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Douglas L. McHoney

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## THE WILD AND SCENIC RIVER ACT'S MANDATORY COMPREHENSIVE MANAGE- MENT PLANS: ARE THEY REALLY MAN- DATORY?

*Newton County Wildlife Ass'n v. United States Forest Serv.*<sup>1</sup>

by Douglas L. McHoney

### I. INTRODUCTION

The Eighth Circuit's recent decision in *Newton County Wildlife Ass'n*<sup>2</sup> profoundly impacts whether the Wild and Scenic Rivers Act (WSRA) comprehensive management plans are required for land management activities that occur outside of, but affect, river segments designated by Congress. The Eighth Circuit's difficulty interpreting the statutory requirements of the WSRA and determining Congressional intent could lead to abuse by agencies that control areas in and around such designated segments.

### II. FACTS AND HOLDING

In 1992, Congress desig-

nated six river segments within the Ozark National Forest as possessing outstanding remarkable environmental values in the national wild and scenic river system.<sup>3</sup> Section 1274 of the WSRA required the U.S. Forest Service, as the responsible federal agency, to prepare a comprehensive management plan within three fiscal years of this designation.<sup>4</sup> The statute required the plan to address resource protection, the development of lands on the designated areas, and other management policies.<sup>5</sup> The Forest Service was unable to meet the three-year deadline for this comprehensive management plan, which expired September 30, 1995.<sup>6</sup>

In early 1994, after amend-

ing its own forest management plan<sup>7</sup> to take into account the new designations, the U.S. Forest Service prepared an environmental assessment discussing the possible effects of four timber sales within the Ozark National Forest.<sup>8</sup> Between August 23, 1994, and September 12, 1995, the U.S. Forest Service issued final agency actions approving these four timber sales.<sup>9</sup> The Newton County Wildlife Association, the Sierra Club, and other individuals ("Wildlife Association") brought suit against the U.S. Forest Service and four of its employees ("Forest Service") to enjoin the sales of timber.<sup>10</sup> The Wildlife Association contended that the sales violated the Wild and Scenic Rivers Act.<sup>11</sup>

The Wildlife Association claimed that the failure to meet the plans' deadline prohibited the Forest Service from selling the timber until the plans were completed.<sup>12</sup> The Forest Service contended that the timber sales were not within the river segments designated by Congress.<sup>13</sup> Further, the Forest Service contended that

<sup>1</sup> 113 F.3d 110 (8th Cir. 1997).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The Forest Service maintains land and resource protection plans for each national forest. *Id.* at 113. See 16 U.S.C. §1274(d)(1)(1994).

<sup>6</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>7</sup> The Forest Service's plans "provide for multiple use and sustained yield of products and services...coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. §1604(e)(1); see 36 C.F.R. Part 219.

<sup>8</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113. Neither the original management plan nor the environmental assessment met the requirements of 16 U.S.C. §1274(d)(1). *Id.* The original management plans were made pursuant to 16 U.S.C. §1604(e)(1). *Id.* See 36 C.F.R. Part 219.

<sup>9</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* See 16 U.S.C. §§1271 and 1274 (1994). The Wildlife Association also contended that the sales violated the Migratory Bird and Treaty Act (MBTA). *Newton County Wildlife Ass'n*, 113 F.3d at 114. The Wildlife Association claimed that the Forest Service's failure to obtain a special purpose permit from the United States Fish and Wildlife service violated the MBTA. *Id.* The Wildlife Association claimed that the timber sales would harm the nesting migratory bird population in the areas where the timber harvest took place. *Id.* See *infra* notes 27-30 and 44-46 and accompanying text.

<sup>12</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>13</sup> *Id.* at 113.

the WSRA plan need only encompass lands within the designated segment.<sup>14</sup> Consequently, the Forest Service argued that the plans could not affect the timber sales.<sup>15</sup>

The United States District Court for the Eastern District of Arkansas denied the Wildlife Association's motion to preliminarily enjoin the timber sales.<sup>16</sup> The District Court ruled that completion of the WSRA plans was not a prerequisite for such timber sales.<sup>17</sup> However, the Court did find that the plans must encompass areas that may affect a designated river segment, despite lying outside its borders.<sup>18</sup> The Eighth Circuit Court of Appeals affirmed only the first part of the District Court's decision, holding that the WSRA does not require the plans' completion before timber sales may be approved.<sup>19</sup> The Eighth Circuit reversed on the

scope of the plans, holding that the plans were not required because the sales lay outside of the designated areas.<sup>20</sup>

