.com/ronway/2009/04/08/>

lands and had preserved them in their wild condition.<sup>5</sup>

NSP's stewardship of the Upper St. Croix did not extend to the entire river. In 1964, the company sparked a major citizen outcry with its plan to construct what would become the Allen S. King Power Plant, a 610,000 kilowatt coal-fired generating plant in Oak Park Heights, Minnesota on the Lower St. Croix.<sup>6</sup> An organization called "Save the St. Croix" was formed in July 1964 to oppose the plant,<sup>7</sup> and attracted national attention to its cause.<sup>8</sup> The proposed power plant also drew Wisconsin Senator Gaylord Nelson's attention.<sup>9</sup> As chair of the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Nelson held public hearings on the proposed plant on December 10 and 11, 1964.<sup>10</sup> In January 1965, he appeared

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5. *Wild Rivers System—St. Croix Waterway: Hearings Before the S. Comm. on Interior and Insular Affairs*, 89th Cong. 286 (1965) (statement of J.W. Hoffman, Vice President, Northern States Power Co.). When Robert L. Herbst, who would later become Minnesota's first Commissioner of Natural Resources, was the Minnesota Conservation Department's forester in Cambridge, Minnesota in the early 1960s, he learned that NSP was planning to sell its lands on the Upper St. Croix. Herbst met with company officials, discussed the great conservation value of the lands and persuaded them to hold off on their plans to sell. Telephone Interview with Robert L. Herbst, former Minn. Comm'r of Natural Res. (Nov. 9, 2009).

6. Kate Hanson, *The Wild and Scenic St. Croix Riverway*, 25:2 GEORGE WRIGHT F. 27 (2008), available at <http://www.georgewright.org/252hanson.pdf>; see, e.g., SAVE THE ST. CROIX: BACKGROUND AND SUMMARY OF THE OPPOSITION TO A PROPOSED NORTHERN STATES POWER COMPANY COAL-FIRED GENERATING PLANT ON THE ST. CROIX RIVER (on file with Minnesota Historical Society, Save the St. Croix Manuscripts Collection, 1965-67, P1348, Box 2, Folder 2) [hereinafter SAVE THE ST. CROIX].

7. See Minutes of Meeting of The Save the St. Croix Committee (July 27, 1964) (on file with Minnesota Historical Society, Save the St Croix Manuscripts Collection, 1965-67, P1348, Box 1, Folder 1).

8. See, e.g., *The New Conservation—III*, N.Y. TIMES, Feb. 17, 1965, at 42; Royce Brier, *Nostalgia for Faraway River*, S.F. CHRON., Jan. 18, 1965, at 40.

9. An August 21, 1964 letter from James Russell Wiggins, Editor, The Washington Post, to his daughter Gerry Thomssen, a St. Paul, Minnesota resident and a founder of Save the St. Croix Committee, indicates that Wiggins had talked to Senator Nelson about the "power plant problem" and that Nelson was "really much concerned about the matter and said he was going to look into it further and try to do something about it." Letter from James Russell Wiggins, Editor, Wash. Post, to Gerry Thomssen, Founder, Save the St. Croix Comm. (Aug. 21, 1964) (on file with Minnesota Historical Society, P1348, Box 1, Folder 3); see also Letter from Mrs. R.H. Thomssen, Jr., to Gaylord Nelson, U.S. Senator (Aug. 30, 1964) (on file with Minnesota Historical Society, P1348, Box 1, Folder 3) (describing a conversation that Thomssen's father, Wiggins, had with various U.S. Senators, including Senator Nelson); Letter from Gaylord Nelson, U.S. Senator, to Mrs. R.H. Thomssen, Jr. (Sept. 2, 1964) (on file with Minnesota Historical Society, P1348, Box 1, Folder 4) (thanking Thomssen for her letter and noting his continued concern about the environmental damage that the proposed power plant could cause).

10. SAVE THE ST. CROIX, *supra* note 6; see also Letter from Mrs. R.H. Thomssen to

at a joint hearing of the Minnesota Water Pollution Control Commission and Minnesota Conservation Department as a private citizen. There, Nelson urged the Conservation Department to reject NSP's request for a water use permit and to "go to the U.S. Supreme Court, if necessary, to establish that the department has authority in the field of recreation under its 'health and welfare powers.'"<sup>11</sup>

The power plant controversy provided the impetus for Nelson to draft a bill to make the St. Croix a national scenic waterway.<sup>12</sup> However, a reported compromise between Nelson and NSP allowed construction of the King Power Plant to proceed.<sup>13</sup> As Wisconsin's governor in 1959, Nelson had initiated conversations with NSP about preserving the St. Croix.<sup>14</sup> Knowing his interest in preserving the river, the company dispatched its emissaries to a meeting with Nelson to cut a deal: NSP would donate its lands on the Upper St. Croix to be preserved as a scenic river if Nelson would not oppose the power plant at Oak Park Heights.<sup>15</sup>

In 1965, Nelson and Minnesota Senator Walter Mondale introduced S. 897,<sup>16</sup> the St. Croix National Scenic Waterway bill.<sup>17</sup> The

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Gaylord Nelson, U.S. Senator (Nov. 21, 1964) (on file with Minnesota Historical Society, P1348, Box 1, Folder 6) (thanking Nelson for sending her a news release about his request for a hearing before the Senate Subcommittee on Air and Water Pollution in regard to the St. Croix river and the proposed power plant); Letter from Mrs. R.H. Thomssen to Gaylord Nelson, U.S. Senator (Dec. 28, 1964) (on file with Minnesota Historical Society, P1348, Box 1, Folder 7) (thanking Nelson for a formal hearing by the Air and Water Pollution Subcommittee held in Stillwater earlier that month).

11. SAVE THE ST. CROIX, *supra* note 6; *see also* Harry Hite, *Sen. Nelson Makes Plea To 'Save' St. Croix Valley*, ST. PAUL DISPATCH (Minn.), Jan. 14, 1965, at 17; Bob Ylvisaker, *Nelson Proposes Test Case on NSP St. Croix Plant*, MINNEAPOLIS TRIB., Jan. 15, 1965, at 20.

12. *See* SAVE THE ST. CROIX, *supra* note 6; *see also* *Upper St. Croix Preservation Bill Explained*, ST. PAUL PIONEER PRESS (Minn.), June 26, 1965, at 20.

13. Way, *supra* note 4 (describing a deal struck between Senator Nelson and NSP whereby NSP donated its land in the St. Croix in exchange for Senator Nelson's acceptance of the Oak Park Heights coal-fired plant); *see also* *Upper St. Croix Preservation Bill Explained*, *supra* note 12.

14. *Designating a Segment of the St. Croix as Part of Wild and Scenic Rivers System: Hearing Before the Subcomm. on Public Lands of the S. Interior and Insular Affairs Comm.*, 92d Cong. 2 (1971) [hereinafter *Hearings*].

15. *See* Way, *supra* note 4.

16. Nelson asked Mondale to join him as a co-sponsor. Mondale, who had been strongly influenced by his friend Sigurd Olson, was already firmly committed to protecting the environment and willingly obliged. Interview with Vice President Walter Mondale, in Minneapolis, Minn. (Nov. 9, 2009); *see also* Letter from Walter F. Mondale, U.S. Senator, to Mrs. R.H. Thomssen (Jan. 18, 1965) (on file with Minnesota Historical Society, P1348, Box 2, Folder 1) (stating that Senator Nelson of Wisconsin was preparing legislation regarding the St. Croix River and that Mondale intended to study Nelson's proposal "with a view towards joining him in its

hearing record of the Senate Committee on Interior and Insular Affairs on S. 897 alludes to Nelson's compromise with NSP. Without mentioning the power plant controversy, Nelson stated, "I think it only fair to point out that the Northern States Power Company has owned and preserved in a primitive condition the land on both banks of the St. Croix for some 70 miles north of Taylors Falls."<sup>18</sup> Later in the hearing, Nelson introduced J.W. Hoffman, vice president of Northern States Power Company, and again only mentioned the company's preservation of land on the Upper St. Croix.<sup>19</sup> Hoffman then testified that the company was ready to consider the disposition of its land holdings along the St. Croix. "If proper terms and conditions can be agreed upon," he said, "the company will give priority to public agencies."<sup>20</sup> Under S. 897, the Lower St. Croix, including the power plant site, was to be protected through zoning rather than land acquisition and easements.<sup>21</sup> An analysis of the bill that is part of the hearing record states that because zoning cannot be retroactive, the proposed NSP plant at Oak Park Heights, which had already received local permits, would not be legally affected by the legislation.<sup>22</sup>

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sponsorship").

17. S. 897, 89th Cong. (1965). The bill would have protected a strip of land about one quarter mile deep on both banks of the St. Croix and its Namekagon tributary. It proposed that 102 miles of the St. Croix north of Taylors Falls and 87 miles of the St. Croix's Namekagon tributary be a "wild river," kept in as primitive condition as possible and that the 57 miles of the St. Croix south of Taylors Falls be an "intensive outdoor recreation area." *Wild Rivers System—St. Croix Waterway: Hearings Before the S. Comm. on Interior and Insular Affairs*, 89th Cong. 208 (1965) [hereinafter *Wild Rivers Hearings*] (statement of U.S. Senator Gaylord Nelson).

18. *Wild Rivers Hearings*, *supra* note 17, at 208 (statement of U.S. Senator Gaylord Nelson).

19. *Id.* at 285. Nelson said that NSP had been holding its beautiful piece of property on the St. Croix "for the purpose of protecting it in its present state." *Id.*

20. *Id.* at 285–86 (statement of J.W. Hoffman, Vice President, Northern States Power Co.).

21. *Id.* at 208 (statement of U.S. Senator Gaylord Nelson).

22. *Id.* at 209. One witness, a representative of the National Parks Association, noticed that there was no discussion of the power plant controversy at the hearing and decided to set the record straight. George H. Siehl, Assistant to the President, and General Counsel, National Parks Association, remarked,

"If I am not mistaken, the events which touched off certain controversies and may have led to the introduction of this legislation involved the threatened construction of a coal-fired thermal electric power plant on the St. Croix, with concomitant devastation of the environment. While I understand you don't have a reference to it, I would like to include it as a passing reference to the power company."

*Id.* at 291 (statement of George H. Siehl, Assistant to the President and General

Although S. 897 passed the Senate, it did not pass the House.<sup>23</sup> In 1967, Senators Nelson and Mondale re-introduced a bill to protect the St. Croix.<sup>24</sup> A portion of their stand-alone bill to protect the St. Croix was eventually merged with the bill that became the Wild and Scenic Rivers Act of 1968.<sup>25</sup> The 1968 Act designated the Upper St. Croix as a component of the national wild and scenic rivers system and expressly addressed the conveyance, without charge, of the lands owned by Northern States Power Company.<sup>26</sup> The more controversial Lower St. Croix was not designated as part of the system in 1968,<sup>27</sup> but was designated for potential inclusion after study by the Secretary of the Interior.<sup>28</sup>

The focus of this article is wild and scenic river protection in Minnesota after 1970. Section II recounts the history of the federal Lower St. Croix Wild and Scenic River Act of 1972, the Minnesota Wild and Scenic Rivers Act of 1973, and the state Lower St. Croix Wild and Scenic River Act of 1973.<sup>29</sup> Section III addresses river protection after enactment of these three laws, including challenges within the state designation and administrative process and shortcomings in the regulatory scheme.<sup>30</sup> Section IV discusses recent steps that the Minnesota Department of Natural Resources has taken toward stronger protection of Minnesota's wild and scenic rivers.<sup>31</sup>

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Counsel, National Parks Association).

23. See *Wild and Scenic Rivers: Hearings Before the Comm. on Interior and Insular Affairs*, 90th Cong. 31 (1967) (statement of U.S. Senator Walter F. Mondale).

24. 113 CONG. REC. 509 (1967).

25. See Pub. L. No. 90-542, 82 Stat. 906 (codified at 16 U.S.C. 1271 *et seq.*); see also *Wild and Scenic Rivers: Hearings Before the Comm. on Interior and Insular Affairs*, 90th Cong. 32 (1967) (Senator Church asking Senator Mondale whether he would want to have the St. Croix included in legislation that would protect both wild and scenic rivers).

26. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, § 3(a) (6), 82 Stat. 906, 907-08.

27. According to Walter Mondale, it was not politically feasible to include the Lower St. Croix for designation in the 1968 Act. Designation of this relatively developed segment of the river was much more controversial than designation of the largely undeveloped Upper St. Croix. Mondale believes that the more developed a river, the harder it is to save. Interview with Vice President Walter Mondale, *supra* note 16.

28. Wild and Scenic Rivers Act of 1968, Pub. L. 90-542, § 5(a) (21), (b), 82 Stat. 906, 910-11.

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Part IV.

## II. THE EARLY 1970S: NEW LAWS BRING THE PROMISE OF WILD AND SCENIC RIVER PROTECTION

The 1970 election of Democrat Wendell R. Anderson as Minnesota's thirty-third governor<sup>32</sup> ushered in what was to become the "golden age of environmental legislation"<sup>33</sup> in the state. Young<sup>34</sup> and visionary, the former Olympic hockey player<sup>35</sup> ran on a platform of school tax reform<sup>36</sup> and environmental protection.<sup>37</sup>

As a newly-elected governor, Anderson wasted no time in moving on the environmental front.<sup>38</sup> He appointed "gutsy"<sup>39</sup> commissioners to head both the Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources. Grant Merritt was named Commissioner of the Minnesota Pollution Control Agency, and Robert L. Herbst was named Commissioner of the newly formed Minnesota Department of Natural Resources (DNR).<sup>40</sup> Both would become key environmental policy leaders in the Anderson administration. A career natural resources professional and former Minnesota

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32. Wendell R. (Richard) Anderson: Governors of Minnesota, Minnesota Historical Society, [http://www.mnhs.org/people/governors/gov/gov\\_35.htm](http://www.mnhs.org/people/governors/gov/gov_35.htm) (last visited Apr. 16, 2010).

33. Telephone Interview with Robert Dunn, former Minn. State Representative & Senator (Oct. 1, 2009).

34. Anderson was elected governor at the age of thirty-seven. He was not a newcomer to politics. At the age of twenty-five and while a student at the University of Minnesota Law School, Anderson was encouraged by his friend and fellow law student Jack Davies to run for the Legislature. Interview with Wendell R. Anderson, former Governor of Minn., in Eden Prairie, Minn. (Oct. 8, 2009). Anderson was elected to the Minnesota House of Representatives in 1958 and was reelected in 1960. In 1962, Anderson ran for the Minnesota Senate where he served until his 1970 election as governor. Biography of Wendell R. Anderson, Minnesota Historical Society, <http://www.mnhs.org/library/findaids/00476.xml> (last visited Apr. 16, 2010).

35. Biography of Wendell R. Anderson, *supra* note 34.

36. A school tax reform law, which included an "astronomical" tax increase, passed in a Special Session in 1971. Interview with Wendell R. Anderson, *supra* note 34. The law became known as the "Minnesota Miracle," and landed Anderson on the cover of Time Magazine in 1973. TIME MAGAZINE, Aug. 13, 1973.

37. Interview with Harry A. Sieben, Jr., former Minn. State Representative, in Minneapolis, Minn. (Oct. 27, 2009).

38. See John Helland, *The Environment's Greatest Legislative Session: 1973*, 34 ADVOC. UPDATE 8, June 2008 [hereinafter *Environment's Greatest Legislative Session*].

39. Interview with Harry A. Sieben, Jr., *supra* note 37.

40. The former Minnesota Conservation Department became the Minnesota Department of Natural Resources in 1971 pursuant to 1969 Minnesota Laws. Act of June 6, 1969, ch. 1129, art. 3, § 1, 1969 Minn. Laws 2312, 2338. This law also abolished the State Geographic Board and transferred its powers and duties to the Commissioner of Natural Resources. *Id.* § 3, 1969 Minn. Laws at 2339.

Commissioner of Conservation,<sup>41</sup> Herbst had regularly appeared to testify on behalf of the Conservation Department when Anderson served in the Legislature.<sup>42</sup> Herbst, whose agenda for river conservation started years earlier,<sup>43</sup> had so impressed Anderson that Anderson named him to head the agency.<sup>44</sup>

Already in 1971, with both houses of the Minnesota Legislature under Republican control, Anderson succeeded in achieving passage of several key pieces of environmental legislation, including the landmark Minnesota Environmental Rights Act,<sup>45</sup> the precursor of which Anderson himself had introduced in 1969 as a member of the Minnesota Senate.<sup>46</sup> Republican control of the Legislature, however, meant Republican committee chairs. One of them, Wallace Gustafson, Chair of the House Committee on Environmental Preservation and Natural Resources, stood in the way of environmental reform by allowing environmental legislation introduced in the 1971 session to become “bottled up” in his committee.<sup>47</sup>

Anderson recognized that he could not carry out his ambitious

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41. Telephone Interview with Robert L. Herbst, *supra* note 5. Herbst began his career in 1957 as a forester in Cambridge, Minnesota with the Minnesota Conservation Department. *Id.* After leaving to work in the nonprofit sector, Herbst was the executive director of the Izaak Walton League of America. When Wendell Anderson was elected, he recruited Herbst to become Minnesota’s Commissioner of Natural Resources. Herbst was one of Anderson’s first agency head appointments. *Id.*

42. Interview with Wendell R. Anderson, *supra* note 34.

43. *See* Telephone Interview with Robert L. Herbst, *supra* note 5.

44. *Id.*

45. Environmental Rights Act, ch. 952, 1971 Minn. Laws 2011. Other environmental laws passed in the 1971 Legislative Session were: The Minnesota State Water Pollution Control Fund, ch. 953, 1971 Minn. Laws 2019; an amendment to Minnesota Statutes 1969, Section 116.06, in Act of June 4, 1971, ch. 727, §§ 1–3, 1971 Minn. Laws 1400–02 (authorizing the Pollution Control Agency to regulate noise pollution); Act of June 4, 1971, ch. 734, 1971 Minn. Laws 1414 (establishing a program for disposal and reuse of abandoned vehicles); Act of June 30, 1971, ch. 3, § 42, subdiv. 1, 1971 Minn. Laws Extra Session 2166, 2205 (raising the PCA staff level to 145); and Act of June 4, 1971, ch. 852, 1971 Minn. Laws 1669 (providing for land and funding for Voyageurs National Park). In his article, *The Environment’s Greatest Legislative Session: 1973*, John Helland notes that one-fourth of the bills introduced in 1971 related to environmental protection and natural resource restoration. *Environment’s Greatest Legislative Session*, *supra* note 38.

46. *See* Governor Wendell R. Anderson, Special Message to the 68th Session of the Legislature of Minnesota: Securing a Quality Environment in Minnesota, at 43 (Feb. 14, 1973) [hereinafter 1973 Special Message] (text available at Minnesota Legislative Reference Library), available at <http://archive.leg.state.mn.us/docs/pre2003/other/I690.pdf>.

47. Interview with John Helland, retired Legislative Analyst, current Bd. Member, Minn. Ctr. for Env’tl. Advocacy, in St. Paul, Minn. (Oct. 13, 2009); *Environment’s Greatest Legislative Session*, *supra* note 38.

agenda with the opposition party in control of the Legislature. Thus, he recruited promising DFL candidates to run for the Minnesota Legislature and spent most of his spare time in 1972 actively campaigning for them.<sup>48</sup> Although some Republicans then in the Minnesota Legislature such as Robert G. Dunn were strong environmental advocates,<sup>49</sup> the DFL Party and Democrats across the country were particularly focused on protecting the environment.<sup>50</sup> A confluence of factors both in Minnesota and in the nation, including the Cuyahoga River catching fire, Earth Day, the Reserve Mining case, and construction of the King Power Plant on the St. Croix River, fueled the Democrats' resolve to enhance environmental regulation and won popular support for their candidates.<sup>51</sup>

A. *The Federal Lower St. Croix Act of 1972*

Section 5 of the federal Wild and Scenic Rivers Act of 1968 required the Secretary of the Interior to study the segment of the St. Croix "between the dam near Taylors Falls and its confluence with the Mississippi River . . . in order to determine whether it should be included in the national wild and scenic rivers system."<sup>52</sup> A federal-state study team, headed by the Interior Department's Lake Central Region of the U.S. Bureau of Outdoor Recreation, was established to conduct the study.<sup>53</sup> By May 1971, the study was nearly complete, and reports had already been leaked to the press that the team was likely

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48. Interview with Wendell R. Anderson, *supra* note 34.

49. *See, e.g.*, Minnesota Legislative Reference Library: Legislators Past & Present, Dunn, Robert G. "Bob", <http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10154> (last visited Mar. 11, 2010). Dunn served in the House of Representatives from 1965–1972 and in the Senate from 1973–1980, and later served as Director/Chair of the Minnesota Waste Management Board. *Id.*

50. Interview with Wendell R. Anderson, *supra* note 34.

51. *See* e-mail from Peter Gove, Env'tl. Assistant to Governor Anderson, to author (Susan Damon) (Oct. 29, 2009, 18:21 CST) (on file with authors). Gove was Anderson's environmental assistant and coordinated environmental legislation, working with the commissioners, chief authors of bills, and citizen groups. *See id.*

52. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 5(a)(21)–(b), 82 Stat. 906, 910–11 (1968).

53. *See* Bob Goligoski, *Lower St. Croix May Be in U.S. Scenic System*, ST. PAUL DISPATCH (Minn.), Apr. 6, 1971, at 17. The study team included representatives of the Bureau of Outdoor Recreation, the U.S. Army Corps of Engineers, the U.S. Bureau of Sports Fisheries and Wildlife, the Minnesota-Wisconsin Boundary Area Commission, and the Minnesota and Wisconsin Departments of Natural Resources. *Id.* *See also* From Our National Bureau, *Lower St. Croix Urged as 'Wild River'*, DULUTH NEWS TRIB. (Minn.), May 25, 1971, at 1 (describing the federal-state study's recommendation that the Lower St. Croix should be included in the national wild and scenic rivers system).

to recommend inclusion of the Lower St. Croix in the national wild and scenic rivers system.<sup>54</sup> It appeared certain that the study team's recommendation would be adopted.<sup>55</sup>

With development pressure on the Lower St. Croix intensifying,<sup>56</sup> Senator Gaylord Nelson of Wisconsin decided to introduce a bill in late May to speed up the process of adding the Lower St. Croix to the national wild and scenic rivers system.<sup>57</sup> The bill was timed with the completion of the federal-state study and was designed to bypass a potentially lengthy administrative process of designating the increasingly vulnerable river.<sup>58</sup> Nelson again teamed up with Senator Walter Mondale, who co-sponsored the bill.<sup>59</sup>

By June, the federal-state study team was ready to unveil its proposal. On June 8, 1971, the Department of the Interior's Bureau of Outdoor Recreation presented the details of the proposal to a crowd of about 500 people who had gathered at the Stillwater High School Auditorium.<sup>60</sup> The study recommended inclusion of the fifty-two mile segment of the St. Croix between Taylors Falls, Minnesota and Prescott, Wisconsin in the national wild and scenic rivers system.<sup>61</sup>

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54. See Goligoski, *supra* note 53, at 17.

55. See *id.*

56. "Several large multiple-dwelling complexes" had been proposed for the Lower St. Croix Valley during the previous year, including a proposed "\$50-million development at Hudson, Wis., which would house 3,000 people." Dale Fetherling, *U.S. Details Preservation Plans for St. Croix*, MINNEAPOLIS TRIB., June 6, 1971. See also Mont Croix at Hudson discussion, *infra* Part II.C.

57. The bill, S. 1928, was introduced in the 92nd Congress, 1st Session, on May 24, 1971. As originally drafted, the bill provided: "Section 3(a) of the Wild and Scenic Rivers Act is amended by adding at the end thereof the following: '(9) SAINT CROIX, MINNESOTA AND WISCONSIN.—The segment between the dam near Taylors Falls and its confluence with the Mississippi River; to be administered by the Secretary of the Interior.'" S. 1928, 92d Cong. (1st Sess. 1971). The bill further repealed section 5(a)(21) of the Wild and Scenic Rivers Act (which required the study of the Lower St. Croix for possible inclusion) and required the Secretary of the Interior, within one year following enactment, to take "such action as is provided for under section 3(b) of the Wild and Scenic Rivers Act" with respect to the Lower St. Croix. *Id.* See also Ridder News Service, *Lower St. Croix Preservation Opposed*, DULUTH NEWS TRIB. (Minn.), Apr. 15, 1972, at 1.

58. The bill would simply place the Lower St. Croix in the national wild and scenic rivers system. See Editorial, *Save Lower St. Croix*, ST. PAUL DISPATCH (Minn.), Oct. 26, 1971, at 8.

59. See *id.* at 8. Senator Hubert H. Humphrey, who had recently returned to the Senate, also signed on as an author of S. 1928. Interview with Vice President Walter Mondale, *supra* note 16.

60. Bob Goligoski, *Lower St. Croix Plan Applauded*, ST. PAUL PIONEER PRESS (Minn.), June 9, 1971, at 27 [hereinafter Goligoski, *Lower St. Croix Plan Applauded*].

61. *Id.* The study team recommended protecting 8250 acres of the river corridor through purchase and the acquisition of scenic easements. *Id.*

The National Park Service was to manage the segment of river in cooperation with state and local governments.<sup>62</sup> The proposal further provided for a master plan to be developed as a management guideline.<sup>63</sup> A newspaper account of the Stillwater meeting noted that “[w]ith the exception of several land owners concerned about government purchase of their property, valley residents from Taylors Falls to Prescott, Wis., gave hearty approval to the plan, because it would limit commercial, industrial and residential development in the lush valley.”<sup>64</sup>

The following month, the federal-state study team proposal got a nod from the Minnesota-Wisconsin Boundary Area Commission.<sup>65</sup> The Commission voted 6–1<sup>66</sup> to support two key provisions of the federal-state study team proposal—namely, the cooperative management provision and the provision calling for development of a master plan.<sup>67</sup>

At a field hearing of the Senate Interior Committee held in St. Croix Falls, Wisconsin on October 23, 1971, Senators Mondale and Nelson continued their push for passage of their bill to include the Lower St. Croix in the national wild and scenic rivers system.<sup>68</sup> Mondale conveyed a sense of urgency. Calling the St. Croix “the last remaining unpolluted, scenic river in the country next to a major metropolitan area,”<sup>69</sup> he said:

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62. Fetherling, *supra* note 56.

63. Dale Fetherling, *Commission Backs Plan to Preserve St. Croix*, MINNEAPOLIS TRIB., July 24, 1971, at 1A [hereinafter Fetherling, *Commission Backs Plan*].

64. Goligoski, *Lower St. Croix Plan Applauded*, *supra* note 60.

65. The Minnesota-Wisconsin Boundary Area Commission was established by the two states in 1965 by formal interstate compact and had jurisdiction over the entire interstate border. Act of May 26, 1965, 1965 Minn. Laws 1233. According to its executive director’s Oct. 23, 1971 testimony before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, the Commission had spent seventy percent of its time in the previous six years working on issues related to the Lower St. Croix Valley. *Hearings*, *supra* note 14, at 51–52 (statement of James M. Harrison, Executive Director, Minnesota-Wisconsin Boundary Area Commission).

66. Fetherling, *Commission Backs Plan*, *supra* note 63, at 10A. According to a report in the *Minneapolis Tribune*, the Commission’s action “came under strong attack by Mrs. Stanley Hubbard Jr., a new member of the advisory body.” *Id.* at 1A. Hubbard, who cast the lone dissenting vote, was quoted as saying, “The federal government will be deciding what the people want rather than the people deciding what they want. . . . [T]he minute the federal becomes involved, the state and local will become incidental.” *Id.* at 1A, 10A.

67. *See id.* at 10A.

68. Dispatch News Service, *Development Called Peril To St. Croix*, ST. PAUL DISPATCH (Minn.), Oct. 23, 1971, at 1.

69. Bob Goligoski, *St. Croix Preservation Backed, Also Debated*, ST. PAUL PIONEER PRESS (Minn.), Oct. 24, 1971, at 1 [hereinafter Goligoski, *St. Croix Preservation Backed*].

