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Articles

Analysis of Agency Authority for Enforcement of Snow Machine Closure Within the “Old Mt. McKinley Park Wilderness Area” of Denali National Park and Preserve

Harry R. Bader* and Chip Dennerlein**

I. Introduction

Denali National Park and Preserve, in interior Alaska, is surely one of the “crown jewels” of the U.S. National Park System. With the continent’s highest peak and more than six million acres of protected tundra, boreal forest, glaciers, rivers, and lakes, it encompasses a definable ecosystem with minimal anthropogenic

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disturbances. To protect these national assets, the park service promulgated rules to enforce a ban on snow machine use within the boundaries of a designated wilderness area established pursuant to the Alaska National Interest Lands Conservation Act.¹ This wilderness encompasses the area within the boundaries of the old Mt. McKinley National Park.

Recreational snow machine² enthusiasts challenged the rule, arguing that the park service lacked the discretionary authority to implement the rule and enforce a closure of the wilderness area to use. This article focuses only upon the narrow issue of whether park authorities have sufficient discretion to interpret their own regulations and affirmative statutes to justify a restriction upon recreational use when there is a perceived threat to park natural resources, without first completing extensive scientific study. To accomplish this task, this article discusses the snow machine use policy; the available scientific literature addressing snow machine disturbance to wildlife and vegetation; the management objectives for Denali National Park and Preserve in statute and regulation; National Park Service authority to regulate visitor use of park resources; and the deference owed to agency decision making. The article concludes that the agency did not exceed its authority.

The outcome of this issue will determine whether the wilderness and wildlife core of Denali National Park and Preserve can be protected from motorized uses. It will also set precedent that will long affect the future nature and extent of motorized activity in all the national parks and wilderness areas in Alaska and the ability of the National Park Service to regulate such activity.

II. Factual Background on Snow Machine Use and Policy

Until recently, incursions into the "old park" by recreational snow machine users were sporadic, and involved minimal numbers of individuals. To address these infrequent infractions, the Park Service historically relied upon public information, sign postings, and warnings to snow machine operators who violated the closure. However, during the past five years, increased capability and reliability of snow machines and increased numbers of snow machine users have resulted in numerous forays into the old park area. The combined concern that (1) current ecological data addressing snow machine activity upon wildlife and vegetation indicate snow machine use may result in resource degradation, (2)

1. Final Rule. 65 Fed. Reg. 37, 863 (June 19, 2000).

2. Snow machine is the Alaskan term used for snowmobile.

the paucity of scientific research focusing upon snow machine impacts to the sub-arctic alpine tundra of the Alaska Range specifically, (3) the uncertainty that such activity may have upon the long-term health of the Denali Park ecosystem, and (4) reports of visitor conflicts and subsistence interference have, in concert, precipitated a decision by the Park Service to begin direct enforcement of the existing closure.

Recreational snow machine use in the old Mt. McKinley portion of the Park and Preserve began to increase significantly after 1990. This increased usage occurred simultaneously with an increase in snow machine sales and use throughout Alaska. In addition to increased recreational snow machine activity, the character and pattern of use also changed. Snow machine manufacturers began production of higher performance vehicles that could access steep terrain and travel farther distances consequently penetrating deep into remote regions within the Alaska Range inside the old park boundaries. Dramatic new pressures upon park resources escalated with publication in the *Alaska Snow Rider*, a snow machine enthusiasts' newsletter,³ of an article urging recreationists to travel throughout the old park area. Concern for potential resource damage with uncontrolled recreational incursions into the closed area triggered the decision to allocate administrative resources for enforcement of the closed area.

Snow machine use historically was not allowed within the former Mt. McKinley portion of Denali National Park and Preserve,⁴ which constitutes approximately one-third (2 million acres) of the Park/Preserve Complex. The enforcement decision

3. See 9 *Alaskan Snow Rider* 6 (Oct. 1998).

4. See *Superintendent's Orders*. June 14, 1979. 36 C.F.R. 2.34 "Snowmobiling is prohibited in Mt. McKinley National Park." *Compendium for Denali National Park and Preserve*. 1984. "Use of snowmachines for recreation is not traditional within the pre-1980 park and much of the park additions." p. 8. *Denali National Park and Preserve General Management Plan*. 1986. pp. 37-38. *Collateral Forfeiture Bond Schedule*. 1990. Alaska Region Revision. "Prohibited non-traditional snowmobile access, \$100." [in reference to 36 C.F.R. 2.18; 43 C.F.R. 36.11 (I); 43 C.F.R. 36.11c]; *Compendium for Denali National Park and Preserve*, May 21, 1992.

