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Are National Park Resources for Sale?: *Edmonds Institute v. Babbitt*

Mike Wood*

I. INTRODUCTION

On March 1, 1872, President Ulysses S. Grant signed into law the Yellowstone National Park Organic Act.¹ Described in part as a “tract of land in the States of Montana and Wyoming, lying near the headwaters of the Yellowstone River,” Yellowstone National Park was the first national park in the nation and set a precedent for the creation of other national parks within the United States and worldwide. By 1916, several other national parks had been established and Congress created the National Park Service (NPS) to manage the national parks in conformance with its intent 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 a manner and by such means as will leave them unimpaired for the enjoyment of future generations.”²

Considerable debate continues over how the NPS ought to manage national parks in order to best meet its mandate from Congress, but it seems clear that most Americans believe that national parks ought to be kept free from the kinds of resource extraction known all too well on other public lands such as national forests.³ The National Park Service Organic Act (NPSOA), implicitly contains a “nonimpairment requirement [that] constitutes a clear substantive standard requiring the Park Service to protect the natural integrity of the landscape when humans pressure comes into conflict with resource values.”⁴

Moreover, Yellowstone was created during a time when resource extraction was running rampant in other parts of the United States:

[r]uthless exploitation of natural marvels stimulated an uneasiness that was felt more generally about the burgeoning spirit of enterprise in the country. Houses were going up, and trees coming down, with such unbridled energy that it was easy to wonder whether Americans valued anything but the prospect of in-

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1. 16 U.S.C. § 21 (1994); R.S. § 2474, 17 Stat. 32

2. 16 U.S.C. § 1, Act of August 25, 1916, c.408 § 1, 39 Stat.535; Ex. Ord. No. 6166, § 2, June 10, 1933, Mar. 2, 1934, c. 38, § 1, 48 Stat. 389.

3. See Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 *ECOLOGICAL Q.* 401 (1999) [hereinafter Doremus].

4. Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 *U. COLO. L. REV.* 293, 304; see also *Conservation Law Found. v. Hodel*, 864 F.2d 954 (1st Cir. 1989); *Organized Fisherman v. Hodel*, 775 F.2d 1544 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986); *Wilderness Public Rights Fund v. Kleppe*, 608 F. 2d 1250 (9th Cir. 1979), cert. denied, 448 U.S. 982 (1980).

creased wealth[.]

The idea of publicly held parks was not only a predictable response to the despoliation and avarice, it also harmonized with a principle that was at the very crest of its influence in American land policy. The [Yellowstone] era was also the time of Homestead and Desert Land acts, when every American family was to have its share of public domain free of monopolization by the rich. The application of that principle to the great scenic wonders could not be realized by granting a sequoia grove or Grand Canyon to each citizen. But it was possible to preserve spectacular sites for the average citizen by holding them as public places to be used and enjoyed by everyone.⁵

Many people believe that the creation of Yellowstone National Park and the national park system has set a precedent based upon the premise that “[i]n today’s world, the parks should be places where the populace can be inspired with the wonder of nature and the understanding that some things are too special to be sold.”⁶ Ironically, perhaps, on Yellowstone’s 125th Anniversary, the NPS announced it had signed an agreement with Diversa Corporation, a biotechnology company, whereby Diversa would be allowed to sample and collect microorganisms primarily from Yellowstone’s geothermal pools.⁷ This agreement set a wholly new precedent within the national park system by opening park resources to commercial exploitation.⁸ Although the Park Service had provided for the extraction of microorganisms from within the park in the past, the agreement with Diversa represented the first time in which the NPS stood to benefit financially from potential royalties generated from a private company’s development of park resources should such findings prove commercially marketable.⁹

Following the announcement of the agreement with Diversa, three non-profit organizations, the Edmonds Institute, the Alliance for the Wild Rockies, and the International Center for Technological Assessment, filed suit, claiming that the NPS illegally entered into the agreement, known as a Cooperative

5. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS, REFLECTIONS ON THE NATIONAL PARKS* 8 (1980).

6. Doremus, *supra* note 3, at 438.

7. *See id.* at 402-03.

8. *Id.*

9. Cooperative Research and Development Agreement for a Project Between Yellowstone National Park/National Park Service and Diversa Corporation, Signed May 4, 1998, Robert Stanton, Dir., NPS, and Michael Finley, Superintendent, Yellowstone National Park, Signed May 5, 1998; Terrance J. Bruggerman, Chairman, President and Chief Executive Officer, Diversa Corporation [hereinafter CRADA]. Importantly, the terms of the CRADA provided for the extraction of Park resources and is therefore distinguishable from other types of commercial activity within the Park (*i.e.* concessions).

Research and Development Agreement (CRADA).¹⁰ At issue in this suit, *Edmonds Institute v. Babbitt*, was first, whether the CRADA constituted a "major federal action"; second, whether Yellowstone National Park had the statutory authority to enter into such agreements; third, whether bio-prospecting ran afoul of the National Park Service purposes; and fourth, whether the public trust doctrine precluded the NPS from entering such an agreement.¹¹ The suit sought both declaratory and injunctive relief on all counts until such time as the court had the opportunity to review the merits of the case.¹²

The plaintiffs in *Edmonds* argued that, notwithstanding the benefits of the CRADA touted by the Park Service and Diversa, the precedential quality of allowing the NPS to benefit from private commercialization of park resources could fundamentally alter how our national parks are managed.¹³ The court bifurcated the ruling in *Edmonds*, ruling primarily on procedural matters in *Edmonds I*, and then on the merits of the remaining claims in *Edmonds II*.¹⁴ The *Edmonds I* court ruled that the plaintiffs had standing, then ruled that the CRADA was a major federal action for the purposes of the National Environmental Policy Act and required the NPS to complete an environmental assessment.¹⁵ The *Edmonds I* court also dismissed plaintiffs' public trust doctrine argument.¹⁶ About one year later, in *Edmonds II*, the court ruled that the NPS CRADA with Diversa did not violate the Yellowstone Organic Act, the National Park Service Organic Act, or the Federal Technology Transfer Act, thus holding for the NPS on all remaining counts.¹⁷

This note highlights the arguments presented in *Edmonds*, and discusses the court's resolution of these issues. This note concludes that although the court applies a reasoned analysis to uphold the CRADA, the court's decision opens the door to future commodification of national park resources, which had hitherto been unavailable for commercial extraction.

II. BACKGROUND

On August 17, 1997, the NPS commemorated the 125th anniversary of the establishment of Yellowstone National Park.¹⁸ During the ceremony, the Park Service announced that it had entered into an agreement with Diversa Corpo-

10. *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1 (D.D.C. 1999) [hereinafter *Edmonds I*].

11. *Id.*

12. *Id.*

13. Plaintiff's Complaint at 25-26.

14. See *Edmonds I* and *Edmonds Institute v. Babbitt* Civ. Action 98-561 (RCL) Memorandum Opinion of Apr. 12, 2000 [hereinafter *Edmonds II*].

15. *Edmonds I* at 14, 19.

16. *Id.* at 16.

