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THE NATIONAL PARK SERVICE AND EXTERNAL DEVELOPMENT: ADDRESSING PARK BOUNDARY-AREA THREATS THROUGH PUBLIC NUISANCE

*John L. Giesser**

I. INTRODUCTION

Economic development projects outside of park boundaries pose a litany of threats to national parks throughout the country.¹ New hotels, retail complexes, and amusement centers interfere with regional ecosystems by destroying natural habitats for plants and animals.² Modern buildings block out, or detract from, scenic vistas.³ Increased commercial activity attracts people to park boundary areas, resulting in increased traffic, smog, litter, noise, and artificial light.⁴ Energy plants pollute the air create haze and acid rain, and contaminate soil and water.⁵ All of these encroachments threaten citizens' enjoyment of national parks.

The National Park Service (NPS) is responsible for managing and protecting national parks.⁶ NPS relies on its regulatory authority to

* Articles Editor, 1992-1993, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ See, e.g., WILLIAM C. EVERHART, *THE NATIONAL PARK SERVICE* 80 (1983); NATIONAL PARKS AND CONSERVATION ASSOCIATION, *A RACE AGAINST TIME: FIVE THREATS ENDANGERING AMERICA'S NATIONAL PARKS AND THE SOLUTIONS TO AVERT THEM* 4-25 (1991) [hereinafter RACE].

² See RACE, *supra* note 1, at 7-8.

³ See *id.*

⁴ See *id.* at 4-9, 23. RACE refers, for example, to a 10,000 unit resort and residential community planned for construction 50 feet from the border of Saguaro National Monument, Arizona. *Id.* at 8-9. Such a development would inevitably produce, among other things, increased traffic, car exhaust, noise, and light.

⁵ EVERHART, *supra* note 1, at 75-79; RACE, *supra* note 1, at 4.

⁶ See 16 U.S.C. § 1 (1988).

fulfill its responsibilities.⁷ NPS's regulatory authority, however, probably does not extend beyond park boundaries.⁸

One option NPS has overlooked in protecting the national parks is the possibility of preventing the most intrusive adjacent developments through public nuisance actions. The federal government has the power to bring public nuisance actions to protect national parks.⁹ Moreover, the government normally may bring such an action under federal common law.¹⁰ Though the federal government, in a public nuisance action to protect a national park, would ordinarily bring the suit under federal common law, it may choose to sue under state law if necessary or preferable.¹¹

For a variety of possible reasons, NPS has hesitated to bring public nuisance actions. Agencies, often hindered by bureaucratic inertia, tend to rely on regulatory authority and overlook possible common-law remedies.¹² In addition, NPS probably has misinterpreted some public nuisance case law as having eliminated the chances of a successful suit.¹³ Finally, recent Republican administra-

⁷ Telephone Interview with William J. Lockhart, Professor, University of Utah College of Law (Sept. 11, 1991) [hereinafter Lockhart Interview]. See *infra* notes 12-13 and accompanying text.

⁸ See EVERHART, *supra* note 1, at 75; Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 241 (1976) [hereinafter *Helpless Giants*]. But see Brief from William J. Lockhart, Professor, University of Utah College of Law, on behalf of Florida Audubon Society 8-17 (Oct., 1991) (on file with William J. Lockhart) [hereinafter Lockhart Brief] (arguing regulations reach outside park boundaries).

⁹ See, e.g., *United States v. Rainbow Family*, 695 F. Supp. 314, 326 (E.D. Tex. 1988); Mark S. Squillace, *Common Law Protection for Our National Parks*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 87, 89-90 (David J. Simon ed., 1988).

¹⁰ When the federal government seeks to protect an important federal interest, and no federal statute governs the issue, a court may apply federal common law. See ERIN CHERINSKY, FEDERAL JURISDICTION § 6.1, at 296 (1989). Thus, as in *United States v. County Bd. of Arlington County*, 487 F. Supp. 137 (E.D. Va. 1979), where the Federal District Court for the Eastern District of Virginia applied federal common law to the federal government's public nuisance action to protect a national park in Washington, D.C., courts will apply federal common law to federal government public nuisance actions filed to protect national parks. See *id.* at 139-40; see also Squillace, *supra* note 9, at 89.

¹¹ See *infra* notes 115-29 and accompanying text.

¹² Lockhart Interview, *supra* note 7. Sax, explaining what he views as NPS's general reluctance to address external threats, attributes the hesitancy to NPS's belief that the Constitution might prevent its interference with private landowners. See *Helpless Giants*, *supra* note 8, at 241.

¹³ Telephone Interview with Lars Hanslin, Attorney, National Park Service (Mar. 13, 1992). Hanslin believes, for example, that *United States v. County Bd. of Arlington County*, 487 F. Supp. 137 (E.D. Va. 1979), where the government lost a public nuisance action to prevent the completion of a high-rise development within view of a national park in Washington, D.C., demonstrated the futility of such lawsuits. *Arlington County*, however, does not foreclose the public nuisance option. See *id.* at 143-44; *infra* notes 177-81 and accompanying text.

tions did not place environmental protection at the top of their domestic agenda.

This Comment focuses on the threat to national parks from development projects near park boundaries. It contends that NPS should use public nuisance actions to seek injunctions against these projects. Section II briefly describes the origin of national parks and the role of NPS. Section II then illustrates the environmental threats national parks face, referring in particular to the planned development of a giant theater and retail complex next to an entrance to Utah's Zion National Park. Section II also analyzes NPS's authority to regulate external development.

Section III of this Comment discusses general principles of public nuisance law. Section IV examines the elements of public nuisance law under both federal common law and Utah law. Section V demonstrates that public nuisance actions would help NPS uphold its responsibility to preserve national parks. Finally, Section VI applies public nuisance law to the planned theater development at Zion National Park.

Using the Zion theater as an example, Section VI demonstrates that NPS, using federal or state public nuisance law, could protect national parks from intrusive developments next to park boundaries. NPS could successfully seek an injunction by arguing that the Zion theater will unnecessarily detract from the level of environmental quality that Zion visitors legitimately expect. The Zion hypothetical lawsuit exemplifies the type of action that NPS might bring on behalf of parks throughout the country.

II. NPS AND THE EXTERIOR DEVELOPMENT THREAT TO NATIONAL PARKS

A. The Origin of National Parks and NPS

In 1872, Congress passed legislation creating Yellowstone National Park, the first national park.¹⁴ Yellowstone consisted of two million acres, and its congressionally declared purpose was to provide the public with a park that every citizen could enjoy.¹⁵ Congress, attempting to protect the Sierra mountain range and shield the giant sequoia trees from destructive logging methods, established Yosem-

¹⁴ See EVERHART, *supra* note 1, at 8.

¹⁵ See *id.*

ite, Sequoia, and Grant National Parks soon thereafter.¹⁶ By 1916, early conservationists gained influence, and President Wilson signed legislation creating NPS.¹⁷

By 1990, 358 national parks were welcoming over 250 million visitors annually.¹⁸ Visitors travel to parks for a variety of reasons. Some seek to escape from the pressures of urban life.¹⁹ Some simply seek an opportunity to enjoy the natural environment.²⁰ Many visitors take advantage of outdoor recreational options—such as hiking, camping, canoeing, and biking²¹—or the growing number of hotel and retail developments that exist within or near parks.²² Others enjoy the historical, cultural, and archaeological treasures located within some parks.²³ Unfortunately, both growing numbers of visitors and increasing development occurring within and outside of park boundaries are threatening the environmental quality of national parks.²⁴ This Comment focuses on exterior threats.

The National Park Service Organic Act of 1916 (Park Act) created NPS.²⁵ The Act broadly authorizes NPS to promote and to manage national parks.²⁶ NPS's purpose is to conserve park scenery and historic objects, protect the parks' natural environment, and facilitate public visitation in a manner consistent with conservation goals.²⁷ Presently, each national park is headed by a superintendent, and park staffs include biologists, architects, engineers, fiscal analysts, maintenance personnel, and rangers, all of whom work together to protect park environments, maintain NPS's facilities, educate visitors, and uphold the law.²⁸ Overall management of NPS comprises three tiers.²⁹ The central headquarters, situated in Washington D.C. and headed by the Director of NPS, develops NPS's

¹⁶ See *id.* at 10.

¹⁷ *Id.* at 13–16.

¹⁸ RACE, *supra* note 1, at 24.

¹⁹ See JOHN ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY 652 (1961).

²⁰ See JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 46 (1980).

²¹ See RACE, *supra* note 1, at 22; Ted Williams, *Zion: The Movie*, AUDUBON, Nov.–Dec. 1991, at 14, 18–21.

²² See SAX, *supra* note 20, at 12.

²³ See EVERHART, *supra* note 1, at 11.

²⁴ See RACE, *supra* note 1, at 4–13, 21–23.

²⁵ 16 U.S.C. § 1 (1988).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See EVERHART, *supra* note 1, at 33, 39.

²⁹ *Id.* at 33.

policy and oversees regional field offices, which in turn monitor individual parks.³⁰

B. Threats to National Parks

Commercial and industrial development threatens national parks with a variety of environmental harms.³¹ The quality of air, water, vegetation, and aesthetics in the parks is deteriorating.³² As a result, plant and wildlife habitats are in danger, cultural and historic landmarks are suffering damage,³³ and visitors are unable to enjoy the pristine environment and tranquility that many seek. According to a 1980 report by NPS, development outside of park boundaries poses the greatest threat to park environments.³⁴

Development of condominiums, hotels, and retail complexes next to park boundaries has a detrimental effect on parks.³⁵ Buildings block scenic vistas.³⁶ Increased water usage drains water tables and damages water quality.³⁷ Developments attract increased populations to boundary areas, add to traffic congestion, and, consequently, increase noise and air pollution levels.³⁸ Additional people create litter. Furthermore, commercial businesses introduce pesticides into park ecosystems.³⁹

People generate pollution outside of parks in a variety of ways that threaten the environment of parks. Smog from large cities, discharge from power plants, and emissions from automobiles combine to produce dirty air, acid rain, and haze in parks throughout the United States.⁴⁰ The dirty air and rain harm aquatic and vegetative life within the parks.⁴¹ Haze detracts from scenic views in parks in all forty-eight lower states for ninety-percent of each year.⁴²

³⁰ *Id.* at 33-35.

³¹ See RACE, *supra* note 1, at 4-25.

³² See *id.* at 4, 12; EVERHART, *supra* note 1, at 75.

³³ See RACE, *supra* note 1, at 7-12.

³⁴ See EVERHART, *supra* note 1, at 80.

³⁵ See RACE, *supra* note 1, at 7.

³⁶ See *id.* at 8 (refers to Shenandoah National Park, Virginia, where construction projects have blocked beautiful vistas, and the percentage of park boundary land that is developed has increased from 10% to 38% over the past 10 years).

³⁷ See *id.* at 7.

³⁸ See *id.* at 7, 23; Williams, *supra* note 21, at 16.

³⁹ See RACE, *supra* note 1, at 7.

⁴⁰ See EVERHART, *supra* note 1, at 75-79; RACE, *supra* note 1, at 4.

⁴¹ See EVERHART, *supra* note 1, at 79; RACE, *supra* note 1, at 4.

⁴² RACE, *supra* note 1, at 4.

By disrupting park ecosystems, pollution also impairs opportunities for scientific study of natural environments.⁴³

Other types of large-scale projects intended to satisfy the needs of modern society also threaten park environments.⁴⁴ At Great Smoky Mountains National Park in North Carolina, for example, environmentalists are fighting to stop a municipal landfill located adjacent to a park entrance and near an important black bear habitat.⁴⁵ Environmentalists warn that the landfill will attract bears, and that humans and bears will clash.⁴⁶ At Everglades National Park in Florida, the construction of canals and the alteration of natural water flows has resulted in extensive damage to the park's complex ecosystem.⁴⁷

Finally, development and pollution have a negative effect on the more intangible aesthetic assets of parks.⁴⁸ New buildings and haze obstruct scenic views, pollutants degrade the quality of the air and water that park visitors breathe and drink, and crowds of people and traffic generate increased levels of noise and commotion. As a result, visitors are less able to find a serene setting in which to reflect, relax, escape, and enjoy nature.⁴⁹

Many development projects that harm the environment also benefit the public in certain ways. New roads and housing near parks increase access to parks.⁵⁰ Development projects can create profits for the business community, revenues for towns, and jobs.⁵¹ Moreover, many park visitors enjoy the luxuries new lodging facilities, restaurants, and shops offer.⁵² Finally, energy plants that create smog, and dams that harm aquatic ecosystems, produce energy for a society that demands large quantities of energy. As for the needs of wilderness lovers, developers might argue that such people can travel into a park's interior to avoid the negative aspects of boundary development.⁵³

⁴³ See ISE, *supra* note 19, at 652.

⁴⁴ See RACE, *supra* note 1, at 8, 12.

⁴⁵ *Id.* at 8.

⁴⁶ See *id.*

⁴⁷ See *id.* at 12. The report exemplifies the problem by noting that "[s]ince the 1930's the Everglades' population of nesting wading birds has decreased by 95%, from more than a half-million to 15,000 or fewer." *Id.*

⁴⁸ See ISE, *supra* note 19, at 652.

⁴⁹ See *id.* at 652-54; SAX, *supra* note 20, at 46.

⁵⁰ See ISE, *supra* note 19, at 652; EVERHART, *supra* note 1, at 80.

⁵¹ See Williams, *supra* note 21, at 18.

⁵² See SAX, *supra* note 20, at 61.

⁵³ See ISE, *supra* note 19, at 656.

Many environmentalists, however, argue that the proper purpose of the national parks is to provide a pure environment in which nature can thrive and visitors can experience a world uncontaminated by man.⁵⁴ These environmentalists believe that if development is necessary to provide modern luxuries and recreation options for those visitors less interested in a natural environment, the development should not occur immediately outside of park boundaries.⁵⁵ The remaining amount of pure wilderness, unlike the growing blocks of commercial development, is too small and deserves protection.⁵⁶

*C. Zion National Park: Portrait of a National Park Facing
External Threats*

1. Background on Zion

National park historian John Ise considers Zion National Park, located in southwestern Utah, to be one of America's most beautiful national parks.⁵⁷ Ise compares Zion, with its tall red canyon walls that reach up from both sides of the Virgin River, to Yosemite National Park.⁵⁸ Explorers of European descent first arrived at Zion in 1858, and Zion officially gained national park status in 1919.⁵⁹ Congress increased Zion's acreage in 1937 and 1956.⁶⁰

In the 1920's, following Congress's authorization of funds for the building of trails, roads, and railroads through Zion, citizens began touring the park in growing numbers.⁶¹ Today Zion is the most popular of Utah's five national parks,⁶² receiving 2.7 million visitors in 1992 alone, with increased numbers expected in the years ahead.⁶³ Visitors arrive to hike the park's canyons and trails, to take tours

⁵⁴ See *id.* at 654-57.

⁵⁵ See generally Robert Reinhold, *Aisle Seats to a National Park? Well, Maybe*, N.Y. TIMES, Feb. 18, 1991, at 9. "The preservationist," according to Sax, ". . . believes that opportunities for conventional tourism are amply provided elsewhere: at resorts and amusement parks . . . and on a very considerable portion of the public domain too." SAX, *supra* note 20, at 14.

⁵⁶ See ISE, *supra* note 19, at 655.

⁵⁷ See *id.* at 241. Over the years, explorers have been "awestruck" by Zion's beauty. See Brian C. Mooney, *Dazzled by the Color Country*, BOSTON GLOBE, Oct. 4, 1992, at B11.

⁵⁸ See ISE, *supra* note 19, at 241-43.

⁵⁹ *Id.* at 241-42.

⁶⁰ *Id.* at 243

⁶¹ *Id.*

⁶² *Utah Town OKs Controversial Theater Near Zion National Park*, CHI. TRIB., June 14, 1991, at C12.

