FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
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Stephan Harris, Clerk
Cheyenne

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF WYOMING**

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| STATE OF WYOMING,<br><br>Petitioner,<br><br>and<br><br>BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK,<br><br>Petitioner,<br><br>and<br><br>THE INTERNATIONAL SNOWMOBILE MANUFACTURER'S ASSOCIATION, INC. et al.,<br><br>Petitioner - Intervenors<br><br>vs.<br><br>UNITED STATES DEPARTMENT OF THE INTERIOR et al.,<br><br>Respondents. | Consolidated Cases:<br><br>Case No. 07-CV-0319-B<br>Case No. 08-CV-0004-B |

**ORDER IMPLEMENTING TEMPORARY REMEDY AND GRANTING MOTION TO INTERVENE**

This matter came before the Court at a hearing on September 15, 2008 and upon the National Parks Conservation Association's

(NPCA) Motion to Intervene [doc. # 77]. At the hearing, Jay A. Jerde represented the Petitioner, State of Wyoming, James F. Davis represented Petitioner, Park County, William P. Horn represented the Petitioner-Intervenors, International Snowmobile Manufacturers Association, Inc., American Council of Snowmobile Associations, Blue Ribbon Coalition, Inc., and Terri Manning, individually (collectively "ISMA"), and Barry A. Weiner represented the United States Department of the Interior, the National Park Service, Secretary of the Interior, Dirk Kempthorne, the National Park Service Director, Mary Bomar, and the National Park Service Intermountain Region Director, Michael Snyder (collectively "Federal Respondents"). Additionally, the NPCA filed its Motion to Intervene on October 3, 2008. This was followed by briefing from all parties currently involved in this litigation. This Court having carefully considered the administrative record, the submitted briefs, the arguments of the parties at the hearing, the motions submitted by the NPCA and the responses thereto, and being fully advised in the premises, **FINDS** and **ORDERS** the following:

## I. BACKGROUND

In June 2005, the National Park Service (NPS) began the process for promulgating rules and regulations concerning winter

activities, including snowmobiling, in our National Parks. Specifically at issue in the present action is the National Park Service's promulgation of winter use rules affecting Yellowstone National Park, Grand Teton National Park and the John D. Rockefeller Memorial Highway (collectively "the parks"). On September 24, 2007, the National Park Service released its final environmental impact statement (EIS) on the issue. The record of decision (ROD) was signed on November 20, 2007 and the final rule was published in the Federal Register on December 13, 2007. See 72 Fed. Reg. 70,781-70,804 (Dec. 13, 2007).

Upon publication of the final rule, the State of Wyoming filed this action. The State asked this Court to review the final agency action taken by the Federal Respondents in promulgating the final rule governing winter use activities in the parks. Specifically, the State of Wyoming alleges that the Federal Respondents violated (1) the Administrative Procedure Act (APA), (2) the National Environmental Policy Act (NEPA), (3) the National Park Service Organic Act, (4) the Yellowstone National Park Act, and (5) the United States Constitution in developing the final EIS and ROD, and in promulgating the final rule.

On January 8, 2008, Park County Board of County

Commissioners (Park County), similarly filed a petition for review in this Court, concerning the final agency action regarding winter use regulation in the parks. This Court consolidated the State's petition with Park County's petition, by order, dated February 19, 2008. Additionally, on February 22, 2008, ISMA filed a motion to intervene in the present case. The Court granted ISMA's motion the same day.

Litigation concerning winter use activity in the parks, however, has not been limited to this Court. Two other lawsuits have been filed in the United States District Court for the District of Columbia. On November 20, 2007, the Greater Yellowstone Coalition, the Wilderness Society, the Natural Resources Defense Council, the Winter Wildlands Alliance, and the Sierra Club (collectively "GYC") filed a complaint in the D.C. District Court (Case No. 07-CV-2111-EGS). GYC's complaint challenged the final EIS and ROD. On January 11, 2008, GYC filed an amended complaint also challenging the final rule. Similarly, on November 21, 2007, the National Parks Conservation Association filed a complaint in the D.C. District Court (Case No. 07-CV-2112-EGS), challenging the final EIS and ROD. The NPCA also filed an amended complaint on December 18, 2008, including the

final rule in its challenge. The D.C. District Court consolidated these cases by order on March 19, 2008.

