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RHETORICAL TRACTION: DEFINITIONS AND INSTITUTIONAL ARGUMENTS IN JUDICIAL OPINIONS ABOUT WILDERNESS ACCESS

Steve Schwarze*

Almost every spring for the past eight years, I made a phone call to Maryland in order to get into Minnesota. An office in Maryland houses the reservation system for the Boundary Waters Canoe Area Wilderness, a one-million acre preserve in the northeastern tip of Minnesota that is the most visited unit of the National Wilderness Preservation System. This office acts as a medium of and barrier to my access to the Wilderness; it issues permits to groups of people wishing to enter the Boundary Waters, and it limits the number of parties that may enter at a given point on a particular day. Although the Wilderness is public land, I must first gain permission from a state institution to enter the Boundary Waters.

That permit is only one of the keys needed to unlock the door to the Boundary Waters. I also must pass through a ranger station on the day I enter to confirm my permit and ensure that I view a short video

about the wilderness ethic of "Leave No Trace." Going into the wilderness does not mean merely entering a supposedly untainted, uninhabited area; it requires that people interact with the environment in ways that the Forest Service has deemed appropriate. Indeed, my yearly trips to the Boundary Waters involve more than just packing up my gear and heading north; more than catching fish and making campfires; more than escaping the sights and sounds of the city and relaxing in solitude. These trips require me to play by the rules set by the state. The rules and regulations, the permits and videos, all affect my sheer physical presence in the wilderness. Passing through the wilderness means passing through the state.

Wilderness, as it has come to be articulated in the United States, is neither an inherent quality of the natural world, nor a state of mind. Nor is it the cultural commonsense about wilderness, the dominant mode of speaking and writing about wilderness. For better or worse, wilderness is a construction of state institutions. Although environmentalists, philosophers and ethicists have written prolifically about the meaning of wil-

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dermess and its contradictions,¹ scholars have given far less attention to the question of how these meanings and contradictions get resolved by governing institutions for the practical purpose of managing wilderness areas.² This essay addresses that question by examining arguments produced by governing institutions that have a direct impact on the management and human experience of established wilderness areas. I take as my case studies the controversies concerning wilderness management in two areas: the Boundary Waters Canoe Area Wilderness in Minnesota and the wilderness portion of Denali National Park in Alaska.

Specifically, I focus my attention on judicial opinions that address the issue of motorized access to the Boundary Waters and Denali. I examine judicial opinions because they are texts by which state institutions provide temporary resolutions of ongoing public controversies. Especially in the last decade, individuals and interest groups have engaged in several controversies in order to influence public policy regarding the use of trucks, off-road vehicles and snowmobiles as modes of access and recreation on federal lands, including wilderness areas.

Advocates of motorized use have exploited ambiguity in wilderness legislation and management plans to gain rhetorical traction for arguments about motorized use in certain areas of designated wilderness. These arguments often get lodged in the

courts, where ambiguities in policy get resolved by judicial opinions.

This essay demonstrates that judicial opinions rely on two related types of argument to resolve ambiguities in wilderness policy: definitional arguments and institutional arguments. Judicial opinions surrounding motorized use employ definitional arguments in order to clarify ambiguous policy prescriptions regarding wilderness management. However, these definitional arguments often get resolved through arguments about institutional authority. Decisions about which definition shall be accepted get supported by arguments about the specific governing institution that has authority to establish that definition. In fact, ongoing philosophical debates about the meaning of wilderness fade into the background as courts attempt to fix definitional authority within a particular institution. Within the courts, then, institutional arguments have primacy over definitional arguments. Institutional arguments provide justification for the court's resolution or deferral of definitional arguments.

Identifying these two types of argument and the relationship between them is useful for elaborating theories of rhetoric and argumentation and for assessing rhetorical strategies in current motorized use controversies. In terms of rhetorical theory, this essay contributes to ongoing discussions about the characteristics and functions of definitions in processes of argumentation.³ It does so by specifying institutional arguments as a significant influence on definitions that get fixed as part of the policy process. Recent essays have identified other influences on definitions, such as political and economic interests (Schiappa 1996), racist beliefs (McGee), and the ideology of normalcy (Titsworth).

¹ A good starting point for understanding the philosophical debates about the idea of wilderness is the collection of essays edited by J. Baird Callicott and Michael P. Nelson. Much of the work in this collection is indebted to Roderick Nash's intellectual history of the idea of wilderness in the United States.

² Both Michael McCloskey and Mark Woods analyze the definition of wilderness in the 1964 Wilderness Act. Daniel Rohlf and Douglas L. Honnold interpret the legal framework of wilderness management, assessing how the definition of wilderness has been put to use in the management of wilderness areas and the adjudication of lawsuits brought against the Forest Service. The present essay extends the work of Rohlf and Honnold by examining by analyzing legal arguments about a recent issue in wilderness management: motorized access.

³ As a set of case studies, this essay takes up the call of both Douglas Walton and David Zarefsky. They suggest that scholars studying the use of definitions in public arguments engage in case studies, in order to "show how definitions are actually used in different contexts as argumentative moves." (Walton 132).

Scholars also have identified a variety of influences on the definitions of wilderness and related terms in public policy (Callicott and Nelson; Nash; Oelschlager). While both the argumentation literature and the wilderness literature successfully discern forces that motivate particular definitions, the cases discussed in this essay point to another influence—arguments about institutional authority—that has little to do with the definitions themselves. That is, regardless of the beliefs and assumptions that might have contributed to definitions of “wilderness” or notions of what counts as an appropriate means of “access” to wilderness areas, the definitions that get fixed by judicial opinions are ultimately justified by the courts through the use of arguments regarding institutional authority. Thus, it is important for argumentation scholars to consider institutional arguments as yet another important influence on the resolution of definitional issues in policy arguments.

Second, this essay contributes to scholarship that explores institutional argument, especially in the realm of environmental issues (Doxtader; Peterson). It does so by showing how arguments about institutional authority function to negotiate the legitimacy of governing institutions. As Erik Doxtader has claimed in his work on institutional argument, “Discussions of particular policy choices often affirm the general authority of institutional practices of reasoning and codify norms of public interest” (185). In the cases I examine, policy prescriptions about motorized access ultimately turn on arguments about institutional authority. By explaining and clarifying the relationship between institutional and definitional arguments, I intend to show how institutional arguments operate as a specific form of argument that not only shapes the concrete execution of public policy but also contributes in complex ways to the legitimation of state power.

To the extent that these arguments contribute to the legitimation of state power,

they also play an important role in the processes of hegemony that have drawn the attention of several theorists and critics in communication studies. This points to a third theoretical contribution of the essay; it suggests that studies of hegemony could benefit by accounting for the specific role that state rhetorics play in the process of consent formation. While many studies of hegemony have examined civil society rhetorics in order to challenge the notion of a monolithic, univocal “dominant ideology,” this turn toward civil society has often neglected how state institutions contribute the hegemonic process. The motorized access cases show how institutional arguments intended to clarify the authority of state institutions can simultaneously erode the legitimacy of those institutions. If the analysis of hegemony is concerned with the process of negotiating consent to the established order, then it is imperative to analyze the rhetorics by which the established order contributes to consent and dissent.

