Center for Biological Diversity v. Veneman: The Ninth Circuit Clarifies an Administrative Duty Arising Under the Wild and Scenic Rivers Act

I. INTRODUCTION

The Wild and Scenic Rivers Act (WSRA) was enacted to preserve selected rivers around the country for the benefit of the greater public.[1] To be considered for addition to the Wild and Scenic Rivers System (WSRS), rivers must fulfill certain conditions.[2] The Arizona congressional delegation issued a request to the United States Forest Service in 1993 asking them to compile a report identifying every stream or river segment in the state that met the statutory requirements for potential inclusion in the WSRS.[3] During 1993, the Forest Service performed three independent studies of free-flowing rivers in Arizona in an effort to create a list of eligible rivers.[4] Once the review of these rivers was complete, a 300-page report (1993 Report) was published to identify the "potential additions" to the WSRS.[5] This report pointed out fifty-seven streams and rivers that qualified as potential additions to the WSRS and mentioned detailed information about each, including location, which specific outstandingly remarkable values (ORVs) each river possessed, land use and development options in the immediate environment, and the social and economic values of each river.[6] Additionally, the 1993 Report listed rivers in Arizona that were not

1. Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 851 (9th Cir. 2003) (citing 16 U.S.C. §§ 1271-1287 (2000)).
2. *Id.* To be eligible, a river must be free-flowing and must possess at least one of the outstandingly remarkable values described in 16 U.S.C. § 1271. *Id.*
3. *Id.* at 852.
4. *Id.*
5. *Id.*
6. *Id.*

eligible for addition to the WSRS because they failed to satisfy certain requirements under the Act.[7]

Since compiling the 1993 Report to identify rivers and streams eligible for inclusion in the WSRS, the Forest Service allegedly failed to consider the impact of land planning activities on these rivers.[8] To that end, the Center for Biological Diversity and the Central Arizona Paddlers Club (collectively, the Center), two environmental organizations, filed suit for injunctive and declaratory relief in the United States District Court for the District of Arizona, claiming that the Forest Service failed to comply with 16 U.S.C. § 1276(d)(1) of the WSRA.[9] Section 1276(d)(1) requires that "[i]n all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic, and recreational river areas."[10] Specifically, the Center claimed that the Forest Service did not consider the fifty-seven rivers and streams identified by the 1993 Report as potential additions to the WSRS.[11]

The district court dismissed the Center's action for lack of subject matter jurisdiction under the Administrative Procedure Act (APA) on which the Center relied, because there is no independent cause of action under the WSRA.[12] The district court dismissed the action on the grounds that the Center failed to allege either final agency action or sufficient agency inaction, as required by the APA.[13] The United States Court of Appeals for the Ninth Circuit reversed the district court's ruling and *held* that the Forest Service had a mandatory duty under the WSRA to consider rivers listed in the 1993 Report, and having violated this requirement, review was appropriate under § 706(1) of the APA.[14] *Center for Biological Diversity v. Veneman*, 335 F.3d 849 (9th Cir. 2003).

II. BACKGROUND

Responding to the need for "an abundant supply of electric energy throughout the United States with the greatest possible economy," Congress passed the Federal Power Act of 1920.[15] Concerns about the

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7. *Id.* The rivers were either not free-flowing or did not have an identifiable ORV. *Id.*
8. *Id.*
9. *Id.*
10. 16 U.S.C. § 1276(d)(1) (2000)).
11. *Ctr. for Biological Diversity*, 335 F.3d at 851.
12. *Id.*
13. *Id.*
14. *Id.* at 857.
15. *Id.* at 851 (citing NAACP v. Fed. Power Comm'n, 425 U.S. 662, 670 & nn.5-6 (1976)).

pro-development effects of the Power Act lead to the enactment of the WSRA in 1968.[16] Proponents viewed this legislation as a necessary complement to the country's expanding hydropower program which often exacted a significant toll on the environment.[17] The landscape of federal waterway policies was substantially altered by the WSRA, which requires federal agencies to preserve selected rivers and to protect the water quality of those rivers when engaging in "the established national policy of dam and other construction."[18] The policy basis for the Act, stated in its preamble, is the preservation of selected rivers which "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . for the benefit and enjoyment of present and future generations."[19] In support of this goal, the WSRA requires that rivers designated under the Act be managed "in such manner as to protect and enhance the values which caused it to be included in said system without . . . limiting other uses that do not substantially interfere with public use and enjoyment of these values."[20] However, before a river can qualify for protection as a wild, scenic, or recreational river area, several preconditions must be met.

