THE NATIONAL PARK SERVICE ORGANIC ACT AND SECTION 7(A)(1) OF THE ENDANGERED SPECIES ACT: PRIORITIZING RECREATION AND ENDANGERED SPECIES PRESERVATION IN THE NATIONAL PARKS

> If we are going to succeed in preserving the greatness of the national parks, they must be held inviolate. They represent the last stand of primitive America. If we are going to whittle away at them we should recognize, at the very beginning, that all such whittlings are cumulative and that the end result will be mediocrity. Greatness will be gone.[1]

INTRODUCTION

People love national parks. Nature watching, hiking, camping, bicycling, backpacking, fishing, rock climbing, swimming, running, motorboating, rafting, kayaking, water skiing, snowshoeing, ice skating, sledding, snowmobiling, and cross country skiing are some of the recreational activities one can enjoy in the United States' national parks. Current visitation rates reveal that recreation in the national parks is dramatically increasing. For instance, more than 250 million visits were paid to the national parks in 1990.[2] That is 100 million more visits than were made in 1980, and by 2010, visits to national parks should reach 500 million per year.[3] During the summer months, Grand Canyon National Park alone receives 27,000 visitors per day.[4]

Although the national parks do exist for our enjoyment, they also serve another purpose—preservation.[5] This purpose includes protecting the endangered and threatened species that exist within the parks. Indeed, almost half of all endangered and threatened species in the United States are present in various national parks[6] and it is likely that these numbers will increase. As urbanization and habitat destruction continue, national parks may represent one of the last havens for many endangered and threatened species.

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1. NATIONAL PARKS MAGAZINE, No. 97, Apr.-June 1949, at 28, *reprinted in* JOHN ISE, OUR NATIONAL PARK POLICY 7 (1979).

2. *See Study: National Parks Falling Apart*, UPI, August 20, 1991, *available in* LEXIS, News Library, Upstart File.

3. *See id.*

4. *See* Leon Jaroff, *Crunch Time at the Canyon; Overflow Crowds, Antiquated Facilities and a Budget Crisis Threaten the Crown Jewel of National Parks*, TIME, July 3, 1995, at 46.

5. The National Park Service Organic Act contains two purposes for the national parks: to conserve the natural and historic objects and wildlife within the parks and to provide for the enjoyment of the same. National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. § 1 (1994)).

6. *See* Chris Elfring , *Wildlife and the National Park Service*, 1986 AUDOBON WILDLIFE REP. 463, 493. Many of these species are not exclusively present in the parks, but portions of their habitat are within national parks. *See id.*

With increases in both the number of threatened and endangered species in the parks and the recreational use of the parks, conflicts between preservation and recreation may increase. Unless priorities are established between preservation and recreation, park managers will be uncertain in instituting management practices; park lovers will be left wondering if their favorite recreational activity might be prohibited to protect endangered or threatened species;[7] and litigation on behalf of both park users and endangered species will likely increase.[8] Giving priority to recreation can negatively affect endangered and threatened species recovery, yet placing preservation concerns above recreation will likely preclude some recreational activities.[9] Resolving this dilemma requires close examination of the dual role required of the national parks. Will preservation or recreation take priority or can the two goals be reconciled?

This Note examines the facts, legislation, and case law necessary to answer this troubling question. Part I examines the National Park Service Organic Act, which created the National Park Service and directs its policies. Part II examines the Endangered Species Act (ESA) which must be considered when dealing with endangered or threatened species. Part II also focuses on section 7(a)(1) of ESA, which may be especially useful in resolving the tension between recreation and preservation in the parks. Finally, Part III examines how both the Organic Act and section 7(a)(1) of ESA have been applied, and suggests that together, the two Acts may create a synergy for preservation.

I. THE NATIONAL PARK SYSTEM AND THE ORGANIC ACT

The Yosemite Valley provided the catalyst for our national park system. In 1864, under President Lincoln, the federal government transferred Yosemite Valley to California "for public use, resort and recreation."[10] The impetus for protecting the Yosemite Valley was not environmentalism, but monumentalism.[11] The sheer cliffs and waterfalls in Yosemite Valley

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7. Indeed, unless wildlife within the parks is protected, parks will lose a large part of their recreational value.

8. *See, e.g.*, Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384 (D. Wyo. 1987) (conflict between the threatened Grizzly Bear in Yellowstone National Park and visitors' use of the Fishing Bridge area); Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996) (conflict between the threatened bald eagle and gray wolf and the use of snowmobiles in Voyageurs National Park); NATIONAL PARK SERVICE, U.S. DEP'T OF INTERIOR, STATE OF THE PARKS—1980, A REPORT TO CONGRESS 3 (1980) (stating that the physical impact of visitors represents one of seven major threats to the Park System's resources).

9. *See, e.g.*, Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) (noting that park managers closing of lake bays and shorelines areas reduced the park area available for snowmobiling).

10. ALFRED RUNTE, NATIONAL PARKS—THE AMERICAN EXPERIENCE 28-29 (1987).

11. *See id.* at 11-12.

provided a "symbol of continuity and stability in [our] new nation."[12] The majestic Yosemite Valley epitomized the notion of tradition and presence that Americans felt was necessary to compete with the time-honored traditions and cultural achievements of the older, more established European nations.[13] In preserving Yosemite, our young nation protected a striking symbol of our national heritage.[14]

Although President Lincoln preserved Yosemite in 1864, the preservation of the United States' richest and most spectacular regions as national symbols officially began with the designation of Yellowstone as our first national park.[15] Yellowstone, comprising more than 3,300 square miles, was created by the Yellowstone Park Act in 1872.[16] The Yellowstone Park Act directed the Secretary of the Interior to implement regulations that "provide for the preservation from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition."[17] Carl Schurz, then Secretary of the Interior, published rules in 1877 that prohibited hunting, trapping, or fishing, and prohibited the cutting of timber without permission and the removal or breaking of natural deposits.[18] These were thus designed to maintain the national parks in their natural condition.

Yosemite National Park, along with Sequoia and General Grant National Parks, was established in 1890.[19] The designations of Mount Rainier (1899),[20]

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12. *Id.* at 12.

13. *See id.* at 11.

14. John Muir, who spent much of his life advocating the protection of Yosemite, described the valley:

> Awful in stern, immovable majesty, how softly these rocks are adorned, and how fine and reassuring the company they keep: their feet among beautiful groves and meadows, their brows in the sky, a thousand flowers leaning confidingly against their feet, bathed in floods of water, floods of light, while the snow and waterfalls, the winds and avalanches and clouds shine and sing and wreathe about them as the years go by, and myriads of small winged creatures-birds, bees, butterflies-give glad animation and help to make all the air into music . . . . [I]nto this one mountain mansion Nature had gathered her choicest treasures, to draw her lovers into close and confiding communion with her.

JOHN MUIR, THE YOSEMITE 4-5 (1914). Yosemite is Native American for "great full-grown grizzly bear;" the Ahwahneechee tribe who once resided in the valley referred to it as Ahwahnee, "deep grassy valley in the heart of the sky mountain." ISE, *supra* note 1, at 51.

15. *See* ISE, *supra* note 1, at 13. Although Yellowstone was the first area declared a national park, Yosemite was, "[i]n fact . . . if not in name . . . the first national park." RUNTE, *supra* note 10, at 30.