⁶³ Telephone Interview with Larry Wiese, Assistant Park Superintendent, Zion National Park (Mar. 1, 1993) [hereinafter Wiese Interview IV].

on roads or railroads, and to camp at Watchman and South campgrounds.⁶⁴

Watchman Campground is located on the eastern bank of the Virgin River, across the river from the town boundary of Springdale, and adjacent to the park's south entrance.⁶⁵ Campers are free to pitch tents and to enjoy the natural surroundings of the river, meadows, trees, and wildlife.⁶⁶ The horizon includes beautiful foothills and mountains that glow as the sun rises and sets. The campground is well known for treating campers to spectacular nighttime views of starlit skies.⁶⁷

2. The Threat: World Odyssey's Giant Theater Development

Commercial developer World Odyssey, Inc., (Odyssey) has selected a site directly across the Virgin river from Watchman Campground, and adjacent to the south entrance to Zion, for the construction of a seven story movie theater (Theater) which will house a giant wraparound movie screen.⁶⁸ The park's south entrance, the gateway for the majority of all visitors to Zion, welcomed 2.7 million visitors in 1992.⁶⁹ The development will include five-thousand square feet of retail shops and a parking lot for 169 cars.⁷⁰ The Theater, modeled after similar theaters near other national parks, will show a film about Zion. The building will be visible from the road leading into the park.⁷¹

The development would have been even larger had Odyssey not responded to the concerns of NPS and local environmentalists by agreeing informally⁷² to modify its original construction blueprints.⁷³

⁶⁴ *Id.*; see Williams, *supra* note 21, at 20–21.

⁶⁵ See RACE, *supra* note 1, at 7; Williams, *supra* note 21, at 19–20; Briefing Statement from National Park Service, Zion National Park 1 (Feb. 1991) (on file with the National Park Service) [hereinafter Briefing Statement].

⁶⁶ See Williams, *supra* note 21, at 19–20.

⁶⁷ Telephone Interview with Larry Wiese, Assistant Park Superintendent, Zion National Park (Oct. 28, 1991) [hereinafter Wiese Interview I].

⁶⁸ Briefing Statement, *supra* note 65, at 1.

⁶⁹ Wiese Interview IV, *supra* note 63.

⁷⁰ See Williams, *supra* note 21, at 16; Briefing Statement, *supra* note 65, at 1.

⁷¹ Wiese Interview I, *supra* note 67.

⁷² Telephone Interview with Larry Wiese, Assistant Park Superintendent, Zion National Park (Jan. 6, 1992) [hereinafter Wiese Interview II]. Odyssey has not formally committed to a modified plan. *Id.* Wiese, however, believes that Odyssey has made a good faith effort to cooperate with NPS officials who are concerned with the Theater's impact on park visitors. Telephone Interview with Larry Wiese, Assistant Park Superintendent, Zion National Park (Feb. 19, 1993) [hereinafter Wiese Interview III].

⁷³ See Williams, *supra* note 21, at 16; Briefing Statement, *supra* note 65, at 1.

Thus, current plans, as described above, reflect Odyssey's agreement to scale back the size of the retail area from twelve-thousand square feet, reduce the number of parking spots from the original goal of 275, and abandon plans for an eighty-room motel complex that would have included a spa, a pool, gift shops, a lounge, and a restaurant.⁷⁴ Moreover, Odyssey has agreed informally to use a reduced level of outdoor lighting,⁷⁵ to operate the Theater only during the day,⁷⁶ to create a construction design that blends in with the park,⁷⁷ to preserve some meadow that Odyssey had targeted for development, to provide a nature trail,⁷⁸ and to help minimize potential traffic congestion.⁷⁹ Odyssey's revised architectural plan, placing the development behind a hill, reduces the projects's visibility from the road.⁸⁰ Finally, Odyssey and Theater proponents contend that the Theater will divert visitors from actually entering the park, thus relieving pressure on the park.⁸¹

Nonetheless, while Odyssey has pledged to make modifications and to adopt plans that address some of the opponents' concerns, the opponents still maintain that the movie theater and retail complex will cause significant environmental damage and detract from the experience of campers and visitors.⁸² These opponents—consisting of park administrators, park enthusiasts, and environmentalists—also point out that Odyssey's pledges are only informal and that the developer is not legally bound.⁸³ Moreover, even with the modifications, the Theater still will obstruct the view from Watchman Campground, and it probably will create increased traffic, noise, litter, air pollution, and light, and detract from the overall experience visitors seek.⁸⁴

Opponents are concerned primarily with the location of the development.⁸⁵ The complex will be directly adjacent to the park's en-

⁷⁴ See Williams, *supra* note 21, at 15–16; Briefing Statement, *supra* note 65, at 1.

⁷⁵ Wiese Interview II, *supra* note 72.

⁷⁶ *Id.*

⁷⁷ Williams, *supra* note 21, at 15–16; Wiese Interview I, *supra* note 67.

⁷⁸ See Williams, *supra* note 21, at 16.

⁷⁹ Wiese Interview III, *supra* note 72.

⁸⁰ See Reinhold, *supra* note 55, at 9; Wiese Interview I, *supra* note 67.

⁸¹ See Williams, *supra* note 21, at 15.

⁸² See Reinhold, *supra* note 55, at 9; Williams, *supra* note 21, at 16–20.

⁸³ See Briefing Statement, *supra* note 65, at 1; Wiese Interview II, *supra* note 72.

⁸⁴ See Reinhold, *supra* note 55, at 9; Williams, *supra* note 21, at 16; Wiese Interview II, *supra* note 72.

⁸⁵ See RACE, *supra* note 1, at 7; Reinhold, *supra* note 55, at 9; Briefing Statement, *supra* note 65, at 1.

trance and the popular Watchman Campground.⁸⁶ Situated as planned, the complex will partially obstruct the view visitors have as they approach and depart from the south entrance of the campground.⁸⁷ Campers, while staying at Watchman, will have an unnatural addition to their surroundings.⁸⁸ Opponents appear to believe that by developing the Theater further from the campground and entrance, Odyssey would cause significantly less harm to the park environment.⁸⁹ Thus, opponents have urged Odyssey to consider available alternative sites.⁹⁰ NPS, for example, while not opposed to the development per se, objects to the development's location.⁹¹ One site that opponents prefer, and that is apparently available, is located approximately one mile from the current site, far from the main road.⁹²

Odyssey has resisted pressure to change the location of the development.⁹³ Developers, pointing to their efforts to scale back plans, insist that the theater complex will not be as objectionable as its opponents fear.⁹⁴ Furthermore, Odyssey argues that private landowners have the right to maximize the profitability of their property.⁹⁵

Developers and supporters of the project point to the benefits the development will offer to the local community and to some park

⁸⁶ RACE, *supra* note 1, at 7.

⁸⁷ See Reinhold, *supra* note 55, at 9; Wiese Interview I, *supra* note 67.

⁸⁸ See *Theater to Be Built Adjacent to Utah Park*, N.Y. TIMES, June 14, 1991, at A14 [hereinafter *Theater*]. Ted Williams describes Watchman Campground:

[I]t is breathtaking and spectacular. My eyes pan the chartreuse band of cottonwoods, box elders, and bigtooth maples along the flood plain then swing up to sage and pinyon pine on the desert foothills, up farther to cedar-flecked talus slides, and finally to sandstone peaks and arches beyond which, like the halls of Olympus, stands an unseen subalpine forest of Douglas fir and Ponderosa pine—dwelling place of deer and mountain lions.

Williams, *supra* note 21, at 20; see also Reinhold, *supra* note 55, at 9.

⁸⁹ See *Theater*, *supra* note 88, at A14; Reinhold, *supra* note 55, at 9; Briefing Statement, *supra* note 65, at 1.

⁹⁰ Reinhold, *supra* note 55, at 9; *Find New Zion Theater Site*, SALT LAKE TRIB., Mar. 6, 1991, at A10. A Salt Lake Tribune editorial stated that "[g]iven the large amounts of undeveloped land in the vicinity, it seems the developer, the city, the park service and interested outsiders could find a compromise other than the presently proposed site which would be in everyone's best interest." *Id.*

⁹¹ Briefing Statement, *supra* note 65, at 1. Reinhold's article quotes Larry Wiese, Assistant Superintendent of Zion, prior to Odyssey's agreement to modify its plans. Said Wiese of the Theater, "[t]he aesthetics at the entrance of the park would be changed dramatically. The size of the project just overwhelms that site." Reinhold, *supra* note 55, at 9.

⁹² Reinhold, *supra* note 55, at 9.

⁹³ See *id.* at 9 (agreement to scale back project, but not relocate); Briefing Statement, *supra* note 65, at 1.

⁹⁴ See Reinhold, *supra* note 55, at 9; Williams, *supra* note 21, at 16.

⁹⁵ Telephone Interview with David Mariani, Chairman, World Odyssey, Inc. (Feb. 26, 1993).

visitors.⁹⁶ The Mayor of Springdale, local business leaders, and several members of the Springdale town council laud the economic effects that the increased business will have on Springdale.⁹⁷ Although it has asked Odyssey to consider alternative locations, the Planning and Zoning Commission has agreed to waive certain ordinances that normally would prohibit the development.⁹⁸ In addition, the producer of Odyssey's film claims that the Theater and its wrap-around screen will afford many viewers who would not enter the park a chance to view an impressive film about the park.⁹⁹ The Mayor adds that the land upon which the complex will be built is merely an ordinary meadow, and thus is not particularly attractive in its current state.¹⁰⁰

The Springdale Planning and Zoning Commission has granted Odyssey final approval of the Theater development, and construction crews have already broken ground.¹⁰¹ Workers, however, will not proceed with construction until springtime.¹⁰² NPS, while opposed to the present location, has not taken legal action to prevent the development or to force a change of location.¹⁰³ The National Parks and Conservation Association (NPCA), on the other hand, unsuccessfully attempted to challenge the legality of the development. NPCA argued that because the development's height would exceed thirty-five feet, the Springdale Town Council's approval of the development violated the Springdale Zoning Ordinance and undermined Springdale's Master Plan.¹⁰⁴

D. NPS's Power to Regulate External Development

NPS's regulatory jurisdiction probably does not extend beyond park boundaries.¹⁰⁵ Although some might argue that NPS has the

⁹⁶ See Williams, *supra* note 21, at 15-21.

⁹⁷ See *id.* at 15-18. The Mayor is quoted as saying "the more business you have here the better it is for everybody." *Id.* at 18.

⁹⁸ Briefing Statement, *supra* note 65, at 1; Wiese Interview I, *supra* note 67.

⁹⁹ See Williams, *supra* note 21, at 21 (Mayor claimed that 80% of park visitors don't hike canyons).

¹⁰⁰ See *id.* at 18.

¹⁰¹ Wiese Interview III, *supra* note 72.

¹⁰² *Id.* Park officials expect construction to proceed at full speed once the warmer months of 1993 arrive. *Id.*

¹⁰³ See Briefing Statement, *supra* note 65, at 1.

¹⁰⁴ See Memorandum from Becky Parr, Attorney, National Parks and Conservation Association (June 24, 1991) [hereinafter NPCA Memo].

¹⁰⁵ See EVERHART, *supra* note 1, at 75 ("[n]ational park legislation restricts the jurisdiction of the Park Service to the lands inside the park boundaries . . . [p]rotection ends at the park boundary"); *Helpless Giants*, *supra* note 8, at 241, 243-44. *But see* Lockhart, *supra* note 8, at 8-17 (arguing regulations may reach outside park boundaries).

statutory power to regulate against external threats,¹⁰⁶ NPS would not share their view.¹⁰⁷ NPS is reluctant to act against private landowners absent eminent domain proceedings.¹⁰⁸ In spite of its inability to regulate against external encroachments, NPS has not aggressively used its ability to bring common-law nuisance or trespass actions.¹⁰⁹

III. PUBLIC NUISANCE UNDER FEDERAL COMMON LAW AND STATE LAW

A. *Application of Federal Common-Law Public Nuisance*

Although the United States Supreme Court, in *Erie Railroad v. Tompkins*,¹¹⁰ severely limited the development of federal common law,¹¹¹ federal courts, out of necessity, still apply federal common law in certain limited circumstances.¹¹² Where no federal statutory rules govern,¹¹³ federal courts may apply federal common law to disputes between states, and to cases involving important federal interests.¹¹⁴ Courts have consequently applied federal common law of public nuisance to certain actions that fit the above exceptions to *Erie*.¹¹⁵

Federal common-law public nuisance governs public nuisance actions between states where no comprehensive federal regulatory

¹⁰⁶ See, e.g., Lockhart, *supra* note 8, at 8-17.

¹⁰⁷ See *Helpless Giants*, *supra* note 8, at 242-43 (describing NPS' belief that it does not have Congressional authority to regulate private landowners outside of parks). Sax states that "[o]nly once did Congress give the Park Service explicit authority to regulate outside lands: this was a short-lived effort to control activity on Indian Reservation lands near Mesa Verde National Park. . . ." *Id.* at 244.

¹⁰⁸ See *id.* at 243.

¹⁰⁹ See *supra* notes 8-13 and accompanying text.

¹¹⁰ 304 U.S. 64 (1938).

¹¹¹ See *id.* at 78.

¹¹² See CHEMERINSKY, *supra* note 10, at 295.

¹¹³ See *id.* at 295, 310-11.

¹¹⁴ See *id.* at 296. For an example of a court hearing a case involving an important federal interest under federal common law, see *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139-40 (E.D. Va. 1979). In *Arlington County*, the federal government brought a public nuisance action to protect U.S. property. See *id.* at 140. On the other hand, *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 316-17 (1981), is an example of a case where the United States Supreme Court did not apply federal common law to a dispute between states because the Clean Water Act governed the controversy.

¹¹⁵ See, e.g., *United States v. Rainbow Family*, 695 F. Supp. 314, 326 (E.D. Tex. 1988) (application of federal common law of public nuisance to federal government's action to prevent defendants from demonstrating in a way that would damage national park); Squillace, *supra* note 9, at 89, and cases cited therein.

scheme governs.¹¹⁶ Thus, in *Illinois v. City of Milwaukee*,¹¹⁷ the Court applied federal common law to the state of Illinois' public nuisance action against the city of Milwaukee.¹¹⁸ In this case, Illinois sued Milwaukee for polluting Lake Michigan's interstate waters, and the Court relied on federal common-law public nuisance because the related federal statute, the Federal Water Pollution Control Act (FWPCA), preserved states' rights to bring common-law actions seeking pollution abatement.¹¹⁹ In *City of Milwaukee v. Illinois and Mich.*,¹²⁰ however, the Court reexamined the dispute following the enactment of the 1977 amendments to FWPCA.¹²¹ The Court held that federal regulations preempted federal common law and governed the dispute between Milwaukee and Illinois because the new FWPCA comprehensively regulated interstate water pollution.¹²²

As with certain interstate suits, federal common-law public nuisance applies where the federal government brings public nuisance actions to protect important federal interests.¹²³ Thus, federal common-law public nuisance applies to federal actions to protect federal lands.¹²⁴ In *United States v. County Bd. of Arlington County*,¹²⁵ for example, the Supreme Court applied federal common law to the federal government's public nuisance action to protect the Capital's national park.¹²⁶ The government sought an injunction against developers of a Virginia highrise development that threatened to degrade the beauty of the park.¹²⁷

¹¹⁶ See CHEMERINSKY, *supra* note 10, at 295, 310-11; *City of Milwaukee v. Illinois and Mich.*, 451 U.S. 304, 316-17 (1981).

¹¹⁷ 406 U.S. 91 (1972).

¹¹⁸ *Id.* at 107.

¹¹⁹ See *id.* at 104.

¹²⁰ 451 U.S. 304 (1981).

¹²¹ *Id.* at 316-17. The Clean Water Act is the common name for the 1977 amendments to FWPCA.

¹²² See *City of Milwaukee v. Illinois and Mich.*, 451 U.S. 304, 316-17 (1981); see also *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (where United States sued defendant landfill owners and operators for polluting air, court held that Clean Air Act preempted federal common law by comprehensively regulating corporate activities that pollute air).