For the purposes of this subsection, a traditional activity is defined as an activity that was regularly practiced in the former Mt. McKinley National Park prior to the 1980 passage of ANILCA. The use of snow machines does not fit this definition. Therefore, they [snowmachines] are not allowed All new areas included in the 1980 park additions are available for snowmachine use during times of adequate snow cover.

Id.

does not diminish, or alter, access for recreation now enjoyed by snow machine users on the remaining two-thirds of park and preserve land, which encompasses another 4.2 million acres.⁵ Prior to 1990, the occasional violations of the closure were of insufficient magnitude to trigger active enforcement measures. A review of Park Service patrol records, incident reports, and public testimony during hearings, demonstrate that recreational incursions into the area of the old park were almost non-existent between 1917 and 1980 and infrequent between 1980 and 1989.⁶

III. Impact of Snow Machine Use

A. *Snow Machine Conflicts with Other Recreation Users and Wilderness Values*

Public comment and written correspondence given to the Park Service indicates anecdotal evidence of possible widespread user conflicts between snow machiners, cross country skiers, ski-jorers, and dog mushers. Park Service research priorities include a review of sound levels created by snow machines within the old park area.⁷ These studies should provide necessary quantitative information addressing the relationship between decibel level and distance with snow machine use.

B. *Snow Machine Interference with Subsistence Opportunities*

Public comments received by the National Park Service indicate the presence of possible interference with subsistence activities in park additions and preserve lands adjacent to the old Mt. McKinley Park area.⁸ It is important to note that the superintendent does not acknowledge any existing subsistence activity within the old park.⁹ Rather, anecdotal evidence suggests that subsistence activities are interfered within park additions as

5. Alaska National Interest Lands Conservation Act. [hereafter referred to as ANILCA] (1981). 16 U.S.C. § 3101 *et seq.* See Title II, § 202 and Title VII, § 701 of ANILCA.

6. Based upon a review of patrol records and enforcement reports. Reports are on file at the Denali National Park Headquarters.

7. *General Management Plan Amendment/Backcountry Management Plan: Denali National Park and Preserve*, Work Assignments, 1999. Internal agency document, on file with author and available upon request.

8. E-mails and letters on file at Denali National Park and Preserve headquarters.

9. South Slope Denali Development Concept Plan Environmental Impact Statement, NPS, pp. 146 (May 1993).

snow machiners traverse these parklands en route to destinations within the old park area. It is probable that the superintendent will be required, under the terms of the Alaska National Interest Lands Conservation Act, to engage in a "810 Analysis" to determine the extent, nature, and significance of recreational snow machine activity, en route to the old park, upon subsistence opportunity in park additions and preserve areas.¹⁰

C. *Snow Machine Impacts upon Wildlife and Vegetation*

Many studies have been conducted on the direct impact of snow machine use upon wildlife behavior and physiological stress.¹¹ While definitive conclusions currently elude the scientific literature, sufficient data has been reported to indicate that snow machine use may have a deleterious effect upon wildlife resources. In particular, exposure of wildlife to snow machine usage may result in behavior alteration, habitat avoidance, and energy expenditures at critical times when animals are under extreme stress due to winter privations. Snow machines have been implicated in disturbances to bear denning, predation rates upon ungulates, and increased forage

10. See 16 U.S.C. § 3120 (2001). Analysis of federal land management programs must take possible impacts to subsistence opportunity into account. This analysis is a two-step process. First, the land manager must determine if the contemplated agency action may significantly restrict subsistence opportunity. If the answer is yes, then the agency must complete a thorough review assessing alternative actions and effective mitigation. The trigger for the second level of analysis is not a "likely" significant impact, but rather, a "credible threat" of a significant impact. Significant interference with the subsistence use may result from: 1) a reduction in availability of harvestable resources due to a population decline; 2) a reduction in availability of harvestable resources caused by an alteration in behavior, location, or habitat; and 3) limitation on access to harvestable resources. In determining if a particular management activity may significantly impact subsistence activity, ANILCA requires evaluation of cumulative impacts from related management activities upon the subsistence opportunity. See *Kunaknana v. Clark* 742 F.2d 1145, 1149-1153 (9th Cir. 1984) and *Sierra Club v. Penfold* 857 F.2d 1307, 1321 (9th Cir. 1988).

