MAUSOLF V. BABBITT: CHALLENGING GOVERNMENT ACTION UNDER THE ENDANGERED SPECIES ACT

I. OVERVIEW

Voyageurs National Park (Park), created by Congress in 1971, is located in Northern Minnesota, adjacent to the Canadian border.[1] The Park is home to bald eagle and gray wolf populations, both of which are classified as threatened species under the Endangered Species Act (ESA).[2] In August 1991, after completing a revised Environmental Impact Statement for the Park, the National Park Service (NPS) recommended closing certain trails in the Park to snowmobile use.[3] The NPS feared that continued snowmobile access might adversely impact the local gray wolf population.[4] The NPS requested a Biological Opinion from the Fish and Wildlife Service (FWS) investigating this matter.[5] Despite the fact that the NPS could not produce any empirical evidence of harm, the FWS concluded that snowmobiles could have an adverse impact on the gray wolves.[6] In December 1992, the Park Superintendent closed sixteen of the Park's bays and certain shoreline areas to "motorized access" during winter.[7] Plaintiffs, members of a snowmobile association, challenged the closure, claiming that the decision was not adequately supported by the NPS's information.[8] The NPS, in turn, challenged plaintiffs' standing to bring the action under Article III of the United States Constitution and the Administrative Procedure Act (APA).[9] The United States District Court for the District of Minnesota held that plaintiffs met the standing requirement of Article III and the APA, and that the NPS decision to close certain areas of the park was not supported by "the evidence before the agency." *Mausolf v. Babbitt,* 913 F. Supp. 1334 (D. Minn. 1996).

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1. *See* Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996).
2. *See id.* at 1337.
3. *See id.* at 1339.
4. *See id.*
5. *See Mausolf*, 913 F. Supp. at 1339.
6. *See id.*
7. *See id.* at 1340.
8. *See id.* at 1336, 1343.
9. *See Mausolf*, 913 F. Supp. at 1336. *See generally* Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1994); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992) (discussing the Supreme Court's development of the Article III test).

II. BACKGROUND

In 1973, Congress enacted the Endangered Species Act (ESA)[10] "to protect America's endangered and threatened wildlife."[11] In passing the Act, Congress declared "that all Federal departments and agencies shall seek to conserve endangered species and threatened species."[12] Pursuant to this policy, the ESA requires federal agencies to consult with the Department of the Interior to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species."[13]

To enforce this provision, the ESA mandates that all federal agencies consult with the Secretary of the Interior before undertaking any action, so as to determine whether endangered species exist in the area.[14] If endangered species are present, the agency must conduct a Biological Assessment to determine whether the action will likely jeopardize the species.[15] The ESA bars any federal action that will likely jeopardize a listed species.[16]

In analyzing the effect of an action, the agency must use "the best scientific and commercial data available."[17] The First Circuit has stated that compliance with this section requires a "first class effort" by the agency that should include "'any . . . tests and studies which are suggested by the best available science and technology.'"[18] The First Circuit has also suggested that an agency must take all "practicable" steps in conducting a Biological Assessment.[19]

The ESA also provides that when a species is listed as threatened or endangered, the Secretary of the Interior "shall issue such regulations as he deems necessary and advisable to provide for the conservation of

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10. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

11. *Mausolf*, 913 F. Supp. at 1336.

12. 16 U.S.C. § 1531(c)(1).

13. *Id.* § 1536(a)(2).

14. *Id.* § 1536(a)(3).

15. *See* 50 C.F.R. § 402.02 (1995). Federal regulations define "jeopardize" as: "to engage in an activity or program which reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species." *Id.*

16. 16 U.S.C. § 1536(a)(2); *see* Village of False Pass v. Watt, 565 F. Supp. 1123, 1154 (D. Ark. 1983).

17. 16 U.S.C. § 1536(c)(1).