17. *Edmonds II* at 1.

18. *Edmonds I* at 4.

ration to give Diversa a "non-exclusive right to 'bioprospect' microbial organisms in Yellowstone in exchange for an agreement to share potential financial returns with the Park."¹⁹ Pursuant to the CRADA, the NPS issued a Research Authorization/Collection permit to Diversa in 1998 authorizing "the collection of biological tissues, soils, sediments, water, and rocks from Yellowstone."²⁰

While the CRADA might provide the Park Service with substantial scientific benefits, the most unique feature of the CRADA is the consideration the Park stands to receive in exchange for access to the Park's natural resources.²¹ "The Yellowstone-Diversa CRADA marks the first time in history that an American national park would stand to gain financially from scientific discoveries made within its borders."²² Ultimately, the issue at hand is whether allowing commercial bioprospecting within National Parks will crack the door open to a slow erosion of the long-standing ban on commercial development of other natural resources within national park boundaries. To understand the significance of the shift in policy embodied in the CRADA at issue, it is necessary briefly to explain the emerging field of "bioprospecting."²³

Bioprospecting is, quite literally, prospecting for microscopic resources, the genetic and biochemical information found in wild plants, animals, and microorganisms.²⁴ Uses of products developed from material discovered through bioprospecting include "stripping the paint from old Navy boots, to extraction of gold from ore, to DNA fingerprinting, to fighting cancer."²⁵

As the demand for bioprospecting has grown, so have the places from which the bioprospecting companies have sought to extract organisms, including Yellowstone National Park.²⁶ Interestingly, Yellowstone holds "an estimated eighty percent of the world's terrestrial geysers and more than half of its thermal features, including hot pools, and fumeroles."²⁷ Park scientists have discovered that the Park's thermal features contain a microbial community with a biological diversity similar in degree to tropical rainforests.²⁸

19. *Id.*

20. *Edmonds I* at 5, n.1.

21. *Id.* at 5. Notwithstanding requests from members of Congress and at least two Freedom of Information Act lawsuits, defendant Park Service refused to disclose to the plaintiffs or the court the specific details of the consideration it would receive under the CRADA. While the NPS did eventually disclose that it would receive between ".5% and 10%" of the royalties generated by Diversa from the microorganisms extracted from the Park, it has more recently come to light that the Park would receive only the .5%, and nothing more. *Yellowstone Collects 0.5% Royalty On Bio-Deal*, SALT LAKE TRIBUNE, Oct. 4, 1999.

22. *Edmonds I* at 5.

23. *Id.* at 5.

24. See generally, John R. Adair, Comment, *The Bioprospecting Question: Should the United States Charge Biotechnology Companies for the Commercial Use of Public Wild Genetic Resources?*, 24 *ECOLOGICAL L.Q.* 131, 132-33 (1997).

25. *Edmonds I* at 6.

26. *Id.*

27. *Id.* at 6-7.

28. *Id.* at 7.

With such a wealth of microbial life within the Park's boundaries, it is not surprising that the Park Service has been under increasing pressure to make Park resources available for microbial resource extraction. The Park informally played host to some form of bioprospecting as early as 1898.²⁹ More recently, an enzyme discovered in 1966 within Yellowstone near Old Faithful has greatly assisted scientists in copying minute DNA samples.³⁰ Yellowstone now receives an average of 1,500 requests from researchers annually, and issues approximately 250-300 research permits each year, of which 40-50 are for microbial research.³¹ The NPS regulates this permitting system with the intent that all research is consistent with the Park's overall goals.³²

Prior to the CRADA at issue in *Edmonds*, researchers were free to remove any specimen allowed by their permit and develop it as they chose.³³ If the development led to commercial uses, the NPS never received any proceeds from the product derived from the park resource.³⁴ In response to serious funding shortfalls, and recognizing the potential for substantial financial returns from such resources, the NPS began to consider a "dramatic shift" in park management policy.³⁵ Rather than continuing to treat biochemical and genetic resources as a "common heritage of mankind," the Park Service began to consider these resources as a means of generating funds and creating incentives for the conservation of biological diversity.³⁶

The NPS began to negotiate with Diversa and other biotechnology companies in 1995.³⁷ Although the NPS allowed Park resources to be extracted for commercial purposes in the past, it lacked the regulatory mechanism to allow the Park itself to benefit financially through a profit-sharing arrangement with private entities. The NPS thus turned to authority under the FTTA to provide the potential avenue by which the Park Service could enter into such a profit-sharing agreement.³⁸ Under the terms of the FTTA, such an agreement is categorized as a CRADA.³⁹ The FTTA provides authority only for federal laboratories to enter into CRADAs with non-federal or private entities to "facilitate the sharing of research performed by government scientists."⁴⁰

29. *Id.*

30. *Id.* at 6. The court noted that patent on the enzyme was eventually sold "in 1991 for \$300 million to a company and now generates over \$100 million annually." *Id.* The NPS, however, has not received any compensation for the use of the Park resource. *Id.* at 7.

31. *Id.* at 7.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 7-8.

37. *Id.* at 8.

38. *Id.*

39. *Id.* at 10.

40. *Id.* (emphasis added). Whether Yellowstone National Park was a "laboratory" under the FTTA would become a critical issue in *Edmonds II*.

When plaintiffs first learned of the NPS CRADA with Diversa, they submitted a petition for rulemaking and collateral relief to the NPS requesting that the NPS perform an environmental impact study and provide the public with notice of the proposed change in policy prior to entering the CRADA.⁴¹ The Park Service refused the request.⁴²

The CRADA signaled a “major change” in Park management policy on scientific research.⁴³ According to documents obtained by plaintiffs pursuant to the Freedom of Information Act (FOIA), NPS officials had recognized the precedential quality of entering a CRADA with a private entity as early as 1996: “Any precedent set will affect all parks, and may influence profitable resource access by other industries besides biotech/microbiology”⁴⁴

III. Edmonds I

Having exhausted all other options, and with the signing of the CRADA imminent, the *Edmonds* plaintiffs filed suit on March 5, 1998, against Secretary of the Interior Bruce Babbitt and National Park Service Director Robert Stanton (hereinafter, defendants shall be referred to, collectively, as Interior), alleging that the CRADA violated the FTTA, the National Park Service Organic Act (NPSOA), the Yellowstone National Park Organic Act, the National Environmental Policy Act (NEPA), the public trust doctrine, and the Administrative Procedure Act (APA).⁴⁵ On August 28, 1998, Interior filed a motion to dismiss the FTTA claim, both claims under the Organic Acts, and the claim based upon the public trust doctrine.⁴⁶ In addition, Interior filed a motion for summary judgment on plaintiffs’ NEPA claim. Plaintiffs subsequently filed a cross-motion for summary judgment on the NEPA claim.⁴⁷

Interior initially chose not to oppose the FTTA and Organic Acts claims on substantive grounds but rather attempted to dismiss the claims by claiming that plaintiffs had “not met the constitutional and prudential requirements of the standing doctrine.”⁴⁸ The *Edmonds I* court addressed current doctrines of constitutional and prudential standing requirements and ultimately concluded that plaintiffs did have full standing to pursue these claims.⁴⁹

Interior also challenged the FTTA, Organic Acts, and public trust doctrine

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* These concerns led to further developments regarding the regulatory structure governing the park permitting process. This issue is discussed in detail *infra*.