¹²³ See, e.g., *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139-40 (E.D. Va. 1979) (application of federal common law to public nuisance action to protect federal land—an important federal interest); CHEMERINSKY, *supra* note 10, at 296.

¹²⁴ See *Arlington County*, 487 F. Supp. at 139-40; Squillace, *supra* note 9, at 89-90.

¹²⁵ 487 F. Supp. 137 (E.D. Va. 1979).

¹²⁶ See *id.* at 139-40.

¹²⁷ *Arlington County*, 487 F. Supp. at 139-40; see also *United States v. Rainbow Family*, 695 F. Supp. 314, 326, 329 (E.D. Tex. 1988) (court applied federal common-law public nuisance to federal government's action seeking injunction to prevent protesters from damaging national park in Washington, D.C.).

B. Application of State Public Nuisance Law

Although federal common-law public nuisance is sometimes applicable, a plaintiff might also bring a public nuisance action under state law.¹²⁸ Thus, although the federal common law often applies to federal public nuisance actions, the federal government might choose to bring an action under state public nuisance law. State public nuisance law, however, might not apply to an action when a state law conflicts with a federal statute.¹²⁹ In *International Paper Co. v. Ouellette*,¹³⁰ where Vermont landowners sued the International Paper Company, a New York corporation, for polluting Lake Champlain in Vermont, the Supreme Court held that the Clean Water Act (CWA) did not preempt New York public nuisance law.¹³¹ The *Ouellette* court reasoned that New York's nuisance law would not conflict with the CWA because the CWA empowered source states like New York to impose higher standards on their own polluters.¹³²

C. Standing

Public officials, such as attorneys general, whose offices vest in them the authority to represent the state, nation, or a government agency, may bring public nuisance actions.¹³³ In addition, courts may grant standing in a public nuisance action to an individual plaintiff in a class action, as well as to a private plaintiff who is among those citizens injured by the defendant's conduct, and who has suffered a more severe injury than the others.¹³⁴ Ordinarily, a government official will bring a public nuisance action.¹³⁵

The United States government, for example, has standing to bring a public nuisance action where the complaint involves an important federal interest.¹³⁶ Thus, the United States would have standing to

¹²⁸ See *International Paper Co. v. Ouellette*, 479 U.S. 481, 498 (1987).

¹²⁹ See *id.* at 494-97.

¹³⁰ 479 U.S. 481 (1987).

¹³¹ *Id.* at 497.

¹³² *Id.* at 496-500. The court also held that Vermont nuisance law did not apply because applying the law of a non-source state, where the state had no input in regulating the polluter pursuant to CWA, would interfere with the CWA. *Id.* at 497.

¹³³ See RESTATEMENT (SECOND) OF TORTS § 821C (1965).

¹³⁴ See *id.*

¹³⁵ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 123 (1992).

¹³⁶ See *United States v. Rainbow Family*, 695 F. Supp. 314, 326 (E.D. Tex. 1988). The United States District Court for the Eastern District of Texas held

[w]here necessary to protect its proprietary interests in public lands, or where there is some other genuine interest to protect or defend, such as preserving the public

bring a public nuisance action to protect federal lands,¹³⁷ or to safeguard the public health.¹³⁸ In *United States v. County Bd. of Arlington County*,¹³⁹ for example, the federal government had standing in its unsuccessful public nuisance action seeking an injunction halting a Virginia highrise development.¹⁴⁰ The United States District Court for the Eastern District of Virginia stated that the United States could bring such an action to protect federal property or to safeguard the general welfare.¹⁴¹

D. General Principles of Common-Law Public Nuisance

Early courts recognized public nuisance primarily as a legal recourse for plaintiffs seeking to prevent a defendant from blocking a highway or offending public morals.¹⁴² Presently, plaintiffs may also bring public nuisance actions to abate environmental hazards—such as pollution—which threaten public health¹⁴³ or the quality of life for citizens.¹⁴⁴ Private nuisance covers a more narrow spectrum of harms than public nuisance.¹⁴⁵ For example, unlike public nuisance, private nuisance actions must involve interference with a landowner's use of land.¹⁴⁶

health and safety, the federal government may justifiably seek equitable intervention of the courts to forestall irreparable damage or some other public nuisance.

Id.; see also Squillace, *supra* note 9, at 89–90. Technically, were NPS to instigate a public nuisance action to protect a national park, the United States would be the plaintiff. See, e.g., *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139 (E.D. Va. 1979) (United States brought action to protect national park). To avoid confusion, this Comment treats NPS as the actual litigant.

¹³⁷ See, e.g., *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.C. 1980) (where Sierra Club brought an action requesting court to order Department of Interior (DOI) to affirmatively protect federal rights threatened by energy development projects, court found that DOI could, at its discretion, bring a public nuisance action to protect national parks); *Arlington County*, 487 F. Supp. 137, 139–40 (E.D. Va. 1979); Squillace, *supra* note 9, at 89–90.

¹³⁸ See *Rainbow Family*, 695 F. Supp. at 326.

¹³⁹ 487 F. Supp. 137 (E.D. Va. 1979).

¹⁴⁰ See *id.* at 139–40.

¹⁴¹ See *id.* at 140.

¹⁴² See PLATER, *supra* note 135, at 123.

¹⁴³ See *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 54–5 (D. Minn. 1974) (defendant's discharge of carcinogens was public nuisance).

¹⁴⁴ See *W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS*, § 90, at 644 (5th ed. 1984) [hereinafter KEETON] (act that interferes with public comfort or convenience might be public nuisance); *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937) (court held that ugly junkyard, under certain circumstances, might be nuisance); Note, *Aesthetic Nuisance: An Emerging Cause of Action*, 45 N.Y.U. L. REV. 1075, 1091 (1970).

¹⁴⁵ See RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (1965).

¹⁴⁶ *Id.* Because public nuisance is the more appropriate action for NPS, this Comment avoids an analysis of private nuisance actions. Public and private nuisance claims, however, share

Federal common law and state laws share many of the same public nuisance principles.¹⁴⁷ Because courts only apply federal common-law public nuisance in limited circumstances,¹⁴⁸ it is not a well-developed body of law. Thus, courts rely on general common-law public nuisance principles, many of which the states have codified,¹⁴⁹ when deciding federal common-law public nuisance cases.¹⁵⁰

A public nuisance at common law is an act, or failure to act, that inconveniences or harms members of the public who are exercising common rights.¹⁵¹ Acts that interfere with the public health, safety, morals, or convenience are often public nuisances.¹⁵² To win a public nuisance action, a plaintiff must show that the defendant's conduct constitutes substantial and unreasonable interference with the public or with public property.¹⁵³ Thus, in order to find a public nuisance, a court must conclude that the defendant's conduct substantially damages public property,¹⁵⁴ or significantly disturbs,¹⁵⁵ offends,¹⁵⁶ or endangers the health of members of the public with ordinary physical stature and "sensibilities."¹⁵⁷ Furthermore, the court must find that

many of the same elements. *See* 58 AM. JUR. 2D *Nuisances* § 32 (1989). Thus, this Comment cites to some private nuisance cases to help determine a court's legal standard for a public nuisance.

¹⁴⁷ *See* *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 143 (E.D. Va. 1979); RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1965); *infra* notes 149–50 and accompanying text.

¹⁴⁸ *See supra* notes 110–27 and accompanying text.

¹⁴⁹ RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1965).

¹⁵⁰ Federal courts, when hearing federal common-law public nuisance cases, have referred to state law cases when formulating public nuisance standards. *See, e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972) ("while federal law governs, consideration of state standards may be relevant"); *Arlington County*, 487 F. Supp. at 143 (court examined precedent from state courts in Virginia and Florida, as well as prior federal common-law precedent, prior to finding that the defendant's high rise did not constitute a public nuisance).

¹⁵¹ *See* KEETON, *supra* note 144, § 90, at 643–44.

¹⁵² A public nuisance is an "act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all' . . . [including] . . . interferences with the public health . . . public safety . . . public morals . . . public peace . . . public comfort . . . public convenience. . . ." *Id.*

¹⁵³ *See* 58 AM. JUR. 2D *Nuisances* § 41–42 (1989). For the purposes of this Comment, "public property" means publicly owned property or private property owned by a private citizen bringing a public nuisance action. *See supra* notes 253–331 and accompanying text.

¹⁵⁴ *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619–20 (1907).

¹⁵⁵ *See, e.g.*, *United States v. Luce*, 141 F. 385, 407–09 (D. Del. 1905).

¹⁵⁶ *See, e.g.*, *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937) (court stated that proper test for aesthetic nuisance would be whether or not object or structure offended average persons in community); Note, *supra* note 144, at 1090.

¹⁵⁷ Note, *supra* note 144, at 1090. *See also* KEETON for description of public nuisance and examples of conduct that constitutes a public nuisance. KEETON, *supra* note 144, § 90, at 643–45.

the defendant's conduct decreases the environmental quality of the affected property to a level lower than that which the public reasonably expects.¹⁵⁸

IV. PUBLIC NUISANCE ACTIONS: ELEMENTS AND INJUNCTIONS

A. *Elements Generally*

Normally, a plaintiff in a public nuisance action seeks injunctive relief.¹⁵⁹ To succeed, the plaintiff must first prove that the defendant is liable. Thus, the plaintiff must show that the defendant's conduct substantially and unreasonably interferes with the public or with public property.¹⁶⁰ After proving liability, the plaintiff must prove that an injunction is the only adequate remedy, and that the benefit of an injunction would outweigh the negative impact an injunction might have on the defendant or the public.¹⁶¹

B. *Federal Common-Law Public Nuisance*

1. Substantial Interference Element

A defendant's conduct satisfies the substantial interference element of a public nuisance claim when that conduct causes significant harm to the public or public property.¹⁶² Often, courts measure a defendant's conduct objectively by gauging the conduct's effect on a plaintiff with ordinary physical stature and sensibilities.¹⁶³ The defendant's conduct must threaten this reasonable plaintiff's health or offend one of the plaintiff's senses.¹⁶⁴ In the view of some state courts, conduct significantly harms a plaintiff where it presents him

¹⁵⁸ See *Tennessee Copper Co.*, 27 S. Ct. 618, 619; *United States v. Luce*, 141 F. 385, 408-11 (D. Del. 1905); KEETON, *supra* note 144, § 90, at 643-45; 58 AM. JUR. 2D *Nuisances* § 41-42 (1989).

¹⁵⁹ See PLATER, *supra* note 135, at 128-30.

¹⁶⁰ See 58 AM. JUR. 2D *Nuisances* § 41-42 (1989).

¹⁶¹ See *infra* note 218 and accompanying text.

¹⁶² See *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619-20 (1907) (emissions from industry that damaged land in Georgia was nuisance); *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 54-55 (D. Minn. 1974) (defendant's discharge of pollutants that were harmful to public was public nuisance); *Robie v. Lillis*, 299 A.2d 155, 158 (Or. 1975); KEETON, *supra* note 144, § 90, at 643-45.

¹⁶³ See *United States v. Luce*, 141 F. 385, 409-10 (Del. Cir. 1905); Note, *supra* note 144, at 1090.

¹⁶⁴ See *Reserve Mining*, 380 F. Supp. at 54-55 (health threat); *Luce*, 141 F. at 408 (offensive odors); KEETON, *supra* note 144, § 90, at 643-44 (offensive noises, odors, vibrations, smoke might be public nuisances).

or her with a visually offensive sight.¹⁶⁵ Finally, most courts consider conduct to be significantly damaging to a plaintiff's property where it injures plant life, pollutes air or soil, or hinders the plaintiff's ordinary use of the property.¹⁶⁶

Courts usually find that a defendant's conduct that physically injures members of the public, or seriously threatens the public health, satisfies the substantial interference element.¹⁶⁷ Thus, in *United States v. Reserve Mining Co.*,¹⁶⁸ where the defendant mining company discharged carcinogens into Lake Superior, the United States District Court for the District of Minnesota considered the defendant company's discharge to be a public nuisance.¹⁶⁹ The *Reserve Mining* court found the substantial interference element satisfied because the carcinogens endangered public health.¹⁷⁰ The defendant's pollution threatened ordinary citizens with an elevated risk of cancer.¹⁷¹

Conduct that creates odors or noises that would cause an ordinary person either to be significantly uncomfortable or ill, or to change his or her work habits or lifestyle, also meets the substantial interference element.¹⁷² Thus, in *United States v. Luce*,¹⁷³ the United States Circuit Court for the Delaware Circuit found that a fish and fertilizer company's odors that made inmates and employees of the nearby quarantine station nauseous were sufficiently substantial to constitute a nuisance.¹⁷⁴ The *Luce* court was concerned that employees' nausea and discomfort would detract from their ability to work

¹⁶⁵ See *Hay v. Stevens*, 530 P.2d 37, 39 (Or. 1975)(visual interference that offends or annoys normal person in community may be nuisance); *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 369-71 (W. Va. 1937) (object that is offensive to view of average citizens in community may be nuisance); Note, *supra* note 144, at 1078. In *United States v. County Board of Arlington County*, 487 F. Supp. 137 (E.D. Va. 1979). The United States District Court for the Eastern District of Virginia hinted that a building that detracted from an average visitor's view of monuments in Washington, D.C. might be a public nuisance. See *id.* at 144.

¹⁶⁶ See *Tennessee Copper*, 27 S. Ct. at 618, 619-20 (widespread damage to soil and plant life was public nuisance); *American Smelting & Ref. Co. v. Godfrey*, 158 F. 225, 225-26 (8th Cir. 1907), *cert denied*, 207 U.S. 597 (1907) (irreparable damage to trees was nuisance).

¹⁶⁷ See, e.g., *Reserve Mining*, 380 F. Supp. at 54-55; *Godfrey*, 158 F. at 225-26; KEETON, *supra* note 144, § 90, at 643 (lists "interference with public health" first among types of interference that constitute public nuisance).

¹⁶⁸ 380 F. Supp. 11 (D. Minn. 1974).

¹⁶⁹ *Id.* at 56.

¹⁷⁰ See *id.* at 54-55.

¹⁷¹ See *id.*

¹⁷² See *United States v. Luce*, 141 F. 385, 407-10 (Del. Cir. 1905); *Wade v. Fuller*, 365 P.2d 802, 804-05 (Utah 1961) (defendant's noises created nuisance).

¹⁷³ 141 F. 385 (Del. Cir. 1905).

¹⁷⁴ See *id.* at 407-08.

effectively.¹⁷⁵ Similarly, a defendant's conduct that creates noises that would interrupt an ordinary person's sleep or solitude on their property meets the substantial interference threshold.¹⁷⁶

Some courts have found, and some have implied, that conduct that presents members of the public with a sight that would offend the taste of an ordinary person satisfies the substantial interference element of a public nuisance claim.¹⁷⁷ In *United States v. County Bd. of Arlington County*,¹⁷⁸ the United States District Court for the Eastern District of Virginia found that the defendant's proposed highrise development across the Potomac River from Washington D.C. was not a public nuisance in part because it would not impair the average visitor's view of the Capital's parks and monuments.¹⁷⁹ Visitors, the court reasoned, would only see the defendant's buildings when viewing monuments from certain angles.¹⁸⁰ Though the *Arlington County* court flatly stated that "unsightliness or offense to the esthetic senses is not sufficient to constitute a public nuisance," it implied that tall structures which detracted from the average visitor's view might be public nuisances.¹⁸¹

While federal courts have only hinted at the possibility that a visual interference might satisfy the substantial interference element, some state courts have explicitly concluded that visual interference may be substantial enough to be a nuisance.¹⁸² Thus, according to some jurisdictions, where the sight of a structure offends average members of a community, the structure satisfies the substantial interference element of a nuisance claim.¹⁸³ In *Parkersburg Builders Material Co. v. Barrack*,¹⁸⁴ where residents were upset by the view of the defendant's nearby auto junkyard, the Supreme Court of Appeals of West Virginia held that the junkyard was not

¹⁷⁵ See *id.*

¹⁷⁶ See *Wade*, 365 P.2d at 803-05; KEETON, *supra* note 144, § 90, at 644.

