

COMMENTS

Snowmobiling and National Park Management: To Conserve for Future Generations or Provide for Public Enjoyment?

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Of all the questions which can come before this nation, short of the actual preservation of its existence in a great war, there is none which compares in importance with the great central task of leaving this land even a better land for our descendants than it is for us, and training them into a better race to inhabit the land and pass it on.¹

—Theodore Roosevelt, 1910

I. OVERVIEW OF THE NATIONAL PARK SYSTEM

In 1872, Congress set aside over two million acres of Wyoming and Montana to create Yellowstone, the world’s first national park, a “public

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1. Barry Mackintosh, National Park Service, *The National Park Service: A Brief History* (1999), at <http://www.cr.nps.gov/history/hisnps/NPSHistory/briefhistory.htm> (1999) (last modified Jan. 16, 2003).

park or pleasuring-ground for the benefit and enjoyment of the people.”² Under the Yellowstone Act, the Secretary of the Interior was required to preserve “from injury or spoilation” the “wonders” of the park and insure “their retention in their natural condition.”³ The Act further required the Secretary to protect the wildlife found within the park from “wanton destruction” and to prevent their “capture or destruction for the purposes of merchandise or profit.”⁴

Throughout the 1890s and early 1900s, Congress followed the precedent of Yellowstone by setting aside more land for national parks.⁵ While one factor influencing the creation of the National Park System was the idealistic impulse to conserve natural values, promoting tourism was an additional motivation.⁶ In fact, western railroads lobbied to create many of the early parks and built hotels in the parks to boost their passenger business.⁷ Consequently, by 1916, the Interior Department oversaw a system of fourteen national parks and twenty-one national monuments but lacked the organization to properly manage them all.⁸ Of particular concern were the competing pressures on the parks: utilitarian conservationists favored regulated use of natural resources contained within the parks (advocating projects such as the Hetch Hetchy Dam in Yosemite), while preservationists argued for the strict protection of natural resources.⁹ In response to the conflict between utilitarians and preservationists, Stephen Mather crusaded for a National Parks Bureau, which “blurred the distinction between utilitarian conservation and preservation through an emphasis on the economic value of parks as tourist meccas.”¹⁰ Congress responded by passing the Organic Act of 1916, establishing the National Park Service (NPS or Service) to formally administer the nation’s parks.¹¹

The Organic Act of 1916 requires the NPS to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means

2. *Id.*

3. 16 U.S.C. § 22 (2000).

4. *Id.*

5. Mackintosh, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* 16 U.S.C. § 1 (2000). Stephen Mather was a wealthy Chicago businessman who became the Assistant for Park Matters to Secretary of the Interior, Franklin Lane. Mackintosh, *supra* note 1.

as will leave them unimpaired for the enjoyment of future generations.”¹² A policy letter of 1918, adopted by then-Secretary of the Interior Franklin Lane, accepted the dual mission of conserving park resources and providing for their enjoyment, specifically reemphasizing the primacy of preservation while also reflecting the idea that the Park Service must attract and accommodate tourism in order to succeed.¹³ The Organic Act further authorized the Department of the Interior to promulgate rules and regulations governing various aspects of park administration including transportation and recreation within the parks.¹⁴ The grant of authority to the Secretary of the Interior to make such regulations has been construed broadly.¹⁵

The result of the Organic Act is a system of competitive tension between the not-always-compatible goals of preservation and enjoyment. While many features of the Park System have been geared towards providing for the public use and enjoyment of parks, the supposed primacy of conservation has not been forgotten. In a 1963 report, A. Starker Leopold recommended that the parks be maintained to “recreate[], as nearly as possible . . . the condition that prevailed when the area was first visited by the white man” and that “[a] national park should represent a vignette of primitive America.”¹⁶

The Organic Act provides the framework for NPS management; however, the NPS must also follow the enabling statutes for each particular park and other provisions of federal law, including the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).¹⁷ Under NEPA, all federal agencies must consider the environmental impacts of any major federal actions with the goal of minimizing environmental degradation.¹⁸ Although NEPA does not require specific results,¹⁹ it does create procedural requirements that must be followed for any major federal action to be valid.²⁰ NEPA requires that agencies proposing major federal actions “significantly affecting”

12. 16 U.S.C. § 1.

13. Mackintosh, *supra* note 1.

14. 16 U.S.C. § 1(a-2). These regulations were codified at 36 C.F.R. §§ 1-1270 (2003).

15. *See* Wilkenson v. Dep’t of Interior, 634 F. Supp. 1265, 1279 (D. Colo. 1986) (upholding the Park Service’s authority to control a road inside the Colorado National Monument).

16. Mackintosh, *supra* note 1.

17. *See* ESA §§ 2-18, 16 U.S.C. §§ 1531-1544 (2000); NEPA §§ 2-209, 42 U.S.C. §§ 4321-4370f (2000).

18. *See* NEPA §§ 2-209, 42 U.S.C. §§ 4321-4370f.

19. *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980).

20. *Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n*, 449 F.2d 1109, 1112-14 (D.C. Cir. 1971).

the environment shall complete an Environmental Impact Statement (EIS) before embarking upon the project.²¹ The EIS (pursuant to the Council on Environmental Quality (CEQ) regulations) must address such factors as cumulative impacts and alternatives and provide the interested public a chance to participate at various stages of the process.²² The ESA requires federal agencies (such as the NPS) to ensure that their activities do not jeopardize the existence of endangered or threatened species.²³ The regulations implementing the ESA further state that habitat modification or harassment of species will be interpreted as jeopardizing the continued existence of a species.²⁴

Thus, national park management has evolved into a inconsistent system with the dual mandate of preserving historical and natural values and promoting public enjoyment and tourism in the present.²⁵ In addition, the NPS must also take other environmental laws such as NEPA and the ESA into account, creating further procedural requirements governing the manner in which the NPS can regulate public use of the parks. The inherent tension in the NPS management mandate is underscored by the recent controversy surrounding the use of snowmobiles in Yellowstone National Park and the NPS's efforts to regulate such use. The following is an analysis of snowmobile use in the National Park System as a whole and, specifically, Yellowstone National Park. This Comment considers both the preservation/enjoyment debate and the struggle between competing public uses for enjoyment of park land that are mutually inconsistent. Finally, this Comment concludes that the only resolution consistent with successfully maintaining the National Park System is to reassert the primacy of conservation.

II. HISTORICAL SNOWMOBILE USE IN NATIONAL PARKS

A. *Overview*

The snowmobiling industry claims that the use and manufacturing of snowmobiles have attained a place of prominence in American life.²⁶ According to the International Snowmobile Manufacturers Association (ISMA), there are approximately 1.65 million registered snowmobiles in

21. 42 U.S.C. § 4332(C).

22. 40 C.F.R. § 1508 (2003).

23. 16 U.S.C. § 1536(a)(2) (2000).

24. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697-98 (1995).

25. *See* 16 U.S.C. § 1 (2000).