45. *Id.* at 9-10.

46. *Id.* at 10.

47. *Id.*

48. *Id.*

49. *Id.* at 10-15.

claims on the basis that plaintiffs had failed to state a claim upon which relief could be granted.⁵⁰ Here, the court agreed with Interior in part and disagreed in part regarding the FTTA claim. Specifically, the court agreed with Interior that the FTTA applies to an agency that has contracted out the operation of a "federal laboratory to a non-federal entity, a circumstance which is not present in this case."⁵¹ Moreover, the court agreed that vague provisions within the FTTA that simply state that its provisions are not intended to limit or diminish existing authorities of an agency do not "provide the [c]ourt with any judicially manageable standard by which to review agency action, and thus it cannot give rise to a cause of action."⁵²

However, the court stated that Interior had "conveniently ignore[d]" the fact that plaintiffs' claim under the FTTA was also brought under the APA by alleging that the NPS's action was "arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law."⁵³ The court found that the APA "provides plaintiffs a cause of action with which to challenge interpretations of law and other final agency actions alleged to be in violation of a statute."⁵⁴ Thus, the court ruled that plaintiffs had successfully stated a cause of action under the FTTA though they had not stated it with "perfect clarity."⁵⁵

Interior likewise claimed that the NPSOA and the Yellowstone Organic Act cannot "conceivably give rise to a cause of action" because the NPSOA provides absolute discretion to the NPS in carrying out its purposes.⁵⁶ In this instance, the court wholly disagreed with Interior's motion for dismissal, citing several recent circuit decisions upholding the plaintiffs' claim by virtue of the fact that the NPSOA provides "broad, but not unlimited discretion in determining what actions are best calculated to protect Park resources, namely, the conservation of wildlife resources."⁵⁷ The court clearly agreed with earlier precedent that the APA's arbitrary and capricious standard applied, thereby warranting further examination of the merits of the claims.⁵⁸ For these reasons, the court denied Interior's motion to dismiss these claims.⁵⁹ The court, however, flatly dismissed plaintiffs' public trust doctrine claim, stating that Congress had "supplanted any trust obligations by enacting the detailed regulatory system governing the national parks."⁶⁰

50. *Id.* at 15.

51. *Id.* Ironically, defendants would later argue at length that Yellowstone National Park is, in fact, a "laboratory." This is discussed in detail *infra*.

52. *Id.*

53. *Id.* See 5 U.S.C. §§ 702, 706 (1994).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 15-16. (citations omitted).

58. *Id.* at 16.

59. *Id.*

60. *Id.* at 17 (citing *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980)).

Finally, Interior moved for summary judgment on plaintiffs' NEPA claim, arguing simply that NEPA's provisions were not applicable to the present action.⁶¹ The court first found that in NEPA, Congress had declared a "broad national commitment to protecting and promoting environmental quality"⁶² The court then considered whether the CRADA constituted a "major federal action significantly affecting the quality of the human environment," which would subject the action to the provisions of NEPA and its implementing regulations—and thus be required to prepare an Environmental Impact Statement (EIS), or, at a minimum, an Environmental Assessment (EA).⁶³

The determination of whether an agency action falls under NEPA's provisions is subject to an arbitrary and capricious standard.⁶⁴ Here, the fact that the defendants provided no evidence that a categorical exclusion was justified prior to the CRADA was "practically determinative" in the court's ultimate holding.⁶⁵ The court thus ordered the NPS to "suspend operation of the [CRADA] and prepare an environmental assessment in accordance with the requirements of the NEPA."⁶⁶

In sum, the court in *Edmonds I* concluded that plaintiffs did have standing to bring claims under the FTTA, the NPSOA, and the Yellowstone Organic Act; NEPA did apply to the development of the CRADA, and that the public trust doctrine alone did not preclude the Park Service from developing and signing the CRADA. The court left the merits of the FTTA and Organic Acts claims to decide in *Edmonds II*.

IV Edmonds II

In *Edmonds I*, Interior argued in part that plaintiffs had failed to meet the constitutional requirement of redressability on their FTTA claim.⁶⁷ Specifically, Interior claimed that "removing the commercial aspect of research and collection activity in the Park cannot possibly redress any alleged injury to plaintiffs' aesthetic injuries."⁶⁸ In discussing this issue, the court stated that Interior's assertion

61. *Id.* at 17.

62. *Id.*

63. *Id.* at 18. The NPS here chose to employ a provision of its manual that allows an agency of the Interior Department to categorically exclude particular types of federal actions from further NEPA review. See Dep't of Int. Dep't Manual, 516 DM 7, App. 7 § 7.4(E)(2).

64. *Edmonds I* at 18 (citing *National Trust for Historic Preservation v. Dole*, 828 F.2d 776,781 (D.C. Cir. 1987)).

65. *Id.* at 18.

66. *Id.* at 20. The court noted, however, that it was concerned solely with enforcing the procedural requirements of NEPA and did not "express any view as to the substantive validity of bioprospecting as a natural resource management strategy, in national parks or elsewhere." *Id.* at n.12.

67. *Id.* at 12.

68. *Id.*

ignores the reality that the commercial nature of an activity can and does affect its impact on the subject environment and particularly on people's aesthetic and recreational interests in the Park. Although parkgoers may be willing to forgive the trespass of their national parkland when the goals of that trespass are scientific and educational, commercial exploitation of that same parkland may reasonably be perceived as injurious.⁶⁹

The court cited *Alaska Wildlife Alliance v. Jensen*, in which the Ninth Circuit had found standing for plaintiffs to challenge a Department of Interior decision to allow commercial fishing in Glacier Bay.⁷⁰ The *Jensen* court had reasoned that "finding in plaintiffs' favor, that commercial fishing is statutorily prohibited in Glacier Bay, would result in the elimination of commercial fishing in the relevant areas. This would redress plaintiffs' claimed injuries."⁷¹ Similarly, the *Edmonds I* court stated that there is "an undeniable reality that commercial activity is qualitatively different than scientific and educational activity of a similar nature, due to the very different forces and motivations that drive them."⁷² Then the *Edmonds I* court concluded that "[i]f the court invalidates the CRADA, or enjoins its exercise pending the completion of an environmental impact statement then the plaintiffs' injuries will be redressed. Therefore, plaintiffs have established redressability."⁷³

Regarding Interior's assertion that the plaintiffs failed to establish prudential standing to bring an FTTA claim, the court first described the NPS interpretation of the term "laboratory" under the FTTA as "amazingly broad."⁷⁴ Then the court looked to *Chem Serv.*, the only federal court of appeals ruling to consider the "zone of interests" covered by the FTTA.⁷⁵ In *Chem Serv.*, the Third Circuit determined that because the FTTA's CRADA provisions were integrally related to federal procurement laws, "[t]o the extent that a CRADA is used to circumvent the statutory and regulatory requirements of the federal procurement laws, we find that Congress intended potential bidders to such a contract to be within the zone of interests protected under the FTTA."⁷⁶

Based upon the *Chem Serv.* ruling, the *Edmonds* court found that although

69. *Id.*

70. 108 F.3d 1065, 1069 (9th Cir. 1991).