We are dealing with a vanishing American asset, and the question for all of us here . . . is whether the St. Croix River is going to go the way that all other rivers have gone, from lovely, scenic, magnificent rivers into ugly, desecrated sewage. The measure which Senator Nelson and I have introduced is designed to try to keep it a lovely, unpolluted, scenic river and magnificent as it is, and I think time is running out.<sup>70</sup>

Nelson, too, stressed the urgent need for action, warning that without passage of the legislation, most of the scenic beauty of the Lower St. Croix could be destroyed “in the next 10, 15, or 20 years.”<sup>71</sup> Committee Chairman Senator Henry Jackson presided over the hearing, where “more than 30 local officials, conservationists and homeowners describe[d]—often poetically—the scenic and recreational values of the 52-mile stretch of river.”<sup>72</sup> Nearly all who testified were in favor of the Mondale-Nelson bill.<sup>73</sup>

Some Lower St. Croix homeowners who attended the hearing

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70. *Hearings, supra* note 14, at 4–5 (statement of U.S. Senator Walter Mondale). In a speech to the Minnesota Conservation Federation around the same time as the field hearing, Mondale also stressed the need for swift action to protect the river:

Time is running out for preservation of the lower St. Croix. This is one of the few remaining scenic rivers located near a major metropolitan area, and its protection must be a matter of the highest urgency and priority. It is imperative that future development along the river be planned, orderly and consistent with the public’s right to use and enjoy the river. It represents a unique and fading hope for more than 2 million Minnesotans and others from nearby states seeking the quiet, the beauty and the enjoyment that only a scenic river can provide. The river valley is already on the verge of basic change and urbanization. There are plans and proposals for the construction of high-rise apartments within the narrow corridors on each side of the river. Land speculation in this area has sharply increased in recent months, and the problem of maintaining high water quality is becoming more serious. Without the comprehensive approach provided by making this river a part of the National Wild and Scenic River system, there is a very real danger of recreational over-use.

Editorial, *The St. Croix’s Future*, MINNEAPOLIS TRIB., Oct. 24, 1971, at 16A (excerpt of Senator Mondale’s speech to the Minnesota Conservation Federation).

71. *Hearings, supra* note 14, at 3 (statement of Senator Gaylord Nelson).

72. Dale Fetherling, *U.S. Urged to Protect St. Croix*, MINNEAPOLIS TRIB., Oct. 24, 1971, at 12B [hereinafter Fetherling, *U.S. Urged to Protect St. Croix*]. Representatives of several environmental organizations, including Sierra Club, the Minnesota Environmental Control Citizens Association, the Izaak Walton League and the Wisconsin Resource Conservation Council, as well as local and intra-governmental agencies testified in support of the Mondale-Nelson bill. See *Hearings, supra* note 14, at 6–9, 14–16, 23–30, 35–40, 46–61. Mondale recalls the St. Croix Falls hearing participants’ overwhelming support for inclusion of the Lower St. Croix into the national system. Interview with Vice President Walter Mondale, *supra* note 16.

73. Fetherling, *U.S. Urged to Protect St. Croix, supra* note 72, at 12B.

feared that the federal government would acquire their lands.<sup>74</sup> Senators Jackson, Mondale, and Nelson sought to allay their fears by stressing their support for preservation through the acquisition of scenic easements, rather than outright purchase of land in the river corridor.<sup>75</sup> The only serious opposition to the bill voiced at the field hearing was from Peter Popovich, a lawyer and resident of St. Mary's Point on the Lower St. Croix.<sup>76</sup> Claiming that local governments could properly regulate development and that there was "no overcrowding or contamination of the south half of the river," Popovich argued that the portion of the river from Stillwater to Prescott should be excluded from the bill.<sup>77</sup>

Despite strong public support for federal designation of the Lower St. Croix, the Interior Department stalled. As of March 1972, the Interior Department had not yet completed its Washington task force comments on the federal-state Lower St. Croix Wild and Scenic Rivers Study (which had been completed in October 1971) and had not provided comments on the Mondale-Nelson bill, as requested by the Senate Interior Committee in June 1971.<sup>78</sup> Frustrated by the lack of action, Governor Anderson wrote to Secretary Morton urging timely action to ensure that the river would be protected from impending development threats.<sup>79</sup> He told Morton that further delay "means the possible loss by default of an irreplaceable resource."<sup>80</sup>

The Senate Interior and Insular Affairs Subcommittee held a

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74. See, e.g., *Hearings, supra* note 14, at 17-22 (statements of Patricia R. Brown and Dr. Erhard Haus).

75. See *id.* at 19-22; Fetherling, *U.S. Urged to Protect St. Croix, supra* note 72, at 12B; see also Goligoski, *St. Croix Preservation Backed, supra* note 69, at 1.

76. *Hearings, supra* note 14, at 31-35. Popovich was later appointed by Minnesota Governor Rudy Perpich as Chief Justice of the Minnesota Supreme Court. At the hearing on the Lower St. Croix, Popovich represented both himself and a neighbor, Stanley Hubbard, president of Hubbard Broadcasting Co. *Id.* at 31, 34; Margaret Zack, *Peter Popovich Dies at 75. He was Retired Chief Judge of State's Highest Courts*, STAR TRIB. (Minneapolis), Mar. 30, 1996, at A1.

77. *Hearings, supra* note 14, at 34.

78. See Letter from Wendell R. Anderson to The Honorable Rogers C.B. Morton (March 24, 1972) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

79. *Id.* In his letter to Morton, Anderson quoted section 5(b) of federal Wild and Scenic Rivers Act, Pub. L. No. 90-542, which requires that priority be given to those rivers with the "greatest likelihood of developments which, if undertaken, would render them unsuitable for inclusion in the national wild and scenic rivers system." *Id.* Anderson contended that the Lower St. Croix was such a river, as "[f]ew other rivers eligible for inclusion in the national system have as much pending development . . . as does the St. Croix." *Id.*

80. *Id.*

hearing on the Mondale-Nelson bill on April 14, 1972.<sup>81</sup> At the hearing, Senator Mondale argued that the qualifications of the Lower St. Croix for addition to the national wild and scenic rivers system were undisputed. He described land speculation and plans for several large developments along the river that could only be stopped with swift congressional action.<sup>82</sup> Minnesota Commissioner of Natural Resources Robert L. Herbst read Governor Anderson's testimony in support of the bill.<sup>83</sup> In this testimony, Anderson argued that the twelve-mile stretch of the Lower St. Croix from Taylors Falls to the Soo Line Railroad swing bridge would qualify as a "scenic" river under the definition set forth in the Wild and Scenic Rivers Act of 1968, and that the remaining forty miles of the Lower St. Croix qualified for designation as a "recreational river."<sup>84</sup> A representative of Wisconsin's Governor Patrick Lucey told the Committee that there were "many dangers that face the valley's continued existence in its scenic state. Today, the Lower St. Croix may meet the criteria defining a scenic river. Tomorrow it may not."<sup>85</sup>

The bill suffered a major setback when the Interior Department, in a surprise move, submitted written testimony to the Subcommittee recommending against enactment of the Mondale-Nelson bill.<sup>86</sup> The testimony, by Harrison Loesch, Assistant Secretary of the Interior, stated that the findings of the Department's field study team, "together with other considerations relevant to Federal administration of the segment, prompt our recommendation against enactment of S. 1928."<sup>87</sup> Loesch continued, "Only those areas which have unique, nationally significant natural or historical characteristics are proposed for a direct Federal responsibility and, after review, we have concluded that this area does not have such characteristics."<sup>88</sup>

Supporters of the Mondale-Nelson bill were dismayed, particularly because the Interior Department's own team had recommended inclusion of the river in the national wild and scenic rivers system.<sup>89</sup>

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81. *Hearings, supra* note 14, at 63–180 (1972).

82. *Id.* at 84–89, 103 (statement of U.S. Senator Walter Mondale).

83. *Id.* at 104–07 (statement of Robert L. Herbst, Minn. Dep't of Natural Res., on behalf of Wendell R. Anderson, Governor of Minn.).

84. *Id.* at 105.

85. *Id.* at 107–10 (statement of Jeff Smoller, Upper Great Lakes Regional Comm'n, representing Patrick J. Lucey, Governor of Wis.).

86. *Id.* at 66–68 (Apr. 13, 1972) (written testimony by Harrison Loesch, Assistant Secretary of the Interior Department, Interior Department Rep.).

87. *Id.*

88. *Id.*

89. Jim Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area

Governor Anderson embarked upon a campaign to persuade the Interior Department to reverse its stance. In a strongly-worded letter to Senator Henry Jackson, Chair of the Senate Committee on Interior and Insular Affairs, Governor Anderson criticized the Interior Department for ignoring the recommendations of its own team.<sup>90</sup> He went on to refute, point-by-point, the rationale articulated in Loesch's written testimony, asserting that Loesch's argument was "not only inaccurate and misleading, but also totally irrelevant to the consideration of the river's qualifications for federal designation."<sup>91</sup> Governor Anderson requested that his letter be accepted as part of the official record of the April 14, 1972 Senate Interior and Insular Affairs Subcommittee hearing in the hope that it would help in Senator Jackson's "analysis of the Department of Interior's statement and assist in passing out the bill."<sup>92</sup>

On the diplomatic front, Governor Anderson and other supporters of the Mondale-Nelson bill appealed to Secretary Morton to reconsider the position the Interior Department had taken. Two Republican congressmen, Albert Quie, of Minnesota, and Vernon Thomson, of Wisconsin, met with Morton in late May in an attempt to persuade him to review the Interior Department's position.<sup>93</sup> The meeting between Quie, Thomson and Morton led to a June 9, 1972

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Commission and a member of the federal-state study team, told the Minneapolis Tribune that Minnesota and Wisconsin officials at the hearing were "a little bit at a loss for words." Steve Dornfeld, *St. Croix 'Scenic' Label is Opposed*, MINNEAPOLIS TRIB., Apr. 15, 1972, at 1A; see also *Hearings*, *supra* note 14, at 144-46 (Letter from Wendell R. Anderson to The Honorable Henry M. Jackson, Comm. on Interior and Insular Affairs (May 8, 1972)) (quoting the federal-state study team's report, which recommended that the Lower St. Croix River be included in the national system of wild and scenic rivers and administered and managed by the National Park Service in cooperation with the states of Minnesota and Wisconsin).

90. *Hearings*, *supra* note 14, at 144-46; Letter from Governor Wendell R. Anderson to Senator Henry Jackson, Chair of the Senate Comm. on Interior and Insular Affairs (Apr. 14, 1972)).

91. *Id.* Anderson refuted, among other claims by Loesch, the argument that a river had to "possess characteristics of national significance" to qualify for inclusion in the national system. *Id.* at 145; see also *id.* at 67 (April 13, 1972) (written testimony by Harrison Loesch, Assistant Secretary of the Interior Department, Interior Department Rep.).

92. *Id.* at 144.

93. Lee Egerstrom, *Minn., Wis. Woo Morton on River Idea*, ST. PAUL DISPATCH (Minn.), June 9, 1972, at 9; see also Press Release, News from the Office of the Governor Wendell B. Anderson (July 20, 1972) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society) (describing the series of meetings that led to an agreement between Minnesota and Wisconsin, as well as the Interior Department's ultimate support for the preservation of the Lower St. Croix River).

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meeting between representatives of the Interior Department and both states.

Before the meeting, the Minnesota-Wisconsin Boundary Area Commission provided participants from both states with a memo that placed the blame for the Interior Department's opposition to designation of the Lower St. Croix on the National Park Service and "internal politics," and outlined the Interior Department's anticipated compromise proposal, as well a strategy to resolve the matter.<sup>94</sup> The Commission's memo included the following:

Simply stated, virtually all state, regional and local interests are actively in support of the bills to include the entire 52 mile Lower St. Croix in the National Wild and Scenic Rivers System under Department of the Interior administration, while the Department has committed itself to a position opposing passage of the bills. . . .

. . .

The Interior statement opposing the Senate bill was not based upon any thoroughgoing analysis by Washington officials of the Department. It was a hastily-constructed position which systematically ignored both the study findings and existing threats to the riverway. It was based primarily on unilateral and arbitrary observations and conclusions of the National Park Service, which abandoned its participation in the river study a year before its completion, and reflects the results of a deliberate effort on the part of the Park Service to avoid having to put a National Park system label on the Lower St. Croix. In effect, the Department got so bogged down in the internal politics of the situation that one unsuspecting official after another got dragged into the comedy of errors in the last-minute scramble to develop a position on the Senate bill. Thus the Department is now stuck with a position on the river which, it has finally realized, is very awkward and out-of-touch with the reality of the situation.

Having now discovered that it has erred in opposing the Lower St. Croix bill, the Department is seeking to rectify the situation in a manner which will allow it to support a program for effective protection of the river without having to admit that it was wrong.<sup>95</sup>

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94. Memorandum from Minnesota-Wisconsin Boundary Area Comm'n to State Participants in June 9, 1972 Discussion of Lower St. Croix River (June 8, 1972) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

95. *Id.* at 1-2. It is not clear how the Commission obtained the information that

The June 9, 1972 meeting took place in Governor Lucey's office in Madison, Wisconsin.<sup>96</sup> At the meeting, the parties reached a tentative agreement<sup>97</sup> that would save the river while allowing the Interior Department to save face. The compromise agreement provided for inclusion of the entire fifty-two-mile stretch of the Lower St. Croix as a component of the national wild and scenic rivers system, with the federal government responsible for managing the upper twenty-seven-mile segment of this stretch of river, and the states responsible for jointly managing the lower twenty-five-mile segment of the stretch.<sup>98</sup> Following its approval by Interior Secretary Rogers Morton, the deal was announced publicly on July 20, 1972.<sup>99</sup> In his press release, Governor Anderson stated that the agreement would not have been possible without the bipartisan efforts of the Minnesota and Wisconsin delegations.<sup>100</sup> He credited Representative Quie with being instrumental in persuading Interior Secretary Morton to review the Interior Department's position, and praised Senators Mondale and Nelson for their work to move the bill through the U.S. Senate.<sup>101</sup>

After the federal-state pact on the bill was reached, Mondale, Anderson and others continued their efforts to ensure its passage that year. The Senate approved the legislation with the agreed-upon amendments as expected,<sup>102</sup> but a full calendar of a House subcom-

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was outlined in its memo. However, the memo itself states that the Commission's executive director had been in discussions with "Congressional and Department officials close to the situation over the" previous three weeks. *Id.* at 1.

96. Press Release, News from the Office of the Governor Wendell B. Anderson (July 20, 1972). Attending the meeting were Peter Gove, Environmental Assistant to Governor Anderson, a representative of the Department of Natural Resources, representatives from the State of Wisconsin and Roman Koenings of the U.S. Department of the Interior. See Letter from W.W. Lyons, Deputy Assistant Sec'y of the Interior, to Governor Anderson (July 11, 1972) (on file with authors).

97. The agreement had to be approved by Interior Secretary Rogers Morton before it could be approved. See Sam Martino, *Tentative Plan Set to Preserve Area of St. Croix*, MINNEAPOLIS TRIB., June 10, 1972, at 7B.

98. *Id.*; see also Press Release, News from the Office of the Governor Wendell B. Anderson (July 20, 1972) (explaining that the northern twenty-seven miles runs from Taylors Falls to the log boom site north of Stillwater and the lower twenty-five miles runs from Stillwater to Prescott, Wisconsin).

99. See Press Release, News from the Office of the Governor Wendell B. Anderson (July 20, 1972).

100. *Id.*

101. *Id.* An editorial in the St. Paul Dispatch lauded Senator Mondale, Senator Nelson, Representative Quie, Governor Anderson and Governor Lucey for their efforts to work with the Interior Department on a compromise agreement. Editorial, *Saving a River*, ST. PAUL DISPATCH (Minn.), July 21, 1972, at 6.

102. S. 1928, 92d Cong. (1st Sess. 1972); see also Al McConagha, *House Panel Approves Lower St. Croix Bill*, MINNEAPOLIS TRIB., Oct. 12, 1972, at 1A (describing

mittee threatened the bill's passage by the House.<sup>103</sup> On October 6, 1972, Anderson and Lucey sent a joint letter to Representative Wayne N. Aspinall, Chairman of the House Committee on Interior and Insular Affairs, urging swift action on the bill.<sup>104</sup> The following day, Anderson telegraphed Minnesota's Congressional delegation, asking their help in scheduling a hearing in the House on the bill.<sup>105</sup> In action that Representative Quie described as a "legislative miracle," Representative Aspinall made room for the bill at the Interior and Insular Affairs Committee's last meeting of the session, where it was heard and approved.<sup>106</sup>

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approval of the legislation).

103. McConagha, *supra* note 102, at 1A. Representatives Quie and Thomson had introduced the House version of S. 1928, H.R. 16996, on October 4, 1972. H.R. 16996, 92d Cong. (1972).

104. Letter from Wendell Anderson, Governor of Minn., and Patrick J. Lucey, Governor of Wis., to The Honorable Wayne N. Aspinall, Chairman, Comm. on Interior and Insular Affairs, U.S. House of Representatives (Oct. 6, 1972) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

105. Anderson wrote:

Your support is crucial next week to gain passage of the Lower St. Croix River Act of 1972. Through a bipartisan effort, the Office of Management and Budget concurred with the funding of the acquisition and management costs for the lower 52 miles. The compromise plan for protecting the river has been agreed to by the Department of Interior. The Senate Interior Committee Friday passed out the amended version of the Act, sponsored by Senators Mondale and Nelson (S1928). Representatives Quie and Thompson have introduced H.R. 16996. Governor Lucey and I have written Congressman Aspinall, requesting a hearing. I ask for any assistance you can give to get a hearing in the House on the legislation. Development pressures on the St. Croix River necessitate passage of the bill this term.

Western Union Telefax from Wendell R. Anderson, Governor, to The Honorable Bob Bergland, The Honorable John Zwach, The Honorable Bill Frenzel, The Honorable John Blatnik, The Honorable Ancher Nelson, The Honorable Don Fraser, and The Honorable Joseph Karth, U.S. House of Representatives, Washington, D.C. (undated) (on file with authors); *see also* Letter from Bill Frenzel, Member of Cong., to The Honorable Wendell Anderson, Minn. Governor (Oct. 12, 1972) (thanking Anderson for his October 7, 1972 telegram "regarding passage of the Lower St. Croix River Act of 1972") (on file with authors). Anderson sent a separate telegram to Representative Quie informing him that he had telegraphed the Congressional delegation asking for their help in scheduling a hearing and that he and Governor Lucey had written to Congressman Aspinall. Western Union Telefax from Wendell R. Anderson, Minn. Governor, to The Honorable Albert Quie, U.S. House of Representatives, Washington, D.C. (undated) (on file with authors).

106. McConagha, *supra* note 102, at 1A. Quie and co-author Thompson considered getting the bill through the committee a "very uphill project" but enlisted the help of Representative John Saylor, R-Pa., ranking minority member of the committee. Saylor, in turn, persuaded Committee chair, Wayne Aspinall, D-Colo., to schedule a hearing on the bill. *Id.* Quie and Thompson persuaded the GOP

On October 13, 1972, the U.S. House of Representatives passed the Lower St. Croix River Act of 1972.<sup>107</sup> President Richard Nixon signed the Act on October 25, 1972.<sup>108</sup>

*B. The Minnesota Wild and Scenic Rivers Act*

Governor Anderson's strategy to elect Democrats to the Minnesota House and Senate proved to be successful. The 1972 election swept Republican majorities from both houses and put Democrats in full control of Minnesota's legislative branch.<sup>109</sup> For environmentalists, the election's outcome was particularly satisfying, as Democrat Willard Munger, a long-time friend of the environment, assumed the role of chair of the House Environment and Natural Resources Committee.<sup>110</sup> A "pent up demand" for laws protecting the environment was released,<sup>111</sup> and newly elected legislators had an opportunity to capitalize on a wave of national interest in new environmental legislation.

On Feb. 14, 1973, Anderson presented an historic Special Message to the Legislature entitled "Securing a Quality Environment in Minnesota."<sup>112</sup> The Special Message was prefaced by two quotes, one from the Environmental Quality Council Citizens Advisory Committee, and the other from John Steinbeck: "If Minnesota is to achieve an equilibrium where people and nature coexist, not just for the next 100 years, but for the life of the planet, the state must now establish some long-term environmental goals and must make a serious commitment to the attainment of those goals."<sup>113</sup> And, "Man himself has become our greatest hazard and our only hope."<sup>114</sup>

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committee members to attend the Committee meeting to ensure a quorum. *Id.*

107. S. 1928, 92d Cong. (1972) (enacted).

108. Lower St. Croix River Act of 1972, Pub. L. No. 92-560, 86 Stat. 1174.

109. Interview with Wendell R. Anderson, *supra* note 34; *Environment's Greatest Legislative Session*, *supra* note 38, at 8.

110. Interview with John Helland, *supra* note 47. Munger, who became known as "Mr. Environment," continued in this role for most of the next quarter century, shaping much of Minnesota's progressive environmental regulatory structure. Minnesota Legislative Reference Library, Legislators Past & Present, Munger, Sr., Willard M., <http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10443> (last visited Mar. 1, 2010); *see also* MARK MUNGER, MR. ENVIRONMENT: THE WILLARD MUNGER STORY (2009) (describing the career of Willard Munger).

111. Interview with Harry A. Sieben, Jr., *supra* note 37; Interview with John Helland, *supra* note 47.

112. 1973 Special Message, *supra* note 46.

113. *Id.* (quoting Environmental Quality Council Citizens Advisory Committee).

114. *Id.* (quoting John Steinbeck).

Giving hope to his state, Anderson announced a sweeping set of proposals to protect Minnesota's environment. His proposals addressed land use, energy and environmental policy, water and recreational resources, mining, solid waste, agricultural and noise pollution, as well as legal remedies, governmental structure, agency staffing and environmental education.<sup>115</sup> Included was a recommen-

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115. *Id.* In his 1973 state of the state message, budget message, and environmental message Anderson recommended a total of forty-five bills or major budget recommendations pertaining to the environment. *See* Environmental Legislation—1973 Session (unpublished document on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society). Of these, thirty-seven were approved by the Legislature. *Id.*; *see* Critical Areas Act, H.F. 1659, 1973 Leg., 68th Sess. (Minn. 1973); Scenic Rivers Act, H.F. 672, 1973 Leg., 68th Sess. (Minn. 1973); Power Plant Siting, S.F. 2115, 1973 Leg., 68th Sess. (Minn. 1973); Subdivided Land Act, H.F. 873, 1973 Leg., 68th Sess. (Minn. 1973); Subpoena Power for Information, S.F. 615, 1973 Leg., 68th Sess. (Minn. 1973); Environmental Quality Council, S.F. 1160, 1973 Leg., 68th Sess. (Minn. 1973); Environmental Policy Act, H.F. 1001, 1973 Leg., 68th Sess. (Minn. 1973); Department of Natural Resources Reorganization, H.F. 1219, 1973 Leg., 68th Sess. (Minn. 1973); Amendments to Municipal Sewage Facilities Act, S.F. 507, 1973 Leg., 68th Sess. (Minn. 1973); Additional Bonding Authority for Sewage Treatment, H.F. 2449, 1973 Leg., 68th Sess. (Minn. 1973); Compliance with Federal Water Pollution Control Act of 1972 and Civil Penalties for Pollution, S.F. 900, 1973 Leg., 68th Sess. (Minn. 1973); Water Law Revisions, H.F. 1465, 1973 Leg., 68th Sess. (Minn. 1973); Drainage Law Revisions, H.F. 1381, 1973 Leg., 68th Sess. (Minn. 1973); Dam Regulation, S.F. 1037, 1973 Leg., 68th Sess. (Minn. 1973); Water Permit Fees, H.F. 1201, 1973 Leg., 68th Sess. (Minn. 1973); Waterwell and Groundwater Pollution, H.F. 1837, 1973 Leg., 68th Sess. (Minn. 1973); Flood Plain Management, S.F. 1332, 1973 Leg., 68th Sess. (Minn. 1973); Stream Maintenance Program, S.F. 929, 1973 Leg., 68th Sess. (Minn. 1973); Shoreland Management with municipal bonding, S.F. 2251, 1973 Leg., 68th Sess. (Minn. 1973); Lower St. Croix River Management Act, H.F. 942, 1973 Leg., 68th Sess. (Minn. 1973); Unrefunded Gas Tax for Trails, H.F. 1297, 1973 Leg., 68th Sess. (Minn. 1973); Wild River State Park, S.F. 1252, 1973 Leg., 68th Sess. (Minn. 1973); Free State Park Admission for Senior Citizens, H.F. 813, 1973 Leg., 68th Sess. (Minn. 1973); Free Fishing Licenses for Senior Citizens, H.F. 304, 1973 Leg., 68th Sess. (Minn. 1973); Leech Lake Settlement, S.F. 655, 1973 Leg., 68th Sess. (Minn. 1973); Luce Line Trail, S.F. 1702, 1973 Leg., 68th Sess. (Minn. 1973); French River Hatchery, S.F. 2417, 1973 Leg., 68th Sess. (Minn. 1973); Mineland Reclamation, H.F. 2029, 1973 Leg., 68th Sess. (Minn. 1973); Severed Mineral Registration and Taxation, H.F. 2121, 1973 Leg., 68th Sess. (Minn. 1973); Auto Hulk Recycling Program, H.F. 1302, 1973 Leg., 68th Sess. (Minn. 1973); PCA Toxic Waste Authority, H.F. 1203, 1973 Leg., 68th Sess. (Minn. 1973); Industrial Revenue Act Amendments, H.F. 1190, 1973 Leg., 68th Sess. (Minn. 1973); Comprehensive Recycling Program, H.F. 1821, 1973 Leg., 68th Sess. (Minn. 1973); Civil Penalties, S.F. 900, 1973 Leg., 68th Sess. (Minn. 1973); Minnesota Environmental Education Council, S.F. 926, 1973 Leg., 68th Sess. (Minn. 1973). The unpublished document with Governor Anderson's papers entitled "Environmental Legislation—1973 Session" also states that "Land Use Planning [was] requested of MRC," and counts this as one of the thirty-seven laws recommended by the Governor that were approved by the legislature. *See* 1973 Special Message, *supra* note 46. It is possible that "Land Use Planning" refers to 1973 Minnesota Laws,

dation that the 68th Legislature pass a "Minnesota Scenic Waterways Act to establish a state system for preserving and managing scenic waterways."<sup>116</sup> Anderson stated:

Numerous rivers in Minnesota must be afforded the same protection now given to the St. Croix River by federal action. Appropriate legislation will constitute an affirmation that our rivers are a most critical area for preservation.

My proposal empowers the Commissioner of Natural Resources to classify certain state rivers as wild, scenic and recreational.<sup>117</sup> It allows the state, in cooperation with the appropriate county unit to establish land use controls that prohibit or guide development along various rivers. Any easement or state management costs would be allocated by the Legislature. Under this legislation, I will immediately instruct the Commissioner of Natural Resources to protect the Kettle River, the Big Fork River, and the Mississippi River above the confluence of the Rum River. The immediate protection of these rivers is essential.<sup>118</sup>

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chapter 720, section 43, an appropriation to the Minnesota Resources Council, and that the Governor requested MRC use some of this appropriation for land use planning. However, this is not clear from the appropriation on its face.

116. 1973 Special Message, *supra* note 46, at 8. The "scenic waterways" reference likely originated with the Minnesota DNR, whose planners recommended a broad scope of protection that would encompass waterways connecting Minnesota's northeastern lakes rather than limiting protection to rivers. *See* Letter from Jerome H. Kuehn, Planning Adm'r, Minn. Dep't of Natural Res., to Mrs. Bernard Herzog (February 18, 1971) (on file with records of Department of Natural Resources, Minnesota State Archives, Minnesota State Historical Society) [hereinafter Kuehn Letter to Herzog]. Although the official title of the bills introduced in 1973 and of the law enacted is "Minnesota Wild and Scenic Rivers Act," *see* H.F. 672, 1973 Leg., 68th Sess. (Minn. 1973) (describing the bill as first introduced in the Minnesota House as one enacted for the "preservation and management of wild and scenic rivers"), contemporaneous reports often referred to the legislation instead as the "Scenic Waterways Act." *See, e.g., Governor Signs River Bill on Mississippi Near Here*, MONTICELLO TIMES (Monticello, Minn.), May 17, 1973, at 1 [hereinafter *Governor Signs River Bill*]; *State to Protect Scenic Waterways* (photo caption), MINNEAPOLIS TRIB., May 17, 1973, at 1A [hereinafter *State to Protect Scenic Waterways*].

