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Snowmobiling in Voyageurs National Park: The Eighth Circuit Gives One Answer Amidst a Blizzard of Controversy. Voyageurs National Park Association v. Norton

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CASE NOTE

SNOWMOBILING IN VOYAGEURS NATIONAL PARK: THE EIGHTH CIRCUIT GIVES ONE ANSWER AMIDST A BLIZZARD OF CONTROVERSY

Voyageurs National Park Association v. Norton[1]

I. INTRODUCTION

Voyageurs National Park is located on the northern edge of Minnesota's border, with fifty-five miles that meander along the Canadian border.[2] Lying in the southern part of the Canadian shied, the Park has 218.200 gross area acres, which attract over 230.000 visitors each year.[3] Voyageurs is a water-based Park with "rugged and varied terrain" consisting of "rolling hills interspersed . . . between bogs, beaver ponds, swamps, islands, small lakes, and four large lakes."[4]

In the winter of 2001, the National Park Service ("Park Service"), respondents[5] in the present action, opened eleven of the seventeen lake-bays in Voyageurs National Park ("the Park") for recreational snowmobiling.[6] Appellants in this action, the Voyageurs National Park Association and various other public interest groups ("the Association").[7] contested the decision by the Park Service to reopen those bays.[8]

II. FACTS AND HOLDING

Congress created Voyageurs National Park in 1971.[9] This northern Minnesota park is not only home to some of the state's most endangered wildlife.[10] but it also serves as a recreational haven.[11] To manage the use of this park, Congress enacted several environmental regulations, two of which are at issue in this appeal.[12] One of these regulations, 36 C.F.R. § 1.5, generally enables a park superintendent to restrict public use of a

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[1] 381 F.3d 759 (8th Cir. 2004) [hereinafter *Voyageurs*].

[2] *Voyageurs National Park*, Nat'l Park Serv., *at* www.nps.gov/voya/index.htm (last visited January 3, 2005).

[3] *Id. See also Voyageurs National Park Facts*, Nat'l Park Serv., *at* http://www.nps.gov/voya/pphtml/facts.html (last visited Nov. 5, 2004).

[4] *Supra* note 2.

[5] Respondents also include Gale A. Norton, Secretary of the Interior; Fran P. Mainella, Director, National Park Service; Steven A. Williams, Director, U.S. Fish and Wildlife Service; United States Department of the Interior; and the intervener, Minnesota United Snowmobilers Association. *Voyageurs*, 381 F.3d at 759.

[6] *Id.* at 761. Of the seventeen bays in the park, the eleven bays at issue include less than five percent of the park acreage that is open to snowmobiling. *Voyageurs: Asking Courts to Manage Parks*, MINNEAPOLIS STAR TRIBUNE, Nov. 18, 2002, at 14A.

[7] The various public interest groups consisted of the Sierra Club, Help Our Wolves Live, Humane Society of the United States, Superior Wilderness Action Network, Minnesota Wolf Alliance, Minnesotans for Responsible Recreation, and Defenders of Wildlife. *Voyageurs*, 381 F.3d at 759.

[8] *Id.* at 761.

[9] *Id.*

[10] The park is home to the endangered gray wolf and bald eagle. *Id.* at 762.

[11] *Id.* Voyageurs provides a "recreational resource for boaters, campers, hikers, anglers, cross-country skiers, snowshoers, ice-fishermen, and snowmobilers." *Id.* The park opened its trails and frozen waters to snowmobiling in 1984. *See* 36 C.F.R. § 7.33(b) (2004).

[12] *Id.* at 762.

park.[13] A narrower regulation, 36 C.F.R § 7.33, applies specifically to Voyageurs and its superintendent's authority to "determine yearly opening and closing dates for snowmobile use . . . ."[14]

The passage of § 7.33 sparked immediate controversy.[15] In 1991, the Association sued the Park Service contesting its authority to allow snowmobiling in Voyageurs National Park.[16] The Association was not only disappointed with the Park Service's authorization of snowmobiling in the park, but also with the Park Service's overall failure to enforce regulations.[17] The Association feared this failure would jeopardize a future wilderness designation for the park.[18] Accordingly, the Association sought an order requiring the Secretary of Interior to submit a wilderness recommendation on behalf of the park, a declaration that the Park Service was illegally permitting snowmobiling, and a preliminary and permanent injunction enjoining the Park Service from allowing future snowmobiling in the park.[19] The district court agreed with the Association's claim that the Park Service was required to make a wilderness recommendation, but the court rejected the Association's other claims, and ultimately held that the Park Service had the proper authority to allow snowmobiling in the park.[20]

The Association appealed the district court's decision to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court's decision in favor of the Park Service.[21] The Eighth Circuit held that in light of Congress' express authorization to allow snowmobiling in the park, coupled with the Park Service's contention that snowmobiling areas would not diminish the potential for a future wilderness designation, the Park Service's decision to allow snowmobiling in the park was neither arbitrary nor capricious.[22]

Despite the court's decision, which conferred authority to the Park Service to open the park's bays to snowmobiling, the Park Service decided to close the park's seventeen bays for the three snowmobiling seasons between 1992 and 1995.[23] In response, a group of snowmobilers ("the Snowmobilers") sued the Secretary of the Interior, Bruce Babbitt, and other governmental officials ("the Government") seeking to enjoin the Park Service's enforcement of the closing restrictions on the basis that the closures violated the Endangered Species Act ("ESA")[24] and the Administrative Procedures Act ("APA").[25] After the initial suit was filed, the

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[13] *See generally* 36 C.F.R. § 1.5.