¹⁷⁷ See Note, *supra* note 144, at 1076; see also *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937).

¹⁷⁸ 487 F. Supp. 137 (E.D. Va. 1979).

¹⁷⁹ See *id.* at 143-44.

¹⁸⁰ See *id.*

¹⁸¹ See *id.* But see Squillace, *supra* note 9, at 92-93. Squillace notes the potential for the concept of an aesthetic nuisance, but states that the *Arlington County* court failed to consider valid aesthetic nuisance arguments under federal common law. *Id.*

¹⁸² See, e.g., *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 370-71 (W. Va. 1937); see also Note, *supra* note 144, at 1078-79 (minority of jurisdictions have begun to recognize visual aesthetic nuisance claims).

¹⁸³ See *Hay v. Stevens*, 530 P.2d 37, 39 (Or. 1975); *Barrack*, 191 S.E. at 370-71.

¹⁸⁴ 191 S.E. 368, 371 (W. Va. 1937).

an enjoicable nuisance because too few people lived nearby.¹⁸⁵ The *Barrack* court, however, reasoned that if the junkyard had been in a residential community, its sight would have created a nuisance by offending average members of the community.¹⁸⁶

Finally, courts find that conduct creates substantial interference where it significantly damages public property by injuring plant life, polluting air or soil, or hindering the public's ordinary use of the property.¹⁸⁷ A defendant's destruction of crops or vegetation on public land constitutes substantial interference.¹⁸⁸ Similarly, conduct that pollutes the air or soil is likely to satisfy the substantial interference element.¹⁸⁹ Thus, in *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*,¹⁹⁰ where the defendant city discharged sewage into a creek on the plaintiff's stock farm, contaminating a pasture, the court found the interference sufficiently substantial to warrant a nuisance claim.¹⁹¹

2. Unreasonable Interference Element

After finding the public-nuisance defendant to have caused substantial interference, a court must then consider whether the interference is unreasonable.¹⁹² A defendant's conduct unreasonably interferes with a plaintiff where the conduct decreases the environmental quality of a plaintiff's property to a level lower than

¹⁸⁵ *Id.* at 371; see also *Hay*, 530 P.2d at 39. In *Hay*, the plaintiff complained that the defendant's fence, built on property between the plaintiff's property and a beach, was unsightly. *Id.* at 38. The Supreme Court of Oregon, finding the substantial interference threshold unmet, held that the fence was not a nuisance. *Id.* at 39. The *Hay* court, however, citing to other jurisdictions for support, explicitly recognized that a sight that offended an average person in a community might be a nuisance. *Id.* In addition, the court stated that "although there is authority to the contrary, we begin with the assumption that in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities." *Id.*

¹⁸⁶ *Barrack*, 191 S.E. at 371.

¹⁸⁷ See *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619-20 (1907); *American Smelting & Ref. Co. v. Godfrey*, 158 F. 225, 225-26 (8th Cir. 1907), *cert. denied*, 207 U.S. 597 (1907) (destruction of trees).

¹⁸⁸ See *Tennessee Copper*, 27 S. Ct. at 619-20 (sulfurous fumes from defendant's industry caused "considerable" damage to forests and plant life in plaintiff state); *Godfrey*, 158 F. at 225 (fumes from defendant's smelting operations destroyed plaintiffs' trees).

¹⁸⁹ See *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 335-37 (1933); *Tennessee Copper*, 27 S. Ct. at 619 (Court stated that citizens have right to breathe clean air); *United States v. Rainbow Family*, 695 F. Supp. 313, 328-30 (E.D. Tex. 1988) (court reasoned that evidence that large gathering in park would cause severe damage to parklands' environment would satisfy substantial interference element).

¹⁹⁰ 289 U.S. 334 (1933).

¹⁹¹ See *id.* at 603-04.

¹⁹² KEETON, *supra* note 144, § 88, at 629; see Squillace, *supra* note 9, at 88.

that which the plaintiff reasonably expects.¹⁹³ Whether the interference is unreasonable often depends on the location and factual circumstances of the case.¹⁹⁴ In determining the unreasonableness of the defendant's interference, courts weigh the harm the interference creates against the harm that the defendant and the public would experience as a result of the judicial remedy.¹⁹⁵

Often, conduct that satisfies the unreasonable interference standard creates a condition unlike the conditions that previously existed in the affected region.¹⁹⁶ Thus, in *United States v. Luce*,¹⁹⁷ the United States Circuit Court for the Circuit of Delaware found the effect of the defendant company's fish odors unreasonable because the odors permeated a quarantine station whose employees and inmates were not accustomed to such strong industrial smells.¹⁹⁸ Similarly, in *Parkersburg Builders Material Co. v. Barrack*,¹⁹⁹ the Supreme Court of Appeals of West Virginia implied that it would have enjoined an ugly auto junkyard if the junkyard was in a residential community where residents would not expect such a facility.²⁰⁰

Another important component of unreasonableness is a defendant's failure to mitigate harm.²⁰¹ Courts might expect defendants to reduce the possibility of injury by operating in a location removed from potential plaintiffs,²⁰² or by reducing their activity's level of interference.²⁰³ The unreasonable defendant in *Luce*, for example, might have sited its operation in a more appropriate industrial location.²⁰⁴ Similarly, in *United States v. Reserve Mining Co.*,²⁰⁵ the court implied that one reason for finding the defendant's activity to

¹⁹³ See *Tennessee Copper*, 27 S. Ct. at 619; *United States v. Luce*, 141 F. 385, 408-11 (Del. Cir. 1905); KEETON, *supra* note 144, § 88, at 629.

¹⁹⁴ KEETON, *supra* note 144, § 88, at 630; Squillace, *supra* note 9, at 88; see also *United States v. Rainbow Family*, 695 F. Supp. 314, 330 (E.D. Tex. 1988).

¹⁹⁵ See *Rainbow Family*, 695 F. Supp. at 321 (court combined analysis of unreasonableness with "balancing of the equities" to determine appropriate remedy); Squillace, *supra* note 9, at 88.

¹⁹⁶ See *Luce*, 141 F. at 411.

¹⁹⁷ 141 F. 385 (Del. Cir. 1905).

¹⁹⁸ See *id.* at 407-11.

¹⁹⁹ 191 S.E. 368 (W. Va. 1937).

²⁰⁰ See *id.* at 371.

²⁰¹ See *United States v. Luce*, 141 F. 385, 417-18 (Del. Cir. 1905).

²⁰² See *id.*

²⁰³ See, e.g., *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 18 (D. Minn. 1974) (public nuisance where plaintiff had not made significant effort to use safer method of discharging pollutants).

²⁰⁴ See *Luce*, 141 F. at 417; see also *Shaw v. Salt Lake County*, 224 P.2d 1037, 1042 (Utah 1950) (court barred defendant from building asphalt plant near plaintiff's property where defendant had several other potential locations for plant).

²⁰⁵ 380 F. Supp. 11 (D. Minn. 1974).

be a public nuisance was the defendant's failure to use safer technology to prevent the discharge of carcinogens into Lake Superior.²⁰⁶

In addition to considering whether the plaintiff is accustomed to the kind of interference the defendant causes, courts will weigh the severity of the interference against the degree of harm a nuisance finding might have on the defendant or other members of the public.²⁰⁷ Where the interference kills, or threatens human health, the interference is probably unreasonable.²⁰⁸ Thus, in *Saint Joseph Lead Co. v. Prather*,²⁰⁹ where the defendant's stored explosives caused a death, the United States Court of Appeals for the Eighth Circuit found the defendant's conduct unreasonable because it created an excessive danger.²¹⁰

When considering interference that damages the plaintiff's property or offends the plaintiff's senses, as opposed to interference that threatens the plaintiff's health, courts appear to give more weight to the harmful effect a remedy would have on the defendant or members of the public who benefit from the defendant's conduct.²¹¹ In *Georgia v. Tennessee Copper Co.*,²¹² for example, where the plaintiff complained that sulfur dioxide from the defendant company damaged forests and crops throughout five Georgia counties, the United States Supreme Court ordered the defendant company either to reduce its pollution or stop operating.²¹³ Although the Court considered the harm an injunction would have on those dependent on the company, it ordered the injunction because the pollution's harmful effects were considerable and widespread.²¹⁴ Similarly, in *Robie v. Lillis*,²¹⁵ the defendant's boathouse and trucks did not cause an

²⁰⁶ See *id.* at 18.

²⁰⁷ See, e.g., *St. Joseph Lead Co. v. Prather*, 278 F.2d 301, 303 (8th Cir. 1956) (storing explosives that caused death was a nuisance); KEETON, *supra* note 144, § 88, at 630.

²⁰⁸ See *Prather*, 278 F.2d at 303-05.

²⁰⁹ 238 F.2d 301 (8th Cir. 1956).

²¹⁰ See *id.* at 303-05; See also *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 54-55 (D. Minn. 1974) (court found defendant's discharge of carcinogens unreasonable).

²¹¹ In *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618 (1907), for example, although the United States Supreme Court held that the defendant's pollution created a nuisance by damaging land in Georgia, it appeared to recognize the potential harm caused by shutting down an industry. See *id.* at 619-20; see also *Robie v. Lillis*, 299 A.2d 155, 157, 161 (N.H. 1972) (where plaintiff complained that defendant's boat storage shed and trucks were ugly and created noises and dust, court paid deference to region's economic reliance on boating, and found conduct not unreasonable).

²¹² 27 S. Ct. 618 (1907).

²¹³ *Id.* at 619-20.

²¹⁴ See *id.* at 620.

²¹⁵ 299 A.2d 155, 161 (N.H. 1972).

unreasonable deterioration of the plaintiff's landscape.²¹⁶ The Supreme Court of New Hampshire gave considerable weight to the economic contribution the defendant's boat storage operation made to the community.²¹⁷

3. Injunctive Relief

Once a court finds that a defendant's conduct has caused substantial and unreasonable interference, and thus constitutes a nuisance, the court will balance the equities of the case to determine an appropriate remedy.²¹⁸ Most often, a public nuisance plaintiff will seek an injunction.²¹⁹ Courts will grant injunctions when they determine that damages would not provide the plaintiff with an adequate remedy, and that the need to prevent harm to the plaintiff outweighs the negative effect an injunction would have on the defendant or the public.²²⁰ Courts prefer to avoid ordering the defendant completely to shut down an operation, often choosing instead to order the defendant to modify the operation.²²¹

Courts will consider the need to abate the nuisance compelling where the defendant's interference causes widespread or severe harm to the plaintiff's health or property.²²² Thus, in *United States v. Reserve Mining Co.*,²²³ although an injunction was likely to cause great difficulty for the defendant and local economy, the United States District Court for the District of Minnesota enjoined the defendant from discharging carcinogens because of the activity's

²¹⁶ *Id.* at 161. *But see* *City of Harrisonville v. W.S. Dickey Clay, Mfg. Co.*, 289 U.S. 334, 337-39 (1933) (although defendant sewage system operator was performing important public service, resulting damage to plaintiff's pasture was nuisance).

²¹⁷ *See Robie*, 299 A.2d at 161.

²¹⁸ *See* PLATER, *supra* note 135, at 113; *see also* *W.S. Dickey Clay*, 289 U.S. at 338-40 (Court balanced city's interest in unobstructed sewage system against plaintiff's interest in uncontaminated land).

²¹⁹ *See* PLATER, *supra* note 135, at 128-30.

²²⁰ *See, e.g.,* *W.S. Dickey Clay*, 289 U.S. at 338-40 (no injunction where city relied on sewage system that polluted plaintiff's land, and damages would satisfy plaintiff); *United States v. Luce*, 141 F. 385, 407-08, 419 (Del. Cir. 1905) (injunction necessary to maintain effectiveness of quarantine station overcome by defendant's fish odors); *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 144 (E.D. Va. 1979) (no injunction where injunction would cause financial harm because defendant already had begun constructing high rise).

²²¹ *See, e.g.,* *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 620 (1907) (Court gave defendant opportunity to decrease pollution before ordering defendant to shut down).

²²² *See, e.g.,* *United States v. Reserve Mining Co.*, 380 F. Supp. 11, 54-55 (N.D. Minn. 1974) (court, concerned with defendant's discharge of carcinogens, ordered injunction).

²²³ 380 F. Supp. 11 (N.D. Minn. 1974).

serious threat to the public health.²²⁴ Similarly, in *Georgia v. Tennessee Copper Co.*,²²⁵ although shutting down the defendant company would cause hardship, the court ordered the defendant either to complete certain structural changes in its physical plant, or close down entirely.²²⁶ In addition, a court may enjoin conduct that interferes with a plaintiff's senses,²²⁷ though such conduct might not merit the same concern as health threats or direct property damage. Thus, in spite of potential costs to the defendant, the *Luce* court ordered the defendant fish company to stop producing odors that disturbed workers and inmates at a nearby federal quarantine station.²²⁸

Courts are less likely to favor abating a nuisance where an injunction would compromise the overall public interest, or severely harm the defendant.²²⁹ Thus, although leakage from the city sewage system was severely damaging the plaintiff's pasture, the United States Supreme Court in *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*²³⁰ refused to order an injunction.²³¹ The Court based its decision in part on the fact that the public relied on the sewage system.²³² Likewise, the United States District Court for the Eastern District of Virginia in *United States v. County Bd. of Arlington County*²³³ refused to prohibit further construction of a high-rise development.²³⁴ The *Arlington County* court was concerned that if it found a public nuisance, an injunction would impose excessive costs on a defendant who had begun to build a project prior to the lawsuit.²³⁵ If shutting down a defendant's operation is too severe a

²²⁴ *Id.* at 55-56.

²²⁵ 27 S. Ct. 618 (1907).

²²⁶ *Id.* at 620.

²²⁷ *See, e.g.*, *United States v. Luce*, 141 F. 385, 419 (Del. Cir. 1905); KEETON, *supra* note 144, § 90, at 644.

²²⁸ *See Luce*, 141 F. at 416-19.

²²⁹ *See City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338-39 (1933); *see also United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 141 (E.D. Va. 1979).

²³⁰ 289 U.S. 334 (1933).

²³¹ *Id.* at 338.

²³² *See id.* at 339; *see also United States v. Rainbow Family*, 695 F. Supp. 314, 329-30 (E.D. Tex. 1988) (court limited, but did not bar, large public gatherings where it was concerned with public's right to free expression); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871-73 (N.Y. 1970) (where defendant company's pollution caused damage that was "relatively small" in comparison to costs to defendant if ordered to shut down, court opted against ordering injunction unless defendant failed to pay damages to plaintiff landowners).

²³³ 487 F. Supp. 137 (E.D. Va. 1979).

²³⁴ *See id.* at 144.

²³⁵ *See id.*

remedy, a court may either award damages or order less restrictive injunctive relief.²³⁶

A plaintiff may seek injunctive relief addressing a future nuisance as well as an existing nuisance.²³⁷ If a defendant has plans that inevitably would create a nuisance, and the defendant is likely to carry out those plans, a court will consider ordering injunctive relief.²³⁸ Thus, in *Arlington County*, the plaintiff sought an injunction against the defendant because the plaintiff claimed that the defendant's development, once completed, would constitute a nuisance.²³⁹ Similarly, in *United States v. Rainbow Family*,²⁴⁰ the United States District Court for the Eastern District of Texas ordered injunctive relief on behalf of the U.S. government after finding that the defendant demonstrators would create a nuisance by generating unsanitary camping conditions at scheduled protests.²⁴¹

C. Utah's Public Nuisance Law

1. Background

Utah is the home of Zion and four other national parks. NPS could bring a public nuisance action under federal common law or Utah law to protect Zion from the Theater project.²⁴² An examination of Utah's nuisance law can serve as a model for NPS suits in Utah. Moreover, a concurrent analysis of Utah and federal public nuisance law might help illustrate the opportunities for NPS nuisance actions in other states.

²³⁶ See, e.g., *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339-40 (1933) (court awarded damages); *Boomer*, 257 N.E.2d at 871-73.