117. Both Senator Mondale and Commissioner Herbst had strongly encouraged Anderson to seek passage of state wild and scenic rivers legislation, and Anderson fully backed the idea. Interview with Vice President Walter Mondale, *supra* note 16. Telephone Interview with Robert L. Herbst, *supra* note 5.

118. 1973 Special Message, *supra* note 46, at 8. In 1971, Representative John A. Blatnik, D-Minn., had introduced a bill to designate the Kettle River as a national wild and scenic river. H.R. 7021, 92d Cong. (1971). That same year, Senator Walter Mondale had introduced legislation to designate Minnesota's Big Fork River as a national wild and scenic river. S. 1508, 92d Cong. (1971). Neither bill for federal designation of these rivers became law.

As of the time Anderson presented his Special Message, proposals for wild and scenic rivers legislation had been under consideration at the Minnesota DNR for over two years. In a memorandum dated January 5, 1971, Jerome Kuehn, DNR's Bureau of Planning Administrator, offered comments on an April 29, 1970 "rough draft" of a bill "designed to create a state system of wild, scenic and recreational rivers."<sup>119</sup> The following month, Kuehn wrote, "At the present time there are proposals for introducing wild or scenic rivers legislation in Minnesota[;] we are in favor of it."<sup>120</sup> A DNR report, *A Study for the Adoption of a Wild and Scenic Rivers Act in the State of Minnesota*, released in May 1971 demonstrated Commissioner Herbst's commitment to wild and scenic river protection.<sup>121</sup> On October 31, 1972, Kuehn wrote the following about a statewide wild and scenic rivers program:

[S]everal public agencies and concerned private groups have advanced proposals for a statewide wild and scenic rivers program. Project 80, a report prepared jointly by the State Planning Agency and the Department of Natural Resources, has developed a tentative proposal for a State Wild and Scenic Waterway System. Also, several private groups . . . have advanced proposals for the development of such a rivers system. However, no such system yet exists."<sup>122</sup>

Sierra Club and the Isaak Walton League were active in pushing for a state wild and scenic rivers law.<sup>123</sup> David Bryden, a professor at University of Minnesota Law School who taught land use planning, drafted a state wild and scenic rivers bill for the Sierra Club.<sup>124</sup>

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119. Memorandum from Jerome H. Kuehn, Planning Adm'r, Minn. Dep't of Natural Res. to Larry Houk (Jan. 5, 1971) (on file with records of Department of Natural Resources, Minnesota State Archives, Minnesota Historical Society, call no. 109.B.16.5.B).

120. Kuehn Letter to Herzog, *supra* note 116.

121. See MINN. DEP'T OF NATURAL RES., A STUDY FOR THE ADOPTION OF A WILD AND SCENIC RIVERS ACT IN THE STATE OF MINNESOTA (1971) (on file with authors).

122. Letter from Jerome H. Kuehn, Planning Adm'r, Dep't of Natural Res., to Charles H. Stoddard, Res. Consultant, N. Env'tl. Council (Oct. 31, 1972) (on file with records of Department of Natural Resources, Minnesota State Archives, Minnesota Historical Society) [hereinafter Kuehn Letter to Stoddard].

123. See *id.*

124. University of Minnesota Law School, Faculty Directory, Professor David P. Bryden, <http://www.law.umn.edu/facultyprofiles/brydend.html>. A December 15, 1972 memorandum from Archie D. Chelseth, Assistant Commissioner of Natural Resources, states that the authors of a "first proposed bill" were from the University of Minnesota Law School and were representing the Isaac Walton League and the Sierra Club. Memorandum from Archie D. Chelseth, Assistant Comm'r, Minn. Dep't of Natural Res., to J.H. Kuehn, G. Hollenstein, M. Krona, R. Story, F. Johnson, & D. Vesall (Dec. 15, 1972) (on file with Division of Waters, Department of Natural

Legislation to create a state wild and scenic rivers system was also supported by the Minnesota Public Interest Research Group, the Metropolitan League of Women Voters, and the Minnesota Canoe Association.<sup>125</sup>

On February 19, 1973, five days after Governor Anderson's Special Message to the 68th Legislature, House File No. 672, which would become the Minnesota Wild and Scenic Rivers Act (the Act), was introduced in the House of Representatives,<sup>126</sup> and its companion bill, Senate File No. 642, was introduced in the Senate.<sup>127</sup> Chief author of the House bill was Representative Harry Sieben, Jr., a second-term representative from Hastings.<sup>128</sup> Senator Winston Borden of Brainerd was the chief author of the Senate's companion bill.<sup>129</sup>

After their first readings, H.F. 672 was referred to the House Committee on Environmental Preservation and Natural Resources<sup>130</sup> and S.F. 642 was referred to the Senate Committee on Natural Resources and Agriculture.<sup>131</sup> Both proponents and opponents of the bills came out in large numbers to testify in subcommittee and committee hearings. Representatives of the Minnesota DNR, Sierra Club, Minnesota Conservation Federation, Isaak Walton League, Minnesota Canoe Association and Don Gapen—a Big Lake angler and tackle manufacturer—were leading proponents at the hearings.<sup>132</sup>

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Resources). The memo also referenced a "second proposed bill," which was a revised "addition of the first proposed bill" prepared by the DNR's Bureau of Planning. *Id.*

125. Minnesota Wild and Scenic Rivers Bill Citizen Task Force, *The Minnesota Wild and Scenic Rivers Bill Summary* (Feb. 15, 1973) (on file with Harry A. Sieben, Jr. Papers, Minnesota State Archives, Minnesota Historical Society, call no. 151.K.7.3(B)).

126. 1 *Journal of the House of Representatives* 367 (68th Minn. Leg. Feb. 19, 1973).

127. 1 *Journal of the Senate* 325 (68th Minn. Leg. Feb. 19, 1973).

128. *See* Minnesota Legislators Past & Present, Sieben, Jr., Harry A. "Tex," Minnesota Legislative Reference Library, <http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10612> (last visited Apr. 9, 2010). Sieben's co-authors were Reps. Savelkoul, Norton, Myrah and Mungler. 1 *Journal of the House of Representatives* 367 (68th Minn. Leg. Feb. 19, 1973).

129. *See* Minnesota Legislators Past & Present, Borden, Winston W., Minnesota Legislative Reference Library, <http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10070> (last visited Apr. 9, 2010); 1 *Journal of the Senate* 325 (68th Minn. Leg. Feb. 19, 1973). Borden's co-authors were Senators Nelson and Lord. *Id.*

130. 1 *Journal of the House of Representatives* 367 (68th Minn. Leg. Feb. 19, 1973).

131. 1 *Journal of the Senate* 325 (68th Minn. Leg. Feb. 19, 1973).

132. Speaking in support of H.F. 672 on March 9, 1973 before the House Environment Subcommittee were Commissioner Herbst and Jerome Kuehn of the DNR; Al Farnes, representing the Minnesota Conservation Federation; Richard Flint of Sierra Club; David Bryden, "teacher of Environmental Law at the U of M," and a

Opponents were primarily farmers and other landowners with property on rivers subject to potential designation and local officials.<sup>133</sup> Organizations called Cannon Valley Concerned Residents and Taxpayers of Minnesota also opposed the bills.<sup>134</sup>

The most controversial provision in the wild and scenic rivers bills by far was one that authorized the Commissioner of Natural Resources to acquire “the title, scenic easements or other interests in land” by eminent domain.<sup>135</sup> This provision was quickly stricken from the Senate bill.<sup>136</sup> The Subcommittee on Water Resources of the

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Sierra Club member; and Duke Addicks, attorney, Association of Minnesota Counties. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env't*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 9, 1973). At the hearing, Commissioner Herbst “stressed the need for the act to prevent impairment of the natural setting, to meet contamination threats, [and] to meet recreational needs.” *Id.* at 1. He further noted that “the bill addressed itself only to a select group of rivers; [and that] preservation of the wilderness along the rivers was essential.” *Id.* Opposing H.F. 672 at the March 9, 1973 Environment Subcommittee hearing was Raef Swanson, counsel, Taxpayers of Minnesota. *Id.* Others who testified at legislative committee hearings in support of the bill included Archie Chelseth, Assistant Commissioner of Natural Resources; Rudie Baack, Chairman, Sierra Club, Northstar Chapter; Don Gapen of Big Lake (Gapen Packing Co.); Paul Jensen, Cannon Valley Development Association; Mayor Jokela of Sandstone; Allan Buckholz, Minnesota Canoe Association; Victor Rotering, representative of Isaak Walton League; Jim Peterson, Editor and Publisher, *Outdoor News*; and Dr. Ronald Christianson, of Hinkley. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env't*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 14, 1973); *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 2, 1973); *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 21, 1973). Opponents of the bill also included Representative George Mann, Burt Olson, Member, Cannon Falls Town Board, Planning Commission; Al Houston, Township Commissioner, Waterford Township; and Bob Richardson, Lobbyist, Cannon Valley Concerned Residents. *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. And Agric. Comm.*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 8, 1973); *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 2, 1973); *Hearing on H.F. 672 Before the Minn. H. Comm. on Env't'l Preservation and Natural Resources*, 1973 Leg., 68th Sess. 44 (Minn. March 14, 1973). (All subcommittee and committee minutes referenced herein are on file in the Minnesota State Archives, Minnesota Historical Society).

133. See *Hearing on H.F. 672 Before the Minn. H. Comm. on Env't'l Preservation and Natural Resources*, 1973 Leg., 68th Sess. 44 (Minn. March 14, 1973); *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1–2 (Minn. Mar. 8, 1973).

134. See *Hearing on H.F. 672*, at 1–2 (Minn. Mar. 9, 1973); *Hearing on S.F. 642*, at 1–2 (Minn. Mar. 2, 1973).

135. H.F. 672 § 7, 1973 Leg., 68th Sess. (Minn. 1973).

136. See *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1 (Minn. Mar. 8, 1973) (“Senator Borden, author, briefly explained the amendment to the bill. He said that the eminent

Senate Natural Resources and Agriculture Committee initially heard the bill on March 2, 1973.<sup>137</sup> Minutes of that meeting include references to testimony in opposition to the eminent domain provision.<sup>138</sup> By the next Subcommittee meeting on March 8, 1973, Senator Borden had agreed to strike the eminent domain provision.<sup>139</sup> The Subcommittee approved this amendment.<sup>140</sup> The Subcommittee's recommendations were considered and adopted by the full Senate Natural Resources and Agriculture Committee on March 21, 1973.<sup>141</sup>

Eminent domain had greater support among members of the House. The House Environment Subcommittee considered H.F. 672 on March 9, 1973, a day after the Senate Committee agreed to strike eminent domain from the companion bill.<sup>142</sup> Eminent domain was discussed at this meeting. The minutes state that "it was pointed out that numerous state groups had such power."<sup>143</sup> After Mr. Raef Swanson, Secretary and counsel, Taxpayers of Minnesota, testified

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domain portion had been stricken from the bill.").

137. *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1-2 (Minn. Mar. 2, 1973).

138. *Id.* Raef Swanson, Secretary of Concerned Taxpayers of Minnesota, and Bob Richardson, Cannon Valley Concerned Residents, spoke against the bill, in part, because of the eminent domain provision. *Id.* Ted Shields, Director, Division of Environmental Affairs, Minnesota Association of Commerce and Industry, expressed concern about the "blanket authority to carry out the provisions of [the] bill" given to the DNR. *Id.*

139. *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1-2 (Minn. Mar. 8, 1973).

140. *Id.* at 2.

141. *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1-2 (Minn. Mar. 21, 1973). The minutes contain a reference to testimony by "Mr. Richardson, President of the Cannon Valley Residents" who "spoke against the bill." *Id.* at 56. The minutes state that Mr. Richardson "[w]ould like to see the eminent domain section put back into the bill." *Id.* at 56. This reference is confusing in light of a letter to the editor published in the Red Wing Republican Eagle on April 13, 1973. In the letter, Richardson vociferously criticized Representative Sieben for supporting eminent domain and stated that Cannon Valley Concerned Residents had succeeded in getting the eminent domain provisions removed from H.F. 642 with the help of rural legislators. Bob Richardson, Letter to the Editor, RED WING REPUBLICAN EAGLE (Minn.), Apr. 13, 1973, at 3. One can only surmise that the Committee minutes either misquote Richardson or that his testimony was a cynical move aimed at killing the bill altogether.

142. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env't*, 1973 Leg., 68th Sess. 1 (Minn. Mar. 9, 1973); see also *Hearing on S.F. 642 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. 1 (Minn. Mar. 8, 1973).

143. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env't*, 1973 Leg., 68th Sess. 2 (Minn. Mar. 9, 1973).

that his organization “objected to any more power of eminent domain,” Representative Rodney Searle moved to strike the eminent domain provision to conform to the Senate bill.<sup>144</sup> His motion failed.<sup>145</sup>

The bill was heard by the House Environmental Preservation and Natural Resources Committee on March 14, 1973.<sup>146</sup> At this committee hearing, Sieben fought hard to preserve the bill’s eminent domain provision.<sup>147</sup> He told his fellow committee members, “This is a good bill with or without eminent domain, but that is its guts. We’ve given the power of eminent domain to all kinds of utilities, to some of the people who have helped spoil the environment, and now we can fight fire with fire!”<sup>148</sup> Despite Sieben’s passionate advocacy and support from some witnesses for eminent domain, there was still vocal opposition to the provision.<sup>149</sup> Representative Searle again moved that the bill be amended to strike the eminent domain language.<sup>150</sup> Chairman Munger called the question and initially ruled the motion to strike eminent domain defeated.<sup>151</sup> However, on a show of hands, the motion prevailed.<sup>152</sup> After three additional motions for amendments failed, Representative Phyllis Kahn moved reconsideration of Representative Searle’s amendment to strike the eminent domain provision, but was ruled out of order.<sup>153</sup> As amended, the committee voted to recommend passage of the bill.<sup>154</sup>

Sieben continued to champion the bill and to support granting the Commissioner of Natural Resources eminent domain authority. On March 28, 1973, Sieben gave a powerful speech on the House

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144. *Id.* at 2.

145. *Id.*

146. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 43–45 (Minn. Mar. 14, 1973).

147. Don Boxmeyer, *Wild, Scenic Rivers Key Provision Fails*, ST. PAUL PIONEER PRESS (Minn.), Mar. 15, 1973, at 21 [hereinafter Boxmeyer, *Wild, Scenic Rivers Key Provision Fails*].

148. *Id.*

149. *See Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 43–44 (Minn. Mar. 14, 1973).

150. *Id.* at 44.

151. *Id.*

152. *Id.* The Committee minutes do not show the margin by which the amendment passed, but a contemporaneous newspaper account states that the vote was fourteen to nine. Boxmeyer, *Wild, Scenic Rivers Key Provision Fails*, *supra* note 147, at 21

153. *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 45 (Minn. Mar. 14, 1973).

154. *Id.*

floor advocating for the bill's passage.<sup>155</sup> Charles Dayton, an attorney and long-time environmental advocate, recalls that Sieben showed "real and rare courage on the House floor, as he spoke forcefully in favor of the passage of the act, knowing that a delegation from his district was in the gallery and was vehemently opposed to the bill."<sup>156</sup> Sieben outlined the terms of the bill, then argued that Minnesota had many rivers still in their natural state that would soon be developed and polluted or would have their scenic and recreational qualities destroyed unless they were protected.<sup>157</sup> Without protection, Sieben argued, future generations would lose these unique natural resources.<sup>158</sup> Ending his speech on a populist note, Sieben proclaimed, "And most importantly . . . *THE RIVERS BELONG TO THE PEOPLE!* . . . These rivers don't belong to the few that happen to own the [land] adjacent, but to all of our people."<sup>159</sup>

On April 4, 1973, Sieben offered an amendment on the House floor to re-insert an eminent domain provision into the bill.<sup>160</sup> The amendment proposed a more limited grant of eminent domain authority to the Commissioner. It did not authorize the Commissioner to acquire fee title to land through eminent domain, but, rather, only authorized the use of eminent domain to acquire scenic easements along rivers classified as "wild or scenic."<sup>161</sup> On a narrow vote of sixty to fifty-eight, Sieben's amendment was adopted.<sup>162</sup>

Sieben's maneuver to reinsert the eminent domain provision was criticized in some circles,<sup>163</sup> and eminent domain was denounced by certain state representatives. Representative Walter Klaus, quoted in the *Red Wing Republican Eagle*, stated, "[E]minent domain is anathema. Under the scenic easements, no one would have access to the land

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155. Representative Harry Sieben, Jr., Speech on the Floor of the Minnesota House of Representatives, at 1 (Mar. 28, 1973) [hereinafter Sieben Speech] (on file with Harry A. Sieben Jr. Papers, Minnesota State Archives, Minnesota Historical Society).

156. E-mail from Charles Dayton, retired environmental lawyer, to John Helland, retired Legislative Analyst, current Bd. Member, Minn. Ctr. for Env'tl. Advocacy (Oct. 22, 2009, 20:32:16 CST) (on file with authors).

157. Sieben Speech, *supra* note 155, at 1.

158. *Id.* at 1.

159. *Id.* at 3 (emphasis in original).

160. 1 Journal of the House of Representatives 1125 (68th Minn. Leg. Apr. 4, 1973).

161. *Id.* Under this proposed amendment, acquisition of scenic easements on "recreational" rivers by eminent domain would not have been allowed.

162. 1 Journal of the House of Representatives 1126 (68th Minn. Leg. Apr. 4, 1973).

163. See, e.g., Richardson, *supra* note 141, at 3.

because there would be restraints on the owner too, to preserve the status quo. Urban people think they're getting something with eminent domain—it's part of this ecology bit."<sup>164</sup> Yet Sieben continued to defend the provision, as he felt that without the power of condemnation, the state would not be able to acquire interests in land at fair market value.<sup>165</sup>

On April 5, 1973, votes were taken in both the Senate and the House on their respective versions of the wild and scenic rivers bill. The Senate recommended by a margin of 54–4 that S.F. 642 be passed.<sup>166</sup> The House version passed on a much closer vote,<sup>167</sup> undoubtedly the result of continuing controversy over the eminent domain provision. The House file was transmitted to the Senate that same day.<sup>168</sup> After the Senate Committee on Rules found the House bill not identical with its companion Senate file,<sup>169</sup> it was amended so it would be identical, substituted for the Senate bill<sup>170</sup> and passed 53–9 on April 11, 1973.<sup>171</sup>

The House refused to concur in the Senate's amendments and requested that a Conference Committee be appointed.<sup>172</sup> The Senate acceded to this request.<sup>173</sup> The Conference Committee reached agreement on the bill, deleting the House version's eminent domain provision.<sup>174</sup> The Conference Committee Report was adopted by the House on April 30, 1973, and the bill, as amended, re-passed 109–13.<sup>175</sup> The following day, the *St. Paul Pioneer Press* reported that Representative Sieben had told his House colleagues that "Senate conferees warned him the bill would be killed for sure in their house

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164. Ames Bower, *Scenic Rivers Amendment Fails*, RED WING REPUBLICAN EAGLE (Minn.), April 14, 1973, at 1 (quoting Representative Walter Klaus).

165. *See id.*

166. 1 Journal of the Senate 1042–44 (68th Minn. Leg. Apr. 5, 1973).

167. The House version passed on a vote of seventy-nine to forty-eight. 1 Journal of the House of Representatives 1161 (68th Minn. Leg. Apr. 5, 1973).

168. 1 Journal of the Senate 1045 (68th Minn. Leg. Apr. 5, 1973).

169. *Id.* at 1084–85.

170. *Id.* at 1087.

171. *Id.* at 1141.

172. *Id.* at 1154.

173. 1 Journal of the Senate 1154 (68th Minn. Leg. Apr. 12, 1973). Members of the Conference Committee were Representatives Harry A. Sieben, Jr., Joseph P. Graba, and Henry J. Savelkoul, and Senators Winston W. Borden, Roger D. Moe, and Robert G. Dunn. *Id.* at 1154, 1181.

174. 2 Journal of the Senate 2038–39 (68th Minn. Leg. May 1, 1973).

175. 2 Journal of the House of Representatives 2268–69 (68th Minn. Leg. Apr. 30, 1973).

unless the eminent domain provisions were excised.”<sup>176</sup> On May 4, 1973, H.F. 672, as amended by the Conference Committee Report, passed in the Senate on a vote of 59–4.<sup>177</sup>

Governor Anderson chose a fitting location to sign the Wild and Scenic Rivers Act. In the morning sunshine of May 16, 1973, Anderson arrived by helicopter at the picturesque Soukup residence located on the banks of the Mississippi River, six miles east of Monticello.<sup>178</sup> There, at 10:00 a.m., in the company of the Soukups, Representative Sieben, Senator Borden, Commissioner Herbst and river advocate Don Gapen and with reporters’ cameras flashing, he signed the bill into law.<sup>179</sup>

The 1970s began a new era for river conservation programs in Minnesota. With the National and Minnesota Wild and Scenic Rivers Acts, a growing concern over environmental issues, solid funding and dedicated staff focused on river conservation, rivers were a central pillar of the DNR’s conservation efforts.<sup>180</sup>

At the time of enactment, the Minnesota Wild and Scenic Rivers Act promised potential protection of at least sixteen state rivers. The month after passage of the law, the DNR was already collecting data on sixteen rivers: the Mississippi (above the Twin Cities), the Minnesota, the St. Louis, the Cloquet, the Red Lake, the Kettle, the Snake, the North Fork of the Crow, the Cannon, the Root, the Rum, the Crow Wing, the Big Fork, the Little Fork, the St. Croix, and the Des Moines.<sup>181</sup> The title of a document received on June 22, 1973 by the DNR Bureau of Planning about these sixteen rivers, “Summary of Fish and Wildlife Data Available and Needed on 16 Designated Minnesota Wild and Scenic Rivers,” suggests that the sixteen were the first considered for designation.<sup>182</sup> Notably, these same sixteen rivers had been named in the original versions of the wild and scenic rivers bills

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176. Don Boxmeyer, *River Act Clears House*, ST. PAUL PIONEER PRESS (Minn.), May 1, 1973, at 9.

177. 2 Journal of the Senate 2278 (68th Minn. Leg. May 4, 1973).

178. *Governor Signs River Bill*, *supra* note 116, at 1.

179. *Id.*; *State to Protect Scenic Waterways*, *supra* note 116; *Anderson Signs Scenic River Act*, ST. CLOUD DAILY TIMES (Minn.), May 17, 1973, at 5.

180. *See generally* DNR OFFICE OF PLANNING, DNR RIVER MANAGEMENT: A SENSE OF HISTORY AMID ANGST FOR THE FUTURE (1990) (on file with Minnesota Department of Natural Resources) (hereinafter *DNR RIVER MANAGEMENT*).

181. Summary of Fish and Wildlife Data Available and Needed on 16 Designated Minnesota Wild and Scenic Rivers (received June 22, 1973) (on file with Department of Natural Resources records, Minnesota State Archives, Minnesota Historical Society).

182. *See id.*

for expeditious study by the Commissioner to determinate whether they should be included in the wild and scenic rivers system.<sup>183</sup>

Other references suggest that even more rivers were thought to merit inclusion in the system. An April 6, 1973 article in the *St. Paul Dispatch* announcing the passage of scenic rivers bills in both houses stated that “[a]s many as 26 rivers could be protected from further development” under the bills.<sup>184</sup> The twenty-six rivers were not all named in the article. However, the article mentioned five of the rivers originally referenced in H.F. 672,<sup>185</sup> and also stated that the Chippewa River would be preserved by the state Act.<sup>186</sup> Letters written in 1971 and 1972 by Jerome Kuehn, DNR’s Planning Administrator, discuss a 1966 study by U.S. Geologic Survey and Midwest Planning and Research, Inc. of twenty-four Minnesota rivers to determine their potential as recreational rivers.<sup>187</sup> Kuehn’s letters responded to inquiries about wild and scenic river legislation, indicating that the twenty-four rivers studied in 1966 may have been among those slated as contenders for designation. Included in the Harry A. Sieben, Jr. Papers in the Minnesota State Archives is a river index, listing the following twenty-four rivers, which, perhaps, comprised those thought to be worthy of designation: the Basswood, the Big Fork, the Brule, the Cannon, the Cloquet, the Cottonwood, the Crow Wing, the Kettle, the Little Fork, the Minnesota, the Mississippi, the North Fork of the Crow, the Ottertail, the Pigeon, the Pine, the Rainy, the Red Lake, the Root, the Rum, the Snake, the St. Croix, the St. Louis, the Vermillion, and the Willow.<sup>188</sup>

### C. *Minnesota Lower St. Croix Wild and Scenic River Act*

The 1973 Legislative Session also saw state action to protect the Lower St. Croix River. In his February 14, 1973 Special Message to the Legislature, Governor Anderson proposed legislation that would enable Minnesota to participate in the management of the Lower St. Croix in accordance with the federal Lower St. Croix Wild and Scenic

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183. See S.F. 642 § 11, 1973 Leg., 68th Sess. (Minn. 1973) (on file with Minnesota Legislature records, Minnesota State Archives, Minnesota Historical Society).

184. Don Boxmeyer, *Bills Protect 26 State Rivers*, ST. PAUL DISPATCH (Minn.), Apr. 6, 1973, at 22C.

185. The five rivers were: Big Fork, Little Fork, Snake, Crow, and Mississippi. *Id.*

186. *Id.*

187. Kuehn Letter to Herzog, *supra* note 116; Kuehn Letter to Stoddard, *supra* note 122.

188. Undated River Index of Minnesota (on file with Harry A. Sieben, Jr. Papers, Minnesota State Archives, Minnesota Historical Society).

River Act of 1972.<sup>189</sup> After giving an overview of the federal Act, Anderson called it an “invaluable tool for protecting the scenic and recreational qualities of the Lower St. Croix, perhaps the only remaining unspoiled river in America that runs within a few miles of a major metropolitan area.”<sup>190</sup> Anderson endorsed funding for the purchase of easements along the Minnesota side of the St. Croix,<sup>191</sup> and announced that he was instructing the Commissioner of Natural Resources “to cease granting any permits for industrial development along the St. Croix River” until the joint management plan with the National Park Service and the State of Wisconsin was developed.<sup>192</sup>

State Representative Michael Sieben, the brother of Harry Sieben, Jr., was chief author and a leading proponent of the House version of Anderson’s proposed Lower St. Croix bill, House File No. 942.<sup>193</sup> Sieben’s counterpart in the Senate was Jerald Anderson, chief author of Senate File No. 902.<sup>194</sup> The House and Senate bills were introduced on March 5, 1973.<sup>195</sup> H.F. 942 was referred to the Committee on Environmental Preservation and Natural Resources.<sup>196</sup> S.F. 902 was referred to the Committee on Natural Resources and Agriculture.<sup>197</sup> Like the Minnesota wild and scenic rivers bills, the original drafts of the Lower St. Croix bills contained provisions authorizing the Commissioner of Natural Resources to acquire land and interests in land by eminent domain.<sup>198</sup>

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189. 1973 Special Message, *supra* note 46, at 29.

190. *Id.* at 30.

191. *Id.*

192. *Id.* at 31.

193. 1 Journal of the House of Representatives 513 (68th Minn. Leg. March 5, 1973); *see* Minnesota Legislators Past & Present, Sieben, Michael R. “Mike,” <http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10613> (last visited Apr. 9, 2010); Interview with Harry A. Sieben, Jr., *supra* note 37. Michael Sieben’s original co-authors were Reps. McCauley, Norton, Pavlak, and I. Anderson. 1 Journal of the House of Representatives 513 (68th Minn. Leg. March 5, 1973). Representative Laidig’s name was later added as an author while Representative Pavlak’s name was stricken. *Id.* at 581–82.

194. Other Senate authors were Jerome M. Hughes and Robert J. Brown.

195. 1 Journal of the House of Representatives 513 (68th Minn. Leg. March 5, 1973); 1 Journal of the Senate 455 (68th Minn. Leg. March 5, 1973).

196. 1 Journal of the House of Representatives 513 (68th Minn. Leg. March 5, 1973).

197. 1 Journal of the Senate 455 (68th Minn. Leg. March 5, 1973).

198. *See Hearing on S.F. 902 Before the Minn. S. Subcomm. on Water Res. of Natural Res. and Agric. Comm.*, 1973 Leg., 68th Sess. (Minn. March 13, 1973) [hereinafter *Natural Resource and Agriculture Hearings*] (on file with Minnesota State Archives, Minnesota Historical Society) (copies of the original bill drafts are not available in Minnesota State Archives).

