Ocean and Coastal Law Journal

Volume 9 | Number 1 Article 5

2003

# State Of Maine v. Norton: Assessing The Role Of Judicial Notice

Hanna Sanders
*University of Maine School of Law*

# *STATE OF MAINE v. NORTON*: ASSESSING THE ROLE OF JUDICIAL NOTICE

*Hanna Sanders**

## I. INTRODUCTION

In *Maine v. Norton*,[1] Maine and several Maine business associations filed suit challenging the decision made by the Department of the Interior to list the distinct population segment (DPS) of Gulf of Maine Atlantic salmon as endangered.[2] Upon cross-motions for summary judgment, the court established that the listing decision was based upon the best scientific data available and clearly supported by the administrative record.[3] The court granted defendant's motion and, accordingly, the listing decision was upheld.[4]

This case presented to the federal court the decision whether to dismiss the Plaintiffs' motions for lack of standing[5] or, alternatively, to determine whether listing the DPS of Gulf of Maine Atlantic salmon was accurate and lawful under the Endangered Species Act.[6] Although the *Maine* court chose to dismiss the Maine business associations' motion, the court took judicial notice of the facts necessary to establish standing by the State of Maine, noting the importance of the issues to be determined in this case.[7] This application of rule 201 of the Federal Rules of Evidence enabled the court to make a detailed determination of the issues raised by this listing

* University of Maine School of Law, Class of 2005.

1. 257 F. Supp. 2d 357 (D. Me. 2003).

2. *Id.*

3. *Id.* at 407.

4. *Id.*

5. *Id.* at 372.

6. *Maine*, 257 F. Supp. 2d at 376.

7. *Id.* at 373. The court states, "[t]he importance of the issues raised in this case persuades the Court to apply the doctrine of judicial notice to determine whether the State of Maine has standing to challenge the listing decision." *Id.*

decision. The question now becomes: was this an appropriate application of judicial notice under Federal Rule 201?

This Note reviews the purpose of the Endangered Species Act of 1973, and the roles that both the State and federal agencies have played throughout the process of listing the DPS of Gulf of Maine Atlantic salmon. The Note considers the elements required to take judicial notice under the Federal Rules of Evidence, and the court's authority to utilize this adjudicative procedure. Further, this Note weighs the *Maine* court's application of Rule 201 to this case, and concludes that the decision to take judicial notice in order to establish standing by Plaintiff, the State of Maine, was judicious and well-timed, considering the current economic climate of the State and the continued threats to the survival of the wild Maine salmon population.

## II. BACKGROUND

### *A. The Endangered Species Act of 1973*

The Endangered Species Act (ESA)[8] was enacted by Congress in 1973 as a response to the rapidly increasing number of fish, plant, and wildlife species that had been rendered extinct, or were threatened by extinction, due to "economic growth and development untempered by adequate concern or conservation."[9] Congress has stated that the purpose of this Act is to provide a means to conserve the ecosystems upon which threatened and endangered species depend, and to provide a program for the conservation of those species.[10] The Supreme Court has explained, "[t]he plain intent of Congress in enacting th[e] statute was to halt and reverse the trend towards species extinction, whatever the cost."[11]

The authority to list a species as threatened or endangered is vested with the Secretary of the Interior,[12] and a listing may be initiated by either the Secretary or by petition from any interested party.[13] The ESA requires that the listing decision be made on the basis of the best scientific and commercial data available.[14] Further, when making a decision the

---

8. 16 U.S.C. §§ 1531–1543 (1988).

9. *Id.* § 1531.

10. *Id.* § 1531(b).

11. *Maine*, 257 F. Supp. 2d at 362 (quoting Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)).

12. 16 U.S.C. § 1533(a)(2). The Secretary of Commerce is also authorized to list marine mammals. *Id.*

13. *Id.* §§ 1533(b)(1)(A)–(b)(3)(A).

14. *Id.* § 1533(b)(1)(A).

