

CHAPTERS

THE *FRIENDS OF YOSEMITE VALLEY* SAGA: THE CHALLENGE OF ADDRESSING THE MERCED RIVER'S USER CAPACITIES

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*In the fall of 2009, Ken Burns's documentary series on the National Park system premieres on PBS. Around the same time, the Park Service plans to release a comprehensive management plan for the Merced River corridor in Yosemite National Park. While Burns' documentary will echo Wallace Stegner's characterization of the park system as one of America's "best" ideas, and is thus likely to inspire nostalgia, as well as increased visitation to popular parks, such as Yosemite, the release of the Merced River Plan will reignite controversy regarding the Park Service's duty under the Wild and Scenic River Act (WSRA) to control visitors and development to prevent the degradation of the Merced River corridor, including Yosemite Valley. The Ninth Circuit, in *Friends of Yosemite Valley v. Norton and Friends of Yosemite Valley v. Kempthorne*, has already rejected two versions of the Merced River Plan. This Chapter chronicles the decade-long battle over the Merced River Plan and user capacity in Yosemite Valley, placing the recent controversy within the context of the Park Service's traditional promotion of visitation and recreation. Although the Ninth Circuit stopped short of requiring a visitor cap in Yosemite Valley, this Chapter examines the arguments for and against such a cap, discusses the immediate consequences for Park Service officials tasked*

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with correcting the Merced River Plan's deficiencies, and considers the ripple effects of the Ninth Circuit's ruling on river managers nationwide.

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I. INTRODUCTION

The Merced River forms from snowmelt and glacier runoff on the western slopes of Mount Lyell in the Sierra Nevadas, cascading down Nevada and Vernal Falls before winding west through the seven-mile-long Yosemite Valley.¹ In the first days of January of 1997, the normally placid Merced, swollen with rain and Sierra Nevada snow melted by warm temperatures, roared out of its banks, submerging employee cabins and Yosemite Lodge, and washing out bridges, roads, utility lines, and campsites.² The floodwaters rushed over a century of overdevelopment in

¹ FRANCOIS E. MATTHES, *THE INCOMPARABLE VALLEY* 67–68 (Fritiof Fryxell ed., 1950).

² William Booth, *Floods Brought Yosemite The Break of the Century: Rangers Rethink Impact of Man's 'Footprint'*, WASH. POST, Mar. 6, 1997, at A1. The flood was the fourth "hundred-year flood" in the century. *Id.*

Yosemite Valley,³ flushing facilities built within the floodplain and parking lots sited at the best scenic viewpoints.⁴ The flood also funneled political attention and money⁵ toward the Park Service's plans for the future of the "incomparable valley"⁶ in America's first protected park.⁷

In Yosemite Valley, where each natural feature and view has its own constituency,⁸ both the Park Service's plans for a quick reconstruction⁹ and the Service's vision for Yosemite Valley in the twenty-first century came under attack. In 2000, two local groups, Friends of Yosemite Valley and Mariposans for Environmentally Responsible Growth (collectively Friends), challenged the Merced River Plan¹⁰ and the Yosemite Valley Plan.¹¹ The Park

³ Yosemite National Park's 1980 General Management Plan (GMP) acknowledged,

During a century of public custodianship of this great park, many decisions have been made, all well intended, which have resulted in a march of man-made development in the Valley. Today, the Valley is congested with more than a thousand buildings—stores, homes, garages, apartments, lodging facilities, and restaurants—that are reflections of our society; the Valley floor is bisected by approximately 30 miles of roadway which now accommodates a million cars, trucks, and buses a year.

Nat'l Park Serv., U.S. Dep't of the Interior, Yosemite GMP: 1980 Preface and Introduction, <http://www.nps.gov/archive/yose/planning/gmp/intro80.html> (last visited July 19, 2009).

⁴ Booth, *supra* note 2.

⁵ Chuck Squatriglia, *Blueprint to Beautify, Restore Yosemite Tangled Up in Court*, S.F. CHRON., Jan. 21, 2007, at A1, available at 2007 WLNR 1195928 (noting that Congress appropriated \$220.5 million to Yosemite after the flood).

⁶ MATTHES, *supra* note 1, at 77. Yosemite Valley is incomparably popular, with 95% of the 3.5 million annual visitors concentrating in the narrow valley. Squatriglia, *supra* note 5.

⁷ In 1864, Yosemite became the nation's first park devoted to the protection of natural scenery when Congress ceded Yosemite Valley to the state of California for "public use, resort, and recreation," to be held "inalienable for all time." An Act Authorizing a Grant to the State of California of the "Yo-Semite Valley," and of the Land Embracing the "Mariposa Big Tree Grove," 13 Stat. 325 (1864); see also ALFRED RUNTE, YOSEMITE: THE EMBATTLED WILDERNESS 145, 204 (1990) (observing that despite the Park Service's legal control, concessionaires had considerable influence); LINDA W. GREENE, YOSEMITE: THE PARK AND ITS RESOURCES 88 (1987), available at http://www.yosemite.ca.us/library/yosemite_resources/yosemite_resources.pdf ("Although the words 'national park' were not used in the legislation, in effect the Yosemite Grant embodied that concept, although neither Congress nor the federal government accepted any responsibility for the valley's preservation or improvement."). The 1864 land grant "constituted the first instance of a central government anywhere in the world preserving an area strictly for a nonutilitarian purpose—the protection of scenic values for the enjoyment of the people as a whole." *Id.* at 91.

⁸ James Rainey, *Yosemite Valley Plan Seen as a Quest for Beauty and Balance*, L.A. TIMES, Nov. 15, 2000, at A3. President Clinton's Interior Secretary Bruce Babbitt characterized Yosemite's diverse stakeholders as a "cantankerous, eccentric, passionate, irrational, idealistic, quarrelsome, impossible crowd of people." Brian Melley, *Yosemite: Tough Task Ahead for New Superintendent*, SEATTLE POST INTELLIGENCER, Feb. 6, 2003, http://www.seattlepi.com/getaways/107353_yosemite06.shtml (last visited July 19, 2009) (quoting Interior Sec. Babbitt).

⁹ Sierra Club challenged the expedited reconstruction plans for Yosemite Lodge, *Sierra Club v. United States (Yosemite Lodge)*, 23 F. Supp. 2d 1132, 1133 (N.D. Cal. 1998), and El Portal Road, *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1207 (E.D. Cal. 1999).

¹⁰ See *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066 (E.D. Cal. 2002), *aff'd in part*, *Friends of Yosemite Valley v. Norton (Yosemite I)*, 348 F.3d 789 (9th Cir. 2003), *clarified by* *Friends of Yosemite Valley v. Norton (Yosemite II)*, 366 F.3d 731 (9th Cir. 2004); *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074 (E.D. Cal. 2006), *aff'd sub nom.* *Friends of*

Service promoted both plans' potential to reinvent Yosemite Valley by reducing traffic, reclaiming developed land, restoring ecosystems,¹² and improving park campgrounds and utilities.¹³ Friends, however, alleged that the plans would authorize projects damaging to the unique geology and ecology of the Merced River¹⁴ in violation of the Wild and Scenic Rivers Act (WSRA).¹⁵

The WSRA requires river managers to "address . . . user capacities" in comprehensive management plans.¹⁶ For twelve years following Congress's designation of the Merced River as a wild and scenic river,¹⁷ the Park Service neglected to prepare a plan, managing the river corridor as the agency had under the Park Service generic mandates.¹⁸ After an eastern California

Yosemite Valley v. Kempthorne (*Yosemite III*), 520 F.3d 1024 (9th Cir. 2008); see also NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MERCED WILD AND SCENIC RIVER COMPREHENSIVE MANAGEMENT PLAN (2001), available at http://www.nps.gov/archive/yose/planning/mrp/2000/final_mpr/pdfs/mrp.pdf [hereinafter MERCED RIVER PLAN].

¹¹ See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, FINAL YOSEMITE VALLEY PLAN: SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (2000), available at <http://www.nps.gov/archive/yose/planning/yvp/seis/index.html> [hereinafter YOSEMITE VALLEY PLAN]. The Yosemite Valley Plan outlined several projects, including the removal of more than 1000 parking spaces inside the valley and the creation of a shuttle service based at parking lots outside of the park. See Rainey, *supra* note 8. Friends filed suit in December 2006. Complaint for Declaratory and Injunctive Relief at 3, Friends of Yosemite Valley v. Kempthorne, No. 06-01902 (E.D. Cal. Dec. 26, 2006), available at <http://www.nps.gov/archive/yose/planning/litigation/yvpcomplaint.pdf>. Friends initially tried to amend its complaint against the Merced River Plan in 2000 to include a challenge of the Yosemite Valley Plan, but the court denied the motion to amend for "judicial economy." *Id.* at 7.

¹² Squatriglia, *supra* note 5.

¹³ Mark Grossi, *Trouble in Paradise*, FRESNO BEE, Jan. 29, 2007, at A1, available at 2007 WLNR 1738186.

¹⁴ *Court Halts Yosemite National Park Construction Plans*, ENV'T NEWS SERV., Mar. 28, 2008, <http://www.ens-newswire.com/ens/mar2008/2008-03-28-091.asp> (last visited July 19, 2009) (quoting Friends member Bridget Kerr). Additionally, Friends argued that the plans would exacerbate air and noise pollution in the park. *Id.* Friends also criticized the commercial character of the Park Service's post-flood proposals, which the group alleged would favor wealthy lodgers and tourists arriving by shuttle bus and recreation vehicle instead of car campers. See, e.g., Bob Egelko, *Yosemite: Clash over Merced River Back in Court*, S.F. CHRON., May 12, 2007, at B1, available at 2007 WLNR 9007995.

¹⁵ 16 U.S.C. §§ 1271–1287 (2006).

¹⁶ *Id.* § 1274(d)(1). Guidelines published by the Interior and Agriculture departments in 1982 for wild and scenic river management refer to carrying capacity. Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,455 (Sept. 7, 1982). Thus, user capacity tends to be used interchangeably with "carrying capacity," which has origins in managing natural resources. See NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, THE VISITOR EXPERIENCE AND RESOURCE PROTECTION (VERP) FRAMEWORK: A HANDBOOK FOR PLANNERS AND MANAGERS 9 (1997), available at <http://planning.nps.gov/document/verphandbook.pdf> [hereinafter VERP HANDBOOK]. The National Parks and Recreation Act of 1978 referred to visitor carrying capacity. 16 U.S.C. § 1a-7(b) (2006). Note that both user capacity and carrying capacity are more inclusive of other nonrecreation uses of an area, such as employee housing and work stations, than "visitor carrying capacity." NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MERCED WILD AND SCENIC RIVER REVISED COMPREHENSIVE MANAGEMENT PLAN AND SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, at II-2 n.1 (2005), available at http://www.nps.gov/archive/yose/planning/mrp/pdf/08_rmrp_ch2.pdf [hereinafter REVISED MERCED RIVER PLAN].

¹⁷ See Pub. L. No. 100-149, 101 Stat. 879 (Nov. 2, 1987) (codified at 16 U.S.C. § 1274(a)(62)(A)).

¹⁸ See *infra* note 115 and accompanying text.

district court ordered the Park Service to prepare a river plan in 1999,¹⁹ the Park Service proposed a user capacity program establishing procedures for monitoring conditions of park resources and visitor experiences—the Visitor Experience and Resource Protection (VERP) framework.²⁰ This framework based visitation limits on facility capacities, instead of capping public access to Yosemite.²¹ The district court upheld the Merced River Plan in *Friends of Yosemite Valley v. Norton*.²² On appeal, the Ninth Circuit invalidated the plan, ruling that the Park Service failed to address user capacities as required by the WSRa because the plan did not provide any “concrete measure of use” in the Merced River corridor.²³ In Friends’ follow-up challenge of the 2005 Revised Merced River Plan in 2008,²⁴ the Ninth Circuit affirmed the district court’s ruling that the plan, which included a revised VERP and interim caps based on facility limits, still failed to describe an actual level of visitor use that would not degrade the Merced River.²⁵

The *Yosemite* decisions reinvigorated longstanding arguments about rationing use in protected areas, but the Ninth Circuit did not ultimately resolve whether the WSRa requires caps on the number of people entering park units.²⁶ However, because of the Park Service’s delay in preparing a valid plan, the court requested interim caps for the Merced River, and

¹⁹ *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1263 (E.D. Cal. 1999).

²⁰ *MERCED RIVER PLAN*, *supra* note 10, at 103.

²¹ This practice dovetailed with Yosemite National Park’s 1980 General Management Plan, which set use levels based on facility capacity and did not propose to limit use by controlling entry. *See* Nat’l Park Serv., U.S. Dep’t of the Interior, Yosemite General Management Plan: Parkwide Policies and Programs, <http://www.nps.gov/archive/yose/planning/gmp/policies.html> (last visited July 19, 2009) [hereinafter 1980 GMP Policies and Programs]. General management plans typically only discuss carrying capacity qualitatively, leaving numeric limits to site-specific plans. *See* VERP HANDBOOK, *supra* note 16, at 11. Park leaders have long eschewed the idea of turning people away from parks. President Clinton’s Interior Secretary Bruce Babbitt rejected the idea that people could overwhelm parks, but supported mass transit initiatives and limitations on cars. *See* Booth, *supra* note 2, at A1. *But see* Glenn E. Haas, *On the Water Front: Vital Judicial Ruling Addresses Visitor Capacity*, PARKS & RECREATION, Sept. 1, 2004, at 106, 109 (documenting a “misunderstanding” by the recreation science community that numeric visitor capacity is no longer an important tool for park management).

