DRIVING AMERICANS' PERCEPTION OF RECREATION: AWAITING THE PARK SERVICE'S LONG-TERM SOLUTION TO ADDRESS SNOWMOBILE ACCESS IN YELLOWSTONE NATIONAL PARK

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"*Snowmobiling has rejuvenated the economies of many communities and is an important segment of the active outdoor recreation economic engine.*"[1]

—International Snowmobile Manufacturers Association

"*Snowmobiling . . . is one of the most environmentally devastating recreational activities permitted by the Park Service.*" [2]

—Sean Smith, Bluewater Network

I. INTRODUCTION

Over the past decade, the process of deciding how to manage snowmobiles in Yellowstone National Park has cost taxpayers more than $10 million, produced upwards of 160,000 pages of documents, and amassed nearly one million public comments.[3] No other issue has been as long-lasting and contentious as the debate over the recreational use of snowmobiles in Yellowstone National Park.[4] One scholar observed that "[t]he determination of which forms of recreation are proper in our national parks has become

1. *Snowmobile Fact Book: Economic Impact*, INT'L SNOWMOBILE MFRS. ASS'N, http://www.snowmobile.org/facts_econ.asp (last visited Mar. 9, 2012) ("Economic impact reports across North America show the positive economic significance of the sport of snowmobiling at all levels.").

2. *Oversight Hearing on Snowmobile Recreation in Nat'l Parks, Particularly Yellowstone Nat'l Park Before the H. Subcomm. on Nat'l Parks and Pub. Lands*, 106th Cong. 4-5 (2000) (statement of Sean Smith, M.S., Public Lands Director, Bluewater Network), *available at* http://naturalresources.house.gov/UploadedFiles/Sean_Smith_testimony_5.25.00.pdf [hereinafter *Bluewater Hearing*].

3. *See* Stephanie Simon, *Battle Over Snowmobiles in Yellowstone Roars On*, WALL ST. J., Oct. 21, 2011, at A6 (discussing recent delay of Long-Term Winter Use Plan addressing snowmobile use in Yellowstone National Park); *see also* Julie Cart, *Decision Postponed, Again, on Winter Snowmobile Rule*, L.A. TIMES BLOG (Sept. 29, 2011, 3:04 PM), http://latimesblogs.latimes.com/greenspace/2011/09/snowmobiles-yellowstone-national-park-.html (noting Park Service has spent over $10 million over past decade studying effects of winter use in Yellowstone National Park).

4. *See* Wyoming v. U.S. Dept. of Interior, 587 F.3d 1245, 1247 (10th Cir. 2009) (noting "long series of cases seeking to resolve the fate of snowmobiles in Yellowstone National Park"); *see also* Robert B. Keiter, *The National Park System: Visions for Tomorrow*, 50 NAT. RESOURCES J. 71, 102 (2010) (noting that Yellowstone is currently site of extensive natural gas drilling, which limits migration routes for region's elk and pronghorn); Therese L. Johnson and Ryan Monello, *An Adaptive Approach to Elk Management in Rocky Mountain National Park, Proceedings of the 11th Conference on Research and Res. Mgmt.*, 82, 82-84, http://www.georgewright.org/15johnso.pdf (last visited Mar. 9, 2012) (discussing Park Service's fire protection non-intervention policy); Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1228 (10th Cir. 2000) (addressing re-introduction of experimental population of gray wolves in Yellowstone National Park); Wyo. State Snowmobile Ass'n. v. U.S. Fish & Wildlife Serv., 741 F. Supp. 2d 1245, 1267-68 (D. Wyo. 2010) (striking down Fish and Wildlife Service's revised designation of critical habitat for Canadian lynch under Endangered Species Act).

one of the most volatile controversies in recent history."[5] A representative for the National Parks Conservation Association stated that "[t]his is the issue that more people, more Americans, have commented on than any other issue in the National Park Service."[6]

Since 2001, the National Park Service ("Park Service") has promulgated ten snowmobile rules, mainly as a result of political reversals and judicial disapprovals.[7] The Park Service has not yet adopted a highly anticipated Long-Term Winter Use Plan addressing snowmobile use in Yellowstone.[8] On September 29, 2011, however, the Park Service announced that it will finalize a long-term plan by late 2012, at which time, history indicates, the plan will most likely be challenged by both snowmobile advocates and environmental organizations.[9]

Today, nearly 125,000 people ride snowmobiles through Yellowstone each winter season.[10] The International Snowmobile Manufacturer's Association ("ISMA"), a snowmobile interest group, argues that snowmobiling is an important part of the local winter

5. Nathan L. Scheg, *Preservationists vs. Recreationists in our National Parks*, 5 HASTINGS W.-NW J. ENVTL. L. & POL'Y 47, 51 (Fall 1998).

6. Kelsey Dayton, *Yellowstone Winter Use Plan Same as Last Year*, STAR-TRIBUNE (Sept. 30, 2011), http://trib.com/news/state-and-regional/article_5317ac79-b62b-5ef0-9032-d432fca8fd83.html (quoting Kristen Brengel, legislative director for National Parks Conservation Association).

7. *See* Bd. of Cnty. Comm'rs of Park Cnty. v. U.S. Dep't of Interior, No. 09–CV–262J, 2010 WL 6429153, at *1 (D. Wyo. Sept. 17, 2010) (discussing history of cases and acknowledging that this line of cases "has a complicated and lengthy history").

8. *See generally* Notice of Intent to Prepare Supplemental Environmental Impact Statement for Winter Use Plan, Yellowstone National Park, 77 Fed. Reg. 6581 (Feb. 8, 2012) (initiating rulemaking process for Long-Term Winter Use Plan for Yellowstone National Park).

9. *See NPS to Implement One-Year Rule for Yellowstone's 2011-2012 Winter Use Plan*, NAT'L PARK SERV. (Sept. 29, 2011), http://www.nps.gov/yell/parknews/11102a.htm ("The [Park Service] intends to have a final . . . long-term regulation in place before the start of the 2012-2013 winter season."); *see also* Rule Implementing Record of Decision for the 2011 Winter Use Plan/Environmental Impact Statement for Yellowstone National Park, 76 Fed. Reg. 77,131, 77,132 (Dec. 12, 2011) ("[The Park Service] intends to complete a supplemental EIS, make a decision on a plan for long-term winter use, and issue a new regulation for winter use before the 2012–2013 winter season."); *see also* 77 Fed. Reg. at 6581 (announcing public scoping for supplemental environmental impact statement that will provide basis for Long-Term Winter Use Plan); *Gazette Opinion: Nothing Lost in Taking Longer to Look at Winter Plan*, BILLINGS GAZ. (Oct. 3, 2011), http://billingsgazette.com/news/opinion/editorial/gazette-opinion/article_f1ff022b-d50e-5ac8-a724-841320705cd2.html ("It seems unlikely that the next 'final' rule will avoid legal challenge.").

10. *See* Jen Millner, *Snowmobiles in Yellowstone National Park: An American Right, or Wrong?*, SCI. EDUC. RES. CTR. AT CARLETON COLL., *available at* http://serc.carleton.edu/research_education/yellowstone/snowmobiles.html (last visited Mar. 9, 2012) (tying snowmobile ridership in Yellowstone to local economic and environmental issues).

economy in Yellowstone's surrounding communities.[11] On the other hand, these machines are capable of generating more hydrocarbon emissions in one day than an automobile emits over its entire lifetime. [12] They produce a tremendous amount of noise that agitates other visitors and frightens indigenous wildlife.[13] Bluewater Network, an organization dedicated to reducing environmental damage from motor vehicles, denounces snowmobiling as one of the most environmentally destructive recreational activities allowed in our national parks.[14] Even Justice Scalia has chimed in on the topic of off-road vehicles ("ORVs") on public lands, observing that the "use of ORVs on federal land has negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers."[15]

The debate over snowmobile regulation in national parks focuses on whether the Park Service's Winter Use Plans adhere to Congress's dual mandate to "*conserve* [park resources] 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*," often referred to as the "preservation/use mandate."[16] How the

11. *See Snowmobile Fact Book: Economic Impact*, *supra* note 1 (summarizing research on economic impact of snowmobiling).

12. *See* JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL 31149, SNOWMOBILES, ENVIRONMENTAL STANDARDS, AND ACCESS TO NATIONAL PARKS 10-11 (Oct. 2, 2008), *available at* http://assets.opencrs.com/rpts/RL31149_20081002.pdf (reporting that in 2008, standard snowmobile emitted as much hydrocarbon and carbon monoxide in one hour as 2008 model automobile emitted in 54,000 miles and 1,050 miles, respectively); *see also* Joanna M. Hooper, *Blowing Snow: The National Park Service's Disregard for Science, Law, and Public Opinion in Regulating Snowmobiling in Yellowstone National Park*, 34 Envtl. L. Rep. 10,975, 10,975 (Nov. 2004), *available at* http://www.elr.info/articles/vol34/34.10975.pdf (citing Consol. Amended Complaint for Declaratory and Injunctive Relief, Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003), which stated that two-stroke snowmobile produces more emissions in one hour than car produces in one year).

13. *See* Rule Phasing Out Snowmobile Use In Yellowstone National Park, 65 Fed. Reg. 79,024, 79,026 (proposed Dec. 18, 2000) (noting that snowmobiles could be heard ninety-five percent of time at Old Faithful and eighty-seven percent of time at Grand Canyon of Yellowstone); *see also* Hooper, *supra* note 12, at 10,976 (citing Consol. Amended Complaint for Declaratory and Injunctive Relief, Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003), which indicated that during 2003-2004 winter season, Park Service employees who worked near snowmobiles were given noise protection devices to prevent hearing damage).

14. *See Bluewater Hearing*, *supra* note 2, at 4-5 (labeling snowmobiling one of most environmentally damaging activities in parks).

15. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 60 (2004) (internal citations omitted) (noting, in context of Wilderness Act, 16 U.S.C. §§ 1131-1136 (2006), that Bureau of Land Management "faces a classic land use dilemma of sharply inconsistent uses, in a context of scarce resources and congressional silence with respect to wilderness designation.").

16. 16 U.S.C. § 1 (2006) (emphasis added). An expanded excerpt reads:

Park Service balances these competing concerns is highly controversial because increasing one reduces the other: preserving park resources is threatened by increased recreation, and increased preservation reduces access to recreation.[17]

The threshold issue of this debate is whether snowmobiling is per se permissible recreation under the National Park Service Organic Act ("Organic Act").[18] If a single snowmobile impairs park resources, then the Organic Act prohibits snowmobiling in national parks.[19] If snowmobiling is a valid use of national parks, however, then further inquiry is required into determining what level of snowmobile use impairs park resources.[20] Historically, the Park Service and federal courts have assumed that snowmobiling in Yellowstone is permissible under the Organic Act and have instead focused almost exclusively on the level at which snowmobile use begins to impair park resources.[21]

This comment investigates both of the aforementioned questions in the context of conflicting theories of nature and recreation, while applying precedent and policies derived from congressional acts, Executive Orders, and the Park Service's regulations, Management Policies, and Winter Use Plans.[22] Unlike com-

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> The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Id.

17. *See* Mausolf v. Babbitt, 85 F.3d 1295, 1304 (8th Cir. 1996) ("[T]he Government's interest in promoting recreational activity and tourism in the Park, an interest many citizens share, may be adverse to the . . . conservation interests, interests also shared by many."); *see also* Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 178-92 (1999) ("[T]he looming conflict in public land use will be between two former allies – recreation and preservation of interests.").

18. *See generally* 16 U.S.C. § 1 (2006) (contemplating that some uses are forbidden under Organic Act, such as those that lead to impairment of park resources).

19. *See generally id.* (forbidding any use that impairs national park's resources).

20. *See generally id.* (permitting enjoyment of park resources so long as such enjoyment does not impair park's resources for future generations).

21. For a further discussion of the Park Service's actions and federal courts' responses to those actions, see *infra* notes 240-348 and accompanying text.

22. For an analysis of the Park Service's actions pursuant to the Organic Act and how those actions fit within the existing legal framework, see *infra* notes 240-531 and accompanying text.

mentaries that debate the proper balance of the Organic Act's preservation/use mandate, this comment largely rests on an overwhelming majority of federal courts and the Park Service itself, which elevate preservation over use.[23]

Part II of this article lays out the regulatory framework currently in place to address snowmobile use in the national parks and briefly introduces the preservation/use debate and how the Park Service and courts have treated this dual mandate when addressing snowmobile use in the parks.[24] Part III provides an overview of the economic and environmental impacts of snowmobile use and discusses conflicting views of natural resource protection and permissible recreation in the national parks.[25] Part IV discusses agency actions addressing snowmobile use in Yellowstone and how courts have treated those actions.[26] The remainder of Part IV analyzes the Park Service's most recently proposed 2011 Long-Term Winter Use Plan and sets the stage for an imminent challenge to the agency's expected 2012 Long-Term Winter Use Plan.[27] Part V concludes that the Park Service's recent proposals elevate recreation to a level

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23. *See* Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 192 (D.D.C. 2008) (confirming Park Service's Organic Act requires conservation mandate "to be predominant"); *see also* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 108 (D.D.C. 2003) (announcing Park Service has "clear conservation mandate," indicating conservation is paramount to enjoyment); NAT'L PARK SERV., MANAGEMENT POLICIES 2006 § 1.4.3 (2006) [hereinafter 2006 MANAGEMENT POLICIES], *available at* www.nps.gov/policy/MP2006.pdf (last visited Mar. 9, 2012) (addressing conservation as predominant); Robin Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575, 575 (1997) (weighing preservation and use); Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L & LITIG. 223, 233 (2004) ("[W]hen push comes to shove, preservation rules."); Scheg, *supra* note 5 ("The credo of the Act seems obvious – the continued preservation of the natural beauty of the parks.").

24. For a discussion of the regulatory framework in place to address snowmobile use in the national parks and an introduction of the preservation/use debate and how the Park Service and courts have treated this mandate when addressing snowmobile use in the parks, see *infra* notes 29-98 and accompanying text.

25. For an overview of the economic and environmental impacts of snowmobile use and a discussion of the conflicting views of natural resource protection and permissible recreation in national parks, see *infra* notes 99-239 and accompanying text.

26. For a discussion of agency actions addressing snowmobile use in Yellowstone and how those actions were viewed by various federal courts, see *infra* notes 240-531 and accompanying text.

27. For an analysis of the Park Service's most recently proposed 2011 Long-Term Winter Use Plan and alternatives suggested for the 2012 Long-Term Winter Use Plan, see *infra* notes 349-516 and accompanying text.

that is equal to or above preservation and discusses implications of this decision on future generations.[28]

II. NATIONAL PARK MANAGEMENT

A. Statutory Obligations

The Park Service was created in 1916 through the Organic Act and administers the National Park System for recreational use of parklands and preservation of park resources.[29] The agency ensures that the "wonders" of the park remain "in their natural condition."[30] In addition, the Park Service prevents "the wanton destruction of the fish and game found within the park . . . ."[31]

Further, under what is commonly referred to as the "preservation/use mandate," the Park Service is required "to *conserve* the scenery and the natural and historic objects and the wild life therein and to *provide for the enjoyment* of the same in such manner and by such means as will leave them *unimpaired* for the *enjoyment of future generations*." [32] Balancing preservation and use is the focus of a longstanding debate over the extent of permissible recreation on federally owned lands.[33] In some instances, this seemingly conflicting standard has created so much confusion that some have suggested a need to amend the Organic Act to provide additional clarity. [34] The preservation/use mandate, however, provides a workable framework for park management; to conclude otherwise would be to assume that Congress either did not know what it was doing, or that it did not care.[35] One scholar suggested that Congress intended to leave discretion with the Park Service in order to avoid answering difficult questions, such as "whether, in the event of a conflict between good health through pure drinking water or

28. For a discussion of how the Park Service's recent proposal favors recreation at the expense of preservation, see *infra* notes 517-531 and accompanying text.

29. *See* 16 U.S.C. § 1 (2006) (setting forth purpose and structure of national parks).

30. 16 U.S.C. § 22 (2006).

31. *Id.*

32. 16 U.S.C. § 1 (emphasis added).

33. *See* KORI CALVERT, ET AL., CONG. RESEARCH SERV., RL 33525, RECREATION ON FEDERAL LANDS 1 (Apr. 29, 2011) (analyzing longstanding debate over extent of permissible recreation on public lands, particularly in context of national parks).

34. *See* Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 911-21 (Spring 2009) (suggesting addition of phrase "where proven compatible" before word, "enjoyment").

35. *See* Winks, *supra* note 23, at 604 (providing overview of reasons why Congress created preservation/use mandate and choose to balance conservation and enjoyment interests).

good health through protected and open spaces, they would favor one over the other."[36]

Based on the congressional record, the private correspondence of the Organic Act's proponents, and the common use of language in 1916, Congress placed priority on conservation and created a presumption of agency inaction in the face of any proposed action that may be viewed as causing impairment.[37] Moreover, Congress was not content with merely leaving the parks unimpaired for future generations, but rather provided for the actual "*enjoyment* of future generations." [38] Many citizens believe that enjoyment of national parks requires physical access, and therefore, the Organic Act could not have intended "impairment" to be used in the broadest sense.[39]

Congress amended the Organic Act in 1970 through the General Authorities Act and again in 1978 through the Redwood Amendment.[40] Those acts reiterated that the national parks must be managed "consistent with the Organic Act" and demanded that the "protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park Service and shall not be exercised in derogation of the values and purposes for which these areas have been estab-

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36. *See id.* at 593-94 (discussing background of Congress's wish to avoid answering difficult, detailed questions).

37. *See id.* at 583-613, 623 (analyzing legislative history, rules of statutory construction, and prevailing language in 1916 to finally arrive at conclusion that Congress intended for preservation to predominate use).

38. *See* 16 U.S.C. § 1 (2006) (emphasis added) (using language to specifically advance legislative purpose).

39. *See* Winks, *supra* note 23, at 575, 597 (concluding that "impairment" does not include all impairment, for if it did, no use would be permitted).

40. *See* 16 U.S.C. § 1a-1 (1970) ("[T]he national park system [must be] preserved and managed for the benefit and inspiration of all the people of the United States."); 16 U.S.C. § 1a-1 (2006) (adding language to Park Service Organic Act and General Authorities Act). The Redwood Amendment added that:

> Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by section 1 of . . . the Organic Act . . . to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established . . . .

Id.

lished."[41] Practically all commentators believe that the 1970 and 1978 amendments bolstered the conservation mandate.[42]

On numerous occasions, federal courts have confirmed that the Organic Act's conservation mandate is predominant.[43] In fact, the Ninth Circuit permitted the Park Service to close bike trails within a national park.[44] Nevertheless, pro-snowmobile groups maintain that "the Organic Act does not place one of these mandates as above or more important than the other" and that "the Organic Act does not make the conservation mandate more important than all other considerations and the Court's conclusion that it does is in error."[45]

B. Executive Orders

In 1972, President Nixon signed Executive Order 11644 ("E.O. 11644"), which established certain requirements for managing the

41. Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 190 (D.C. 2008) (describing General Authorities Act and Redwood Amendment as maintaining focus on preservation). *See* Bicycle Trails of Marin v. Babbitt, 82 F.3d 1445, 1453 (9th Cir. 1996) (finding amendments left "resource protection the overarching concern").

42. *See* Winks, *supra* note 23, at 575, 579 (stating that overwhelming number of commenters believe that Organic Act maintains focus on preservation).

43. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 192 (confirming Park Service's Organic Act requires the "conservation mandate . . . to be predominant"); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 108 (D.D.C. 2003) (announcing Park Service has "clear conservation mandate," indicating conservation is paramount to enjoyment); *see also* 2006 MANAGEMENT POLICIES, *supra* note 23 (addressing conservation as predominant) *see also* Save Our Snowplanes v. Salazar, No. 05-CV-100-D, 2007 WL 1959177, at *18 (D. Wyo. June 27, 2007) (upholding Park Service's decision to ban use of snowplanes), *vacated and remanded for lack of standing*, 2009 WL 1530168, No. 07-8055 (10th Cir. June 2, 2009); S. Utah Wilderness Alliance v. Nat'l Park Serv., 387 F. Supp. 2d 1178, 1199 (D. Utah 2005) (upholding Park Service's decision to ban motorized access to certain parts of Canyonlands National Park). *But see* Harmony A. Mappes, Note, *National Parks: For Use and "Enjoyment" or for "Preservation"? And the Rule of the National Park Service Management Policies in that Determination*, 92 IOWA L. REV. 601, 604-06, 611-13 (Feb. 2007) (opining that courts merely provided agency deference to Park Service's interpretation and did not provide opinion of their own); Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1247 (E.D. Cal. 1999) (stating that "Organic Act does not serve as basis for a cause of action when the issue is confined to the Agency's exercise of discretion in attempting to balance [the] valid, competing values" of preservation and use); S. Utah Wilderness Alliance v. Dabney, 222 F.3d 819, 829 & n.9 (10th Cir. 2000) (holding that permitting "significant, permanent impairment" would violate Organic Act's preservation/use mandate, but suggesting range of impairment sufficient to violate act might be broader).

44. *See Bicycle Trails Council of Marin*, 82 F.3d at 1454 (paying deference to Park Service's decision to close popular bike trails).

45. *Snowmobile Fact Book: Effects of Snowmobiling On . . .* , INT'L SNOWMOBILE MFRS. ASS'N, *available at* http://www.snowmobile.org/facts_ece.asp (last visited Mar. 9, 2012) (maintaining, in face of overwhelming adverse precedent, that Organic Act requires equal balancing of preservation and use).

use of ORVs, including snowmobiles.[46] E.O. 11644 defines "off-road vehicle," now referred to as an "off-highway vehicle" ("OHV"),[47] as "any motorized vehicle designed for or capable of cross country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain."[48] E.O. 11644 requires each agency to:

> [E]stablish policies and provide for procedures that will ensure that the use of off-road vehicles on public lands will be controlled and directed so as to protect the resources of those lands, to promote the safety of all users of those lands, and to minimize conflicts among the various uses of those lands.[49]

Each agency must designate areas on public lands on which ORVs may be used, as well as areas on which ORVs may not be used.[50] In particular, areas chosen for off-road vehicle use must minimize impacts on wildlife and wildlife habitats.[51]

In 1977, President Carter issued Executive Order 11989 ("E.O. 11989"), which supplemented E.O. 11644.[52] E.O. 11989 amended E.O. 11644 to require ORV use to be immediately discontinued if the agency determines that such use will cause "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of the public lands."[53] Such areas must remain closed until the agency eliminates the adverse effects and implements measures to prevent those adverse effects from recurring.[54]

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46. *See* Exec. Order No. 11644, 37 Fed. Reg. 2877 § 1 (Feb. 8, 1972) (addressing increased recreational use of off-highway vehicles on public lands by requiring agencies to comply with certain procedures).

47. *See* CALVERT, *supra* note 33, at 3 (noting change in terminology from off-road vehicle to broader term, off-highway vehicle).

48. Exec. Order No. 11644, 37 Fed. Reg. 2877 § 2(3).

49. *Id.* § 1.

50. *See id.* § 3 ("Each respective agency head shall develop and issue regulations and administrative instructions . . . to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles may not be permitted . . . .").

51. *See id.* § 3(2) ("Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats.").

52. *See* Exec. Order No. 11989, 42 Fed. Reg. 26,959 §§ 1-2 (May 24, 1977) (supplementing and amending E.O. 11644).

53. *Id.* § 9.

54. *See id.* (requiring areas to remain closed until the agency "determines that such adverse effects have been eliminated and that measures have been implemented to prevent future recurrence").

C. Managing Snowmobile Use in Yellowstone National Park

The federal government has broad control over snowmobile use that impacts public lands.[55] The Park Service receives its authority to regulate OHV use either through congressional acts that specifically provide for OHV use or through "unit-specific regulations, management plans, and the superintendent's compendium."[56] Congress has been both vague and specific when addressing recreational activities in national parks.[57] Nevertheless, out of 394 Park Service units in the United States, forty-three permit snowmobile use.[58]

1. *Yellowstone National Park*

In 1872, Congress dedicated Yellowstone National Park as the world's first national park "for the benefit and enjoyment of the people."[59] Today, Yellowstone's 3500 square miles are home to a handful of endangered and threatened species, more than 300 geysers, thousands of petrified trees, roughly 290 waterfalls, and an active volcano.[60] The Park Service is authorized "to take all such measures as may be necessary or proper" to preserve all "natural

55. *See* Minn. ex rel. Alexander v. Block, 660 F.2d 1240, 1251 (8th Cir. 1981), (holding that snowmobile ban on non-federal land adjacent to and within boundaries of public land was valid exercise of power under Property Clause); *see generally* Byron Kahr, *The Right to Exclude Meets the Right to Ride: Private Property, Public Recreation, and the Rise of Off-Road Vehicles*, 28 STAN. ENVTL. L.J. 51, 98-99 (Feb. 2009) (providing overview of implications of federal regulations of OHV use on private lands).

56. *See* CALVERT, *supra* note 33, at 3 (contrasting Park Service with other agencies in regards to how each obtains authority to regulate use of public lands).

57. *Compare* 16 U.S.C. § 459i (2006) ("In order to provide for public outdoor recreation use and enjoyment of certain significant shoreline lands and waters of the United States . . ."), *with* 16 U.S.C. § 192b-9(g) (2006) (permitting use of snowmobiles on one particular trail in Rocky Mountain National Park), *and* 16 U.S.C. § 460n-3(b) (2006) (providing Park Service with specific examples of permissible recreational uses in Lake Mead National Recreation Area, including "bathing, boating, camping, and picnicking").

58. *See* CALVERT, *supra* note 33 (explaining extent to which snowmobiling is, and has been, permitted in national parks).

59. *See* 16 U.S.C. § 21 (2006) (establishing boundaries of Yellowstone National Park and duties of Secretary of Department of the Interior); *see also* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 98 (D.D.C. 2003) (noting that Yellowstone's dedication was followed by, among others, Grant Teton National Park in 1950 and John D. Rockefeller Memorial Parkway in 1972).

60. *See* Simon, *supra* note 3 (reporting size of Yellowstone National Park); *see also* Hillary Prugh, *To Sled or Not to Sled: The Snowmobiling Saga in Yellowstone National Park*, 11 Hastings W. -N. W. J. ENVTL. L. & POL'Y 149, 150 (Spring 2005) (listing bald eagle, whooping crane, grizzly bear, gray wolf, and Canadian lynx as among animals living in Yellowstone); *Yellowstone Fact Sheet*, NAT'L PARK SERV., http://www.nps.gov/yell/planyourvisit/factsheet.htm (last visited Mar. 9, 2012) (listing notable facts, including park's natural and manmade features).

curiosities, or wonders, within the park, and their retention in their *natural condition*," although Congress did not define "natural."[61] As of 2000, when comparative data on the national parks was last available, Yellowstone accounted for roughly forty percent of all snowmobile use in the National Park System.[62]

2. *National Park Service Regulations*

In 1971, the Park Service issued its first regulation addressing "oversnow vehicle" ("OSV") use in Yellowstone.[63] For a number of years following, a special regulation was in place that designated certain routes open to snowmobiles in Yellowstone without entry limits.[64] In recent years, however, the Park Service has begun to limit snowmobile access in the park.[65]

Park Service regulations categorically prohibit the use of snowmobiles, 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 [when their use] will not disturb wildlife or damage park resources."[66] This framework is sometimes referred to as the "closed unless open" rule.[67] The Park Service must promulgate special regulations to designate particular routes open to snowmobiles in a particular park.[68] Park Service regulations also impose a number of technical and operational restrictions on snowmobiles, which in-

61. 16 U.S.C. § 22 (emphasis added) (describing powers and duties delegated to Secretary of Department of the Interior).

62. *See* MCCARTHY, *supra* note 12 (citing congressional testimony of Kevin Collins of National Parks Conservation Association).