16. *See* ISE, *supra* note 1, at 15-20.

17. *Id.* at 18.

18. *See id.* at 19.

19. *See id.* at 55.

20. *See id.* at 121.

Crater Lake (1902),[21] and Glacier National Parks (1910)[22] soon followed. Like Yellowstone, these national parks were under the authority of the Secretary of the Interior.[23] However, each park was a separate administrative unit and there was no consistency in the management of the various parks.[24] The absence of administrative unity led to a myriad of problems, including a lack of public information about the parks, disparate regulations both between and within the parks, and disputes between parks for federal appropriations.[25]

In 1911, the first National Park Conference was held. At this initial and subsequent meetings various officials voiced the need for a centralized national parks office.[26] In 1912, President Taft sent a message to Congress asking for the creation of a national parks bureau, and a number of bills were subsequently introduced in the 62d, 63d, and 64th Congresses.[27] During the 64th Congress, a bill to create the National Park Service (NPS) passed both houses, and on August 25, 1916, President Wilson signed the National Park Service Organic Act into law.[28]

The Organic Act of 1916 requires the NPS to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[29] Thus, the Organic Act requires the NPS to maintain the national parks for two purposes: (1) to conserve scenery and wildlife within the national parks; and (2) to provide for public enjoyment of these resources. Although the dual role of the NPS likely presented no problem in 1916,[30] conflicts between preservation and recreation soon arose[31] and continue to increase.[32]

The explicit language of the Organic Act provides clear guidance on how to balance the two objectives of preserving the parks' resources and providing

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21. *See id.* at 131.
22. *See id.* at 175.
23. *See id.* at 185.
24. *See id.*
25. *See id.* at 185-86.
26. *See id.* at 187-88.
27. *See id.* at 189-90.
28. *See id.*
29. National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. § 1 (1994)).
30. Prior to the passage of the Organic Act in 1916, preservationists had argued that creation of a national park system would provide economic growth. To substantiate this argument, preservationists encouraged the use of national parks. As the numbers of people visiting national parks increased, economic benefits from tourism would increase. *See* RUNTE, *supra* note 10, at 89.
31. *See* John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41, 51 (1984).
32. *See id.* at 42-43 (noting the major issue facing parks is how to accomodate increased visitation).

for the public enjoyment of such resources. The Act's language clearly establishes that the parks resources *cannot be impaired.* Without preserving the "scenery and natural and historic objects and the wildlife therein," the Park Service cannot provide for the "enjoyment of the same."[33] Thus, although the Organic Act lists two purposes, in instances where preservation and recreation conflict, preservation should take priority.[34]

A. Legislative History of the Organic Act

The legislative history of the Organic Act supports the clear meaning of the Organic Act: that the balance between preservation and recreation should favor preserving the parks' resources. President Taft, who urged Congress to establish the Park Service, stated that the need for the Organic Act "is essential to the proper management of those wondrous manifestations of nature, so startling and so beautiful that everyone recognizes the obligations of the Government to preserve them for the edification and recreation of the people."[35] The House of Representatives' report on the Organic Act also emphasized a preservationist mandate, stating that "[t]he segregation of national-park areas necessarily involves the question of preservation of nature as it exists."[36] Finally, the Secretary of the Interior accentuated the preservationist function of the national parks: "[the parks] alone have the seclusion and other conditions essential for the protection and propagation of wild animal life."[37] These statements support the proposition that recreation is an important aspect of the parks, but where recreation and preservation conflict, preservation should prevail.

Early administrative policies of the parks, like the legislative history, support both a preservationist interpretation and a more utilitarian, recreation oriented purpose for the parks. However, these policies clearly indicate that preservation should take priority. In 1918 Franklin Lane, then Secretary of the Interior,[38] outlined the administrative priorities that should govern the parks:

> First . . . the national parks must be maintained in *absolutely unimpaired form* for the use of future generations as well as those of our own time; second, . . . they are set aside for the use, observation, health, and pleasure of the people; and third, . . . the

33. 16 U.S.C. § 1 (1994); *see also* Lemons & Stout, *supra* note 31, at 57.
34. *See* Lemons & Stout, *supra* note 31, at 57.
35. *Id.* at 51 (citing H.R. REP. No. 64-515, at 9 (1916)).
36. *Id.* at 50 (citing H.R. REP. No. 64-700, at 3 (1916)).
37. *Id.* at 51 (citing H.R. DOC. No. 64-90, at 122-23 (1916)).
38. *See* ISE, *supra* note 1, at 187.

> national interest must dictate all decisions affecting public or private enterprises in the parks.[39]

Recognizing the strong role parks should play in preservation, Lane also noted that recreation would play an important part in attracting visitors to the parks: "All outdoor sports, including winter sports, should be encouraged."[40] Thus, although Lane recognized the importance of recreation, his list of priorities placed preservation over recreation.[41]

B. Judicial Interpretation of the NPS Organic Act

Prior judicial application of the Organic Act supports a preservationist approach. In *National Rifle Association of America v. Potter*, the District Court for the District of Columbia found that the overriding purpose of the Organic Act was conservation.[42] Plaintiffs in this case sought to have overturned regulations that prohibited hunting and trapping in the National Park System.[43] In evaluating the legislative intent of the Organic Act, the court found that "the paramount objective of the park system with respect to its indigenous wildlife, and the philosophy which came to pervade the new Park Service to whom it was entrusted, was, *from the beginning, one of protectionism.*"[44] The court noted that Congress' single purpose in the Organic Act was conservation.[45] Also, in examining a 1978 amendment to the Organic Act, the court stated that "Congress reiterated its intention that the National Park System be administered in furtherance of the 'purpose' (not 'purposes') of the Organic Act, that being, of course, the conservation of, inter alia, wildlife resources."[46] The court relied on these standards to hold that the

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39. Letter from Secretary of the Interior, Franklin Lane, to Director of the Park Service, Steven Mather (May 13, 1918), *in* ISE, *supra* note 1, at 194 (emphasis added).

40. *Id.* Apparently, Lane foresaw no potential for conflict between the mandates of preservation and recreation. Although the conflict is obvious today, in 1918 these goals might have seemed complementary.

41. *See id.*

42. Nat'l Rifle Assoc. of America v. Potter, 628 F. Supp. 903, 909 (D.D.C. 1986). Conservation is not the same as preservation. Conservation, as defined by Gifford Pinchot (the founder and first chief of the United States Forest Service), focuses on the planned management of natural resources. *See* GIFFORD PINCHOT, BREAKING NEW GROUND 384, 504-506 (1947). Preservation, however, emphasizes the absolute protection of natural resources. *See* THURMAN WILKINS, JOHN MUIR 174, 179, 182-83, 243 (1995); *see generally* Louise A. Halper, *The Adirondack Park and the Northern Forest: An Essay on Preservation and Conservation*, 19 VT. L. REV. 335 (1995).

43. *See Potter*, 628 F. Supp. at 904.

44. *Id.* at 905 (emphasis added).

45. *See id.* at 909.