²² *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066, 1127 (E.D. Cal. 2002), *aff’d in part*, *Yosemite I*, 348 F.3d 789 (9th Cir. 2003), *clarified by Yosemite II*, 366 F.3d 731 (9th Cir. 2004).

²³ *Yosemite I*, 348 F.3d 789, 797 (9th Cir. 2003).

²⁴ *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074 (E.D. Cal. 2006), *aff’d sub nom. Yosemite III*, 520 F.3d 1024 (9th Cir. 2008).

²⁵ *Yosemite III*, 520 F.3d 1024, 1039 (9th Cir. 2008).

²⁶ The extreme arguments are posed rhetorically as, “What is the point of preservation if no one is allowed to benefit from it? What good is recreation in areas that become overrun and exploited, no longer distinguishable from suburban sprawl?” Harmony A. Mappes, Note, *National Parks: For Use and “Enjoyment” or for “Preservation”? and the Role of the National Park Service Management Policies in That Determination*, 92 IOWA L. REV. 601, 621 (2007). Many of those arguments originated from debates about the development and use of Yosemite Valley. *See* Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 5 (1992) (“The initial conflicts pitting preservation against use were largely fought in Yosemite.”). *See* other arguments against and in favor of rationing use in Part V.A.

suggested how the Service must estimate visitor caps, if it uses them.²⁷ The court also indicated that if the Park Service prefers the VERP, the agency must require a management action that prevents degradation.²⁸ As the *Yosemite* opinions represent the judiciary's first interpretation of the WSRA's user capacity mandate, the courts' analyses are relevant to managing agencies tasked with creating management plans for a large number of wild and scenic rivers.²⁹ However, the Ninth Circuit's decision does not threaten the Park Service's widespread application of VERP outside of the wild and scenic river realm.³⁰

To provide context for the *Yosemite* cases and the challenge of addressing the Merced River's user capacity, Part II of this paper chronicles the Service's traditional approach to carrying capacity in Yosemite Valley under Park Service statutes, prior to the Merced River Plan. Part III examines the WSRA's directive to "protect and enhance" designated rivers and to address user capacities in comprehensive plans, as well as judicial review of the WSRA under the Administrative Procedure Act (APA).³¹ Part IV describes Friends' challenges to the Park Service's post-flood planning and the Ninth Circuit's interpretation of the WSRA's requirement to address user capacities. Finally, Part V discusses the ramifications of the *Yosemite* decisions, including the lessons for the Park Service in Yosemite Valley and implications for other wild and scenic river managers nationwide.

II. ADDRESSING CARRYING CAPACITY IN YOSEMITE VALLEY UNDER PARK SERVICE LEGISLATION

Under the Park Service Organic Act of 1916 (Organic Act),³² the Park Service's traditional approach to "carrying capacity"³³ in Yosemite Valley was to increase capacity by adding accommodations, attractions, and infrastructure to lure visitors.³⁴ The Park Service's success in promoting the valley's scenery to people, without restricting the types of use and development, led to conflicts between park visitors and increased degradation of park resources.³⁵ In the 1960s, to prevent these conflicts and lessen environmental degradation occurring in Yosemite's wilderness areas,

²⁷ See *infra* Part V.C.

²⁸ *Yosemite III*, 520 F.3d at 1034–36; see also *infra* Part V.B.

²⁹ See Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991; Press Release, American Rivers, President Obama Signs Historic Wild and Scenic River Bill Into Law (Mar. 30, 2009), <http://www.americanrivers.org/newsroom/press-releases/2009/president-obama-signs.html> (last visited July 19, 2009) ("The Omnibus Public Land Management Act of 2009 designates 86 new Wild and Scenic Rivers, totaling over 1,100 miles in Oregon, Idaho, Arizona, Wyoming, Utah, California, and Massachusetts."). Notably, the Omnibus Public Land Management Act of 2009 designated 165 miles of wild and scenic rivers in Zion National Park. *Id.*

³⁰ See *infra* Part V.A.

³¹ See 5 U.S.C. §§ 701–06 (2006) (containing the judicial review provisions of the APA).

³² Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1 (2006)).

³³ See *supra* note 16 for a discussion of "carrying capacity," "user capacity," and "visitor carrying capacity."

³⁴ See *infra* notes 48–56 and accompanying text.

³⁵ See *infra* Part II.A–B.

the Park Service applied carrying capacity concepts to backcountry plans, by tailoring the number of campers and the distance between campsites to the area's natural limitations.³⁶ Thereafter, the Service accepted carrying capacity as a possible means of protecting resources and the visitor experience in the front country.³⁷ Congress eventually added a carrying capacity consideration into the Park Service's comprehensive planning requirements.³⁸ However, in Yosemite Valley, attempts to limit public access based on removing facilities and parking spaces, under the broad goals of the 1980 General Management Plan, failed to yield real reductions in the valley's facilities and day use.³⁹ As annual visitation to the valley peaked prior to the Merced River flood in 1997, preserving Yosemite Valley by tailoring the number of visitors to the valley's natural capacity remained, in large part, a theoretical exercise.⁴⁰

A. Increasing Carrying Capacity Under the Organic Act of 1916

The Organic Act established preservation as a fundamental purpose of the Park Service, empowering the Park Service to promote public use and enjoyment of parks that was compatible with preservation.⁴¹ Legal scholars have described the Organic Act's mandate as ambiguous as a result of the contradiction between promoting both preservation and use.⁴² However, the statute's plain language implies that the two purposes are not mutually exclusive, but intertwined,⁴³ with enjoyment being subservient to preservation, because the statute limits use and enjoyment to 1) the parks' particular scenery, objects, and wildlife, and 2) that which will leave the parks unimpaired for future generations.⁴⁴ Although section 3 of the Organic

³⁶ VERP HANDBOOK, *supra* note 16, at 4; *see infra* Part II.B.

³⁷ *See infra* Part II.B.

³⁸ National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 604, 92 Stat. 3467, 3518–19 (1978) (codified at 16 U.S.C. § 1a-7(b)(3) (2006)) (requiring General Management Plans to include “identification of and implementation commitments for visitor carrying capacities for all areas of the unit”).

³⁹ *See infra* Part II.B.

⁴⁰ *See infra* Part II.B.

⁴¹ National Park Service Organic Act, 16 U.S.C. § 1 (2006) (establishing the Park Service to “promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations”). Although the Organic Act references the duty to “conserve,” not to “preserve,” the act's legislative history demonstrates an intent to “preserv[e] nature as it exists,” as distinguished from the designation of national forests “for the conservation of timber and other national assets.” *See* John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41, 50 (1985) (quoting H.R. REP. NO. 64-700, at 3 (1916)).

⁴² *See* Lemons & Stout, *supra* note 41, at 44–45 (summarizing scholarship concluding that the Organic Act did not resolve the dilemma between preservation and development).

⁴³ *See* Mappes, *supra* note 26.

⁴⁴ 16 U.S.C. § 1 (2006); *see also* Herman, *supra* note 26, at 17–18 (“The plain language of the Organic Act implies that preservation trumps use whenever the two are in conflict.”); Lemons & Stout, *supra* note 41, at 50–51 (observing that while Congress intended the public to use the

Act authorized the Secretary of the Interior to grant restricted leases, permits, and privileges to accommodate the public,⁴⁵ read in context with the conservation purpose and “non-impairment” requirement of section 1, section 3 does not promote development at the expense of preservation.⁴⁶ Thus, even though the Organic Act contemplated public enjoyment and accommodations within parks, the statute requires the Park Service to regulate uses to prevent the impairment of future generations’ enjoyment of the parks.⁴⁷

In Yosemite Valley, under the traditional interpretation of the Organic Act as a dual-purpose mandate, the Park Service promoted public use by adding accommodations, attractions, and infrastructure to invite visitors.⁴⁸ The Service, originally led by Stephen Mather, viewed popularity and profitability as the key to congressional appropriations,⁴⁹ and thus focused on tourism,⁵⁰ with little consideration of limits on visitation or development.⁵¹

parks, “preservation of natural park resources [was] a primary management objective”); Mappes, *supra* note 26, at 611–17 (“From the beginning preservation was a clear goal driving the creation of the first national park.”); William Andrew Shutkin, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345, 349 (1991) (tracing contradiction in the Act to a misconception of the term “use” and arguing that no such conflict existed for preservationists like John Muir because “[p]reservation implied not only the protection of nature but also use of it for spiritual nourishment and aesthetic, recreational pleasure”). Shutkin concluded that the Organic Act was “a well-devised document which sanctions a specific amount of park use while protecting the indescribable natural splendor of the parks.” *Id.* at 370. *But see* Mappes, *supra* note 26, at 617–21 (demonstrating that both history and law support a view that public enjoyment is the primary purpose of the Organic Act). Mappes presents both arguments as a background for the Park Service’s predicament: “Someone must decide at what point the use becomes overuse, no longer leaving the parks truly ‘unimpaired.’ Someone must determine the point at which limiting visitation and over-protecting the parks excessively hinders use and enjoyment, in violation of the statute.” *Id.* at 621.

⁴⁵ 16 U.S.C. § 3 (2006).

⁴⁶ Lemons & Stout, *supra* note 41, at 52–53.

⁴⁷ In recent policy documents, the Park Service accepts this interpretation, describing its enduring purpose as “prevent[ing] impairment of park resources and values” and listing public use as another fundamental purpose, but explaining that “conservation will be predominant when there is a conflict between the protection of resources and their use.” NAT’L PARK SERV., U.S. DEPT OF THE INTERIOR, MANAGEMENT POLICIES 2006, at 5 (2006), available at <http://www.nps.gov/policy/MP2006.pdf> [hereinafter MANAGEMENT POLICIES].

⁴⁸ See Lemons & Stout, *supra* note 41, at 45–46.

⁴⁹ Alfred Runte, *Introduction to YOSEMITE AND SEQUOIA: A CENTURY OF CALIFORNIA NATIONAL PARKS* 1, 5 (Richard J. Orsi et al. eds., 1993) (“The surest measure of success for the National Park Service was to demonstrate that more and more Americans were enjoying the parks. People, not preservation, confirmed that Yosemite, Sequoia, and Kings Canyon were worth the investment in congressional appropriations.”).

⁵⁰ Tourism became a hallmark of the Park Service. See Lemons & Stout, *supra* note 41, at 46 (stating that besides inviting automobiles into the park, the Park Service used “railroads, Chambers of Commerce, tourist bureaus, and automobile associations to promote park use to the fullest extent”).

⁵¹ Despite the prediction of one of Yosemite Valley’s first park commissioners that visitation and development would harm the magnificence of Yosemite, few, if any, prominent people in the parks movement anticipated, much less advocated, placing limitations on visitation and development. See RUNTE, *supra* note 7, at 29 (quoting Frederick Law Olmsted’s 1865 report to the California legislature warning that “[a]n injury to the scenery so slight that it may be unheeded by any visitor now, will be one of deplorable magnitude when its effect upon each

Inside the park, as visitor numbers increased, park facilities expanded and concessioners⁵² built and promoted more attractions, including golf courses, tennis courts, ice rinks, and ski resorts, which extended the tourist season year round.⁵³ Automobiles, which became the primary transportation mode into Yosemite Valley by 1916,⁵⁴ fueled the symbiotic relationship between the park's popularity, profitability, and congressional appropriations that funded improved and expanded accommodations for the next half-century.⁵⁵ The success of the Park Service in selling Yosemite to the outside world, without restricting the types of use and development within, led to increased degradation of park resources.⁵⁶

visitor's enjoyment is multiplied by [the] millions"). Legal scholars and historians have advanced several explanations for the Park Service's emphasis on use, despite the Organic Act's emphasis on preservation. *See* Herman, *supra* note 26, at 21 (arguing that in the early 20th century, risks of overcrowding and overuse were unrecognized, because "the vision of the American West as an almost limitless, untrammelled frontier may still have persisted in the political consciousness"); *see also* Shutkin, *supra* note 44, at 357–60 (documenting how preservationists viewed tourism as the salvation of the parks after the loss of the Tuolumne River Valley to the City of San Francisco for the construction of Hetch Hetchy reservoir in 1913); GREENE, *supra* note 7, at 322 (noting how preservationists realized "some concession had to be made to provide for the comforts and convenience of tourists in order to get them into the parks for longer periods of time so that they would come to appreciate them and rally to their defense").

⁵² The Curry Camping Company, founded by David Curry, merged with the Yosemite National Park Company in 1925 upon the Interior Department's insistence. This monopoly resulted in more available capital to invest in major construction projects. RUNTE, *supra* note 7, at 145. Runte described how concessioner's sought to "maintain and expand their operations," by any means possible. *Id.* at 214 ("If the aim was to keep swimming pools, the Merced River was fragile or dangerous. If rafting appeared profitable, suddenly the river was durable and safe."). Public choice theory, which "predicts that small, well-organized special interest groups will exert a disproportionate influence on policymaking," Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994), might explain how concessioners succeeded in maintaining and expanding their operations at the expense of preservation considerations.

⁵³ RUNTE, *supra* note 7, at 103, 152–53. Stephen Mather, the first director of the Park Service, expressly supported the idea of using recreational concessions to attract visitors. Lemons & Stout, *supra* note 41, at 45–46 (documenting Mather's letter that stated, "[g]olf links, tennis courts, swimming pools, and other equipment for outdoor pastime and exercise should be provided by concessions"). In this way, the Park Service misinterpreted the contemplative uses intended by early preservationists, *see supra* note 41, in favor of "individual taste." Lemons & Stout, *supra* note 41, at 45.

⁵⁴ *See* RUNTE, *supra* note 7, at 121 (noting that auto tourists surpassed rail tourists by 1916, and by 1927, 490,430 visitors had entered Yosemite National Park); ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 147 (1951).