11. See N. Tyler, *Short-Term Behavioral Responses Of Svalbard Reindeer To Direct Provocation By A Snowmobile*, 56 *BIOLOGICAL CONSERV.* 179-194 (1991); K. Simpson, *The Effects Of Snowmobiling On Winter Range Use Of Mountain Caribou*, B.C. Minist. Environ. Parks Wildl. Working Rep. No. WR-25(1987); D. Freddy, W. Bronaugh, and M. Fowler., *Responses Of Mule Deer To Disturbance By Persons Afoot And Snowmobiles*, 14 *Wildl. Soc. Bull.* 63-68 (1986); A. Moen, S. Whittmore, and B. Buxton, *Effects Of Disturbances By Snowmobiles On Heart Rate Of Captive White-Tail Deer*, 29 vol. 2 *NY FISH AND GAME J.* 176-183 (1982); S. McCool, *Snowmobiles, Animals, And Man: Interactions And Management* 43 *Trans. N. Am. Wildl. Nat. Res. Conf.* 140-148 (1978); M. Dorrance, P. Savage, and D. Huff, *Effects Of Snowmobiles On White-Tailed Deer*, 39 *J. WILDL. MANAG.* 563-569 (1975).

energy expenditures.¹² Studies addressing these wildlife impact issues have not yet been implemented in Denali National Park and Preserve; however, ample evidence within the scientific literature suggests that enforcement of the recreational snow machine closure is a prudent action to protect wildlife resources while definitive research can be conducted and completed within the old Mt. McKinley park area.¹³ Such wildlife impact studies are scheduled to be addressed in the Environmental Impact Statement required for adoption of the Back Country Management Plan in accordance with the National Environmental Policy Act.¹⁴

Contrary to popular belief, a review of scientific literature suggests significant vegetation disturbance is a result of snow machine usage.¹⁵ Stress to terrestrial vegetation includes abrasion, delayed snowmelt along trail corridors, and changes in soil temperature due to snow compaction and loss of insulating qualities.¹⁶ The vegetation studies were not completed within Denali National Park and Preserve; however, the conclusions suggest that enforcement of the existing closure status is an appropriate response to increasing snow machine use violations until such time that studies are implemented in the park as part of the ongoing planning and management process.

D. Further Research Needs and Problems

In addition to park specific studies concerning snow machine impacts to wildlife, vegetation, wilderness resources, and conflicts with other winter recreationists, a number of studies may be necessary under the Clean Air and Clean Water Acts.¹⁷ The Park Service may be obligated to initiate research efforts concerning possible snow machine impacts to water and air quality. The Park

12. N. Tyler, *Short-Term Behavioral Responses Of Svalbard Reindeer To Direct Provocation By A Snowmobile*, 56 *BIOLOGICAL CONSERV.* 179-194 (1991); K. Simpson, *The Effects Of Snowmobiling On Winter Range Use Of Mountain Caribou*, B. C. Minist. Environ. Parks Wildl. Working Rep. No. WR-25 (1987).

13. S. McCool, *Snowmobiles, Animals, And Man: Interactions And Management* 43 *Trans. N. Am. Wildl. Nat. Res. Conf.* 140-148 (1978).

14. National Environmental Policy Act (NEPA) 42 U.S.C.A. § 4321 *et seq.*

15. See A. Pesan *et al.*, *Effects Of Snowmobile Traffic On Yield And Botanical Composition Of Forage Stands In Quebec*, 65 *CAN. J. PLANT SCI.* 543-552 (1985); A. Greller, *Snowmobile Impact On Three Alpine Plant Communities*, 1 *ENVTL. CONSERV.* 101-110 (1974); W. Wanke, *Snowmobiling Impact On Vegetation, Temperature, And Soil Microbes*, 1 *ENVTL. CONSERV.* 117-130 (1971).

16. W. Wanke, *Snowmobiling Impact On Vegetation, Temperature, And Soil Microbes*, 1 *ENVTL. CONSERV.* 117-130 (1971).

17. Clean Air Act, 33 U.S.C.S. §§ 1251 *et seq.* (2001); Clean Water Act 42 U.S.C.S. §§ 7401 *et seq.* (2001).

Service may also be required to study the effect that non-point source pollution may have on long-term environmental quality base line data gathering conducted within the old park boundaries and the monitoring role played by Denali National Park for environmental quality assessment. These and other additional studies may be needed to adequately evaluate effects of recreational snow machine use in this region. The temporary enforcement of the existing regulatory closure will provide appropriate time necessary for thorough studies and complete planning as required by law.¹⁸