63. *See* Winter Use Regulations, 36 Fed. Reg. 12,014 (June 24, 1971) (establishing entry limits, emissions standards, and other limitations on OSV use in Yellowstone). OSVs are "self-propelled vehicles intended for travel on snow, driven by a track or tracks in contact with the snow that may be steered by skis or tracks in contact with the snow. This term includes both snowmobiles and snowcoaches." 2000 Record of Decision, 65 Fed. Reg. 80,908, 80,911 (Dec. 22, 2000). "Snowcoaches [are] self-propelled, mass transit vehicles intended for travel on snow, having a curb weight of over 1,000 pounds (450kg), driven by a track or tracks and steered by skis or tracks, having a capacity of at least 8 passengers." *Id.*

64. *See* 36 C.F.R. § 7.13(l)(2) (2000) (designating routes as open generally, but providing no limits on maximum access).

65. *See* 36 C.F.R. § 2.18 (2011) (providing for general authority to limit snowmobile use in national parks).

66. 36 C.F.R. § 2.18(c) (2011) (emphasis added) (stating that snowmobile use is permitted "on designated routes and water surfaces that are used by motor vehicles or motorboats during other seasons").

67. *See* Wyo. v. Dept. of Interior, 587 F.3d 1245, 1248 (10th Cir. 2009) (characterizing Park Service's regulatory framework).

68. *See* 36 C.F.R. § 2.18(c) (2011) ("Routes and water surfaces designated for snowmobile use shall be promulgated as special regulations.").

clude prohibiting visitors from "[o]perating a snowmobile that makes excessive noise."[69]

3. *2006 Management Policies*

In 2000, the Park Service defined its interpretation of "impairment" as "an impact that . . . would harm the integrity of the park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values."[70] The Utah District Court upheld the Park Service's definition, which was later memorialized in the Park Service's 2001 Management Policies. [71]

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69. *See* 36 C.F.R. § 2.18(d) (2011) (noting restrictions on snowmobile operators). The Park Service's regulations include the following restrictions on snowmobile noise:

> Excessive noise for snowmobiles manufactured after July 1, 1975 is a level of total snowmobile noise that exceeds 78 decibels measured on the A-weighted scale measured at 50 feet. Snowmobiles manufactured between July 1, 1973 and July 1, 1975 shall not register more than 82 decibels on the A-weighted scale at 50 feet. Snowmobiles manufactured prior to July 1, 1973 shall not register more than 86 decibels on the A-weighted scale at 50 feet. All decibel measurements shall be based on snowmobile operation at or near full throttle.

36 C.F.R. § 2.18(d)(1) (2011). In addition, the Park Service prohibits "[o]perating a snowmobile without a lighted white headlamp and red taillight from one half-hour after sunset to one half-hour before sunrise, or when persons and vehicles are not clearly visible for a distance of 500 feet." 36 C.F.R. § 2.18(d)(2) (2011). Visitors may not "[operate] a snowmobile that does not have brakes in good working order." 36 C.F.R. § 2.18(d)(3) (2011). Regulations prohibit "racing, or operating a snowmobile in excess of 45 mph" with limited exceptions. 36 C.F.R. § 2.18(d)(4) (2011). Lastly, the Park Service's regulations list age restrictions on snowmobile operation, which permits a person as young as twelve years of age to operate a snowmobile if "accompanied on the same machine by a responsible person 21 years of age or older." *See* 36 C.F.R. § 2.18(e) (2011) (stating individuals as young as twelve years can operate snowmobile).

70. S. Utah Wilderness Alliance v. Nat'l Park Serv., 387 F. Supp. 2d 1178, 1183, 1190 (D. Utah 2005) (citing Notice of New Policy Interpreting the National Park Service (NPS) Organic Act, 65 Fed. Reg. 56,003 (Sept. 15, 2000)).

71. *See id.* (approving of Park Service's decision to ban motorized access to certain areas of Canyonlands National Park and denying OHV groups claims on grounds that Park Service properly interpreted Organic Act to elevate preservation over use and thereby dismissing OHV groups' claims that Organic Act requires Park Service to equally balance preservation and use); *see generally* NAT'L PARK SERV., 2001 MANAGEMENT POLICIES (2001) [hereinafter 2001 MANAGEMENT POLICIES], *available at* http://www.nps.gov/refdesk/mp/ (interpreting Organic Act). Proposed revisions to the 2001 MANAGEMENT POLICIES "would have elevated recreational use of the national parks to the same level as protection of park resources." *See* Robert B. Keiter, *Breaking Faith with Nature: The Bush Administration and Public Land Policy*, 27 J. LAND RESOURCES & ENVTL. L. 195, 211, 251 (2007) (arguing that final 2006 MANAGEMENT POLICIES reconfirmed conservation mandate as predominant). For a discussion of the 2001 MANAGEMENT POLICIES, see generally Fund for Animals v. Norton, 294 F. Supp. 2d 92, 103 (2003).

In August 2006, the Park Service released final revised management policies, "in part to reflect changing recreational uses and evolving technologies."[72] Section 1.4.3 of the 2006 Management Policies maintains an emphasis on conservation.[73] The 2006 Management Policies acknowledge that courts' interpretation of the Organic Act has been: "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant."[74]

Section 1.4.3 states that the Organic Act's purpose "begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired."[75] With regard to "enjoyment," Section 1.4.3 reads:

> The enjoyment that is contemplated by the statute is broad; it is the enjoyment of all the people of the United States and includes enjoyment both by people who visit parks *and by those who appreciate them from afar.* It also includes deriving benefit (including scientific knowledge) and inspiration from parks, as well as other forms of enjoyment and inspiration.[76]

The final 2006 Management Policies also retained the impairment standard articulated in the 2001 Management Policies. [77] The Park Service defines "impairment" as "an impact that . . . would

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72. *See* CALVERT, *supra* note 33 (discussing reasons why Park Service revised its policies); *see generally* 2006 MANAGEMENT POLICIES, *supra* note 23 (revising 2001 MANAGEMENT POLICIES).

73. *See* CALVERT, *supra* note 33 (claiming 2006 MANAGEMENT POLICIES "retain[ed] the 2001 edition's emphasis on conserving park resources in conservation/use conflicts"). *Compare* 2001 MANAGEMENT POLICIES, *supra* note 71, *with* 2006 MANAGEMENT POLICIES, *supra* note 23.

74. 2006 MANAGEMENT POLICIES, *supra* note 23 ("Congress . . . recognize[d] that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired.").

75. *Id.* (acknowledging that this interpretation is supported by "the Organic Act and reaffirmed by the General Authorities Act, as amended"). Section 1.4.3 further states "the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values." *Id.*

76. *Id.* (emphasis added).

77. *See* JAMES RASBAND, ET AL., NATURAL RESOURCES LAW AND POLICY 618 (2d ed. 2009) (claiming that revised 2006 MANAGEMENT POLICIES reiterated Park Service's 2001 interpretation of impairment). Section 1.4.6 of the 2006 MANAGEMENT POLICIES lists certain park resources and values as being subject to the non-impairment standard. *See* 2006 MANAGEMENT POLICIES, *supra* note 23, at § 1.4.6.

harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values.[78]

> Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts. . . . An impact would be less likely to constitute an impairment if it is an unavoidable result of an action necessary to preserve or restore the integrity of park resources or values and it cannot be further mitigated. An impact that may, but would not necessarily, lead to impairment may result from visitor activities . . . .[79]

Section 1.4.7.1 of the 2006 Management Policies takes impairment a step further by establishing "a standard that offers greater assurance that impairment will not occur."[80] This standard requires the Park Service to avoid uses that would cause "unacceptable impacts," which are impacts that "fall short of impairment, but are still not acceptable within a particular park's environment."[81]

4. *National Environmental Policy Act*

Apart from the Organic Act, the statute with the greatest impact on national park management is the National Environmental Policy Act ("NEPA").[82] NEPA requires all federal agencies to con-

78. 2006 MANAGEMENT POLICIES, *supra* note 23, at § 1.4.5 ("What Constitutes Impairment of Park Resources and Values").

79. *Id.*

80. *Id.* § 1.4.7.1 ("Unacceptable Impacts").

81. *Id.* Section 1.4.7.1 defines unacceptable impacts as:

> [I]mpacts that, individually or cumulatively, would be inconsistent with a park's purposes or values, or impede the attainment of a park's desired future conditions for natural and cultural resources as identified through the park's planning process, or create an unsafe or unhealthful environment for visitors or employees, or diminish opportunities for current or future generations to enjoy, learn about, or be inspired by park resources or values, or unreasonably interfere with park programs or activities, or an appropriate use, or the atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park . . . .

Id.

82. 42 U.S.C. §§ 4321-4347 (2006). Other statutes that greatly influence national park management include the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006), the Wilderness Act, 16 U.S.C. §§ 1131-1136 (2006), the Wild Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (2006), the Clean Water Act, 33 U.S.C. §§ 1251-1376 (2006), the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (2006),

duct an environmental review "for major Federal actions significantly affecting the quality of the human environment."[83] The 2006 Management Policies require the Park Service to consider any environmental reviews conducted pursuant to NEPA when determining whether an activity would cause impairment.[84] NEPA is meant to "foster excellent action" and does not mandate particular results or substantive requirements.[85] NEPA review, however, must include information regarding the environmental impact of the proposed action, any unavoidable adverse environmental effects,

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and the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785 (2006). The Endangered Species Act delegates authority to the Fish and Wildlife Service to list species as endangered or threatened, to designate critical habitat for listed species, and to prohibit any "taking" of listed species. *See* 16 U.S.C. § 1533(c) (2006) ("The Secretary of the Interior shall publish . . . a list of all . . . endangered species and a list of all . . . threatened species."); *see also* 16 U.S.C. § 1538(a)(1)(B)-(C) (2006) (listing unlawful acts involving endangered species). Listing decisions require consideration of "present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence." 16 U.S.C. § 1533(c). Department of the Interior regulations apply the ESA's prohibition on takes to threatened species. *See* 50 C.F.R. §§ 17.31, 17.21 (2011) (applying prohibition on takes to threatened species). "Take" includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Regulations further define "harm" as "an act which actually kills or injures wildlife" and includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (2011).

83. 42 U.S.C. § 4332 (2006). NEPA declares "a national policy which will encourage productive and enjoyable harmony between man and his environment[,] . . . promote efforts which will prevent or eliminate damage to the environment and biosphere[,] . . . stimulate the health and welfare of man[, and] enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321 (2006). A "major Federal action" is an action "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2011). There are four categories of Federal actions under NEPA: "adoption of a federal policy," "adoption of formal plans," "adoption of programs," and "approval of specific projects." 40 C.F.R. § 1508.18(b) (2011).

84. *See* 2006 MANAGEMENT POLICIES, *supra* note 23, at § 1.4.7 ("In making a determination of whether there would be an impairment, [a Park Service] decision-maker must . . . consider any environmental assessments or environmental impact statements required by . . . NEPA.").

85. *See* 40 C.F.R. § 1500.1 (2011) ("NEPA's purpose is not to generate paperwork–even excellent paperwork–but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather than unwise-agency action.") (footnote omitted).

and alternatives to the proposed action.[86] All agencies subject to NEPA must comply with NEPA's requirements "to the fullest extent possible."[87]

NEPA regulations provide for three different types of environmental review: an environmental impact statement ("EIS"), an environmental assessment, and a categorical exclusion.[88] An EIS is required for all agency actions that will significantly affect the environment.[89] Agencies must prepare a supplemental EIS ("SEIS") if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[90]

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86. *See* 42 U.S.C. § 4332 (detailing requirements of NEPA review).

87. *See* 40 C.F.R. § 1500.6 (2011) (defining term "to the fullest extent possible" to mean that federal agencies must comply with NEPA "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible").

88. *See* 40 C.F.R. § 1508.11 (2011) (defining EIS). An agency may prepare an environmental assessment instead of an EIS if the agency action might not have significant environmental effects or if an agency is unsure of the degree of significant effects an action may have. *See* 40 C.F.R. § 1508.13 (2011) (explaining circumstances that require preparation of environmental assessment). An environmental assessment must discuss the "need for the proposal, alternatives" and "environmental impacts of the proposed action." 40 C.F.R. § 1508.9(b) (2011). If the agency determines the action will result in significant environmental impacts, it must prepare an EIS. *See* 40 C.F.R. § 1508.13 (2011) (requiring preparation of EIS after environmental assessment if results of environmental assessment indicate action will likely result in significant environmental impacts). If the agency determines that the action will not result in significant environmental impacts, it can issue a "finding of no significant impact." *See id.* (describing possible outcomes of environmental assessments). A finding of no significant impact is a statement explaining "why an action . . . will not have a significant effect on the human environment." *Id.* A categorical exclusion is a "category of actions which do not individually or cumulatively have a significant effect" on the environment. 40 C.F.R. § 1508.4 (2011). If an agency issues a categorical exclusion, it does not have to prepare an EIS or an environmental assessment. *See id.* (explaining effects of issuing categorical exclusion).

89. *See* 40 C.F.R. § 1502.3 (2011) (explaining when EIS is required). An EIS ensures that a federal agency has considered significant environmental impacts and a reasonable range of alternatives of a proposed major federal action. *See* 40 C.F.R. § 1502.1 (2011) (requiring consideration of reasonable range of alternatives). An EIS must also be prepared in draft form, and agencies must allow time for comment before issuing a final EIS. *See* 40 C.F.R. § 1502.9 (2011) (requiring public comment for EIS).

90. 40 C.F.R. §§ 1502.9(c)(1)(i), (ii) (2011).

5. *Environmental Protection Agency Regulations*

Until 2006, snowmobile emissions were not regulated in the United States.[91] In 2000, the Park Service determined that the eight-hour maximum concentration of carbon monoxide at the West Yellowstone entrance of the park exceeded the Clean Air Act's National Ambient Air Quality Standard for carbon monoxide by almost seventy percent.[92] The Park Service also concluded that snowmobiles accounted for 97.9% of the carbon monoxide at West Yellowstone during the winter season.[93] In response, the Environmental Protection Agency ("EPA") promulgated regulations in 2002, which became effective in 2006 and required reductions of both carbon monoxide and hydrocarbon emissions from new snowmobiles by roughly thirty percent by 2006 and fifty percent by 2012.[94]

EPA also has independent authority to regulate noise from transportation equipment, including recreational vehicles and re-

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91. *See* MCCARTHY, *supra* note 12, at 9 (providing overview of snowmobile regulation in United States).

92. *See id.* at 10 (listing measured emissions from snowmobiles); *see also* Record of Decision, 65 Fed. Reg. 80,908, 80,916 (Dec. 22, 2000) ("We have also determined that the snowmobile use now occurring is inconsistent with the requirements of the Clean Air Act . . . ."). The Park Service also stated that:

> The effect of snowmobile emissions on air quality was identified as a concern with respect to health, natural resources, and aesthetic and wilderness values. For example, on high snowmobile use days in [Yellowstone], the visual evidence and odor of snowmobile exhaust is apparent in some areas. The effect of hydrocarbons, carbon monoxide, and particulate matter emitted by snowmobiles on water quality was also a concern.

Id. at 80,919.

93. *See* MCCARTHY, *supra* note 12, at 10 (stating percentage of total emissions); 65 Fed. Reg. at 80,912 ("Park concessions will be required to mitigate the impacts of air pollution during the interim period by selling only bio-fuels and synthetic lubes inside the park.").

94. *See* Control of Emissions from Nonroad Large Spark-Ignition Engines, and Recreational Engines (Marine and Land-Based), 67 Fed. Reg. 68,242, 68,271-73 (Nov. 22, 2002) (discussing EPA's regulations that reduce hydrocarbon emissions); *see also* Exhaust Emissions Standards for 2012 and Later Model Year Snowmobiles, 73 Fed. Reg. 35,946, 35,946 (June 25, 2008) (revising prior rule after court remand). The level of emissions produced by a snowmobile depends largely on whether the vehicle contains a two-stroke engine or a four-stroke engine. *See* MCCARTHY, *supra* note 12, at 10 (comparing two-stroke and four-stroke snowmobiles). Two-stroke engines take in fuel in the combustion chamber at the same time that exhaust gases are ejected, resulting in roughly one-third of the fuel passing through the engine without being combusted and, therefore, lower fuel economy and higher emissions. *See id.* (explaining engineering of two-stroke engine). Four-stroke engines take in fuel in the combustion chamber, compress it, ignite it, and exhaust it in separate cycles, which results in more complete combustion and lower emissions. *See id.* at 10 n.32 (explaining engineering of four-stroke engine).

lated equipment, under the Noise Control Act.[95] The Agency's Office of Noise Abatement and Control was defunded in 1982, however, and EPA has not issued any rules under the Noise Control Act.[96]

Congress has previously addressed snowmobiles in Yellowstone in appropriations bills, usually to safeguard snowmobile use from adverse judicial rulings.[97] As of October 28, 2011, no legislation pertaining to snowmobiles in Park Service territory has been introduced in the 112th Congress. [98]

III. MANAGING SNOWMOBILE ACCESS IN YELLOWSTONE NATIONAL PARK WITHIN COMPETING DEFINITIONS OF NATURE AND RECREATION

A. Economic and Environmental Impacts of Snowmobile Use

The western United States boasts substantial demand for recreation on federal lands.[99] This demand stems from increasing population and development in western states, the proximity of public lands to urban areas, and the growing demand for outdoor recreation.[100] Over the last forty years, snowmobiling has increased in popularity while the amount of federal land available for snowmobiling has diminished.[101] Nevertheless, yearly snowmobile use in Yellowstone reached a peak of 87,206 during the 2001-2002 winter

95. *See* Noise Control Act of 1972, 42 U.S.C. §§ 4901-4908 (2006) (declaring federal authority to promote noise-free environment because "inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population . . . .").

96. *See* McCarthy, *supra* note 12, at 9 (reporting that EPA has failed to promulgate any rules under Noise Control Act). When EPA issued its snowmobile emissions regulations, it announced that it lacked the funding to concurrently implement noise regulations. *See* U.S. EPA, Office of Air and Radiation, Summary and Analysis of Comments: Control of Emissions from Unregulated Nonroad Engines, II-78 (Sept. 2002) (explaining reasons for failure to promulgate noise regulations).

97. *See* Calvert, *supra* note 33, at 11 (discussing congressional actions addressing snowmobile regulation in national parks).

98. *See id.* at 11 (recognizing lack of any current congressional proposals to address snowmobile use on Park Service lands).

99. *See id.* at 1 (citing statistics of growing demand for recreation in western United States).

100. *See id.* (discussing boom in demand for recreational activity in western United States); *see also* Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 Ecology L.Q. 521, 537-38 (1996) ("The overpopulation of the West, which threatens its natural systems, is a direct result of providing below-cost resources (water, electricity, minerals, timber, and recreational areas) to private parties."); Laitos, *supra* note 17 (discussing reasons for national increase in recreational use).

101. *See* Calvert, *supra* note 33, at 2 (announcing dilemma caused by increased desire for recreation and fewer areas for such use).

season, but during the 2009-2010 season, only 22,228 used snowmobiles in Yellowstone, roughly half the yearly average over the past eleven years.[102] The daily average snowmobile use in Yellowstone has also dropped from 299 during the 2006-2007 winter season to 187 during the 2009-2010 winter season.[103]

1. *The Pro-Snowmobile Position*

Generally, pro-snowmobile groups argue that the recreational value attributable to public lands has significant economic importance.[104] The Yellowstone region's tourism industry rakes in roughly $700 million a year from park visitors.[105] A large piece of this revenue is based on the North American snowmobile industry, which generates $22 billion a year and maintains over 90,000 full time jobs involving manufacturing, dealerships, and tourism-related businesses.[106] Allowing snowmobile access on public lands can pro-

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102. *See id.* at 145 (providing data on declining yearly snowmobile use).

Season	Yearly snowmobile use
1999-2000	76,571
2000-2001	84,473
2001-2002	87,206
2002-2003	60,406
2003-2004	30,210
2004-2005	24,049
2005-2006	28,833
2006-2007	31,805
2007-2008	31,420
2008-2009	23,417
2009-2010	22,228
Average	45,511

Id.

103. *See id.* at 146 (providing data on declining daily average snowmobile use).

Season	Daily Average	Peak	Daily Limit
2006-2007	299	542	720
2007-2008	294	557	720
2008-2009	205	426	720
2009-2010	187	293	318

Id.

104. *See* Laitos & Carr, *supra* note 17, at 199-220 (discussing role of recreation on public lands to U.S. economy).

105. *See* Stephen Saunders et al., *Greater Yellowstone in Peril: The Threats of Climate Disruption*, ROCKY MOUNTAIN CLIMATE ORGANIZATION 4 (Sept. 2011), *available at* http://www.rockymountainclimate.org/images/YellowstoneInPeril.pdf (coordinating with Greater Yellowstone Coalition).

106. *See Snowmobiling Quick Facts & Stats*, INT'L SNOWMOBILE MFRS. ASS'N, http://www.snowmobile.org/pr_snowfacts.asp (last visited Mar. 9, 2012) (acknowledging 1.55 million registered snowmobiles in United States and stating that average North American snowmobiler rides 1414 miles per year).

vide substantial economic benefits to resident states.[107] Many states reap the benefits of economic stimulus provided through the many companies offering guided snowmobile tours, which typically generate revenues of $100 to $300 per person per day.[108]

The International Snowmobile Manufacturer's Association ("ISMA") is the representative industry organization for the four major snowmobile manufacturers.[109] According to the ISMA, the main reasons people ride snowmobiles are for scenery, spending time with friends, escaping the "usual demands of life," spending time with family, and being close with nature.[110] Roughly eighty percent of riders use snowmobiles merely for recreational riding,

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107. *See* Erin Carver & James Caudill, *Banking on Nature 2006: The Economic Benefit to Local Communities of National Wildlife Refuge Visitation*, FISH AND WILDLIFE SERV. i-iii (Sept. 2007), *available at* http://www.fws.gov/refuges/about/pdfs/BankingOnNature2006_1123.pdf (pointing out that U.S. national wildlife refuges generate roughly four times economic activity as is appropriated by Congress to National Wildlife Refuge System); *see also* CALVERT, *supra* note 33, at 2 (noting that pro-snowmobilers claim that off-highway vehicles, including snowmobiles, bring "economic benefits to communities serving riders . . . ").

108. *See* Simon, *supra* note 3 (reporting high number of recreational offerings in surrounding area of Yellowstone National Park). For a list of snowmobile rental companies surrounding Yellowstone, see TWO TOP SNOWMOBILE RENTAL, INC. (last visited Mar. 15, 2012), http://www.twotopsnowmobile.com/; YELLOWSTONE TOURS (last visited Mar. 15, 2012), http://www.yellowstonesnowmobiles.com/; OLD FAITHFUL SNOWMOBILE TOURS (last visited Feb. 10, 2012), http://www.snowmobilingtours.com/; JACKSON HOLE SNOWMOBILING TOURS (last visited Mar. 15, 2012), http://www.jacksonholesnowmobile.com/snowmobile-tours.php; YELLOWSTONE SNOWMOBILE TOURS, INC. (last visited Mar. 15, 2012), http://snowmobileyellowstone.com/; YELLOWSTONE ADVENTURES (last visited Mar. 15, 2012), http://www.yellowstoneadventures.com/; BACK COUNTRY SNOWMOBILE ADVENTURES (last visited Mar. 15, 2012), http://backcountry-adventures.com/; HICOUNTRY SNOWMOBILES (last visited Mar. 15, 2012), http://hicountrysnowmobiles.com/current-specials/; ALL YELLOWSTONE SPORTS (last visited Mar. 15, 2012), http://allyellowstone.com/calculate-your-package.html; YELLOWSTONE ARCTIC YAMAHA (last visited Mar. 15, 2012), http://www.yellowstonearcticyamaha.com/rentals/snowmobile-yellowstone/; ROCKY MOUNTAIN SNOWMOBILE TOURS (last visited Mar. 15, 2012), http://rockymountainsnow.com/ ; SCENIC SAFARIS (last visited Mar. 15, 2012), http://scenic-safaris.com/snowmobile/; WYOMING ADVENTURES (last visited Mar. 15, 2012), http://www.wyoming-adventures.com/pages/main.html#tours.

109. *See Snowmobiling Quick Facts & Stats*, *supra* note 106 (name four major snowmobile manufacturers: Arctic Cat, BRP, Polaris Industries, and Yamaha Motor Corporation); *see also id.* (reporting over forty registered non-profit associations representing snowmobilers in North America).

110. *See Snowmobiling Fact Book: The Snowmobile Lifestyle,* INT'L SNOWMOBILE MFRS. ASS'N, http://www.snowmobile.org/facts_sport.asp (last visited Mar. 9, 2012) (citing Montana State University study and research conducted by Consumer Insights). The ISMA believes that snowmobiling is "great exercise" and an "an invigorating sport that is great for stress release and good mental health." *Snowmobiling Quick Facts & Stats*, *supra* note 106. Further, the ISMA asserts that in many winter regions, snowmobiling is the main form of winter outdoor recreation and sometimes the primary method of transportation available. *See id.* (outlining purported benefits of snowmobiling).

while twenty percent of riders use them for work, ice fishing, and transportation.[111]

Proponents claim that snowmobiles "provide outdoor recreation opportunities for the disabled, senior citizens, and others with mobility limitations; visitor access to hard-to-reach natural areas . . . increased access to sites during the winter season."[112] They argue that the adverse environmental effects proposed by environmental groups are exaggerated.[113]

Snowmobilers assert that they care about the land on which they ride.[114] Some groups argue that advances in technology continue to limit air and noise pollution.[115] For example, while pre-1969 snowmobiles were noisy and emitted sound levels as high as 102 decibels from a distance of 50 feet, which is comparable to the sound produced by a diesel truck, updated regulations require that snowmobiles manufactured after 1976 emit no more than 73 decibels from a distance of 50 feet while traveling at 15 miles per hour, which is comparable to the sound produced by city traffic.[116] Overall, snowmobilers argue that they do not have a significant impact on wildlife.[117]

2. *The Pro-Environment Position*

Environmental groups do not believe that they should be forced to bear the burden of the environmental externalities caused by snowmobiling.[118] They contend that, in addition to mo-

111. *See Snowmobiling Fact Book*, *supra* note 110 (naming primarily uses for snowmobiles).

112. CALVERT, *supra* note 33, at 2.

113. *See Snowmobiling Fact Book: Effects of Snowmobiling on . . .* , INT'L SNOWMOBILE MFRS. ASS'N, http://www.snowmobile.org/facts_ece.asp (last visited Mar. 9, 2012) (dismissing environmentalists claims of adverse environmental impacts of snowmobiling on wildlife, air quality, soundscapes, snowmelt, human health, and compaction and vegetation).

114. *See* Laura Bruno, *Off-Roaders in Search of Trails*, USA TODAY, Apr. 6, 2010, at 3A ("Riders care about the land . . . using their vehicles to appreciate sites they could not reach on foot.").

115. *See* CALVERT, *supra* note 33, at 2 (explaining snowmobilers' argument for why improved technology limits air pollution, and therefore more snowmobiles should be permitted in national parks).

116. *See Snowmobile Fact Book: Sound & Environment*, INT'L SNOWMOBILE MFRS. ASS'N, http://www.snowmobile.org/facts_sound.asp (last visited Mar. 9, 2012) (discussing noise pollution reductions achieved over prior decades).

117. *See generally* P.J. White et al., *Wildlife Responses to Motorized Winter Recreation in Yellowstone*, NAT'L PARK SERV. (July 2005), *available at* http://www.nps.gov/yell/parkmgmt/upload/winterrec05.pdf (finding little impact on wildlife from snowmobiling and suggesting ways to mitigate any impacts).

