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NEWS & ANALYSIS

Blowing Snow: The National Park Service's Disregard for Science, Law, and Public Opinion in Regulating Snowmobiling in Yellowstone National Park

by Joanna M. Hooper

[Off-road vehicles] are domineering, exclusive, destructive and costly; it is they and their operators who would deny the enjoyment of the backcountry to the rest of us. About 98% of the land surface of the contiguous USA already belongs to heavy metal and heavy equipment. Let us save the 2%—that saving remnant.

—Edward Abbey

If future generations are to remember us with gratitude rather than contempt, we must leave them something more than the miracles of our technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it.

—President Lyndon B. Johnson, upon signing the Wilderness Act of 1964¹

Snowmobiles were first allowed in Yellowstone National Park in 1963.² Five years later, the National Park Service (NPS or Park Service), responding to growing public concern about the effects of snowmobiling on park resources, implemented the park's first official winter use policy.³ Winter use of the park, including snowmobiling, increased dramatically during the three decades following the Park Service's 1971 decision to groom snow-covered roads for passage by oversnow vehicles.⁴ Winter use doubled between 1983 and 1993, increasing from 40,000 winter visitors to 140,000.⁵ Today, there are over 180 miles of groomed trails within the park and, on peak days, as many as 1,700 snowmobiles entering.⁶ As the popularity of snowmobiling has increased, so has the snowmobiling public's desire for bigger, faster, and more powerful machines, and technology has evolved accordingly.⁷ This seemingly insatiable quest

reflects the American public's general fascination with all things super-sized and motorized,⁸ and has created super-sized noise and air pollution problems as well as significant threats to wildlife. As a result, Yellowstone has made the National Park Conservation Association's annual list of 10 Most Endangered National Parks every year since 1999 (the list is only six years old).⁹

By far, the most severe environmental impact of snowmobiling is that of snowmobile-generated emissions on air quality in the park. Despite being outnumbered by cars 16 to 1, snowmobiles produce 68% of the park's annual carbon monoxide (CO) and 90% of the park's annual hydrocarbon emissions.¹⁰ Not only did one study find CO levels in some areas of the park higher than those in the city of Los Angeles,¹¹ but overall, CO levels exceed both federal and state ambient air quality standards.¹² A number of other air pollutants are also generated at dangerous levels.¹³ The haze created by increased ambient concentrations of particulate matter produced by snowmobile emissions is a leading cause of visibility impairment in the park.¹⁴ In addition, the increased air pollution has created significant health risks for Park Service employees, many of whom have experienced sore throats, headaches, lethargy, eye irritation, and lung problems as a result of exposure to snowmobile fumes.¹⁵ In 2002, the Park Service went so far as to issue respirators to employees in high snowmobile traffic areas for use while performing their duties.¹⁶

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1. 16 U.S.C. §§1131-1136.

2. *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 98, 34 ELR 20010 (D.D.C. 2003). For the sake of this Article, the term Yellowstone National Park or the park includes Yellowstone National Park, Grand Teton National Park, and the John D. Rockefeller Jr. Memorial Parkway.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Yamaha's first snowmobile, produced in 1968, was powered by a 20-horsepower engine; the company's new RX Warrior has a 145-horsepower engine, bigger than the motor of a Honda Civic. Philip Reed, *Why the Motorized Toys We Love Keep Getting Bigger and Bigger and Bigger*, L.A. TIMES, Mar. 9, 2004, at F4.

8. See, e.g., Art Buchwald, *The NASCAR Dads of Winter*, WASH. POST, Dec. 30, 2003, at C3; Alan Freeman, *America Has Super-Sized*, Globe & Mail Update, Feb. 19, 2004, at <http://www.globeandmail.com/servlet/story/RTGAM.20040219.wlett0219/BNStory/International> (commenting on "America's love affair with size," Alan Freeman observes: "At times I began to think that all of American society had gone on steroids. From soft drinks to cars to houses and sadly, to people, America has gone super-sized.").

9. Kelly McBride, *Inadequate Funds, Pollution Cited as National Park Woes*, WASH. POST, Jan. 14, 2004, at A17.

10. Yellowstone Protection Act, H.R. 1130, 108th Cong. (2003). An additional comparison to automobiles: two-stroke (older model) snowmobiles produce more smog-forming pollution in one hour than a modern car creates in one year. Consolidated Amended Complaint for Declaratory and Injunctive Relief, *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 34 ELR 20010 (D.D.C. 2003) (No. 02-2367).

11. *Fund for Animals*, 294 F. Supp. 2d at 114.

12. Consolidated Amended Complaint for Declaratory and Injunctive Relief, *Fund for Animals* (No. 02-2367).

13. *Id.*

14. *Id.*

15. Yellowstone Protection Act, H.R. 1130, 108th Cong..

16. *Id.* The bill also notes that a Yellowstone supervisor requested additional staff at the West Entrance (the most popular entrance for snowmobilers) so that he could begin rotating employees more frequently out of the fume cloud. *Id.*

The noise pollution generated by the roar of the snowmobile engine has also had significant impacts on both park visitors and employees. The level of noise generated by one snowmobile approximates that of a jet airliner flying just 1,000 feet above the ground.¹⁷ Park employees during the 2003-2004 winter season working near snowmobiles were fitted with special devices to protect against hearing loss.¹⁸ However, the impact is not limited to those in close proximity to the machines, as snowmobiles can be heard throughout the park.¹⁹

Yellowstone is home to four species protected by the federal Endangered Species Act (ESA)²⁰—grizzly bears, gray wolves, bald eagles, and lynxes—all of which have been adversely impacted by snowmobile use.²¹ Members of each of these species are generally harassed and disturbed by the presence of snowmobiles in the park.²² Specific impacts include displacement from suitable habitat, disruption of feeding and breeding activities, impeded or reduced access to prey, and alteration of movements.²³

Despite these clear impacts, little is being done to fix Yellowstone's myriad snowmobile-generated environmental problems. The only two federal courts to address the issue are divided along regional lines in an East/West stalemate, and the Park Service—and this appears to be the only point on which the two judges can agree—is unable to arrive at any nonpolitically motivated solutions.²⁴ This Article will outline the evolution of the Yellowstone snowmobiling controversy, addressing both of the Park Service's past attempts at fashioning an effective rule to govern snowmobile access to and use of the park. Part II will examine the ensuing litigation and the current controversy between the U.S. District Court for the District of Columbia and the U.S. District Court of Wyoming. Part III will address the authority of the Park Service to ban snowmobiles in Yellowstone, setting forth the relevant governing statutes, regulations, and guidelines, and describe Park Service regulation of snowmobiles and other off-road vehicles (ORVs) in other national parks. Part IV will detail the Park Service's disregard for its governing mandates and its disingenuous approach to snowmobile regulation in Yellowstone National Park. Finally, in Part V, this Article will propose a solution: Yellowstone-specific legislation should be passed to phase out snowmobile use in the park entirely.