26. Int'l Snowmobile Mfrs. Ass'n, *Snowmobile Statistics*, at http://www.snowmobile.org/stats_registrations_us.asp (last visited June 1, 2004) [hereinafter *Snowmobile Statistics*].

the United States today, 114,927 of which were sold in 2003 alone.²⁷ The industry also claims that it has generated over 75,000 fulltime jobs in North America including work involved in manufacturing, dealerships and tourism-related businesses.²⁸ In sum, the ISMA represents an industry with an annual economic impact of seven *billion* dollars in the United States.²⁹ Over 225,000 miles of groomed and marked snowmobile trails have been developed by volunteer clubs, local government and private land owners.³⁰ Snowmobiling is touted as “great exercise” and “an invigorating sport that is great for stress release and good mental health.”³¹

Snowmobiles were first permitted in Yellowstone in 1963 and the first official winter-use policy for the Parks was implemented in 1968 amidst concerns about the effects of snowmobiling on park resources.³² In 1971, the NPS began the practice of “trail grooming” to allow for the safe passage of oversnow vehicles.³³ In the subsequent three decades, winter use (and snowmobiling in particular) increased dramatically; between 1983 and 1993 alone, the number of winter visitors at Yellowstone doubled from 70,000 to 140,000.³⁴ Currently, there are over 180 miles of groomed park roads, accommodating as many as 1700 snowmobiles in the Parks per day.³⁵ Snowmobile use in national parks is controlled and regulated by federal officials and is restricted to the same roads used by recreational vehicles (RVs), cars, trucks and buses; thus, it is impermissible to use snowmobiles as off-road vehicles to access remote areas of the park system.³⁶ In addition to Yellowstone, snowmobile use has been the source of controversy in several other National Parks and Wilderness Areas, including the Boundary Waters Canoe Area and Voyageurs National Park in Minnesota and Denali National Park and Preserve in Alaska.³⁷

27. *Id.*

28. Press Release, Int'l Snowmobile Mfrs. Ass'n, Snowmobile Related Tourism—a MAJOR Job Generator, at http://www.snowmobile.org/pr_jobs.asp (last visited June 1, 2004).

29. *Snowmobile Statistics*, *supra* note 26.

30. Int'l Snowmobile Mfrs. Ass'n, *Facts and Statistics About Snowboarding*, at http://www.snowmobile.org/pr_snowfacts.asp (last visited June 1, 2004).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Press Release, Int'l Snowmobile Mfrs. Ass'n, Yellowstone National Park Winter Use Snowmobile History (Mar. 27, 2003), at http://www.snowmobile.org/pr_winteruse.asp (last visited June 1, 2004).

37. See *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981); *Voyageurs Reg'l Nat'l Park Ass'n v. Lujan*, No. CIV.A.4-90-434, 1991 WL 343370 (D. Minn. Apr. 15, 1991).

Despite the controlled framework governing snowmobile use, some suggest that any use of snowmobiles in the parks is detrimental to the vitality of the park system. This position is supported by an analysis of the relevant legal provisions. In particular, the NPS regulations presumptively prohibit all snowmobile use, unless the snowmobiles are used in specifically designated areas (i.e., routes and water surfaces used by motor vehicles and motorboats in other seasons) and only then where such use is consistent with an individual park's "natural, cultural, scenic and aesthetic values, safety considerations, park management objectives, and will not disturb wildlife or damage park resources."³⁸ Pursuant to the Interior Department's broad power to regulate the park system,³⁹ the NPS may also impose restrictions or limits on particular activities to protect environmental values or to avoid conflict among visitor use activities.⁴⁰ Furthermore, two Presidential Executive Orders have sought to control the use of off-road vehicles, including snowmobiles, on public lands. Executive Order 11,644, signed by President Nixon in 1972, mandated that agencies allow the use of snowmobiles only in specially selected areas so that vehicle use "minimize harassment of wildlife or significant disruption of wildlife habitats."⁴¹ Executive Order 11,989, signed by President Carter in 1977, provided that an agency head "shall immediately close" specific areas or trails to off-road vehicles (including snowmobiles) when such vehicles would cause "considerable adverse effects" to those areas of the public lands.⁴²

B. *Minnesota v. Block*

The Boundary Waters Canoe Area Wilderness Act of 1978 established the Boundary Waters Canoe Area Wilderness (BWCAW) in Northern Minnesota along the United States—Canadian border in conjunction with Quetico Provincial Park of Ontario.⁴³ The Wilderness Act of 1964 provided the BWCAW with a specific exemption from the generalized ban on motorized vehicles in Wilderness Areas, allowing already established use of motorboats and snowmobiles in the area.⁴⁴ Regulatory power over the "Wilderness Area" was vested in the United

38. 36 C.F.R. § 2.18(c) (2003).

39. *Wilkenson v. Dep't of Interior*, 634 F. Supp. 1265, 1279 (1986).

40. 36 C.F.R. § 1.5(a)(1).

41. Exec. Order No. 11,644, 3 C.F.R. 142 (1972 Comp.), *reprinted as amended in* 42 U.S.C. § 4321 app. at 64-65 (2000).

42. Exec. Order No. 11,989, 3 C.F.R. 120 (1977 Comp.), *reprinted as amended in* 42 U.S.C. § 4321 app. at 64-65 (2000).

43. *Minnesota v. Block*, 660 F.2d 1240, 1245 (8th Cir. 1981).

44. *Id.* at 1245-46.

States Department of Agriculture (USDA) to retain the “primitive character” of the BWCAW.⁴⁵ Pursuant to this mandate, the Secretary banned all snowmobiling within the BWCAW in 1976.⁴⁶ In order to address the confusion generated by the BWCAW exemption to the Wilderness Act, section 4(e) of the 1978 BWCAW Act subsequently limited snowmobile use within the area to two designated trails and banned it everywhere else.⁴⁷

In response to section 4(e), the state of Minnesota, joined by an association of private property owners and the Minnesota United Snowmobilers Association, challenged the 1978 Act’s restrictions on snowmobile and motorboat use in federal court.⁴⁸ Minnesota claimed that because the United States owned only ninety percent of the lands within the BWCAW, it could not constitutionally regulate the use of the remaining ten percent (owned primarily by the state of Minnesota) and the beds of all lakes and rivers within the BWCAW (also owned by Minnesota).⁴⁹

The United States Court of Appeals for the Eighth Circuit rejected Minnesota’s arguments, holding that the Property Clause of the U.S. Constitution⁵⁰ granted Congress power over public lands “without limitations.”⁵¹ The court went on to find that Congress’s authority under the Property Clause extended to “regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”⁵² Thus, given the 1978 Act’s purpose to preserve the wilderness character of the BWCAW, the court in *Minnesota v. Block* held that section 4’s provisions restricting motorized vehicle use in the BWCAW (extending even to state and privately owned lands within the Wilderness Area) were consistent with Congress’s management goals for the area.⁵³

Minnesota v. Block makes clear that the federal government (specifically Congress) has broad authority over government-owned land. Although there is seemingly a distinction between the Wilderness Act at issue in *Block* and the Organic Act as applied to the National Park System (given the dual mandates of the Organic Act as opposed to the

45. *Id.* at 1246.

46. *Id.* at 1246 n.8.

47. *Id.* at 1247.

48. *Id.* at 1244.

49. *Id.*

50. *See* U.S. CONST. art. IV, § 3, cl. 2 (providing that “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

51. *Block*, 660 F.2d at 1248 (citing *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976)).

52. *Id.* at 1249.

53. *Id.* at 1250.

singular goal of preservation embodied by the Wilderness Act), the distinction is not overly significant. A plausible interpretation of the Organic Act is that national parks are for the enjoyment of the public, as long as such enjoyment does not threaten the mandate to conserve, and as long as such enjoyment does not unduly interfere with other public enjoyment uses. The Eighth Circuit looked to the legislative history of the 1978 BWCAW Act and gave deference to the determination that some uses of the BWCAW (specifically the operation of motorized vehicles such as snowmobiles) threatened not only other uses of the BWCAW, but also the area's continued existence as a Wilderness Area.⁵⁴ Thus, the court's decision in *Block* implies that Congress could regulate motorized vehicle use in national parks if such vehicle use interferes with other public uses more consistent with the original purpose of the area in question.⁵⁵ Therefore, Congress should be able to limit uses of National Parks in order to further the purposes of the Organic Act; however, the courts have not always granted such broad authority to the NPS.⁵⁶

C. *Voyageurs Regional National Park Ass'n v. Lujan*

Congress authorized the establishment of Voyageurs National Park in a 1971 act that simultaneously instructed the Secretary of the Interior to review the area within the Park and to report to the President within four years as to the suitability of a possible wilderness designation, pursuant to the Wilderness Act.⁵⁷ However, the NPS did not submit a proposed wilderness recommendation to the Secretary of the Interior until 1983.⁵⁸ This proposal was rejected by Secretary James Watt; the NPS then issued a second recommendation, this time recommending against the designation of any wilderness areas in the park.⁵⁹ Neither of these recommendations was ever transmitted to the President or Congress, as mandated by the Wilderness Act.⁶⁰

In between the Park's formal establishment in 1975 and the NPS's wilderness recommendation in 1983, the NPS allowed snowmobiling on the Park's Kabetogama Peninsula and intended to adopt a trail plan

54. *Id.* at 1251 n.21 (quoting Congressman Vento of Minnesota: "[H]istorically the use of motor vehicles could not be reconciled with retaining a primitive wilderness area.").