On a more practical level, my analysis can help critics and advocates assess arguments about motorized use on other public lands. Arguments about access in the Boundary Waters and Denali have re-emerged in other management controversies. The Interior Department’s proposed ban on snowmobiles in national parks is an especially salient example of how arguments get taken up in new controversies. An *Anchorage Daily News* article about a 1999 lawsuit over snowmobile regulations in Denali encapsulates this argumentative move: “Both sides say the case could carry weight far beyond the borders of Denali. The debate has come to symbolize a much broader struggle over snowmachining in Alaska and in national parks across the country” (Komarnitsky). Public arguments by advocates for motorized use provide clear evidence for such an assertion. Advocates have continued to pursue arguments about access during the process of developing the Winter Use Plan in Yellowstone and Grand

Teton National Parks, proposed off road vehicle bans on other federal lands, and the Bureau of Land Management's proposed National Off-Highway Vehicle Strategy. In the conclusion of the essay, I briefly discuss how my analysis provides a useful point of departure for interpreting and intervening in other management controversies.

The essay is divided into three major sections. In the first two sections, I analyze the judicial opinions in the Boundary Waters and Denali controversies. I introduce each of these sections by contextualizing the controversies in relation to the ambiguous terms of federal wilderness policy. In the analysis, I explain how the ambiguity of key terms such as "wilderness," "feasible" means of "access," and "traditional activities" allow advocates to gain rhetorical traction for their positions; but ultimately, the courts resolve these ambiguities through arguments about institutional authority. In the third section, I expand on the theoretical and practical implications suggested above.

DEFINING "FEASIBLE": THE CASE OF THE BOUNDARY WATERS

The issue of motorized portages has been at the heart of the ongoing management controversies in the Boundary Waters Canoe Area Wilderness. Travel from one lake to another in the Boundary Waters often involves portaging canoes and equipment around rapids and other impasses. Although most portages force travelers to carry their gear across footpaths from one body of water to the next, a few of the longer and more rugged portages have been developed as mechanical portages. Initially used for logging operations in the early part of the 20th century (Proescholdt 46-47), these mechanical portages have since been staffed by private truck operators who help travelers load gear, boats and canoes onto flatbed trucks and then transport the gear over portages to the next lake or river. These portages have long

been a point of dispute between wilderness preservation groups and local interest groups. Wilderness groups (in particular, the Friends of the Boundary Waters) have sought to eliminate the portages and argue persistently against exceptions and loopholes in the Wilderness Act of 1964 and the Boundary Waters Act of 1978 that allow forms of motorized travel in the Boundary Waters. Other local interest groups (such as Conservationists with Common Sense) have defended motorized modes of travel as historically accepted patterns of use on certain lakes and portages and have argued that these patterns have been codified in federal legislation.

The voices from these groups, however, must also contend with the voice of Congress and the Forest Service, the agency with management responsibility for the Boundary Waters. Although Congress mandated the elimination of nearly all mechanized forms of travel with the passage of the Wilderness Act and the Boundary Waters Act, a clause in the Boundary Waters Act kept three motorized portages open until January 1, 1984. The Act mandated closure of these portages unless the Forest Service found "no feasible nonmotorized means of transporting boats across the portages" (Boundary Waters Act, Section 4(f)).

The ambiguity of the term "feasible" in this clause provided rhetorical traction for advocates, sustaining the controversy well beyond the 1984 deadline and resulting in two judicial opinions in the early 1990s that I will analyze in this section of the essay. Initially, the Forest Service declared that on the basis of their field trials, there was no feasible alternative to motorized portages, thus keeping the three portages motorized. Wilderness preservation groups fought this decision (among others) through the administrative appeals process, but failed to achieve closure of those portages. Finally, in January 1990 wilderness groups brought action in federal district court to overturn the

Forest Service's decision. In 1991, the District Court upheld the Forest Service, but in 1992, the Appeals Court reversed that decision (*Friends of the Boundary Waters Wilderness v. Robertson*, 1991 and 1992). The Supreme Court refused to hear a subsequent appeal brought by local interest groups. In both the District Court decision and the Appeals Court reversal, the crux of the opinions was the judicial interpretation of the term "feasible."

The District Court Opinion

The plaintiffs in the District Court case, wilderness preservation groups, claimed that there is a "feasible" means of boat transportation: portage wheels. Based on their own tests as well as those performed by the Forest Service, preservationist groups claimed it is possible (therefore, in their view, "feasible") for travelers to use these wheels to assist human-powered transportation across portages. The preservationists sought judicial review of the agency's decision because, in their view, the decision to maintain the motorized portages violated the Boundary Waters Act, the Wilderness Act, and "the obligation delegated to [the Forest Service Chief] by Congress to manage the Boundary Waters with a presumption in favor of wilderness values" (*Friends v. Robertson*, 1991, 1388-1389).

The defendants, the United States Forest Service, argued that the Court should "defer to the administrative finding of nonfeasibility," since the Boundary Waters Act "leaves this decision to the Chief of the Forest Service" (1389). There are two significant elements to this argument, one definitional and the other institutional. First, the Forest Service claims that no nonmotorized means of transportation fits the definition of "feasible." As evidence, they offer results of their field studies that show how transporting boats physically generated significant health and safety risks. Given this evidence, the Forest

Service suggests that physically transporting equipment over portages does not fall under the definition of "feasible." Second, this definitional argument works hand in hand with an institutional argument about the appropriate authority for determining this definition. The Forest Service claims that Congress delegated decisions about "feasible" transportation to the agency; therefore, the Forest Service's decision should not be a matter for legal dispute. Thus, the argument of the Forest Service hinges both on a definition of "feasible" as well as a determination of which governing institution has the authority to define the term.

The first part of the court's opinion shows how these institutional and definitional questions are intertwined. To judge the competing definitional claims, the District Court turns to the Administrative Procedures Act (APA) and a series of precedent cases to provide the appropriate scope for their review. This results in the court articulating the doctrine of "substitute judgment," which limits the institutional authority of the court: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency" (1389). This limitation on the court's authority marks an important institutional influence on the definition of "feasible." The APA provides parameters for judicial review of agency decisions, and makes clear that while the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," it cannot replace the agency's decision with its own judgment.

