Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 5
Issue 3 *1997*

Article 5

1997

Winter Wonderland: Intervention, Endangered Species and Snowmobiling in Voyageurs National Park. Mausolf v. Babbitt

Rebecca Williams

WINTER WONDERLAND: INTERVENTION, ENDANGERED SPECIES AND SNOWMOBILING IN VOYAGEURS NATIONAL PARK

Mausolf v. Babbitt[1]

by Rebecca Williams

I. INTRODUCTION

At Voyageurs National Park, along the northern border of Minnesota, visitors can see bald eagles and gray wolves in the wild.[2] As of fall 1997, visitors can no longer use snowmobiles to reach some of the remote areas where these animals live.[3] The Eighth Circuit Court of Appeals upheld a trail plan generated by the park superintendent, the National Park Service (NPS), and the Fish and Wildlife Service (FWS), despite the objections of a group of snowmobilers.[4] This Note will discuss the complex litigation surrounding the decision and how restricting snowmobile access in the "watery maze" that makes up Voyageurs Park's over thirty lakes and nine hundred islands might affect similar conflicts between outdoor recreationists and environmental groups in other national parks.[5]

II. FACTS AND HOLDING

The litigation involved three separate cases and three visits by the same parties to the Eighth Circuit Court of Appeals.[6] Each set of cases centered on the issue of snowmobiling in Voyageurs National Park in Minnesota – its environmental impact on endangered species,[7] NPS' authority to regulate or ban snowmobile use in the park,[8] and the standing of an environmental group to intervene on the government's behalf,[9] respectively.

Snowmobiling, although generally prohibited in national parks,[10] was a popular form of winter recreation in Voyageurs even before its opening in 1975.[11] Both the park's originating legislation and NPS regulations issued in 1991 allowed snowmobiling on frozen lake surfaces and trails.[12] A series of NPS and FWS reports and opinions provided a basis for the 1991 regulations that determined that snowmobiling did not have a significant impact on park wildlife, including the threatened bald eagle and gray wolf populations.[13]

When NPS issued the 1991 regulations, the Voyageurs Region National Park Association (Association) filed suit in Minnesota federal court, claiming that the regulations were illegal on the grounds that NPS had not specifically prepared a wilderness plan to check the effects of the regula-

[1] 125 F.3d 661 (8th Cir. 1997) [hereinafter *Mausolf IV*].

[2] Mausolf v. Babbitt, 85 F.3d 1295, 1297 (1996) [hereinafter *Mausolf II*].

[3] *Mausolf IV*, 125 F.3d at 670.

[4] *Id.* The plaintiffs were Jeffrey Mausolf, William Kuhlberg, Arlys Strehlo, and the Minnesota United Snowmobilers Association.

[5] *Mausolf II*, 85 F.3d at 1296.

[6] *See* Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996) [hereinafter *Mausolf III*], *rev'd*, 125 F.3d 661 (8th Cir. 1997); Mausolf v. Babbitt, 158 F.R.D. 143 (D. Minn. 1994) [hereinafter *Mausolf I*], *rev'd*, 85 F.3d 1295 (8th Cir. 1996); Voyageurs Region National Park Association v. Lujan, No. 4-90-434, 1991 WL 343370 (D. Minn. Apr. 15, 1991), *aff'd*, 966 F.2d 424 (8th Cir. 1992).

[7] Voyageurs Region National Park Association v. Lujan, No. 4-90-434, 1991 WL 343370 (D. Minn. Apr. 15, 1991), *aff'd*, 966 F.2d 424 (8th Cir. 1992).

[8] Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996) [*Mausolf III*], *rev'd*, 125 F.3d 661 (8th Cir. 1997).

[9] Mausolf v. Babbitt, 158 F.R.D. 143 (D. Minn. 1994) [*Mausolf I*], *rev'd*, 85 F.3d 1295 (8th Cir. 1996).

[10] *See* 36 C.F.R. § 2.18(c) (1994).

[11] *Mausolf III*, 913 F. Supp. at 1338. *See also Mausolf IV*, 125 F.3d at 663.

[12] The originating legislation instructed the park superintendent to include snowmobiling provisions in the park's development plan. 16 U.S.C. § 160h (1994). The 1991 regulations explicitly allowed snowmobiling in the park. 36 C.F.R. § 7.33(b) (1994). The same regulations authorized closing areas of the park if suggested by "park management objectives." 36 C.F.R. § 7.33(b)(3).

[13] *Mausolf III*, 913 F. Supp. at 1338. The investigations and reports include NPS' 1989 draft trail plan and 1990 environmental assessment of lake-surface snowmobiling's impact, along with FWS' 1989 and 1990 biological opinions. *See id.*

tions.[14] The District Court ordered NPS to promulgate a wilderness plan for the park within one year, but declined to enjoin snowmobiling in the park until a wilderness recommendation was made.[15] The Eighth Circuit Court of Appeals affirmed the District Court's decision, stating that the agency's action was justified under the park's enabling legislation, which more specifically governed the park superintendent's decision whether to allow snowmobiling than the Wilderness Act did.[16]

In 1991, while working on a draft wilderness plan as ordered,[17] NPS requested a "biological opinion" from FWS to ascertain the effects on the park's gray wolf, bald eagle, and general animal populations of a proposed closing of some overland park areas to snowmobiling.[18] The opinion, issued in March 1992, concluded that the proposed wilderness plan, which limited the access previously available to snowmobilers, would not "jeopardize the animals' survival or adversely affect their critical habitats."[19] The opinion warned, however, that the cumulative effects of frequent snowmobile intrusion into areas where wolves hunted prey could create "significant negative effects."[20] The opinion directed avoiding these effects by closing more overland trails, lakes and lakeshores to snowmobile access than NPS had suggested in the draft wilderness plan.[21]

