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**To Sled or Not To Sled:  
The Snowmobiling Saga in  
Yellowstone National Park**

By Hillary Prugh\*

In December 2003, Judge Emmet Sullivan of the United States District Court of the District of Columbia invalidated a rule promulgated only five days before by the National Park Service ("NPS") under the Bush administration. The rule allowed snowmobiling in Yellowstone National Park, after the NPS under the Clinton administration had determined that snowmobiling in Yellowstone impaired the Park's resources, and therefore violated the National Park Service Organic Act of 1916 ("Organic Act"). Judge Sullivan determined that the statutes and regulations directing the NPS had a "conservation mandate" and opined that the Bush administration did not offer a reasoned analysis explaining why the new rule satisfied this mandate. Judge Sullivan's order reinstated the Clinton rule. Less than two months later, however, Judge Brimmer of the Wyoming District Court invalidated the Clinton rule because it did not adequately consider the effects on local businesses. Judge Brimmer directed the NPS to craft snowmobile regulations to satisfy both economic and environmental concerns. This Comment analyzes the statutory framework and interpretations of the Organic Act's prohibition on impairment of park resources, arguing that conservation trumps all competing concerns. It also examines the NPS Rules and District Court orders, concluding that the prohibition on impairment requires elimination of snowmobiling in Yellowstone National Park.

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## I. Introduction

Yellowstone National Park (“Yellowstone” or the “Park”) represents the crown jewel of the national park system. Congress established Yellowstone as the world’s first national park<sup>1</sup> in 1872,<sup>2</sup> to preserve the area in its natural condition.<sup>3</sup> Today, the National Park Service (“NPS” or “the Service”) operates Yellowstone under its mandate “to conserve the scenery and the natural and historic objects and the wild life [sic] therein and to provide for the enjoyment of the same in such manner and by such means as will leave [the Park] unimpaired for the enjoyment of future generations.”<sup>4</sup> In fact, the NPS has stated that “[a]s the physical remnants of our past, and great scenic and natural places that continue to evolve—repositories of outstanding recreation opportunities—class rooms of our heritage—and the legacy we leave to

future generations—[the parks] warrant the highest standard of protection.”<sup>5</sup> The Park founders established Yellowstone to preserve the area in its pristine condition.

Yellowstone provides sanctuary to five endangered and threatened species, including the bald eagle (*Haliaeetus leucocephalus*), the whooping crane (*Grus americana*),<sup>6</sup> the grizzly bear (*Ursus arctos horribilis*), the gray wolf (*Canis lupus*),<sup>7</sup> and the Canadian lynx (*Felis lynx canadensis*).<sup>8</sup> Also, approximately 4,000 bison (*Bison bison Linnaeus*)<sup>9</sup> and 30,000 elk (*Cervus elaphus*)<sup>10</sup> graze in the Park’s meadows, forests, and grasslands. This 2.2 million acre<sup>11</sup> reserve offers a protected home to these species whose habitats elsewhere are rapidly disappearing.<sup>12</sup>

Yellowstone also contains numerous geological wonders, including 300 geysers,<sup>13</sup> the best known of which is Old

1. National Park Service, U.S. Department of the Interior, *Yellowstone National Park Facts* ¶ 1, at <http://www.nps.gov/yell/technical/yellfact.htm> (last updated Dec. 22, 2004) [hereinafter *YNP Facts*].

2. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f, 1a-1 (2000 & Supp. II 2003) [hereinafter *Organic Act*].

3. Yellowstone National Park Act of 1872, 16 U.S.C. §§ 21-40c, 21 (2000). (establishing the purpose of Yellowstone as “preservation, from injury or spoliation, of all timber mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition.”)

4. *Id.* § 1.

5. NATIONAL PARK SERVICE, NPS MANAGEMENT POLICIES ¶¶ 1.1, 1.2 (2001) [hereinafter *NPS MANAGEMENT POLICIES*].

6. *YNP Facts*, *supra* note 1, ¶ 2; National Park Service, *Threatened & Endangered Species*, at <http://www.nps.gov/yell/nature/animals/birds/birds.html> (last updated Jan. 4, 2005).

7. *YNP Facts*, *supra* note 1, ¶ 2; National Park Service, *Potential Interactions Between Black Bears, Grizzly Bears, and Gray Wolves in Yellowstone National*

*Park*, at <http://www.nps.gov/yell/nature/animals/bear/infopaper/info9.html> (last updated Oct. 20, 2003).

8. *YNP Facts*, *supra* note 1, ¶ 2; National Park Service, *Lynx*, at <http://www.nps.gov/yell/nature/animals/lynx/lynx.html> (last updated Oct. 20, 2003).

9. *YNP Facts*, *supra* note 1, ¶ 2; National Park Service, *Bison: Answers to Frequently Asked Questions*, at <http://www.nps.gov/yell/nature/animals/bison/bisonqa.html> (last updated Jan. 13, 2005).

10. National Park Service, *Elk*, at <http://www.nps.gov/yell/nature/animals/elk/elk.html> (last updated Oct. 20, 2003)

11. *YNP Facts*, *supra* note 1, ¶ 1.

12. See, e.g., Endangered and Threatened Wildlife, 40 Fed. Reg. 31, 374 (July 28, 1975) (to be codified at 50 C.F.R. pt. 17) (listing the grizzly bear as a threatened species because “the range of the grizzly bear [in the contiguous 48 states], which at one time was most of the western United States, is now confined to isolated regions in Montana, Idaho, and Wyoming”).

13. *YNP Facts*, *supra* note 1, ¶ 4.

Faithful. The Park is the site of 2,000 annual earthquakes and is home to one of the world's largest petrified forests, 290 waterfalls, an active volcano, and over 1,000 documented archeological sites.<sup>14</sup> When Congress created the NPS, 44 years after the creation of Yellowstone, it explicitly reserved all of these priceless resources, and those in other national parks, "to provide for the enjoyment . . . of future generations."<sup>15</sup>

To this picture of beauty, wildlife, and ancient culture, add the roar of snowmobiles and exhaust pollution that despoil the lands and wildlife that Yellowstone was established to protect. In the winter, some estimates indicate that a snowmobile's blare can be heard up to 20 miles away.<sup>16</sup> Bison and elk traveling on groomed trails frequently flee from snowmobilers and their "inappropriate behavior."<sup>17</sup> Snowmobile exhaust creates air pollution in Yellowstone that often exceeds Los Angeles, California's rush hour traffic.<sup>18</sup> Over the 90-day winter sea-

son, snowmobiles produce 77 percent of the annual hydrocarbon emissions within the Park.<sup>19</sup> High levels of air pollutants, such as carbon monoxide, particulate matter, and hydrocarbons—including benzene, ethyl benzene, toluene, xylenes, aldehydes, and polycyclic aromatic hydrocarbons—contribute to a pernicious cornucopia of health hazards: chest pain, shortness of breath, coughing, wheezing, headache, heart attacks, lung cancer, and exacerbation of asthma and chronic heart and lung disease, to name a few.<sup>20</sup> This air pollution can also saturate the snow, causing high levels of ground and surface water pollution during snowmelt.<sup>21</sup>

This air pollution not only threatens the health of Yellowstone's employees, visitors, and wildlife but also hinders the enjoyment of the Park's resources. Snowmobiles that gather at Old Faithful produce large levels of carbon monoxide and particulate matter, considerably obstructing the visibility of this geyser.<sup>22</sup> Yellowstone may be the prize possession

14. *Id.*

15. National Park Service Organic Act of 1916, 16 U.S.C. § 1 (2005).

16. National Parks Conservation Association, *Snowmobiles: Why Snowmobiles Don't Belong in Our National Parks*, at [http://www.npca.org/across\\_the\\_nation/visitor\\_experience/motorized\\_abuse/snowmobiles.asp](http://www.npca.org/across_the_nation/visitor_experience/motorized_abuse/snowmobiles.asp) (last visited April 11, 2005) [hereinafter NPCA]; see also Greater Yellowstone Coalition, *Yellowstone Park Sound Survey*, at [http://www.greateryellowstone.org/news/news\\_archives/snowmobiles/snowmobiles\\_noise\\_survey.html](http://www.greateryellowstone.org/news/news_archives/snowmobiles/snowmobiles_noise_survey.html) (last visited April 11, 2005) (determining that snowmobiles can be heard up to 15-20 miles away).

17. Special Regulations, Areas of the National Park System, 65 Fed. Reg. 79,024, 79,026 (proposed Dec. 18, 2000) (to be codified at 36 C.F.R. pt. 7) [hereinafter 2000 Proposed Rule]. The 2000 Proposed Rule outlines the actions taken in the 2001 Snowcoach Rule, *infra* note 23, in greater

detail, without major changes.

18. SARAH JANSSEN & TED SCHESSLER, *HEALTH IMPLICATIONS OF SNOWMOBILE USE IN YELLOWSTONE NATIONAL PARK* 13, 15 (2003), available at [http://www.womenandenvironment.org/Health\\_imp\\_snow.pdf](http://www.womenandenvironment.org/Health_imp_snow.pdf) (last visited Feb. 3, 2005); see also Nathan L. Scheg, *Preservationists vs. Recreationists in Our National Parks*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 47, 53 (1998) ("Data accumulated by the California Air Resources Board shows that the fumes from 1,000 snowmobiles are equal to the total nitrous oxide and hydrocarbon output of 1.7 million automobile tailpipes.").

19. JANSSEN & SCHESSLER, *supra* note 18, at 8.

20. *Id.* at 7, 9. "A large body of scientific research demonstrates" that air pollution causes these health hazards discussed above. *Id.* at 9.

21. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. At 79,026, 79,026.

22. JANSSEN & SCHESSLER, *supra* note 18, at 19.

of the NPS, but winter visitors should not expect quiet solitude—as the snowmobile rumble erases the quiet. Instead, they should expect air pollution rivaling that of the most polluted urban airscapes in the country, elevated levels of pollutants causing various respiratory ailments, noise pollution, and smog obfuscating Old Faithful's spout, due in substantial part to snowmobile use.

In an attempt to halt Yellowstone's winter pollution, at the midnight hour of the Clinton administration, the NPS issued a final rule (the "2001 Snowcoach Rule").<sup>23</sup> In its 2000 Proposed Rule, which preceded the 2001 Snowcoach Rule, the Service determined that snowmobile use adversely affects the natural soundscapes, wildlife, air quality, and water quality of Yellowstone and other parks, and creates safety hazards<sup>24</sup>—therefore, harming "the integrity of the resources and values of the parks, and . . . constitut[ing] an impairment."<sup>25</sup> This impairment finding was legally significant because the legislation creating the NPS<sup>26</sup> requires agency

action to prevent impairment of the national parks.<sup>27</sup> In compliance with this mandate, the 2001 Snowcoach Rule directed the Service to phase out snowmobiling in Yellowstone by the 2003-2004 winter season.<sup>28</sup>

Some two years later, in December 2003, when the 2001 Snowcoach Rule was designed to take full effect, the Bush administration attempted to reverse the rule by issuing a new rule ("2003 Final Rule"), which allowed continued snowmobile use in Yellowstone.<sup>29</sup> The record accompanying the new rule contained information analyzing the negative consequences of snowmobiles in the Park similar to that previously evaluated by the Clinton administration.<sup>30</sup> Thus, the 2003 Final Rule seemed merely to reflect a shift of the political tides. Instead of the 2001 Snowcoach Rule's phase-out, the Bush rule allowed continued snowmobiling subject to daily limits of 950 snowmobiles and required use of the new four-stroke engine technology<sup>31</sup> "to more effectively manage winter visitation and recreation

23. Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7260 (Jan. 22, 2001) (to be codified at 35 C.F.R. pt. 7) [hereinafter 2001 Snowcoach Rule].

24. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,026-27.

25. *Id.* at 79,025.

26. 16 U.S.C. § 1.

27. NPS MANAGEMENT POLICIES, *supra* note 5, ¶ 1.4.4. The Management Policies establish that "[t]he impairment of park resources and values may not be allowed by the Service unless directly and specifically provided by legislation or by the proclamation establishing the park." *Id.*

28. 2001 Snowcoach Rule, *supra* note 23, 66 Fed. Reg. at 7265.

29. Special Rules, Areas of the National Park System, 68 Fed. Reg. 69,268 (Dec. 11, 2003) (to be codified at 36 C.F.R. pt. 7) [hereinafter 2003 Final Rule].

30. See NATIONAL PARK SERVICE, WINTER USE PLANS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, VOL. 2 at 26 (2003) (stating that the Environmental Protection Agency ("EPA") commented on the Draft Supplemental Environmental Impact Statement ("Draft SEIS") discussing the proposed 2003 Final Rule as follows: "The new information provided regarding snowmobile technologies [i.e. the four-stroke engine] is largely within the range of information and alternatives considered in the Final Environmental Impact Statement ("FEIS")."), available at <http://www.nps.gov/grte/winteruse/fseis/vol2/2-coopagencies.pdf> (last visited Feb. 13, 2005) [hereinafter WINTER USE PLANS FSEIS VOL. 2].