118. *See generally* Christopher B. Chuff, Comment, *"Rolling the Dice" on Financial Regulatory Reform: Gambling Law as a Framework for Regulated Structured Invest-*

torized recreation, non-motorized recreation also has a beneficial economic impact on local communities.[119] Environmentalists also point to a steep decrease in snowmobiles in Yellowstone over the past decade as evidence that current access limits are significantly higher than necessary, given the much lower corresponding actual visitation levels.[120]

Furthermore, snowmobiles cause "potential damage to wildlife habitat and land and water ecosystems, such as the impact of dust on winter snow melts and water supply; noise, air, and water pollution; and a diminished experience for recreationalists seeking quiet and solitude and/or hunting and fishing opportunities."[121] Due to the expansive areas covered by the national parks, illegal snowmobile use can increase such damage.[122]

Air pollution from snowmobiles causes devastating impacts on national parks.[123] In 2008, a standard snowmobile emitted as much

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ments, 18 VILL. SPORTS & ENT. L.J. 569 (2011) (discussing approaches to reducing externalities in variety of economic contexts, which vary drastically from issues presented by environmental externalities, where regulators are faced with task of assigning monetary value to natural resources).

119. *See* CALVERT, *supra* note 33, at 2 (citing economic benefits of quieter forms of recreation); *see also* Eryn Gable, *Public Lands: Economic Model Cites Benefits of 'Quiet' Recreation*, E&E News, Oct. 29, 2009, http://www.responsibletrails.org/pdf/National/public-lands-economic-model-cites-benefits-of-quiet-recreation.pdf (finding "quiet recreation" is more economically beneficial to community than motorized recreation); Kreg Lindberg & John Loomis, *Economic Impacts of Non-Motorized (Quiet) Recreation on the Wallowa-Whitman National Forest,* CENT. OR. RECREATION SERVS. FOR THE WILDERNESS SOC'Y, Mar. 11, 2009, http://wilderness.org/files/WWNF-Economic-Impact-Report.pdf (discussing economic benefits of non-motorized recreation including sales, labor income, and employment).

120. *See* 2011 DRAFT LONG-TERM WINTER USE PLAN, *infra* note 350, at 145-46 (documenting drop in winter snowmobile users).

121. CALVERT, *supra* note 33, at 2.

122. *See* Jason Rapp, Comment, *Snowmobiling and National Park Management: To Conserve for Future Generations or Provide for Public Enjoyment?*, 17 TUL. ENVTL. L.J. 301, 324-25 (2004) (discussing destructive effects of illegal snowmobile use). For example, in 2004, the Park Service reported that the "worst case of illegal snowmobile use ever recorded on Yellowstone West Entrance Road has damaged trees and shrubs in park meadows." *See id.* (internal quotations omitted) (citing *Higher Court Leaves Snowmobile Phaseout in Place in Yellowstone*, COMMON DREAMS PROGRESSIVE NEWSWIRE, Jan. 13, 2004, http://www.commondreams.org/news2004/0114-04.htm); *see also* Cart, *supra* note 3 (including picture of group of at least thirteen snowmobiles when maximum group size is only eleven).

123. *See* George Cameron Coggins & Robert L. Glicksman, *Criteria Pollutants*, 2 Pub. Nat. Resources L. § 18:2 n.4 (2d ed. 2011) (explaining how heavy snowmobile use in Yellowstone caused carbon monoxide levels to exceed NAAQS during 1994-1995 winter season). In addition,

> Ozone also may injure plant life. Symptoms of weakened resistance to parasitic infestations, slow growth, and yellowing of foliage of trees in the parks all have been traced to ozone pollution. Nitrogen oxides and sulfur dioxide concentrations have had similar effects. Nitrogen compounds can increase vulnerability to frost damage, interfere with trees'

hydrocarbon and carbon monoxide in one hour as a car emitted in 54,000 miles and 1050 miles, respectively.[124] In other words, in merely one day of use, a snowmobile could emit as much hydrocarbon as a car could over its entire lifetime. [125] In 2001, the Park Service estimated that the roughly 1000 snowmobiles entering Yellowstone each day emitted air pollution "equivalent to the tailpipe emissions of 1.7 million cars."[126] While only six percent of Yellowstone's vehicular traffic was attributable to snowmobiles in 2000, they emitted roughly ninety percent of all hydrocarbons and sixty-eight percent of all carbon monoxide emissions in the park.[127] In addition, the hydrocarbons emitted from snowmobiles contain

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> ability to withstand drought, and withhold soil nutrients such as magnesium from trees. Sulfur dioxide, which has been measured at levels close to or exceeding the national ambient air quality standards in many parks, can disrupt natural ecosystems by damaging forests and destroying lichen species. Soot deposition reduces snow accumulation and spring snowmelt, especially in the central Rockies.

Id. § 18:2 (footnotes omitted). For a further discussion of snowmobile emissions in Yellowstone Park, see Millner, *supra* note 10 (providing overview of issues in Yellowstone snowmobile debate).

124. *See* McCarthy, *supra* note 12, at 10-11 ("In one hour, a new model snowmobile emits as much hydrocarbon as a 2008 model auto emits in about four years (54,000 miles) of driving."); *see also* Hooper, *supra* note 12 (citing Consolidated Amended Complaint for Declaratory and Injunctive Relief, Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003), which stated that two-stroke snowmobile produces more emissions in one hour than car produces in one year).

125. *See* McCarthy, *supra* note 12, at 10-11 ("The Environmental Protection Agency (EPA) promulgated regulations limiting air emissions from snowmobiles in 2002, but the regulations have the effect of allowing the machines to emit as much hydrocarbon pollution in a day as a new auto emits in its lifetime.").

126. *See* Richard J. Ansson, Jr. & Dalton L. Hooks, Jr., *Protecting and Preserving our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act?*, 62 Mont. L. Rev. 213, 224 (2001) (discussing emissions from snowmobiles); s*ee also* Rasband, *supra* note 77, at 617-18 (describing snowmobile emissions).

127. *See* Coggins, *supra* note 123, § 18:2 n.4 (citing *Ousting Snowmobiles from Yellowstone*, N.Y. Times, Apr. 16, 2000, at 14) (analyzing emissions from snowmobiles relative to all motorized access in Yellowstone throughout year); *see also* Hooper, *supra* note 12, at 109,75 (citing Yellowstone Protection Act, H.R. 1130, 108th Cong. (2003) for fact that even though cars outnumber snowmobiles sixteen to one, snowmobiles emit sixty-eight percent of Yellowstone's annual carbon monoxide and ninety percent of its annual hydrocarbon). A 1999 Environmental Protection Agency report determined that while OHVs represent two percent of the overall mobile sources in the United States, snowmobiles and other off-highway vehicles emit fifteen percent of all hydrocarbons from mobile sources and nine percent of all carbon monoxide from mobile sources, which includes planes, trains, and automobiles. *See* Control of Emissions From New Nonroad Spark-Ignition Engines Rated Above 19 Kilowatts and New Land-Based Recreational Spark-Ignition Engines, 64 Fed. Reg. 6008, 6008-13 (Feb. 8, 1999) (summarizing EPA study on nation-wide emissions produced from OHVs as well as all other motorized vehicles).

highly hazardous substances, such as benzene, formaldehyde, and at least three other known or potential carcinogens.[128]

In 1996, the Park Service announced that snowmobile use caused Yellowstone National Park to contain the highest carbon monoxide levels of any area in the United States.[129] Sometimes the pollution from snowmobiles has become so bad that park rangers have resorted to wearing gas masks to avoid feeling dizzy and ill.[130] In 2003, the D.C. District Court noted that "one study found that carbon monoxide levels in some areas of Yellowstone were higher than that in the city of Los Angeles."[131] Even more troubling, snowmobile emissions result in reduced visibility at the park, caused by massive buildups of particulate matter.[132] In contrast to snowmobile proponents, environmentalists worry that snowmobiles which are purportedly equipped with "best available technology" ("BAT"), still fail to meet acceptable standards.[133] One commentator cited that the "Park Service attributes the increase in emissions to an increase in horse power."[134]

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128. *See* McCarthy, *supra* note 12, at 10 (reporting hazardous substances emitted by snowmobile engines).

129. *See* Dan Egan, *Yellowstone: Geysers, Grizzlies and the Country's Worst Smog*, High Country News (Apr. 1, 1996), http://www.hcn.org/issues/56/1756 (reporting that world's "oldest national park has flunked three tests for federal carbon monoxide standards during the past 14 months, and the Park Service says the most recent, conducted March 2, confirms that the air is dangerous on busy winter days. . .[t]he culprit: snowmobiles").

130. *See* Blane Harden, *Snowmobilers Favoring Access to Yellowstone Have Found an Ally in Bush*, N.Y. Times, Mar. 6, 2002 at A16 (discussing Bush Administration's snowmobile policy in Yellowstone National Park); *see also Park Rangers with Respirators*, N.Y. Times, Mar. 6, 2002, at A20 ("[W]orkers at the kiosks at the park's western entrance were issued respirators to help them deal with the carbon monoxide created by the hundreds of snowmobiles that gather there on winter mornings."); Hooper, *supra* note 12 (citing Yellowstone Protection Act, H.R. 1130, 108th Cong. (2003) and reporting that as result of emissions, some Yellowstone employees experienced health problems, including "sore throats, headaches, lethargy, eye irritation, and lung problems," and in 2002, Park Service actually issued respirators to employees who worked near snowmobiles).

131. Fund for Animals v. Norton, 294 F. Supp. 2d 92, 114 (D.D.C. 2003) (citing Bluewater Network's 1999 Rulemaking Petition which argued that snowmobiles should be banned from Yellowstone National Park).

132. *See* Hooper, *supra* note 12, at 10,975-76 (citing Consolidated Amended Complaint for Declaratory and Injunctive Relief, Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003)).

133. *See id.* at 10,981 (stating that "the 2003 Rule specifically states that Park Service analysis indicates that some snowmobile emission in the 2004 model year have actually increased since the 2002 model year, and that even 2004 models that have been certified as BAT have slightly increased CO emission relative to 2002 models").

134. *Id* at 10,981-82 (describing Park Service's comparison of 2004 model snowmobile to 2002 model snowmobile); *see also id.* at 10,975 n.7 ("Yamaha's first snowmobile, produced in 1968, was powered by a 20-horsepower engine; the com-

In addition, the Park Service has noted that noise from snowmobiles can be heard over much greater distances than can noise from automobiles and that this noise is essentially continuous at popular locations in Yellowstone throughout the winter season.[135] For example, the Park Service determined that park visitors could hear snowmobile noise ninety-five percent of the time at Old Faithful.[136] In addition, environmentalists cite evidence that newer model snowmobiles are just as loud as older ones.[137] During the 2003-2004 winter season, Yellowstone employees who worked near snowmobiles were given special devices to prevent hearing loss.[138]

Another adverse environmental impact caused by snowmobiling is the added stress placed on indigenous wildlife.[139] In 2001, researchers discovered a correlation between snowmobiling and elevated hormonal stress levels in Yellowstone elk as well as wolves in other national parks.[140] Researchers noted that stress hormones in elk fluctuated on a weekly basis in direct correlation with snowmobile activity.[141]

Snowmobiling can also discourage recreationists who wish to enjoy the park in a peaceful manner, such as hikers and cross-country skiers.[142] Environmentalists point out that some riders believe that enjoying the park's scenery is secondary to the rush of riding a

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pany's new RX Warrior has a 145-horsepower engine, bigger than the motor of a Honda Civic.").

135. *See* Rule Phasing Out Snowmobile Use in Yellowstone National Park, 65 Fed. Reg. 79,024, 79,026 (proposed Dec. 18, 2000) ("[I]n Yellowstone, snowmobile noise can be heard 95 percent of the time by visitors at Old Faithful and 87 percent of the time at the Grand Canyon of the Yellowstone.").

136. *See id.* (reporting that snowmobiles can also be heard eighty-seven percent of time at Grand Canyon of Yellowstone).

137. *See Leaked Documents Report Lies About Snowmobiles in Parks*, COALITION OF CONCERNED NAT'L PARK SERV. RETIREES (Apr. 14, 2004), http://www.cs.cornell.edu/gries/howbushoperates/suppresssnowmobile.html (reporting on leaked documents that suggest new models are not less noisy than older models, despite findings from other reports).

138. *See* Hooper, *supra* note 12, at 10976 (citing Consolidated Amended Complaint for Declaratory and Injunctive Relief, Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003)) (reporting effect of snowmobile noise on workers).

139. *See* Marcia Goodrich, *Snowmobiles, Wolves and Elk: The Straight Poop*, MICH. TECH, http://www.admin.mtu.edu/urel/news/media_relations/83/ (last visited Mar. 9, 2012) (explaining research supporting position that snowmobiles have adverse impacts on national park wildlife).

140. *See id.* (discussing research published in Journal of Conservation Biology).

141. *See id.* (linking snowmobile activity to elevated stress hormones in elk).

142. *See* Rasband, *supra* note 77, at 618-22 (explaining how conflicts between different visitor groups can diminish visitor experience).

snowmobile.[143] For example, one rider articulated this feeling, stating that snowmobiling is "for the thrill . . . the rush . . . the wind in your face . . . ."[144] In addition, snowmobiles also present a human safety hazard in and of themselves, sometimes resulting in crashes that cause serious injuries to riders.[145]

B. Natural Resources Management and Recreation on Public Lands

A century ago, most Americans lived in a rural setting, whereas today, Americans live in increasingly urban areas.[146] Some believe that this demographic shift caused nature to become less of a basic element of American life.[147] Others suggest that this social movement necessitates an increasing need for the federal government to conserve what public land is still available for the enjoyment of current and future generations.[148]

1. *Theories of Nature*

While the Park Service is obligated to preserve Yellowstone in its "natural condition," many commentators fail to define exactly what "natural" means, let alone the complex relationship between conflicting views of recreation and nature.[149] Underlying the Park Service's recreational decisions under the Organic Act's preservation/use mandate is the question, what natural resources are worth protecting?[150]

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143. *See* Dennis McCauliffe, Jr., *Snowmobilers Could Shift Into Park Again: U.S. May Ease Ban on Vehicles in Yellowstone*, WASH. POST, Feb. 15, 2002, at A3 (discussing competing views of snowmobile use in Yellowstone).

144. *See id.* (discussing competing views of snowmobile use in Yellowstone).

145. *See Wisconsin Man Injured in Snowmobile Crash*, BOZEMAN DAILY CHRONICLE (Feb. 8, 2012), http://www.bozemandailychronicle.com/news/county/article_948fa894-5278-11e1-adbd-0019bb2963f4.html (reporting story of man flown by helicopter to hospital after crashing snowmobile seventeen miles south of West Yellowstone near Yellowstone National Park border).

146. *See* Keiter, *supra* note 4, at 104 (observing historic demographic shifts in U.S. population).

147. *See id.* (arguing that any increases in park visitation are offset by proliferation of improved U.S. transportation system).

148. *See* 16 U.S.C. § 1 (2006) (requiring Park Service to conserve park resources in manner that does not impair enjoyment of those resources for future generations).

149. *See* 16 U.S.C. § 22 (2006) (demanding that Yellowstone be maintained in its "natural condition"); *see also* Prugh, *supra* note 60, at 179 (claiming Organic Act, Executive Orders, Yellowstone National Park Act, Park Service regulations, and Management Policies "prioritize preservation of the park in its natural state").

150. *See* Rasband, *supra* note 77, at 2-36 (providing broad overview of variety of theories of nature and natural resources).

a. Defining Nature

One scholar noted that "the laws and policies governing the public lands are a mirror reflection of the larger societal trends that are reshaping the prevailing social order."[151] In other words, nature is inherently a social construct and has no independent meaning.[152] Environmental historian, William Cronon identified distinct categories of nature and suggests that a disagreement over the hierarchy of these categories underlies the contentiousness of natural resources policy.[153] These categories include "nature as naïve reality," an objective, non-questioning position towards the nature of things; "nature as moral imperative," a belief that natural resources are superior and should be protected; "nature as Eden," a belief in one correct concept of nature that we are all striving for, the nature that existed before human interaction; "nature as artifice," the created landscape through human intervention; "nature as virtual reality," a detached, computerized view of the world; "nature as demonic other," nature as a nonhuman world; "nature as commodity," the tourist attraction value; and "nature as contested terrain," assigning a property value to natural resources.[154]

The Organic Act's preservation/use mandate creates tension between two of these views: "nature as commodity" and "nature as a moral imperative."[155] Snowmobilers support a "nature as commodity" position, arguing that Yellowstone's natural resources should be reserved primarily for human enjoyment through tourism and recreation.[156] Environmentalists support the "nature as a moral imperative" position, believing that natural resources are superior to a human-centered environment and should therefore be protected from excessive human intervention.[157] For example, the late author, Edward Abbey objected to people "using the parks as they use Disneyland, simply as places to be entertained while they are on

151. *See* Robert B. Keiter, *Change Comes to the Public Lands: New Forces, Directions, and Policies*, 46 RMMLF-INST 3 (2000) (discussing how public land use is reflection of public's belief of "prevailing social order").

152. *See* WILLIAM CRONON, UNCOMMON GROUND: TOWARD REINVENTING NATURE 34 (1995) ("[N]one of these natures is natural: all our cultural constructions that reflect human judgments, human values, human choices.").

153. *See id.* at 34-52 (declaring that categories form basis of our understanding of natural resources and values we assign to them).

154. *See id.* (listing various methods of assigning meaning to idea of nature).

155. *See generally id.* at 36, 46 (describing "nature as moral imperative" as belief that natural resources are superior and should be protected and "nature as commodity" as tourist attraction value, including recreation).

156. *See generally id.* at 46 (defining "nature as commodity").

157. *See generally id.* at 36 (defining "nature as moral imperative" as belief that natural resources are superior and should be protected).

vacation."[158] One scholar framed this debate as whether parks should be "treated as recreational commodities" or whether they should be "reserved as temples of worship."[159]

b. Anthropocentrism vs. Biocentrism

Two conflicting views of nature are often referred to as anthropocentrism and biocentrism.[160] Anthropocentrists take a human-centered view towards nature.[161] Utilitarianism, a sub-group of anthropocentrism, is the position that natural resources should be used in a way that provides "the greatest good to the greatest number of people."[162] Utilitarians argue that humans should not protect nature "unless the reason for doing so . . . is the benefit of man."[163] A utilitarian would argue that parks have basically no economic value themselves, and therefore any impairment that occurs to the parks is really just enjoyment.[164]

A modern example of anthropocentrism in the United States is Executive Order 12866 ("E.O. 12866") which requires all agencies to conduct a cost-benefit analysis for every major decision impacting the economy.[165] Under E.O. 12866, agencies may adopt

158. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 13 (1980).

159. *Id.* at 2 (asking whether parks should "basically be treated as recreational commodities, responding to the demands for development and urban comforts that visitors conventionally bring to them; or should they be reserved as temples of nature worship, admitting only the faithful?"); *see also* Jay D. Wexler, *Parks as Gyms? Recreational Paradigms and Public Health in the National Parks*, 30 AM. J. L. & MED. 155, 171-72 (2004) (expanding on Sax's work).

160. *See* Rasband, *supra* note 77, at 12 (explaining primary differences between anthropocentrism and biocentrism through scholarship).

161. *See id.* at 16 (referring to anthropocentrists as human-centered). Some believe that human interaction can have a positive contribution to national parks. *See* ALSTON CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK 92-93, 95-97 (1987) (discussing positive effects of natural burning of fires which prevents seral succession, or overgrowth, and therefore caution against creating public land system that is devoid of human contact).

162. *See* Rasband, *supra* note 77, at 16 (explaining foundation of utilitarianism).

163. *See* WILLIAM BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 4-9, 12 (1974) (advocating for utilitarianist approach to nature).

164. *See* Richard W. Sellars et al., *The National Parks: A Forum on the "Worthless Lands" Thesis*, 27 J. FOREST HIST. 130, 130-45 (July 1983) (discussing "worthless lands" thesis). *But see* Winks, *supra* note 23, at 612 (noting flaw in "worthless lands" thesis because Congress provided for certain limited number of ways to obtain economic value from parks).

165. *See* Exec. Order No. 12866, 58 Fed. Reg. 51,735 § 1(b) (Sept. 30, 1993) (requiring cost-benefit analysis).

only those regulations that produce greater benefits than costs. [166] Justice Stevens, in *Entergy Corp. v. Riverkeeper, Inc.*,[167] discussed a limitation of cost-benefit analysis in the context of environmental decision making through his discussion of non-quantified outcomes.[168] Quantifying the benefits of natural resources can result in non-quantified outcomes, which are costs or benefits that cannot easily be expressed in terms of monetary value.[169] Environmental benefits tend to include more non-quantified outcomes than do costs, and as a result, crucial benefits, such as irreplaceable values, tend to be omitted from consideration.[170] Justice Stevens argued that there should be a presumption against allowing an agency to conduct cost-benefit analysis in the environmental context because it leads to poor results.[171]

Biocentrism, or biocentric equality, extends beyond human-derived value and provides inherent value to non-human species, ecosystems, and natural processes, regardless of their consciousness.[172] Biocentrists argue that natural resources have other inherent value outside of their use in law and economics. [173] In 1949, when the prevailing view of conservation leaned heavily towards anthropocentrism, American environmentalist, Aldo Leopold, in a work entitled "The Land Ethic," argued for a "new ethic," an ethic involving humans' "relation to land and to the animals and plants which grow upon it."[174] The "deep ecology" movement has emerged more recently and maintains that "all things in the biosphere have an equal right to live and blossom and to reach their own individual

166. *See id.* at 51,735 § 1(b)(6) (demanding that agencies avoid acting where costs of particular action would outweigh all accruing benefits).

167. 556 U.S. 208 (2009) (Stevens, J. dissenting).

168. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 237-40 (2009) (Stevens, J. dissenting) (criticizing cost-benefit analysis in environmental context).

169. *See id.* (providing basis for idea of non-quantified outcomes).

170. *See* RASBAND, *supra* note 77, at 24-26 (recognizing that certain values are irreplaceable and therefore have no value at all, and as such are not considered in decision-making).

171. *See Entergy Corp.*, 556 U.S. at 237, 245-46 (concluding that cost-benefit analysis should not be used in cases involving protection of natural resources).

172. *See* RASBAND, *supra* note 77, at 12 (explaining concept of biocentrism and providing examples); *see also* BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 65 (1985) (promoting theory of biocentric equality).

173. *See* RASBAND, *supra* note 77, at 12 (describing inherent value of nature that exists with or without human interaction).

174. ALDO LEOPOLD & CHARLES W. SCHWARTZ, A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE 204 (1949).

forms of unfolding and self-realization within the larger Self-realization."[175]

c. Valuing Natural Resources

One way of valuing natural resources is to focus on its "ecosystem services," which are the services that natural resources provide to humans.[176] Natural resources have "direct market uses," such as consumable goods that can be priced in a market; "direct non-market uses," such as recreational activities; and "indirect non-market uses, such as pollination, water purification, [and] maintenance of biodiversity."[177] In addition to certain uses, "ecosystem services" assign other values to natural resources, including "option value," knowledge that you have the option to visit in the future; "bequest value," knowledge that future generations will benefit from the resources; and "existence value," knowledge that certain areas or natural resources exist, even if you never visit, plan to visit, or even care if future generations will visit.[178]

Pro-snowmobile groups generally argue in favor of ecosystem services, particularly for the different use categories, including the "direct non-market use" of recreation.[179] Some argue that "recreation is a resource" because it is similar to "conventional resources" such as commodities.[180] Scholars claim that this fact is evidenced by commodity resources users' opposition to proposals to increase recreation.[181] They further argue that "if aesthetic appreciation of nature is deemed a facet of recreation, then recreation is the most frequent, if not dominant, federal land use."[182]

175. DEVALL & SESSIONS, *supra* note 172 (providing underpinnings of deep ecology movement and its increased valuation of natural resources, relative to anthropocentrism viewpoint).

176. *See* RASBAND, *supra* note 77, at 18 (explaining that "ecosystem services" is subset of anthropocentrism).

177. *See id.* (providing categories and examples of human uses of natural resources).

178. *See id.* (citing additional methods of valuing natural resources, such as existence value, which, unlike other valuation methods described, involves no use at all.).

179. *See id.* (noting that "direct non-market uses" include various recreational activities).

180. *See* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *Public Recreation Resource*, 3 PUB. NAT. RESOURCES L. § 31:1 (2d ed. 2012) (citing Nathan L. Scheg, Note, *Preservationists v. Recreationists in Our National Parks*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 47 (1999)) (explaining similarities between recreation and commodities).

181. *See id.* (claiming that recreation may be most "dominant" use of federal lands).

182. *See id.* (discussing pervasiveness of recreational use of federal lands).

The three values within "ecosystem services" play a larger role in the preservation/use debate, particularly when trying to weigh those values in the context of permitting snowmobile use in Yellowstone.[183] While snowmobilers believe that "option value," i.e., having the option to ride a snowmobile in the park, is significant, environmentalists argue that "existence value," i.e., the symbolism tied with preserving natural resources, is in and of itself more valuable.[184]

In addition, the Organic Act specifically provides for "bequest value," and both sides of the debate form competing arguments on what future generations will desire.[185] The issue underlying "bequest value" is intergenerational equity, which strives to determine what duties the current generation owes to future generations.[186] One scholar, Edith Brown Weiss, identified three duties associated with intergenerational equity: "conservation of options," "conservation of quality," and "conservation of access."[187]

Snowmobilers argue that future generations should be permitted to snowmobile, and environmentalists argue that the park

183. *See* RASBAND, *supra* note 77, at 18 (identifying task of separating, valuing, and assessing different sources of natural resource values).

184. *See id.* (implying that tension exists between more tenuous forms of natural resources valuation). The Park Service has recognized the importance of existence value as late as 2007. *See* Carver, *supra* note 107, at i ("In today's increasingly complex society, it is important to be able to discover and clearly express the economic values of things, even such things as human experiences and 'existence values' that benefit society as a whole.").

185. *See id.* (defining "bequest value" as knowledge that future generations will benefit from resources).

186. *See id.* at 20 (citing Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 199-202 (1990)) (finding difficulty in assessing what future generations will desire, which may ultimately be reflection of current preferences); *see also* JOHN RAWLS, A THEORY OF JUSTICE xv (1971) ("[A] property-owning democracy [should be seen] as a fair system of cooperation over time . . . from one generation to the next").

187. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 199-202 (1990) ("The purpose of human society must be to realize and protect the welfare and well-being of every generation."). "Conservation of options" requires the current generation to refrain from limiting the options of future generations. *See id.* at 201-02 ("[E]ach generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations."). "Conservation of quality" requires that the quality passed on to the next generation be "no worse than . . . [the conditions] . . . in which it was received" from the prior generation. *See id.* at 202 ("[E]ach generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received."). Conservation of access requires the current generation to conserve the access and rights associated with the prior generation for future generations. *See id.* ("[E]ach generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations.").

should be preserved for future generations by banning snowmobile use.[188] Snowmobilers rely on "conservation of access," environmentalists rely on "conservation of quality," and both groups rely on "conservation of options," which merely begs the question of what activities should be permitted in the national parks.[189]

2. *Determining Permissible Recreation in National Parks*

a. Defining Recreation

Debating the permissible modes of recreation in national parks "has become one of the most volatile controversies in recent history."[190] The Park Service's position on this issue affects the public perception of recreation in future generations and therefore influences trends in social awareness about recreation's place in the meaning of "future enjoyment" under the Organic Act.[191] The Park Service's explanation of what constitutes future enjoyment is a self-fulfilling prophecy because the agency controls future generations' views of what constitutes permissible recreation in the national parks.[192] National park scholar, Joseph Sax, summarized this concept: "To the extent that we infuse the parks with symbolic meaning by the way in which we use them, the symbolism attached to particular uses itself becomes a critical factor in the meaning that parks have for us."[193] Sax suggested that how we define recreation in the national parks will not be based primarily on economic or environmental factors, but rather by policy judgments based on "what we are trying to achieve by having a public recreation policy."[194]

188. *See generally id.* at 199 (explaining that every group will take what actions it believes are best to ensure conservation of natural resources for future generations).

189. *See generally id.* at 202 (implying uncertainty of this framework can lead to different interpretations of conservation).

190. Scheg, *supra* note 5, at 51-52 (noting severe conflict between recreationists and those who want recreational activities banned from national parks).

191. *See* Wexler, *supra* note 159, at 171 (providing overview of Joseph Sax's theories regarding control over parks).