[14] 36 C.F.R. § 7.33 (b)(3). The Voyageurs' superintendent was given the explicit discretion to determine "yearly opening and closing dates for snowmobile use, and temporarily close trails or lake surfaces, taking into consideration public safety, wildlife management, weather, and park management objectives." *Id.*

[15] *Voyageurs*, 381 F.3d at 762. This controversy led to a series of lawsuits. *Id.*

[16] Voyageurs Reg'l Nat'l Park Ass'n v. Lujan, 1991 U.S. Dist. LEXIS 20640, No. 4-9-434, at *1-2 (D. Minn. 1991) [hereinafter *Voyageurs I*].

[17] *Id.*

[18] *Id.* at *6-7. An area that receives a wilderness designation is defined as:

> [A]n area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped federal land retaining its primeval character and influence, without permanent improvements of human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least 5,000 acres of land or is of such sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (2000).

[19] *Voyageurs I*, 1991 U.S. Dist. LEXIS 20640 at *11-12.

[20] *Id.* at *44-46.

[21] Voyageurs Reg'l Nat'l Park Ass'n v. Lujan, 966 F.2d 424, 428 (8th Cir. 1992) [hereinafter *Voyageurs II*].

[22] *Id.*

[23] Mausolf v. Babbitt, 913 F. Supp. 1334, 1335 (D. Minn. 1996) [hereinafter *Mausolf I*]. *See also* Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 762 (8th Cir. 2004).

[24] The Endangered Species Act is found at 16 U.S.C. § 1531 (2000).

[25] *Mausolf I*, 913 F. Supp. at 1336. The APA states that persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" may bring suit to challenge a federal agency action. 5 U.S.C. § 702 (2000).

Association filed a motion to intervene, which the district court denied.[26] While the Association's appeal on the intervention was pending before the Eighth Circuit Court of Appeals,[27] the district court addressed the merits of the Snowmobilers' challenge to the closing of the Park's bays.[28]

The Snowmobilers claimed injury based on the closures.[29] They argued that closing the bays threatened to diminish or deplete the number of endangered animals available for observation.[30] In rebuttal, the Government justified the closures by claiming that snowmobiling in the Park caused displacement and harm to the Park's endangered gray wolf and bald eagle populations.[31] The district court found the Government's administrative record unpersuasive because it did not sufficiently conclude that the closures had a negative effect on the endangered animals, and the court remanded the record back to the Fish and Wildlife Service ("FWS") and the Park Service for further review.[32] The court issued summary judgment in favor of the Snowmobilers, and, pending a sufficient explanation, enjoined enforcement of the closures.[33]

Once the Association was allowed to intervene, it appealed the district court's decision in favor of the Snowmobilers.[34] In its opinion, the Eighth Circuit first addressed the Snowmobilers' contention that the court lacked jurisdiction to hear the case.[35] The court found that even though the Association was not an initial party to the decision in which the district court had ruled on the merits,[36] the Association properly became a party to the lawsuit, and accordingly, was entitled to appeal the district court's decision.[37] Furthermore, the court defended its jurisdiction based on the Association's standing, timely notice of appeal, and the fact that a case and controversy still existed.[38] The court then addressed the Park Service's decision to close Voyageurs' bays to snowmobiling.[39] In recognition of the substantial deference given to an agency decision, the court concluded that the Park Service's decision should not have been deemed arbitrary and capricious.[40] The court noted that even though the evidence in the administrative record did not overwhelming support the closures, the record was nonetheless sufficient to provide a rational foundation on which the Park Service could base its decision.[41]

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[26] Mausolf v. Babbitt, 158 F.R.D. 143, 147-48 (D. Minn. 1994) (opinion of Magistrate Judge), *approved*, Order of Nov. 15, 1994 (order of District Judge). The Association claimed an interest in the enforcement of the restrictions and a concern that the Government might not adequately represent the Association's interests. *Id.* The district court denied the motion, finding that the Government did in fact adequately represent the Association's interests. *Id.*

[27] In the Association's appeal to the Eighth Circuit, the Association urged the court to hold that even if it did not have standing in the Snowmobilers' action against the Government, such standing is not required for intervention. Mausolf v. Babbitt, 85 F.3d 1295, 1299 (8th Cir. 1996) [hereinafter *Mausolf II*]. The court disagreed with the Association's contention that standing is not required for intervention, but the court ultimately held that the Association did have the requisite standing to intervene. *Id.* at 1301. Furthermore, the court found that the Association rebutted the presumption that the Government adequately represented the Association's interest; and thus, the Eighth Circuit reversed the district court's order denying intervention. *Id.* at 1303.