### III. LEGAL BACKGROUND

#### A. Wild and Scenic River Act

The development of federal water policy began in 1902 when Congress passed the Reclamation Act.<sup>21</sup> The Act was an attempt to reclaim the American West from the desert through irrigation.<sup>22</sup> In 1920 Congress passed the Federal Power Act, calling for the development of the country's rivers and creating the Federal Energy Regulatory Commission.<sup>23</sup> However, since the mid-1960s the general population and the government have expressed growing concern for the country's environmental resources.<sup>24</sup> Federal regulation regarding river resource protection has continued to evolve.<sup>25</sup>

In 1968, Congress passed the Wild and Scenic River Act (WSRA).<sup>26</sup> Congress stated that the policy of the United States was that certain rivers and their immediate environments that possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values" should be maintained and preserved in their "free-flowing" condition.<sup>27</sup> Further, Congress established that both the river segments and their immediate environments were to be protected.<sup>28</sup> Congress also established that the national policy of building dams and other river construction needed to be complimented by a law and policy that would protect and preserve rivers in their original condition.<sup>29</sup> Congress enacted the WSRA to "protect the water quality of such rivers and to fulfill other vital

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 112. After the District court denied this preliminary injunctive relief under the WSRA, the Wildlife Association filed its second motion for a preliminary injunction claiming that the Forest service violated the MBTA. *Id.* at 114. See *supra* note 11. The District court denied this motion, claiming that it did not have jurisdiction over such a claim and that such claims were subject to judicial review under the National Forest Management Act. *Id.* See *infra* notes 44-46.

<sup>17</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The Eighth Circuit Court of Appeals also affirmed the District Court's ruling regarding the MBTA. *Id.* at 114. The Court held that the MBTA does not apply to government agencies. *Id.* at 115. The court also held that its views and conclusions were tentative because the agency responsible for administering and enforcing the statute, the Fish and Wildlife Service, has agency discretion not subject to judicial review in determining who must obtain MBTA permits for timber sales. *Id.*

<sup>21</sup> Ch. 1093, 32 Stat. 388 (1902) (codified as amended in sections of 43 U.S.C.). Eric L. Hiser, *Piloting the Preservation/Development Balance on the Wild and Scenic Rivers*, 1988 DUKE L.J. 1044, 1046 (1988). See entire article for a detailed historical analysis of the WSRA. See also Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970).

<sup>22</sup> Hiser, *supra* note 21, at 1046.

<sup>23</sup> Ch. 285, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§791a-825r). See Hiser, *supra* note 21, at 1046. See also MARC REISNER, *CADILLAC DESERT* 115-24, 179-81 (1987) (detailing the federal commitment to irrigation, hydropower production and dams).

<sup>24</sup> Hiser, *supra* note 21, at 1046.

<sup>25</sup> *Id.*

<sup>26</sup> Pub. L. No. 90-542, 82 Stat. 906 (1968) (codified as amended at 16 U.S.C. §§1271-1287 (1994)).

<sup>27</sup> 16 U.S.C. §1271.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

national conservation purposes."<sup>30</sup>

Under the WSRA, either Congress<sup>31</sup> or a state legislature<sup>32</sup> can designate a river as a wild and scenic river. Congress sought to ensure full consideration of both the preservation and development values of each designated wild and scenic river before it was designated under the statute.<sup>33</sup> The WSRA requires that before attempting to classify a river segment, an agency seeking protection of a river segment must prepare a report for circulation to relevant federal agencies.<sup>34</sup> The report must show "the characteristics which make the area a worthy addition to the system; the current status of land ownership and use in the area; [and] the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included."<sup>35</sup> Unless the lands to be included are entirely federally owned, the agencies are required to consult with the respective state.<sup>36</sup> By creating these formal require-

ments for WSRA protection, Congress wanted to ensure that each designation would best serve the nation by assuring that planning for preservation and development values both occur at the beginning stage.<sup>37</sup>

In 1986, Congress amended the WSRA, requiring the agency responsible for the designated river segment to prepare a comprehensive management plan ("WSRA plan") discussing protection of the river values.<sup>38</sup> This comprehensive management plan was required to "address resource protection, development of lands and facilities, user capacities, and other management practices necessary and desirable to achieve the purposes of the WSRA."<sup>39</sup> The responsible agency must prepare a WSRA plan within three fiscal years from the date of designation.<sup>40</sup> Further, the statute states that the plan must "be coordinated with and may be incorporated into resource management planning for affected adjacent Federal lands (emphasis added)."<sup>41</sup>

In addition to the WSRA plan, the Forest Service is required by statute to maintain land and resource management plans for each national forest.<sup>42</sup> The plans provide for the use and yield of forest products and for the coordination of outdoor recreation, timber, wildlife and fish, and wilderness.<sup>43</sup>