A river is eligible to be included in the WSRS if it is a free-flowing stream and it possesses at least one of the ORVs listed in the preamble to the Act.[21] When these two conditions are met, a river may be designated for inclusion in the WSRS by either an Act of Congress or an application of a governor, acting pursuant to an act by the state legislature designating a given river as wild, scenic, or recreational.[22] Discovery of eligible rivers is entrusted to the Secretaries of the Interior and Agriculture under the WSRA; they are required to conduct "specific studies and investigations" to determine additional rivers that have the potential to qualify for inclusion in the system.[23] Overall, the process to add a river to the WSRS can be initiated by a variety of parties.[24]

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16. *Id.*

17. *See* 16 U.S.C. § 1271 (2000).

18. *Id.*

19. *Ctr. for Biological Diversity*, 335 F.3d at 851; 16 U.S.C. § 1271; Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000).

20. *Hells Canyon Alliance*, 227 F.3d at 1176 (citing 16 U.S.C. § 1281(a)).

21. *Ctr. for Biological Diversity*, 335 F.3d at 851 (citing 16 U.S.C. § 1273(b)). This list includes scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. *Id.*

22. *Id.* (citing 16 U.S.C. § 1273(a)).

23. *Id.* (citing 16 U.S.C. § 1276(d)(1)).

24. *See* 16 U.S.C. § 1273(a). Under this provision, parties at either a state or federal level, including members of Congress or of a state legislature, can initiate the designation process. *Id.*

Apart from laying out the scheme for eligibility and designation, the WSRA requires all federal agencies involved in "planning for the use and development of water and related land resources" to consider all potential rivers that are designated as wild, scenic, or recreational under the Act.[25] In addition, all land planning reports submitted to Congress that concern river basin projects must "consider and discuss" the impact of the activity on any rivers designated as potential additions to the WSRS.[26]

Because the WSRA does not provide for an independent cause of action, review of agency action under the Act is governed by the APA.[27] Courts will intervene to resolve a dispute concerning administration of the law "only when, and to the extent that, a 'final agency action' has an actual or immediate threatened effect."[28] An agency action, finding or conclusion found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" will be held unlawful and set aside under the APA.[29] To qualify for judicial review, the challenged agency action "must be a final agency action for which there is not any other adequate court remedy, or be reviewable by statute."[30] According to the United States Supreme Court, an agency action is "final" for purposes of appellate review under the APA if it marks the consummation of the agency's decision-making process and is one "by which rights or obligations have been determined, or from which legal consequences will flow."[31] In *Montana Wilderness Ass'n, Inc. v. United States Forest Service*, the Ninth Circuit reviewed a lower court's determination that trail maintenance and improvement work in certain Study Areas were final agency actions.[32] Because the legislative history of the Montana Wilderness Study Act (Study Act) indicated that only forest and travel management plans constituted final agency action regarding off-road vehicle access in these areas, the court held that "maintenance of trails designated by those plans is merely an interim aspect of the planning

25. *Id.* §§ 1273(a), 1276(d)(1).

26. *Id.* § 1276(d)(1).

27. *Ctr. for Biological Diversity*, 335 F.3d at 852 (citing Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1176 (9th Cir. 2000)).

28. *Id.* at 853; Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894 (1990)).

29. *Ctr. for Biological Diversity*, 335 F.3d at 853 (quoting 5 U.S.C. § 706(2)(A) (2000)).

30. *Ecology Ctr.*, 192 F.3d at 924 (citing 5 U.S.C. § 704).

31. *Ctr. for Biological Diversity*, 335 F.3d at 853 (citing Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997))); *see also Ecology Ctr.*, 192 F.3d at 925 (providing the Supreme Court's two-part test for determining whether final agency action exists).

32. Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1150 (9th Cir. 2003).

process, not the consummation of it."[33] However, even if the action is not considered final agency action, there are limited exceptions through which the APA permits judicial review.