192. *See id.* (noting Park Service's "decisions will have important impacts on how the parks are both understood and experienced").

193. SAX, *supra* note 158, at 33.

194. *See* Joseph L. Sax, *Fashioning A Recreation Policy for our National Parklands: The Philosophy of Choice and the Choice of Philosophy*, 12 CREIGHTON L. REV. 973, 975 (1979) (suggesting policy judgments define recreation in national parks above any other consideration).

The word recreation originated from the Fifteenth Century Middle English phrase "restoration of health."[195] Common definitions of the term, recreation, include "refreshment of strength and spirit after work" and "a means of refreshment or diversion."[196] Certainly Congress did not intend for the Park Service to interpret "use" to include recreation in its broadest meaning; after all, the Organic Act limits "enjoyment," and therefore also recreation, to forbid any form of use that would impair park resources.[197]

In addition, three separate eras have dominated natural resources law in the United States: natural resource extraction; repairing damage caused by exploitation of natural resources; and the current era, using natural resources for recreational purposes.[198] The current era "marks a change in natural resource use from environmental protection to preservation and recreation."[199] Although the Organic Act was enacted in the era of natural resource extraction, it is often used to resolve conflicts in the current era of recreation and is therefore viewed by some as lacking the necessary rules to provide adequate protection to the parks.[200]

b. Preservationists vs. Recreationists

The general debate over permissible recreation in national parks involves two broadly defined groups of citizens: "preservationists" and "recreationists."[201] Preservationists believe that the national parks are unique in that they allow visitors "to see our past, present, and . . . future" and, as such, should remain in pristine

195. *See* MERRIAM-WEBSTER, *Recreation*, http://www.merriam-webster.com/dictionary/recreation (last visited Mar. 9, 2012) (noting first known use of term recreation was in 15th Century Middle English).

196. *See id.* (defining recreation).

197. *See* 16 U.S.C. § 1 (2006) (applying limits on enjoyment by requiring Park Service to not allow park resources to become impaired).

198. *See* Jan G. Laitos & John A. Carver, Jr., *The Multiple to Dominant Use Paradigm Shift in Natural Resources Management*, 24 J. LAND RESOURCES & ENVTL. L. 221, 221-26 (2004) (believing that Organic Act was created during era of natural resource extraction and therefore does not provide adequate protection against impairment of resources as is required by society in today's era of recreation).

199. Jan G. Laitos & Rachel B. Reiss, *Recreation Wars for our Natural Resources*, 34 ENVTL. L. 1091, 1093 (2004) (recognizing dramatic change in natural resource use).

200. *See id.* at 1098, 1105 (stating that "Congress has failed thus far to enact any new laws to deal with the unique disputes of" this new era).

201. *See* Wexler, *supra* note 159, at 169 (describing differences between preservationists and recreationists, as well as subcategories of recreationists); *see also* Scheg, *supra* note 5, at 47 ("The controversy revolves around two distinct groups: the preservationists and the recreationists.").

condition.[202] Preservationists tend to "value a location irrespective of human use."[203] In support of this position, they argue on the basis of civic values and sound science.[204] Preservationists claim that pristine "areas should be protected because they are sources of aesthetic pleasure"; they "serve important symbolic functions"; they are necessary in order to maintain ecosystem stability; and they offer opportunities to engage in personal growth through reflection.[205] Most notably, they believe that "preservationist sentiment can be found in the governing sentence" of the Organic Act, and therefore the national parks should be kept off-limits to motorized recreation.[206]

Recreationists generally argue that the national parks should be open for park users to exercise whatever forms of recreation they prefer.[207] They claim that the Park Service "has tended to focus on recreation as its primary mission, at the expense of conservation."[208] In fact, recreationists argue that "many forms of recreation are 'easily compatible' with preservation."[209] In addition, recreationists often refer "to preservationists as elitists" for imposing their views on the masses.[210] To them, "a golf course may be

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202. Scheg, *supra* note 5, at 47 ("Preservationists see the national parks as unique windows. . . . They claim we are able to see what our planet was like thousands of years ago, what it is like today, and what it is likely to become.").

203. Laitos, *supra* note 199, at 1099 (noting value preservationists hold as important).

204. *See* SAX, *supra* note 158, at 51 ("While one element of preservationist advocacy is scientific . . . another . . . is dominated by value judgments . . . .").

205. *See* Scheg, *supra* note 5, at 51-52 (discussing reasons preservationists give for the need to protect "natural areas").

206. *See id.* at 51 (discussing Organic Act's preservation/use mandate in light of preservationist view); *see also* SAX, *supra* note 158, at 115 n.1 ("By preservationists, I mean those whose inclinations are to retain parklands largely (though not absolutely) as natural areas, without industrialization, commercialized recreation, or urban influences."); *id.* at 14 ("The preservationist is like the patriot who objects when someone tramples on the American flag. It is not the physical act that offends, but the symbolic act."). *But see* SAX, *supra* note 168, at 115 n.1 ("There is no official preservationist position, and obviously no unanimity of view on any controversial question.").

207. *See* Scheg, *supra* note 5, at 47 ("Recreationists . . . see the national parks as areas that should be open for everyone to use as they see fit.").

208. Keith Bradley, *The Design of Agency Interactions*, 111. COLUM. L. REV. 745, 781 n.191 (May 2011) (citing Eric Hudson, *The National Park Service Organic Act and Section 7(A)(1) of the Endangered Species Act: Prioritizing Recreation and Endangered Species Preservation in the National Parks*, 22 VT. L. REV. 953, 954 (1998) (noting Park Service's favoring recreation in park settings).

209. *Id.* (citing Hudson, *supra* note 208, at 977) (naming forms of recreation which do not adversely impact preservation efforts).

210. *See* Scheg, *supra* note 5, at 47 ("They resent the preservationists' ideals, often referring to the preservationists as elitists."). A modern example of this claim was brought to light in 2010, when a local pro-ORV user referred to a college

preferred to a forest, a ski hill to a wild mountain."[211] Recreationists can be further divided into three sub-groups: "low-impact, non-motorized recreationists, such as hikers"; "high-impact, non-motorized recreationists, such as mountain bikers"; and "motorized recreationists, such as snowmobilers."[212]

c. Conflicts Detract from Enjoyment

Preservationists wish to exclude or limit low- and high-impact, non-motorized recreationists.[213] Low-impact, non-motorized recreationists "want to use the land but leave it relatively untouched," and therefore wish to exclude or limit high-impact, non-motorized recreationists and other commercial operations. [214]

National park scholar, Joseph Sax espoused an anthropocentric argument *against* motorized vehicle access in the park.[215] He argued that national parks should provide a contrast to urban life while allowing visitors to achieve personal growth.[216] Consistent with this vision of the national parks, the Park Service should permit activities such as "camping, backpacking, mountain-climbing, and fishing," and exclude activities such as motorized vehicle

professor as "a meddling outsider and environmental extremist" after the professor advocated against OHV access on local public lands. *See* David Kelly, *Two ways of life collide in Wonder Valley*, L.A. TIMES, Jan. 5, 2010, at A5 (exemplifying strain between conflicting views of recreation use of public lands). *But see* DEVALL, *supra* note 172, at 65-66 (discussing underpinnings of deep ecology movement and its increased valuation of natural resources, relative to anthropocentrism viewpoint).

211. *See* Scheg, *supra* note 5, at 61 (citation omitted) ("The recreationists believe that the forms of recreation in which people choose to engage are irrelevant."); *see also id.* at 61 ("To say to such a person that it is 'more important to preserve nature and the integrity of the ecosystem' is comparable to telling an atheist that it is 'important to honor God.'"). This argument presupposes that any citizen should be permitted to participate in any form of recreation within the national parks. *See generally id.* (suggesting that recreationists are far-reaching in their demands for recreational variety).

212. *See* Laitos, *supra* note 198, at 224 (explaining differences between groups); *see also* Wexler, *supra* note 159, at 174-75, n.126 (noting that at least three identifiable groups of citizens will be effected by motorized vehicles: non-ORV users, such as backpackers and mountain climbers; ORV users; and "those who rarely [visit] the parks or [never visit] at all").

213. *See* Laitos, *supra* note 199, at 1091, 1099 ("It is rare that people desire to protect natural resources without any attendant personal benefit. As such, these two subgroups rarely come into conflict.").

214. *See id.* at 1091, 1098-99 (describing how low-impact non-motorized recreationists disfavor high-impact, non-motorized recreation).

215. *See* Sarah Krakoff, *Mountains Without Handrails . . . Wilderness Without Cellphones*, 27 HARV. ENVTL. L. REV. 417, 426-53 (2003) (criticizing Sax for taking too much of anthropocentric, or human-centered, view of nature and park management).

216. *See* Wexler, *supra* note 159, at 172-73 (drawing on thoughts from Frederick Law Olmstead to argue in favor of preservationists).

use.[217] Sax believes that off-road vehicles "divert the visitor's attention to the achievements of man" rather than "facilitate the opportunity to experience the park's scenery."[218]

Some non-motorized recreationists believe that the historical purpose of the national parks is to transform visitors into better human citizens.[219] Others suggest defining "recreation" on the premise that the national parks exist to promote "public health, exercise, and fitness."[220] This premise, however, would seemingly deprive some, based on disability or age, from accessing the park during the winter season.[221]

Non-motorized users are forced to tolerate the sight of motorized vehicles and an influx of park visitors.[222] In addition, the air and noise pollution caused by snowmobiles interferes with visitors seeking to enjoy the park's serene environment.[223] Nevertheless, many motorists either tolerate or are unaware of nearby non-motorists.[224] Thus, motorized use has a displacement effect on other users.[225] For example, when snowmobiles occupy groomed trails, they deter other users, such as cross-country skiers, from utilizing those trails.[226] Motorized access can also harm those who rarely or never use the park yet still attach option or existence value to the

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217. *See id.* (discussing Sax's conclusions).

218. *Id.* at 173-74 (citing SAX, *supra* note 158, at 80-81).

219. *See* Holly Doremus, *Nature, Knowledge, and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 ECOLOGY L.Q. 401, 441-42 (1999) ("Park advocates [have long] insisted that parks would offer a form of recreation that would make people better citizens. . . . [They] agreed that parks would instill in citizens the vigor, patriotism, and productivity the nation needed.").

220. *See* Wexler, *supra* note 159, at 178 (discussing benefits of focusing Park Service mission on public health, fitness, and exercise).

221. *See* CALVERT, *supra* note 33, at 2 (reporting that snowmobile advocates claim that snowmobiles "provide outdoor recreation opportunities for the disabled, senior citizens, and others with mobility limitations; allow visitor access to hard-to-reach natural areas; [and] allow increased access to sites during the winter season").

222. *See* Wexler, *supra* note 159, at 174 (suggesting adverse effects on non-motorized recreationists merely by awareness of surrounding motorized recreation).

223. *See* Jay Wilkinson, Note, *The New Competing Uses: Balancing Recreation with Preservation in Utah's Wasatch Mountains*, 24 J. LAND RESOURCES & ENVTL. L. 561, 575 (2004) (explaining adverse health effects that motorized recreationists impose on other park visitors and park's environment).

224. *See id.* ("In contrast, many higher impact users are either tolerant or oblivious to nearby low-impact users.").

225. *See id.* (concluding that motorized recreation causes non-motorized recreationists to abandon areas and find enjoyment elsewhere).

226. *See id.* (providing specific example of displacement effect that motorized recreation has on non-motorized recreationists).

park's natural resources.[227] Even motorized recreationists are harmed by their own motorized use because by treating the parks like extensions of cities, they deprive themselves of solitary recreation, which preservationists argue is a primary purpose for which the parks were created.[228]

Motorized recreationists argue that "[m]otorized recreation brings pleasure" and "that public lands should be managed to produce the highest utility to the greatest number of people."[229] Snowmobile users in particular argue that engines with lower emissions suffer from lower performance; therefore, any mitigation to appease non-motorists would come at a loss to motorists.[230]

d. Solutions to Avoiding Conflicts

Three general tools exist to guide the Park Service in addressing these competing interests: non-segregated multiple-use, segregated multiple-use, and dominant-use models.[231] In a non-segregated multiple-use model, the Park Service would permit all forms of recreation within the same area.[232] Such a plan would need to accommodate all three groups and therefore "could result in serious and tense conflicts."[233] Non-segregated plans would

227. *See* Wexler, *supra* note 159, at 175 (suggesting that motorized recreation harms Americans who do not even attend Yellowstone or plan to ever attend Yellowstone). Pursuant to requirements under the Comprehensive Environmental Response, Compensation, and Liability Act, 40 U.S.C. §§ 9601-9675 (2006), and the Clean Water Act, 33 U.S.C. §§ 1251-1376 (2006), the Department of the Interior can create Natural Resources Damage Assessments, which, in part, "assess damages to natural resources resulting from a discharge of oil or a release of a hazardous substance." *See* 43 C.F.R. § 11.10 (2011) (providing deference to Department of the Interior to determine appropriateness of preparing Natural Resource Damage Assessment). When calculating "compensable value," which "is the amount of money required to compensate the public for the loss in services provided by the injured resources," agencies may include "use values," "option and existence values" and "[l]ost use values of injured natural resources." *See* 43 C.F.R. § 11.83(c)(2)(vii) (2011) (describing calculation of compensable value within Natural Resource Damage Assessment).

228. *See* SAX, *supra* note 158, at 12 ("Tourism in parks today [is] little more than an extension of a city."); *see also* Wexler, *supra* note 159, at 174 (adding to Sax's work and suggesting ways in which snowmobilers actually harm themselves).

229. Wilkinson, *supra* note 223.

230. *See id.* at 583 (reporting at least one adverse impact on recreationists incurred as result of emissions reductions).

231. *See* Laitos, *supra* note 199, at 1105-06 (explaining benefits and shortcomings of non-segregated multiple-use, segregated multiple-use, and dominant-use models).

232. *See id.* at 1105 (implying that all groups of visitors would come into contact with one another).

233. *See id.* at 1106 (describing conflicts between user groups created by non-segregated multiple-use model).

probably be least successful, particularly as technology advances to allow motorized recreationists to reach deeper areas of the park.[234]

A segregated multiple-use model would permit all uses, but agency regulations would separate the park into different use groups.[235] A segregated multiple-use plan, for example, would be one that designates separate trails for hiking, mountain biking, and motorized vehicles.[236] This model would deny certain visitors, depending on their chosen mode of recreation, access to certain areas of the park.[237]

Motorized recreationists enjoy the multiple-use model, particularly the non-segregated, multiple-use model because they are not significantly affected by non-motorized uses.[238] Generally, preservationists and non-motorized recreationists prefer a dominant-use model that would prohibit motorized use because they believe motorized access "impairs the experiences" of other groups. [239]

IV. CONTRASTING JUDICIAL AND ADMINISTRATIVE DECISIONS CONCERNING SNOWMOBILE ACCESS IN YELLOWSTONE NATIONAL PARK WITHIN LEGAL AND THEORETICAL FRAMEWORKS

A. Judicial Treatment of Administrative Decisions

The first issue facing the Park Service is determining whether snowmobiling is a per se permissible or impermissible form of recreation under the Organic Act.[240] Within the past decade, three

234. *See id.* (ignoring, however, that increased technology would probably present problems more for preservationists than non-motorized recreationists because if motorized recreationists are barely capable of reaching remote area of park, non-motorized recreationists would have even more difficult time).

235. *See id.* at 1105 (contrasting segregated multiple-use to non-segregated multiple-use approach).

236. *See id.* at 1106-07 (pointing out that, unlike non-segregated multiple-use plans, segregated plans allow different groups of visitors to avoid contact with one another).

237. *See id.* (mentioning only that segregated multiple-use model "deprives low impact/non-motorized recreationists of the opportunity to enjoy the areas that can only be accessed by mountain bike or motorized vehicle" but failing to mention it deprives opportunities to other groups as well).

238. *See id.* at 1104 (reiterating that motorists are unaffected by other groups).

239. *See id.* (concluding dominant-use model is preferred by majority of user groups).

240. *See* 16 U.S.C. § 1 (2006) (permitting particular uses unless they impair park resources for future generations). If a single snowmobile in Yellowstone would cause impairment, then the Organic Act forbids it. *See generally id.* (reading ambiguously as to whether "use" in regards to impairment refers to category of uses or level of use). If no impairment results from entry of a single snowmobile,

presidential administrations and a number of federal courts have disagreed over whether snowmobiling causes impairment, and each have reached markedly different conclusions about the permissible limits on snowmobile access within Yellowstone.[241]

1. *Pre-2001: The Rise of Snowmobile Use in National Parks*

Snowmobile use was first permitted in national parks in 1963.[242] Within three years, snowmobile access increased from 1000 to 5000.[243] As use increased, the Park Service became increasingly concerned, and in response, the agency created its first winter use policy in 1968.[244] That policy "encouraged and permitted winter use by snowmobiles."[245] By the late 1980s and early 1990s, up to 1500 snowmobilers accessed Yellowstone each day.[246]

The Park Service uses a "park-by-park approach" to address snowmobile use.[247] Snowmobile use is largely permitted in national parks, but at least one circuit court upheld the Park Service's decision to ban snowmobile use in a national park.[248]

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the Park Service must determine the permissible limits of snowmobile use. *See generally id.* (contemplating that if one snowmobile were permissible, there must still be some ceiling on limit of snowmobiles, such as one begin to cause impairment).

241. For a further discussion of the Park Service's and federal courts' interpretations of the Organic Act when applied to snowmobile use in Yellowstone National Park, see *infra* notes 242-531 and accompanying text.

242. Fund for Animals v. Norton, 294 F. Supp. 2d 92, 98 (D.D.C. 2003).

243. Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1253 (D. Wyo. 2004).

244. *See Fund for Animals*, 294 F. Supp. 2d at 98 (explaining Park Service's response to rapid increase in snowmobile use in national parks).

245. *Int'l Snowmobile Mfrs. Ass'n*, 340 F. Supp. 2d at 1253.

246. *See* Simon, *supra* note 3 (reporting highest levels of snowmobile use ever in Yellowstone).

247. *See* Hooper, *supra* note 12 (describing Park Service's historical approach to address snowmobile use during winter season in national parks).

248. *See id.* (describing Park Service's ban on snowmobile use in Montana's Glacier National Park ever since park was designated in 1970s); *see also* Mausolf v. Babbitt, 125 F.3d 661, 670 (8th Cir. 1997) (upholding Park Service's decision to ban snowmobiles in sections of Voyageurs National Park under Organic Act and implementing regulations). The Eight Circuit in *Mausolf* found that a Fish and Wildlife Service biological opinion finding that snowmobile use may have a significant negative, cumulative adverse impact on listed wolves was sufficient evidence to sustain the agency's use of discretion in issuing the ban. *See id.* (explaining impact of biological opinion in reference to agency's decision). In 2004, the Eighth Circuit upheld the Park Service's decision to renew the ban at issue in *Mausolf*. *See* Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759 (8th Cir. 2004) (affirming holding in *Mausolf*).

2. *Clinton Administration Bans Snowmobiling in Yellowstone*

In 1971, the Park Service began "trail grooming" snow covered roads to facilitate the safe travel of OSVs.[249] By 2003, over 180 miles of roads in national parks were groomed every other night.[250] At least one adverse impact of the increased trail grooming was that bison began migrating from the parks, sometimes traveling along the same trails groomed to facilitate OSV use.[251] As a result, the federal government killed over 1000 bison to prevent the spread of brucellosis to livestock outside the park.[252]

The Fund for Animals sought to enjoin trail grooming and OSV use in national parks until the Park Service prepared an EIS and consulted with the Fish and Wildlife Service.[253] In 1997, the parties reached a settlement agreement, whereby the Park Service agreed to prepare an EIS that reconsidered its trail grooming and OSV policies.[254] In January 1998, however, the Park Service subse-

249. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 97 n.2, 98 (D.D.C. 2003) (explaining that trail grooming is "the packing of snow along trails to facilitate winter use").

250. *See id.* at 98 (discussing trail grooming's effect on Yellowstone, its wildlife, and recreation).

251. *See id.* at 99 (noting that Park Service's 2000 EIS and Winter Use Plan explained adverse impacts of trial grooming on park's wildlife). The Park Service stated in November 2011 that "there is no evidence that bison preferentially used groomed road during winter." 2011 LONG-TERM WINTER USE PLAN, *infra* note 372, at 107. Ironically, three months later, the Park Service released a newsletter depicting a large herd of bison utilizing a groomed trail. *See* NAT'L PARK SERV., YELLOWSTONE WINTER USE PLAN SUPPLEMENTAL EIS NEWSLETTER 3(Feb. 2012) [hereinafter SEIS NEWSLETTER], *available at* http://parkplanning.nps.gov/document.cfm?parkID=111&projectID=40806&documentID=45670 (depicting large herd of bison walking on groomed trail).

252. *See* Fund for Animals v. Norton, 294 F. Supp. 2d at 99 (providing Park Service's explanation substantial indirect impacts caused by trail grooming).

253. *See id.* (reciting Fund for Animals' arguments for injunction).

254. *See id.* (discussing terms of settlement agreement). The existing policy would continue while the Park Service undertook its assessment. *See id.* (providing temporary solution to gap in winter use management). The Park Service agreed to prepare both an environmental assessment pursuant to NEPA and a biological assessment pursuant to the ESA to determine the effects of winter use on the grizzly bear and the gray wolf, which would be followed by formal consultation with the Fish and Wildlife Service. *See id.* at 99 (acknowledging Park Service's ancillary promises for additional environmental analyses). The Endangered Species Act requires agencies to consult with the Fish and Wildlife Service to ensure that an agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (2011). For a discussion of the statutory framework of the Endangered Species Act, see Matthew Groban, Casenote, *Arizona Cattlegrowers' Ass'n v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" to Protect?*, 22 VILL. ENVTL. L.J. 259, 265-67 (2011) (explaining framework of Endangered Species Act). The Park Service did complete a Biological Assessment but did not follow it up with formal

quently refused to close any roads while it collected data for the EIS.[255]

In July 1999, the Park Service issued a draft EIS containing seven alternatives for trail grooming and OSV use, ranging from unrestricted snowmobile use to highly restricted access limits.[256] On President Clinton's final day in office, and only one day after the public comment period closed, the federal government signed

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consultation with the Fish and Wildlife Service. *See Fund for Animals*, 294 F. Supp. 2d at 100 (noting Park Service's failure to consult). Rather, the Fish and Wildlife Service "concurred" in the Park Service's conclusion that its proposed action would not likely result in adverse effects on endangered or threatened species. *See id.* (citing Park Service's 2003 Biological Assessment).

255. *See id.* at 99-100 (recounting Park Service's environmental assessment proposing to close segment of groomed road and subsequent issuance of finding of no significant impact followed by decision not to close roads while collecting data for EIS). The Fund for Animals filed an action claiming that the refusal to close roads to obtain additional data was a violation of the 1997 Settlement and impeded preparing of an EIS. *See id.* at 100 (summarizing Fund for Animal's claims). The D.C. District Court found those claims were not ripe because "what is not final is whether the decision not to close trails will produce an EIS not in compliance with the settlement agreement and NEPA." *See id.* (ruling on ripeness of Fund for Animal's claims).

256. *See id.* (noting that Park Service's 1999 Draft EIS contained seven specific alternatives to address OSV use in Yellowstone). The Park Service ultimately selected the most environmentally preferred alternative, which permitted snowmobiling to continue through the 2002-2003 winter season but completely phased out snowmobile use in favor of multi-passenger snowcoaches by the 2003-2004 winter season. *See* 2000 Record of Decision, 65 Fed. Reg. 80,908, 80,911 (Dec. 22, 2000) (explaining that snowcoaches are "self-propelled, mass transit vehicles intended for travel on snow . . . having a capacity of at least eight passengers"). In April 2000, while the Park Service was reviewing comments on the draft EIS, the Assistant Secretary for Fish and Wildlife and Parks sent an agency memorandum to the Director of the Park Service in response to a Rulemaking petition submitted by over sixty anti-snowmobile organizations, proposing that "all parks which currently allow recreational snowmobile use under a special regulation . . . should repeal these special regulations immediately and halt recreational snowmobile use." *See* Memorandum from Assistant Secretary for Fish and Wildlife and Parks at 5 (Apr. 26, 2000) (on file with author) (advocating for favorable decision regarding snowmobile ban). The memorandum observed that "most, if not all, of the recreational snowmobile use now occurring in the National Park System is not in conformity with applicable legal requirements." *See id.* (acknowledging widespread illegal snowmobile operation in Yellowstone). During the thirty-day public comment period, the Park Service received 5273 comments, most of which were in support of the proposed rule. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 100 (D.D.C. 2003) (recalling historical context of rule). Comments received during the comment period for the draft EIS indicated that forty-four percent of commenters supported one particular alternative that allowed for continued snowmobile use, while forty-five percent of commenters supported an alternative to ban snowmobile use. *See* Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1260 (D. Wyo. 2004) (noting preferences of commenters). The Park Service, however, exempted certain areas from this policy, including Yellowstone National Park, the Grand Teton National Parks, Alaskan park units, Voyageurs National Park in Minnesota, and "access to private land within or adjacent to a park." *See* CALVERT, *supra* note 33 (stating Park Service exemptions).

off on a final rule ("2001 Rule") to phase out snowmobile use in Yellowstone.[257] The 2001 Rule permitted snowmobile use to continue through the 2001-2002 winter season, drastically reduced snowmobile use in the 2002-2003 winter season, and completely eliminated snowmobile use in favor of increased snowcoach use by the 2003-2004 winter season.[258]

3. *Bush Administration Reopens Yellowstone to Snowmobiling*

Weeks later, the Bush Administration temporarily delayed implementation of the 2001 Rule and eventually reversed the rule altogether.[259] A June 2001 lawsuit brought by the ISMA and the State of Wyoming, among others, arguing that the 2001 Rule should be set aside, resulted in a settlement agreement requiring the Park Service to revisit the 2001 Rule and prepare an SEIS that considered additional information on cleaner and quieter snowmobile technology.[260]

In March 2002, the Park Service released a draft SEIS, which proposed four alternative actions, one of which contained the 2001 Rule's ban on snowmobile use.[261] During the sixty-day comment period, the Park Service received 104,802 comments.[262] Roughly eighty percent of the commenters favored the complete phasing out of snowmobiles, which included support from the EPA.[263] Nevertheless, in November 2002, one month before the 2001 Rule's snowmobile ban was scheduled to take effect, the Park Service fur-

257. *See* 2001 Winter Use Plan, 66 Fed. Reg. 7260, 7260 (Jan. 22, 2001) (promulgating regulations in short window).

258. *See id.* at 7265 (providing parameters of 2001 Rule). Nevertheless, the 2001 Rule made no changes to the Park Service's trail grooming policy, thereby permitting trail grooming to continue unregulated. *See id.* at 7262 (denying commenters' request to end trail grooming).

259. *See* Temporary Delay of Effective Date of 2001 Rule, 66 Fed. Reg. 8366, 8366 (Jan. 31, 2001) (delaying temporarily Clinton's 2001 Rule for sixty days from February 21, 2001 to April 22, 2001); *see also* 2003 Final Winter Use Plan, 68 Fed. Reg. 69,268, 69,269 (Dec. 11, 2003) (reversing Clinton's 2001 Rule).

260. *See* 2003 Proposed Winter Use Plan, 68 Fed. Reg. 51,526, 51,527 (proposed Aug. 27, 2003) (explaining terms of settlement agreement).

261. *See* NAT'L PARK SERV., DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (Mar. 2002) (describing range of alternatives considered by Park Service).

262. *See* 2003 Final Winter Use Plan, 68 Fed. Reg. at 69,268 (reporting immense number of comments received on rule).

263. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 101 (D.D.C. 2003) (drawing attention to overwhelming support for banning snowmobile use in Yellowstone); *see also* Hooper, *supra* note 12, at 10,977 n.50 (citing Yellowstone Protection Act, H.R. 1130, 108th Cong. (2003), which noted that EPA believed 2001 Rule had "among the most thorough and substantial science base that [EPA] ha[d] seen supporting a NEPA document").

ther delayed the 2001 Rule's effective date for one year, thereby permitting snowmobile use to continue throughout the 2002-2003 winter season.[264]

In December 2003, the Park Service finalized a new rule ("2003 Rule") that reversed the 2001 ban and permitted up to 950 snowmobiles per day in Yellowstone.[265] Over ninety-one percent of commenters believed that the Park Service's chosen alternative would impair the park's resources.[266] This lack of support was in stark contrast to the 2001 Rule, which received support of eighty-three percent of its commenters.[267] The 2003 Rule required eighty percent of snowmobilers to use commercial guides, created snowmobile emissions standards which required snowmobiles to be equipped with BAT, and further utilized "adaptive management," which permitted park rangers to alter access limits based on the results of noise and air pollution monitoring.[268]

4. *D.C. District Court Overturns Bush Rule and Reinstates Clinton's Ban on Snowmobiling*

Environmental groups challenged the Bush Administration's policy reversal, arguing that it violated the Park Service's conserva-

264. *See* One-Year Delay of Effective Date of 2001 Rule, 67 Fed. Reg. 69,473, 69,473 (Nov. 18, 2002) (delaying phase-out of snowmobiles for one year). A majority of the commenters opposed the delay. *See id.* (providing comment statistics).

265. *See* 2003 Final Winter Use Plan, 68 Fed. Reg. at 69,269 (Dec. 11, 2003) (implementing 2003 Record of Decision, 68 Fed. Reg. 16,548 (Apr. 4, 2003); *see also* 2003 Proposed Winter Use Plan, 68 Fed. Reg. 51,526, 51,527 (proposed Aug. 27, 2003) (explaining differences between draft SEIS and final SEIS).

266. *See* 2003 Final Winter Use Plan, 68 Fed. Reg. at 69,269 (Dec. 11, 2003) (summarizing positions of commenters).

267. *See* Hooper, *supra* note 12 (comparing drastic differences in public support for 2003 Rule and 2001 Rule).

268. *See* 2003 Final Winter Use Plan, 68 Fed. Reg. at 69,268 (claiming BAT would result in overall eighty percent reduction in emissions). The record of decision was issued in August 2003. *See* Proposed Winter Use Plan, 68 Fed. Reg. at 51,526 (discussing 2003 record of decision). The proposed rule, final rule, and record of decision were all substantially similar. *See Fund for Animals*, 294 F. Supp. 2d 92 at 101 (comparing proposed rule, final rule, and record of decision). The Park Service claimed that the 2003 Rule would reduce hydrocarbon emissions by ninety percent and carbon monoxide emissions by seventy percent. *See* 2003 Final Winter Use Plan, 68 Fed. Reg. at 69,268 (claiming that it would substantially reduce pollution by requiring snowmobiles to be equipped with BAT technology). Noise levels would be reduced by fifty percent compared to the average snowmobile in existence at that time. *See id.* (limiting sound levels to seventy-three decibels). The Park Service released a list of approved snowmobile models for use during the 2003-2004 winter season. *See* MCCARTHY, *supra* note 12, at 5 (identifying Park Service's list of approved snowmobiles). This list still exists and is periodically updated. *See Snowmobile Best Available Technology (BAT) List*, National Park Service (Oct. 1, 2011), http://www.nps.gov/yell/parkmgmt/current_batlist.htm (listing snowmobile models equipped with BAT).

tion mandate because snowmobile and trail grooming cause "air and noise pollution, threaten wildlife and endangered species, and create health threats to visitors and park employees."[269] The Park Service defended its policy based on the new availability of "cleaner, quieter snowmobiles" that resulted from the transition from two-stroke to four-stroke snowmobiles and implementation of BAT requirements.[270] The D.C. District Court pointed out that the Bush Administration's new position was a "180 degree reversal" from reasoning under the 2001 Rule, which stated that "[c]leaner, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife."[271] In fact, many of the Park Service's conclusions in the 2003 Rule contradicted prior scientific findings, prompting one scholar to claim that the 2003 Rule was based on "junk science."[272]

269. *See Fund for Animals*, 294 F. Supp. 2d at 98 (listing environmental groups' arguments in support of their claim that 2003 Rule was arbitrary and capricious). The list of environmental groups included the Fund for Animals, the Greater Yellowstone Coalition, the National Parks Conservation Association, the Wilderness Society, the Natural Resources Defense Council, the Winter Wildlands Alliance, and the Sierra Club. *See id.* at 97-98 (listing environmental plaintiffs). The Fund for Animals sought an injunction on trail grooming, while the Greater Yellowstone Coalition, representing the remaining environmental groups, argued for reinstatement of the 2001 Rule. *See id.* at 98 (noting plaintiffs' arguments). The court noted that if it had decided to eliminate trail grooming, the 2001 Rule would have been impossible to enforce, as a lack of trail grooming would preclude snowmobile access altogether. *See id.* (explaining court's decision). Both groups claimed the 2003 Rule violated the Organic Act, Park Service regulations, executive orders, and management policies. *See id.* at 102 (detailing plaintiffs' claims).

270. *See Fund for Animals*, 294 F. Supp. 2d at 106 (summarizing government's argument that transition from two-stroke to four-stroke snowmobiles and implementation of BAT technology would alleviate prior air quality problems). Supporting the Park Service's 2003 Rule were the ISMA, the Blue Ribbon Coalition, Inc., and the State of Wyoming. *See id.* at 98 (listing intervenors for government). The ISMA is composed of snowmobile manufacturers whose purpose is to advocate for the growth of snowmobile use. *See id.* (describing ISMA). The Blue Ribbon Coalition represents over 1000 organizations that have a commercial interest in snowmobile opportunities in the National Parks. *See id.* (explaining purpose of Blue Ribbon Coalition).

271. *See Fund for Animals*, 294 F. Supp. 2d at 106-08 (citing 2001 Winter Use Plan, 66 Fed. Reg. 7260, 7260 (Jan. 22, 2001)) (recalling statement from Park Service's 2001 Rule stating that "[s]ome 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. *Cleaner, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife.*") (emphasis in original). In support of the science underlying that finding, the EPA confirmed the Park Service's technological projections relied upon in the 2001 Rule. *See id.* at 107 ("EPA affirms that technological projections made in 2000 were accurate, and concludes that, even with new technology, a phase-out of snowmobile use is still necessary.").

272. *See* Linda A. Malone, Book Note, *What do Snowmobiles, Mercury Emissions, Greenhouse Gases and Runoff Have in Common?: The Controversy Over "Junk Science"*, 9 CHAP. L. REV. 365, 365-66, 370-73 (2006) (arguing Bush Administration's decision

Additionally, the Park Service's theory that traveling in groups would mitigate adverse environmental impacts was flawed because regulations permitted a group size of merely one rider. [273] The agency also conceded that the guide system was flawed due to both the practical impossibility of communicating with drivers over the loud noise produced by a snowmobile, as well as the 2003 Rule's requirement that drivers must stay only within one-third of a mile from the first snowmobiler in the group, which presumably would be the guide.[274]

In December 2003, the D.C. District Court vacated and remanded the 2003 Rule.[275] The court found that the Park Service failed to provide an adequate explanation for its decision to reverse the 2001 Rule's snowmobile ban given that the 2001 Rule was based on a finding that snowmobile use in Yellowstone caused impairment, which violated the Organic Act, but the 2003 Rule permitted access of 950 snowmobiles each day.[276] A decision that favors the interests of snowmobilers to the detriment of an environmentally preferable alternative, the court held, was arbitrary and capricious.[277]

More specifically, the court found that the Park Service "chose an alternative whose primary beneficiaries are the park visitors who ride snowmobiles in the parks and the businesses that serve them."[278] In addition, the court held that the 2003 SEIS was arbitrary and capricious because the Park Service failed to consider the

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to permit snowmobile access in Yellowstone completely contradicted Clinton Administration's scientific findings). Malone argued that "[w]hen funding is scarce, and politically driven outcomes preferred, the danger of junk science being not only overly recognized but overly funded is increased as scientists compete for scarce governmental grants or turn to private grants from organizations with purely political agendas." *Id.* at 407.

273. *See* 2003 Final Winter Use Plan, 68 Fed. Reg., 69,268, 69,274 (Dec. 11, 2003) (pointing to Park Service's flawed logic).

274. *See id.* (conceding that guiding system would produce questionable results).

275. *See Fund for Animals*, 294 F. Supp. 2d at 108 (remanding 2003 Rule, 2003 SEIS, and 2003 record of decision).

276. *See id.* (noting that under *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983), agency that reverses prior final action is not entitled to same level of deference afforded to agency's initial decision, but rather is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). The court referred to the Park Service's claim that snowmobiling's adverse impacts were offset by technological improvements and mitigation measures as "weak at best." *See id.* (criticizing the Park Service's reasoning).

277. *See id.* (finding that decision was favorable to snowmobilers' interests).

278. *Id.* (internal quotations omitted) (quoting 2003 Final Winter Use Plan, 68 Fed. Reg., 69,268, 69,279 (Dec. 11, 2003)).

alternative of prohibiting trail grooming on account of its adverse effects on bison.[279] The court ordered the Park Service to reinstate the 2001 Rule that phased out snowmobile use while the agency reconsidered the 2003 Rule.[280]

Significant to the court's opinion was its finding that the Park Service had a "clear conservation mandate" that "trumps all other considerations."[281] In fact, the court reasoned, the Park Service's own 2001 Management Policies stated that the Park Service "must always seek to avoid, or minimize to the greatest degree practicable, adverse impacts on park resources and values."[282] The court believed that the Bush Administration's 2003 Rule "was completely politically driven and result oriented."[283] The court also stated that "two Executive Orders, as well as [Park Service] regulations, demand that if it is determined the snowmobile use has an adverse effect on the Park's resources, or disturbs wildlife, the snowmobile use must immediately cease."[284]

5. *Wyoming District Court Overturns Ban on Snowmobiling and Upholds Daily Access of 720 Snowmobiles*

In response to the reinstatement of the 2001 Rule, the Wyoming District Court issued a preliminary injunction barring enforcement of the snowmobile ban and later vacated the rule, finding that, although the rule did not violate the Organic Act, the Park Service violated NEPA and the Administrative Procedure Act ("APA").[285] Under NEPA, the court found that the agency failed to

279. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 108 n.14, 108-11, 112-15 (D.D.C. 2003) (holding that Park Service's failure to include its chosen alternative in draft SEIS did not violate NEPA because "its component parts were included as parts of other alternatives that were included in the [draft SEIS]" and noting that alternative was included in Proposed Rule).

280. *See id.* at 97 (reinstating ban on snowmobiles).

281. *See id.* at 105 (finding that preservation trumps use under Organic Act); *see also* 2003 Record of Decision, 68 Fed. Reg. 16,548 (Apr. 4, 2003) (reasoning that "Congress has provided that when there is a conflict between conserving resources and values [in the national parks] and providing for enjoyment of them, conservation is to be of primary concern."); *see also* Nat'l Rifle Assoc. of Am. v. Potter, 628 F. Supp. 903, 909 (D.D.C. 1986) (noting that Congress reaffirmed conservation mandate in Redwoods Act and further stating that "[i]n the Organic Act Congress speaks of but a single purpose, namely, conservation").

282. *Fund for Animals*, 294 F. Supp. 2d at 105 (citing 2001 MANAGEMENT POLICIES).

283. *See id.* at 108 n.11 (noting that participant in Park Service meeting noted that "Gale Norton wants to be able to come away saying some snowmobiles are allowed").

284. *Id.* at 106 (citing E.O. 11644, E.O. 11989, and 36 C.F.R. § 2.18(c)).

285. *See* Int'l Snowmobile Mfrs. Ass'n v. Norton, 304 F. Supp. 2d 1278, 1293 (D. Wyo. 2004) (finding that 2001 Rule did not violate Organic Act). To prove

consider the additional noise and air pollution caused by an increase in snowcoach use and deprived the public of meaningful comment by issuing a final rule only one day after the close of the public comment period.[286] In addition, the court found that the Park Service failed to engage in any "scientific study," and instead conducted a literature review comparing snowmobile emissions with snowcoach emissions.[287] Under the APA, the court found that the Park Service failed to provide an adequate explanation for its drastic withdrawal from thirty-seven years of permitting snowmobile use and for its failure to provide adequate public participation.[288]

Overall, the Wyoming District Court believed that the 2001 ban was a "prejudged, political decision," although the court "never explained . . . how an improper 'political decision' differs from a legitimate decision based on the agency's conception of sound public policy."[289] Some scholars believe that the court's holding required the Park Service to consider potential economic losses caused by banning snowmobile use.[290] However, the court only considered economic impacts when it enjoined the 2001 Rule and did not consider economic impacts when it ruled on the actually legality of the rule.[291]

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irreparable harm, the ISMA argued that the D.C. District Court's reinstatement of the 2001 Rule one night before the opening of the snowmobile season in the Parks caught many businesses off guard and could even force some businesses into bankruptcy. *See id.* at 1287 (summarizing ISMA's arguments against 2001 Rule). The court noted that the "new 4-stroke snowmobiles offer decreased hydrocarbon levels of more than 90%, reduced carbon emissions of more than 70% and decreased sound levels of approximately 50%." *Id.* at 1278, 1284.

286. *See id.* at 1291-92 (finding Park Service also failed to adequately include cooperating agency participation).

287. *See id.* at 1290-91 (identifying Park Service's inadequate support for its conclusions).

288. *See id.* at 1290-93 (striking down 2001 Rule under APA).

289. *See id.* at 1291 (failing to provide guidance on when agency action is "prejudged, political decision"); *see also* George Cameron Coggins & Robert L. Glicksman, *Preservation in the National Park System*, 3 Pub. Nat. Res. L. § 23:3 (2d ed. 2012) (calling into question court's rationale).

290. *See* Rapp, *supra* note 122, at 322 (noting "the potentially catastrophic economic losses which some snowmobile outfitting businesses may have been subject to with the implementation rule" and proposing that "[t]he court concluded that these potential losses were much greater than the detrimental effects that continued snowmobile use would cause the Parks . . . ").

291. *See Int'l Snowmobile Mfrs. Ass'n*, 304 F. Supp. 2d at 1293-94 ("Wyoming and ISMA Plaintiffs have demonstrated irreparable harm [which] includes the significant financial loss that will be sustained by businesses and concessionaires, the loss of goodwill and the potential that some businesses may go bankrupt if the injunction is not issued."); *see also id.* at 1293 (failing to rule on economic impacts as factor in Organic Act analysis). Any claim that the Wyoming District Court considered private economic loss within the Park Service's use mandate is unfounded. *See* Rapp, *supra* note 122, at 322 (arguing, after discussing Wyoming District

Although the Wyoming District Court ultimately vacated the 2001 Rule under NEPA and the APA, the court found that the rule did not violate the Organic Act.[292] The court held that the 2001 Rule, "while protecting [Yellowstone's] natural resources, was a decision that was within the discretion of the [Park Service]" and therefore did not constitute an improper balancing of preservation and use. [293] The combined effect of the D.C. court's invalidation of the 2003 Rule and the Wyoming court's invalidation of the 2001 Rule was a split 2003-2004 winter season, with each portion of the season managed under different rules with different entry limits. [294] This split confused visitors, the local community, and businesses, who were uncertain of which rules were in effect at different points throughout the winter season.[295] The D.C. District Court then modified its prior 2003 order by removing the requirement to reinstate the 2001 Rule and instead required the agency to promulgate a new rule for the 2004-2005 winter season in line with the court's 2003 opinion.[296] In response, the Park Service proposed alternatives ranging from a complete snowmobile ban to allowing access of up to 950 snowmobiles each day.[297]

Court's injunction based partly on economic grounds, Park Service is not permitted to consider private economic interests within Organic Act's use mandate).

292. *See Int'l Snowmobile Mfrs. Ass'n*, 340 F. Supp. 2d at 1266 (upholding 2001 Rule under Organic Act).

293. *See id.* (conceding 2001 Rule did not violate Organic Act, but went out to state "even though for obvious reasons it was a wrong-headed decision, based on poor judgment").

294. *See* CALVERT, *supra* note 33, at 10 (describing regulatory chaos that occurred in Yellowstone during 2003-2004 winter season). The 2003 Rule was in effect through December, the 2001 Rule was in effect through February, and in February, the Park Service increased the limit of daily snowmobile access to 780. *See* Geoff O'Gara & Dan Whipple, *Judicial Roulette*, CASPER STAR-TRIB. (Feb. 18, 2004), http://trib.com/editorial/columns/judicial-roulette/article_7141abd7-c83a-5b54-936b-2b18c140d547.html (discussing confusion among Park employees and public caused by constantly changing rules); *see also* Rapp, *supra* note 122, at 322 (discussing differences in entry limits between 2001 Rule, 2003 Rule, and 2004 temporary rule and noting February temporary rule increased entry limits from 493 to 780).

295. *See* O'Gara, *supra* note 294 ("Park officials who had complained of wooziness from snowmobile gas fumes at the gate were now dizzy with court orders.").

296. *See* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 92 (D.D.C. 2003) (requiring agency to promulgate rule at least thirty days prior to the start of the 2004-2005 winter season).

297. *See* Wyo. Lodging & Rest. Ass'n v. U.S. Dept. of Interior, 398 F. Supp. 2d 1197, 1205-06 (D. Wyo. 2005) (examining alternatives proposed in 2004 environmental assessment). The environmental assessment was followed by a finding of no significant impact. *See id.* at 1206 (noting outcome of Park Service's environmental assessment).

In November 2004, the Park Service issued a temporary winter use management plan effective for three winter seasons through the 2006-2007 winter season ("2004 Rule").[298] The 2004 Rule was similar to the 2003 Rule struck down by the D.C. District Court; it permitted 720 snowmobiles into Yellowstone, all of which had to be accompanied by a commercial guide in groups of eleven or less.[299] The Park Service reasoned "that when asked to close Yellowstone to snowmobile use via legislation, a clear, bi-partisan majority of the U.S. House of Representatives explicitly voted this down."[300] The 2004 Rule was meant to provide clarity to park visitors, park employees, and the local community, as well as provide a temporary solution while the agency prepared a long-term EIS and a management plan addressing winter recreational use in Yellowstone Park.[301] The Wyoming District Court upheld the 2004 Rule.[302]

6. *D.C. District Court Overturns Daily Access of 540 Snowmobiles*

By December 2007, the Park Service issued a new Winter Use Plan ("2007 Rule").[303] The 2007 Rule was intended to address the

298. *See* 2004 Final Winter Use Plan, 69 Fed. Reg. 65,348, 65,348 (Nov. 10, 2004) (stating terms of 2004 Rule). Congress correspondingly appropriated funds to enforce the 2004 Rule prior to all three seasons, stating each time that the rule "shall be in force and effect for the winter use season." *See* McCarthy, *supra* note 12, at 7 (citing to Congress's 2005-2007 appropriations bills and detailing Congress's appropriations measures for winter seasons of 2004-2005, 2005-2006, and 2007-2008).

299. *See* 69 Fed. Reg. at 65,349 (imposing similar requirements as 2003 Rule).

300. *See id,* at 65,348-49 (describing Congress's influence on Park Service's decision).

301. *See id.* at 65,348 (announcing intent to promulgate long-term rule).

302. *See Wyo. Lodging & Rest. Ass'n*, 398 F. Supp. 2d at 1221 (upholding 2004 Rule). Under NEPA, the court found that the Park Service adequately evaluated the requirement that snowmobilers use commercial guides to ensure responsible wildlife viewing and to reduce noise impacts on the parks. *See id.* at 1212-15 (determining that Park Service considered adequate range of alternatives, including "no action" alternative). Under the APA, the court held that the Park Service's conclusions were supported by substantial evidence and reasoned analysis, including the conclusion that permitting more than 720 snowmobiles per day would cause significant adverse environmental effects. *See id.* at 1217-21 (finding Park Service's analysis supporting its decision that all snowmobilers must be accompanied by commercial guides was adequate under APA). The D.C. District Court refused to enforce its 2003 order in order to permit the Wyoming District Court to rule on the matter. *See* Fund for Animals v. Norton, 390 F. Supp. 2d 12, 12 (D.D.C. 2005) (denying plaintiffs' order). After the 2004 Rule expired, the D.C. District Court ruled that challenges to the 2004 Rule were moot. *See* Fund for Animals v. Norton, 512 F. Supp. 2d 49, 49 (D.D.C. 2007) (denying challenges to 2004 Rules).

303. *See* 2007 Winter Use Plan, 72 Fed. Reg. 70,781, 70,782 (Dec. 13, 2007) (describing long-term EIS, record of decision, and final selected action). Prior to the 2007-2008 winter season, the Park Service considered several alternatives to address OSV access, ranging from a "no action" alternative, which would have banned all OSV use in Yellowstone, to an "expanded recreational use" alternative,

concerns that the D.C. District Court had with the 2003 Rule and to provide long-term guidance for managing winter recreational use in Yellowstone.[304] During 2007-2008 winter season, the 2007 Rule mimicked the 2004 Rule's requirements, permitting up to 720 guided BAT snowmobiles per day and up to 78 snowcoaches per day on existing groomed park roads only.[305] Beginning with the 2008-2009 winter season, the 2007 Rule required more restrictive measures, permitting access of up to 540 commercially guided BAT snowmobiles in groups of eleven or less and up to eighty-three snowcoaches per day. [306] The 2007 Rule also began utilizing "adaptive management" which permitted park managers to alter access limits up or down depending on the results of monitored impacts on soundscapes, air quality, and wildlife protection.[307]

The National Parks Conservation Association and Earthjustice challenged the 2007 Rule in the D.C. District Court on behalf of

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which would have allowed up to 1025 snowmobiles per day. *See* Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183, 187 (D.D.C. 2008). The public comment period generated 122,190 comments, only 0.1% of which supported the Park Service's preferred alternative. *See Public Comment Report: Winter Use Plans, Draft Environmental Impact Statement, Yellowstone and Grand Teton National Parks and John D. Rockefeller, Jr., Memorial Parkway,* NAT'L PARK SERV., 4 (2007), www.nps.gov/yell/parkmgmt/upload/deis_results_draft2.pdf. The EPA noted that the Park Service's preferred alternative, as it stood in the proposed rule, would result in five times more carbon monoxide emissions and seventeen times more hydrocarbon emissions than the agency's snowcoach-only alternative. *See* MCCARTHY, *supra* note 12, at 17 (citing *EPA Raises Concerns About Latest Plan for Snowmobile Use In Yellowstone Park*, DAILY ENV'T REP., June 22, 2007, at A4) (reporting that EPA suggested Park Service either modify its preferred choice or choose another alternative).

304. *See* NAT'L PARK SERV., 2007 WINTER USE PLANS, FINAL ENVIRONMENTAL IMPACT STATEMENT 3-4 (2007) [hereinafter 2007 WINTER USE PLAN], *available at* http://www.nps.gov/yell/parkmgmt/winterusetechnicaldocuments.htm (addressing D.C. District Court opinion and establishing long-term plan); *see also Greater Yellowstone Coal.*, 577 F. Supp. 2d at 187 (summarizing intention of Park Service and development of plan).

305. *See* 2007 WINTER USE PLAN, supra note 304, at 6-9 (permitting 140 snowmobiles in Grand Teton and Rockefeller parkway, most of which were required to utilize BAT emission and noise pollution standards, but requiring use of commercial guides). "Avalanche control operations continued, allowing motorized and nonmotorized oversnow travel via Sylvan Pass near Yellowstone's East Entrance." CALVERT, *supra* note 33, at 13; *see also* FINAL WINTER USE PLANS RECORD OF DECISION AMENDMENT – SYLVAN PASS MANAGEMENT, 3 (2008), http://www.nps.gov/yell/planyourvisit/upload/rod_sylvanpass_7-08.pdf (noting that while original 2007 record of decision closed Sylvan Pass, which connects East Entrance to Cody, WY, record of decision was amended in 2008 to permit Sylvan Pass to be open subject to "full avalanche forecasting").

306. *See* 2007 WINTER USE PLAN, supra note 304, at 8, 11 (noting that in Grand Teton and Rockefeller Parkway, 2007 Rule permitted access to sixty-five snowmobiles per day with sixty-two percent BAT but no guiding requirements).

307. *See id.* at 3, 39-40 (implementing adaptive management to inject flexibility into park management).

environmental groups opposed to snowmobile use in Yellowstone.[308] Simultaneously, the State of Wyoming, Park County, the ISMA, the American Council of Snowmobile Associations, and the Blue Ribbon Coalition, among others, filed claims against the Park Service in the Wyoming District Court seeking to overturn the 2007 Rule and increase the daily limits on snowmobile access.[309] The National Parks Conservation Association and Earthjustice argued that the 2001 Rule phasing out snowmobile access should be reinstated.[310] The Park Service admitted that the 2007 Rule would triple the area in which OSVs could be heard and would increase carbon monoxide emissions by 18%, benzene emissions by 33%, hydrocarbon emissions by 50%, formaldehyde emissions by 60%, and particulate matter emissions by 100%.[311]

In the D.C. District Court, both the environmental groups and the Park Service disagreed over exactly what the Organic Act's conservation mandate requires and when it applies.[312] The Park Service argued that the conservation mandate is triggered only when the impacts caused by a particular use are deemed "unacceptable impacts."[313] If the Park Service finds that a use causes unacceptable impacts, then that use of park resources conflicts with their conservation, and the Park Service must prohibit that particular use.[314]

The government argued on the theory that any impacts of an activity are "acceptable" under the Organic Act if they are "unavoidable and appropriate."[315] The environmental groups disagreed with this characterization of the Organic Act and claimed that the Park Service both failed to explain how snowmobiling was "necessary and appropriate to fulfill the purposes of the park" to render adverse impacts acceptable and failed to explain how it planned "to

308. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 187 (explaining that cases were consolidated in March 2008).

309. *See* Wyoming v. U.S. Dep't of Interior, 587 F.3d 1245 (10th Cir. 2009) (explaining request to eliminate 2007 Rule's commercial guide requirement).

310. *See* Plaintiffs' Memorandum in Support of Summary Judgment at 18, Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008) (Nos. 07-2111, 07-2112) (arguing that 2007 Rule violates Organic Act and that banning snowmobiles is Park Service's only permissible choice).

311. *See id.* at 15, 21-22 (describing elevated environmental concerns associated with 2007 Rule that were stated in Park Service's 2007 final EIS).

312. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 191 (discussing Organic Act's preservation/use mandate in light of 2007 Rule's snowmobile limits).

313. *See id.* at 191-92 (explaining Park Service's "unacceptable impacts" analysis).

314. *See id.* (citing Park Service policy to ban activity that causes unacceptable impacts).

315. *See id.* at 192 (reciting Park Service's position that activities that cause unacceptable impacts are permitted if they are "unavoidable and appropriate").

avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values."[316]

Further, the environmentalists showed that on multiple occasions over the prior three-year period, the "adaptive management thresholds" for air quality and soundscapes had been exceeded, but that these exceedances were not followed by a response from the Park Service.[317] Earthjustice's brief in particular pointed out that the number of snowmobile proponents permitted in the park under the 2008 plan was based on contradictory logic; it permitted up to 540 snowmobiles, but the current averages of 250 to 300 were already exceeding environmental thresholds.[318]

The D.C. District Court denied the Park Service and snowmobilers' requests to transfer the environmental groups' claims to Wyoming.[319] Instead, the court vacated the 2007 Rule, holding that the Park Service failed to adequately support its finding that the level of OSV use permitted under the rule would have "acceptable" environmental impacts.[320] The court particularly disfavored the Park Service's failure to provide any quantitative or qualitative analysis in support of its finding that the 2007 Rule would not impair or result in unacceptable impacts on park resources, including soundscapes, wildlife, and air quality.[321] The court reiterated that the Organic Act requires the "conservation mandate" "to be predominant" and further pointed out that even the Park Service concedes this point under Section 1.4.3 of its own 2006 Management Policies, in the case of a conflict between preser-

316. *See id.* at 191-92 (quoting section 1.4.3 of 2006 MANAGEMENT POLICIES).

