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LOOKING THE GIFT HORSE IN THE MOUTH: WILD HORSE MANAGEMENT IN OZARK NATIONAL SCENIC RIVERWAYS

*WILKINS V. LUJAN*¹

by Sarah Madden

FACTS AND HOLDING

In *Wilkins v. Lujan*, Richard Wilkins and Roland Smotherman sued the Secretary of the Interior, Manuel Lujan, and the Superintendent of Ozark National Scenic Riverways, Art Sullivan, in district court to enjoin the park's planned removal of a pack of wild horses living in Ozark National Scenic Riverways at that time.² On appeal, Lujan sought to lift the district court's permanent injunction.³

The horses roamed a 24-mile area in the interior of the 140-mile long park.⁴ Although the number of horses had fluctuated marginally over the years, park officials had most recently estimated the total to be at about twenty.⁵ Some locals believed that the ancestors of the pack might have first roamed

freely in the park during the 1940's or 1950's.⁶

Based on various impact studies and aerial surveys, the park service determined in 1990 that it should take steps to trap and remove the horses.⁷ The park superintendent cited the inability of the horses to overcome environmental factors unique to the park, ranging from food shortages to harsh winters, as well as incompatibility with park use as primary to its decision.⁸

Wilkins and Smotherman, joined by other area residents, filed suit to enjoin the park's removal of the horses, at which time the federal district court issued a temporary restraining order preventing removal.⁹ At the district court trial, Wilkins argued that the feral horses represented a cultural and historical element of the Ozark Riverways re-

gion and should therefore be allowed to continue to roam, pursuant to the purposes articulated in the Ozark Riverways enabling act.¹⁰ The district court stated that the rarely-seen horses were a source of not only local interest, but an attraction for visitors to the area.¹¹

The district court found that the Secretary's plan for removal was subject to review and reversal under the Administrative Procedure Act.¹² The court based its holding on two main issues: first, the Secretary failed to show that the horses were detrimental to the use of the park, and second, the Secretary did not properly assess the horses' value as either a historical or cultural resource.¹³ Therefore, the court held that removal was "arbitrary and capricious" and issued a permanent injunction against removal.¹⁴

On appeal to the Eighth Circuit Court of Appeals, reversed. Held: When the Secretary of the Department of the Interior determines to remove an exotic species from a park based on a record of conflict with the resources of the park, it is neither arbitrary nor capricious.¹⁵

II. LEGAL BACKGROUND

In 1964, Congress enacted legislation to establish Ozark National Scenic Riverways, located in the southern half of Missouri.¹⁶ The establishment provision stated the mission of the new national park was one of "conserving and interpreting unique scenic and other natural values and objects of historic interest ... management of wildlife,

¹ 995 F.2d 850 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 921 (1994).

² *Wilkins v. Lujan*, 798 F. Supp. 557, 558 (E.D.Mo. 1992).

³ *Wilkins v. Lujan*, 995 F.2d 850, 851 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 921 (1994). Ozark National Scenic Riverways encompasses sections of Carter, Dent, Shannon and Texas counties. Included in the park are parts of the Current and Jacks Fork Rivers, as well as Big Springs and Alley Springs. *Id.* at 851.

⁴ *Wilkins*, 798 F. Supp. at 558.

⁵ *Id.*

⁶ *Id.* at 559-60. The origin of these particular horses was not known; residents dated the horses' habitation in the area to at least twenty years before the ban on "open range" in Missouri in the 1960's. National Park policies identify horses as "exotic" species, as scientists estimate that indigenous horses died out as a species in North America around 8000 B.C. Specifically, the National Park Service has defined exotic species as "those that occur in a given place as a result of direct or indirect deliberate or accidental actions by humans . . . [which] would not be a natural component of the ecological system characteristic of that place." *Id.*

⁷ *Id.* at 560.

⁸ *Wilkins*, 995 F.2d at 851. This information was based on impact studies in 1985, 1989, and 1990. The studies noted that the horses ate various types of fauna and crops growing on rented fields in the area and caused some soil erosion in the park, as well. *Id.*

⁹ *Id.* at 852.

¹⁰ *Wilkins*, 798 F. Supp. at 560.

¹¹ *Id.* at 559.

¹² *Wilkins*, 995 F.2d at 852 (citing 5 U.S.C. § 706(2)(A) (1966)).

¹³ *Wilkins*, 995 F.2d at 852.

¹⁴ *Id.*

¹⁵ *Id.* at 852, 853.