71. *Id.*

72. *Edmonds I* at 13.

73. *Id.*

74. *Id.* at 14. Drawing upon the administrative record, the court referred to the Park Service's interpretation that not only all national parks, but possibly all federal lands could be characterized as "laboratories" under the FTTA. *Id.*

75. *Id.* (citing *Chem Serv., Inc. v. Environmental Monitoring Sys. Lab.-Cincinnati*, 12 F.3d 1256, 1267 (3d Cir. 1993)).

76. *Edmonds I* at 14 (citing *Chem Serv.* at 1267).

it is not readily apparent that the FTTA shares a similar “integral” relationship with the laws governing the NPS and national park system, “if the [NPS] insist[s] on interpreting the FTTA to apply to Yellowstone (and potentially to other parks and federal lands), then the relationship between the two bodies of law grows closer to point that an ‘integral’ relationship is shown.”⁷⁷ Importantly, however, the *Edmonds* court further stated that

[t]he intuitive barrier to this decision is that it seems absurd that an entire two-million-acre national park should be considered a “laboratory” under the FTTA. It is precisely the defendants who are to blame for this interpretation, however, and it would be inequitable to allow an agency to avoid review of its action taken pursuant to a statute merely by adopting an absurd interpretation of that statute.⁷⁸

When considering the FTTA claim, the court agreed with Interior in part, finding that the “clear and unambiguous terms” of the FTTA “apply only to an agency that has contracted out the operation of a federal *laboratory* to a non-federal entity, *a circumstance which is not present in this case*.”⁷⁹ Interior had also claimed that the NPSOA and Yellowstone Organic Act cannot “conceivably give rise to a cause of action.”⁸⁰ Interior based its claim on the notion that these acts provide such broad discretion to the NPS in carrying out its mission that its decision to sign the CRADA was beyond judicial review.⁸¹

In response, the court reminded defendants that this assertion is “inconsistent with past decisions of this and other courts.”⁸² Citing relevant case law, the court stated that at least the NPSOA provides “broad, but not unlimited discretion in determining what actions are best calculated to protect Park resources.”⁸³ The Court then referred to a line of prior case law in which courts had found various Park Service programs to be inconsistent the NPSOA.⁸⁴

Of particular relevance to the case presently before the Court is a line of decisions by this and other courts that have reviewed the 1970 and 1978 amendments to the NPSOA and found those amendments to reflect a renewed insistence on the part of Congress that the national parks be managed in accordance with the

77. *Id.* at 14.

78. *Id.*

79. *Id.* at 15 (emphasis added).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (citing *Damngerfield Island Protective Society v. Babbitt*, 40 F.3d 422 (D.C. Cir. 1994)).

84. *Id.* at 15-16.

primary purpose of the NPSOA, namely the *conservation of wildlife resources*.⁸⁵

Finally, the court found unconvincing Interior's claim that its permitting regulations render the prohibition on the "sale or commercial use of natural products inapplicable," "primarily because the regulations governing research permits by their own terms are applicable only to scientific and educational research and do not contemplate commercial research."⁸⁶ Based upon the court's analysis on these standing issues in *Edmonds I*, therefore, one may have speculated that plaintiffs would prevail in *Edmonds II*. This was, however, not to be the case.

A. *Is Yellowstone National Park a "Laboratory"?*

Plaintiffs characterized their FTTA claim as asking "whether defendants can legislate a dramatic shift in federal lands management by allowing a national park to contract away natural resources to a private, commercial entity through a CRADA."⁸⁷ In *Edmonds I*, court had found that the APA provides for such a claim to be brought.⁸⁸ The APA dictates that a reviewing court "shall hold unlawful and set aside agency action in excess of statutory jurisdiction, authority or limitations, or short of statutory right."⁸⁹ Plaintiffs simply claimed that entering into the CRADA exceeded "the authority granted to the Department of the Interior through the FTTA and is [therefore a] violation of the APA."⁹⁰

Because the FTTA provides specific authority to the director of any government-operated federal *laboratory* to enter into CRADAs such as the one in question here, the ultimate question under the FTTA claim was whether Yellowstone National Park constitutes a federal "laboratory."⁹¹ The court's standard of review in determining whether the Park Service had in fact exceeded its authority under the FTTA was critical to the plaintiffs' case. Plaintiffs argued that in reviewing a claim under the APA section 706(2)(c), the

85. *Id.* at 16 (emphasis added) (citing *National Rifle Assoc. of Am. v. Potter*, 628 F.Supp. 903, 909-10 (D.D.C. 1986); *Sierra Club v. Andrus*, 487 F.Supp. 443, 447-49 (D.D.C. 1980); *Michigan United Conservation Clubs v. Lujan*, 949 F.2d, 207 (6th Cir. 1991) (expressly agreeing with and adopting the reasoning of *National Rifle Assoc. of Am. v. Potter*); and *Bicycle Trails Council of Marin v. Babbitt*, 82 F.#d 1445, 1449-50 n.2 (9th Cir. 1996) (expressly adopting the findings in *Potter*)).

86. *Id.* at 16. Importantly, however, the *Edmonds I* court explicitly deferred its determination whether the CRADA actually called for commercial use of natural products until such time as it did have a chance to review the claim on the merits. Likewise, the court deferred its decision whether the Park Service's overall interpretation of its regulations was "reasonable" under the second prong of the *Chevron* doctrine.

87. See *Plaintiff's Motion for Summary Judgment and Accompanying Memo in Support, Edmonds II*, at 10. *On file with author [hereinafter Pl. Memo]*.

88. *Edmonds I* at 10.

89. 5 U.S.C. § 706 (1994).

90. *Pl. Memo* at 10.

91. *Id.* at 11-12.

two-pronged standard of review established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* should control.⁹² Under *Chevron*, a reviewing court first asks “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear [by the terms of the statute itself], that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁹³ Where the statute is unambiguous, “judicial inquiry is complete except in rare and exceptional circumstances.”⁹⁴ Based upon this process of statutory review, plaintiffs urged the *Edmonds II* court to look to the particular statutory language at issue.⁹⁵ The specific language in question defines a CRADA as

[a]ny agreement between one or more Federal *laboratories* and one or more non-Federal parties under which the Government...and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are *consistent with the mission of the laboratory* ⁹⁶

As plaintiffs further pointed out, the FTTA defines a “laboratory” as: “a facility or group of facilities owned, leased, or otherwise used by a Federal agency, a substantial purpose of which is the performance or research, development or engineering by [its employees].”⁹⁷ Based upon this clear language of the FTTA, plaintiffs reiterated that Yellowstone is not a “laboratory”⁹⁸

In the alternative, plaintiffs reasoned that even absent the FTTA definition, a common definition of the term “laboratory” could “in no way be used by defendants to extrapolate the authority of the FTTA onto the activities they have entered into for Yellowstone National Park.”⁹⁹ Plaintiffs relied on a common dictionary definition of laboratory as “a place *equipped* for experimental study in science or for testing and analysis.”¹⁰⁰

Under the *Chevron* standard of review paradigm, and based upon the foregoing discussion of the statutory language in question, plaintiffs argued that the term “laboratory” is unambiguous, that Yellowstone National Park cannot conceivably be considered a “laboratory” under any plain meaning of the

92. *Id.*, see 467 U.S. 837, 842-43 (1984).