I. The Evolution of the NPS' Yellowstone Snowmobile Rules

The controversy over snowmobiling in Yellowstone dates back to 1997, when several nonprofit environmental groups, including the Fund for Animals and the Greater Yellowstone Coalition, filed suit against the U.S. Department of the Interior (DOI) in the D.C. District Court.²⁵ The plaintiffs alleged that the Park Service's then-current Winter Use Plan for Yellowstone violated both the National Environmental Policy Act (NEPA)²⁶ and the ESA. The plaintiffs accordingly sought an injunction prohibiting snowmobiling and trail grooming until the Park Service prepared an environmental impact statement (EIS) as required by NEPA and consulted with the U.S. Fish and Wildlife Service (FWS) as required under the ESA.²⁷ The parties ultimately reached a settlement agreement requiring the Park Service to produce an EIS "addressing a full range of all alternatives for all types of visitor winter use, including snowmobiling . . . and considering the effects of those alternatives on the Park's environment," and an accompanying record of decision (ROD) determining how the winter use policies would be adjusted.²⁸

Pursuant to the settlement agreement, the Park Service produced an EIS and ROD (Winter Use EIS and ROD). The agency then issued a proposed rule implementing the Winter Use EIS' environmentally preferred alternative, which called for a complete phaseout of snowmobile use in Yellowstone within two seasons in favor of multipassenger snowcoach use.²⁹ Expanded snowcoach use was selected as the replacement for snowmobile use based on Park Service findings that snowcoaches have far less of an impact on wildlife than snowmobiles, are significantly less noisy and, because they carry so many passengers, result in fewer vehicles overall operating in the park and disturbing wildlife.³⁰ In addition, snowcoaches generate "very little [air] pollution" relative to snowmobiles.³¹ The comments received by the Park Service overwhelmingly supported the phaseout,³² and on January 22, 2001, the day after George W. Bush took office, the Snowcoach Rule was finalized.³³ The Snowcoach Rule was immediately stayed pending review by a new administration.³⁴

Meanwhile, the Winter Use EIS and ROD had been challenged in a Wyoming District Court in a suit brought by the International Snowmobile Manufacturers Association (ISMA) against the DOI and the Park Service.³⁵ The state of

17. Consolidated Amended Complaint for Declaratory and Injunctive Relief, *Fund for Animals* (No. 02-2367).

18. *Id.*

19. *Id.*

20. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

21. *Id.*

22. Yellowstone Protection Act, H.R. 1130, 108th Cong..

23. Consolidated Amended Complaint for Declaratory and Injunctive Relief, *Fund for Animals* (No. 02-2367).

24. See *Fund for Animals*, 294 F. Supp. 2d at 108 n.11 (noting that "there is evidence in the [r]ecord that there *isn't* an explanation [for the Park Service's second rule] and that the [supplemental environmental impact statement] was completely politically driven and result-oriented") (emphasis in original); International Snowmobile Mfrs. Ass'n v. Norton, No. 00-CV-229-B, 2004 U.S. Dist. LEXIS 1796, at *30 (D. Wyo. Feb. 10, 2004) (labeling the Park Service's first rule a "prejudged political conclusion").

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

26. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209.

27. *Id.*

28. *Id.*

29. A snowcoach is "a self-propelled mass transit vehicle intended for travel on snow . . . driven by a track or tracks and steered by skis or tracks, having a capacity of at least eight passengers." Snowcoach Rule, 66 Fed. Reg. 7260 (Jan. 22, 2001).

30. Snowcoach Rule, 66 Fed. Reg. at 7260.

31. Winter Use Plans Final Rule, 68 Fed. Reg. 69268 (Dec. 11, 2003).

32. *Id.* Of the 5,273 comments received, 4,395 supported the proposed rule. *Id.*

33. *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 99, 34 ELR 20010 (D.D.C. 2003).

34. Final Rule, Delay of Effective Date, 66 Fed. Reg. 8366 (Jan. 31, 2001).

35. International Snowmobile Mfrs. Ass'n v. Norton, No. 00-CV-229-B, 2004 U.S. Dist. LEXIS 1796 (D. Wyo. Feb. 10, 2004).

Wyoming intervened on behalf of the plaintiffs who alleged that the Park Service had failed to give legally mandated consideration to all of the alternatives in the Winter Use EIS and asked that the decision contained in the Winter Use ROD be set aside.³⁶ A settlement agreement (Wyoming Agreement) was reached in June 2001, calling for a supplemental EIS (SEIS), in which the Park Service agreed to consider data on new snowmobile technologies.³⁷

In February 2003, the Park Service issued a final SEIS, pursuant to the Wyoming Agreement. The SEIS expressly adopted the Winter Use EIS and ROD, reiterating that it was meant to be supplemental, and that the findings of the Winter Use EIS were not erroneous.³⁸ However, the Winter Use EIS had considered, and rejected, virtually the same technology evaluated in the SEIS.³⁹ Indeed, the ROD for the SEIS (2003 ROD) states that “the analysis and alternatives in the SEIS are not vastly different than those in the [Winter Use] EIS,” and concludes: “What appears to have changed is the snowmobiling public’s perception regarding new technology, or its willingness to consider its use and industry’s willingness and ability to produce it.”⁴⁰