¹⁶ 16 U.S.C. § 460m (1964). The statute specified that the total area of the park in terms of purchased land is not to exceed sixty-five thousand acres. *Id.*

and provisions for the use and enjoyment of the outdoor recreation resources by the people of the United States."¹⁷

The statute further provided for cooperation between state and federal agencies with respect to the various preservation and conservation projects which were necessary in the park.¹⁸ Aside from Department of the Interior and National Park Service oversight, the Ozark National Scenic Riverways Commission, made up of state residents, was to advise in the park's functioning for its first ten years of the park's existence.¹⁹

The American National Park System has a fairly long tradition. Its earliest origins are found more than 120 years ago, when Congress first authorized the creation of Yellowstone National Park.²⁰ Congress' most current articulation of the park system's purposes describes its functions as "inter-related," incorporating the protection and management of natural, historical, and recreational areas.²¹ Statutes require the park service to accomplish these objectives "in light of the high public value and integrity of the National Park System ... except as may have been or shall be directly and specifically provided by Congress."²²

In furthering these delineated goals, Congress gave the Park Service considerable responsibility in the supervision of wildlife in each national park. Statutes addressing this area require the Secretary of the Interior to

make necessary and proper general rules concerning operation of the parks.²³ More specifically, the Secretary may also make the discretionary decision to remove or destroy plants or animals that are "detrimental" to park use.²⁴

Courts have acknowledged that this particular decision-making power is not fettered with many rigorous guidelines.²⁵ Rather, the Secretary, via Park Service employees, must make determinations on a case-by-case basis.²⁶ One of the few judge-made standards concerning the park service's wildlife management stated that, in keeping with the Department of the Interior's already broad discretion, the Secretary may act preemptively in the destruction of animals which are expected to damage the parks' native species.²⁷

However, courts have also found that the states in which wild animals are found, rather than the park systems, are the animals' true "owners."²⁸ This state ownership is for the "benefit of the people," and also carries with it the right to regulate the wild animals' removal or destruction, apparently in absence of National Park System action.²⁹ There is the potential for significant dispute in situations where a state policy may be one of protection, or at least non-interference with a certain species, in opposition to actions taken by the National Parks, thus highlighting an inherent conflict between the

powers of the Secretary and the powers of the state.

The same regulatory framework under which most federal agencies operate controls the actions of the National Park System. The Administrative Procedure Act applies to the majority of federal agency actions. The exceptions are those situations in which Congress has drafted agency-specific legislation so broadly that "in a given case there is no law to apply."³⁰ Courts have stressed that the category of unreviewable cases is quite narrow.³¹

When an individual brings an action against an agency, the district court must determine that an agency's actions are in fact reviewable under the Administrative Procedure Act, based on the existence of applicable and directive law.³² The two main indications that an agency's actions are unreviewable are where "there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'"³³

The court will then verify that the plaintiff has standing.³⁴ This issue is also governed by the Administrative Procedure Act, which provides that a "person suffering legal wrong because of agency action . . . is entitled to judicial review thereof," in absence of clear Congressional intent that the agency's actions are not reviewable.³⁵

Assuming the plaintiff meets the additional standing elements traditionally re-

¹⁷ *Id.*

¹⁸ 16 U.S.C. § 460m-4 (1964).

¹⁹ 16 U.S.C. § 460m-6 (1964).

²⁰ 16 U.S.C. § 1a-1 (1970).

²¹ *Id.*

²² *Id.*

²³ 16 U.S.C. § 3 (1958).

²⁴ *Id.*

²⁵ See, e.g., *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 390 (D.Wyo. 1987).

²⁶ See *id.* at 391.

²⁷ *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197, 1201 (10th Cir. 1969), *cert. denied*, 396 U.S. 961 (1969).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 411 (1971) (finding that the decision to route a highway through the park was not "committed to agency discretion," but was clearly constrained by applicable legislative guidelines, namely the Department of Transportation Act and the Federal-Aid to Highway Act; the fact that the guidelines pertained to the issue indicated that there was law to apply).

³¹ *Id.*

³² *Id.*

³³ *Wilkins*, 798 F. Supp. at 561.

³⁴ *Id.*

³⁵ *Id.* Courts have interpreted a "legal wrong" as requiring "some actual or threatened injury as a result of the defendant's allegedly illegal conduct . . . fairly traceable to the challenged action . . . likely to obtain redress by a favorable decision." *Id.* at 560.

quired,³⁶ the court will proceed with analyzing the agency's actions further to decide whether the agency has acted within its authority.³⁷ The appellate review is *de novo*, based on a completely independent review of the administrative record.³⁸ In doing so, the court cannot substitute its judgment for that of the agency in question.³⁹

A reviewing court must then ascertain the appropriate standard of review.⁴⁰ The more common standard requires a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴¹ However, in cases where an agency acted pursuant to formal rule-making procedures or adjudications, the threshold diminishes to some extent.⁴² An additional Administrative Procedure Act clause then requires the action to also be "unsupported by substantial evidence."⁴³ Again, this appears to be a fairly narrow set of exceptions.