However, the court does have the authority to interpret statutes; thus, the court's definitions of statutory terms and phrases have authority in the development of management policy. In this opinion, the court engages almost exclusively in definitional arguments to support their opinion. As the court

puts it, "This case ultimately turns on the meaning of 'feasible' as used in the BWCAW Act" (1390). To generate this definition, the court turns to a Supreme Court decision, *Citizens to Preserve Overton Park*, which examined the use of the word "feasible" in a case about building a highway through a city park. However, the court asserts that the *Overton Park* case is not a "direct analogue" to the Boundary Waters case, and so they do not simply use the definition of "feasible" from *Overton Park*. Rather, the court says that in *Overton Park* the Supreme Court considered the definition of "feasible" within the context of that particular park. So, the District Court proceeds by constructing the context of "wilderness" in order to define feasibility within the Boundary Waters.

This strategy of contextualization requires the court to make a definitional argument about the meaning of "wilderness." However, the court's interpretation of the statutory language regarding "wilderness" also allows the court to develop a questionable position regarding "access" as a fundamental purpose of wilderness management. Invoking the definition of wilderness used in the 1964 Wilderness Act, the court claims that the words of the act "ring hollow if this carefully protected wilderness is without human appreciators" (1390). With this assertion, the court sets up a logic of balancing that they believe underlies wilderness protection. The court says that the Boundary Waters Act "seeks to balance protections of wilderness with public access to that wilderness" (1391). In this logic, the desire for a protected wilderness must be balanced with the desire for an accessible wilderness that can be appreciated by human beings.

This balancing act is based on two questionable rhetorical moves. First, the court positions access and preservation as equally important policy objectives, even though the term "access" appears nowhere in the Wilderness Act. Through this positioning, the court creates an obligation (insuring access

for all) that is not stated in the statutory definition of wilderness. Framing wilderness management in terms of these allegedly equal objectives makes it easier for the court to refute arguments for limiting access. Second, the court tries to emphasize the importance of access by describing a hypothetical situation of a wilderness so strictly "preserved" that it would be "without human appreciators." This is a red herring; the situation is neither what the management plan proposes, nor what the Wilderness Act states. The plan does not prohibit access or prevent appreciation; it merely limits the *type of transportation* one may use in specific areas. Further, the Act explicitly requires wilderness areas to provide "outstanding opportunities for solitude or a primitive and unconfined type of recreation" (Section 2(c)). Overall, then, the District Court's opinion invokes a version of "wilderness" that presents wilderness management as the outcome of a precarious balancing act between preservation and access. While this balancing act may help the court argue against further regulation of access in the Boundary Waters, it poses a false dilemma that ignores the parts of the statute and the proposed management plan that give primacy to protecting the wilderness.

Nonetheless, after defining access as a fundamental goal of the Wilderness Act, the court proceeds to interpret the Boundary Waters Act in light of this goal. In effect, the court's opinion defines "feasible" in a way that favors access over preservation. To develop this definition, the court makes two arguments about how a ban on motorized access would subvert Congress's intent in including the term "feasible" in the Act. First, Congress obviously could not have intended "feasible" to function as producing a universal ban on motorized access, since the Boundary Waters Act contains language that does ban other motorized portages. Had Congress intended a universal ban, the court argues, they could have written that into the

law instead of providing a clause allowing for access alternatives. Second, the legislative history of the Boundary Waters Act also precludes a universal ban on motorized access. Since the Act clearly accommodated competing interests regarding wilderness, and since earlier versions of the bill argued for a complete ban on motorized access, the feasibility criterion could not have been intended to require complete elimination of the motorized portages. However, these two arguments suggest only that the feasibility criterion cannot be interpreted as *requiring* an absolute ban. They leave open the possibility that motorized portages *could* be eliminated, unless the Forest Service determined that there was no feasible alternative.

Importantly, the latter phrase emphasizes that the Forest Service ultimately has the institutional authority to define "feasible." The District Court's opinion simply uses a series of definitional arguments to declare the Forest Service's definitions and decision to be reasonable. Referring to the definition articulated by the Forest Chief, the court states, "More fundamentally, 'feasible,' as used in the context of a wilderness which is to be available to the general citizenry . . . is more properly thought of as 'reasonably convenient or usable'" (1392). The court goes on to concur with the Chief's decision in a way consistent with their earlier concerns about access: "Here the Chief, and this Court, must focus on matters of human capabilities in conjunction with citizen access to a managed wilderness. When viewed in this light, the Court concludes that the Chief's decision is in accord with the BWCAW Act, the Wilderness Act, and prudent wilderness management" (1392). In the end, an argument about institutional authority, coupled with questionable definitional arguments regarding "access," resolves the issue in favor of the Forest Service decision to maintain the motorized portages.

While the District Court opinion relies primarily on a series of definitional argu-

ments, the Appeals Court focuses more on the institutional context of particular definitions. The Appeals Court intends to eliminate contention over definitions by devoting much of their opinion to determining which institution's definition should be authoritative in this situation. Thus, institutional arguments move into the foreground.

The Appeals Court Opinion

In reversing the District Court decision, the Appeals Court develops a much more succinct argument about the definition of feasibility. It argues that the definition of "feasible" is clear when considered in relation to the congressional intent of the Boundary Waters Act. This turn of the argument to Congressional intent is enabled by the court's use of *Chevron USA, Inc. v. Natural Resources Defense Council* as a precedent case providing the standard for review. In *Chevron*, the Supreme Court argued that judicial review of agency action must determine first whether the intent of Congress is clear. If the Appeals Court can show that the intent of the Act is clear, then it does not need to engage in a detailed analysis of the legislative history and compromises that went into the Act, and it can dismiss attempts by the agency to redefine key terms.

The court cites specific statutory language from the Boundary Waters Act to argue that Congress's intent is clear. The opinion states that the Act explicitly includes "preventing: 'further road and commercial development and restoring natural conditions to existing temporary roads in the wilderness.' Although some motorboats are allowed on the lakes in issue, it is evident that congressional intent was to discourage motorized uses" (*Friends v. Robertson*, 1992, 1487). Given this purpose of the Act, the court rejects the notion that feasible is an ambiguous word in the statute:

The Chief's decision, as effectuated by the district court's ruling, as well as the dissent, reads into the

statute an ambiguity which does not exist. In applying the clearly expressed intent of Congress, we can only conclude that 'feasible' means 'capable of being done' or 'physically possible,' and as a matter of law, the Chief erred in ordering that the portages remain open (1488).

On this basis, the court claims that closing motorized portages "is consistent with the Act;" allowing some portages to remain motorized is merely "an exception to a clearly expressed mandate" (1487).

Thus, in contrast to the District Court's assertion of ambiguity in the term "feasible," the Appeals Court eliminates ambiguity by situating the term within the context of a clear institutional mandate: motorized uses in wilderness areas are to be discouraged. For both courts, then, arguments about the definition of "feasible" get resolved through arguments about which institution's definitions have authority in a particular instance. Here, institutional mandates articulated by Congress in the Wilderness Act and Boundary Waters Act provide the grounds for the court's argument. Congress, rather than the Forest Service, is the appropriate institutional authority regarding this definition.