The Senate Natural Resources and Agriculture Committee's Subcommittee on Water Resources heard S.F. 902 on March 13, 1973.<sup>199</sup> Two representatives of the Minnesota DNR, Assistant Commissioner Archie Chelseth and Planning Administrator Jerome Kuehn, testified in favor of the bill, as did Jim Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area Commission; the bill's co-author Senator Robert Brown; and James W. Johnson, Secretary, St. Croix Inter-Governmental Planning Conference.<sup>200</sup> The Subcommittee minutes summarize their testimony as follows:

They explained that the bill is needed because of the proposed development along the St. Croix River. The city of Hudson plans a \$50 million high-rise development along [the] river. There is presently a moratorium on development and local units of government have been asked to cease and desist issuing building permits. The only way [the] river can be saved is with cooperation of federal, state and local governments. Local people do not have power to save [the] river. Public hearings have been held on this issue since 1965, the public is well aware of this legislation and is in favor of it.<sup>201</sup>

In an apparent attempt to head off controversy about the eminent domain provision, Subcommittee Chair Wegener moved to recommend an amendment that would have revised the eminent domain language of the bill.<sup>202</sup> His proposed amendment would have limited the Commissioner's eminent domain authority to the acquisition of scenic easements,<sup>203</sup> and also would have added the same definition of "scenic easement" found in the Minnesota wild and scenic rivers bills then under consideration.<sup>204</sup> His proposal was not acted upon.<sup>205</sup>

Senator Schrom objected to both scenic easements and eminent domain.<sup>206</sup> Peter Wattson,<sup>207</sup> Assistant Commissioner Chelseth, and

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199. *Id.*

200. *Id.* Nobody testified against the bill at the March 13, 1973 subcommittee hearing. *Id.*

201. *Id.* at 1.

202. *Id.* at 2.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Wattson worked in the Office of Senate Research. See Memorandum from Peter S. Wattson, Office of Senate Research, to Senator Winston W. Borden (Feb. 23, 1973) (on file with Harry Sieben, Jr. Papers, Minnesota State Archives, Minnesota Historical Society).

James Johnson then explained that scenic easements were “the way to save [the] river,” and that people had gone to Congress “pleading that the river be saved from development.”<sup>208</sup> They further testified, “People . . . want someone other than local councilmen making decisions about [the] river.”<sup>209</sup> Their attempts to persuade the committee to retain eminent domain in the bill were unsuccessful. A motion by Senator Moe to strike the eminent domain provision carried.<sup>210</sup>

At the March 19, 1973 meeting of the House Committee on Environmental Preservation and Natural Resources, Representative Michael Sieben spoke in favor of the bill, and then introduced Assistant Commissioner of Natural Resources Chelseth.<sup>211</sup> A copy of Chelseth’s prepared statement indicates that he squarely addressed the eminent domain issue with the following testimony:

You will readily discover that Section 1, subdivision 3 of the proposal, does grant the power of eminent domain for the purpose of acquiring fee title to certain lands as well as for the taking of scenic easements.

Mr. Chairman and Members of the Committee, over the years our Department has been fully cognizant of the Legislature’s understandable reluctance to give a broad delegation of authority when it comes to the condemnation of private property rights. We are also quite mindful of this Committee’s general attitude after last week’s deliberations on the proposed Minnesota Wild and Scenic Rivers System.

We respectfully submit, however, that there are two vital elements which differentiate the bill before you on the Lower St. Croix from the Wild and Scenic Rivers legislation:

(1) The Wild and Scenic Rivers proposal is intended only to establish a framework system under which the State could proceed rationally on creating a system of its own—at this point in time, this broad-gauged legislation is not “project related.” Specific projects will come later only after detailed study and planning.

The Lower St. Croix proposal, however, is a definite, specific project which is identifiable in the minds of the Legislature, the managing agencies, and the general public. In

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208. See *Natural Res. And Agric. Hearings*, *supra* note 198, at 2..

209. *Id.*

210. *Id.* Subsequently, Charles Dayton of Sierra Club testified that eminent domain was essential to the bill and referenced the federal government’s power of eminent domain on the Upper St. Croix. *Id.*

211. *Hearing on H.F. 942 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 47 (Minn. Mar. 19, 1973).

short, this grant of authority would be for a single project in which the unknown factors are far less than those which likely would arise in a complete system as yet unplanned.

(2) Both the National Park Service and the State of Wisconsin do have the power of eminent domain. Should Minnesota not follow suit[] we could be significantly disadvantaged in proceeding to achieve the goals of the project.

Furthermore, eminent domain is not an end in itself—it is only a legal tool intended to be used in instances of last resort. It is also a vehicle by which the proprietary rights of private citizens are fully protected in the courts through the judicial process.<sup>212</sup>

Several other witnesses testified in favor of the bill.<sup>213</sup> Jerome Kuehn of the DNR discussed the bill section by section.<sup>214</sup> Jim Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area Commission, testified that “the St. Croix River should be looked at as a corridor like a highway, a ‘linear experience,’ needing legal mechanisms like eminent domain to protect scenic value” as the State of Wisconsin and the federal government already had.<sup>215</sup> Robert Burns, president of the St. Croix River Association and its legal counsel, also representing the Sierra Club, went on record in favor of the bill, stating that scenic easements and eminent domain were “integral parts of the bill, to avoid spot zoning and variances.”<sup>216</sup> Tom Carroll, representing the Minnesota Canoe Association, and Al Farmes, of the Minnesota Conservation Federation, also testified in support of the bill.<sup>217</sup> The only opponent to appear at the hearing was Peter Popovich, then a member of the Afton Planning Commission, who opposed delegation of authority to the DNR and asked that municipalities handle zoning.<sup>218</sup> A motion to limit the Commission-

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212. Statement by Archie D. Chelseth, Assistant Comm’r, Minn. Dep’t of Natural Res., to Comm. on Envtl. Pres. & Natural Res., Minn. House of Representatives (Mar. 19, 1973) (on file with Mike Sieben Papers, Minnesota State Archives, Minnesota Historical Society). Handwritten arrows and strike-outs on the copy of the statement indicate that Chelseth omitted other portions of his prepared testimony at his committee presentation.

213. See *Hearing on H.F. 672 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 43–44 (Minn. Mar. 14, 1973).

214. *Id.* at 43.

215. *Hearing on H.F. 902 Before the Minn. H. Subcomm. on the Env’t*, 1973 Leg., 68th Sess. 47 (Minn. Mar. 19, 1973).

216. *Id.* at 48.

217. *Id.*

218. *Id.*

er's power of eminent domain unless the acquisitions were approved "by the village council" failed by three votes.<sup>219</sup> The Committee approved an amendment imposing a requirement on the Commissioner to make the proposed master plan available to affected parties and to hold a public hearing.<sup>220</sup>

The full House adopted the Committee report on March 22, 1973.<sup>221</sup> The House vote on the bill took place on April 11, 1973, and the bill passed 116–10.<sup>222</sup>

Senate File 902 was heard by the Senate Natural Resources and Agriculture Committee on April 4, 1973.<sup>223</sup> Senator Anderson showed a movie of the area that would be covered by the bill and presented maps showing land ownership in the area and what the owners planned to do with the land.<sup>224</sup> Two proponents spoke in favor of the bill,<sup>225</sup> and one opponent testified in opposition to eminent domain.<sup>226</sup> The committee voted to recommend passage of the bill as amended.<sup>227</sup>

After its transmission to the Senate, H.F. 942 was initially amended to conform to the Senate version of the bill—i.e., the eminent domain provision was stricken.<sup>228</sup> The Senate then substi-

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219. *Id.*

220. The amendment provided:

"[t]he commissioner shall make the proposed comprehensive master plan available to affected local governmental bodies, shoreland owners, conservation and outdoor recreation groups, and the general public. Not less than 60 days after making such information available, the commissioner shall conduct a public hearing on the proposed comprehensive master plan in the county seat of each county which contains a portion of the area covered by the comprehensive master plan, in the manner provided in chapter 15."

1 Journal of the House of Representatives 788 (68th Minn. Leg. Mar. 22, 1973). This same amendment had been adopted by the Senate Subcommittee on Water Resources on March 13, 1973 and was later approved by the Senate Natural Resources and Agriculture Committee. *Natural Res. And Agric. Hearings, supra* note 198; *S. Comm. on Natural Res. & Agric.* 74 (April 4, 1973).

221. 1 Journal of the House of Representatives 788–89 (68th Minn. Leg. Mar. 22, 1973).

222. *Id.* at 1307.

223. *S. Comm. on Natural Res. & Agric.* (April 4, 1973), *supra* note 220.

224. *Id.* at 74.

225. The proponents were Tom Carroll, Minnesota Canoe Association, and Jim Harrison, Executive Director of the Minnesota-Wisconsin Area Boundary Commission. *Id.*

226. Peter Popovich, who is listed in the Committee minutes as "Chairman of the Planning Division on St. Mary's Point," opposed the bill. *Id.*

227. *Id.*

228. 1 Journal of the Senate 1243 (68th Minn. Leg. April 11, 1973).

tuted H.F. 942 for S.F. 902.<sup>229</sup> On April 19, 1973, however, chief Senate author Anderson persuaded the full Senate to adopt an amendment reinserting a limited grant of eminent domain power to the Commissioner of Natural Resources. The amendment authorized the Commissioner to acquire scenic easements or other interests in land on the St. Croix “by gift, purchase, or other lawful means” but also authorized the Commissioner to acquire scenic easement interests by eminent domain.<sup>230</sup> On April 28, 1973, the bill, as amended, passed in the Senate 60–1.<sup>231</sup>

The amended Senate bill was returned to the House. Chief author Michael Sieben moved that the House concur in the Senate amendments to H.F. 942 and that the bill be re-passed with the Senate’s amendment.<sup>232</sup> The motion prevailed and the bill was re-passed 110–12.<sup>233</sup>

Governor Anderson signed the Minnesota Lower St. Croix River Act on May 12, 1973, on board the MV Zebulon Pike in Lake St. Croix.<sup>234</sup> One week later, a crisis erupted on the Lower St. Croix.

Section three of the federal Lower St. Croix Wild and Scenic River Act of 1972 required the Secretary of the Interior, in concert with the states of Minnesota and Wisconsin, to prepare, within one year of enactment, a comprehensive master plan that would include “a determination of the lands, waters, and interests therein to be acquired, developed, and administered by the agencies or political subdivisions” of Minnesota and Wisconsin.<sup>235</sup> Concerned about intensifying development pressure during the one-year period while the master plan was being developed, Jim Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area Commission, had recommended immediate action to hold the line on development along the river in the interim.<sup>236</sup> On December 22, 1972, the Commis-

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229. *Id.*

230. *Id.* at 1413–14.

231. Senator Baldy Hansen cast the lone dissenting vote. *Id.* at 1826.

232. 2 Journal of the House of Representatives 2634 (68th Minn. Leg. May 4, 1973).

233. *Id.* at 2635.

234. *Id.* at 3249; James M. Harrison, *A Chronology of the Major Actions Relating to the Lower St. Croix Scenic Riverway* (Jan. 31, 1974) [hereinafter *Lower St. Croix Chronology*] (on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society).

235. Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 3, 86 Stat. 1174, 1174.

236. Interstate Memorandum from Jim Harrison, Executive Dir., Minn.-Wis. Boundary Area Comm’n, to Farnum Alston, Admin. Assistant to Wis. Governor

sion's chair sent a memo to representatives of the Anderson and Lucey administrations, their respective Departments of Natural Resources, and the National Park Service. This memo outlined a model resolution for local governmental units bordering the Lower St. Croix under which the LGUs would temporarily withhold action on requested permits to build on lands within 1000 feet of the normal high water mark of the river until federal and state plans and standards were adopted, or until July 15, 1973, whichever occurred first.<sup>237</sup> The Commission, on January 11, 1973, had adopted and submitted to local governments bordering the Lower St. Croix its proposal for voluntary moratoria on the issuance of such building permits pending completion of the master plan.<sup>238</sup> Most local governments had embraced the Commission's proposal, and by April 16, 1973, ninety-two percent of the waterfront lands in the Lower St. Croix Valley were controlled by voluntary local government building moratorium provisions.<sup>239</sup> Thirty-three of thirty-four local governments along the Lower St. Croix agreed to prevent private and commercial development of the river's banks pending completion of the master plan.<sup>240</sup> Only Hudson, Wisconsin held out.<sup>241</sup>

A St. Paul-based developer, Calder Corporation, and its Wisconsin corporate counterpart, Cardel Corporation, proposed a multi-million dollar residential development on the banks of the Lower St. Croix in a newly annexed part of Hudson immediately south of the I-

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Patrick Lucey, and Peter Gove, Envtl. Assistant to Minn. Governor Wendell Anderson (Nov. 10, 1972) (on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society). In this memorandum, Harrison reminded Alston and Gove of the St. Croix River Intergovernmental Planning Conference, an "ad hoc council" of local governments in both states, which the Minnesota-Wisconsin Boundary Area Commission had set up in 1970 to prepare for a local control mechanism while the plan was being developed. *Id.*

237. Memorandum from Roger L. Hartman, Chairman, Minn.-Wis. Boundary Area Comm'n, to Peter Gove, Office of Minn. Governor Wendell Anderson; Farnum Alston, Office of Wis. Governor Patrick Lucey; Robert Chandler, Nat'l Park Serv.; Richard Wittpenn, Nat'l Park Serv.; Sec'y L. P. Voight, Wis. Dep't of Natural Res.; Arthur Doll, Wis. Dep't of Natural Res.; Comm'r Robert Herbst, Minn. Dep't of Natural Res.; Jerome Kuehn, Minn. Dep't of Natural Res. (Dec. 22, 1972) (on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society). The Anderson administration concurred with this approach. *See* Letter from Robert L. Herbst, Comm'r, to Roger L. Hartman, Chairman, Minn.-Wis. Boundary Area Comm'n (Jan. 5, 1973) (on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society).

238. *See Lower St. Croix Chronology, supra* note 234.

239. *Id.*

240. Editorial, *A Victory on the St. Croix*, MINNEAPOLIS TRIB., Sept. 30, 1973, at 10A.

241. *Id.*

94 bridge.<sup>242</sup> The project, known as “Mont Croix at Hudson,”<sup>243</sup> was to include two twelve-story “mid-rise” apartment buildings,<sup>244</sup> townhouses, and luxury terrace apartments, and was to ultimately comprise 1700 dwelling units.<sup>245</sup> The terrace apartments, sixteen in all, were to be built on the brink and into the surface of the bluff overlooking the St. Croix.<sup>246</sup> Mont Croix at Hudson was to be “the largest single development” in the city’s history and was expected to “more than double” its tax base.<sup>247</sup> Ignoring personal appeals from Senator Mondale, Senator Nelson, Governor Anderson, and Wisconsin’s Governor Patrick J. Lucey,<sup>248</sup> the Hudson City Council, on May 21, 1973, approved Calder Corporation’s plan for the development.<sup>249</sup>

The administrations of both Minnesota and Wisconsin, the states’ Congressional delegations, the Minnesota-Wisconsin Boundary Area Commission, environmental organizations, and individuals who had worked so hard to secure passage of the federal and Minnesota Acts knew the stakes were high. If Mont Croix at Hudson “[were] built on the scenic river boundary, the ability to stop other structures would be

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242. The development project had already been in the works for about three years and had been strongly opposed by the Minnesota-Wisconsin Boundary Area Commission, citizen groups, and public officials. See Bob Goligoski, *The St. Croix: A River Under Growing Pressure*, ST. PAUL SUNDAY PIONEER PRESS (Minn.), Oct. 31, 1971, at 4; Dean Rebuffoni, *Will Apartments Mar St. Croix View? Plan for Terraced Homes Causing Controversy in Hudson*, MINNEAPOLIS TRIB., Apr. 9, 1973, at 1A; Robert Whereatt, *St. Croix Project Dropped*, ST. PAUL DISPATCH (Minn.), Sept. 28, 1973, at 17; Interview with Vice President Walter Mondale, *supra* note 16.

243. Letter from Edward J. Driscoll, Comm’r of Sec., to Alfred A. Albert, Executive Vice President, Calder Corp. (July 27, 1973).

244. Memorandum from Peter L. Gove, Env’tl. Assistant to Governor Anderson (June 29, 1973) [hereinafter Gove Memorandum] (on file with Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society). Earlier plans to erect high-rise apartments on the river bluff had apparently been abandoned due to opposition. See Bob Goligoski, *The St. Croix: A River Under Growing Pressure*, ST. PAUL SUNDAY PIONEER PRESS (Minn.), Oct. 31, 1971, at 5.

245. Order Suspending Exemption and Requiring Subdivider to Show Cause Why Exemption Should Not Be Permanently Revoked, *In the Matter of Mont Croix at Hudson*, at 1 (Minn. Dept. of Commerce, Securities Div. July 27, 1973).

246. Complaint at 8, *Minnesota v. Calder Corp.*, Civil No. 3-73-206 (D. Minn. July 16, 1973).

247. Robert Whereatt, *St. Croix Project Dropped*, ST. PAUL DISPATCH, Sept. 28, 1973, at 20.

248. Editorial, *At the River’s Edge*, MINNEAPOLIS TRIB., May 28, 1973, at 6A; UPI, *Hudson Project Delay Urged*, ST. PAUL PIONEER PRESS (Minn.), Apr. 20, 1973, at 7; Letter from Patrick J. Lucey, Governor, State of Wis., to Phil Lerman, Sec’y Indus., Labor and Human Relations (June 28, 1973).

249. See *Lower St. Croix Chronology*, *supra* note 234, at 2. The approval was obviously timed to get the project in under the wire, before the master plan under the Lower St. Croix Wild and Scenic River Act of 1972 was complete.

all but impossible.”<sup>250</sup>

On June 19, 1973, representatives of the Anderson administration, the Lucey administration, Senator Mondale’s office, the Minnesota-Wisconsin Boundary Area Commission and the Sierra Club met with Calder and Cardel Corporation representatives to discuss the Mont Croix on Hudson development and to inspect the building site.<sup>251</sup> Governor Anderson’s environmental assistant, Peter Gove, reported back to Anderson noting his observations from the meeting.<sup>252</sup> The most serious threat posed by the development was thought to be the terraced apartments because of their location on the bluff.<sup>253</sup> Calder argued that the terraces would be compatible with the St. Croix, as existing vegetation and shrubbery to be planted would screen them from the river.<sup>254</sup> Gove opined that Calder’s plans for “screening” the terraces were a farce, as the shrubbery would not screen the front view of the terraces, the plans for side screening were inadequate, and existing trees would be bare from November to May.<sup>255</sup> Gove also noted the potential deleterious effect on other communities along the Lower St. Croix, which, despite voluntary construction moratoria, were under pressure to grant building permits.<sup>256</sup> Finally, Gove raised concerns about conflicts of interest between the developer and the City of Hudson, noting that the project engineer was the city engineer and the project attorney was the city attorney.<sup>257</sup> “Everything seems very cozy,” he wrote to Governor Anderson, “especially the prospect of \$1 million in tax revenue to the City of Hudson.”<sup>258</sup>

Following their meeting and site visit, state and federal representatives met privately to discuss a course of action.<sup>259</sup> They agreed on a general strategy to delay the construction of the terraced

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250. E-mail from Peter Gove, *supra* note 51.

251. Gove Memorandum, *supra* note 244, at 1. Participants included Peter Gove from Governor Anderson’s office, Farnum Alston from Wisconsin Governor Lucey’s office, representatives from the Wisconsin Departments of Administration and Natural Resources, Bob Hurner from Senator Walter Mondale’s office, Jim Harrison from the Minnesota-Wisconsin Boundary Area Commission, Jerry Kuehn from the Minnesota DNR, and Chuck Dayton from the Sierra Club. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 2.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

apartments until the joint federal-state master plan was finalized and official.<sup>260</sup> The plan, due to be completed in October, 1973, would be official ninety days after its publication in the Federal Register.<sup>261</sup> Once in effect, it would enable Wisconsin to move to impose requirements that would “void any terrace apartments.”<sup>262</sup>

State and federal representatives discussed several legal options. The most promising option at that time appeared to be one on the Wisconsin side. Upon Calder’s application for a permit for a multi-family dwelling development, the State of Wisconsin could require an environmental impact statement (EIS).<sup>263</sup> The time required to prepare an EIS would delay the project.<sup>264</sup> The State of Minnesota, through its Commissioner of Securities, Edward Driscoll, was exploring an option to halt sales of the project’s dwelling units in Minnesota under the newly enacted Subdivided Land Sales Practice Act.<sup>265</sup> Although this would not prevent sales of the terraced apartment units altogether, Calder Corporation’s inability to advertise the project in Minnesota could adversely impact its sales of other units in the development as well as future phases of the project.<sup>266</sup> Gove planned to hold meetings with Commissioner Driscoll and representatives of the Minnesota Attorney General’s Office in an effort to recommend a definite course of action.<sup>267</sup>

Governor Lucey was the first to act. On June 28, 1973, he sent Phil Lerman, Wisconsin’s Secretary of Industry, Labor and Human Relations, a letter outlining his concerns about the Mont Croix project and stating that he was committed to doing everything within his power to ensure that the state was in compliance with the National Wild and Scenic Rivers Act.<sup>268</sup> After carefully reviewing the proposed design of the Mont Croix project, Lucey concluded that the project

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260. *See id.*

261. *See id.*

262. *Id.*

263. *Id.* at 2–3. At this time, the State of Wisconsin had not yet passed a bill to enable it to participate in management of the Lower St. Croix. *See* Rojean Kenitz, *Lucey Signs River Bill While Wendy Watches*, RED WING REPUBLICAN EAGLE (Minn.), Apr. 20, 1974, at 1. The Wisconsin counterpart to Minnesota’s Lower St. Croix River Act was not signed into law until Apr. 19, 1974. *See id.*

264. Gove Memorandum, *supra* note 244, at 3.

265. *Id.*

266. *See id.*

267. *Id.* at 4.

268. Letter from Patrick J. Lucey, Governor, State of Wis., to Phil Lerman, Sec’y Indus., Labor and Human Relations 1 (June 28, 1973) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

was “likely to have a significant environmental impact on the character of the intended wild and scenic river area.”<sup>269</sup> Accordingly, he requested that Lerman’s agency review any permits from the Calder Corporation “and where appropriate, request that environmental impact statements be drafted.”<sup>270</sup>

Minnesota took the next step. On July 16, 1973, Minnesota’s Attorney General Warren Spannaus initiated a legal action in Federal District Court in an effort to halt the Mont Croix development.<sup>271</sup> The lawsuit named Calder Corporation, Cardel Corporation, and Rogers C. B. Morton, Secretary of the Interior, as defendants.<sup>272</sup> The state alleged, *inter alia*, that the Secretary of the Interior was required by 16 U.S.C.A. section 1283 (Supp. 1973) (the National Wild and Scenic Rivers Act) to review Calder Corporation’s development plan “to determine what action should be taken to protect the [Lower St. Croix] during the period in which it is being considered for inclusion in the National Wild and Scenic Rivers System” and that he had failed to conduct such review.<sup>273</sup> The state further alleged that the Mont Croix development would “adversely affect the scenic, recreational, historical and esthetic qualities of the Lower St. Croix” and “would constitute a public nuisance.”<sup>274</sup>

In its request for relief, the state asked for a declaratory judgment that “lands being considered for potential inclusion in the Wild and Scenic Rivers System” are lands under the Secretary of the Interior’s jurisdiction under 16 U.S.C.A. section 1283(a), that the “Secretary of the Interior must review any contracts or plans affecting potential additions to the System,” and that 16 U.S.C.A. section 1283(a) (Supp. 1973) grants “implied . . . authority to the Secretary of the Interior to issue administrative orders [or] to commence civil actions [while] . . . rivers are being considered for inclusion . . . for the purpose of protecting such rivers during said period.”<sup>275</sup> The state also requested that Calder Corporation be enjoined from proceeding with the development at least until the master plan was completed.<sup>276</sup>

On July 23, 1973, Wisconsin’s Governor Lucey took further ac-

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269. *Id.*

270. *Id.* at 2.

271. Complaint, *Minnesota v. Calder Corp.*, Civil No. 3-73-206 (D. Minn. July 16, 1973).

272. *Id.* ¶ 7.

273. *Id.* ¶¶ 35–36.

274. *Id.* ¶¶ 39–40.

275. *Id.* at Prayer for Relief ¶ I(A)–(C).

276. *Id.* ¶ II.

tion to prevent the Mont Croix development from going forward.<sup>277</sup> To prohibit “short-sighted actions . . . which would serve to contradict or undermine the National Act” or the management plan then under development, Lucey designated the Lower St. Croix as “a critical resource area.”<sup>278</sup> He therefore directed the Wisconsin Department of Natural Resources and four other State of Wisconsin departments to take “all necessary action to protect [it] from developments which would affect [its] quality.”<sup>279</sup>

On July 24, 1973, Governor Anderson requested that Commissioner of Securities Edward Driscoll suspend Calder Corporation’s statutory exemption from registration under the Subdivided Land Sales Practice Act<sup>280</sup> and require it to register the development.<sup>281</sup> In an apparent reference to the “cozy” relationship between the City of Hudson and Calder described by Peter Gove, Anderson also asked Commissioner Driscoll to investigate any “conflict of interest by the parties involved in the process by which [Calder] Corporation has obtained development permits from the City of Hudson.”<sup>282</sup>

In response, Driscoll issued an order suspending Calder Corporation’s exemption and requiring that it show cause why the exemption should not be permanently revoked.<sup>283</sup> The order alleged that the Mont Croix development may violate the Federal Wild and Scenic Rivers Act of 1968, the Federal Lower St. Croix River Act of 1972, and

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277. Statement, Patrick J. Lucey, Governor, State of Wis. (July 23, 1973) (on file with Wendell R. Andersen Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society).

278. *Id.*; Press Release, Patrick J. Lucey, Governor, State of Wis. (July 24, 1973) (on file with Wendell R. Andersen Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society).

279. Press Release, Patrick J. Lucey, *supra* note 278.

280. The exemption was authorized by 1973 Minn. Laws ch. 413, § 7, subdiv. 1, which declared that the Act did not apply to offers or dispositions of interest in land where the land was “located within 20 miles of the city limits of a city of the first class.” Act of May 19, 1973, 1973 Minn. Laws 915–16. The development, being within twenty miles of St. Paul, was eligible for this exemption. This provision, however, authorized the Commissioner of Securities to suspend, revoke or condition the exemption “as may be necessary for the protection of purchasers consistent with the provisions” of the Subdivided Land Sales Practice Act. *Id.*

281. Letter from Wendell R. Anderson, Governor, State of Minn., to Edward Driscoll, Comm’r of Sec. 2 (July 24, 1973) (on file with the Wendell R. Anderson Papers (Peter Gove files), Minnesota State Archives, Minnesota Historical Society).

282. *Id.*

283. Order Suspending Exemption and Requiring Subdivider to Show Cause Why Exemption Should Not Be Permanently Revoked at 5, *In re* Mont Croix at Hudson (Minn. Dep’t of Commerce, Sec. Div. July 27, 1973).

the Minnesota Lower St. Croix River Management Act.<sup>284</sup> It also stated that these potential violations of law “may adversely affect the rights of Minnesota purchasers of land or interests in land in the proposed development;” that there was “insufficient information currently available to potential purchasers upon which an intelligent investment judgment may be made;” and that purchasers of an interest in the proposed development could consequently be deceived.<sup>285</sup> The order directed Calder Corporation and its officers to appear before the Commissioner of Securities to show cause why its exemption should not be revoked.<sup>286</sup>

A Stipulation signed on September 27, 1973 disposed of all claims brought by the Minnesota Attorney General<sup>287</sup> and resolved Calder’s pending case before the Commissioner of Securities.<sup>288</sup> The Stipulation prohibited the corporate defendants from building the terraced apartments or any residential structure on a portion of their St. Croix land, the slope of which exceeded thirteen percent; from building any residential structure on the land which was not set back at least 200 feet from the normal high water mark and which was not at least forty feet from the bluff line; and from erecting any structure of which more than thirty-five vertical feet was visible from any portion of the St. Croix River water surface.<sup>289</sup> In addition, the Stipulation required the corporate defendants to comply with all valid and applicable statutes, ordinances, rules, regulations, and codes.<sup>290</sup>

To ensure compliance with the settlement terms and as a pre-condition to dismissal of the federal action and matter pending before the Commissioner of Securities, Calder and Cardel Corporations were required to execute and file with the St. Croix County, Wisconsin Register of Deeds, a scenic easement on a portion of its Hudson, Wisconsin land running in favor of the State of Minnesota.<sup>291</sup> “I believe that this is the first time that any state has been given any rights over property located in a neighboring state in order to protect the scenic interests of its citizens,” commented Attorney General

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284. *Id.* at 4.