Courts have specifically noted that while the Secretary of the Interior's discretion is broad, Congress has often designated a fairly small range of objectives to be accomplished, like those goals set out in the National Park Service's enabling legislation.⁴⁴

Courts must normally defer to an agency's interpretation of any controlling statutes, as the agency's analysis and resulting actions carry a presumption of reasonableness which a challenger must overcome.⁴⁵

However, courts have noted that this does not ensure a "rubberstamp" of all agency acts.⁴⁶ The court will assess whether Congress has articulated its intent on the particular issue.⁴⁷ Presumably, this search does not begin and end with the legislation immediately controlling the agency, but involves a broader examination. In the event the court finds the agency's action to be in conflict with, or perhaps detrimental to Congress' intent, it will hold the action to be invalid.⁴⁸

As they are investigating legislative intent, reviewing courts look to potentially relevant statutes beyond the general management mandate that at least speak to the issue in question, if not specifically mandate a particular policy.⁴⁹ In this regard, one of the most relevant pieces of legislation concerning the presence of wild animals which are not indigenous to a given area is the Wild Free-Roaming Horses and Burros Act.⁵⁰

Here, Congress stated its policy to protect wild horses and burros from capture and

death, as the animals are considered an "integral part of the natural system of the public lands."⁵¹ The act specifies long-term ecological supervision aimed at encouraging both the horses and the surrounding native species to flourish.⁵²

However, the act goes on to define "public land" as that which is regulated by the Bureau of Land Management or the Forest Service.⁵³ Although the statute is not binding on the National Parks, it is this type of judicial investigation that may reveal pertinent issues on the Congressional agenda that aid the adjudication process.

After evaluating both explicit and perhaps even implicit Congressional intent, the reviewing court must examine an agency's actions in light of its adherence to the statutes that govern its activities.⁵⁴ On a broader level, the agency must follow the mandates set out in the Administrative Procedure Act.⁵⁵

As stated previously, the language of the statutes authorizing wildlife control is liberal in terms of the amount of decision-making power the Secretary has.⁵⁶ However, when the Secretary makes the determination that a particular species of wildlife has become

³⁶ *Id.* at 560. The requirements include plaintiffs prove the legal wrong and that their claim is within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*

³⁷ *Id.* at 562.

³⁸ *Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992). The controlling statute is 5 U.S.C. § 553 (1977). *Citizens to Protect Overton Park, Inc.*, 410 U.S. at 413.

³⁹ *Gettler v. Lyng*, 857 F.2d 1195, 1198 (8th Cir. 1988).

⁴⁰ *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 414, 415.

⁴¹ 5 U.S.C. § 706 (1966).

⁴² *Ethyl Corp. v. E.P.A.*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 96 S.Ct. 2662 (1976).

⁴³ 5 U.S.C. § 706 (1966). See *Gettler*, 857 F.2d at 1198. The definition of "arbitrary and capricious" is clearly defined here as situations in which an agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

⁴⁴ *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 414.

⁴⁵ *Arkansas Poultry Fed'n v. U.S.E.P.A.*, 852 F.2d 324, 325 (8th Cir. 1988).

⁴⁶ *Id.*

⁴⁷ *Sierra Club*, 955 F.2d at 1193.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 16 U.S.C. § 1331 (1971).

⁵¹ *Id.*

⁵² 16 U.S.C. § 1332(f)(2) (1971).

⁵³ *Id.* § 1332(e). While Congressional intent may be to protect wild horses, that zone of protection apparently does not extend to National Parks, like Ozark Riverways, at this point.

⁵⁴ *Sierra Club*, 955 F.2d at 1196.

⁵⁶ See *supra* note 25.

detrimental to the use of the park, past National Park Service policy indicates that some amount of investigation is necessary before authorizing destruction or removal.⁵⁷

While Congress has not delineated the level of thoroughness or a required number of impact studies, the agency's evaluation is crucial in the overarching concern of whether its administrative record will support its actions.⁵⁸ Courts have found that this record can even be based on previous, more limited destruction of the particular animal in furtherance of the park's investigation.⁵⁹

Courts have specified that the reviewing court will only take into account the actual record upon which the agency relied, rather than one submitted solely for the use of the district court.⁶⁰ In all areas of federal agency action, courts have consistently held that they will not accept "post hoc rationalization" as a basis for upholding agency acts.⁶¹ Therefore, courts will pay particular attention to the affidavits the agency in question submits to determine if the documents are really reflective of the agency's record in its entirety.⁶²

In the rather complex preliminary case analysis, the plaintiff's argument may break down before the court ever evaluates the merits of the issue. The court must make a series of determinations that are potentially fatal to the case: whether the issue is reviewable, which may be precluded by

statutory construction or extremely wide administrative discretion; whether the plaintiff has standing; the appropriate standard of review; and the authority under which the agency is required to act, whether it be independent or guided by legislation.

Given the discretionary nature of the Secretary of the Interior's role, a successful challenge to the Secretary's actions is the rare exception, rather than the rule.⁶³ Nonetheless, such an exceptional challenge came under scrutiny in the instant decision.