31. Special Regulations, Areas of the National Park System, 68 Fed. Reg. 51,526, 51,530 (proposed Aug. 27, 2003) (to be codified at 36 C.F.R. pt. 7) [hereinafter 2003 Proposed Rule]. The new technology was the four-stroke engines, which decreased hydrocarbon and carbon monoxide emissions by 95-98 percent and 85 percent, respectively. *Id.*

use in Yellowstone . . . .”<sup>32</sup> The Bush administration’s view of impairment differed significantly from that of the Clinton administration and 91 percent of Yellowstone’s interested parties, whose comments supported snowmobile elimination.<sup>33</sup>

This Comment addresses the legal issues surrounding snowmobiles in Yellowstone by considering two broad questions. First, did the NPS satisfy the Supreme Court’s standard of providing a “reasoned analysis”<sup>34</sup> when it reversed the 2001 Snowcoach Rule in the absence of new facts? Second, under the National Park Service Organic Act of 1916 (“Organic Act”),<sup>35</sup> does snowmobiling result in an impairment of Park resources, and should it therefore be prohibited in Yellowstone? This Comment concludes that the NPS failed to present a “reasoned analysis” justifying the drastic departure from the 2001 Snowcoach Rule, and that the effects of snowmobiling, if unabated, will leave Yellowstone impaired for future generations.

This Comment contains five sections discussing the legal framework for the management of Yellowstone, as well as the recent litigation over snowmobiling. Section II explains the Organic Act’s directive requiring the Service to leave park resources “unimpaired,” examining the his-

torical context of the drafter’s intent, the statutory language, the NPS Management Policies, and judicial interpretation of the Act. Section III considers the two competing rules for snowmobile use in Yellowstone. First, it addresses the Clinton administration’s plan to phase out snowmobiling in the Park under the provisions of the 2001 Snowcoach Rule. Second, it discusses the Bush administration’s reversal under the 2003 Final Rule, as well as the new technology and policies the NPS presented to justify the change. Section IV analyzes the recent litigation surrounding these two rules, discussing two apparently conflicting district court orders from the District of Columbia and Wyoming. Section V applies the definition of impairment to Yellowstone to assess the appropriate role for snowmobiling in the Park. The Comment concludes that snowmobiling does in fact impair Yellowstone’s resources, and therefore cannot coexist with the NPS’s statutory mandate to prevent impairment of national parks.

## II. Impairment of National Parks

The Organic Act created the NPS and the national park system, assigning the new agency the duty to ensure that the parks remain “unimpaired for the enjoyment of future generations.”<sup>36</sup> This direc-

32. *Id.* at 51,526.

33. 2003 Final Rule, *supra* note 29, 68 Fed. Reg. at 69,269. (“91% of all commentors believed the proposed regulation does not adequately protect park resources due to the presence of snowmobiles [and said that the NPS should] instead allow the [2001 Snowcoach Rule] to take effect, which would eliminate snowmobiles in favor of mass transit snowcoaches.”). See also News Release, Greater Yellowstone Coalition, Taxpayers Will Pay \$1.3 Million More Each Year to Subsidize Snowmobile Use in Yellowstone and Grand Teton (Mar. 25, 2003), at [http://www.greateryellowstone.org/news/news\\_](http://www.greateryellowstone.org/news/news_)

[archives/snowmobiles/snowmobiles\\_final\\_ROD\\_nr.html](http://www.greateryellowstone.org/news/news_) (last visited Apr. 20, 2005) (NPS received 360,000 comments for the SEIS, of which 80 percent urged the agency to phase out snowmobiles.) [hereinafter *Taxpayers Will Pay*]. Note that there is a difference in the percentages of comments supporting snowmobile phase-out because the ‘91 percent’ statistic reflects comments on the FSEIS, whereas the ‘80 percent’ statistic reflects comments on the Draft SEIS.

34. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

35. 16 U.S.C. § 1 to 18f-3.

36. *Id.* § 1.

tive, NPS's chief responsibility, instructs the Service to ensure the integrity of a park's resources and values.<sup>37</sup> Unfortunately, the Organic Act did not define the key term, "unimpaired." This section examines the meaning of "unimpaired" by analyzing the historical context of the Organic Act, statutory framework, the NPS Management Policies implementing the Act, and judicial interpretations of the statute.

### A. Historical Context and Contemporary Thought

The Organic Act's primary promoters were passionate about national park preservation and the need for the NPS. Frederick Law Olmsted, Jr.<sup>38</sup> composed the Organic Act's introduction, climaxing with the statement that the parks must remain "unimpaired for the enjoyment of future generations."<sup>39</sup> Together with California Representative William Kent, the founding father of the Organic Act, Olmsted crafted the Act's mission statement intending to apply a "common sense approach to the questions of impairment."<sup>40</sup> Olmsted believed the impairment determination should focus on the probability of adverse influences to the

parks.<sup>41</sup> Olmsted offered five criteria for impairment determinations: 1) those who advocate a proposed activity have the burden to demonstrate that the activity is "within the theoretical limits of jurisdiction of a National Park";<sup>42</sup> 2) the activity must be of "real social importance from a national standpoint"<sup>43</sup> to be permitted inside park boundaries; 3) the activity cannot "endanger the value of the park for its proper purpose to the slightest appreciable degree";<sup>44</sup> 4) the activity must be suitable for the park; and 5) the importance of the activity causing the impairment must be of greater value than the park's purposes to justify the impairment.<sup>45</sup> In sum, according to Olmsted, the Organic Act's inclusion of the term "unimpaired" requires that advocates of a proposed activity demonstrate a compelling need in order to trump this high preservation standard.

Representative William Kent, the "father of the National Park System,"<sup>46</sup> also sought to create a high protection criterion for the national parks, emphasizing that the NPS must resist surrounding communities' pressures to transform the park into primarily a tourist attraction.<sup>47</sup>

37. See NPS MANAGEMENT POLICIES, *supra* note 5, ¶¶ 1.4.4, 1.4.5.

38. Olmsted, Jr. was the son of Frederick Law Olmsted, creator of New York City's Central Park and early promoter of Yosemite National Park. Olmsted, Jr. also emerged as a designer and promoter of the national parks. Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 596 (1997). This article concludes that the Organic Act does not have a contradictory mandate because after analyzing the legislative history it is clear that Congress's intent was resource conservation. *Id.* at 623.

39. *Id.* at 596; 16 U.S.C. § 1.

40. Winks, *supra* note 38, at 596, 598 (quoting Olmsted's commentary on "impairment").

41. *Id.* at 598-99. "[W]ithin the theoretical limits of jurisdiction of a National Park" seems to refer to activities that one could reasonably imagine taking place within park boundaries.

42. *Id.* at 599.

43. *Id.*

44. *Id.*

45. *Id.* The NPS management policies also reflect this perspective on impairment determinations. NPS MANAGEMENT POLICIES, *supra* note 5, ¶¶ 1.4.4, 1.4.5.

46. Winks, *supra* note 38, at 599.

47. *Id.* at 602. It is also important to note that Kent was Vice President of the Playground and Recreation Association of America at the time the

Kent believed that conservation of the national park's scenery was the "most valuable purpose."<sup>48</sup> He distinguished national forests and monuments from parks, asserting that the national parks "must be held in a state of nature and that animal life must be forever free from molestation."<sup>49</sup> Kent also agreed with Henry S. Graves, Chief Forester in 1916, who declared that the goal of the national parks was to "preserve these areas in their natural condition," by conservation of the parks' "exceptional natural wonders."<sup>50</sup> These statements make clear that the creators of the Organic Act drafted the "unimpaired" clause to ensure exceptional husbandry of the lands and wildlife within the national parks.

## B. Statutory Framework

The Organic Act directs the NPS to "conserve the scenery and the natural and historic objects and wild life [sic] [in the parks] 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."<sup>51</sup> This directive creates two obligations for the NPS in Yellowstone. First, the Service must protect Yellowstone's resources, such as Old Faithful, the roaming bison

Act was drafted. Thus, if he had intended the national parks to focus on recreation he would have explicitly stated that intent in the Organic Act. *Id.* However, Kent and the other creators of the Organic Act chose instead to emphasize park preservation. *Id.*

48. *Id.* at 601. See also Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 *ECOLOGY L.Q.* 401, 438–39 (1999) ("Most observers have concluded that these areas were designated for preservation primarily on account of their spectacular natural scenery.").

49. Winks, *supra* note 38, at 601 (internal quotations omitted).

and elk, and the Park's spectacular scenery.<sup>52</sup> Second, the Service must "provide for the enjoyment" of the Park's resources in a manner and through such means as will preserve the resources for "future generations."<sup>53</sup> The purpose fails to mention any balancing between conservation and recreation; Congress limited recreation to a manner ensuring resource protection. This directive establishes preservation of natural resources within the parks as the Service's primary focus, not to be displaced by visitor enjoyment.

Under the Yellowstone National Park Act of 1872 ("Yellowstone Act"),<sup>54</sup> the NPS must provide for the "preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition."<sup>55</sup> Like the Organic Act, the 1872 Act also emphasized a conservation theme by reiterating the importance of preserving the natural resources within Yellowstone's boundaries<sup>56</sup> and stating that the Park's resources should be maintained "in their natural condition."<sup>57</sup> In addition to the statues, President Nixon's 1972 and President Carter's 1977 Executive

50. *Id.* at 602.

51. Organic Act, 16 U.S.C. § 1.

52. *Id.* ("purpose is to conserve the scenery and the natural and historic objects and the wild life therein . . .").

53. *Id.* ("purpose is . . . 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").

54. 16 U.S.C. §§ 21–40c.

55. *Id.* § 22.

56. *Id.*

57. *Id.*

Orders<sup>58</sup> prescribe NPS administration of snowmobile use in the national parks eliminating its use when adverse to the natural resources.<sup>59</sup> The plain language of the statutes and Executive Orders require protection of Yellowstone's resources allowing recreational activities, such as snowmobiling, only when the resources are not threatened.

### C. The National Park Service Interpretation of Impairment

The NPS's generic snowmobile regulation also allows snowmobile use only when "consistent with the park's natural, cultural, scenic and aesthetic values . . ." <sup>60</sup> The NPS Management Policies further reflect the Organic Act's predominant conservation theme by declaring that national parks "warrant the highest standard of protection."<sup>61</sup> These management policies require the NPS, first and foremost, to preserve park resources, according protection a higher priority than enjoyment by citizens, including both visitors and non-visitors who enjoy from afar.<sup>62</sup> The management policies establish resource preservation as the NPS's primary duty.<sup>63</sup>

To fulfill this directive, the NPS Management Policies mirror the Organic Act by prohibiting impairment to park resources.<sup>64</sup> The policies define impairments as "impacts that . . . would harm the integrity of the park resources or values . . ." <sup>65</sup> According to the NPS, adverse effects caused by actions unnecessary for park purposes, integrity, or goals are more likely to impair than effects that are the "unavoidable result . . . of an action necessary to preserve or restore the integrity of park resources or values."<sup>66</sup> As evidenced by the regulation and these policies, the NPS has determined that an impairment exists when an action threatens park resources, unless the action itself is necessary to protect the park.<sup>67</sup>

### D. Judicial Interpretations of Impairment

Court interpretations of the Organic Act and its amendments state that resource protection is the "overarching concern" of the NPS.<sup>68</sup> In 1996, the Ninth Circuit declared that the NPS had no choice but to manage park recreation in light of the statutory mandate of resource

58. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972), as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977), reprinted in note following 42 U.S.C. § 4321 (1977). Executive Order 11,989 requires agency heads to "immediately close . . . areas or trails" where off-road vehicle use "will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails of the public lands . . ." until the adverse effects have been eliminated or measures implemented to prevent recurrence. *Id.*

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

60. 36 C.F.R. § 2.18(c) (2004).

61. NPS MANAGEMENT POLICIES, *supra* note 6, ¶ 1.2.

62. *Id.* ¶ 1.4.3.

63. *Id.*

64. *Id.* ¶ 1.4.4.

65. *Id.* ¶ 1.4.5.

66. *Id.*

67. *Id.*

68. *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1453 (9th Cir. 1996). The court also stated that "[i]ntervenors argue persuasively that . . . Congress clearly intended by its 1970 and 1978 amendments to the Organic Act that NPS . . . manage all areas of the park system uniformly with the fundamental goal of resource protection in mind." *Id.* at 1452.

protection.<sup>69</sup> The court's ruling reflected the Organic Act's intent that land and wildlife preservation take priority over recreation in the national parks.