Issued on December 16, 1992, the final wilderness plan mandated closing sixteen of the park's lake bays and certain shoreline areas to motorized access during the winter.[22] NPS justified the closings under a provision that gave the park superintendent authority to restrict snowmobiling for wildlife-management purposes.[23] The restricted areas consisted of 6,541 acres, comprising seven percent of the park's total water acreage and three percent of the park's total acreage.[24] The superin-

[14] *Mausolf IV*, 125 F.3d at 664. The park's enabling legislation required a wilderness plan for the park's development within four years of the park's establishment in 1971. 16 U.S.C. § 160f(b). The Association argued that NPS management policies required any areas under study for a wilderness designation be managed as actual wilderness areas pending formal designation as such, therefore making use of any motorized vehicle within such areas prohibited as mandated by the Wilderness Act. Voyageurs Region National Park Association v. Lujan, No. 4-90-434, 1991 WL 343370 at 3 (citing 16 U.S.C. § 1133(c) (1994)).

[15] Voyageurs Region National Park Association v. Lujan, No. 4-90-434, 1991 WL 343370 at 15.

[16] Voyageurs Region National Park Association v. Lujan, 966 F.2d at 428. The court said that the enabling legislation evidenced Congress' intent that snowmobiling could be allowed at Voyageurs if, as did happen, the park superintendent found that snowmobiling would not damage the area so as to preclude designation as a wilderness area. *Id.* at 427. The court held that this specific permission to allow snowmobiling overrides the general provisions of the Wilderness Act to maintain undesignated areas as wilderness. *Id.* at 428. Therefore, NPS' allowing snowmobiling did not violate the "arbitrary and capricious" standard of review imposed on federal agency action. *Id. See* 5 U.S.C. § 706(A)(2) (1994).

[17] *See Mausolf III*, 913 F. Supp. at 1339. The plan suggested limiting onland snowmobiling on the Kabetogama Peninsula to a 12-foot-wide trail while allowing continued access to all major lake surfaces. *Id.*

[18] *Mausolf IV*, 125 F.3d at 664. The biological opinion from FWS is a requirement for any federal agency contemplating action "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2) (1994). A biological opinion is a "written statement setting forth [FWS'] opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A).

[19] *Mausolf IV*, 125 F.3d at 664.

[20] *Id.* The chance that passing snowmobiles would disrupt wolves hunting and feeding along shorelines was mentioned in a 1990 environmental assessment of trail plans issued by NPS. *Mausolf III*, 913 F. Supp. at 1338. The report went on to dismiss any long-term dangers of such access by explaining that the wolves' hunting and feeding time, evenings and early mornings, did not coincide with the presence of winter recreationists. *Id.* The assessment stated that the detrimental impact on wolves had not been formally studied, but that the wolf population had remained relatively stable over the first 15 years of the park's existence. *Id.*

[21] *Id.*

[22] *Mausolf IV*, 125 F.3d at 664. *See also Mausolf III*, 913 F. Supp. at 1340 (noting that Park Superintendent Ben Clary expressed disagreement with the plan, but felt legally obligated to comply with the biological opinion's suggestion about expanding the closings).

[23] 36 C.F.R. § 7.33(b)(3) (1994). The statute reads, "The Superintendent may 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."

[24] *Mausolf IV*, 125 F.3d at 664 n.5.

tendent renewed the closure order in 1993 and 1994.[25] In 1994 and 1996, after becoming aware of snowmobilers' objections to the closures, FWS supplemented its biological opinion with an additional explanation for the restrictions and revised its initial incidental take statement, reducing the allowed number of incidental takings of gray wolves from six to two per year.[26]

On January 1, 1994, the current plaintiffs/appellees filed a complaint in Minnesota federal district court seeking declaratory and injunctive relief against NPS, Secretary of the Interior Bruce Babbitt, Voyageurs National Park, and its Superintendent Ben Clary.[27] They alleged that the FWS biological opinion and supplements did not show sufficient supporting evidence for the closings and that the closings violated the arbitrary and capricious standard of review for agency action.[28] The plaintiffs were a group of snowmobile enthusiasts represented by Jeffrey Mausolf.[29]

The Voyageurs Region National Park Association, the current appellant, moved to intervene in the snowmobilers' suit on behalf of the government.[30] It asserted an interest in "restricting the use of snowmobiles in the park, and in maintaining and preserving the pristine nature of this Nation's wildlife and wilderness refuges."[31] The same group sued to force NPS to promulgate the wilderness plan for the park in the lawsuit described above.[32]

The District Court denied the Association's motion to intervene on the grounds that it had not identified a separate, private basis for its involvement that was not already covered by the government's presence in the suit.[33] On appeal, the Eighth Circuit reversed the District Court and held that the Association had standing to intervene.[34] The Court said that the Association met the Article III requirements for standing and proved that the government might not adequately represent its interests.[35] The Court found that specific affidavits from Association members showed "concrete, imminent and redressable injuries in fact," similar to how the snowmobilers alleged certain injuries would result from the closings.[36] In addition, the

[25] *Id.* at 664.