On March 25, 2008, the Federal Respondents filed, in the D.C. District Court, a motion to transfer the consolidated cases to the District of Wyoming. Also on March 25, 2008, the Federal Respondents filed a contingent motion to transfer the present case, to the D.C. District Court. On April 24, 2008, D.C. District Judge Emmet G. Sullivan issued a memorandum opinion and order denying Federal Respondents' motion to transfer. Following the D.C. District Court's denial, on May 14, 2008, this Court similarly denied Federal Respondents' contingent motion to transfer the present consolidated cases to the D.C. District Court.

This Court held a hearing on Petitioners' challenge to the final rule developed by Federal Respondents on September 15, 2008. It was at this hearing that the Court was presented with a memorandum opinion and order entered by Judge Emmet G. Sullivan of the D.C. District Court vacating and remanding the final rule promulgated by the Federal Respondents. At the close of this hearing, the Court asked the parties to brief the issue of a remedy that could be carried out while the Federal Respondents

promulgate a new rule pursuant to the D.C. District Court's ruling. The parties have done so.

Additionally, this Court is faced with the issue of the NPCA's Motion to Intervene. The NPCA moves to intervene in this case for the "limited purpose of arguing that these proceedings are moot, and that the Court should dismiss for lack of subject matter jurisdiction." (NPCA Mot. to Intervene 2-3.) The State of Wyoming, Park County, and ISMA all filed responses opposing NPCA's intervention. (Pet'r State of Wyo.'s Resp. to Applicant-Intervenor National Parks Conservation Association's Mot. to Intervene; Pet'r Intervenors' (Snowmobilers') Opposition to NPCA's Mot. to Intervene; Pet'r Park County Commissioners' Resp. to National Parks Conservation Association's Mot. to Intervene.) The Federal Respondents filed a response in favor of allowing the NPCA to intervene for the limited purpose of being heard on the remedy issues, but opposing the NPCA's intervention for any other purpose. (Federal Resp'ts' Resp. to the National Parks Conservation Association's Mot. to Intervene.) It is with this background that the Court turns to the current issues.

## II. DISCUSSION

### A. The National Park Service's Final Rule

Initially, this Court finds it unfortunate that a United States District Court sitting over 2,000 miles away from the actual subject of this litigation feels compelled to hand down a ruling affecting land that lies in this Court's backyard. As the United States Supreme Court has stated, "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947), *superseded by statute on other grounds*.

Additionally, the principle of comity would seem to demand that the D.C. District Court transfer cases relating to snowmobiles in the parks to this Court. It is well-established, under the principles of comity that "the first federal district court which obtains jurisdiction of parties and issues should have priority and the second court should decline consideration of the action until the proceedings before the first court are terminated." Cessna Aircraft Co. v. Brown, 348 F.2d 689, 692

(10th Cir. 1965). As pointed out in this Court's Order Denying Federal Respondents' Contingent Motion to Transfer [doc.e# 51], this Court has asserted and maintained continuous jurisdiction over these issues. In Wyoming Lodging and Restaurant Ass'n v. United States Deparment of the Interior this Court stated, "HOWEVER, IT IS FURTHER ORDERED that this Court will retain jurisdiction over this matter during the pendency of the long-term environmental study to ensure that the NPS meets the requirements of NEPA and the APA during such process." 389 F. Supp. 2d 1197, 1222 (D. Wyo. 2005).

The D.C. District Court claims that under the first-to-file rule, it was the first Court to obtain jurisdiction over these issues.[1] The D.C. District Court fails to consider that this Court has continued to retain jurisdiction over these issues beginning in 2005. Based on this retention of jurisdiction, GYC and NPCA should have filed their challenges to the final rule in this Court. Failing that, the D.C. District Court should have declined to hear the cases, and transferred them to this District. To this Court's great dismay, neither of these

[1] GYC filed its Petition for Review on November 20, 2006. The State of Wyoming filed its Petition for Review on December 13, 2007.

contingencies occurred, thereby resulting in this Court being prevented from deciding issues that greatly affect the great state in which it sits.