A decade earlier, the District Court for the District of Columbia also came to a similar conclusion. While the court's statements were made while assessing whether it was rational for the NPS to reach the conclusion that conservation was its primary management function, it stated in categorical terms that "[i]n the Organic Act Congress speaks of but a single purpose, namely, conservation . . . ."<sup>70</sup> The court also determined that from the beginning the NPS's "paramount objective" was protectionism.<sup>71</sup> Therefore, the court ruled that the NPS regulations prohibiting hunting and trapping in the national park system, except where Congress explicitly allowed,<sup>72</sup> were consistent with the Organic Act's purpose, "that being of course, . . . conservation of wildlife resources."<sup>73</sup>

The Sixth Circuit also adopted the District of Columbia District Court's findings, concluding that "unlike national forests, Congress did not regard the National Park System to be compatible with consumptive uses. Rather, Congress intended the Park Service to manage the system in order 'to conserve the scenery and the national and historic objects and

the wild life therein' . . . ."<sup>74</sup> The Tenth Circuit has also concluded that "significant, permanent impairment would violate the Act's mandate that the NPS provide for the enjoyment of the parks in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>75</sup> In addition to preventing permanent impairment, the court determined that Congress intended to prohibit other temporary impacts adverse to the natural resources.<sup>76</sup> The Tenth Circuit did not elaborate as to what temporary impacts would be adverse to the natural resources, but in the instructions for remand, the court hinted that impact of off-road vehicles on a ten-mile segment near Salt Creek, the "only year-round, fresh water creek in Canyonlands National Park other than the Colorado and Green Rivers," would meet "the level of impairment prohibited by the Act."<sup>77</sup> To ascertain whether the proposed activity would leave the national park resources "unimpaired," the court ruled that the NPS must balance the competing values of preservation and public enjoyment to determine the level of temporary impairment prohibited by the Organic Act.<sup>78</sup> It is also important to note that this decision was issued before the NPS Management Policies, which stress resource protection,<sup>79</sup> but the court determined that the policies would likely

69. *Id.*

70. *Nat'l Rifle Ass'n of Am. v. Potter*, 628 F. Supp. 903, 909 (D.D.C. 1986). See also *Fund for Animals*, 294 F. Supp. 2d at 105.

71. *Potter*, 628 F. Supp. at 905 ("The paramount objective of the park system with respect to its indigenous wildlife, and the philosophy which came to pervade the new Park Service to whom it was entrusted, was, from the beginning, one of protectionism.").

72. 36 C.F.R. § 2.2 (2005).

73. *Potter*, 628 F. Supp. at 910, 912.

74. *Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 207 (6th Cir. 1991) (quoting 16 U.S.C. § 1).

75. *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000) (quoting 16 U.S.C. § 1).

76. *Id.*

77. *Id.* at 822, 829.

78. *Id.* at 826.

79. See *supra* notes 61-67 and accompanying text (discussing NPS Management Policies).

deserve agency deference.<sup>80</sup> Congress thus entrusted the NPS with the primary management duty of preserving the natural resources of the park system for future generations, even at the risk of compromising recreation.<sup>81</sup>

### III. The Rules

In 1963, after 91 years of quiet winters, the NPS allowed the first snowmobiles into Yellowstone.<sup>82</sup> NPS implemented the first winter-use policy in 1968 and began grooming trails in 1971.<sup>83</sup> Winter use, including snowmobiling, of Yellowstone, Grand Teton National Park, and the John D. Rockefeller, Jr. Memorial Parkway increased dramatically over the next three decades, and winter visitors in the combined parks doubled within a

80. *Dabney*, 22 F.3d at 829.

81. *Potter*, 628 F. Supp. at 912. “The Secretary and the Park Service have been charged by Congress with the responsibility for achieving the sometimes conflicting goals of preserving the country’s natural resources for future generations while ensuring their enjoyment by current uses. . . [The Service reasonably interpreted that its] primary management function with respect to Park wildlife is its preservation. . . .” *Id.*

82. *Fund for Animals*, 294 F. Supp. 2d at 98.

83. *Id.*

84. *Id.*

85. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,528; Press Release, National Park Service, Winter Use Decision for Yellowstone and Grand Teton National Park is Announced (Nov. 22, 2000), available at [www.yellowstone-park.net/winteruse.htm](http://www.yellowstone-park.net/winteruse.htm) (last visited Feb. 8, 2005) [hereinafter NPS Press Release].

86. See *Fund for Animals*, 294 F. Supp. 2d at 98.

87. *Id.* at 99; *Intertribal Bison Co-op v. Babbitt*, 25 F. Supp.2d 1135, 1137 (provides a history of the Service’s policy dealing with bison leaving Yellowstone and the State of Montana’s involvement). Brucellosis is a contagious livestock disease, which in 1917 was discovered in

decade from 70,000 in 1983 to 140,000 in 1993.<sup>84</sup> To accommodate this increase in winter visitors—up to 1,700 snowmobiles on peak days during the 2001-2001 winter season<sup>85</sup>—NPS groomed 180 miles of trail at least every other night.<sup>86</sup>

Yellowstone’s snowmobile litigation began in 1997, following the 1996-1997 winter season when the Service killed over 1,000 bison leaving the Park on groomed trails to prevent the spread of brucellosis.<sup>87</sup> The bison kill sparked concern over the conduit of the bison exodus—the groomed trails.<sup>88</sup> The Fund for Animals (the “Fund”)<sup>89</sup> challenged NPS’s reliance on the winter plan in effect in 1997, alleging that NPS violated the National Environmental Policy Act (“NEPA”)<sup>90</sup> by failing to prepare an environmental

Yellowstone’s bison in 1917. Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 661 (1997). Bison can pass the disease to cattle, which can then cause cattle to abort. *Id.* Although “science has not definitively answered whether brucellosis can be transmitted from wildlife to cattle in the wild[, t]here is no confirmed instance where free roaming wildlife have infected domestic livestock with brucellosis on the open range.” Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 LAND & WATER L. REV. 1, 28 (1993). Also, one respected scientist in the field concluded that bison are not a threat to transmitting brucellosis to cattle. *Id.* at 28-29. For further discussion about the science behind brucellosis transmission between bison, elk, and cattle, see *id.* at 27-32.

88. *Fund for Animals*, 294 F. Supp. 2d at 99.

89. The Fund for Animals (the “Fund”) is a non-profit organization “committed to preserving animal and plant species in their natural habitats and to preventing the abuse and exploitation of both wild and domestic animals.” *Fund for Animals*, 294 F. Supp. 2d at 97 (internal quotations omitted).

90. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (2000) (“NEPA”).

impact statement (“EIS”) discussing snowmobiling and trail grooming. The Fund also alleged that the NPS violated the Endangered Species Act of 1973 (“ESA”)<sup>91</sup> by failing to consult with the Fish and Wildlife Service (“FWS”) to determine the impact of snowmobiling and trail grooming on the federally protected species, specifically the grizzly bear and gray wolf.<sup>92</sup> The Fund and NPS subsequently reached a settlement agreement requiring, among other things, that the Service prepare an EIS and Biological Assessment and then engage in a “formal consultation”<sup>93</sup> with the FWS.<sup>94</sup> The process ultimately resulted in a comprehensive environmental impact statement (“FEIS”), which paved the way for the adoption of the Clinton administration’s 2001 Snowcoach Rule<sup>95</sup> and the gradual phase-out of snowmobile use.<sup>96</sup> But the 2001 Snowcoach Rule never took effect because it was published the day after President Bush took office, and the Bush administration immediately stayed its implementation.<sup>97</sup>

In the meantime, the International Snowmobile Manufacturers Association

(“ISMA”) challenged the 2001 Snowcoach Rule, alleging that it inadequately considered the new snowmobile technologies.<sup>98</sup> This second suit resulted in yet another settlement, requiring NPS to create a supplemental environmental impact statement (“SEIS”).<sup>99</sup> The new SEIS, prepared by the Bush administration, included information about the new snowmobile technologies, socioeconomic concerns, employee health concerns, and the alleged reduced adverse effects of the “new” four-stroke snowmobile engines.<sup>100</sup> During the SEIS comment period, the NPS received over 350,000 comments, over 80 percent of which favored retaining the 2001 Snowcoach Rule, rather than allowing continued snowmobiling.<sup>101</sup> Despite this widespread support for implementation of the 2001 Snowcoach Rule, the NPS promulgated the 2003 Final Rule that allowed 950 snowmobiles per day, implemented an “adaptive management” strategy, and required use of the “best available technology”—the four stroke engine.<sup>102</sup> This section analyzes the process and rationale behind these competing rules, beginning with the Clinton administra-

91. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000) (“ESA”).

92. *Fund for Animals*, 294 F. Supp. 2d at 99. However, the formal consultation never occurred because the FWS concurred with NPS that continued trail grooming was unlikely to affect protected species. *Id.* at 100.

93. 16 U.S.C. § 1536(a)(2) (“Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species...”).

94. *Fund for Animals*, 294 F. Supp. 2d at 99. The Fish and Wildlife Service “‘concurred’ in the conclusions that the proposed action was not likely to adversely affect protected species,” thus the formal consultation did not occur. *Id.* at 100.

95. NATIONAL PARK SERVICE, WINTER USE PLANS, FINAL ENVIRONMENTAL IMPACT STATEMENT (2000) [hereinafter FEIS]. See also *Fund for Animals*, 294 F. Supp. 2d at 99-100 (discussing Yellowstone’s snowmobiling factual background).

96. *Fund for Animals*, 294 F. Supp. 2d at 99-100.

97. *Id.*

98. *Id.*

99. *Id.* at 100-01.

100. *Id.* at 101 (internal quotations omitted). See *infra* notes 134-153 and accompanying text (discussing the “significant new or additional information or data” analyzed by the NPS in the SEIS during the Bush administration).

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

102. *Id.* See generally *infra* notes 115-157 and accompanying text (discussing the 2003 Final Rule).

tion's snowmobiling ban, followed by the Bush administration's reversal.

### A. The Clinton Administration's Ban on Snowmobiling

In May 1997, the Fund sued the NPS to compel preparation of the FEIS, eventually settling in 2000; pursuant to this settlement, NPS prepared an FEIS in cooperation with nine other agencies.<sup>103</sup> The FEIS process included six public meetings, 46,500 public comments, a rulemaking petition, and a two-day "snowmobile summit."<sup>104</sup> In the end, in the 2001 Snowcoach Rule, the NPS determined that snowmobiling created an impairment because of the adverse effects on natural soundscapes, wildlife, air quality, water quality, visitors, and safety considerations.<sup>105</sup> Therefore, the rule aimed to eliminate snowmobiling from Yellowstone.<sup>106</sup>

The essence of Yellowstone's visitor attraction is the opportunity to encounter the Park's wildlife, natural wonders, and the accompanying soundscapes.<sup>107</sup> Unfortunately, NPS determined that Yellowstone's winter soundscapes included constant snowmobile blare at popular

venues; for instance, visitors heard snowmobiles at Old Faithful 95 percent of the time and 87 percent of the time at the Grand Canyon of Yellowstone.<sup>108</sup> The NPS relied on four separate studies indicating that one snowmobile was audible 4,120 feet away, much further than automobiles, which can only be heard from approximately half the distance.<sup>109</sup>

The NPS also found that snowmobiles significantly affected the wildlife that seek refuge in Yellowstone. It reviewed 232 publications on the impacts of recreation on wildlife, concluding that snowmobilers caused severe impacts and aggravation to Yellowstone's wildlife because of their large number and inappropriate behavior that harassed the animals.<sup>110</sup> Ungulates,<sup>111</sup> such as bison and elk, gravitate to groomed trails for easier travel, leading to interactions with snowmobile traffic.<sup>112</sup> One study concluded that snowmobile presence negatively affected the 60 percent of bison that travel on groomed trails, as evidenced by observations of bison fleeing from snowmobiles.<sup>113</sup> Therefore, the NPS determined that, along with the normal winter stresses on wildlife due to deep snow,

describe the "inappropriate behavior," but snowmobilers have been described as "a little bit obnoxious," creating a "birdwatchers against the NASCAR crowd" war, with snowmobilers "hot-dogging" bison herds, [and] "rocket[ing] along at speeds of 60 or 70 mph . . . ." William Booth, *At Yellowstone, the Din of Snowmobiles and Debate*, WASH. POST, Feb. 6, 2003 at A3.

111. Ungulates are mammals with hoofs, such as bison and elk. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2497 (1971).

112. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,026.

113. *Id.* But see Daniel Fortin & Mark Andruskiw, *Behavioral Response of Free-Ranging Bison to Human Disturbance*, 31 WILDLIFE SOC'Y BULLETIN 804, 808 (2003) (discussing a study conducted in Prince

103. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,024.

104. *Id.*

105. *Id.* at 79,025-27. "This prohibition on impairment is the single most important statutory direction Congress has provided for the management of the national park." *Id.* at 79,025.

106. *Id.*

107. *Id.* at 79,026-27. "Soundscapes" are "the sounds which form an auditory environment." OXFORD ENGLISH DICTIONARY (7th ed. 1989).

108. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,026.