285. *Id.* at 4–5.

286. *Id.* at 5.

287. The Secretary of the Interior did not sign the Stipulation. However, under its terms, the State of Minnesota agreed to dismiss the case with prejudice against all defendants. Stipulation ¶ 5, *Minnesota v. Calder Corp.*, Civil No. 3-73-206 (D. Minn. Sept. 28, 1973).

288. *Id.*

289. *Id.* ¶¶ 1–3.

290. *Id.* ¶ 4.

291. *Id.* ¶ 5.

Spannaus.<sup>292</sup> The scenic easement granted to the State of Minnesota was recorded on October 22, 1973.<sup>293</sup> It covers 18.761 acres of land, recites the prohibitions agreed to in the Stipulation, authorizes the State of Minnesota to initiate legal proceedings in the event of a violation or attempted violation, and binds all future owners of the land.<sup>294</sup>

Wisconsin's Governor Lucey expressed his delight with the settlement agreement, stating that "the diligent and relentless efforts of officials on both sides of the river" had averted "what would have been an unforgivable violation of the St. Croix's shoreline beauty."<sup>295</sup> But he cautioned those who would protect the rivers to remain vigilant:

[I]t would be unwise of us to assume that this one agreement reached only after months of deliberation and work means our job is done. It is only the beginning. The inadequacy of present laws and ordinances in dealing with this type of unwise shoreline development was highlighted in the Hudson experience. It should encourage us to press even harder for land use policies that protect the land rather than the developer.<sup>296</sup>

### III. WILD AND SCENIC RIVER ADMINISTRATION: DESIGNATION AND MANAGEMENT YEARS

The enactments of the National Wild and Scenic Rivers Act and Minnesota's Wild and Scenic Rivers Act were, for Minnesotans and the DNR, nearly simultaneous historical events. For the DNR, this required the creation of administrative programs to deal with these new pieces of environmental legislation. Minnesota's 1973 Wild and Scenic Rivers Act had three primary provisions that give public agencies the tools to protect and manage designated rivers: land use controls,<sup>297</sup> recreation management,<sup>298</sup> and conservation (scenic) easement and land acquisitions.<sup>299</sup> Scenic easements are a critical part

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292. Warren Spannaus, Attorney General, Press Release (Sept. 28, 1973) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

293. *Scenic Easement Grant*, St. Croix County Document no. 319106.

294. *Id.*

295. Press Release, Patrick J. Lucey, Governor, State of Wis. (Sept. 28, 1973) (on file with Wendell R. Anderson Papers, Minnesota State Archives, Minnesota Historical Society).

296. *Id.*

297. See MINN. STAT. § 103F.335 (2008).

298. See MINN. STAT. § 103F.331 (2008).

299. See MINN. STAT. § 103F.331 (2008).

of the Act, and if used on sufficient acreage, could be the core of the wild and scenic rivers system. However, the agency was not able to put long-term programmatic structures in place to maximize the use of the scenic easement tool. It would take over thirty years to invest in a program in order to manage them sustainably.<sup>300</sup>

In comparison to the federal Wild and Scenic Rivers Act, the Minnesota Act provides more provisions for land use control (as opposed to sole acquisition of land and easements) and requires local units of government to adopt land use ordinances.<sup>301</sup> In addition, the Minnesota Act authorizes any beneficiary to enforce a scenic easement.<sup>302</sup> Federal wild and scenic river easements do not have this provision. Also, language within Minnesota easement documents and within the definition of "scenic easement" in the 1973 Act provides more authority for scenic easements to protect scenic, recreational, or natural characteristics.<sup>303</sup>

Before the Lower St. Croix River was designated as a national scenic riverway, Jim Harrison, Executive Director of the Minnesota-Wisconsin Boundary Area Commission,<sup>304</sup> was asked by Minnesota

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300. *See infra* Part IV.

301. *See* MINN. STAT. § 103F.331 (2008); MINN. STAT. § 103F.335 (2008).

302. MINN. STAT. § 103F.311, subdiv. 6(2) (2008).

303. MINN. STAT. § 103F.311, subdiv. 6 (2008) (defining "scenic easement" as "an interest in land, less than the fee title, that limits the use of the land to protect the scenic, recreational, or natural characteristics of a wild, scenic, or recreational river area. Unless otherwise expressly and specifically provided by the parties, the easement must be: (1) perpetually held for the benefit of the people of [Minnesota]; (2) specifically enforceable by its holder or any beneficiary; (3) binding upon the holder of the servient estate, and the holder's heirs, successors, and assigns; and (4) restricted so as not to give the holder or any beneficiary the right to enter on the land except for enforcement of the easement.") (alternations in original).

304. Jim Harrison was the second Minnesota-Wisconsin Boundary Area Commission Executive Director. The official publication of the State of Minnesota stated,

The Minnesota-Wisconsin Boundary Area Commission serves as the principal coordinating agency for the two sponsor States and their local governments on planning, policies and management of the 266-mile river corridor of the St. Croix and Mississippi Rivers forming the common border of Minnesota and Wisconsin. It assists the States and localities in their participation in federal programs affecting the rivers. It has a special assignment to serve as coordination center and chairman of the Lower St. Croix National Scenic Riverway project, a cooperative effort of the U.S. National Park Service and the Minnesota and Wisconsin Departments of Natural Resources. The agency makes special studies and recommendations concerning the wise use, development and protection of the waters and lands forming the interstate border. It has been instrumental in maintaining good Federal-State relations on the complex management problems of the Mississippi River and was responsible for promoting the enactment by

Governor LeVander's staff for assistance on the matter. Harrison recalls he was asked to "give some advice to the governor's office about a potential Lower St. Croix designation."<sup>305</sup> The Governor went on to ask, "What would it take to make it worthwhile?"<sup>306</sup> Before responding, Harrison consulted the commission and advisors.<sup>307</sup> After consideration, Harrison told LeVander that "scenic easements are critical to making designation work long term."<sup>308</sup> Harrison stated that "local governmental unit leaders and zoning administrators will change over time and are subject to shifting political values that may affect success of ordinance implementation. Easements will provide more long-term sustainability of retaining the values of the wild and scenic river."<sup>309</sup> Harrison stated in a December 2009 interview that he was disappointed in the agencies' inability to obtain more scenic easements within the overall riverway corridor.<sup>310</sup>

Paul Swenson, former DNR Regional Director and former DNR Director of Trails and Waterways, headed the Rivers Program in the 1970s. He recalls challenging issues with the initial attempts to acquire scenic easements: "There were some pretty strong forces within the department that didn't believe in easements. There were a lot of problems trying to acquire scenic easements even if we had willing sellers. It was a terrible problem to establish value. We had to get certified appraisals."<sup>311</sup> On the St. Croix River, Swenson and his staff preferred to use the Minnesota scenic easement template, which was more restrictive than the federal easement template.<sup>312</sup> This made

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Congress of the Great River Study amendment in 1976 and the Lower St. Croix Wild and Scenic River Act of 1972 in response to the strong interests of both States. The Commission seeks to promote actions by others rather than taking actions itself, since it does not have direct authority to govern or manage but only to make recommendations.

*Minnesota State Register, Pursuant to Laws 1978, Chapter 592, MINN. ST. REG.*, Nov. 27, 1978.

305. Telephone Interview with Jim Harrison, former Executive Dir., Minn.-Wis. Boundary Area Comm'n (Dec. 18, 2009).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Interview with Paul Swenson, former Reg'l Dir. and Dir. of Trails and Waterways, Minn. Dep't of Natural Res. (Dec. 10, 2009).

312. *Id.* ("We were very concerned. If you look at the easement contracts, what we were taking from people on the Lower St. Croix with the zoning regulations...that was quite a bit. Now, if we started compensating somebody for something [it would be] a lot less in most parts than what we had already taken through zoning. So we wanted to make sure that if we were acquiring an easement, that it would be easily

the Minnesota scenic easement land interests appraise for eighty to ninety percent of fee value.<sup>313</sup>

Also, landowners along rivers during the initial stages of the designation process feared being overrun by river recreationists, making DNR staff hesitant to focus efforts on promoting and managing public use and enjoyment.<sup>314</sup> Young and ambitious, early staff in the DNR Rivers Program learned as they went, and recreation management plans were completed with flaws.<sup>315</sup> Years later, some of the lands identified in the plan for potential acquisition as recreation sites, upon inspection, turned out to be poorly suited for development and undermined the implementation of recreation management efforts.<sup>316</sup> To date, this element of the wild and scenic rivers program is underutilized. Land use controls would turn out to be the primary focus for the DNR into the future, leaving behind two of the three important tools provided by the Wild and Scenic Rivers Act.

In the first year after the Act was passed, Commissioner of Natural Resources Herbst created a staff unit in the Department to study and work on a wild and scenic rivers study and designation process.<sup>317</sup> This was the Rivers Program. Under its first Rivers Coordinator, Michael F. Priesnitz, the program got off to a strong start. By the 1976–1977 Biennium, the Rivers Program was operating at \$918,900, the 2009 equivalent of \$4,372,000.<sup>318</sup> Every dollar was eligible for federal matching dollars at 1:1,<sup>319</sup> making this program the equivalent

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discernable that we were taking something far beyond what the ordinance required.”).

313. *Id.*

314. Interview with Wayne Sames, Supervisor, Local Grants Unit, Minn. Dep’t of Natural Res., series of interviews, winter/spring 2009–2010. *See also*, Interview with Paul Swenson, *supra* note 311.

315. Interview with Paul Swenson, *supra* note 311.

316. Interview with Tim Browning, early River Program staff and Minn. Dep’t of Natural Res. Reg’l Manager, in St. Paul, Minn. (Dec. 8, 2009).

317. Telephone Interview with Robert L. Herbst, *supra* note 5.

318. *See* MINN. DEP’T OF NATURAL RES., MINNESOTA RES. COMM’N APPROPRIATION SUMMARY FOR MINNESOTA’S RIVER PLANNING & ACQUISITION PROGRAMS, Introduction (1976–77 Biennium). All 2009 calculations are based upon the formula found at <http://www.measuringworth.com/uscompare/>.

319. The introduction to the DNR’s 1978–1979 Budget Request stated:

With the passage of the Wild and Scenic Rivers Act in 1973, the Legislature established the statewide policy of protecting Minnesota’s outstanding rivers. With the rapidly-increasing recreational use of Minnesota’s rivers and the critical water supply problems actions to conserve these resources should be taken now. The wild and scenic rivers program, its goals and accomplishments, is a vital part of a statewide water program. (FEDERAL FUNDING) This relationship is particularly evident in view of the fact that

of a nearly \$9 million program today. Priesnitz and the Rivers Program were working under ten challenging sets of responsibilities:

- (1) Classify and designate rivers in the system;<sup>320</sup>
- (2) Prepare statewide minimum standards and criteria;<sup>321</sup>
- (3) Prepare management plans;<sup>322</sup>
- (4) Public meetings, participation, etc.;<sup>323</sup>
- (5) Conduct public hearings;<sup>324</sup>
- (6) River designation (by Commissioner of Natural Resources);<sup>325</sup>
- (7) Adopt local land use ordinances;<sup>326</sup>
- (8) Assist local units of government in ordinance preparation, implementation, and enforcement;<sup>327</sup>
- (9) Acquire land and interests in land (through Department of Administration);<sup>328</sup>
- (10) Assist on national wild and scenic river studies of rivers in Minnesota.<sup>329</sup>

Funding for acquisition of lands was more than half of the program budget for the 1976–1977 biennium, totaling \$525,000 (or \$2.3 million in 2009 dollar equivalent), and all funds were eligible for a 1:1 federal title III match.<sup>330</sup> By the 1978–1979 Biennium, there was \$875,000 (\$3,464,000 in 2009 equivalent) in Legislative Commission on Minnesota Resources (LCMR) and General Fund dollars dedicated to acquisitions, and \$1,955,000 (\$7,748,000 in 2009 equivalent) in Bonding Authority dollars for the wild and scenic and canoe and boating programs.<sup>331</sup> In 1978–1979, the LCMR appropriated \$455,000

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staff salaries and expenses were used to match federal title III water resources planning funds for the state of Minnesota.

MINN. DEP'T OF NATURAL RES., 1978–79 BUDGET REQUEST, INTRODUCTION.

320. MINN. STAT. § 104.34, subdiv. 1 (recodified in 1990 as MINN. STAT. § 103F.321).

321. MINN. STAT. § 103F.321, subdiv. 2 (2008).

322. MINN. STAT. § 103F.325, subdiv. 1 (2008).

323. *Id.* at subdiv. 3.

324. *Id.* at subdiv. 2.

325. MINN. STAT. § 103F.321, subdiv. 1 (2008).

326. *Id.*

327. MINN. STAT. § 103F.335, subdiv. 1(c) (2008).

328. MINN. STAT. § 103F.331, subdiv. 1 (2008).

329. MINN. STAT. § 103F.341 (2008).

330. MICHAEL F. PRIESNITZ, MINN. DEP'T OF NATURAL RESOURCES, MINN. RESOURCES COMM'N APPROPRIATION SUMMARY (1976–77); *see also* MINN. DEP'T OF NATURAL RES., 1978–79 BUDGET REQUEST, *supra* note 319 (on file with Minnesota Department of Natural Resources) (“staff salaries and expenses were used to match federal title III water resources planning funds for the state of Minnesota”).

331. RIVER'S SECTION, DIV. OF PARKS & RECREATION, MINN. DEP'T OF NATURAL RES.,

for wild, scenic and recreational river planning.<sup>332</sup> Adding the federal title III matching dollars, the 2009 total equivalent wild and scenic rivers program 1978–1979 budget was worth at least \$10 million (but far higher if Bonding Authority for canoe and boating program and wild and scenic rivers program is included in this calculation).<sup>333</sup> Originally housed within the Division of Parks and Recreation, the Rivers Program soon split into the Division of Trails and Waterways (which included the canoe and boating program and the wild and scenic rivers program), the Division of Waters, Bureau of Lands, and the Office of Planning.<sup>334</sup> Responsibilities for writing wild and scenic river management plans were later transferred to the Office of Planning.<sup>335</sup> Local units of government were responsible for adopting and enforcing wild and scenic river ordinances, and the DNR was responsible for overseeing that process. But no DNR division was initially assigned responsibility for monitoring and enforcing scenic easements.

#### A. *The Wild and Scenic River Designation Years*

##### 1. *The Kettle River*

Before easements could be acquired, rivers needed to be designated, and management plans needed to be written. The first river the Department of Natural Resources added to the system was the Kettle River in Northeastern Minnesota. More than fifty public meetings were held to determine whether the Kettle River wild and scenic river proposal was adequate and necessary to protect the river.<sup>336</sup> Over sixty Pine County residents “petitioned to have the river designated[,] and [eleven] local and regional groups and municipalities registered their support.”<sup>337</sup> However, the Kettle River proposal was a rough start for the state rivers act. With strong opposition from

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WILD AND SCENIC RIVER AND CANOE AND BOATING ROUTE ACQUISITION (1978–79). The 2009 calculations are based upon the formula found at <http://www.measuringworth.com/uscompare/> (author uses average results).

332. RIVER’S SECTION, DIV. OF PARKS & RECREATION, MINN. DEP’T OF NATURAL RES., WILD, SCENIC AND RECREATIONAL RIVER PLANNING (1978–79).

333. Calculation based upon the formula found at <http://www.measuringworth.com/uscompare/> (federal 1:1 match added to the sum average).

334. Interview with Paul Swenson, *supra* note 311.

335. MINN. WILD & SCENIC RIVERS, PROGRAM REVIEW (DRAFT 1B) at 5 (1994).

336. Division of Waters, Kettle River Speech Outline (prepared for the DNR from the Division of Waters files) (on file with authors).

337. *Id.*

local citizens, and both Pine and Carlton County boards officially opposing the designation of the Kettle, it seemed that designation would be challenging.<sup>338</sup>

An April 1975 article headlined, “Landowners Oppose Kettle River Plan,” was published in the *Cloquet Pine Knot* newspaper describing opponents’ worries that designation would turn the Kettle River into a DNR playground, be a burden on local governments, and restrict landowner rights.<sup>339</sup> Though Mike Priesnitz adequately defended the DNR’s position and rationale, the proposal was on the table and citizens were merely allowed to comment on, not make alterations to, the management plan.<sup>340</sup> Presided over by the Assistant Commissioner for Planning, Archie Chelseth, the hearings were civil, yet controversial.<sup>341</sup> The Kettle River was designated on July 30, 1975.<sup>342</sup>

As this was the first river to be designated, it demonstrated to the public how the program would be run in the future. Setting a precedent for local opposition, inadequate citizen input into management plan elements and negative rhetoric about the DNR being allowed to seep into small communities throughout the state may have planted the seeds for dissent that would later paralyze the program and put it into relative hibernation. Thomas Waters, river expert and advocate agrees.<sup>343</sup> Mr. Waters believes that the Minnesota Wild and Scenic River System was created with an over-reliance on river management “experts” leaving out sufficient citizen participation, causing local community members to feel that their private

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338. *County Takes First Legal Step Against Kettle River Designation*, PINE CITY PIONEER (Minn.), Dec. 15, 1976, at 1 (Pine County); *Commissioners Oppose DNR River Plan*, CLOQUET PINE KNOT (Minn.), Apr. 24, 1975, at 1 (Carlton County).

339. James Selleck, *Landowners Oppose Kettle River Plan*, CLOQUET PINE KNOT (Minn.), Apr. 17, 1975, at 1 (“‘I’d hate to see it (the Kettle) end up like the Brule,’ said Anderson. (The Brule is a controlled northern Wisconsin River). ‘I feel the plan, is a foot in the door, making it their playground, and they (DNR) want to control it.’”) (quoting Carlton County’s zoning officer, Albert Anderson).

340. *In the Matter of the Proposed Inclusion in the Minnesota Wild and Scenic Rivers System of that Portion of the Kettle River Lying Between Carlton County State Aid Highway 12 and the River’s Mouth, and the Proposed Adoption of a Management Plan for Said Proposed Wild and Scenic River*, Hearing before Archie D. Chelseth, Assistant Comm’r for Planning, Minn. Dep’t of Natural Res. (statement of Michael Priesnitz, Rivers Coordinator for the Minn. Dep’t of Natural Res.).

341. *Id.*

342. *Pine County v. State*, Dep’t of Natural Res., 280 N.W.2d 625, 627 (Minn. 1979); MINN. R. 6105.0600–.0760 (2007); *see* MINN. STAT. §§ 103F.301–.345 (2008).

343. Interview with Dr. Tom Waters, writer, publisher, conservationist, and emeritus Professor at University of Minnesota, in Shoreview, Minn. (Nov. 4, 2009).

property rights were at risk.<sup>344</sup> Mr. Waters believes that this antagonism by the people spread to the Department of Natural Resources itself, causing the wild and scenic designation process to stall.<sup>345</sup>

## 2. *The Mississippi River*

The public mistrust about river designation was to follow the DNR at nearly every stage of the process. The *St. Cloud Daily Times* reported that many land owners along the Mississippi River between St. Cloud and Anoka were in opposition to the DNR's plan.<sup>346</sup> Opponents said that they felt unable to stop the Mississippi River wild and scenic river designation but spent considerable time and resources to oppose designation, anyway.<sup>347</sup> Later, opposition groups to river designation bolstered their confidence and determination for denying state and federal river protection.<sup>348</sup>

An administrative and procedural alteration to the designation process may have been instrumental in shutting down the designation process. In January of 1976, the Minnesota State Office of Hearings Examiners (SOHE) was formed and led the public hearing process for the Mississippi River wild and scenic river proposal.<sup>349</sup> This administrative and procedural shift during the designation process was a difficult change for the Minnesota DNR. Wayne Sames, one of the original staff of the Rivers Program under Priesnitz, described the problem in detail. Sames said that the hearing examiner's methods limited the DNR's ability to adequately respond to the public about issues during public hearings.<sup>350</sup> Controversial, uninformed, and incorrect accusations were made, and the DNR was not given adequate ability to respond due to procedural directives by the SOHE.<sup>351</sup> This may have further inflamed public dissent over the wild and scenic river designation process.<sup>352</sup> Local opposition to designa-

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344. *Id.*

345. *Id.*

346. Dave Peters, *Proposal to Keep River Wild Stirs Debate*, *ST. CLOUD DAILY TIMES* (Minn.), Oct. 24, 1975, at 1.

347. *See id.* ("We're not going to stop them; we're just going to neutralize them a little bit." (quoting Leonard DeChene, President of Anoka to St. Cloud Mississippi River Land Owners Association, Inc.)).

348. *See, e.g.,* Steve Voit, *Local Control is Issue in River Frontage Flap*, *ST. CLOUD DAILY TIMES*, Oct. 7, 1978, at 3.

349. MINN. STAT. § 15.052, subdiv. 1 (1976).

350. Interviews with Wayne Sames, Bus. & Cmty. Dev. Supervisor, Office of Mgmt. & Budget, Minn. Dep't of Natural Res. (Sept. & Oct., 2009).

351. *Id.*

352. *Id.*

tion was high. Though the river was eventually designated,<sup>353</sup> Sherburne County protested designation and refused to enforce the wild and scenic river ordinance on the Mississippi River.<sup>354</sup> This was not the end of the negative impact the SOHE had on the wild and scenic rivers program.

### 3. *The Rum River*

Every designation process was not a failure to garner public support for wild rivers. The Rum River was a refreshing reminder that Minnesotans can support river protection in their own backyard. Perhaps part of the success was because of a citizen and DNR collaborative process led, in part, by the DNR's Dale Holmuth.<sup>355</sup> In 1976, a thirty-five-member local citizens' advisory council and the DNR joined forces to develop a management proposal for the Rum River.<sup>356</sup> The *Minneapolis Tribune* reported that public acceptance of the Rum River Management Plan was high.<sup>357</sup> The article reports that positive feelings were attributed to a collaborative advisory council consisting of residents from the four affected counties and the quality of the DNR draft management plan.<sup>358</sup> These local good feelings about the designation and the collaborative effort were in stark contrast to the Crow Wing River designation process in Wadena County in 1977 and the Cloquet River hearings in 1979.<sup>359</sup>

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353. See MINN. R. 6105.0800–0960 (2007); see MINN. STAT. §§ 103F.301–.345 (2008). The Mississippi River was designated in 1976. DIV. OF WATER, MINN. DEP'T OF NATURAL RES., MISSISSIPPI SCENIC RIVERWAY MANAGEMENT PLAN 5 (July 2004), [http://files.dnr.state.mn.us/waters/watermgmt\\_section/wild\\_scenic/missplan\\_07-01-2004.pdf](http://files.dnr.state.mn.us/waters/watermgmt_section/wild_scenic/missplan_07-01-2004.pdf)

354. Voit, *supra* note 348.

355. At the time of publication, Dale Holmuth was a Regional Hydrologist for the Minnesota Department of Natural Resources, Central Region.

356. See *Rum River Plan Detailed*, PRINCETON UNION EAGLE, Apr. 28, 1977.

357. Dean Rebuffoni, *Scenic Status Urged for Rum*, MINNEAPOLIS TRIB., Oct. 22, 1977, at 1A.

358. *Id.*

359. See Mike Gravidahl, *Crow Wing Owners Await DNR Decision on River*, PARK RAPIDS ENTERPRISE, May 15, 1976, at 3 (“the overwhelming feeling at the various [informational] meetings was primarily against [including the Crow Wing River in Wild, Scenic, and Recreational Rivers system]”). Paul Swenson recalls that a man who led some of the opposition efforts on the Crow Wing River, came to all of the Rum River meetings and “finally, because the planning was going just great, it was going to happen, [he] said, ‘if these people are not going to listen, then I’m not going to try and help them anymore.’...How those plans got developed had a great deal to do with how implementation went.” Interview with Paul Swenson, *supra* note 311.

#### 4. *The Crow Wing River*

Though qualified, the Crow Wing River in Wadena County, Minnesota, is still unprotected by wild and scenic designation.<sup>360</sup> The Crow Wing designation process was another blow against wild and scenic river designations in Minnesota. By 1977, the original proponents of the Wild and Scenic Rivers Act had left the DNR and the Governor's office.<sup>361</sup> A long-time staff member of the DNR rivers program and former Minnesota-Wisconsin Boundary Area Commission member, Steve Johnson, stated, "Wendell Anderson had taken Walter Mondale's vacant Senate seat after he took the office of the Vice President. Rudy Perpich, previously lieutenant governor, appointed William Nye as Commissioner."<sup>362</sup> Nye did not last long at the DNR.<sup>363</sup>

This new governor and unpopular commissioner came into office to face red-hot public opposition about the wild and scenic rivers program.

Just a few months prior to these changes, the *Fargo-Moorhead Sunday Forum* reported the local sentiment: "Wadena County Commissioners [and] . . . nearly 200 concerned landowners banded together to form the Crow Wing Property Association[,] which opened a campaign in opposition to the DNR plan."<sup>364</sup> The *Park Rapids Enterprise* explained further that public opposition to the Crow Wing wild and scenic river designation was attributed to (1) the citizens' belief that they would lose their individual rights, (2) the government ignoring a local desire for non-designation, and (3) fear of an eventual "takeover" by National Park Service national wild and scenic river designation.<sup>365</sup> During the public informational meetings, DNR car tires were slashed, staff threatened, and local police protection was provided at subsequent meetings.<sup>366</sup>

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360. See MINN. R. 6105.0060 (2007). See generally ch. 6105 (listing management plans for all protected rivers in the state; the Crow Wing river is not included).

361. See Interview with John Helland, *supra* note 47 (stating that the new Governor, Al Quie, was not a supporter of environmental conservation).

362. Interview with Steve Johnson, former River Mgmt. Supervisor, DNR Waters Nat'l Parks Serv., current Miss. Nat'l River & Recreation Area Chief of Res. Stewardship, in Stillwater, Minn. (Nov. 13, 2009).

363. *Id.*

364. Hal Simons, *Advisory Unit Seeks to Calm Scenic River Dispute*, THE FARGO-MOORHEAD SUNDAY FORUM (Minn.), June 20, 1976, at B11.

365. Emil E. Burgau, Letter to the Editor, *Wadena County Residents Object to DNR River Plan*, PARK RAPIDS ENTERPRISE (Minn.), Jan. 15, 1977, at 4.

366. Simons, *supra* note 364, at B11.

Eventually, State Hearing Examiner Myron Greenberg recommended against including the Crow Wing River as a wild and scenic river, finding that the Crow Wing River was adequately protected by the Wadena County Zoning Ordinances.<sup>367</sup> Greenberg's conclusions included the following:

The rules contained in the proposed management plan were generally not supported by an affirmative presentation of facts demonstrating their need or reasonableness.<sup>368</sup>

It is clear from the record as a whole that those people who have been primarily responsible for preserving the river in its current natural and mainly unspoiled condition are willing to continue to do so. Opposition is not so much to a management plan as it is to designation. There appears to be a willingness on the part of those who expressed their opinions at the hearing and in comments to work with the DNR and other state agencies to strengthen and improve *local* efforts to maintain the river.<sup>369</sup>

The *Minneapolis Tribune* reported: "It was the first time in the four-year history of the rivers program that an examiner has recommended that a stream sought by the DNR not be included in the state rivers system."<sup>370</sup> This was the first hearing since Robert Herbst left the Commissioner's office. It is the commissioner of natural resources, not the hearing examiner, who determines whether to designate a state wild and scenic river.

One month after he took office, Commissioner William Nye announced his affirmation<sup>371</sup> of Hearing Examiner Greenberg's recommendation that the Crow Wing River not be included within

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367. *Wild River Exemption Urged for Crow Wing*, MINNEAPOLIS TRIB., Aug. 14, 1977, at 14B.

368. MYRON GREENBERG, OFFICE OF HEARING EXAMINERS, DEP'T OF NATURAL RES., STATE OF MINN., REPORT OF HEARING EXAMINER 13 (Aug. 9, 1977). The Report recounted the DNR's Statement of Need, explaining:

Wadena County zoning and other methods of protecting the river that are now possible (short of designation) are inadequate to preserve the outstanding value of the Crow Wing against the development pressure that now exists along the river. What's more, the pressure to build along the river is likely to increase.