⁵⁵ Anne F. Hyde, *From Stagecoach to Packard Twin Six: Yosemite and the Changing Face of Tourism, 1880-1930*, in YOSEMITE AND SEQUOIA: A CENTURY OF CALIFORNIA NATIONAL PARKS, *supra* note 49, at 69, 83 ("Building roads and facilities to handle cars and campers did encourage swarms of people to visit Yosemite and increase support for park appropriations."); RUNTE, *supra* note 7, at 101 (noting that improving the road into the park "increased awareness of the ease of admitting automobiles").

⁵⁶ *See* GREENE, *supra* note 7, at 365 ("The increased visitation to Yosemite caused a variety of natural-resource related problems . . ."); *see also* RUNTE, *supra* note 7, at 147 (describing the Park Service's struggle to respond to the "bear problem" as an exemplar of the Park Service's conflict of interest, as a "protector of the resource or as facilitator of company gains").

B. Carrying Capacity and Yosemite's 1980 General Management Plan

In the 1960s, which saw a period of increased ecological awareness in the parks⁵⁷ and the passage of environmental legislation in Congress,⁵⁸ concerns about conflicts between visitors compelled the Park Service to consider applications of carrying capacity in park areas.⁵⁹ In 1963, the Park Service released a blueprint for managing the Yosemite and Sequoia backcountry that described the negative effects of increasing visitor use and called for carrying capacity determinations.⁶⁰ Long applied to managing domestic livestock and wildlife, applications of carrying capacity in backcountry areas offered rangers a method of limiting the deterioration of the wilderness by restricting the numbers of backcountry visitors and the areas visited, based on the area's natural limitations.⁶¹ Initial applications of carrying capacity focused on park visitors' effects on park resources and the ecological environment, but researchers soon focused on the quality of the visitor experience and the social environment as well.⁶² In 1968, Garrett Hardin implied that visitation and development in Yosemite's front country exceeded the land's carrying capacity, which eroded the visitor experience.⁶³ At the time, conflicts among users in Yosemite Valley had intensified,⁶⁴ forcing the Park Service to consider how many people the valley could accommodate.⁶⁵

⁵⁷ See AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 198-99 (Larry M. Dilsaver ed., 1994), available at http://www.nps.gov/history/history/online_books/anps [hereinafter CRITICAL DOCUMENTS] (documenting how the Leopold Report and Robbins Report directed Park Service attention to ecosystem preservation).

⁵⁸ See generally *id.* at 269-71 (documenting the passage of the Wilderness Act, the Land and Water Conservation Fund Act, the Clean Air Act, the Wild and Scenic Rivers Act, and the National Environmental Policy Act (NEPA)).

⁵⁹ Although carrying capacity did not appear in formal planning documents until the 1960s, early suggestions for applying the concept to manage the number and types of people in parks appeared as early as the 1930s. See ROBERT E. MANNING, PARKS AND CARRYING CAPACITY: COMMONS WITHOUT TRAGEDY 19 (2007).

⁶⁰ CRITICAL DOCUMENTS, *supra* note 57, at 214 ("[N]o management plan can be effective if it ignores the practical limitations of the natural environment. Ecologists point out that a basic requirement for intelligent management of any environment used by man, or influenced by him, is a determination of its 'carrying capacity.'").

⁶¹ *Id.* The Park Service's estimation of an area's capacity and corresponding visitor limitations amounted to judgment calls. See *id.* at 214-15 (documenting how the Service "determined from observation the minimum distance required for wilderness-type privacy between high country campsites"). For a description of the current Wilderness Management Plan, see *infra* notes 165-66 and accompanying text.

⁶² VERP HANDBOOK, *supra* note 16, at 5 (citing J.A. Wagar's 1964 monograph, *The Carrying Capacity of Wild Lands for Recreation*).

⁶³ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968) ("The values that visitors seek in the parks are steadily eroded.").

⁶⁴ During summer holidays in the 1960s, nearly 50,000 campers would crowd into Yosemite Valley, creating "social tensions of overcrowding, crime, and drug abuse." ZBIGNIEW MIECZKOWSKI, ENVIRONMENTAL ISSUES OF TOURISM AND RECREATION 309 (1995). On July 4, 1970, conflicts became violent when hundreds of antiwar, anti-establishment youth gathered in Yosemite Valley and clashed with park rangers. RUNTE, *supra* note 7, at 202.

⁶⁵ See MIECZKOWSKI, *supra* note 64 (speculating that Yosemite Valley's overcrowding prompted recreation managers to consider the issue of carrying capacity in the front country).

Congress ultimately codified the concept of carrying capacity into the Park Service's planning mandate with the National Parks and Recreation Act of 1978;⁶⁶ in Yosemite, however, authorities had already begun an extensive planning process and the Service's 1980 General Management Plan did not produce significant reductions in facilities, nor did it cap day use.⁶⁷ Beginning in 1978, Congress required each unit of the park system to prepare general management plans that include an "identification of and implementation commitments for visitor carrying capacities for all areas of the unit," among other things.⁶⁸ By the time Congress acted, Yosemite authorities had already rejected an unpopular management plan proposal in 1974,⁶⁹ and began crafting a new general management plan.⁷⁰

After receiving over sixty thousand public comments, the Service produced a draft master plan in 1978.⁷¹ In October 1980, the Park Service released the final general management plan (GMP), which provided a blueprint to better preserve Yosemite Valley by removing automobiles and pushing development, such as employee accommodations, to the park's periphery.⁷² The Park Service proposed to reduce and cap Yosemite Valley's overnight facility capacity by removing accommodations and to reduce impacts from day visitors by removing parking spaces and implementing shuttle services.⁷³ However, the plan's goals of reducing traffic congestion and crowding did not depend on capping the number of day visitors.⁷⁴ The Service's implementation of the 1980 GMP's goals, including facility removal,

The conflicts ultimately spurred the Park Service to close portions of Yosemite Valley and the Mariposa Grove to automobiles. RUNTE, *supra* note 7, at 203.

⁶⁶ See National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 604, 92 Stat. 3467, 3518-19 (1978) (codified at 16 U.S.C. § 1a-7 (2006)).

⁶⁷ See *infra* note 76 and accompanying text.

⁶⁸ 16 U.S.C. § 1a-7(b) (2006).

⁶⁹ See RUNTE, *supra* note 7, at 205. In 1971, the Service also revealed two controversial proposals in a preliminary management plan. *Id.* at 203. The first called for incrementally eliminating automobiles from Yosemite Valley, while the second proposed building the Glacier Point tram, an aerial cableway from the valley floor to Glacier Point. *Id.* These proposals, as well as some public relations gaffes by the park's primary concessioner, brought public attention to park management, focused in part on the disconnect between the commercialization of the park and its preservation purpose. See *id.* at 203-04. In response to public outcry, in 1974 the Park Service rejected the master plan that had considered the Glacier Point tram, and opened the planning process to public participation. See *id.* at 205.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, e.g., Dan Blackburn, *Of Bears and BMWs: Upscaling Yosemite*, CAL. J., June 1992, at 315. But see RUNTE, *supra* note 7, at 206 ("[T]he park had escaped the development only of those structures that had never been built in the first place.").

⁷³ See Nat'l Park Serv., U.S. Dep't of the Interior, Yosemite GMP: Yosemite Valley, <http://www.nps.gov/archive/yose/planning/gmp/yovalley.html> (last visited July 19, 2009) (summarizing proposed reductions in accommodations, parking spaces, campsites, and employee housing in Yosemite Valley).

⁷⁴ See 1980 GMP Policies and Programs, *supra* note 21 ("At the present time, it is not proposed to limit day use by controlling entry into the park, but this may be necessary sometime in the future."); see also VERP HANDBOOK, *supra* note 16, at 11 (noting general management plans typically only discuss carrying capacity qualitatively, leaving numeric limits to site-specific plans).

moved at a glacial pace because of pressure from concessioners and the Park Service's hesitant support for the plan's goals.⁷⁵ As a result, the Park Service had attained few of the plan's reductions in facilities,⁷⁶ and annual park visitation had grown from over 2.5 million in 1980 to nearly 4 million by the time the Merced River flooded in 1997.⁷⁷

III. THE WILD AND SCENIC RIVERS ACT: REQUIREMENTS AND JUDICIAL REVIEW

In the post-flood litigation, the WSRA became a primary avenue of challenges to Park Service planning⁷⁸ because the WSRA places a primary emphasis on preserving river values over development and other uses inconsistent with the river's preservation.⁷⁹ In 1987, Congress designated eighty-one miles of the Merced River within Yosemite and the El Portal administrative site as a wild and scenic river⁸⁰ to prevent the construction of hydroelectric projects near the park.⁸¹ The designation of the Merced required the Park Service to revise the 1980 GMP and protect the river from development and use inconsistent with a wild and scenic designation.⁸²

⁷⁵ See Herman, *supra* note 26, at 39–41. The Park Service's release of the 1992 Concession Services Plan (CSP), which amended the 1980 GMP, expanded fast food operations and added motel-style accommodations, see Blackburn, *supra* note 72, but overall, the CSP proposed a 13% reduction in overnight lodging by eliminating most of the park's more rustic tent cabins. Larry B. Stammer, *Yosemite Housing Plan Debated*, L.A. TIMES, Jan. 30, 1992, at A3.

⁷⁶ See Wendy Mitman Clarke, *After the Flood*, NAT'L PARKS, Mar. 1, 1999, at 24 (“[O]ther than a 1992 Concession Services Plan—which many felt still permitted too much development—not much happened to further the GMP's lofty goals.”); DYAN ZASLOWSKY & T.H. WATKINS, THESE AMERICAN LANDS: PARKS, WILDERNESS, AND THE PUBLIC LANDS 43 (1994) (“[O]nly one golf course had been removed, parking spaces had increased, most employees still lived in the valley, and the number of overnight facilities had actually been allowed to increase—from 1,528 beds to 1,549.”).

⁷⁷ Nat'l Park Serv., U.S. Dep't of the Interior, NPS Reports, <http://www.nature.nps.gov/stats/park.cfm> (last visited July 19, 2009) (comparing annual park visitation statistics). In addition, the number of tour buses had increased from 5000 in 1980 to nearly 16,000 in 1995. Dan Blackburn, *Yosemite: New Management for an Old Favorite*, CAL. J., Apr. 1995, at 26, 27.

⁷⁸ Sierra Club challenged the expedited reconstruction plans for Yosemite Lodge, *Sierra Club v. United States (Yosemite Lodge)* 23 F. Supp. 2d 1132, 1133 (N.D. Cal. 1998), and El Portal Road, *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1207 (E.D. Cal. 1999), alleging, inter alia, violations of the WSRA.

⁷⁹ Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (2006); Lemons & Stout, *supra* note 41, at 59 (suggesting the WSRA “strengthens the preservation objective that the [Park Service] must use to govern its decisions to allow an activity”). One commentator observed that “if the Merced River had been protected by a statute like the Wild and Scenic Rivers Act since the early days of its inclusion in Yosemite National Park, the tragedy of Yosemite Valley could not have occurred.” Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designation*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 331, 339 (David J. Simon ed., 1988) (footnote omitted).

⁸⁰ Pub. L. No. 100-149, § 1, 101 Stat. 879 (1987) (codified at 16 U.S.C. § 1274(a)(62)(A)); Final Environmental Impact Statement and Comprehensive Management Plan, Merced Wild and Scenic River, 65 Fed. Reg. 50,565, 50,565 (Aug. 18, 2000).

⁸¹ See, e.g., *Designating the Kern and Merced Rivers as National Wild and Scenic Rivers: Hearing on S. 247, S. 275, and H.R. 317 Before the Subcomm. on Public Lands, National Parks and Forests of the Comm. on Energy and Natural Resources*, 100th Cong. 17 (1987) (statement of Sen. Alan Cranston).

⁸² 16 U.S.C. § 1274(a)(62)(A) (2006).

Because the WSRA does not authorize citizen suits, judicial review of agency action under the WSRA falls under the APA,⁸³ which prohibits agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.⁸⁴

A. Protections and Procedures of the Wild and Scenic Rivers Act

Congress enacted the Wild and Scenic Rivers Act in 1968 to protect free-flowing rivers from dams and other development for present and future generations.⁸⁵ The WSRA establishes designation procedures, management directives, and protection mandates for free-flowing rivers.⁸⁶ To qualify for designation, a river or segment of a river must possess at least one “outstandingly remarkable value” (ORV),⁸⁷ including “scenic, recreational, geologic, fish and wildlife, historic, [and] cultural” values.⁸⁸ Under section 1281 of the WSRA, river managers must “protect and enhance” designated ORVs.⁸⁹ Although the WSRA’s “protect and enhance” mandate places a primary emphasis on “esthetic, scenic, historic, archeologic, and scientific features,”⁹⁰ the statute contemplates uses compatible with preservation.⁹¹ The WSRA Guidelines explain a managing agency’s duty to protect and enhance a river’s ORVs, “while providing for public recreation and resource uses which do not adversely impact or degrade those values.”⁹² Thus, the statute and its implementing guidelines establish a preservation mandate, but allow uses that do not adversely affect a river’s ORVs.

After designation, a managing agency has several duties. Within one year, a managing agency must establish river boundaries⁹³ and classify the river or its various segments as “wild,” “scenic,” or “recreational.”⁹⁴ Within three years, river managers must prepare comprehensive management plans (CMPs).⁹⁵ Under

⁸³ Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

⁸⁴ *Id.*

⁸⁵ See Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. § 1271 (2006)).

⁸⁶ See 16 U.S.C. §§ 1271–1287 (2006).

⁸⁷ See *id.* §§ 1271, 1273(b).