46. *Id.* at 910. The court also noted the emphasis on conservation in the General Authorities Act:

> [T]he national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and

Park Service's regulations prohibiting hunting and trapping in the entire park system (except where specifically allowed by Congress) were reasonable and allowed to stand.[47]

The preservationist interpretation of the Organic Act continued in *Michigan United Conservation Clubs v. Lujan*.[48] Plaintiffs in this case, Michigan United Conservation Clubs and the National Trappers Association, challenged regulations that prohibited trapping in areas administered by the National Park Service.[49] Holding that the Secretary of the Interior's regulations were not arbitrary and capricious, the court stated: "Notwithstanding that the goals of user enjoyment and natural preservation may sometimes conflict, the NPS may rationally conclude, in light of the Organic Act . . . , that its *primary management function with respect to wildlife is preservation* . . . ."[50]

Thus, under *Michigan United v. Lujan* and *NRA v. Potter*, a reasonable interpretation of the Organic Act is one that recognizes preservation as the paramount purpose of the park system. This suggests that conflicts between endangered species preservation and recreation should be resolved in favor of preservation. In conflicts specifically involving endangered species and recreation in national parks, recognizing the preservationist intent of the Organic Act may be essential to effectively protect endangered and threatened species in the national parks.

> recreation areas in every major region of the United States . . . ; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage.

Id. at 905-06 (citing 16 U.S.C. § 1(a)(1), (c) (1982)). In addition, the court noted the preservationist intent of a rider to the Redwood Park Expansions Act:

> [T]he promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by [the Organic Act], to the common benefit of all the people of the United States. The authorization of activities shall be construed . . . in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established.

Id. at 906 (citing 16 U.S.C. § 1(a)(1) (1982)).

47. *See id.* at 912.

48. Michigan United Conservation Clubs v. Lujan, 949 F.2d 202 (6th Cir. 1991). Plaintiffs sought to have trapping allowed at Pictured Rocks National Lakeshore and Sleeping Bear Dunes National Lakeshore. *See id.* at 203. Although these areas are not national parks, both Lakeshores, as well as all other areas administered by the Park Service, are regulated in accordance with the Organic Act. *See id.* at 204-05.

49. *See id.* at 203.

50. *Id.* at 207 (emphasis added).

II. THE ENDANGERED SPECIES ACT

Like all other federal agencies, the NPS must abide by the ESA.[51] The national parks contain viable habitat for almost one half of all endangered or threatened species, and many of the National Park Service's management decisions require consideration of ESA.[52] This Part provides a brief overview of ESA,[53] including an examination of *Tennessee Valley Authority v. Hill*,[54] and then examines a specific section of the Act—section 7(a)(1)—that may be particularly effective in resolving the dispute between recreation and conservation in the national parks.

A. ESA Background

The ESA presents comprehensive legislation for the preservation of endangered species.[55] The ESA mandates that "all Federal departments and agencies shall seek to conserve endangered species and threatened species."[56] Under the ESA, "conserve" is defined as:

> to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, [and] habitat acquisition and maintenance . . . .[57]

Section 7(a)(1) of the Act imposes an affirmative duty to conserve on federal agencies: "All other Federal agencies *shall* . . . utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered . . . and threatened species . . . ."[58] Section 7(a)(2) requires that "[e]ach Federal agency shall . . . insure that any action

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51. *See* The Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1997).

52. *See generally* Elfring, *supra* note 6.

53. For an excellent analysis of the Endangered Species Act, see RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION (1992).

54. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

55. *See id.* at 180. When President Nixon signed the Act, he stated that the legislation "provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage—threatened wildlife." Presidential Statement on Signing section 1983 into Law, 10 Weekly Comp. Press. Doc. 2 (Dec. 28, 1973), *reprinted in* LITTELL, *supra* note 53, at 10.

56. 16 U.S.C. § 1531(c)(1).

57. 16 U.S.C. § 1532(3).

58. *Id.* § 1536(a)(1) (emphasis added).

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."[59]

The U.S. Fish and Wildlife Service (USFWS) administers consultation under section 7(a)(2)to insure that federal actions are not likely to jeopardize endangered or threatened species.[60] After consultation, the USFWS provides a "jeopardy opinion," which consists of a written statement describing how an agency action will affect the species or its designated critical habitat.[61] If an agency cannot show that its action is unlikely to jeopardize or adversely modify the habitat of an endangered or threatened species, then the USFWS must suggest "reasonable and prudent alternatives" if they exist.[62] Essentially, section 7(a)(2) consultation requires that agency actions will not adversely affect endangered or threatened species or their habitat.[63]

Section 9 of the ESA, which prohibits the taking of a species,[64] defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[65] The USFWS, elaborating on the meaning of "harass" in the statutory definition of "take," defines "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[66]

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59. *Id.* § 1536(a)(2).

60. *See* 50 C.F.R. § 402.02 (1996). Consultation is the process by which a federal agency insures that its actions will not jeopardize an endangered or threatened species. *See* 16 U.S.C. § 1536(a)(2).

61. 16 U.S.C. § 1536 (b)(3)(A).

62. *Id.*

63. Consultation under section 7(a)(2) is the primary means by which conflicts between endangered species and agency actions are resolved. *See* Frederico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 18 (1996). Between 1987 and 1991, 1869 consultations were performed under § 7(a)(2). *See id.* Of these 1869 consultations,

> 181 resulted in "jeopardy opinions" identifying conflicts. In 158 of those 181 cases, the agencies offered at least one reasonable and prudent alternative allowing the activity to go forward without violation of section 7(a)(2). Still, section 7 is better known for the handful of projects it has stopped than for the hundreds it has allowed to go forward.

Id. (citations omitted).

64. 16 U.S.C. § 1538.

65. 16 U.S.C. § 1532(19).

66. 50 C.F.R. § 17.3 (1996); *see also* Babbitt v. Sweet Home Chapter of Commun. for Great Or., 115 U.S. 2407 (1995). In *Sweet Home*, the Court upheld the Secretary of the Interior's definition of harm, which the Secretary interpreted to include habitat modification. *See id.* The Secretary defined harm as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* at 2410 (citing 50 C.F.R. § 17.3 (1994)).

Section 11 of the ESA provides both civil and criminal penalties for violations of the Act's provisions.[67] For violations of section 9, a civil penalty of up to $25,000 per violation may be assessed.[68] Criminal convictions of section 9 carry fines up to $50,000 and imprisonment of up to one year.[69]

B. An Early Mandate for Conservation: Tennessee Valley Authority v. Hill

The ESA provides extensive protection to endangered and threatened species. However, just how far protection would reach was undetermined until 1978, when the Supreme Court decided *Tennessee Valley Authority v. Hill* (*TVA*).[70] In *TVA*, the Court decided whether the presence of an endangered fish species could stop the completion of the Tellico Dam. The snail darter, listed as endangered in 1975, was found to exist in only one area of the Little Tennessee River below the Tellico Dam, and this area of the river was to be completely inundated upon completion of the dam.[71] The Supreme Court considered whether the ESA, enacted seven years after construction on the Tellico Dam commenced, could force construction of the dam to stop.[72]

In *TVA*, the Supreme Court said that the actual language of the ESA required that construction of the dam be halted to ensure the conservation of the endangered snail darter.[73] Referring to section 7(a)(2) of the Act,[74] the Court stated that "[t]his language admits of no exceptions."[75] The Court continued its literal construction of the ESA, noting the absence of ambiguity in the purpose of the Act: "all Federal departments and agencies *shall* seek *to*

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67. *See* 16 U.S.C. § 1540.