*Id.* at 6.

369. *Id.* at 13.

370. *Wild River Exemption Urged for Crow Wing*, *supra* note 367.

371. Though Nye announced that he would not designate the Crow Wing River and he would accept Greenberg's findings, the DNR did not issue its final decision until August 21, 1978 under Acting Commissioner Joe Alexander. Joseph N. Alexander, *Findings, Conclusions, and Intentions of the Commissioner of Natural Resources* (Minn. Dep't of Natural Res., Comm'r of Natural Res. Aug. 21, 1978).

the wild and scenic rivers system.<sup>372</sup> The *Minneapolis Tribune* recounted:

Greenberg found that, under the state Administrative Procedures Act, the DNR must show a need to designate a particular stream, other than the obvious need to preserve its good natural condition. In short, he said, the DNR must show that an otherwise worthy river is threatened by development before it can be designated under the Wild and Scenic Rivers Act. Nye said that could put the entire rivers program in some jeopardy, if Greenberg's finding is applied to other streams under consideration by the DNR. This is so, he said, because if a particular stream is in fine condition but also largely unthreatened by development, then it cannot be included in the protective rivers system.<sup>373</sup>

This set a new direction for designation policy for the rivers program at this time, for the DNR was influenced by Greenberg's analysis that development pressure is a defining criterion for designation eligibility. An undeveloped river that would qualify for wild river status could not be designated under this interpretation. The Minnesota Wild and Scenic Rivers Act and rules promulgated under the Act<sup>374</sup> set clear criteria for designation of a river in the system, and development pressure is not one of the reasons stated.<sup>375</sup> Nevertheless, Greenberg's decision had a chilling effect on the rivers program and further wild and scenic river designations.

Because of this decision, opposition groups had their first big win over wild and scenic river designations. This win likely fueled other opposition groups, showing them that they can oppose designation successfully, perhaps influencing the process not on designation criteria, but on public pressure.<sup>376</sup> The tactics that were used in Wadena County were violent and threatening, escalating the intensity of public opposition over a contentious topic for the DNR.<sup>377</sup> They also impacted the Cloquet and St. Louis Rivers public hearing process

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372. See Dean Rebuffoni, *DNR Chief Rejects Scenic Status for Crow Wing River*, MINNEAPOLIS TRIB., Dec. 16, 1977, at 2B.

373. *Id.* at 6B.

374. MINN. R. 6105 (2007).

375. See MINN. R. 6105.0060, subdiv. 1 (2007).

376. See, e.g., Jim Sloan, *Wadena Landowners Win 1st Round in Scenic River Battle*, BRAINERD DAILY DISPATCH (Minn.), Aug. 12, 1977, at 1.

377. See *Wild River Exemption Urged for Crow Wing*, *supra* note 367 ("Several DNR automobiles were vandalized during public meetings on the proposal this past spring and agency employees reported receiving threats, apparently from some of [the] landowners who oppose the program.").

in similar fashion. Because of negative public sentiment and the decision not to designate the Cloquet, the DNR decided not to complete the hearing process on the St. Louis River.<sup>378</sup>

##### 5. *The Cloquet River*

Paul Swenson, former DNR staff for the wild and scenic rivers program, recalls that during the Cloquet River public hearings, discussions were contentious.<sup>379</sup> Arne Carlson, then Minnesota State Auditor, was a vocal opponent to Cloquet designation.<sup>380</sup> A group called “People’s Property Rights Association” was formed to fight wild and scenic river designation.<sup>381</sup> Swenson recalls that “[t]hey were quite effective . . . and active, and had a lot of people at the hearings.”<sup>382</sup> During the Cloquet Hearings, Hearing Examiner Howard Kaibel concluded that in order for a river to qualify for designation, it needed to be under threat of imminent development.<sup>383</sup> Swenson believes that Kaibel “destroyed the possibility of getting [wild and scenic river] designations . . . . Because unless the bulldozers were coming over the hill . . . . If you’re going to protect something, why do you wait until it’s under imminent threat?”<sup>384</sup>

Also at the Cloquet hearing, Swenson recalls “Minnesota Power and Light . . . who was the major landowner on the river, said, ‘We’re not going to sell our land. We’re going to protect this, it’s going to be open for the public. There’s no need for this designation, because we will protect it with our own land ownership.’”<sup>385</sup> Swenson continues, “a few years later, things changed and they started putting their land up for sale . . . so one of the main reasons not to designate [the Cloquet River] was Minnesota Power was going to protect it with their

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378. Interview with Paul Swenson, *supra* note 311.

379. Interview with Paul Swenson, *supra* note 311; *see also*, *Hearing on the Proposed Inclusion in the Minnesota Wild, Scenic and Recreational Rivers System of the Cloquet River from its Source at Cloquet Lake to its Mouth at the St. Louis River, and the Proposed Adoption of a Management Plan for the Cloquet River* (June 11–13, 1979) [hereinafter *Cloquet River Hearing*]

380. *Cloquet River Hearing* (June 12, 1979), *supra* note 379 (statement of Arne Carlson, Minnesota State Auditor); Interview with Paul Swenson, *supra* note 311.

381. Interview with Paul Swenson, *supra* note 311.

382. *Id.*

383. HOWARD L. KAIBEL, JR., OFFICE OF HEARING EXAMINERS, MINN. DEP’T OF NATURAL RES, REPORT OF HEARING EXAMINER (Aug. 15, 1979) [hereinafter KAIBEL REPORT]

384. Interview with Paul Swenson, *supra* note 311.

385. *Id.*

landownership. Well, that policy changed.”<sup>386</sup>

Although Greenberg’s findings on the Crow Wing River designation had influenced the DNR’s determination that lack of development pressure precluded a river from designation, Hearing Examiner Kaibel’s findings on the Cloquet River clearly detailed that rationale.<sup>387</sup> Again, this standard is unsupported by the Wild and Scenic Rivers Act.<sup>388</sup>

Bill Clapp, then the Special Assistant Attorney General for the DNR, and Paul Swenson drafted the commissioner’s Cloquet River findings, and “threw out” Kaibel’s Hearing Examiner Report.<sup>389</sup> Though the commissioner rejected Kaibel’s findings, he did not designate the Cloquet.<sup>390</sup>

In a 1981 report, Wayne Sames recalled the controversial events between 1976 and 1979.<sup>391</sup> Sames believed a number of events were tied together at that time:

Northern Minnesota had recently undergone another bitter, controversial fight over the question of management and use of the Boundary Waters Canoe Area Wilderness. Controversy was also brewing over issues related to Voyageurs National Park. . . . A planned expansion of Itasca State Park was reversed by the state legislature after organized local opposition prevailed. The frustration and anger that many people in northern Minnesota felt over what they had perceived as a loss of influence and involvement in local decisions regarding land use and management was now being expressed as a negative attitude toward virtually any new

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386. *Id.* See also KAIBEL REPORT, *supra* note 383.

387. See generally *id.*

388. See MINN. R. 6105.0060, subdiv. 1 (2007).

389. Interview with Paul Swenson, *supra* note 311; see also, RIVERS SECTION, MINN. DEP’T OF NAT. RES., STAFF REPORT ON THE HEARING EXAMINER’S FINDINGS OF FACT FOR THE CLOQUET RIVER (1979). Also, Bill Clapp wrote an Agency Memorandum lambasting Hearing Examiner Howard Kaibel’s findings. He stated, “The only serious attempt to challenge the agency’s presentation of the river’s outstanding scenic, recreational, natural, historical and scientific values was focused on the impact of the Island Lake Dam on the canoeability of the river below the dam. Unlike the dam, this challenge does not hold water . . . .” Agency Memorandum, *In the Matter of the Proposed Cloquet Wild and Scenic River Designation, Classification, and Management Plan* (Minn. Dep’t of Natural Res., Special Assistant Attorney General, July 3, 1979).

390. Joseph N. Alexander, *Findings and Conclusions of the Commissioner* (Minn. Dep’t of Natural Res., Comm’r of Natural Res. Oct. 4, 1979) (stating the commissioner’s decision not to designate the Cloquet on grounds different than those set forth by the hearing examiner).

391. See WAYNE SAMES, THE MISSISSIPPI HEADWATERS BOARD: AN ALTERNATIVE STRATEGY FOR PROTECTION OF THE UPPER MISSISSIPPI RIVER (1981).

state or federal proposal.<sup>392</sup>

Management of the Minnesota Wild and Scenic Rivers Act encountered failure at many stages since its passage. However, this would change in two separate court proceedings—one over the Commissioner of Natural Resources' authority to adopt a wild and scenic river ordinance on behalf of a local government unit that refused to adopt its own, and one upholding the public's right to enforce wild and scenic river easements. The first was in 1978, when the Minnesota Supreme Court decided *Pine County v. State*,<sup>393</sup> which upheld the Wild and Scenic Rivers Act, its provisions, and the DNR's authority to administer and manage it.

#### 6. Pine County v. State

*Pine County* arose out of the Pine County Board of Commissioners' refusal to adopt a local wild and scenic river ordinance after the Commissioner of Natural Resources designated the Kettle River as the state's first wild and scenic river.<sup>394</sup> Although the Commissioner ultimately prevailed in forcing the board to implement an ordinance that he adopted on its behalf, this case illustrates how a recalcitrant local government can, at least temporarily, frustrate the intent of Minnesota's Wild and Scenic Rivers Act.<sup>395</sup>

##### a. Facts

The Kettle River became Minnesota's first state-designated wild and scenic river on July 30, 1975.<sup>396</sup> Within six months of the designation, the Pine County Board was required to adopt a local ordinance that would comply with the standards and criteria of the commissioner and the management plan.<sup>397</sup> Despite the urging of its own planner and of the Commissioner of Natural Resources, Robert Herbst,<sup>398</sup> the board refused to adopt an ordinance.<sup>399</sup> Accordingly, in

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392. *Id.* at 2–3.

393. 280 N.W.2d 625 (Minn. 1979).

394. *Id.* at 627.

395. *Id.* at 627–28.

396. *Id.* at 627.

397. *Id.* (quoting MINN. STAT. § 104.36, subdiv. 1 (1973), which requires “each local government containing any portion [of a wild, scenic, or recreational river area] . . . [to] adopt or amend its local ordinances and land use district maps to comply with the standards and criteria of the commissioner and the management plan.”) This statute was later recodified as MINN. STAT. § 103F.335 (2006).

398. *Herbst Asks County Board Approval of Ordinance*, PINE CITY PIONEER (Minn.), July 21, 1976, at 1.

November 1976, the DNR initiated an action to adopt an ordinance on the board's behalf.<sup>400</sup>

On March 23, 1977, the commissioner adopted the Kettle River Wild and Scenic Ordinance for Pine County.<sup>401</sup> It differed substantially in several respects from the existing Pine County shoreland ordinance, requiring, for example, greater lot sizes, minimum frontages, and building setbacks.<sup>402</sup> The ordinance was filed with the county auditor and county recorder.<sup>403</sup> The final step in enactment was for the DNR to file an affidavit of publication. However, on May 24, 1977, the county filed an injunction action and obtained a temporary restraining order (TRO) to prevent the DNR from filing the affidavit.<sup>404</sup> Subsequently, the district court allowed the Scanlans, property owners within the wild river district, to intervene.<sup>405</sup>

After a hearing on the plaintiffs' motion for a temporary injunction, the court dissolved its TRO against publication of the ordinance, but issued a permanent injunction against enforcement of the Kettle River Wild and Scenic Ordinance "to the extent that its provisions exceeded those of the Pine County shoreland ordinance."<sup>406</sup> The district court held that enforcement of the Kettle River Wild and Scenic Ordinance "would constitute an impermissible taking" of the Scanlans' property in violation of the Fifth Amendment of the U.S. Constitution and article 1, section 13, of the Minnesota Constitu-

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399. Contemporaneous reports indicate that the board questioned the "[p]ropriety or [l]egality of the state dictating" to it that it had to pass the ordinance. *Id.* (quoting Pine County Board Chairman, Gerry Robbins). A further issue was apparently the cost to the county of adopting and administering the ordinance. The board apparently believed that the DNR had diluted the county's tax base because of its authority to "veto the sale of tax delinquent and on water frontage." *Id.* (quoting Board Chairman Robbins).

400. *See State Agency Acts to Adopt Law on Ordinance for River Zoning*, MINNEAPOLIS STAR, Nov. 20, 1976, at 2A. Minnesota Statute section 103F.335 requires the commissioner to adopt a wild and scenic river ordinance on behalf of a local government that fails to do so within six months of river designation. MINN. STAT. § 103F.335, subdiv. 1(b) (2008) (then codified as MINN. STAT. § 104.35, subdiv. 1).

401. *See* Brief of Appellant DNR at 7, *Pine County v. State, Dep't of Natural Res.*, 280 N.W.2d 625 (Minn. 1979) (on file with Attorney General Materials, Minnesota State Archives, Minnesota Historical Society).

402. *Pine County v. State, Dep't of Natural Res.*, 280 N.W.2d 625, 628 n.2 (Minn. 1979).

403. *See* Brief of Appellant DNR at 8, *Pine County v. State, Dep't of Natural Res.*, 280 N.W.2d 625 (Minn. 1979) (on file with Attorney General Materials, Minnesota State Archives, Minnesota Historical Society).

404. *Pine County*, 280 N.W.2d at 628.

405. *Id.*

406. *Id.* at 628-29.

tion.<sup>407</sup>

In February 1978, the court reopened the case upon motion of the Commissioner, made its permanent injunction temporary, and allowed Dr. Ronald M. Christianson, the county's largest private landowner on the Kettle River, to intervene.<sup>408</sup> After a trial in March, 1978, the court, in an amended order, concluded, *inter alia*, that the proposed Kettle River Wild and Scenic River Ordinance was unconstitutional, that proposed open space zoning was not authorized by the Wild and Scenic Rivers Act, and that a permanent injunction should be issued against enforcement of the ordinance to the extent its provisions exceeded those of the Pine County shoreland ordinance.<sup>409</sup>

*b. Decision by Minnesota Supreme Court*

On appeal, the Minnesota Supreme Court reversed the district court's decision and rejected the county's and the Scanlans' constitutional arguments.<sup>410</sup> The supreme court made three principal holdings.<sup>411</sup> First, it held that the Kettle River Wild and Scenic River Ordinance constituted a valid exercise of the state's police power, despite having an "aesthetic" purpose.<sup>412</sup> Referencing how the restrictions in the ordinance could limit adverse environmental impacts and "harmful spillover effects on a major public resource, the river corridor," the court noted that rather than radically departing from traditional zoning, the ordinance "merely reflects the increasing complexity of society and the realization that property must be viewed more interdependently."<sup>413</sup> Second, the court flatly rejected the district court's conclusion that the Wild and Scenic Rivers Act prohibited the commissioner from imposing a more restrictive zoning ordinance than the county's existing shoreland ordinance.<sup>414</sup> Finally, the court rejected the district court's conclusion that the Kettle River

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407. *Id.* at 629.

408. *Id.*

409. Amended Findings of Fact, Conclusions of Law and Order for Judgment at 6-7, *County of Pine v. State of Minnesota*, Dep't of Natural Res. (10th Judicial District Aug. 28, 1978) (*reversed* and *remanded* for findings consistent with decision by *Pine County v. State, Dep't of Natural Res.*, 280 N.W.2d 625 (Minn. 1979)) (on file with Attorney General Materials, Minnesota State Archives, Minnesota Historical Society).

410. *Pine County*, 280 N.W.2d at 630-31.

411. The court declined to rule on the Scanlans' constitutional claims as applied, as it held that they had failed to first exhaust their available remedies below. *Id.* at 629.

412. *Id.*

413. *Id.* at 629-30.

414. *Id.* at 630-31.

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Wild and Scenic Rivers Ordinance was *ultra vires* because it included concepts not included in the enabling statute and, in effect, secured the elements of a scenic easement through zoning.<sup>415</sup> The court noted that enabling legislation cannot possibly include all details of administrative regulation or the need for such regulation would disappear.<sup>416</sup> The court also noted that zoning and scenic easements were *both* authorized by the Wild and Scenic Rivers Act and were demonstrably different in the degree to which they restricted development.<sup>417</sup> The difference, the court stated, was that the “zoning ordinance can, at best, guide development, while a scenic easement arrests development in perpetuity.”<sup>418</sup>

*B. Wild and Scenic River Administrative Years 1978–97*

*1. The End of a Wild and Scenic River Designation Era*

Though distinct in their designation and management, the protection of federal wild and scenic rivers and Minnesota’s wild and scenic rivers are inextricably linked. This fact was revealed in the public perception and political process for both federal and Minnesota wild and scenic rivers. Referring to the national study and proposed federal designation of the Upper Mississippi River, Wayne Sames wrote:

During the summer of 1978 Congressman Oberstar and Stangeland, representing roughly the northern one-third of Minnesota, arranged for two public meetings on the question of designation of the Upper Mississippi. One of the reasons given for these meetings was the feeling on the part of many people that the B[ureau of] O[utdoor] R[ecreation] had not provided sufficient opportunity for the public to review and comment on the proposal. The meetings, held in Grand Rapids and Bemidji, Minnesota were attended by several hundred people. The vast majority of those who spoke, including many civic and political leaders, were strongly opposed to federal designation and management.

These meetings were the first real indication of the depth of the opposition that was developing and suggested future

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415. *Id.* at 631.

416. *Id.*

417. *Id.*

418. *Id.*

management problems if the river were to be designated.<sup>419</sup>

The next year was not much better for wild rivers designation. In the 1979 Minnesota legislative session, various amendments, although unsuccessful, were proposed to the Minnesota Wild and Scenic Rivers Act. These amendments attempted to (1) give designation power to the Minnesota Legislature—as opposed to the Commissioner of Natural Resources,<sup>420</sup> (2) limit acquisition and condemnation authority for wild and scenic rivers,<sup>421</sup> (3) designate rivers in a streamlined process when local land use controls equaled wild and scenic river minimum standards,<sup>422</sup> and (4) give more local zoning power and control over designation and the administrative process.<sup>423</sup>

That same year, the DNR placed a one-year moratorium on the designation of the Lower Minnesota River as a wild and scenic river, part of the DNR's wild and scenic river study.<sup>424</sup> By 1980, the Upper Mississippi River Headwaters Board was formed (under guidance by Mike Priesnitz, who had by that time had left the DNR, and Minnesota State Senator Bob Lessard) to combat a "federal takeover" of the Upper Mississippi by the National Park Service.<sup>425</sup> Priesnitz, who had been the first DNR Rivers Coordinator and then owned a private consulting firm (Goff/Priesnitz and Associates), offered fee-based consulting assistance to local groups around organizing official local river projects.<sup>426</sup> After the Mississippi Headwaters Board formed on February 22, 1980, the federal government abandoned its plans for national wild and scenic designation.<sup>427</sup> By May of the following year, the Minnesota Legislature passed the Mississippi River Headwaters Act<sup>428</sup>—establishing a joint board (made up of all eight counties surrounding the Upper Mississippi River) to prepare and implement a comprehensive land use plan.<sup>429</sup> The Lower Minnesota River process

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419. WAYNE SAMES, *THE MISSISSIPPI HEADWATERS BOARD: AN ALTERNATIVE STRATEGY FOR PROTECTION OF THE UPPER MISSISSIPPI RIVER* 3 (1981) (on file with authors).

420. 1 Journal of the Senate 45 (71st Minn. Leg. Jan. 8, 1979).

421. 1 Journal of the Senate 377 (71st Minn. Leg. Mar. 8, 1979).

422. *Id.* See also Minn. Dep't Natural Res., Minnesota Wild & Scenic Rivers Program Review Draft 1 B, Dec. 15, 1994, at 3 [hereinafter Wild & Scenic Rivers Program Review Draft] (on file with Minnesota Department of Natural Resources)

423. 1 Journal of the Senate 377 (71st Minn. Leg. Mar. 8, 1979).

424. Wild & Scenic Rivers Program Review Draft, *supra* note 422, at 3; see also MINNESOTA WILD AND SCENIC RIVERS SYSTEM (Jan. 16, 1977).

425. Interview with Steve Johnson, *supra* note 362.

426. *Id.*

427. MINN. STAT. § 103F.367 (2009).

428. *Id.*

429. *Id.*

followed suit with an alternative to wild and scenic river designation. On March 23, 1982, the Minnesota Legislature authorized "Project Riverbend Board" to implement and administer a plan for the lower Minnesota River instead of wild and scenic river designation.<sup>430</sup>

By the time the last wild and scenic river was designated in 1980, the DNR Rivers Program had run out of gas.<sup>431</sup> The program was being undercut by alternative<sup>432</sup> planning efforts,<sup>433</sup> the adoption of the previous hearing examiner's arguments against designations,<sup>434</sup> and a lack of funding.<sup>435</sup> Eventually, Commissioner Alexander reduced the agency's efforts for the program.<sup>436</sup> Designated in 1980, the Cannon River was the final river to be added to the Minnesota Wild and Scenic Rivers System to date.<sup>437</sup> A 1990 DNR report from the

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430. Act of Mar. 23, 1982, 1982 Minn. Laws 1544; *see also* MINN. STAT. § 103F.378 (2009). Project Riverbend Board was dissolved by the Minnesota Legislature in August, 2005. Act of May 10, 2005, 2005 Minn. Laws 325.

431. Steve Mueller, former DNR Division of Trails and Waterways rivers program staff for over twenty years states:

The budget for river [recreation] probably stayed relatively constant in the 90's but other priorities lowered the amount focused on [wild and scenic rivers] . . . . A significant amount of time was redirected towards hydropower licensing and the St. Louis River Management Plan, both having major river protection implications for the state.

E-mail from Steve Mueller, former Staff Member, Minn. Dep't of Natural Res., Div. of Trails and Waterways, to author (Jay Krienitz) (Dec. 29, 2009) (on file with authors).

432. Steve Mueller discussed hydropower licensing and the effect it had on river protection: "The State and other natural resource agencies negotiated important new license requirements reestablishing more natural river flows which greatly enhanced fish and wildlife, recreation, and aesthetic resources. Millions of dollars of public recreational enhancements were also provided by the power companies as a result of the new licenses." *Id.*

433. One local planning effort outside of the wild and scenic rivers program has raised the interest of river protection advocates. Steve Mueller recounts:

National Park Service officials have stated to me that [the St. Louis River Management Plan] was the largest river protection effort in the eastern U.S. in the 90's. 23,000 acres were acquired, including 150 miles of river shoreline, and very restrictive zoning requirements resulted from this plan. The term 'Wild and Scenic' was never mentioned during the process due to the past political climate, but what was accomplished locally was equal to or better than some of the W&S plans. It was the St. Croix River of the 90's.

*Id.*

434. *See* Interview with Paul Swenson, *supra* note 311. Swenson recalls, "among other things, there [was] all this local river planning going on. If under the administrative procedures act, we had to have our statement of need and reasonableness for our rulemaking process, it was getting harder and harder to do that." *Id.*

435. *Id.*

436. Phone Interview with Bill Clapp, former Special Assistant Attorney Gen. (Dec. 18, 2009).

437. *See* Minnesota Department of Natural Resources, The Wild and Scenic Cannon River, [http://www.dnr.state.mn.us/waters/watermgmt\\_section/wild\\_scenic/](http://www.dnr.state.mn.us/waters/watermgmt_section/wild_scenic/)

Office of Planning noted that river management lost momentum at the DNR during the late 1970s. This was said to have come about because of the following factors:

- Distracting issues like shoreland rules revisions, drought, etc.
- Transfer of advocacy: Some central river advocacy staff moved on to other positions, leaving gaps in program development, one example is the departure of Paul Swenson, who was known as the “voice for river management” within the DNR.
- Program maturity: Slowing of the Rivers Program is thought to be part of the organizational development paradigm, and it was thought to be a matter of time until the program surges again someday.<sup>438</sup>

The 1990 report went on to describe the next ten years of administration in the 1980s: “During this period, river management made a transition from a growth phase to a maintenance phase. Program maintenance requires a different leadership and management approach. Unfortunately, DNR river management failed to make an effective transition.”<sup>439</sup> Most of DNR’s activity focused on land use controls and zoning,<sup>440</sup> and the other Wild and Scenic River Act tools of recreation management and scenic easements went into disuse.<sup>441</sup> Easement records and management of the program were nearly non-existent. Bill Clapp recalls, “A few scenic easements were picked up in early days, but the Department lost track of them. There was no one set up to track any of these properties.”<sup>442</sup> By this time (and to this day), only twenty-three percent of “priority areas” identified within individual wild and scenic river management plans were acquired in

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wsrivers/cannon.html (last visited Apr. 6, 2010). Swenson recalls that the Cannon River designation process was also relatively positive. Interview with Paul Swenson, *supra* note 311. By that time, the DNR had learned from public planning consultants Hans and Annemarie Bleicker and changed its strategy for the public designation process. *Id.*

438. DNR RIVER MANAGEMENT, *supra* note 180, at 3.

439. *Id.* at 1.

440. See Interview with Paul Swenson, *supra* note 311. Swenson recalls that as a hydrologist with a personal focus on land use he put more importance on the zoning part of the Wild and Scenic Rivers program. “[B]ecause that [zoning part] was out there and that was the stuff that we had to get implemented . . . and legitimized and so . . . we were able to put a position in the Central Office, Division of Waters.” *Id.* They put Dale Holmuth in a position out of Brainerd, working on the Mississippi and the Rum, as a hydrologist. *Id.*

441. The last easement acquired in the program was in 1988. Wild & Scenic Rivers Program Review Draft, *supra* note 422, at 3.

442. Phone Inter view with Bill Clapp, *supra* note 436.

fee title or easement.<sup>443</sup> There was no staff dedicated to manage scenic easements.

In 1983, the DNR attempted to study rivers outside of the wild and scenic rivers program process.<sup>444</sup> The “Statewide Outstanding Rivers Inventory Project Report” was conducted to gather information and analyze rivers for potential protection status for the DNR.<sup>445</sup> All of “First Priority” rivers in the project were rivers that had been previously studied or identified for wild and scenic river designation but were not given wild and scenic river status.<sup>446</sup>

By 1989, active river study activity and easement acquisition had virtually ceased. Besides rivers that were included into the system or had an official hearing, the following rivers were studied: the Zumbro, the Snake, the Root, the Blue Earth, the Big Fork, the Cottonwood, the Des Moines, the Kawishiwi, the Sunrise, the Littlefork, and the Red Lake Rivers.<sup>447</sup> Citizen proposals were submitted for inclusion of Cedar River and Willow River (over 400 petitioners).<sup>448</sup> To date, 145 public information meetings and 21 official public hearings have been conducted.<sup>449</sup>

All scenic easements were purchased between 1976 and 1989, with isolated exceptions in the years since 1989.<sup>450</sup> Acquisitions included 135 scenic easements and 47 properties in fee title, totaling approximately 5800 acres.<sup>451</sup> Just over \$2.7 million has been spent on land and easements,<sup>452</sup> with a present-day value at millions more than that amount. The federal Land and Water Conservation Fund (LAWCON) matched with 50% of acquisition costs, bringing the 2009 dollar equivalent to easily over \$10 million in public money for

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443. Wild & Scenic Rivers Program Review Draft, *supra* note 422.

444. See OFFICE OF PLANNING, MINN. DEP’T OF NATURAL RES., STATEWIDE OUTSTANDING RIVERS INVENTORY PROJECT REPORT (1983), available at [http://files.dnr.state.mn.us/waters/watermgmt\\_section/shoreland/Outstanding\\_Rivers\\_Inventory\\_opt.pdf](http://files.dnr.state.mn.us/waters/watermgmt_section/shoreland/Outstanding_Rivers_Inventory_opt.pdf).

445. *See id.*

446. *Id.* at 42.

447. Wild & Scenic Rivers Program Review Draft, *supra* note 422, at 3.

448. *Id.*

449. *Id.*

450. Database records of the Minnesota Department of Natural Resources, Division of Parks and Trails, St. Paul, Minn.

451. *Id.*; see also Dep’t of Natural Res., Wild and Scenic Easement Program Working Manual (2002) [hereinafter Working Manual] (on file with Department of Natural Resources Office of Waters). The Wild and Scenic Easement Program Working Manual indicates that the acquisitions included 134 scenic easements, but this was later discovered to be inaccurate. Based upon the author’s personal knowledge, 135 scenic easements were included in the acquisitions.