55. *Id.*

56. *See, e.g.,* Alaska State Snowmobile Ass'n v. Babbitt, 79 F. Supp. 2d 1116 (D. Alaska 1999); *Voyageurs Reg'l Nat'l Park Ass'n v. Lujan*, No. CIV.A.4-90-434, 1991 WL 343370 (D. Minn. Apr. 15, 1991).

57. 16 U.S.C. §§ 160-160K (2000).

58. *Voyageurs*, 1991 WL 343370, at *2.

59. *Id.*

60. *Id.*

“providing for the creation of a permanent snowmobile highway across the full length of the . . . [p]eninsula.”⁶¹ Conservation organizations brought suit, alleging that the NPS violated Department of the Interior regulations governing national parks by allowing snowmobile use in nondesignated areas.⁶² They further argued that, given the provision in the Park’s enabling act setting it up as a wilderness study area, the NPS violated its management policies by allowing use inconsistent with an actual Wilderness Area.⁶³ The NPS claimed that the Voyageurs National Park Act specifically allowed for the Secretary of the Interior to develop the Park to include the use of snowmobiles.⁶⁴ Accordingly, the NPS announced in 1990 that it would waive its usual management policies regarding snowmobiling in areas under consideration for wilderness designation in light of the enabling act’s snowmobile language and the pervasive unregulated use of snowmobiles within the Park.⁶⁵ Subsequently, the NPS issued a final regulation authorizing snowmobile use on designated trails while allowing the Superintendent the power to temporarily close trails for purposes of “public safety, wildlife management, weather, and park management objectives.”⁶⁶

The United States District Court for the District of Minnesota held that the NPS’s failure to submit a wilderness recommendation within the time commanded by the Park’s enabling act represented an agency action “unlawfully withheld or unreasonably delayed” within the meaning of the Administrative Procedure Act (APA).⁶⁷ Pursuant to the APA, the court ordered the Secretary to issue a recommendation to the President in accordance with the Voyageurs National Park statute.⁶⁸ Notwithstanding this holding, the court found that the final regulation authorizing snowmobiling in designated areas of the park was valid.⁶⁹ The court cited the express authorization of snowmobiling in the Voyageurs enabling act

61. *Id.* at *3. The Kabetogama Peninsula accounts for approximately half of the park’s land area and is the largest contiguous landmass in the park. *Id.* at *1.

62. *See* 36 C.F.R. § 2.18(c) (2003) (“The use of snowmobiles is prohibited, except on designated routes and water surfaces that are used by motor vehicles or motorboats during other seasons.”).

63. *Voyageurs*, 1991 WL 343370, at *2-*3. These policies provide that pending congressional action, the Service will take no action with respect to a wilderness study area that would diminish its wilderness suitability, and that all management decisions made in the interim period will be “made in expectation of eventual wilderness designation.” 36 C.F.R. § 2.18(c).

64. *See* 16 U.S.C. § 160h (2000).

65. *Voyageurs*, 1991 WL 343370, at *3-*4.

66. 36 C.F.R. § 7.33(b).

67. *Voyageurs*, 1991 WL 343370, at *11-*12.

68. *Id.* at *12. The APA provides that a court “shall compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1) (2000).

69. *Voyageurs*, 1991 WL 343370, at *14.

and maintained that the NPS could allow snowmobiling and still meet the goals of the Wilderness Act after a reasoned determination that “such a use is not inconsistent with future wilderness designation.”⁷⁰ In support of such a determination, the NPS pointed to a draft trail plan and environmental assessment finding that snowmobiling does not conflict with wilderness suitability because “the nonconforming use can be stopped at any time and the trails will quickly revegetate . . . restoring wilderness characteristics.”⁷¹

On appeal, the Eighth Circuit upheld the district court’s decision, finding that the enabling legislation evidenced Congress’ intent that snowmobiles could be used in the Park.⁷² The court further noted that the specific language of the enabling act trumped the general requirements of the Wilderness Act, finding that the NPS had adequately explained its departure from the Wilderness Act.⁷³

The holdings of both the district court and the Eighth Circuit in *Voyageurs* are consistent: the NPS’s presumptive ban on snowmobiling in national parks is subordinate to any park-specific enabling act that contemplates snowmobile use. Furthermore, enabling acts that allow for snowmobiling may control even in the face of a mandate to preserve the land for possible future wilderness designation, where the NPS makes a reasonable determination that such use will not diminish the land’s wilderness suitability.⁷⁴ The district court also pointed to the support for snowmobiling within the community surrounding Voyageurs National Park as an additional basis to uphold the NPS’s approval of snowmobile use in the Park.⁷⁵ Thus, in the wake of *Voyageurs*, it is clear that park-specific enabling acts can override both the generalized ban on snowmobiles found in section 2.18 of the NPS regulations and the Organic Act’s mandate to conserve and leave unimpaired the natural values of national parks. Whenever Congress merely contemplates snowmobiling in an enabling act by allowing for “appropriate provisions for . . . the use of snowmobiles,” pervasive and unregulated use can be deemed consistent with law.⁷⁶

70. *Id.*

71. *Id.* at *13.

72. *Voyageurs Reg’l Nat’l Park Ass’n v. Lujan*, 966 F.2d 424, 427-28 (8th Cir. 1992).

73. *See id.* at 428 (observing that the regulations provide for closure under certain circumstances, and minimal trail clearing and signing will not diminish the possibility for future wilderness designation (citing the minimal trail clearing and signing authorized and the provisions of 36 C.F.R. § 7.33 that provided for closure under certain circumstances)).

74. *Id.* at 428 (“[T]he general language of the Wilderness Act must give way to the more specific provisions of the park’s enabling legislation.”).

75. *Voyageurs*, 1991 WL 343370, at *14.

76. 16 U.S.C. § 160(h) (2000).

Given the Organic Act's requirement that NPS managers "always seek to avoid, or minimize . . . adverse impacts on park resources and values,"⁷⁷ an outcome allowing the unregulated use of snowmobiles in a potential Wilderness Area over a number of years is problematic and inconsistent with at least one purpose of the National Park System.⁷⁸ Based on the enabling act for Voyageurs National Park, the NPS only had the authority to pass regulations allowing limited snowmobile use, where such use would be consistent with a possible future wilderness designation.⁷⁹ However, much of the snowmobile use that took place in the park went beyond the scope of these limits; the NPS effectively allowed fifteen years of *unregulated* snowmobiling in violation of the enabling act's requirement of "appropriate provisions for . . . the use of snowmobiles."⁸⁰

D. Mausolf v. Babbitt

In December 1992, pursuant to the Voyageurs National Park snowmobiling regulations, the NPS closed certain areas of the park to snowmobile use in order to protect two endangered species: the bald eagle and the gray wolf.⁸¹ Subsequently, the Minnesota United Snowmobilers Association brought suit, claiming the closures violated the ESA and the Administrative Procedure Act (APA).⁸² Although the NPS had initially found that snowmobiling's impacts on wildlife in the park were insignificant, the NPS changed course based on a biological assessment issued by the Fish and Wildlife Service (FWS) in March 1992.⁸³ The FWS opinion instructed the NPS to close snowmobile trails to prevent disruptions of the gray wolf's feeding habits.⁸⁴

Under the ESA, it is unlawful for individuals to "take" a threatened or endangered species;⁸⁵ "take" is defined to include the "harass[ment]" or "harm[ing]" of such species.⁸⁶ By regulation, "harass" is defined as

77. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 103 (D.D.C. 2003) (quoting NAT'L PARK SERV., 2001 Mgmt. Policies at 1.4.1., A.R. 85,318).