Each designated river segment becomes a component of the national river system.<sup>44</sup> Following the designation of a particular river segment, the responsible agency must define the boundaries of each river component within one year of the designation, determining how much land adjacent to the river is included in the designation.<sup>45</sup> The act specifically requires that the boundaries shall include an average of not more than three hundred and twenty four acres per mile from the ordinary high water mark on both sides of the river.<sup>46</sup>

The WSRA restricts the jurisdiction and discretion of administrative agencies in dealing with designated wild and scenic rivers.<sup>47</sup>

<sup>30</sup> *Id.*

<sup>31</sup> 16 U.S.C. §1273(a)(i) (1994).

<sup>32</sup> 16 U.S.C. §1273(a)(ii) (1994). These rivers can only become part of the system if designated by a state legislature and approved by the Secretary of the Interior (the §2(a)(ii) process). *Id.* Rivers designated in this manner shall be administered by the state without expense to the federal government except for the management of federally owned lands. *Id.*

<sup>33</sup> Hiser, *supra* note 21, at 1049.

<sup>34</sup> 16 U.S.C. §1275(a) (1994).

<sup>35</sup> *Id.*

<sup>36</sup> 16 U.S.C. §1275 (b).

<sup>37</sup> Hiser, *supra* note 21, at 1050.

<sup>38</sup> Pub. L. No. 99-590, 100 Stat. 3330 (1986) (codified in scattered sections, including 16 U.S.C. §1274(d)(1) (1994)). The "river values" referred to are those defined in §1271.

<sup>39</sup> 16 U.S.C. §1274(d)(1) (1994) (Forest and Rangeland Renewable Resources Planning Act).

<sup>40</sup> *Id.* The plans must be published in the Federal Register. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 16 U.S.C. §1604(e)(1) (1994). *See supra* note 7.

<sup>43</sup> 16 U.S.C. §1604(e)(1) (1994).

<sup>44</sup> 16 U.S.C. §1274(a) (1994).

<sup>45</sup> 16 U.S.C. §1274(b) (1994). Congress allows a different date if it is provided for in subsection (a). *Id.* Notice of the boundaries and classification must be published in the Federal Register and are not effective until ninety days after being forwarded to the President and Speaker of the House. *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See* 16 U.S.C. §1278(a) (1994) (restricting the Federal Energy Regulatory Commission and any other department or agency of the United States from licensing the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other works under the Federal Power Act after the designation of such a river segment).

Congress prohibited agencies from permitting developments which would adversely affect the values for which the river segment was designated.<sup>48</sup> The responsible agency must protect its "aesthetic, scenic, historic, archeologic, and scientific features."<sup>49</sup> Congress required that the Secretary of the Interior or, where national forest lands are involved, the Secretary of Agriculture, must be notified if the construction of a project would conflict with these purposes.<sup>50</sup>

The WSRA states that the head of the federal agency with jurisdiction over any lands which "include, border on, or are adjacent to" any river included within the system, shall take action respecting management policies, regulations, contracts, and plans affecting such lands.<sup>51</sup> These actions must be taken as necessary to protect river

segments in accordance with the purposes of the WSRA.<sup>52</sup>

#### B. *Wilderness Society v. Tyrrel*<sup>53</sup>

In 1990, the Ninth Circuit decided a case of first impression regarding timber sales in an area adjacent to another area protected by the WSRA.<sup>54</sup> At issue was the Forest Service's proposed sale of timber wood damaged by fire from an area located immediately around portions of the South Fork of the Trinity River, an area protected by the WSRA.<sup>55</sup> The South Fork of the Trinity River became part of the WSRA through the §2(a)(ii) process<sup>56</sup> after being approved by the Secretary of the Interior in early 1981.<sup>57</sup>

The District Court found that the proposed salvage sale violated the WSRA, and issued an

injunction.<sup>58</sup> The Court found that the WSRA mandated that the Forest Service prepare a WSRA plan prior to conducting land management activities.<sup>59</sup> The Court also found that the Forest Service's own manual dictated the need for a management plan before timber sales could be made.<sup>60</sup>

On appeal, the Ninth Circuit framed its analysis by identifying three issues.<sup>61</sup> The first issue was whether the WSRA required a comprehensive management plan before land management activities could take place on lands located in or adjacent to areas designated by the §2(a)(ii) process.<sup>62</sup> The second issue dealt with whether the Forest Service's own guidelines mandated that WSRA plans be completed before such sales could take place.<sup>63</sup> Third, the Court discussed the Forest Service's legal duty to protect the

<sup>48</sup> Hiser, *supra* note 21, at 1051 (citing 16 U.S.C. §1278(b)).