18. Conservation Law Found. v. Watt, 560 F. Supp. 561, 571-72 (D. Mass. 1983) (quoting Roosevelt Campobello Int'l Park Comm'n v. United States Envtl. Protection Agency, 684 F.2d 1041, 1052 n.9 (1st Cir. 1982)).

19. *Roosevelt Campobello Int'l Park Comm'n,* 684 F.2d at 1055.

such species."[20] Courts have held that this section is not discretionary, but instead places an affirmative duty on the Secretary to protect the species and bring it back to the point where it can be removed from the endangered species list.[21]

The ESA also reaches the private sector, making it unlawful for a person to "take" any species listed as endangered or threatened.[22] The ESA defines "take" broadly to include, inter alia, "harassment" and "harm."[23] Federal regulations further define these terms and, again, do so in a broad manner. The regulations define "harassment" to include activities that "significantly disrupt normal behavioral patterns. . . ."[24] "Harm" covers any act that significantly modifies or degrades an endangered species' habitat.[25]

It is clear from the language of the statute and the regulations that the ESA "mandates *affirmative preservation* of endangered life."[26] The United States Supreme Court has recognized the importance with which Congress viewed this duty. In *Tennessee Valley Authority v. Hill*,[27] the Court noted that "[t]he legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species."[28]

It was against this statutory backdrop that the NPS moved on the issue of snowmobile and motor vehicle access in the Park. In August 1991, after completing an Environmental Impact Statement, the NPS determined that snowmobiling on land trails might have an adverse

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20. 16 U.S.C. § 1533(d).

21. *See* Sierra Club v. Clark, 577 F. Supp. 783, 787 (D. Minn. 1984); *see generally* North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980).

22. 16 U.S.C. § 1538(a)(1)(B)-(D); *see Mausolf*, 913 F. Supp. at 1336.

23. *See Mausolf*, 913 F. Supp. at 1336; 16 U.S.C. § 1532 ("The term 'take' means to harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.").

24. 50 C.F.R. § 17.3 (1995).

25. *Id.* The Supreme Court upheld the Secretary of the Interior's definition of "harm" in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2417 (1995). The Court found the Secretary's interpretation reasonable given the ordinary understanding of the word "harm" and the broad purpose of the ESA to protect endangered species. *Id.*

26. *North Slope Borough*, 642 F.2d at 607.

27. 437 U.S. 153 (1978).

28. *Id*. at 177. Given such a clear statement of congressional intent, the Court in *Tennessee Valley Authority* enjoined construction of a nearly completed dam because the resulting reservoir would destroy the critical habitat of the snail darter, an endangered fish. Up to that point, the TVA had already spent nearly $29 million on the project. *Id.* at 158 n.5. Following the decision in *Tennessee Valley Authority v. Hill*, Congress amended the ESA. *See* Pub. L. No. 95-632, 92 Stat. 3751 (1978). The Amendments lessened the impact of the *Tennessee Valley Authority* decision. Nevertheless, preservation of endangered species continues to take precedence over other concerns. *Sweet Home*, 115 S. Ct. at 2413.

impact on the Park's gray wolf population.[29] The NPS asked the FWS to investigate this issue more completely.[30]

The NPS could only offer anecdotal evidence of potential harm.[31] There were a few "casual observations" of snowmobiles scaring feeding wolves and of snowmobilers cutting away meat from wolf-killed deer.[32] Beyond this, the NPS could not offer, and the FWS could not find, any empirical evidence of an adverse impact.[33]

Despite the lack of empirical evidence, the FWS agreed that a possible adverse cumulative effect did exist.[34] In March 1992, the FWS recommended closing certain trails and shoreline areas to snowmobiles and motor vehicles.[35] The closures were carried out in December 1992.[36] Prior to the August 1992 action, the NPS and FWS had consistently found that snowmobiles presented little danger to the wolf population.[37]

Since the ESA is implemented by federal agencies, the Administrative Procedure Act (APA) is applicable.[38] The APA outlines procedures for federal agency action. Importantly, it also enables citizens to challenge such agency action. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[39]