⁸⁸ *Id.* § 1271. ORVs, in short, are values that make the river worthy of protection. James Bacon et al., *VERP: Putting Principles into Practice in Yosemite National Park*, 23 GEORGE WRIGHT F. 73, 74 (2006), available at www.georgewright.org/232bacon.pdf. The Agriculture and Interior departments’ joint guidelines also provide for values not listed in the statute. See Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,457 (Sept. 7, 1982) (“[O]ther similar values, . . . if outstandingly remarkable, can justify inclusion of a river in the national system.”).

⁸⁹ 16 U.S.C. § 1281(a) (2006).

⁹⁰ *Id.*

⁹¹ *Id.* (“Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.”).

⁹² Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. at 39,458–59.

⁹³ 16 U.S.C. § 1274(b) (2006).

⁹⁴ *Id.* § 1273(b).

⁹⁵ *Id.* § 1274(d); see also Pub. L. No. 99-590, § 501, 100 Stat. 3330, 3335 (1986).

section 1281(a) of the WSRA, CMPs may establish a wide range of agency discretion, by providing for “varying degrees of intensity for [a river component’s] protection and development, based on the special attributes of the area,”⁹⁶ but under section 1274(d), plans must also “address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the [WSRA’s] purposes.”⁹⁷

Although the statute does not define “user capacities,” the WSRA Guidelines discuss an analogous term, “carrying capacity,” and offer guidance about the duty to address user capacities in a CMP.⁹⁸ The WSRA Guidelines define “carrying capacity” as “[t]he quantity of recreation use which an area can sustain without adverse impact on the [ORVs] and free-flowing character of the river area, the quality of recreation experience, and public health and safety.”⁹⁹ The WSRA Guidelines further require that a CMP describe the “kinds and amounts of public use,” including recreation, that each river segment can sustain without adverse affect on its ORVs.¹⁰⁰ Thus, to satisfy the WSRA Guidelines carrying capacity provisions, and hence, the WSRA’s requirement to address user capacity, CMPs must not allow amounts and types of uses that adversely affect a river’s ORVs.

B. Agency Discretion and Judicial Review of the WSRA

Under section 706 of the APA, courts can set aside agency action, findings, and conclusions that are not in accordance with the WSRA.¹⁰¹

⁹⁶ 16 U.S.C. § 1281(a) (2006).

⁹⁷ *Id.* § 1274(d)(1).

⁹⁸ Before 1986, the WSRA required agencies to “prepare a plan for necessary developments in connection with [the river’s] administration in accordance with such classification.” 16 U.S.C. § 1274(b) (1982). In 1982, the Departments of Agriculture and Interior released the WSRA Guidelines, which defined carrying capacity. *See* Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,455 (Sept. 7, 1982). In response, Congress amended the WSRA in 1986, ratifying the carrying capacity requirement but terming it “user” capacity. *See* Pub. L. No. 99-590, § 501, 100 Stat. 3330, 3335 (1986) (deleting reference to “necessary developments” from the statute). Because Congress incorporated user capacity, which the administering departments defined and discussed in a previous interpretation of WSRA duties, courts may imply that Congress meant the same thing as the agency’s previous interpretation. *See, e.g.,* Hall v. U.S. Env’t Prot. Agency, 273 F.3d 1146, 1158 (9th Cir. 2001) (noting, in a case involving the 1990 amendments to the Clean Air Act, that there is a “strong inference” that when Congress incorporates an administratively defined term, it intends “the term to be construed in accordance with pre-existing . . . interpretations” (alteration in original) (citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998))).

⁹⁹ Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. at 39,455.

¹⁰⁰ *Id.* at 39,458. The WSRA Guidelines also contemplated that during the preparation of the CMP, the management agency would undertake a study “to determine the quantity and mixture of recreation and other public use which can be permitted without adverse impact on the resource values of the river area.” *Id.* at 39,459.

¹⁰¹ *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006). Judicial review of agency action is narrow, and a reviewing court may not substitute its judgment for that of the agency. *See, e.g.,* Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376 (1989) (upholding a U.S. Army Corps of Engineers decision to not perform a second supplemental environmental impact statement for a dam project, based in part on the agency’s substantial expertise). However, a

Under the WSR, CMPs form the foundation for agency discretion.¹⁰² In *Sierra Club v. Babbitt*,¹⁰³ a precursor to the *Yosemite* cases, the court concluded that a CMP is central to agency management¹⁰⁴ because it defines the methods and levels of protection for river ORVs, and conversely, the levels of use and development that river ORVs can tolerate.¹⁰⁵ When a plan does not exist, a managing agency's ability to comply with the WSR's protect-and-enhance ORV standard is "severely limited."¹⁰⁶ A court can order the preparation of a plan under the APA¹⁰⁷ and can consider the failure to prepare a plan in issuing injunctive relief.¹⁰⁸

When evaluating a plan's validity, or a managing agency's action based on a plan, judicial review centers on whether the agency is managing the river area to protect and enhance the river's ORVs.¹⁰⁹ This inquiry involves both an investigation of the particular river's ORVs and an evaluation of the

court can overturn an agency that committed a clear error in judgment. *Id.* at 378. An agency action is arbitrary or capricious if the agency

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (holding the National Highway Traffic Safety Administration failed to present an adequate basis and explanation for rescinding a passive restraint requirement for automobiles); *see also* *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1521 (9th Cir. 1995) (upholding EPA decision about total maximum daily loads (TMDLs) for dioxin in the Columbia River). In short, "an agency must articulate a 'rational connection between the facts found and the choice made.'" *Pub. Citizen v. U.S. Dep't of Transp.*, 316 F.3d 1002, 1020 (9th Cir. 2003) (holding the U.S. Department of Transportation acted arbitrarily by not completing environmental impact statements for three trucking regulations promulgated pursuant to the North American Free Trade Agreement).

¹⁰² Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (2006) ("Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.").

¹⁰³ 69 F. Supp. 2d 1202 (E.D. Cal. 1999) (ordering the Park Service to prepare a CMP for the Merced River and enjoining reconstruction of a one mile section of El Portal Road for violations of the WSR and NEPA).

¹⁰⁴ *Id.* at 1250–51.

¹⁰⁵ *Id.* at 1251.

¹⁰⁶ *See* Charlton H. Bonham, *The Wild and Scenic Rivers Act and the Oregon Trilogy*, 21 PUB. LAND & RESOURCES L. REV. 109, 136 (2000).

¹⁰⁷ *See* *Sierra Club v. Babbitt*, 69 F. Supp. 2d at 1263; *Nat'l Wildlife Fed'n v. Cosgriffe*, 21 F. Supp. 2d 1211, 1224 (D. Or. 1998) (ordering Bureau of Land Management to prepare a CMP six years after the statutory deadline passed).

¹⁰⁸ *See* *Sierra Club v. Babbitt*, 69 F. Supp. 2d at 1251 (concluding that failing to plan could factor into the court's consideration of injunctive relief for a substantive violation of the WSR). *But see* *Sierra Club v. United States*, 23 F. Supp. 2d 1132 (N.D. Cal. 1998) (holding that the WSR does not indicate that a court may enjoin an agency's land management activities because of a mere failure to timely adopt a comprehensive management plan in the absence of a substantive violation of the WSR).

¹⁰⁹ *See* *Or. Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1191 (D. Or. 1998) (holding the Bureau of Land Management violated the WSR by authorizing grazing before determining that grazing would not frustrate protection of the rivers' ORVs).

agency's action.¹¹⁰ Because the WSRA requires a managing agency to limit uses that "substantially interfere" with public use and enjoyment of river ORVs,¹¹¹ courts have granted a managing agency wide discretion with regard to limiting uses and developments that affect a river.¹¹² Although the burden of proof in these matters is unclear,¹¹³ courts have been more willing to conclude that an agency acted arbitrarily when the administrative record contains scientific evidence and recommendations that contradict the findings of agency management decisions, plans, and actions regarding degradation in the river corridor.¹¹⁴

IV. ADDRESSING USER CAPACITY AND THE REDEVELOPMENT OF YOSEMITE VALLEY

The Park Service delayed drafting a comprehensive management plan for the Merced River until 1999, twelve years after Congress designated the Merced River, and nine years after the statutory deadline.¹¹⁵ That year, a federal district court ordered the Park Service to complete a plan by July 2000.¹¹⁶ After a one month extension, the Service adopted a record of decision (ROD) on August 9, 2000.¹¹⁷ Because the Merced River Plan essentially governs what the Park Service can build in the narrow valley,¹¹⁸ the plan is critical to the Park Service's reconstruction of Yosemite Valley. Friends promptly challenged the Merced River Plan in 2000, sparking eight

¹¹⁰ See *id.* at 1185–86.

¹¹¹ Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (2006).

¹¹² See Gray, *supra* note 79, at 336–37. Compare *Sierra Club v. United States*, 23 F. Supp. 2d at 1139 (upholding a Park Service proposal to reroute a road into the Merced River's floodplain because of the recreational values of the area), with *Or. Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1143–44 (D. Or. 1997) (invalidating a Bureau of Land Management decision to construct new parking lots, make improvements on an access road, and allow cattle grazing in a river segment Congress classified as "wild," meaning that it was to be free of impoundments and generally inaccessible except by trail).

¹¹³ See Bonham, *supra* note 106, at 138.

¹¹⁴ See *id.*

¹¹⁵ See 16 U.S.C. § 1274(d) (2006). The Forest Service and Bureau of Land Management completed comprehensive management plans for portions of the Merced outside of Yosemite in 1991. MERCED RIVER PLAN, *supra* note 10, at 19. In 1996, the Park Service completed the other procedural duties of the WSRA, under section 1274(b), by releasing an environmental impact statement for the Yosemite Housing Plan that contained descriptions of the river segments, classifications (wild, scenic, or recreational), and the ORVs for each segment. See *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1249 (E.D. Cal. 1999).

¹¹⁶ *Sierra Club v. Babbitt*, 69 F. Supp. 2d at 1263. Following the 1997 flood, Sierra Club challenged the Park Service's expedited reconstruction of El Portal Road, the highway adjacent to the Merced River that is critical for access to Yosemite. *Id.* at 1202. Sierra Club objected to the widening of the road, which would accommodate more recreational vehicles and tour buses, as well as to the blasting of rock walls and fragmentation of the riparian habitat. *Id.* at 1253. The court concluded the Park Service acted arbitrarily in expanding the footprint of the road into sensitive riparian areas and replacing the historic guard walls. *Id.* at 1257.

¹¹⁷ See Final Environmental Impact Statement and Comprehensive Management Plan, *Merced Wild and Scenic River*, 65 Fed. Reg. 50,565 (Aug. 18, 2000).

¹¹⁸ See MERCED RIVER PLAN, *supra* note 10, at 18 (describing how implementing plans, such as the Yosemite Valley Plan, tier to the Merced River Plan and the 1980 GMP).

years of litigation about the Park Service's user capacity program and stalling several projects tiered to the plan.¹¹⁹

A. Defining the WSRA's Mandate to "Address User Capacity"

In *Friends of Yosemite Valley v. Norton*, Friends challenged the 2000 Merced River Plan, alleging that the Park Service's implementation of VERP failed to address the Merced River's user capacities.¹²⁰ The district court upheld the plan, concluding that the Park Service had not acted arbitrarily in addressing user capacity.¹²¹ But on appeal, the Ninth Circuit invalidated the plan, interpreting section 1274(d)(1) of the WSRA and the WSRA Guidelines to require descriptions of actual levels of visitor use that will not adversely effect the Merced's ORVs.¹²² Following the invalidation, the district court enjoined several Yosemite Valley construction projects.¹²³

1. The Merced River Plan

In the 2000 Merced River Plan, the Park Service proposed VERP as the primary method of "address[ing] user capacities."¹²⁴ VERP is an adaptive process, requiring "a continual learning process, a reiterative evaluation of goals and approaches, and redirection based on an increased information base and changing public expectations."¹²⁵ In lieu of specific numerical limits on visitors, VERP focuses on the prescription and maintenance of selected "desired conditions" of cultural resources, natural resources, and visitor experiences,¹²⁶ and uses management zoning to specify desired conditions for specific areas of the Merced River corridor.¹²⁷ To protect desired

¹¹⁹ See *infra* Part IV.A–B.

¹²⁰ 194 F. Supp. 2d 1066, 1080 (E.D. Cal. 2002), *aff'd in part*, *Yosemite I*, 348 F.3d 789, 792 (9th Cir. 2003), *clarified by Yosemite II*, 366 F.3d 731, 731 (9th Cir. 2004). Friends ultimately challenged other aspects of the Merced River Plan, including 1) its failure to set proper boundaries for the El Portal segment of the Merced River, 2) its lack of specificity, and 3) its lack of cooperation with federal and state water pollution control agencies to prevent pollution of the river. *Yosemite I*, 348 F.3d at 793. See *infra* note 139 for the disposition of those claims.

¹²¹ *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d at 1102–03.

¹²² *Yosemite I*, 348 F.3d at 797.

¹²³ See *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d 993, 1000 n.1 (E.D. Cal. 2006) (discussing projects enjoined by Judge Ishii's unpublished Memorandum Opinion and Order from July 6, 2004); *infra* notes 149–51 and accompanying text.

¹²⁴ MERCED RIVER PLAN, *supra* note 10, at 103. The Park Service intended the Merced River Plan and its use of VERP to dovetail with the use of VERP principles within Yosemite National Park, which began in 1998. *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d at 1101. VERP arose out of more than 30 years of research, planning, and management experience. Bacon et al., *supra* note 88.

¹²⁵ MERCED RIVER PLAN, *supra* note 10, at 103.