Secretary is required to conduct a status review, and must take into account efforts being made by a state to protect the species within its area of jurisdiction.[15]

While merely listing a species under the ESA cannot ensure the survival of the species, the listing decision does carry a "potent array of protections."[16] The most notable of those protections is the Act's prohibition on the "taking" of a listed species, which renders unlawful the harming, wounding, killing, collecting, pursuing or capturing of any listed species.[17] The Act additionally mandates that all federal agencies seek to conserve those species that are listed as endangered.[18]

Given the Act's strength and widespread consequences, the decision to list a species under the ESA can be very controversial.[19] When a final listing decision is challenged, the agency's action is subject to judicial review under the Administrative Procedure Act (APA).[20] Under the APA, the agency's decision can be reversed, *inter alia*, if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[21]

### *B. History of the Listing Decision*

Despite efforts made during the past 130 years by both state and federal agencies, the numbers of wild Atlantic salmon in the United States have been declining at a staggering rate.[22] Historically, Atlantic salmon populations were native to almost "every major coastal river north of the Hudson," including more than twenty-eight Maine rivers.[23] In the early 1990s the first federal action was taken by the United States Fish and Wildlife Service and the National Marine Fisheries Service (the Services) to determine the status of the Atlantic salmon population; the Services stated that the only remaining native populations were to be found in seven

---

15. *Id.*

16. Tony A. Sullins, *Endangered Species Act—Judicial Review of an Emergency Listing—A Wasteful Allocation of Resources?* City of Las Vegas v. Lujan, *891 F.2d 927 (D.C. Cir. 1989)*, 26 LAND & WATER L. REV. 619, 622 (1991).

17. 16 U.S.C. §§ 1538(a)(1)(B), 1532(19) (1988).

18. *Id.* § 1536(a)(2).

19. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 334 (rev. ed. 1983).

20. 5 U.S.C. §§ 701–706 (1994). The Act provides the moving party a right to judicial review of "final agency action for which there is no other adequate remedy in a court." *Id.* § 704.

21. *Id.* § 706.

22. *Maine*, 257 F. Supp. 2d at 364.

23. *Id.*

Maine rivers.[24] Upon receiving petitions to list the Atlantic salmon under the ESA, the Services conducted a status review in 1995,[25] and proposed to list as endangered the "distinct population segment" of Gulf of Maine Atlantic salmon.[26]

Concurrent to this listing proposal, the Services invited the State of Maine to develop a conservation plan that would decrease the risks to this threatened population.[27] The Services asserted that such a plan would allow the State "to maintain the lead role in the management of activities that could impact Atlantic salmon in the DPS."[28] The Services further recommended that this plan address threats posed to the population by activities such as recreational fishing, habitat modification, and aquaculture.[29]

Governor Angus King accepted this invitation and convened a task force that developed the "Atlantic Salmon Conservation Plan for Seven Maine Rivers," which was submitted to the Services in the spring of 1997.[30] The State set forth a detailed plan of action that included ongoing and proposed measures to decrease potential threats to the salmon and rehabilitate their habitat.[31] The plan included a five-year implementation schedule that assessed actual and potential threats to Atlantic salmon in Maine waters, and set benchmarks for state and federal agencies and private stakeholders.[32]

Upon reconsideration of its listing proposal, the Services took into account the significant and ongoing efforts made by the State to protect this distinct population of salmon under the Maine Conservation Plan.[33] The Services concluded that threats to the DPS of Atlantic salmon in Maine had been reduced, and the population was "not likely to become endangered in

---

24. *Id.* at 365. The remaining native salmon populations were found in the Dennys, Machias, East Machias, Narraguagus, Pleasant, Ducktrap, and Sheepscot Rivers in downeast Maine. Endangered and Threatened Wildlife and Plants, 59 Fed. Reg. 3067 (Jan. 20, 1994).

25. 16 U.S.C. § 1533(b)(1)(A) (1988).

26. *Maine*, 257 F. Supp. 2d at 366. The Services cited as threats to the population: 1) low natural survival rate; 2) poaching; and 3) impacts from aquaculture and fish hatcheries. *Id.*

27. *Id.*

28. *Id. See also* Endangered and Threatened Species, 60 Fed. Reg. 50,535 (Sept. 29, 1995).

29. *Maine*, 257 F. Supp. 2d at 366–67.

30. *Id.* at 367; Atlantic Salmon Conservation Plan for Seven Maine Rivers, *available at* http://www.state.me.us/asa/99AnnRpt.html (last visited Sept. 25, 2003).

31. *Maine*, 257 F. Supp. 2d at 367.

