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SYMPOSIUM: THE NATIONAL PARK SYSTEM

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EDITOR'S NOTE

We are pleased to present our special Symposium Issue on the National Parks. This issue features contributions by some of the foremost experts in the fields of Park Service history, Park Service management, and natural resources and environmental law. The issues facing the Park Service are examined from many varied viewpoints: the law professor, the historian, the political scientist, and the federal agency employee all offer their perspectives and solutions.

In the lead article of this issue, Robin Winks examines the National Park Service Act of 1916, and the contradiction inherent in the Service's dual mandate: both to conserve, and to provide for the present enjoyment of, the national park lands. The tension between these goals is most apparent in conflicting management policies and is reflected, in varying degrees, in each of the articles in this issue.

Federico Cheever examines the consequences of the mandates given to the Park Service and Forest Service, and their role in the decline of agency discretion. Professor Cheever describes the effect of these contradictions on both internal agency function and the perceptions of lobbying groups, the courts, and other government agencies.

The articles that follow each discuss a different challenge to the Park Service as it enters its ninth decade. John Freemuth discusses the development of the ecosystem management paradigm and the difficulties surrounding its implementation as the policy of the Park Service. George Cameron Coggins and Robert Glicksman have produced the definitive work on national parks concessions law, tracking the development of the Park Service's policy toward concessionaires, and thoroughly examining the criticisms of, and proposed changes to, that policy.

Robert Fischman opens his article with the trenchant observation that the "bright fame" of the Organic Act's preamble "has blinded many scholars to several hundred sections that follow it in Title 16."[1] His thoughtful analysis of the level of statutory detail in those succeeding sections, as it relates to pollution control law, follows.

Eric Freyfogle argues that both the scientific and legal means exist to improve the condition of national parks waters. The primary obstacle to effecting this "repair," he argues, is the lack of a unifying, long-term strategic goal for these efforts. In the next article, Jan G. Laitos notes the emergence of recreation as the dominant use of the national parks.

We are fortunate to be able to close our Symposium Issue with perspectives from two people intimately familiar with the issues raised by these articles. Deborah Williams, Special Assistant to the Secretary for Interior for Alaska, offers an informative look at the special challenges facing the Park Service's largest holdings. Finally, Gina Guy, Regional Solicitor for the Department of the Interior, shares her views on lawyering for the Park Service.

We are deeply indebted to Professor Jan G. Laitos for planning this Symposium Issue. The *Denver University Law Review* would also like to thank Judge John Kane, former Editor-in-Chief of the *Review*, for his advice; as well as Kent Holsinger, Chad Cummings, Chad Henderson, Gregoria Frangas, Alan Garber, and Professor Fred Cheever. Finally, this issue would not have been possible without the commitment and effort of distinguished contributors.

S. Tarek Younes, Editor-in-Chief

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[1]Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779 (1997).

FOREWORD

STEWART L. UDALL

The essays in this volume validate the truth of Justice Holmes' maxim that the "life of the law has not been logic but experience." Contrary to legend, the National Park idea did not emerge full-blown when Congress created Yellowstone Park as a public "pleasuring ground" in 1872. The concept we honor today is a component of our national experience which offers many insights about the evolution of American democracy and American law.

Any policy that expresses elements of a nation's ethos changes over time. The concept of nature preserves first proposed by George Catlin, Ralph Waldo Emerson, and Henry Thoreau was simplistic and vague. None of these visionaries realized that laws embracing conceptions of public ownership and management of specific lands would be imperative if their dreams were to be fulfilled. Nor could they envision that the managers of such reserves would face complex problems of stewardship as they confronted pressures from park patrons, the findings of future scientists, and the intrusions generated by the machines of modern technology.

It is important to remember that the laws which created the first National Parks in the West did little more than fix boundaries and set forth hortatory recitals about the purposes for which these reserves were created. Since most of the initial parks were located in remote wildernesses, for a half century the Congress saw no need to appropriate funds to protect or manage these lands.

John Muir, the founder of the Sierra Club of California, had long argued that the parks would never be treated as inviolate sanctuaries unless there was "legislative interference." The Organic Act of 1916 met most of Muir's specifications. This landmark law was rooted in tenets of resource management developed by the nascent conservation movement, and it provided a legal foundation which enabled our park system to become a model for other nations.

However, the most important issue facing the Congress involved the need to provide clear guidelines for park stewardship. With what can only be described as masterful evasion, the authors of the 1916 Act passed the buck by fashioning the now famous use-but-do-not-impair dictum which, to this day, bedevils the decisionmaking of American park managers. (Professor Robin Winks's analysis of the effect of this "contradictory mandate" provides a valuable centerpiece to this volume.)

A period of relative quiet followed until the 1960's when a tidal wave of events brought changes that made park management more complex, enlarged the reach of the nation's legal system, and fostered the emergence of a new discipline called environmental law. In 1961 when I became Secretary of the Interior there were no environmental lawyers and environmental law was not a

subject taught in law schools.

A list of the developments that altered the matrix of policymaking and changed the politics of conservation must include:

- Leadership in Washington that enlarged the mission of the Park Service by adding a necklace of National Seashores and Lakeshores to the System. In the process of creating these new parklands Congress wrote statutes that described in detail how these new areas were to be administered.
- The publication in 1962 of Rachel Carson's seminal book. *Silent Spring* introduced fresh insights and values that quickened ecological thinking and became the spearpoint of what was soon described by Americans as the environmental revolution.
- When it approved John F. Kennedy's Cape Cod National Seashore legislation, Congress broke the hidebound "not a scent for scenery" policy and began appropriating hundreds of millions annually to acquire lands for parks in all parts of the country. This was a move that, in due course, stripped the "Western" label from the National Park System and led to major additions to that system located east of the Mississippi river.
- The acceleration of environmental action brought to the forefront new, vibrant citizen organizations like The Nature Conservancy, and sparked the creation of aggressive national environmental law groups such as the Environmental Defense Fund and the Natural Resources Defense Council.
- A landmark decision by the United Stats Supreme Court gave aggrieved groups of citizens access to the courts where they could force government agencies to enforce existing laws and challenge decisions made by wrongheaded federal officials.
- The enactment of a National Environmental Policy Act, with its requirement that government that government entities prepare environmental impact statements, instituted a planning process which revolutionized decisionmaking in federal agencies and, in effect, gave environmental lawyers power as citizen "Attorneys General" to compel public officials to carry out mandates embedded in the growing body of environmental laws.
- During this same period, big increases in visitation and the growing impacts and intrusions of mechanized forms of recreation (polluting autos, dune buggies, helicopters, airplane tours, etc.) confronted harried park administrators with complex decisions about (a) allowable "uses" relating to the carrying capacity of particular parks; and (b) methods to faithfully implement the "maintain unimpaired" injunction in the Organic Act of 1916.

The essays in this volume convey the message that the conflicts over the policies that determine the quality of stewardship that prevails in our National Parks are not abating. Indeed the available evidence tells us that our national treasures are beleaguered today by myriad threats. Auto emissions damage

trees in Sequoia. Oil, mining, and logging companies encroach on the borders of some parks. Geothermal development outside Yellowstone poses a threat to geysers inside. Tour companies, cruise ships and air charter firms hard-sell parks to increase their profits while noisy overflights of the Grand Canyon are marketed in Las Vegas as a break from blackjack.

Meanwhile, the Park Service has its own troubles. Never adequately funded, it now has a $2 billion backlog in deferred maintenance and infrastructure needs. In the age of ecology, good science is the backbone of good management, but the Service's science program remains an embarrassment. Some poorly paid summer rangers now qualify for food stamps. And intrusions by heavy-handed members of Congress and by political hacks in Washington demoralize the agency's dedicated and competent staff.

Now, perhaps more than at any time in history, our Park Service needs strong leadership, assiduous, ardent support from the American people, and levels of funding that will enable it to meet the challenges that lie ahead.

Santa Fe, New Mexico
April, 1997

INTRODUCTORY NOTE:

SOME THOUGHTS ABOUT THE VALUE OF A PROFESSION

ROGER G. KENNEDY*

We who are lawyers and conservationists have in recent years overvalued adversarial jurisprudence, I think, and undervalued the law of community. It is time to give more energy to law as a binding force, more emphasis to equal rights within a system of ordered liberty. Lawyering may more often be generous and affirming. It may be participatory and deferential, rather than manifest that invidious cleverness which has rendered good causes too often unappealing.

I do not suggest that the law of community should be smug or indolent. When equal rights are violated, idiosyncratically or systematically, when the social compact is betrayed or ruptured, we should take to the streets, we should sue, we should deploy every shrewd device to call to conscience the better sense of the community. But conscientious environmentalists must learn to be more respectful and to build alliances.

Reinhold Neibuhr is a good mentor: no citizen should be treated as if he or she were unworthy of being heeded. Nor should any citizen, however rich or celebrated, be accorded disproportionate power or credence. The implicit ground of the law of community is that none of us are either so depraved or so exalted either to be dealt out of the great game of civil life, or dealt extra cards.

In the eighties, our sense of law as a binding force frayed and unraveled. Litigation became the first resort, not the second; sustained ameliorative effort became unappealing to ardent spirits. The calvary raided, and the infantry stayed home. The institutions of conservation, the patient conservators and protectors, such as the National Park Service, suffered. The physical assets they tended were allowed to deteriorate disgracefully, as their antagonists and predators gained converts while their leaders were muzzled and too many of those who should have been their friends were content with one-liners, photo-ops, thirty-second spots and spasms of heroic litigation. The cause of conservation suffered as feeling good replaced doing good. The long-sustained, arduous, complex process of learning science, learning the law and managing in accordance with experience, seemed to many bright young things too much trouble and boring. Professionals—people who go to the trouble of doing

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things over enough time so as to learn what works and what does not—were undervalued, while celebrities danced out a choreography of clever haste on television.

It is time, I think, to interest ourselves again in process, in honest consultation and discussion, in listening, in striving for consensus (yes, even for consensus) so that change will become internal to organizations and will endure. There will always be a role for the calvary—or, if that reference seems hopelessly antiquated—for the stukas. But they should be more respectful of people slogging around on the ground, bloody and muddy and very tired, but getting up every day to get back to the uncelebrated, unglamourous, and the lasting. It is on the ground that one learns about the care of the earth.

And here's a pitch—while we solicit a little more respect for the professionals—especially for the professionals in the National Park Service—I suggest to young lawyers: think about this line of work. It has its satisfactions. And they last.

THE NATIONAL PARK SERVICE ACT OF 1916: "A CONTRADICTORY MANDATE"?

ROBIN W. WINKS*

INTRODUCTION

Historians concerned with the National Park Service, managers in the Park Service, and critics and defenders of the Service, frequently state that the Organic Act which brought the National Park Service into existence in 1916 contains a "contradictory mandate." That "contradictory mandate" is said to draw the Park Service in two quite opposite directions with respect to its primary mission; the contradiction is reflected in management policies; the inability to resolve the apparent contradiction is blamed for inconsistencies in those policies.

The apparent contradiction is contained in a single sentence of the preamble to the act. That sentence reads, in addressing the question of the intent of the Service to be established by the act, that the Service is

> to conserve the scenery and the natural and historic objects and the wild life therein [within the national parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[1]

This paper is an attempt to determine the intent of Congress with respect to the Act of 1916. It is the work of an historian, not a legal scholar. The historian recognizes that the intent of the whole of Congress in passing an act, and the intent of the individuals who framed that act, do not perfectly coincide; that intent must nonetheless be interpreted as individual; that intent changes; and that the law of unintended consequences looms large in any legislation.

A MOMENT FOR CONTEXT

The National Park System of the United States is unique among the world's systems of government preserves. Because of this uniqueness, reference to attitudes, legislation, or management practices elsewhere, even if legally admissible, is of little help in understanding the American National Parks. One says of "little help," however, rather than of no help, precisely because the system's unique characteristics may be brought into focus best by a comparison with park systems elsewhere. Consider these aspects of the system's uniqueness.

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1. 16 U.S.C. § 1 (1994).

The Unique System

The National Park System of the United States is the world's largest, both in the number of units (375 as of June 1997) and in total land area. Thus, legislation passed with respect to the Park System, beginning with the National Park Service Act signed by President Woodrow Wilson on August 25, 1916 (also referred to as the Park Service's "Organic Act"), whether generic to the system as a whole or specific to an individual unit, has more extensive application than any other park system in the world. Such legislation influences, is affected by, and is of concern to all Americans.