317. *See id.* at 192 (discussing plaintiff's argument that Park Service failed to react to threshold exceedances and therefore adaptive management failed).

318. *See* Plaintiffs' Memorandum in Support of Summary Judgment at 13, Greater Yellowstone Coal. v. Kempthorne, (D.D.C. 2008) (describing elevated environmental concerns associated with 2007 Rule and arguing that doubling current average would lead to increase in adverse environmental impacts); *see also id.* at 13-14 (noting that 2007 EIS and 2007 record of decision each stated that Park Service's adaptive management thresholds were exceeded on numerous occasions). In other words, given that these exceedances occurred when the average number of snowmobiles in Yellowstone was between only 260 and 290 per day, by allowing up to 540 snowmobiles per day, the Park Service would substantially increase the level of environmental harm. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 192 (examining plaintiff's argument that 2007 Rule's increased snowmobile access limits were unacceptable given that prior monitoring indicated that thresholds were already being exceeded at lower access limits).

319. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 183 (D.D.C. 2008) (noting that ISMA intervened on behalf of Park Service in D.C. District Court).

320. *See id.* (finding 2007 Rule was arbitrary and capricious).

321. *See id.* at 193-97, 201-02, 204-05, 209-10 (chastising Park Service for failing to provide adequate analysis).

vation and use.[322] The court identified a number of other federal courts that believe conservation is paramount under the Organic Act.[323] The court summarized its interpretation of the Organic Act as follows:

> [W]hile it is true that "enjoyment" is also a fundamental purpose of the parks, enjoyment is qualified in the Organic Act in a way that conservation is not. The Organic Act charges [the Park Service] with the duty to "provide for the enjoyment" of the parks' resources and values in "such manner and by such means as will leave them unimpaired for the enjoyment of future generations" . . . . "[E]njoyment" . . . is not enjoyment for its own sake, or even enjoyment of the parks generally, but rather the enjoyment of the "scenery and natural and historic objects and the wild life" in the parks in a manner that will allow future generations to enjoy them as well.[324]

Ultimately, the court held that the Park Service "elevate[d] use over conservation" and failed to explain "why the Plan's major adverse impacts are necessary and appropriate to fulfill the purposes of the park."[325] Further, the Park Service failed to explain how in-

322. *See id.* at 191-92 (citing Section 1.4.3 of 2006 MANAGEMENT POLICIES).

323. *See id.* at 193 (discussing federal jurisprudence in favor of interpretation that preservation outweighs use under Organic Act). The Ninth Circuit has held that the "overarching concern" of the Organic Act is "resource protection." *See* Bicycle Trails of Marin v. Babbitt, 82 F.3d 1445, 1453 (9th Cir. 1996) (discussing effect of General Authorities Act and Redwood Amendments on Organic Act's purpose). The D.C. District Court has previously held that the Organic Act "amendments . . . reflect a renewed insistence on the part of Congress that the national parks be managed in accordance with the primary purpose of the [Organic Act], namely the conservation of wildlife resources." Edmonds Inst. v. Babbitt, 42 F. Supp. 2d 1, 16 (D.D.C. 1999); *see also* Nat'l Rifle Ass'n of Am. v. Potter, 628 F. Supp. 903, 909 (D.D.C. 1986) ("In the Organic Act, Congress speaks of but a single purpose, namely, conservation . . . ."); *Fund for Animals*, 294 F. Supp. 2d at 105 ("[The Park Service] is bound by a conservation mandate and that mandate trumps all other considerations."). The court also pointed to a letter written by eleven former Park Service Directors who opposed increasing snowmobile access to over 250 snowmobiles per day, because such an increase would elevate air and noise pollution and contradict a recommendation by the Park Service's own scientists to maintain or reduce current access levels. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 193-94 (discussing letter as significant evidence that Park Service failed to adequately consider environmental impacts of increased snowmobile use in Yellowstone).

324. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 192-93 (quoting 16 U.S.C. § 1 (2007)).

325. *See id.* at 210 (striking down 2007 Rule). Under the APA, the court found that the Park Service failed "to provide a rational explanation for the source of the 540 snowmobile limit." *Id.* Under NEPA, the court rejected the 2007 EIS on a number of technical grounds. *See id.* (striking down 2007 EIS under NEPA).

creasing snowmobile access over current average levels, "where adaptive management thresholds [were] already being exceeded, complied with the Organic Act's conservation mandate."[326] The D.C. District Court ultimately vacated and remanded the 2007 Rule.[327]

7. *Bush Administration Reinstates Daily Access of 720 Snowmobiles*

Soon after the D.C. District Court vacated the 2007 Rule, the Park Service released for comment on November 5, 2008 a new proposed rule that would have decreased daily access of snowmobiles from 720 to 318 and would have allowed daily access of up to 78 commercially guided snowcoaches.[328] But only two days later, on November 7, 2008, the Wyoming District Court ordered the Park Service to reinstate the 2004 Rule's 720 snowmobile limit without a sunset provision.[329] The Wyoming court reasoned that "equity requires reinstatement of the 2004 temporary rule to provide some semblance of order in this disordered and confusing state of affairs" until the Park Service can "promulgate an acceptable rule to take its place."[330] The court further stated that reinstatement of the 2004 Rule without a sunset provision "will provide businesses and tourists with the certainty that is needed in this confusing litigation."[331]

The Wyoming court opined that the 2007 Rule should have been upheld and that, had it ruled on the issue first, the state of affairs would look very different.[332] Emphasizing the theme of local pride that has persisted throughout this litigation, the Wyoming

326. *Id.*

327. *See id.* (vacating Park Service's Winter Use Plan and remanding 2007 Rule, 2007 record of decision, and 2007 final EIS for further consideration).

328. *See* 2008 Proposed Environmental Assessment, 73 Fed. Reg. 65,784, 65,793 (proposed Nov. 5, 2008), *available at* www.nps.gov/yell/parkmgmt/upload/2008_winter_use_ea(p1).pdf (Part 1) *and* www.nps.gov/yell/parkmgmt/upload/2008_winter_use_ea(p2).pdf (Part 2) (proposing new guidelines for snowmobiles and snowcoaches and proposing to allow only commercially guided BAT snowmobiles).

329. *See* Order Implementing Temporary Remedy and Granting Mot. to Intervene, Wyoming v. U.S. Dept. of Interior, Nos. 07-CV-0319-B, 08-CV-0004-B (D. Wyo. Nov. 7, 2008), *vacated,* 587 F.3d 1245 (10th Cir. 2009) (ordering Park Service to reinstate 2004 Rule); *see also* 2008 Winter Use Plan, 73 Fed. Reg. 74,606 (2008) (reinstating limits of 2004 Rule).

330. Order Implementing Temporary Remedy and Granting Mot. to Intervene, Wyoming v. U.S. Dept. of Interior, Nos. 07-CV-0319-B, 08-CV-0004-B (D. Wyo. Nov. 7, 2008), *vacated,* 587 F.3d 1245 (10th Cir. 2009), at 15 (attempting to provide public with predictability while Park Service contemplated new rule).

331. *See id.* at 21 (attempting to provide businesses and tourists with certainty).

332. *See id.* at 10 (asserting opinion that 2007 Rule should have been upheld and would have been upheld had matter been resolved in Wyoming).

court chastised the D.C. court for vacating the 2007 Rule, stating that "this Court finds it unfortunate that a United States District Court sitting over 2,000 miles away from the actual subject of this litigation feels compelled to hand down a ruling affecting land that lies in this Court's backyard."[333] The Wyoming District Court requested that the D.C. District Court transfer all future cases relating to snowmobiles in national parks to the Wyoming District Court as a matter of comity.[334]

One month later, the Park Service issued a final rule ("2008 Rule") pursuant to the Wyoming District Court's November 7, 2008 order.[335] The 2008 Rule mimicked the 2004 Rule and permitted access of up to 720 commercially guided BAT snowmobiles and up to 78 snowcoaches per day in Yellowstone.[336] The State of Wyoming and snowmobile enthusiasts challenged the Wyoming District Court's November 7, 2008 interim remedial order allowing daily access of up to 720 snowmobiles as *too stringent*.[337]

8. *Obama Administration Lowers Limit to 318 Snowmobiles*

On November 20, 2009, the Park Service yet again issued a new temporary rule ("2009 Rule"), but this time the agency permitted only 318 snowmobiles through the 2010-2011 winter season. [338] The agency stated that what happens next "will be left for future rules to sort out."[339] As a result of the new 2009 interim rule, the Tenth Circuit Court of Appeals dismissed the pro-snowmobilers' appeal of the 2008 Rule.[340] Acknowledging that this was "the latest installment in a long series of cases seeking to resolve the fate of snowmobiles in Yellowstone National Park," the Tenth Circuit found that because the Park Service had issued a new regulation replacing the Wyoming District Court's self-imposed 2008 Rule, challenges to the 2008 Rule were moot.[341]

333. *See id.* at 7 (scolding D.C. District Court for refusing to transfer case to Wyoming).

334. *See id.* at 21 (citing to its prior holding claiming it retained jurisdiction over "this matter").

335. *See* 2008 Final Winter Use Plan, 73 Fed. Reg. 74,606, 74,606 (Dec. 9, 2008) (stating's rule consistency with Wyoming District Court's opinion).

336. *See id.* (noticing similarities between two rules).

337. *See* Wyoming v. U.S. Dep't of Interior, 587 F.3d 1245, 1247 (10th Cir. 2009) (addressing snowmobilers' claims that 2008 Rule regulated snowmobile access too stringently).

338. *See* 2009 Final Winter Use Plan, 74 Fed. Reg. 60,159, 60,160 (Nov. 20, 2009) (identifying maximum snowmobile capacity).

339. *See Wyoming*, 587 F.3d at 1252 (articulating agency's prediction).

340. *See id.* at 1247 (dismissing snowmobile advocates' appeal of 2008 Rule).

341. *See id.* (mooting snowmobile advocates' claims against 2008 Rule).

Soon thereafter, the State of Wyoming, Park County, and the ISMA challenged the 2009 Rule.[342] In September 2010, the Wyoming District Court dismissed the case for lack of standing.[343] Wyoming and Park County claimed their injuries were potential loss of tax revenues and other economic injuries, but the court found that those claims were "conjectural and hypothetical injuries and generalized grievances insufficient to" satisfy injury-in-fact under Article III standing.[344]

The plaintiffs appealed the district court's decision, and the Tenth Circuit heard oral argument in September 2011.[345] The National Parks Conservation Association maintained its argument that Wyoming and Park County lacked standing because they failed to show injury-in-fact.[346] More specifically, the daily average snowmobile access levels over the past five years were far below the 318 snowmobile limit under the interim rule, so the 2009 Rule had not actually produced an adverse economic impact on the local community.[347] In fact, in the four consecutive winter seasons beginning

342. *See* Bd. of Cnty. Comm'rs of Cnty. of Park v. U.S. Dept. of Interior, 2010 WL 6429153, at *1 (D. Wyo. Sept. 17, 2010) (identifying plaintiffs).

343. *See id.* at *17 (outlining procedural history of case).

344. *See id.* (explaining rationale for finding of lack of standing). In addition, the court held that a finding in the petitioners' favor would not guarantee that their purported injuries would be redressed. *See id.* (discussing redressability of claims).

345. *See* Brief of the Respondent-Intervenor-Appellee at 1, Wyoming v. U.S. Dept. of Interior, 2011 WL 1352474 (Nos. 10-8090, 10-8089, 10-8088) (10th Cir. Mar. 30, 2011) (noting timing of oral argument).

346. *See id.* at 4 (arguing plaintiffs lacked standing on number of grounds).

347. *See id.* at 4, 8 (noting that total seasonal access of East Entrance has fallen from 635 in 2005-2006 winter season to 73 in 2008-2009 winter season). The Justice Department also filed a brief on behalf of the appellees. *See* Answering Brief of the Federal Appellees at 6, 11-19, Wyoming v. U.S. Dept. of Interior, 2011 WL 1352474 (Nos. 10-8090, 10-8089, 10-8088) (10th Cir. Mar. 30, 2011) (arguing primarily that plaintiff's claimed tax burdens caused by snowmobile regulation did not supply basis for standing). *But see* Consolidated Joint Reply Brief of the Appellants at 1-5, Wyoming v. U.S. Dept. of Interior, 2011 WL 1352474 (Nos. 10-8090, 10-8089, 10-8088) (10th Cir. Apr. 15, 2011) (arguing loss in tax benefits served as foundation for standing to challenge Park Service winter use rule). In fact, after the 2007-2008 winter season, the average daily snowmobile entries in Yellowstone dropped significantly. *See* News Release, Yellowstone National Park, Yellowstone Winter Visitation Impacted by Heavy Snowfall (Apr. 11, 2011), www.nps.gov/yell/parknews/11023.htm (reporting drop in visitors); *see also* News Release, Yellowstone National Park, Yellowstone Reports Drop in Winter Visitation (Apr. 2, 2009), www.nps.gov/yell/parknews/09020.htm; News Release, Yellowstone National Park, Yellowstone Winter Visitor Figures a Mixed Bag (Apr. 5, 2010), *available at* www.nps.gov/yell/parknews/10022.htm (noting attendance was lower than previous year). To access additional Park Service reports, visit www.nature.nps.gov/stats/park.cfm?parkid=421. One commentator suggested that the drop in snowmobile entries may be attributable to a "light snow year and the weakened economy," whereas the slight rebound in the 2010-2011 season may be attributable to "heavier

with the 2007-2008 season and ending with the 2010-2011 season, the average number of snowmobile entries was 294, 205, 187, and 194, respectively.[348]

B. Awaiting a Long-Term Winter Use Plan

In January 2010, the Park Service announced its intent to prepare an EIS and a Long-Term Winter Use Plan covering a substantial twenty-year period.[349] In May 2011, the Park Service released a draft Winter Use Plan and EIS ("2011 Draft Long-Term Winter Use Plan").[350] The 2011 Draft Long-Term Winter Use Plan was intended to implement variable access limits throughout the winter season, allowing 110-330 snowmobiles and 30-80 snowcoaches per day.[351] Other alternatives ranged from a complete ban on all public OSV use to permitting up to 720 commercially guided BAT snowmobiles and 78 snowcoaches per day.[352]

In September 2011, however, less than two weeks after the Tenth Circuit heard oral argument in Wyoming in the appeal of the 2009 Rule, the Park Service decided to delay issuing a Long-Term Winter Use Plan until 2012.[353] The Park Service instead is-

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snowfalls." *See* CALVERT, *supra* note 33, at 12 (providing one possible explanation for trends in snowmobile use in Yellowstone).

348. *See Yellowstone Winter Visitation Impacted by Heavy Snowfall*, *supra* note 347 (noting that over same period of time, average daily entries of snowcoaches were thirty-five, twenty-nine, thirty-two, and forty, respectively). In addition, the *peak* number of entries in any one day over the same four seasons was 557, 426, 293, and 289 snowmobiles, respectively. *See id.* (noting that over same period of time, peak daily entries of snowcoaches were sixty, fifty-four, fifty-nine, and sixty-eight, respectively).

349. *See* Notice of Intent to Prepare Environmental Impact Statement for Winter Use Plan, 75 Fed. Reg. 4842, 4842 (Jan. 29, 2010) (providing notice of forthcoming proposal of new Long-Term Winter Use Plan). By the end of the preliminary scoping phase in March 2010, before the Park Service even issued a draft EIS, the agency had already received over 9000 comments. *See* NAT'L PARK SERV., DEIS PUBLIC MEETING PRESENTATION (June 2011) [hereinafter 2011 PUBLIC MEETING PRESENTATION], *available at* http://www.nps.gov/yell/parkmgmt/upload/YELL-Winter-Use-Plan-Draft-EIS-Public-Meeting-Presentation.pdf (explaining prior history of proposed long-term plan); *see also* CALVERT, *supra* note 33, at 13 (reporting number of comments received by agency).

350. Draft Environmental Impact Statement for the Winter Use Plan, Yellowstone National Park, 76 Fed. Reg. 27,087 (May 10, 2011); NAT'L PARK SERV., YELLOWSTONE NATIONAL PARK, DRAFT WINTER USE PLAN / ENVIRONMENTAL IMPACT STATEMENT (May 2011) [hereinafter 2011 DRAFT LONG-TERM WINTER USE PLAN], *available at* http://www.nps.gov/yell/parkmgmt/upload/wu_deis_2011.pdf.

351. *See* 2011 DRAFT LONG-TERM WINTER USE PLAN, *supra* note 350, at 60-65, 73-75 (describing preferred alternative, Alternative 7).

352. *See id.* (providing overview of alternatives contemplated in proposed long-term plan).

353. *See NPS to Implement One-Year Rule for Yellowstone's 2011-2012 Winter Use Plan*, *supra* note 9 (announcing delay of long-term plan until 2012); *see also* Winter

sued another temporary one-year rule, effective December 15, 2011, covering only the 2011-2012 winter season ("2011 Rule").[354] The one-year 2011 Rule permitted up to 318 commercially guided BAT snowmobiles and up to 78 commercially guided snowcoaches per day in Yellowstone.[355] The Park Service, nevertheless, announced plans to finalize a SEIS and a Long-Term Winter Use Plan before the 2012-2013 winter season.[356]

In the end, issues addressed by the nearly 59,000 public comments on the 2011 Draft Long-Term Winter Use Plan caused Yellowstone Superintendent Dan Wenk to conclude that "[w]ithout further analysis . . . we would not have a sustainable decision."[357] Within the nearly 59,000 comments received on the proposed Winter Use Plan were approximately 179,000 specific comments, and of those, 82,362 specifically called for banning snowmobile use in favor of snowcoach-only access.[358]

Use Plan and Final Environmental Impact Statement for Yellowstone National Park, 76 Fed. Reg. 68,503, 68,504 (Nov. 4, 2011) (adding and choosing Alternative 8 as preferred alternative and announcing plans to supplement EIS in 2012).

354. *See* Rule Implementing Record of Decision for the 2011 Winter Use Plan / Environmental Impact Statement for Yellowstone National Park, 76 Fed. Reg. 77,131, 77,131 (Dec. 12, 2011) (retaining, for one additional year, regulatory framework that had been in place for previous two winter seasons, 2009-2010 and 2010-2011 winter seasons). The 2011 Rule became effective on opening day of Yellowstone's winter season. *See Gazette Opinion*, *supra* note 9 (noting winter season scheduled to open on December 15, 2011).

355. *See* 76 Fed. Reg. at 77,131 (providing entry limits).

356. *See id.* ("[The Park Service] intends to complete a supplemental EIS, make a decision on a plan for long-term winter use, and issue a new regulation for winter use before the 2012–2013 winter season."); *see also* Mark Heinz, *Winter Use Delay Draws Praise*, CODY ENTERPRISE (Oct. 3, 2001), http://www.codyenterprise.com/news/local/article_f98a7448-ee0c-11e0-8c20-001cc4c03286.html (noting that Yellowstone Superintendent Dan Wenk stated that he hopes to have long-term plan in place for 2012-2013 winter season).

357. *See Gazette Opinion*, *supra* note 9 (quoting Superintendent Wenk from telephone news conference); *see also* Kurt Repanshek, *Yellowstone National Park Officials Need More Time to Complete Winter Use Plan*, NATIONAL PARKS TRAVELER (Sept. 29, 2011), http://www.nationalparkstraveler.com/2011/09/yellowstone-national-park-officials-need-more-time-complete-winter-use-plan8825 (quoting Superintendent Wenk who stated that "[t]he public comment period did exactly what we hope public comment will do in a process like this, in that it identified issues that were not addressed as fully as they should be perhaps, or brought to our attention issues that we did not consider.").

358. *See* Repanshek, *supra* note 357 (separating comments for and against individual alternatives). Recall that snowcoaches are "self-propelled, mass transit vehicles intended for travel on snow . . . having a capacity of at least 8 passengers." *See* Record of Decision, 65 Fed. Reg. 80,908, 80,911 (Dec. 22, 2000). Of the 59,000 comments, 56,462 were from seventeen distinct "form letters." *See* C.J. Baker, *Yellowstone Delays New Winter Use Plan*, POWELL TRIB. (Oct. 6, 2011), http://www.powelltribune.com/news/item/8841-yellowstone-delays-new-winter-use-plan

The Superintendent believed that there may be a better way to address snowmobile group sizes, avalanches, and impacts on wildlife than was addressed by the 2011 Draft Long-Term Winter Use Plan.[359] Additionally, the Superintendent wanted more time to consider the draft EIS's air quality and sound modeling assumptions, proposed BAT for controlling snowcoach emissions and noises, and opportunities for non-commercially guided snowmobile access.[360] When asked whether further analysis may change the Park Service's decision, Wenk commented, "I'm not making a predetermination . . . . But we believe that we have to have more analysis."[361]

The delay angered some citizens, who asked, "[a]t what point do you finally have enough information to make a sound decision?"[362] Others welcomed the delay, such as United States Senator Mike Enzi, R-Wyo., and Wyoming Governor, Matt Mead, who commended the Park Service's decision to extend its current OSV access limits.[363]

The Greater Yellowstone Commission announced that it will not waiver, noting that it prefers snowcoaches over snowmobiles. [364] Environmental groups believe that even fewer snowmobiles would still "disturb animals, pollute the air and disrupt the park's solitude in winter" and that "[t]here are millions of acres outside the park where you can take thrill rides on snowmobiles."[365]

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359. *See* Repanshek, *supra* note 357 (citing questions posed by Dan Wenk about how best to address certain unanswered questions concerning technical aspects of Long-Term Winter Use Plan).

360. *See Gazette Opinion*, *supra* note 9 (discussing Park Service's statement regarding future research); *see also* Repanshek, *supra* note 357 (reporting that "[p]ark staff did not consider impacts on air quality and soundscapes using 2010 fleet data[,] . . . [p]ark staff is uncertain whether sound levels prescribed for 'best available technology' snowcoaches are achievable[,] . . . . [and t]he DEIS did not examine the impacts of allowing non-commercially guided snowmobile trips").

361. Repanshek, *supra* note 357.

362. *See* Heinz, *supra* note 356 (quoting Park County Commissioner Tim French who further stated that "[i]n a couple of months, I will be starting my 12th year working on this issue, and they were at it for a couple of years before that.").

363. *See id.* (suggesting that current policy is more snowmobile-friendly than agency's preferred alternative in 2011 DRAFT LONG-TERM WINTER USE PLAN of 110 to 330 snowmobiles per day).

364. *See id.* (noting that Greater Yellowstone Coalition prepared report showing climate change's effects on Yellowstone National Park, although it does not plan to use climate change as driver in future challenges of agency's Winter Use Plans); *see also* Saunders, *supra* note 105 (coordinating with Greater Yellowstone Coalition and reporting relative temperature increases in Yellowstone National Park have exceeded world averages over past decade).

365. *See* Simon, *supra* note 3 (noting that environmental groups still desire ban on Yellowstone snowmobile access).

On the other side of the debate, Blue Ribbon Coalition announced its intent to focus primarily on allowing non-commercially guided snowmobile groups into Yellowstone.[366] Blue Ribbon Coalition also indicated that it will request yet another one-year temporary rule for the 2012-2013 winter season to give local business owners more time to adapt to a long-term plan.[367] Local business owners blame a decrease in sales partly on confusion over the Park Service's long-term plan.[368] They believe that the Park Service's snowmobile policy has caused a general decline in park visitors over the past decade.[369]

C. Alternatives Proposed in the 2011 Long-Term Winter Use Plan

The Park Service's 2011 Long-Term Winter Use Plan was the agency's sixth NEPA process since 2000.[370] Three others have been vacated by courts, and two have expired.[371] The long-term plan focused its analysis on different categories with the potential for greater than "minor" impacts.[372] Any impacts the Park Service deemed "minor or less" were omitted from the analysis.[373]

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366. *See* Dayton, *supra* note 6 (reporting that Welch suggests allowing person to obtain type of non-commercial guide permit that would allow that person to lead group of riders after going through orientation session). Blue Ribbon Coalition also argued that providing flexible entrance limits can harm some visitors who, if they arrive to the park a day late, might not be allowed to enter the next day if the entry limits are reduced. *See id.* (describing potential harm to snowmobilers under flexible approach to setting access levels).

367. *See id.* (outlining Blue Ribbon Coalition's legal strategy).

368. *See* Simon, *supra* note 3 (suggesting uncertainty creates reluctance in some tour guide businesses to invest in expanding their business).

369. *See id.* (stating that Park officials suggest that other factors affect visitor numbers, such as heavy storms, avalanches, rock slides, and road closures).

370. *See* 2011 PUBLIC MEETING PRESENTATION, *supra* note 349 (discussing release of Winter Use Plan for Yellowstone National Park). A Scientific Advisory Team conducted a Scientific Assessment supporting the EIS. *See* NAT'L PARK SERV., SCIENTIFIC ASSESSMENT OF YELLOWSTONE NATIONAL PARK WINTER USE, May 2011, *available at* http://parkplanning.nps.gov/document.cfm?parkID=111&projectID=29281&documentID=40803 (providing scientific basis for EIS).

371. *See* 2011 PUBLIC MEETING PRESENTATION, *supra* note 349 (discussing history of NEPA processes in Yellowstone).

372. *See* NAT'L PARK SERV., YELLOWSTONE NATIONAL PARK, WINTER USE PLAN/ENVIRONMENTAL IMPACT STATEMENT 7-10 (Nov. 2011) [hereinafter 2011 LONG-TERM WINTER USE PLAN], *available at* http://parkplanning.nps.gov/document.cfm?parkID=111&projectID=29281&documentID=44049 (including impacts on air, sound, wildlife and wildlife habitat, visitor use and experience and visitor accessibility, human health and safety, socioeconomic values, and park operations and management).

373. *See id.* at 11 ("In those cases where impacts are either not anticipated or are expected to be minor or less, the issues and impact topics are dismissed from detailed analysis.").

The 2011 Draft Long-Term Winter Use Plan considered seven alternatives, all of which covered a twenty-year period.[374] The final 2011 Long-Term Winter Use Plan included those same seven long-term alternatives plus an additional one-year alternative, which the Park Service ultimately chose to implement.[375]

Alternative 1 was the "no action" alternative, under which the Park Service would not issue new regulations permitting the public use of OSVs in the park, and non-motorized transportation, such as hiking, skiing, and snowshoeing, would be permitted in limited areas during future winter seasons.[376] The Park Service listed this as the "environmentally preferable alternative."[377]

Each of the six remaining alternatives would require BAT snowcoaches by the 2014-2015 winter season and would allow, at least in its first year, up to 318 snowmobiles and seventy-eight snowcoaches per day.[378] Alternative 2 would continue current limits permitting access of up to 318 commercially guided BAT snowmobiles and seventy-eight snowcoaches per day.[379] Alternative 3 would reinstate the 2004 Rule's limits of up to 720 commercially guided BAT snowmobiles and seventy-eight snowcoaches per day.[380] Alternative 4 created a mixed-use plan that permitted the Park Service to plow certain roads and allow up to 100 commercial buses and vans to travel on those roads.[381]

Beginning with the 2014-2015 winter season, Alternative 5 would require snowcoaches to replace snowmobiles within five years either depending on the demand for snowcoach use or at the park's discretion.[382] Snowcoaches access could then increase to up to 120 entries per day with a corresponding decrease in the number

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374. *See* 2011 DRAFT LONG-TERM WINTER USE PLAN, *supra* note 350, at 35-36 (summarizing seven alternative plans to be discussed in detail); *see also* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 35-37 (including an additional eight alternative for a one-year plan).

375. *See* Winter Use Plan and Final Environmental Impact Statement for Yellowstone National Park, 76 Fed. Reg. 68,503, 68,504 (Nov. 4, 2011) (adding and choosing Alternative 8 as preferred alternative).

376. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 41 (presenting Alternative 1).

377. *See id.* at 77 (suggesting preservationists would prefer Alternative 1).