452. See Working Manual, *supra* note 451, § I.

acquisition of lands and scenic easements.<sup>453</sup> Until 1990, little to no maintenance of the scenic easements program had been done. By this time, some of the easements were nearly fifteen years old. It was possible that landowners were forgetting their responsibilities to maintain their easements and ownership was surely changing hands. Scenic easements are perpetual and binding on all future landowners.<sup>454</sup>

Potential violations of conservation easement agreements increase greatly when ownership transfers.<sup>455</sup> Fearing this, in 1990–1991, the DNR’s Steve Mueller and Owen Caddy initiated a review of the Kettle and Rum easements.<sup>456</sup> An aerial survey and interpretation was conducted of both rivers, and they contacted some landowners who were in possible violation.<sup>457</sup> Eight violations were found but most were not followed up on due to lack of a program budget.<sup>458</sup>

During that same year, the DNR Office of Planning issued a report, “DNR River Management: A Sense of History Amid Angst for the Future.”<sup>459</sup> The report concluded that there is a need for a multi-stage, in depth wild and scenic river program assessment.<sup>460</sup> The Office of Planning conducted an assessment that asked questions about DNR stream and watershed programs, including the wild and scenic rivers program. The following conclusions and observations were made:

- Presently, there is a lot of competition within [Trails and Waterways Division] for time and dollars. The public is pushing hard for programs that are not related to stream issues.<sup>461</sup>

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453. Database records of the Minnesota Department of Natural Resources, Office of Management and Budgets, St. Paul, Minn. *See also* Interview with Wayne Sames, *supra* note 314.

454. MINN. STAT. § 103F.311 (2008).

455. *See* RENEE J. BOUPLON & BRENDA LIND, CONSERVATION EASEMENT STEWARDSHIP: THE LAND TRUST ALLIANCE 73 (Sterling Hill Productions 2008), *available at* [http://learningcenter.lta.org/attached-files/0/71/7143/CESteward\\_Small.pdf](http://learningcenter.lta.org/attached-files/0/71/7143/CESteward_Small.pdf) (“The Land Trust Alliance’s 2004 study of conservation easement violations and amendments found that most violations are committed not by original easement grantors, but by successor landowners.”).

456. Working Manual, *supra* note 451, § I.

457. *Id.*

458. *Id.*

459. DNR RIVER MANAGEMENT, *supra* note 180.

460. *Id.* at 1.

461. OFFICE OF PLANNING, MINN. DEP’T OF NATURAL RES., WHAT ARE THE MOST SIGNIFICANT OBSTACLES TO MANAGEMENT OF STREAM AND WATERSHED RESOURCES THAT CAN BE ATTRIBUTED TO INTERACTION WITH YOUR DIVISIONAL MANAGEMENT? 2 (on file

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- There is the feeling that the unit is not committed to stream issues in any significant way. No position is allocated to stream issues.<sup>462</sup>
  - A philosophical difference exists between those who stress maximizing opportunities for providing recreation and those who stress environmental protection over recreation.<sup>463</sup>
  - • •
  - User groups are not well organized which creates an obstacle for us when we try to muster support for river and/or watershed based programs. While user groups have no unified voice, neither do we have a forum from which to address stream and watershed management with user groups.<sup>464</sup>
  - • •
  - Perception of the DNR is a big problem. Anti-DNR feeling is a hard barrier to overcome. Mistrust among the public is common.<sup>465</sup>
  - • •
  - There are significant loopholes in the original [wild and scenic river] rules. Blufflands are not adequately protected. There is no monitoring program for the easements that have been purchased.<sup>466</sup>
  - The controversial history of this [wild and scenic rivers] program seems to have us paralyzed. These plans need to be revisited to determine their effectiveness for the 1990's. There is a renewal of interest in river protection that should cue the department to reactivate and add rivers to this program.<sup>467</sup>
  - [SUCCESSSES: Wild and scenic rivers] program is key to heightening people's awareness of rivers and it has protected the natural character of some good stream resources. Size of district protected, level of DNR control, and educational efforts associated with the program were cited as successes.<sup>468</sup>

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with Minnesota Department of Natural Resources).

462. *Id.*

463. *Id.*

464. *Id.* at 7.

465. *Id.*

466. *Id.* at 10.

467. *Id.*

468. *Id.* at 15.

From review of DNR records, it is apparent that work within the wild and scenic river program during the 1990s was mostly limited to programs focused on land use control, and the agency's budget for that work has shrunk with each passing year.<sup>469</sup> The lack of record keeping or easement program support began to cause a fundamental erosion of the wild and scenic rivers program. This became apparent in 1997, with a land use controversy on the St. Croix.<sup>470</sup> By 1997, some easements on the St. Croix were twenty years old, and no known monitoring, landowner education regarding scenic easements, or comprehensive record-keeping had been done.

The following section outlines the second major court case upholding the Minnesota Wild and Scenic Rivers Act. It is important to note that this easement violation turned into a ten-year battle and cost the DNR tens of thousands of dollars in legal fees and significant staff time.<sup>471</sup> This situation highlights the fact that the conservation easements need stewardship; otherwise, the costs may become overwhelming, as the potential for violations will increase with no attention, landowner education, or proper enforcement.

## 2. *Scenic Easement Enforcement: Department of Natural Resources v. Dow*

The only Minnesota action to date arising out of violations of a scenic river easement is *Department of Natural Resources v. Dow*,<sup>472</sup> filed in Washington County District Court.

### a. *Facts*

On August 12, 1976, Thomas E. Foss, Joyce F. Foss, Richard F. Rintelmann and Julie A. Rintelmann granted the State of Minnesota a scenic easement over a tract of land located on the Lower St. Croix River in Denmark Township, Washington County.<sup>473</sup> The scenic

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469. Interview with Steve Johnson, *supra* note 362.

470. *See* Complaint, Dep't of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000).

471. Minnesota Attorney General's Office, Docket/Class Time Report (Jan. 5, 2009) (on file with Minnesota Department of Natural Resources) (legal fees incurred between July 1, 1995 and December 23, 2008).

472. This was a consolidation of two related actions. Complaint, Dep't of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000); Complaint, Hyers v. Dow, No. C3-00-4804 (Minn. Dist. Ct. Aug. 29, 2000). Where the original actions need to be distinguished from the consolidated case in subsequent citations, the individual court file numbers will be referenced.

473. Complaint at Ex. A, Dep't of Natural Res. v. Dow, No. C9-00-1101 (Minn.

easement was recorded in Washington County on October 28, 1976.<sup>474</sup> The DNR was apparently not notified of the scenic easement at the time of the grant and did not learn of it until 1998, after violations of the easement had already occurred.<sup>475</sup>

The scenic easement restricts development on or alteration of the subject tract (referred to in the scenic easement as the "Scenic Area"), which runs approximately from the bluffline to the river's edge.<sup>476</sup> It prohibits a number of activities and includes the following covenants:

(1) No topographic changes or alteration of the natural landscape within or upon [the] "Scenic Area" by excavation, drainage, filling, dumping or any other means without written authorization from the Commissioner of Natural Resources.

. . .

(3) No other structures or devices, whether permanent or temporary, hereafter constructed or placed in the "Scenic Area" without a written authorization from the Commissioner of Natural Resources. . . .

(4) No destruction, cutting, trimming or removing of trees or bushes without a written authorization from the Commissioner of Natural Resources. . . .

(5) No dumping of ashes, trash, junk, rubbish, sawdust, garbage or offal upon the "Scenic Area."

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Dist. Ct. Feb 17, 2000).

474. Findings of Fact, Conclusions of Law and Order for Judgment, at Findings of Fact ¶ 9, Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Dec. 6, 2001) [hereinafter FFCO].

475. See *id.* at Findings of Fact ¶¶ 11, 27, 33. The most likely explanation is that the scenic easement was a gift of which the DNR was not notified. See *id.* ¶ 11. The DNR's eleven other scenic easements on the St. Croix were drafted by the Minnesota Attorney General's Office, which serves as legal counsel to the DNR. Copies of these recorded documents were assigned DNR document numbers and filed with the DNR's land records in the Division of Lands and Minerals at the DNR's St. Paul Central Office. The Foss/Rintlemann scenic easement, however, was drafted and notarized by private counsel, apparently without participation by the DNR or the Attorney General's Office. See Complaint at Ex. A, Dep't of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000). See also Post-Trial Memorandum of Plaintiff State of Minnesota, Department of Natural Resources at 15 n.10, Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Jun. 20, 2001) ("Note that the easement was drafted by a private attorney, not DNR or the Minnesota Attorney General's Office, counsel for DNR.").

476. FFCO, *supra* note 474, at Findings of Fact ¶ 10; see also Complaint at Ex. A, Dep't of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000) (designating the subject tract as "Scenic Area").

...

(7) No use made of the “Scenic Area” in violation of the restrictive covenants herein.<sup>477</sup>

The scenic easement also indicates that “[n]o rights herein are granted to the general public for access to or entry upon the ‘Scenic Area’ for any purpose.”<sup>478</sup> The scenic easement and covenants contained in the easement were to run with the land and be binding on all persons who would come into ownership of the Scenic Area.<sup>479</sup>

The Fosses and Rintlemanns each built a house on the bluff, west of the tract covered by the scenic easement, in the mid-1970s.<sup>480</sup> Each apparently owned a separate strip of land on the bluff covered by the scenic easement and owned the area from the base of the bluff to the river’s edge in common.<sup>481</sup> The common property consists of a floodplain vegetated with trees and other plants.<sup>482</sup>

In 1995, John Dow bought the Fosses’ property, which consisted of a house and property west of and not subject to the easement, a strip of land subject to the scenic easement extending from the bluff line down a steep bluff to the floodplain, and an undivided one-half interest in the common property, also subject to the scenic easement.<sup>483</sup> Dow’s warranty deed stated that his property was subject to “restrictions relating to the use or improvement of the property.”<sup>484</sup> A title insurance policy that Dow obtained at the time of purchase stated that the property was subject to the scenic easement.<sup>485</sup> In 1996, Dean and Kimberly Hyers purchased the Rintlemanns’ property, adjacent to and south of Dow’s property, as well as an undivided one-half interest in the common property.<sup>486</sup> The scenic easement was one of the reasons the Hyers bought the property.<sup>487</sup> In 1997, Dow and the Hyers entered into a land covenant and shared property agreement

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477. Complaint at Ex. A, Dep’t of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000).

478. *Id.* (emphasis omitted).

479. *Id.*

480. *See* FFCO, *supra* note 474, at Findings of Fact ¶ 10.

481. *See id.* ¶¶ 9–10. The scenic easement simply lists the Fosses and the Rintlemanns as the grantors but is silent about the specifics of their property ownership interests. *See* Complaint at Ex. A, Dep’t of Natural Res. v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000).

482. FFCO, *supra* note 474, at Findings of Fact ¶¶ 4, 6.

483. *See id.* ¶¶ 4, 10, 12.

484. *Id.* ¶ 12 (internal quotation omitted).

485. *Id.*

486. *See id.* ¶ 13.

487. *Id.*

pertaining to uses of the common property.<sup>488</sup>

At the time Dow and the Hyers acquired their properties, each property had a footpath on the bluff to the shared beach.<sup>489</sup> The footpaths were approximately one foot wide and had thick vegetation growing on each side.<sup>490</sup> They crossed the floodplain, which contained a railroad berm with a narrow cut leading to the shared beach.<sup>491</sup> There was a stairway made of 4 x 4 timbers from the berm down to the beach.<sup>492</sup>

In 1996, Dow told the Hyers he was going to work on his path so that he could drive his ATV to the beach.<sup>493</sup> Over the next year, Dow cut a number of trees on his property and constructed a road, using a bobcat “to excavate a large switchback that [was] visible from the Hyers property and the common property.”<sup>494</sup> Dow removed brush and small trees from and graded the path in the common area.<sup>495</sup>

Kimberly Hyers notified Washington County about Dow’s activities in the late summer of 1997.<sup>496</sup> The county sought advice from a DNR hydrologist about the situation.<sup>497</sup> The hydrologist and county employees inspected the site and determined that major excavation, grading, tree removal, and erosion had occurred on the bluff.<sup>498</sup> At the time, neither the DNR nor the county was aware of the scenic easement.<sup>499</sup>

The county directed Dow to obtain professional assistance and submit a grading plan.<sup>500</sup> Dow hired a landscape architect and completed some temporary erosion control measures per the landscape architect’s plan.<sup>501</sup> Before a final grading plan and restoration plan had been approved by the county, the county discovered a reference to the scenic easement on a plat map and

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488. *Id.* ¶ 17. The terms of the shared property agreement placed limitations on hunting and target shooting and provided for notice to and permission of the other party before certain activities could occur. *See id.*

489. *Id.* ¶ 14.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* ¶ 15.

494. *See id.* ¶¶ 15, 16, 19–22.

495. *Id.* ¶ 22.

496. *Id.* ¶ 23.

497. *Id.* ¶ 24; *see also id.* ¶ 16 (introducing and identifying the DNR hydrologist as Molly Shodeen).

498. *Id.* ¶¶ 26, 27.

499. *Id.* ¶ 27.

500. *Id.* ¶ 28.

501. *See id.* ¶¶ 29–31.

notified the DNR hydrologist of the easement.<sup>502</sup>

The DNR's water recreation coordinator, whose division was responsible for monitoring scenic easements, visited the site in September 1998.<sup>503</sup> He determined that the road Dow had constructed was six to ten feet wide, that the area of damage from the construction was twenty to thirty feet wide, and that "grading, vegetative cutting, erosion control devices and dumping of firewood were violations of the scenic easement."<sup>504</sup>

Based on the scenic easement, the DNR sent Dow a letter on October 16, 1998 directing him to halt all further work on the road and to stop using it for vehicular traffic.<sup>505</sup> Dow failed to do so.<sup>506</sup> He also refused to comply with the DNR's request that he restore the property,<sup>507</sup> resulting in the DNR's initiation of a declaratory judgment action against him in Washington County District Court.<sup>508</sup>

*b. Claims and Theories*

The DNR sought a declaration that Dow had violated and continued to violate the scenic easement and an order requiring that he correct the violations and permanently enjoining him from further violations of the easement.<sup>509</sup> Subsequently, the Hyers filed suit against Dow.<sup>510</sup> In a four-count complaint, the Hyers alleged that Dow had breached the 1997 land covenant and shared property agreement, violated the scenic easement, committed waste, and violated the Minnesota Environmental Rights Act (MERA).<sup>511</sup> Of note are the Hyers' scenic easement enforcement and MERA claims.

The Hyers alleged that Dow had violated the scenic easement "by removing trees, excavating, grading, constructing and maintaining

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502. *Id.* ¶¶ 32-33.

503. *Id.* ¶ 35.

504. *Id.*

505. *Id.* ¶ 37.

506. *See id.* ¶ 38.

507. *See* Complaint ¶ 18, DNR v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000).

508. *See* Complaint, DNR v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000). Dow's wife was initially named as a defendant. *Id.* However, all claims against her were later dismissed without prejudice by stipulation. Order, State of Minnesota by its Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Oct. 2, 2000).

509. Complaint ¶¶ 2-4, DNR v. Dow, No. C9-00-1101 (Minn. Dist. Ct. Feb. 17, 2000).

510. Complaint, Hyers v. Dow, No. C3-00-4804 (Minn. Dist. Ct. Aug 30, 2000).

511. *Id.* ¶¶ 19-35.

the Road, and by depositing debris on the Common Property.”<sup>512</sup> They sought a declaration under Minnesota Statute section 555.01, *et seq.*, that Dow had violated the scenic easement by these activities;<sup>513</sup> an injunction requiring Dow to restore both his own property and the common property to their condition prior to the activities constituting violations of the scenic easement;<sup>514</sup> and damages in excess of \$50,000.<sup>515</sup>

In their claim under MERA,<sup>516</sup> the Hyers alleged that Dow’s “removing trees, excavating and grading for, and constructing and maintaining the [r]oad” had caused soil from both the Dow property and common property to erode into the St. Croix River and onto their property, and had damaged the area’s natural aesthetic beauty.<sup>517</sup> They further alleged that Dow’s conduct had caused, or was likely to cause, “the pollution, impairment or destruction of the water or other natural resources of the State of Minnesota.”<sup>518</sup> The Hyers sought injunctive relief under Minnesota Statute section 116B.01, *et seq.*, requiring restoration of the Dow property and common property to their prior condition and permanently enjoining Dow “from engaging in any further conduct likely to cause pollution, impairment or destruction of the land, water and other natural resources of the State of Minnesota.”<sup>519</sup>

The Hyers moved to consolidate their action with the DNR’s action against Dow, as both actions alleged that Dow’s conduct in constructing the road violated the scenic easement and, thus, involved common questions of law and fact.<sup>520</sup> The court granted the Hyers’ motion and issued an order consolidating the two actions.<sup>521</sup>

*c. Standing to Enforce Scenic Easement*

Following consolidation of the actions, Dow moved to dismiss Count II of the Hyers’ Complaint (“Enforcement of Scenic Ease-

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512. *Id.* ¶ 25.

513. *Id.* ¶ 26.

514. *Id.* at Prayer for Relief ¶ 5.

515. *Id.* ¶ 1.

516. MINN. STAT. § 116B.01–.13 (Supp. 2010).

517. Complaint ¶ 33, Hyers v. Dow, No. C3-00-4804 (Minn. Dist. Ct. Aug. 30, 2000).

518. *Id.* ¶ 34.

519. *Id.* ¶ 35.

520. Memorandum of Law in Support of Motion to Consolidate, DNR v. Dow, No. 82-C9-00-001101 (Minn. Dist. Ct. Aug. 29, 2000).

521. Order, DNR v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Sept. 21, 2000).

ment”) under section 12.02(e) of the Minnesota Rules of Civil Procedure.<sup>522</sup> Dow argued that the Hyers lacked standing to assert a claim for enforcement of the scenic easement because they (1) had suffered no “[a]ctual or [t]hreatened [i]njury [d]ue to a [v]iolation of the [s]cenic [e]asement,” and (2) had no legislative standing to enforce the scenic easement.<sup>523</sup>

Dow’s legislative standing argument rested on four grounds. Dow first pointed to Minnesota Statutes section 103F.311, subdivision 6, the scenic easement enabling legislation,<sup>524</sup> which includes the following language:

Unless otherwise expressly and specifically provided for by the parties, the easement must be:

- (1) perpetually held for the benefit of the people of the state;
- (2) specifically enforceable by its holder or any beneficiary;
- (3) binding upon the holder of the servient estate, and the holder’s heirs, successors, and assigns; and
- (4) restricted so as not to give the holder or any beneficiary the right to enter on the land except for enforcement of the easement.<sup>525</sup>

Dow contended that “the parties to the Scenic Easement [had] expressly and specifically provided” that the easement was not enforceable by “any beneficiary” because the scenic easement only expressly authorized the “grantee [State of Minnesota], its successors, assigns and agents’ [to] enter upon the ‘Scenic Area’ for the purposes of inspection and enforcement.”<sup>526</sup> Dow argued that the following statement in the scenic easement evidenced the parties’ specific intent to prohibit the general public from enforcing the easement: “NO

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522. Motion to Dismiss Count II, *Hyers v. Dow*, No. C3-00-4804 (Minn. Dist. Ct. Oct. 11, 2000).

523. Defendant John C. Dow’s Memorandum of Law in Support of Motion to Dismiss at 6–11, *Hyers v. Dow*, No. C3-00-4804 (Minn. Dist. Ct. Oct. 11, 2000).

524. Application of Minnesota Statutes section 103F.311, subdivision 6 to the scenic easement at issue was not disputed. The position that provisions of the state’s Wild and Scenic Rivers Act, sections 103F.301–.345 of the Minnesota Statutes, are applicable in the DNR’s management of the Lower St. Croix River is consistent with the court’s analysis in *In re Hubbard*. See *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010), discussed, *infra*, Part III-C-2.

525. Defendant John C. Dow’s Memorandum of Law in Support of Motion to Dismiss at 8, *Hyers v. Dow*, No. C3-00-4804 (Minn. Dist. Ct. Oct. 11, 2000) (quoting MINN. STAT. § 103F.311, subdiv. 6 (2008)).

526. *Id.* at 9 (quoting scenic easement).

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RIGHTS HEREIN ARE GRANTED TO THE GENERAL PUBLIC FOR ACCESS TO OR ENTRY UPON THE 'SCENIC AREA' FOR ANY PURPOSE."<sup>527</sup>

Second, Dow noted that the parties had failed to incorporate the language of Minnesota Statutes section 103F.311, subdivision 6, authorizing enforcement by "any beneficiary" into the substantive terms of the scenic easement itself.<sup>528</sup> He contended that this omission evidenced the parties' intent to limit standing to enforce the easement to the State of Minnesota.<sup>529</sup>

Third, Dow argued that the scenic easement enabling legislation was "not a clear grant of standing."<sup>530</sup> Contrasting the standing language set forth in MERA, which provides that "[a]ny person residing within the state . . . may maintain a civil action," he noted that the scenic easement enabling legislation was "dependent on the language of the scenic easement document," hence, "not absolute."<sup>531</sup>

Finally, Dow argued that it would be "impractical" to permit the Hyers to litigate the scenic easement issue, as the State of Minnesota would be litigating the same issue in the consolidated case, and each plaintiff may have different settlement demands.<sup>532</sup>

In the alternative to his Motion to Dismiss Count II in its entirety, Dow argued that if a determination was made that the Hyers had standing to enforce scenic easement claims on the common property, their claims as to the Dow parcel should still be dismissed.<sup>533</sup> Dow contended that "[t]he mere proximity of [the Hyers'] property to the Dow Parcel [did] not afford them any greater standing than the general public."<sup>534</sup> Dow, thus, implicitly claimed that Minnesota Statutes section 103F.33, subdivision 6 confers no standing to enforce a scenic easement based solely on one's status as a member of the public.

The court denied Dow's Motion to Dismiss Count II.<sup>535</sup> The court found the Hyers' allegations that Dow's acts had "diminished the aesthetic beauty of the area, caused erosion onto [their] property,

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527. *Id.* (quoting scenic easement) (emphasis in original).

528. *Id.* at 10.

529. *See id.*

530. *Id.*

531. *Id.* (quoting MINN. STAT. § 116B.03, subdiv. 1 (2008)).

532. *Id.* at 10–11.

533. *See id.* at 11.

534. *Id.*

535. Order, Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Feb. 6, 2001) (order denying motion to dismiss).

and devalued the common property. . . . [a] sufficient injury in fact to avoid a motion to dismiss . . . .<sup>536</sup>

Addressing the issue of the Hyers' legislative standing to bring an action to enforce the scenic easement, the court held that under section 103F.311, subdivision 6 of the Minnesota Statutes, "the beneficiaries of the scenic easement who are the people of the State of Minnesota have the right to enforce the scenic easement unless otherwise expressly and specifically provided by the parties in the scenic easement."<sup>537</sup> The court determined that the scenic easement at issue did not "specifically and expressly provide that the people of the State of Minnesota may not enforce the easement."<sup>538</sup> Rejecting Dow's implicit argument that status as a citizen of the State of Minnesota is insufficient to confer standing to enforce a scenic easement under the enabling legislation, the court stated that "[e]ven if Plaintiffs did not have an actual injury, they would still have standing . . . to enforce the scenic easement"<sup>539</sup> under Minnesota Statutes section 103F.311, subdivision 6(2).<sup>540</sup>

*d. Findings of Fact, Conclusions of Law, and Order for Judgment*

The case proceeded to trial in June and July of 2001. Following submission of post-trial briefs by the DNR, the Hyers, and Dow, the

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536. Memorandum at 3, Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Feb. 6, 2001).

537. *Id.* at 5.

538. *Id.* The court rejected Dow's claim that the provisions in the easement authorizing (1) the state to enter the Scenic Area for the purposes of inspection and enforcement and (2) prohibiting access to the scenic area by the general public, constituted express and specific repudiation of the legislative grant of standing to enforce the easement. *Id.* at 4-5. The court noted that the provision of the scenic easement pertaining to entry related only to section 103F.311, subdivision 6(4) of the Minnesota Statutes. *Id.* at 4.

539. Memorandum at 5, Dep't of Natural Res. v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. Feb. 6, 2001). The express public right of enforcement granted under section 103F.311, subdivision 6 stands in stark contrast to enforcement rights granted under section 84C of the Minnesota Statutes, the Uniform Conservation Easement Act. Under section 84C.03(a), a conservation easement may only be enforced by "(1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement; or (4) a person authorized by other law." MINN. STAT. § 84C.03(a) (2008). However, the court's ruling on the Hyers' MERA claim, discussed below, raises the intriguing possibility of a citizen's right to enforce a section 84C conservation easement under MERA and section 84C.03(a) (4) of the Minnesota Statutes.

540. Subdivision 6(2) provides that a scenic easement is "specifically enforceable by its holder or any beneficiary." MINN. STAT. § 103F.311, subdiv. 6(2) (2008).

court issued its Findings of Fact, Conclusions of Law, and Order for Judgment.<sup>541</sup> The court made a number of findings relating to construction of the road, Dow's continued use of his ATV on the road following the DNR's 1998 directive that he stop doing so, and littering on the common property by Dow and his guests.<sup>542</sup> The court specifically found that Dow's continuing ATV use contributed to ongoing erosion.<sup>543</sup> Ruling in favor of the DNR and the Hyers on their scenic easement claims, the court held that Dow had violated the scenic easement by:

- (a) excavating and grading to construct the road,
- (b) removing trees and bushes from the scenic area,
- (c) dumping litter, scrap wood, brush, nails and other debris in the scenic area, [and]
- (d) his continued use of motor vehicles in the scenic area which results in alteration of the topography and landscape in the scenic area.<sup>544</sup>

The court also ruled in favor of the Hyers on their MERA claim.<sup>545</sup> The court concluded that the "scenic area is a protectable natural resource as defined by [MERA]."<sup>546</sup> Stating that Dow's conduct had "caused, and is likely to continue to cause, pollution, impairment or destruction of the bluff, trees and other resources located in the scenic area," the court concluded that he had violated MERA.<sup>547</sup>

The court ordered Dow, within sixty days of its order, to come to an agreement with the DNR for restoration of the property and further ordered that if no such agreement could be reached, the DNR

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541. See FFCO, *supra* note 474.

542. See, e.g., *id.* at Findings of Fact ¶¶ 15, 16, 19–23, 26–27, 35–38, 40–45.

543. *Id.* ¶ 38.

544. *Id.* at Conclusions of Law ¶ 3.

545. *Id.* at ¶ 5. To establish a *prima facie* showing under MERA, a party must show (1) the existence of a "protectible natural resource," which, under MINN. STAT. § 116B.02, subdiv. 4 (2008), may include "all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational and historical resources;" and (2) the defendant's conduct has caused or is likely to cause "pollution, impairment or destruction of that resource." *State v. Brunkow Hardwood Corp.*, 510 N.W.2d 27, 29–30 (Minn. Ct. App. 1993) (citing *State v. Archabal*, 495 N.W.2d 416, 421 (Minn. 1993)). To rebut a *prima facie* showing of a violation under MERA, a defendant must prove there is "no feasible and prudent alternative and the conduct at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare . . ." *Id.* at 31 (citing MINN. STAT. § 116B.04 (2008)).

546. FFCO, *supra* note 474, at Conclusions of Law ¶ 4.

547. *Id.* at ¶ 5.

should submit a restoration proposal to the court for consideration.<sup>548</sup> The court further ordered Dow to “remove all personal property and debris from the common [area]” and “permanently enjoined [him] from violating the terms of [his] Shared Property Agreement” with the Hyers, “from violating the terms of the scenic easement and from engaging in . . . conduct likely to cause pollution, impairment or destruction of the . . . natural resources in the scenic easement.”<sup>549</sup>

*e. Epilogue*

After an extension approved by the court, the DNR and Dow stipulated to a restoration plan.<sup>550</sup> The court issued an order requiring that Dow “restore the area located within the scenic easement in accordance with [this plan.]”<sup>551</sup> Subsequently, Dow’s property went into foreclosure.<sup>552</sup> The mortgagee bank completed the restoration work per the court’s order and sold the property.<sup>553</sup>

*C. Administrative Years 1998–2010*

Since Jim Harrison’s recommendations to Governor LeVander concerning the need for scenic easements for long-term viability of a protected river,<sup>554</sup> and Representative Harry Sieben’s passionate speech on the House floor,<sup>555</sup> efforts to protect wild and scenic rivers have been less focused on the scenic easement tool. Instead, since the 1980s, regulation has been largely left up to local units of government through their implementation of wild and scenic river ordinances.<sup>556</sup> Unfortunately, the manner in which local governments have implemented these ordinances and the state’s oversight of the process<sup>557</sup>

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548. *Id.* at ¶ 10.