93. *Chevron*, 467 U.S. at 842-43.

94. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

95. Pl. Memo at 12.

96. Pl. Memo. at 12 (citing 15 U.S.C. §. 3710a(d)(1) (1994) (emphasis added)).

97. Pl. Memo at 14 (citing 15 U.S.C. § 3710a(d)(2)(A) (1994)).

98. *See id.*

99. *Id.*

100. *Id.* at 14-15. (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1988)) (emphasis added).

word, and that the provisions of the FTTA do not subsequently grant Yellowstone National Park the authority to enter in the CRADA.¹⁰¹

Furthermore, plaintiffs argued that even under the second prong of the *Chevron* doctrine, the NPS clearly exceeded its statutory authority under the FTTA.¹⁰² The second prong of the *Chevron* doctrine applies only where the terms of the statute are ambiguous.¹⁰³ The court must then look to whether the agency's interpretation is a "permissible construction of the statute."¹⁰⁴ To determine whether the agency's interpretation constitutes a permissible construction of the statute, the court may look to the intent of Congress.¹⁰⁵

Plaintiffs pointed to several examples of unique laboratories specifically contemplated by Congress while discussing the FTTA on the Senate floor.¹⁰⁶ Such specific examples, plaintiffs argued, place a "reasonable limitation" on the statute's definition of the term "laboratory."¹⁰⁷ Plaintiffs contended that even as broad an interpretation of the term "laboratory" as contemplated by the NPS should not be construed to include Yellowstone National Park.¹⁰⁸

Interior responded by claiming that Yellowstone Park is, in fact, a "laboratory" under the FTTA.¹⁰⁹ In doing so, Interior recognized that the court's standard of review would be critical in determining whether the Park Service's broad interpretation of the term "laboratory" within the FTTA fell within the purview of the APA.¹¹⁰ Interior agreed that the APA provisions were controlling, but emphasized that this standard afforded great deference to the

101. *Id.*

102. *Id.* at 16.

103. *Chevron*, 467 U.S. at 843.

104. *Id.*

105. *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463, n.8 (1937); *Commissioner of Internal Revenue v. Bilder*, 369 U.S. 499, 503-04 (1962).

106. Pl. Memo at 18. Plaintiffs' examples included the U.S. Geological Survey's Earth Resources Observation System Data Center, a government entity interested in establishing public-private partnerships for remote sensing applications, and the National Center for Toxicological Research, a federal research center under the authority of the Food and Drug Administration. *Id.*

107. *Id.* at 18-19.

108. *Id.* at 19. In addition, plaintiffs argued that the Park Service's expansive interpretation of "laboratory" contravened Presidential intent, citing Exec. Order No. 12,591, 52 Fed. Reg. 13414 (1987), in which President Reagan ordered each department head to "delegate authority to its government-owned, government-operated Federal laboratories" to enter CRADAs as defined by the FTTA. Plaintiffs also argued that the agency's past interpretation of the FTTA supported a more narrow reading than that now advocated by the NPS. Plaintiffs here cited the Department of Interior's FTTA training manual interpretation of the FTTA as applying to Federal laboratories only. With these final arguments, plaintiffs concluded that "defendant's have stretched the FTTA's definition of 'laboratory' beyond Congressional, Presidential and agency interpretation in an illegal attempt to obtain the authority to transfer the natural resources of Yellowstone to a private entity through a CRADA. They have thereby set a dangerous precedent which threatens the conservation of natural resources in all our national parks." Pl. Memo at 19-21.

109. Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Partial Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment, *Edmonds II*, at 20 [hereinafter Def. Memo].

110. *Id.*

agency's statutory interpretation.¹¹¹

The Supreme Court has made clear that the "arbitrary and capricious standard" of the [APA] is "highly deferential" and presumes the validity of agency action. If the court can discern a rational basis for the agency's decision, that decision must be affirmed. Similarly, the court must uphold the agency's construction of the statute unless it is plainly unreasonable.¹¹²

Interior asserted that the term "laboratory" under the FTTA is open to interpretation by the Park Service,¹¹³ implying that the second prong of the *Chevron* doctrine applied.¹¹⁴ Interior's argument simply ignored the first prong of the *Chevron* doctrine.¹¹⁵ Interestingly, just as plaintiffs cited the statutory definition of "laboratory" in arguing that Yellowstone can not conceivably be considered a laboratory, Interior looked to the statutory definition of "laboratory" to bolster its assertion that the term is open to a broad interpretation, arguing that "at a bare minimum, [the NPS] determination on the issue was not arbitrary and capricious."¹¹⁶ Interior argued that "there should be no dispute that Yellowstone consists of a 'facility or group of facilities' owned by a federal agency"¹¹⁷ Although the term "facility" is not defined within the FTTA itself, Interior borrowed from other portions of the United States Code in order to provide the court with a working definition of "facility" Interior then listed in exhaustive detail how "a substantial purpose" of the facilities is "the performance of research" by federal employees, including a list of prior collaborative efforts with private entities and the benefits of these efforts.¹¹⁸

Interior thus claimed that the FTTA does not require that "each and every

111. *Id.* The NPS agreed that the court should be concerned with whether the Park Service's action in entering into the CRADA was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (1994).

112. Def. Memo at 20-21 (quoting *United Transportation Union v. Lewis*, 711 F.2d 233, 252 (D.C. Cir. 1983) (internal citations omitted); see also *American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594, 595 (D.C. Cir. 1990).

113. *Id.* at 21-22.

114. *Id.* at 22.

115. See *Id.*

116. *Id.* at 21-22.

117. *Id.* at 22.