The SEIS contained five alternatives, two of which called for phaseouts of snowmobiling followed by expanded snowcoach use similar to the Snowcoach Rule. The only difference between the two alternatives was the timeline for implementation: Alternative 1a called for immediate implementation of the phaseout while Alternative 1b, labeled the environmentally preferred alternative,⁴¹ delayed implementation for a year. The SEIS defined the environmentally preferred alternative designation “to identify for the public and the decisionmaker the alternative which causes the least damage to the biological and physical environment.”⁴² The term is further defined as “the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.”⁴³ The Park Service supported Alternative 1b’s designation as the environmentally preferred alternative with the findings that it “yields the lowest level of impacts to air quality, water quality, natural landscapes, and wildlife,”⁴⁴ “best attains the widest range of beneficial uses of the environment without degradation and risk to health or

safety,”⁴⁵ and “fulfills the Park Service’s responsibility as trustee of our national parks for the enjoyment and inspiration of future generations by preserving the parks in the best possible environmental conditions, while allowing for current generations to experience and enjoy the parks.”⁴⁶ The Park Service then dismissed the issue of economic harm to local communities from the phaseout, concluding that economic impacts would be “negligible to minor.”⁴⁷ Indeed, the SEIS states that Alternative 1b “strikes a balance between population and resource use by allowing additional time for local communities and businesses to adapt to the phaseout.”⁴⁸ Finally, the SEIS acknowledged that Alternative 1b was the public’s choice as well: 80% of commentators favored this alternative,⁴⁹ including the U.S. Environmental Protection Agency (EPA).⁵⁰ Yet, despite all these findings, the Park Service adopted Alternative 4 which provided for increased numbers of snowmobiles, while imposing best available technology (BAT) standards⁵¹ designed to reduce harmful emissions, and requiring that 80% of entering snowmobiles be accompanied by guides.⁵² The Final Rule (2003 Rule) was published on December 11, 2003, the day before the start of the Yellowstone snowmobiling season.⁵³

II. The Conflict Between the D.C. District Court and the Wyoming District Court

Five days after the 2003 Rule was published, Judge Emmet G. Sullivan of the D.C. District Court vacated it and reinstated the Snowcoach Rule in *Fund for Animals v. Norton*.⁵⁴ The plaintiffs, various conservation groups, had challenged the 2003 Rule on several grounds, alleging that it violated the National Park Service Organic Act (Organic Act)⁵⁵ and the ESA.⁵⁶ The court did not address these claims, however, invalidating the rule instead on the basis of the plaintiffs’

36. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268.

37. *Id.*

38. *Fund for Animals*, 294 F. Supp. 2d at 106. A footnote from the 2003 ROD states: “The SEIS is a supplement to the 2000 EIS per the settlement, and the context in which it is being written is the acceptance of new data, not the conclusion that the 2000 EIS and ROD are incorrect as alleged in the ISMA litigation.” NPS, Record of Decision, Winter Use Plans—Supplemental Environmental Impact Statement 7 n.3 (Mar. 25, 2003) (emphasis in original) [hereinafter 2003 ROD].

39. The Final SEIS reports that much of the information submitted on snowmobile technology was “not new,” “did not add to data for other analyses,” did not include “data sufficient for changing emission/sound model outputs,” or “did not provide information . . . that would lead to new conclusions.” Consolidated Amended Complaint for Declaratory and Injunctive Relief, *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 34 ELR 20010 (D.D.C. 2003) (No. 02-2367) (quoting NPS, Winter Use Plans Final Supplemental Environmental Impact Statement 71 (Feb. 2003) [hereinafter Final SEIS]).

40. 2003 ROD, *supra* note 38, at 6 n.2.

41. *Id.* at 7.

42. Final SEIS, *supra* note 39 (quoting Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981)).

43. *Id.*

44. *Id.* at 72.

45. *Id.*

46. *Id.* This finding is echoed in a Park Service internal review document obtained by the Greater Yellowstone Coalition, in which the Park Service concluded that a snowmobile ban would best protect the park and attain the widest range of beneficial use of the environment without degradation and risk to health or safety. *Air Pollution: Final Version of Environmental Impact Study Supports Continued Snowmobile Use in Parks*, Daily Env’t Rep. (BNA), Feb. 25, 2003.

47. Final SEIS, *supra* note 39, at 72.

48. *Id.*

49. *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 101, 34 ELR 20010 (D.D.C. 2003). Over 91% of commentators believed that Alternative 4 would not adequately protect park resources due to the presence of snowmobiles and favored the Snowcoach Rule. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268.

50. Mike Ferullo, *Air Pollution: House Members Introduce Bill to Re-instate Snowmobile Ban in Yellowstone, Grand Teton*, Daily Env’t Rep. (BNA), June 28, 2002. EPA lauded the 2000 EIS (on which the phaseout alternative was based) as having “among the most thorough and substantial science base that [EPA] ha[d] seen supporting a NEPA document.” Yellowstone Protection Act, H.R. 1130, 108th Cong.

51. BAT standards for the newer four-stroke snowmobiles require a 90% reduction in hydrocarbon emissions and a 70% reduction in CO emissions as compared to a standard two-stroke snowmobile. *Id.*

52. See 2003 ROD, *supra* note 38.

53. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268.

54. 294 F. Supp. 2d 92, 34 ELR 20010 (D.D.C. 2003).

55. 16 U.S.C. §§1-4, 22, 43.