68. *See id.* § 1540(a)(1).

69. *See id.* § 1540(b)(1).

70. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

71. *See id.* at 158-63.

72. *See id.* at 153.

73. *See id.* at 172-73.

74. When the Supreme Court decided *TVA*, section 7(a)(2) required that federal agencies "insure that any action authorized, funded, or carried out [by them do not] jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (1973) (amended 1979). For the current text of section 7(a)(2), see *infra* note 76.

75. *TVA*, 437 U.S. at 173. Congress amended the language of § 7(a)(2) after *TVA*. *See* 16 U.S.C.S. § 1536. Section 7(a)(2) now reads:

> Each Federal Agency shall . . . 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 . . . .

16 U.S.C. § 1536(a)(2) (emphasis added). The substitution of "is not likely to" for "do not" clearly presents a less demanding standard. Indeed, after the amendment, this language may, unfortunately, admit for exceptions.

conserve endangered species . . . ."[76] The Court recognized that its application of the ESA would have harsh economic results,[77] but stopping construction of the dam was inevitable because "examination of the language, history, and structure of the legislation under review . . . indicate[d] beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[78]

In examining the legislative history of the Act, the Court found that "[t]he dominant theme pervading all Congressional discussion of the proposed [ESA] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national . . . wildlife resources."[79] The Court concluded that the language and history of the ESA require federal agencies to take affirmative action to speed the recovery of endangered and threatened species: "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost.* This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[80] Based on the actual language and the legislative history, the Court held that construction of the Tellico Dam must be halted to prevent the destruction of the snail darter's critical habitat.

The Supreme Court's decision in *TVA* relied heavily on section 7(a)(2), which has been the heart of the ESA for protecting endangered species.[81] In addition to stopping construction of the Tellico Dam, section 7(a)(2) has been used to modify the construction of an interstate highway in Mississippi,[82] to delay highway and flood control projects near San Diego,[83] and to prevent timber cutting in the Pacific Northwest.[84] Despite the successful use of section 7(a)(2) to protect endangered species in these instances, 7(a)(2)

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76. *Id.* at 180 (quoting 16 U.S.C. § 1531(c)).

77. *See id.* at 174. Halting construction of the dam would "requir[e] the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds." *Id.*

78. *Id.* The Court's approach towards interpreting the ESA is epitomized by the majority's response to Justice Powell's assertion that the word "action" in section 7 was ambiguous. *See id.* at 173 n.18. Responding to Justice Powell's dissent, the majority cited Lewis Carroll's advice on language construction: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" *Id.* (citing LEWIS CARROLL, THROUGH THE LOOKING GLASS, THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939)).

79. George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1975).

80. *TVA*, 437 U.S. at 184 (emphasis added).

81. *See* Cheever, *supra* note 64, at 17.

82. *See* National Wildlife Fed'n v. Coleman, 529 F.2d 359, 375 (5th Cir. 1976) (delaying the completion of Mississippi's Interstate 10 to protect the habitat of a Sandhill Crane species).

83. *See* Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987) (delaying completion of flood control channels and freeway construction in California to protect the Light-Footed Clapper Rail and the California Least Tern).

84. *See* Portland Audobon Soc'y v. Lujan, 795 F. Supp. 1489, 1510-11 (D. Or. 1992); Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 628-30 (Wash. 1991).

consultation has been unsuccessful in preventing the harm of threatened species in at least one national park.[85] New uses of the same Act may therefore be necessary to resolve the conflict between recreation and preservation in the national parks.

C. Section 7(a)(1) of the ESA

Section 7(a)(1) provides that "[a]ll other Federal agencies *shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this chapter by carrying out programs *for the conservation* of endangered species and threatened species."[86] As the *TVA* Court noted, section 7(a)(1) creates an affirmative duty for federal agencies to conserve.[87] Section 7(a)(1) specifically refers to conservation in light of the "purposes of this chapter," and the Act defines this purpose, in part, as "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[88]

Unlike the frequently invoked section 7(a)(2), section 7(a)(1) "has been the monumental underachiever of the ESA."[89] Although previously under-utilized, section 7(a)(1) may be ideal for protecting endangered and threatened species in national parks for several reasons. First, unlike sections 7(a)(2) and (9), which respectively require either a jeopardy finding or a taking, the duty to conserve under section 7(a)(1) is triggered whenever a species is listed as threatened or endangered.[90] Second, under section 7(a)(1) federal agencies are directed to "utilize their authorities" to conserve.[91] The Organic Act of 1916 provides the Park Service's authority and, because the Organic Act specifically recognizes the Park Service's duty to conserve, the ESA and the Organic Act together create a strong tool for protecting endangered species.[92]

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85. *See* Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384, 392 (D. Wyo. 1987); David P. Sheldon, *A Threatening Turn for a Threatened Species: The Impact of* National Wildlife Federation v. National Park Service, 10 PUB. LAND L. REV. 157 (1989).

86. 16 U.S.C. § 1536(a)(1) (emphasis added).

87. *See TVA*, 437 U.S. at 183-85.

88. 16 U.S.C. § 1531(b). Other purposes of the Act are "to provide a program for the conservation of such endangered species and threatened species and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [16 U.S.C. § 1531(a)(4)(A)-(G)]." *Id.*

89. J.B. Ruhl, *Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1128 (1995).

90. *See* 16 U.S.C. § 1536(a)(1). A jeopardy finding under section 7(a)(2) means that a federal agency's action will either "jeopardize the continued existence of any endangered or threatened species or result in the . . . adverse modification of [the species'] habitat." 16 U.S.C. § 1536 (a)(2).

91. *Id.*

92. *See infra* Part III.

1. Early Application of 7(a)(1): *Defenders of Wildlife v. Andrus* and *Connor v. Andrus*

Before applying section 7(a)(1) of the Act to the conflict between endangered species and recreation in the national parks, it is useful to examine how lower courts have interpreted 7(a)(1). In *Defenders of Wildlife v. Andrus*, plaintiffs argued that the Department of Interior's regulations governing duck hunting violated the ESA.[93] The regulations at issue allowed hunting thirty minutes before sunrise, and plaintiffs argued that there was a reasonable possibility that several endangered, migratory waterfowl species would be shot during this low-light period.[94] The court, interpreting section 7(a)(1) to place an affirmative duty on the Secretary of Interior, held that the regulations were arbitrary because they did not "focus upon the obligations of the Secretary to conserve and increase the populations of these species."[95]

In making this decision, the court found it clear that federal agencies "*must* do far more than merely avoid the elimination of protected species. The Secretary *must* bring these species back from the brink so that they may be removed from the protected class, and it must use all methods necessary to do so."[96] Because the Interior Department did not present (and indeed had not gathered) evidence that hunting in low-light conditions would not result in misidentifications of endangered species, the court found the agency's regulation allowing hunting during low light conditions to be arbitrary.[97]

Connor v. Andrus, another case concerning duck hunting, involved U.S. Fish and Wildlife regulations that prohibited duck hunting in certain areas of Texas, New Mexico, and Arizona to protect the endangered Mexican duck (*Anas diazi*).[98] Plaintiffs (duck hunters) alleged that the evidence on which the USFWS relied to close hunting provided "no rational factual basis for the regulation closing duck season in the affected areas."[99] The plaintiffs' claim acknowledged that the Mexican duck was endangered, but pointed out that the

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93. Defenders of Wildlife v. Andrus, 428 F. Supp. 167, 168 (D.D.C. 1977).
94. *See id.*
95. *Id.* at 170.
96. *Id.* (emphasis added).
97. *See id.* In explaining its holding, the court stated:

> The rulemaking proceedings did not concern themselves with the amount, extent or nature of such killing and, especially since plaintiff by its affidavits presents a substantial argument that the destruction of protected species may be considerable, it is apparent that the rulemaking process was not adequately focused upon the obligation of the Fish and Wildlife Service to conserve and increase the population of these species. In this sense, then, the regulations must be said to be arbitrary.