32. *Id.*

33. 16 U.S.C. § 1533(b)(1)(A) (1988).

the foreseeable future."[34] The proposal to list was consequently withdrawn in December, 1997.[35]

In 1999, the Defenders of Wildlife, along with several private individuals and environmental organizations, filed a lawsuit against the Secretary of the Interior (the Defenders of Wildlife lawsuit) challenging the decision to withdraw the proposed listing of the DPS of Gulf of Maine Atlantic salmon under the ESA.[36] The Defenders of Wildlife lawsuit alleged that the Services improperly considered future and voluntary measures proposed by the Maine Conservation Plan when making their determination,[37] and requested both an emergency and permanent listing of this salmon population.[38] Nine months after this lawsuit commenced – and less than two years after their determination that the population was "not likely to become endangered" – the Services found that the DPS of Atlantic salmon was now "in danger of extinction" and re-initiated the proposal to list.[39] Although the State of Maine strongly disagreed with the listing and challenged the policies used in making the determination,[40] the Services nevertheless published their final rule in November of 2000, determining that the DPS of Gulf of Maine Atlantic salmon was in danger of extinction throughout its range.[41]

### *C. Judicial Notice*

In *Maine v. Norton*, the court took judicial notice of the fact that the State's sovereign interests were directly impacted by the Services' decision

---

34. *Maine*, 257 F. Supp. 2d at 367. *See also* Endangered and Threatened Wildlife and Plants, 62 Fed. Reg. 66,337 (Dec. 18, 1997).

35. *Maine*, 257 F. Supp. 2d at 367.

36. *Id.* at 399.

37. *Id.* In *Oregon Natural Resources v. Daley*, the court stated that the Services may only consider "conservation efforts that are currently operational, not those promised to be implemented in the future" when deciding whether to list a species as endangered. 6 F. Supp. 2d 1139, 1154 (D. Or. 1998). Further, this court held that the Services could not consider voluntary or "unenforcable efforts" because those actions are merely speculative. *Id.* at 1155.

38. *Maine*, 257 F. Supp. 2d at 399.

39. *Id.* at 399–400. *See also* Availability of a Status Review of the Atlantic Salmon in the Gulf of Maine Distinct Population Segment, 64 Fed. Reg. 56,297–56,298 (Oct. 19, 1999).

40. *Maine*, 257 F. Supp. 2d at 400 n.21.

41. Endangered or Threatened Species, 65 Fed. Reg. 69,459 (Nov. 17, 2000). The Services' concluded that listing was appropriate due to the danger of extinction to the Atlantic salmon population created by disease, inadequate regulation of agricultural water withdrawals, impacts from aquaculture practices, and low marine survival. *Id.* at 69,479.

to list the DPS of Gulf of Maine Atlantic salmon under the ESA.[42] The court noted that the application of judicial notice was appropriate, as "[t]he State of Maine and its sovereign interests involved in the listing is not a matter of dispute."[43]

Judicial notice is an adjudicative device that dispenses with formal proof and provides a flexible procedure for the court to establish that particular information is true.[44] "Judicial notice is based on the assumption that certain information does not need to be proved by the introduction of evidence at trial."[45] Judicially noticed facts must possess the requisite degree of certainty and may not be subject to reasonable dispute.[46] The principle of judicial notice will only apply to cases where certain prerequisites have been met: first, the matter must be common knowledge, although it does not have to be universally known; second, the matter must be settled beyond a doubt with no uncertainties; and third, the knowledge must exist within the jurisdiction of the court.[47]

One of the basic objectives of Rule 201 is the promotion of judicial convenience and economy.[48] When a matter is not reasonably disputable, establishing adjudicative facts through judicial notice can save the court time, energy, and money by dispensing with formal proof.[49] In either a bench or jury trial, the court has the authority to take judicial notice of an adjudicative fact at any stage of the proceeding.[50] The court may do so at its discretion, whether or not requested by a party to the suit.[51]

Traditionally, courts have taken a cautious approach to judicially noticing adjudicative facts.[52] Within the bounds of the Rule 201,

---

42. *Maine*, 257 F. Supp. 2d at 374.

43. *Id.*

44. 29 AM. JUR. 2D *Evidence* § 24 (2003).

45. *Id. See, e.g.*, Cupey Bajo Nursing Home, Inc. v. U.S., 36 Fed. Cl. 122, 135 n.22 (1996) ("By taking judicial notice of a fact, the court may inform itself of a particular fact without resort to evidentiary proof."); Meredith v. Beech Aircraft Corp., 18 F.3d 890, 895 (10th Cir. 1994) (judicial notice "is when a judge recognizes the truth of certain facts, which from their nature are not properly the subject of testimony, or which are universally regarded as established by common knowledge.").