The APA's judicial review provision has two requirements. First, a potential plaintiff must identify an agency action that produces an adverse effect.[40] Second, the adverse impact must fall within the "'zone

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29. *See Mausolf*, 913 F. Supp. at 1339.
30. *See id.*
31. *See id.*
32. *See id.* The NPS reported that snowmobiles caused wolves feeding on their kills to flee. It also appeared that snowmobilers were taking away choice cuts of meat from deer killed by wolves. The NPS was concerned that such disruptions in feeding patterns would have an adverse cumulative impact on the wolf population. *Id.*
33. *See Mausolf*, 913 F. Supp. at 1339.
34. *See id.*
35. *See id.* at 1339-40.
36. *See id.* at 1340.
37. *See Mausolf*, 913 F. Supp. at 1338. In its 1989 draft trail plan and 1990 Environmental Assessment, the NPS concluded that snowmobile access presented no more of a long-term threat to wolves than did persons on foot. *Id.*
38. 5 U.S.C. § 551-583, 701-706 (1994).
39. 5 U.S.C. § 702.
40. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882 (1989).

of interests' sought to be protected by the statutory provision whose violation forms the legal basis" of the adverse effect.[41]

In explaining the second factor, the Supreme Court has noted that a party's interest must be "among the *sorts* of interests" a statute was "specifically designed to protect."[42] The Supreme Court has further stated that the "zone of interests" test denies standing to plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[43]

III. THE COURT'S DECISION

The district court first turned to the issue of standing.[44] The defendants initially argued that plaintiffs failed to establish standing under Article III.[45] The court, however, quickly dismissed this claim.[46] It noted that Article III requires plaintiffs to satisfy three factors to establish standing. Plaintiffs must demonstrate that "(1) they have suffered an injury in fact, (2) [that]the injury can fairly be traced to the conduct complained of, and (3) [that] the injury is likely to be redressed by a favorable decision."[47]

After noting that this was not an "onerous burden," the court found plaintiffs satisfied the Article III standing test.[48] Plaintiffs claimed they were injured by the NPS action because they would be prevented from observing wolves in their natural habitat.[49] Moreover, this injury in fact was a direct result of the improper NPS decision to close parts of the Park.[50] A favorable ruling, namely enjoining the enforcement of the closures, would redress the injury.[51] Without offering any discussion, the court agreed with plaintiffs' arguments.[52]

The defendants next argued that the plaintiffs lacked standing under the APA.[53] The defendants asserted that plaintiffs did not satisfy

41. *Id.* at 883; *see also Mausolf*, 913 F. Supp. at 1341.
42. *National Wildlife Fed'n*, 497 U.S. at 886.
43. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987).
44. *Mausolf*, 913 F. Supp. at 1341.
45. *See id.*
46. *Id.*
47. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).
48. *Mausolf*, 913 F. Supp. at 1341.
49. *See id.*
50. *See id.*
51. *See id.*
52. *Mausolf*, 913 F. Supp. at 1341.
53. *See id.*

the "zone of interests" requirement.[54] The defendants alleged that plaintiffs' interests were in recreational snowmobiling, whereas the ESA sought to protect endangered and threatened species from further harm.[55] Defendants argued that since the plaintiffs' claim did not flow from the potential harm to the wolves, their interest fell outside the ambit of the ESA.[56]

The court disagreed with this argument.[57] It first noted that the zone of interests test was "not especially demanding."[58] The test only required a "plausible relationship" between the plaintiffs' interest and the broad policies of the statute.[59]

Turning to the defendants' argument, the court refused to admit that only actions on behalf of endangered species fell within the zone of ESA protection.[60] Instead, the court declared that plaintiffs' aesthetic interest in observing the wolves in their natural habitat was "undeniably a cognizable interest for the purposes of standing."[61] The court went on to state that since plaintiffs' interest would ultimately be served by a thriving wolf population, their interest fell within the zone of interests protected by the ESA.[62]