78. *Voyageurs*, 1991 WL 343370, at *3-*4. Snowmobile use was apparently ongoing from the time of at least the inception of Voyageurs National Park in 1975 until the NPS finally explicitly authorized such use in 1991 through 36 C.F.R. § 7.33. *Id.*

79. *Id.* at *12-*13. The NPS has authority to promulgate regulations allowing limited snowmobile use. *See* 16 U.S.C. § 160h.

80. *Fund for Animals*, 294 F. Supp. 2d at 103; *see* 16 U.S.C. § 160h.

81. *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1335-36 (D. Minn. 1996).

82. *Id.* at 1336.

83. *Id.* at 1338.

84. *Id.*

85. 16 U.S.C. § 1538(a)(1)(B)-(D).

86. *Id.* § 1532(19).

action “which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns . . . includ[ing] . . . breeding, feeding or sheltering.”⁸⁷ Likewise, “harm” is defined to include significant habitat modification through the impairment of “essential behavioral patterns, including breeding, feeding or sheltering.”⁸⁸ A 1994 supplement to the FWS biological opinion stated that the purpose of the trail closures was to minimize the “harm, harassment, and taking of gray wolves” through “adverse human/wolf contact.”⁸⁹

The plaintiff snowmobilers argued that the trail closures deprived them of their enjoyment of park features and scenery, particularly the observation of gray wolves in their natural habitat.⁹⁰ Additionally, the plaintiffs argued that the snowmobiling restrictions were unnecessary, unsupported and beyond the authority granted by the ESA because the NPS and the FWS failed to adequately explain their action.⁹¹ In *Mausolf v. Babbitt (Mausolf I)*, the district court agreed, finding that although there was some evidence of snowmobilers displacing feeding wolves, the record lacked adequate proof of significant, permanent impacts on wolf or eagle populations.⁹²

On appeal, the Eighth Circuit reversed, finding that the district court only considered the NPS’s authority under the ESA, ignoring other bases of support for the decision.⁹³ In particular, the Eighth Circuit pointed to the authority vested in the NPS by the regulations governing snowmobiling in Voyageurs National Park, the regulations pertaining to the management of all national parks and the Organic Act.⁹⁴ The circuit court also noted that the NPS trail closure fell outside the ambit of formal rulemaking,⁹⁵ finding that the general ban on snowmobiling in national parks controlled even though the NPS had never enforced the ban.⁹⁶ Thus, the court found no “significant alteration” where a previously unlawful use was later restricted.⁹⁷

87. 50 C.F.R. § 17.3 (2003).

88. *Id.*

89. *Mausolf I*, 913 F. Supp. at 1340 (citing anecdotal reports of snowmobile users harassing feeding wolves).

90. *Id.* at 1341.

91. *Id.* at 1343.

92. *Id.*

93. *Mausolf v. Babbitt*, 125 F.3d 661, 668 (8th Cir. 1997).

94. *Id.* (citing 36 C.F.R. §§ 1.5(a), 7.33(b)(3) (2003)).

95. *See* 36 C.F.R. § 1.5(b) (requiring that any closures resulting in a “significant alteration in the public use pattern[s] . . . shall be published as rulemaking”). *Id.*

96. *Mausolf II*, 125 F.3d at 668.

97. *Id.*

The court also rejected the claim that the NPS's decision was procedurally invalid under the APA's arbitrary and capricious standard.⁹⁸ Because the regulations at issue were "reasonably related to the purposes of the enabling legislation" and because the FWS's biological opinion provided a rational basis for the conclusion that closures would likely prevent takings of gray wolves, the court upheld the NPS's restriction on snowmobiling.⁹⁹ Finally, the court outlined limits to a Park Superintendent's discretion to close trails, holding that temporary closures under 36 C.F.R. § 7.33(b)(3) must be reviewed at least once annually and that such closures must be implemented to promote "specific regulatory objectives."¹⁰⁰

In sum, the Eighth Circuit's decision in *Mausolf* granted the NPS broad authority to regulate snowmobile use in national parks. Presented with an agency finding of "less than ideal clarity," the court imposed only the minimal procedural requirement that the NPS regulation be "reasonably related" to the legislative purpose.¹⁰¹ In *Mausolf I*, the evidence of adverse impacts on the endangered wildlife from snowmobiling was anecdotal and conjectural.¹⁰² Therefore, after *Mausolf*, any evidence that shows snowmobiling may be threatening the purposes of the Organic Act appears to be a sufficient basis for a snowmobiling prohibition. The NPS's authority after *Mausolf* is even broader considering that the Voyageurs National Park enabling act specifically contemplated snowmobile use in the park.¹⁰³ Thus, *Mausolf* upheld and strengthened the federal government's power to regulate park land for conservation purposes, even when such regulation limits the enjoyment of some park visitors by restricting previously allowed uses.

E. Alaska State Snowmobile Ass'n v. Babbitt

In 1917, Congress established Mount McKinley National Park for public recreation and preservation purposes.¹⁰⁴ In 1980, Congress added an additional 3.75 million acres to the park through the Alaska National Interest Lands Conservation Act (ANILCA) and renamed the park

98. *Id.* at 669.

99. *Id.* at 669-70.

100. *Id.* at 669 (quoting 36 C.F.R. § 1.5(a)'s objectives of "protection of environmental or scenic values" and "protection of natural or cultural resources").

101. *Id.* at 667, 670.

102. *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1339 (D. Minn. 1996) (citing NPS reports of "casual observations suggesting" that snowmobilers had interfered with feeding wolves and the "unknown" extent of possible disturbance to wolves).

103. *See* 36 C.F.R. § 7.33(b).

104. *See* 16 U.S.C. § 351 (2000).

Denali National Park and Preserve.¹⁰⁵ Under ANILCA, snowmobile use was permitted within the park, as long as such use was “for traditional activities,” subject to regulation by the Secretary of the Interior to protect the park’s natural values.¹⁰⁶ Further, the prohibition of snowmobiling is only allowed after “notice and hearing” and if the Secretary finds that snowmobile use “would be detrimental to the resource values of the unit or area” affected.¹⁰⁷ In 1986, the Secretary codified the “open until closed” snowmobile policy of ANILCA by regulation.¹⁰⁸

A 1988 order by the Park Superintendent specified the NPS’s longstanding policy that snowmobile use in the “Old Park” “is not traditional and is not allowed.”¹⁰⁹ An order by the Superintendent in 1992 defined the term “traditional activity” used in ANILCA to mean an “activity that was regularly practiced in the former Mt. McKinley National Park prior to the 1980 passage of ANILCA”;¹¹⁰ this effectively banned snowmobiling in the Old Park. However, the Superintendent also decided that all *new* areas of the park would be open to snowmobile use.¹¹¹ In 1996, an updated compendium of park rules stipulated that recreational snowmobile use in the Old Park had no historical basis, and therefore was a prohibited activity.¹¹²

Although the NPS never officially sanctioned snowmobile use in Denali National Park and despite the fact that the Park Superintendent had already been treating snowmobile use in the former Mt. McKinley National Park as a prohibited activity, the NPS announced in 1998 that it intended to temporarily close the Old Park to snowmobile use with the exception of two open corridors.¹¹³ The notice for hearings regarding the temporary closure emphasized that the new regulation represented a “continued closure” and that “snowmachines had always been prohibited in the Old Park.”¹¹⁴ At the hearing, the Alaska State Snowmobile Association (ASSA) protested the closure, arguing that, under ANILCA, the NPS could only close the Old Park to snowmobiles after finding a resource detriment.¹¹⁵ Subsequently, the ASSA filed suit alleging that the

105. *Id.* § 410hh-1(3)(a).