²³⁷ See, e.g., *United States v. Rainbow Family*, 695 F. Supp. 314, 329 (E.D. Tex. 1988) (court granted injunction limiting size of planned demonstration where federal government feared future gathering would damage Washington, D.C. park); 58 AM. JUR. 2D *Nuisances* § 351 (1989).

²³⁸ See 58 AM. JUR. 2D *Nuisances* § 351 (1989).

[C]ourts are not required to wait for actual injuries to occur before a condition may be adjudged a nuisance and abated; that is, a court of equity may enjoin a threatened or anticipated nuisance, where it clearly appears that a nuisance will necessarily result from the contemplated act or thing which it is sought to enjoin.

Id. (citing *Missouri v. Illinois*, 180 U.S. 208).

²³⁹ *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 140-44 (E.D. Va. 1979).

²⁴⁰ 695 F. Supp. 314 (E.D. Tex. 1988).

²⁴¹ See *id.* at 329-30.

²⁴² See *supra* notes 123-41 and accompanying text.

Because public nuisance laws in the different jurisdictions share many of the same principles, an analysis of Utah's public nuisance law resembles the preceding analysis of federal common-law public nuisance.²⁴³ Furthermore, Utah public and private nuisance law are very similar.²⁴⁴ Thus, an analysis of Utah public nuisance law requires an evaluation of both public and private nuisance case law.

The Utah Code defines public nuisance as conduct that threatens, harms, or disturbs the comfort or well-being of three or more persons, or that interferes with three or more persons' use of property.²⁴⁵ The Supreme Court of Utah, consistent with courts in other jurisdictions, regards public nuisance²⁴⁶ as conduct that substantially and unreasonably²⁴⁷ interferes with persons or property of members of the public.²⁴⁸ Thus, to be a public nuisance, a defendant's conduct must cause significant harm to ordinary members of the public,²⁴⁹ or

²⁴³ See *supra* notes 147-50 and accompanying text.

²⁴⁴ Utah courts have applied a similar analysis to both private and public nuisance cases. The primary difference between the two varieties of nuisance seems to be that a public nuisance affects an interest common to the general public, instead of one or several individuals. See *Turnbaugh v. Anderson*, 793 P.2d 939, 942 (Utah 1990). The Court of Appeals of Utah has stated that the private nuisance statute "encompasses two types of nuisance developed under the common law: public and private nuisance." *Id.* Therefore, in developing a standard for public nuisance, one must look to public and private nuisance cases.

²⁴⁵

(1) A public nuisance . . . consists in unlawfully doing any act or omitting to perform any duty, which act or omission either:

A) Annoys, injures, or endangers the comfort, repose, health or safety of three or more persons; or

B) Offends public decency; or

C) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or

D) In any way renders three or more persons insecure in life or the use of property.

UTAH CODE ANN. § 76-10-803 (1990).

The code further states that the county attorney, city attorney, or attorney general may bring an action to abate a public nuisance. *Id.* § 76-10-806. Although the code does not specifically empower other parties to initiate such an action, it does not expressly forbid other parties from bringing a public nuisance action. See *id.* The Court of Appeals of Utah has emphasized that its nuisance statutes do not modify common law doctrine. See *Turnbaugh*, 793 P.2d at 942.

²⁴⁶ Public and private nuisance standards are very similar. See *supra* note 244 and accompanying text.

²⁴⁷ *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 336 (Utah 1969). While *Johnson* differentiates between "substantial" and "unreasonable" interference, the Utah courts have, at times, combined the two into one "unreasonable" standard. See, e.g., *Turnbaugh*, 793 P.2d at 942; *Dahl v. Utah Oil Ref. Co.*, 262 P. 269, 273 (Utah 1927).

²⁴⁸ *Solar Salt Co. v. Southern Pac. Transp. Co.*, 555 P.2d 286, 289 (Utah 1976).

²⁴⁹ See *Hatch v. W.S. Hatch Co.*, 283 P.2d 217, 220 (Utah 1955) (to constitute nuisance, noises would have to disturb reasonable, objective person).

significant damage to a plaintiff's property.²⁵⁰ Furthermore, a defendant's conduct must decrease the environmental quality of a plaintiff's property to a level lower than that which the plaintiff reasonably expects.²⁵¹ In determining whether a particular public nuisance complaint meets this standard, a court will look closely at the particular facts of the case.²⁵²

2. Elements of a Public Nuisance Claim

a. *Substantial Interference Element*

The Supreme Court of Utah, like courts in other jurisdictions, has concluded that a defendant's conduct must substantially interfere with the plaintiff to constitute a public nuisance.²⁵³ A defendant's conduct satisfies the substantial interference element of a public nuisance claim where the conduct causes significant harm to the plaintiff, or where the defendant's conduct causes significant damage to the plaintiff's property. According to Utah courts, a defendant's conduct causes significant harm to a plaintiff where the conduct disturbs the physical²⁵⁴ or mental health²⁵⁵ of the plaintiff.

Conduct that causes or threatens serious bodily injury to the plaintiff satisfies the substantial interference element.²⁵⁶ The Utah Code states that injury or endangerment of health is one form of public nuisance.²⁵⁷ In *Pratt v. Hercules, Inc.*,²⁵⁸ the United States District Court for the District of Utah held that a weapons manufacturer's business did not create a nuisance to surrounding land-

²⁵⁰ See, e.g., *Shaw v. Salt Lake County*, 224 P.2d 1037, 1040 (Utah 1950).

²⁵¹ For example, homeowners in a normally peaceful residential neighborhood, accustomed to enjoying quiet evenings, expect the community's night time environment to remain serene. When unforeseeable commotion outdoors deteriorates the quality of the community's environment, the commotion might be unreasonable. Thus, in *Wade v. Fuller*, a new drive-in cafe created a nuisance by attracting noisy, vulgar patrons who disturbed residents at night in a previously quiet area. See *Wade v. Fuller*, 365 P.2d 802, 804-05 (Utah 1961).

²⁵² *Dahl v. Utah Oil Ref. Co.*, 262 P. 269, 273 (Utah 1927).

²⁵³ *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 336 (Utah 1969).

²⁵⁴ KEETON, *supra* note 144, § 8, at 627; see *Pratt v. Hercules, Inc.*, 570 F. Supp. 773, 791-92 (D. Utah 1982) (no nuisance where safety standards were met, thereby implying threat to safety might be nuisance).

²⁵⁵ See, e.g., *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041 (Utah 1959) (threat of "highly disturbing" noise); *Monroe City v. Arnold*, 452 P.2d 321, 332 (Utah 1969) (pigs' odors and squeals).

²⁵⁶ See UTAH CODE ANN. § 76-10-803 (1990); *Pratt*, 570 F. Supp. at 791.

²⁵⁷ See UTAH CODE ANN. § 76-10-803 (1990).

²⁵⁸ 570 F. Supp. 773 (D. Utah 1982).

owners.²⁵⁹ The court implied, however, that if the manufacturer failed government safety standards, or failed to satisfy a concerned local zoning commission, the manufacturer's conduct might have threatened the safety of plaintiffs enough to be a nuisance.²⁶⁰

A court is likely to find the substantial interference element satisfied where the defendant's conduct would cause an ordinary person to become significantly uncomfortable,²⁶¹ or would cause an ordinary person to change lifestyles.²⁶² Thus, a defendant who creates noises or odors that bother a reasonable plaintiff might cause substantial harm sufficient to constitute a nuisance.²⁶³ Similarly, creating a general commotion in a community can satisfy the substantial interference standard.²⁶⁴

In *Shaw v. Salt Lake County*,²⁶⁵ for example, a city's operation of a planned asphalt plant would have constituted a nuisance because the plant probably would have exposed residents to intolerable noises and odors.²⁶⁶ Similarly, in *Wade v. Fuller*,²⁶⁷ the operation of a restaurant that attracted noisy youths and loud cars constituted a nuisance because it disturbed nearby residents.²⁶⁸ The *Wade* court suggested that conduct that makes a homeowner decide to move, or forces a homeowner to live uncomfortably, satisfies the substantial interference element.²⁶⁹ In *Monroe City v. Arnold*,²⁷⁰ the Utah Su-

²⁵⁹ See *id.* at 791-92.

²⁶⁰ See *id.*

²⁶¹ See, e.g., *Wade v. Fuller*, 365 P.2d 802, 804 (Utah 1961) (causing "positive" discomfort may be nuisance); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041 (Utah 1950) (expected noise and dust from planned asphalt plant would be nuisance).

²⁶² See *Monroe City v. Arnold*, 452 P.2d 321, 332 (Utah 1969) (hog ranch odors forced plaintiffs to shut windows).

²⁶³ See *Wade*, 365 P.2d at 804 (loud noises that emanated from restaurant and disturbed neighbors was nuisance); *Shaw*, 224 P.2d at 1040-01 (smoke, dust, noise, and odors from similar asphalt plants convinced court it should forbid planned operation of defendant's plant).

²⁶⁴ See *Wade*, 365 P.2d at 804 (restaurant patrons loud car-driving and conversations created nuisance); *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 672 (Utah 1943) ("... [n]oises, odors, gatherings of crowds of people may or may not be an actionable nuisance depending upon the [circumstances] . . .").

²⁶⁵ 224 P.2d 1037 (Utah 1950).

²⁶⁶ See *id.* at 1040-41 (court referred to witness accounts of "unbearable" and "highly disturbing" noises from similar asphalt production facilities).

²⁶⁷ 365 P.2d 802 (Utah 1961).

²⁶⁸ See *id.* at 804-05 (court implied that general commotion caused by combination of loud voices, traffic, and collection of large numbers of youths caused sufficiently substantial harm); see also *Brough*, 242 P.2d at 672 (citing *Hansen v. Independent Sch. Dist. No. 1*, 61 Idaho 109 (1939) (traffic, light, and crowds from night baseball games combined to cause nuisance in local neighborhood)).

²⁶⁹ See *Wade*, 365 P.2d at 804 ("[T]he law does not allow anyone . . . to be driven from his home or compelled to live in positive discomfort. . .").

²⁷⁰ 452 P.2d 321 (Utah 1969).

preme Court found that the defendant's operation of a hog ranch that harbored loud squealing pigs and produced bad odors was a public nuisance.²⁷¹ The bad odors in *Monroe* were forcing nearby residents to change their life-style by keeping windows closed.²⁷² Conduct that does not expose residents to a new type of harm or property damage, however, does not substantially interfere with those residents.²⁷³ For example, in *Dahl v. Utah Ref. Co.*,²⁷⁴ the Utah Supreme Court held that an unpleasant smell emanating from the defendant's factory was not a nuisance where the plaintiff's home was located in an industrial area near piles of trash dumped in vacant lots.²⁷⁵

Utah courts might find that a visually offensive sight satisfies the substantial interference element.²⁷⁶ To satisfy this element, the offensive sight would have to make an ordinary person uncomfortable or hinder his or her life-style.²⁷⁷ In *Brough v. Ute Stampede Ass'n*,²⁷⁸ the Supreme Court of Utah held that the defendant's planned carnival activities, to be carried out in front of the plaintiff's home, would be a nuisance.²⁷⁹ Although the court was concerned primarily with the threat of noise and disorder, it supported its holding by citing to an Idaho case where the Idaho Supreme Court held that night baseball games constituted a nuisance in part because the games' bright lights disturbed nearby residents.²⁸⁰ By referring to cases in other jurisdictions,²⁸¹ *Brough* demonstrates that Utah courts might consider cases in which courts have held that conduct that disturbs a plaintiff's aesthetic tastes causes substantial harm suffi-

²⁷¹ *Id.* at 321-22.

²⁷² *See id.* at 322.

²⁷³ *See Dahl v. Utah Oil Ref. Co.*, 262 P.2d 269, 270, 273-74 (Utah 1927).

²⁷⁴ 262 P.2d 269 (1927).

²⁷⁵ *See id.* at 270, 273-74; *Hatch v. W.S. Hatch Co.*, 283 P.2d 217, 220-21 (Utah 1955) (no nuisance where defendant's conduct did not add to "noises, confusion and smells which emanate and exist in" the immediate vicinity of defendant).

²⁷⁶ *See Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 672 (Utah 1943); Note, *supra* note 144, at 1077-79; *infra* notes 277-85 and accompanying text.

²⁷⁷ *See Brough*, 142 P.2d at 672 (neighbors in community should be able to enjoy their homes in reasonable comfort); *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937) ("[e]quity should act only where there is presented a situation which is offensive to the view of average persons of the community").

²⁷⁸ 142 P.2d 670, 672 (Utah 1943).

²⁷⁹ *Id.* at 672-74.

²⁸⁰ *See id.* The *Brough* court referred specifically to the night ballgame noise and traffic that created a nuisance in *Hansen v. Independent Sch. Dist. No. 1*, 61 Idaho 109 (1939). *Id.* at 672. In *Hansen*, light from the games also contributed to the nuisance. *See Hansen*, 61 Idaho at 116.

²⁸¹ *Brough*, 142 P.2d at 672.

cient to constitute a nuisance.²⁸² A visual intrusion, however, would have to cause a plaintiff significant discomfort to constitute a nuisance.²⁸³ Thus, in *Wade v. Fuller*,²⁸⁴ the Supreme Court of Utah distinguished between conduct that merely annoys a plaintiff and fails to be a nuisance, and conduct that causes a plaintiff so much discomfort that the plaintiff has difficulty enjoying his or her home environment.²⁸⁵

Finally, if a defendant's conduct significantly damages, or threatens to damage, a plaintiff's property by polluting the air, causing pollutants to accumulate on the property, or hindering the plaintiff's ordinary use of the property, that conduct meets the substantial interference standard.²⁸⁶ In *Shaw v. Salt Lake County*,²⁸⁷ the Supreme Court of Utah enjoined a proposed asphalt plant because it threatened to pollute the plaintiffs' air with smoke and dust, and threatened to cause dust to collect on the plaintiffs' property.²⁸⁸ A defendant does not cause substantial harm, however, where the plaintiffs' property already has suffered from similar interference.²⁸⁹ Thus, in *Coon v. Utah Constr. Co.*,²⁹⁰ although the defendant's trucks were creating dust, smoke, and vibrations, the plaintiff's nuisance complaint failed because other vehicles had similarly disturbed the plaintiff.²⁹¹ Moreover, merely reducing property value does not satisfy the substantial interference standard.²⁹² The defendant's conduct must actually damage, or threaten to damage, the plaintiff's property.²⁹³

²⁸² See Note, *supra* note 144, at 1078-90 (analyzing various case law and expounding on possibilities for successful visual nuisance actions).

²⁸³ See, e.g., *Wade v. Fuller*, 365 P.2d 802, 804 (Utah 1961); see also Note, *supra* note 144, at 1080 (ordinarily, courts will not find visual nuisance).

²⁸⁴ 365 P.2d 802 (Utah 1961).

²⁸⁵ See *id.* at 804 ("[T]he mere fact of an annoyance does not establish the existence of a nuisance. . .").

²⁸⁶ See *infra* notes 287-93 and accompanying text.

²⁸⁷ 224 P.2d 1037 (Utah 1950).

²⁸⁸ See *id.* at 1040.

²⁸⁹ See *Coon v. Utah Constr. Co.*, 228 P.2d 997, 997-98 (Utah 1954); see *infra* notes 290-91 and accompanying text.

²⁹⁰ 228 P.2d 997 (Utah 1954).

²⁹¹ See *id.* at 997-98.

²⁹² See *Pratt v. Hercules, Inc.*, 570 F. Supp. 773, 792-93 (D. Utah 1982) (plaintiffs' complaint that neighboring weapons manufacturer caused loss of speculative profits from nearby real estate holdings failed to state claim).

²⁹³ See *id.* at 793-94.

b. Unreasonable Interference Element

To constitute a public nuisance, the defendant's interference must be unreasonable as well as substantial.²⁹⁴ A defendant's conduct unreasonably interferes with a plaintiff where the conduct decreases the environmental quality of the plaintiff's property to a level lower than that which the plaintiff reasonably expects.²⁹⁵ Thus, whether the defendant creates a noise,²⁹⁶ odor,²⁹⁷ bright light,²⁹⁸ vibrations,²⁹⁹ vulgar conversation,³⁰⁰ or general state of commotion,³⁰¹ the court considers the plaintiff's legitimate expectations.