The National Park System of the United States is the most complex, the most carefully articulated, and thus the most specific system in the world. There are twenty-one types of units (national park, national monument, national preserve, national reserve, national seashore, national lakeshore, national historical park, national battlefield park, national military park, national battlefield, national battlefield site, national historic site, national memorial, national wild, scenic, and/or recreational river, national parkway, national scenic and historic trail, national memorial, national recreation area, national scientific reserve, national capital parks and a miscellany of units grouped simply as "other") that are administered directly by the Park Service.[2] Several units exist in forms of partnership and loose affiliation, and three programs (national historic landmarks, national natural landmarks, the national registry of historic places) are run by the Park Service with respect to properties that, in general, it neither owns nor administers. Despite the care with which these various types of parks are designated, and the high degree of specificity that applies to the laws creating specific units, all are governed by the Organic Act.

The National Park System of the United States is genuinely national, for there are units in all but one state and in all dependencies. In some nations, such as Australia, areas designated national parks are in fact administered by state and local authorities. In some nations, such as Canada, resources adhere to the individual province, so that national park legislation may be substantially compromised at a more local level, as in the province of Quebec.

The National Park System of the United States is the world's most intellectually elegant system, for it has grown, and in more recent years has most consciously been added to, by the application of a National Park System Plan to which a series of Theme Studies is central. These Theme Studies, ranging over a number of subjects, both with respect to natural areas and to cultural and historical experiences of significance to the nation as a whole, have been conducted with care and imagination, with both Park Service professionals and informed non-governmental experts involved. While Canada, and to a lesser

2. Omitted from this list of types of units are (a) units with slight variations in title which are, despite those variations, clearly of one of these types; (b) seven properties administered through the National Capital Parks but not in fact included in those parks, such as the White House, and (c)—quite confusingly—several national recreation areas, one "national volcanic monument," and three national monuments which, despite the use of titles generally specific to the National Park Service, are in fact administered by the National Forest Service or the Bureau of Land Management.

extent New Zealand, have imitated the Theme Study approach to the evaluation and designation of potential Park System units, neither has applied this approach so fully. While at times a unit may be added to the U.S. System through more local political pressure, the overwhelming body of units reflect a close awareness on the part of the Park Service of Congress's desire to adhere to Theme Studies and to carry them out expeditiously.

The National Park System of the United States also has the warm support of the American people, who clearly cherish the system even when they do not fully understand it. This has not always been the case, of course, and any given unit may at some point have been the object of hostility, especially locally, but there can be no doubt that by the 1970s the system was embedded within a vigorous, growing, wide-spread public sentiment for conservation and protection of the environment. This sentiment has not abated, and the public brooks little compromise with what it understands to be the System's mission. The same may be said of National Park Systems in few if any other countries.

To be sure, public—and thus legislative—awareness of this mission has changed across time. For example, the initial campaign for the creation of national parks was strongly supported by the tourism industry, most particularly by railroads and, soon after, by automobile associations. At the time of passage of the Organic Act of 1916, the railroad was a power in the land, the only feasible means of mass transport to the great Western parks, while the automobile was being admitted to parks in ever greater numbers. The goal of the Park Service created by the act was to "preserve, forever unimpaired, the sublime beauty, dignity, and nobility of national park landscapes";[3] the Organic Act was silent on issues of biological preservation as we would understand the term today. But then, so too was the Constitution of the United States initially silent on such issues as privacy or anti-trust goals, though language was present by which courts would, in this century, find implied constitutional intent.

Acts Subsequent to 1916

Whatever the intent of Congress in 1916, with the enactment of the National Park Service Act, Congress may change its intent by subsequent acts. The Act of 1916 is examined in its full legislative history in the material that follows. But first, a sense of context requires some comment on the manner in which Congress added to the intent of the original act.

That intent has been Congressionally modified by two types of acts. There are broad-ranging acts relating to natural resources which impact upon the national parks, and there have been specific acts, notably those of 1970 and 1978, that have extended the discussion of the purposes of parks. Of the first type of act, there have been four above all that apply to the national park system. The Wilderness Act of 1964 created a National Wilderness Preservation System, prohibited all commercial activities, motorized vehicles, perma-

3. Richard West Sellars, *The Roots of National Park Management: Evolving Perceptions of the Park Service's Mandate*, J. FORESTRY, Jan. 1992, at 16, 17.

nent roads, or development of any kind within designated wildernesses, and provided that portions of National Park System units might be so designated. The Wild and Scenic Rivers Act of 1968 designated segments of rivers as part of a system in which waterways were to be maintained in or returned to a pristine state. (Subsequently a designation of Recreational River was added.) The Clean Water Act of 1972 set as a national goal the elimination of all pollutant discharges into waters and making waters safe for fish, wildlife, and people. While the deadline mandated by Congress was relaxed, the act continues to apply within national parks. The Endangered Species Act of 1973 defined endangered and threatened species and required the government to draw up lists of these species and to acquire lands and waters necessary to their protection. As many national park units function as wildlife preserves, the act has direct application to the parks.

Additionally, a series of acts relating to natural resources broadly, notably the National Environmental Policy Act, the National Forest Management Act, and the Federal Land Policy and Management Act, are also relevant to the parks. The last two acts require the U.S. Forest Service and the Bureau of Land Management to coordinate their resource management plans with other agencies, including the National Park Service. These acts quite obviously tilted the 1916 mandate toward a more compatible interpretation of the Park Service's responsibilities. To be sure, none of these acts defined the key word "unimpaired" in the 1916 act, but taken together, they provided a functional definition that went beyond "preserve unimpaired" virtually to call for the restoration of the ecological integrity of the National Parks.

National Park Acts of the 1970s

Congress went some distance toward functional definitions in two park-specific acts in 1970 and 1978. In an amendment to national park legislation, Congress declared that National Parks "derive *increased* national dignity and recognition of their *superb environmental quality* through their *inclusion* . . . in one national park system preserved and managed for the benefit and inspiration of all the people."[4] Clearly here Congress was holding National Parks to an "increased" or higher standard of protection, this higher standard was based on the maintenance or achieving of superb "environmental quality," and each park benefitted by being included in a system that benefitted all: that is, a threat to one was a threat to all. Further, Congress now called for preservation and management that would benefit and inspire "all the people," thus by implication ruling out management decisions that would redound to the benefit of only "some of the people": interest groups, local parties, one might argue even historically vested bodies that lacked clear national significance.

In 1978, Congress reaffirmed the Organic Act and declared that parks must be protected "in light of the high public value and integrity" of the park system in a way to avoid "derogation of the values and purposes" for which

4. National Park System General Authorities Act, Pub. L. No. 91-383, § 1, 84 Stat. 825 (1970) (emphasis added) (codified as amended at 16 U.S.C. § 1a-1 (1994)).

the parks, collectively and individually, were created.[5] "High public value" is somewhat subjective and clearly changes over time; by the use of this criterion, Congress appears to have instructed the National Park Service to manage parks in relation to public sentiment and, in effect, sociological jurisprudence. By this standard in 1978 Congress gave a powerful mandate to the Park Service, a mandate which would prohibit actions that could have the effect of "derogation" of park values. Virtually all commentators at the time and since have concluded that the 1978 provision added to the Park Service's mandate to protect ecological values.

Of course, the amendments of 1970 and 1978 apply to actions, not to inaction. That is, where an invasive activity, practice, or structure already existed, was the Park Service required to take action to eliminate it, or to mitigate its effects, or was the Park Service merely required to brook no future intrusions? In some measure the answer to this question requires site-specific knowledge, since national parks clearly are meant to be held to a higher standard than other, nearby, surrounding, or environing federal lands and one must know what those standards are, and thus what the specific threat, incursion, or compromising situation may be. Does, for example, an historic ditch that conveys water from, across, through, or into national park lands, for the benefit of private persons or municipalities, now require removal? That such a ditch requires mitigation there can be no question, under the expectation of parks being held to higher standards; that a local ditch, used for irrigation, would not meet park criteria is abundantly clear; that such a ditch impairs the "values and purposes" of parks also seems clear in the context of modern sensitivities and the legislation of 1970 and 1978. But neither act directs the Park Service specifically to remove such a ditch. Absent such instruction, a question is, may or should the Park Service do so?

Historic Structures within National Park Units

Today, more than half of the 375 units of the National Park System are primarily cultural/historical in their purpose, and there is likely to be greater growth in the future of such parks than there will or can be of natural/scenic reserves. Further, public awareness of historical structures, and public concern for their protection, has grown at least as rapidly as public awareness and concern for specified sites within the natural environment. It is not, therefore, a digression to comment briefly on how the Antiquities Act of 1906, and other legislation relating to historical preservation, would bear upon an historic object within a national park that had been set aside primarily for natural and scenic purposes. The example already proposed, an "historic ditch," may be used.

Might a ditch on park lands be an "historic object" in the meaning of the Organic Act, and thus entitled to consideration for protection on that ground? If the ditch were present in 1916, surely the answer is yes; if the ditch were

5. Act of Mar. 27, 1978, Pub. L. No. 95-250, § 101(b), 92 Stat. 166 (codified as amended at 16 U.S.C. § 1a-1 (1994)).

constructed after 1916, the answer is far more ambiguous. However, on either side of the date of the Organic Act, management would not be *required* to protect the ditch either as a structure or object or in its historic use unless it clearly met certain criteria.

In August of 1916 the Department of the Interior was responsible for twenty-one national monuments and one archaeological reservation. Of these, nine were defined as being primarily of historical significance, and therefore these units may be taken to suggest what Congress meant at that time by an "historic object." Of these units, five were purely archaeological in their intent (e.g., Chaco Canyon, Gran Quivira). These ancient ruins would more commonly be referred to today as "cultural" rather than "historical." One unit, Dinosaur National Monument, was set aside for the fossil record, that is, for paleontology rather than history as commonly understood. Only three units provide any functional definition of what Congress may have had in mind when it referred to "historic objects" in 1916: El Morro, a great rock on which Spanish, Mexican, and American explorers had inscribed their names; Tumacacori, the ruins of a significant mission church near the Arizona-Mexico border; and Sitka, site of a Tlingit village in Alaska. These were quite major, visible, and substantial sites. Clearly an historic ditch, no more than an historic cabin, was envisioned by Congress in 1916 as automatically embraced by the act.

Whatever Congress may have had in mind in 1916, the Historic Sites Act of 1935 provided criteria for the protection, selection, or conservation of "objects" that qualified for the attention of the National Park Service, so that thereafter decisions with respect to the protection of historically-used structures, or other alterations of nature within a national park, could be made on the basis of relatively clear principles. The Act of 1935 built upon the Antiquities Act of 1906, and it specifically required that to be of significance under the Act a site, building, or object must:

1) Be associated with and now be the "primary tangible resource" that illustrates, recalls, or characterizes "individuals, groups, events, processes, institutions, movements, lifeways, folkways, ideals, beliefs, or other patterns or phenomena that had a decisive impact on or pivotal role in the historic or prehistoric development of the Nation as a whole." By this criterion, an irrigation ditch—to continue with the example chosen—would be worthy of protection provided it were the "primary tangible resource" illustrative of the process of irrigation, or of a folkway that hinged upon the practice of irrigation, provided that the ditch in question were, indeed, "primary," "tangible"—for which read, retaining its substantial integrity as a structure—and relating to the Nation "as a whole." Thus a ditch that served or serves local purposes would not qualify, while a ditch that served wide-spread purposes illustrative of national growth would qualify, provided it were the "primary" (best surviving or most important) example illustrative of irrigation.

2) A ditch might qualify provided it were a "masterpiece of type," or had a "pivotal influence" in the later development of its type of construction as an aspect of "technological or engineering design." Thus the Park Service could recognize different stages in the development of irrigation, and protect

more than one ditch, provided each was an exemplar of a stage of development that transcended local use. This would require passing a test of integrity, or primacy, and finally of significance to the development of a particular application of engineering that had national impact.

3) A ditch might be protected if, in its structure, it provided "information" that was "essential to professional or public understanding of human development," such information not being obtainable by example elsewhere; and

4) The ditch would have to "possess an exceptionally high degree of integrity of form, material, and setting."