The argument for clear Congressional intent, however, gets criticized in the dissenting opinion written by Judge Magill. In his view, the court "has blindly adopted the definition of 'feasible' from other statutes without considering whether Congress intended to adopt that definition" (1490). Yet it is arguable that the majority opinion does so. The majority opinion finds that the purposes of the Boundary Waters Act itself are clear, and then derives the meaning of "feasible" from these purposes. In addition, the majority opinion invokes the definition of wilderness found in the Wilderness Act and then infers that prohibiting motorized portages is "entirely consistent with the purposes announced in these Acts" (1487). So, the definition of feasible in the majority opinion depends on accepting the meaning of feasible within the context of the Boundary Wa-

ters and Wilderness Acts, not blindly adopting a definition stripped from another context.

Although Magill's opinion ultimately did not win the day, his dissent reinforces my point that arguments about institutional authority are a crucial means for resolving arguments about definitions. For Magill, the majority's decision violates the institutional authority that has been delegated to the Forest Service; in his view, it is inappropriate for the court to engage in definitional arguments that have the effect of dictating policy to the agency. He argues that Congress could have clearly stated that they wanted the portages terminated in 1984, but by leaving the passage ambiguous they delegated this responsibility to the Forest Service. "Instead, Congress directed an executive agency to interpret an ambiguous statutory term and to determine at the end of the six-year period whether the portages should remain open" (1491). Magill asserts that this direction must not be taken lightly, since it is crucial in maintaining proper relationships between branches of government and promoting responsive government.

Because Congress did not explicitly define 'feasible nonmotorized means,' I would defer to the Forest Service's reasonable decision. This conclusion does not imply a lack of respect for the legislative branch; instead, I believe it fosters respect. If Congress clearly directs, we judges will follow. Here, however, it appears that Congress decided not to decide the status of these portages, and left that decision to the agency. By deferring to the agency, we respect that congressional decision. Moreover, by leaving policy decisions to the politically accountable agencies rather than the judiciary, we foster democratic accountability (1493).

Magill's argument explicitly reveals the tensions between institutional authority and definitional arguments. Definitions that have the force of law are not determined merely by the best scientific, political, or ecological argument; they are produced within institutional contexts. Thus, resolving definitional questions not only requires arguments about

the definitions themselves; it also requires arguments about institutional authority over those definitions.

Empowering definitions, then, has as much to do with determining *whose* definition counts as with generating a persuasive definition. This relationship between definitional and institutional arguments leads us to consider the complexities behind Schiappa's assertion that "the only definitions of consequence are those that have been *empowered* through persuasion or coercion" (1996, 209). In the Boundary Waters cases, definitions are empowered in part by means of persuasion but ultimately by means of coercion. Both the District Court and the Appeals Court use a series of definitional arguments to persuade audiences that a particular definition of a term is reasonable. When the courts argue that these definitions ultimately are to be determined by a specific governing institution, however, they invoke the coercive power of the state to empower that institution's definitions as authoritative.

But the issue of *whose* definition counts raises another issue that affects the empowerment of a definition. In particular, I contend that in the realm of public policy, the empowerment of a definition is dependent on the *legitimacy* of the institution authorized to define the term, in addition to the dimensions of persuasion and coercion noted by Schiappa. (While legitimacy is a product of persuasion, it is analytically separate from persuasion about the definition itself.) A definition will not be empowered if the institution authorized to define it is not seen as legitimate. So, even when a court invokes the coercive power of the state to back an institution's definition, their focus on *who* should define rather than what the definition should be foregrounds the legitimacy or status of that institution in the eyes of public advocates.

For example, when the District Court supported the Forest Service definition of "feasible," public criticism emerged in part be-

cause the Forest Service was not seen as a legitimate public agency by a significant set of advocates. Preservation advocates felt that the Forest Service had shut them out of decision-making and had failed to follow the spirit of wilderness legislation in managing the area. Given this view of the agency, the District Court's deferral to the Forest Service did not successfully empower the definition of "feasible," in spite of the court's considerable efforts to persuade audiences that the definition was reasonable. Thus, preservation advocates appealed the District Court's decision.

The Boundary Waters case, then, suggests that neither persuasion nor coercion is sufficient to empower a definition. As arguments about institutional authority defer definitional questions to other institutions, those definitions may not be fully empowered if those institutions are not seen as legitimate. An important effect of arguments about institutional authority, then, is that they can revive larger questions about the legitimacy of specific governing institutions. We will see further evidence of this in arguments in the controversy over snowmobile use in Denali National Park. As in the Boundary Waters, the issue of motorized access to wilderness is at the heart of the controversy. And, as in the Boundary Waters, arguments about this issue ultimately turn toward arguments about which institution has authority to fix definitions for the practical purpose of management.

DEFINING "ACCESS" AND "TRADITIONAL ACTIVITIES": THE CASE OF DENALI

The use of snowmobiles in Denali National Park has emerged as a public issue for two main reasons. First, snowmobile access has generated controversy because the popularity of snowmobiling has rapidly increased in the past decade. Consequently, private snowmobile associations and snow-

mobile manufacturers have become identifiable, active groups interested in influencing park management policies. Second, the increasing popularity of snowmobiling has led to more use of the park by snowmobilers, but the National Park Service has articulated unclear policies and exercised inconsistent enforcement regarding snowmobile operation in Denali. As with the Boundary Waters, the legislation designating wilderness areas inside the park contains ambiguous terms that provide the grounds for competing arguments about motorized access.

The Alaska National Interest Lands Conservation Act, or ANILCA, is the main source of ambiguity about motorized access. In 1980, Congress passed ANILCA and effectively divided Denali into two main areas; the "Old Park," approximately two million acres formerly called Mt. McKinley National Park, and another four million-acre area surrounding the Old Park. Nearly all of the Old Park is now managed as wilderness. However, ANILCA allows motorized uses in a portion of the wilderness under certain circumstances. Section 811 of ANILCA states that the Secretary of the Interior shall permit use of snowmobiles, motorboats and other means of surface transportation by local residents for "subsistence uses." In addition, section 1110(a) allows the use of snowmachines and other modes of motorized transportation in the park for "traditional activities" and "travel to and from villages and homesites." So, although the Wilderness Act prohibits motorized uses, ANILCA provided an exception in the case of use for traditional activities and access to private holdings. The phrase "traditional activities" did not get defined in the legislation, however, and this source of ambiguity provides rhetorical traction for an array of arguments about snowmobile access.

In addition to this definitional problem, ANILCA also is a source of ambiguity regarding institutional authority over motorized use. Again, section 1110(a) provides the

relevant passage describing agency discretion in managing motorized access:

Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area.