46. FED. R. EVID. 201(b).

47. 29 AM. JUR. 2d *Evidence* § 24.

48. 1–201 WEINSTEIN'S FEDERAL EVIDENCE: NATURE OF JUDICIAL NOTICE, § 201.02 at 2 (Matthew Bender & Co., Inc., 2003).

49. *Id.* (citing Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 541–46 (1968)).

50. FED. R. EVID. 201(f).

51. *Id.* at 201(c).

52. 1–201 WEINSTEIN'S FEDERAL EVIDENCE: JUDICIAL NOTICE OF ADJUDICATIVE FACTS, § 201.10 at 1 (Matthew Bender & Co., Inc., 2003).

adjudicative facts that are established through judicial notice are typically those that are well known and easily recalled by the general population.[53] For example, courts have taken judicial notice of the "traditional features of a snowman;" the popularity of certain reusable containers; or the impossibility of driving from one place to another in a specific period of time.[54]

Appellate courts, when reviewing the use of Rule 201 by the trial courts, have maintained this cautious approach, and frequently find error in judicially noticed facts that are beyond reasonable controversy. For example, the appellate court found in *Lussier v. Runyon* that the trial court erred in taking judicial notice of disability benefits that the plaintiff expected to receive through the Civil Service Retirement System, since the information was not readily determined by general knowledge nor by the public record, and the monetary amount remained a disputed fact.[55] In *Lozano v. Ashcroft*, the trial court was found to have erred by taking judicial notice that the Department of Justice received Equal Employment Opportunity Commission (EEOC) discrimination findings on a specified date, as the date of actual receipt remained in genuine dispute throughout the trial.[56] Similarly, in *U.S. v. Jones*, the trial court was held in error by judicially noticing a "fact" that had been found by the court in a related proceeding, because the fact was not indisputable under Rule 201 and was actually disputed by the party throughout the proceeding.[57]

Courts have been urged to apply Rule 201 stringently, especially in cases where the adjudicative fact in question is at all subject to reasonable dispute.[58] This approach is warranted because a court should not "bypass" the adversarial, truth-finding process of our judicial system in the interest of judicial convenience and economy.[59]

---

53. Lussier v. Runyon, 50 F.3d 1103, 1114 (1st Cir. 1995).

54. *Id.* (citing Eden Toys, Inc. v. Marshall Field & Co., 675 F.2d 498, 500 n.1 (2d Cir. 1982); Price Food Co. v. Good Foods, Inc., 400 F.2d 662, 665 (6th Cir. 1968); and U.S. v. Baborian, 528 F. Supp. 324, 332 (D.R.I. 1981)).

55. *Runyon*, 50 F.3d at 1114.

56. Lozano v. Ashcroft, 258 F.3d 1160, 1164–65 (10th Cir. 2001).

57. U. S. v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994).

58. *Runyon*, 50 F.3d at 1114.

59. *Id.*

## III. PROCEDURAL HISTORY

In *Maine v. Norton*,[60] Maine and several Maine business associations[61] brought an action against the Secretary of the Interior[62] following the November, 2000, determination by the United States Fish and Wildlife Service and the National Marine Fisheries Service to list the Gulf of Maine distinct population segment of Atlantic salmon as endangered under the ESA.[63] Upon cross motions for summary judgment,[64] the court granted Defendant's motion concluding that the Services did not act in a manner that was unlawful nor contrary to the APA when listing the Gulf of Maine Atlantic salmon as endangered.[65] The court reasoned that the Services' decision to list the salmon as endangered was supported by the administrative record and was necessary considering the continued threats to this distinct population.

Plaintiffs challenge the listing decision under the APA,[66] alleging that the listing decision was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law.[67] Plaintiff, the State of Maine, contends that the decision to list was motivated by litigation concerns rather than conditions that had changed with respect to the DPS of Atlantic salmon.[68] Further, the State argues that the Services' listing decision should be set aside because it is premised on an unlawful interpretation of

---

60. 257 F. Supp. 2d 357 (D. Me. 2003).