For example, § 706(1) of the APA allows courts to "compel agency action unlawfully withheld or unreasonably delayed."[34] For a right to review to exist under this provision, the challenging party must "make[] a showing of 'agency recalcitrance . . . in the face of clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility.'"[35] *Oregon Natural Resources Council Action v. Bureau of Land Management* (ONRCA) illustrates the burden on the plaintiff.[36] ONRCA filed suit claiming violations of the National Environmental Policy Act (NEPA) and the Federal Land Policy Management Act (FLPMA) stemming from the Bureau of Land Management's (BLM) failure to halt certain activities pending the completion of an Environmental Impact Statement (EIS).[37] The plaintiffs argued that NEPA established a clear duty, under the circumstances, "to stop actions that adversely impact the environment, that limit the choice of alternatives for the EIS, or that constitute an 'irreversible and irretrievable commitment of resources.'"[38] Similarly, they argued that FLPMA "requires BLM to base its land management activities on up-to-date land use plans."[39] Despite these claims, the court decided that the statutes at issue included "policy statements which require due consideration, but [which] do not provide a clear duty to update land management plans or cease actions during the updating process."[40] Besides identifying a clear statutory duty, courts also require proof of a genuine failure to act on the part of the agency.[41] Many courts in the Ninth Circuit have held that evidence of insufficient agency action is not enough to satisfy this requirement.[42]

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33. *Id.*

34. *Ctr. for Biological Diversity*, 335 F.3d at 853 (quoting 5 U.S.C. § 706(1)); *see also* Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997) (stating the APA allows courts to "compel agency action unreasonably delayed").

35. *Mont. Wilderness Ass'n*, 314 F.3d at 1150 (quoting Or. Natural Res. Council Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1137 (9th Cir. 1998)).

36. *ONRC Action*, 150 F.3d at 1134.

37. *Id.*

38. *Id.* at 1137 (citing Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988)).

39. *Id.*

40. *Id.* at 1139.

41. Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999).

42. *Id.* (citing Nevada v. Watkins, 939 F.2d 710, 714 n.11 (9th Cir. 1991)).

III. COURT'S DECISION

In the noted case, the Ninth Circuit initially addressed whether the 1993 Report prepared by the Forest Service satisfied the APA's "final agency action" requirement.[43] This was the necessary first step to determine if judicial review was appropriate.[44] The appeals court relied on the Center's claim that the 1993 Report fulfilled the "final agency action" requirement to decide the issue.[45] The Ninth Circuit, finding that there was no "final agency action," stated that the 1993 Report was a mere inventory of the rivers, not an action marking the consummation of the Forest Service's decision-making process.[46] Identifying those characteristics of the rivers included in the 1993 Report, most importantly whether they were free-flowing and which, if any, ORVs they possessed, made up only the first step of the designation process mandated by § 1276(d)(1) of the WSRA.[47] The court then pointed to the second step of that process, which requires the relevant federal agency to study the rivers to determine their suitability for inclusion in the WSRS.[48] This was a policy determination, the court said, that contemplated "potential conflicts with future uses and state or local interests in the river."[49] Having considered eligibility and suitability, the court recognized the final step in the designation process as one belonging to Congress.[50] The court stated that because the 1993 Report did not represent the final step in the § 1276(d)(1) designation process it, therefore, did not represent a "definitive policy statement usually associated with final decisions reviewable under" the APA.[51] As a result, the court concluded that inventorying the rivers for the 1993 Report did not qualify as final agency action.[52]

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43. Ctr. for Biological Diversity v. Veneman, 335 F.3d 849, 853 (9th Cir. 2003).

44. *Id.*

45. *Id.*; *see also* Alaska Dep't of Envtl. Conservation v. EPA, 244 F.3d 748, 750 (9th Cir. 2001) (finding that certain EPA orders were final agency actions and thus subject to suits under the APA).

46. *Ctr. for Biological Diversity*, 335 F.3d at 853.

47. *Id.* (citing Wild & Scenic River Study Process, Technical Report Prepared for the Interagency Wild and Scenic Rivers Coordinating Council, at 9 (Dec. 1999), *available at* http://www.nps.gov/rivers/publications.html (last visited Jan. 16, 2004) [hereinafter Wild Rivers Technical Report]).

48. *Id.*; *see also* National Wild and Scenic Rivers System: Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454, 39,456 (Sept. 7, 1982).

49. *Ctr. for Biological Diversity*, 335 F.3d at 853.

50. *Id.* (citing Wild Rivers Technical Report, *supra* note 47, at 21).

51. *Id.* (citing Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1150 (9th Cir. 2003)).