56. See *Fund for Animals*, 294 F. Supp. 2d at 92.

Administrative Procedure Act (APA)⁵⁷ claim. Pursuant to the APA, the court reviewed the rule using an arbitrary and capricious standard,⁵⁸ imposing an additional requirement of a “reasoned analysis for the change” because of the Park Service’s “180-degree reversal” from a decision on the same issue by the previous administration.⁵⁹ The court held that the Park Service had failed to meet its obligation to explain its reversal, “in light of [the Agency’s] clear conservation mandate and the previous conclusion that snowmobile use amounted to unlawful impairment.”⁶⁰ Judge Sullivan scolded the Park Service, noting that there was evidence in the record of no reasoned explanation for the reversal and that the “SEIS was completely politically driven and result[-]oriented.”⁶¹ He also observed that “disregard for public input has been the NPS’ *modus operandi* throughout the rulemaking process,” finding that disregard most clearly evidenced by the Park Service’s selection of an alternative opposed by 91% of commentators.⁶²

Judge Sullivan further displayed his impatience with the Park Service by denying emergency motions to stay his earlier judgment vacating the rule.⁶³ The court denied the motion on the ground that the defendants were unable to demonstrate a likelihood of success on the merits, as the court had found clear violations of the APA and the defendants failed to present any evidence demonstrating that holding was in error.⁶⁴ In addition, the court noted that the defendants were unable to establish a showing of irreparable harm. The ISMA and the state of Wyoming had alleged that imposition of the Snowcoach Rule so close to the start of the winter season would cause irreparable economic and emotional harm to the local Yellowstone communities relying on snowmobile business and to snowmobilers with already established vacation plans.⁶⁵ Judge Sullivan dismissed this claim, stating that “any economic or emotional harm to snowmobilers with vacation plans falls squarely on the [Park Service’s] shoulders.”⁶⁶ He noted that he had previously warned the Park Service of the court’s concern about the Park Service’s delay in implementing the final rule, even going so far as to suggest the Park Service deliberately timed publication of the final rule to coincide with the start of the snowmobiling season.⁶⁷ He labeled the Park Service “disingenuous at best” for claiming that his decision caused irreparable injury because it was issued so soon after publication of the 2003 Rule, after the agency had consistently argued that a decision *before* publication of the 2003 Rule should not be issued because of ripeness concerns.⁶⁸

Judge Sullivan’s dissatisfaction with the Park Service’s decisionmaking can be contrasted with Wyoming District

Court’s Judge Clarence Brimmer’s support for the agency. The case before the Wyoming court, *International Snowmobile Manufacturers Ass’n v. Norton*,⁶⁹ was first brought in 2001 to challenge the Snowcoach Rule. Judgment in the case had been stayed pending completion of the SEIS process detailed in Part I of this Article. The Snowcoach Rule was finally implemented in December 2003, as a result of Judge Sullivan’s decision to vacate the 2003 Rule and go ahead with the Snowcoach Rule. The state of Wyoming, a plaintiff intervenor in *International Snowmobile*, then requested the case be reopened.⁷⁰ Judge Brimmer found no conflict between his case and the one before the D.C. District Court, reasoning that the D.C. District Court case addressed only the validity of the 2003 Rule, not the validity of the Snowcoach Rule.⁷¹ He then enjoined the enforcement of the Snowcoach Rule, holding that the irreparable harm to the plaintiffs (significant financial loss to businesses and concessionaires relying on the [then not yet finalized] 2003 Rule for taking reservations for the 2003-2004 winter season, loss of goodwill, and potential bankruptcy) outweighed any injury the intervenor defendants (the Greater Yellowstone Conservation Coalition) might suffer.⁷² Judge Brimmer concluded that the public interest in ending confusion about access to the park also favored issuance of the injunction.⁷³ Finally, he concluded that the plaintiffs had demonstrated a substantial likelihood of success on the merits because the Winter Use EIS and ROD violated the APA.⁷⁴ The court determined that the Winter Use EIS and ROD violated the APA because: the Park Service failed to take a hard look at the information relevant to its decisionmaking, specifically the environmental and safety aspects of snowcoaches; the Park Service’s decision to ban the snowmobiles was a prejudged political decision; and the Park Service deprived the public of a meaningful opportunity for participation in the Winter Use EIS and ROD process by offering a comment period of only one month.⁷⁵

After enjoining enforcement of the Snowcoach Rule, Judge Brimmer ordered the Park Service to promulgate temporary rules that would be “fair and equitable to snowmobile owners and users, to the business community, and to the environmental interests . . . by limiting snowmobile use to [four]-stroke machines.”⁷⁶ On February 11, 2004, the Park Service issued temporary Winter Use rules to be in effect for the remainder of the 2003-2004 winter season.⁷⁷ The new rules allow for 798 snowmobiles to access the park per day (an increase of 305 from the number permitted when neither the Snowcoach Rule nor the 2003 Rule had been in place).⁷⁸ Of these, 297 must use BAT. All snowmobiles must be accompanied by commercial guides.⁷⁹

57. 5 U.S.C. §§500-706, available in ELR STAT. ADMIN. PROC.

58. *Id.* at 104.

59. *Id.* (quoting Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 13 ELR 20672 (1983)).

60. *Id.*

61. *Id.* at 108 n.11.

62. *Id.* at 109 n.14.

63. See *Fund for Animals v. Norton*, No. 02-2367, 2003 U.S. Dist. LEXIS 22992 (D.D.C. Dec. 23, 2003).

64. *Id.*

65. See *id.*

66. *Id.* at *4.

67. *Id.* at *3.

68. *Id.* at *2.

69. No. 00-CV-229-B, 2004 U.S. Dist. LEXIS 1796 (D. Wyo. Feb. 10, 2004).

70. *Id.* at *11.

71. *Id.* at *12.

72. See *id.*

73. *Id.* at *23.

74. *Id.* at *27.

75. *Id.* at **27-30.

76. *Id.* at *38.

77. See NPS, *Winter Use Status* (Feb. 11, 2004), at <http://www.nps.gov/yell/planvisit/todo/winter/index.htm>.

78. *Id.*

79. *Id.*

III. The Authority of the Park Service to Phase Out Snowmobile Use in Yellowstone

Ample support for phasing out snowmobile use in Yellowstone can be found in the statutes governing national park management throughout the park system, such as the Organic Act⁸⁰ and the National Park System General Authorities Act (General Authorities Act) of 1970⁸¹; in similar legislation specific to Yellowstone, such as the Yellowstone National Park Act⁸² (which includes a Yellowstone-specific section)⁸³; in the Park Service's *Management Policies*⁸⁴; in two Executive Orders addressing snowmobile use in the parks⁸⁵; and in Park Service regulations.⁸⁶ Each of these authorities emphasizes the importance of conservation of national park resources and protection of wildlife—goals which appear incompatible with continued snowmobile use. In addition, an examination of Park Service approaches to regulation of snowmobiles and other ORVs in other parks reveals the ample discretion the agency has in applying its conservation mandates in this area and demonstrates that such a phaseout in a particular park is consistent with past Park Service decisions regarding ORV access.