[26] *Id.* at 664-65. The 1994 supplement stated that FWS' goal was to reduce "adverse human/wolf contact," and that limiting snowmobile access would limit the ability of humans to reach remote habitat areas and "intentionally or unwittingly" cause harm. *Id.* The 1996 supplement cited five takings and anecdotal evidence of harassment to justify the reduced number of permissible takings. *Id.* FWS must issue an incidental take statement when a proposed agency action is found to possibly result in unintentional taking of individual members of an endangered or threatened species. 16 U.S.C. § 1536(b)(4) (1994). A "taking" is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or, collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994).

[27] *Mausolf III*, 913 F. Supp. at 1340. The defendants also included Roger Kennedy, the Director of NPS, and Mollie Beattie, the Director of FWS. *Id.* at 1134. *See also Mausolf I*, 158 F.R.D. at 144.

[28] *Mausolf IV*, 125 F.3d at 665.

[29] *Id.* at 663.

[30] *Mausolf I*, 158 F.R.D. at 144. Other intervenors included the Sierra Club, North Star Chapter, Humane Society of the United States, Friends of the Boundary Waters Wilderness, National Park and Conservation Association, Izaak Walton League of America. *Mausolf II*, 85 F.3d at 1295.

[31] *Mausolf II*, 85 F.3d at 1295.

[32] *See supra* notes 14-16.

[33] *Mausolf I*, 158 F.R.D. at 148. The court characterized the Association's interest as general and shared by the general public, therefore adequately represented by NPS under parens patriae, a doctrine that the government represents all of the interests of its citizens. *Id.* at 147. A separate interest is required for intervention of right by Federal Rule of Civil Procedure 24(a)(2), which sets out a three-part test: "1) the party must have a recognized interest in the subject matter of the litigation; 2) that interest must be one that might be impaired by the disposition of the litigation; 3) the interest must not be adequately protected by the existing parties." *Id.* at 146 (quoting Mille Lacs Band of Indians v. Minnesota, 989 F.2d 997 (8th Cir. 1993)).

[34] *Mausolf II*, 85 F.3d at 1304.

[35] *Mausolf IV*, 125 F.3d at 665. The Article III test requires that a party meet three elements: 1) suffer an "injury in fact"; 2) establish a causal connection between the alleged injury and the conduct being challenged; 3) show that the injury is likely to be redressed by a favorable decision. *Mausolf II*, 85 F.3d at 1301 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 at 560-61 (1992)).

[36] *Mausolf II*, 85 F.3d at 1301-02. The opinion describes the affidavit of Jennifer Hunt, the Association's Executive Director, in which she averred that she visited the park at least twice a year and planned specific return visits. Other detailed affidavits submitted that allowing snowmobiling would lessen the members' "enjoyment of the Park's tranquility and beauty." *Id.*

Court held that the Association rebutted the parens patriae presumption of adequate representation by the government.[37]

While its appeal on intervention was pending, and ultimately granted, the Association watched the original suit proceed to the District Court. On cross-motions for summary judgment, the Court ruled for the snowmobilers, holding that the closure order was based on insufficient evidence, "little more than speculation," about the threats to endangered species from snowmobiling.[38] The Court based its decision on a standard from the Endangered Species Act (ESA) regulations requiring the "best scientific and commercial data available."[39] After the District Court issued its ruling, the Association filed a timely appeal in hopes that the Eighth Circuit would grant its appeal on intervention.[40]

The Eighth Circuit did grant the Association intervenor status, as described above, but the government dismissed its appeal of the District Court's decision granting summary judgment to the snowmobilers.[41] Thus, the Association became the only party appealing the judgment, but it had not been a party before the summary judgment.

On appeal, the snowmobilers first claimed that the court lacked jurisdiction to hear the appeal because the Association was not a party to the litigation until after the filing period for an appeal expired.[42] The snowmobilers also argued that because the government dismissed its appeal, it had essentially abandoned the regulations, leaving the Association without standing to force the government to reinstate the Park closings.[43]

In contrast, the Association argued that its "interests in observing and enjoying park wildlife" gave it continued standing to appeal.[44] It also claimed that NPS had sufficient evidence and authority for the closings under the organic act creating NPS and the national park system, and the regulations governing all national parks and Voyageurs Park specifically, in addition to the ESA regulations cited by the District Court.[45] In response, the snowmobilers argued that the park superintendent did not have authority to issue an order without a stated time limit.[46]

The District Court denied the Association's motion to intervene and ruled in favor of the snowmobilers that the park closures were unwarranted. The Eighth Circuit Court of Appeals reversed both decisions.[47]

The Eighth Circuit held that when the defending intervenor was granted standing to sue after the initial judgment and the original defendant dismissed its appeal, the intervenor continued to have standing because it could show an Article III case or controversy that differed in interests from the original defendant's.[48] In addition, the Court held that because NPS had a reasonable basis for Park closures and the closures were reviewed annually, the regulations governing NPS and the individual Park granted the Park Superintendent the discretion to temporarily close areas of the Park.[49]

[37] *Id.* at 1303. The court noted that the enabling act listed both recreational and conservationist purposes for the park's establishment, then stated, "these purposes will sometimes, unavoidably conflict, and even the Government cannot always adequately represent conflicting interests at the same time." *Id.* The Association's interest was conservation, while the government had an interest in promoting recreation and tourism. *Id.*

[38] *Mausolf III*, 913 F. Supp. at 1344. The court stated: "FWS and the NPS simply contend that temporary displacements of these species may evolve into permanent displacements . . . There is absolutely no evidence in the record to support this proposition." *Id.*

[39] *Id.* at 1343 (citing 50 C.F.R. § 402.14(g)(8) (1996)).

[40] *Mausolf IV*, 125 F.3d at 665.