61. Maine Chamber of Commerce, Atlantic Salmon of Maine, LLC, Stolt Sea Farm, Inc., Maine Aquaculture Association, Maine Pulp and Paper Association, Wild Blueberry Commission of Maine, Jasper Wyman & Sons, Cherryfield Foods, Inc. (Maine Businesses). *Id.* at 361.

62. Gale A. Norton, in her Official Capacity as Secretary of the United States Department of the Interior, et. al. *Id.* at 357.

63. Endangered and Threatened Species, 65 Fed. Reg. 69,459 (Nov. 17, 2000).

64. The court determined that summary judgment is the appropriate procedure for resolving the issues in this case, as their review is based upon the administrative record. As a general rule, in cases brought pursuant to the APA all relevant facts are contained in the administrative record and, as a result, there are no material facts in dispute. *Maine*, 257 F. Supp. 2d at 363.

65. *Id.* at 397.

66. 5 U.S.C. §§ 701–707 (1966).

67. *Maine*, 257 F. Supp. 2d at 361. In their complaint, Plaintiffs, the Maine Businesses, also raised claims alleging that the decision to list Gulf of Maine Atlantic salmon DPS under the Endangered Species Act is both procedurally and factually illegal, and is an unconstitutional violation of both due process and the Commerce Clause. *Id.* at 361–62.

68. *Id.* at 398. Specifically, the State is referring to the 1999 Defenders of Wildlife lawsuit. *See* note 36.

the term "distinct population segment," and expands the definition of "species" beyond that which was intended by Congress.[69]

The Plaintiff, State of Maine, contends that it has both constitutional and prudential standing[70] to challenge the action because the listing decision interferes with two of the State's sovereign interests: one, the State's ability to manage its own natural resources and two, the State's ability to enact and enforce its own laws.[71] The State asserts that listing this salmon population injures their sovereign interests because it essentially nullifies any State law or regulation that would be considered an illegal "take" under the ESA, such as the State's regulation of recreational and commercial Atlantic salmon fishing, aquaculture operations, and water use management.[72] These injuries, the State argues, are directly and solely caused by the decision to list the Gulf of Maine Atlantic salmon under the ESA, and a judgment vacating the listing would redress those injuries.[73]

Defendants contend that the decision to list the Gulf of Maine Atlantic salmon under the Endangered Species Act was based solely on the best scientific and commercial data available, as supported by the administrative record.[74] Defendants maintain that the standard the Services used in making their determination was not only in accordance with the law, but also reflected Congress's intent that the agency take conservation measures before a species is "'conclusively' headed for extinction."[75] The Services

---

69. *Id.* at 406. Although Congress has not defined the term "distinct population segment," the State argues specifically that the Services' interpretation of "distinct population segment" is based solely upon international boundaries and other geographical considerations, which is beyond the interpretation that Congress intended. Plaintiff's Motion for Summary Judgment at 13–24; *Maine*, 257 F. Supp. 2d at 383 (citing Policy Regarding the Recognition of Distinct Vertebrae Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

70. As required by both U.S. CONST. art. III, § 2 and 5 U.S.C. § 702 (1966).

71. *Maine*, 257 F. Supp. 2d at 373.

72. *Id.* at 374. The State's assertion is true both by virtue of the U.S. CONST. art. VI, cl. 2 (invalidating state laws that interfere with, or are contrary to, federal law) and by the ESA's own preemption provision, 16 U.S.C. § 1535(f). *Id.*

73. *Id.* at 373.

74. *Id.* at 375.

75. *Id.* Further, the Services found that of the five factors set forth by section 4 of the ESA in determining whether to list a species as endangered under 16 U.S.C. § 1533(a)(1), the Gulf of Maine Atlantic salmon population were implicated for each one of the factors. *Id.* at 397. These factors include:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

explained that in several critical areas, such as water use management, disease, and aquaculture operations, "[e]xisting regulatory mechanisms either lack the capacity or have not been implemented to decrease or remove threats to wild Atlantic salmon."[76]

Defendants argued that the Plaintiffs' complaints should be dismissed for lack of standing, because they failed to make the necessary evidentiary showing of specific facts that they were among the injured, as required by Local Rule 56.[77] Defendants further argued that the Plaintiff, State of Maine, brought a citizen suit under section 4 of the ESA, and not under the APA, and that Plaintiffs' claims should therefore be dismissed because the State failed to submit the statutorily imposed sixty-day notice of intent to sue.[78]