¹²⁶ *Id.*

¹²⁷ *Id.* at 56. The Park Service determined desired conditions through an "ongoing, iterative process," relying on data collection, data analysis, and continual hypothesis testing. *Id.* at 103. The Park Service alleged that desired conditions correlated to the Merced River's ORVs. *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d at 1102.

conditions, VERP calls for management action when indicators¹²⁸ reflect that desired conditions have fallen below standards,¹²⁹ but the plan provided neither specific indicators nor standards.¹³⁰ Instead, the Park Service offered example indicators for protecting biological and recreational ORVs from excessive degradation due to overuse, such as measuring the percentage of bare ground or exposed roots in a particular area and the number of people encountered on a trail within a particular time frame.¹³¹

2. *Friends of Yosemite v. Norton (Yosemite I)*¹³²

Friends alleged that the Merced River Plan only described how a user capacity program “would be implemented” and failed to “prescribe maximum visitor use.”¹³³ In the Eastern District of California, Judge Ishii upheld the 2000 Merced River Plan, concluding that the Park Service had not acted arbitrarily in addressing user capacity with VERP.¹³⁴ Judge Ishii ruled that the plan did not postpone addressing user capacity, despite VERP’s five-year implementation timetable, because the Park Service had committed, in the interim, to “initiate increased resource monitoring to ensure that conditions do not deteriorate.”¹³⁵ Judge Ishii explained that section 1274(d)(1) did not mandate that a plan contain “specific numerical limits on usage,” and further reasoned that section 1274(d)(1) did not prohibit the Park Service from using an adaptive “process” like VERP instead of a “completed product.”¹³⁶ The court also explained that because the desired conditions focused on the Merced’s ORVs, not visitor preferences, Friends’ argument that VERP favored visitor use over resource protection lacked foundation.¹³⁷ In short, Judge Ishii deferred to the Park Service’s expertise in creating and managing a user capacity program, despite the lack of actual capacity limits.

Friends appealed and, joined by 60 amicus groups, challenged Judge Ishii’s interpretation of the WSRA’s user capacity requirement.¹³⁸ The Ninth Circuit reversed Judge Ishii’s ruling, basing their decision on the basis of the

¹²⁸ Indicators are measurable variables that reflect a desired condition. *MERCED RIVER PLAN*, *supra* note 10, at 106.

¹²⁹ Standards represent acceptable measurements of indicators. *Id.* at 108. Essentially, standards provide the thresholds against which indicators are measured, and can trigger if or when management action should be taken. *Id.* at 106–08.

¹³⁰ *Id.* at 108.

¹³¹ *Id.* at 107 tbl.3. The example indicator had the following standard: “No more than 10% of a 100 square foot use area shall be composed of bare ground or exposed roots as compared to a similar natural area.” *Id.*

¹³² *Yosemite I*, 348 F.3d 789, 792–93 (9th Cir. 2003).

¹³³ *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066, 1101–02 (E.D. Cal. 2002), *aff’d in part*, *Yosemite I*, 348 F.3d 789, 792 (9th Cir. 2003), *clarified by Yosemite II*, 366 F.3d 731, 731 (9th Cir. 2004).

¹³⁴ *Id.* at 1102–03.

¹³⁵ *Id.* at 1101.

¹³⁶ *Id.* at 1102.

¹³⁷ *Id.*

¹³⁸ *Yosemite I*, 348 F.3d 789, 792–93 (9th Cir. 2003).

plain language of section 1274(d)(1) and the WSRA Guidelines.¹³⁹ The court interpreted the WSRA's command to "address user capacity" in section 1274(d)(1) to require the Park Service to "deal with or discuss the maximum number of people that can be received" in a wild and scenic river corridor.¹⁴⁰ The court also looked to the language in the WSRA Guidelines, which it interpreted to require the Merced River Plan to contain "specific measurable limits on use."¹⁴¹ Because VERP contained only sample standards and indicators, the Ninth Circuit ruled that it failed to describe an actual level of visitor use that will not adversely affect the Merced's ORVs.¹⁴²

In addition to highlighting the Merced River Plan's deficiencies, the Ninth Circuit offered the Park Service some guidance. The court reasoned that the WSRA did not require "one particular approach" to address user capacity¹⁴³ and mentioned that setting limits on the specific number of visitors or monitoring and maintaining environmental and experiential criteria using actual indicators and standards might sufficiently address user capacity.¹⁴⁴ Further, the court instructed the Park Service, on remand, to implement preliminary or temporary limits on user capacity pending completion of a valid Merced River Plan, especially if the Service needed additional time for VERP to become fully functional.¹⁴⁵

By establishing the invalidity of the Merced River Plan, Friends succeeded in halting many of the construction projects the group felt compromised preservation in Yosemite Valley. After the Ninth Circuit clarified that the entire Merced Plan was invalid,¹⁴⁶ the district court enjoined several major projects that increased Yosemite Valley's overnight accommodations, such as the Curry Village Cabins and Campgrounds project, because of concerns that expanded development would inhibit the ability of the Park Service to make decisions about user capacity.¹⁴⁷ Judge Ishii did allow some projects to go forward, such as the first phase of a utilities plan, because the Park Service established that halting the project

¹³⁹ *Id.* at 803. The court also concluded that the Park Service drew the Merced's boundary at El Portal too narrowly, in violation of the WSRA's "protect and enhance" mandate, and remanded the boundary determination to the agency. *Id.* at 797, 799. Further, the court ruled that, other than the user capacities deficiency, the Service prepared the Merced River Plan with sufficiently specific data and detail to satisfy NEPA and the WSRA. *Id.* at 799. Finally, the court concluded that the Service did not violate its duty to cooperate with water pollution agencies under section 1283(a). *Id.* at 803.

¹⁴⁰ *Id.* at 796.

¹⁴¹ *Id.* at 797.

¹⁴² *Id.*

¹⁴³ *Id.* at 796.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 803–04.

¹⁴⁶ *Yosemite II*, 366 F.3d 731 (9th Cir. 2004).

¹⁴⁷ *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d 993, 1003 (E.D. Cal. 2006) (quoting Judge Ishii's unpublished Memorandum Opinion and Order from July 6, 2004). Judge Ishii also enjoined the Yosemite Lodge Development, the Yosemite Village Parking and Transit Area Improvements, and the Camp Wawona Redevelopment and Proposed Land Exchange. *Scarlett*, 439 F. Supp. 2d 1074, 1081 (E.D. Cal. 2006).

would threaten the public health, safety, and the environment.¹⁴⁸ These injunctions demonstrated the importance of a CMP for tiering environmental analysis and focused even more attention on the revision of the Merced River Plan.

B. Another Attempt at Addressing User Capacity: The 2005 Merced River Plan

In July 2005, the Park Service issued the revised Merced River Plan, which, the Park Service claimed, responded to the Ninth Circuit's opinion by amending the 2000 plan.¹⁴⁹ Friends challenged the plan, which 1) proposed VERP as the primary method of addressing user capacity, 2) used existing facility caps as interim limits during VERP's implementation, and 3) incorporated other management systems limits on visitor use, such as the Wilderness Trailhead Quota System and Superintendent's Compendium.¹⁵⁰ Friends alleged that VERP still failed to actively prevent degradation because the Park Service did not commit to take management action until degradation has occurred, and argued that the interim facility limits lacked a connection to the Merced's ORVs.¹⁵¹ The Park Service explained that these methods, in combination, "function as a suite of specific, measurable limits" to regulate visitor use and to protect and enhance the Merced River.¹⁵² But Judge Ishii ruled that the Revised Merced River Plan still failed to adequately address user capacities because it did not require management action that prevented ORV degradation,¹⁵³ and enjoined several construction projects tiered to the plan.¹⁵⁴ On appeal, the Park Service, supported by several prominent conservation and recreation groups that opposed the imposition of numeric caps on visitation,¹⁵⁵ failed to convince the Ninth Circuit that the

¹⁴⁸ *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d at 1005 (quoting Judge Ishii's unpublished Memorandum Opinion and Order from July 6, 2004). The court also allowed some repair, maintenance, and non-intrusive projects to go forward, such as El Portal Office Building Annex, Curry Village Employee Dorms, the South Fork Bridge Replacement Project, tree stump removal, and data collection efforts. *Scarlett*, 439 F. Supp. 2d at 1081. Additionally, the court allowed ecological restoration projects that were in the preliminary planning stages to proceed. *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d at 1004.

¹⁴⁹ *Yosemite III*, 520 F.3d 1024, 1031 (9th Cir. 2008).

¹⁵⁰ *Id.* at 1031, 1033.

¹⁵¹ *Scarlett*, 439 F. Supp. 2d at 1097–98.

¹⁵² *Id.* at 1095.

¹⁵³ *Id.* at 1100. The court also ruled that because the Ninth Circuit found the 2000 Merced River Plan to be invalid, the 2005 Revised Plan could not refer to it and rely on it as a separate, existing entity, and instead must incorporate the planning elements from the 2000 MRP that the court upheld into a single, self-contained document. *Id.* at 1093–94. Additionally, the court ruled that the environmental impact statement attached to the 2005 revision violated NEPA for lacking a valid no-action alternative and an adequate range of alternatives. *Id.* at 1109.

¹⁵⁴ See *infra* notes 181–90 and accompanying text.

¹⁵⁵ See Brief for The Yosemite Fund et al. as Amici Curiae in Support of the Brief on Appeal of Dirk Kempthorne, et al., for Reversal of the District Court's Judgment and Injunction at i–ii, *Yosemite III*, 520 F.3d 1024 (9th Cir. 2008) (No. 07-15124) [hereinafter Brief for the Kempthorne Amici]. Besides the Yosemite Fund, The Access Fund, The American Alpine Club, California Trout, Friends of the River, National Parks Conservation Association, The Wilderness Society,

Revised Merced River Plan described an actual level of use that did not adversely affect the Merced's ORVs, and the court affirmed the district court's rejection of the revised plan.¹⁵⁶

1. 2005 Revised Merced River Plan

The 2005 revision proposed VERP as the primary method of addressing user capacity.¹⁵⁷ The Revised Merced River Plan contained a revised VERP, which the Park Service planned to implement and refine over five years.¹⁵⁸ The revised VERP, like the 2000 version, relied on a system of monitoring indicators of desired conditions to protect the Merced River's ORVs.¹⁵⁹ Unlike the earlier plan, the 2005 version contained ten actual indicators and standards.¹⁶⁰

During VERP's implementation period, the Park Service proposed interim limits that capped "the number of lodging rooms, day visitor parking spaces, bus parking spaces, tour buses, employee bed spaces, and campsites."¹⁶¹ Several of the limits, such as the number of lodging rooms, day visitor parking places, and bus parking spaces, corresponded with existing levels.¹⁶² However, campsite limits increased and bus tours matched levels from the mid-1990s.¹⁶³

The Revised Merced River Plan did incorporate specific limits on user capacity, based on Yosemite's Wilderness Trailhead Quota System, the Superintendent's Compendium, and limitations based on facilities.¹⁶⁴ The Wilderness Trailhead Quota System, implemented in the 1970s for Yosemite's backcountry, establishes and assigns daily quotas for visitors for each wilderness trailhead, which allows the Park Service to "regulate and

and Jay Watson supported the Park Service's position and argued against the imposition of numerical caps. *Id.*

¹⁵⁶ *Yosemite III*, 520 F.3d 1024, 1039 (9th Cir. 2008).

¹⁵⁷ REVISED MERCED RIVER PLAN, *supra* note 16, at II-1.

¹⁵⁸ *Scarlett*, 439 F. Supp. 2d at 1098.

¹⁵⁹ See REVISED MERCED RIVER PLAN, *supra* note 16, at II-30; see also *supra* notes 125–31 and accompanying text.

¹⁶⁰ See REVISED MERCED RIVER PLAN, *supra* note 16, at II-30 to II-31, II-39 to II-47; Bacon et al., *supra* note 88, at 75 tbl.1. For example, the Park Service proposed the length of visitor-created informal trails in meadows as an indicator in areas zoned for "Day Use" in order to study and manage the "contiguity and ecological health of meadows and wetland areas," which relates to a biological ORV. REVISED MERCED RIVER PLAN, *supra* note 16, at II-31, II-44 tbl.II-5. The Park Service set the standard for social trail length at "[n]o net increase in length of social trails," calibrated from a 2004 baseline. *Id.* at II-44 tbl.II-5. VERP's management action still depended on the information gleaned from monitoring set indicators. *Id.* at II-33 to II-34. Thus, when conditions approach a standard, a yellow-light condition occurs, which "may call" for management action. *Id.* When conditions fail to meet a standard, a red light condition occurs and management action "must be taken" to restore conditions to the acceptable standard. *Id.* The Park Service listed several categories of possible management actions, including 1) visitor education, 2) site management, 3) regulation, 4) deterrence and enforcement, and 5) rationing and allocation. *Id.* at II-35.

¹⁶¹ *Scarlett*, 439 F. Supp. 2d at 1097.

¹⁶² *Yosemite III*, 520 F.3d 1024, 1035 (9th Cir. 2008).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1033.

disperse visitor use.”¹⁶⁵ The Wilderness Trailhead Quota System applied to portions of the Merced River zoned as “wilderness,” which comprised fifty-one miles of eighty-one total miles under the Park Service’s management.¹⁶⁶ The Superintendent’s Compendium, essentially a park-specific supplement to the Code of Federal Regulations, sets specific limits on the time and location of specific park activities, such as areas of nonmotorized water craft use and fishing, and imposes limits on the number of people allowed to engage in certain activities, such as the number of campers in each campsite.¹⁶⁷ Both programs, with rigid, preventative limits on the number of users in specific areas, provide a contrast to VERP’s lack of limits in favor of monitoring and flexible management action alternatives.