[41] *Id.* at 666.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 667.

[45] *Id.* at 668. *See* 16 U.S.C. § 1, 3 (1994), 36 C.F.R. § 1.5(a) (1994), and 36 C.F.R. §7.33(b)(3) (1994).

[46] *Mausolf IV*, 125 F.3d at 669. The stated authority for park superintendent to issue the closings was 36 C.F.R. § 7.33(b)(3), which governs yearly opening and closing dates and other park regulations. *See supra* note 23. The snowmobilers asserted that the lack of a stated time limit moved the challenged closings outside the realm of the provision. *Mausolf IV*, 125 F.3d at 669.

[47] *Mausolf IV*, 125 F.3d at 665, 670.

[48] *Id.* at 667.

[49] *Id.* at 670.

III. LEGAL BACKGROUND

A. Intervention and Appeal

An important feature of the Eighth Circuit's decision in *Mausolf IV* was its acceptance of the Association's effort to proceed with an appeal of the District Court's decision against NPS despite the Association's absence at the district level. The choice to allow the appeal involved combining two separate tests and the case law surrounding them: the Federal Rule of Civil Procedure 24(a)(2) test for intervention of right and the Article III standing requirements.[50]

The language of Rule 24(a)(2) does not require parties to meet the Article III standing requirements.[51] In *Diamond v. Charles*, the Supreme Court recognized that the Courts of Appeals differ in their interpretations of the question whether intervenors must meet the Article III standing requirements along with Rule 24(a)(2).[52] But the *Diamond* court refused to resolve the issue.[53]

Complex standing law emerged when Congress began to create statutory rights and to recognize the practicality of allowing groups or individuals to sue to protect the public's rights.[54] The prior practice was not to question a party's standing to sue, but to decide whether the party had a private cause of action.[55] The change emerged from Congress' expansion of social and civil rights from the mid-1960s to the mid-1970s.[56] Amendments to the Federal Rules of Civil Procedure in 1966 dealing with compulsory party joinder, class actions and intervention of right, combined with expanded public rights, created a fertile environment for a boom in public law litigation.[57]

In the mid-1970s, the judiciary began to narrow the test for standing to restrict the growth of public law litigation.[58] The Supreme Court developed a more precise test for standing, narrowing the "injury-in-fact" test stated in *Association of Data Processing Service Organizations v. Camp.*[59] Courts gave more emphasis to prudential standing requirements to further protect their time and resources.[60]

In contrast to the growth in judicial interpretation of standing requirements, conclusive applica-

[50] As stated *supra* notes 33 and 35, the Rule 24(a) criteria include: (1) a recognized interest in the subject matter that (2) might be impaired by the disposition of the litigation and (3) is not adequately protected by the existing parties. Article III of the U.S. Constitution requires that to have standing, a party must show: (1) an injury in fact, (2) a causal connection between the alleged injury and the conduct being challenged, and (3) the injury is likely to be redressed by a favorable decision.

[51] Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 (1991).

[52] 476 U.S. 54, 68 n.21 (1986).

[53] *Id.* at 68-69.

[54] Tobias, *supra* note 51, at 424.

[55] *Id.* at 423-24. The private interests spring from common law claims like tort or contract. *Id.* at 419. Public law litigation often involves more abstract interests and attempts to deal with whole branches of government policy or practice, such as reforming institutions like prisons, or challenging administrative agency actions. *Id.* at 419-20.

[56] *Id.* at 421.

[57] *Id.* at 422-23. Tobias concluded that the committee probably did not draft the amendments with enabling the expansion of public law litigation in mind. *Id.* at 431. *See* Advisory Committee Notes for Rule 19, 39 F.R.D. 89 (1966); Rule 23, *Id.* at 98; and Rule 24(a)(2), *Id.* at 109.

[58] Tobias, *supra* note 51, at 425.

[59] 397 U.S. 150 (1970). The Article III test used today requires plaintiffs to show the following:

> that they have suffered some actual or threatened harm, which is "distinct and palpable," not abstract, conjectural or hypothetical. Second, the injury must be fairly traceable to the challenged unlawful behavior of the defendant. Finally, there must be a substantial likelihood that plaintiff's injury will be redressed by a favorable determination.

Tobias, *supra* note 51, at 425 (citing, e.g., County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1667 (1991); Primate Protection League v. Tulane Educ. Fund, 111 S.Ct. 1700, 1704 (1991); Whitmore v. Arkansas, 110 S.Ct. 1717, 1723 (1990); Asarco, Inc. V. Kadish, 490 U.S. 605, 612-13 (1989); Allen v. Wright, 468 U.S. 737, 751 (1984); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99, 100 (1979); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976)).

[60] Tobias, *supra* note 51, at 426. The prudential requirements are separate from Article III requirements but are as important to parties asserting standing. Generally, prudential standards require that parties assert only their own interests, not those of third parties (*see, e.g.*, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991); United States Dep't of Labor v. Triplett, 110 S. Ct. 1428 (1990); and Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954-58 (1984)); and that parties assert specific questions, not generalized issues better suited for legislation (*see, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75 (1982)).

tion of Rule 24(a)(2) after the 1966 amendments was lacking.[61] The *Diamond* court acknowledged that lower federal courts were left to interpret the Rule.[62] The results had been inharmonious, with those circuits that required meeting both standing and the intervention requirements not clearly articulating the relationship between the two.[63] Generally, courts did not invoke standing requirements against intervenors or explain the relevance of standing to intervention of right.[64] The courts that found a connection between the two tests applied them in differing degrees: requiring more than standing,[65] requiring an interest similar to standing,[66] or applying prudential standing limitations to would-be intervenors.[67] In *Mausolf IV*, the Eighth Circuit faced this state of confusion about what is actually required to intervene of right and what a party granted intervenor status must show on appeal when the original party on whose side the intervenor entered is no longer present.