[28] *See generally Malsolf I*, 913 F. Supp. at 1343.

[29] *Id.* at 1341.

[30] *Id.*

[31] *Id.* at 1343-44.

[32] *Id.* at 1344.

[33] *Id.*

[34] Mausolf v. Babbitt, 125 F.3d 661, 666 (8th Cir. 1997) [hereinafter *Mausolf III*].

[35] *Id.*

[36] *See Mausolf I*, 913 F. Supp. at 1343-44.

[37] *Mausolf III*, 125 F.3d at 666.

[38] *Id.* at 667.

[39] *Id.* at 668.

[40] *Id.* at 669. Under the APA, judicial review of an agency decision is limited, as such the court must give "agency decisions a high degree of deference," and set aside an agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). *See* Sierra Club v. EPA, 252 F.3d 943, 947 (8th Cir. 2001).

[41] *Mausolf III*, 125 F.3d at 669.

As such, the Eighth Circuit reversed the district court's order for summary judgment in favor of the Snowmobilers and entered judgment in favor of the Government and the Association.[42]

In 1996, twelve years after some of the bays were initially opened, the Park Service re-opened six of the Park's bays for snowmobiling, leaving eleven closed.[43] In 2001, the Park Service re-opened the Park's remaining bays for snowmobiling.[44] Following the re-opening of the eleven bays, the Association sued the Park Service seeking to enjoin the Park Service's decision to re-open the bays.[45] The Association again argued that snowmobiling in these bays could harm the endangered bald eagle and gray-wolf populations.[46] The district court granted summary judgment in favor of the Park Service.[47]

The Association appealed the district court's judgment to the Eighth Circuit, leading to the instant decision. The Association's argument was two-fold.[48] First, the Association asked the court to reverse the district court's grant of summary judgment in favor of the Park Service on the basis that the Park Service's decision to re-open the eleven bays violated the Park Service's rule-making requirements, the National Environmental Policy Act ("NEPA"),[49] and the ESA.[50] In the alternative, the Association asked the court to allow limited discovery and to vacate the district court's decision for further proceedings.[51]

The Eighth Circuit held that the Park Service's decision to reopen the eleven bays was neither arbitrary nor capricious.[52] The court based its holding on several findings.[53] First, the court found that the Park Service did not need to conduct a "full-blown NEPA review" each year, but rather, the Park Service properly complied with its obligation to be a "faithful steward of national resources" and with its "own procedural rules and regulations as set forth at 36 C.F.R. § 1.5," and further, because the Park Service cured its procedural defect under the ESA.[54]

III. LEGAL BACKGROUND

A. National Environmental Policy Act

In 1969, Congress enacted NEPA in order to increase the public's understanding and appreciation for the environment, while at the same time, providing a means whereby federal agencies could more effectively minimize public harm to the environment.[55] To implement this policy at the local level, Congress directed all federal agencies to abide by NEPA's procedural requirements.[56] For example, all federal agencies are required to complete an Environmental Impact Statement ("EIS") for "every recommendation or report on proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment."[57]

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[42] *Id.* at 670.
[43] Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 762-63 (8th Cir. 2004).
[44] *Id.* at 763.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 761, 763.
[49] 42 U.S.C. § 4321 (2000).
[50] *Voyageurs*, 381 F.3d 763.
[51] *Id.*
[52] *Id.* at 764.
[53] *Id.*
[54] *Id.* at 764-65, 767.
[55] 42 U.S.C. § 4321 (2000).
[56] *Id.* § 4332(1).
[57] *Id.* § 4332(2)(C). An EIS should include unavoidable "adverse environmental effects . . . , alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,

Preparing an EIS not only ensures that the agency has the detailed information to make an informed decision, but the EIS also provides the public with relevant information so that it can play a supporting role in the agency's decision-making process.[58] Whether a particular proposed action significantly affects the environment, and therefore necessitates completion of an EIS, is a threshold question.[59]

In 1981, the Eighth Circuit addressed this issue in *State of Minnesota v. Block*.[60] In *Block*, the court had to determine whether the Secretary of Agriculture was required to make an EIS concerning motorboat usage in the Boundary Waters Canoe Area Wilderness ("BWCAW").[61] The Eighth Circuit noted that NEPA only requires an agency to make an EIS when a future federal action is anticipated.[62] In the case of the BWCAW, the motorboat usage regulations automatically went into effect by force of the BWCAW Act.[63] Therefore, the court held that because the BWCAW Act explicitly provided for motorboat restrictions without leaving the Secretary discretion to make modifications, the Secretary did not need to conduct an EIS because no future federal action was anticipated.[64]

An agency's preparation of an EIS does not necessarily satisfy NEPA's requirements; supplemental analyses may also be required.[65] Such analyses are only required when changes to a proposed agency action reach a certain threshold.[66] Most notably, supplemental analyses are required when changes would result in

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and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.* To issue regulations that supplement NEPA's statutory requirements, NEPA created the Council on Environmental Quality ("CEQ"). Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 12 (2nd Cir. 1997). According to CEQ regulations, if an agency is uncertain whether the impacts of its proposed action will rise to the level of a major federal action, the agency should prepare an environmental assessment ("EA"). *Id. See* 40 C.F.R. §§ 1501.2, 1501.4, 1508.9 (2004).