The court is more likely to accept a plaintiff's expectations of environmental quality where the plaintiff resided in or visited the affected location prior to the defendant's troubling conduct.³⁰² Thus, in *Johnson v. Mount Ogden Enter., Inc.*,³⁰³ where the defendant enlarged an outdoor theater in a residential neighborhood, the Utah Supreme Court found that the resulting increase in noise and mischief among patrons was unreasonable.³⁰⁴ The residents justifiably expected the level of serenity that existed prior to the plaintiff's expansion.³⁰⁵

A plaintiff's expectations of environmental quality are usually legitimate where the defendant creates a condition that is new to the locality.³⁰⁶ Thus, in *Wade v. Fuller*,³⁰⁷ the Utah Supreme Court found that the defendant's opening of a cafe in a residential area was unreasonable because the neighborhood was quiet at night prior to the cafe's existence.³⁰⁸ Yet in *Coon v. Utah Constr. Co.*,³⁰⁹ where

²⁹⁴ See *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 335 (Utah 1969); Squillace, *supra* note 9, at 88.

²⁹⁵ See, e.g., *Wade v. Fuller*, 365 P.2d 802, 804-05 (Utah 1961). Utah's standard is, generally, the same as that of the federal common law. See *supra* notes 149-50 and accompanying text.

²⁹⁶ See *Johnson*, 460 P.2d at 335.

²⁹⁷ See *Monroe City v. Arnold*, 452 P.2d 321, 321-22 (Utah 1969).

²⁹⁸ See *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 672 (Utah 1943) (citing *Hansen v. Independent Sch. Dist. No. 1*, 61 Idaho 109 (1939), where traffic, light, and crowds from night baseball games combined to cause nuisance in local neighborhood).

²⁹⁹ See *Coon v. Utah Constr. Co.*, 228 P.2d 997, 997-98 (Utah 1951).

³⁰⁰ See *Wade v. Fuller*, 365 P.2d 802, 804 (Utah 1961).

³⁰¹ See *id.* at 804-05.

³⁰² See *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 334-46 (Utah 1969).

³⁰³ 460 P.2d 333 (Utah 1969).

³⁰⁴ *Id.* at 334-36.

³⁰⁵ See *id.* at 334-35.

³⁰⁶ See *Wade v. Fuller*, 365 P.2d 802, 804-05 (Utah 1961); *Coon v. Utah Constr. Co.*, 228 P.2d 997, 997-98 (Utah 1951); *infra* notes 307-12 and accompanying text.

³⁰⁷ 365 P.2d 802 (Utah 1961).

³⁰⁸ See *id.* at 804.

³⁰⁹ 228 P.2d 997 (Utah 1951).

the defendant construction company's trucks operated on a street that other truckers previously had used, the Supreme Court of Utah found that the defendant's driving was not unreasonable.³¹⁰ Because trucks had traveled on the highway in the past,³¹¹ the plaintiffs had no legitimate expectation that trucks like the defendant's would not rumble along the highway.³¹²

Where business practices are at issue, a plaintiff's expectations of environmental quality are legitimate where the defendant could mitigate damages by successfully operating in another location, at another time, or by taking other measures.³¹³ In *Shaw v. Salt Lake County*,³¹⁴ the defendant proposed siting an asphalt plant in a residential area, and the plaintiffs objected to the specter of equipment removing and processing gravel near their homes.³¹⁵ The court found the defendant's proposal unreasonable because the defendant could have located the plant at a greater distance from the residential area.³¹⁶ Similarly, the *Wade* court found an operator of a drive-in cafe's conduct unreasonable.³¹⁷ The *Wade* court thus affirmed a lower court order stipulating that the cafe operate at hours more amenable to neighborhood residents.³¹⁸ Where a business limits interference with potential plaintiffs as much as possible without endangering its economic survival, the interference is less likely to be unreasonable.³¹⁹

In determining the legitimacy of the plaintiff's expectations of environmental quality, a court will consider the extent to which the public benefits from the defendant's conduct.³²⁰ The more beneficial a defendant's conduct or operations are to the community, state, or

³¹⁰ *Id.* at 997-98.

³¹¹ *Id.*

³¹² *See id.*

³¹³ *See, e.g.,* *Wade v. Fuller*, 365 P.2d 802, 804 (Utah 1961); *Hatch v. W.S. Hatch Co.*, 283 P.2d 217, 220 (1955); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1038-42 (Utah 1950).

³¹⁴ 224 P.2d 1037 (Utah 1950).

³¹⁵ *Id.* at 1038.

³¹⁶ *See id.* at 1042.

³¹⁷ *Wade*, 365 P.2d at 804-05. The *Wade* court implied that the defendant should consider additional mitigation measures, including modification of the patrons' behavior. *Id.*

³¹⁸ *Id.* at 803, 805.

³¹⁹ *See, e.g.,* *Hatch v. W.S. Hatch Co.*, 283 P.2d 217, 221 (Utah 1955). In *Hatch*, the defendant business, headquartered next to the plaintiff's property, transported road tars and oils from the headquarters to various roadways. *Id.* at 218. The *Hatch* court noted that although the defendant had made a good faith effort to keep the premises clean and quiet, the process of supplying oil and tar to road workers required workers to operate through the night at the headquarters. *Id.* Consequently, the court found the defendant's noises and fumes not unreasonable. *Id.*

³²⁰ *See, e.g., id.*

nation, the less likely the court is to recognize the plaintiff's expectations of environmental quality.³²¹ In *Hatch v. W.S. Hatch Co.*,³²² the plaintiff complained that the defendant oil and tar transport business—which chose to base its operations near the plaintiff's house—created intolerable noises, fumes, and light.³²³ The Supreme Court of Utah implied that the plaintiff's expectations were unreasonable because the oil and tar contributed to important road repairs.³²⁴ Similarly, in *Pratt v. Hercules, Inc.*,³²⁵ the fact that the defendant's production of explosives for the federal government served important security interests may have influenced the decision of the United States District Court for the District of Utah in favor of the defendant.³²⁶

In determining whether or not a plaintiff's expectation of environmental quality is reasonable, Utah courts weigh several factors at once.³²⁷ Citizens, according to Utah courts, have a right to the peaceful enjoyment of their homes, public ways, and common areas.³²⁸ A business cannot necessarily move into a quiet neighborhood and create additional noise, pollution, or other negative effects.³²⁹ At the same time, all citizens are expected to endure some conduct that has annoying results.³³⁰ Court opinions reflect the idea that industry is important enough to the welfare of communities and the state to excuse some of its pollution and other negative by-products, particularly where the business does its best to reduce environmental damage.³³¹

³²¹ See *id.*; *Pratt v. Hercules, Inc.* 570 F. Supp. 773, 791-92 (D. Utah 1982); *infra* notes 322-26 and accompanying text.

³²² 283 P.2d 217 (Utah 1955).

³²³ *Id.* at 218.

³²⁴ See *id.* at 221. The court stressed the importance of balancing equities to determine the reasonableness of a defendant's conduct. See *id.* "[W]hether or not an actionable nuisance exists must depend upon weighing the gravity of harm to the plaintiffs against the utility and reasonableness of defendants' conduct." *Id.*

³²⁵ 570 F. Supp. 773 (D. Utah 1982).

³²⁶ See *id.* at 791-92.

³²⁷ See, e.g., *Hatch*, 283 P.2d at 220 (test for nuisance is "the reasonableness of the use [of property] complained of in the particular locality and in the manner and under the circumstances of the case").

³²⁸ See UTAH CODE ANN. § 76-10-803 (1990); *Wade v. Fuller*, 365 P.2d. 802, 804 (Utah 1961).

³²⁹ See, e.g., *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 335 (Utah 1969) (erection of movie screen across from plaintiff residents resulting in noise, traffic, and trespassers, was nuisance).

³³⁰ See *Pratt v. Hercules, Inc.*, 570 F. Supp. 773, 792 (D. Utah 1982).

³³¹ Thus, a plaintiff's dissatisfaction with an important industry that tries to mitigate damages might not merit a nuisance finding. See, e.g., *Hatch*, 283 P.2d at 221.

3. Injunctive Relief

Once a court holds a defendant liable for public nuisance, it proceeds to consider an appropriate remedy.³³² Most often, public nuisance plaintiffs seek injunctions.³³³ A Utah court will grant an injunction if the court determines that the need to abate or prevent injury to a plaintiff outweighs the societal benefit of a defendant's activities.³³⁴ A court usually prefers to order a defendant to modify rather than terminate its conduct.³³⁵

The rationale for abating or preventing harm to a plaintiff is strong where a defendant's conduct interferes with residents and visitors throughout an entire neighborhood.³³⁶ Thus, in *Monroe City v. Arnold*,³³⁷ the Supreme Court of Utah enjoined a hog ranch whose offensive noises and odors affected a nearby neighborhood.³³⁸ Likewise, the *Wade v. Fuller* court affirmed a limited injunction against operators of a drive-in cafe whose patrons unreasonably disturbed residents throughout the surrounding neighborhood.³³⁹ In addition, while courts seem most concerned with interference that affects an entire community, the *Monroe* court expressed concern for pedestrians who encounter the interference while passing through the community.³⁴⁰

Courts also are inclined to protect a plaintiff when a defendant fails to take available action to mitigate harm. If a defendant could operate effectively in a different location, at a different time, or take other mitigating measures, a court is likely to order an injunction.³⁴¹

³³² See, e.g., *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041-42 (Utah 1950) (after finding defendant would create nuisance if allowed to carry out plans for operation of asphalt plant, court considered possible equitable remedies).

³³³ See RESTATEMENT (SECOND) OF TORTS § 821C (1965). A plaintiff can only recover damages in a public nuisance action if he or she has suffered a type of harm that is unique from the harm inflicted on other members of the public. *Id.* Thus, especially where the government sues on behalf of the public, the appropriate remedy would be an injunction.

³³⁴ See *Shaw*, 224 P.2d at 1041-42.

³³⁵ See *Wade v. Fuller*, 365 P.2d 802, 803-05 (Utah 1961) (instead of shutting down defendants' restaurant, court required defendant to reduce noise and imposed limits on restaurant's hours of operation).

³³⁶ See *Monroe City v. Arnold*, 452 P.2d 321, 321-22 (Utah 1969) (public nuisance where noises and odors from hog ranch "permeated" neighborhood).

³³⁷ *Id.* at 321.

³³⁸ See *id.* at 321-22.

³³⁹ See *Wade*, 365 P.2d at 804-05.

³⁴⁰ See *Monroe*, 452 P.2d at 322.

³⁴¹ See *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041-42 (Utah 1950) (in affirming injunction against planned asphalt plant, court emphasized that defendant could operate plant successfully elsewhere).

Before ordering an injunction, however, a court may demand modifications that might help protect the plaintiff's interests.³⁴² In *Wade*, for example, the court attempted to prevent the injury the defendant's noisy drive-in cafe caused by ordering the owner to close earlier.³⁴³ Conversely, if a defendant business attempts to limit the harm to a plaintiff, a court will be more reluctant to order an injunction.³⁴⁴

Utah courts will award plaintiffs injunctive relief to address future nuisances as well as existing nuisances.³⁴⁵ If a court finds that there is a reasonable probability that the defendant, by carrying out plans, will create a nuisance, the court may grant an injunction.³⁴⁶ Thus, the *Shaw* court enjoined the defendant from carrying out its future plans to operate an asphalt plant because the operation of the plant probably would constitute a nuisance.³⁴⁷ Similarly, the *Brough v. Ute Stampede Ass'n*³⁴⁸ court enjoined the defendant from carrying out its planned operation of carnival rides and concession stands because of the likelihood that the defendant's activities would constitute a nuisance.³⁴⁹

V. PUBLIC NUISANCE: A LEGAL TOOL THAT THE NATIONAL PARK SERVICE SHOULD UTILIZE TO PROTECT NATIONAL PARKS

A. *Why NPS Should Bring Public Nuisance Actions to Prevent Harmful External Development*

NPS should use every available means to carry out its mission to protect the environmental quality of parks. Commercial development outside of national park boundaries—a phenomenon that poses a substantial threat to parks across the country—deserves NPS's utmost attention. NPS should act aggressively to minimize harm from external development.

³⁴² See *Wade*, 365 P.2d at 803-05; see Jonathan M. Purver, Annotation, *Modern Status of Rules as to Balance of Convenience or Social Utility as Affecting Relief from Nuisance*, 40 A.L.R. 3d 601, 608 (1971).

³⁴³ *Wade*, 365 P.2d at 803-05.

³⁴⁴ See *Monroe*, 452 P.2d at 321 (although court enjoined defendant's business, it did so less willingly after recognizing defendant's "efforts to keep the premises reasonably clean"); Purver, *supra* note 342, at 608.

³⁴⁵ See *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 673 (Utah 1943); see also *Shaw*, 224 P.2d at 1041-42 (injunction barring construction and operation of asphalt plant).

³⁴⁶ See *Brough*, 142 P.2d at 673-74.

³⁴⁷ See *Shaw*, 224 P.2d at 1040-41.

³⁴⁸ 142 P.2d 670 (Utah 1982).

³⁴⁹ See *id.* at 672-74.

Although NPS probably does not have regulatory jurisdiction beyond park boundaries, it has the power to seek injunctions through public nuisance actions where it believes development projects substantially and unreasonably harm parks or park visitors.³⁵⁰ Courts have recognized public nuisance as a proper avenue for government officials to use to protect public lands.³⁵¹ Thus, where external development threatens national parks and park visitors, and an injunction is the best remedy, public nuisance provides NPS with a particularly appropriate legal recourse.

B. Application of Law: A Choice of Federal Common Law or State Law

A federal court would apply federal common law to an NPS public nuisance claim alleging that a development project beyond park boundaries threatened a park with substantial and unreasonable harm.³⁵² The federal government has an important interest in protecting federal lands.³⁵³ In *United States v. County Bd. of Arlington County*,³⁵⁴ the United States District Court for the Eastern District of Virginia applied federal common law to NPS's public nuisance action to protect a national park in Washington D.C. from an aesthetically intrusive high-rise development.³⁵⁵ Like the *Arlington County* court, other federal courts would apply federal common law to NPS public nuisance complaints against external developers.³⁵⁶

The Park Act does not preempt federal common-law public nuisance because NPS does not comprehensively regulate external activities.³⁵⁷ Other federal statutes, however, may prevent a court from applying federal common law to some harmful effects of commercial development, such as air or water pollution.³⁵⁸ The Clean Water Act,

³⁵⁰ See *supra* notes 104–09, 123–27, 136–38, 159–60 and accompanying text.

³⁵¹ See *supra* note 124 and accompanying text.

³⁵² See *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139–40 (E.D. Va. 1979); Squillace, *supra* note 9, at 89; see also *supra* notes 123–27 and accompanying text. The court could rely, however, on state public nuisance law principles as well as federal law. See *supra* notes 128–32 and accompanying text.

³⁵³ See *Arlington County*, 487 F. Supp. at 139–40; Squillace, *supra* note 9, at 89–90.

³⁵⁴ 487 F. Supp. 137 (E.D. Va. 1979).

³⁵⁵ *Id.* at 139–40.

³⁵⁶ See *id.*; Squillace, *supra* note 9, at 89.

³⁵⁷ See 16 U.S.C. § 1 (1988); *City of Milwaukee v. Illinois and Mich.*, 451 U.S. 304, 316–17 (1981); *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139–40 (E.D. Va. 1979); CHEMERINSKY, *supra* note 10, § 6.1–6.2, at 295, 310–11; EVERHART, *supra* note 1, at 75; *supra* notes 105–09 and accompanying text.