The snowmobilers cited *Diamond*, the leading Supreme Court case on the issue of appeal and intervention, to support the proposition that the Association lost its right to appeal when NPS dropped its appeal, signaling NPS' abandonment of the regulation at issue.[68]

In *Diamond*, the intervenor was a pediatrician who, along with the state of Illinois, defended a suit brought by abortion providers to enjoin enforcement of four sections of the Illinois Abortion Law of 1975.[69] The District Court enjoined the operation of sections providing for criminal liability for performing abortions under certain circumstances and requiring dispensation of certain information to patients.[70] The State did not appeal from the permanent injunctions upheld by the Seventh Circuit Court of Appeals.[71] The intervenor filed timely notice of appeal with the United States Supreme Court, supported by a "letter of interest" from the State, saying that the State, though not appealing, continued as a party to the action with interests "co-terminous" with the appellant's.[72]

The Court rejected Diamond's contention that the letter signified a recognizable continued State interest in the statute and said that its decision not to appeal amounted to an acceptance of the District Court's decision.[73] Without the State continuing the case, the Court found that Diamond lacked Article III standing because no "case" or "controversy" existed.[74]

The Court also found Diamond's claims of an "injury in fact," as required by Article III, to be insufficient.[75] The intervenor claimed an interest as a pediatrician in that with fewer abortions performed, he would gain patients

[61] Tobias, *supra* note 51, at 434. The Supreme Court's rare confrontations with Rule 24(a)(2) left decisions that were fact-specific and minimally instructive as to application of the Rule. *Id.* at 432. *See, e.g.*, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967); Donaldson v. United States, 400 U.S. 517, 528 (1972); and Trbovich v. United States, 404 U.S. 528 (1972).

[62] Tobias, *supra* note 51, at 434.

[63] *Id.* at 436.

[64] *Id.* at 441-42. *Compare* Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991); Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979); USPS v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978); and United States v. Imperial Irrigation Dist., 559 F.2d 509, 521 (9th Cir. 1977) (all stating standing not necessary for intervention) *with* United States v. Board of School Commissioners, 446 F.2d 573, 577 (7th Cir. 1979) (stating generally that intervention standards are more liberal than standing requirements).

[65] *See* United States v. 36.96 Acres of Land, 754 F.2d 855 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986).

[66] *See* Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984); Howard v. McLucas, 782 F.2d 956, 962 n.1 (11th Cir. 1986); Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); and New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464-65 (5th Cir. 1984).

[67] *See* Panola Land Buying Ass'n v. Clark, 844 F.2d 1506, 1509 (11th Cir. 1988); Chiles v. Thornburgh, 865 F.2d 1197, 1212 (11th Cir. 1989); Harris v. Pernsley, 820 F.2d 592, 602 (3d Cir. 1987); and Portland Audubon Society v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989).

[68] *Mausolf IV*, 125 F.3d at 661, 666.

[69] *Diamond*, 476 U.S. 54, 56 (the sections are codified as ILL. REV. STAT., ch. 38, para. 81-21 to 81-34 (1992)).

[70] *Id.* at 60-61.

[71] *Id. See* 749 F.2d 452 (1984).

[72] *Id.*

[73] *Id.* at 63.

[74] *Id. See supra* note 35 for the Article III requirements. The "case" or "controversy" requirement "ensures the presence of the 'concrete adverseness which sharpens the presentation of issues.'" *Diamond*, 476 U.S. at 62 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

[75] *Diamond*, 476 U.S. at 65.

from the increase in live births.[76] The Court called this interest "speculative", and also rejected his asserted interests as a member of the medical profession and father of a minor daughter who would be entitled to parental notification under the abortion law.[77] The Court noted that Article III did not provide a forum for legislation of moral values and that Diamond's concerns did not rise to the level of a protected interest in the statute.[78]

The *Diamond* Court justified its refusal to recognize the intervenor's right to appeal by expressing concern that allowing the appeal could stifle independent state action.[79] It explained that to allow a private citizen to appeal the injunction of a statute in the absence of the government amounted to an attempt to enforce private preferences against statutes that emerged from the democratic process.[80] The Court said that the State alone reserved the power to legislate.[81] The State's decision to abandon enforcement of the statute in accordance with the injunction could not be revoked by a private citizen who supported the statute.

As will be discussed later, the *Mausolf IV* court was the first case to explicitly limit the application of *Diamond*'s ruling about the right of intervenors to appeal in absence of the original litigant on whose side intervention occurred.

B. Statutory Authority for Park Closings

The standard for rejecting an administrative agency's actions is high, as established by case law and statutory mandate.[82] The court must uphold the agency action unless it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[83] The standard allows courts to defer to the expertise of the agencies, which are created in order to resolve issues that fall under their statutory authority.[84] The Eighth Circuit held in *Voyageurs Region Nat'l Park Ass'n v. Lujan* that it would uphold regulations "reasonably related to the purposes of the enabling legislation."[85] The *Mausolf IV* court cited a standard that only implausible explanations that run counter to available evidence may be struck down.[86]

The *Mausolf III* opinion questioned NPS' authority under the ESA for the park closings.[87] A look at the origins and history of the ESA and NPS provides a basis for understanding the subsequent opinion.