III. THE INSTANT DECISION

A. The Majority Opinion

In overturning the district court's holding and permanent injunction on removal of the horses, the Court of Appeals first determined that the National Park Service acted in its decision-making capacity, rather than its more official functions of rule-making and adjudication, which would indicate review might be unavailable.⁶⁴ Thus, the Court agreed with the court below that the proper standard of review required a reversal of agency policies only if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁶⁵

In keeping with that standard, the Court stated that deference must be given to an agency's reading of its own controlling statutes.⁶⁶ In addition to an acceptance of any "reasonable" legislative interpretation, the

Court found that it must also defer to the agency's development and enforcement of the policies it sets forth to meet its Congressional mandates.⁶⁷

The Court further stated that as this was an agency action review, it must base its judicial findings on an independent, or de novo review of the same record originally examined by the district court.⁶⁸ In making this independent review, the Court then focused on the administrative record which detailed the National Park Service's plan to remove the wild horses.

Noting that some individuals consider horses to be an exotic species, the Court went on to describe the various types of damage the park attributed to the animals.⁶⁹ In particular, it mentioned crop damage and soil erosion, as well as the threat to plants and animals defined as indigenous to Ozark National Scenic Riverways.⁷⁰ Finally, the Court found that the horses created a danger for park users, in that the park had received reports of several people shooting at and harassing the horses.⁷¹

Based on these factors, the Court found that the horses were "in conflict with the purpose of the park, which is to maintain, rehabilitate, and perpetuate the park's natural resources"⁷² The Court stated that not only did the enabling legislation of the National Park Service allow for destruction of animals that were detrimental to park use,

⁵⁷ *Wilkins*, 798 F. Supp. at 562. See *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416 (the reviewing court must determine if the agency based its conclusions on relevant fact, a process that typically requires the agency to educate itself as to possible solutions available; although the agency need not produce a formal finding of fact, the Secretary must reasonably believe "there are no feasible alternatives or that alternatives do involve unique problems").

⁵⁸ *Wilkins*, 995 F.2d at 853.

⁵⁹ *New Mexico State Game Comm'n*, 410 F.2d at 1201.

⁶⁰ *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

⁶¹ *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981) (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 419).

⁶² *Id.*

⁶³ This may lead to consistent results, in that National Park Service actions will almost invariably survive the court's scrutiny, but no easy answers will be found to the legal and ecological questions that will continue to confront the National Parks, the people who use them, and the courts.

⁶⁴ *Wilkins*, 995 F.2d at 853. See also *supra* text accompanying note 32 (stating that the reviewability of these functions is primarily a function of legislative intent).

⁶⁵ *Id.* at 853.

⁶⁶ *Id.* at 853 (citing *Arkansas Poultry Federation*, 852 F.2d at 325).

⁶⁷ *Wilkins*, 995 F.2d at 853.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 852. The Court's finding of fact stated that "reports include the shooting of a mare for her colt, the death of a stallion resisting capture, and the shooting of a horse purportedly to attract coyotes." *Id.*

⁷² *Id.* at 853.

the Secretary could take early preventative measures to curtail any substantial damage.⁷³

In conclusion, the Court held that while the court below was correct in using the “arbitrary and capricious” standard, it erred in its application.⁷⁴ More specifically, the Court criticized the district court for engaging in independent fact finding.⁷⁵ In light of administrative record, the Court found that the agency’s plan to remove the horses was justified.

B. The Dissenting Opinion

Like the majority, the dissenting opinion found that the appropriate review for informal agency acts was the “arbitrary and capricious” standard.⁷⁶ It stressed that the existence of a “decision document,” explaining the agency’s reasoning at the time of its actions, was crucial to the defense of those actions.⁷⁷ The dissent stated that while there was, in fact, a document the Park Service identified as its decision document, the Park Service had made its actual decision some time before it communicated this intention to the public.⁷⁸

The dissent found this time-lag to be significant. It suggested that the rationale the agency had articulated in its decision docu-

ment did not correspond with what agency officials later testified was their intent during the planning stages, indicating a “post hoc rationalization.”⁷⁹

In addition, the dissent found that there were further grounds for the argument that the agency’s original justification was not what it testified to in court; the dissent cited statements from park officials who indicated that at some point before they officially announced the planned roundup, they believed National Park System regulations actually required removal.⁸⁰ Stating that “an agency cannot defend its actions on grounds different from those on which the action were based,” the dissent argued that these two discrepancies made the agency’s actions invalid.⁸¹

The dissent went on to observe that even had the majority been correct in accepting the Secretary’s reasoning as contemporaneous with the horse removal plan, that reasoning fell short in other areas.⁸² The dissent cited the National Park Service’s “Management of Exotic Species Already Present” plan, which says that while exotic species may be destroyed when necessary, their management is afforded a “high priority” in park planning, requiring programs based on “scientific information that ... demonstrates

their impact on park resources.”⁸³

The dissent pointed to several specific areas where it found the agency acted upon assumptions, rather than objective data. As a starting point, the dissent said the horses were in good health, by Ozark National Scenic Riverways’ own admission, despite the fact that the Park Service portrayed the horses as suffering from lack of food and the unfavorable climate.⁸⁴ It also stated that while the horses may cause future problems in the park environment, which may be acted upon before the fact, studies predicting future impacts were as inconclusive in assessment of damage as present evaluations were.⁸⁵

In conclusion, the dissent said that one of the most important factors both the Secretary and the majority had failed to take into account was the importance of the horses as a cultural resource.⁸⁶ The dissent stated that several sources indicated Congressional interest in the protection of wild horses and in cultural resources in general.⁸⁷ It said that while a reviewing court must give an agency’s decision the deference it demands, the particular facts of this case called for at least a temporary injunction against the Park Service’s wild horse removal plan, as it was both arbitrary and capricious.⁸⁸

⁷³ *Id.* (citing *New Mexico State Game Commission*, 410 F.2d at 1199).