<sup>49</sup> 16 U.S.C. §1281(a) (1994). This section links agency planning and administration to the designated areas. *Id.* 16 U.S.C. §1281 reads:

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. In such administration primary emphasis shall be given to protecting its esthetic, scenic; historic, archeologic, and scientific features. 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. *Id.*

<sup>50</sup> 16 U.S.C. §1278(c) (1994).

<sup>51</sup> 16 U.S.C. §1283(a) (1994).

<sup>52</sup> *Id.* 16 U.S.C. §1283 reads:

The Secretary of the Interior, the Secretary of Agriculture, and the head of any other Federal department or agency having jurisdiction over any lands which include, border upon, or are adjacent to, any river included within the National Wild and Scenic Rivers System or under consideration for such inclusion...shall take such action respecting management policies, regulations, contracts, plans, affecting such lands...as may be necessary to protect such rivers in accordance with the purposes of the chapter. *Id.*

<sup>53</sup> 918 F.2d 813 (9th Cir. 1990) [hereinafter *Wilderness Soc'y II*].

<sup>54</sup> See *id.* See also Clifford I. Levenson, *Wetlands and Scenic Rivers*, 21 ENVTL. L. 1245 (1991).

<sup>55</sup> *Wilderness Soc'y II*, 918 F.2d at 815.

<sup>56</sup> See *infra* note 80 for a detailed explanation of the §2(a)(ii) process.

<sup>57</sup> *Wilderness Soc'y II*, 918 F.2d at 815 (citing 46 Fed. Reg. 7484 (Jan. 23, 1981)). According to the *Wilderness Soc'y* court, there were numerous complaints that the process was unduly rushed at the end of the Carter administration for political reasons. *Id.* (citing Andrews & Buchsbaum, *Federalism and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417 (1984)).

<sup>58</sup> See *Wilderness Soc'y v. Tyrrel*, 701 F.Supp. 1473, (E.D. Cal. 1988) [hereinafter *Wilderness Soc'y I*].

<sup>59</sup> *Wilderness Soc'y I*, 701 F.Supp. at 1487.

<sup>60</sup> *Id.* at 1488.

<sup>61</sup> *Wilderness Soc'y II*, 918 F.2d at 815.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

designated river segments under the WSRA and whether these duties were satisfied.<sup>64</sup>

The Court began by examining the WSRA's purpose in placing restrictions on water resource projects, federal mining, and mineral leases affecting lands within the system.<sup>65</sup> The Court recognized that the river area's administration must protect the values that justified the river's designation.<sup>66</sup> The Court also recognized that these restrictions were placed on federal agencies engaged in projects around designated river segments.<sup>67</sup>

The first issue was whether the WSRA required a federal agency to prepare a comprehensive management plan before land management activities take place on lands in or adjacent to WSRA river segments.<sup>68</sup> The District Court relied on the language in §1283(a) to hold that the agency was required to create "manage-

ment policies, regulations, contracts, [and] plans" to protect the designated river segments.<sup>69</sup> The Ninth Circuit held that §1283(a) required agencies to consider the values as stated in the WSRA when conducting an independent project or plan.<sup>70</sup> While recognizing this as a "subtle" distinction, it found that this differed from a mandatory procedural requirement, in that responsible federal agencies prepare a plan under the act itself.<sup>71</sup>

The Wilderness Society contended that the language in §1281 mandated the preparation of WSRA plans by the Forest Service.<sup>72</sup> Because there was no express language in the statute requiring the WSRA plan, the Court held that it could not infer that a plan was required before land management activities could take place.<sup>73</sup>

The Court also held that language in §1274(d) did not apply to river segments designated under the §2(a)(ii) process prior to the

1986 amendment.<sup>74</sup> It found that this section's requirement that the managing agencies review existing plans was not the same as requiring the creation of plans before the amendment was passed.<sup>75</sup> The Court did note that under the statutory scheme preceding the 1986 amendment, the WSRA only expressly required that a managing agency develop comprehensive management plans for rivers designated by Acts of Congress.<sup>76</sup> However, while the Court was not willing to impose its own notions of procedural priority, it noted that "the preparation of comprehensive management plans prior to embarking on land management activities would be a prudent measure to ensure that the purposes of the Act are being respected."<sup>77</sup>

The second issue addressed by the Ninth Circuit was the District Court's ruling that the Forest Service Manual required that a management plan must be

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 816.

<sup>67</sup> *Id.* (citing 16 U.S.C. §1283(a)).