Congress enacted the ESA in 1973 to protect certain individual species from endangerment and extinction.[88] The FWS administers the statute, which explains the agency's involvement in the Voyageurs Park trail plan via the biological opinion.[89] The agency can veto federal action by asserting that the proposed action would jeopardize a listed species; the agency is also charged with monitoring and limiting takings of protected species.[90] Commentators praise the ESA for its de facto imposition of an ecosystem overlay in areas where listed species live, helping to dissolve political and managerial boundaries between agencies and to establish a broader basis for biodiversity conservation.[91] Shortcomings of the statute

[76] *Id.* at 66.
[77] *Id.* at 66-67.
[78] *Id.*
[79] *Id.* at 65.
[80] *Id.*
[81] *Id.*
[82] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984), and 5 U.S.C. § 706(2)(A) (1994).
[83] 5 U.S.C. § 706(2)(A). *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
[84] *Mausolf IV*, 125 F.3d at 667.
[85] 966 F.2d 424, 427 (1992) (citing Arkansas v. Block, 825 F.2d 1254, 1256 (8th Cir. 1987) (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973))).
[86] *Mausolf IV*, 125 F.3d at 669 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)).
[87] 913 F. Supp. at 1343-44.
[88] 16 U.S.C. §§ 1531-1544 (1994).
[89] 16 U.S.C. § 1531(b).
[90] 16 U.S.C. §§ 1536(a)(2), 1538(a). *See generally*, Frederico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991) *and* Thomas France & Jack Tuholske, *Stay the Hand: New Directions for the Endangered Species Act*, 7 PUB. LAND L. REV. 1 (1986).
[91] Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 308 (1994).

are that the single-species approach to conservation does not match the objectives of true biodiversity and that it only protects species that are already almost extinct.[92]

Specifically, the provisions that affected the *Mausolf III* and *IV* cases cover FWS' obligation to issue biological opinions.[93] Section 7 of the ESA prohibits federal agencies from taking any action determined by the Secretary of the Interior to jeopardize protected species or negatively affect a protected species' habitat.[94] After a request from an agency, FWS issues its opinion of the likelihood of such harm.[95] The standard for a biological opinion is that it be based on "the best scientific and commercial data available."[96]

Other possible sources of authority for NPS' action in closing parts of the park to snowmobilers are the NPS' and the national park system's organic act, and the federal regulations governing national parks.[97] Before Congress established the national park system, it created Yellowstone National Park in Wyoming as a public "pleasuring ground" in 1872[98] — preserving almost 2 million acres of undeveloped land from settlement and formally locating some responsibility for conservation in the federal government.[99] In 1916, Congress created NPS to manage the growing national park system under the Secretary of the Interior's authority.[100]

Early in its existence, NPS placed emphasis on enabling public use and enjoyment of the parks, building facilities and welcoming various concessions.[101] Once problems accompanying overuse of the parks became apparent, however, Congress' goals in establishing and NPS' role in managing the parks shifted.[102] After about 1950, the legislation creating various parks ceased using "cookie-cutter language" about public enjoyment of the parks and began listing specific resources to be conserved, such as wild rivers, lakes, glaciers, scenery and certain animal populations.[103] In 1964, the influential Leopold Report caused the then Secretary Stewart Udall to dictate an agency policy of "preserving the total environment."[104] In addition, amendments to the NPS Organic Act in 1970 and 1978 added "inspiration" of park visitors to the list of objectives governing the agency, further indicating a turn towards preservation of nature and away from unlimited public use.[105] This historically increasing concern with the impact of human use on the national park system can be seen as the basis for the general prohibition of snowmobiling in the parks.[106] Presumably because of Voyageurs Park's relatively recent establishment and the history of unrestricted snowmobiling there, NPS initially gave the park superintendent some leeway in allowing snowmobiling in the park.[107]

[92] *Id.* at 309. *See also* Oliver Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

[93] *Mausolf III*, 913 F. Supp. at 1336, and *Mausolf IV*, 125 F.3d at 668.

[94] 16 U.S.C. § 1536(a)(2).

[95] 16 U.S.C. § 1536(b)(3)(A).

[96] 50 C.F.R. § 402.14(g)(8) (1996).

[97] *Mausolf IV*, 125 F.3d at 668. *See* 16 U.S.C. § 1, 3 (1994); 36 C.F.R. § 1.5(a) (1994).

[98] 16 U.S.C. § 21 (1994). *See generally* AUBREY L. HAINES, THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK (rev. ed. 1966).

[99] Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DEN. U. L. REV. 649, 653 (1997).

[100] 16 U.S.C. §§ 1-18f (1994).

[101] Keiter, *supra* note 99, at 654. Railroad lines, hotels and roads came into the parks, while NPS attempted to insure visitor satisfaction by eliminating wolves and other predators, feeding bears so that visitors could see them and suppressing fires. *Id.* at 654-55.

[102] 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, 19-20 (1992).

[103] *Id.* at 21-22 and n.108 (citing organic legislation for eleven national parks and seven other national monuments or preserves).

[104] Keiter, *supra* note 99, at 656-57 (citing Memorandum from Secretary of the Interior Steward Udall on Management of the National Park System to National Park Service Director (July 10, 1964), reprinted in AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 272, 273 (Lary M. Dilsaver, ed., 1994)).

[105] Herman, *supra* note 102, at 18 (quoting 16 U.S.C. § 1a-1 (1994)). The original Organic Act language confusingly directed management towards both protecting resources and allowing free public access. *Id.* at 17.

[106] *See supra* note 10.

[107] *See supra* note 12.