⁷⁴ *Wilkins*, 995 F.2d at 852, 853.

⁷⁵ *Id.* The instant decision stated, “the district court in the present case chose not to remand the matter to the Secretary, and instead developed independent findings of fact at trial.” *Id.*

⁷⁶ *Id.* at 854.

⁷⁷ *Id.* See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978) (the dissent in *Wilkins* is apparently equating “decision document” with what *Vermont* calls a “contemporaneous explanation of the agency decision”).

⁷⁸ *Wilkins*, 995 F.2d at 854. The dissent pointed to a press release of May, 1990, that announced the plan to roundup the horses, accompanied by several arguments for their removal which were not supported by data. This release was followed by a letter in February 1991, which the Acting Assistant Secretary identified as the decision document. Unlike the press release, the letter detailed the results of various studies. Thus, the dissent argued that neither rationalization was contemporaneous with the actual decision, which the dissent suggested may have been as early as 1985. *Id.*

⁷⁹ *Id.* at 855.

⁸⁰ *Id.* The relevant testimony, in part, from Superintendent Sullivan is as follows:

“Q. Had there been a decision made prior to the [1985] study to remove the horses?”

A. . . . I don’t think there was ever any question about the decision being made, I think the decision was made for us . . . under our rules and regulations and under the laws and policies. The management had no leeway . . . I think the decision is built into the management policies of the National Park System and those in turn emanate from certain pieces of legislation.” *Id.* at 854.

⁸¹ *Id.* at 855 (citing *General Elec. Co. v. Nuclear Regulatory Comm’n*, 750 F.2d 1394, 1403-04 (7th Cir. 1984)).

⁸² *Wilkins*, 995 F.2d at 855.

⁸³ *Id.*

⁸⁴ *Id.* at 855-56.

⁸⁵ *Id.* at 856. A 1985 study of the horses’ impact at that time found little damage and stated “extensive investigation would take considerable time and money which may not be necessary.” The 1991 future impact study summed up its findings by saying, “[p]ermitting the horses to stay would require [the Park Service] to document and mitigate impact on listed species and habits in the area.” *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* The dissent cited 16 U.S.C. § 1331 (the Wild Free-Roaming Horses and Burros Act) as well as 16 U.S.C. § 460m (the enabling legislation for the Ozark National Scenic Riverways). *Id.*

⁸⁸ *Id.*

IV. COMMENT

To interpret the significance of *Wilkins*, both to Ozark National Scenic Riverways and for its broader impact on National Park policy, it is helpful to first analyze the instant decision in terms of the strengths and weaknesses of its holding, as well as the assumptions and policies which the Court emphasized in that holding. Both the majority and the dissent based their respective holdings primarily on two sources: National Park Service guidelines, and the evidence before the Court. The Court's review was appropriately confined to these matters, in accordance with the narrowly defined role courts play in administrative review.⁸⁹

Arguably, the Court's holding was correct, in that the park followed Department of the Interior guidelines when it determined it necessary to remove the feral horses. This type of decision can only be seen as a discretionary one, in terms of the latitude given to the National Park Service to best fulfill the national park "ideal," as well as the extremely diverse number of situations the Park Service will face.

In any given act of policy-making, the individual park must interpret statutory mandates, often based not on the controlling statutes themselves, but on previous interpretations from the National Park Service. The definitions of terms and policies are part of the rather amorphous body of park guidelines upon which the Court based its verification of Ozark National Scenic Riverways' own interpretation and subsequent actions.

The Court's analysis turned on several key definitions used by the park, one of the most important being "exotic species." On this point, the park clearly focused on the length of time these particular horses were thought to have roamed in what is now the

park, as well as the fact that scientists believe horses were not reintroduced to North America until the 1500's.⁹⁰

Ozark National Scenic Riverways also had to define what scope the term "detrimental" encompassed. Park officials referred collaterally to park users and those farmers renting cropland within the grounds, but seemed to rely most upon the threat they perceived to the native species in the area.⁹¹

Although scarcely articulated, perhaps the most important definition was a self-definition of the park's actual purpose. The enabling legislation for the National Park Service as a whole, and Ozark National Scenic Riverways as a distinct unit, echoes the same themes: the dual purposes of protection and management of wildlife, and the availability of historical, cultural, and recreational resources.⁹² In light of the testimony given at trial, the park stressed the former almost exclusively, and effectively ignored the latter.⁹³