These criteria were subsequently expanded so that, in 1996, they number six. To the four stated above, one must add that such an historic place, site, structure, or object may be designated if it is a) representative of some "great idea or ideal of the American people" and/or b) is "associated importantly with the lives of persons nationally significant."[6]

There are also negative criteria. Ordinarily reconstructed structures do not fall under the act. Nor do structures that have achieved significance within the last fifty years. Nor do structures, even though they may have integrity, which have been moved from their original locations, unless the structure is historically significant for reasons of architectural merit.

There are two programs under which a site already within a national park unit can be formally designated as historic: the National Landmarks and the National Register.

There are now nearly 2,200 National Historic Landmarks. While one might argue that historic structures within a national park's borders automatically are entitled to special consideration, the fact that several structures that are inside park boundaries have been designated independently as National Historic Landmarks suggests that to guarantee preservation, or to cause the localized setting aside of criteria relating to natural preservation within a park that has been created primarily for landscape/scenic/wildlife purposes, such structures need be given the highest consideration only if they meet the separate Landmark criteria. In other words, historic structures that do not meet such criteria may be removed—or not—depending upon management decisions relating to the overall purpose of an individual park as stated in that park's enabling act.

Within Rocky Mountain National Park, for example, twenty-three structures or sites (including the old Fall River Road) had been placed on the National Register of Historic Places as of 1988.[7] There is no requirement that a structure be nationally significant to be placed on the National Register, for "properties significant to the nation, a state, or a community" may be nominated by states, federal agencies, and others. There are well over 50,000 places on the Register, including over 900 within units of the National Park System.

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6. *See* HISTORY DIVISION, U.S. DEP'T OF THE INT., CATALOG OF NATIONAL HISTORIC LANDMARKS (1987).

7. NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, U.S. DEP'T OF THE INT., NATIONAL REGISTER OF HISTORIC PLACES, 1966-1988 (1989).

In this way the Park Service has honored its obligation, as stated in the Organic Act, to recognize historic objects.

However, the continued presence of an "historic object" may militate against the primary purpose of a park unit, and unless that object is judged to be of National Landmark status, the Park Service may override the preservation of the historic object in the interests of the park's primary purpose. Nor does placement on the National Register assure any form of protection, local, state or federal; indeed, some two percent of National Register places have been destroyed.

The "historic object" reference within the Organic Act of 1916 has bedeviled historians and non-historians alike. Within the original national parks, those "historic" objects overwhelmingly were fences and gates used to control grazing, ditches and other structures to effect irrigation, or cabins used by hunters, foresters, and recreationists prior to the creation of a unit. The question has arisen often—most dramatically in Grand Teton and Olympic national parks in recent years—as to whether any or all of these three categories of "objects" either require protection, or may receive protection, under the Organic Act. The conclusion is that such "objects" do not require protection, and that the burden of proof is on the advocates of such protection, given the criteria relating to national significance, integrity, and "exhibit" value.[8]

Contextually, in addition to considering the impact of post-1916 natural resource legislation, of acts specific to the national parks, and of acts relating to historical preservation, on the Organic Act of 1916, one must consider one other aspect of the intent of Congress: how the meaning of language changes. One need not belabor the point here beyond observing that in usage and meaning, terms like "conserve" and "preserve" have functionally changed across time. Thus, the use of such terms in legislation subsequent to 1916 may not have precisely the same connotations as these words had at the time.

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8. In fact, few irrigation ditches would be likely to qualify in future for protection under these criteria, since the Park Service has, for example, already designated its choice of eight National Historic Landmarks with respect to the sub-theme of irrigation under the broad theme of engineering. Roosevelt Dam in Arizona, the first major project completed under the Reclamation Act of 1902, was designated in 1963, and in the citation of designation was meant to stand for the entire Salt River Irrigation Complex; San Bernardino Ranch, also in Arizona, designated in 1964, commemorates and illustrates ranch irrigation through the use of springs; the Folsom Powerhouse, in California, was designated in 1981 in recognition of the first use of high-voltage alternating current from a hydroelectric generating plant (1895); the Columbia Historic District, also in California, was designated in 1961, in part to include millraces and sluice boxes relating to gold mining; the Old Mission Dam, near San Diego, was demarked in 1963 to commemorate the first major irrigation-engineering project on the Pacific Coast undertaken by Spanish inhabitants; the Carlsbad Reclamation Project, dating from the 1880s, was designated in 1964 to commemorate the earliest extensive irrigation project built by private enterprise, and to honor the inhabitants of the Pecos Valley for their achievements; and Bonneville Dam and adjacent structures were honored in 1987 as the best example of a water diversion project. The Espada Aqueduct, in Bexar County, Texas, was designated in 1964 as the only remaining Spanish structure of its type in the United States. It is now part of San Antonio Missions National Historical Park. With this articulation of sites illustrative of the theme of irrigation, it is difficult to imagine that a case could be made for the national protection of other structures or objects relating to the more-or-less routine transport of water in the 19th- or 20th-century West.

CREATING A NATIONAL PARK SERVICE: THE ACT OF 1916

The National Park Service was created by Act of Congress in August, 1916, and President Woodrow Wilson signed the Organic Act on August 25. The act was the result of some six years of discussion, intense lobbying by a variety of interest groups, and growing public concern. The leaders of the campaign to establish a Park Service were, in the House, Congressmen William Kent and John Raker, both of California, and in the Senate, Reed Smoot of Utah. Congressman Kent had the close advice of Frederick Law Olmsted, Jr., son of the founder of American landscape architecture and creator of Central Park. Stephen T. Mather, a wealthy borax industry executive (who later would become the first full-time Director of the new National Park Service created by the act) was heavily involved, as were a number of recreational, outdoor, tourist, and automobile associations, of which the American Civic Association was the most important.

These advocates spoke of most of the thirty-seven parks that then existed, as well as the wide range of park proposals pending before Congress, in terms of scenic reserves, often invoking a comparison with Switzerland, which it was invariably argued had capitalized on its natural scenery more effectively than any other nation. Both railroad and automobile interests advocated more consistent administration of the existing parks in order to protect them more effectively, and also to make certain that accommodations and campgrounds were held to a consistent standard for the public's pleasure. While the railroads wished to bring spur lines to the borders of the parks, they seldom argued for actual entry. Automobilists wished to see roads to and within the parks upgraded so that visitors could tour the parks in greater comfort. All spoke of "scenery" with respect to the principal natural parks, though with a variety of qualifiers, and all referred to the need for preservation of that scenery while also making the scenery accessible for the "enjoyment" of the public. Thus, any discussion of Congressional intent in 1916 involves some understanding of what was meant at the time by "scenery," as well as the specific references to it in hearings, debate, legislation, and the correspondence of the key legislators.

In 1915-16, during the Congressional session which enacted the Organic Act, there were twenty-one members of the House Committee on the Public Lands, eleven of whom had served on the Committee in one or more previous Congresses and had experience with earlier omnibus park bills. Of these members, some were silent throughout, speaking neither at hearings nor in debate. The papers of sixteen of these members have survived. Debate, and the members' papers, make it abundantly clear that the key members in the House, with respect both to the Organic Act and to specific national park bills during this time, were Congressmen Kent and Raker, Congressman Irvine Lenroot of Wisconsin, who was a watchdog preoccupied with scrutinizing all bills for their financial impact on government spending, and Congressman Edward T. Taylor of Colorado, who was an advocate of the bill that created Rocky Mountain National Park in 1915 and who saw the two acts as closely related. While other members spoke on occasion, their concerns were to clarify matters relating to grazing, roads, or fire protection, and almost never did

any Congressman other than these four speak to general principles of preservation and protection or to matters concerning water. Indeed, many key members of the Committee, who were active with respect to other matters that came before it, were silent on the Organic Act of 1916. Their papers are also silent: in the hundreds of volumes of manuscripts in the Carl Hayden Collection at Arizona State University, for example, there are frequent references to national parks from the 1930s forward, but the collection is, except for a single document, utterly silent on the act of 1916. To cite a second example, the papers of Congressman Addison T. Smith of Idaho, now in the Idaho State Historical Society in Boise, are "a dead collection" on any matters relating to the public lands.[9] Thus, in the House one best focuses on Congressman Kent, whose bill, H.R. 8668, was ultimately enacted (with slight modifications) as H.R. 15522, and whose papers are voluminous.

The story is similar in the Senate. While several Senators spoke with respect to their final bill, S.9969, which was offered by Senator Smoot, almost no one took up broad questions of the language of the bill. An examination of the surviving papers of all members of the Senate Committee on the Public Lands and Surveys for 1915-16 reveals that only Smoot was closely attentive to the legislation. His papers, most particularly his diary, in the library of Brigham Young University, supplement his public remarks.

The preamble, or "statement of fundamental purpose" for the Act of 1916, was drafted by Frederick Law Olmsted, Jr., at the request of Congressman Kent. Thus Olmsted's views, though he was not a member of the legislature, are also important to understanding Kent's intent. Fortunately, his papers survive at the Library of Congress (and, to a lesser extent, at the former Olmsted offices and studios in Brookline, Massachusetts).

The governing sentences of the National Park Service Act of 1916 read as follows:

> The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reserva-

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9. The Hayden manuscripts are typical of those of members of the House Committee. In 1915 he was involved in an International Irrigation Congress but saw no need to mention this subject when discussing the Rocky Mountain National Park Act that year, and his papers are silent except for a copy of Enos Mills' *What We Owe to Our National Parks.* In 1916 Hayden was fully engaged in speaking out on women's suffrage, the European war, and prohibition; if he ever spoke in public on the Organic Act, there is no record of it in his papers. When Hayden did refer to parks, the content of his papers is typical for the time: in 1913 he apparently agreed that an archaeological site near Phoenix should be saved because it was a commercial asset, and he apparently agreed with the Phoenix Board of Trade in its demand for auto roads along the Grand Canyon. The Smith Collection contains a clipping file on Good Roads and nothing on parks. The Papers of James Wickersham, in the Alaska State Library in Juneau, show diary entries for the months in which the Park Service Act was discussed, and though Wickersham comments on other bills to come before the Committee on the Public Lands, he is quite silent on the Organic Act. *See* Hayden MSS (on file with Arizona State University (Tempe) box 607, folder 20, and box 631, folders 13 & 14); Addison Taylor Smith Collection MS (Idaho State Historical Society, 22 finding aid); James Wickersham Papers MS (Alaska State Library (Juneau) 107 Inventory and Diaries (photo.)).

> tions, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[10]

It is this language which requires explication, and it is the path to this language, beginning with the first suggestion that there should be a National Park service or bureau, that requires tracing if we are to understand Congressional intent.

Taft and Ballinger Recommend a Bureau

Beginning early in 1910 the American Civic Association had declared the need for a special bureau, most likely within the Department of the Interior, to administer the nation's national parks, of which by then there were eleven, with a twelfth to be added in May. (There were also eleven units with other designations.) There also were by the end of that year seventeen national monuments, under the administration of the Department of the Interior or the Department of Agriculture, and the Association wished to see common principles of administration applied, certainly to the parks and perhaps to the monuments. In his annual report for 1910, the Secretary of the Interior, Richard Ballinger, recommended that Congress should create a "bureau of national parks and resorts" in order to assure future generations competent administration of the parks.[11] This statement was immediately taken up by the American Civic Association though never again was there reference to "and resorts" in relation to a bureau's prospective title.

This did not mean that some of the parks were not seen in some measure as resorts, of course, but rather that those groups lobbying for creation of more parks, and more consistent administration of them by a central bureau, preferred different terminology. The lobbyists often referred to the parks as "the nation's playgrounds," as "havens of rest," as places where the public might enjoy solitude, recreation, and "a sense of good health." To some, however, "resort" carried a somewhat undemocratic connotation, while "playground"—which was universal, for the people—became the preferred term at the time. In all the lobbying, Congressional hearings, and debates to follow, emphasis remained upon ways of bringing benefits "to the people," and the only analogous discussion to "resorts" vs. "playgrounds" would occur in 1916, when the automobile was seen by some, as it was being admitted to the parks, to be an instrument of the rich. By the time the Kent bill was before Congress, most members spoke little of the parks being resorts, and virtually all used as preferred language, "the nation's playgrounds," a term also used by the American Civic Association.

Secretary Ballinger was in the midst of a major scandal at the time he

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10. 16 U.S.C. §1 (1994).