<sup>68</sup> *Id.* at 815.

<sup>69</sup> *Id.* at 817. See *supra* note 52 for the exact language of §1283.

<sup>70</sup> *Wilderness Soc'y II*, 918 F.2d at 817.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* See *supra* note 49 for the exact language of §1281.

<sup>73</sup> *Wilderness Soc'y II*, 918 F.2d at 817. The Court noted that its ability to interpret statutes does not provide it the ability to add statutory requirements. *Id.*

<sup>74</sup> *Id.* Section 1274(d) states in pertinent part:

(1) For rivers designated on or after January 1, 1986, the Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall prepare a comprehensive management plan for such river segments...

(2) For rivers designated before January 1, 1986, all boundaries, classifications, and plans shall be reviewed for conformity within the requirements of this subsection within 10 years through regular agency planning processes. 16 U.S.C. §1274(d)(1994).

<sup>75</sup> *Wilderness Soc'y II*, 918 F.2d at 817-18.

<sup>76</sup> *Id.* at 818.

<sup>77</sup> *Id.*

prepared.<sup>78</sup> Like the requirement in the WSRA, the Court held that the legislation did not require a time limit for plans for lands designated prior to 1986.<sup>79</sup>

Finally, the Ninth Circuit analyzed §§1281 and 1283, which laid out management requirements for federal agencies with jurisdiction over lands covered by the WSRA.<sup>80</sup> The Forest Service argued that the WSRA was not applicable because the timber sales at issue rested on lands a quarter of a mile from the river.<sup>81</sup> The Court interpreted §1283(a) to give federal agencies jurisdiction over activities either within or adjacent to the river system.<sup>82</sup> The proposed sale of timber, it concluded, could impact the river's protected values and was subject to the laws of the WSRA.<sup>83</sup> Ultimately, the Court determined that the issue of whether the proposed sales violated the WSRA's purposes was a

question of fact and remanded the case for a factual determination as to whether the Forest Service fulfilled its obligations under the WSRA.<sup>84</sup>

#### IV. THE INSTANT DECISION

In *Newton County Wildlife Association v. U.S. Forest Service*,<sup>85</sup> a case of first impression in the Eighth Circuit, the Court dealt with two primary issues in deciding whether the Forest Service's four timber sales violated the WSRA and warranted an injunction.<sup>86</sup> The first question involved determining whether the Forest Service must complete comprehensive management plans as described in 16 U.S.C. §1274(d)(1) before approving timber sales.<sup>87</sup> The second issue involved whether the WSRA required management plans, given that the timber sales lay outside of the protected regions as designated by Congress.<sup>88</sup>

The timber sales at issue were approved between August 23, 1994, and September 12, 1995.<sup>89</sup> The three-year deadline for the completion of the WSRA plans was September 30, 1995.<sup>90</sup> The Wildlife Association argued that because the WSRA plans were not completed within the three-year deadline, the Forest Service's four timber sales must be preliminarily enjoined until the agency completed the WSRA plans.<sup>91</sup> In support of its argument, the Wildlife Association relied on cases involving situations where plans or studies were a statutory precondition to the agency actions under review.<sup>92</sup>

The Court found that the WSRA did not mandate completion of the WSRA plan before timber sales may be approved.<sup>93</sup> It thus concluded that the Forest Service did not violate agency law by approving the timber sales while the management plans were still in the

<sup>78</sup> *Id.* The Wilderness Society relied on §2354.32 of the Forest Service Manual entitled "River Management Plan." *Id.* It reads:

Manage river areas which either Congress or the Secretary of the Interior designates as components of the National Wild and Scenic Rivers Systems in accordance with the requirements of the Act . . . Forest Supervisors shall prepare and approve an implementation plan for each river area included in the NW & SRS by (a) Act of Congress or (b) Secretary of the Interior designation under §2(a)(ii) of the Act. When a river crosses more than one National Forest, the Forest Supervisors involved shall jointly prepare and approve the implementation plan. Complete the plan by the date specified in the legislation or within three years after designation by the Secretary of the Interior, for rivers designated on or after January 1, 1986. Forest Service Manual §2354.32 (Region 5 Supp. 165) (July 1988).

<sup>79</sup> *Wilderness Soc'y II*, 918 F.2d at 818.

<sup>80</sup> *Id.* at 819.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 820.

<sup>85</sup> 113 F.3d 110 (8th Cir. 1997).