2. Friends of Yosemite v. Scarlett¹⁶⁸

Friends argued that the Revised Merced River Plan still failed to address user capacity.¹⁶⁹ Because the Wilderness Trailhead Quota System, Superintendent’s Compendium, and other limitations based on the park’s facilities appeared without alteration in the 2000 plan, which the Ninth Circuit invalidated, Judge Ishii discounted them,¹⁷⁰ focusing entirely on the revised VERP and interim limits.¹⁷¹ Citing the *Yosemite I* opinion, Judge Ishii ruled that the revised VERP lacks “specific measurable limits on use,” and thus failed to address user capacity, because VERP only required management action after degradation had occurred.¹⁷² The court equated the “specific measurable limits” requirement from *Yosemite I* with the ability to prevent degradation.¹⁷³ Because VERP functions to “stop degradation that has already occurred,” instead of preventing it, Judge Ishii classified VERP as “reactionary,” and ruled that it did not adequately address user capacities.¹⁷⁴ Essentially, Judge Ishii implied that to satisfy the WSRA, VERP must provide some preventative limits on use.¹⁷⁵

¹⁶⁵ *Scarlett*, 439 F. Supp. 2d at 1095; see also Nat’l Park Serv., U.S. Dep’t of the Interior, Wilderness Permits, <http://www.nps.gov/yose/planyourvisit/wildpermits.htm> (last visited July 19, 2009). To measure the effectiveness of the Wilderness Trailhead Quota System, the Park Service developed the Wilderness Impact Monitoring System to gather data on wilderness trail and campsite impacts. *Scarlett*, 439 F. Supp. 2d at 1096.

¹⁶⁶ *Yosemite III*, 520 F.3d at 1033 n.3.

¹⁶⁷ *Id.*; see also NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, SUPERINTENDENT’S COMPENDIUM OF DESIGNATIONS, CLOSURES, PERMIT REQUIREMENTS, AND OTHER RESTRICTIONS IMPOSED UNDER DISCRETIONARY AUTHORITY 1, 18 (2009), available at <http://www.nps.gov/yose/parkmgmt/upload/compendium.pdf>.

¹⁶⁸ 439 F. Supp. 2d 1074 (E.D. Cal. 2006), *aff’d sub nom. Yosemite III*, 520 F.3d 1024 (9th Cir. 2008).

¹⁶⁹ *Id.* at 1097–98.

¹⁷⁰ The Park Service relied on these limits in the 2000 plan to supplement VERP, but the Ninth Circuit concluded that the plan was deficient. *Id.* at 1096. Thus, Judge Ishii found these methods unpersuasive in deciding whether the 2005 Merced River Plan addressed user capacity. *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1099–1100.

¹⁷³ *Id.* at 1100.

¹⁷⁴ *Id.* Judge Ishii also suggested that a user capacity method should be permanent. *Id.* at 1099 (“Under this scenario, there is no indication when, if ever, [the Park Service] will finally

Judge Ishii also ruled that the 2005 Merced River Plan's interim limits, set at the current physical capacity of the facilities in the Yosemite Valley, failed to address user capacity because the Park Service failed to show that such limits protected the Merced River ORVs.¹⁷⁶ The Park Service emphasized that most of the interim limits set capacity below facility levels that existed in 1980, well before the Merced's designation as a wild and scenic river.¹⁷⁷ Thus, the Service argued that capacity set at predesignation levels, when Yosemite Valley had more parking space, campsites, and accommodations, could not degrade the Merced River.¹⁷⁸ Judge Ishii rejected this argument because the Park Service lacked support for the presumption that facility levels in place at the time of designation automatically protected the Merced River.¹⁷⁹ Thus, the court ruled that the interim limits also failed to "describe an actual level of visitor use that will not adversely affect the Merced[] [River's] ORVs."¹⁸⁰

Before the Park Service appealed, Judge Ishii enjoined several of the Park Service's redevelopment projects, many of which he had previously enjoined, such as the Curry Village Cabins.¹⁸¹ As in the court's grant of injunctive relief following *Yosemite I*, Judge Ishii reasoned that new development, such as the construction of new campsites, would increase visitor use and capacity and could prejudice the Park Service's user capacity analysis.¹⁸² In all, the court enjoined significant aspects of nine projects because of user capacity and resource degradation concerns.¹⁸³ However, the court allowed the Park Service to proceed with a few projects, which involved preliminary planning, data collection, and routine maintenance, that did not raise these concerns.¹⁸⁴ One month later, however, pending an appeal,¹⁸⁵ the court stayed injunctions on a utilities project¹⁸⁶ and a

adopt a permanent primary method for addressing user capacity, a required component for a comprehensive management plan under WSRA.").

¹⁷⁵ *Id.* at 1100.

¹⁷⁶ *Id.* at 1099–1100.

¹⁷⁷ *Id.* at 1099.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* Judge Ishii also noted that the interim limits did not prohibit new construction outside of existing developed spaces, despite a statement in the 2005 plan to the contrary. *Id.*

¹⁸⁰ *Id.* at 1099–1100.

¹⁸¹ *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d 993, 1000 n.1 (E.D. Cal. 2006).

¹⁸² *See, e.g., id.* at 1003.

¹⁸³ *Id.* at 1012–13. The court enjoined the Yosemite Lodge Redevelopment and Northside Drive Relocation, the Curry Village Cabins and East Yosemite Valley Expanded Campgrounds, the East Yosemite Valley Utilities Improvement Plan, the Happy Isles Footbridge, and the El Portal Wastewater Treatment Facility. *Id.* at 1013.

¹⁸⁴ *See id.* at 1010 (enjoining the Park Service from performing ground disturbing activities for the Yosemite Village Parking and Transit Area Improvements, but allowing the Park Service to perform preliminary planning); *id.* at 1004 (partially enjoining the Ecological Restoration and Bank Rehabilitation project, but allowing preliminary planning and data collection); *id.* at 1011 (allowing the Park Service to repair and replace culverts for the Yosemite Valley Loop Road project, but enjoining the rest of the project); *id.* at 1012 (enjoining the Valley Loop Trail, except for routine maintenance).

¹⁸⁵ *Friends of Yosemite Valley v. Kempthorne*, No. CV F 00-6191 AWI DLB, 2007 WL 896154, at *5 (E.D. Cal. Mar. 22, 2007). In staying the injunction against the utilities project, the court

rehabilitation of Yosemite Valley Loop Road.¹⁸⁷ Both stays included conditions to each project's implementation that served to protect the Merced River and limit any increase in visitor capacity.¹⁸⁸ Thus, even though the court eventually allowed some construction in Yosemite Valley to proceed, Friends largely succeeded in curbing development that they alleged would adversely affect the Merced River.¹⁸⁹

3. Friends of Yosemite v. Kempthorne (Yosemite III)¹⁹⁰

In March 2008, the Ninth Circuit ruled, for a third time, that the Park Service's Merced River Plan was invalid. The Ninth Circuit upheld Judge Ishii's ruling that the Wilderness Trailhead Quota System and the Superintendent's Compendium failed to address user capacities.¹⁹¹ Although the court characterized these methods as "steps in the right direction,"¹⁹² it reasoned that these methods were not persuasive, because these methods predated the 2000 plan, and the Park Service had relied on them without success in *Yosemite I*.¹⁹³ Thus, the Park Service could not rely on the Wilderness Trailhead Quota or the Superintendent's Compendium to fulfill the agency's duty to address user capacity.

Although the Ninth Circuit noted that VERP could be an acceptable method of addressing user capacities if implemented properly,¹⁹⁴ the court ruled that the revised VERP failed to address user capacity since VERP's system of monitoring requires management action only after degradation has already occurred.¹⁹⁵ The court criticized the nature of choosing standards that "*may be able*" to protect from degradation, ruling that standards "must

reasoned that the Park Service established the need to protect public health, safety, and ecologically sensitive habitats along the Merced River, which outweighed Friends' concern that the proposed work would predetermine user capacity and affect the environment. *Id.* at *3. In staying the injunction against the Yosemite Valley Loop Road project, the court reasoned that the Park Service's duty to maintain the only road providing access to Yosemite Valley outweighed Friends' concerns about increased visitor capacity. *Id.* at *4.

¹⁸⁶ The East Yosemite Valley Utilities Improvement Plan consisted of repairing sewer lines as well as relocating utility lines out of sensitive wetlands and meadows. *Id.* at *2.

¹⁸⁷ The Yosemite Valley Loop Road project consisted of maintenance, rehabilitation, and resurfacing of the road that provides access to Yosemite Valley. *Id.* at *4.

¹⁸⁸ *Id.* at *5. For example, the court prohibited the Park Service from expanding or realigning the Yosemite Valley Loop road, creating new roadside parking spaces, and creating new access to the Merced River. *Id.*

¹⁸⁹ The Ninth Circuit did not alter the district court's ruling on injunctive relief. The Park Service failed to address the injunction issue in its brief, so the court deemed the Park Service's argument waived. *Yosemite III*, 520 F.3d 1024, 1033 (9th Cir. 2008).

¹⁹⁰ 520 F.3d 1024 (9th Cir. 2008).

¹⁹¹ *Id.* at 1033.

¹⁹² *Id.*

¹⁹³ *Id.* Because these programs showed that the Park Service *could* impose user limits for specific areas, they indicated that the Park Service preferred to avoid generic limits on use for Yosemite Valley.

¹⁹⁴ *Id.* at 1035 n.4.

¹⁹⁵ *Id.* at 1034.

be chosen” that can trigger management action before degradation occurs.¹⁹⁶ Additionally, the court rejected VERP’s permissive warning signs, which “may call” for proactive management as conditions near standards, but require management action only when degradation has already occurred.¹⁹⁷ Thus, the Ninth Circuit affirmed Judge Ishii’s ruling that VERP still failed to adequately address user capacities.¹⁹⁸

The Ninth Circuit also affirmed the district court’s ruling that the interim limits failed to adequately address user capacity¹⁹⁹ because the Park Service could not advance a rational connection between the interim levels and its WSRA duty to protect and enhance the Merced River.²⁰⁰ Like Judge Ishii, the Ninth Circuit rejected the Park Service’s presumption that the facility capacity levels in existence when Congress designated the Merced as a wild and scenic river adequately protected the Merced’s ORVs or satisfied the user capacity requirement.²⁰¹ Under the statute’s “protect and enhance” command, the court reasoned the Park Service had a responsibility to address both past and ongoing degradation.²⁰² The court implied that the multitude of recreational facilities and services along the Merced, from the swimming pools and mountain sports shops to the gift shops and bars, could not rationally serve as a basis for a user capacity that protected the Merced River from degradation because those facilities and services did not qualify for classification as a recreational ORV under the Service’s classification scheme in the Merced River Plan.²⁰³ The Ninth Circuit also reasoned that the interim limits violated the statutory command of WSRA by failing to demonstrate a “primary emphasis” on the protection of the Merced River’s “esthetic, scenic, historic, archeologic, and scientific features.”²⁰⁴

V. LESSONS AND IMPLICATIONS OF THE *YOSEMITE* OPINIONS

After the Ninth Circuit affirmed the district court’s invalidation of the plan and related injunctions, the Park Service renewed planning efforts for a new and improved plan, which is scheduled for release in September 2009.²⁰⁵ Because the Ninth Circuit first requested, then rejected, the Park Service’s interim “caps” on visitation based on facilities, the *Yosemite* decisions stirred longstanding arguments for and against rationing use in protected

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1035.

²⁰⁰ *Id.* at 1036.

²⁰¹ *Id.* at 1035.

²⁰² *Id.*

²⁰³ *Id.* at 1035 n.5. To qualify for a recreational ORV, such facilities and services must be 1) “river-related or river dependant,” and 2) “rare, unique, or exemplary in a regional or national context.” *Id.*

²⁰⁴ *Id.* at 1036; *see also* Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (2006).

²⁰⁵ Press Release, Nat’l Park Serv., U.S. Dep’t of the Interior, Yosemite National Park Announces Merced River Plan Public Scoping (Mar. 28, 2007), <http://www.nps.gov/yose/park/news/mrpscooping32007.htm> (last visited July 19, 2009) [hereinafter Nat’l Park Serv. Press Release].

areas.²⁰⁶ However, the Ninth Circuit did not ultimately hold that the Park Service must cap the number of people entering a river corridor to satisfy the WSRA's user capacity mandate.²⁰⁷ Instead, the court suggested that a more flexible, adaptable framework of monitoring and maintaining environmental and experiential conditions might satisfy the WSRA under certain conditions.²⁰⁸ In addition, the *Yosemite* opinions outlined how a managing agency must estimate visitor caps, if it uses them, by requiring a connection to the designated river's ORVs, instead of existing facilities and uses.²⁰⁹ As the *Yosemite* opinions represent the judiciary's first interpretation of the WSRA's user capacity mandate, the analysis may influence management plans for eighty-six wild and scenic river segments designated in March 2009, especially those in developed parks like Zion.²¹⁰ However, the Ninth Circuit's decision did not change the interpretation of the Service's charge to identify or implement commitments to carrying capacity in national parks or threaten the widespread application of VERP outside of wild and scenic river corridors.²¹¹

*A. Muddying the Waters: Should the Park Service Cap Access
to the Merced River Corridor?*

Despite the Ninth Circuit's interpretation of the WSRA's user capacity mandate to require a description of the "maximum number of people" at the Merced river in *Yosemite I*,²¹² as well as the court's suggestion that caps are an appropriate and common way of protecting the environment in *Yosemite III*,²¹³ the court ultimately left the decision about capping public access to the Park Service. The Ninth Circuit tempered its definition of the user capacity mandate by explaining that the WSRA did not mandate "one particular approach"²¹⁴ or a numerical cap on visitors specifically.²¹⁵ The court also suggested that monitoring and maintaining environmental and experiential criteria under VERP could provide a useful measure of use.²¹⁶ For the Merced River, the court urged the Service to devise interim limits on use because of the agency's lengthy delay in preparing a plan.²¹⁷ Some specific and generic arguments for and against each approach are addressed below.