Id.

98. Connor v. Andrus, 453 F. Supp. 1037, 1039 (W.D. Tex. 1978).
99. *Id.* at 1039-40.

two dangers to the duck were not hunting, but habitat destruction and hybridization.[100]

Holding for the duck hunters, the Texas district court noted that "the record is filled to abundance with data to show that hunting presents no threats to the Mexican duck."[101] The court, citing *Defenders of Wildlife v. Andrus*, noted that the Secretary of the Interior has an affirmative duty to facilitate the recovery of endangered species.[102] However, the court stated that "such a duty is not met by promulgating regulations which do not attack the cause or causes of population depletion of a species."[103] Thus, because the USFWS regulations closing duck hunting were not based on factors that attacked the problem affecting the Mexican duck, the court overturned the agency's regulations.[104]

Defenders of Wildlife teaches us that courts will literally interpret the affirmative duty language of section 7(a)(1). If regulations are promulgated that do not address the "amount, extent or nature" of harm to an endangered species, then an agency will not have met its duty under 7(a)(1).[105] *Connor*, however, teaches that there is a limit to section 7(a)(1): unless an action actually "attack[s] the cause or causes" of the species' endangered or threatened status, then section 7(a)(1) cannot be used to justify such action.[106] Thus, section 7(a)(1) requires that an agency's actions promote the recovery of endangered or threatened species, but actions that do not produce actual benefits will not be upheld under 7(a)(1).

2. Section 7(a)(1) as a Promise for Protection: *Carson-Truckee Water Conservancy District v. Watt*

Section 7(a)(1) was later applied in *Carson-Truckee Water Conservancy District v. Watt*.[107] At issue in *Carson-Truckee* was the Secretary of Interior's management of the Stampede Dam and Reservoir.[108] Plaintiffs were seeking to compel the Secretary of the Interior to sell more water from the Stampede

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100. *See id.* at 1041.

101. *Id.*

102. *See id.*

103. *Id.*

104. *See id.* at 1041-42 ("[T]he rules . . . challenged were not based on all the relevant factors which the Fish and Wildlife Service should have considered and this is a clear error of judgment.").

105. *Defenders of Wildlife*, 428 F. Supp. at 170.

106. *Connor*, 453 F. Supp. at 1041.

107. Carson-Truckee Water Conservancy Dist. v. Watt, 549 F. Supp. 704 (D. Nev. 1982), *aff'd in part*, Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).

108. The Little Truckee River in Eastern California passes through the Stampede Dam and Reservoir, and then flows into the Truckee River which flows from California into Nevada, and empties into Pyramid Lake.

Reservoir to be used for industrial and municipal purposes.[109] Pyramid Lake, however, was inhabited by the endangered cui-ui fish (pronounced "kwee-wee")[110] and the threatened Lahontan cutthroat trout[111] and the Secretary was managing the dam and reservoir to conserve these two fish species.[112]

Plaintiffs in *Carson-Truckee* acknowledged that the Endangered Species Act applied to the case.[113] However, plaintiffs argued that although the Secretary cannot negatively affect the survival of the endangered species, section 7(a)(2) of the act permitted "federal agencies to supply only that amount of water necessary to prevent the extinction of endangered species."[114] Interpreting *Defenders of Wildlife* and *Connor* to hold that "[The Secretary] must do *far more* than merely avoid the elimination of protected species," the court relied on section 7(a)(1) to uphold the Secretary's water management practices.[115] The court held section 7(a)(1) to require that the Secretary "*must* bring these species back from the brink so that they may be removed from the protected class, and [he] *must use all methods necessary* to do so."[116] Relying on the interpretations of section 7(a)(1) in *Connor* and *Andrus*, the court applied section 7(a)(1) to require the Secretary to "give the Pyramid Lake fishery priority over all other purposes of the [dam and reservoir] until the cui-ui fish and Lahontan cutthroat trout are no longer classified as endangered or threatened."[117] Thus the court rejected plaintiffs' argument that section 7(a)(2) only required that the Secretary's water management practices not harm the threatened or endangered species. Instead, the court held section

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109. *See id.* at 707.

110. The cui-ui fish is the only pure remaining species of the genus *Chasmistes*. Although much is unknown about the cui-ui, the fish require a large in-flow of water into Pyramid Lake for spawning. This flow, provided by the Little Truckee River, is necessary to the cui-ui for several reasons: It attracts spawning cui-ui to the mouth of the river; provides cool water temperatures which increases migration, hatching, and survival rates; and keeps the river at an adequate depth such that spawning cui-ui are not trapped in the river and unable to return to Pyramid Lake. *See id.* at 710-11.

111. The Lahontan cutthroat trout does not spawn naturally in Pyramid Lake because the trout require lower water temperatures and faster currents than the cui-ui. Migration by the trout into the upper Truckee River is blocked by a dam, but fish that are attempting to migrate are captured and bred in the Pyramid Lake hatchery program. Cool water sustained by the Little Truckee River's inflow is necessary to attract migrating Lahontan cutthroats into the fishway for capture. *See id.* at 711.

112. *See id.*

113. *See id.* at 709.

114. *Id.*

115. *Carson-Truckee*, 549 F. Supp. at 710 (emphasis added). It is important that the court upheld the Secretary's action—the court was not called upon to force the Secretary to act.

116. *Id.* (emphasis added). The Ninth Circuit, affirming the district court decision, noted "ESA § 7(a)(1) . . . specifically directs that the Secretary 'shall' use programs administered by him to further the conservation purposes of ESA." Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 261 (9th Cir. 1984) (citing 16 U.S.C. § 1536 (a)(1) (1982)).

117. *Carson-Truckee*, 549 F. Supp. at 710.

7(a)(1) to require that the cui-ui and Lahontan cutthroat trout be given first priority in the Secretary's decisions.[118]

A key point in *Carson-Truckee* is that the court was only called upon to uphold the Secretary's water management practices.[119] The Secretary had already taken an affirmative measure to protect the cui-ui, and the court readily upheld that action under section 7(a)(1). In subsequent litigation regarding Pyramid Lake and the cui-ui, section 7(a)(1) was again invoked, but in this case the plaintiffs attempted to use section 7(a)(1) to force a federal agency to act, rather than to uphold an agency action.[120] This attempt at an affirmative use of 7(a)(1) produced a much different result.