Notwithstanding the principle of comity, this Court is of the opinion that justice required the D.C. District Court to transfer the cases pending in its Court, to this District. See Cent. Union Trust Co. v. North Butte Mining Co., 26 F.2d 675, 675 (D. Mon. 1928) (stating "comity . . . should not defeat justice"). The rule promulgated by the NPS is of the utmost importance to the people of Wyoming. Not only do Wyoming residents have the privilege of having these awesome and wonderous parks in their state[2], many also have an economic interest in snowmobile use in the parks. The livelihood of many residents depends upon the rules promulgated and effected by the NPS. Justice would seem to require, therefore, that a Court sitting in the same state that these parks are located be given the opportunity to decide a case of this magnitude.

This Court, however, was not given that opportunity, and Federal Respondents now urge this Court to uphold the final rule despite the ruling in the D.C. District Court. Based on the

[2] Over 90% of Yellowstone National Park lies in the State of Wyoming.

administrative record provided, this Court would be inclined to grant this request. The Court believes that the NPS thoroughly reviewed and investigated the effects of the final rule on the environment of the parks. The final rule promulgated by the NPS reflects this thorough review and investigation. Furthermore, the NPS has been designated as an expert in this area, and should be given wide discretion when discharging its duties. See 5 U.S.C. 706(2)(A) (West 2008) (stating that a court can set aside agency action only if it is "arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with the law" (emphasis added)). Based upon these considerations, this Court believes that the final rule should have been upheld. This Court found no evidence in the record in which it could have held that the final rule was arbitrary and capricious or contrary to law.

Although this Court would have upheld the final rule promulgated by the NPS, it did not have the opportunity to do so. The D.C. District Court determined that the final rule was "arbitrary and capricious, unsupported by the record, and contrary to law" prior to the completion of a hearing on the same held in this Court. Greater Yellowstone Coal. v. Kempthorne, No. 07-2111, 07-2112, 2008 WL 4191133, at *24 (D.D.C. September 15,

2008). Although urged to do so by the Federal Respondents, this Court refuses to make a finding contrary to that of the D.C. District Court. A contrary finding would provide no immediate relief to the Federal Respondents. The D.C. District Court has ordered that the final rule be vacated and remanded back to the agency. This Court has "no power or authority to amend, modify, or revoke an order of another United States District Judge." In re Pusser, 123 F. Supp. 164, 167 (E.D.S.C. 1954). Therefore, even if the final rule were upheld here, the D.C. District Court order would still require that the rule be vacated and remanded. As a result, although this Court may disagree with the D.C. District Court, it refuses to disturb the order that has already been laid down by that Court.

Not only would a contrary ruling provide no relief to the Federal Respondents, but the Court is convinced that the D.C. District Court's decision should be afforded respect from other courts of concurrent jurisdiction. "This Court is mindful of the practice in Federal Courts that a Judge should not reconsider matters of record that have been ruled upon by a Judge of coordinate jurisdiction in the same case. The wisdom and soundness of this rule cannot be questioned." Van Laeken v.

Wixon, 84 F. Supp. 958, 963 (N.D. Cal. 1949). Additionally, this Court recognizes that it would be "highly indiscreet and injudicious for one judge of equal rank and power to review identical matters passed on by his colleague." 36A C.J.S. Federal Courts § 859 (West 2008). Although the cases decided in the D.C. District Court and the cases heard here in Wyoming are not identical[3], the defendants, subject matter and challenges are identical. This is enough for this Court to determine that comity and respect require that the ruling of the D.C. District Court remain undisturbed here.

B. Remedy

This Court now faces the issue of the remedy that should be implemented while the NPS promulgates a new rule in compliance with the D.C. District Court's order.

All parties to this action agree that when an agency's rule has been invalidated, the rule previously in place is reinstated. This principle is also supported by numerous cases from various circuits. See Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); Cumberland Med. Ctr. v. Davis, 781 F.2d 536, 538 (6th Cir. 1986); Abington Mem'l Hosp. v. Heckler, 750 F.2d 242, 244 (3d

[3] The only difference between these cases are the Petitioners involved in each case.

Cir. 1985); Menorah Med. Ctr. v. Heckler, 768 F.2d 292, 297 (8th Cir. 1985); Action on Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 797 (D.C. Cir. 1983); Oceana, Inc. v. Evans, 389 F. Supp. 2d 4, 7 (D.D.C. 2005).