This passage suggests that institutional authority to regulate motorized use ultimately lies with the Secretary of the Interior. However, advocates for motorized use challenge this position, arguing that Congress established a clear rationale for motorized access in ANILCA. Thus, a second line of argument about access emerges regarding which institution's definitions should determine the extent of motorized access.

These definitional and institutional arguments coalesced when the Denali Park Superintendent issued temporary regulations in November 1998 and February 1999 that banned snowmobile use in the Old Park. The Alaska State Snowmobile Association took the Park Service to court, and in November 1999 the District Court remanded the decision to the Park Service. In this section of the essay, I will briefly examine public advocacy by the ASSA and the Park Service about those regulations before turning to the District Court's opinion. I draw attention to the public advocacy in this controversy since those texts illustrate how easily the definitional arguments about access turn into arguments about institutional authority, even outside the judicial arena. Then, as in the Boundary Waters example, I show how the court opinion resolves those definitional arguments by way of institutional arguments.

Initial Public Arguments

The definitional arguments of the National Park Service (NPS) and the Alaska State Snowmobile Association (ASSA) at-

tempt to establish what counts as permissible access by showing how their position maintains continuity in policies regarding access. For the snowmobile group, motorized access has been a consistent feature of the Old Park. In the first paragraph of a 1997 article in *Alaskan Snow Rider* entitled, "Denali Park Access: Next Major Issue Facing Snowmobilers," ASSA Access Chair Joe Gauna writes, "Buses were taking people into the park as early as the 1920s and a hotel and visitor center was operated by the Alaska Railroad, the only reasonable access other than the primitive Denali Highway." He goes on to state that gradually, snowmobiles became part of motorized use as well, but the number of users was small and did not present a significant problem. Then in 1980, ANILCA made special provisions for motorized access to the wilderness portion of the park: "To insure continued access, Congress specifically addressed snowmobiles, motorboats and airplanes in ANILCA, affirming the right to use them, even in 'backcountry.'" For the ASSA, this claim is central to their argument that the Old Park should be open to snowmobile use. ANILCA provides the most recent legislative precedent for snowmobile access, and points to Congress as the institution with primary authority over that access.

However, this argument overgeneralizes the meaning of access as described in ANILCA. The ASSA article asserts that citizens have a broad right to motorized access, but it does not address ANILCA's limitations on that right. Specifically, the article ignores the fact that snowmobile access is limited; they are only to be used in conjunction with traditional activities such as hunting. ANILCA articulates a clear relationship between snowmobile use and other activities: In the Old Park, snowmachine use must be *instrumental*; it is a means for pursuing other activities, not an end in itself. The ASSA's argument, then, overgeneralizes this limited sense of access when it claims that

ANILCA allows motorized access. Only through this overgeneralization can they maintain their argument about a history of continuous motorized access.

In contrast, National Park Service press releases build the case that prohibiting snowmobiles in the Old Park provides continuity in policies regarding access. For example, a November 1998 press release claims that the regulations are a "continued closure" of the Old Park, and that traditional snowmachine use "was not allowed in the former Mount McKinley National Park" (National Park Service, "Snowmachine"). Further, the NPS argues that motorized use of the area prior to ANILCA also was illegal: "Recreational use of snowmachines in the former Mount McKinley National Park was neither customary or [sic] traditional, and was, in fact prohibited by regulation." A February 1999 press release also emphasizes continuity by pointing to specific sections of ANILCA: "In the former Mount McKinley National Park, there was no history of authorized general public snowmobile use for any activity, traditional or otherwise. The enactment of section 1110(a) of ANILCA left this general prohibition of snowmobile use in the old park area intact unless the snowmobile use was for the purpose of conducting a 'traditional activity'" (National Park Service, "Portion"). Taken together, these claims depict an Old Park from which snowmachines have always been banned, thus suggesting that the NPA has maintained a continuous policy regarding motorized access.

These competing arguments about continuity of policy regarding access are grounded in appeals to institutional authority. Arguments about institutional authority dominate the discussion of motorized access in Denali. Specifically, decisions about snowmobile access turn on arguments about which institution has authority on this issue. As the controversy moves toward the judicial arena, the ASSA and the NPS (as well as the Wilderness Society, an intervenor in the suit) all

attempt to articulate their substantive positions on management in terms of the appropriate institutional decision-maker.

The ASSA, for example, questions whether the park superintendent has authority to enact regulations against snowmobile use. In the ASSA's November 1997 article, Gauna hints that the superintendent's authority over snowmobile use is limited. He claims that Park Superintendent Steve Martin has taken a definite position for keeping the Old Park motor free and that Martin is pursuing his personal preference rather than being accountable to requirements and regulations. "[The superintendent] said that his legal people have told him that superintendent's orders are not the proper way to implement snowmobile regulations (as well as some others) and that's why he is working on the regulations package that includes the snowmobile closure." Here, the threat of a superintendent's unbridled discretion hovers over the management process. The ASSA article raises an early concern about the superintendent overstepping his institutional authority.

The ASSA continues to press the issue of institutional authority in their response to the temporary regulations issued in February 1999, further raising questions about the legitimacy of the Park Service and their decision-making procedures. They placed a copy of the NPS announcement of the regulation on their website and responded point-by-point to a number of passages, and also provided a link to a form letter that could be emailed to the Superintendent. The response directly challenges the NPS claim that the Old Park has never been open to snowmobiles, using statutory justification to support their argument. The ASSA states that ANILCA "addressed snowmobiles, affirming the right to use them in 'back country' areas (a designation given to the original Mount McKinley National Park)." Then, they contrast this statutory justification with the questionable foundation of the temporary regulations: "What has happened is the

Denali staff has prohibited snowmobile use in this area through a 'Superintendents [sic] Order,' which is on shaky ground from a legal standpoint." This contrast marks an important shift in the pattern of argument, as they turn away from the continuity or consistency of the policy itself and begin to question the institutional authority exercised to promulgate the regulations.

Arguments about institutional authority are the basis not only of the ASSA lawsuit challenging the regulations; interestingly, they also are at the heart of the Wilderness Society's own lawsuit against the NPS and their motion opposing the ASSA suit. For the ASSA, the temporary regulations are too restrictive; for the Wilderness Society, the regulations are not restrictive enough. These positions on motorized access, however, eventually get translated into arguments about institutional authority during the course of clarifying the policy. Just as the ASSA argues that the superintendent does not have the authority to close areas to snowmobile use, the Wilderness Society argues that the NPS does not have authority to keep open two narrow corridors for snowmobile use in the Old Park. Thus, both advocacy groups use the ANILCA legislation to challenge Park Service decisions that appear to overstep the boundary between statutory mandate and agency discretion. Arguments about snowmobiles get rearticulated as arguments about institutions.