378. *See id.* at 41, 46, 50, 52, 53, 60, 65, 66 (noting similarities among remaining six alternatives).

379. *See id.* at 46-47 (describing Alternative 2).

380. *See id.* at 49 (allowing fixed daily snowmobile and snowcoach entries).

381. *See id.* at 50 (detailing alternative that allows for snow plowing and bus access as well as snow mobile and snow coach access).

382. *See id.* at 53 (stating alternative that favors transition to snow coaches).

of snowmobiles during the five-year phase-out period.[383] Alternative 6 would implement "variable management" by setting a seasonal limit of up to 32,000 snowmobiles and 4600 snowcoaches, and a daily limit of up to 540 snowmobiles and 78 snowcoaches.[384] The agency would set aside certain times and places for higher and lower levels of use, including additional opportunities for undisturbed skiing and snowshoeing.[385] Additionally, up to twenty-five percent of snowmobile entries would be available for unguided or non-commercially guided use.[386]

Alternative 7, originally proposed as the Park Service's preferred alternative, would provide a variety of use levels and experiences for visitors beginning with the 2012-2013 winter season.[387] Snowmobile access would range from 110 to 330 entries per day and snowcoach access would range from 30 to 80 per day, resulting in average limits of 254 snowmobiles and 63 snowcoaches per day.[388] The schedule for use would be set annually, one year in advance of the winter season.[389] Both snowmobiles and snowcoaches would be equipped with BAT technology, and all snowmobiles would be accompanied by a commercial guide.[390] Alternative 7 would also implement a hydrocarbon and nitrogen oxide emissions limit for snowmobiles by the 2014-2015 winter season.[391]

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383. *See id.* at 53, 55 (proposing phase-out period for snow mobiles).

384. *See id.* at 56-59 (discussing alternative that provides for seasonal limit to number of vehicles).

385. *See id.* at 56, 59-60 (discussing provisions for enjoyment of various activities).

386. *See id.* at 59 (allowing for individual use of snowmobiles).

387. *See id.* at 60-65 (describing Alternative 7); *see also* 2011 DRAFT LONG-TERM WINTER USE PLAN, *supra* note 350, at 60-65 (describing preferred alternative under proposed EIS).

388. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 60-63 (noting that levels for half of winter season would be 330 snowmobiles and eighty snowcoaches, levels one third of winter season would be 220 snowmobiles and fifty snowcoaches, and levels for remaining one sixth of winter season would be set at 110 or 148 snowmobiles and thirty or eighty snowcoaches).

389. *See id.* at 60 (setting guidelines for release of vehicle schedule).

390. *See id.* at 60, 63 (providing safety guidelines and restrictions for vehicle use in park). All OSVs would be required to enter the park no later than 10:30 AM. *See id.* at 60, 65 (noting, in addition, that Sylvan Pass would be open, while being managed for avalanche prevention in accordance with Sylvan Pass Working Group agreement).

391. *See id.* at 63 (restricting sum of hydrocarbon and nitrogen oxide emissions to not exceed fifteen grams per kilowatt-hour).

D. The Treatment of Preservationists and Recreationists Under the 2011 Long-Term Winter Use Plan

The Park Service memorialized its interpretation of the Organic Act's preservation/use mandate when it issued the 2006 Management Policies.[392] Although the Organic Act ties impairment only to preservation, not to enjoyment or use, the Park Service defined "impairment" as "an impact that . . . would harm the integrity of park resources or values, *including the opportunities that otherwise would be present for the enjoyment of those resources or values*."[393] Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[394] Congress was not ambiguous when it tied impairment only to preservation, not to enjoyment, and therefore the act of tying impairment to enjoyment through the 2006 Management Policies is arguably an impermissible construction of the Organic Act.[395]

While the Park Service took impairment one step further, purportedly to bolster "preservation," it concomitantly strengthened "enjoyment" by forbidding unacceptable impacts "that, individually or cumulatively, would . . . unreasonably interfere with an appropriate *use*."[396] This interpretation significantly affected how the Park Service treated recreation in the Proposed Plan.[397]

1. *Conflicts Between Preservationists, Non-Motorized Recreationists, and Motorized Recreationists*

The 2011 Long-Term Winter Use Plan expended considerable ink on the interests of snowmobilers, while downplaying the adverse impacts snowmobilers inflict on other groups.[398] Overall, the

392. *See* 2006 MANAGEMENT POLICIES, *supra* note 23 (interpreting Organic Act's preservation/use mandate).

393. 16 U.S.C. § 1 (2006) (emphasis added).

394. 467 U.S. 837 (1984).

395. *See generally* 16 U.S.C. § 1 (linking impairment to preservation, not to enjoyment).

396. *See* 2006 MANAGEMENT POLICIES, *supra* note 23, at § 1.4.7.1 (emphasis added) (defining impairment and establishing policy for determining impairment).

397. For a discussion of how the Park Service treated permissible recreation under the 2011 Long-Term Winter Use Plan and implications of those decisions on future use, see *infra* notes 398-462, 510-514, 519-531 and accompanying text.

398. *See generally* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372 (discussing at length adverse impacts to snowmobilers of decreasing motorized recreation and benefits to snowmobilers of increasing motorized recreation, but failing to legitimize adverse impacts inflicted by motorists on non-motorists). The Park Service defined "beneficial" as "[a] positive change in the condition or appearance of the resource or a change that moves the resource toward a desired condition" and defined "adverse" as "[a] negative change to the appearance or condition of the resource." *Id.* at 185.

agency did not acknowledge the preservationist viewpoint.[399] Preservationists, who wish to preserve the park in a manner that excludes human interference, face an uphill battle, considering that the Organic Act explicitly provides for the enjoyment of the park's resources and particularly because the Park Service and courts have a long history of interpreting the Organic Act to permit various forms of recreation in Yellowstone.[400] Additionally, recreationists would argue, other public lands have been set aside for total preservation; those areas are designated as "wilderness."[401]

The Park Service did not conduct independent research on the harm that snowmobilers inflict on non-motorized recreationists, choosing instead to cite a few outside sources that raise only some conflicts and failing to provide any comparison or foundation on which to judge use conflicts.[402] The agency acknowledged that conflicts caused by OSV use in the park could be due to several different types of impacts that can sometimes be "asymmetrical," in that only one group is impacted.[403] The EIS identified four primary factors that contribute to conflicts between different types of recreationists: "(1) differences in the level of significance attached to using a specific recreation resource; (2) differences in personal meanings assigned to an activity; (3) differences in expectations of the natural environment; and (4) differences in lifestyles."[404]

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399. *See generally id.* (failing to consider preservation of Yellowstone for sake of preservation). For a further discussion of preservationists' position in the debate over permissible use of public lands, see *supra* notes 201-206 and accompanying text.

400. *See* 16 U.S.C. § 1 (providing for enjoyment of park resources). For a further discussion of how federal courts have generally accepted snowmobile use in Yellowstone National Park, see *supra* notes 296-344 and accompanying text.

401. *See generally* Wilderness Act, 16 U.S.C. §§ 1131-1136 (2006) (defining "wilderness" "as an area where the earth and community of life are untrammeled by man, where man himself is a visitor who does not remain").

402. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 152-53 (spending brief three paragraphs summarizing some conflicts that exist between different types of recreationists).

403. *See id.* at 152 (citing "engine or track noise interrupting inspirational visitor experiences; vehicle congestion at popular locations and rest areas; incompatible styles of use; perceived differences between user groups in social status, values, or identity; and conflicts arising from perceived differences in support or opposition to [Park Service] management actions."); *see also id.* ("In some cases, this conflict could be 'symmetrical' (i.e., recognized and experienced by all groups that are involved in the conflict). In other cases, the conflict may be 'asymmetrical' in that it is perceived only by the impacted group, but not by the group or groups causing the impact . . . .").

404. *Id.*

The Park Service then provided brief summaries of three surveys related to visitor preferences.[405] One survey involved handing out questionnaires to snowcoach passengers, i.e., motorized recreationists, over a two-year period from 2005 to 2006.[406] The results indicated that out of the motorized recreationists who stayed overnight in West Yellowstone, only "24% said snowmobiling was a reason for visiting . . . ."[407] Two other studies surveyed local residents living near two national forests bordering Yellowstone.[408] A survey indicated that out of 480 responses, 87% preferred non-motorized access and 56% preferred OSV use.[409] Another survey indicated that out of a mere thirty-nine responses, 37% preferred non-motorized access, and 28% preferred OSV use.[410] These surveys are insufficient because of their small sample sizes and are biased because only local residents were questioned.[411]

The Park Service's analyses of impacts to visitor use and experience and visitor accessibility under each individual alternative also gave short shrift to the harm that snowmobiling has on other visitors.[412] For example, under Alternative 1, the Park Service's conclusion that, "restricting winter access to the interior of the park by non-motorized means would result in long-term major adverse impacts on the visitor use and experience to *all* visitors" ignores those visitors at Yellowstone whose sole purpose would be to enjoy the enhanced experience of natural sounds and wildlife viewing, a factor that the Park Service acknowledged in its analysis but failed to

405. *See id.* at 153-55 (reviewing results of three surveys).

406. *See id.* at 153 (citing survey entitled, *West Yellowstone Snowcoach Study, Visitor Profile of Snowcoach Passengers in West Yellowstone, Montana* (Nickerson et al. 2006)).

407. *Id.*

408. *See id.* at 153-55 (discussing surveys conducted on local residents).

409. *See id.* at 154 (citing *Study of Preferences and Values on the Bridger-Teton National Forest Study* (Clement and Chang 2009)).

410. *See id.* (citing *Shoshone National Forest Study: An Economic Profile of the Shoshone National Forest,* Taylor et al. 2008).

411. *See generally id.* at 154 (citing independent study). First, the sample size is incredibly small, particularly for the second survey. *See generally id.* (surveying small group of individuals). Second, the two surveys, although conducted on local residents all living in the same general areas, produced widely different results, indicating that those results may be unreliable. *See generally id.* (surveying only local residents). Third, the two surveys only provide the preferences of about 500 local residents and ignore the preferences of more than 600,000,000 other Americans, many of whom may have an interest in how Yellowstone, a *national* park, is managed. *See generally id.* (explaining results of survey).

412. *See id.* at 293-313 (analyzing alternatives based on visitor use, experience, and accessibility).

account for in its conclusion.[413] In the agency's analysis of Alternative 2, which would maintain daily snowmobile access at 318, the Park Service downplayed impacts to non-motorized recreationists, concluding that:

> Localized adverse effects would occur from periodic exposure to OSV sounds and sights. . . . [T]hese intrusions would not be expected to result in measurable reductions in visitor satisfaction or understanding and appreciation of park resources and values. Therefore, impacts to visitor use and experience for those seeking a non-motorized experience would be long-term, negligible to minor adverse.[414]

In addition, the agency noted in its analysis of Alternative 3, which would permit daily access of up to 720 snowmobiles, that "some non-motorized users may be adversely impacted by an increase in OSV use."[415] However, in the agency's analysis of Alternative 3, the Park Service again downplayed impacts to non-motorized recreationists, concluding that:

> Limited adverse effects would occur from periodic exposure to OSV sounds and sights. With periods of noise intrusion over 35 dBA, and permitted use levels more than doubling compared to what has occurred the past two winter seasons, the ability to appreciate park resources and values would be impacted for these visitors and could result in long-term *minor* adverse effects. . . . Visitors would experience long-term *minor* adverse impacts under alternative 3. These impacts would result from increased use levels that could adversely affect park resources, and in turn, diminish the visitor experience. Non-motorized users may experience decreased satisfaction with increased OSV use.[416]

Nevertheless, the Park Service combined the benefits and adverse impacts of Alternative 3 with benefits derived from recreational opportunities outside of Yellowstone to conclude that cumulative impacts to visitor use and experience would be long-

413. *See id.* at 297, 299 (emphasis added) (acknowledging that eliminating OSV use will result in "increased opportunities to enjoy natural sounds and view wildlife").

414. *Id.* at 300.

415. *See id.* at 296 (discussing Alternative 3).

416. *Id.* at 302 (emphasis added).

term and beneficial, noting that "Alternative 3 would make a large contribution to these impacts by supporting *traditional* winter visitor use and experience opportunities in Yellowstone," an opinion that was reapplied in Alternatives 4 through 8 as well.[417] Additionally, the corresponding analysis for Alternative 4 did not acknowledge harm to non-motorized recreationists caused by continued snowcoach use.[418]

Further, the 2011 EIS recognized benefits to non-motorized visitors under Alternative 5, stating that transitioning to BAT snowcoaches would "result in a small reduction in OSV sounds . . . as compared to the combined presence of snowmobiles and snowcoaches. As a result, backcountry visitors may experience an increment of improved opportunities to experience quiet and solitude."[419] The Park Service also recognized that "[l]imited adverse effects would continue to occur from periodic exposure to snowcoach sounds and sights. . . . these intrusions would be considered minimal."[420] Neither of these two factors was mentioned in the Park Service's conclusion for Alternative 5, even though the agency considered the "long-term moderate adverse impacts to [snowmobilers]."[421]

Under Alternatives 6 and 7, which each institute variable use plans that would permit up to 540 and 330 snowmobiles, respectively, and up to seventy-eight and eighty snowcoaches, respectively, per day, the Park Service asserted that non-motorized visitors could plan their trip at a time of low snowmobile use, thereby minimizing conflicts with snowmobilers.[422] That reasoning, however, would effectively shorten the Yellowstone winter season for non-motorists who wish to enjoy a snowmobile-free Yellowstone.[423] The Park Ser-

417. *See id.* at 302 (emphasis added) (combining impacts both inside and outside Yellowstone to conclude that Alternative 3 would provide cumulative long-term, beneficial effects); *id.* at 302, 305, 307, 309, 311, 313 (combining impacts from both inside and outside Yellowstone and reiterating, but not defining, "traditional winter use and experience opportunities in Yellowstone").

418. *See id.* at 303-05 (omitting analysis of harm inflicted on non-motorized recreationists by snowcoach use).

419. *Id.* at 306.

420. *Id.*

421. *See id.* at 307 ("[T]he opportunity to experience a specific, individual snowmobile experience as offered in the past would be lost. This would result in the potential for visitors' expectations not to be met.").

422. *See id.* at 308-09, 310 (providing method for non-motorists to avoid OHV users under Alternatives 6 and 7).

423. *See generally id.* (explaining method of avoidance without explicitly acknowledging adverse consequences). "Snowmobile-free" does not necessarily mean "natural." For a discussion of the various definitions of nature, see *supra* notes 151-159 and accompanying text.

vice quickly dismissed that fact, however, and recognized only "long-term negligible to minor adverse impacts if these individual desires cannot be accommodated."[424] In contrast to Alternative 6, however, the Park Service believed that Alternative 7, the draft EIS's preferred alternative, would have "the greatest potential to meet expectations of non-motorized winter users of the park."[425] This conclusion did not account for the harm to non-motorists caused by interactions with snowmobilers.[426]

In a practice that was common among many of the alternatives' analyses, the Park Service chose to draw a direct comparison to Alternative 1's snowmobile ban to emphasize Alternative 7's relative *benefits* to snowmobilers, even though the Park Service never provided a comparison to Alternative 1 to emphasize Alternative 7's *adverse impacts* on non-motorists caused by OSV use.[427] Again, under Alternative 2, the Park Service stated: "[c]ompared to alternative 1, alternative 2 would offer a markedly improved visitor experience . . . because it would allow motorized access in the park to continue . . . ."[428] Likewise, the Park Service stated that "Alternative 8 would offer a markedly improved visitor experience for *all* visitors . . . compared to alternative 1."[429] The Park Service also wrote blanket statements claiming that Alternatives 4, 5, 6, and 7 provided greater benefits to visitor use and enjoyment and visitor accessibility than Alternative 1.[430] Overall, these conclusions identified all visitors as benefiting from increased OSV use but failed to account for the adverse impacts on non-motorized recreationists, thereby tipping the scales in favor of motorized recreation.[431]

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424. *See id.* at 309-10 (discounting adverse impacts on visitors whose "desires cannot be accommodated").

425. *See id.* at 310 ("Cross-country skiers and snowshoers would gain access to routes previously shared with OSVs, and would have the new opportunities to experience park resources and values with low levels of OSV noise and intrusion.").

426. *See generally id.* (failing to factor in harm to non-motorists).

427. *See id.* at 311 ("Compared to alternative 1, overall impacts on visitor use and experience would be long-term beneficial, with long-term, minor to moderate, adverse impacts for those visitors unable to achieve their desired visitor experience because of reduced OSV availability and route changes."). *But see id.* at 300, 306, 309 (citing adverse impacts under Alternatives 2, 5, 6).

428. *Id.* at 299.

429. *Id.* at 312 (emphasis added). *But see id.* ("The exception to this improved experience would be for the small group of people capable of skiing the long distances between entrances and attractions–because continued motorized access would increase winter visitation to the park's interior.").

430. *See id.* at 304, 305, 306, 307, 309, 311 (comparing Alternatives 5, 6, 7, and 7 to Alternative 1).

431. For examples of how the Park Service failed to account for motorists' impact on non-motorists, see *supra* notes 398-430 and accompanying text. For a

2. *Impacts on Air Quality, Wildlife, and Soundscapes*

The Park Service labeled the cumulative impacts on air quality for all eight alternatives, including Alternative 1's ban on OSV use, as minor adverse.[432] This conclusion is astonishing considering the wide range of access limits considered, from as low as zero to as much as 720 snowmobiles daily, as well as Yellowstone's historical air pollution problems caused by snowmobile emissions.[433] In addition, OSVs, which the Park Service recognized directly kill wildlife, account for more than 99% of all interactions between wildlife and winter visitors.[434]

In regard to soundscapes, the Park Service took the position that "Yellowstone's winter soundscapes . . . include sound from OSV use . . . ."[435] Most non-motorized recreationists experience OSV noise considering that they generally stay within two miles of travel corridors, and, therefore, the Park Service concluded that most non-motorized visitors would "experience conflict with OSV use . . . if they are seeking natural sounds and quiet." [436] Moreover, in as late as 2010, the agency noted, "many travel corridors and developed areas, particularly those near motorized routes or with heavy use, experience higher sound levels."[437] Thus, even though the agency went on to acknowledge that "[s]oundscapes are a key element of the environment and natural ecology of national parks," it implied that throughout the many travel corridors in the park, higher sound levels have become a part of the park's winter sound-

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further discussion of the Organic Act's preservation/use mandate, see *supra* notes 32-45 and accompanying text.

432. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 271-75 (discussing alternatives' cumulative impacts on air quality).

433. *See generally id.* (concluding that air quality impacts would be similar under all "action alternatives"). For a further discussion of Yellowstone's historical air quality problems, see *supra* notes 126-134 and accompanying text.

434. *See id.* at 196, 197-98 (discussing history of wildlife deaths caused by collisions with OSVs based on data that was over fourteen years old and stating that "[i]nteractions with non-motorized users in the front country accounts for less than 1% of observed interactions between wildlife and winter users during winters 2007 to 2009, compared to those between OSVs and wildlife . . . .").

435. *See id.* at 134 (citation omitted) (relying on fact that "most visitors either use OSVs to tour the park or stay within two miles of motorized routes if engaging in non-motorized uses").

436. *See id.* (acknowledging that because non-motorized visitors remain close to motorized recreationists, the noise level experience by non-motorized visitors will typically cause a conflict). Noise modeling indicated that "mechanized noise may be audible to humans in areas up to ten miles from travel corridors." *See id.* at 152 (relying on 2006 sound modeling study conducted in Yellowstone National Park).

437. *Id.* at 134.

scapes.[438] Further, the agency stated that "equally important [to the environmental and natural ecology of national parks] are the ways in which visitors experience a natural soundscape."[439] This logic elevates "use" to the same level as "preservation" under the Organic Act, even though the Organic Act and the Park Service's own 2006 Management Policies prohibit such a result.[440] In addition, the Park Service did not later consider in the soundscape analysis for each alternative that OSVs create unavoidable one-way adverse impacts on non-motorized recreationists.[441]

The Park Service did recognize the importance of soundscapes in its analysis of visitor use and experience under Alternative 3, but it downplayed that importance in the analyses for other alternatives, such as Alternative 2.[442] Even though the Park Service indicated that natural sounds are important to visitors and noted that snowmobiles could be heard up to ninety-five percent of the day in certain areas of the park, it concluded that snowmobiles have only a negligible to minor adverse impact on non-motorists.[443] In contrast, the Park Service believed that any beneficial improvement to soundscapes for non-motorists based on Alternative 1's ban on OSV use would be "limited" and "localized."[444]

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438. *See id.* at 134, 149 (implying that sounds from OSVs are common, and therefore natural, part of Yellowstone).

439. *Id.* at 149 (citation omitted).

440. *See* 2006 MANAGEMENT POLICIES, *supra* note 23 (noting that preservation deserves more consideration than use).

441. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 275-93 (failing to consider impacts of motorized recreation on soundscapes). The Park Service did, however, consider soundscapes in its alternatives analyses for visitor use and experience. *See id.* at 297-98, 300-03, 306-09, 311-13 (discussing impacts of differing levels of soundscape quality on visitor use and experience).

442. *See id.* at 300, 302 (citing Freimund study under Alternative 3 that found "opportunity to experience natural sounds at Yellowstone in the winter is important to the visitor experience" but stating under Alternative 2 that "[e]xposure to OSV sounds . . . would not be expected to result in measurable reductions in visitor satisfaction or understanding and appreciation of park resources and values").

443. *See generally id.* at 302 (stating that, under Alternative 2, "incremental decreases in resource conditions . . . would result in long-term negligible to minor adverse effects to the visitor use and experience"). A 2006 noise modeling study conducted at Yellowstone National Park indicated that "mechanized noise may be audible to humans in areas up to ten miles from travel corridors." *Id.* at 152. Moreover, in as late as 2010, the Park Service noted that "many travel corridors and developed areas, particularly those near motorized routes or with heavy use, experience higher sound levels." *Id.* at 134. The Park Service has previously stated that "in Yellowstone, snowmobile noise can be heard 95 percent of the time by visitors at Old Faithful and 87 percent of the time at the Grand Canyon of the Yellowstone." Proposed Rule to Phase Out Snowmobile Use in Yellowstone National Park, 65 Fed. Reg. 79,024, 79,026 (proposed Dec. 18, 2000).

444. *See id.* at 298 ("[T]he benefits of reduced motorized use for nonmotorized users would be limited, localized, and long-term."). The agency

Furthermore, the Park Service cited a study that found that "snowmobilers and snowcoach riders generally felt strongly or somewhat agreed that Yellowstone is a place for *natural quiet*."[445] The results of this study are misleading because they assume that all groups, motorists and non-motorists, use the same definition of "natural," and thus ignore William Cronon's various definitions of nature and fail to provide an adequate basis for comparing the competing views of motorists and non-motorists.[446] Recreationists generally adhere to a belief in "nature as commodity," and therefore, motorized recreationists include recreational noise in their definition of natural quiet.[447] Non-motorized recreationists, however, may also side with the "nature as commodity" viewpoint, but they believe that natural quiet does not include the sound of OSV engines, as would other non-motorized recreationists and pure preservationists who define "nature as a moral imperative."[448]

The Park Service's snowmobile regulations permit snowmobile use 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."[449] The Park Service indicated, however, in the 2011 Long-Term Winter Use Plan that sounds from snowmobiles are inconsistent with the park's natural sounds, which the agency con-

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concluded with regards to soundscapes, particularly under Alternative 5, that transitioning to snowcoaches would lead to a thirty-three percent reduction in sound. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 306 ("It is anticipated that this would result in a small reduction in OSV sounds exceeding 35 dBA in the travel corridor (from approximately 9 percent to 6 percent of the day) as compared to the combined presence of snowmobiles and snowcoaches."). However, the Park Service concluded that "[v]isitors seeking non-motorized uses inside the park would experience limited beneficial effects" from the reduction. *See id.* at 306 ("As a result, backcountry visitors may experience an increment of improved opportunities to experience quiet and solitude.").

445. *See id.* at 150 (emphasis added) (explaining results of survey conducted on snowmobilers and snowcoach riders). *But see id.* at 150 (noting that only fifteen percent of visitors were able to find the level of natural sound they were looking for "all of the time" they were in Yellowstone).

446. *See* CRONON, *supra* note 152, at 34-52 (discussing various approaches to defining nature). For a summary of Cronon's definitions of nature, see *supra* notes 152-157 and accompanying text. A similar deficiency appears in the statute establishing Yellowstone National Park, in which Congress required the Park Service to preserve all "*natural* curiosities, or wonders . . . in their *natural* condition." *See* 16 U.S.C. § 22 (2006) (emphasis added) (failing to define natural).

447. *See generally* CRONON, *supra* note 152, at 46 (defining "nature as commodity" as tourist attraction value, including recreation).

448. *See generally id.* at 36, 46 (defining "nature as moral imperative" as belief that natural resources are superior and should be protected).

449. 36 C.F.R. § 2.18(d)(1) (2011) (stating permissible sound levels of snowmobiles in national parks).

ceded is one of the natural values of the park.[450] Therefore, the agency may violate section 2.18(d)(1) of its own regulations by permitting snowmobile use in Yellowstone.[451]

3. *2011 Long-Term Winter Use Plan Initially Preferred Daily Access of up to 110-330 Snowmobiles*

In the Park Service's first attempt at a long-term solution, the Park Service proposed that Alternative 7 had "the greatest potential to meet expectations of non-motorized winter users of the park."[452] The agency stated that "[c]ross-country skiers and snowshoers would gain access to routes previously shared with OSVs, and would have the new opportunities to experience park resources and values with low levels of OSV noise and intrusion."[453] The Park Service believed that "Alternative 7 would result in long-term, parkwide, benefits for park visitors pursuing non-motorized means of recreation."[454]

Recall that Executive Order 11989 requires snowmobile use to immediately discontinue if such use adversely impacts the park's resources or disturbs wildlife.[455] Inherent in the agency's preference of Alternative 7 is therefore its belief that permitting up to 110-330 snowmobiles will not adversely impact Yellowstone's resources or disturb wildlife.[456] Alternative 7, however, provides no *practical* limit on snowmobile use in Yellowstone given that snowmobile access over the 2009-2010 and 2010-2011 winter seasons averaged only 187 and 194 and peaked at 293 and 289.[457] Setting limits above current averages appeases snowmobilers who are not actually affected by the limits, but it is not a compromise between motorized

450. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 134 (explaining that OSV sounds are common part of Yellowstone).

451. *See* 36 C.F.R. § 2.18(d)(1) (prohibiting operation of snowmobiles in national parks that do not meet sound standards).

452. 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 310.

453. *Id.*

454. *Id.*

455. *See* Exec. Order No. 11989, 42 Fed. Reg. 26,959 § 9 (May 25, 1977) (requiring snowmobile use to immediately discontinue if such use will cause "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of the public lands"). For a further discussion of Executive Orders 11644 and 11989, see *supra* notes 46-54 and accompanying text.

456. *See* 37 Fed. Reg. 2877 (assuming that if snowmobile levels adversely impact park resources or disturb wildlife that they must immediately cease).

457. *See* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 145-46 (summarizing visitor statistics).

and non-motorized recreationists, and it ignores input from preservationists.[458]

In addition, Alternative 7's adaptive management approach risks the agency's undue reliance on unmonitored decisions rather than forcing the agency to prove how its policies will meet its "substantive legal criteria."[459] Courts typically reject adaptive management plans as "too amorphous," particularly because they allow agencies to dodge difficult policy decisions through statutory subterfuge.[460] Some courts, however, understand that adaptive management can play a role in administrative law and attempt to balance the flexibility of adaptive management with the certainty of a final agency action.[461] Nevertheless, in 2008, the D.C. District Court found that the Park Service's adaptive management program for Yellowstone provided "no quantitative standard or qualitative analysis to support" a finding of impairment under the Organic Act.[462]

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458. *See* Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 192 (D.D.C. 2008) (striking down 2007 Rule that permitted significantly more snowmobiles in Yellowstone than historical averages).