Although the parties agree that the previous rule is automatically reinstated upon the invalidation of an agency's current rule, the Federal Respondents claim that the reinstatement of the 2004 temporary rule would have no effect in this case. The 2004 temporary rule states that the authorization to use snowmobiles and snow coaches in the parks shall remain in effect only through the 2006-2007 winter season. See 36 C.F.R. 7.13(l)(3)(ii) and 7.13(l)(7)(I); 69 Fed. Reg. 65348, 65360-61 (November 10, 2004). The Federal Respondents argue that this sunset provision terminates any authorization to operate snowmobiles and snow coaches in the parks after the 2006-2007 winter season. (Federal Resp'ts' Supplemental Mem. on Remedy 11-12.) Because snowmobile use in any National Park requires affirmative authorization, and because that authorization was terminated following the 2006-2007 winter season in accordance with the 2004 temporary rule, reinstatement of that rule would have no effect according to the Federal Respondents.

The Court concedes that the 2004 temporary rule contains a sunset provision. Nevertheless, this Court has recently recognized that it has "full authority to grant any equitable remedy it deems proper and necessary without violating the principles of comity." Wyoming v. U.S. Dep't of Agriculture, No. 07-CV-07-B, 2008 WL 3397503, at *34 (D. Wyo. Aug. 12, 2008); see also Small Refiner Lead Phase-Down Task Force v. U.S. Envtl. Prot. Agency, 705 F.2d 506, 545 n. 108 (D.C. Cir. 1983) (stating, "[a] court can, of course, give the agency specific guidance"). At this juncture, the Court finds it unlikely that the NPS will have the ability to promulgate and put into effect a rule for this winter season in a timely manner. The Court finds it appropriate to reinstate the 2004 temporary rule without the sunset provision. This will provide businesses and tourists with the certainty that is needed in this confusing litigation.

Furthermore, there is support in case law for the reinstatement of the 2004 temporary rule despite the existence of a sunset provision. See Paulsen, 413 F.3d 999; Cumberland Med. Ctr., 781 F.2d 536; Abington Mem'l Hosp., 750 F.2d 242; Menorah Med. Ctr., 768 F.2d 292; Action on Smoking & Health, 713 F.2d 797; Oceana, Inc., 389 F. Supp. 2d 4. In all instances where a

court has invalidated an existing rule promulgated by an agency and reinstated a prior rule, that prior rule is no longer effective at that time. The agency has effectively rescinded or revoked the prior rule with the new rule. Therefore, in those cases, as is the case here, the prior rule was ineffective until the court reinstated it. The broad power granted to courts to fashion an equitable remedy when necessary gives district courts the power to reinstate a rule that has previously been deemed ineffective. See Cumberland Med. Ctr., 781 F.2d at 539 (stating "Our review of the rescission of an existing rule requires the same analysis that must be employed to review the promulgation of a new rule."); see also Menorah Med. Ctr., 768 F.2d at 297 (stating "prior regulations remain valid until replaced by a valid regulation or invalidated by a court"). Based on the case law, and this Court's equitable power, the Court finds that equity requires reinstatement of the 2004 temporary rule to provide some semblance of order in this disordered and confusing state of affairs.

C. Intervention

Finally, this Court addresses the NPCA's Motion to Intervene in the current case. Having reviewed the motion and the

responses thereto, this Court finds that the NPCA's motion should be **GRANTED**.

The NPCA argues that it is entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a). Alternatively, the NPCA claims that this Court should grant it permissive intervention under Rule 24(b).

Federal Rule of Civil Procedure 24(a) provides:

> On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

The United States Court of Appeals for the Tenth Circuit requires an intervenor to meet four requirements prior to allowing a party, not named in the original action, to intervene. See Coal. of Arizona/New Mexico Counties for Stable Econ. Growth v. Babbitt, 100 F.3d 837, 840 (10th Cir. 1996). A party may intervene as of right if: "(1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the

applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by exiting parties." Id. (citations omitted). In applying these factors, the Court finds that the NPCA meets the requirements for intervention as of right.