The District Court Opinion

It is not surprising, then, that institutional arguments provide the ultimate basis for the District Court opinion that remanded the agency's decision on regulations to the Secretary of the Interior. This interpretation of the court's opinion differs from the interpretation offered in newspaper accounts of the decision, which claim that the court's opinion was based on a definitional issue: the Park Service's failure to define the phrase

"traditional activities." Although the NPS did not define that phrase clearly, an analysis of the opinion shows that arguments about institutional authority serve as grounds for the definitional arguments and thus provide the ultimate rationale for the court's decision. Institutional arguments justify the acceptance or rejection of a particular definition.

The court's opinion identifies the Secretary of the Interior as having the institutional authority to determine the appropriate definition of "traditional activities." The opinion begins by disposing arguments that the court should examine the legislative history of ANILCA to determine the legality of the snowmobile ban: "Of course, as Justice Scalia has observed, it is the language of statutes, not the language of legislative history, which is enacted as law by Congress. Here, where Congress failed to define 'traditional activities' in ANILCA, Congress did include a statutory authorization empowering the Secretary to adopt regulations necessary to carry out the law" (*ASSA v. Babbitt* 7). In this passage, the court clarifies the delegation of authority from Congress to the administrative agency, which gives the Secretary authority to make regulations to execute the law. Thus, the opinion invokes an argument about institutional authority that allows the court to situate the resolution of definitional questions within a specific governing institution.

Resituating the definitional question in this way allows the court to establish a straightforward definitional argument based on the words of the Secretary. The opinion turns to the 1986 Denali regulations in which the Secretary argues that there is no statutory support in ANILCA for banning snowmobiles in the Old Park. Thus, the opinion relies on the prior arguments of the controlling institutional authority to determine the definition that applies in this instance. Regardless of the definitions that are possible, the Secretary's definition is determinative: "Although the Secretary might have defined

traditional activities in the manner suggested by Wilderness Society—the court does not now decide whether such an interpretation could be consistent with ANILCA—the Secretary has not done so. Under these circumstances, this court rejects Wilderness Society's argument. It follows that the Decision violates ANILCA for the reason previously explained" (9). In other words, the Secretary's earlier interpretation found no statutory support for a ban, and thus the court is obligated to follow the Secretary's earlier interpretation of the statute as definitive. By appealing to the earlier argument of the controlling authority, the court finds that the temporary regulations of February 1999 violate ANILCA.

Thus, it is not solely a definitional argument that grounded the court's decision. The definitional argument is embedded within a determination of *whose* definition and interpretation of the statute has authority. In this case, the Secretary's definition, ascertained through analysis of previous regulations, determines the court's judgment about the new regulations. Since the ruling, the Park Service has drafted new regulations that address the definitional problem surrounding "traditional activities." Nonetheless, these key definitional assertions must come from the appropriate institutional authority in order to have rhetorical and legal force. In these cases about motorized access to wilderness, then, arguments about institutional authority have rhetorical primacy over arguments about definitions.

THE PRIMACY OF INSTITUTIONAL ARGUMENTS: THEORETICAL AND PRACTICAL IMPLICATIONS

The Boundary Waters and Denali cases demonstrate how arguments about institutional authority play a crucial role in establishing definitions used in the implementation of public policy. Not only do those arguments help resolve definitional disputes,

but also they function to negotiate the legitimacy of governing institutions. The illustration of this process leads back to the theoretical issues surrounding definitions, institutional arguments, and hegemony raised in the introduction of this essay. In this section, I elaborate on each of these areas by discussing the importance and rhetorical effects of arguments about institutional authority, using examples from these cases to illustrate my arguments.

First, I suggested that this study contributes to argumentation scholarship by specifying institutional arguments as a significant influence on definitions that get fixed as part of the policy process. The Boundary Waters and Denali cases described above show how easily arguments about the definitions of terms like "feasible," "access," and "traditional activities" are subsumed by arguments about institutional authority.

The importance of this influence emerges when we consider one of the potential rhetorical effects of institutional arguments. *Arguments about institutional authority allow the courts to deflect definitional questions, with the effect of perpetuating political conflict over definitions.* Both the Boundary Waters and Denali cases show how a court's deferral of definitional questions prolongs rhetorical struggle and moves it to other institutional sites. Take the case of the Boundary Waters: the Appeals Court's arguments about institutional authority directed advocates to take their claims to Congress. So, advocates who found fault with the Appeals Court decision encouraged Senator Rod Grams and Representative Jim Oberstar to hold Congressional field hearings and propose new legislation for Boundary Waters management throughout the mid-1990s. Rather than settle a definitional dispute, the Court's arguments about institutional authority prolonged the dispute and shifted it toward a different policymaking forum (Jones and Taylor 331).

This shift of forum points to the second issue raised at the outset of this essay. I sug-

gested that arguments about institutional authority function rhetorically to negotiate the legitimacy of state institutions. When courts assert that a particular institution has the authority to define a term for policy purposes, then questions of legitimacy emerge for that institution. With every invocation of an argument about institutional authority, the courts imply that some other part of the policy-making apparatus (Congress, the Forest Service, the Park Service) should be accepted as the rightful definer of key terms. However, this acceptance is based not only on the court's assertion of definitional authority; whether that authority will be accepted as legitimate depends upon the broader public perception of the institution. Thus, we can note a second important rhetorical effect of institutional arguments. By focusing on who should define the term rather than on the definition itself, *arguments about institutional authority raise the issue of an institution's legitimacy.*

The Boundary Waters and Denali cases are especially useful for discussing the relationship between institutional arguments and legitimacy because they show how institutional arguments can have divergent, uneven effects on the legitimacy of governing institutions. In that regard, the cases provide a useful counterpoint to Doxtader's claim that institutional justifications shut down conflict in order to preserve institutional stability. As he puts it, "Justificatory arguments are sites where the interests of the public and the institutional-instrumental process of stability maintenance meet . . . Critique shows how institutions collapse the relational elements of justificatory argument into a self-perpetuating argument form that reifies processes of public interest formation in the name of pre-given norms of stability" (197). Although a governing institution justifies its decisions in order to stabilize relationships between citizens and the institution, the wilderness access cases reveal that institutional

arguments may stabilize some institutions but can destabilize others.