109. *Id.* Automobiles can only be heard from approximately 2,330 feet away. *Id.*

110. *Id.* The 2001 Snowcoach Rule did not

extreme cold, and food shortages, snowmobiling was an unacceptable incremental strain.<sup>114</sup>

The Service also relied on multiple studies documenting Yellowstone's air quality deterioration.<sup>115</sup> According to the NPS, even though snowmobiles are only in the Park during three months of the year and compose only a small fraction of the motorized vehicle use in Yellowstone, snowmobiles contributed more air pollution than automobiles annually.<sup>116</sup> Snowmobiles accounted for up to 90 percent of the annual hydrocarbons and 35 to 68 percent of the annual carbon monoxide pollution in the Park.<sup>117</sup> In the 1993-1994 winter season, excessive levels of carbon monoxide contributed to 1,200 letters complaining of adverse effects on employee and visitor health.<sup>118</sup> The Environmental Protection Agency ("EPA") commented that Yellowstone possibly exceeded the allowable increase in particulate matter under the Clean Air Act's "Prevention of Significant Deterioration" program.<sup>119</sup> Furthermore, snowmobiles contributed to decreased visibility at the West Entrance, at Old Faithful, and on other heavily used roadways.<sup>120</sup> In addition, during snowmelt, this air pollution contributed to ground and surface water

Albert National Park in central Saskatchewan, Canada, which determined that "[i]n winter bison were as likely to flee from an observer traveling by snowmobile as from one on foot").

114. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,026.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* See generally Clean Air Act, 42 U.S.C. §§ 7401-7618, 7470-7479 (2000) (the Clean Air Act's Prevention of Significant Deterioration Program).

pollution.<sup>121</sup> Finally, according to the NPS, concentrations of ammonium, sulfate, benzene, and toluene in areas correlating with snow traffic were greater than the 50 to 60 other sites sampled in the Rocky Mountain region.<sup>122</sup>

The NPS also determined that snowmobile pollution decreased visitor enjoyment, while exacerbating numerous safety concerns. Winter surveys indicated that the most important visitor enjoyment factors were the opportunity to view scenery and wildlife, the safe behavior of others, and the ability to experience clean air and solitude.<sup>123</sup> As discussed above, snowmobiles harassed wildlife and adversely affected scenic views and clean air.<sup>124</sup> In addition, snowmobiles aggravated safety hazards. For example, in 1994, 44 percent of all fatalities occurring in Yellowstone resulted from snowmobiling.<sup>125</sup> Further, in 1998, when snowmobilers accounted for only two percent of all Park visitors, they were involved in nine percent of the vehicular accidents.<sup>126</sup> This disproportionate quantity of fatalities and accidents, together with the deteriorating wildlife habitat and air quality, convinced the NPS under the Clinton administration to ban snowmobiling in Yellowstone.<sup>127</sup>

120. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,026.

121. *Id.*

122. *Id.* These concentrations were greatest on the roadway between West Yellowstone and Old Faithful. *Id.*

123. *Id.* at 79,026-27.

124. See *supra* notes 107-22 and accompanying text (discussing snowmobiles' negative effects on wildlife, scenery, and clean air).

125. 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,027.

126. *Id.*

127. See generally *id.*

After determining that snowmobiles impaired Yellowstone's resources, the Clinton administration issued the 2001 Snowcoach Rule eliminating snowmobiles from the Park.<sup>128</sup> The 2001 Snowcoach Rule authorized a gradual snowmobile phase-out from Yellowstone, which would culminate with a total prohibition of snowmobiling by the 2003-2004 winter season.<sup>129</sup> Snowcoaches, carrying eight passengers each, would replace snowmobiles, which carry only one driver and one passenger.<sup>130</sup> According to the NPS, "the snowmobile use occurring in [Yellowstone] harms the integrity of the resources and values of the [Park], and therefore constitutes an impairment."<sup>131</sup> Thus, relying on the overwhelming evidence that snowmobiling degraded Yellowstone's environment, the Service planned to eliminate snowmobiling from the Park by the 2003-2004 winter season.<sup>132</sup>

## B. The Bush Administration's Reversal

In December 2003, the NPS, under the Bush administration, reversed the

2001 Snowcoach Rule, allowing snowmobiles in Yellowstone despite the agency's earlier finding that snowmobiling constituted an impairment to Park resources.<sup>133</sup> Before rescinding the rule, the NPS prepared an SEIS, addressing issues it claimed the 2000 FEIS overlooked.<sup>134</sup> According to the 2003 Record of Decision ("2003 ROD") announcing the new rule, "[t]he laws give the NPS the discretion to allow some impacts to park resources and values when appropriate and necessary to fulfill the purposes of a park as long as that impact does not constitute impairment."<sup>135</sup> The 2003 ROD acknowledged, however, that the environmental analysis presented by the Bush administration was not "vastly different" from the 2001 Snowcoach Rule analysis.<sup>136</sup> The NPS's new decision considered the same issues as in the original rule, such as air and noise pollution and adverse effects on wildlife, but it added to the mix socioeconomics, solutions to the employee health concerns, and the reduced adverse effects that a "new"<sup>137</sup> snowmobile technology

128. 2001 Snowcoach Rule, *supra* note 23, 66 Fed. Reg. at 7260; 2000 Proposed Rule, *supra* note 17, 65 Fed. Reg. at 79,025.

129. *Id.* at 79,024.

130. *Id.* at 79,027.

131. *Id.* at 79,025.

132. *See id.* at 79,026 (discussing the multiple adverse environmental impacts to Yellowstone's resources such as natural soundscapes, wildlife, air quality, and water quality).

133. 2003 Final Rule, *supra* note 29, 68 Fed. Reg. at 69,268.

134. NATIONAL PARK SERVICE, WINTER USE PLANS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, VOL. 1, SUMMARY OF THE SEIS at S-1 (2003), *available at* <http://www.nps.gov/grte/winteruse/fseis/vol1/2-summary.pdf> (last visited Feb. 10, 2005) [hereinafter SEIS SUMMARY].

135. NATIONAL PARK SERVICE, RECORD OF

DECISION, WINTER USE PLANS-SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR YELLOWSTONE AND GRAND TETON NATIONAL PARKS AND THE JOHN D. ROCKEFELLER JR., MEMORIAL PARKWAY 18 (2003), *available at* <http://www.nps.gov/grte/winteruse/FinalROD.pdf> (last visited Feb. 10, 2005) [hereinafter 2003 ROD].

136. *Id.* at 6 n.2.

137. For purposes of discussion, this article refers to four-stroke engine snowmobile technology as "new." However, the designation of this technology as "new" is misleading. Although, the 2003 Final Rule called the technology "new," the 2001 Snowcoach Rule, in fact, evaluated the availability of "[c]leaner, quieter snowmobiles" but concluded that they "would do little, if anything, to reduce the most serious impacts on wildlife, which are caused more by snowmobiles . . ." 2001 Snowcoach Rule, *supra* note 23, 66 Fed. Reg. at 7260. *See also Fund for Animals*, 294 F. Supp. 2d 92, 106 (D.D.C. 2003) (same); *infra* notes 210-213 and accompanying text

would have on Yellowstone's delicate winter environment in justifying the reversal.<sup>138</sup> This section examines the NPS's new findings and the resulting 2003 Final Rule to discuss the NPS's paradigm shift under the Bush administration, which effectively redefined "impairment."

The snowmobile industry's alleged new technology, four-stroke engines, constituted the major change in assessing effects of snowmobiling in Yellowstone.<sup>139</sup> According to the 2003 Final Rule, the new four-stroke engines reduced carbon monoxide and hydrocarbon air pollution by 85 percent and 95-98 percent, respectively, "relative to the EPA's baseline assumptions about current average two-stroke snowmobile emissions."<sup>140</sup> Moreover, in response to an Occupational Safety and Health Administration ("OSHA")<sup>141</sup> study in February 2000, which discovered that employees riding snowmobiles during work were exposed to excessive levels of noise, carbon monoxide, benzene, and formaldehyde, and severe vibration, the 2003 Final Rule stated that the NPS would provide earplugs and other protective equipment at employees' request.<sup>142</sup> To further improve

(same). Moreover, the District of Columbia District Court noted that the 2003 Final Rule acknowledged that snowmobile emissions even increased between the 2002 and 2004 model years. *Fund for Animals*, 294 F. Supp. 2d at 107 n.9.

138. 2003 ROD, *supra* note 135, at 6-7.

139. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,527.

140. *Id.*

141. The Occupational Safety and Health Administration ("OSHA"), part of the U.S. Department of Labor, is the agency charged by the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678 (2000), with the duty to save lives, prevent injuries, and protect the health of American workers. For more information, see <http://www.osha.gov/oshinfo/mission.html> (last

employee work conditions, the 2003 Final Rule planned to redesign the kiosks at the Park's West Entrance to minimize noise and air pollution.<sup>143</sup>

The 2003 Final Rule also represented the NPS's new perspective that although some winter visitors wanted tranquil, peaceful, solitary Yellowstone visits, these desires were those of a minority of the winter users because 75 percent of winter park visitors rode snowmobiles.<sup>144</sup> The NPS concluded that "there [was no] evidence that winter recreation [was] clearly responsible for any long-term adverse consequences to ungulate populations, including bison and elk" because "both of these species [were] at sound populations levels."<sup>145</sup> Consequently, the NPS determined that snowmobiling did not constitute an impairment because the agency considered the new snowmobile technology and protective equipment for employees sufficient to mitigate any adverse impacts.<sup>146</sup> More importantly, as discussed above, the NPS reversed its earlier impairment finding by determining that, contrary to its conclusion three years earlier, visitors and wildlife were not actually adversely affected by snowmobiles.<sup>147</sup>

visited Feb. 13, 2005).

142. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,528.

143. *Id.* Kiosks are "a stand or booth at which merchandise is sold or information is provided." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1245 (1971).

144. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,528.

145. *Id.*

146. *Id.*

147. *Id.* See *supra* notes 144-45 and accompanying text (discussing the Bush administration's findings that the majority of visitors rode snowmobiles and that bison and elk populations were at acceptable levels).

The 2003 Final Rule also adopted what it called an “adaptive management and monitoring strategy.”<sup>148</sup> This strategy allowed Yellowstone’s managers to use their discretion to modify the daily snowmobile limits and restrictions when wildlife, air quality, noise quality, employee and visitor health and safety, or visitor enjoyment thresholds were exceeded.<sup>149</sup> Additionally, the 2003 Final Rule required that all snowmobiles in Yellowstone use the “best available technology”—the four-stroke engine—by the 2004-2005 winter season to reduce Yellowstone’s air and noise pollution.<sup>150</sup> The rule further required all snowmobiles to travel in groups composed of between one and eleven snowmobiles, including a guide.<sup>151</sup> Finding that snowmobilers riding in groups resembled mass transit, the Service required snowmobilers to maintain a one-third of one mile maximum distance between the first rider and the last to guarantee exchange of the interpretive signals through the group to ensure safe-

148. *Id.*

149. *Id.* at 51,528-29.

150. *Id.* at 51,530.

151. 2003 Final Rule, *supra* note 29, 68 Fed. Reg. at 69,274. Note that the rule originally proposed in 2003 required groups composed of between two and eleven snowmobiles, but the 2003 Final Rule reduced the allowable group size to between one and eleven snowmobiles because public comments supported the change and recognized the NPS’s ability to concentrate snowmobiles by other means. *Id.* The NPS determined that snowmobiles generally would be concentrated in groups because 80 percent will travel with a commercial guide and a survey indicated that only two percent will ride solo. *Id.* However, it is not entirely clear how groups of one could include the required guide. A possible rationale was the NPS’s assumption that only two percent of visitors ride solo, and therefore will account for a portion of the 20 percent of the daily entries without a guide. *Id.*

152. 2003 Proposed Rule, *supra* note 31, 68

ty.<sup>152</sup> Eighty percent of the groups would have a commercial guide, while the remaining 20 percent would have a NPS-approved leader.<sup>153</sup> The NPS also established daily entry limits, further mitigating negative impacts, while maintaining historic visitation levels with the additional use of snowcoaches.<sup>154</sup> The rule allowed only 950 snowmobiles per day through Park entrances,<sup>155</sup> which according to the Service, was a reduction compared to the 2001-2002 peak allowance of 1700 snowmobiles per day.<sup>156</sup> In sum, the NPS determined that these new limitations on snowmobile use allowed the Service to alter snowmobile daily limits and restrictions balancing recreation with preservation, while eliminating impairment.<sup>157</sup>

#### IV. The Litigation

In December 2003, Judge Emmet Sullivan of the District of Columbia District Court, invalidated the Bush administration’s 2003 Final Rule only five

Fed. Reg. at 51,532-33. *See also infra* note 215-16 and accompanying text (discussing Judge Emmet Sullivan’s analysis of the flaws in this mitigation effort).

153. *Id.*

154. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,533.

155. *Id.*

156. *Id.*; NPS Press Release, *supra* note 85, at 5 (allowing 1690 snowmobiles on Yellowstone’s peak days).