52. *Id.*

With one route to judicial review closed, the court moved on to discuss the Center's claims that the Forest Service unreasonably delayed completing the steps of the designation process, thus failing to comply with their mandatory responsibility to consider the fifty-seven rivers included in the 1993 Report.[53] Proof of these claims would allow judicial review under § 706(1) of the APA, which permits a court to review claims "to compel agency action unlawfully withheld or unreasonably delayed."[54] The court noted that the Center "must identify a statutory provision mandating agency action" and "must demonstrate that the Forest Service genuinely failed to pursue the statutory mandate" to attain review under § 706(1).[55]

The court focused its inquiry on the two issues raised by the Center's reliance on the first sentence of § 1276(d)(1).[56] Specifically, the court looked at whether the 1993 Report identified "potential" WSRS rivers and, if so, whether the duty expressed in the statute to "consider" those rivers was mandatory and enforceable against the Forest Service.[57] To answer the first question, the court recognized the need to categorize the findings in the 1993 Report.[58] If the rivers listed in the report had not been identified as "potential national wild, scenic and recreational river areas,"[59] but were instead just an inventory of Arizona's rivers eligible for WSRS inclusion, the Center would have to establish that § 1276(d)(1) imposed a mandatory duty on the Forest Service to inventory eligible rivers.[60] There was little support for this argument, and the court acknowledged the Center's hesitation to make such a claim.[61] Thus, the court considered whether the 1993 Report was a listing of potential WSRS rivers which the Forest Service was required to consider while engaging in land planning under § 1276(d)(1).[62]

Looking to the plain language contained in the 1993 Report, the court entertained the Forest Service's argument that the report was not an

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53. *Id.* at 53-54.

54. *Id.* (quoting 5 U.S.C. § 706(1) (2000)).

55. *Id.* at 854 (citing Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (9th Cir. 1999)).

56. *Id.*

57. *Id.*; *see* 16 U.S.C. § 1276(d)(1) (2000) ("In all planning for the use and development of water and related land resources, *consideration shall be given* by all Federal agencies involved to *potential* national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress *shall consider* and discuss any such potentials." (emphases added)).

58. *Ctr. for Biological Diversity*, 335 F.3d at 854.

59. 16 U.S.C. § 1276(d)(1).

60. *Ctr. for Biological Diversity*, 335 F.3d at 854.

61. *Id.*

62. *Id.*

official study because of the manner of its release.[63] Normally, official reports are issued according to guidelines established by the Departments of the Interior and Agriculture which apply to rivers designated for study under the WSRA.[64] Because the Forest Service typically prepared and issued reports while implementing the forest planning process set forth in the National Forest Management Act (NFMA), the Service urged that a study, like the 1993 Report, prepared while following a different procedure did not constitute an official list of potential rivers.[65] The court disagreed with this claim, finding that eligible rivers are identified using other methods besides the land-use planning process, including independent studies like those carried out for the Arizona delegation.[66] In addition, the court noted that the WSRA did not require the identification of eligible rivers solely by the NFMA's preferred land-use planning process.[67] Because the 1993 Report expressly identified the two statutory characteristics of an eligible river—it is free-flowing and it possesses at least one ORV—the court concluded that it qualified as an eligibility study that merited consideration under § 1276(d)(1).[68] The court was further persuaded by the inclusion of the rivers listed in the 1993 Report on the Nationwide Rivers Inventory, which purported to be "a register of river segments that potentially qualify as national wild, scenic or recreational river areas."[69] This register, the court noted, was maintained in fulfillment of the WSRA.[70]

After concluding that the 1993 Report satisfied the eligibility requirements necessary for consideration under the Act, the court turned to whether § 1276(d)(1) imposed a mandatory duty on the Forest Service.[71] Citing cases involving similar claims of agency inaction, the court trained its attention on the specific language of the WSRA and drew comparisons to other statutes.[72] Most notably, the WSRA's requirement to "consider" all rivers in planning was found to be

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63. *Id.* at 854-55. The plain language pointed to by the court includes a statement indicating that the purpose of the 1993 Report was "to provide information on those rivers that the Forest Service 'determine[s] to be *potentially eligible* for inclusion in the national wild and scenic rivers systems.'" *Id.* at 854 (alteration in original).

64. *Id.* at 855.

65. *Id.*

66. *Id.* (citing Wild Rivers Technical Report, *supra* note 47, at 10).