11. *Bills to Establish a National Park Service and for Other Purposes: Hearing on H.R. 434 & H.R. 8668 Before the House Comm. on the Public Lands*, 64th Cong., 1st Sess. 3 (1916) [hereinafter *Hearing 1916*].

made his recommendation. The primary student of Richard Ballinger's land policies, James Penick, Jr., has argued that the scandal that surrounded Ballinger in his last months, prior to his resignation on March 11—usually referred to in standard textbooks as the "Ballinger-Pinchot" controversy, in which Ballinger lost, at least in the eyes of the public (and of historians subsequently), to Gifford Pinchot, the dynamic director of the U.S. Forest Service—was not in fact a scandal so much as a clash between theories. Ballinger ran the General Land Office—the primary agency for disposing of the public domain—according to nineteenth-century principles while new theories of land management had, by 1907, won over a large public who believed that private individuals ought not to be able to control essential public resources such as water power. Penick astutely observes that "[t]he same generation which would soon sanction immigration laws to protect the genetic purity of the American population and would support a National Park Service to protect the heritage of natural beauty awoke somewhat earlier to the revelation that the material wealth had been acquired by a few men who used their great economic power to exploit the farmer and laborer."[12] These people, associated with the Progressives though not necessarily Progressives themselves, felt the General Land Office had "abetted [a] great betrayal."[13]

"These people," largely middle class, wished to see the grand scenery of America preserved virtually as a patriotic act. They did not want any of the natural scenery within the national parks to be used to private ends. A shift "from the general to the particular" had occurred, so that there was an informed public ready to argue the merits of damming the Hetch Hetchy Valley in Yosemite National Park, for example, as there were those who were promoting a National Park Service to be concerned with the integrity of all parks.

On February 11, 1911, when President William Howard Taft sent his special message on conservation to Congress, he omitted any reference to "resorts" altogether, recommending the establishment of a bureau of national parks, as essential to the "proper management of those wondrous manifestations of nature," which were, he said, "so startling and so beautiful that every one recognizes the obligations of the Government to preserve them for the edification and recreation of the people."[14] He thus combined the inspirational, educational, and recreational purposes of the parks in a lockstep that would become fixed in the minds of park proponents. On February 12, 1912, Taft spoke in public, listed some of the national parks (to which he added the Grand Canyon, which was then a national monument), and declared that in "consideration of patriotism and the love of nature and of beauty and of art" it was essential to spend the money needed to "bring all these natural wonders within easy reach of our people."[15] A bureau would improve the parks' "ac-

12. JAMES PENICK, JR., PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR 24 (1968).

13. *Id.*

14. President William Howard Taft, (Feb. 11, 1911) *in Hearing 1916, supra* note 3, at 4.

15. Taft's address on parks appears in *A Bill to Establish a National Park Service and for Other Purposes: Hearing on H.R. 104 Before the House Comm. on the Public Lands*, 63d Cong., 2d Sess. 6 (1914) [hereinafter *Hearing 1914*] (introduced by Congressman Raker).

cessibility and usefulness," he concluded.[16] These were common themes at the time, for parks were likened to "nature's cathedrals" through which the United States, a raw young country, matched in splendor the great human-built cathedrals of Europe (a commonplace comparison, especially for Yosemite), and in which nature imitated the colors of art (usually said in reference to Yellowstone or the Grand Canyon). Such messages made clear that the President regarded, and believed that the American people regarded, the parks as symbols of the nation and thus of vital importance. However, Taft's words did nothing to define standards of protection, much less of administration. This would be left to Congress.

President Taft's concern had grown directly from the first major conference devoted specifically to national parks, held at Yellowstone in 1911. There, in a park policed by the U.S. Army, where different concessionaires charged different prices for transport from different entrances, where hotel facilities were deemed on the whole inadequate and automobiles were not yet permitted, a number of interested parties, including members of the House and Senate, spoke of the need for national parks to serve the nation's health, preserve its great scenic wonders, and provide for recreational outlets for the people. Nature was compared to architecture, Providence (and at times God) were invoked, and most speakers believed that these wonders were intended for human "delight."[17]

The Hearing of 1912

The first substantive discussion of the purposes of a National Park Service or Bureau occurred during the House hearings on H.R. 22995 on April 24 and 25, 1912.[18] During the discussion much was revealed concerning what, in the eyes of individual members of the House and in the mind of the Secretary of the Interior, Walter Lowrie Fisher, national parks were meant to be. The hearing moved expeditiously, with significant questions being fed to the Secretary by Congressman Raker, who clearly was committed to the creation of some type of professional service. Though the hearing was ill-attended—of twenty members of the House Committee on the Public Lands, only ten were present, and but half of these spoke—it brought forth several basic points.

After noting that the Secretary of Agriculture, James Wilson, approved of the proposed Park Service, while offering some amended language to the bill calculated to put greater distance between parks and national forests, the Committee called upon Secretary Fisher, who in his prepared statement gave six reasons why a bureau or service was desirable. (In subsequent discussion he elaborated upon some of these and added two additional reasons.) Interestingly, his first goal was to establish criteria for national park status and to hold to

16. *Id.*

17. The background to the post-1911 bills is explored in Donald C. Swain, *The Passage of the National Park Service Act of 1916*, WIS. MAG. HIST., Autumn 1966, at 4, 4-17.

18. *A Bill to Establish a National Park Service, and for Other Purposes: Hearing on H.R. 22995 Before the House Comm. on the Public Lands*, 62d Cong., 2d Sess. (1912) [hereinafter *Hearing 1912*].

these criteria in the face of local pressure (in which he included political figures and associations).[19] Reverting to this point later, Fisher observed that there were among the now twelve existing national parks three that were not of national significance (while he did not name them, correspondence at the time makes it clear he had in mind Platt National Park in Oklahoma, Sullys Hill National Park in North Dakota—both ultimately demoted or abolished—and the Hot Springs Reservation in Arkansas). The twelve parks included duplications, were an "accumulation," and were not all of equal significance. A bureau would give the Department added strength in resisting future inappropriate proposals.[20]

Fisher also cited as justification for a bureau the need for coordination in policy and funding. Lacking a bureau, any experience gained in one park was of little practical use in another park (here he spoke of the need for an engineer who could formulate and apply common policies with respect to roads and bridges, and the development of such "incidental power" from the natural waterfalls as could appropriately be developed for lighting hotels and roads without interfering with scenic values). He cited the need for continuity and consistency in granting leases for accommodation, in order to avoid the chaos inherent in policies that ranged from no provision for granting leases through ten- to twenty-year leases (and one instance—Mount Rainier National Park—where the enabling act was silent on any time limit).[21] Finally, a bureau could set administrative and management policy on a range of problems in order to assure visitors some common standard of experience, whether in hotels, campgrounds, or transport. As something of an afterthought, Fisher added in closing that a bureau would make possible "scientific" determinations (he cited the question of the effect of the use of oil on roads within the parks) not then available.[22] Under questioning, Clement S. Ucker, the chief clerk then responsible for the parks, pointed out that the intention also was to bring the existing national monuments and the Casagrande Ruin (as then spelled) Reservation in Arizona under the proposed bureau's jurisdiction.[23]

Throughout testimony, Fisher, Ucker, and those Congressmen who spoke, reflected a desire to see the lands administered by the proposed bureau viewed as being unique, nationally significant, and a coherent whole rather than an "accumulation." When discussing the "automobile question," Fisher noted that "to help the scenic beauty of the parks," they ought "to be kept properly" and asserted that there was "a park point of view": "The Forest Service, for instance, in its regulations, treats of the matter only from a timber point of view and not from a scenic point of view at all."[24] One important goal of management was "not to destroy the scenic effect." Congressman Raker concluded, in response to a colleague's observation that the parks were "simply large areas," that "you do not find any on earth that contains the scenic beauty and gran-

19. *Id.* at 4-6.
20. *Id.* at 17.
21. *Id.* at 7-9.
22. *Id.* at 10.
23. *Id.* at 12.
24. *Id.* at 13.

deur and necessity for preservation as in those national parks."[25]

What Is Scenery?

This hearing in 1912 was typical of discussion to follow. For the most part, both members of the House and witnesses from the executive branch restricted themselves to mid-level generalities. No one asked probing questions about precisely how scenic values were to be preserved or, indeed, what scenery was. Nonetheless, three generalizations emerged. Parks were to be held to a higher standard of preservation because of their grandeur and (with monuments) scientific values than were other federally-administered lands; this would best be achieved through a separate bureaucracy which would understand these different needs and values; and while roads, accommodations, and other man-made intrusions were necessary in order to enhance the recreational purposes of the national parks, such physical objects were to be subordinate to the preservation of the "scenery." Never, however, was *scenery* defined, for clearly all believed they understood its meaning.

There is no doubt that Congress wished to protect the scenery of the national parks. (Protection is not, of course, preservation, a word more commonly applied through the Antiquities Act of 1906 to national monuments, especially of an archaeological nature.) Though "scenery" is to some extent subjective, one should note that the word has certain agreed meanings which have not changed substantially. "Scenery" is "the *aggregate* of features that give character to a landscape"—a definition that allows for scenery to fall well short of "grandeur" and which thrusts a significant burden onto "landscape," which is defined (somewhat circuitously) as "a section or portion of scenery, usually extensive, that may be seen from a single viewpoint."[26] This sense of "scenery"—that it represented a viewpoint, or perspective, that was wholly to be determined by humans—is reinforced when one notes the second definition, "the painted backdrops on a theatrical stage."[27] When Peter Roget first prepared his now famous thesaurus in 1853, he noted as synonymous terms for "scenery" the words "view," "scene," "sight," "prospect," "outlook," "lookout," "vista," "perspective," and "landscape."[28] (Other terms, such as "panorama" or "waterscape," are products of the twentieth century.) One may argue, then, that if one may assume those who used the term "scenery" in conjunction with "protection" knew the value of the words they chose, they intended that priority should be given to land that embraced several natural features (an aggregate) that were capable of being viewed from some point, whether road, trail, outlook, above or below, and that any alteration of timber cover, water course, rock face, or naturally occurring floral or faunal presence was to be avoided.

In 1911 the Century Company had issued a new *Dictionary and Cyclope-*

25. *Id.* at 23.

26. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1176 (Coll. ed. 1968) (emphasis added).

27. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1979).

28. ROGET'S INTERNATIONAL THESAURUS § 446.6 (4th ed. 1911)

dia which had become the favored reference of Congress. In addition to invoking the words "aggregate of features or objects" and "character," this authoritative dictionary had added a definition of *scenery* which also included the notion of the "picturesque or pictorial point of view."[29] Thus, no matter which dictionary one might consult, "scenery" is tied to "a place," or "features"; involves more than one "object"; and derives special value from the "aggregate" or conjunction of those objects, as viewed from some undefined but nonetheless human vantage point.

The Hearing of 1914

The National Park Service bill was introduced again at the 63d Congress, and as H.R. 104 it was the subject of another hearing before the Committee on the Public Lands on April 29, 1914, at which the idea of a "scenic point" was introduced by one of the speakers, Henry S. Graves, the Chief Forester for the Department of Agriculture.[30] However, this hearing turned largely upon the practical question of whether a separate service would reduce expenses, be more efficient, and eliminate the need to use U.S. Army troops in some of the parks, a practice against which the War Department was protesting. Well attended, this hearing was particularly revealing on the army question but did little to advance general definitions of parks; there was no discussion of natural resources or of the meaning of protection. Congressman Raker again made the running, referring to the parks as "playgrounds," embracing the widely held language of the good roads, health, and recreation interests that were pressing both for a uniform service and for additional parks.[31]

President Taft's statements were placed on the record. He clearly felt there should be more national parks; equally, he wanted a bureau so that the parks "may become what they are intended to be when Congress creates them."[32] He made no effort to suggest what that intention was, since quite properly this was a matter for the legislative branch. Raker was the only member of the Public Lands committee who appeared to be concerned with the fact that there was no clear definition of the purposes of parks beyond being in themselves "great natural wonders" preserved for the benefit of the people, and he introduced to the hearing an address by Secretary Fisher made the previous year in which Fisher remarked that while he did not wish to intrude upon the terrain of such men as J. Horace McFarland, the President of the American Civic Association, or Senator Smoot, who had spoken strongly about the need for parks at the 1911 Yellowstone conference, he nevertheless found "there is no consistent theory of legislation with regard to the national parks."[33] Fisher addressed himself to the concerns he had laid out in the 1912

29. DICTIONARY AND CYCLOPEDIA VIII, 5385 (1911).

30. The Papers of Henry S. Graves are in the Yale University Library Archives. Though rich and relatively extensive (53 boxes), they contain no topical files on national parks. They do cover the period under scrutiny here, 1910-16, and were searched on all points on which Graves is mentioned hereafter.