³⁵⁸ See *City of Milwaukee*, 451 U.S. at 316–19 (1981) (Clean Water Act preempted application

for example, may prevent a court from applying federal common law to an NPS complaint against a development's pollution of water.³⁵⁹ NPS might succeed, however, with the argument that federal pollution statutes should not preempt federal common-law nuisance claims brought to protect national parks because the statutes do not address the specific problems in the parks.³⁶⁰

More importantly, NPS lawsuits against commercial developments should focus on the projects' visual interference and noises. The federal government does not comprehensively regulate the architecture and lighting of construction projects. Public nuisance actions focusing on commercial structures and lighting are less likely to encounter federal common-law preemption difficulties than would actions solely directed at air or water pollution sources.³⁶¹

NPS should attempt to bring public nuisance actions under federal common law, as opposed to state law, because of the federal government's interest in protecting national parks.³⁶² Moreover, federal common law would provide uniformity to NPS public nuisance actions, whereas state law outcomes might vary from state to state.³⁶³ Nonetheless, NPS may also bring public nuisance actions under the state law where a development is located.³⁶⁴ Because many state and federal jurisdictions share similar public nuisance law principles, NPS should have a strong opportunity to succeed in state law, regardless of the potential prejudice a jurisdiction might have in favor of a home-state defendant. Furthermore, NPS might determine that a particular jurisdiction is sympathetic to nuisance actions based on interference with a plaintiff's aesthetic environment.³⁶⁵

C. Chances for Success on the Merits Under Federal Common Law

NPS would probably succeed in convincing a court that at least some of the development projects springing up near park boundaries

of federal common-law public nuisance in interstate dispute over polluted water); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 702 (D.N.J. 1982) (Clean Air Act preempted federal common-law public nuisance in part of complaint that related to landfill operator's pollution of air); Squillace, *supra* note 9, at 94.

³⁵⁹ See *City of Milwaukee*, 451 U.S. at 316-19 (1981); Squillace, *supra* note 9, at 94.

³⁶⁰ See Squillace, *supra* note 9, at 104 n.37.

³⁶¹ See *id.* at 91-94; *supra* notes 358-60 and accompanying text.

³⁶² See 16 U.S.C. § 1 (1988); *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 139-40 (E.D. Va. 1979); Squillace, *supra* note 9, at 89.

³⁶³ See Squillace, *supra* note 9, at 89.

³⁶⁴ See *supra* notes 128-32 and accompanying text.

³⁶⁵ See, e.g., *Hay v. Stevens*, 530 P.2d 37, 39 (Or. 1975).

constitute public nuisances under federal common law.³⁶⁶ First, a court likely would find that some developments substantially interfere with park visitors by creating visual obstructions, noises, odors, and commotion that would offend and disturb ordinary park visitors.³⁶⁷ Thus, unlike *United States v. County Bd. of Arlington County*,³⁶⁸ where the court concluded that a highrise development within view of the Capitol did not constitute a nuisance because it did not offend the average visitor,³⁶⁹ a court would probably find that developments in more remote areas offend the average visitor seeking the solace and unspoiled beauty of nature.³⁷⁰ In addition, as in *Wade v. Fuller*,³⁷¹ where the Utah Supreme Court stated that by driving homeowners out of their homes, even a lawful business would be a nuisance,³⁷² a development on a park boundary may satisfy the substantial interference standard by inducing park visitors to leave a favorite park or park area. In short, some developments create noises, bright lights, odors, or ugly visages that would cause ordinary park visitors to change habits by seeking alternative vacation sites.³⁷³ Arguably, such developments would satisfy the substantial interference standard of a court that has demonstrated respect for aesthetic values.³⁷⁴

After satisfying the substantial interference element of a federal common-law public nuisance, NPS, in many cases, probably would convince a court that a development unreasonably interfered with park visitors. NPS could persuasively argue that many developments create a type of interference or condition that denigrates park

³⁶⁶ This Section of the Comment focuses on federal common-law public nuisance. Federal common-law shares, and borrows from, many of the same principles as state common law. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972). For application of state public nuisance law, see *infra* Section VI.

³⁶⁷ See *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 143-44 (E.D. Va. 1979); Note, *supra* note 144, at 1077-79; see also *supra* notes 177-81 and accompanying text.

³⁶⁸ 487 F. Supp. 137 (E.D. Va. 1979).

³⁶⁹ See *id.* at 143-44.

³⁷⁰ See *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937) (court implied that hypothetical junkyard in residential community would offend average resident and be a nuisance); *SAX*, *supra* note 20, at 46 (description of aesthetic value of national parks to visitors); *Squillace*, *supra* note 9, at 92-93 (suggesting that courts should recognize aesthetic nuisance in certain situations); Note, *supra* note 144, at 1091.

³⁷¹ 365 P.2d 802 (Utah 1961).

³⁷² See *id.* at 804.

³⁷³ See *supra* notes 177-81 and accompanying text.

³⁷⁴ See *Arlington County*, 487 F. Supp. at 143-44; *Wade*, 365 P.2d at 804; *Squillace*, *supra* note 9, at 92; Note, *supra* note 144, at 1075-79 (citing variety of state court cases indicating recognition of aesthetic nuisances).

environments to quality levels that visitors find unreasonably low.³⁷⁵ Thus, as in *United States v. Luce*,³⁷⁶ where a factory owner interfered with the plaintiff's workers by subjecting them to obnoxious odors unlike any that previously existed, a court might find that the development of unsightly structures—with their accompanying noises, lights, and odors—next to an all-natural park would unreasonably interfere with park visitors.³⁷⁷ In addition, in many cases, NPS forcefully could contend that developers could build successful projects in locations less objectionable to park visitors.³⁷⁸ In *Luce*, for example, the United States Circuit Court for the Delaware Circuit supported its finding of unreasonable interference by noting that the defendant, with multiple siting options, chose to operate where odors were certain to reach the plaintiff's quarantine station.³⁷⁹ Like the *Luce* court, a court hearing an NPS complaint might find that a developer unreasonably interfered with park visitors by choosing to operate immediately next to a park. A court would be inclined to make such a finding where a developer, choosing from among multiple options, chose the option closest to a park.³⁸⁰

Consistent with its analysis of the unreasonableness of a development's interference with a park, a court may issue an injunction preventing a developer from using a particular site.³⁸¹ NPS arguably deserves injunctive relief when a defendant chooses to site a development close to a park, ignoring promising sites located further from the park.³⁸² The benefits of the injunction would outweigh the harm to the developer and the community.³⁸³ Unlike *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*,³⁸⁴ where an injunction would have disrupted the city's sewage system, an injunction against a developer would not threaten the public interest.³⁸⁵ A developer often could

³⁷⁵ See *infra* notes 376–80 and accompanying text.

³⁷⁶ 141 F. 385 (Del. Cir. 1905).

³⁷⁷ See *id.* at 407–11.

³⁷⁸ See *id.*; *infra* note 379 and accompanying text.

³⁷⁹ See *Luce*, 141 F. at 407–11.

³⁸⁰ See *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 339–40 (1933); *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619–20 (1907); *supra* notes 201–06 and accompanying text.

³⁸¹ See *W.S. Dickey Clay*, 289 U.S. at 338–40; 58 AM. JUR. 2D *Nuisances* § 351 (1989) (court may issue injunction to prevent future nuisance); *infra* notes 382–87 and accompanying text.

³⁸² See *W.S. Dickey Clay*, 289 U.S. at 338–40; *United States v. Rainbow Family*, 695 F. Supp. 314, 330 (E.D. Tex. 1988); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041–42 (Utah 1950).

³⁸³ See, e.g., *W.S. Dickey Clay*, 289 U.S. at 338–40.

³⁸⁴ 289 U.S. 334 (1933).

³⁸⁵ See *id.* at 339.

locate elsewhere and still earn a profit and help support the local economy.³⁸⁶ Furthermore, if NPS sued to prevent the construction of a development prior to groundbreaking, it would not have to ask the court to force a developer to accept financial hardship.³⁸⁷

D. Taking Advantage of a Useful Legal Recourse

Public nuisance law is a legal avenue that NPS could use successfully to seek injunctions against neighboring development projects that threaten the environment of national parks across the country. NPS should take immediate advantage of this area of law because it would help NPS fulfill its statutory obligation to protect parks for future generations of park visitors.³⁸⁸ While courts historically have hesitated to find that visual interference may be a public nuisance, courts increasingly have begun to recognize the value of aesthetics and environmental preservation.³⁸⁹ Given this recognition of aesthetics and the environment, and because public nuisance law would force courts to weigh the interests of park visitors against those of developers who could succeed with developments removed from park boundaries, NPS could win in court. NPS should be able to convince courts to order developers to build structures without detracting from the parks' environment. NPS is ignoring its responsibility by not challenging courts with public nuisance claims aimed at preserving our national heritage.

VI. PUBLIC NUISANCE AND THE ZION NATIONAL PARK CASE

Odyssey's development immediately next to Zion National Park provides an important example of a threat NPS should attempt to address with a public nuisance claim. NPS could probably win a court order mandating that Odyssey move the Theater to a location further removed from Zion's south entrance and Watchman Campground. If Odyssey reneged on its promise to scale down its original plans, NPS's suit would be even more likely to succeed.

³⁸⁶ Like Odyssey, other developers surely could find locations where they could succeed without threatening park environments. *See supra* notes 90-92 and accompanying text.

³⁸⁷ *See* *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 141 (E.D. Va. 1979) (court stated that "the Government should not have waited until the buildings in question were under construction before bringing this suit. . .").

³⁸⁸ *See* 16 U.S.C. § 1 (1988).

³⁸⁹ *See* *Hay v. Stevens*, 530 P.2d 37, 39 (1975); *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 370-71 (W. Va. 1937); Note, *supra* note 144, at 1079.

NPS would have standing to bring a public nuisance action, and it could sue under either federal common law or Utah Law,³⁹⁰ NPS could successfully argue that the proposed Theater will constitute a public nuisance because its existence will cause substantial and unreasonable harm to Zion and Zion's visitors.³⁹¹ Because promising alternative sites exist where Odyssey could develop the Theater, and where the Theater would not constitute a nuisance, a court would likely order Odyssey to build at a different location.³⁹²

A. Application of Federal Common-Law Public Nuisance and Utah Public Nuisance Law

1. The Theater Will Substantially Interfere With Visitors of Zion National Park

a. Federal Common Law

Odyssey, by building the Theater according to its current plans, will substantially interfere with park visitors because the Theater will create noises, odors, and commotion that will make ordinary visitors of Watchman Campground significantly uncomfortable.³⁹³ In addition, the Theater will substantially interfere by causing a change in life-style for the campers and creating a visual obstruction that will offend ordinary visitors.³⁹⁴ The Theater, seven stories high, will be visible from the campground.³⁹⁵ It will attract thousands of viewers with their accompanying cars, car exhaust, noise, litter, and general commotion.³⁹⁶ Although Odyssey has agreed not to operate at night, campers trying to enjoy the serene outdoors will surely be distracted by the bustle and automobile exhaust during daylight hours. Were Odyssey to back out of its agreement to scale back its development and operate only during the day, its impact on Zion would be even greater.

³⁹⁰ See *Arlington County*, 487 F. Supp. at 139-40; Squillace, *supra* note 9, at 89-90; *supra* notes 123-41, 245 and accompanying text.

³⁹¹ See *supra* note 160 and accompanying text.

³⁹² See, e.g., *United States v. Luce*, 141 F. 385, 417-18 (Del. Cir. 1905) (defendant wrongly built factory in locality not accustomed to its odors); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041-42 (Utah 1950).

³⁹³ See *infra* notes 402-05 and accompanying text.

³⁹⁴ See *infra* notes 397-400 and accompanying text.

³⁹⁵ See Wiese Interview I, *supra* note 67; see also Reinhold, *supra* note 55, at 9.

³⁹⁶ See Reinhold, *supra* note 55, at 9; Williams, *supra* note 21, at 16; Wiese Interview II, *supra* note 72.

Today's Watchman Campground visitors seek a peaceful and natural environment for camping.³⁹⁷ Known for its gorgeous views of daytime horizons and nighttime stars, Watchman attracts campers who want to enjoy nature, live outdoors, and escape from their lives' normal routines.³⁹⁸ A court should recognize that citizens suffer substantial interference when they must change their life-styles as a result of someone's interference with their property.³⁹⁹ The Theater will cause substantial interference by detracting from the quality of the campers' experience and compelling them to travel elsewhere.⁴⁰⁰

Similar to the workers in *United States v. Luce*,⁴⁰¹ who were nearly driven out of their workplace by a fish factory's odors,⁴⁰² and the plaintiffs in *Wade v. Fuller*,⁴⁰³ who the *Wade* court implicitly compared to people forced out of their homes, Watchman Campground visitors reluctantly might choose to camp elsewhere.⁴⁰⁴ Campers who do not move, undoubtedly will experience the relative discomfort of hearing crowds of movie-goers and inhaling the exhaust of additional automobiles. Admittedly, being forced out of a campground is less injurious than being forced out of a private home. Nonetheless, courts should recognize that Zion is a type of vacation home to members of the public who wish to visit the park and experience its wonders. Moreover, the Park Act, mandating that parks survive for future generations, implies that any deterioration of a park environment is significant.⁴⁰⁵

Odyssey will also cause substantial interference with the public because the Theater will obstruct the scenic views from Watchman Campground and from the road leading to Watchman and the park's south entrance.⁴⁰⁶ The building will offend the aesthetic tastes of ordinary campers seeking the joy of camping at Watchman.⁴⁰⁷ Unlike

³⁹⁷ See Williams, *supra* note 21, at 16 ("[t]hose drawn to places like Las Vegas and those drawn to places like Zion generally are two different sorts"); Wiese Interview I, *supra* note 67.

³⁹⁸ Wiese Interview I, *supra* note 67; see generally ISE, *supra* note 19, at 654-57.

³⁹⁹ See *United States v. Luce*, 141 F. 385, 409-11 (Del. Cir. 1905); *Wade v. Fuller*, 365 P.2d 802, 803-05 (Utah 1961); *infra* notes 401-05 and accompanying text.

⁴⁰⁰ See *Wade*, 365 P.2d at 803-05. A Supreme Court of Utah decision should be persuasive.

⁴⁰¹ 141 F. 385 (Del. Cir. 1905).

⁴⁰² See *id.* at 407-08.

⁴⁰³ 365 P.2d 802 (Utah 1961).

⁴⁰⁴ See *id.* at 804.

⁴⁰⁵ See 16 U.S.C. § 1 (1988).

⁴⁰⁶ See *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 143-44 (E.D. Va. 1979); Note, *supra* note 144, at 1075-76.

⁴⁰⁷ See *Arlington County*, 487 F. Supp. at 143-44; *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va. 1937).

United States v. County Bd. of Arlington County,⁴⁰⁸ where the court found that the defendant's buildings would not offend the ordinary park visitor, the Theater will disturb the many campers who go to Watchman to enjoy the aesthetic pleasures of viewing the landscape.⁴⁰⁹ Planned for construction directly across from the campground, the Theater will obstruct ordinary campers' views from Watchman and from the road approaching Zion.⁴¹⁰

Substantial damage would be even more likely to occur were Odyssey to retreat from its promise to scale back the size of the development and to limit operations to day-time hours. A larger theater, restaurant, and hotel would attract greater numbers of patrons who would create more noise, litter, and commotion. Operating at night, the Theater would disturb campers seeking a quiet place in which to sleep or relax. Thus, the Theater would be like the outdoor cafe in *Wade* that interrupted nearby residents' sleep.⁴¹¹ Outdoor lighting would impede campers' abilities to see stars—a favorite activity at Watchman.⁴¹² Furthermore, the larger buildings would have a greater impact on the view of the ordinary camper.⁴¹³ Overall, an enlarged development would cause campers additional discomfort and compel more campers to camp elsewhere.

Although NPS could argue successfully that Odyssey will substantially interfere with the public, NPS would have more difficulty claiming that Odyssey will substantially interfere with NPS by significantly damaging Zion. Theater patrons probably will contaminate the environment with litter and automobile exhaust, yet they probably will not cause direct damage to the park land.⁴¹⁴ Thus, unlike *Georgia v. Tennessee Copper Co.*,⁴¹⁵ where the plaintiff's air pollution actually damaged crops, the increased pollution from cars is unlikely to substantially damage vegetation in Zion.⁴¹⁶ Although car exhaust or litter blowing into the park conceivably could cause sig-

⁴⁰⁸ 487 F. Supp. 137 (E.D. Va. 1979).