After settling the standing issues, the court turned to the NPS decision to close trails in the Park.[63] The court acknowledged that the NPS decision deserved substantial deference.[64] The court stated the well-settled principle that "[a] court may overturn agency actions only if they are 'arbitrary, capricious, or manifestly contrary to the statute.'"[65] As long as there is a rational basis for the agency action, it will stand.[66]

The plaintiffs argued, however, that the NPS acted arbitrarily for three reasons: (1) the NPS and FWS did not adequately explain the

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54. *See id.*
55. *See id.*
56. *See Mausolf,* 913 F. Supp. at 1342.
57. *Id.*
58. *Id.* at 1341.
59. *See id.* at 1342.
60. *Mausolf,* 913 F. Supp. at 1342. The court acknowledged that plaintiffs in environmental cases typically seek to force agency action to protect endangered species. *Id.*
61. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992)).
62. *Id.* at 1343.
63. *Id.*
64. *Id.*
65. *Mausolf*, 913 F. Supp. at 1343 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). *See also* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).
66. *See id.*

closures, (2) the NPS and FWS relied solely on anecdotal evidence, and (3) the NPS and FWS failed to consider other important issues.[67]

In light of the evidence the defendants presented, the court agreed that the NPS did not adequately explain the closures.[68] The bulk of the defendant's evidence consisted of general anecdotes of harm, as well as four specific incidents of harm to wolves.[69] Moreover, the only scientific evidence available did not suggest any permanent effect on the wolf population.[70] Based on this review, the court felt compelled to "[find] that the evidence presently in the record is inadequate to establish that curtailing snowmobiling will improve the condition of [the wolf] population."[71]

The defendants finally argued that the closures were rational because of the "generally accepted" principle that increased snowmobile access would lead to increased mortality.[72] The court dismissed this proposition since it failed to explain why snowmobiles should be singled out from other forms of access, such as skiing and hiking.[73]

IV. ANALYSIS

The court's analysis of the zone of interests issue departs from prior zone of interests jurisprudence and raises questions about the court's decision. The court's reasoning seems to flow as follows: the plaintiffs' interest lies in observing wildlife; since a thriving wolf population would benefit this interest, plaintiffs satisfy the zone of interests test.

In *City of Milwaukee v. Block*, the Seventh Circuit explained that the problem of deciding standing under the APA is "'basically one of interpreting congressional intent.'"[74] Thus, the key issue for a court to decide is which interests Congress wanted to protect with the statute. An appropriate analysis of the zone of interests test involves analysis of "all available evidence" of congressional intent, such as other portions of the

67. *See id.*
68. *Id.*
69. *See Mausolf*, 913 F. Supp. at 1343.
70. *See id.*
71. *Id.* at 1344.
72. *Id.*
73. *Mausolf*, 913 F. Supp. at 1343.
74. 823 F.2d 1158, 1165-66 (7th Cir. 1987) (quoting Clarke v. Security Indus. Ass'n, 479 U.S. 388, 394 (1987)).

relevant statute and legislative history.[75] This is the court's duty in applying the test.

R.T. Vanderbilt Co. v. Occupational Safety & Health Review Commission provides an example of a more widely accepted zone of interests analysis.[76] In *R.T. Vanderbilt*, the plaintiff company filed suit to overturn a finding of the Review Commission that a certain product contained asbestos.[77] The Commission made the finding while adjudicating a claim brought by an employee of plaintiff's supplier.[78]

In analyzing the zone of interests, the court turned to the legislative history of the Act.[79] The court noted that this history clearly indicated Congress's intent to protect the interests of employees and to strike a balance between employers and employees.[80] Based on this finding, the court held that granting the plaintiff standing would upset the balance Congress intended to strike.[81] The plaintiffs thus failed to satisfy the zone of interests test.[82]

In the noted case, the court made no such effort to uncover the intent of Congress in passing the ESA. It simply explained that "interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA."[83] However, without looking at available evidence of Congress's intent, this claim seems to be without foundation. As *R.T. Vanderbilt Co.* and *Clarke v. Securities Industry Association* suggest, the district court should have examined the entire ESA and available legislative history to determine Congress's intent in passing the ESA.[84] Without such consideration, the court could not have properly decided that the ESA protected plaintiffs' interest.