549. *Id.* ¶¶ 11–12.

550. *See* Stipulation and Order, DNR v. Dow, Nos. C9-00-1101, C3-00-4804 (Minn. Dist. Ct. May 13, 2002).

551. *Id.* at Order ¶ 1.

552. Letter from David P. Iverson, Assistant Attorney General, to The Honorable J. E. Cass (Sept. 7, 2006) (on file with Minnesota Department of Natural Resources, Division of Parks and Trails).

553. Letter from David P. Iverson, Assistant Attorney General., to Christina M. Volkers, Court Adm’r (Aug. 9, 2007) (on file with Minnesota Department of Natural Resources, Division of Parks and Trails).

554. Phone Interview with Jim Harrison, *supra* note 305.

555. Sieben Speech, *supra* note 155.

556. Under the 1973 Minnesota Wild and Scenic Rivers Act, local units of government are responsible for enforcing wild and scenic river rules. MINN. STAT. § 103F.335 (2008).

557. Until the Minnesota Supreme Court’s February 11, 2010 ruling in *In re*

have come under fire from such national organizations as American Rivers:

The state-managed segment of the Lower St. Croix River is threatened by unfortunate zoning decisions by local governments, made without effective oversight by the Minnesota and Wisconsin Departments of Natural Resources (DNRs). Pursuant to the Congressional designation of the Lower St. Croix Scenic Riverway, the states committed to review zoning decisions that affect the river's unique values. However, over time, the states have allowed several of the 19 local governments along this protected stretch of the river to build large structures too close to the river, degrading the experience of boaters and anglers, and disregarding the intent of the Wild and Scenic Rivers Act.

Denmark Township in Washington County, MN approved a 3500-square-foot structure just 13 feet from the riverbank, where the zoning standard is 100 feet. Lakeland, MN approved a major building expansion too close to the riverbank. In Wisconsin, the town of Troy has relaxed its zoning rules without state objection, lessening protection for the river. This erosion of protections hurts the integrity of the Lower St. Croix Scenic Riverway and threatens the Wild and Scenic Rivers System as a whole.<sup>558</sup>

*1. Wild and Scenic River Zoning: Davies Variance on the Lower St. Croix*

The 3500-square-foot structure referenced in the American Rivers report resulted from a controversial variance decision that has generated concern from local citizens, natural resource professionals, and other experts.<sup>559</sup> The following account is from the public record of the variance request for the property.

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*Hubbard*, 778 N.W.2d 313 (Minn. 2010), the DNR either certified approval of or refused to approve variance decisions by local units of government pursuant to MINN. R. 6105.0540 (2009) (pertaining to the Saint Croix Riverway) and MINN. R. 6105.0230 (2009) (pertaining to state wild, scenic, or recreational rivers). As discussed in more detail below in Part III-C-2, the supreme court invalidated the DNR's authority to review these variance decisions in *Hubbard*.

558. America's Most Endangered Rivers of 2009 #10 Lower St. Croix National Scenic Riverway, AMERICAN RIVERS 2 (2009), <http://www.americanrivers.org/assets/pdfs/mer-2009/lower-st-croix-national.pdf>.

559. Interviews with Jim Harrison, Paul Swenson, Steve Johnson, & Bill Clapp, *supra* notes 305, 311, 362, 436.

a. *Facts*

Donald and Diane Davies owned property in Denmark Township, Washington County Minnesota, within the federal St. Croix National Scenic Riverway.<sup>560</sup> The parcel at issue was approximately 45.8 acres with river frontage along the Lower St. Croix.<sup>561</sup> The Davies sought to redevelop their property by demolishing two existing structures that were built before the adoption of the 1976 Lower St. Croix Bluffland and Shoreland Management Ordinance by Washington County and Denmark Township.<sup>562</sup> Both structures were substandard—one located directly on the bluffline of the river and one located fourteen feet back.<sup>563</sup> The ordinance required new developments to rebuild according to current setback standards.<sup>564</sup>

The Davies submitted a variance request to Denmark Township (received by the DNR on January 19, 2006) seeking a bluffline setback of zero feet (the required setback is 100 feet).<sup>565</sup> In order for such a variance to be granted, the landowner must show a “hardship” that was not self-created.<sup>566</sup> The Davies justified their Statement of Variance Request with eight points (abbreviated here), claiming that (1) the topographical and physical features of the site constrained its development; (2) the new building needed to maintain a drainage culvert, which existed due to hydrological constraints of the area, in order to prevent erosion and allow the culvert to “continue to serve its purpose”; (3) the proposed location was the only feasible location due to septic system needs; (4) they were unable to move the building location “further west than [the] proposed location” because of unstable slopes, and they were unable to move to the “upper meadow”

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560. *In re* Variance of: Donald and Diane Davies, Washington County Board of Adjustment and Appeals, Settlement Agreement, at 1 (Dec. 12, 2006) (recorded document available in Office of the County Recorder, Washington County, #3621783) [hereinafter Settlement Agreement].

561. *In re* Variance of: Donald and Diane Davies, Washington County Board of Adjustment and Appeals, Findings of Fact, Conclusions of Law and Order Granting Variance, at 1 (Apr. 27, 2006).

562. Letter from Daniel B. Johnson, Attorney for applicants Donald and Diane Davies, to Den. Twp., Wash. County, & Minn. Dep’t of Natural Res., at 1 (Jan. 13, 2006) (on file with authors) [hereinafter Variance Request].

563. *Id.*

564. WASH. COUNTY LOWER ST. CROIX RIVER BLUFFLAND AND SHORELAND MANAGEMENT ORDINANCE, § 402.01(5) (1976).

565. Variance Request, *supra* note 562; WASH. COUNTY LOWER ST. CROIX RIVER BLUFFLAND AND SHORELAND MANAGEMENT ORDINANCE, § 402.01(5) (1976).

566. WASH. COUNTY LOWER ST. CROIX RIVER BLUFFLAND AND SHORELAND MANAGEMENT ORDINANCE, § 805.01 (1976).

as it would “effectively deny the owners the river view they have enjoyed for 37 years, and would deny them the reasonable access to the river that they currently enjoy”; (5) they preferred not to move the building location to the “upper meadow” due to their desire to continue their working farm and their belief that doing so constitutes “being good stewards of their entire property, not just of the proposed building site, and of the river as well” and that the plan would “significantly reduce[] the visual impact of the improvements on the proposed site”; (6) “[t]he proposed building site would not alter the essential character of the locality”; (7) “[g]ranting a variance in this case would result in a developed site which better complies with the stated goal of the ordinance of reducing the visual conspicuousness of improvements. . . . [and] [i]n [the place of existing structures] would be a more aesthetically pleasing structure . . . .”; and (8) “the topography and drainage characteristics are circumstances unique to the property and were not created by the landowner after May 1, 1974.”<sup>567</sup>

On February 14, 2006, the DNR responded to Denmark Township, which had received the Davies’ variance request.<sup>568</sup> The DNR contended there was no showing of hardship “other than what the owner created . . . founded solely on the owner’s desired house design, size, and location.”<sup>569</sup> Based on the information the DNR had received at that point, it recommended denial of the proposed variance.<sup>570</sup>

*b. Decision by Washington County*

The Washington County Board of Adjustment and Appeals discussed this matter on March 2, 2006, ultimately disagreeing with the DNR’s analysis of the Davies’ hardship claim.<sup>571</sup> Testimony was heard by nine individuals, including the Davies, DNR Hydrologist Molly Shodeen, Lower St. Croix National Scenic Riverway Act chief author and South Washington County Representative Michael Sieben, and local government representatives.<sup>572</sup> After the public hearing was closed, and a short discussion amongst the commissioners, the motion

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567. Variance Request, *supra* note 562.

568. Letter from Molly Shodeen, Area Hydrologist, to Mr. Dennis O’Donnell, Senior Planner, Survey & Land Mgmt., Wash. County (Feb. 14, 2006) (on file with authors).

569. *Id.*

570. *Id.*

571. See Washington County Board of Adjustment and Appeals Meeting Summary (Mar. 2, 2006) (on file with authors).

572. See *id.* at 1.

to approve the variance (with changes) carried five to zero.<sup>573</sup>

The Washington County Board of Adjustment and Appeals determined that the Davies had shown a valid hardship, concluding that the “plight of the Applicants was not created by them but is due to the topography of the land and the placement of the existing drainage system.”<sup>574</sup> The board’s Order Granting Variance approved the following:

- Reduction from a required 200-foot river setback to fifty-five to sixty feet,
- Reduction from a required 100-foot bluffline setback to ten feet,
- Restricted placement of their home on greater than twelve percent slope.<sup>575</sup>

The Board determined that the “requested variance will not alter the essential character of the area. There are other homes in this area and throughout Denmark Township located on or near the bluffline.”<sup>576</sup> In addition, the board sought to justify its grant of a variance by claiming consistency with previous variance decisions:

Differing setback variances have been granted to other residents based on their individual situations. Granting of the variance does not grant additional rights to the applicants than are enjoyed by others in the area . . . . The modification made by the Applicants keeps the project within the spirit and intent of the Lower St. Croix River Bluffland and Shoreland Management Ordinance by balancing the interests of removing the old structures and replacing them with a single new structure that is less obtrusive from the river.<sup>577</sup>

*c. Denial of Certification, Appeal, and Settlement*

On April 25, 2006, the DNR initially denied certification of the variance approved by Washington County.<sup>578</sup> On May 20, 2006, the Davies appealed the DNR’s decision.<sup>579</sup> This appeal demanded a

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573. *Id.* at 9.

574. Variance Request, *supra* note 562. The existing drainage system was installed by members of the Davies family. *See id.* at 2.

575. *Id.* at 2–4.

576. *Id.* at 2.

577. *Id.* 2–3.

578. Pursuant to MINN. R. 6105.0540(3)(C) (2005) (DNR’s variance certification authority invalidated by *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010)).

579. Pursuant to MINN. R. 6105.0540(3)(E)(1) (2005) (DNR’s variance certification authority invalidated by *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010)).

public hearing and a required \$500 bond.<sup>580</sup> The public hearing never occurred and the Davies' bond was returned.<sup>581</sup> Instead, the DNR and Davies agreed to a settlement on the following points:

- (1) The Davies agree to a bluffline setback of 13.3 feet, as opposed to 0 feet as approved by Washington County in its Order Granting Variance . . . .
- (2) DNR and the Davies agree that this Settlement Agreement does not change, modify, or otherwise impact the remaining requirements contained within the Order Granting Variance.
- (3) DNR agrees to and upon execution of this Settlement Agreement does withdraw its nonapproval of Washington [C]ounty's Order Granting Variance.
- (4) The Davies agree to and upon execution of this Settlement Agreement do withdraw their appeal of DNR's nonapproval.
- (5) DNR and the Davies agree that this Settlement Agreement may be recorded in the Office of County Recorder for Washington County.<sup>582</sup>

*d. The Aftermath*

Both the Washington County Board of Adjustment and Appeals' variance grant and the DNR's settlement with the Davies have been widely criticized. An official collaborative body made up of forty-nine member organizations including local government representatives, landowners, and stakeholder organizations, the Lower St. Croix Partnership Team (Partnership Team), an advisory group for the Lower St. Croix Management Commission, came out in strong opposition to the decision.<sup>583</sup> Created out of the 2002 Lower St. Croix Cooperative Management Plan,<sup>584</sup> the Partnership Team's purpose is to monitor whether proper policy and procedure is followed for

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580. See Letter from Ron Anderson, Water Mgmt. Section, Minn. Dep't of Human Res., to Daniel B. Johnson, Attorney (May 24, 2006) (on file with authors).

581. Interview with Molly Shodeen, Hydrologist, Minn. Dep't of Natural Res., in St. Paul, Minn. (Dec. 14, 2009).

582. Settlement Agreement, *supra* note 560, at 2-3.

583. See Lower St. Croix River Workshops 2008-2009: Minnesota DNR, [http://www.dnr.state.mn.us/waters/watermgmt\\_section/wild\\_scenic/wsrivers/workshops\\_2008-2009.html](http://www.dnr.state.mn.us/waters/watermgmt_section/wild_scenic/wsrivers/workshops_2008-2009.html).

584. LOWER ST. CROIX NATIONAL SCENIC RIVERWAY, FINAL COOPERATIVE MANAGEMENT PLAN ENVIRONMENTAL IMPACT STATEMENT vi (1999), available at <http://files.dnr.state.mn.us/waters/wsrivers/nps/contents.pdf>.

variance requests.<sup>585</sup> Following strict policies and procedures in their work reviewing variance requests for the Lower St. Croix, this organization presented alternative conclusions in a strongly-worded letter about the Davies Variance.<sup>586</sup> The Partnership Team refuted nearly every point contained in the Washington County Board of Adjustment and Appeals' Order Granting Variance, claiming there was no valid hardship to justify the Davies' development proposal.<sup>587</sup> The Partnership Team asserted unanimously that the Findings of Fact and Conclusions of Law influencing the Washington County Order Granting Variance and the DNR settlement were untrue:

The proposed house is much longer, taller and bigger than the existing homes to be removed on the bluff line, will be visually conspicuous and has a shiny copper roof which does not comply with ordinance regulations of earth tone or summer vegetation colors. The project is located across the St. Croix River from Kinnickinnic State Park, is clearly visible from the river, and from the only deck structure in the Park.

The Partnership Team cannot find in the record any justification for the hardship variance granted. The reason given therein, that a drainage culvert buried up to 25 feet below ground by the applicants, prohibits building the house farther back is insufficient and self-created. The adjacent land owned by the applicant includes hundreds of acres of land and hundreds of feet of bluffland and shoreland. The Washington County Planner's report cited the criteria for issuing a hardship variance; . . . . Signaling unprecedented, prejudicial bias, the record contains unsubstantiated and gratuitous findings that the Davies had shown themselves to be "good stewards." It concerns us that the record contains no analysis of potential increased surface water runoff. The review and approval of the Davies project by Denmark Township and the Washington County Board of Appeals is not consistent with the rules and laws protecting the Lower St. Croix National Scenic Riverway.

After the Minnesota Department of Natural Resources (MnDNR) objected to the permit, the Davies legal team ap-

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585. Email from Buck Malick, Chairman of the Lower St. Croix Nat'l Scenic Riverway P'ship Team, to author (Jay Krienitz) (Dec. 31, 2009, 15:34 CST) (on file with authors).

586. See Undated Letter from John Jansen, Chair, LSCNSR P'ship Team to Scott Humrickhouse, Chair, Lower St. Croix Mgmt. Comm'n, Wis. Dep't of Natural Res. (on file with authors).

587. *Id.*

pealed and sought an expedited review by an Administrative Law Judge. Without a hearing nor decision by any judge, the MnDNR agreed to an unwarranted settlement allowing the issuance of a permit to build this home only 13 feet back from the original proposal. Denmark Township, the Washington County Board of Appeals and the MnDNR all failed to protect the Lower St. Croix National Scenic Riverway.<sup>588</sup>

The Davies matter exemplifies the peril of relying too heavily on land use ordinance implementation to protect Minnesota's wild and scenic rivers. As Jim Harrison opined in his advice to Governor LeVander, this tool is subject to shifting political values that may undermine the intent of the Wild and Scenic Rivers Acts in the long term.<sup>589</sup>

2. *In re Denial of Certification of Hubbard Variance, 778 N.W.2d 313 (Minn. 2010)*

On February 11, 2010, the Minnesota Supreme Court invalidated the DNR's authority over variance decisions by local units of government, thereby removing one layer of river protection altogether.<sup>590</sup>

a. *Facts*

In 2006, Robert W. Hubbard purchased a property in the City of Lakeland within the Lower St. Croix National Scenic Riverway.<sup>591</sup> The property had 200 feet of frontage along the St. Croix.<sup>592</sup> Hubbard intended to build a new, single-family 10,000-square-foot residence "right up to the bluff so that the beach would be visible from the house."<sup>593</sup> This plan did not comport with the City's bluffline-setback ordinance, which required a setback of forty feet.<sup>594</sup>

Hubbard requested three variances, including a variance from the bluffline-setback ordinance.<sup>595</sup> The DNR opposed Hubbard's variance request from the outset, when it was assigned to the Lakeland Planning Commission for a recommendation to the Lakeland

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588. *Id.*

589. *See supra* Part III.

590. *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010) (invalidating the DNR's authority to certify approval or deny approval of a LGU variance granted under MINN. R. 6105.0540).

591. *Id.* at 316.

592. *Id.*

593. *Id.*

594. *See id.*

595. *Id.*

City Council.<sup>596</sup> The Planning Commission recommended denial of Hubbard's bluffline-setback request "on the basis that he had not shown hardship."<sup>597</sup>

Hubbard's variance request was then considered by the Lakeland City Council.<sup>598</sup> DNR again opposed the variance request at this stage.<sup>599</sup> The City Council rejected the Planning Commission's recommendation and DNR's arguments and granted Hubbard's request, concluding that he had shown "hardship" justifying a variance.<sup>600</sup>

Minnesota Rule 6105.0540 states that a variance decision of a local unit of government applicable to the Lower St. Croix is not "effective unless and until the commissioner [of Natural Resources] has certified that the action complies with the intent of the National Wild and Scenic Rivers Act, the federal and state Lower Saint Croix River acts and the master plan adopted thereunder, and [the] standards and criteria" set forth in the rules.<sup>601</sup> Pursuant to Minnesota Rule 6105.0540, the City notified the DNR of its variance decision and sought the Commissioner's certification of the variance.<sup>602</sup> The DNR refused to certify the variance, concluding that there was not sufficient justification for it, as nothing in the City's findings explained why Hubbard could not simply build the house away from the bluff to meet the forty-foot setback requirement.<sup>603</sup>

Subsequently, the City of Lakeland and Hubbard requested a hearing before an administrative law judge (ALJ).<sup>604</sup> The ALJ concluded that Hubbard failed to show hardship to justify a grant of the bluffline-setback variance, and recommended that the Commissioner of Natural Resources affirm the agency's denial of certification of the variance.<sup>605</sup>

Hubbard and the City filed exceptions and arguments to the ALJ's report.<sup>606</sup> In his Findings of Fact, Conclusions, and Order dated Sept. 18, 2007, Commissioner Mark Holsten adopted the ALJ's findings with minor modifications, adopted the ALJ's conclusions,

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596. *Id.*

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.*

601. MINN. R. 6105.0540 (2009) (invalidated in part by *Hubbard*).

602. *Hubbard*, 778 N.W.2d at 317.

603. *Id.*

604. *Id.*

605. *Id.*

606. *Id.*

and affirmed the DNR's denial of certification of the bluffline-setback variance the City had granted to Hubbard.<sup>607</sup>

Hubbard and the City appealed.<sup>608</sup> In an unpublished decision, the Minnesota Court of Appeals reversed the Commissioner's decision, holding that it was untimely and should have been made within sixty days of the ALJ's recommendation, pursuant to Minnesota Statute section 15.99, subdivision 2(a) (2008), rather than within ninety days, as authorized by Minnesota Statute section 14.62 (2008) of the Minnesota Administrative Procedure Act.<sup>609</sup>

*b. Decision by Minnesota Supreme Court*

The Commissioner, the Sierra Club, and the St. Croix River Association petitioned the Minnesota Supreme Court for review of the court of appeals' ruling, and the court granted their petitions.<sup>610</sup> Following oral argument, the court ordered briefing on three alternative issues raised by Hubbard and the City, including whether the DNR lacked statutory authority to certify local variance decisions.<sup>611</sup>

In its February 11, 2010 opinion, the court ruled in favor of Hubbard and the City, holding that the DNR lacked both express and implied statutory authority to approve local government variance decisions.<sup>612</sup> The court held that the DNR did not have express authority to certify the City's variance decision as neither the Minnesota Lower St. Croix Wild and Scenic Rivers Act<sup>613</sup> nor provisions within the Minnesota Wild and Scenic Rivers Act relied upon by the Commissioner<sup>614</sup> "unambiguously grant" the DNR such authority.<sup>615</sup> The court also rejected the Commissioner's argument that authority

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607. *In re Denial of Certification of the Variance Granted to Robert W. Hubbard by the City of Lakeland, Findings of Fact, Conclusions, and Order*, (Minn., Dep't of Natural Res., Comm'r of Natural Res. Sept. 18, 2007); *see also In re Denial of Certification of the Variance Granted to Robert W. Hubbard by the City of Lakeland, Findings of Fact, Conclusions of Law and Recommendation*, OAH Docket No. 3-2000-17810-2 (Minn. Office of Administrative Hearings May 8, 2007).

608. *Hubbard*, 778 N.W.2d at 317.

609. *In re Hubbard ex rel. City of Lakeland*, Nos. A07-1932, A07-2006, 2008 WL 5136099, at \*4-5 (Minn. Ct. App. Dec. 9, 2008).

610. *Hubbard*, 778 N.W.2d at 317.

611. *Id.*

612. *Id.* at 325.

613. MINN. STAT. § 103F.351 (2008).

614. MINN. STAT. § 103F.321, subdiv. 1; MINN. STAT. § 103.335, subdiv. 1(a), (c) (2008).

615. *Hubbard*, 778 N.W.2d at 321.

to approve the variance decision could be implied from both the Minnesota Wild and Scenic Rivers Act and the Minnesota Lower St. Croix Wild and Scenic Rivers Act.<sup>616</sup> Accordingly, the court determined that the DNR's non-approval of the variance that the City granted to Hubbard was void.<sup>617</sup>

*c. Responses to the Supreme Court's Decision*

Within a few days of the Minnesota Supreme Court's decision, the *Star Tribune's* editorial board called on the Legislature to fix the "loophole" created by the ruling.<sup>618</sup> Calling the court's decision a "severe blow to the lower St. Croix," the February 19, 2010 editorial asks, "What good is a 'Wild and Scenic' river if every town along its banks has the power to ignore the rules that keep the river wild and scenic?"<sup>619</sup> The editorial stated that the Legislature should correct its "mistake" in not having granted "unambiguous authority to the DNR to veto local variances."<sup>620</sup>

As of this writing, Senator Ann Rest and Representative Beverly Scalze have introduced bills in the Minnesota Senate and Minnesota House of Representatives to abrogate the Supreme Court's *Hubbard* decision.<sup>621</sup> These bills would expressly grant the DNR certification authority over zoning variances on the Lower St. Croix.<sup>622</sup> The Sierra Club supports the proposed legislation.<sup>623</sup> The DNR has indicated that it will attempt to work cooperatively with local units of government for a year and then decide whether to pursue legislation to address the *Hubbard* ruling.<sup>624</sup>

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616. *Id.* at 325. The Commissioner argued that such a power must be implied from the Acts, as without such power, "local governments granting unjustified variances with no oversight could in essence undo the guidelines and standards that the DNR sets for river protection, which are supposed to apply uniformly and on a statewide basis." *Id.*

617. *Id.* at 325.

618. Editorial, *Legislature Must Fix St. Croix Loophole*, STAR TRIB. (Minneapolis), Feb. 19, 2010, at A12.

619. *Id.*

620. *Id.*

621. See S.F. 2820, 2009–2010 Leg., 86th Sess. (Minn. 2010); H.F. 3406, 2009–2010 Leg., 86th Sess. (Minn. 2010). These bills contain language that is largely identical to Minnesota Rule 6105.0540, which was invalidated by the Minnesota Supreme Court in *Hubbard*. See *In re Hubbard*, 778 N.W.2d 313 (Minn. 2010).

622. S.F. 2820, 2009–2010 Leg., 86th Sess. (Minn. 2010); H.F. 3406, 2009–2010 Leg., 86th Sess. (Minn. 2010).

623. Mary Divine, *Lower St. Croix: Bill Would Boost DNR's Authority Legislation a Result of Hubbard Ruling*, ST. PAUL PIONEER PRESS (Minn.), Mar. 4, 2010, at B3.

624. See *id.*

What courses of action, if any, the DNR, the Legislature, and organizations such as American Rivers, the Sierra Club, and the St. Croix River Association take to address the Minnesota Supreme Court's ruling remain to be seen. The only thing that appears certain in the ruling's wake is renewed attention to Minnesota's wild and scenic rivers.

#### IV. THE FUTURE: TOWARD UTILIZATION OF THE COMPLETE "WILD AND SCENIC RIVER TOOLBOX"

Steve Johnson, DNR Division of Waters, released a 1998MDNR memorandum detailing issues with the wild and scenic river program.<sup>625</sup>

Since acquisition [of all 135 easements,] little or no staff effort has been undertaken to monitor the easement lands to ensure landowners conform to the terms of the easements, and little work has gone into locating the easements. At this point it appears just identifying the exact location of each easement may be a significant undertaking. The number of violations is unknown, but may be large. Landowners involved may be only dimly aware of the state's interest in their land. There may also be an unknown number of easements not reflected in the figures noted above, since their records are lost.<sup>626</sup>

In 2000, the Division of Trails and Waterways hired a student worker to work on the scenic easements program.<sup>627</sup> However, the DNR's investment in this program, though significant when compared to historical actions, was not a long-term solution for the program. It became apparent that a concerted effort to manage wild and scenic river easements was necessary to administer the program. The DNR realized that this is a program that needs ongoing support and full-time staff.

It wasn't until 2008 that the DNR, under Commissioner Mark Holsten and Deputy Commissioner Laurie Martinson, hired its first full-time "classified" natural resource program coordinator to administer scenic easements for the wild and scenic rivers program.<sup>628</sup>

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625. See Memorandum from Steve Johnson, River Mgmt. Supervisor, DNR Waters, to Ron Nargang, CMO, et al. (Oct. 12, 1998) (on file with authors).

626. *Id.*

627. *Id.*

628. Staff Records on file with Minnesota Department of Natural Resources Human Resources Department.

This is the most significant action regarding staffing commitment within the wild and scenic rivers program in many years. The DNR wild and scenic rivers program now has dedicated staff focused on land use controls and planning and land and scenic easement administration.<sup>629</sup> The DNR Division of Waters has staff hydrologists who (in addition to other duties) assist local citizens and local units of government with understanding the wild and scenic river rules. While the DNR has invested staff and resources for the land use control and zoning “tool” for some time, this is the first time that the DNR is substantially investing in ongoing scenic easement *stewardship*, not just acquisition. Stewardship of scenic easements can provide a preventative measure against situations akin to the *Department of Natural Resources v. Dow* case.

With staff present to administer it, the wild and scenic river easements program can be brought up to industry standard. The program is collecting baseline field documentation, beginning a regular monitoring program, building a data system for records and communications management, educating internally within the DNR, educating partners about needs for conservation easement administration, and beginning to forge relationships with the landowners upon whom the viability of the easements relies.<sup>630</sup> This is the beginning of a process to utilize another core tool that the Minnesota Wild and Scenic Rivers Act provided. The designers of the Minnesota Wild and Scenic Rivers Act provided the tools necessary for sustainable management of our wild rivers.<sup>631</sup> However, for the Act to be effective, the DNR needs continued support from Minnesota’s conservation leaders and the legislature so that the core functions of program administration can continue to operate.

The future of the wild and scenic river program relies on building partnerships between the DNR, citizens, landowners and local units of government. The agency, to be successful at administering all three tools within the wild and scenic rivers program, should also create strategic alliances with and provide support for user groups and citizen organizations, encouraging them to be engaged. The DNR has done great work educating local units of government to imple-

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629. See Department of Natural Resources, Wild and Scenic Rivers Program, [http://www.dnr.state.mn.us/waters/watermgmt\\_section/wild\\_scenic/index.html](http://www.dnr.state.mn.us/waters/watermgmt_section/wild_scenic/index.html) (last visited Apr. 6, 2010).

630. See, e.g., Minn. Dep’t of Natural Res., MINNESOTA’S WILD AND SCENIC RIVERS SCENIC EASEMENTS PROGRAM 1 (Mar. 2009), available at [http://files.dnr.state.mn.us/waters/wsrivers/scenic\\_easements\\_flyer.pdf](http://files.dnr.state.mn.us/waters/wsrivers/scenic_easements_flyer.pdf).

631. See *supra* Part II.

ment zoning, but it is necessary to put the other tools into full operation, reconsider the administrative and procedural process for designation, and give more power to local citizens during the early stages in wild and scenic river study. The rivers belong to the people!