Initially, the Court must decide whether the NPCA's Motion to Intervene is timely. In determining the timeliness of a motion to intervene the Court should consider the "length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001)e

Petitioners and Intervenors argue that they will be prejudiced if this Court allows the NPCA to intervene. Petitioners/Intervenors claim that the NPCA will move to dismiss the case, the motion will then have to be briefed by opposing parties, followed by a hearing in front of this Court. According to Petitioners/Intervenors this would, in effect, delay this Court's ability to fashion a remedy to promote certainty for the 2008-2009 winter season. As this Court has already fashioned a remedy to be followed by the NPS until it can promulgate a valid

rule, Petitioners'/Intervernors' concern has no merit.

Additionally, Petitioners/Intervenors claim that the NPCA was aware of its interest in this case months ago, and chose not to intervene in a timely manner. Petitioners/Intervenors accuse the NPCA of forum shopping, essentially choosing a federal district court sympathetic to its cause. The Court believes that this may be true. However, "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." Id. As this Court has already stated, the parties will not be prejudiced by the NPCA's intervention as it has already fashioned a temporary remedy. Additionally, this Court will not punish the NPCA by denying its motion to intervene. The Court does, however, admonish the NPCA to refrain from future forum shopping, and to assert its intervention in a case early so as to avoid prejudicing other parties in the future.

The second factor this Court must consider is whether the NPCA has claimed a sufficient interest in the land that is the subject of this litigation. The Court believes that it has done so. The Tenth Circuit requires that the interest asserted be

"direct, substantial, and legally protectable." Coal. of Arizona, 100 F.3d at 840. The NPCA has been directly involved in the litigation of this matter in front of the D.C. District Court for many months now. It has also expended a substantial amount of time, money, and resources in an attempt to have the final rule invalidated. Finally, the NPCA's interest is clearly legally protectable as it has already been protected by a ruling of the D.C. District Court. Based on the foregoing, this Court finds that the NPCA has a sufficient interest in the conservation of the parks for intervention as of right.

Next, the Court must look to whether the NPCA's right could be impaired or impeded if it is not permitted to intervene in this matter. The Court finds that the NPCA's right could be impaired if it were not permitted to intervene. This Court has become a fixture in this litigious matter. This order places a temporary remedy in effect for the time being. Without the opportunity to intervene in this case, the NPCA's rights and interests in conservation would be impaired without ever being able to voice its arguments.

Finally, the Court must look to whether the NPCA's interests are adequately represented by other parties. The

Petitioners/Intervenors claim that the NPCA's interests are protected by the Federal Respondents. This contention, however, is incorrect. Federal Respondents are seeking to have the rule promulgated by the NPS upheld by this Court. Conversely, the NPCA initially sought to have the rule invalidated and remanded back to the agency. It now seeks to have this Court dismiss the current action for lack of subject matter jurisdiction. Furthermore, the Tenth Circuit has expressed that the government is often inadequate to represent the interests of private parties. Nat'l Farm Lines v. Interstate Commerce Comm'n, 564 F.2d 381, 384 (10th Cir. 1977) (stating "We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.").

The NPCA's interests are also clearly not adequately represented by either Petitioners or Intervenors. Although all wish to have the final rule invalidated, they are clearly on opposite sides of the spectrum. The NPCA wishes to reduce the number of snowmobiles and snow coaches in the parks while Petitioners/Intervenors wish to increase that number. Neither

Petitioners nor Intervenors can adequately expect to represent a viewpoint diametrically opposed to their own. For these reasons, this Court finds that the NPCA is entitled to intervene as of right.

**III. CONCLUSION**

Based upon the foregoing, and for the reasons previously stated therein,

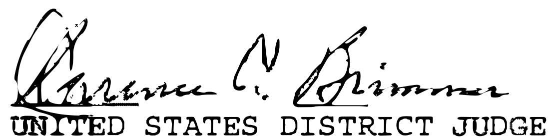
**IT IS HEREBY ORDERED** that the D.C. District Court's invalidation of the final rule shall remain undisturbed by this Court.

**IT IS FURTHER ORDERED** that the NPS shall reinstate the 2004 temporary rule until such time as it can promulgate an acceptable rule to take its place.

**IT IS FURTHER ORDERED** that the NPCA's Motion to Intervene is **GRANTED.**

**IT IS SO ORDERED.**

Dated this 7th day of November, 2008.



UNITED STATES DISTRICT JUDGE