157. 2003 Proposed Rule, *supra* note 31, 68 Fed. Reg. at 51,528-29 (“The NPS is proposing an adaptive management and monitoring strategy to mitigate the impacts described previously on air quality, employee and visitor health and safety, natural soundscapes, wildlife, and visitor experience, while allowing snowmobile access on all major routes in Yellowstone . . . . The NPS will continuously adapt these limits to protect park resources and values while allowing for the enjoyment of those resources by the American people.”).

days after the rule took effect.<sup>158</sup> Less than two months later, Judge Clarence Brimmer of the Wyoming District Court issued an additional order invalidating the Clinton administration's 2001 Snowcoach Rule.<sup>159</sup> While these opinions allude to the Organic Act's impairment requirement, neither attempts to define this fundamental term. This section discusses both opinions to understand the courts' legal reasoning and to assess the future of snowmobiling in Yellowstone.

### A. The District of Columbia District Court's Order

On March 25, 2003, NPS issued the 2003 ROD reversing the 2001 Snowcoach Rule, allowing up to 950 snowmobiles per day in Yellowstone.<sup>160</sup> The same day, the NPS's drastic rule shift prompted the Fund and the Greater Yellowstone Coalition ("GYC")<sup>161</sup> to challenge the rule in the District of Columbia's District Court.<sup>162</sup> The two environmental organizations filed separate suits on separate grounds, but Judge Sullivan consolidated the suits because they had sufficiently

similar interests.<sup>163</sup> The Fund challenge sought to end trail grooming in the park, while the GYC sought implementation of the 2001 Snowcoach Rule, which allowed trail grooming.<sup>164</sup> Thus, the two plaintiffs desired competing ends.<sup>165</sup> The Fund alleged that the NPS failed to consider any trail grooming closure alternatives in the 2003 SEIS, and this constituted a failure to consider all reasonable alternatives, as required by NEPA.<sup>166</sup> The Fund was successful on this claim, because Judge Sullivan determined that the "ample evidence that bison are adversely affected by trail grooming is highly relevant, and thus cannot be excluded from a NEPA analysis without a cogent explanation."<sup>167</sup> Therefore, the trail grooming issue was remanded to the NPS because the SEIS was "flatly inadequate under NEPA."<sup>168</sup>

Both plaintiffs argued that the continued snowmobiling and trail grooming violated Yellowstone's "conservation mandate" evidenced in the Organic Act, regulations, executive orders, and the NPS Management Policies.<sup>169</sup> Overall,

158. *Fund for Animals*, 294 F. Supp. 2d at 108.

159. *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1294 (D. Wyo. 2004) (ordering a preliminary injunction); *see also Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249 (D. Wyo. 2004) (Judge Brimmer's order vacating the 2001 Snowcoach Rule and remand to NPS).

160. 2003 ROD, *supra* note 135, at 12 tbl.1.

161. The Greater Yellowstone Coalition ("GYC") is a "conservation organization dedicated to protecting and restoring the Greater Yellowstone ecosystem and the unique quality of life it sustains." *Fund for Animals*, 294 F. Supp. 2d at 97-98 (quoting the Plaintiff's complaint).

162. *Id.* at 96.

163. *Id.* at 98.

164. *Id.*

165. *Id.*

166. *Id.* at 108. "Trail 'grooming' is the packing of the snow along trails to facilitate winter use." *Id.* at 97 n.2. Trail grooming may present a problem in Yellowstone because, as the court explained, the "administrative record is ripe with studies indicating that winter park use, and especially trail grooming, has lead [sic] to major changes in bison migration patters." *Id.* at 110 (citing Mary Meagher, *Recent Changes in Yellowstone Bison Numbers and Distribution*, in NATIONAL PARK SERVICE, ADMIN. REC. 5329; Mary Meagher, *Winter Recreation-Induced Changes in Bison Numbers and Distribution in Yellowstone National Park*, in NATIONAL PARK SERVICE, ADMIN. REC. 5345).

167. *Id.* at 111.

168. *Id.* at 111 n.16.

169. *Id.* at 102. "In essence, plaintiffs argue[d] that the NPS's decision to allow continued trail

the plaintiffs challenged the validity of snowmobile presence in Yellowstone by claiming it was inconsistent with the Organic Act and administrative interpretation thereof.<sup>170</sup> The NPS and interveners, ISMA and the state of Wyoming,<sup>171</sup> defended the rule change as within NPS's discretion and claimed that the introduction of mitigating solutions—namely, the new four-stroke snowmobile engine technology, combined with guided tours—justified the policy shift of allowing snowmobiling in the Park.<sup>172</sup>

Judge Sullivan observed that the “agency decision . . . amounts to a 180 degree reversal from a decision on the same issue made by a previous administration . . . conspicuously timed with the change in administrations. . . .”<sup>173</sup> To

grooming and snowmobiling violate[d] the Park's conservation mandate, as codified in statutes, regulations, executive orders, and management policies.” *Id.*

170. *Id.*

171. *Id.* at 98.

172. *Id.* at 106-07.

173. *Id.* at 105.

174. *Id.* at 104 (quoting *State Farm*, 463 U.S. at 41) (emphasis in original). The opinion also discussed the NEPA claims from both the Fund and GYC, as well as the Fund's 1999 rulemaking petition. 294 F. Supp. 2d at 108–115. The Fund also claimed that NPS failed to respond to the Bluewater Network's 1999 rulemaking petition seeking to create regulations to eliminate snowmobiling in the park system as a whole was an unreasonably delayed agency action under the Administrative Procedure Act. *Id.* at 112-13. See generally 5 U.S.C. §§ 555(b), 706(1) (2000). The court determined while there was no time limit for an agency to respond to rulemaking petitions, and no promise that the petition would receive a favorable response, Bluewater Network was nevertheless entitled to an answer to the petition. 294 F. Supp. 2d at 114.

ascertain whether the Bush Administration's reversal was permissible, the court focused on an agency's ability to change course with political tides, employing the Supreme Court's heightened “reasoned analysis” standard, which applies to such situations.<sup>174</sup> This section discusses Judge Sullivan's analysis of the NPS's statutory mandate and his application of the Supreme Court's heightened “reasoned analysis” standard to assess the NPS's change of course.

### 1. The National Park Service's Conservation Mandate

When determining whether an agency has supplied the “reasoned analysis for the change,” a court must first consider the agency's statutory directive.<sup>175</sup> Judge Sullivan concluded that the Organic

GYC challenged the SEIS, asserting it “did not consider the elevated risks for the Park's most susceptible visitors and employees.” *Id.* at 111-12. This claim focused on NPS's failure to use accurate science to determine health effects and did not dedicate adequate analysis to the health effects on pregnant women, children, and the elderly. *Id.* However, Judge Sullivan was reluctant to intervene in a “battle over proper scientific methodology” and determined that NPS's dedication of a SEIS sub-section to health concerns met the purely procedural requirements of NEPA, and therefore was not a NEPA violation. *Id.*

The Supreme Court described typical deference as:

Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*State Farm*, 463 U.S. at 43.

175. *Fund for Animals*, 294 F. Supp. 2d at 105.

Act binds the Service to a “conservation mandate and that mandate trumps all other considerations.”<sup>176</sup> He noted that this the NPS’s statutory authority is codified in the NPS Management Policies,<sup>177</sup> Executive Orders 11,644 and 11,989,<sup>178</sup> and the NPS snowmobile regulation,<sup>179</sup> which collectively establish the NPS’s preservation directive.<sup>180</sup>

Judge Sullivan first looked to Congress’s language creating Yellowstone and the Organic Act.<sup>181</sup> In creating Yellowstone, Congress directed NPS to “preserve ‘from injury or spoliation’ the ‘wonders’ of the park and [to] insure ‘their retention in their natural condition,’”<sup>182</sup> and further to “provide against the wanton destruction of the fish and game

found within the park, and against their capture or destruction for the purposes of merchandise or profit.”<sup>183</sup> Based on this evidence, as well as precedent, the court concluded that the Organic Act’s primary purpose was conservation.<sup>184</sup> The court also determined that the NPS Management Policies reflect the NPS’s interpretation that it must prioritize preservation in park management.<sup>185</sup> In fact, the 2003 ROD stated that the Yellowstone National Park Act of 1872, the NPS Organic Act, and the NPS Management Policies emphasize that “Congress has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be the primary concern.”<sup>186</sup> Relying on these same doc-

176. *Id.* at 105-06.

177. NPS MANAGEMENT POLICIES, *supra* note 5, ¶ 1.4.3.

178. Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972), as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977), reprinted in note following 42 U.S.C. § 4321 (1977).

179. 36 C.F.R. §2.18(c) (2005).

180. *Fund for Animals*, 294 F. Supp. 2d at 105-06.

181. *Id.* at 102.

182. *Id.* (quoting Yellowstone National Park Act of 1872, 16 U.S.C. § 22 (2000)). Congress created Yellowstone prior to NPS, but upon NPS’s creation, Congress placed Yellowstone under the Service’s jurisdiction. *See* 16 U.S.C. § 22 (establishing that Yellowstone was managed and regulated by the Secretary of Interior); *see also id.* § 1 (later transferring the duty to regulate national parks to the NPS).

183. *Fund for Animals*, 294 F. Supp. 2d at 102 (quoting 16 U.S.C. § 22).

184. *Id.* at 105. In determining that the conservation mandate “trumps all other considerations,” Judge Sullivan relied in part on *Potter*, where the court said “In the Organic Act Congress speaks of but a single purpose, namely, conservation.” For further discussion, *see supra* notes 70-73 and accompanying text (same).

185. *Id.* at 105. The management policies state that NPS “must always seek to avoid, or minimize to the greatest degree practicable adverse impacts on park resources and values.” *Id.*; NPS MANAGEMENT POLICIES, *supra* note 5, ¶ 1.4.3. Judge Sullivan continued to note the importance of the NPS Management Policies by emphasizing its language that the conservation mandate “applies at all times, with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired.” 294 F. Supp. 2d at 103 (quoting NPS MANAGEMENT POLICIES, *supra* note 5, ¶ 1.4.3). The court interpreted the NPS Management Policies to mean that the NPS is required to protect the resources, minimize adverse impacts, and when conservation and enjoyment conflict, prioritize conservation. *Id.* *See also* NPS MANAGEMENT POLICIES, *supra* note 5, ¶¶ 1.4.3 (stating that “conservation is predominant.”); 1.4.6 (stating that “the park resources and values that are subject to the no impairment standard include . . . [o]pportunities to experience enjoyment of the [park’s scenery, natural and historic objects, and wildlife], to the extent that can be done without impairing any of them”).

186. 2003 ROD, *supra* note 135, at 18. Judge Sullivan particularly focused on the phrase “conservation is to be the primary concern” in his analysis. 294 F. Supp. 2d at 105 (quoting 2003 ROD, *supra* note 135, at 18).

uments, Judge Sullivan ruled that preservation was the priority in managing the Park.<sup>187</sup>

Judge Sullivan also examined the NPS snowmobile regulation and Executive Orders controlling snowmobile use in national parks. The NPS snowmobile regulation prohibits wildlife disturbance, allowing snowmobiles only when the activity does not disturb park resources and is consistent with park values.<sup>188</sup> Presidents Nixon and Carter limited off-road vehicle use, including snowmobiles, in Executive Orders 11,644 and 11,989.<sup>189</sup> Together, the executive orders only allow minimal effects to natural resources and wildlife, guaranteeing that the effects will never be adverse.<sup>190</sup> The agency regulation and the executive orders persuaded Judge Sullivan 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.”<sup>191</sup> Thus, in the court’s view, the NPS’s primary concern in managing Yellowstone was to ensure that

the natural resources remained unimpaired.<sup>192</sup>

## 2. No “Reasoned Analysis for the Change”<sup>193</sup>

Typically, courts accord agency actions considerable deference. Once a court determines “whether a decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,”<sup>194</sup> it can set aside an agency action only when it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>195</sup> Courts will essentially accept any plausible reasoning presented by the agency.<sup>196</sup> But in order for an agency to deviate from a prior rule, as in the Yellowstone snowmobiling situation, the agency’s burden is elevated. It must supply, in the words of the Supreme Court, “a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>197</sup> The agency must convince the court that there is a compelling motive for the change. Failure to

187. *Id.* at 108.

188. *Id.* at 102–03. See also 36 C.F.R. § 2.18(c) (“Snowmobiles are prohibited except where designated and only when their use is consistent with the park’s natural, cultural, scenic and aesthetic values, safety considerations, park management objectives, and will not disturb wildlife or damage park resources”).

189. *Fund for Animals*, 294 F. Supp. 2d at 102. See generally Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 8, 1972), as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977), reprinted in note following 42 U.S.C. § 4321 (1977).

190. *Fund for Animals*, 294 F. Supp. 2d at 102. Executive Order 11,989 provides that:

[W]henever [the Secretary] determines that the use of off-road vehicles will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of

particular areas or trails of the public lands, [he shall] immediately close such areas or trails to the type of off-road vehicles. . . .

Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977), reprinted in note following 42 U.S.C. § 4321 (1977).

191. *Fund for Animals*, 294 F. Supp. 2d at 106.

192. *Id.* at 102-03.