²⁰⁶ See *infra* notes 218–33 and accompanying text.

²⁰⁷ See *supra* notes 191–98 and accompanying text.

²⁰⁸ *Yosemite III*, 520 F.3d at 1034–35 n.4; see *infra* Part V.B.

²⁰⁹ *Yosemite III*, 520 F.3d at 1035, 1035–36 n.5; see *infra* Part V.C.

²¹⁰ See Press Release, Am. Rivers, President Obama Signs Historic Wild and Scenic River Bill into Law (Mar. 30, 2009), <http://www.americanrivers.org/newsroom/press-releases/2009/president-obama-signs.html> (last visited July 19, 2009).

²¹¹ See *infra* Part V.D.

²¹² *Yosemite I*, 348 F.3d 789, 796 (9th Cir. 2003).

²¹³ *Yosemite III*, 520 F.3d at 1033 n.2.

²¹⁴ *Yosemite I*, 348 F.3d at 796.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ For a managing agency that has completed a plan within the WSRA's three year deadline, a court is likely to defer to the agency's choice of using a monitoring and maintenance framework, visitor caps, or both. See *id.* at 797, 803–04. The Ninth Circuit emphasized that it

Several arguments undergird the Park Service's preference for a monitoring and maintenance framework, such as VERP, over visitor caps. First, even famed environmentalist David Brower argued that claims of overcrowding in Yosemite Valley are exaggerated, and that there is no reason to cap visitation beyond facility capacity.²¹⁸ As a philosophical matter, visitor caps can "imply cultural elitism" and raise questions of equity by rationing access to certain classes of people.²¹⁹ As a statutory matter, general visitor caps can undermine a managing agency's attempt to provide for public uses and enjoyment clearly contemplated by WSRA, without necessarily determining which uses are incompatible with a river's ORVs.²²⁰ Critics allege caps cause counterproductive side effects because, by restricting the public's access to rivers and parks, caps erode taxpayer support for the Park Service and for withdrawing lands and waters for conservation.²²¹ The effectiveness of visitor caps is premised on the assumption that adverse effects on river resources are directly related to the number of users, and that the managing agency is capable of calculating a specific user capacity number for each area. But in practice, river degradation is often the result of many factors, including the types of uses, the dispersion of users, and the season of use,²²² and the Park Service posits that there is no scientific way to determine a particular area's capacity.²²³ Further, caps preemptively select the most restrictive management action that may not correct the root cause of a problem; in contrast, VERP contemplates a

was requiring preliminary limits primarily because of the Service's long delay in preparing a plan. *Id.* at 797.

²¹⁸ Carl Nolte, *Famed Environmentalist Opposes the Yosemite Valley Plan*, S.F. CHRON., Dec. 11, 1997, at C20, available at 1997 WLNR 3739916.

²¹⁹ Lemons & Stout, *supra* note 41, at 48; see also MANNING, *supra* note 59, at 216–17 (documenting programs that ration use based on the market, demand, equality, and compensation). River managers frequently ration use on protected rivers. See, e.g., *infra* note 230 and accompanying text.

²²⁰ Wild and Scenic Rivers Act, 16 U.S.C. § 1281(a) (2006).

²²¹ *Out of the Wilderness*, ECONOMIST, July 10, 2008, at 35, 35 ("As Americans lose interest in the national parks, they will become less willing to pay for them through taxes."). Indeed, limiting access can also have political consequences. See Lemons & Stout, *supra* note 41, at 48. For example, in 2003, after the release of the Yosemite Valley Plan, California Rep. George Radanovich proposed legislation to undermine key parts of the plan by increasing the number of parking spaces, rebuilding two campgrounds, and halting a long-term plan to use shuttle buses to bring in more visitors without their cars. See Zachary Coile, *Congressman Looks to Revise Plans for Yosemite*, S.F. CHRON., July 23, 2003, at A2, available at 2003 WLNR 8250809.

²²² See REVISED MERCED RIVER PLAN, *supra* note 16, at II-4. The Park Service outlined several other assumptions to support the agency's user capacity program, including the idea that "[a]llowing any amount of use is likely to have some impact on resources," which echoed Joseph Sax's observation that that "[e]very human use impairs the natural setting to some extent." *Id.*; Joseph L. Sax, *Fashioning a Recreation Policy for Our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973, 974 (1979).

²²³ See REVISED MERCED RIVER PLAN, *supra* note 16, at II-4. Thus, the Service argued that a user capacity determination should be based on "sound professional judgment supported and informed by scientific studies, management goals and objectives, public preferences, traditional uses, and many other factors." *Id.*

variety of management actions, including the restriction of uses, based on the type and extent of the problem.²²⁴

On the other hand, there are problems with the Park Service's primary reliance on VERP as a user capacity program without other numeric limits. First, the WSRA places a primary emphasis on "esthetic, scenic, historic, archeologic, and scientific features," and clearly contemplates limiting uses that interfere with a river's ORVs.²²⁵ Monitoring frameworks do not replace the need for proactive numeric visitor capacity decisions, which can inform stakeholders of the prescribed supply of recreation opportunities to aid decision-making.²²⁶ Of course, although it tends to be a management device of last resort,²²⁷ land managers have long rationed uses on protected public lands,²²⁸ including rivers.²²⁹ Further, research indicates a surprising amount of public support for management practices that ration and allocate use,²³⁰ as long as those practices are fair.²³¹ Finally, critics of the Park Service have warned that VERP provides the Park Service with too much discretion, without requisite funding and institutional support,²³² and have thus advocated a system that incorporates both VERP and numerical limits on visitors.²³³

²²⁴ See Brief for the Kempthorne Amici, *supra* note 155, at 13, 14 n.3.

²²⁵ 16 U.S.C. § 1281(a) (2006) (implying that river managers may limit uses that "substantially interfere with public use and enjoyment of [a river's outstandingly remarkable] values").

²²⁶ Haas, *supra* note 21 ("[K]nowing the supply or number of opportunities is important information for managers, communities, visitors, concessionaires and other stakeholders . . .").

²²⁷ MANNING, *supra* note 59, at 212.

²²⁸ See, e.g., *U.S. Air Tour Ass'n v. Fed. Aviation Admin.*, 298 F.3d 997, 1011–12 (D.C. Cir. 2002) (noting that "[l]imiting the number of visitors at a given time in a national park is a standard measure used to protect park resources" in the context of allowing a numerical cap on the number of commercial air tours over the Grand Canyon); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128–29 (8th Cir. 1999) (upholding the U.S. Forest Service's environmental impact statement where nine out of ten alternatives placed limits on visitor use and established motorboat quotas at or below current levels).

²²⁹ See, e.g., *United States v. Hells Canyon Guide Serv.*, 660 F.2d 735, 737–38 (9th Cir. 1981) (rejecting river guide service's argument that permit system on wild and scenic river was invalid and upholding an injunction against guides operating boat services without permits); *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979) (upholding the Park Service's allocation of permits between commercial and noncommercial users on the Colorado River).

²³⁰ See MANNING, *supra* note 59, at 218 ("Despite the complex and controversial nature of use rationing and allocation, there appears to be considerable support for a variety of such management practices among park and outdoor recreation visitors."). Managing agencies have identified several rationing and allocating practices, including 1) reservation systems, 2) lotteries, 3) first come, first served, 4) pricing, and 5) merit. *Id.* at 213.

²³¹ See *id.* at 216–17.

²³² Plaintiffs-Appellees' Opposition Brief at 21, *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008) (No. 07-15124) [hereinafter *Friends Opposition Brief*].

²³³ *Id.* at 18. Friends favors a system similar to Yosemite's Wilderness Management Program, which contains a monitoring component in conjunction with a daily trailhead quota, based on scientific studies that evaluated ecological conditions and historic use patterns. See *supra* notes 165–66 and accompanying text for a discussion of the Wilderness Management Program. Friends' leaders commended the program, see Squatriglia, *supra* note 5 (citing Greg Adair's praise for the wilderness program), and the Ninth Circuit described it as a "step[] in the right direction," *Yosemite III*, 520 F.3d 1024, 1033 (9th Cir. 2008).

B. Protecting Wild and Scenic Rivers: Modifying VERP to Prevent Degradation

To protect a designated river, a comprehensive management plan using VERP must require management action prior to degradation.²³⁴ Both the Ninth Circuit and the district court reasoned that VERP's management protocol was too reactive,²³⁵ ruling that management action must be required before degradation.²³⁶ For the Merced River, the Park Service could correct VERP's deficiency by replacing the program's permissive language with mandatory language. For example, instead of stating that early warning signs "may call for" proactive management actions,²³⁷ the Park Service could require that VERP's monitoring standards and indicators "shall call for" such action. This revision would respond directly to the Ninth Circuit's request that management action occur prior to degradation, but mandating action in a CMP would also provide an environmental plaintiff with judicial review of an agency's inaction.²³⁸ Moreover, this type of revision would not guarantee a particular kind of management action,²³⁹ nor would it resolve the challenges posed by Park Service funding and personnel constraints, which can encumber timely and appropriate action.²⁴⁰

The Ninth Circuit noted another related deficiency of VERP that might be more difficult to remedy. In *Yosemite III*, the court ruled that VERP's standards must be set to trigger management action.²⁴¹ To be able to trigger management action prior to degradation, a managing agency must calibrate standards and indicators in a way that correlates levels of use to effects on a river's ORVs. In *Yosemite III*, the court focused on VERP's deficient management action and did not resolve whether VERP's standards and indicators constituted adequate measures of use, much less levels of use that did not adversely affect the Merced River.²⁴² This is a difficult task, but

²³⁴ *Yosemite III*, 520 F.3d. at 1034; *Scarlett*, 439 F. Supp. 2d 1074, 1100 (E.D. Cal. 2006).

²³⁵ *Yosemite III*, 520 F.3d. at 1034; *Scarlett*, 439 F. Supp. 2d at 1100.

²³⁶ *Yosemite III*, 520 F.3d. at 1034; *Scarlett*, 439 F. Supp. 2d at 1100.

²³⁷ REVISED MERCED RIVER PLAN, *supra* note 16, at II-33.

²³⁸ The Supreme Court's holding in *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 66 (2004), stated that the Bureau of Land Management's alleged failure to act to fulfill its nonimpairment obligation was not remediable under the APA because it did not constitute agency action and would not bar judicial review of a river management plan that specifically required management action prior to degradation. See Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL'Y F. 105, 147 (2007) (suggesting that *SUWA* does not bar challenges of agency actions when particular plan provisions "bind an agency to a specific course of action").

²³⁹ The Park Service has outlined a variety of management tactics, ranging from visitor education to rationing and allocating use. See REVISED MERCED RIVER PLAN, *supra* note 16, at II-34, II-35 tbl.II-3.

²⁴⁰ Bacon et al., *supra* note 88, at 82. Friends worried about a lack of Park Service support for VERP and prescriptive management actions. Friends Opposition Brief, *supra* note 232, at 20.

²⁴¹ *Yosemite III*, 520 F.3d at 1034.

²⁴² Friends argued that VERP's standards measured social and resource conditions, not "levels of use" required by *Yosemite I. Scarlett*, 439 F. Supp. 2d 1074, 1097-98 (E.D. Cal. 2006). As an example, the standard that purported to protect the biological ORV in El Capitan Meadow provides that there be "[n]o net increase in [the] length of social trails," which states a quantitative measure of the condition of the meadow. Bacon et al., *supra* note 88, at 76 tbl.2.

simulation modeling of visitor use can help the Service make estimates of levels of visitor use that will ultimately violate standards, so that the Service can manage user capacities more proactively.²⁴³ Because of the complexity of choosing indicators and setting standards, as well as the public's involvement in revising Yosemite's user capacity plan,²⁴⁴ it seems likely the court would defer to a managing agency's specific system that included mandatory preventive action—unless, as in *Yosemite III*, the record indicated that the system failed to prevent degradation.²⁴⁵

C. Enhancing Wild and Scenic Rivers: Confronting the Status Quo

The *Yosemite* opinions indicate that if a managing agency implements a visitor cap to address user capacity, the cap cannot rely on existing development, but instead must address past and ongoing degradation facilitated by overdevelopment.²⁴⁶ In *Yosemite III*, the Park Service acknowledged the obvious—fewer facilities and parking equals less crowding and cars—but provided no analysis about the relationship between setting caps at maximum facility capacity and preventing degradation of the Merced's ORVs.²⁴⁷ Although the WSRA does not require the removal of existing facilities that do not complement the statute's "protect and enhance" mandate,²⁴⁸ if a managing agency wants to use facility capacities to address user capacities, the agency must show how current facility capacities protect or enhance a river's ORVs.²⁴⁹ Based on the "dozens" of facilities the Ninth Circuit cited as perpetuating degradation within Yosemite Valley,²⁵⁰ the Park Service faces an uphill battle in justifying that these facility capacities actually protect and enhance the Merced River. Requiring a rational connection between facility capacity as a visitor limit and a designated river's ORVs could potentially reduce uses associated with

This measurement arguably indicates certain aspects of visitor use, such as the location of use and type of use (like hiking), but does not correlate to a number of persons as a specific level of use.

²⁴³ See MANNING, *supra* note 59, at 92.