A. Relevant Statutes, Management Policies, Regulations, and Orders

The Organic Act⁸⁷ sets forth the Park Service's overriding conservation mandate. The Act "establishes the legal framework for management of the entire park system,"⁸⁸ providing for the creation of the NPS and authorizing the agency to make and publish such rules as are necessary for proper management of the parks.⁸⁹ Regulation must conform to the fundamental purpose of the parks, namely, "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations."⁹⁰

The U.S. Congress supplemented and clarified the provisions of the Organic Act in the General Authorities Act⁹¹ and again with a 1978 Amendment to the General Authorities Act (Redwood Amendment), which together reinforce the primacy of the conservation mandate. In the General Authorities Act, as amended, Congress specifically reaffirmed and directed that regulation of the units of the NPS be "consistent with and founded in the purpose established by [the

Organic Act]"⁹² and reiterated that authorization of activities in parks, as well as park management, protection, and administration, be construed and conducted "in light of the high public value and integrity of the National Park System" and not "in derogation of the values and purpose for which [the parks] have been established."⁹³

The Park Service's *Management Policies*, issued in 2001, interpret the directives of the Organic Act and the General Authorities Act.⁹⁴ The *Management Policies* identify the Organic Act as "the most important statutory directive" for the Park Service. The *Management Policies* define the "fundamental purpose" of the park system as beginning with "a mandate to conserve park resources and values."⁹⁵ However, the *Management Policies* make clear that the Organic Act and the General Authorities Act embody both a conservation mandate, which applies all the time with respect to all park resources and values,⁹⁶ even when there is not risk that they will be impaired, and a separate prohibition on impairment.⁹⁷ Impairment is defined in the *Management Policies* as any impact that would "harm the integrity of park resources of values, including opportunities that would otherwise be present for the enjoyment of those resources or values." The *Management Policies* note that while Congress has given the Park Service discretion to allow certain types of impacts within parks, that discretion is limited by the nonimpairment requirement.⁹⁸ Park Service managers are directed "always to seek to avoid, or minimize to the greatest degree practicable, adverse impacts on park resources and values."⁹⁹

The *Management Policies* also acknowledge that another fundamental purpose of the parks is to provide for enjoyment of park resources and values by the people of the United States.¹⁰⁰ A number of commentators have suggested that the dual purposes that the Park Service must promote—conservation and enjoyment—are necessarily at odds with one another and create a paradoxical mandate.¹⁰¹ The *Management Policies*, however, recognizing that the "enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and

80. 16 U.S.C. §1 (2003).

81. *Id.* §1a-1 (2003).

82. *Id.* §21 (2003).

83. *Id.* §22 (2003).

84. NPS, *MANAGEMENT POLICIES* (2001).

85. Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), ADMIN. MAT. 45005; Exec. Order No. 11989, 42 Fed. Reg. 26959 (May 24, 1977).

86. 36 C.F.R. §2.18 (2004); 36 C.F.R. §2.1 (2004).

87. 16 U.S.C. §1.

88. Harry R. Bader & Chip Dennerlein, *Analysis of Agency Authority for Enforcement of Snow Machine Closure Within the Old Mt. McKinley Park Wilderness Area of Denali National Park and Preserve*, 9 DICK. J. ENVTL. L. & POL'Y 403, 411 (2001).

89. See 16 U.S.C. §1.

90. *Id.*

91. See NPS General Authorities Act, 16 U.S.C. §1a-1.

92. *Id.*

93. *Id.*

94. See *MANAGEMENT POLICIES*, *supra* note 84.

95. *Id.* at 12.

96. Park resources and values are defined to include wildlife, natural visibility, soundscapes and smells, and water and air resources, among many others. *Id.* at 13.

97. *Id.* at 12. This interpretation was cited as the proper one in the 2003 ROD. See 2003 ROD, *supra* note 38.

98. See *id.*

99. *Id.* at 13.

100. *Id.* at 12.

101. See, e.g., Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625 (1997). Dennis Herman also points to two statements by Steven Mather, the first director of the NPS, as being illustrative of the long-standing conflict between use and preservation of parks: "Defend the National Parks and National Monuments fearlessly against assaults of private interests and aggressive commercialism." Herman continues: "Scenery is a hollow enjoyment to a tourist who sets out in the morning after an indigestible breakfast and a fitful sleep in an impossible bed." Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3 (1992).

values is left unimpaired,”¹⁰² interpret the Organic Act as requiring that “when there is a conflict between conserving resources and values and providing for the enjoyment of them, conservation is to be predominant.”¹⁰³ The *Management Policies* stress that this interpretation is consistent with case law on the issue.¹⁰⁴

Courts have upheld the *Management Policies* as binding on the Park Service. When in *Fund for Animals* the government defendants attempted to argue otherwise,¹⁰⁵ the court explicitly rejected this suggestion. The court cited the Park Service’s continual reliance on the *Management Policies* throughout the rulemaking process.¹⁰⁶ (The 2003 ROD repeatedly cites and relies on the *Management Policies* for support for the 2003 Rule.)¹⁰⁷ In addition, the court found that the Park Service had clearly evidenced the requisite intent to be bound, because the *Management Policies* were not simply internal, informal guidelines but rather were promulgated through a notice-and-comment process and were advertised in the *Federal Register* as the official interpretation of the Organic Act.¹⁰⁸