193. *State Farm*, 463 U.S. at 49.

194. *Fund for Animals*, 294 F. Supp. 2d at 104. (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)).

195. *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000)).

196. *State Farm*, 463 U.S. at 43.

197. *Fund for Animals*, 294 F. Supp. 2d at 104. (quoting *State Farm*, 463 U.S. at 41-42).

meet this standard requires a court to vacate the agency action.<sup>198</sup>

The Supreme Court announced this heightened “reasoned analysis” standard when an agency changes course because “[t]here is ... at least a presumption that policies will be carried out best if the settled rule is adhered to.”<sup>199</sup> Therefore, when an agency revokes or reverses a former view, the agency must “supply a reasoned analysis for the change.”<sup>200</sup> The Court recognized that agencies require the flexibility to alter rules and policies, but extensions and amendments are preferred to deregulation and rescission.<sup>201</sup> Thus, for rule rescissions, the Court required more than a rational connection between facts presented and decision made, requiring a “reasoned analysis” instead.<sup>202</sup>

Judge Sullivan applied this heightened standard to the NPS’s issuance of the 2003 Final Rule by analyzing the 2001 and 2003 rules, the conservation man-

date, and the previous decision that snowmobiling was an impairment.<sup>203</sup> He concluded that the Service failed to supply any reasoning “to explain this 180 degree reversal.”<sup>204</sup> The court observed that, in 2001, the NPS had eliminated snowmobiling from Yellowstone to comply with the Park’s statutory and regulatory requirements.<sup>205</sup> According to Judge Sullivan, NPS concluded that snowmobiling impaired Yellowstone by adversely affecting the Park’s wildlife, air quality, and natural soundscapes and odors.<sup>206</sup> The court then analyzed the NPS rule change a scant three years later, which relied largely on the “availability of cleaner, quieter snowmobiles”<sup>207</sup> and the use of guided group tours.<sup>208</sup> Judge Sullivan rejected the Service’s dependence on these justifying alterations as “weak at best.”<sup>209</sup> He observed that the 2001 Snowcoach Rule acknowledged that even with new cleaner and quieter snowmobile technology—such as the four-stroke engine—the improvements would do lit-

198. *Id.*

199. *State Farm*, 463 U.S. at 41-42 (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973)).

200. *Id.* at 42.

201. *Id.*

202. *Id.* The Supreme Court vacated the agency action in *State Farm* because the agency did not amend the rule, it simply accommodated industry’s economic pressures and, without a reasoned explanation, it dismissed the known benefits of the previous rule, which accomplished the statutory directive. *Id.* at 46-56. An additional note about the *State Farm* concerns Justice Rehnquist’s dissent. While concurring in part, his dissent emphasized that “[t]he agency’s changed view of the standard seems to be related to the election of a new President of a different political party.” *Id.* at 59. The dissent was not troubled by this reality because “people casting their votes is a perfectly reasonable basis for an executive

agency’s reappraisal of the costs and benefits of its programs and regulations.” *Id.* Although Justice Rehnquist accepted that agency rule rescissions occur with a change in the political tides, the *State Farm* majority required the agency to articulate the higher standard of a “reasoned analysis” for its rule shift beyond what it would demonstrate when it had initially promulgated the rule. *Id.* at 42.

203. *Fund for Animals*, 294 F. Supp. 2d at 104.

204. *Id.* at 108 (“In light of its clear conservation mandate, and the previous conclusion that snowmobile use amounted to unlawful impairment, the Agency is under an obligation to explain this 180 degree reversal. NPS has not met this obligation.”).

205. *Id.* at 106.

206. *Id.*

207. *Id.*

208. *Id.* at 107.

209. *Id.* at 107-08.

tle to minimize the impairment.<sup>210</sup> Moreover, the court relied on the fact that the 2003 Final Rule expressly accepted this information in the 2000 Record of Decision (“2000 ROD”) and FEIS as accurate.<sup>211</sup> Additionally, during the 2003 rulemaking process, the EPA confirmed that the FEIS accurately projected the technological improvements; thus, the alleged “new” technological improvements in the 2003 Final Rule did not justify the policy reversal.<sup>212</sup> EPA’s findings, along with the 2003 Final Rule’s adoption of the 2000 ROD and FEIS, persuaded Judge Sullivan that the new four-stroke engine technology did not support allowing snowmobiling to continue in Yellowstone.<sup>213</sup>

The 2003 Final Rule also justified continued snowmobiling with guided tours, concluding that the tours would “mitigate snowmobiler interaction with wildlife . . . .”<sup>214</sup> Judge Sullivan concluded that this theory was flawed because: 1) the daily limits actually increased snowmobile use, rather than decreased it because

210. *Id.* “The 2001 Snowcoach Rule states that: ‘Some newer snowmobiles have promise for reducing some impacts, but not enough for the use of large numbers of those machines to be consistent with the applicable legal requirements. *Clean, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife.*’” *Id.* at 106 (emphasis in original) (quoting 2001 Snowcoach Rule, *supra* note 23, 66 Fed. Reg. at 7260).

211. *Id.* at 106. “Significantly, this conclusion [that clean, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife] was never found to be erroneous, as the 2000 EIS and ROD were expressly adopted during the 2003 rulemaking process.” *Id.* See 2003 ROD, *supra* note 135, at 7 n.3 (“The SEIS is a *supplement* to the Final EIS per the settlement, and the context in which it is being written is the acceptance of new data, not a conclusion that the Final EIS and ROD are incorrect as alleged in the ISMA litigation.”) (emphasis in original).

the rule only ensured that the daily limits “[did] not exceed the current average throughout the West Entrances’ and actually ‘allow[ed] for modest increases at the other entrances and road segments;”<sup>215</sup> 2) the definition of groups (one to eleven snowmobilers) allowed solo snowmobile travel, and therefore eliminated the benefits of group travel; and 3) oral communication was difficult to impossible with a one-third mile distance between snowmobiles, and therefore negated the benefits of a guide.<sup>216</sup> Therefore, the court rejected the mitigation rationale as inadequate to eliminate snowmobiles’ impairment on Yellowstone’s resources.

Ultimately, Judge Sullivan rejected NPS’s new impairment interpretation because the 2003 Final Rule primarily benefitted “the park visitors who ride snowmobiles in the parks and the businesses that serve them,” rather than Yellowstone’s natural resources.<sup>217</sup> According to the court, the NPS’s explanation for the 2003 rule change was “weak at best” and failed to provide a “reasoned

212. *Id.* at 107. The EPA commented during the 2003 rulemaking process that “the FEIS [was] remarkably accurate in setting and analyzing emissions objectives that could be achieved by the new technology.” *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* (“Given that the Final Rule only requires snowmobilers to stay within one-third of a mile of the first snowmobiler in the group (presumably the guide), these oral communication difficulties apply with equal force.”); see also *id.* at 107 n.10 (“Defendants [also] assert[ed] that communication will occur via hand signals, but given the allowance of a one-third of a mile gap between the guide and a snowmobiler, the efficacy of this method of communication is also questionable.”).

217. *Id.* at 108.

analysis” for the “stark” difference between the 2001 and 2003 rules.<sup>218</sup> The Service did not satisfy the “reasoned analysis” standard established in the Supreme Court’s 1984 *State Farm* decision because the 2003 Final Rule accepted the information within the 2000 ROD and FEIS as accurate.<sup>219</sup> Moreover, NPS relied on flawed mitigation logic.<sup>220</sup> Therefore, Judge Sullivan invalidated the Bush Administration’s rule as “quintessentially arbitrary and capricious.”<sup>221</sup>

## B. The Wyoming District Court’s Order

After Judge Sullivan’s December 2003 order, environmentalists cheered because they believed snowmobiling in the treasured park was a thing of the past. But the snowmobile industry and the state of Wyoming responded by reopening their challenge to the 2001 Snowcoach Rule in

218. *Id.* at 107-08. Judge Sullivan accurately noted that “[i]ndeed, there is evidence in the Record that there isn’t an explanation for this change, and that the SEIS was completely politically driven and result oriented.” *Id.* at 108 n.11. He relied on the following two pieces of evidence: (1) the NPS “‘internal objective’ [was] ‘to determin[e] under what terms and conditions snowmobiling will continue in the three parks,’ and the external objective [was] ‘whether to affirm the previous decision or to make a new one,’” *id.* (quoting NPS Meeting Agency for June 3, in NATIONAL PARK SERVICE, ADMIN. REC. 51,392); and (2) a “participant in NPS meeting noted that ‘Gale Norton wants to be able to come away saying some snowmobiles are allowed.’” *Id.* (quoting NATIONAL PARK SERVICE, ADMIN. REC. 51,392).

219. *Fund for Animals*, 294 F. Supp. 2d at 107-08.

220. *Id.* at 108.

221. *Id.*

222. *See supra* notes 98-100 and accompanying text (discussing ISMA’s challenge and settlement).

223. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1283-84. *See also supra* notes 98-100 and accompanying text (discussing ISMA’s challenge and settlement). On December 6, 2000, ISMA and the state

Wyoming District Court.<sup>222</sup> The court had retained jurisdiction over the 2001 Snowcoach Rule as a result of the earlier litigation, which was stayed after the parties reached the 2001 settlement promising the SEIS and the ensuing 2003 Final Rule.<sup>223</sup> Judge Clarence Brimmer subsequently enjoined implementation of the 2001 Snowcoach Rule on February 10, 2004—less than two months after Judge Sullivan’s order.<sup>224</sup>

Judge Brimmer concluded he had jurisdiction to hear ISMA’s and the state of Wyoming’s (collectively the “plaintiffs”) request for a preliminary injunction because Judge Sullivan ruled only on the validity of the 2003 Final Rule, while the Wyoming court order was “separate and distinct” because it only concerned the validity of the 2001 Snowcoach Rule.<sup>225</sup> A

of Wyoming filed suit in Judge Brimmer’s Wyoming District Court challenging the validity of the 2001 Snowcoach Rule; GYC intervened as a defendant in this action. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1283-84. In June 2001, ISMA and Wyoming settled with the federal defendants (GYC was not part of the settlement). *Id.* Under the settlement agreement, NPS agreed to prepare the SEIS evaluating the new four-stroke engine technology, which the Wyoming District Court determined was not included in the FEIS. *Id.* The parties requested that the Wyoming court stay the litigation pending SEIS completion. *Id.*

224. *Id.* at 1294.

225. *Id.* at 1285. Judge Brimmer’s order first considered the question of jurisdiction, because the GYC challenged that “any injunction granted by [the Wyoming court] would directly conflict with the mandatory injunction issued by” Judge Sullivan in the District of Columbia District Court. *Id.* The Wyoming court responded by stating that Judge Sullivan’s order was not applicable because the District of Columbia order invalidated the 2003 Final Rule, SEIS, and 2003 ROD, and simply replaced the rulemaking process with the 2001 Snowcoach Rule. Judge Brimmer made clear that the issue before the Wyoming court did not ques-

preliminary injunction requires that the requesting party carry the burden to prove: 1) a substantial likelihood of success; 2) irreparable harm; 3) that the balance of harm favors injunction; and 4) that if issued, the injunction will not harm the public interest.<sup>226</sup> This section discusses Judge Brimmer's findings in each of the above factors in the order that the Judge discussed them and the resulting preliminary injunction.

First, the court determined that the plaintiffs experienced irreparable injury from implementation of the 2001 Snowcoach Rule, despite the Tenth Circuit rule that "injury will not be considered irreparable if monetary damages would be adequate to provide relief . . . ."<sup>227</sup> The plaintiffs claimed they would suffer "millions of lost dollars," in labor, income and tax revenue, and because of investments in the conversion to the four-stroke engine snowmobiles, all potentially lead-

tion the validity and wisdom of the District of Columbia court's decision, noting that "[t]hese two issues are separate and distinct and there are no issues of judicial comity presented by this Court deciding the validity of the 2001 Snowcoach Rule." *Id.* Further, Judge Brimmer agreed with Judge Sullivan's acceptance that federal comity applies only when the identical suit is filed in two separate federal courts, which was not the case in the Yellowstone litigation. *Id.* Therefore, since the 2001 settlement agreement had not been fully completed because the SEIS was not finalized, the Wyoming court retained "jurisdiction over the issue of the validity of the 2001 Snowcoach [R]ule and ha[d] the proper authority to grant a preliminary injunction in [the] matter." *Id.* at 1285-86. The federal-comity doctrine is "between federal district courts . . . [with] the general principal . . . to avoid duplicative litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 816 (1976).

226. *Int'l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1286.