An EA is a "concise document that briefly discuses the relevant issues and either reaches a conclusion that preparation of [an] EIS is necessary or concludes with a finding of no significant impact, in which case preparation of an EIS is unnecessary. *Nat'l Audubon Soc'y*, 132 F.3d at 12 (citing Sierra Club v. Espy, 38 F.3d 792, 796 (5th Cir. 1994)). *See* 40 C.F.R. § 1508.9(a).

If it is unclear whether or not a significant impact will result from the proposed agency action, the agency should err in favor of preparing an EIS. *Nat'l Audubon Soc'y*, 132 F.3d at 13. *See* 40 C.F.R. § 1508.3 (defining "affecting" to mean "will or may have an effect on"); *see also id.* at § 1508.18. "Major federal action" includes:

> [A]ctions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly. . . (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.

Id. § 1508.27 (a)(b) (when considering the significance of a proposed agency action, the agency should consider the various contexts of the agency action and the actions intensity, or severity of impact). Only when the proposed agency action "will *not* have a significant effect on the human environment," is the preparation of an EIS unnecessary. *Nat'l Audubon Soc'y*, 132 F.3d at 13. Moreover, a "categorical exclusion" may excuse compliance with NEPA's requirements for an EIS or EA. Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1446-47 (9th Cir. 1996) (finding that the NPS' decision to close off-road areas to bicycle use clearly falls within a categorical exclusion and therefore the NPS had no obligation to prepare an EA or EIS). *See* 40 C.F.R. § 1508.4. Agency actions that fall within this categorical exclusion are those, "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. Even though this exclusion permits an agency to take action without preparing an EIS or EA, an agency may nonetheless choose to prepare an EA to aid in its compliance with NEPA. *Id.* §§ 1508.4, 1508.9(a)(2).

[58] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[59] *Nat'l Audubon Soc'y*, 132 F.3d at 12.

[60] 660 F.2d 1240 (8th Cir. 1981).

[61] *Id.* at 1259.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp., 113 F.3d 1505, 15008-09 (9th Cir. 1997).

[66] *Id.*

significant or uncertain environmental impacts that were not initially evaluated by the EIS.[67] However, the agency does not need to supplement the finalized EIS every time new information comes to light.[68] "An agency's decision not to prepare an EIS or other supplemental NEPA analyses may be overturned only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[69]

B. Endangered Species Act

Congress enacted the ESA to counteract the extinction of an increasing number of species of fish, wildlife, and plants.[70] The ESA provides rules and procedures to conserve endangered and threatened species.[71] This Act requires federal agencies to consult the FWS 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 or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[72]

The ESA requires agencies to conduct either informal or formal consultations with the FWS.[73] If after informal consultations,[74] the FWS approves the proposed action, the agency is not required to conduct a formal consultation.[75] However, if the agency determines that its proposed action "may affect listed species or critical habitat," the agency is required to make a formal consultation with the FWS.[76] If the FWS determines that a species listed in the ESA may be present in the area of the proposed action, the agency "shall conduct a biological assessment for the purpose of identifying any endangered species . . . which is likely to be affected by such action."[77]

If an agency conducts informal consultations but does not receive the FWS's concurrence until after the agency begins implementing its proposed action, the requirement for consultation may nonetheless be

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[67] *Id.*

[68] *Id.*

[69] Cold Mountain v. Garber, 375 F.3d 884, 892 (9th Cir. 2004) (holding that the U.S. Forest Service's issuance of a permit to operate a bison capture facility in Minnesota did not violate NEPA or ESA). Furthermore, NEPA's procedural requirements do not apply to "federal actions that maintain the environmental status quo." Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1114 (9th Cir. 2002). "An EIS is not required in order to leave nature alone." Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995). Rather, an EIS is only required when a change in status quo is "effected by humans." *Kootenai Tribe of Idaho*, 313 F.3d at 1114 (citing *Douglas County*, 48 F.3d at 1506). This change in status quo not only applies to any increase in human intervention, but also to significant reductions in the human intervention such as to have a significant impact on the physical environment. *Id.* at 1115 (holding that because the Roadless Rule would alter how the Forest Service manages inventoried roadless areas, the Forest Service was required to make an EIS as required by NEPA).

[70] 16 U.S.C. § 1531(a), (b) (2000).

[71] *Id.*

[72] *Id.* at § 1536(a)(2).

[73] 50 C.F.R. §§ 402.13(a), 402.14(b) (2004). *See also* S. Utah Wilderness Alliance v. Smith, 110 F.3d 724, 728 (10th Cir. 1997).