IV. Management Objectives of Denali National Park and Preserve

Mt. McKinley National Park was specifically authorized by Congress to preserve animal and bird life as a game refuge and to protect the scenic beauty and natural curiosities while providing for recreation by the general public.¹⁹ The Alaska National Interest Lands Conservation Act (hereinafter ANILCA) authorized the establishment of an additional 104 million acres to the conservation system units in Alaska for the purpose of preserving and using lands of national significance for education, scientific study, and recreation.²⁰ These values include protection of wildlife populations, fisheries, unaltered ecosystems, and wilderness.²¹ For purposes of ANILCA the term wilderness has the same meaning as that contained within the Wilderness Act²² and wilderness area management is consistent with the Wilderness Act except as specifically called for under particular provisions in ANILCA. The statute also authorized the enlargement of Mt. McKinley National Park by approximately four million acres and renamed the unit as Denali National Park and Preserve.²³ The area of the old park constituting about two million acres became designated wilderness.²⁴ Interpretation of ANILCA, in the context established by the Organic Act and other statutes addressing the management of the nation-wide park system, continues in accordance with the

18. National Environmental Policy Act 42 U.S.C.S. §§ 1431 *et seq.* (2001).

19. *See* Mount McKinley Park, Alaska Act, Pub. L. No. 64-353, 39 Stat. 938 (1917).

20. Alaska National Interest Lands Conservation Act. 16 U.S.C.A. 3101 *et seq.* (2000).

21. *See id.* at § 3101.

22. *See id.* at § 3102, 1131.

23. *See id.* at § 410hh-1.

24. *Id.* at Title II and Title VII.

canons of statutory construction.²⁵ Thus, ANILCA augments application of the Organic Act as applied in Alaska, but does not repeal the Organic Act.

A. Access for Traditional Activities

Section 1110(a) of ANILCA authorizes transportation access within CSU's without a permit unless the activity is prohibited by administrative action.²⁶ The threshold qualification for snow machine and other specified access under this provision is that the access must be for traditional activities.²⁷ "Traditional" is understood to mean those uses generally occurring in the area prior to its designation in ANILCA. Such uses would be allowed to continue and individuals would not need to prove pre-existing personal uses to qualify.²⁸ Areas within Conservation System Units would remain closed to transportation access if traditional use did not occur prior to 1980.²⁹ Thus, this provision is interpreted by the Park Service as being restricted by both federal regulations and executive orders closing the old park to recreational snow machining prior to ANILCA.³⁰

B. Preservation of Natural Resources and Ecosystems

The mission of the National Park System is to preserve, unimpaired, the natural and cultural resources and values of the nation for the enjoyment, education, and inspiration of this and future generations.³¹ Park Service policy, therefore, is to adopt those methods and procedures that will provide the American people with the opportunity to enjoy natural environments evolving through natural processes, minimally influenced by anthropogenic disturbance.³² These qualities include tangible and intangible

25. For a discussion on the canons of statutory construction see W. E. Eskridge & P. Frickey, *Statutory Interpretation as Practical Reasoning* 42 STAN. L. REV. 321-384 (1990).

26. See 43 C.F.R. § 36.11. See also 16 U.S.C. § 3170(a) discussed in S.P. Quarles, & T. Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands: You Can Get There from Here*, 4 ALASKA L. REV. 1, 8 (1987).

27. See 16 U.S.C. § 3170 (1990). ANILCA Title 11 § 1110(a) 1980.

28. See S. Rep. No. 413 (1979), noted in Quarles & Lundquist *supra* note 13, at 9.

29. Statement of Finding: Temporary Closure 1-2 (1999).

30. See 36 C.F.R. §§ 2.17-2.18 and Executive Order 11,644, 3 C.F.R. § 666 (1971-1975), reprinted in 42 U.S.C. § 4321.

31. See Nat'l Park Service Strategic Plan 6 (1997).

32. See NPS Mgmt. Policy Statement of 1988.

attributes of natural systems including natural quiet, solitude, open space, scenery, and the sounds of nature.³³ In compliance with its statutory mandates and agency policies, Denali National Park and Preserve is managed to provide protection for geologic, scenic, wildlife, habitat, unaltered ecosystems, and water resources; to provide for subsistence opportunities in the ANILCA additions and preserve; to maintain opportunities for scientific research in undisturbed ecosystems; to preserve wilderness resource values; and to provide for recreational opportunity by the visiting public.³⁴

V. National Park Service Authority to Protect Natural Resources and Balance Recreational Use With Ecological Preservation

A. *Preservation of Park Resources*

The Organic Act establishes the legal framework for management of the entire national park system, and it is applicable to all park units, absent express contrary legislation addressing specific park areas.³⁵ The Organic Act gives the Secretary of the Interior the authority to make and publish such rules and regulations as are necessary for the proper management of national parks and monuments under the jurisdiction of the National Park Service.³⁶ This authority cannot be exercised to the detriment of the Act's primary purpose that is to conserve the scenery, natural features and wildlife within the national parks and to provide for their enjoyment by such means as will leave them unimpaired for future generations.³⁷ As to the question of whether the Park Service may permit activities within national parks that permanently impair unique park resources, the answer is decidedly "no."³⁸ The Park Service mandate is to permit only those forms of enjoyment and access that are consistent with preservation and inconsistent with significant, permanent impairment.³⁹ Management of national parks must always be exercised with an eye toward promoting specific regulatory objectives and the protection of scenic, natural, and cultural resources.⁴⁰

33. *See id.*

34. *See* Strategic Plan: Denali Nat'l Park and Preserve (1998).