The Court of Appeals also looked for evidence in the agency's record to support the National Park Service's actions. The evidence seems to have gone mostly toward the issue of detriment. The Court was satisfied that there was sufficient evidence of detriment within the record, in the form of harassment and poor health of the horses, past park destruction attributed to the horses, and the likelihood and magnitude of future damage.⁹⁴

It is difficult to ascertain from the opinion alone the extent and quality of data the Park Service put forth on each of these claims. In the end, the Court seemed to emphasize that since this is ultimately a discretionary decision, any amount of supporting evidence is enough to overcome the "arbitrary and capricious" standard.⁹⁵

The dissent in the instant decision highlighted the possibility of procedural flaws in the National Park Service's removal planning that may have invalidated the actions, making further discussion moot.⁹⁶ However, beyond these criticisms lies a set of counterarguments that mirror those made by the majority, also focusing on the guidelines Ozark National Scenic Riverways purported to follow and the evidence it used to support its actions.

It can be contended that while the park did follow the letter of National Park Service guidelines, it neglected to follow their spirit. Above all, the legislation concerning the origins of the National Park Service calls for the agency to strike a "balance between preservation and promotion."⁹⁷

The same key terms relied upon by the park in its horse removal planning and by the majority in support of the plan appear to have alternative definitions that Ozark National Scenic Riverways could have applied, bearing in mind the discretion Congress has authorized. As indicated by the dissent, perhaps a re-evaluation of these terms was in order, given the fact that no broad mandate will ever take into account the unique facets of each particular park. Further, careful examination of the definitions espoused by the Park Service might have avoided what the dissent pointed to in terms of the park acting on assumptions, rather than actual park guidelines.⁹⁸

As a starting point, it would have been difficult for the Court to construe "exotic" in any way other than the manner it chose, given the particular definition provided.⁹⁹ However, the belief of some scientists that horses originated as a species in North America,¹⁰⁰ coupled with the fact that the horses, regardless of their precise date of

⁸⁹ See *supra* note 43.

⁹⁰ *Supra* note 6.

⁹¹ *Wilkins*, 798 F. Supp. at 562.

⁹² 16 U.S.C. § 1a-1 (1970), and 16 U.S.C. § 460m (1964).

⁹³ See *supra* note 80.

⁹⁴ *Wilkins*, 955 F.2d at 852-53.

⁹⁵ *Id.* at 853.

⁹⁶ See *supra* note 78.

⁹⁷ *National Wildlife Fed'n*, 669 F. Supp. at 390.

⁹⁸ See *supra* text accompanying note 80.

⁹⁹ See *supra* text accompanying note 90.

¹⁰⁰ Kyla Seligsohn-Bennett, *Mismanaging Endangered and "Exotic" Species in the National Parks*, 20 ENVTL. L. 415, 428 (1990).

origin in any respect, predate the establishment of the park, could at least create some question as to what "exotic" really means.¹⁰¹

Even more at issue might be the way in which the park chose to define "detrimental." There is some validity in the lower court's and dissent's opinions that the administrative record simply did not demonstrate the amount of damage necessary to remove all of the horses, if ecological damage was in fact the National Park Service's main concern.¹⁰²

Again, the over-arching question presented might be better termed as the role Ozark National Scenic Riverways has defined for itself within the context of the National Parks System.¹⁰³ Seeking to achieve a balance of its dual purposes would not have to signal less emphasis on preservation, but rather a heightened awareness of the cultural, scenic, and historical functions that necessarily accompany the mission of all national parks.

The dissent observed that the same evidence upon which Ozark National Scenic Riverways focused in its planning may have indicated both past and future problems, but was inconclusive beyond those speculations.¹⁰⁴ Even under the highly deferential arbitrary and capricious standard, an agency decision cannot stand if it is based on "...an explanation for its decision that runs counter to the evidence before the agency."¹⁰⁵

It is important to note that confined to its facts, the *Wilkins* decision may ultimately be

correct: The wild horses, in reality, may be a significant detriment to the park, in which case the National Park Service unquestionably has the authority to act as the circumstances dictate. However, in such a highly discretionary decision, common sense and the park system itself demand that any new management plan must be one based on solid scientific data and reasonable alternatives.¹⁰⁶

Perhaps one of the most serious flaws in current park management is the very issue that is central to *Wilkins*: individual parks are given too much discretion and not enough guidance for effective management planning. Loosely defined terms contribute to this problem. Words like "exotic" are akin to terms of art when interpreted and reinterpreted through the various layers of park management. These difficulties are compounded when parks perceive a rigid mandate in what the park system considers only a discretionary policy.¹⁰⁷ Even the concept of a park "use" is subject to alternative readings that potentially have quite different impacts.¹⁰⁸

Further, critics fault the National Park Service for requiring especially detailed wildlife management plans, or "Environmental Impact Statements" only under certain circumstances.¹⁰⁹ These same critics are often frustrated by their perception that the parks discount public input.¹¹⁰ The extent of public comment that the parks currently encourage would be cut short dramatically, with poten-

tially significant effects on wildlife, by proposed measures that would prevent the parks from having to disclose some types of wildlife management to the public.¹¹¹