31. *Hearing 1914*, *supra* note 7, at 75.

32. *Id.* at 6.

33. *Id.* at 7.

hearing, adding two additional reasons for creating a park service: the need to protect the public and enhanced effectiveness in publicizing the parks. He commended the great railroads, and the Northern Pacific in particular, for their enlightened practices in promoting but not penetrating parks.[34]

Thus, little that was new emerged from the 1914 hearings, except for the revealing comments of Adolph C. Miller, assistant to the Secretary of the Interior, who after much praise for the soldiers who patrolled Yellowstone and Yosemite parks, and some battering by members of the committee who feared the growth of another expensive government bureaucracy, found that his most persuasive case appeared to be in demonstrating that the public did not like the presence of the army in the parks.[35] "Military rule," said Denver S. Church, Congressman from California, "spoils the scenery and makes cold water taste flat."[36] Miller did make it clear that the parks were faced with requests that a bureau could best resist, citing the case of an effort by the power and electric company operating in Sequoia National Park to change the location of their conduits and intakes, moving nearer a waterfall, that ought not to be permitted if a move was to the "detriment" of the "scenery of the park," a judgment best made on the spot by a trained individual.

The Department of Agriculture, which administered the national forests and the national monuments within forest boundaries, was a consistent supporter of the 1914 and 1916 national park service bills. Here the commonly held notion that Interior and Agriculture were in opposition to each other is quite untrue. Graves had been dubious about national parks prior to 1914, but he had changed his mind by then. He reasoned that a separate park service, which could hold to higher standards of protection and scenic values, taking in only areas of truly national significance, would in fact protect the forest service in its holdings, since so many proposed parks were in Forest Service lands but were not of national significance. As Graves said, the Grand Canyon should be a national park—thus he helped make clear the criteria, at least of size and splendor, for inclusion in the system—while other areas (he named Mount Hood, Estes Park—the current way of referring to what would become Rocky Mountain National Park, or the Mount of the Holy Cross, all of "a special scenic character") might begin as national monuments administered by the Department of Agriculture and then, upon further study, become parks. In short, a vigorous, well-managed, and clearly-defined system of national parks would protect the forest department from poaching by local interests that thought the name "national park" would bring in more tourists and more quickly lead to good roads.[37]

Later, after a National Park Service was created, the NPS proved Graves to be accurate in his prediction. Between 1916 and 1932 over thirty-five national park proposals came before the Park Service, and its Director, or the Secretary of the Interior, declared with respect to twenty of these proposals

34. *Id.*
35. *Id.* at 74-75.
36. *Id.* at 75.
37. *Id.* at 79.

that the areas in question were not worthy of national park status, leaving the lands in the hands of those then administering them, usually the Forest Service.[38]

The Hetch-Hetchy Factor

After 1913 discussion of national park bills, and of any bill to require the application of uniform policies to parks, was constrained by bitter and recent memories on all sides of the great battle over the Hetch Hetchy Valley in Yosemite National Park. Many conservationists felt betrayed by President Wilson when, in December, 1913, he signed a bill authorizing the building of a great dam that flooded the Hetch Hetchy, thus infringing in the most basic and dramatic way on a park and most clearly contradicting any rhetoric to that point about scenic preservation and recreation being the highest values. Most of the players in the Rocky Mountain National Park and National Park Service bills were involved in these heated debates, and at times virtually coded remarks were made in hearings and in correspondence which, read in the context of the Hetch Hetchy, carried more pointed meanings than they may appear to do today.[39] Certainly this was the case with Congressman Kent, who in favoring the dam had lost the affection of "the father of national parks," John Muir, and had gained the suspicion of the American Civic Association and the Sierra Club. For Congressman Raker, the situation was especially difficult, for it had been his bill that created the dam, and taken together with other efforts on his part to bring water to his northern California constituents, he did not, in fact, appear to most proponents of parks to be a firm friend. This may well account for his emotional commitment to the park service bill, and especially a somewhat remarkable outburst during the hearings of 1916,[40] and surely contributes to the silence of many members of Congress on water matters, in particular, as they related to parks in 1914 to 1916.

Historians of public land policy for this period often detect four separate and distinct political groups which, depending upon the issue at hand, interacted in alliance. One, who called themselves the preservationists, were opposed to virtually any use of natural resources that would lead to their unnatural alteration. A second group, the "advanced progressives," advocated federal development as opposed to state or private enterprise. A third group, business-minded conservationists, were at the center of an emerging alliance between commerce and conservation; they wished to see private business, and sometimes the states, directly involved in both development and protection. It was this group that was most vocal on the national park issue, for they recognized that a magnificent protected area might be of great local commercial value. (Some subsequent scholars have referred to those who espoused such an alliance, especially when they worked with the advanced progressives, as "utili-

38. These are spread throughout the National Park Service records in the National Archives *seriatim.*

39. Hetch Hetchy is put into perspective by SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

40. *Hearing 1916, supra* note 3, at 119-20.

tarian-conservationists.") A fourth group simply opposed any federal regulation of resources within the states, invoked arguments of states' rights, and are usually referred to as the laissez-fairists.[41]

The significance of the Hetch Hetchy controversy to understanding the language used in discussing national parks subsequent to 1913 is that these four groups changed positions respective to each other during the affair, producing much bad feeling, and many who were involved in the bills of 1915 and 1916 had been burned over the Yosemite "violation," as some called it. Kent, for example, had been thought to be in the first group and then moved to the second; Robert LaFollette of Wisconsin had been so outspoken a member of the second, he was expected to be a champion of subsequent bills but remained largely silent on national park issues; Smoot, Lenroot, and Senator Henry Lee Myers of Montana belonged to the third group and would ordinarily have been opposed to President Wilson, but the war in Europe had muddied alliances, and they frequently proved to be the most powerful voices of moderate conservatism. Senators John F. Shafroth of Colorado and Clarence D. Clark of Wyoming were ideological laissez-fairists on most positions, and yet Shafroth would, after much soul-searching, support the Rocky Mountain National Park and Clark would defend a no-grazing provision for Yellowstone.[42]

Again, the person most alert to the damage the Hetch Hetchy type of controversy could do was William Kent. He had been a municipal reformer in Chicago who, despite having moved to California, with a home in Marin County, had remained active in Chicago politics until 1907. He disliked crowded cities and ordinarily favored any bill that would provide parks and playgrounds within the cities or would slow the pace of urbanization outside them. With the Hetch Hetchy he found himself in conflict, for he did not want to see a national park lessened and yet he believed that an assured supply of fresh water to San Francisco would so enhance health as to outweigh his convictions about the psychological and spiritual benefits of solitude and nature. As one scholar has remarked, "Kent was progressive except on the question of progress itself" while J. Horace McFarland, President of the American Civic Association, who opposed Hetch Hetchy, "was conservative except regarding conservation."[43] Thus Congressional discussions of both the Rocky Mountain bill in 1915 and, more directly, the Park Service bill in 1916, were shaped by memory of the wounds inflicted upon each other only a few years before, and no one appeared to want to directly confront the question of whether, in the

41. On these groups see in particular ELMO R. RICHARDSON, THE POLITICS OF CONSERVATION: CRUSADES AND CONTROVERSIES, 1897-1913 (1962).

42. These divisive woundings are discussed in Roderick Nash, *John Muir, William Kent, and the Conservation Schism*, 36 PAC. HIST. REV. 423, 423-33 (1967).

43. STEPHEN FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT 138 (1981). The Raker Bill to dam the Hetch Hetchy was proposed in the Senate by Nebraska's "fighting liberal," George W. Norris. *See* NORMAN L. ZUCKER, GEORGE W. NORRIS: GENTLE KNIGHT OF AMERICAN DEMOCRACY (1966); RICHARD LOWITT, GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE, 1913-1933 (1971). Lowitt points out that Norris favored protection of scenery but that he felt the beauty of the Hetch Hetchy valley would be enhanced by a lake with a dam the color of the surrounding mountains. LOWITT, *supra*, at 23. This was in keeping with the view, popular early in the century, that a "water feature," even if artificial, enhanced a view.

event of a conflict between good health through pure drinking water or good health through protected and open spaces, they would favor one over the other. Kent, having seen the divisiveness of the issue, appears to have deliberately avoided it.

Through their successive introduction, the Raker and Smoot bills to establish a national park service remained unaltered, save for one change in punctuation which unlike such changes in diplomatic documents, had no apparent significance. Congress intended to leave to the Secretary of the Interior the actual task of determining policies which, by their nature, would more clearly define what parks were to be. Section 4 of the bills consistently instructed the Secretary to "make and publish such rules and regulations as he may deem necessary and proper . . . for the management, use, care, and preservation of such parks, monuments, and reservations [this word was retained throughout to accommodate Hot Springs Reserve], and for the protection of property and improvements, game, and natural scenery, curiosities, and resources therein."[44] This remained the language of H.R. 424, introduced on December 6, 1915, on which the Committee on the Public Lands held hearings on April 5 and 6, 1916.

The Hearings of 1916

The House hearings of April, 1916, dealt with two bills, H.R. 434 (Raker's bill) and H.R. 8668, a new bill introduced by Congressman Kent. H.R. 8668 differed from H.R. 434 in that it contained the significant preamble quoted at note 2 above. The Chairman of the Committee on the Public Lands, Scott Ferris of Oklahoma, perhaps sensing that victory could be achieved in this session of the 64th Congress, let Kent virtually run the hearing, though Raker also was present. Since his first attempt to sponsor a successful bill, Raker had visited Yellowstone, several monuments and all the parks in California, Yosemite being in his district and Lassen and Cinder Cone monuments having been so prior to a revision of district boundaries. He entered a formal written statement into the record in which he told of his long-standing interest in the parks and endorsed the views of several men who had testified or offered statements at previous hearings, including Secretary of the Interior Fisher, Chief Forester Graves, and J. Horace McFarland.[45] He also commended the work of Rowland B. Grant, a conservation writer, and described the park bill as his "pet project," as the matter uppermost on his mind. "[M]y whole soul is wrapped up in this legislation," he told his colleagues, in an emotional appeal to have the bill passed within the next few days.[46]

Congressman Kent was no less concerned with speed, however, and being a more seasoned politician and more popular colleague, he was both more active behind the scenes and more effective in the committee. Remarking that

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44. *Hearing 1914*, *supra* note 7, at 3.

45. *Hearing 1916*, *supra* note 3, at 93. On McFarland, see ERNEST MORRISON, J. HORACE MCFARLAND: A THORN FOR BEAUTY (1995) (see especially chapter 11).