35. *See* 16 U.S.C. § 1.

36. *See* Conservation Act, 16 U.S.C. § 3 (1999).

37. *See id.* at § 1.

38. *See* Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 821, 829 (10th Cir. 2000).

39. *See id.* at 824-825.

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

The federal judiciary has interpreted the National Park Service Organic Act as requiring a primary priority for preservation if conflicts arise in the management of national park units, unless Congress has specifically authorized a conflicting purpose for a particular park.⁴¹ While the Organic Act requires management of park areas so as not to compromise park natural resources,⁴² the statute is silent as to how the Park Service is to implement its protection obligations.⁴³ In meeting its preservation responsibilities, the Park Service *need not wait for actual damage to occur before taking protective action to prevent degradation to wildlife and other natural resources.*⁴⁴

Courts have consistently interpreted the Organic Act as empowering the Park Service to promulgate rules and make decisions to limit recreational activities, (such as mountain bikes, off-road vehicles, hunting, etc.), that may impair the primary goal of natural resource preservation.⁴⁵ Consequently, the park service concluded that Congress intended not to allow potentially damaging or consumptive activities where not specifically authorized.⁴⁶ The 1978 Amendments to the Organic Act expressly articulated the role of the national park system in the effort toward ensuring ecosystem protection.⁴⁷ Pursuant to this preservation mandate, the U.S. Supreme Court concluded that so long as procedural safeguards were adhered to and the will of Congress obeyed, only the National Park Service (hereinafter NPS) had the competency "to judge how much protection of park lands is wise and how that level of conservation is to be attained."⁴⁸

41. See *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996), (approving of Park Service enforcement action that closed of one-third of the national recreation areas' trails to mountain bikes to prevent conflicts with other recreation users); *Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 206-207 (6th Cir. 1991); *Nat'l Rifle Ass'n v. Potter*, 628 F.Supp. 903 (D.D.C. 1986).

42. See *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1072 (9th Cir. 1997).

43. See *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 391 (D. Wyo. 1987).

44. See *Wilkins v. Dep't of Interior*, 995 F.2d 850, 853 (8th Cir. 1993); *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969).

45. See R. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 675-677 (1997).

46. See *Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 207 (6th Cir. 1991); *Nat'l Rifle Assoc. v. Potter*, 628 F. Supp. 903, 909 and 912 (D.D.C. 1986).

47. See 16 U.S.C. § 1a-1 (West 2000).

48. *Clark v. Community for Creative NonViolence*, 468 U.S. 288, 299 (1984) cited in R. Keiter, *supra* note 45, at 676-677.

B. Recreation Management and Allocation

Under the Organic Act, the NPS has been given the difficult task of balancing use with protection in the management of national parks.⁴⁹ To achieve this difficult enterprise, the NPS is given broad discretion in determining what uses of park resources are proper and what proportion of the park's resources are available for each use.⁵⁰ The NPS is not expected to increase public use to the extent of compromising the nature and character of park units,⁵¹ and courts have been careful to ensure that the NPS has the authority to strike a reasoned balance between the goals of natural resources protection, recreation, and safety without undue interference.⁵² Thus, exotic species such as wild horses, for example, may be removed when they pose a potential threat to preserving the park's ecological integrity.⁵³

Allocation of a limited recreational resource between competing user groups is well within the administrative discretion granted to the Park Service for the management of national parks.⁵⁴ Therefore, if the overall use and enjoyment of a park must be limited to protect park values, an allocation among users is acceptable so long as it is rational and fair.⁵⁵ Indeed, the Park Service is empowered with all necessary authority to determine what uses of park resources are proper and what proportion of the park's resources will be available for each use.⁵⁶ Simply stated, *there is nothing within the Organic Act that requires the National Park Service to give one recreational user unfettered rein of a park without regard to the recreational interests of those whose chosen mode of recreation is inconsistent with such unfettered rein.*⁵⁷ Even when Congress has specifically permitted snow machine activity in a particular area, the Secretary of Interior has sufficient authority to terminate that activity if continued use impairs park values.⁵⁸

49. See *Nat'l Wildlife Fed'n*, 669 F. Supp. at 390.

50. See *Bicycle Trails of Marin*, 82 F.3d at 1454; *Nat'l Wildlife Fed'n*, 669 F. Supp. at 391.

51. See *Bicycle Trails of Marin*, 82 F.3d at 1457.

52. See *id.* at 1468.

53. See *Wilkins*, 995 F.2d at 852-853.

54. See *Bicycle Trails Council of Marin*, 82 F.3d at 1454, 1462; *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1253 (9th Cir. 1979).