It is difficult to argue with the principle that exotic animals and plants, if unchecked, can create havoc in a delicately balanced ecosystem.¹¹² The resulting harm may not be limited to competing species, as in situations where overpopulation of an exotic species may lead to eventual death of the exotic species, as well as other wildlife.¹¹³

A more difficult question presents itself when even scientists are unable to agree on whether a particular species is exotic.¹¹⁴ The park may fail to evaluate the significance of past - even the distant past - species habitation in the area.¹¹⁵ Although a species may not have originated in a region, long-term exotic "guests" may predate other species in the park.¹¹⁶ More importantly, park management may not analyze the fact that semi-permanent exotic species may have been evolving and interacting with native plants and animals for an extended period.¹¹⁷

Further problems arise due to the limited degree of National Park Service oversight. Bureaucracies, by their very nature, are difficult to regulate.¹¹⁸ Critics have stated that the National Park Service legislation is so ambiguous that for all practical purposes, a reviewing court will be unable to find an abuse of discretion in the park actions in question.¹¹⁹ Much of the blame can be placed on Congress, which may draft legis-

¹⁰¹ *Wilkins*, 798 F. Supp. at 564.

¹⁰² *Wilkins*, 995 F.2d at 856; *Wilkins*, 798 F. Supp. at 563. See *supra* note 85 and accompanying text.

¹⁰³ *Supra* text accompanying note 92.

¹⁰⁴ *Wilkins*, 995 F.2d at 856.

¹⁰⁵ *Supra* note 43.

¹⁰⁶ See *Wilkins*, 995 F.2d at 855 (citing the Park Service Policy titled "Management of Exotic Species Already Present," which states in part, "the decision to initiate a management program will be based on existing, and where necessary newly acquired, scientific information that identifies the exotic status of the species, demonstrates its impact on park resources, and indicates alternative management methods and their probabilities of success"). *Id.*

¹⁰⁷ See *supra* note 80.

¹⁰⁸ See William Andrew Shutkin, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345 (1991) (discussing possible interpretations of "use": "in the context of progressive conservation, use denotes a utilitarian or consumptive relationship to nature Use in the preservationist sense means an aesthetic, spiritual or recreational relationship to nature"). *Id.* at n.16.

¹⁰⁹ See *Seligsohn-Bennett*, *supra* note 100, at 428, 429 (stating that the National Park policies did not require the Assateague National Park Service to submit an Environmental Impact Statement, as it considered the feral ponies in the park to be exotic). *But see* Carmi Weingrod, *On the Horns of a Dilemma*, NATIONAL PARKS, May/June 1994, at 30 (describing how Olympic National Park determined it necessary to proceed with an Environmental Impact Statement for management planning of exotic wild goats).

¹¹⁰ See *Weingrod*, *supra* note 109, at 30.

¹¹¹ *Seligsohn-Bennett*, *supra* note 100, at 439.

¹¹² John L. Dentler, Comment, *Noah's Farce: The Regulation and Control of Exotic Fish and Wildlife*, 17 U. PUGET SOUND L. REV. 191, 198 (1993).

¹¹³ Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 507 (1985). This article describes a protected population of deer in Arizona, which, in the absence of predators, grew from 4,000 to 100,000 in less than 20 years; the population eventually stabilized, but not before 80,000 deer starved to death. *Id.* at 516 n.72.

¹¹⁴ *Weingrod*, *supra* note 109, at 31.

¹¹⁵ *Id.* at 31. There is some debate as to whether the mountain goats found at Olympic National Park originally inhabited the region; some scientists suggest this may have been possible millions of years ago. *Id.* at 31-32.

¹¹⁶ *Id.*

¹¹⁷ *Seligsohn-Bennett*, *supra* note 100, at 430.

¹¹⁸ See, e.g., *Weingrod*, *supra* note 109, at 30 (describing the formation of the "Interagency Goat Management Team," made up of Olympic National Park, Olympic National Forest, and Washington Department of Wildlife, all of whom had an interest in the wild goats). *Id.*

¹¹⁹ Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3 (1992).

lation defined by an "absence of structure,"¹²⁰ that contributes little to the problems existing, or perhaps even created by the legislation.¹²¹ To begin to fashion a workable solution to the wildlife management dilemma, the courts should encourage a more rationally-based decision-making process, even within the confines of their fairly narrow scope of review. By accepting only clearly articulated, scientifically supported reasoning, the courts ensure discretionary decisions are justified.

Congress can also help to clear up some of the uncertainties parks face by more clearly defining the dual purposes of the National Park system,¹²² as well as being more willing to assert its intent to help guide the various management plans for which parks are responsible.