67. *Id.*

68. *Id.*

69. *Id.* (citing Nationwide Rivers Inventory, *available at* http://www.nps.gov/ncrc/programs/rtca/nri (last visited Jan. 16, 2004)).

70. *Id.*

71. *Id.*

72. *Id.* at 856.

indistinguishable from the obligation to "maintain" the potential study areas at issue in *Montana Wilderness*.[73] In that case, the Study Act required the Forest Service "to *maintain* [potential wilderness study areas in] their presently existing wilderness character and potential for inclusion in the [Wilderness System]."[74] The court held that the duty in the Study Act was more than a generalized policy statement or an instruction that could be overlooked by an implementing agency, and that it created a management directive which the Forest Service was required to follow when administering the Study Areas.[75] Because of the similarity of facts, the decision in *Montana Wilderness* was determinative to the court's analysis in this case. The distinction identified in that opinion between generalized policy statements and nondiscretionary, mandatory requirements convinced the court that the duty under § 1276(d)(1) of the WSRA meant "that federal agencies must consider the future designation of an eligible river when planning for that river and its immediate area."[76] Against that backdrop, the court concluded that the duty to consider constituted a mandatory duty to act.[77]

Because judicial review is appropriate under § 706(1) of the APA only when an agency genuinely fails to act, the court then turned its attention to the Forest Service's claims that it satisfied the mandatory duty to consider eligible areas when it engaged in land planning.[78] Specifically, the Forest Service noted its policy of "addressing eligible rivers through its national land-use planning process," and its intention to act when revising forest plans in the future.[79] The court rejected both defenses and referenced the holding in *Montana Wilderness*, which stated that "awareness alone of the obligation to maintain wilderness character was insufficient to satisfy the statutory requirements" because the duty must actually have been performed.[80] Because the Forest

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73. *Id.* (citing Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1148 (9th Cir. 2003)).

74. *Id.* (alteration in original).

75. *Id.*

76. *Id.*; *see also* Or. Natural Res. Council Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1139-40 (9th Cir. 1998) (holding that BLM-issued RMPs did not constitute final agency action under the APA).

77. *Ctr. for Biological Diversity*, 335 F.3d at 856.

78. *Id.* at 856-57; *see also* Ecology Ctr., Inc. v. United States Forest Serv., 192 F.3d 922, 926 (1999) (noting that the Forest Service performed extensive monitoring and therefore did not fail to act).

79. *Ctr. for Biological Diversity*, 335 F.3d at 857.

80. *Id.*; *see also* Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1151 (9th Cir. 2003) (finding that the Forest Service failed to act when it was aware of a duty to maintain but did not fulfill that duty).

Service failed to act on the mandatory duty under the WSRA, the court held that judicial review was proper under § 706(1) of the APA.[81]

IV. ANALYSIS

The decision reached by the Ninth Circuit in the noted case is significant for its creation of a working definition to deal with ambiguous terms found in the WSRA. Although this clarification helped the court arrive at a decision here, it also brought into focus a conflict with previous rulings in this circuit, specifically *ONRC Action* and *Montana Wilderness*.[82]

At issue in this case is the WSRA, which provides that "[i]n all planning for the use and development of water and related land resources, *consideration* shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas."[83] The Act also states that "all river basin and project plan reports submitted to the Congress shall *consider and discuss* any such potential [areas]."[84] Arguably, the operative terms used in the Act are ambiguous and, without further instruction, compliance with these provisions appears difficult to gauge. In actions to successfully enforce the WSRA, however, the challenging party must demonstrate that the statute includes a clear duty requiring agency action.[85] To show that the requirement to "consider" eligible areas is sufficiently clear, the court contrasted the regulation with similar language in *ONRC Action*.[86] The provisions at issue in that case were based on FLPMA, and included policy statements and general guidance statements held insufficient to establish a clear duty for purposes of enforcement.[87] For instance, 43 U.S.C. § 1712 mandates the development, maintenance, and revision of land use plans providing for the use of public lands, as well as the preservation and protection of these areas.[88] When contrasting the specific language in the statutes, there is some doubt as to whether FLPMA's language is any less clear than the duty to "consider" that appears in the WSRA. Both statutes include vague terms with seemingly broad scope, i.e., "develop," "maintain," and "consider," and both provide that these actions should take place when

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81. *Ctr. for Biological Diversity*, 335 F.3d at 857.