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75. *Id.* at 1166. *See also* R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n, 708 F.2d 570, 576 (11th Cir. 1983).

76. 708 F.2d 570 (11th Cir. 1983).

77. *See id.* at 576.

78. *See id.* The supplier was cited for violating asbestos exposure standards in its plant. R.T. Vanderbilt intervened on behalf of the supplier. The Commission determined that one of R.T. Vanderbilt's products contained asbestos. R.T. Vanderbilt filed suit challenging the Commission's finding. *Id.* at 572-73.

79. *Id.* at 577.

80. *R.T. Vanderbilt Co.,* 708 F.2d. at 577. In analyzing congressional intent, the court looked to purpose and policy statements in OSHA, as well as Senate and Conference Committee Reports. *Id.*

81. *Id.*

82. *See id.*

83. Mausolf v. Babbitt, 913 F. Supp. 1334, 1342 (D. Minn. 1996).

84. *See R.T. Vanderbilt Co.*, 708 F.2d at 570; Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987).

The noted case also leaves open the question of what evidence an agency must provide before acting to protect a species. While the court concluded that the NPS's decision was not supported with proper evidence, it gave little guidance as to what evidence the NPS must produce to sustain the Park's closing.[85] While the court stated that anecdotal evidence could be a part of the basis for action, it doubted whether this qualified as the "'best scientific and commercial data available.'"[86]

As previously mentioned, the First Circuit has stated that an agency must "initiate feasible and necessary tests or studies."[87] In the noted case, it appears that the district court believed further scientific studies were possible. The court, however, did not indicate what type of test would be sufficient to support the NPS decision. This lack of guidance makes it difficult to speculate on the future of the closure decision.

Finally, despite this apparent lack of information, it is possible that the court could have allowed the closures to stand. The duty to use the best scientific evidence available does not "[prohibit] agency action when the information necessary to establish jeopardy is unavailable."[88] In such situations, the agency is under a duty to continue to gather necessary information proving compliance with the ESA.[89] Thus, it appears that the court could have allowed the closures to stand while the NPS developed adequate information.

V. CONCLUSION

It is unclear whether future plaintiffs will be able to rely on this decision to satisfy the standing requirements of the APA. A complete examination of congressional intent is still needed to determine what interests fall within the ESA's "zone of interests." *Mausolf v. Babbitt* should not be read to expose the NPS or Department of the Interior to a new class of plaintiffs with aesthetic or recreational interests until such time as congressional intent is fully examined.

However, the noted case may make agency action to protect endangered species in national parks more difficult. Although the court

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85. *See Mausolf*, 913 F. Supp. at 1343-44.

86. *Id.* at 1343 (quoting 16 U.S.C. § 1533(b)(1)(A)).

87. *Village of False Pass*, 565 F. Supp. at 1154.

88. *Id.*; *see also* North Slope Borough v. Andrus, 486 F. Supp. 332, 352 (D.C. 1980), *aff'd in part and rev'd in part*, 642 F.2d 599 (D.C. Cir. 1980).

89. *See Village of False Pass*, 565 F. Supp. at 1154.

opinion does not rule out the use of anecdotal evidence, it does appear to require some form of scientific test or study. This may only serve to create needless difficulty and expense when an agency is attempting to protect an endangered species. Such a result would run contrary to Congress's intention that agencies use "'*all methods* and procedures which are necessary . . . to *prevent* the loss of any endangered species, regardless of the cost.'"[90]

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90. *Roosevelt Campobello Int'l Park Comm'n*, 684 F.2d at 1049 (citations omitted) (quoting *Tennessee Valley Authority*, 437 U.S. at 185, 188 n.34).