[74] An informal consultation is defined as:

> [A]n optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required. *If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.*"

50 C.F.R. § 402.13 (emphasis added).

[75] *S. Utah Wilderness Alliance*, 110 F.3d at 729. "A federal agency need not initiate formal consultation if. . . . as a result of informal consultation with the service under § 402.13, the Federal agency determines . . . that the proposed action is not likely to adversely affect any listed species or critical habitat." *Id.* (citing 50 C.F.R. § 402.14(b)).

[76] 50 C.F.R. § 402.14.

[77] 16 U.S.C. § 1536(c)(1) (2000). A biological assessment "shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary." 50 C.F.R. § 402.12(a).

satisfied.[78] This proposition is illustrated in *Southern Utah Wilderness Alliance v. Smith*.[79] In this case, the Southern Utah Wilderness Alliance (SUWA) sued the Bureau of Land Management (BLM) alleging that the BLM failed to consult the FWS before implementing its recovery plan to protect Welsh's Milkweed, a threatened species.[80] The U.S. Court of Appeals for the Tenth Circuit held that even though the BLM did not receive the FWS's concurrence until after it began implementing its plan, the BLM nonetheless satisfied the ESA's consultation requirement and the SUWA's claim was therefore rendered moot.[81]

C. The National Park Service and Snowmobiling in the National Parks

Under the Organic Act of 1916, Congress established the Park Service to manage the nation's federal parks, monuments and reservations.[82] The Act requires the Park Service "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of future generations."[83] Further, the Act directs the Department of the Interior to create rules and regulations concerning "various aspects of park administration including transportation and recreation within the parks."[84]

In the early 1960s, the Park Service began to allow snowmobiling in Yellowstone National Park, and by 1968 the Park Service had implemented its first official winter-use policy.[85] With the dramatic increase in use of off-road recreational vehicles, concerns arose about the vehicles' potential negative impact on the land.[86] In 1972, President Richard Nixon responded to these concerns by signing an Executive Order that established policies and procedures to control the use of these off-road recreational vehicles.[87] In particular, the Order directed agency heads to designate "specific areas and trails on public lands on which the use of off-road vehicles may be permitted" in locations that would "minimize harassment of wildlife or significant disruption of wildlife habitats."[88] Furthermore, agency heads were to develop regulations and directions that protect the lands' national resources and the safety of all of its users, and minimize conflicts among various uses of the land.[89] Several years later, President Jimmy Carter signed the 1977 Executive Order that instructed an agency

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[78] *S. Utah Wilderness Alliance*, 110 F.3d at 728.

[79] *See id.*

[80] *Id.* at 725. On February 28, 1994, the BLM implemented the first step to its plan, which closed several off-road vehicle routes into the Coral Pink Sand Dunes where the Milkweed was located. *Id.* at 726. In response, the SUWA filed suit on October 12, 1994, claiming that the BLM failed to consult the FWS prior to its closing of the routes. *Id.* On February 9, 1995, the BLM filed its administrative record with the court, which included a letter from the BLM to the FWS, dated February 2, 1995. *Id.* "The letter sets forth the 'chronological record' of the two Agencies' consultations regarding ORV impact on the Milkweed. The letter also requests the FWS' concurrence regarding the actions and conclusions resulting from informal consultations that have taken place thus far." *Id.* Also included in the record was the FWS' response letter (dated February 6, 1995) which "acknowledged its 'informal interagency consultation with the BLM regarding the BLM's actions affecting the Milkweed, and praised the BLM for its accomplished and continuing conservation efforts' . . . in the Welsh's milkweed recovery plan." *Id.*

[81] *Id.* at 729. The court further noted that because the BLM received the FWS's concurrence after informal consultations, the BLM was not required to conduct a formal consultation with the FWS. *Id.*

[82] Jason Rapp, Comment, *Snowmobiling and National Park Management: To Conserve for Future Generations or Provide for Public Enjoyment?*, 17 TUL. ENVTL. L.J. 301, 302-303 (2004). *See also* 16 U.S.C. § 1 (2000).

[83] 16 U.S.C. § 1.

[84] Rapp, *supra* note 82, at 303. *See* 16 U.S.C. § 1. These regulations were codified at 36 C.F.R. §§ 1-1270 (2003).

[85] Rapp, *supra* note 82, at 304-05. *See also Facts and Statistics About Snowboarding*, Int'l Snowmobile Mfrs. Ass'n, *at* http://www.snowmobile.org/pr_snowfacts.asp (last visited Oct. 15, 2004).

[86] Rapp, *supra* note 82, at 305-06.