In *Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy*, the Pyramid Lake Paiute Tribe of Indians sued the U.S. Navy for violations of the ESA.[121] The Navy diverted water from the Truckee River to maintain irrigated vegetation around the Fallon Naval Air Station in Nevada to create "buffer zones."[122] The purpose of the vegetated "buffer zones" was to protect aircraft runways from the blowing sand and debris that is common in the desert regions of Nevada.[123] To effectuate its "buffer zones," the Navy leased water rights to local farmers, who cultivated crops on lands adjoining the runways.[124] Because the water that was leased to farmers resulted in less water reaching Pyramid Lake, the Tribe alleged that the Navy violated its affirmative duty to conserve under section 7(a)(1).[125] Specifically, the Tribe claimed that if the Navy could find any alternative that would "enhance conservation [of the cui-ui] to an equal or greater degree than does the challenged action," then the Navy should be required to adopt that alternative.[126] In response to this argument, the Navy maintained that agencies are not required to choose the "least burdensome alternative."[127] The Navy argued that while agencies need to develop programs that will operate to

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118. *See id.*

119. *See id.*

120. *See* Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy, 898 F.2d 1410 (9th Cir. 1990); *see also infra* notes 121-128 and accompanying discussion.

121. The Tribe alleged that the Navy's practice of leasing water rights to landowners near Pyramid Lake constituted a violation of section 7(a)(1) and 7(a)(2). *See id.* at 1414-16. The Ninth Circuit found that the Navy's reliance on USFWS opinions that the leasing programs would not jeopardize the existence of the cui-ui was not arbitrary and capricious. *See id.* at 1415.

122. *See id.* at 1412.

123. *See id.*

124. *See id.*

125. *See id.* at 1417.

126. *Id.*

127. *Id.*

conserve endangered species, they "need to do so only in a manner consistent with the accomplishment of the agencies' primary goals."[128]

Relying on USFWS reports that the Navy's water-leasing program would not jeopardize the cui-ui and the district court's finding that alternative proposals would be of "insignificant effect upon the availability of water in the lower Truckee River for the preservation of the cui-ui," the Ninth Circuit held that the Navy did not violate section 7(a)(1).[129] Because alternatives would have only insigniffcant effects on conserving the cui-ui's habitat, the Navy had not violated its affirmative duty to conserve:

> An "insignificant" conservation measure in the context of ESA is oxymoronic; if the proposed measure will be insignificant in its impact, how can it serve the ends of conservation, and thus be a "conservation measure"? To require an agency to implement such a measure would be ill-advised.[130]

Because the Navy's use of water from the Truckee River was not shown to harm the cui-ui, the Ninth Circuit would not, under section 7(a)(1), order the Navy to alter its water lease program. Thus, unless an alternative to an agency's action existed that would impart "significant" conservation benefits to a species, the agency is not required to adopt other actions under 7(a)(1).

Connor, *Defenders of Wildlife*, *Carson-Truckee*, and *Pyramid Lake* elucidate three points about ESA section 7(a)(1). First, there is no question that section 7(a)(1) places an affirmative duty to conserve on federal agencies. Second, an agency's action prohibiting certain activities or practices will not be upheld unless the activity or practice will jeopardize a threatened or endangered species' existence. Third, section 7(a)(1) cannot be used to force an agency to act if only insignificant benefits will be imparted to the endangered species.

Section 7(a)(1) requires federal agencies to take actions to speed the recovery of protected species, but such actions must actually benefit the species. Applying section 7(a)(1) to recreation in the national parks, the question becomes, what may the Department of Interior do to speed the recovery of endangered and threatened species in the national parks?

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128. *Id.* The primary goal here was creating buffer zones of irrigated vegetation to protect Navy pilots during takeoffs and landings.

129. *Id.* at 1418.

130. *Id.* at 1418-19.

III. THE NPS ORGANIC ACT AND THE ESA: A SYNERGY FOR CONSERVATION?

When both recreation and preservation are at issue in the national parks, the Organic Act alone may not always provide a clear resolution. However, whenever an endangered or threatened species is involved, there should be no question that the balance between recreation and preservation should tip in favor of preservation. Thus, the Organic Act and the ESA, together, provide a simple solution for when recreation collides with endangered or threatened species in the national parks. This Part evaluates the case law surrounding this issue, and suggests that a recent Eighth Circuit decision presents valuable precedent for managing recreation and endangered species protection in national parks.

A. National Wildlife Federation v. National Park Service

The first conflict involving section 7(a)(1) of the ESA and an endangered species in a national park occurred in *National Wildlife Federation v. National Park Service*.[131] At issue in *National Wildlife Federation* was the timing of the Park Service's closure of Fishing Bridge Campground in Yellowstone National Park.[132] Fishing Bridge Campground constituted critical habitat for grizzly bears, and the Park Service had implemented an interim management plan for the area.[133] The plan provided that the campground would remain open until the park service could complete an environmental impact statement.[134] Plaintiffs, the National Wildlife Federation and the Wyoming Wildlife Federation, contended that the Park Service violated the ESA by leaving the campground open.[135]

Noting that the affirmative nature of 7(a)(1) was "beyond dispute," the court allowed the Park Service to leave Fishing Bridge open pending the results of the EIS.[136] The court premised its decision to uphold the Park Services' interim management plan on two grounds. First, the court

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131. Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384 (D. Wyo. 1987). For extensive analysis of this case, see Kyla Seligsohn-Bennett, *Mismanaging Endangered and "Exotic" Species in the National Parks*, 20 ENVTL. L. 415 (1990); David P. Sheldon, *A Threatening Turn for a Threatened Species: The Impact of* National Wildlife Federation v. National Park Service, 10 PUB. LAND L. REV. 157 (1989).

132. *Nat'l Wildlife Fed'n*, 669 F. Supp. at 385.

133. *See id.* at 387.

134. *See id.* at 386-87.

135. *See id.* at 386-87. The Park Service initially recommended closure of the Fishing Bridge. However, in 1984 the Service instead decided to prepare an Environmental Impact Statement.

136. *Id.* at 387.

recognized the Park Service's continuing effort to protect the endangered grizzly bear:

> In the instant case, as in *Carson Truckee*,[137] the Secretary and the Park Service have not undertaken a project that threatens the existence of an endangered or threatened species. Rather, the Park Service has acted pursuant to [§ 7(a)(1)] by implementing a very concise and aggressive management plan that has as its ultimate goal the preservation of the grizzly bear and eventual recovery of the grizzly so as to one day remove it from the ranks of the ESA.[138]

Second, the court recalled the interim nature of the Park Service's management plan. The court deemed it important that the ultimate fate of Fishing Bridge would not be decided until the EIS was completed.[139] Based on the temporary status of the Park Service's leaving Fishing Bridge open, the court found "no reason why the status quo cannot be maintained through enforcement of the Interim Management Plan."[140] Thus, because the interim management plan reflected an aggressive attempt to protect the grizzly, and because the continued fate of Fishing Bridge depended on the results of a pending EIS, the Park Service met its duty under section 7(a)(1).