106. *Id.* § 3170(a).

107. *Id.*

108. *See* 43 C.F.R. § 36.11 (2003).

109. *Alaska State Snowmobile Ass’n v. Babbitt*, 79 F. Supp. 2d 1116, 1121 (D. Alaska 1999). The “Old Park” is the area formerly known as Mt. McKinley National Park. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1122.

114. *Id.* at 1123.

115. *Id.*

NPS decision to close the Old Park to snowmobiles violated ANILCA, NEPA and the APA.¹¹⁶ In addition, the Wilderness Society also brought suit as defendant-interveners alleging that the Department of the Interior violated ANILCA by not reading it in conjunction with the Wilderness Act, which prohibits the use of all motorized vehicles in Wilderness Areas.¹¹⁷

The United States District Court for the District of Alaska rejected the Wilderness Society's claim, finding that section 1110(a) of ANILCA specifically allowed snowmobile use for "traditional activities" unless such use would be "detrimental to the resource values of the area" controlled.¹¹⁸ Ultimately, the court held that the NPS's decision violated ANILCA and the APA and was, therefore, arbitrary and capricious because "the absence of any definition of traditional activities . . . means that the [d]ecision contains no rational basis for the conclusion that the use of snowmachines for traditional activities in the Old Park is detrimental to the resource values of the Old Park."¹¹⁹

The lack of a definition for the term "traditional activity" in ANILCA doomed the NPS decision. Absent a definition, the NPS could not defeat the ASSA's assertion that its members used snowmobiles to engage in the "traditional activities" of "sightseeing, solitude, photography, back country camping [and] wilderness experience."¹²⁰ The court rejected the Wilderness Society's contention that traditional activities meant subsistence activities because such a statutory construction would have been redundant given that ANILCA has a separate provision expressly sanctioning snowmobile use for subsistence activities.¹²¹ The court also rejected the notion that recreational snowmobile use could not be a traditional activity because it did not take place in the Old Park prior to 1980, on the ground that the NPS undermined such a construction by simultaneously opening a part of the Old Park to snowmobiling.¹²² The court also found that the NPS closure was not supported by any evidence of "resource detriment" caused by snowmobile use in the park.¹²³ Indeed, the NPS itself conceded that the effects of snowmobiling on the Park's ecosystem were "uncertain."¹²⁴

116. *Id.* at 1119.

117. *See id.* at 1140-41.

118. *Id.*

119. *Id.* at 1146.

120. *Id.* at 1142.

121. *See id.* at 1141.

122. *See id.*

123. *See id.* at 1144.

124. *Id.*

ASSA v. Babbitt is clearly different from the other snowmobiling cases due to ANILCA's "traditional activity" language and the lack of a definition thereof. The NPS seems to have based its entire decision on the procedural notion that snowmobile use in the Park had always been prohibited and thus was not a "traditional activity" within the meaning of ANILCA.¹²⁵ Following this logic, the NPS may have thought that its decision was only the continuation of the generalized prohibition of snowmobile use in the park. It is possible that the outcome of *ASSA v. Babbitt* may have been different if the NPS had attempted to base its decision on the detrimental effects of snowmobiling. Indeed, given the relatively weak adverse impacts that cases such as *Mausolf* found sufficient to uphold restrictions on snowmobiling, the NPS's failure to provide such an argument is puzzling.¹²⁶ In sum, it appears that some showing of adverse or detrimental impacts on resource values is necessary for courts to uphold regulatory prohibitions on uses of park land that provide for the public enjoyment—even where such uses have been historically and generally prohibited.

III. SNOWMOBILES IN YELLOWSTONE: THE CURRENT BATTLE

A. *The 2001 Final Rule*

In 1997, the Fund for Animals brought suit against the NPS amidst concerns over the effects of trail grooming and snowmobiling on the wildlife in Yellowstone National Park, Grand Teton National Park, and the John D. Rockefeller Memorial Parkway (the Parks).¹²⁷ The suit alleged that the Service's winter use plan permitting trail grooming and snowmobiling violated NEPA and the ESA and sought an injunction prohibiting these activities pending an assessment of their impact on federally protected species, particularly bison.¹²⁸ Ultimately, the parties reached a settlement agreement where the NPS agreed to prepare an EIS addressing the issues of snowmobile use and trail grooming.¹²⁹ Subsequently, the NPS released a draft EIS on September 29, 1999, designating a preferred Alternative *B* to allow the continued use of snowmobiles subject to new standards to reduce emissions and noise.¹³⁰ In October 2000, the NPS issued the final EIS, which made a modified

125. *See id.* at 1141-42.

126. *See supra* text accompanying note 102.

127. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 99 (D.D.C. 2003).

128. *Id.*

129. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, No. 00-CV-229-B, 2004 WL 240343, at *2 (D. Wyo. Feb. 10, 2004).

130. *Id.*

Alternative *G* the preferred alternative.¹³¹ Under Alternative *G*, snowmobile use in the Park was completely banned and snowmobiles were to be replaced with snowcoaches.¹³²

On January 22, 2001, the NPS issued a Final Rule that would have eliminated the use of snowmobiles in the Parks over a period of a few years.¹³³ Under this rule, the ban on snowmobile use in the Parks would have taken effect during the 2003-2004 season, at which point oversnow travel would be limited to snowcoach.¹³⁴ In addition, the 2001 Rule mandated the phase-out, through a permitting process, of all oversnow vehicles that failed to meet “the best environmental standards available.”¹³⁵ As a basis for its decision, the NPS cited the purpose of the National Park System, as established by the Organic Act, of “conserv[ing] park resources and values.”¹³⁶ Furthermore, the NPS noted in the 2001 Final Rule that while policies of the Service permit recreation and other activities providing for public enjoyment, such activities may be “allowed only when they will not cause an impairment or derogation of a park’s resources, values or purposes”; where a conflict exists between conserving resources and providing for enjoyment of them, “conservation is to be the primary concern.”¹³⁷ According to the 2001 Final Rule, snowmobile use adversely affects wildlife, air quality, natural soundscapes and odors, and the enjoyment of park values and resources by other visitors.¹³⁸ Finally, the NPS found that snowcoaches would cause relatively minor adverse impacts to resources when compared to the effects of snowmobiling, and that the option to use snowcoaches appropriately balanced the economic concerns of nearby communities and snowmobile concessionaires against the public benefit of banning snowmobile use.¹³⁹ The 2001 Final Rule was officially issued on the last

131. *Id.*

132. *See* Winter Use Plans for the Yellowstone and Grand Teton National Parks and John D. Rockefeller Jr., Memorial Parkway, 65 Fed. Reg. 80,908, 80,911 (Dec. 22, 2000) [hereinafter Winter Use Plan] (defining snowcoaches as “self-propelled, mass transit vehicles intended for travel on snow . . . driven by a track or tracks and steered by skis or tracks, having a capacity of at least 8 passengers”).

133. *Id.* at 80,909.

134. *Id.*

135. *Id.* at 80,910.

136. *Id.* at 80,913-14; *see also* 16 U.S.C. § 1 (2000).

137. 65 Fed. Reg. 80,914.

138. *Id.* at 80,915.