C. Park Closings Precedent

A Ninth Circuit case that upholds NPS action related to limiting public access is *Bicycle Trails Council of Marin v. Babbitt*.[108] Several environmental groups intervened in the suit, but, different from the present case, the government won at the district court and remained present at the appeal level.

The plaintiffs, a group of bicycling associations, challenged a 1992 NPS trail plan for the Golden Gate National Recreation Area (GGNRA).[109] NPS claimed authority for closing certain bike trails under the GGNRA originating act's mandate that the agency manage the area's resources in a manner "consistent with sound principles of land use planning" and "protect it from development and uses which would destroy the scenic beauty and natural character of the area."[110] The bicyclists asserted that the NPS plan was arbitrary and capricious because it was based on insufficient evidence that had no rational connection to the result reached.[111]

The court, adopting the district court's opinion, held that NPS' decision to limit trail use passed the "arbitrary and capricious" standard for agency action: It was reasonably related to resource protection while balancing the interests of recreationists.[112] The court cited an extensive public review process for the plan, including hearings, user group workshops and testimony from experts and staff of the recreation area.[113] The court characterized the bicyclist's complaint as one of priority – they felt that their desire for "unfettered reign of the park" should trump the interests of others' chosen mode of recreation.[114]

In addition to public use information, other evidence of the environmental impact of the closings supported NPS' decision to close certain trails to bicyclists. The agency cited environmental assessments that addressed resource protection problems like erosion and off-trail damage to vegetation and wildlife that occurred when bicyclists forced other trail users to the adjacent areas.[115] The court found that the agency took sufficient action to determine whether the closings would achieve the goals of sound land use and resource protection, noting that the agency had not "thought up some rationale after the fact to justify its action."[116] The *Bicycle Trails Council of Marin* decision lends support to the decision in *Mausolf IV* upholding the snowmobile trail closures.

IV. INSTANT DECISION

The Eighth Circuit Court of Appeals began its analysis by addressing the snowmobilers' argument that the Association lacked standing, which, if valid, would remove the court's jurisdiction over the appeal.[117] The court said that although the Association was not granted intervenor status until after the period to appeal the District Court's summary judgment had elapsed, the Association had standing to appeal because its motion to intervene was pending at the time it filed a notice of appeal.[118]

Next, the court rejected the snowmobilers' argument that because NPS dismissed its appeal of the summary judgment, the Association lost its grounds for appeal.[119] The court cited *Diamond* for the principle that if seeking intervention in the absence of the original party, the intervenor must show Article III standing, along with the separate requirements for intervention of right.[120] Having granted the intervention of right status and Article III standing in the *Mausolf II* decision, the court looked to whether a sufficient case or controversy continued to exist for the Association after NPS dropped its appeal.[121] The court ruled that the Article III requirement of a case or

[108] 82 F.3d 1445 (1996).
[109] *Id.* at 1457.
[110] 16 U.S.C. § 460bb (1994).
[111] *Bicycle Trails Council of Marin*, 82 F.3d at 1459.
[112] *Id.* at 1468.
[113] *Id.* at 1459.
[114] *Id.* at 1461.
[115] *Id.* at 1462.
[116] *Id.* at 1464.
[117] *Mausolf IV*, 125 F.3d at 666.
[118] *Id.* (quoting Marino v. Ortiz, 484 U.S. 301, 304 (1988): "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled").
[119] *Id.* at 667.
[120] *Id.* at 666.
[121] *Id.* at 667.

controversy still existed for the Association despite NPS' dismissal, because the Minnesota District Court's judgment would endanger the Association's separate interests.[122] The court noted that because the government had not actually revoked the closure order, the Association could still benefit from a judgment reversing the District Court, therefore satisfying the Article III requirement of redressability.[123]

Then the court's analysis turned to NPS' authority to issue the Park closings. Under the lenient standard of deference to agency discretion, the court ruled that because NPS had authority under "the organic act creating the NPS and the national park system," NPS regulations and Voyageurs regulations, the Park Superintendent had specific discretion to order the closures.[124] The court also ruled that it was within NPS' authority to issue the closings as long as the agency reviewed the orders annually to "determine the benefits, if any, the closures have had on the wolf population."[125] The court noted that NPS reviewed and renewed the 1992 orders in 1993 and 1994 in compliance with this standard.[126]

Finally, the court considered the District Court's finding that the evidence did not support the closures, making the agency's action "arbitrary and capricious" in violation of the court's well-established standard for deference to agency decisions.[127] The court held that because the anecdotal evidence could support a rational conclusion that Park closures would protect the gray wolf habitat, the closures were warranted.[128] The court noted that "the absence of definitive, irrefutable evidence" did not prohibit NPS from reasonably connecting snowmobiling and harm to gray wolves and other threatened or endangered species in issuing the Park closures.[129]

V. COMMENT

A result of the *Mausolf IV* decision is that interest groups granted intervention of right can remain parties on appeal when the government agency being challenged by a private citizen or group declines to appeal a decision, as long as the environmental group maintains interests separate from the government's. This result seems to allow interest groups to butt heads in a courtroom instead of in a legislative forum better suited to handle broad policy questions through the democratic process.

Because NPS and the separate parks sometimes work under directives that literally call for the protection of conflicting interests,[130] there is a broad selection of possible interests that differ from an agency's stated objectives from which groups can choose. In *Mausolf IV*, the Association's interest was enjoying wildlife, and the park superintendent's obligations under the regulations were to "wildlife management, weather, and park management objectives."[131] The general language of the NPS and individual park enabling legislation provides a fertile field for naming interests that qualify a party to continue its suit.