227. *Id.*

228. *Id.* at 1287.

ing to bankruptcy for many local businesses due in part to lost good will.<sup>228</sup> Judge Brimmer emphasized that this analysis did not apply to just one business, but a whole group who supplied services to Yellowstone's snowmobilers.<sup>229</sup> Therefore, relying greatly on language from an earlier Tenth Circuit decision,<sup>230</sup> the court determined that the "irreparable injury factor weighs heavily in favor of granting the requested preliminary injunction."<sup>231</sup>

Second, in determining whether the harm to the Plaintiffs outweighed that to GYC, Judge Brimmer balanced the "alleged [environmental] harm"<sup>232</sup> to the local business's "extreme financial distress."<sup>233</sup> Although the court believed that the health risks and noise pollution would probably escalate with increased numbers of snowmobiles, despite the reduced pollution from the four-stroke engine technology,<sup>234</sup> Judge Brimmer

229. *Id.*

230. See *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) ("A threat to trade or business viability may constitute irreparable harm"). Judge Brimmer also relied on *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181 (D.Kan. 1988), which states that "loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm." *Int'l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1287. Apparently the loss of goodwill persuaded Judge Brimmer to grant the preliminary injunction, despite the determination that irreparable harm would not occur with purely monetary damages. *Id.* at 1286 ("Generally injury will not be considered irreparable if monetary damages would be adequate to provide relief . . .").

231. *Id.* at 1287.

232. *Id.* at 1288.

233. *Id.*

234. *Id.*

ruled that the financial loss to local business owners was paramount.<sup>235</sup> He reasoned that the potential loss of goodwill and bankruptcy presented more definite injuries.<sup>236</sup> The court therefore concluded that ISMA's economic concerns surpassed park ranger respiratory complications, the degraded air quality from snowmobile pollution, and the other environmental harms associated with snowmobile use.<sup>237</sup>

Third, Judge Brimmer examined whether issuing a preliminary injunction was in the public interest. The parties presented the court two conflicting views of the public interest: 1) protecting the local economies; and 2) protecting public health and preserving Yellowstone's resources.<sup>238</sup> Judge Brimmer concluded, with no substantive explanation, that the true public interest supported protection of the local business owners.<sup>239</sup> He fumed that a "single Eastern district judge shouldn't have the unlimited power to impose the old 2001 rule on the public and the business community . . ." <sup>240</sup> The

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 1289. ("Wyoming and ISMA Plaintiffs argue that public policy favors protecting local economies preserving public access to the National Parks and preserving the public process for agency decision making. The GYC Defendant-Intervenors assert that public policy is in favor of protecting public health and the integrity of our first National Park.").

239. *Id.* (stating that the "[p]ublic interest is served by protecting the business owners and concessionaires who relied on the NPS's proposed regulations").

240. *Id.*

241. According to Judge Brimmer, Judge Sullivan's decision invalidating the 2003 Final Rule was "released the night before the snowmobile season was to begin. . . ." *Id.*

rushed manner<sup>241</sup> in which Judge Sullivan's order imposed the 2001 Snowcoach Rule on Yellowstone's gateway communities also tipped the public interest towards favoring a grant of a preliminary injunction.<sup>242</sup>

Finally, Judge Brimmer concluded by determining the plaintiffs' likelihood of success on the merits. The court ascertained that because of the "tremendous impact" on the businesses, visitors, and surrounding communities, the plaintiffs were likely to succeed on the merits.<sup>243</sup> First, according to Judge Brimmer, NPS failed to take a "hard look" at the snowcoach alternative because the Service inadequately considered snowcoaches' environmental and safety benefits, and because four-stroke engine snowmobiles polluted less than the NPS originally believed.<sup>244</sup> Second, the court concluded that the 2001 Snowcoach Rule was a "prejudged political decision," which would be found arbitrary and capricious after a full review of the administrative record.<sup>245</sup> Third, Judge Brimmer determined that the state agencies received a deficient comment

242. *Id.*

243. *Id.* at 1289.

244. *Id.* at 1290-91. The term "hard look" refers to "[t]he sweeping policy goals announced in [section] 101 of NEPA [that] are thus realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look at environmental consequences,' and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

245. *Int'l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1290. Judge Brimmer offered only one example from the administrative record to support this conclusion, stating that "[i]n April 2002, Assistant Secretary Barry issued a memorandum to the NPS directing them to prohibit snowmobile access in national park units. This memorandum came after the September 29, 1999 Draft EIS, which concluded that snowmobile access was consistent with all applicable laws." *Id.*

period when the NPS proposed the ban on snowmobiles in the FEIS.<sup>246</sup> This change, according to the court, violated the requirement that cooperating agencies<sup>247</sup> participate meaningfully in the commenting process.<sup>248</sup> Fourth, according to Judge Brimmer, the rushed administrative process creating the 2001 Snowcoach Rule also did not allow the public sufficient time to comment, violating NEPA.<sup>249</sup> Finally, the court

ascertained that the 2001 Snowcoach Rule violated the Administrative Procedure Act (“APA”)<sup>250</sup> because NPS never offered a “rational connection” for the “sudden” decision eliminating snowmobiles from Yellowstone; the court therefore determined that the NPS’s 2001 actions were “arbitrary and capricious.”<sup>251</sup> In sum, Judge Brimmer concluded that the NPS’s failure to comply with NEPA and APA requirements meant

246. *Id.* See NATIONAL PARK SERVICE, RECORD OF DECISION, WINTER USE PLANS FOR THE YELLOWSTONE AND GRAND TETON NATIONAL PARKS AND THE JOHN D. ROCKEFELLER JR., MEMORIAL PARKWAY 18, 38 (2000), available at <http://www.planning.nps.gov/document/yellrodwinteruse%2E.pdf> (last visited Feb. 14, 2005). “The overwhelming negative reaction to the preferred alternative B in the draft EIS, which would have plowed the road from West Yellowstone to Old Faithful, was a factor in considering a new preferred alternative for the final EIS.” *Id.* at 18. NPS therefore chose alternative G, the environmentally preferred alternative, which phased out snowmobiling in Yellowstone. *Id.* at 38.

247. Lead agencies are those that “supervise the preparation of an environmental impact statement [EIS]....” 40 C.F.R. § 1501.5(a) (2005). In EIS preparation the lead agency requests assistance from cooperating agencies, which are those agencies that have jurisdiction by law over the project, a special expertise, or those who request this designation. *Id.* § 1501.6. Also, “[s]tate and local agencies which are authorized to develop and enforce environmental standards” are invited to comment during the EIS process. *Id.* § 1503.1(a)(2)(i).

248. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1291. According to Judge Brimmer, the cooperating agencies were aware of this change on March 13, 2000, and comments were due on March 24, 2000. The Governors of Montana, Idaho, and Wyoming protested this short comment period, and Judge Brimmer agreed that the short comment period violated the NEPA requirement to have a meaningful opportunity to comment. *Id.* See 40 C.F.R. § 1501.7(a)(1) (“As part of the scoping process the lead agency shall: (1) Invite the participation of affected Federal, State, and local agencies.”).

249. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1292. The court determined that the public only had one day to comment on the FEIS and thirty days to comment on the 2001 Proposed Rule. *Id.* On the last day of the Clinton Administration, the day after the 2000 Proposed Rule’s comment period closed, the 2001 Snowcoach Rule was released. The court correctly opined that this was an inadequate time period to fully consider the 5,000 comments received, many on the day prior to the final rule’s issuance. *Id.* However, it is important to note that while Judge Brimmer believed that there was a NEPA violation because of an inadequate comment period, the Council on Environmental Quality regulations—the regulations implementing the NEPA process—do not require a specific time frame for commenting. “[T]he council ... decided that prescribed universal time limits for the entire NEPA process are too inflexible....” 40 C.F.R. § 1501.8.

250. Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

251. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1292. In reaching the conclusion that the NPS’s actions were arbitrary and capricious, the court primarily relied on the lack of public participation and the ten-month period during which NPS moved from unlimited snowmobiling to elimination, which was not fully explained. *Id.* Unlike Judge Sullivan, Judge Brimmer did not rely on the *State Farm* “reasoned analysis” standard, but rather only determined that there was a lack of a “rational connection between the facts found and the choice made.” *Id.* (quoting *State Farm*, 463 U.S. at 43). The Supreme Court differentiated between these two standards in *State Farm*, describing the “rational connection” standard as typical agency deference, and the “reasoned analysis” standard as an elevated standard when an agency changes course. *State Farm*, 463 U.S. at 40, 43. Therefore,

that the plaintiffs were likely to be successful on the merits.<sup>252</sup>

According to Judge Brimmer, determining the appropriate remedy was “[o]ne of the most difficult issues in this case . . . .”<sup>253</sup> Either reverting to the 2003 Final Rule or the pre-2001 winter use plan was the first option before the court.<sup>254</sup> But Judge Brimmer was reluctant to reinstate the 2003 Final Rule because this action directly conflicted with Judge Sullivan’s earlier ruling.<sup>255</sup> The court also strongly implied that the pre-2001 Snowcoach Rule illegally impaired Yellowstone, and therefore violated the Organic Act—although Judge Brimmer did not expand on the reasons why “unrestricted snowmobile use” impaired Yellowstone’s resources.<sup>256</sup> With no viable alternative available, Judge Brimmer deferred to the NPS’s expertise, ordering the agency to craft temporary snowmobile regulations for the remainder of the 2003-2004 winter season to benefit both Yellowstone’s economic and environmental interests.<sup>257</sup> Pursuant to Judge Brimmer’s order, the

the NPS must present a more substantial explanation justifying the 2003 Final Rule than the 2001 Snowcoach Rule. *See also supra* notes 185-93 and accompanying text.

252. *Int’l Snowmobile Mfrs.*, 304 F. Supp. 2d at 1293.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* It is curious that Judge Brimmer implied that the pre-2001 Snowcoach Rule caused impairment, after articulating the deficiencies in the 2001 Snowcoach Rule, which was created to eliminate impairment. Judge Brimmer, however, did not expand his reasoning to articulate what would impair Yellowstone’s resources or what would avoid impairment—one can only assume that it lies somewhere between “unrestricted snowmobile use” and the phase-out within 2001 Snowcoach Rule.

NPS promulgated snowmobile regulations that increased daily snowmobile entries from 493 to 780.<sup>258</sup> The additional 287 snowmobiles were required to have four-stroke engine meeting the “best available technology.”<sup>259</sup>

## V. The Future of Snowmobiling in Yellowstone

The confusion over the status of snowmobiling in Yellowstone did not end with Judge Brimmer’s February 2004 order. On February 17, 2004, one week after the Wyoming District Court order, Judge Sullivan decried the NPS’s temporary regulation, which nearly doubled the daily allowable snowmobile entrances into Yellowstone, as “a nonchalant attitude of the government to a federal judge’s order.”<sup>260</sup> Nevertheless, in an early March 2004 contempt of court hearing, Judge Sullivan declined to hold the NPS in contempt due to the rapidly dwindling snowmobile season and the appeal of Judge Brimmer’s decision pending in the Tenth Circuit.<sup>261</sup> But before delaying the con-

257. *Id.*

258. National Park Service, U.S. Dept. of Interior, Yellowstone National Park, *Winter Use Background Information*, at <http://www.nps.gov/yell/planvisit/winteruse/background.htm> (last updated Dec. 22, 2004).

259. *Id.* For further discussion about the snowmobiling rulemakings and litigation, see Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10,397, 10,415-19 (2004).

260. John Heilprin, *Judge Blasts New Sled Rules*, CASPER STAR TRIBUNE, Feb. 18, 2004, at <http://www.casperstartribune.net/articles/2004/02/18/news/296e8d1fcee9924d87256e3e000da142.txt> (last visited Feb. 16, 2005).

261. *See* Ted Monoson, *Judge Delays Contempt Ruling*, CASPER STAR TRIBUNE, Mar. 10, 2005, at <http://www.casperstartribune.net/articles/2004/03/>

tempt decision, Judge Sullivan vowed that the NPS's rejection of his order would be eventually "set straight."<sup>262</sup> Additionally, in late August 2004, the NPS released a "Temporary Winter Use Plans Environmental Assessment" ("EA") designed to control Yellowstone winter management through the 2006-2007 winter season.<sup>263</sup> The preferred alternative of the EA allowed 720 snowmobiles daily.<sup>264</sup> All snowmobiles would have to include the "best available technology" and would be commercially guided.<sup>265</sup> Further, at the end of 2004, Congress passed an appropriations rider eliminating the NPS's ability to lower this daily limit, halting all litigation efforts until the 2005 fiscal year.<sup>266</sup>

10/news/wyoming/c4e12f5445927cbb87256e530006914c.txt (last visited Apr. 16, 2005) (Judge Sullivan said, "It is the better part of wisdom to put on hold any issues of contempt.") ; Earthjustice, *Conservationists Appeal Judge's Decision to Lift Snowmobile Phaseout*, at <http://www.earthjustice.org/news/display.html?ID=779> (last visited Apr. 16, 2005) (Appellants are GYC, National Parks Conservation Association, The Wilderness Society, Natural Resources Defense Council, Winter Wildlands Alliance, and Sierra Club.). Also, in March 2004, ISMA had a pending motion for a new trial in Judge Sullivan's court. E-mail from Barbara A. Miller, Attorney for ISMA, to Hillary Prugh, author (Mar. 19, 2004 06:19:00 PST) (on file with author).