139. *Id.* at 80,917 (noting the three year window before snowmobile use would be banned is adequate to allow local communities and snowmobile operators to make the switch from snowmobiles to snowcoaches.)

day of the Clinton Administration; President George W. Bush subsequently stayed implementation of the Rule pending review.¹⁴⁰

B. The 2003 Final Rule

In December of 2000, the International Snowmobile Manufacturers Association (ISMA) sued to challenge the 2001 Final Rule.¹⁴¹ In June 2001, ISMA, plaintiff-intervenor Wyoming, and the NPS entered into a settlement agreement where the NPS agreed to prepare a supplemental EIS taking into account previously unconsidered snowmobile technologies.¹⁴² The draft of this EIS was issued in March 2002.¹⁴³ In November 2002, one month before the snowmobile phase-out mandated by the 2001 Final Rule was scheduled to go into effect, the NPS issued another final rule delaying the implementation of the phase-out for an additional year.¹⁴⁴ In February 2003, the NPS issued its Final Supplemental EIS (FSEIS), and in the following month, it adopted Alternative Four of the FSEIS, allowing 950 snowmobiles a day in Yellowstone and 1,140 snowmobiles a day in the other Parks.¹⁴⁵

The 2003 Final Rule allowing “limited” snowmobile use in the Parks was primarily based on supposed technological improvements resulting in cleaner snowmobiles.¹⁴⁶ In particular, the NPS cited the advent of four-stroke snowmobiles that are expected to reduce carbon monoxide emissions by as much as 85%, hydrocarbons emissions by up to 95%, and decrease sound levels by 50%.¹⁴⁷ The NPS set the minimum requirements for snowmobile Best Available Technology (BAT) compliance at those achieving a 90% reduction in carbon monoxide emissions and a 70% reduction in hydrocarbons emissions.¹⁴⁸ The 2003 Final Rule adopted the BAT requirement allowing continued snowmobile use in the Parks despite a separate finding that “[i]n comparison with four-stroke snowmobiles, snowcoaches . . . are cleaner, especially given their ability to carry up to seven times more passengers.”¹⁴⁹ The 2003 Final Rule also stipulated that “it would be the responsibility of the end

140. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 100 (D.D.C. 2003).

141. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, No. 00-CV-229-B, 2004 WL 240343, at *3 (D.Wyo. Feb. 10, 2004).

142. *Id.*

143. *Fund for Animals*, 294 F. Supp. 2d at 101.

144. *Id.*

145. *Int'l Snowmobile Mfrs. Ass'n*, 2004 WL 240343, at *3.

146. Special Regulations; Areas of the National Park System, 68 Fed. Reg. 51,526, 51,529 (Aug. 27, 2003).

147. *Id.* at 51,527.

148. *Id.* at 51,530.

149. *Id.* at 51,531.

users, guides and outfitters . . . to ensure that their oversnow vehicles comply with all applicable requirements,” raising the likelihood that noncomplying snowmobiles would enter into the Parks if the end users, guides and outfitters breached this responsibility.¹⁵⁰

C. The Fund for Animals v. Norton

In response to the 2003 FSEIS allowing continued snowmobiling in the Parks, the Fund for Animals (the Fund) brought suit against the NPS alleging that snowmobiling “cause[s] air and noise pollution, threaten[s] wildlife and endangered species and create[s] health threats to visitors and park employees.”¹⁵¹ As a result, the Fund argued that the NPS’s decision to allow snowmobiling violated the APA by contradicting the evidence collected during the rule-making process, thus making the NPS’s decision “arbitrary, capricious, an abuse of discretion . . . [and] not in accordance with law.”¹⁵² In particular, the Fund pointed to the Yellowstone Enabling Act, the Organic Act and the NPS’s general regulatory prohibition against snowmobiling in national parks.¹⁵³

The United States District Court for the District of Columbia began its analysis by considering the NPS’s management policies interpreting the Organic Act.¹⁵⁴ The court found that the “conservation mandate applies all the time, with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired,” and that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.”¹⁵⁵

The court ultimately remanded the 2003 FSEIS to the agency for further consideration, holding that the NPS failed to adequately explain the change from phasing-out snowmobile use in the 2001 Final Rule to allowing 1140 snowmobiles a day into the Parks under the 2003 Final Rule.¹⁵⁶ Furthermore, the court rejected the possibility of “cleaner, quieter” snowmobiles as justification for the 2003 Final Rule, citing EPA findings that even with new technology, the phase-out of snowmobiles is

150. *Id.*

151. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 97 (D.D.C. 2003).

152. *Id.*

153. *Id.* at 102-03; *see also* 16 U.S.C. §§ 1, 22 (2000) (mandating that the NPS “preserve” the “wonders” of the park and insure “their retention in their natural condition”); 36 C.F.R. § 2.18 (2003) (generally prohibiting snowmobiles in national parks, subject to certain exceptions).

154. *Fund for Animals*, 294 F. Supp. 2d at 103.

155. *Id.*

156. *Id.* at 107-08.

necessary to comply with governing law.¹⁵⁷ Additionally, the court found that the daily limits on snowmobiles entering the Parks did not actually reduce the number of snowmobiles in the Parks.¹⁵⁸ Instead, the limits would only maintain the status quo, or even allow modest increases at some entrances.¹⁵⁹ In the end, the court vacated the 2003 Final Rule and reinstated the 2001 Final Rule, pending further court order.¹⁶⁰

D. International Snowmobile Manufacturers Ass'n v. Norton (ISMA v. Norton)

Following *Fund for Animals*, ISMA and Wyoming requested that the District Court for Wyoming reopen the pending 2001 suit challenging the validity of the 2001 Final Rule.¹⁶¹ The Wyoming court found that it had jurisdiction separate from the D.C. District Court because the latter was assessing the validity of the 2003 Final Rule, while the Wyoming court was assessing the 2001 Final Rule; thus, the two rules were viewed as separate and distinct.¹⁶²

In *ISMA v. Norton*, the state of Wyoming sued for an injunction preventing implementation of the 2001 Final Rule, as ordered by the D.C. District Court, on the ground that “confusion over the status of snowmobile use in the Parks” would cause millions of dollars of unrecoverable and noncompensable losses.¹⁶³ ISMA alleged that winter recreation businesses were incurring catastrophic losses, including potential bankruptcies, as a result of the 2001 Final Rule.¹⁶⁴

The Wyoming district court balanced these losses against the defendant-intervenor Greater Yellowstone Coalition’s (GYC) claim that snowmobiling causes adverse effects on park resources and threatens the health of park employees and visitors; the scales tipped in favor of the plaintiffs.¹⁶⁵ The court reasoned that since implementation of the 2001 Final Rule would do nothing to reduce snowmobile use for the *current* year, the defendants had not shown a present loss comparable to the plaintiffs’ “catastrophic” economic losses, and, therefore, the greater

157. *Id.* at 106-07.

158. *Id.* at 107.

159. *Id.*

160. *Id.* at 115.

161. Int’l Snowmobiling Mfrs. Ass’n. v. Norton, No. 00-CV-229-B, 2004 WL 240343, at *4 (D.Wyo. Feb. 10, 2004).

162. *Id.* at *4-*5.

163. *Id.* at *6.

164. *Id.*

165. *Id.* at *7-*8.

harm was incurred by the plaintiffs.¹⁶⁶ In addition, the court noted that with the advent of four-stroke snowmobile technology, the health problems of park employees and visitors would be greatly diminished in the future.¹⁶⁷ The court also found that the public interest favored granting the injunction, harshly criticizing the D.C. District Court for imposing the 2001 Final Rule on Western business owners and concessionaires who had relied on the NPS's 2003 regulations as being in effect.¹⁶⁸

The Wyoming court also found that the plaintiffs were likely to succeed on the merits and that the 2001 Final Rule would eventually be invalidated as procedurally improper.¹⁶⁹ The court found the 2001 Final Rule was based on "predetermined political motives"¹⁷⁰ despite the several years the NPS spent studying the impacts of snowmobiling and the EPA's finding that new technology would not sufficiently curb these impacts.¹⁷¹ Based on its finding that the 2001 Final Rule was a prejudged political decision, the court declined to give the NPS's actions very much deference.¹⁷² Additionally, the court pointed to the NPS's failure to take an adequate "hard look" at the impacts of snowcoach use.¹⁷³ The court also found procedural flaws with respect to the brevity of the public comment period for the 2001 Final Rule and the lack of explanation to justify the NPS's decision to reverse course after a forty-year history of unlimited snowmobile use in the Parks to a complete ban.¹⁷⁴ Ultimately, the court enjoined implementation of the 2001 Final Rule and remanded the Rule to the NPS to create a winter use plan for the remainder of the 2003-2004 season that would be "fair to all parties."¹⁷⁵ In sum, the court based its decision almost exclusively on the perceived procedural defects of the 2001 Final Rule, thus largely failing to consider whether the 2001 Final Rule was directed towards curbing the detrimental resource effects of snowmobiling in order to effectuate the broader purposes of the Park System.