B. Mausolf v. Babbitt*: Solid Precedent for Managing Endangered Species and Recreation*

A more recent decision involved a clash between bald eagles, gray wolves, and snowmobiles in Voyageurs National Park.[141] In *Mausolf v. Babbitt*, a group of snowmobilers challenged the National Park Service's closure of several snowmobiling trails within Voyageurs National Park. In its initial decision, a Minnesota District Court held that the trail closings were not adequately explained and were therefore arbitrary and capricious.[142] The Eighth Circuit Court of Appeals, however, overturned this decision.[143] Relying on both the ESA and the NPS Organic Act, the Eighth Circuit held that the trail closure had a "rational foundation" and should therefore be upheld.[144]

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137. *See supra* notes 101-119 and accompanying text.
138. *National Wildlife Fed'n*, 669 F. Supp. at 388 (emphasis omitted).
139. *See id.*
140. *Id.*
141. *See* Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996); *rev'd*, 125 F.3d 661 (8th Cir. 1997).
142. *See id.* at 1343-44.
143. *See Mausolf*, 125 F.3d at 663.
144. *Id.* at 669.

Voyageurs National Park, established in 1975, consists of nearly 220,000 acres in northern Minnesota.[145] The enabling legislation for Voyageurs expressly considered recreational snowmobiling, stating that "[t]he Secretary may, when planning development of the park, include appropriate provisions for . . . winter sports, including the use of snowmobiles."[146] Voyageurs is home to between 13 and 21 breeding pairs of bald eagles and approximately 35 gray wolves.[147] Both parties agreed that the populations of gray wolves and bald eagles within the park were stable.[148]

In 1989, the USFWS issued a biological opinion stating that a snowmobile trail across the Kabetogama Peninsula within Voyageurs would not adversely affect either the existence of the gray wolf or its critical habitat.[149] In its opinion, the USFWS added that creating no new snowmobiling trails could benefit the park's wolf population.[150] In 1991, as part of an environmental impact statement for the park, the NPS recommended limiting snowmobiling on the Kabetogama Peninsula.[151] This recommendation was based on the NPS conclusion that onland snowmobiling might adversely impact the wolf population.[152] In 1992, the USFWS issued a biological opinion that noted that, although the disruption of wolves due to snowmobiling may be insignificant on an individual basis, "repeated disruptions may lead to a cumulatively significant effect, particularly during periods of stress caused by severe weather or reduced prey availability."[153] Based on this opinion, the USFWS directed the NPS to close snowmobiling trails in a manner consistent with its opinion.[154]

The Voyageurs Park superintendent questioned the USFWS directive, stating that "leading wildlife biologist[s], including the USFWS biologist,

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145. *See Mausolf*, 913 F. Supp. at 1336.

146. 16 U.S.C. § 160(h) (1994).

147. *See Mausolf*, 913 F. Supp. at 1337. The gray wolves comprise six to nine wolf packs, with between two to eleven wolves per pack. *See id.*

148. *See id.* at 1336 n.2. The USFWS believed that the main threat to bald eagles in the park was "human disturbance during the breeding cycle, which may cause eagles to metabolize fat reserves containing polychlorobiphenyl . . . and mercury. [S]uch metabolism increases contaminant levels in eagle eggs." *Id.* at 1337 (citation omitted). If this is true, the main threat for bald eagles "extends from courtship in late February through incubation in mid-May." *Id.* (citation omitted). Based on this theory, plaintiffs did not dispute the temporary trail closures within one quarter mile of the eagles' nests during breeding season. *See id.*

149. *See id.* at 1338. The Kabetogama Peninsula makes up almost half of Voyageurs National Park's land area; 85,506 acres, or 39 percent, of the Park is water. *See id.* at 1336. The biological opinion and other reports prepared by NPS and USFWS were performed to determine the effects of snowmobiling and snowmobile trails on the wolf population. *See id.* at 1338.

150. *See id.*

151. *See id.* at 1339.

152. *See id.*

153. *Id.*

154. *See id.*

have . . . stated that snowmobiling will not have [a] significant impact on the gray wolf."[155] The superintendent's statement was supported by various NPS reports, including the NPS conclusions provided to the USFWS for its 1992 biological opinion: "The extent to which a given wolf pack is disturbed [by snowmobiling] and, once disturbed, abandons a kill is unknown."[156] Also, before the NPS issued snowmobiling regulations in 1991,[157] the NPS performed a biological assessment, in which they noted:

> Although the frequency of displacement by winter recreationists and return of wolves to prey have not been formally studied at Voyageurs, if winter recreationists have a significant detrimental effect on the park's wolf population, it has not been reflected in the relative stability of the population during the first 15 years of the park's existence.[158]

Essentially, the NPS stated that although snowmobiling might have a detrimental effect on wolves, no empirical data was available to support this assertion. Until the USFWS showed that snowmobiling did indeed pose a threat to the wolves, the Voyageurs Park superintendent wished to leave the snowmobiling trails open.[159] However, facing the USFWS directive, in December of 1992 the NPS complied with the order.[160]

Before examining the NPS trail closures under the ESA, the district court noted that it could overturn the closures only if they were "arbitrary, capricious, or manifestly contrary to the statute."[161] The court also stated that it would uphold the trail closures if they could be supported on any "rational basis."[162] However, after explaining the deferential standard employed for reviewing agency actions, the court stated that "an *unsupported* agency decision is not sacrosanct," and concluded that the NPS had failed to explain adequately the trail closures.[163]

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155. *Id.* at 1340.

156. *Id.* at 1339.

157. "These regulations expressly allowed snowmobiling on virtually all of the Park's frozen lake surfaces. They also authorized the Park Superintendent to temporarily close trails or lake surfaces, after 'taking into consideration public safety, wildlife management, weather, and park management objectives.'" *Id.* at 1338 (citing 36 C.F.R. § 7.33(b) (1991)).

158. *Id.*

159. *See id.* at 1340.

160. *See id.* Sixteen lake bays and certain shoreline areas within the Park were closed to snowmobiling. *See id.*

161. *Id.* at 1343 (citing Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984)).

162. *Id.*

163. *Id.* (emphasis added).

In refusing to uphold the Park Service's trail closures, the court noted that the government "failed to explain adequately the reasons for the closures" and that the "evidence presently in the record is inadequate to establish that curtailing snowmobiling will improve the condition" of the wolf population.[164] For example, the court cited expert testimony that snowmobiling would have no detrimental effect on the wolf population;[165] stated that the occurrence of incidental takings amounted to "little more than speculation;"[166] and rejected NPS reliance on the "generally accepted principle that increased access to wildlife will result in increased mortality."[167] In rejecting the "generally accepted principle" argument, the court stated:

> The danger of premising lakeshore closures on "generally accepted principles," rather than on particularized evidence, is apparent. Facile resort to the precept that "increased access leads to increased mortality," if taken to its logical extreme, would allow the FWS and the NPS to close Voyageurs altogether. This was not Congress' intent when it established Voyageurs.[168]

Thus the court concluded that the USFWS and NPS had not offered an adequate justification for the trail closures and remanded the case for the agencies to supplement the record.[169]

The district court's decision in *Mausolf* is reminiscent of *Connor v. Andrus*,[170] in which regulations promulgated to benefit endangered species were struck down because of inadequate evidence.[171] Although the *Mausolf* court did not discuss section 7(a)(1) of the ESA, by requiring evidence of either actual harm or actual benefit to the wolves, they implicitly adopted the rationale of *Connor*.[172] Had the USFWS or NPS presented evidence similar to that in *Carson-Truckee Water Conservancy District v. Watt*,[173] where there

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164. *Id.* at 1343-44.