118. *Id.* at 25-27. The Park maintains and coordinates its scientific efforts through the Yellowstone Center for Resources, an arm of the Park that employs approximately 43 individuals, "most of whom have doctorates and other advanced academic degrees and are substantially engaged in scientific research activities at the Park." *Id.* The NPS pointed out specifically that the Park Service has worked cooperatively with such private interests as Lockheed-Martin Corporation and Diversa in the past and that such efforts have enhanced understanding of *Brucella*, a bison disease, and wolf genetics. The NPS also note that the Park has worked with NASA, the U.S. Geological Survey, the Agricultural Research Service, the Department of Energy's Idaho National Engineering and Environmental Laboratory, the National Academy of Sciences/National Research Council, and the National Marine Mammal Laboratory. *Id.*

piece of a federal entity be devoted purely to research in order for the entity to be able to enter into a CRADA."¹¹⁹ Interior reasoned that the Park Service is merely the "administrative and operational structure authorized to manage the natural resources and facilities under its jurisdiction" and is therefore the most appropriate entity to "enter into a CRADA as a legal matter."¹²⁰ Furthermore, under the *Chevron* doctrine, where a statutory term is ambiguous, a reviewing court may look to the legislative history of an Act to determine its meaning or to determine whether an agency's interpretation is reasonable.¹²¹ Interior countered plaintiffs' claim that the legislative history of the FTTA supported a "narrow" reading of the term "laboratory" by citing language from debate on the Senate floor and Senate reports indicating that the FTTA was intended to include the "widest possible range of research institutions operated by the Federal Government."¹²²

Finally, Interior argued that recent statutory provisions also confirm its authority to enter into the CRADA.¹²³ Interior cited the National Parks Omnibus Management Act, an act "which specifically addresses the important scientific and research activities of our national parks, and strongly encourages them to cooperate in research efforts with the private sector."¹²⁴ Several of the Omnibus Act's stated goals, as well as specific statutory language, authorized the Secretary of Interior to entertain requests from the public and private sectors "for the use of any unit of the National Park System for the purposes of scientific study"¹²⁵ Interior thus contended that Congress had made its intent clear that national parks were to enter into agreements with private industry for the purpose of scientific research and that this authority extended to entering into CRADAs under the FTTA.¹²⁶

In sum, Interior's arguments were premised upon the notion that the arbitrary and capricious standard of review affords great deference to an agency's

119. *Id.* at 28.

120. *Id.* Interior explicitly noted that it made no assertion about the legality of other CRADAs into which the Park Service may enter, only that the terms of this CRADA were well within the Park Service's legal authority as the administrative body carrying out the CRADA. *Id.* at 29.

121. See *supra* notes 105-108 and accompanying text.

122. Def. Memo at 30; see S.Rep. No. 99-283, at 11 (1986), reprinted in 1986 U.S.C.C.A.N. 3442, 3453. Moreover, defendants cited a specific instance in which the remote sensing devices used by the United States Geological Survey were to be considered a laboratory under the FTTA and suggested that these devices are "strikingly similar to one of the many types of research activities conducted by Yellowstone National Park", concluding that "[t]o the extent that Congress explicitly recognized that USGS facility falls within the definition of a laboratory, it implies that the same must be true for the activities conducted at Yellowstone." Def. Memo at 30-31.

123. Def. Memo at 30.

124. *Id.*

125. *Id.* at 33, See 16 U.S.C.A. § 5935(a) (1998). The Omnibus Act also provided that the Secretary may "enter into negotiations with the research community and private industry for equitable, efficient benefits-sharing arrangements." See 16 U.S.C.A. § 5935 (d) (1998).

126. Def. Memo at 33.

interpretation of statutory language.¹²⁷ Therefore, Interior concluded that it had reasonably interpreted Yellowstone as a “laboratory” under the FTTA and that this reasonable interpretation must be upheld by the court.¹²⁸

The plaintiffs then replied with a further refinement of their claim by providing a more in-depth analysis of the FTTA’s provisions and intent.¹²⁹ Plaintiffs first argued that the Park’s resources are not “technologies” as contemplated by the FTTA, and that “even assuming, *arguendo*, that Yellowstone research facilities constitute a ‘laboratory’ under the FTTA, the existence of this purported laboratory would still be irrelevant, in that the CRADA at issue does not deal with any ‘materials, inventions or contributions developed at these facilities.’”¹³⁰

Neither Interior nor plaintiffs contested the fact that the CRADA at issue provides for the transfer of raw natural resources, and not technologies, from the Park to a private corporation.¹³¹ In entering into the CRADA, therefore, plaintiffs claimed that the Park Service’s “primary contribution to the CRADA is opening up the Park’s resources for commercial exploitation,” rather than “the creation of ideas or inventions at Yellowstone’s research facilities.”¹³² For the CRADA to be valid, therefore, “the entirety of Yellowstone National Park would have to be classified as a federal laboratory,” an “absurd” conclusion.¹³³ On this basis, plaintiffs claimed it is irrelevant that the Park may contain “facilities or a group of facilities” that may be classified as laboratories as the Park itself cannot be considered a laboratory.¹³⁴

However, plaintiffs further contended that a “substantial purpose” of the Park is not “research, development or engineering,” contrary to NPS claims.¹³⁵ Drawing upon NPSOA and Yellowstone’s Organic Act,¹³⁶ plaintiffs noted that the Park is a “tract of land” dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people” and “for the preservation, from injury or spoilation, of all timber, mineral deposits, natural

127. *Id.*

128. *Id.*

129. Plaintiffs’ Memorandum of Points and Authorities in Support of its Opposition to Defendant’s Partial Summary Judgement, and Reply to Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgement on Counts I, II, and III., *Edmonds II*, at 9. [hereinafter Pl. Reply].

130. *Id.*

131. *Id.*

132. *Id.* Plaintiffs additionally pointed out that the administrative record shows that Yellowstone’s research facilities have not historically engaged in “actual ongoing research and development project collaboration with permittees that collect biological specimens” from the Park. Moreover, plaintiffs pointed out that Congress had specifically stated that the primary purpose of the FTTA is to “take technologies that originate in the laboratories and to stimulate or support their development and commercialization.” *Id.* (citing FTTA code).

133. Pl. Reply at 9.

134. *Id.* at 11.

135. *Id.*

136. See discussion *infra*.

curiosities, or wonder and their retention in their natural condition.”¹³⁷

Based upon this analysis, plaintiffs reiterated their conclusion that Yellowstone National Park is not a “laboratory” within the meaning intended by the FTTA.¹³⁸ Moreover, drawing upon their earlier arguments, plaintiffs claimed that the FTTA’s intent was clear in that the FTTA applies to federal *laboratories only*.¹³⁹ Under the *Chevron* doctrine’s standard of review, where a statutory intent is clear, “that is the end of the matter.”¹⁴⁰ As such, plaintiffs argued that the court need not look any further in finding that the Park Service had exceeded its authority in entering into the CRADA.¹⁴¹

Finally, plaintiffs rebutted Interior’s suggestion that by enacting the National Park Omnibus Act, Congress “removed any doubt on the point” of whether the entirety of Yellowstone National Park is a laboratory that can sign CRADAs.¹⁴² Plaintiffs concluded, “however convenient it might currently seem to defendants, the [Omnibus Act] was not intended to be, nor can [it] be construed as, a carte blanche to the agency for violations of other federal statutes...The [Omnibus Act] does not amend the FTTA and does not authorize” the Park Service to act in contravention of the Organic Acts creating both Yellowstone and the Park Service.¹⁴³

Presented with these arguments, the *Edmonds* court, citing the second prong of the *Chevron* analysis, found that defendants had provided a “reasoned basis for concluding that the broad, statutorily-assigned definition [of laboratory] encompasses Yellowstone’s extensive research facilities.”¹⁴⁴ Although the court agreed with the plaintiffs that a national park does not “immediately conjure the term ‘laboratory,’” the court concluded that the Park Service did have the authority under the FTTA to enter in CRADAs such as the one in

137. Pl. Reply at 12 (citing 21 U.S.C. § 22 (1994)). In addition, plaintiffs pointed out the court had already determined that NPSOA’s “primary purpose” is the “conservation of wildlife resources.” *Edmonds I* at 6. Specifically, Congress had directed the Park Service “to conserve the scenery and the natural and historic object and 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.” *Id.* (citing 21 U.S.C. § 22 (1994)).