For example, in these cases arguments about institutional authority allow the courts to bolster their legitimacy. When courts side-step definitional questions in favor of arguments about institutional authority, they can avoid the appearance of being "active"; deferral to agency definitions allows the courts to appear that they are not legislating from the bench. Creating this appearance is important for the courts in light of criticisms that courts have squashed administrative discretion in reviewing agency decisions (for criticisms see Rabkin, Shapiro; for a defense, see Clayton). So, even as the courts engage in definitional arguments to support agency interpretations or to specify Congressional intent, their ultimate arguments about institutional authority function to show that the court is not overstepping its bounds. Arguments that focus on institutional authority can help the courts appear as if they are not actively intervening in agency decisionmaking or creating their own definitions of statutory terms. Thus, by subsuming definitional questions within arguments about institutional authority, courts can minimize the appearance of actively imposing their own policy preferences and bolster their legitimacy.⁴

For other institutions, however, the deferral of definitional questions back to Congress or the agencies raises the issue of the legitimacy of those institutions. As suggested above, public acceptance of an institution's definitional authority depends on whether that institution is seen as legitimate. In both

the Boundary Waters and Denali cases, for example, public acceptance of an agency's definition hinged on the perception of those agencies as adhering to the mandates of Congress (in the Boundary Waters) and making decisions that were not merely personal preference of agency personnel (in Denali). These perceptions of legitimacy are brought into the foreground when courts claim that a particular institution has authority to establish definitions. Hence, arguments about institutional authority need to be assessed with regard to the range of potential effects on governing institutions. Institutional arguments do not necessarily shore up the stability of institutions; they may heighten the legitimacy of one institution, and bring another institution's legitimacy problems into sharp relief.

These divergent and uneven effects of institutional arguments on legitimacy are instructive for the study of hegemony and the role of the rhetoric of state institutions in the formation of consent, the third issue raised at the outset of this essay. Specifically, *the divergent effects of institutional arguments on legitimacy make those arguments especially useful for examining the role that state institutions play in the constitution of hegemony*. The implications I have already drawn show how institutional arguments are productive of both consent and dissent. To the extent that arguments about institutional authority generate some degree of adherence to state institutions, whether through unspoken agreement or the ongoing disagreements within other institutional forums, it may be argued that these arguments are productive of consent to state institutions. That is, participation in or acquiescence to the policy process may be taken as a sign that a basic level of legitimacy has been achieved by state institutions as a whole. In this view, dissent is managed by transferring conflict from one institution to another, and the state continues to exercise hegemony over the transformation of wild-

⁴ In other instances, judicial opinions can bolster legitimacy by channeling dissent out of institutional arenas. This is the case when arguments about institutional authority focus not on which institution has the authority to establish a definition, but on whether institutions should have the power to define. Schiappa (2000) illustrates this in his analysis of constitutional disputes over abortion, showing how Justice O'Connor's opinions have argued that the "meaning" of a pre-viability abortion is best left to individual women rather than state institutions. By delegating definitional authority back into civil society, the courts rely on an implicit appeal to "the people" to further bolster their legitimacy.

ness into "wilderness" (for an extreme form of this argument, see Birch).

But shifting the conflict to another institution may encourage advocates to further question the legitimacy of that institution. The courts' arguments about institutional authority draw attention to the institutions themselves, to *whose* definition should have authority. So, even as conflicts get transferred from one institution to the another, that may only reinforce negative perceptions of those institutions. If a court opinion merely ratifies the authority of an already-maligned agency, that ratification does little to bolster the agency's legitimacy and heightens the sense that the agency is insulated from public criticism. Further, the transfer of conflict from one forum to another may damage the legitimacy of the state as a whole, if it appears that none of the institutions can provide a decisive definition or policy (Wondolleck 105–118). To the extent that arguments about institutional authority provoke generalized dissatisfaction with state institutions, these arguments can generate dissent even as they attempt to displace it.

Attention to how state rhetorics generate both consent and dissent provides an important qualification and addition to dominant theorizations of hegemony within rhetorical scholarship. My argument above about the divergent and uneven effects of institutional arguments on legitimacy reinforces the common claim that the exercise of hegemony is best characterized as the dynamic process of producing consent rather than the monolithic imposition of a dominant ideology (Condit). However, producing consent does not only consist of forging an accommodation on substantive, definitional issues. *Hegemony also requires the production of consent to the procedural, institutional means by which substantive issues get resolved.* As I have argued here and elsewhere, institutional arguments may be productive of hegemony to the extent that they channel further disagreement within in-

stitutional boundaries, but they also may function to undercut hegemony to the extent that they erode the legitimacy of governing institutions (Schwarze). Thus, scholars concerned with the rhetorical dimensions of hegemony would do well to include the arguments of governing institutions in their analyses, and to address the multiple levels on which those arguments contribute to the production of consent.

This analysis of institutional arguments, then, suggests how studies of hegemony might be complemented by turning a critical eye toward the rhetorics of governing institutions. So far work on hegemony within communication studies has tended to focus on civil society rhetorics.⁵ This focus on stems in part from a reading of Gramsci that relies on a sharp distinction between the State and civil society, where the term "hegemony" names the type of leadership exercised in civil society and "domination" characterizes the coercive power of the state. In this reading, hegemony produces consent among citizens; when consent dissolves, the State apparatus exercises domination through repressive force. An early passage in *Prison Notebooks* captures this distinction concisely:

What we can do, for the moment, is to fix two major superstructural "levels": the one that can be called "civil society", that is the ensemble of organisms commonly called "private", and that of "political society" or "the State." These two levels correspond on the one hand to the function of "hegemony" which the dominant group exercises throughout society and on the other hand to that of "direct domi-

⁵ Condit's work on reproductive technologies analyzes popular magazine and national newspaper articles. Cloud develops her critique of Condit's view of hegemony via an analysis of television and magazine biographies of Oprah Winfrey. Hanke and Dow examine television shows in order to examine hegemonic versions of masculinity and femininity, respectively. And while Mumby does not undertake an empirical study in his essay on hegemony, he does argue that Gramsci's attention to civil society should be emulated in future critical scholarship, since it "creates greater possibilities for examining gaps and fissures in the prevailing ideology" (365).

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nation" or command exercised through the State and "juridical" government (12).

This passage gets invoked by Mumby (347) and Condit (206) to warrant the focus on civil society. As Mumby puts it, "hegemony resides primarily in the realm of civil society (although it can be exercised also by the State)" (348). In spite of this admission about the role of the state in producing hegemony, there has been little examination of that role within communication studies.⁶ Scholars have produced numerous studies of the hegemonic and counter-hegemonic rhetorics within civil society, but they have barely explored the state's role in hegemony or problematized Gramsci's explanation of the relationship between civil society and the state.

Near the end of the *Prison Notebooks*, however, Gramsci explicitly links state institutions to the exercise of hegemony. In a section on the separation of state powers, Gramsci suggests that each of the branches of the state have an important hegemonic function: "Naturally all three powers are also organs of political hegemony: 1. Legislature; 2. Judiciary; 3. Executive" (246). Here, Gramsci hints that governing institutions can function as sites at which hegemony is exercised. At these sites, the state contributes to hegemony not simply in the form of coercion or direct domination, but by rhetorically producing consent and managing dissent with regard to the exercise of state power. When the courts, administrative agencies, and legislative bodies produce arguments that define and justify public policy, those institutions contribute to the hegemonic process by articulating provisional accommodations on public policy and negoti-

ating state legitimacy. The introduction of this essay intended to display a specific example of this contribution. State institutions directly influence my experience of wilderness, not by influencing my perceptions of wilderness, or by offering a philosophical defense of what wilderness ought to be, but by determining *which institution* gets to define the terms by which practical, material management decisions are made. By examining these institutional arguments, then, rhetorical scholars can better understand the full range of voices that influence the operation of hegemony.