Two sections of the U.S. Code specifically pertain to Yellowstone,^{109, 110} both of which highlight the importance of conservation in Yellowstone in particular. The first section, the park’s enabling legislation, represented the first time any country had designated such a large parcel of public land to be preserved from settlement or development, and “formally introduced the notion of setting some public lands aside for nature conservation purposes.”¹¹¹ The second section, essentially a Yellowstone-specific Organic Act, is the federal statute governing the agency’s administration of the park; like the Organic Act, it has a conservation focus. The section directs the Secretary of the Interior to promulgate regulations providing for “the preservation, from injury and spoliation, of all . . . wonders, within the park and their retention in their natural condition.”¹¹² In addition, the second section specifically addresses wildlife protection: the Secretary “shall provide against the wanton destruction of the fish and game found within the park, and

against their capture or destruction for purposes of merchandise or profit.”¹¹³

The Organic Act, the General Authorities Act, and the Yellowstone National Park Act authorize the Secretary of the Interior to make and publish regulations necessary for the proper management of the park. The two regulations most relevant to the Yellowstone snowmobile controversy impose significant limitations on visitor activities in the parks in order to protect park resources and wildlife. Snowmobiling specifically is generally prohibited throughout the park system except on designated routes and water surfaces and then “only when [it] 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.”¹¹⁴ The second regulation generally prohibits “destroying, injuring . . . , or disturbing” wildlife, fish, or plants “from their natural state” as a result of any activity.¹¹⁵

Two Executive Orders serve to limit snowmobile use in the National Park System where it might disrupt wildlife or adversely affect park resources. In 1972, President Richard M. Nixon signed Executive Order No. 11644, which sets forth procedures for controlling the use of ORVs, including snowmobiles, on public lands.¹¹⁶ The Executive Order requires the several public lands agencies, including the Park Service, to designate specific zones wherein ORV use is permissible.¹¹⁷ The location of the chosen areas must be designed to “minimize harassment of wildlife and significant disruption of wildlife habitats.”¹¹⁸ Executive Order No. 11989, signed by President Jimmy Carter in 1977, amended and strengthened Executive Order No. 11644.¹¹⁹ The 1977 order mandates that the Secretary of the relevant public lands agency immediately close any ORV zone or trail if he determines that the use of ORVs in that area “will cause considerable adverse effects on the [area’s] soil, vegetation, wildlife habitat, or cultural or historic resources.”¹²⁰

B. Past Park Service Approaches to Snowmobile Regulation in the National Parks

In the past, the Park Service has used a park-by-park approach to addressing whether snowmobile use is appropriate given the applicable mandates. In Montana’s Glacier National Park, for example, snowmobile use has been prohibited since the park’s designation in the 1970s. Conversely, snowmobiling is permitted in most sections of Voyageurs National Park in Minnesota, although the Park Service retains the authority, upheld by the courts, to prohibit access to particular sections temporarily.¹²¹ An analogous case is that of Massachusetts’ Cape Cod National Seashore, wherein the Park Service, after engaging in a mean-

102. *MANAGEMENT POLICIES*, *supra* note 84, at 12.

103. *Id.*

104. *Id.* An example is *National Rifle Ass’n of Am. v. Potter*, in which the D.C. District Court identified the “single purpose” of the Organic Act as conservation, and upheld the Secretary of the Interior’s decision to prohibit hunting in the parks based on the Secretary’s conclusion that the “primary management function [of the Park Service] with respect to wildlife is its preservation.” *National Rifle Ass’n of Am. v. Potter*, 628 F. Supp. 903, 909, 910, 16 ELR 20356 (D.D.C. 1986). The *Management Policies’* interpretation is also echoed in a number of law journal articles, based on the history of the Organic Act, *see, e.g.*, Cheever, *supra* note 101, and, as applied to Yellowstone, based on the special nature of the park itself, the management of which has always had more of a preservation focus, *see* Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 653 (1997).

105. *Fund for Animals*, 294 F. Supp. 2d at 105 n.8.

106. *Id.*

107. *See* 2003 ROD, *supra* note 38.

108. *Fund for Animals*, 294 F. Supp. 2d at 105 n.8.

109. *See* 16 U.S.C. §21 (2003).

110. *Id.* §22 (2003). Collectively, the sections are known as the Yellowstone National Park Act.

111. Keiter, *supra* note 104, at 653.

112. 16 U.S.C. §22 (2003).

113. *Id.*

114. 36 C.F.R. §2.18 (2004).

115. *Id.* §2.1 (2004).

116. *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 102, 34 ELR 20010 (D.D.C. 2003).

117. Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), ADMIN. MAT. 45005.

118. *Id.*

119. *Fund for Animals*, 294 F. Supp. 2d at 102.

120. Exec. Order No. 11989, 42 Fed. Reg. 26959 (May 24, 1977).

121. *See, e.g.*, *Mausolf v. Babbitt*, 125 F.3d 661, 28 ELR 20057 (8th Cir. 1997).

ingful environmental analysis, decided to allow ORV use in designated areas; the decision was also upheld in court.¹²² In evaluating the Park Service's decisions regarding snowmobiles in Voyageurs National Park and ORVs on Cape Cod National Seashore, the courts were willing to grant the Park Service broad discretion, provided the agency complied with the Organic Act, its implementing regulations, the relevant Executive Orders, NEPA, and the APA. It is likely, then, that even in the absence of a direct authorization from Congress, a decision by the Park Service to ban snowmobiles in Yellowstone would be upheld as a valid exercise of discretion as long as the Park Service followed its statutory and regulatory mandates.

Some environmental groups have urged the Park Service to ban snowmobiles throughout the National Park System, abandoning its park-by-park approach to ORV regulation. The Bluewater Network, plaintiffs in *Fund for Animals*, petitioned the Park Service in 1999, seeking regulations prohibiting snowmobiling and trail grooming throughout the entire NPS. Such a ban would affect over 30 national park units. Judge Sullivan addressed the Bluewater Network's claim that the Park Service's delay in responding to its petition rose to the level of unreasonable in *Fund for Animals* and concluded that "pressing human health conditions, as well as the possibility of grave environmental damage, demand prompt review."¹²³ He ordered the Park Service to respond to the petition within 60 days; the court, however, did not take a position as to what response would be warranted.¹²⁴

IV. The Park Service's Disregard for Governing Mandates in Yellowstone Snowmobile Regulation

Both the 2003 Rule and the current temporary Winter Use rules violate the Organic Act and the General Authorities Act as amended, Executive Order No. 11644 as amended by Executive Order No. 11989, and the Park Service's own management policies and regulations interpreting those provisions. Any snowmobile use, whether it be four-stroke ("new" technology), two-stroke, or any other stroke, constitutes unlawful impairment of park resources and values and conflicts with the Park Service's fundamental conservation mandate. Ironically, the Park Service offers the best evidence that snowmobile use in the park conflicts with applicable mandates. Both public and internal Park Service documents contain explicit agency findings that snowmobiling impairs park resources and values, as well as ample public comments to that effect, yet action taken based on these findings seems directly contradictory to the findings.