138. Pl. Reply at 12.

139. *Id.* (emphasis added).

140. *Id.* (citing *Chevron*, 467 U.S. at 842). Plaintiffs had already stated their rationale for employing the *Chevron* doctrine as the appropriate standard of review.

141. Pl. Reply at 12. Plaintiffs also reiterated much of their earlier arguments regarding the applicability of the FTTA in the present situation. Here, plaintiffs claimed that, even if the FTTA is not clear on its face, the Park Service’s and Executive Branch’s prior interpretation of the FTTA, and the Act’s legislative history all indicate that Yellowstone has never been contemplated as a “laboratory.” *Id.* at 8-12.

142. *Id.* at 17; Here, plaintiffs pointed out that three main purposes of the Omnibus Act are to (1) *more effectively achieve the mission of the National Park Service*; (4) encourage others to use the National Park System for study to the benefit of the park management as well as broader scientific value, *where such study is consistent with the Act of August 25, 1916 (commonly known as the National Park Service Organic Act; 16 U.S.C. 1 et. Seq.)*; and, (5) encourage the publication and dissemination of information derived from studies in the National Park System.” (emphasis added) *Id.* at 17-18.

143. *Id.*

144. *Edmonds II* at 10.

question.¹⁴⁵ The court, stated, furthermore, that plaintiffs' reliance on a "plain meaning" argument was misplaced, because Congress assigned a definition to "laboratory" in FTTA that included "facilities owned or otherwise used by a federal agency"¹⁴⁶ The court then looked to the ordinary meaning of "facility," since it was not defined in the statute, and found that "the extensive array of research facilities at Yellowstone plainly satisfy this definition."¹⁴⁷ The court relied heavily upon the NPS showing that a substantial purpose of the facilities is scientific research, a requisite for falling within the definition of laboratory under the FTTA.¹⁴⁸

The court also determined that the CRADA clearly fell within the National Parks Omnibus Management Act's directives to the NPS to "enter into negotiations with the research community and private industry for equitable, efficient benefits-sharing arrangements' with a private entity for the purposes of scientific study"¹⁴⁹ Further, the court reasoned, if Congress wanted to foreclose Yellowstone or any other park system unit from entering into these cooperative agreements, it could have done so, and Congress' refusal to foreclose these options is indicative that the CRADA supports congressional intent.¹⁵⁰

B. *Commercial Use of Yellowstone's Natural Resources*

Although the court ruled that Yellowstone was a laboratory for the purposes of FTTA, the Organic Acts of Yellowstone and the Park Service, along with their implementing regulations, still presented several obstacles to implementing the CRADA. For example, it is illegal for visitors to remove pine cones or antlers from the Parks, even though it is highly questionable whether any environmental harm would come from such activity. However, such policies are not meant to protect the Park's resources only, but to affirm that the National parks belong equally to all U.S. citizens.

The court thus addresses whether the Organic Acts of Yellowstone National Park and the National Park Service, and their implementing regulations, afforded the Park Service with the authority to implement the CRADA. Simply stated, because the CRADA arguably provided for the extraction of natural resources from the park for commercial enterprises, plaintiffs claimed that the CRADA's provisions were contrary to the mission of Yellowstone and the Park Service as whole.¹⁵¹ In addition, and perhaps more to the point, plaintiffs

145. *Id.*

146. *Id.* at 11.

147. *Id.* at 12.

148. *Id.* at 10-13.

149. *Id.* at 14 (citing 16 U.S.C. § 5935(a) (1998)).

150. *Id.* at 14-15.

151. Pl. Memo at 23.

claimed that the CRADA violated Park Service regulations embodying the mission of the Park Service which prohibits "the sale or commercial use of natural products," if not the intent of the Organic Acts themselves.¹⁵²

Plaintiffs argued that the courts have determined the NPSOA places a specific emphasis on conservation above other considerations.¹⁵³ In *Michigan United Conservation Clubs v. Lujan*, the court stated that "unlike national forests, Congress did not regard the National Park system to be compatible with consumptive use."¹⁵⁴ Rather, Congress intended the Park Service to manage the system in order to "conserve the scenery and the natural and historic objects and wildlife therein."¹⁵⁵ Plaintiffs argued that the Park Service had recognized this principle for park management in promulgating regulations which prohibited the "sale or commercial use of natural products."¹⁵⁶ Additionally, the Park Service has issued rules which incorporate this principle.¹⁵⁷ As such, plaintiffs argued that the "consumptive use" of Park resources embodied in the CRADA violated the Park Service's overarching mission as well as its implementing regulations designed to carry out that mission.¹⁵⁸

Plaintiffs then reiterated their earlier arguments with regard to the appropriate standard of review, stating that courts have found the NPSOA to provide "broad, but not unlimited discretion in determining what actions are best calculated to protect park resources."¹⁵⁹ Although the NPSOA does provide discretion to the Park Service, the Park Service must at least "articulate the standards and principles that govern [its] discretionary decisions in as much detail as possible."¹⁶⁰ Yet, plaintiffs asserted, the Park Service had "provided no reasoned explanation for this historic and fundamental shift in national park lands management."¹⁶¹

Because the CRADA violated the overarching mission of the Park Service,

152. Pl. Memo at 22. From plaintiffs' perspective, the very heart of the issue involved in this case was whether the Park Service is authorized to commercialize the park's natural resources and act as a broker in marketing these "commodities." To this end, the *Edmonds* plaintiffs relied on both legal and spiritual arguments. *Id.* at 22-23.

153. *Id.* at 23. See *Michigan United Conservation Clubs v. Lujan*, 949 F.2d 202, 207 (6th Cir. 1991) (citing *National Rifle Ass'n. of America v. Potter*, 628 F.Supp. 903, 909 (D.D.C. 1986).

154. *Michigan*, 949 F.2d at 207.

155. *Id.*

156. See 36 C.F.R. § 2.1(c)(3)(v) (1999).

157. See, e.g., 51 Fed. Reg. 28110 (1986) The Park Service must "provide protection to all natural features of a national park system area." *Id.*

158. Pl. Memo at 22-23.

159. *Id.* at 24 (quoting *Dangerfield Island*, 40 F.3d at 446).

160. *Id.* at 25 (citing *Kent Farm Co. v. Hills*, 417 F. Supp. 297, 302 (D.D.C. 1976) (quoting *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971)). Citing the administrative record, plaintiffs further referred the court to a statement from the Secretary of Interior in which the Secretary admits that the CRADA at issue is the "first ever natural resource commercial use venture in a national park," and that the CRADA had already been used to "expand the commercial use management principle to other federal lands." Pl.'s Memo at 26.