46. *Hearing 1916*, *supra* note 3, at 120.

he had no desire to have his name attached to the legislation, and bowing to Judge Raker's primacy in having brought a bill to the House, he unsuccessfully sought to put aside the single issue which all agreed had sidetracked Raker's earlier bills: the question of costs. These hearings were better attended than any previous ones on the issue, and as Kent noted privately, with war in Europe and a national election fast approaching, it was now or never if this bill—any bill, his or Raker's—were to be passed. Kent believed his position was clear enough. What he wanted when he agreed to introduce a bill in place of Congressman Raker's was a document that was "as short and uncluttered as possible," knowing that this meant that language would not be provided to clarify all future areas of conflict and ambiguity. The resulting act was only two and a half pages long.[47]

The 1916 hearings substantially repeated the previous hearings, even to the extent of reading into the record the text of those hearings. The Secretary of the American Civic Association, Richard B. Watrous, as well as McFarland, spoke, rehearsing the history of previous efforts to create a service and invoking the spirit of John Muir, who had died two years before. Watrous more than any other commentator argued that parks were a "business undertaking," that public ignorance kept them from being the profitable enterprises they could be, and that Switzerland and Canada had well-organized park systems which led to large sums of money for their governments as well as for private enterprise.[48] Speaking first, he set the tone for the hearing, which overwhelmingly focused on the twin financial questions, could the parks make money and would a bureau be costly, by reminding the Congressmen that during the recent international expositions in San Francisco and San Diego, to which many thousands of visitors travelled from the East, perhaps 75 percent of all tourists had chosen to go or return via the Canadian railroads because of the existence of national parks in the Canadian Rockies, parks that were well publicized by the Canadian Commissioner of National Parks, R.B. Harkin. Watrous quoted Harkin approvingly when the commissioner declared that parks "will pay not only in the strictly commercial dollars and cents way but they will also pay in a still more important way—by adding to the efficiency and virility of the nation."[49]

Thereafter the hearing focussed upon the costs of maintaining the parks, especially the expense of building and maintaining roads and the merits of charging a fee to those who entered in automobiles, and on whether a bureau would make for such efficiencies as actually to save the government money. Congressman Ferris declared that the hearing would concern itself only with "the general subject," and when it appeared that the committee might again

47. On the framing of the bill, see HORACE M. ALBRIGHT & ROBERT CAHN, THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913-33 34-45 (1985). This is a primary source, being Albright's memoirs. He was present at the meetings in Kent's home. Albright appears to have been the first administrator to refer to a national park "system." *See* DWIGHT F. RETTIE, OUR NATIONAL PARK SYSTEM: CARING FOR AMERICA'S GREATEST NATIONAL AND HISTORIC RESOURCES 13 (1995).

48. *Hearing 1916*, *supra* note 3, at 5.

49. *Id.* at 8.

fail to report out a park bill, and especially when there was a possibility that some members would delay the bill by demanding more information on the question of tolls, Kent spoke up vigorously to cut off discussion on the issue until some future time when it would become apparent whether or not the automobile would be the standard means of transportation to the parks. He told the committee that the time had come to "get action" and that matters of detail could wait.[50]

In the hearings only two new points were made. For the first time the phrase "national park system" was used, involving the image of a systematic inventory of the nation's grandest scenic landscapes and natural and scientific curiosities, all to be combined (with the ultimate transfer of national monument properties then under the jurisdiction of the Department of Agriculture) within one efficient and consistent administration.[51] Secondly, for the first time the notion of the parks as great educational enterprises, places to which the public could come to learn about nature, geology, fossils or sedimentation, while also increasing their working efficiency, their health, and their patriotism, was set out clearly, in this case by McFarland and by R.B. Marshall, the Superintendent of the National Parks, a newly-created position.[52] The "great parks are, in the highest degree, as they stand today, a sheer expression of democracy, the separation of these lands from the public domain, to be held for the public, instead of being opened to private settlement."[53] McFarland read into the hearing the sentence Frederick Law Olmsted, Jr. had framed as the preamble to Kent's bill and declared that this statement must "remain as it is, unless it can be strengthened; it should never be weakened."[54]

Olmsted's Statement of "Fundamental Purpose"

Frederick Law Olmsted, Jr. is important to understanding the language of Kent's bill. The son of Frederick Law Olmsted, the great creator (with Calvert Vaux) of Central Park, the person who had been one of the first to promote the idea of a Yosemite National Park, and the "father of American landscape architecture," the younger Olmsted had by 1916 long emerged from his distinguished father's shadow and was both a famed designer of major parks in his own right and a member of the federal government's Commission of Fine Arts. Olmsted shaped his language in conjunction with Kent, Raker, and others. The key provision Olmsted originally wrote for H.R. 8668 read:[55]

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50. *Id.* at 76.
51. *Id.* at 56.
52. *Id.* at 54.
53. *Id.* at 53.
54. *Id.* at 54.
55. In 1911 Olmsted and McFarland had used this language:

> That the parks, monuments and reservations shall not at any time be used in any way contrary to the purpose thereof as agencies for promoting public recreation and public health through the use and enjoyment by the people of the said parks, monuments and reservations, and of the natural scenery and objects of interest therein, or in any way detrimental to the value thereof for such purpose.

Letter from J. Horace McFarland, President of the American Civic Association, [hereinafter McFarland] to Richard Ballinger, Secretary of the Interior, [hereinafter Ballinger] (Jan. 3, 1911)

> The fundamental object of these aforesaid parks, monuments, and reservations is to conserve the scenery and the natural and historical objects therein and to provide for the enjoyment of said scenery and objects by the public in any manner and by any means that will leave them unimpaired for the enjoyment of future generations.

This would be very slightly altered in its final form, to state (as we have seen) that the "fundamental purpose" of the parks was "to *conserve* the *scenery* and the *natural* and *historic* objects and the wild life therein and to provide for the *enjoyment* of the same in such manner and by such means as will *leave* them *unimpaired* for the enjoyment of future generations."[56] Each signifier here has undergone change since 1916; a linguist might argue that the change is somewhat differential between sections of the country, but none would argue that change has not occurred or that such change has not tended in one direction, toward a wider interpretation of the key words "conserve," "natural," "historic," "objects," "wildlife," and "unimpaired." As this last word set the only actual standard (as opposed to purpose), it has been seen as most open to attack, interpretation, expansion, and ambiguity.

What may we reasonably believe Congress, and those who framed the legislation, meant by "unimpaired"? To stalk this question, one must turn to the papers, first, of Frederick Law Olmsted, Jr., and then to those of Congressman William Kent, for it was Olmsted who had insisted that there must be an overriding and succinct statement of purpose (today one would say "mission statement"). Since he expected and hoped for substantial public use of the parks, he was not content with leaving an area "unimpaired for future generations," but inserted the key words, "for the enjoyment of" those generations.

Herein lay an ambiguity and a potential source for future conflict. "Enjoyment" reasonably required access, and at the time roads, trails, hotels, campgrounds, and administrative facilities did not seem unduly invasive. The act cannot have meant that "unimpaired" was to be taken in its strictest sense, particularly since the act included specific approval for certain inevitably compromising actions: leasing for tourist accommodation was the most obvious example.

The Organic Act also contained a provision likely to affect natural resources in parks. By reaffirming an act of 1901 that authorized the Secretary of the Interior to permit rights of way in Yosemite, Sequoia, and General Grant national parks, for pipelines, canals, ditches, water plans, dams, and reservoirs "to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber outside the parks," the act of 1916 showed that public use of the national parks might, when approved by the Secretary, extend to consumption of some of the park's resources. Did the statement of "fundamental purpose" temper this section of the bill?

(on file with the National Archives, R. Group 79, entry 6, box 783, 61st Cong.). Ballinger had promptly accepted this language. Letter from Ballinger to Frederick Law Olmsted, Jr. [hereinafter Olmsted] (Jan. 4, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783, 61st Cong.).

56. 16 U.S.C. § 1 (1994) (emphasis added).

One should not make too much of this provision. First, it applied by name to only three national parks, all in California, where water interests were powerful and historically entrenched within and around the three parks in question. That the act was silent on other parks may be taken to mean that the provision did not—or at least did not readily—apply to them, unless specific legislation with respect to a park mentioned such rights of way (the 1915 act creating Rocky Mountain National Park did contain such a provision). Second, to the degree that multiple use was peculiar to the mandate of the National Forest Service, other language in the Organic Act of 1916, and most particularly in subsequent amendments to that act in 1970 and 1978, clearly meant to provide national parks with a higher standard of protection than in national forests or, conversely, those acts were less permissive of the application of a policy of multiple use. Third, across time the conflict between any grant of authority to the Secretary to provide for multiple use and the language relating to "unimpaired" and "for future generations" was interpreted by the courts to stricter and stricter (that is, more protective) meanings of "unimpaired."

What did Olmsted mean at the time? We have a commentary by him, written in 1937, in which he provides a gloss on his meaning. In the midst of debate in Colorado over the Colorado-Big Thompson Project, a water diversion plan that would bring water from the western slope of the Continental Divide to the parched agricultural lands on the eastern slope, in part by the use of a tunnel that would pass through, or under, Rocky Mountain National Park, Olmsted wrote of what he deemed the "common sense" approach to the question of impairment.[57] An editorial had appeared shortly before in the journal *American Forests*, arguing that, were a decision made "to subordinate the principles of National Park conservation to principles of economic exploitation within the limits of the Rocky Mountain National Park," then the park would lose the central value by which it was worthy of national park status, and that the land should be withdrawn and transferred to the Forest Service as a National Forest. The editorial further suggested that any diminution of the park's natural scene should lead to the transfer of the entire park, not merely of the portion visibly affected by the Colorado-Big Thompson irrigation project.

While Olmsted found this reaction excessive, it is instructive to note that he had clear criteria in mind by which he would define a rational position on the question of invasions of the park in relation to water needs outside the park. First, he argued that a stand on "absoluteness" was not "sane" in a "world of relativities," acknowledging that an absolutely unbending position would lose support for the park since the Park Service would appear to be opposing a goal that was "for the good of society." Second, he thought that an unduly "academic conception" (in this case, of landownership "as extending vertically from the center of the earth indefinitely upward into space") would be, and would be seen to be, non-rational. Third, he specifically argued that a tunnel a mile below the surface would not necessarily or invariably inflict harm on the park; rather, the test to be applied should be one of the "probable

57. Letter from Olmsted to Bradford Williams (Oct. 22, 1937) (on file with the Library of Cong., American Soc'y of Landscape Architects).

degree of its adverse influences." Fourth, not content with so general an argument, he proposed actual criteria, in keeping with the original intentions of the Organic Act, that should be applied when issues of this nature arose.

Olmsted proposed five criteria. 1) The burden of proof—"and thoroughly well-considered and convincing proof"—must rest upon the advocates of "any enterprise for non-park purposes within the theoretical limits of jurisdiction of a National Park"; 2) the enterprise must be of "real social importance from a *national* [italics added] standpoint and is not to be practically attainable" elsewhere; 3) the enterprise must not "endanger the value of the park for its proper purposes to the slightest appreciable degree"; 4) the danger must be "so slight and of such a nature that the land if subject to it in advance would nevertheless have been wisely considered eminently suitable for selection and permanent maintenance as a National Park"; and 5) the non-park purpose must be "of so much more importance nationally than the purposes of the park" as to justify the lessening of the park. Olmsted concluded that, while he was open to reason, he did not find the arguments for the Colorado-Big Thompson Project complete or convincing.

Of course, Olmsted's reasoning was not law (and this expression of his view came over twenty years after he had drafted the 1916 preamble). Congress and the President, in their wisdom, did in due course approve the Colorado-Big Thompson project.[58]

Congressman Kent's Views

What did the principal formal author of the National Park Act of 1916, Congressman William Kent, say about it himself? Kent often is singled out as the "father of the National Park System," and his views deserve some extended analysis.[59]

Kent was a Chicago businessman who had bought a home in Marin County, California, in 1899 and moved there in 1907. He was adding to an already substantial fortune through land in California and in Nevada. A Progressive, he had stood with Theodore Roosevelt in 1912, and after 1912 he was a somewhat ambiguous independent supporter of Woodrow Wilson. Elected to Congress in 1910, he brought with him a reputation as a conservationist, and he quickly went on record in favor of public power. He wished to see the nation's flooding rivers brought under control, advocated extensive irrigation projects for California's Owens Valley, strongly supported public water power projects on the Suwanee, the Susquehanna, and the Mississippi rivers, and was an early proponent of the Tennessee Valley Authority. As he championed public power, he also opposed private power, and he was particularly ambiva-

58. *See* C.W. BUCKHOLTZ, ROCKY MOUNTAIN NATIONAL PARK: A HISTORY 188-91 (1983).