262. Monoson, *supra* note 261.

263. National Park Service, U.S. Dept. of the Interior, *Winter Use Status, Winter Use Plans Environmental Assessment Comment and Proposed Rule*, at <http://www.nps.gov/yell/planvisit/winteruse/index.htm> (last updated Dec. 22, 2004) [hereinafter *Winter Use Plans EA Comment*].

264. *Id.* See also NATIONAL PARK SERVICE, U.S. DEPT. OF THE INTERIOR, TEMPORARY WINTER USE PLANS ENVIRONMENTAL ASSESSMENT FOR THE GRAND TETON AND YELLOWSTONE NATIONAL PARKS AND THE JOHN D. ROCKEFELLER, JR. MEMORIAL PARKWAY 1 (2004), available at <http://www.nps.gov/yell/planvisit/winteruse/temwinteruseae8-18.pdf> (last visited Feb. 19, 2005).

265. *Winter Use Plans EA Comment*, *supra* note 263. The NPS issued a final rule on November 10,

Clearly there remains substantial debate about managing the competing interests of preventing adverse economic impacts to local economies and preventing impairment of the Park's resources. Yet, the Organic Act undoubtedly establishes the conservation mandate recognized by Judge Sullivan.<sup>267</sup> Additionally, the drafters of the Organic Act intended that national parks remain immune from economic considerations, such as those emphasized by the Bush Administration.<sup>268</sup> To illustrate the statutory priority of preventing impairment to park resources, and to determine the future of snowmobiling in Yellowstone, this section discusses the real issue which neither Judge Sullivan nor Judge Brimmer

2004. *Id.* Also, the announcement noted that the NPS contracted with an independent researcher to assess the effect of trail grooming on bison distribution and abundance, as well as bison use of groomed trails. *Id.* However, this information would not be available until after the conclusion of the EA process. *Id.*

266. Press Release, United States Senator Conrad Burns, *Burns: Omnibus Bill Finalized* (Nov. 22, 2004) ("Yellowstone Snowmobiling: Included in the package is language that ensures a continued ability to snowmobile within Yellowstone National Park through this winter's tourism season. Burns said, 'Last year, mid-way through the winter, a Washington D.C. judge temporarily suspended all snowmobiling within the park. That action was devastating to West Yellowstone businesses, and the scores of families who were unable to enjoy the park. The language I've included works to protect those local businesses and economies by ensuring that, if snowmobiles are challenged in such a way again, the decision to remove them can't be implemented until the following season.'"), at [http://burns.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=1216&Month=11&Year=2004](http://burns.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1216&Month=11&Year=2004) (last visited Apr. 20, 2005).

267. See *supra* notes 176-92 and accompanying text (discussing the NPS's "conservation mandate").

268. See *supra* note 47 and accompanying text (discussing Representative Kent's intent).

fully addressed—the application of the impairment standard to Yellowstone.

Scholars have described the Organic Act's directive as a "contradictory mandate,"<sup>269</sup> of which the Yellowstone snowmobiling debate presents a prime example. The snowmobilers emphasize the Act's mention of "enjoyment of future generations," while preservationists focus on the requirement that the NPS leave park resources "unimpaired."<sup>270</sup> But when there is a conflict between these two philosophies as in Yellowstone, the NPS Management Policies, interpreting the Organic Act, dictate that "conservation is to be predominant."<sup>271</sup> The Organic Act's prohibition of impairment represents the NPS's primary duty.<sup>272</sup>

However, dealing in generalities begs the question: when must the NPS prohibit an activity that would cause impairment? The plain language and legislative history of the Organic Act provide no definitive guidance for determining

whether activities impair parks, as the courts have recognized.<sup>273</sup> But, the drafter of the "non-impairment" clause, Frederick Law Olmsted, Jr., suggested a "common sense approach" to which we can turn.<sup>274</sup> Snowmobiling in Yellowstone fails nearly all of Olmsted's aforementioned criteria for determining an impairment. Regarding Olmsted's second criteria,<sup>275</sup> snowmobiling is not of high social importance, as evidenced by 80 percent of Yellowstone's interested public supporting snowmobile elimination.<sup>276</sup> Regarding Olmsted's third and fourth criterion,<sup>277</sup> snowmobiling endangers Yellowstone's wilderness values and snowmobiling represents an unsuitable activity for the Park because it prevents visitors from experiencing the Park's silence and even from clearly viewing the Park's iconic natural wonders, as well as forcing Yellowstone park rangers to wear gas masks while at work.<sup>278</sup> And finally, regarding Olmsted's fifth criteria,<sup>279</sup> snowmobiling is less important than the

to occur inside park boundaries.").

276. See *supra* note 101 and accompanying text (discussing the 2003 Final Rule's comment period where 80% of 350,000 comments supported implementation of the 2001 Snowcoach Rule).

277. See *supra* notes 44-45 and accompanying text ("[T]he activity cannot 'endanger the value of the park for its proper purpose to the slightest appreciable degree'" and "the activity must be suitable for the park.").

278. See *supra* note 22 and accompanying text (discussing inability to see Old Faithful); JANSSEN & SCHETTLER, *supra* note 18, at 5 (discussing park rangers use of gas masks, "respiratory masks," and charcoal lined paper masks). See also Booth, *supra* note 110 ("park rangers wearing gas masks gasping at the West Gate").

279. See *supra* note 45 and accompany text ("[T]he importance of the activity which causes the impairment must be of greater value than the park's purposes to justify the impairment.").

269. See, e.g., Winks, *supra* note 38, at 575 ("Historians concerned with the National Park Service, managers in the Park Service, and critics and defenders of the Service, frequently state that the Organic Act which brought the National Park Service into existence in 1916 contains a 'contradictory mandate.'").

270. See generally, Scheg, *supra* note 18, at 51-52 (discussing the different national park use perspectives between those who promote recreation verses preservation).

271. NPS MANAGEMENT POLICIES, *supra* note 5, ¶ 1.4.3.

272. *Id.* ¶ 1.4.4.

273. See, e.g., *supra* notes 68-81 and accompanying text (discussing judicial interpretations).

274. See *supra* notes 38-45 and accompanying text (discussing Olmsted's influence on the Organic Act).

275. See *supra* note 43 and accompanying text ("[T]he activity must have high social importance

Park's purposes because snowmobilers can pursue their chosen recreation in areas outside Yellowstone, which are not specifically designated for scenery and wildlife conservation.<sup>280</sup>

The NPS has prohibited snowmobiling in several other national parks.<sup>281</sup> In 1987, the Service also promulgated a regulation eliminating snowmobiles from all national parks, unless consistent with an individual park's values.<sup>282</sup> Additionally, the EPA has consistently recognized snowmobiling's adverse effects on otherwise pristine airscapes.<sup>283</sup> The NPS has previously restricted mountain biking, hunting, and trapping in national parks.<sup>284</sup> The NPS regulated these activities in less historic and arguably less important parks than Yellowstone, the world's first national park.<sup>285</sup> In addition to the statutory language forbidding impairment,<sup>286</sup> these examples of the NPS's wholesale prohibitions of activities

that cause impairment underscore the need to eliminate snowmobiling from perhaps one of the most celebrated ecosystems left in the national park system.

Finally, the NPS's economic justifications—the “extreme financial distress” of the local economies—advanced under the Bush administration for maintaining snowmobiling in Yellowstone do not pass muster because preservation, rather than economic considerations, represent NPS's principal concern.<sup>287</sup> Furthermore, we ought to pay heed to the explicit assertions of the father of NPS, Representative Kent, in assessing the role of economics in national park administration. He believed that the Service must resist local community pressures because the parks were intended to be a reserve, not a tourist attraction.<sup>288</sup> Other commentators share Kent's view that the parks were created primarily for non-economic purposes. Some commentators have sug-

280. See 16 U.S.C. § 1 (national parks' purpose is “to conserve the scenery and the natural and historic objects and the wild life therein . . .”)

281. See *Mausolf v. Babbitt*, 125 F.3d 661, 670 (8th Cir.) (affirming NPS decision to eliminate snowmobiling from Voyageurs National Park, in Minnesota, because of snowmobiling's adverse effects on that park's resources such as the gray wolf); 36 C.F.R. 13.63(h) (2005) (eliminating snowmobiling in Denali National Park because it is “not a traditional activity” and thus cannot occur within the boundaries of the “Old Park” (area formally known as Mt. McKinley National Park)).

282. 36 C.F.R. §2.18(c) (2005). The NPS determined that the snowmobiling allowed in the 2003 Final Rule was not likely to impair the Park's values. 2003 Final Rule, *supra* note 29, 68 Fed. Reg. at 69,269.

283. See *supra* notes 30, 119, 212 and accompanying text (discussing EPA's comments that Yellowstone possibly exceeded the allowable increase in particulate matter under the Clean Air Act's ‘Prevention of Significant Deterioration’ pro-

gram); see also *supra* note 212 and accompanying text (stating that “during the 2003 rulemaking process, EPA confirmed that the FEIS accurately projected the technological improvements, [and that] thus the alleged ‘new’ technological improvements in the 2003 Final Rule did not eliminate the need for a snowmobile phase-out”); see also *Bluewater Network v. EPA*, 370 F.3d 1, 24 (D.D.C. 2004) (affirming the EPA's authority to regulate carbon monoxide and hydrocarbon emissions from snowmobiles).

284. See *Bicycle Trails*, 82 F.3d at 1454 (mountain biking); *Potter*, 628 F. Supp. at 909 (hunting and trapping); *Mich. United Conservation Clubs*, 949 F.2d at 207 (hunting and trapping).

285. *YNP Facts*, *supra* note 1.

286. 16 U.S.C. § 1.

287. *Doremus*, *supra* note 48, at 487.

288. See *supra* note 47 and accompanying text (“NPS must resist surrounding communities' pressures to transform the park into primarily a tourist attraction.”).

gested that the national parks were created to establish a sense of national identity.<sup>289</sup> While Europe had history and culture, which this country could not rival, the United States had “spectacular national wonders.”<sup>290</sup> The parks were created to emphasize that this nation valued something other than materialism and monetary wealth.<sup>291</sup> To be true to Representative Kent’s vision for the National Park System, economic interests that the Bush administration finds compelling cannot override an impairment determination.

The legacy of our national parks is diminished when the NPS authorizes uses such as snowmobiling, which impair the very wonders that Yellowstone was created to protect.<sup>292</sup> The Organic Act,<sup>293</sup> the Yellowstone National Park Act of 1872,<sup>294</sup> Executive Orders 11,644 and 11,989,<sup>295</sup> the NPS snowmobile regulation,<sup>296</sup> and NPS Management Policies<sup>297</sup> prioritize preservation of the Park in its natural state. These directives prohibit the NPS from allowing future snowmobiling in Yellowstone.

## VI. Conclusion

The roller coaster that snowmobiling in Yellowstone has become epitomizes the dangers of political decisionmaking

that the Supreme Court struck down with its 1984 *State Farm* decision.<sup>298</sup> The NPS under the Bush administration relied on the same information which it had used earlier to determine that snowmobiling impaired Yellowstone.<sup>299</sup> The NPS presented no new information and ignored the Organic Act’s “conservation mandate.”<sup>300</sup> Not only did the Bush administration ignore this well-established mandate, but so did Judge Brimmer in the Wyoming District Court. The Wyoming District Court erroneously accepted the Bush administration’s reliance on economic considerations irrelevant in an Organic Act analysis, providing only conclusory statements as rationale.<sup>301</sup> This nonchalant interpretation of the Organic Act sets dangerous precedent endangering all of our national parks.

The United States is blessed with outstanding natural wonders, with which many countries cannot compare.<sup>302</sup> When the Service manages our parks in such a way as to result in air pollution rivaling Los Angeles during rush hour traffic,<sup>303</sup> it eviscerates the unprecedented forethought of the parks’ founders.<sup>304</sup> Congress established the NPS to protect rather than destroy a park’s resources. Consideration of local economies has no place in park administration, especially

289. Doremus, *supra* note 48, at 440.

290. *Id.*

291. *Id.*

292. See *supra* notes 107-27, 206-16 and accompanying text.

293. See *supra* notes 51-53 and accompanying text.

294. See *supra* notes 54-57 and accompanying text.

295. See *supra* notes 58-59 and accompanying text.

296. See *supra* note 60 and accompanying text.

297. See *supra* notes 61-67 and accompanying text.

298. See *supra* notes 194-202 and accompany-

ing text.

299. See *supra* notes 204-21 and accompanying text.

300. *Id.*

301. See *supra* notes 222-59 and accompanying text.

302. See *supra* note 291-93 and accompanying text.

303. See *supra* note 18 and accompanying text.

304. See *supra* notes 38-50 and accompanying text.

when such mismanagement threatens our priceless natural resources. When Congress enacted the National Park Service Organic Act, it gave all Americans an interest in our national parks. The decisions which derogate a national park's integrity and purpose also diminish our interests in national park protection. Therefore, snowmobiling must be eliminated from Yellowstone, our national park.