[87] Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

[88] *Id.*

[89] *Id.*

head to "immediately close" specific areas or trails to any off-road vehicle that "will cause or is causing considerable adverse effects" to the public land.[90]

IV. INSTANT DECISION

In *Voyageurs National Park Association v. Norton*, the U.S. Court of Appeals for the Eighth Circuit decided whether the Park Service's decision to re-open eleven of the seventeen lake-bays in Voyageurs National Park during the 2001 snowmobiling season was arbitrary and capricious.[91]

The court first identified the proper standard of review to evaluate an administrative agency's decision.[92] The court noted that its limited review in such a case requires a "high degree of deference"[93] to the agency's decision and its review is "based on consideration of the relevant factors and whether there has been a clear error of judgment."[94] Under the APA, the court may only set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[95] The court will uphold the decision if supported by "any rational basis," particularly when the agency is acting on a matter of its own expertise.[96]

The court then addressed whether the district court erred in granting summary judgment in favor of respondents. Beginning with the NEPA analysis, the court reiterated NEPA's requirement for federal agencies, such as the Park Service, to prepare an environmental impact study for all "major Federal actions significantly affecting the quality of the human environment."[97] The court explained that it was clear that the Park Service had conducted the proper NEPA study when Congress first allowed snowmobiling in the Park.[98] The issue was whether the Park Service must make a supplemental NEPA analysis each year when deciding whether to disallow snowmobiling in some of the Park's bays.[99] Without hesitation, the court concluded that it had already decided that the Park Service did not need to conduct a "full-blown NEPA review" before its annual renewal.[100] The Park Service's only obligation was to be a "faithful steward of national resources" and to comply with "its own procedural rules and regulations as set forth at 36 C.F.R. § 1.5."[101]

Turning to the issue of the Park Service's compliance with its rule-making requirements, the court analyzed whether the Park Service was, as the Association contended, subject to the requirements under 36 C.F.R. § 1.5(b),[102] or as the Park Service believed, subject to 36 C.F.R. § 1.5(c) and 36 C.F.R. § 1.7.[103]

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[90] Exec. Order No. 11989, 42 Fed. Reg. 26,959 (May 24, 1977).
[91] Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004).
[92] *Id.*
[93] *Id.* (quoting Sierra Club v. EPA, 252 F.3d 943, 947 (8th Cir. 2001))
[94] *Id.* (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, (1971)). *See also* 5 U.S.C. § 706(2)(A) (2000).
[95] 5 U.S.C. § 706(2)(A).
[96] *Voyageurs*, 381 F.3d at 763 (citing Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1184 (8th Cir. 2001)).
[97] *Id.*; 42 U.S.C. § 4332(2)(C) (2000). The NEPA analysis includes:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible an irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.
[98] *Voyageurs*, 381 F.3d at 763.
[99] *Id.* at 763.
[100] *Id.* at 764.
[101] *Id.*
[102] 36 C.F.R. § 1.5(b) provides that:

> [A] closure . . . or the termination or relaxation of such, which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, adversely affect the park's natural, aesthetic, scenic or cultural

Ultimately, the court agreed with the Park Service by finding that the re-opening of Voyageurs' bays did not constitute a "significant alteration" that would be governed by § 1.5(b). rather, the decision to re-open the bays fell within the procedural requirements of § 1.5(c) and § 1.7.[104] The court supported this decision with its prior holding in *Mausolf v. Babbitt*.[105] in which it held that § 1.5(b) did not apply when the Park Service made its decision to close only a few bays in the entire Park.[106] Moreover, the court concluded that because the Park Service had complied with its notice requirement under § 1.7 and its "general stewardship obligations," as set forth under § 1.5. its decision to re-open the eleven bays was "neither arbitrary nor capricious."[107]

Next. the court analyzed whether the Park Service had violated the ESA by failing to formally consult with the FWS before making the decision to re-open the bays for snowmobiling.[108] The Park Service acknowledged that it had failed to make this formal consultation with the FWS before deciding to close the bays.[109] However. the Park Service contended that its informal communications with the FWS in the five years prior to its decision. coupled with the Park Service's subsequent completion of the formal requirements, satisfied the formal consultation requirement.[110] Upon respondents' admission of technical error, the court analyzed whether the error was "rendered moot by subsequent compliance of the Park Service."[111] In reaching its decision. the court adopted the Tenth Circuit's prudential mootness reasoning that "a claim that seeks both declaratory and injunctive relief" could be "mooted when the required consultation was completed, even if such consultation did not occur before the implementation of the policy change."[112] Applying this reasoning to the instant case. the court agreed that the Park Service had cured its procedural error by completing the required formal consultation after the re-opening of the bays. thereby rendering the requirement moot.[113]

The court found appellants' second claim under the ESA that respondents "failed to make an adequate assessment of whether the reopening of [Voyageurs'] eleven bays would have a negative affect on [the Park's] endangered species." without merit.[114] The court explained that in determining how the re-opening of Voyageurs' bays would affect the Park's endangered species, the Park Service had relied on research it conducted over the course of approximately nine years.[115] The court was satisfied with this research, and concluded that whether or not the public agreed with the Park Service's decision to re-open the bays, the decision was neither arbitrary nor capricious.[116]

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values. require a long-term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature. shall be published as rulemaking in the Federal Register.