82. Or. Natural Res. Council Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1139 (9th Cir. 1998); *Mont. Wilderness Ass'n*, 314 F.3d at 1150.

83. 16 U.S.C. § 1276(d)(1) (2000) (emphasis added).

84. *Id.* (emphasis added).

85. *Ctr. for Biological Diversity*, 335 F.3d at 854.

86. *Id.* at 856.

87. *See* 43 U.S.C. §§ 1701-1732 (2000).

88. *Or. Natural Res. Council Action*, 150 F.3d at 1139 n.6.

the acting agencies are involved in land planning.[89] In addition, the preamble to the WSRA communicates the policy that certain rivers should be protected for, among other things, their remarkable scenic, recreational, or historic values.[90] This language is comparable to FLPMA § 1701(a)(8), which was held to be a mere policy statement that failed to establish a clear duty in *ONRC Action*.[91] Specifically, § 1701(a)(8) provides that "it is the policy of the United States that—(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air, atmospheric, water resource, and archeological values."[92] While it initially appears that these provisions are similar, the court distinguished them by explaining that "the duty to consider eligible rivers while planning means that federal agencies must consider the future designation of an eligible river when planning for that river and its immediate area."[93] In *ONRC Action*, no comparable explanation was given and the opinion consistently states that the regulations at issue were nothing more than generalized policy statements.[94] This inconsistency highlights the conflict between these decisions and illustrates the functional interpretation used by this court to render a decision.

Another departure from precedent becomes obvious when examining the court's use of the *Montana Wilderness* decision. To support their holding that the WSRA's duty to consider constitutes a mandatory duty to act, the court pointed to the language of the Montana Wilderness Study Act.[95] This Act instructed the Forest Service to manage certain areas "to *maintain* their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."[96] In enforcement proceedings in *Montana Wilderness*, the district court interpreted the Forest Service's duty under the Study Act to consider the impact of its decisions on the wilderness character of the study areas as a clear statutory duty.[97] The Ninth Circuit, however, declared the statutory duty to be more specific and stated that although the Forest Service's failure to consider the impact of its decisions may be

89. *See Ctr. for Biological Diversity*, 335 F.3d at 854; *Or. Natural Res. Council Action*, 150 F.3d at 1139 n.6.

90. *Ctr. for Biological Diversity*, 335 F.3d at 851 (citing 16 U.S.C. § 1271 (2000)).

91. *Or. Natural Res. Council Action*, 150 F.3d at 1139.

92. *Id.* at 1139 n.5 (quoting 43 U.S.C. § 1701(a)(8)).

93. *Ctr. for Biological Diversity*, 335 F.3d at 856.

94. *Or. Natural Res. Council Action*, 150 F.3d at 1139.

95. *Ctr. for Biological Diversity*, 335 F.3d at 856.

96. Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1148 (9th Cir. 2003) (citing Montana Wilderness Study Act, Pub. L. No. 95-150, 91 Stat. 1243 (1977)).

97. *Id.* at 1151.

relevant to the duty to maintain the lands' wilderness character, as prescribed by the Act, "a simple failure to consider without more is not enough to violate the duty" if the duty to maintain has been fulfilled.[98] This interpretation suggests that the duty to consider is nothing more than a generalized instruction and is insufficient to establish a clear and mandatory duty to act. Because the statutory language in *Montana Wilderness* clearly established a mandatory duty to act, perhaps the characterization of "consider" as a general term was a response to the district court's misinterpretation of the Study Act, and was meant only to have limited effect.[99] Reliance on the holding of *Montana Wilderness* demonstrates the court's willingness to go beyond precedent when rendering an opinion.[100]

V. CONCLUSION

The Ninth Circuit reviewed the intricacies of the APA to conclude that judicial review was appropriate where the United States Forest Service failed to abide by a mandatory requirement under the WSRA. Arguably, the court reached this decision in the face of prior holdings that should have led the court in a different direction. The remarkable aspect of the court's decision is not that it defined statutory language in a novel way, but that it turned precedent on its head and, in doing so, strengthened the WSRA to allow for a wide range of future challenges. Furthermore, the impact from the noted case might not be limited to this statute alone, since many comparable pieces of legislation require federal agencies to execute similar responsibilities. This leaves many open questions about the application of this holding to future challenges.

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98. *Id.* at 1152.
99. *See id.*
100. *Ctr. for Biological Diversity*, 335 F.3d at 856.