55. See *Wilderness Public Rights Fund*, 608 F.2d at 1253.

56. See *Bicycle Trails Council of Marin*, 82 F.3d at 1454; *Nat'l Wildlife Fed'n*, 669 F. Supp. at 390; *Organized Fisherman of Fla. v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985); *Wilderness Public Rights Fund*, 608 F.2d at 1253.

57. See *Bicycle Trails of Marin*, 82 F.3d at 1461.

58. See *Mausolf*, 125 F.3d at 661 (closing Voyageurs National Park snow

Two cases are particularly instructive; both *Mausolf v. Babbitt*⁵⁹ and *Bicycle Trails Council of Marin v. Babbitt*⁶⁰ address recreational use restrictions by Park Service superintendents to protect natural resources within a parkland unit.

Mausolf confronted restrictions on snow machine use in Minnesota's Voyageurs National Park.⁶¹ The park was authorized in 1971 with enabling legislation permitting recreational snow machining within the park.⁶² Two decades later, in 1991, the National Park Service issued regulations restricting snow machine use to certain corridors and on frozen lake surfaces.⁶³ The decision was predicated on a wildlife impact report issued by the agency.⁶⁴ The Park Service concluded, in its report, that snow machining may possibly impact wolf populations by disrupting hunting behavior.⁶⁵ The U.S. Fish and Wildlife Service (hereinafter FWS) concurred with the Park Service in its own report.⁶⁶ After additional studies, the Park Service, along with FWS, implemented supplemental restrictions on snow machine use in 1994.⁶⁷ Local snow machine operators sued arguing that the Park Service had engaged in an "about face" on snow machining and had not considered the best available scientific and most definitive information before issuing the new restrictions.⁶⁸

The Ninth Circuit Court ruled in favor of the National Park Service.⁶⁹ The court noted that the agency enjoys broad discretion in carrying out the mandates of its governing statutes, particularly in areas involving the agency's specific expertise.⁷⁰ Even when snow machining is permitted by statute in parks, it may occur only where such activity is consistent with park management objectives and will not disturb wildlife or damage park resources.⁷¹ In accordance with the NPS's responsibility to manage and regulate park resources, the NPS has been given wide latitude to make management decisions

machine trails to prevent disturbance to gray wolves).

59. *See id.*

60. *See Bicycle Trails of Marin*, 82 F.3d 1445.

61. *See Mausolf*, 125 F.3d 661.

62. *See id.* at 663.

63. *See id.* at 664.

64. *See id.* at 664.

65. *See id.*

66. *See Mausolf*, 125 F.3d at 664.

67. *See id.*

68. *See id.* at 665.

69. *See id.* at 669-670.

70. *See id.* at 667-668.

71. *See Mausolf*, 125 F.3d at 668.

regarding the scope of permitted activities on park property.⁷² Indeed, the information relied upon by the agency in its decision need not be definitive nor irrefutable; it need only provide a sufficient basis to conclude that its decision is neither arbitrary nor capricious.⁷³ The statutory authority for the decision to restrict snow machine use could be found in the Organic Act alone.⁷⁴

In *Bicycle Trails Council of Marin v. Babbitt*, the park service confronted competing recreationists for park resources.⁷⁵ The case involved recreational restrictions and allocations among these recreationists, and invoked issues of NPS administrative discretion in developing management plans.⁷⁶

The issue in this case was the NPS decision to limit use of mountain bikes in the Golden Gate National Recreation Area (hereinafter GGNRA) after a period in which the recreational activity had been tolerated in a manner that left bicyclists virtually unregulated.⁷⁷ In 1987, the NPS adopted a regulation pursuant to notice and comment that created a uniform rule for all park units.⁷⁸ The rule prohibited all bicycle use in off-road areas unless local park unit managers specifically designated particular trails open to mountain bike use.⁷⁹ Exercising prosecutorial discretion, the GGNRA superintendent chose not to enforce the regulation in Golden Gate National Recreation Area until a recreation management plan had been developed, addressing, in part, the role of bicycling as a recreational activity in the park.⁸⁰ Therefore, bicyclists continued to enjoy unfettered access to all trails throughout the unit.⁸¹

By 1992, the NPS had completed a trail management plan for GGNRA.⁸² The plan had been generated after a process that involved four public hearings, three "advisory committee" meetings with various organizations with a vested interest in trail use within the park, letters submitted to the NPS from concerned individuals, and a variety of informal staff reports and observations.⁸³ The plan

72. *See id.*

73. *See id.* at 669.