36 C.F.R. § 1.5(b) (2004).

[103] *Voyageurs*. 381 F.3d at 764. For "closures or terminations of closures" that do not rise to the level of a "significant alteration," the requirements of 36 C.F.R. § 1.5(c) and 36 C.F.R. § 1.7 apply. *Id.* Under 36 C.F.R. § 1.5(c), a park superintendent must prepare a written determination justifying its decision to close or terminate a closure. *Id.* Furthermore, 36 C.F.R. § 1.7 requires the superintendent to publicize the decision by "signage. maps, publication in local newspapers. and/or 'other appropriate methods.'" *Id.*

[104] *Id.*

[105] 125 F.3d 661 (8th Cir. 1997).

[106] *Voyageurs*. 381 F.3d at 764.

[107] *Id.*

[108] *Id.* at 765. According to the ESA. a federal agency must consult with the appropriate federal fish and wildlife agency when its actions "may affect" an endangered or threatened species. *Id. See* 16 U.S.C. § 1536(a)(2) (2000). *See also* 50 C.F.R. § 402.14(a) (2004).

[109] *Voyageurs*. 381 F.3d at 765.

[110] *Id.*

[111] *Id.*

[112] *Id* (citing S. Utah Wilderness Alliance v. Smith. 110 F.3d 724. 728 (10th Cir. 1997)).

[113] *Voyageurs*. 381 F.3d at 765.

[114] *Id.*

[115] *Id.*

[116] *Id.*

Finally, the court addressed whether the district court erred in denying appellants' motion for discovery to supplement the record.[117] In referencing a number of U.S. Supreme Court cases, the court noted that according to the APA, judicial review of an administrative agency's decision is "limited to the administrative record that was before the agency when it made its decision."[118] The court recognized several exceptions to this general rule that arise in extraordinary circumstances.[119] Appellants' claim, on the other hand, alleged that the administrative record was "incomplete and thus [would] frustrate effective judicial review."[120] The court rejected this claim by noting that the record was "fully sufficient to facilitate judicial review without discovery."[121] Therefore, the Eighth Circuit held that the district court had not erred in denying appellants' request for extra-record discovery.[122]

In sum, the Eighth Circuit found that in re-opening eleven of Voyageurs' bays for snowmobiling, the Park Service had exercised its discretion properly.[123] According to the court, the Park Service satisfied its own rule-making requirements, as well as those of NEPA and the ESA.[124] Furthermore, the court affirmed the district court's decision by holding that the Park Service's decision to re-open the bays was neither arbitrary nor capricious.[125]

V. COMMENT

This decision establishes a multi-dimensional precedent that affects the snowmobiling industry, endangered species in Voyageurs National Park, and most notably, the Park Service's future role in preserving the Park.

During the winter months at Voyageurs, snowmobling is a major component of the public's enjoyment of the Park, and accordingly, a crucial source of income for local tourism. Voyageurs is a favorite among snowmobilers because it has the largest area open to snowmobiling of any national park,[126] and is one of only two national parks that allows snowmobiling off unplowed roads.[127] To market and promote snowmobiling in and around the Park, a variety of snowmobile clubs joined together in 1986 to form the Voyageur Trail Society, Inc. (VTSI).[128] The VTSI promotes the local tourism industry, including lodging accommodations, snowmobile

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[117] *Id.* at 763, 765. Before addressing the substance of the issue, the court identified the applicable standard of review of deference to the district court's decision "absent a gross abuse of discretion." *Id.* at 765. *See* Tenkku v. Normandy, 348 F.3d 737, 743 (8th Cir. 2003).

[118] *Voyageurs*, 381 F.3d at 766.

[119] *Id.* For example, discovery and evidentiary supplementation to the administrative record are sometimes allowed upon a "showing of bad faith or improper behavior." *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* The court further clarified that the Park Service "re-opened" the bays and the Association's position that it "opened" the bays is incorrect. *Id.*

[125] *Id.* After rendering its decision, the court added that it had considered appellants' other arguments and decided that they were meritless and not worthy of discussion. *Id.*

[126] Dean Rebuffoni, *Voluntary Snowmobile Ban to Protect Voyageurs Wolves Becomes Mandatory*, MINNEAPOLIS STAR TRIBUNE, Jan. 13, 1998, at 1B.

[127] Dean Rebuffoni, *Plan for Voyageurs Park Criticized on All Sides*, MINNEAPOLIS STAR TRIBUNE, Oct. 11, 1991, at 7B. The other park is Grand Teton in Wyoming. Dean Rebuffoni, *Voyageurs Snowmobile Compromise Rejected*, MINNEAPOLIS STAR TRIBUNE, Jan. 20, 1992, at 1B.

[128] *Voyageur Trail Society . . . Preserve the Resource, Use it Wisely and Do it Safely!*, Voyageur Snowmobile Trail System, *at* http://www.snowmobilevacation.com/vt_society/index.html (last visited Feb. 21, 2005). According to the website, "[t]he VTSI is aware of no other place in North America where snowmobile trails exists on large expansive wilderness lakes that are certified safe by the Federal Government and are marked and groomed." *Id.*

rental facilities, and area restaurants. Each winter, the influx of snowmobilers to the area provides a major source of revenue for an industry that typically thrives during the summer months.