59. The Kent Papers are in the Sterling Memorial Library at Yale University. I have also examined his correspondence with his son Sherman Kent, later director of the Office of National Estimates at the Central Intelligence Agency (these papers are under restricted access at the Yale University Library), and inquired of the family, through Mrs. Sherman Kent, and through a grandson, whether any papers remain at the family home in Kentfield, California, to which the answer was no.

lent toward a bill put forward by his colleague on the Committee on the Public Lands, Congressman Scott Ferris of Oklahoma. This bill, H.R. 16673, came before Congress in January, 1915, to authorize the Secretary of the Interior to lease to American citizens "for purposes of constructing dams, water controls, reservoirs, transmission box lines" "any part of the public lands . . . including lands in national forests, the Grand Canyon and Mount Olympus national monuments, and other reservations, not including national parks" for a period of fifty years. Kent vigorously opposed this bill, pouncing upon its reference to the Grand Canyon, and even though Ferris added the provision that leases were to be granted only if they were not inconsistent with the purpose for which a national park or national monument was created, Kent remained adamant. Water, Kent maintained, should belong to the people.[60]

A second consistent strain in his thought was revealed in his persistent efforts to transfer to public ownership a large area of Mt. Tamalpais, in Marin County. Kent owned much of the mountain and an outstanding grove of coastal redwoods that nestled in one of its valleys, and beginning shortly after his arrival in California he had wished to see this land become a state park or, as later phrased, national monument—the first national monument having been created by executive action at Devil's Tower, Wyoming, in 1906—in part because the growing population of Marin County was creating pressure for more water, and he wanted both to protect the purity of the watershed and to assure the towns of the county an adequate public water supply. In 1908 he was successful in these endeavors, and his redwood grove became Muir Woods National Monument. From 1903 forward he spoke of the need for more national parks and the necessity to keep lands in or destined for parks out of local politics.

Thus Kent favored the development of water power through public means, the protection of watersheds, and the creation of national parks and monuments to preserve scenic and natural areas. At Muir Woods he was insistent on the highest standards of protection, and the early wardens, who were in his pay, even kept local societies that had been accustomed to walking in the park to "botanize"—the contemporary term for taking plants for educational purposes, pressing them in "flower books," and identifying them—from picking wild flowers. At Muir Woods, he wrote all was to be left natural, with no plants to be removed and no naturally downed trees to be cleaned up from the valley floor.[61] He also proposed a park for Lake Tahoe, on which he was unable to obtain effective support.

As a member of Congress, Kent was not dogmatic on the water issue, save for his insistence on public power, and he was not invariably a supporter of undisturbed wilderness even in national parks. After all, he was among those who pressed for opening up Yosemite National Park to the Hetch Hetchy reservoir, for he felt constrained to put the water needs of his Bay

60. William Kent Papers (on file with Yale University Library, R. Group 309, box 71, folder 125).

61. *Id.* (box 25, folder 499).

Area constituents first.[62] For whatever reason, he was silent on water issues when both the 1915 and 1916 park service bills were introduced, though in 1913, during an early discussion of Rocky Mountain National Park, he observed that scenic judgments were subjective and that he preferred a "mirror lake" to a mud flat.[63]

Kent's views on what a national park should be had been made clear, however, across several park proposals. In 1913 he had offered up a national monument on the Middle Fork of the Feather River in northern California and a Redwood National Park on the California north coast and in January, 1915, he had come out strongly in House debate for the Rocky Mountain National Park bill, declaring that the preservation of scenery is a "most valuable purpose." He drew a distinction between national forest, national monument, and national park land, asserting that a national park must be held "in a state of nature" and that animal life must be "forever free from molestation."[64] One may reasonably conclude that this was still his view only a year later, as sponsor of H.R. 8668.

Kent's position thus seems clear. He promoted his own park bill because he thought it, and not Raker's, would pass and also because it was the better bill. It contained Olmsted's preamble and Raker's had none. In close touch with President Wilson, Kent was cautioning him weekly on the need to keep the United States out of the war that had broken out in Europe, and he intended to withdraw from the Congressional race in the first district of California (though he postponed an official announcement until June to allow for an appropriate successor to test the waters) because of ill health. Thus, he also felt a sense of urgency in getting the bill to the President. For reasons of health, Kent's focus on his bill clearly declined after it was reported out of committee in May, but he could well feel he had made his position abundantly clear already, and he knew that Senator Smoot would carry the bill in the Senate.

During this time letters poured in from a wide range of constituents, organizations state and national, and fellow members of Congress, praising him for his park bill. Examples of letters of commendation and support received in March of 1916 alone include the Washington State Federation of Women's Clubs, Seattle *Daily Times*, Fortuna (CA) Women's Civic Club, City Shade Tree Commission of York, PA, College Women's Club of San Diego, the Henry Street Settlement in New York City, The Appalachian Club, Tramp and Trail Club, Erie (PA) Board of Commerce, Corona Club of San Francisco, Twentieth Century Club of Berkeley, California Development Board, Hebrew Educational Society of Brooklyn, Los Angeles City Teachers' Club, Miss Haskell's School of Boston, *National Magazine*, American Society of Landscape Architects, South Bend (IN) Chamber of Commerce, Highland Park Ebell of Los Angeles, and Herbert W. Gleason of Boston (a lecturer on

62. *Id.* (box 67, folders 83-85).
63. *Id.* (folders 86-91).
64. *Id.* (Scrapbook B, microfilm reel 4, §§ 8-10).

parks).[65]

Kent was particularly concerned with standards, and with the rumor that the chief forester, Henry S. Graves, was opposed to his bill, and on this he sought out assurances. Graves responded to Kent on March 17, declaring that he fully favored the bill. The Department of the Interior was facing pressure for economic use of natural resources in the parks and chose to meet this by granting grazing privileges similar to the national forests. This would affect the forests too, and as we have seen, Graves wanted to see a national park service created so that a national park would be clearly distinct from a national forest, "almost wholly protective," set aside to preserve "exceptional natural wonders," "segregated," for "exclusively . . . recreation and scenic purposes." The goal was to "preserve these areas in their natural condition." Congress must, Graves concluded, be certain that national parks are "really distinctive" and then hold them to a higher standard than other public lands, with the proposed National Park Service to have "its own separate and distinct field."[66]

Nothing could have seemed clearer, and Kent and Graves were in agreement that precisely because a higher standard was to be applied to national parks, one must resist the growing demand at the local level to create parks primarily to attract tourists. Graves noted that there were fifteen or more bills pending to create new parks; many of the bills would not prohibit industrial use and would authorize grazing, mineral development, the sale of timber or the use of streams for water power. This must not happen, he said, and Kent agreed. Late in 1916, Kent was unhappy with power companies in the Mono Lake Valley for obtaining rights under the guise of irrigation, and for being allowed to effect a change in the Yosemite Park line, to the loss of two magnificent waterfalls.[67]

Had Kent intended any emphasis on recreational purposes for the parks—one of the purposes to which Graves referred—he surely would have said so, for at the time Kent was a Vice President of the Playground and Recreation Association of America. Had he believed that he could leave interpretation of the bill to the Secretary of the Interior, Frederick K. Lane, he surely would not have written to Woodrow Wilson on July 24, when the bill was soon to be on the President's desk, advising him that Interior was abandoning sound policy. The Assistant Secretary, A.A. Jones, was not to be trusted, and Lane himself "had broken down to a considerable extent in his conservation policies."[68]

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65. *Id.* (box 24, folders 468-72).

66. Letter from Henry S. Graves, Chief Forester [hereinafter Graves], to William Kent, Congressman, [hereinafter Kent] (Mar. 17, 1916) (William Kent Papers, *supra* note 51 (box 24, folder 470)).

67. Letter from Wallis D. McPherson to Kent (Dec. 14, 1916) (William Kent Papers, *supra* note 51 (box 25, folder 507)).

68. Letter from Kent to Woodrow Wilson, President, (July 24, 1916) (William Kent Papers, *supra*, note 51 (box 25 folder 493)); *see also* William Kent Papers, *supra*, note 51 (folder 500). Lane's views were, indeed, moving more toward commerce than conservation in 1916, but on the national park bill itself he remained supportive. The sparse Lane Papers at the Library of Congress do not help us here, nor does THE LETTERS OF FRANKLIN K. LANE: PERSONAL AND POLITICAL (Anne Wintermute Lane & Louise Herrick Hall, eds. 1922). Having had a heart attack, Lane was

Until his death William Kent tracked the national parks. In 1922 he marked a passage in an article by Barton Warren Evermann, that "National parks should be maintained as *natural* parks and not be marred by artificiality of any avoidable kind."[69] In 1925, when a Senate Subcommittee of the Committee on the Public Lands held hearings on the national forests, Arno B. Cammerer, Assistant Director of the National Park Service, appeared before it, and Kent noted his remarks with approval. Cammerer asserted that the parks "were established to be kept absolutely in their natural condition," except for roads and hotels: it was, he felt, preferable to lose land and change boundaries than to permit an incompatible act within a park.[70] Reservoirs, for example, were clearly incompatible, Cammerer noted, pointing out that Congress had, by amendment to the Federal water power act of 1920, gone on record that before any ditches, reservoirs, etc., could go into any national park, they would have to be specifically authorized by an act of Congress. Kent appears to have felt that his basic principles had at last been clearly recognized.

A Contradictory Mandate?

Several commentators on the National Park Service Act of 1916 have concluded that the preamble, or statement of fundamental purpose, presented the Service with a contradictory mandate. There are three possible sources of contradiction: doubt as to whether the 1916 act applied to parks existing before that time; conflict between federal agencies; and ambiguities in the language of the act. The first two possible sources of conflict do not arise, for Congress was clear with respect to them. In the debates on the bill, Senator Reed Smoot of Utah, sponsor in the Senate, specifically said that the bill was intended to apply to the then existing parks.[71] In the Committee Report accompanying the 1916 bill, Congress noted that there was not supposed to be any conflict of jurisdiction among the agencies.[72] Thus, if the new National Park Service was handed a contradictory mandate by Congress, the contradiction arose from the language of the bill, and in particular from its statement of "fundamental purpose." Whether such a contradiction exists or not now requires further examination.[73]

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not vigorous and would die in 1921. The only biography, KEITH W. OLSON, BIOGRAPHY OF A PROGRESSIVE: FRANKLIN K. LANE, 1864-1921 (1979), is silent on parks. An unpublished M.A. thesis that apparently shows access to additional materials, Henry W. Wiens, The Career of Franklin K. Lane in California Politics (1936) (unpublished M.A. thesis, University of California), has been reported lost by the Berkeley institution.

69. Dr. Barton Warren Evermann, *Conservation and Proper Utilization of Our Natural Resources*, SCI. MONTHLY, Oct. 1922, at 293, 294 (emphasis in original).

70. William Kent Papers, *supra* note 51 (April 1925) (pamphlet file (copy)).

71. 64 CONG. REC. 12,151 (1916).

72. H.R. REP. NO. 700, 64th Cong., 1st Sess. 3 (1916).

73. Many standard books on the National Park Service, or in conservation or environmental history, devote a paragraph or so to the act, usually in much the same language. When one pursues these paragraphs through the references supplied, one finds a nearly infinite regression, each leaning upon the previous secondary statement, most virtually devoid of any independent examination. For the most part these accounts pass over the actual framing of the bill and raise no questions about Congressional intent, simply celebrating (in words attributed to Wallace Stegner) "the best idea America ever had." Perhaps half the secondary works conclude that the preamble to

These recent commentators ask, in one form or another, how a management policy can both accommodate use and preserve a natural area. These commentators, often in very similar terms, conclude that the Park Service was presented by the act with a "fundamental dilemma," that the Service was asked to attempt "harmonizing the unharmonizable," and that the dilemma is not capable of either logical or historical resolution.[74] None of these authors appears to have examined the bills that led to the Act of 1916, the hearings, the debates—that is to say, the legislative history—much less having sought out and explored the private papers of the members of the Committee on the Public Lands.

To accept the conclusion that the preamble presented the Park Service with an inherent contradiction, that it is illogical, is to conclude that Congress had no clear intent, that it either did not know what it was doing when it posed a dilemma, that it did not care, or that there is no inherent contradiction in the preamble. While Congressional acts undeniably contain unclear language, and (when acted upon administratively) unresolved issues, it seems unreasonable to so summarily dismiss Congressional intent when the act was the product of well-informed men, especially Raker and Kent, both of whom had studied the issue with care, one of whom declared the act to be his "pet" and the other, by evidence of his correspondence, having spent much time upon it; when the act was the last of a series, each of which had benefitted from the clarification of hearings; when the co-sponsor in the senate, Reed Smoot, confided to his diary that this act was one of the most important of his accomplishments;[75] and when such careful and scholarly individuals as Frederick Law Olmsted and Robert B. Marshall had a hand in its language.