In a practical vein, the importance of institutional arguments demonstrated in this essay suggests that advocates can gain rhetorical traction by appealing to institutional concerns in controversies on other public lands. We can already see evidence of this in one of the most notable controversies mentioned at the beginning of this essay: snowmobile access in Yellowstone National Park. The Winter Use Plan for Yellowstone and Grand Teton National Parks, released in November 2000, proposed a phased-out ban on snowmobiles in those parks by the winter of 2003–2004. Even before the plan was released, advocates employed institutional arguments to raise concerns about the legitimacy of the agency's Plan. For example, Representative Barbara Cubin (R-WY) claimed that the Park Service failed to include the public in planning and fulfill other institutional responsibilities as required by law. "Throughout the process, the National Park Service has disregarded the views of the public, the application of sound science and the Administrative Procedures Act" (Gruver, B1). Then in June 2001, the Department of the Interior essentially overturned the plan, settling a lawsuit brought against the agency by the International Snowmobile Manufacturers Association. The settlement lifted the snowmobile ban and required a new environmental study to be completed in 2002 ("Politics, Not Science"). As this settlement

⁶ The exception to this claim is M. Linda Miller's essay on how legislative debate transformed many of the public arguments surrounding midwifery legislation in Florida. Her essay suggests that institutional commitments constrain the rhetoric produced in legislative bodies; my essay suggests that similar sorts of commitments constrain the arguments produced by courts.

was being developed, critics complained that the Bush administration had inappropriately exercised its institutional authority, ignoring the Park's extensive environmental impact statement and shutting out local park personnel from settlement discussions. In the words of former Yellowstone Park Superintendent Mike Finley: "Had the Park been asked, we would have resisted settlement and sought a vigorous defense. We were not asked. In over six and a half years at Yellowstone, I was involved in every major and minor lawsuit. I was consulted . . . This is the first time the opinion of the Park was not sought, or solicited, or considered by the administration" (Greater Yellowstone Coalition).

These arguments underscore that battles over access on federal lands often get fought at the level of institutional authority. Advocates thus would do well to consider how arguments about institutional authority could be used to influence the policy process. In particular, advocates for minimizing snowmobile use could benefit by emphasizing the Congressional mandate to preserve parks unimpaired for future generations, and by questioning the legitimacy of an administration that overturns its own agency's policy. The latter argument is especially important in this instance, given that the NPS policy was based on over a decade of thorough scientific studies and three years of public comment on management proposals. The assertion of institutional authority by the Secretary of the Interior in this situation raises serious questions about the administration's legitimacy.

CONCLUSION

My most recent wilderness excursion took a friend and me into the Great Burn, an area in the Bitterroot Mountains straddling the Montana-Idaho border. This rugged maze of ridges, creeks and high mountain lakes was in the heart of the forest fires of 1910 that burned over 3 million acres of national for-

ests in Montana and Idaho. We knew that the area was proposed for wilderness designation and had heard several great reports about the backcountry hiking there. We thought it would be an ideal place for a weekend in the wilderness.

My friend and I were especially disappointed, then, when we arrived at Fish Lake. After a demanding hike that took us along the Montana-Idaho border ridge and challenged us with several ascents and descents, we looked forward to a quiet, relaxing evening by a remote wilderness lake. Instead, as we descended into Fish Lake we were greeted by what we thought at first were chain saws. But as we got closer, it was apparent that the sounds were coming from all-terrain vehicles. We were no longer in the backcountry; we were in ATV-Land.

This affected our "wilderness" experience in several ways. The constant ATV traffic past our campsite and the random start-up of the machines eliminated the possibility for uninterrupted, quiet solitude, which was why I took the trip in the first place. Further, even in the middle of another dry summer, the hiking trails are packed relatively hard and create negligible amounts of dust. But at the point where our trail met the trail being used by ATVs, the soil turned into a fine dust that hung in the air and on the trees, and quickly became a part of our meal and our sleeping bags. Most of all, it ruined what was otherwise a great day. It was disappointing to work that hard, get ten miles into the backcountry, and then have to deal with an unexpected, unwanted intrusion.

It is easy to dismiss these concerns as special pleading from a backpacker who wants to have the wilderness all to himself, who believes that some forms of recreation are "better" than others, and who simply wants his way. To be sure, there are good philosophical and environmental arguments that support the complete elimination of motorized access in wilderness areas. But those arguments are not necessary here. Even my

friend, a great outdoorsman but certainly not someone who identifies himself as an environmentalist, openly expressed his disappointment about the experience. In this situation, it is less a matter of philosophy than a matter of expectations, a certain trust that the Forest Service will manage public lands in accordance with the law.

This failure to manage in accordance with law erodes the legitimacy of the Forest Service and connects this case to the problems I have already outlined with management in the Boundary Waters and Denali. In the case of the Great Burn, the problem again stems from a definitional issue and an issue of institutional authority. The Great Burn area is managed by two different National Forests, the Lolo NF on the Montana side and the Clearwater NF on the Idaho side. Each Forest is legally required to manage in accordance with its Forest Plan (the official management document, revised every 10–15 years). On both the Lolo and the Clearwater, Forest Service personnel are directed to manage large portions of the Great Burn (including the Fish Lake area) as wilderness until a statutory decision is made about the area. The plans direct the Forest Service to “protect the wilderness character of proposed wilderness areas until Congress makes classification decisions” (Clark). Not surprisingly, the phrase “wilderness character” is open to definitional dispute, and the two Forests have operationally defined this phrase in contrasting ways. On the Lolo, protecting wilderness character means excluding motorized use, while on the Clearwater managers have allowed motorized use in proposed wilderness. Given these contrasting exercises of agency discretion, three environmental groups have filed suit to prohibit motorized access on areas proposed as wilderness on the Clearwater, arguing that the Clearwater’s management practices have degraded the area’s “wilderness character.”

As in the other wilderness access cases, one can anticipate that the decision about

the Great Burn will turn on arguments about which institution has authority to define “wilderness character.” Whether that authority lies at the Forest level, with the Chief of the Forest Service, or with Congress and its definition in the Wilderness Act, my excursion into the Great Burn made it all too clear that the placement of definitional authority has a significant effect on what might ultimately pass for wilderness. Merely passing across a state border, from one National Forest into an adjacent Forest, fundamentally altered the character of wilderness. That experience reinforced the underlying assumption of this essay: arguments about institutional authority offer a fruitful area for research, not only for the purpose of advancing theories of argumentation and hegemony, but also for the purpose of preparing public advocates to engage and criticize hegemonic accommodations produced by state institutions.

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