<sup>86</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* See *Kleppe v. Sierra Club*, 427 U.S. 390, 398-402 (1976) (National Environmental Policy Act); *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 402 (9th Cir. 1988) (Federal Power Act); *Thomas v. Peterson*, 753 F.2d 754, 763-64 (9th Cir. 1985) (Endangered Species Act). The Court concluded that there was not statutory precondition in this case. *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>93</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

planning process.<sup>94</sup> Further, the Court found that the Forest Service was not required to suspend the timber sales until the plans were completed.<sup>95</sup> The Court held that absent statutory direction, failure of an agency to meet a mandatory time limit does not void agency action.<sup>96</sup>

The Court also asserted that an agency has substantial discretion in deciding procedurally how it will meet its obligations.<sup>97</sup> It reasoned that because the Forest Service amended its own management plan to take into account the 1992 WSRA designations and because it prepared an environmental assessment plan before approving the timber sales, the Forest Service met its own procedural requirements before approving the sales.<sup>98</sup> The Court stated that the Forest Service did not rely on the WSRA plans as evidence of its compliance with the statute.<sup>99</sup> Since there was nothing in the WSRA requiring that WSRA plans be completed before timber sales were approved, the Court concluded that

the agency's procedural autonomy would be usurped if it were required to complete such plans.<sup>100</sup>

The Forest Service argued the four timber sales lay outside the boundaries of the designated river segments.<sup>101</sup> The Court noted that the Wildlife Association failed to refute that contention.<sup>102</sup> On appeal, the Forest Service argued that the WSRA plans need only encompass lands lying within a designated segment, and its failure to complete the plans could not affect the timber sales.<sup>103</sup> The Court applied the plain meaning rule in finding that the planning requirement only related to the designated river segments.<sup>104</sup> Moreover, the Court found failure to complete the plans on time could not be a basis for enjoining timber sales on lands lying outside any designated area.<sup>105</sup> According to the Court, §1281(a), which links planning and administration by the agency to the designated component, confirmed this application of the plain meaning rule.<sup>106</sup> Because of this interpretation, the Court

found that WSRA plans were limited to lands lying within the designated river segments, and that failure to prepare plans in a timely manner was not a basis for enjoining timber sales on outside areas.<sup>107</sup>

Nonetheless, in Footnote 4 the Court recognized that the WSRA<sup>108</sup> imposes a responsibility on agencies for lands "which include, border upon, or are adjacent to" designated river segments.<sup>109</sup> The Court concluded, however, that §1283(a) did not require agencies that own lands adjacent to these river segments to prepare WSRA plans, but only to take actions that protect these river segments.<sup>110</sup>

#### V. COMMENT

Since its adoption in 1968, courts and agencies have struggled with the interpretation of the WSRA.<sup>111</sup> The WSRA's language has caused these reviewing tribunals difficulty in conforming with Congress' goals.<sup>112</sup> *Newton County* and *Wilderness Society* exemplify this difficulty. Both cases are

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing *Brotherhood of Ry. Carmen v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) (Federal Railroad Administration deadline requiring a petition for reconsideration in four months); *Kinion v. United States*, 8 F.3d 639, 644 (8th Cir. 1993) (Farmer's Home Administration 60-day time limit to provide buyout information to debtors)).

<sup>97</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113 (citing *Sierra Club v. Cargill*, 11 F.3d 1545, 1548 (10th Cir. 1993)).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* In Footnote 2, the Court said that a party who is damaged by an agency's failure to meet a statutory planning deadline may seek a court order requiring the agency to complete the plan. *Id.* (citing *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986)). The Court noted that the Wildlife Association did not separately challenge the Forest Service's failure to prepare WSRA plans. *Id.*

<sup>101</sup> *Id.* See *supra* Section III.A for the detailed boundary requirements.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 16 U.S.C. §1283(a) (1994).

<sup>109</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113.

<sup>110</sup> *Id.*

<sup>111</sup> *Hiser*, *supra* note 21, at 1045.

<sup>112</sup> *Id.*

matters of first impression in their respective jurisdictions, dealing with the statutory requirement of comprehensive management plans as required in §1274(d)(1) of the WSRA. While the Ninth Circuit made a sound decision based on the language of §1274(d)(1), the Eighth Circuit, while reaching a desirable result, confused an already complicated WSRA. Further, the Eighth Circuit's interpretation relaxed statutory requirements that Congress expressly stated, opening the door to environmental abuse in areas located in and around those protected by the WSRA.

#### A. The Eighth Circuit

The first issue raised in the Eighth Circuit's decision was whether WSRA plans were required before the timber sales could be made.<sup>113</sup> The timber sales were approved prior to the agency's deadline.<sup>114</sup> The Forest Service was not required to suspend the implementation of the timber sales when it failed to complete the plans on time.<sup>115</sup> If the timber sales were made subsequent to the deadline, however, it seems that the Court should have reached a different result in order to protect the river's values. The Court was quick to conclude, however, that based on the language in §1274(d)(1), completion of WSRA plans was not a prerequisite for the approval of timber sales.<sup>116</sup> The Court thus

suggested that the Forest Service could have approved timber sales after September 30, 1995, when the WSRA plans were due, even if the WSRA plans were not completed.