Correspondence between a United States Representative from Missouri and the Superintendent of Ozark National Scenic Riverways indicated that park management continued to believe that the only way it could be prevented from removing the wild horses at this point is through an amendment of the act that gave life to the park.¹²³ Consequently, Representative Bill Emerson, R-Mo., recently introduced the "Ozark Wild Horses Protection Act," which prohibits Department of Interior interference with the horses excepting cases of natural or medical emergency.¹²⁴

Critics might justifiably argue that this type of intervention by lay persons, i.e. those outside of the scientific community, could yield disastrous results. While the appropriate amount of Congressional intervention is certainly debatable, this particular conflict is representative of the struggle parks have encountered in shaping their own identity in

the face of an omnipresent responsibility to meet the needs of the public.

The Department of the Interior must strive to more clearly articulate its own "house" rules. The most important, albeit not exclusive overall mission of the park system is arguably preservation.¹²⁵ However, the National Park Service must draw the line between "mandates" and "suggestions" more cleanly, as is evident in the *Wilkins* case.¹²⁶

By requiring a more stringent reasoning process on which to base wildlife management plans, individual parks can better satisfy the public, the courts, and themselves that an act as drastic as complete elimination of an exotic species from a park is well-founded.¹²⁷ The combined effect of workable, standard definitions and a greater emphasis on data collection would also improve decision making.

Admittedly, the former goal is somewhat ambitious, given that scientific thinking is continuously evolving. The second goal necessarily equates added expense, but the information to be gained is crucial. Park officials should have a very clear understanding of the impact of exotic species,¹²⁸ as well as the various reasonable alternatives that exist. Since the *Wilkins* ruling, Ozark National Scenic Riverways has indicated that a possible intermediary solution might be relocating the horses to a wild horse preserve in the area.¹²⁹ While this might not be the resolution opponents to the removal had wanted, it is at least an acknowledgement of the public's demand for "local autonomy" in the control of the park that can be observed in *Wilkins*.¹³⁰

All parties concerned can benefit from the realization that wildlife, whether exotic or

not, is a resource. Sights like the wild goats of Olympic National Park perched on rocky crevices or feral horses racing across an open field are unforgettable and add to the recreational experience of park-goers.¹³¹ Our nation's culture and history can be represented by wild ponies in western states that come from the same genetic stock as the horses left by Spanish explorers of the sixteenth century,¹³² or even the more common horses of Ozark National Scenic Riverways that several generations of visitors have traveled to see.¹³³

Even exotic animals may be considered an ecological resource. Beyond the effect a long-term exotic animal may have on its ecosystem, some scientists argue that these uniquely evolved animals carry a wealth of genetic information that must be preserved, as with any other protected species.¹³⁴

Perhaps the most promising solution to the concerns of preservationists, park management, and the public is represented by the "multiple use-sustained yield" concept. Not a diminishment of the precedence preservation takes in National Parks, this theory is an effort to encourage management decisions based on the total ecological picture before officials articulate specific priorities.¹³⁵

In the meantime, courts will struggle to define concepts like "native" species and proper park "uses." The burden of the ambiguity that is so prevalent in the very mission of the park system will continue to fall on the courts, which have a most difficult task in setting a standard for the seemingly subjective decision of when a species becomes "detrimental" to park use, and to whom it must be detrimental in order to justify agency action.

¹²⁰ Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499, 506 (1984).

¹²¹ Pitt, *supra* note 113, at 516.

¹²² Seligsohn-Bennett, *supra* note 100, at 439.

¹²³ Letter from Rep. Bill Emerson to Superintendent Arthur Sullivan, Ozark National Scenic Riverways (Oct. 5, 1994).

¹²⁴ H.R. 5260, 103d Cong., 2d Sess. (1994).

¹²⁵ Shutkin, *supra* note 108.

¹²⁶ See *supra* note 80.

¹²⁷ See, e.g., Pitt, *supra* note 113, at 512 (stating that "[s]tudies of the effect of wild horses on non-game wildlife are rare . . . with innovative funding techniques such as non-game check-offs on tax returns, and with a growing public awareness of ecological concepts, this situation is sure to change").

¹²⁸ See, e.g., Dentler, *supra* note 112, at 236, 237 (listing the questions that park and state officials should address when determining the impact of an exotic species: "(1) the life history of the species in question, (2) the physical factors that might control its abundance and distribution, (3) the species' typical food requirements and potential for competition with native species should the exotic escape or be released, and (4) whether the exotic harbors any diseases or parasites that are not native to its new environment").

¹²⁹ Letter from Superintendent Arthur Sullivan, Ozark National Scenic Riverways, to Rep. Bill Emerson (Oct. 7, 1994).

¹³⁰ Sax, *supra* note 120, at 502.

¹³¹ See, e.g., Weingrod, *supra* 109, at 29.

¹³² Verlyn Klinkenborg, *The Mustang Myth: America's Wild Horses Have Inspired One of the Nations Most Passionate Conservation Battles. But How Much of the "Wildness" Is in the Horses and How Much Is in Our Minds?* AUDUBON, Jan/Feb 1994, at 38.

¹³³ *Wilkins*, 798 F. Supp. at 559.

¹³⁴ Klinkenborg, *supra* note 132, at 38.

¹³⁵ *American Horse Protection Ass'n, Inc. v. Frizzel*, 403 F. Supp. 1206, 1221 (1975).