166. *Id.* at *6-*8.

167. *Id.* at *7.

168. *Id.* at *8.

169. *See id.* at *9.

170. *Id.*

171. *See* The Fund for Animals v. Norton, 294 F. Supp. 2d 92, 106-07 (D.D.C. 2003).

172. *Int'l Snowmobiling Mfrs. Ass'n*, 2004 WL 240343, at *10.

173. *Id.*

174. *Id.* at *12.

175. *Id.* at *13.

IV. CONCLUSION

Pursuant to the court's decision in *ISMA v. Norton*, the NPS passed an amendment to the Parks' orders allowing 780 snowmobiles per day to enter Yellowstone National Park and 140 snowmobiles each day for Grand Teton National Park and the John D. Rockefeller Memorial Parkway.¹⁷⁶ Previously, 493 snowmobiles were allowed in Yellowstone each day; the additional 287 now allowed must meet BAT standards and all snowmobiles must be commercially guided.¹⁷⁷ There is no requirement for guides or BAT in Grand Teton or the John D. Rockefeller Memorial Parkway.¹⁷⁸ Thus, as a result of *ISMA v. Norton*, the Parks are subject to limited snowmobile use, although the limits have been set lower than those mandated by the 2003 Final Rule.

It is difficult to reconcile the district court's decision in *ISMA v. Norton* with the requirements of the Organic Act, the Yellowstone Act, and the regulations found in 36 C.F.R. § 2.18. The court based its holding to enjoin implementation of the 2001 Final Rule on the potentially catastrophic economic losses which some snowmobile outfitting businesses may have been subject to with implementation of the rule.¹⁷⁹ The court concluded that these potential losses were much greater than the detrimental effects that continued snowmobile use would cause the Parks despite the fact that, under the 2001 Final Rule, snowmobile use for the 2003-2004 season would be allowed at traditional levels.¹⁸⁰ Given the status quo of snowmobile use that would have taken place with implementation, the court found that any injury caused to the Parks by an injunction would occur in future seasons, but somehow failed to apply this same logic to plaintiffs' economic losses. The court also ignored the results of the 2003 Final Rule study finding that a transition to snowcoaches would reduce carbon monoxide emissions to fifty percent of four-stroke snowmobile emissions levels.¹⁸¹ Instead, the court claimed that four-stroke technology would abate the adverse impacts of snowmobiling on public health within the Parks in the

176. Nat'l Park Serv., Yellowstone National Park Winter Use Status, at <http://www.nps.gov/yell/planvisit/todo/winter/index.htm> (last visited Mar. 17, 2004).

177. *Id.*

178. *Id.*

179. *Int'l Snowmobiling Mfrs. Ass'n*, 2004 WL 240343, at *13.

180. Winter Use Plan, 65 Fed. Reg. 80,908, 80,909 (Dec. 22, 2000).

181. Press Release, Wilderness Soc'y, Rangers No Longer Getting Sick in Yellowstone (Feb. 4, 2004), available at <http://www.wilderness.org/NewsRoom/Release/20040204.cfm> (last visited Apr. 10, 2004) [hereinafter Wilderness Society].

future, thus mitigating any harm an injunction on implementation of the 2001 Final Rule would cause the Parks or defendant-interveners.¹⁸²

In assessing the alleged catastrophic economic losses that businesses would suffer if the 2001 Final Rule was implemented, the court emphasized that these businesses had relied on the 2003 Final Rule taking effect in conducting their business operations.¹⁸³ However, it is questionable how reasonable this reliance was given the tumultuous and contentious background behind the promulgation of both rules. Furthermore, as mentioned above, implementation of the 2003 Final Rule would have had *no effect* on snowmobile use for the 2003-2004 season.¹⁸⁴ Although the court noted that snowmobile concessionaires often take reservations one year in advance, these businesses should have been on notice that there was at least the possibility that some type of snowmobile restriction could occur soon, given the purpose of the 2001 Final Rule and the continuing litigation regarding the 2003 Final Rule.¹⁸⁵

Beyond the analytical flaws of the *ISMA v. Norton* decision, there is an additional disconnect between the court's reasoning and the mandates of the Organic Act, the Yellowstone Act, and the NPS's regulations. A scrupulous review of the Organic Act must lead to the conclusion that the Act does not mention an NPS duty to protect the health and welfare of private business interests.¹⁸⁶ Instead, the purpose of the Organic Act is "to conserve the scenery and the natural and historic objects and the wild life 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."¹⁸⁷ The Yellowstone Act calls for the preservation of the natural wonders of the park from injury and spoilation and mandates the retention of those wonders in their natural condition.¹⁸⁸ Finally, section 2.18 of the NPS's regulations generally prohibits snowmobile use in national parks.¹⁸⁹ Within this framework, the Service should be expected to take measures regulating activities such as snowmobiling that adversely affect the values of the Parks.¹⁹⁰ On the other hand, there is no requirement that the NPS consider the potential economic effects that such regulations might have

182. *Int'l Snowmobiling Mfrs. Ass'n*, 2004 WL 240343, at *7.

183. *Id.* at *8.

184. Winter Use Plans, 65 Fed. Reg. at 80,909.

185. *Int'l Snowmobiling Mfrs. Ass'n*, 2004 WL 240343, at *7.

186. See 16 U.S.C. §§ 1-18f-3 (2000).

187. *Id.* § 1.

188. *Id.* § 22.

189. 36 C.F.R. § 2.18 (2003).

190. See generally 16 U.S.C. §§ 1-22; 36 C.F.R. § 2.18.

on private business. While the Service could consider the effect of regulations on certain visitors' "enjoyment" of the Parks, the consideration of private economic loss within the "enjoyment" mandate does not fit within the statutory and regulatory demands that the NPS protect and conserve park resources.¹⁹¹ In fact, the 2001 Final Rule *did* consider the economic impacts a total ban on oversnow travel would have on local communities and settled on the snowcoach alternative as the one that best balanced the need to protect the Parks with the economic needs of surrounding communities.¹⁹²

ISMA claims that "for more than 30 years snowmobilers have been riding with nature and working to keep it beautiful, healthy and thriving."¹⁹³ However, there is significant evidence that snowmobile use in Yellowstone has "impaired" the Park's natural values. A yearlong review of the environmental impacts of snowmobiling on national park resources culminated in an April 2000 report finding that "most, if not all, of the recreational snowmobile use now occurring in the National Park System is not in conformity with applicable legal requirements."¹⁹⁴ The report further found that snowmobile use is "disturbing wildlife, polluting the air and water of the parks, [and] exceeding the [S]ervice-wide noise standards."¹⁹⁵ As a result, the NPS proposed that "all parks which currently allow recreational snowmobile use under a special regulation . . . should repeal these special regulations immediately and halt recreational snowmobile use."¹⁹⁶

In addition to the 1999-2000 study, the 2001 Final Rule explicitly found that snowmobiling resulted in "unacceptable" impacts on public health and adverse impacts on wildlife, air quality, and natural soundscapes and natural odors.¹⁹⁷ Furthermore, the 2003 Final Rule considered Occupational Safety and Health Administration (OSHA) studies that found employees in the Parks were exposed to "high levels of noise, carbon monoxide, benzene, [and] formaldehyde . . . during the performance of their work duties."¹⁹⁸ In recent years, air quality at Yellowstone has been so poor as to cause employees "headaches, nausea,

191. 16 U.S.C. §§ 1-22; 36 C.F.R. § 2.18.