The statute provides that the management plans address "resource protection . . . and other management practices necessary to achieve the purposes of [WSRA]."<sup>117</sup> The Court seemed to imply that because the statute does not specifically state that the plans are required before timber sales can be approved, that plans are not required. Obviously, Congress could not take into account every situation in which a river segment's resources might be affected. However, the designation by Congress and the policy and purpose in the statute, imply that it is in situations in which resources are affected, like the sale of timber, that plans are needed.

Further, the Court in *Newton County* noted that the Forest Service prepared its own environmental assessment before approving the timber sales and did not rely on WSRA plans as evidencing its compliance with the WSRA.<sup>118</sup> The Court held that ". . . absent statutory directive, we would usurp the agency's procedural autonomy if we compelled it to channel its compliance efforts into a particular planning format."<sup>119</sup> It seems that §1274(d)(1) provides this statutory directive, requiring that plans be

made within three fiscal years.<sup>120</sup> From this very language, however, the Eighth Circuit would not require a WSRA plan (only some agency plan), even if the timber sales occurred after the three-year deadline had passed because the statute did not specifically require a WSRA plan.

While Congress did not expressly require that on-going land management activities be halted when the three-year deadline is violated, it seems clear that land management activities should not be started after this three-year deadline is violated. Section 1274 implies that WSRA plans are a prerequisite to land management activities even if other agency plans are required. Only once these WSRA plans are completed may they then be incorporated into the agency's own management plans. This would protect both the purpose and the policy of the WSRA.<sup>121</sup>

The second issue the Eighth Circuit addressed was whether WSRA plans were required when timber sales occur on an area adjacent to protected lands.<sup>122</sup> The language in § 1274 requires that WSRA plans are to be coordinated with "resource management planning for affected adjacent Federal lands."<sup>123</sup> It is clear in this case that the lands where the timber sales occurred were Federally owned.<sup>124</sup> The Court relied on what it called the

<sup>113</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> 16 U.S.C. §1274(d)(1) (1994).

<sup>118</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113.

<sup>119</sup> *Id.*

<sup>120</sup> 16 U.S.C. §1274(d)(1) (1994).

<sup>121</sup> See *supra* notes 27-32 and accompanying text.

<sup>122</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

<sup>123</sup> 16 U.S.C. §1274(d)(1) (1994).

<sup>124</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 112.

plain meaning of §1274.<sup>125</sup> It seems quite clear that nowhere in this section does Congress limit the planning requirement to the boundaries of the river segment. Instead of only using the "plain meaning" of §1274 to determine Congress's intent, the Court should have looked to other statutes, specifically §§1271, 1281(a), and 1283(a).

Section 1271 protects both river segments and their "immediate environments."<sup>126</sup> Requiring that adjacent lands be included in WSRA plans before an agency approves action affecting such areas would only further this policy.

The Eighth Circuit reasoned that §1281(a) confirmed its "plain meaning" interpretation of §1274 in that it "links agency planning and administration to the designated components."<sup>127</sup> The Court seemed to imply that this section limits planning and administration to the designated component. However, nowhere in §1281(a) does Congress limit an agency's planning and administration to lands within designated areas. Instead, §1281 states that an agency shall administer lands to protect the values for which the lands were included in the WSRA.<sup>128</sup> Timber sales on lands adjacent to WSRA segments would definitely affect these values. Requiring a plan would only further the WSRA policy.

In a footnote, the Eighth Circuit recognized that §1283(a)

imposes a general obligation on agencies for lands that are adjacent to those areas designated by Congress.<sup>129</sup> The Court concluded, however, that this does not require agencies managing adjacent land to prepare a WSRA plan, only to take actions in protecting the designated rivers and their surrounding areas.<sup>130</sup> Although it is true that §1283 does not expressly require WSRA plans for lands adjacent to those protected under the WSRA, it does state that agencies shall take action respecting management policies and plans as necessary to protect the purposes of the WSRA.<sup>131</sup> In order to respect these policies and plans, it would seem more logical that the courts use this statute to require plans. The Court's argument that it could not create procedural requirements is countered by the fact that §1274 contains this procedural requirement. Section 1283 should have been interpreted to tie this procedural requirement to bordering and adjacent lands. This interpretation would allow for a more consistent statute that protects the purposes of the WSRA.