459. *See* J.B. Ruhl & Robert L. Fischman, *Adaptive Management in the Courts*, 95 MINN L. REV. 424, 469 (2010) (chastising agencies for using adaptive management strategies).

460. *See id.* at 460 (citing Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 209-10 (D.D.C. 2008); Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 387 (E.D. Cal. 2007); Mountaineers v. U.S. Forest Serv., 445 F. Supp. 2d 1235, 1250 (W.D. Wash. 2006); Natural Res. Def. Council v. U.S. Army Corps of Eng'rs, 457 F. Supp. 2d 198, 234-35 (S.D.N.Y. 2006)). *But see* Defenders of Wildlife v. Salazar, 651 F.3d 112, 115-118 (2011) (upholding adaptive management approach to reducing winter elk populations). A number of courts have likewise reprimanded agencies in their attempts at implementing adaptive management. *See* Klamath Siskiyou Wildlands Ctr. v. Boody, 468 F.3d 549, 558-59 (9th Cir. 2006) (disapproving of adaptive management implementation); High Sierra Hikers Ass'n v. Weingardt, 521 F. Supp. 2d 1065, 1091 (N.D. Cal. 2007) (reiterating opinion stated in *Klamath Siskiyu Wildlands*). The Ninth Circuit held that changes made pursuant to adaptive management programs do not shield later management changes from complying with regulations that provide procedures for amendment plans. *See Klamath Siskiyou Wildlands Ctr.*, 468 F.3d at 558-59 (holding that changes made pursuant to adaptive management programs do not shield later changes from complying with regulations that provide procedures for amendment plans). The District Court for the Northern District of California determined that an agency may not rely on adaptive management to avoid proving it will meet Wilderness Act standards. *See High Sierra Hikers Ass'n*, 521 F. Supp. 2d at 1090-91 (N.D. Cal. 2007) (denying reliance on adaptive management to meet requirements of Wilderness Act).

461. *See* Ruhl, *supra* note 459, at 469 (citing Pac. Coast Fed'n of Fishermen's Ass'ns, 606 F. Supp. 2d 1122, 1194 (E.D. Cal 2008), and Natural Res. Def. Council, 506 F. Supp. 2d 322, 387 (E.D. Cal. 2007)) (explaining approaches taken by other courts).

462. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 195, 209-10 (rejecting Park Service's use of adaptive management program within Yellowstone Winter Use Plan).

E. Forthcoming 2012 Long-Term Winter Use Plan

On February 8, 2012, the Park Service published a Notice of Intent to Prepare a SEIS for the Yellowstone National Park Winter Use Plan.[463] The SEIS will consider new information based on air quality and sound modeling, adaptive management, the possibility of offering non-commercially guided access, BAT for snowcoaches, and the operation of Sylvan Pass.[464] The Park Service stated that it will likely remove Alternatives 3 and 6, which would permit up to 720 and 520 snowmobiles per day, respectively, from the final EIS and propose minor changes to the remaining alternatives.[465] The SEIS will also consider at least one alternative "that manages snowmobile and snowcoach use based on sound events, rather than numbers alone."[466] The comment period for the Notice of Intent closed on March 9, 2012.[467] At the time this comment went to publication, the Park Service intended to release a new draft SEIS in late spring 2012 and intended to formally adopt and implement, if necessary, a proposed rule in October or November of 2012.[468]

Along with the Notice of Intent, the Park Service also issued a newsletter explaining its plans for the SEIS.[469] Unless a new regula-

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463. Notice of Intent to Prepare Supplement Environmental Impact Statement for Winter Use Plan, Yellowstone National Park, 77 Fed. Reg. 6581 (Feb. 8, 2012).

464. *See id.* ("[T]he SEIS will focus primarily on the substantial new information and issues that were raised during the Draft EIS comment period, as well as any other substantial new information or issues that are raised."); *see also* Martin Kidston, *'Sound Events' Could Govern Oversnow Travel Limits in Yellowstone*, BILLINGS GAZETTE (Feb. 14, 2012), *available at* http://billingsgazette.com/news/state-and-regional/wyoming/sound-events-could-govern-oversnow-travel-limits-in-yellowstone/article_51c52811-fff3-5327-8b42-ce3cb0066820.html (quoting Superintendent Dan Wenk as saying, "We didn't fully evaluate the existing fleet of snowcoaches in terms of air quality and noise. . . . We wanted to look at non-commercially guided (snowmobile) use, and with the climate changing, we needed to see if our seasons of operation were correct."); *see id.* (reporting that Park County commissioner and member of Wyoming-based snowmobile club stated, "We don't want Yellowstone to become a playground for the wealthy. I'm asking the Park Service to acknowledge that the average person can't afford a commercial guide.").

465. *See* 77 Fed. Reg. at 6581 (discussing intentions for upcoming SEIS).

466. *Id.* (introducing idea of regulating OSV access based on sound events). A newsletter that accompanied the release of the Notice of Intent claimed, however, that "at least two new alternatives" would consider sound events. *See* SEIS NEWSLETTER, *supra* note 251, at 2 (preferring to "regulat[e] park entry according [sic] the number of "sound events" created by snowcoaches or guided snowmobile groups, rather than by specific numbers of snowcoaches or snowmobiles").

467. *See* 77 Fed. Reg. at 6581 (providing thirty-day comment period).

468. *See* SEIS NEWSLETTER, *supra* note 251, at 5 (providing timeline for SEIS and formal rulemaking).

469. *Id.*

tion is adopted, after March 15, 2012, Alternative 1 would be implemented by default to indefinitely prohibit all OSV access.[470] Alternative 2 would continue OSV access at the 2008 Rule's limits, which permitted up to 318 commercially guided BAT snowmobiles and up to 78 snowcoaches per day.[471] Alternative 3, formerly referred to as Alternative 4 in the 2011 EIS, would provide a mixed-use plan that would allow access to buses, vans, snowcoaches, and snowmobiles.[472] Two routes in the park would be plowed for access of up to 100 buses and vans per day, and Yellowstone's east and south access roads would be groomed for up to 30 snowcoaches and 100 BAT snowmobiles per day.[473] Alternative 4, formerly referred to as Alternative 5, would provide a transition to snowcoaches only.[474] Initially, 318 BAT snowmobiles and 78 snowcoaches per day would be allowed in the park.[475] As the park's snowcoaches transitioned to BAT, snowmobile access would be reduced until finally being eliminated within five years after the 78 snowcoaches achieve BAT.[476]

Alternatives 5 and 6 would implement "Sound Event Management."[477] Under both alternatives, park entrance operators would be allocated a certain number of sound events, which would each initially equal one snowcoach or one group of snowmobiles.[478] The Park Service believes that this approach would permit entrance operators the ability "to increase the number of visitors while reducing noise impacts."[479] Under Alternative 5, a group of snowmobiles would average up to seven snowmobilers, but would not exceed ten,

470. *See* 77 Fed. Reg. at 6581 (noting that Alternative 1 would still allow skiing and snowshoeing); *see also* SEIS NEWSLETTER, *supra* note 251, at 4 (explaining possible ban on OSV use after March 15, 2012).

471. *See* SEIS NEWSLETTER, *supra* note 251, at 5 (providing limited exceptions for non-commercial guides).

472. *See id.* (allowing wheeled commercial vehicles and motorized oversnow vehicles).

473. *See id.* (explaining vehicle access limits).

474. *See id.* (providing timeline for transition to snowcoaches only).

475. *See id.* (noting access limits under Alternative 4).

476. *See id.* (adding that Sylvan Pass, Yellowstone's east entrance, would be closed to both snowmobiles and snowcoaches once snowmobiles are completely phased out).

477. *See id.* at 5-6 (explaining idea of how Park Service may propose to regulate access levels based on sound events).

478. *See id.* ("Snowmobile and snowcoach numbers, including snowmobile group size, could change over time through adaptive management.").

479. *See id.* at 5 (naming benefits of sound event management). *But see* Kidston, *supra* note 464 (quoting local resident who believed that "[i]f you want to have a serious discussion about this, we need to talk seriously about the sound in the summer versus the sound in the winter. . . . We hear the Harleys and they're here all summer long in numbers we can't even fathom.").

and under Alternative 6, a group of snowmobiles would be limited to a maximum of seven.[480] Alternative 5 would permit up to 120 sound events each day, and Alternative 6 would permit up to 120 sound events each day.[481] Under Alternative 5, operators would be required to permit both snowmobile and snowcoach access, which would allow demand to drive access allocations.[482] In contrast, under Alternative 6, operators would decide whether and how to allocate sound events between snowmobiles and snowcoaches, although Alternative 6 would institute access limits and no more than fifty percent of an operator's allocated sound events could come from snowcoaches.[483]

As a result of the different maximum permissible sound events and management methods described above, the resulting OSV access limits under Alternatives 5 and 6 vary widely.[484] Alternative 5 would permit up to 840 snowmobiles and no snowcoaches, or no snowmobiles and up to 120 snowcoaches, or some combination in between, per day.[485] Alternative 6 would permit up to 350 snowmobiles and 50 snowcoaches, or no snowmobiles and up to 100 snowcoaches, or some combination in between, per day.[486] To make up for this difference, Alternative 5 would allow impacts to resources to factor into limiting OSV access and would permit only "commercial wheeled or rubber-tracked vehicles" during the first two and last two weeks of the winter season.[487]

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480. *See* SEIS NEWSLETTER, *supra* note 251, at 5-6 (noting that limits "could change over time through adaptive management").

481. *See id.* (starting maximum sound events permitted under Alternatives 5 and 6).

482. *See id.* at 5 (describing Alternative 5's market-driven approach to allocating sound events).

483. *See id.* at 6 (describing Alternative 6's regulatory-driven approach to allocating sound events).

484. *See id.* at 5-6 (pointing to two extreme OSV access level scenarios under both Alternative 5 and Alternative 6). An owner of a local snowmobile rental company criticized the wide range of possible access levels under Alternatives 5 and 6, arguing that the "two extremes for the total snowmobile and snowcoach numbers in regards to the alternatives dealing with sound events . . . are too extreme." *See* Abbie Tumbleson, *Meeting Touches on the Future of Winter Use in Yellowstone*, WEST YELLOWSTONE NEWS (Feb. 24, 2012), http://www.westyellowstonenews.com/news/article_bc129318-5f16-11e1-9d22-001871e3ce6c.html (reporting on meeting over alternatives to be considered in upcoming 2012 Long-Term Winter Use Plan).

485. *See* SEIS NEWSLETTER, *supra* note 251, at 5 (noting two extreme OSV access level scenarios under Alternative 5).

486. *See id.* at 6 (noting two extreme OSV access level scenarios under Alternative 6).

487. *See id.* at 5-6 (adding that adverse effects on "resources, such as air and wildlife [sic] could be limiting factors" on access limits).

Alternative 7, which the Park Service originally preferred in the proposed 2011 EIS, would permit variable use management.[488] OSV access limits would vary depending on the time of season, ranging from 110 to 330 snowmobiles and from 30 to 80 snowcoaches per day.[489] OSV access would be prohibited in certain areas of the park during certain portions of the winter season to allow for skiing and snowshoeing.[490] In addition, the Park Service would implement a limit on the emission of nitrogen oxides from snowmobiles, and the current carbon monoxide and hydrocarbon emissions limits would continue.[491]

The Park Service held a series of public meetings in February 2012 to address the alternatives that would be offered in the SEIS.[492] The tone of these meetings indicated how local bias has influence the management of Yellowstone National Park which may be attributable to the fact that the majority of these meeting take place in communities immediately surrounding Yellowstone.[493] Snowmobile groups concerned only with the financial gain associated with OSV access continue to frame the debate from an anthropocentric viewpoint.[494] Congress, however, did not recognize local financial interests as a factor to consider when determining the per-

488. *See id.* at 6 (retaining Alternative 7 from the 2011 LONG-TERM WINTER USE PLAN).

489. *See id.* (stating possible OSV access levels under Alternative 7).

490. *See id.* (explaining variable use management).

491. *See id.* (preserving emissions limits originally proposed for Alternative 7 in the 2011 LONG-TERM WINTER USE PLAN).

492. *See* Notice of Intent to Prepare Supplemental Environmental Impact Statement for Winter Use Plan, Yellowstone National Park, 77 Fed. Reg. 6581 (Feb. 8, 2012) (announcing meeting dates); *see also* Tumbleson, *supra* note 484 (reporting on meeting in West Yellowstone); Kidston, *supra* note 464 (reporting on meeting in Cody, WY).

493. *See* Tumbleson, *supra* note 484 (reporting that "[l]ocals from Backcountry Adventures, Randy Roberson, of Yellowstone Vacations, staffers from Two Top Snowmobile Rentals, Clyde Seely, of See Yellowstone and Three Bear Lodge and Jason and Bill Howell, of Yellowstone Arctic Yamaha, were just a few familiar faces in attendance from the snowmobile and snowcoach communities," and providing no evidence of representation of anyone with environmental interest); Kidston, *supra* note 464 (reporting no representation at the meeting of environmental groups, but noting that roughly "20 people attended the park's first meeting in Cody, most of them snowmobilers who were critical of the park's proposed plan" even though most of 59,000 comments on 2011 LONG-TERM WINTER USE PLAN favored limiting OSV winter access in Yellowstone); *see generally* 77 Fed. Reg. at 6581 (providing public meeting information).

494. *See* Tumbleson, *supra* note 484 (quoting local resident's anthropocentric viewpoint as stating "We're talking about animals, sound. We're not talking about the people that live here. . . . I care about the animals, but I care more about feeding my family."). At a meeting in Cody, WY, attendees complained that regulating sound events creates uncertainty for local businesses that support winter visitors. *See* Kidston, *supra* note 464 (paraphrasing concerns of local business owners).

missible use of Yellowstone.[495] The Park Service has acknowledged that fact.[496] History indicates that the upcoming Long-Term Winter Use Plan will be immediately challenged by multiple parties representing both sides of the debate, regardless of which alternative the Park Service chooses.[497] When that time comes, the analysis provided above for the 2011 Long-Term Winter Use Plan will still apply.[498]

F. Judicial and Administrative Trends in Managing Recreation in National Parks

Prior to the Clinton Administration's 2001 Rule, the Park Service utilized a nonsegregated multiple-use model by allowing relatively permissive access to a diverse group of recreational visitors, both motorized and non-motorized, without segmenting the park into isolated "use" areas.[499] Motorized recreation thrived during this time period, particularly because snowmobilers were not significantly affected by other visitors.[500] Nonsegregated multiple-use plans became increasingly unsuccessful as technology advanced and allowed motorized recreationists to reach deeper areas of the park, "result[ing] in serious and tense conflicts between" various types of

495. *See* 16 U.S.C. § 1 (2006) (announcing "purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.").

496. *See* Kidston, *supra* note 464 (reporting that at meeting in Cody, WY, park officials responded to local business owners' financial concerns and requests to put more weight towards local interests at expense of other areas of country, by stating that "Yellowstone is a national park belonging to the country as a whole"). *But see* Tumbleson, *supra* note 484 (reporting that at seventy-person meeting in West Yellowstone, Superintendent Dan Wenk stated that "[w]e're not going to make the whole population happy. We need to make a sustainable decision that will hold up in the courts, if someone challenges that decision."). Pro-snowmobile groups continue to skew the debate, often drawing on false premises to garner additional local support. *See* Kidston, *supra* note 464 (quoting Park County Commissioner Joe Tilden as stating that "[e]very alternative in this plan will eventually phase out winter use in Yellowstone. . . . Each alternative takes us one step closer to having no winter access."). *But see* SEIS NEWSLETTER, *supra* note 251, at 4-6 (permitting continued winter OSV access under all but one alternative).

497. *See Gazette Opinion*, *supra* note 9 ("It seems unlikely that the next 'final' rule will avoid legal challenge.").

498. For an analysis of the 2011 LONG-TERM WINTER USE PLAN, see *supra* notes 398-462 and accompanying text.

499. *See* Laitos, *supra* note 199, at 1105 (discussing implications of nonsegregated multiple-use approach on recreational groups).

500. *See id.* at 1104 (identifying imbalance of impacts on non-motorists caused by motorists).

visitors.[501] The 2001 Rule employed an approach most closely associated with the dominant-use model by reducing snowmobile access and maintaining non-motorized access; however, the agency still permitted limited snowcoach access.[502] In addition to appeasing non-motorized recreationists, the government provided fundamental support for its decision that closely paralleled a "preservationist" premise.[503]

The Bush Administration retreated from the dominant-use model and reinstated the nonsegregated multiple-use model that prevailed throughout the latter part of the 20th Century.[504] While the D.C. District Court rejected the 2003 Rule's nonsegregated multiple-use approach, the Wyoming District Court almost simultaneously rejected the 2001 Rule's dominant-use approach.[505] Some scholars, at the time, believed that the Wyoming District Court's decision was an exception to the trend, and that generally federal courts were becoming less favorable towards motorized recreation.[506] Most courts, scholars believed, tended to discount the economic benefit derived from commercial recreation and focused

501. *See id.* at 1106 (discussing differences between motorized recreationists and non-motorized recreationists). Increased technology would probably present problems more for preservationists than non-motorized recreationists because if motorized recreationists are barely capable of reaching a remote area of the park, non-motorized recreationists would have even greater difficulty. *See id.* (surveying various forms of approaches to recreation management in national parks).

502. *See id.* at 1104 (concluding that dominant-use model is preferred by majority of user groups).

503. *See id.* (noting that dominant-use approach generally favors preservationists, as well as low-impact non-motorized recreationists).

504. *See* 2003 Proposed Winter Use Plan, 68 Fed. Reg., 51,526, 51,527 (proposed Aug. 27, 2003) (creating nonsegregated multiple-use management plan).

505. *Compare* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 108 (D.D.C. 2003) (striking down snowmobile access), *with* Int'l Snowmobile Mfrs Ass'n v. Norton, 340 F. Supp. 2d 1249, 1253 (D. Wyo. 2004) (striking down snowmobile ban).

506. *See* Laitos, *supra* note 199, at 1108-10 (discussing conflicts between motorized recreationists and preservationists and low-impact, non-motorized recreationists); *see also* Southwest Four Wheel Drive Ass'n v. Bureau of Land Mgmt., 271 F. Supp. 2d 1308 (D. N.M. 2003) (affirming Bureau of Land Management's decision to close roads in wilderness study areas where ORVs caused adverse environmental impacts); Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1214 (10th Cir. 2002) (upholding Forest Service's decision to close roads in national forests where increased sedimentation was decreasing trout populations); Am. Sand Ass'n v. U.S. Dep't. of Interior, 268 F. Supp. 2d 1250, 1253-55 (S.D. Cal. 2003) (supporting BLM decision to close part of sand dunes to ORV access at site of endangered plant). The author further noted that "[t]he use of personal watercraft, snowmobiles, aircraft, and ORVs either diminishes or virtually eliminates the values associated with nonmotorized hiking, snowshoeing, and bird and wildlife watching. Motorized recreation is entirely inconsistent with those seeking solitude or a view of an untouched natural environment." *Am. Sand* Ass'n, 268 F. Supp. at 1108.

more on other interests, such as preservation.[507] Those scholars also observed that usually the only time courts would disapprove of the dominant-use model was when preservationists or non-motorized recreationists failed to prove that motorized vehicles caused environmental harm.[508] At the start of the 2004-2005 winter season, one commentator noted:

> A dominant-use model is emerging, which rejects the notion that multiple preservation and recreation uses might be compatible within the same general area. In this model, preservation coupled with low impact, nonmotorized forms of recreation becomes the primary use of natural resources.[509]

The 2011 Draft Long-Term Winter Use Plan originally proposed to adopt Alternative 7's segregated multiple-use model which would permit all recreational uses but would designate motorized and non-motorized recreation to separate areas of the park. [510] This model would allocate trails among hikers, mountain bikers, and snowmobilers, as well as apply varying access levels in different areas of the park throughout the winter season.[511] Although non-motorists generally prefer the segregated model to the non-segregated model, segregation harms all visitors by restricting access and providing only a nominal improvement to preservation.[512]

In the end, the Park Service's proposed segregated multiple-use plan failed to adequately consider adverse impacts on non-motorized recreationists and preservationists caused by snowmobiles, although it provided overwhelming weight to snowmobilers' desire

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507. *See* Laitos, *supra* note 199, at 1118 (footnote omitted) ("[E]xcept in a Wyoming case where one judge issued an injunction on a snowmobile ban, economics has played almost no role in judicial decisions involving recreation.").

508. *See id.* at 1110-11 (espousing view that courts were trending towards dominant-use model).

509. *Id.* at 1091.

510. *See generally* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 60-65 (describing management under Alternative 7); *see also* 2011 DRAFT LONG-TERM WINTER USE PLAN, supra note 350, at 60-65 (proposing Alternative 7 as preferred alternative); Laitos, *supra* note 199, at 1105 (discussing operation of dominant-use model).

511. *See generally* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 60-65 (explaining park management under Alternative 7); *see also* Laitos, *supra* note 199, at 1106-07 (discussing implications of segregated multiple-use model).

512. *See* Laitos, *supra* note 199, at 1107 (mentioning only that segregated multiple-use model "deprives Group 1 recreationists of the opportunity to enjoy the areas that can only be accessed by mountain bike or motorized vehicle" but failing to mention that it deprives opportunities to other groups as well).

to retain full access.[513] The Park Service indicated the Alternative 7 would remain in its upcoming 2012 SEIS.[514] Recently, the Park Service has indicated that it plans to move away from the segregated multiple-use model by removing the original Alternative 6's segregated multiple-use plan and adopting two new non-segregated multiple-use plans that regulate access levels based on sound events.[515] Although the Park Service stated that the SEIS will likely contain two dominant-use plans, both Alternatives 1's snowmobile ban and Alternative 4's transition to BAT snowcoaches, the agency's preference for a non-segregated multiple-use plan may indicate an aversion to a long-term dominant-use approach to winter use in Yellowstone.[516]

V. CONCLUDING REMARKS

The Park Service will face high stakes when it promulgates a long-term rule in 2012 because that plan may remain intact for an entire generation.[517] As a result, the 2012 Rule will influence how future generations perceive recreation in the parks.[518] There are two distinct approaches to interpreting the Organic Act's preserva-

513. *See generally* 2011 LONG-TERM WINTER USE PLAN, *supra* note 372, at 60-65 (failing to adequately consider adverse impacts on non-motorized recreationists and preservationists caused by snowmobilers).

514. *See* SEIS NEWSLETTER, *supra* note 251, at 6 (discussing Alternative 7). Alternative 3 of the upcoming SEIS would also implement a segregated multiple-use model. *See id.* at 5 (providing for varied access levels).

515. *See* Notice of Intent to Prepare Supplement Environmental Impact Statement for Winter Use Plan, Yellowstone National Park, 77 Fed. Reg. 6581 (Feb. 8, 2012) (stating intent to drop original Alternative 6 from future consideration); *see also* SEIS NEWSLETTER, *supra* note 251, at 4 (stating intent to remove original Alternative 6). *But see generally id.* at 4-5 (disfavoring non-segregated multiple-use model espoused in Alternative 2, as well as abandoned Alternative 3 from 2011 EIS, both of which focus only on numerical access levels). The Park Service believed, in its analysis of Alternative 6 in the 2011 DRAFT LONG-TERM WINTER USE PLAN, that "variable limits might also attract more visitors who want a non-motorized experience than alternatives with constant daily limits for motorized recreation." *Id.* at 350.

516. *See generally* SEIS NEWSLETTER, *supra* note 251, at 4-6 (discussing expected proposed alternatives in upcoming SEIS). Although Alternative 1 would ban most non-motorized public access and Alternative 4 would still permit some snowcoach use, both approaches generally accommodate non-motorized recreationists by maximizing non-motorized use and minimizing motorized access. *See generally id.* (limiting motorized recreational use under Alternatives 1 and 4 but still allowing for at least some non-motorized recreational uses).

517. *See* Notice of Intent to Prepare Environmental Impact Statement for Winter Use Plan, 75 Fed. Reg. 4842 (Jan. 29, 2010) (noting anticipated plan will cover subsequent twenty-year period).

518. *See* SAX, *supra* note 158, at 33 ("To the extent that we infuse the parks with symbolic meaning by the way in which we use them, the symbolism attached to particular uses itself becomes a critical factor in the meaning that parks have for us.").

tion/use mandate.[519] An interpretation favorable to "preservation" is to *minimize recreation* to a point that meets the minimum level of enjoyment required by the Organic Act.[520] An interpretation favorable to "use," the interpretation ultimately adopted by the Park Service, is to *maximize recreation* to a point that is just short of impairing the park's resources.[521]

If the Park Service's preservation mandate does in fact trump use, then the proper construction of the Organic Act is the former interpretation, which requires that recreation be reduced to the lowest level permissible to meet enjoyment.[522] Instead, since 2002, the agency has continued to focus on maximizing enjoyment, and concurrently recreation, to a level that it claims falls just short of impairment.[523] By adopting the latter interpretation, the Park Service has impliedly elevated use to the maximum permissible extent under the Organic Act, even though it claims to hold preservation as its primary focus.[524]

The federal government's interpretation of the Organic Act reflects a highly anthropocentric view of Yellowstone, adopting a "nature as commodity" view towards nature and applying considerable importance to Yellowstone's direct nonmarket value derived from recreation.[525] In effect, while the cost of preservation, i.e., lost recreational opportunities, can be accurately valued in a monetary sense, the benefits of preservation will consistently be undervalued.[526] The government's current line of thinking therefore risks a deliberate erosion of Yellowstone's resources.[527]

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519. *See generally* 16 U.S.C. § 1 (2006) (contemplating multiple interpretations through ambiguous language).

520. *See generally id.* (availing itself of interpretation favorable to preservation).

521. *See generally id.* (allowing for interpretation favorable to use).

522. *See generally id.* (providing construction favorable to preservation if preservation outweighs use).

523. For a discussion of the Park Service's approaches to OSV management in Yellowstone since 2002, see *supra* notes 259-348, 378-517 and accompanying text.

524. *See* 2006 MANAGEMENT POLICIES, *supra* note 23 (asserting that preservation trumps use).

525. *See* CRONON, *supra* note 152, at 46 (discussing various formation of natural resource values); *see also* RASBAND, *supra* note 77, at 18 (providing categories and examples of human uses of natural resources).

526. *See generally* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009) (Stevens, J. dissenting) (criticizing cost-benefit analysis in environmental context in light of requirements under Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993)). For a further discussion of the shortcomings of cost-benefit analysis in the environmental protection context, see *supra* notes 165-171 and accompanying text.

527. *See Entergy Corp.*, 556 U.S. at 208 (Stevens, J. dissenting) (concluding that cost-benefit analysis in environmental context is unworkable).

Apart from considering visitors' interests, the Park Service will have to determine whether it believes existence value is worth protecting.[528] If only 1 in 3000 Americans visits Yellowstone National Park each year, what is the existence value assigned to those other 2999 citizens?[529] On top of visitors' interests, should local state and business interests be considered, even though Yellowstone is a *national* park?[530] Additional interpretations will come shortly through a Long-Term Winter Use Plan which, history indicates, both snowmobilers and environmentalists will challenge for years to come.[531]

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528. *See* RASBAND, *supra* note 77, at 18 (defining existence value as knowledge that certain geographic areas or natural resources exist, even if you never visit, plan to visit, or even care if future generations will visit).

529. *See generally Winter Visitor Figures a Mixed Bag*, NAT'L PARK SERV. (Apr. 5, 2010), http://www.nps.gov/yell/parknews/10022.htm (implying that roughly 100,000 visitors during 2009-2010 winter season divided by United States population of roughly 300,000,000 citizens indicates that roughly 1 in 3000 Americans visit Yellowstone each year).

530. *See* 30 U.S.C. § 21-22 (2006) (establishing Yellowstone as national park).

531. *See Gazette Opinion*, *supra* note 9 ("It seems unlikely that the next 'final' rule will avoid legal challenge.").

* J.D., Villanova University School of Law, May 2012. Thank you, Megan.