In addition, the broad language of the NPS Organic Act and the supporting regulations also make it unlikely for courts to find that any action is outside the arbitrary and capricious standard.[132] The well-established and expansive agency authority combined with the result of the instant case would seem to be a recipe for maximizing litigation where public use and environmental protection interests collide.

The Voyageurs Park snowmobiling litigation may have been a warm-up for a larger fight over Yellowstone, the flagship for the national park system. Ongoing conflict in the park concerns the impact of snowmobiling on the park's bison population.

Environmental groups contend that bison take groomed snowmobile trails to avoid plowing through deep snow and that the trails enable the bison to roam

[122] *Id.* The court characterized the other interests as "observing and enjoying Park wildlife . . . without the potential interference of snowmobiles." *Id.*

[123] *Id.*

[124] *Id.* at 668.

[125] *Id.* at 669. By citing the park regulations authorizing closings, the park superintendent could characterize the closings as temporary and thus subject to annual review under 36 C.F.R. § 7.33(b)(3) (1994). *Id.* The closure orders became effective without having to meet the more stringent requirements of rulemaking under 36 C.F.R. §1.5(b) (1994). *Id.* at n.10.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 670.

[130] *See supra* notes 37 and 105.

[131] *Mausolf IV*, 125 F.3d at 667, 669.

[132] Herman, *supra* note 102, at 24-25.

outside the park.[133] Once outside park borders, bison are subject to pursuit by hunters or to slaughter to avoid passing brucellosis, a disease that threatens calves. Yellowstone's is the only remaining free-ranging bison herd in the country, and it was infected with the disease from cattle when the park imported captive bison from ranches and private herds.[134] Brucellosis is a bacteria-borne disease that can cause pregnant cattle to miscarry or, if contracted by humans as undulant fever, severe joint pain.[135] Despite evidence that brucellosis is no longer a danger to humans and that no free-range transmission has been documented, the U.S. Department of Agriculture has spent billions to eradicate the disease while NPS and Montana fight over methods to control its spread.[136]

During the winter of 1997, nearly 1,100 bison, about one-third of Yellowstone's herd, died because they left the park.[137] The killings happened in the state of Montana, which won a lawsuit against NPS in 1995 allowing an interim bison-management plan while the various groups involved worked out an environmental impact statement concerning the disease.[138] A draft impact statement called for park personnel to assist in the capture and slaughter of infected bison.[139]

In 1997, an environmental group called The Fund for Animals, alleging violations of the National Environmental Policy Act and the Endangered Species Act, filed suit to force NPS to study the impact of winter recreation on Yellowstone and Grand Teton National Park wildlife.[140] Opposition to the group includes merchants in nearby West Yellowstone who benefit from the winter activities, which draw revenue during a season otherwise inhospitable to tourists.[141] The town of West Yellowstone is in Montana; the state opposes restricting snowmobile access to the parks, despite the fact that the trails might enable more bison to reach the state.

The Fund for Animals' suit settled out of court last fall.[142] Under the settlement terms, NPS agreed to study winter recreation use and to suggest closing some park roads to determine the effects on the bison.[143] In January 1998, Yellowstone Park Superintendent Michael Finley announced plans to keep the roads open for the winter and the next two snowmobiling seasons in order to study the bison's winter use of the groomed trails.[144] The Fund for Animals and other environmental groups filed suit a month later, claiming that leaving the trails open would skew the results of the environmental impact study already underway.[145]

The instant case lends supports to the groups claims in that if the study confirms an environmental impact, NPS would be authorized to close snowmobiling trails. The court's finding that the Association's interests differ from NPS' gives credence to the environmental group's efforts on behalf of the bison, even if no clear environmental impact is found, because of the rational basis standard used for the closings in *Mausolf IV*.

---

[133] Todd Wilkinson, *Yellowstone's Bison War: A Plan to Combat Disease Threatens America's Famous Wild and Free-Ranging Bison Herd*, Nat'l Parks, Nov. 21, 1997, *available in* 1997 WL 9300300 at *6.

[134] *Id.* at *2.

[135] *Id.* at *3.

[136] *Id.* at *3, *4.

[137] *Id.* at *1.

[138] *Id.* at *4. The groups involved in writing the impact statement were NPS, the Animal and Plant Health Inspection Service branch of the Department of Agriculture and the state of Montana. *Id.*

[139] *Id.* at *4-5.

[140] Kurt Repanshek, *Will Decision Bring New Litigation on Yellowstone Roads?*, SALT LAKE TRIB., Jan. 17, 1998, at A3.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Natural Resources National Parks: Enviros Sue NPS Over Trail Decision*, Greenwire, American Political Network, Feb. 20, 1998, *available in* WESTLAW, 2/20/98 APN-GR 13.

VI. CONCLUSION

The full impact of the Eighth Circuit's decision in *Mausolf v. Babbitt* is unclear at this point. The standard that the court used to uphold NPS' action is not subject to question because courts generally accept administrative agencies' interpretations of evidence and implementation of regulations. The significance of the court's reading of *Diamond* is also unclear, given the confusion among the circuits as to what exactly is required for intervention and appeal. What is clear is that the decision could lead to greater conflict between environmental groups and those who benefit from commercial snowmobiling or other forms of recreation enjoyed in the national park system. In addition, because the statutes and regulations governing park management seem to favor preservation over exploitation of the parks' natural resources, NPS and park administrators can feel confident that studies and opinions citing adequate evidence will probably be upheld if challenged.