In evaluating the Park Service's decision to re-open eleven of Voyageurs' bays to snowmobiling, it is important to weigh the benefits to local tourism against the potential negative impacts snowmobiling may have on the Park and its endangered species. To minimize any harm, the ESA requires the Park Service to consult the FWS before making any decision that may affect endangered species. In the present case, the Park Service's failure to consult the FWS before making its decision to re-open the bays was an undisputed technical error.[129] However, this technical flaw was merely peripheral to the critical issue of whether snowmobiling in the Park is actually harmful to the Park's endangered gray wolf and bald eagle populations.

Based on the Park Service's research, there appears little data indicating that snowmobiling in the Park has actually caused harm to the Park's endangered species. Further, the Association has not at any point advanced any supplemental data showing any harm. Even more, it is important to note that the FWS ultimately agreed with the Park Service's conclusion that snowmobiling would not have a significant impact on the Park's endangered species. In the instant decision, the court properly considered the Park Service's research, coupled with the FWS' approval, in rendering its decision that re-opening the Park's remaining bays would not have a significant impact on the Park's endangered species. However, while the court's decision may have solved the issue at hand, the court did not address future challenges to Park Service's decisions regarding the bays.

Thus, the most significant implication of this decision is the lack of guidance the court offered the Park Service in deciding whether to close or re-open Voyageurs' bays in the future. Considering the decade of litigation leading up to the instant decision, the Park Service was in need of a procedural method for making its annual decision to close or re-open the bays.[130] Such a method would not only give the Park Service guidance, but would also hold the Park Service accountable for explaining the rationale behind its decisions. This would legitimize the Park Service's annual decisions and hopefully reduce the number of challenges brought by both opponents and proponents of the Park Service's decisions. This would in turn, eliminate the need for the court's involvement in matters of park management.

One option for holding the Park Service accountable in making its annual decision regarding the bays is to require the Park Service to make an EIS. In the instant decision, the court addressed NEPA's requirement for an EIS to be made every time an agency's proposed action significantly affects the environment. Consistent with its prior opinions,[131] the court concluded that the Park Service did not need to make a full-blown EIS annually. However, what was needed in lieu of the EIS was left open. By not addressing the issue of supplemental analyses, the court missed an opportunity to provide the Park Service with the guidance it needed to prevent future litigation.

Requiring the Park Service to conduct supplemental analyses would forge a compromise between requiring a full-blown NEPA analysis and not requiring any analysis at all. Unlike an EIS, the Park Service would not need to make supplemental analyses each year. Rather, the Park Service would only need to supplement its original EIS when changes in the Park's conditions reached a certain threshold. The court could set this threshold at the point when changes within the Park caused snowmobiling to have an uncertain impact on the Park's habitat. As conditions within the Park are bound to change over time, the supplemental analyses would provide the Park Service with ample opportunities to research the changed conditions and to make decisions accordingly.

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[129] Instead, news of the Park Service's decision to re-open the eleven bays was leaked out with new route maps. *Voyageurs, Asking Courts to Manage Parks*, MINNEAPOLIS STAR TRIBUNE, Nov. 18, 2002, at 14A.

[130] Options for such a method include requiring the Park Service to conduct an EIS or supplemental analyses to a previously conducted EIS.

[131] The court was consistent with both its prior opinion in *Maulsolf II*, Maulsolf v. Babbitt, 85 F.3d 1295, 1298 (8th Cir. 1996), and *Mausolf III*, Mausolf v. Babbitt, 125 F.3d 661, 666 (8th Cir. 1997).

However, while there may be advantages in requiring supplemental analyses, the analyses are not entirely foolproof. The analyses could undermine the Park Service's authority in managing the Park, and impose unnecessary and wasteful constraints. For example, as the court noted, the Park Service's role entails making decisions as a "faithful steward of national resources" and to comply with "its own procedural rules and regulations." Demanding the Park Service conduct supplemental analyses whenever conditions in the Park change would undoubtedly require the Park Service to expend a great deal of time and effort that may be unnecessary. Holding the Park Service accountable through these analyses may also insinuate that the Park Service is incapable of handling environmental issues within the Park on its own. Furthermore, whether conditions have even changed may be a subjective question that could pose future conflicts and lead to further involvement by the courts in management of the Park.

In conclusion, requiring supplemental analyses may not preclude all challenges to the Park Service's decisions, but it would at least provide the Park Service with guidance in making future decisions. Instead, the court only addressed the current challenge to the Park Service's decision, and in effect, left the Park Service susceptible to future challenges by both the Association and the Snowmobilers.

VI. CONCLUSION

It is unclear whether the Eighth Circuit's decision will end the disputes regarding snowmobiling in Voyageurs' bays. What is clear is that without substantive evidence that snowmobiling is actually harmful to the Park's endangered species, groups such as the Snowmobilers will continue to advocate their right for recreational use of the bays. Moreover, had the court provided the Park Service with guidance for making future decisions regarding the bays, such guidance might have given more legitimacy to the Park Service's authority. Instead, the court merely decided the issue at hand and left the Park Service vulnerable to future litigation.

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