The disconnect between what the Park Service apparently knows to be true, namely, that snowmobile use in Yellowstone conflicts with the agency's governing mandates, and what it has in fact chosen to do is most starkly revealed by a Park Service internal review document, obtained by the Greater Yellowstone Coalition, in which the agency concluded that a snowmobile *ban* would best protect the park and attain the widest range of beneficial use of the environment without degradation and risk to health or safety.¹²⁵

Evidence of the Park Service's disingenuousness is not limited to leaked internal reports. Abundant support can also be found in the SEIS, 2003 ROD, and even the 2003 Rule itself. First and foremost, the SEIS states that the Winter Use EIS and ROD—the conclusions of which the SEIS specifically adopts—determined that of the seven alternatives examined, only one (Alternative G, which became the Snowcoach Rule) "did not exceed a level of impairment pursuant to [Park Service] policy" and that this finding applied to all alternatives that permitted snowmobile use, including "those that would have required phased-in use of cleaner and quieter snowmobiles in accordance with set objectives for emissions and sound."¹²⁶ The SEIS thus can be read to include the finding that any snowmobile use—cleaner and quieter or dirtier and noisier—in the park constitutes unlawful impairment. Yet the Park Service blatantly disregarded this finding and promulgated a rule—allegedly based on the SEIS—that expressly provides for increased numbers of cleaner and quieter snowmobiles.

In adopting the Winter Use EIS and ROD, the SEIS also adopted their rejection of BAT technology as a remedy for snowmobile-generated harms. In the Winter Use EIS and ROD, the Park Service had specifically examined this "new" technology that the SEIS was allegedly created to address and that the 2003 Rule relied upon—and rejected it. In the Snowcoach Rule, the agency explains the findings of the Winter Use EIS in regard to new snowmobile technologies:

Some newer snowmobiles have promise for reducing some impacts, but not enough for the use of large numbers of those machines to be consistent with applicable legal requirements. Cleaner, quieter snowmobiles would do little, if anything, to reduce the most serious impacts on wildlife, which are caused more by inappropriate use of snowmobiles than by the machines themselves. Quieter snowmobiles are still noisy, and are audible at greater distances than snowcoaches . . .¹²⁷

Thus, unless some dramatically different technologies came to light between 2000 and 2002, it would not seem to be possible for the Park Service to permit snowmobile use in Yellowstone and still satisfy its legal mandates. As the Park Service makes clear in the 2003 ROD, however, no such new technologies materialized. In fact, according to the 2003 ROD, the only thing which changed between the EIS process for the Snowcoach Rule and the one for the 2003 Rule was "the snowmobiling public's *perception* regarding new technology, or its willingness to consider its use and industry's willingness and ability to produce it."¹²⁸ Moreover, the 2003 Rule specifically states that Park Service analysis indicates that some snowmobile emissions 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 emissions relative to 2002 models.¹²⁹ The 2003 Rule's BAT requirement

126. Final SEIS, *supra* note 39, at 243.

127. Snowcoach Rule, 66 Fed. Reg. at 7260. A group of four snowmobiles (carrying eight passengers in total) can be heard at a distance of 5,810 feet in open terrain, while a snowcoach, carrying far more passengers, is audible for only 2,630 feet under the same conditions. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268.

128. 2003 ROD, *supra* note 38, at 6 n.2 (emphasis added).

129. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268. The Park Service attributes the increase in emissions to an increase in horsepower.

122. See Conservation Law Found. of New England v. Secretary of the Interior, 864 F.2d 954, 19 ELR 20631 (1st Cir. 1989).

123. *Fund for Animals*, 294 F. Supp. 2d at 114.

124. See *id.* at 115.

125. *Air Pollution*, *supra* note 46.

for prevention of impairment is thus based entirely on findings that BAT did *not* prevent impairment back when the Park Service studied it during the Winter Use EIS process, that new technologies have *not* come to light that change this, and that what new technologies there are actually *increase* pollution.

Another of the Park Service's stated justifications for the 2003 Rule is equally unsupported by the administrative record: prevention of economic harm to the communities surrounding Yellowstone. The Park Service alleged economic harm in an unsuccessful attempt to convince Judge Sullivan to stay his judgment reinstating the Snowcoach Rule. The state of Wyoming and the ISMA made the same argument (this time successful) two months later in an effort to persuade Judge Brimmer to enjoin enforcement of that rule. However, the Park Service's economic harm argument rings hollow in light of the findings and conclusions stated in the 2003 ROD. In that document, the Park Service states that the economic impacts of any of the alternatives evaluated in the SEIS are negligible, and would produce "less than a [1%] decline in both jobs and dollars," except in the gateway community of West Yellowstone, in which the percent change in output ranges from 2% to 8%, depending on the alternative.¹³⁰

In a weak effort to justify its position despite all of the aforementioned inconsistencies, the Park Service in the SEIS latches on to one sentence from the Snowcoach Rule, in which the Park Service recognized that "achieving compliance with the applicable legal requirements while still allowing snowmobile use would require very strict limits on the numbers of both snowmobiles and snowcoaches."¹³¹ Based on that statement, the Park Service in the SEIS attempts to argue that, in small enough numbers, BAT snowmobiles would not create unlawful impairment. Whether or not this is true is irrelevant, in light of the fact that the 2003 Rule calls for *increased* numbers of snowmobiles. Furthermore, the Park Service's stated rationale for the 2003 Rule is maintaining historic visitation levels,¹³² a goal which cannot be accomplished by imposing very strict limits on snowmobile numbers.