165. *See id.* at 1339.

166. *Id.* at 1344. The court, relying on Justice O'Connor's concurring opinion in *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2420 (1995), stated that mere speculation would not support an agency action under the ESA. *See id.*

167. *Id.*

168. *Id.*

169. *See id.* The Eighth Circuit Court of Appeals overturned the district court's decision. *See Mausolf*, 125 F.3d at 661; *see also infra* notes 182-93 and accompanying discussion.

170. Connor v. Andrus, 453 F. Supp. 1037 (W.D. Tex. 1978).

171. *See supra* Part II.

172. The court in *Connor* held that the duty to speed species recovery under 7(a)(1) "is not met by promulgating regulations which do not attack the cause or causes of population depletion of a species." *Connor*, 453 F. Supp. at 1041.

173. Carson-Truckee Water Conservancy Dist. v. Watt, 549 F. Supp. 704 (D. Nev. 1982).

was ample evidence supporting potential harm to two endangered species, the district court arguably would have upheld the snowmobile trail closures.[174]

Although the district court's application of the ESA in *Mausolf* was consistent with the holdings of *Connor* and *Carson-Truckee*, the *Mausolf* court neglected a critical difference between the facts in those cases and the situation in Voyageurs. The important distinction is that *Mausolf* involved a national park, and the case therefore required consideration and discussion of the NPS Organic Act. The Minnesota District Court however, in its application of the ESA, took no notice of the Organic Act. Had the district court considered the Organic Act's mandate for conservation in combination with ESA section 7(a)(1), a different decision may have resulted.

This different result was realized in the Eighth Circuit's decision overturning the district court's holding.[175] Unlike the district court, which considered only the ESA, the Eighth Circuit considered the ESA in combination with the Organic Act and the specific enabling legislation for Voyageurs National Park.[176] Consideration of both sources led the Eighth Circuit to conclude that the evidence in the record was sufficient to "provide a rational foundation on which the NPS could base its closure order."[177]

Before discussing the basis for the NPS's decision, the Eighth Circuit reviewed the broad discretion that administrative agencies enjoy.[178] The court cited four different cases to emphasize that an administrative agency is entitled to a very deferential standard of review.[179] In doing so, the court seemed to be telling the reader that it, unlike the district court, was going to abide by the deferential standard of review.[180]

After quoting the district court's decision that the NPS's decision to close the snowmobiling trails was "based on little more than speculation,"[181] the Eighth Circuit detailed what the district court failed to examine:

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174. The court in *Mausolf* "share[d] defendants' concern for any reported takings of Voyageurs wolves . . . ." *Mausolf*, 913 F. Supp. at 1344.

175. *See Mausolf*, 125 F.3d at 661.

176. *See id.* at 668-69.

177. *Id.* at 669.

178. *See id.* at 667 (citing Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984)).

179. The court included the following quotations: "[W]e will set aside an agency's action only upon a showing that the action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,'" *id.* (citing 5 U.S.C. § 706(2)(A)(1994)); "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is more clearly in order," *id.* (quoting Udall v. Tallman, 380 U.S. 1 (1965)); "[the] standard of review requires that the reviewing court defer to the agency's decisions in matters within its area of expertise," (citing Bankruptcy Estate of United Shipping Co. v. General Mills, 34 F.3d 1383 (8th Cir. 1994)); "this Court 'is not permitted to substitute its judgment for that of the agency,'" *id.* (quoting Sierra Club v. Davies, 955 F.2d 1188, 1192 (8th Cir. 1992)).

180. *See Mausolf*, 125 F.3d at 667.

181. *Id.* at 668 (quoting *Mausolf*, 913 F. Supp. at 1343).

> The District Court, however, neglected to consider the closures in light of the NPS's authority rising from the organic act creating the NPS and the national park system, from the regulations promulgated under these statutes that govern the management of all national parks, or from regulations promulgated to manage snowmobiling in Voyageurs Park in particular.[182]

According to the Eighth Circuit, consideration of these sources justified the trail closures.[183]

The Eighth Circuit concluded that "[t]he evidence in the administrative record, while not overwhelming, is sufficient to provide a rational foundation on which the NPS could base its closure order."[184] Referring to the record of wolf disturbance by snowmobilers, the court stated:

> While this evidence is not definitive, it does provide a rational basis on which the NPS could have concluded that the Park closures were a reasonable solution to the problem of gray wolf harassment.
>
> The absence of definitive, irrefutable evidence in the record to establish the adverse connection between snowmobiling and incidental taking of gray wolves is not fatal to the NPS's closure order, since a reviewing court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[185]

Thus, while the court seemed skeptical of the frequency of incidental takings of gray wolves by snowmobiling, it determined that the facts on which the NPS justified its trail closures were sufficient to uphold the closure.[186] Thus, by considering the correct sources of statutory authority, rather than just the ESA (as did the district court), the Eighth Circuit deferred to the agency's decision and reached the correct decision: to uphold the trail closures.

The Eighth Circuit's decision establishes valuable precedent for the preservation of endangered and threatened species in the national parks. The USFWS and the NPS can now act confidently to assist these species in their recovery from endangered or threatened status. Under the Organic Act, the ESA, and the specific park's enabling regulations, agency actions that actually effectuate endangered species recovery will be upheld. From a preservationist standpoint, the Eighth Circuit's decision is welcome precedent.

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182. *Id.*
183. *See id.* at 669.
184. *Id.*
185. *Id.* at 670 (quoting Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974)).
186. *See id.*

CONCLUSION: THE SYNERGY EMERGES

Although the number of endangered and threatened species existing in the national parks and the numbers of people recreating within the parks will continue to increase, conflict is not inevitable. Indeed, most visitors to National Parks want the resources protected. The parks capture what many consider to be the essence of America: rugged beauty, untainted wilderness, and natural wildlife. Most forms of recreation are easily compatible with the parks' preservationist purpose, and, if restrictions necessary to protect endangered species are properly explained, most visitors will support them.

However, in situations where recreation and the preservation of endangered or threatened species clash, preservation should take priority. Under such circumstances, courts must follow the Eighth Circuit's lead and apply both the ESA and the NPS Organic Act. When both Acts are considered, the synergy emerges, and section 7(a)(1) of the ESA should be construed in light of the NPS Organic Act. The overriding mandate of the Organic Act, that the primary management function of the parks is preservation, requires that courts show special consideration towards efforts to effectuate endangered species recovery under section 7(a)(1) in the national parks. Indeed, the preservationist purpose of the NPS Organic Act suggests that endangered or threatened species in national parks should benefit from heightened efforts at both preservation and recovery. In setting priorities for endangered species recovery, factors such as time constraints, economic forecasts, and visitor use should not override the preservationist function of both the parks and the ESA. Together, the ESA and the Organic Act create a strong mandate for preservation, and parks should be managed in a manner consistent with both Acts.

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