Plaintiffs, the Maine Businesses attached supporting affidavits from each representative in order to establish the facts necessary to satisfy their standing requirements.[79] However, these Plaintiffs failed to present the facts either in the Supporting Statement of Material Facts or the Opposing Statement of Material Facts, as required by Local Rule 56.[80] Consequently, the *Maine* court ruled that the affidavits could not be considered, and held that the Plaintiff, Maine Businesses', claims "must be dismissed" because they failed to meet their burden of establishing standing to challenge the listing of the Gulf of Maine Atlantic salmon as endangered.[81]

Although the State of Maine also failed to satisfy the requirements of Local Rule 56, the court stated that it would take judicial notice of the State's sovereign interests involved in the listing decision, as those facts were not in dispute.[82] The court held that the injuries to the State's

---

(E) other natural or manmade factors affecting its continued existence.

*Id.* (citing 16 U.S.C. § 1533(a)(1)). In order to list a species under the ESA, the Services only need to find that one of these factors is satisfied. *Id.*

76. *Maine*, 257 F. Supp. 2d at 397 (quoting 65 Fed. Reg. 69,459, 69,477 (Nov. 17, 2000)). Specifically, the Services found that the aquaculture industry poses a serious threat to survival of the population because escaping fish compete for habitat, spread disease, and interbreed with the wild salmon population. *Id.* (citing 65 Fed. Reg. 69,459, 69,478 (Nov. 17, 2000)).

77. Defendant's Cross Motion for Summary Judgment at 10–11. *Maine*, 257 F. Supp. 2d at 371–72. The facts necessary to establish the parties' standing to bring the suit, which are not included in the administrative record of the case, must satisfy the requirements of Local Rule 56. *Id.* at 372; D. ME. LOCAL R. 56.

78. *Maine*, 257 F. Supp. 2d at 376; *see* 16 U.S.C. § 1540 (g)(2)(C) (1973) (requiring written notice must be given to the Secretary sixty days prior to commencement of any action).

79. *Maine*, 257 F. Supp. 2d at 371.

80. *Id.* at 372; D. ME. LOCAL R. 56(h).

81. *Maine*, 257 F. Supp. 2d at 372.

82. *Id.* at 373.

sovereign interests therefore satisfied the elements of both constitutional and prudential standing to bring the suit.[83] Moreover, the court concluded that the State's claim challenging the final listing decision was subject to judicial review under the APA, not the ESA, and therefore the State was not required to file a sixty-day written notice.[84]

After lengthy consideration, the court found that the Services' interpretation of the term "distinct population segment" as applied to the Gulf of Maine Atlantic salmon, and the Services' application of the 1996 Joint DPS Policy, were reasonable in light of ambiguous statutory language.[85] The court, noting that it must defer to an agency's scientific and technical expertise,[86] held that the Services' findings were based on the best scientific and commercial evidence, and were clearly supported by the administrative record.[87] The State's argument that the listing was improperly motivated by litigation concerns failed to convince the court that the Services considered anything other than the best evidence available to them while making their listing decision.[88]

## IV. ASSESSING THE ROLE OF JUDICIAL NOTICE

Since the inception of the Endangered Species Act in 1973, battles between conservation groups and industry have become commonplace. Economic factors drive these battles in that the livelihood of the local population often depends upon those industries whose practices threaten the species that are listed under the ESA. Listing a species as "endangered" or "threatened" under this Act affects more than the fish, wildlife, or plants protected; the listing affects the industries that are further regulated by yet another federal administrative agency, the employees of those industries whose jobs are threatened, and the economy of the state that is dependent upon those industries and an employed workforce.

---

83. *Id.* at 374–75. The court acknowledged that the listing injures the State by interfering with its sovereign interests; that the injury is "obviously causally connected" to the listing decision; and that the injury would be redressed by a favorable decision vacating the listing decision. *Id.* Further, the court stated that the State's alleged injuries fell within the "zone of interests" encompassed by the Endangered Species Act, as required by section 702 of the APA, and therefore fulfilled the prudential standing requirement. *Id.* at 375.

84. *Id.*

85. *Id.* at 386–87.

86. *Maine*, 257 F. Supp. 2d at 389 (citing ALLTEL Corp. v. FCC, 838 F.2d 551, 561–62 (D.C. Cir. 1988), the court explained that they must defer to an agency's expertise as long as the agency's decisions are reasonable).