74. *See id.* at 668.

75. *See Bicycle Trails of Marin*, 82 F.3d 1445.

76. *See id.* at 1451, 1459-1465.

77. *See id.* at 1450.

78. *See id.* at 1451.

79. *See id.*

80. *See Bicycle Trails of Marin*, 82 F.3d at 1450.

81. *See id.* at 1450-1451.

82. *See id.* at 1457.

83. *See id.* at 1458-1460, 1464-1465.

discussed four alternatives that differed only in that the allocation of trail availability among bicyclists, equestrians, and hikers were different within each option.⁸⁴ According to the plan, bicyclists were prohibited from approximately 36 percent of the recreational trails.⁸⁵ The rationale provided for by NPS was that the trails from which bikes were banned were those in which user conflicts were likely between bikers and hikers due to trail configuration, and where bicycling posed a threat to the protection of park resources because of erosion and vegetation destruction.⁸⁶

In arriving at its plan, the NPS stated that it had considered the recreational interests of bicyclists, hikers, and equestrians.⁸⁷ The NPS said it had balanced these interests against what it viewed to be competing interests in resource protection and visitor safety, as well as the desire of hikers to enjoy access to some bike free trails.⁸⁸

The Bicycle Trails Council of Marin filed suit, arguing that the NPS had improperly prioritized hiker's desires over bicyclist's, that the NPS had not adequately evaluated the needs for the "bicycling experience," and that the data used to determine user conflicts and resources damage was inadequate or improper.⁸⁹

The federal court, on appeal, upheld NPS's decision.⁹⁰ The court pointed out that balancing and allocating recreational opportunity in a park unit was well within the management discretion granted to the park service.⁹¹ The plan clearly articulated that it had considered the plaintiff's concerns and then rejected those concerns.⁹² The court commented that the plan explained the connection between the facts that it found and how those facts resulted in the decision made.⁹³

The plaintiffs contended that the data used by the NPS to identify user conflicts was flawed because it was generated by staff observations and informal individual visitor comments, rather than from a systematic study derived from a scientific survey or a review of official accident and complaint forms.⁹⁴ The court rejected this argument and said that subjective reports by park visitors is a

84. *See id.* at 1458-1459.

85. *See id.* at 1461.

86. *See Bicycle Trails of Marin*, 82 F.3d at 1460-1465.

87. *See id.* at 1459-1461.

88. *See id.* at 1461.

89. *See id.* at 1460.

90. *See id.* at 1445.

91. *See Bicycle Trails of Marin*, 82 F.3d at 1468.

92. *See id.* at 1460.

93. *See id.* at 1460-1468.

94. *See id.* at 1463-1465.

reasonable method by which an agency can determine that conflicts exist.⁹⁵ Individual comments from competing users are a very persuasive indicator of conflict. The mere fact that the bicyclists argued that hikers were pursuing an anti-bike political agenda is enough to satisfy the court that conflict existed.⁹⁶

VI. Judicial Deference to Park Service Decisions

NPS interpretation of a statute, which the agency is charged with administering, is entitled to deference from the courts.⁹⁷ Judicial review of agency interpretation of statutes is a two step process: First, the court must determine if Congress has spoken directly concerning the precise question at issue, (if so, the Court must implement the explicit will of Congress); second, if the statute is ambiguous, the court must uphold an agency's interpretation if that interpretation is reasonable.⁹⁸ In determining if a Park Service interpretation is reasonable, a court may look to whether the agency has been consistent, whether the interpretation is supportable on the basis of available information, and whether Congress intended to commit the matter to the agency's discretion.⁹⁹ Consistency is especially important. For example, if an agency's interpretation of a statute is open and public over a long period of time and there is no evidence that Congress sought to expressly alter this interpretation, a strong presumption settles in that the agency has correctly arrived at a reasonable interpretation.¹⁰⁰

The National Park Service enjoys significant deference with regard to its management actions, when reviewed by the federal judiciary.¹⁰¹ Regulations promulgated pursuant to statutory authority will be upheld by courts so long as the agency's rule making is not arbitrary, capricious, or manifestly contrary to express statutory intent.¹⁰² Rule making, based upon technical decisions exercised as a consequence of an agency's expertise, must receive deferential approval so long as the agency strove to explain

95. *See id.* at 1464-1465.

96. *See id.* at 1465.

97. *See Alaska Wildlife Alliance*, 108 F.3d at 1069-1070.

98. *See Bicycle Trails of Marin*, 82 F.3d at 1452; *Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 206 (6th Cir. 1991).