161. Pl. Memo at 26.

as well as its implementing regulations, and because the Park Service had not offered any reasoning upon which it had based this “fundamental shift” in Park policy, plaintiffs claimed that the agency’s action can be afforded no deference and must therefore be enjoined.¹⁶²

Interior opened its argument on the Organic Acts by claiming that, under the appropriate standard of review, the NPS should be afforded wide discretion in “implementing its statutory responsibilities under authorizing statutes” and that this is especially important when agencies have interpreted implementing regulations.¹⁶³ “[I]n construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”¹⁶⁴ Interior argued that it was afforded great interpretive deference by the organic acts of the both Yellowstone and the NPS in fulfilling its mission.¹⁶⁵ In fact, the vast majority of Interior’s argument consisted of a recitation of the internal correspondences, discussions, meetings and other considerations undertaken by the NPS prior to entering into the CRADA.¹⁶⁶ Based upon these internal considerations, Interior claimed that it “ultimately came to the very sensible conclusion that entering into this agreement would be consistent with law, would facilitate valuable scientific research, and would enhance the Park’s ability to carry out its primary mission of protecting its natural features.”¹⁶⁷

Significantly, however, Interior claimed that plaintiffs had misinterpreted CRADA, and CRADA would not result in a “consumptive use” as plaintiffs had argued.¹⁶⁸ Citing its own administrative interpretation of the CRADA, Interior argued that the “CRADA does not authorize any otherwise prohibited consumptive use of park resources because none of the organisms themselves are being sold or otherwise transferred for any non-research-related consumptive purpose.”¹⁶⁹ Defendants explained that, under the terms of the CRADA, Diversa would obtain no title to specimens they collect and that the amount of material taken from the Park is no different from that taken by any other researchers in the Park.¹⁷⁰

162. *Id.* at 27. The remainder of plaintiffs’ argument pertaining to Counts II and III focused upon countering Interior’s claim that a separate regulation providing for the Park Service to issue research permits within the Park supercedes the prohibition on commercialization of natural products derived from the Park. Plaintiffs’ claim rested upon the assertion that such permits issued by the Park Service must be for scientific research purposes only and are constrained by the prohibition on commercializing Park resources. *Id.* at 27-30.

163. Def. Memo at 33-34 (citing *Sierra Club*, 487 F. Supp. at 450).

164. *Id.* at 34-35 (quoting *United States v. Larrison*, 431 U.S. 864, 872 (1977) (internal quotation omitted)).

165. *Id.* at 33-34.

166. *Id.* at 35-38.

167. *Id.* at 35.

168. *Id.* at 39-40.

169. *Id.*

170. *Id.* at 40.

Moreover, Interior explained that patent laws draw a distinction between naturally occurring organisms, which are not patentable, and scientific discoveries derived from the study of such organisms, which are patentable.¹⁷¹ Interior thus concluded that neither of the Organic Acts nor the regulation prohibiting the sale or commercial use of natural products from the Park prohibit the Park Service from entering into the CRADA.¹⁷²

Similar to the issue of whether Yellowstone is a laboratory, the *Edmonds II* court's reasoning closely paralleled Interior's arguments to rule that Interior had "offered a reasoned basis explaining how the CRADA [was] consistent with the organic statutes and regulations."¹⁷³ The court determined that defendants had provided a rational basis for how entering into the CRADA was consistent with NPSOA and the Yellowstone Organic Act.¹⁷⁴ The court also found Interior's discussion of how the CRADA would not authorize "consumptive use" of park resources particularly persuasive:

More fundamentally, however, the CRADA does not conflict with the conservation mandate of the organic statutes because it does not grant Diversa the right to collect any research specimens at all. Indeed, contrary to plaintiff's assertion, neither the CRADA nor its Scope of Work authorizes Diversa to take any natural materials from Yellowstone. Rather, the CRADA outlines the rights and responsibilities of Yellowstone and Diversa with respect to information and inventions developed *after* the conclusion of research specimen collection and analysis.

In mounting a frontal attack on the CRADA, plaintiffs fail to recognize this critical distinction. While they challenge the CRADA, they do not in any way contend that the research permit issued to Diversa is improper or is otherwise invalid. Indeed, plaintiff's misconception of the legal force of the CRADA reveals the fundamental flaw in their challenge. If the court were to find that the CRADA was improper under relevant statutes, Diversa could still collect specimens under a research permit, as it has since 1994. The only - albeit critical - difference would be that Yellowstone could not share in any of the potential benefits from Diversa's research. Instead, the positive gains from the research would go exclusively to Diversa.¹⁷⁵

171. *Id.* at 41.

172. *Id.* at 42-43.

173. *Edmonds II* at 15-16.

174. *Id.* at 18.

175. *Id.* at 18-19.

The *Edmonds II* court thus ruled for Interior on all counts.

V CONCLUSION

As of this writing, plaintiffs intend to appeal the court's ruling in *Edmonds II*.¹⁷⁶ Throughout much of its holding in *Edmonds II*, the court employed technical interpretations of the FTFA and legal determinations of the degree of discretion afforded to the Park Service in carrying out its mission under the NPSOA and Yellowstone Organic Act. In effect, the *Edmonds II* court has provided the Park Service with the means to "commodify" park resources in the name of park conservation. In its most basic terms, this case presents a critical question regarding the purposes of national parks in general and, more specifically, how the Park Service ought to achieve those ends: Should national parks and their resources be available for extraction by private commercial interests?

Although Interior took great pains in explaining (and convinced the court) how the CRADA at issue does not provide for commercial use of park resources, it is undisputed that Diversa is a commercial enterprise and seeks to make use of park resources for commercial purposes.¹⁷⁷ Moreover, the present agreement with Diversa represents the first time that a national park has entered into a profit-sharing agreement with a private commercial interest, thereby directly linking the Park Service's financial future to commercial, extractive interests within the Park.

In sum, the *Edmonds II* Court's ruling has upheld the improbable conclusion that Yellowstone National Park is a "laboratory" under the FTFA. In addition, the bioprospecting program, and the court's decision to uphold it, validates a back-door, albeit clever, approach to allowing policies and programs which on their face appear to be prohibited both by the NPSOA and Yellowstone Organic Acts as well as by Congressional intent of how the Parks should be managed and protected. Such back-door maneuvering is a poor approach to implementing drastic, and highly controversial, policy changes and defeat the spirit of an open government approach to democracy. Further, it has put the American public at the point at which it must ask itself whether, "[i]n today's world, the parks should be places where the populace can be inspired with the wonder of nature and the understanding that some things are too special to be sold."¹⁷⁸

176. Telephone Interview with Joseph Mendelson III, Attorney for Plaintiffs (May 1, 2000).

177. As discussed in the court's holding above, this case does at least implicitly question the entire permitting system provided by Park Service regulation. While this topic is certainly worthy of greater discussion, it is beyond the scope of this article and is therefore left for perhaps a future article on that topic alone.

178. Doremus, *supra* note 3, at 438.