Finally, the agency's lack of consideration for public opinion, especially blatant when one compares consideration given to public opinion in the Snowcoach Rule, is noteworthy as evidence that the Park Service was not using the administrative record as the basis for the 2003 Rule. One of the reasons for staying the Snowcoach Rule, put forth by the ISMA, the state of Wyoming, and ultimately Judge Brimmer, was the Park Service's failure to provide for adequate public participation. Evidence of this failure, the ISMA and Wyoming argued, could be found in the shortened period—30 days—provided for public comment and in the relatively low number of comments—59,000—received during the rulemaking that preceded promulgation of the Snowcoach Rule.¹³³ In contrast, the agency took comment for 49 days following publication of the proposed 2003 Rule and received 104,802 comments.¹³⁴ On its face, then, the ISMA and Wyoming's argument seems to carry

some weight—until one compares what those comments actually said with what the Park Service did in response. Longer comment periods and the receipt of more comments mean little when the contents of the comments are disregarded. Of the 104,802 comments received in 2003, only 8% supported the rule as proposed; 90% were affirmatively opposed to the rule.¹³⁵ Yet the proposed rule, substantially unchanged, became the 2003 Rule. The agency was far more responsive to public opinion in 2001, however, finalizing a rule which 83% of commentators supported.

V. The Solution: Yellowstone-Specific Legislation Phasing Out Snowmobile Use in the Park Entirely

The only lasting legacy of the last five years of agency deliberations, studies and studies supplementing studies, and reversals seems to be confusion and frustration.¹³⁶ Despite Judge Brimmer's noble and logical suggestion that park use issues should be left in the care of the agency charged with managing the parks and not in the hands of "a single Eastern district [court] judge [or] a single Western [district court] judge," it would appear that the "experts" might not be up to the task.¹³⁷ Even Judge Brimmer might be inclined to agree, since he, like Judge Sullivan, accused the Park Service of making sudden and unexplained reversals and basing decisions on predetermined political motives.¹³⁸

If the courts are not the proper arbiters for decisions about snowmobile access in the parks, and the Park Service is incapable of using its expertise rather than its political inclinations to fashion a solution, perhaps the legislature should step in and offer the necessary prodding and direction. That Congress is capable of such guidance is evident from two bills proposed during the first half of 2003, one in the U.S. House of Representatives and one in the U.S. Senate. The identical bills, both titled the Yellowstone Protection Act, would have required the Secretary of the Interior to implement a final rule phasing out snowmobiles in Yellowstone.¹³⁹ In the Senate, the bill had 4 sponsors; in the House, 134. The bills expressed support for the Snowcoach Rule, finding that it was "made by professionals in the [Park Service] who based their decision on law, [10] years of scientific study, and extensive public process."¹⁴⁰ In particular, the bills highlighted the several opportunities members of the public were given for comment during the EIS process, explaining that 22 public hearings were held in regional communities and across the country and that "at each stage of the input process, support for phasing out snowmobiles grew."¹⁴¹ The fate of the bills indicates a fair amount of congressional support for a phaseout: although the Senate version languished in committee, the House nearly passed its

130. 2003 ROD, *supra* note 38, at 23.

131. *Id.* (quoting the Snowcoach Rule, 66 Fed. Reg. at 7260).

132. Final SEIS, *supra* note 39, at 70.

133. Snowcoach Rule, 66 Fed. Reg. at 7260.

134. Winter Use Plans Final Rule, 68 Fed. Reg. at 69268.

135. *Id.*

136. See generally Geoff O'Gara & Dan Whipple, *Judicial Roulette*, CASPER STAR-TRIB., Feb. 18, 2004 (noting that "park officials who had complained of wooziness from snowmobile gas fumes were now dizzy with court orders" and that the "real economic hardship" comes from having the rules change every week).

137. International Snowmobile Mfrs. Ass'n v. Norton, No. 00-CV-229-B, 2004 U.S. Dist. LEXIS 1796, at *36 (D. Wyo. Feb. 10, 2004).

138. See *id.* at *29.

139. See Yellowstone Protection Act, H.R. 1130, 108th Cong. and Yellowstone Protection Act, S. 965, 108th Cong..

140. *Id.*

141. *Id.*

version.¹⁴² In fact, the bill had passed (211-209, with a number of Republican representatives crossing party lines), until the Republican liaison between the White House and Republican House leadership changed his vote, resulting in deadlock and defeat.¹⁴³

VI. Conclusion

As the popularity of snowmobiling (and the horsepower of the snowmobiles) in Yellowstone has increased, the Park Service has struggled to design and implement effective rules for the sport's regulation. The years of debate and analysis, however, have only served to cast a haze even thicker than that generated by snowmobile emissions over snowmobile policy in the park. The haze appears to be impenetrable by courts both near the park and far, as well as by snow-

mobile outfitters, enthusiasts, and nonenthusiasts, all of whom are left wondering exactly what rule is in place on any given day. But in light of the Park Service's governing mandates and its fundamental purpose, namely, conservation, there should not be such a thick cloud over the issue of snowmobiling in Yellowstone. Under the applicable statutes, regulations, policy manuals, and Executive Orders, the Park Service should no longer even be debating whether or not to allow snowmobiling in Yellowstone—the only lawful course of action is to ban it from the park entirely. Because the Park Service is aware that allowing snowmobiling in Yellowstone to continue—indeed increasing the numbers of snowmobiles permitted to enter per day—violates the relevant mandates, its recent rulemaking is disingenuous and a farce of the American public. When an agency is no longer able to act independently, and when it appears to ignore the advice of its own experts, Congress should step in. In this case, Congress should pass legislation phasing out snowmobiling in Yellowstone National Park.

142. See *For the Record*, WASH. POST, July 24, 2003, at T9.

143. Editorial, *The Snowmobile Quagmire*, N.Y. TIMES, Oct. 13, 2003, at A16.