⁴⁰⁹ See *id.* at 143–44; *Barrack*, 191 S.E. at 371 (object is visual aesthetic nuisance if it offends average member of community).

⁴¹⁰ Wiese Interview I, *supra* note 67; see Reinhold, *supra* note 55, at 9.

⁴¹¹ See *Wade*, 365 P.2d at 803–05.

⁴¹² Wiese Interview I, *supra* note 67; see *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 672 (Utah 1943) (citing *Hansen v. Independent Sch. Dist. No. 1*, 62 Idaho 109 (Idaho 1939)).

⁴¹³ See *supra* notes 406–10 and accompanying text.

⁴¹⁴ See *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619–20 (1907).

⁴¹⁵ 27 S. Ct. 618 (1907).

⁴¹⁶ See *id.* at 619–20.

nificant damage to the park, a court would be unlikely to predict a future nuisance because the damage is not inevitable.⁴¹⁷

b. Utah State Law

NPS probably would have similar success convincing the Utah Supreme Court that Odyssey's Theater will substantially interfere with the public under Utah law.⁴¹⁸ In addition to *Wade v. Fuller*,⁴¹⁹ NPS could point to *Monroe City v. Arnold*⁴²⁰ and argue that Odyssey will substantially interfere with park visitors by forcing campers to leave Zion. Thus, like the plaintiffs in *Monroe* who shut their windows at night to prevent the defendants' squealing, malodorous pigs from disturbing their sleep, Watchman campers might experience enough discomfort to induce them to change their camping habits, or camp at different locations.⁴²¹

A Utah court might hesitate before finding that the visual intrusion resulting from the construction of the Theater will cause substantial interference with ordinary campers. Nonetheless, the court might look to other jurisdictions and recognize that a structure could significantly offend an ordinary camper and, consequently, cause substantial interference.⁴²² More likely, a Utah court would consider the visual interference part of a combination of factors that will make it difficult for ordinary campers to enjoy the park.⁴²³

A Utah court probably would find that the harm the Theater will inflict on the park property will not, alone, constitute substantial interference.⁴²⁴ Car exhaust from Theater patrons probably will not inflict significant damage on the property. Unlike *Shaw*, where the defendant's proposed asphalt plant threatened to cause pollutants to accumulate on the plaintiff's property, the exhaust from cars of theater patrons probably will not damage park vegetation or NPS

⁴¹⁷ See 58 AM. JUR. 2D *Nuisances* § 351 (1989).

⁴¹⁸ See *Monroe City v. Arnold*, 452 P.2d 321, 321-22 (Utah 1969); *Wade v. Fuller*, 365 P.2d 802, 803-05 (Utah 1961); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1040-42 (Utah 1950); *Dahl v. Utah Oil Ref. Co.*, 262 P. 269, 270-74 (Utah 1927); see also *supra* notes 261-72 and accompanying text.

⁴¹⁹ 365 P.2d 802 (Utah 1961).

⁴²⁰ 452 P.2d 321 (Utah 1969).

⁴²¹ See *id.* at 321-22; *Wade*, 365 P.2d at 804; *supra* notes 262-72 and accompanying text.

⁴²² See *Parkersburg Builders Material Co. v. Barrack*, 191 S.E. 368, 371 (W. Va 1937); Note, *supra* note 144, at 1076-79; *supra* notes 277-82 and accompanying text.

⁴²³ See *Wade*, 365 P.2d at 804-05; *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 677 (Utah 1943) (court referred to Idaho case where night lighting caused visual intrusion that, along with noises, created nuisance).

⁴²⁴ See *Shaw v. Salt Lake County*, 224 P.2d 1037, 1040 (Utah 1950).

structures.⁴²⁵ NPS would have to focus its argument on the effect of the Theater on the public who utilize the park.

2. The Theater Will Unreasonably Interfere with Visitors of Zion National Park

a. Federal Common Law

Under federal common law, Odyssey's Theater will unreasonably interfere with the public because the Theater will decrease the environmental quality of Zion National Park's Watchman Campground and the park's south entrance area to a level below that which campers reasonably expect.⁴²⁶ This type of interference has never previously existed at Zion. Moreover, Odyssey is capable of building a comparable complex in a nearby location that would not harm the campground's immediate environment.⁴²⁷ Finally, the severity of the Theater's threat outweighs the benefits the Theater will provide to Odyssey and members of the public.⁴²⁸

The Theater, by attracting patrons and traffic, will create a level of noise, air pollution, and general commotion that does not currently exist at Watchman Campground.⁴²⁹ In addition, the Theater will occupy part of what is currently an unobstructed scenic view from the campground.⁴³⁰ Thus, as in *United States v. Luce*,⁴³¹ where workers suffered unreasonable interference when subjected to fish odors that permeated previously fresh air, campers at Watchman Campground will suffer unreasonable interference because they will be exposed to substantial interference unlike any that has previously existed.⁴³² The Theater's bustle and pollution, along with its intrusion on a scenic view, will suddenly deteriorate a formerly pristine environment.

Also contributing to the unreasonable nature of the Theater's interference is Odyssey's unwillingness to construct the Theater in a location further away from Zion. Alternative sites exist that would

⁴²⁵ See *id.* at 1040.

⁴²⁶ See *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619 (1907); *United States v. Luce*, 141 F. 385, 407-11 (Del. Cir. 1905); *supra* notes 192-95 and accompanying text.

⁴²⁷ See *Luce*, 141 F. at 417; *infra* notes 433-36 and accompanying text.

⁴²⁸ See *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338-40 (1933); *Tennessee Copper*, 27 S. Ct. at 619; *infra* notes 439-40 and accompanying text.

⁴²⁹ See *Luce*, 141 F. at 411.

⁴³⁰ Wiese Interview I, *supra* note 67.

⁴³¹ 141 F. 385 (Del. Cir. 1905).

⁴³² See *id.* at 407-11; *Tennessee Copper*, 27 S. Ct. at 619.

be less intrusive.⁴³³ One such alternative site is within one mile of Zion.⁴³⁴ Thus, Odyssey's actions will be comparable to the defendant's in *Luce*.⁴³⁵ There, the defendant factory owner was unreasonable because he chose to operate in a location that would subject the plaintiff's workers and inmates to odors, instead of choosing a location more accustomed to industrial odors.⁴³⁶ Odyssey's willingness to modify the original plan by reducing the development's size and hours of operation strengthens its position, but does not change the overall unreasonableness of the interference.⁴³⁷ Partial mitigation is not sufficient where the interference remains unreasonable.⁴³⁸

Finally, a court would find Odyssey's interference unreasonable because the severity of the Theater's harms will outweigh the benefits the Theater will create.⁴³⁹ A court should find that the harm to park visitors will outweigh the Theater's benefits to Odyssey and Theater patrons because Odyssey could create those same benefits by building in another location.⁴⁴⁰ Odyssey could construct the Theater at an alternative site and, most likely, still create jobs, make a profit, and provide recreation for movie-goers.

b. Utah State Law

The Theater would also satisfy the unreasonable interference standard under Utah law. NPS could base its argument on the same factors relied on under federal common law. Thus, NPS could argue that Odyssey's type of interference will be new to the region, Od-

⁴³³ Reinhold, *supra* note 55, at 9.

⁴³⁴ *Id.*

⁴³⁵ *See Luce*, 141 F. at 417.

⁴³⁶ *See id.*

⁴³⁷ *See Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 620 (1907).

⁴³⁸ *See id.* (defendants' air pollution would remain unreasonable if new technology failed to prevent damage to Georgia land).

⁴³⁹ *See id.* at 619–20. Implicit in the *Tennessee Copper* Court's reasoning was the fact that the harm to crops caused by pollution from Tennessee industries outweighed any benefit the defendant company created. *See id.* Although the Court dismissed the notion of balancing equities to determine appropriate relief, it appeared to weigh the potential harm an injunction would have on a region dependent upon the defendant industry. *See id.*

⁴⁴⁰ *See City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 189 U.S. 334, 338–40 (1933). Courts look ahead to the type of relief they would order when determining whether the defendant's interference is unreasonable. *See id.* at 339–40. Thus, the *W.S. Dickey Clay* Court found a nuisance in part because the Court would not have to shut down the defendant's sewage operations, but instead could compensate the plaintiff with damages. *See id.* Perhaps, the *W.S. Dickey Clay* Court would not have found a nuisance had the only possible remedy been an order to shut down the sewage system. In a lawsuit against Odyssey, the court could safely find Odyssey liable for public nuisance without having to enjoin Odyssey from building the Theater. The court could simply bar Odyssey from building at its current site.

yssey failed to choose a less harmful location, and the Theater's harm will outweigh its benefits.⁴⁴¹

NPS could refer to *Wade v. Fuller*.⁴⁴² Like the defendants in *Wade*, whose cafe disturbed a formerly peaceful neighborhood, Odyssey will generate a new type of interference with its neighbors.⁴⁴³ Although visitors to Watchman presently arrive in cars and make noise, the Theater will cause an unforeseen increase in the noise and commotion that normally exists at the campground among campers.⁴⁴⁴

In addition, NPS could emphasize that the interference will be unreasonable because of Odyssey's refusal to build on nearby property that would pose less of a threat to Zion.⁴⁴⁵ Thus, as in *Shaw*, where the defendant could have operated an asphalt plant in a less residential area, a Utah court could find that the Theater's interference will be unreasonable because Odyssey could choose a location where it could operate successfully without harming the quality of Zion's environment.⁴⁴⁶ Although Odyssey has agreed to scale down its original plans for a larger development, the current plan will still substantially interfere with Zion. Thus, by not changing locations, Odyssey would compel a court to find the interference unreasonable.⁴⁴⁷

3. Injunctive Relief

Whether NPS were to bring a public nuisance action under federal common law or Utah law, NPS would probably win an injunction

⁴⁴¹ See *supra* notes 303–26 and accompanying text.

⁴⁴² 365 P.2d 802 (Utah 1961).

⁴⁴³ See *id.* at 804–05; see also *Johnson v. Mount Ogden Enter., Inc.*, 460 P.2d 333, 334–35 (Utah 1969) (defendant constructed drive-in movie screen adjacent to plaintiff residents).

⁴⁴⁴ See *Wade v. Fuller*, 365 P.2d 802, 804–05 (Utah 1961); *Hatch v. W.S. Hatch Co.*, 283 P.2d 217, 218–19 (Utah 1955); *Coon v. Utah Constr. Co.*, 228 P.2d 997, 997–98 (Utah 1951). Unlike *Coon*, where the defendant's conduct was not unreasonable because the defendant's trucks, operating on a nearby road, did not noticeably increase the level of noise entering the plaintiff's home, the Theater would cause an increased level of noise and commotion, and partially occupy a formerly unobstructed view. See *Coon*, 228 P.2d at 997–98.

⁴⁴⁵ See *Hatch*, 283 P.2d at 220–21; *Shaw v. Salt Lake County*, 224 P.2d 1037, 1042 (Utah 1950); *supra* notes 313–19 and accompanying text.

⁴⁴⁶ See *Shaw*, 224 P.2d at 1042.

⁴⁴⁷ See *supra* notes 313–19 and accompanying text. Odyssey's conduct is distinguishable from that of the defendant tar transportation business in *Hatch*. See *Hatch*, 283 P.2d at 220–21. In *Hatch*, the Supreme Court of Utah found the business' conduct reasonable in part because the defendant took measures to create less noise. See *id.* at 221. The defendant, however, was an established small business and was therefore probably less able to change locations. See *id.* at 218–21. Moreover, by repairing roads, the defendant in *Hatch* was serving a vital public interest. See *id.*

ordering Odyssey to build the Theater on an alternative site. The court, after finding that the proposed Theater will inevitably create a public nuisance,⁴⁴⁸ would order Odyssey to change locations because the benefits of preventing the Theater's harm to Zion outweigh the harms that such an injunction would inflict on Odyssey and those who would gain from the Theater's construction.⁴⁴⁹ The benefits of the injunction outweigh its harms because Odyssey could develop the Theater in a different location without suffering losses from having already begun construction at the current site.⁴⁵⁰ Thus, the court could protect Zion without having to take the severe measure of shutting down an existing business, or totally preventing Odyssey from operating its planned business. Odyssey could still earn profits, create jobs, and offer its film to interested patrons.

The court would probably expect Odyssey to have attempted to mitigate potential harm to Zion by picking a less intrusive site.⁴⁵¹ Like the court in *Shaw*, which was troubled by the defendant's choice of a residential neighborhood as a site for a planned asphalt plant, the court would feel justified ordering Odyssey to take available action to lessen interference with Zion.⁴⁵²

VII. CONCLUSION

NPS must act aggressively to protect national parks from threatening development projects immediately outside of park boundaries.⁴⁵³ Construction of hotels, retail complexes, and amusement centers continues at a rapid pace, contributing to the destruction of the natural environment of park boundary areas.⁴⁵⁴ NPS should overcome its hesitancy to bring public nuisance actions on behalf of national parks and park visitors.

⁴⁴⁸ See *Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 673 (Utah 1943) (court held it could grant injunction as long as it reasonably believed nuisance would be created); 58 AM. JUR. 2D *Nuisances* § 351 (1989).

⁴⁴⁹ See, e.g., *United States v. County Bd. of Arlington County*, 487 F. Supp. 137, 141 (E.D. Va. 1979); *Wade v. Fuller*, 365 P.2d 802, 803-05 (Utah 1961); *Shaw v. Salt Lake County*, 224 P.2d 1037, 1041-42 (Utah 1950); *supra* notes 220, 334 and accompanying text.

⁴⁵⁰ Although construction workers have broken ground, they will not begin construction of the Theater until springtime, 1993. Wiese Interview III, *supra* note 72.

⁴⁵¹ See *Shaw*, 224 P.2d at 1041-42.

⁴⁵² See *id.* at 1041-42; see also *Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 619-20 (1907) (although Court did not explicitly balance equities to determine appropriate relief, its reasoning implied that it felt justified ordering defendant to take available measures to reduce airborne pollutants).

⁴⁵³ See EVERHART, *supra* note 1, at 80; RACE, *supra* note 1, at 7.

⁴⁵⁴ See RACE, *supra* note 1, at 7-12.

The federal government has the power to bring public nuisance actions to protect national parks under either federal common law or state law.⁴⁵⁵ Public nuisance provides NPS with an important legal tool. Courts consider public nuisance an appropriate avenue through which the government can seek injunctions on behalf of members of the public whose rights are endangered by a nuisance. Where a development impedes citizens' ability to enjoy a natural and peaceful park environment, NPS should seek an injunction on behalf of present and future park visitors. By taking advantage of the public nuisance option, NPS can fulfill its responsibility to the public.⁴⁵⁶

Zion National Park's Theater problem demonstrates the potential utility of public nuisance actions. NPS could protect Zion and its visitors by bringing a public nuisance action to prevent Odyssey's construction of a giant theater complex next to Zion's Watchman Campground. Under either federal common law or Utah law, a court is likely to agree with NPS that Odyssey, by choosing a site immediately next to a popular park entrance and campground, will substantially and unreasonably interfere with Zion's visitors.⁴⁵⁷ Public nuisance law, balancing the interests of opposing litigants and community members, would enable a court to order Odyssey to pick a less intrusive site where Odyssey's development could still succeed.⁴⁵⁸ NPS, by using public nuisance law, could successfully address one of the troubled national park system's most invidious problems: developments that threaten boundary areas at Zion and numerous other parks.

⁴⁵⁵ See *supra* notes 123-41 and accompanying text.

⁴⁵⁶ See 16 U.S.C. § 1 (1988).

⁴⁵⁷ See *supra* notes 393-447 and accompanying text.

⁴⁵⁸ See *supra* notes 448-52 and accompanying text.