192. Winter Use Plans, 65 Fed. Reg. 80,908, 80,917-18 (Dec. 22, 2000).

193. Press Release, Int'l Snowmobile Mfrs. Ass'n, The Argument to Keep Yellowstone Open: The Truth About Snowmobiling, at http://www.snowmobile.org/pr_argument.asp (last visited Apr. 10, 2004).

194. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 102 (D.D.C. 2003).

195. *Id.* at 113 (alteration in original).

196. *Id.* at 102.

197. Winter Use Plans, 65 Fed. Reg. 80,908, 80,915 (Dec. 22, 2000).

198. Special Regulations; Areas of the National Park System, 68 Fed. Reg. 51,526, 51,527 (Aug. 27, 2003).

sore throats, and watering eyes” and force the NPS to pump fresh air into entrance booths and issue respirators.¹⁹⁹ On January 12, 2004, the NPS announced that the “worst case of illegal snowmobile use ever recorded on Yellowstone’s West Entrance Road has damaged trees and shrubs in park meadows.”²⁰⁰ Thus, there is a substantial basis for the finding that snowmobile use has adversely affected and impaired park values in Yellowstone. Given these impacts and the Secretary of the Interior’s broad authority to regulate the National Parks, there is much stronger evidentiary, statutory and regulatory support for the NPS’s 2001 Rule than for the 2003 Rule.²⁰¹

Furthermore, the NPS should consider banning snowmobiling in all National Parks. The impacts caused by snowmobiling at Yellowstone are similar to impacts found at other National Parks, as evidenced by the Eighth Circuit’s decision in *Mausolf* finding that snowmobile use harassed park wildlife.²⁰² In fact, the NPS’s management policies *require* park managers to “always seek to avoid or minimize . . . adverse impacts on park resources and values”; and that “when there is a conflict between conserving resources and values and providing for enjoyment of them, *conservation is to be predominant.*”²⁰³ Additionally, as noted by the court in *Fund for Animals*, “two Executive Orders, as well as NPS regulations, *demand* that if it is determined that snowmobile use has an adverse effect on the Park’s resources, or disturbs wildlife, the snowmobile use *must immediately cease.*”²⁰⁴

Public opinion also suggests support for a ban on snowmobiling in national parks. The NPS received over 350,000 comments on the 2001 Final Rule, over eighty percent of which “supported the phase-out of snowmobiles in favor of snowcoaches.”²⁰⁵ Additionally, a poll commissioned by Zogby found that fifty-eight percent of Americans felt that overturning the decision to phase out snowmobile use in Yellowstone was wrong.²⁰⁶ Public comments received following the announcement of

199. Wilderness Society, *supra* note 181.

200. *Higher Court Leaves Snowmobile Phaseout in Place in Yellowstone*, COMMON DREAMS PROGRESSIVE NEWSWIRE, Jan. 13, 2004, available at <http://www.commondreams.org/news2004/0114-04.htm> (last visited Apr. 10, 2004).

201. See *Wilkenson v. Dep’t of Interior*, 634 F. Supp. 1265, 1278 (D. Colo. 1986).

202. See *Mausolf v. Babbitt*, 125 F.3d 661, 669-70 (8th Cir. 1997).

203. *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 103 (D.D.C. 2003) (emphasis added).

204. *Id.* at 106 (emphasis added) (citing 36 C.F.R. § 2.18(c); Exec. Order No. 11644 § 3(2); and Exec. Order No. 11989, § 2).

205. *Id.* at 101.

206. Press Release, Zogby Int’l, Keep Snowmobiles out of Yellowstone, Majority of Americans Say Again (Nov. 11, 2002) (on file with author).

the 2003 Final Rule evidenced concerns that the rule was “inconsistent with the NPS Organic Act[,] . . . NPS general snowmobiling regulations (36 C.F.R. § 2.18), executive orders, NPS Management Policies, and OSHA regulations to protect employee and visitor health.”²⁰⁷

When the lightly-restrained “enjoyment” of our national parks threatens the very existence of the park system and is contrary to a wide body of law both mandating that the NPS take protective measures and granting the agency broad authority to manage, it is clear that an actual, total ban on snowmobiling in the National Park System is necessary. Ironically, the NPS’s success in promoting tourism and enjoyment of the parks may be threatening the ability of future generations to enjoy the parks. This concern was apparent in the legislative history of the BWCWA, where Congressman Vento of Minnesota stated: “[I]t is amazing that this wilderness should be threatened by our enthusiasm to rush forward and to use it. . . . [T]o be threatened by the fact of overuse of recreation is indeed a sad irony.”²⁰⁸ Edward Abbey espoused similar fears that unrestrained “industrial tourism” in the park system will destroy the ability of future generations to enjoy our national parks.²⁰⁹ Abbey’s solution to the tension between conservation of park resources and enjoyment of them was to severely restrict motorized vehicle access within the parks.²¹⁰

A complete ban on snowmobiling is also supported by the inconsistency of snowmobile use with the manner in which other visitors enjoy the parks. It is easy to imagine people going to national parks to escape the “developed world” and immersing themselves in the solitude and quiet of nature, only to be roused from that solitude by the roar of 1,140 snowmobiles a day. Indeed, in *Alaska State Snowmobile Ass’n v. Babbitt*, a member of the defendant-intervenor National Parks Conservation Association submitted affidavits claiming that “the introduction of snowmachines will injure my aesthetic, recreational, and wildlife viewing interests.”²¹¹ The 2001 Final Rule also noted the incompatibility of snowmobiling with other park uses, mentioning “unacceptable impacts on visitor enjoyment due to interference or conflict with other visitor use activities” and noting the “contention

207. Special Regulations; Areas of the National Park System, 68 Fed. Reg. 69,268, 69,276 (Dec. 11, 2003).

208. *Minnesota v. Block*, 660 F.2d 1240, 1251 n.21 (8th Cir. 1981) (citing 124 CONG. REC. H4944 (daily ed. June 5, 1978) (statement of Rep. Vento)).

209. EDWARD ABBEY, *DESERT SOLITAIRE: A SEASON IN THE WILDERNESS* 60-73 (1968).

210. *Id.* at 65.

211. *Alaska State Snowmobile Ass’n v. Babbitt*, 79 F. Supp. 2d 1116, 1126 (D. Alaska, 1999).

between groups for which quiet, solitude, and clean air needs conflict with the impacts of snowmobiles. . . . Nonmotorized users are easily affected or displaced by the sight, sound and odor of snowmobiles.”²¹²

In conclusion, continued snowmobile use in National Parks to provide for the public “enjoyment” is not legally supportable. Snowmobile use currently allowed by the NPS threatens the continued vitality of the Park System, interferes with other less-stressful uses of the parks and violates the Organic Act’s mandate of conservation. The tension between snowmobiling—a damaging, disruptive park use—and more benign park uses, demands that snowmobiling must cease. Given the dual purpose of the National Park System to conserve nature and to provide for enjoyment, any conflict between competing uses should be resolved in favor of the use that best harmonizes the system’s dual purposes. If the NPS continues to allow snowmobiling, snowmobiles may severely impair the condition of the national parks to the point that their continued existence is threatened. The NPS has the statutory and regulatory authority to broadly control park uses. Therefore, it is high time that the Service uses that power to protect the natural beauty of America’s parkland from the harm wrought by snowmobiles.

212. Winter Use Plans, 65 Fed. Reg. 80,908, 80,918 (Dec. 22, 2000).