99. *See Mich. United Conservation Clubs*, 949 F.2d at 206.

100. *See id.* at 209.

101. *See Alaska Wildlife Alliance*, 108 F.3d at 1070; *Bicycle Trails Council of Marin*, 82 F.3d at 1445; *Conservation Law Foundation v. Dep't of Interior*, 864 F.2d 954, 957 (1st Cir. 1989); *Nat'l Wildlife Fed'n*, 669 F. Supp. at 391.

102. *See Spiegel v. Babbitt*, 855 F. Supp. 402, 404 (D.D.C. 1994).

the data it used, how it analyzed information, the weight it gave conflicting information, and the balances the agency struck within its deliberative process.¹⁰³ Scientific uncertainty does not invalidate a decision, and the fact that available information may not be dispositive does not render a decision arbitrary.¹⁰⁴ Of particular relevance is that public opinion evidence used to make a determination of user conflicts need not be generated by a systematic study quantifying particular sentiments; subjective visitor comments and staff reports are sufficient to justify the determination of user conflicts within a park.¹⁰⁵ Also, the absence of irrefutable evidence in the statement of finding, which establishes an adverse connection between wildlife and snow machining, will not invalidate the closure of snow machine use in a park.¹⁰⁶ ANILCA prescribes special procedural requirements upon the planning and management of Conservation System Units within the jurisdiction of the National Park Service; however, these procedural considerations do not constrain the substantive discretion the agency exercises in its decision-making process.¹⁰⁷

VII. Conclusions

The old park area was closed by regulation to recreational snow machining as part of a general National Park Service rule making in 1970.¹⁰⁸ This prohibition on off-road motorized recreation has been in continuous effect through present.¹⁰⁹ Park management of this closure has included visitor education efforts, issuance of warnings, and sign postings, as well as publication in planning documents.¹¹⁰

Recreational snow machine use was not a traditional activity within the boundaries of the old park prior to 1980. It was not generally practiced in the area from 1917-1970 because the technology was neither available nor utilized by the general public at that time. From 1970 to the present, such activity has been

103. See *Wyo. Farm Bureau v. Babbitt*, 987 F. Supp. 1349, 1364 (D. Wyo. 1997); *Wilkins*, 995 F.2d at 853; *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1336 (4th Cir. 1995).

104. See *Wyo. Farm Bureau*, 987 F. Supp. at 1372 (D. Wyo. 1997); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 & 114 (D.D.C. 1995).

105. See *Bicycle Trails Council of Marin*, 82 F.3d at 1465.

106. See *Mausolf*, 125 F.3d 661.

107. See 16 U.S.C. § 3191.

108. See 36 U.S.C. §§ 2.17-2.18.

109. See *supra* note 5.

110. See *General Management Plan, Denali Nat'l Park and Preserve* (1986). On file with author and available upon request.

prohibited as a matter of regulation.¹¹¹ Because this use has been both minimal and illegal in the area of the old park, snow machining in the affected closure area cannot be characterized as having been a general traditional activity within the requirements of ANILCA. Acknowledgment of this regulatory closure is well known among snow machine enthusiasts, and information regarding the closure has been widely disseminated among snow machiners through popular literature relied upon by the public.¹¹²

The National Park Service seeks to strike a reasonable balance among competing winter recreation users of the Denali National Park and Preserve. This current decision maintains existing opportunities for snow machine use for recreation purposes on all 4 million acres where it is now permitted. Also, no new restrictions on snow machine use are imposed by this action. Non-motorized winter recreation may continue in both the old park area and in the ANILCA park additions and preserve. Conflicts between motorized and non-motorized winter recreationists will be prevented by the continuation of the snow machine closure in the old park, thereby providing the opportunity for non-motorized recreationists to seek those areas where snow machine use has been prohibited since 1970. Thus, management separation of conflicting users can be achieved without imposing any new restrictions upon either type of user.

Sufficient scientific information exists to indicate that unauthorized recreational snow machining poses a direct threat of deterioration of park resources within the old Mt. McKinley National Park area. Enforcement of the existing closure prevents possible deterioration of park values while permitting the current planning process to continue.

111. See NAT'L PARK SERVICE NEWS RELEASE, *Snowmobile Use in Denali National Park and Preserve*, Alaska Regional Office, Anchorage (March 8, 1993).

112. See M. Runser & R. Runser, *Snowmobile Adventures in Alaska: A Guide to Snowmobiling in Alaska*, (Glacier House Press 1995). This popular guide to snow machining activity states in its section on Denali National Park: "No riding is currently allowed in the two million acre old park, the original McKinley Park, the Denali Wilderness. Know where you are so you don't cross the park borders." *Id.*