²⁴⁴ REVISED MERCED RIVER PLAN, *supra* note 16, at II-39.

²⁴⁵ Friends referred to the administrative record, which showed that "[m]onitoring in 2004 demonstrated exceedances of two standards." Friends Opposition Brief, *supra* note 232, at 14. The results of monitoring the length of social trails demonstrated that from 2004 to 2005, there were "significant social trail impacts." Bacon et al., *supra* note 88, at 77.

²⁴⁶ *Yosemite III*, 520 F.3d at 1035.

²⁴⁷ See REVISED MERCED RIVER PLAN, *supra* note 16, at II-7 (asserting that visitor use levels are higher in portions of the east Yosemite Valley, where parking and visitor facilities are prevalent, than in the west Yosemite Valley, where parking is more limited); see also *Yosemite III*, 520 F.3d at 1035.

²⁴⁸ Recreational river segments may contain commercial and residential development and roads. See Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,457–58 (Sept. 7, 1982). However, the Park Service proposed stringent conditions for facilities located within the Merced's River Protection Overlay, which is the area within 100 or 150 feet of the river's high water mark, depending on the elevation. See MERCED RIVER PLAN, *supra* note 10, at 51–54.

²⁴⁹ *Yosemite III*, 520 F.3d. at 1035–36.

²⁵⁰ *Id.* at 1035 n.5.

certain facilities by removing facility capacities from overall visitor cap calculations, as well as discourage future development that affects designated rivers.

Similarly, a managing agency cannot simply maintain the status quo by grandfathering in existing uses.²⁵¹ The WSRA requires a managing agency to limit uses that substantially interfere with or degrade a river's ORVs,²⁵² no matter how long those uses have been in existence.²⁵³ Thus, an agency's selection of ORVs can predetermine user capacity estimations by creating an inherent class of appropriate uses. For the Merced River, the Park Service allows human uses that satisfy two elements to be considered a recreational ORV: those that are 1) river-related or river-dependent, and 2) rare, unique, and exemplary in a regional or national context.²⁵⁴ Many recreational uses, especially outdoor activities and experiences such as hiking, meet both requirements. However, many other Yosemite Valley activities, such as shopping, do not relate or depend on the Merced River at all.²⁵⁵ Thus, the Service faces a difficult task in showing how long-existing uses within Yosemite Valley relate to the Merced River. River plans that require a connection between a recreational use and the river have the potential to enhance designated rivers by reducing inappropriate and degrading uses over time.

D. Channeling the Yosemite Decisions to the WSRA

Because the court did not evaluate the Park Service's user capacity program under the Organic Act or National Parks and Recreation Act, the *Yosemite* decisions have no direct effect on the Service's duties related to carrying capacity or implementation of VERP in national parks.²⁵⁶ Of course, the Ninth Circuit's interpretation of the statutory language of "address user capacities" to mean dealing with or discussing the "maximum number of

²⁵¹ The Ninth Circuit's opinion echoes other court rulings in the context of wilderness areas, *see* *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 648 (2004) (holding that Forest Service's decision to grant wilderness special use permits at their preexisting levels in the face of documented damage resulting from overuse did not have rational validity), and *wildlife refuges*, *Defenders of Wildlife v. Andrus*, No. 78-1210, 1978 U.S. Dist. LEXIS 16578, at *13 (D.D.C. July 14, 1978) ("Past recreational use is irrelevant to the statutory standard except insofar as deterioration of the wildlife resource from prior recreational use serves to increase the need to protect, enhance and preserve the resource. Past recreational abuses may indeed require the Secretary to curtail recreational use to an even greater degree than mandated by the Refuge Recreation Act, in order to restore and rehabilitate the area promptly as required by the Secretary's existing regulations.").

²⁵² *Wild and Scenic Rivers Act*, 16 U.S.C. § 1281(a) (2006); Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. at 39,458–59.

²⁵³ *See* Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. at 39,458.

²⁵⁴ *MERCED RIVER PLAN*, *supra* note 10, at 40.

²⁵⁵ *See* Friends Opposition Brief, *supra* note 232, at 37–38.

²⁵⁶ In *Yosemite III*, the amici argued that the Ninth Circuit's rejection of the Revised Merced River Plan would threaten the Park Service's ability to use VERP in protecting the national parks. Brief for the Kempthorne Amici, *supra* note 155, at 18.

people that can be received”²⁵⁷ could serve as persuasive precedent for a court interpreting the Service’s duty to identify and implement commitments to visitor carrying capacity in other park units,²⁵⁸ based on the Park Service statutes’ similar purpose and planning requirements.²⁵⁹ However, a federal district court already upheld the Park Service’s integration of VERP into a general management plan in *Isle Royale Boaters Association v. Norton*,²⁶⁰ reasoning that no authority required a specific numeric cap.²⁶¹ Thus, at least one court has declined to define the Service’s carrying capacity duty under the Park Service statutes as stringently as under the WSRA.

Administrative law might explain why the Park Service’s interpretation of its Organic Act duty to identify and implement commitments to carrying capacity deserves more deference than under the WSRA. Because the Park Service uniquely administers the Park Service statutes, the agency’s statutory interpretation may deserve substantial deference.²⁶² Conversely, because Congress entrusted four agencies in two federal departments to

²⁵⁷ *Yosemite I*, 348 F.3d 789, 796 (9th Cir. 2003).

²⁵⁸ Of course, despite this interpretation, the court did not require a numerical cap. See discussion *supra* Part V.A.

²⁵⁹ Both the Organic Act and the WSRA require land managers to make and manage protected areas for the purpose of preservation. Compare National Park Service Organic Act, 16 U.S.C. § 1 (2006), with Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (2006); see also Bacon et al., *supra* note 88, at 73 (suggesting that the WSRA objective “mirrors the dual mission found in the 1916 National Park Service Act”). Both acts, as interpreted by the Park Service, require managers to avoid harming natural resources. National parks cannot be “impaired,” and wild and scenic rivers cannot be degraded. See 16 U.S.C. § 1 (2006); Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,455 (Sept. 7, 1982); MANAGEMENT POLICIES, *supra* note 47, at 5. The Park Service possesses substantial discretion to allow “impacts” to park resources, and river managers have substantial discretion to manage rivers with “varying degrees of intensity” for protection and development. 16 U.S.C. § 1281(a) (2006); MANAGEMENT POLICIES, *supra* note 47, at 11. Finally, a river’s CMP is analogous to a park’s GMP. Compare 16 U.S.C. § 1274(d) (2006), with 16 U.S.C. § 1a-7 (2006). However, the WSRA expressly establishes a dominant purpose by placing “primary emphasis” on protecting “scientific, scenic, historic, archaeologic, and scientific features,” while the Organic Act’s emphasis on preservation over use and enjoyment, has been subject to differing interpretations by courts. 16 U.S.C. § 1281(a) (2006); see discussion *supra* Part II.A. Compare, e.g., *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1247 (E.D. Cal. 1999) (concluding that the Organic Act did not serve as a basis for relief because it granted broad deference to the Park Service in balancing the competing values of protecting and promoting 1) the preservation of natural and cultural resources, and 2) the facilitation of public use and enjoyment), with *Nat’l Rifle Ass’n of Am. v. Potter*, 628 F. Supp. 903, 909 (D.D.C. 1986) (“In the Organic Act Congress speaks of but a single purpose, namely, conservation.”). But see MANAGEMENT POLICIES, *supra* note 47, at 11 (“Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.”).

²⁶⁰ 154 F. Supp. 2d 1098 (W.D. Mich. 2001), *aff’d*, 330 F.3d 777 (6th Cir. 2003).

²⁶¹ *Id.* at 1139–40.

²⁶² See *Cook Inlet Native Ass’n v. Bowen*, 810 F.2d 1471, 1473 (9th Cir. 1987) (challenge of Bureau of Indian Affairs interpretation of the Indian Self-Determination Act); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (challenge of the Environmental Protection Agency’s plantwide definition of a stationary source under the Clean Air Act).

administer the WSRA, the Park Service's interpretation may not be entitled to such deference.²⁶³ Further, the Park Service's statutes are supplemented by the Service's own Management Policies, which incorporate the VERP framework for addressing visitor carrying capacity.²⁶⁴ Because the Park Service's Management Policies went through a notice and comment period and represent the Service's official interpretation of its statutory obligations, courts have recognized that the Service's interpretations deserve deference.²⁶⁵ Thus, unless a court rules that the visitor carrying capacity requirement unambiguously requires a specific numeric visitor cap, a court is likely to rule that the Service's interpretation of the visitor carrying capacity requirement is a permissible interpretation of the National Parks and Recreation Act language.

VI. CONCLUSION

Forty years after Garrett Hardin depicted Yosemite Valley as a classic manifestation of the tragedy of the commons,²⁶⁶ recreation science and ecosystem management have armed park and river managers with new tools to preserve protected areas while providing for public use and enjoyment, based on the concept of user capacity.²⁶⁷ Yet the task of protecting Yosemite Valley, the shiniest facet of the park system's grandest jewel, has not become easier because the demand for park resources has increased,²⁶⁸ while supply has remained static. There is still only one Yosemite Valley,²⁶⁹

²⁶³ See *Proffitt v. Fed. Deposit Ins. Corp.*, 200 F.3d 855, 860 (D.C. Cir. 2000) (denial of review of Federal Deposit Insurance Corporation's removal of bank director); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986) (challenge of the Department of Health and Human Services regulations under the Rehabilitation Act).

²⁶⁴ MANAGEMENT POLICIES, *supra* note 47, at 160. In comparison, the WSRA Guidelines, published as the official interpretations of the Interior and Agriculture departments in 1982, did not mention VERP specifically. See Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. at 39,494.

²⁶⁵ See *S. Utah Wilderness Alliance v. Nat'l Park Serv.*, 387 F. Supp. 2d 1178, 1187–89 (D. Utah 2005) (reasoning that the Service's "no impairment" interpretation of the Organic Act in regulating off-road vehicle use deserved deference as a permissible interpretation because such policies were the type Congress intended to carry the force of law (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001))).

²⁶⁶ Hardin, *supra* note 63.

²⁶⁷ See MANNING, *supra* note 59, at 25, 90–95 (describing different carrying capacity frameworks and computer simulations of visitor use).

²⁶⁸ See Press Release, National Park Service, National Park System Attendance Rises in 2007 (Feb. 26, 2008), <http://home.nps.gov/applications/release/Detail.cfm?ID=785> (last visited July 19, 2009). After a decade of slight declines, Yosemite experienced an increase in visitation in 2007. *The Massive Renovation of Yosemite Valley* (KGO-TV San Francisco television broadcast Aug. 1, 2008), http://abclocal.go.com/kgo/story?section=news/assignment_7&id=6301747 (last visited July 19, 2009).

²⁶⁹ In 1987, Secretary Hodel issued an internal memo that favored the removal the O'Shaughnessy Dam to create a second Yosemite Valley, at the cost of \$1 billion. Robert Crabbe, *Restoring the 'Second Yosemite': Can it be Done?*, UNITED PRESS INT'L, Aug. 24, 1987, available at LEXIS. Hodel argued that restoring Hetch Hetchy would relieve overcrowding in Yosemite Valley, but Park Service Director Mott disagreed. *Id.*

and park stakeholders have not yet arrived at an agreeable solution—what Hardin might refer to as “mutual coercion”²⁷⁰—to ensure that future generations can enjoy the valley, unimpaired, by regulating the use and enjoyment of current users.

The judiciary’s first interpretation of the duty to address capacity-related issues in Yosemite, albeit in the context of the Wild and Scenic Rivers Act, complicates the Park Service’s traditional management of carrying capacity within Yosemite Valley, as well as the Service’s application of VERP, a new adaptive management framework, within the Merced River corridor. The *Yosemite* decisions force the Park Service to address past and ongoing degradation by connecting interim limits on use and facilities with the Merced’s ORVs, instead of existing uses and development.²⁷¹ Further, the *Yosemite* decisions require the Service to modify VERP so that the monitoring framework contains mandatory action prior to ORV degradation.²⁷² In short, the rulings serve as a costly²⁷³ reminder to the Service that the agency must protect and enhance rivers within park units and also as a guide to managing agencies preparing comprehensive management plans for newly designated wild and scenic rivers. However, the *Yosemite* decisions signal neither the end of the Park Service’s use of monitoring and maintenance frameworks like VERP, nor the beginning of visitor caps for all river corridors,²⁷⁴ and are unlikely to have a legal effect on judicial interpretations of the Service’s duty to identify and implement carrying capacities in park units outside designated WSRA corridors.²⁷⁵ But because the management of Yosemite often becomes the blueprint for other park units,²⁷⁶ the Ninth Circuit’s past invalidations of the Merced River Plan, as well as the court’s treatment of the next plan scheduled for release in September 2009,²⁷⁷ may influence the management of both protected parks and rivers for years to come.

²⁷⁰ Hardin, *supra* note 63, at 1247.

²⁷¹ *Yosemite III*, 520 F.3d 1024, 1036 (9th Cir. 2008); *see discussion supra* Part V.C.

²⁷² *Yosemite III*, 520 F.3d at 1033–34; *see discussion supra* Part V.B.

²⁷³ *See Squatriglia, supra* note 5 (estimating the cost of litigation at \$15 million).

²⁷⁴ *See discussion supra* Part V.A.

²⁷⁵ *See discussion supra* Part V.D.

²⁷⁶ Blackburn, *supra* note 72.

²⁷⁷ Nat’l Park Serv. Press Release, *supra* note 205. This time period is nearly three times as long as previous planning periods. *See* MERCED RIVER PLAN, *supra* note 10, at 14–15 (describing the timeline for the 2001 plan, which took about a year to complete).