Although the Eighth Circuit correctly ruled that WSRA plans are not required for agencies invoking timber sales prior to the statutory deadline, its dicta indicates that plans are not required before agencies may approve any timber sales and that adjacent Federally owned lands do not require WSRA plans.<sup>132</sup> Federal agencies may interpret this

ruling to mean that no WSRA plans are required before timber sales may be approved, regardless of whether the property is on or adjacent to the protected lands. This would seem a logical rationalization based on the Court's ruling, yet one that appears to be against Congressional intent.

## B. The Ninth Circuit

In *Wilderness Society*, the Ninth Circuit used a sound analysis in determining that plans are not required. It held that because the language in the statute expressly states that WSRA plans are required only for rivers designated on or after 1986 (the river was designated prior to that), WSRA plans are not required.<sup>133</sup> Further, the pre-amendment act only required WSRA plans for rivers designated by Acts of Congress, not those designated under the 2(a)(ii) process.<sup>134</sup>

It is interesting to question how the Ninth Circuit would have ruled on the facts in *Newton County*. Because the planning deadline was after the timber sales took place, it is very likely the Ninth Circuit would have reached the same result. A likely future factual scenario is one essentially the same as *Newton*, but where the planning deadline has expired.

The Ninth Circuit held that because there is no express language in §1283(a) requiring a WSRA plan, one is not needed

<sup>125</sup> *Id.* See *supra* notes 106-109 and accompanying text.

<sup>126</sup> 16 U.S.C. §1271 (1994). See *supra* notes 27-30 and accompanying text.

<sup>127</sup> 16 U.S.C. §1271 (1994).

<sup>128</sup> 16 U.S.C. §1281(a)(1994). See *supra* note 49 and accompanying text.

<sup>129</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113 (citing 16 U.S.C. §1283(a) (1994)).

<sup>130</sup> *Id.*

<sup>131</sup> 16 U.S.C. §1283(a)(1994).

<sup>132</sup> *Newton County Wildlife Ass'n*, 113 F.3d at 113.

<sup>133</sup> *Wilderness Soc'y II*, 918 F.2d at 819.

<sup>134</sup> *Id.* (citing 16 U.S.C. §1274(b) (1982)).

before management activities can take place.<sup>135</sup> Because §1281(a) does not contain the express requirement for WSRA plans, the Ninth Circuit saw no need for WSRA plans prior to conducting land management activities on federal lands adjacent to or within designated segments.

The *Wilderness Society* court used logic similar to its §1281 analysis in determining that §1283 does not require WSRA plans. It held that while the statute requires agencies to take action respecting WSRA policies and plans, the WSRA does not mandate the formulation of a plan as a procedural requirement.<sup>136</sup>

The Ninth Circuit held that §§1281(a) and 1283(a) do not require the preparation of WSRA plans before land management activities can take place. The Court also stated, however, that "the preparation of comprehensive management plans prior to embarking on land management activities would be a prudent measure to ensure that the purposes of the Act

are respected."<sup>137</sup> The Ninth Circuit was unable to impose notions of procedural priority in *Wilderness Society*.<sup>138</sup> Based on this conflicting reasoning, it is unclear how the Ninth Circuit would decide a case in which the timber sales occurred after the WSRA plan deadline had expired. However, the Ninth Circuit seemed to use §§1281(a) and 1283(a) to interpret the requirements of §1274. It seems highly possible that the Ninth Circuit could have interpreted these sections differently had a WSRA plan been required under §1274.

It is interesting to note that while the Eighth Circuit used this §1281 and §1283 analysis to determine that WSRA plans are not required for lands adjacent to designated river segments, the Ninth Circuit used these sections to determine that management plans are generally not required. This exemplifies the poor statutory language used in the Act and the difficulty suffered by courts in interpreting it. It would seem more

logical that the courts use these sections of the Act to tie agency planning and administration together, while using the express language in §1274 to determine if a WSRA plan is actually required.

## VI. CONCLUSION

Because of the vague statutory language used in §1281(a) and §1283(a), courts will continue to struggle with the interpretation of §1274, requiring the development of comprehensive management plans. The opinion in *Newton County* could have clarified the WSRA by examining the holding in *Wilderness Society* and the broad intentions of Congress. Instead the Eighth Circuit continued to muddy the waters in its interpretation of the WSRA and abolished the plain and logical intentions of Congress. The result will be continued struggles with whether a comprehensive management plan is required for lands that affect those protected by the WSRA. Ultimately, it could open the door for abuse by agencies that control these lands.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 818.

<sup>138</sup> *Id.*