87. *Id.* at 390–91.

88. *Id.* at 398, 400.

Against this backdrop comes *Maine v. Norton*. This case demonstrates the classic battle between an economically challenged, rural state and a well-funded conservation group that has pressured the Secretary of the Interior to list the Atlantic salmon as an endangered species. The State of Maine has never before been in a position where the listing of an endangered species has had such a palpable effect upon the economy of the state and its citizens.

The determination that the wild Atlantic salmon that inhabit the Gulf of Maine are a "distinct population segment" and may therefore be protected under the Endangered Species Act, has a direct impact upon hundreds of Maine businesses, both large and small. Due to the Act's prohibition on the "taking" of a listed species, the State will no longer be in complete control of regulating many of the activities within its own waterways. The effect of listing the salmon population as endangered handcuffs the State when making immediate regulatory decisions that impact not only the wildlife and natural resources within its jurisdiction, but also the industries that generate much-needed revenue. For example, the State will be unable to determine the extent to which persons may fish for Atlantic salmon within its jurisdiction, which affects tourism, and recreational and commercial fishing. Dredging, bulldozing, displacing soil, and discharging pollutants into the waterways will also no longer be within the State's direct control, which could seriously impact the agriculture, forestry, and aquaculture industries within the State.

The State has an undeniable interest in protecting the interests of those industries within its borders. Revenue from the agriculture, fishing, forestry, aquaculture, and tourism industries enrich the economic climate of the State and its people, and enable the economy to recover in times of need. Clearly, Maine had a strong economic interest in de-listing this DPS of Atlantic salmon, as federal regulations on water use management, commercial and recreational fishing, and environmental policies will trump any state regulations and legal codes currently in force.

The *Maine* court understood the impact of this listing decision upon the State and its economy. The court realized that the importance of the issues in this case warranted decisive action regarding the Services' listing decision of the DPS of Gulf of Maine Atlantic salmon as endangered. However, in order to rule on the motions for summary judgment, the court first had to establish that the State of Maine had standing in the case.

In *Maine*, the court conceded that, like the Maine Business associations, the State had failed to provide the evidentiary support necessary to establish standing under Local Rule 56. The State needed to establish that its sovereign interests were sufficiently injured by the listing decision under the ESA. Citing *Lussier v. Runyon*, the court determined that the State's

sovereign interests in the listing were not a matter of dispute, and took judicial notice of those facts. The *Maine* court must also have reasoned that those adjudicative facts were capable of ready and accurate determination, and beyond reasonable controversy, as required by Federal Rule 201. Although this was not a cautionary approach to applying the doctrine of judicial notice, it was an effective one.

By applying judicial notice, the court was able to establish the State's constitutional and prudential standing in the case without resort to evidentiary proof. This decision enabled the court to rule on the cross-motions for summary judgment. If judicial notice under Rule 201 had not been applied, the State's motion would have been dismissed for lack of standing, as were the Maine Business associations'. Thus the challenge to the final listing decision of the DPS of Gulf of Maine Atlantic salmon would have remained unresolved.

Ultimately, the long-range goals of the parties in this case may be the same: the protection of the population of Atlantic salmon distinct to the Gulf of Maine. The State of Maine has a long history of working with the federal government to protect the Atlantic salmon and its habitat. Their commitment to protection has been demonstrated through the allocation of time and financial resources.[89] However, recent budget shortfalls within the State may have made sustainable efforts to protect the salmon population and its habitat impracticable. Further, the State's Atlantic Salmon Conservation Plan may have proven economically unfeasible to maintain at the levels necessary to ensure the long-term survival of the population.

In light of these and other important issues raised by the Services' listing decision, the *Maine* court's application of judicial notice under Federal Rule 201 was indeed judicious. The time was ripe to ensure that this salmon population did not become further threatened or endangered. The court's ruling ensures that the Department of the Interior, and the State of Maine, will take actions to preserve this distinct population segment of Gulf of Maine Atlantic salmon before extinction.

89. *See* Me. Atlantic Salmon Comm'n, Atlantic Salmon Conservation Plan for Seven Maine Rivers, 1999 Annual Progress Report, *available at* http://www.state.me.us/asa/99AnnRpt.html (last visited Oct. 20, 2003).