We have Raker's testimony to the importance he attached to this legislation. Though his papers apparently have not survived[76] in public hands, we know that Raker (and Kent) met regularly in 1916 at the apartment of Robert

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the act contains a "logical contradiction" (the words of Ronald A. Foresta in RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 100 (1984)), or appears to. However, not one of these books or articles is based on an examination of the Kent, Olmsted, or other relevant papers, and Swain's 1966 article, *supra* note 8, on which most of the recent writings are based, is drawn almost wholly from the papers of Horace Albright, secondary accounts, and a limited survey of Congressional Debates and Interior Department annual reports, with no reference to Congressional Hearings or other manuscript collections.

74. Upon examination more recently, this conclusion is often cited to an unpublished Master's thesis, Daniel McCool, The National Park Service: The Politics of Appropriations (1980) (unpublished M. thesis, University of Arizona), which is in fact about funding rather than purpose; or from political scientists and sociologists whose primary inquiry is into the theory of management. A check of five frequently quoted articles shows that not one of the authors went beyond what they construed to be the common sense meaning of the language, which they found on the face of it contradictory. However, if one is to construe, deconstruct, or (as an historian) explicate a text, one generally may not do so without going behind the text.

75. Diary of Reed Smoot (July 11, Aug. 6, 1916) (Reed Smoot Papers, on file with Brigham Young University). See also his biographical sketch (which he himself wrote) in 35 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 63-64 (1949).

76. The Congressional Information Office has found no papers. This writer called all major depositories in California, the local historical societies of Susanville and Alturas (where Raker had his law offices), the alumni office of San Jose State University (from which he graduated in 1884, when it was a normal school), and a variety of repositories in Washington, DC, where he died in 1926, all without success.

Sterling Yard, a journalist working for the United States Geological Survey in Washington, and that the final bill was drafted by these men, joined by three officers of the American Civic Association, McFarland, Richard B. Watrous, and Henry A. Barker; by Enos Mills, Huston Thompson (the Assistant Attorney General), Gilbert Grosvenor, editor of *The National Geographic Magazine*, Emerson Hough, a leading exponent of reforestation, and Herbert Quick of the *Saturday Evening Post*. Except for Mills, who was popularly dubbed "the father of Rocky Mountain National Park," which had been created by act of Congress earlier in 1915, these men were professional publicists, editors of travel and outdoors oriented magazines, or officers of similarly inclined associations. As noted earlier, McFarland and Watrous would testify at the 1916 hearings on the National Park Service Act. Yard had been editor of *Century Magazine* and of the Sunday magazine of the *New York Herald*, but he had recently come to Washington to be head of any future national parks information office, and he was writing a booklet on the parks. (Stephen Mather, future director of the National Park Service, had arranged for Yard to be employed through the Geological Survey, since there was as yet no park bureau that could hire him.[77]).

Once Kent agreed to sponsor a new parks bill, these men moved their meetings to his home on F Street in Washington, where they met "fairly regularly," according to the young Horace Albright,[78] who was Mather's assistant and a regular member of the group. He recalled Kent, McFarland, Marshall, and Yard as the core group, with Olmsted, Grosvenor, Quick, Hough, Barker, Watrous, and Mills present from time to time. Thus there was reasonable continuity of attendance at these meetings. It seems unlikely that such a group, even though they wanted a simple and uncluttered bill and wished it in a hurry, would allow a glaring contradiction to be part of the statement of "fundamental purpose" over which Olmsted labored, producing at least three versions. One must presume that the language was deliberate and that it is worthy of the closest attention.

Not present at the F Street meetings was Stephen Mather himself. Mather had brought Yard to Washington and had persuaded Albright to give up a career in the law to be his assistant; a rich man, he paid both out of his own pocket, an unusual but not illegal arrangement. Mather had taken pains to get to know the people who ran the national parks, by calling a national park conference for Berkeley, California, in March of 1915, and asking all park superintendents to attend. He also had invited most of the concessionaires from the parks and took with him from Washington several key players. One member of the House Committee on the Public Lands, Denver S. Church of Fresno, California, had attended. At Berkeley, Mather had spoken of the need for a park service and had shared with Albright his sense that many of the

77. ALBRIGHT & KAHN, *supra* note 38, at 24; *see also* ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 100-01 (2d ed. 1954). I have examined the Mather Papers, in the Bancroft Library of the University of California, Berkeley, but do not cite to them here since all relevant quotations and statements drawn from them in Shankland, or Albright and Cahn, are accurate, and citation to the more readily available source is preferable.

78. ALBRIGHT & CAHN, *supra* note 38, at 35.

superintendents, being political appointees, were not up to their tasks, a deficiency a park service would remedy.

Mather also took the trouble to get to know the key members of the House and Senate committees. He was on social terms with Congressmen Kent, Raker, Carl Hayden, Addison Smith, and Louis C. Cramton of Michigan, all members of the Committee on the Public Lands, as well as with Senators Smoot and Norris. He talked with them about the need for a service, shared with them his philosophy of what the parks should be, and urged them to move forward as quickly as possible with a new bill. Kent did so at a time when Raker was ill, mindful of the fact that his California colleague was unpopular and maladroit on the floor of the House, as well as disliked by the House minority leader, James R. Mann, who came from Kent's former district in Illinois. Thus the working group got behind Kent's bill quickly, knowing that it had a far greater prospect of being reported out of committee than Raker's bill did.

Finally, it was Mather who orchestrated the presence of powerful journalists at the planning meetings on F Street. He took a party into Sequoia National Park in July of 1915, including local newspaper editors, natural scientists, the head of the American Museum of Natural History, the ranking Republican on the House Appropriations Committee, the vice-president of the Southern Pacific Railroad, photographers, magazine writers, and travel editors. Following this visit to Sequoia and the Kings River and Kern River canyons, Mather and Albright brought a number of national magazines into line, and then promoted meetings at the Yard and Kent residences. Given this careful preparation, it is also unreasonable to assume that Mather would have allowed a "logical contradiction" to emerge from Olmsted's pen.[79]

Mather testified during the hearings of April, 1916. He frequently noted that an act was needed quickly, given uncertainties in Europe, and admitted that from his perspective the bill did not deal in detail with all matters of importance.[80] He did not pronounce upon the language of the Kent/Olmsted preamble at the time, though in 1918 he agreed with Secretary of the Interior Lane that the parks "must be maintained in absolutely unimpaired form." If he believed this in 1918, he surely believed it in 1916, and it seems reasonable to conclude that, given the care with which he orchestrated the shaping and passage of the Organic Act, he believed that the statement of "fundamental purpose" supported his view.[81]

We also have the commentary of two men who were consistently present at the meetings in Yard's and Kent's residences. One was Robert Sterling Yard himself. Early in 1916 Yard compiled a lengthy booklet, *Glimpses of Our National Parks*, which he wished to get into public schools.[82] He told

79. SHANKLAND, *supra* note 68, at 83-99; ALBRIGHT & CAHN, *supra* note 38, at 24-26; Swain, *supra* note 8, at 8-15; DONALD C. SWAIN, WILDERNESS DEFENDER: HORACE M. ALBRIGHT AND CONSERVATION 41-60 (1970).

80. *Hearing 1916*, *supra* note 3, at 11-25.

81. On this early period see also JOHN C. MILES, GUARDIANS OF THE PARKS: A HISTORY OF THE NATIONAL PARKS AND CONSERVATION ASSOCIATION 12-16 (1995).

82. ROBERT STERLING YARD, U.S. DEP'T OF THE INT., GLIMPSES OF OUR NATIONAL PARKS

Kent there was a great demand in Congress for this publication, with many members wanting 2500 copies while he could provide each with only 25, and he asked Kent to sponsor a rider to an appropriations bill that would make the booklet a public document. *Glimpses* would be transmuted by Yard first into a substantial book of photographs with modest text, *National Parks Portfolio*, and then, with greatly extended text, into *The Book of the National Parks*.[83] In the last Yard wrote that "[o]riginally the motive in park-making had been unalloyed conservation"; indeed, he used the controversial language, that Congress had said it wished to "lock up" certain places.[84] However, after the creation of great parks such as Yellowstone and Yosemite, local pride had led to the enactment of units "better fitted for State parks" (this was with reference to Sullys Hill, Wind Cave, and Platt national parks), so that "the modern period" had followed, the period of "definite policy" represented by the act of 1916, after which parks had to be of "distinguished company" and embrace "the nation's noblest landscapes and sites."[85]

Horace Albright, likewise present at the creation, is the only one of those who helped to talk out the proposed bill who would later explicitly confront the presumed contradiction in the act. In his memoirs, published in 1985, he noted that contrary to some scholars' accounts Olmsted did not write the full bill itself, though he was "responsible for the wording of the governing sentence," and that all present wanted the bill "to carry a clear definition of what the Park Service should be." They were aware of the "inherent conflicts between use and preservation," he wrote—he did not say "contradiction"—but they were facing the political reality that this issue could not be resolved by the organic act alone.[86]

National Park Services files at the National Archives reveal hundreds of letters written by many dozens of organizations and individuals in favor of the proposed National Park Service Act of 1916. These letters invariably focus, as we have noted, on scenic values, road access, the quality of accommodations, and the notion that the parks were the nation's playgrounds. The most prolific correspondents were the officers and members of the American Civic Association; and, as we have seen, three of those officers, McFarland, Watrous, and Barker were present, the first almost always and the others less frequently, at the meetings in Yard's apartment and Kent's house when the bill was drafted and Olmsted completed his statement of "fundamental purpose." Thus their voices are also entitled to be heard on the allegedly contradictory mandate.

McFarland commended Olmsted's preamble. "There is no better service we can render to the masses of the people than to set about and preserve for them wide spaces of fine scenery for their delight," he wrote.[87] In truth,

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(1916).

83. ROBERT STERLING YARD, THE BOOK OF THE NATIONAL PARKS (1919).

84. *Id.* at 24.

85. *Id.* at 24-26.

86. ALBRIGHT & CAHN, *supra* note 38, at 35. In particular, see Albright's exchanges with Huston Thompson. Horace Albright Papers (Feb. 23, 27, 1916, March 26, 1964 (typescript interview)) (on file with University of California (Los Angeles)).

87. Letter from McFarland to Olmsted (Oct. 13, 1910) (Frederick Law Olmsted Papers, on

McFarland had first drawn Olmsted into the cause, and the language of both the House and, even more, the Senate bills from the first proposal in 1911 had been deeply influenced by McFarland's views. Further, McFarland appears to have persuaded Secretary of the Interior Ballinger as early as 1910 that Olmsted was "the man who ought to do the thing that is in mind with relation to these national parks"—that is, prepare a statement of purpose.[88] Ballinger had sent that portion of his 1910 annual report in which he proposed a national park bureau to McFarland for comment, and the American Civic Association had immediately begun a public campaign. At McFarland's urging, Olmsted had submitted directly to the Department of the Interior his first attempt at a general statement to accompany the first draft bill. The statement in the draft read:

> That the parks, monuments, and reservations herein provided for shall not at any time be used in any way detrimental or contrary to the purpose for which dedicated or created by Congress.

Olmsted said this was not adequate and added to the bare bones section the additional proviso that the parks, etc., should not be used in any way contrary to "promoting public recreation and public health through the use and enjoyment by the people . . . of the natural scenery and objects of interest" in the parks. Olmsted was particularly concerned that the word "scenery" be inserted in connection with "natural" throughout the document. Olmsted sent copies of this correspondence to McFarland.[89]

McFarland told Olmsted that he regarded him as "the wisest man in America" on park subjects, and that his "conception of what a park is . . . " was most important.[90] He argued Olmsted's view at the Yellowstone Park conference of 1911, in correspondence with Ballinger, and consistently each year thereafter, seeing to it that Olmsted was always in a prominent position to comment on, and thus help shape, the language of any subsequent bills. The Olmsted Papers, the Marshall and Mather manuscripts, and the files of the National Park Service are filled with letters from McFarland, showing that he remained carefully in touch with each development. Surely it is unlikely that McFarland would have allowed the final product of all this effort, the Act of 1916, to contain a "fundamental statement" of purpose which he thought was weak or contradictory?

Indeed, McFarland made his position clear in a heated interchange with

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file with the Library of Congress) [hereinafter *Olmsted Papers*].

88. Letters from McFarland to Ballinger (Nov. 10, 12, 16, 1910, Jan. 3, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from Ballinger to McFarland (Nov. 11, 1910) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from McFarland to Knute Nelson, Chairman, Senate Committee on the Public Lands (Jan. 4, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from McFarland to Ballinger (Dec. 22, 1910) (on file with the National Archives, R. Group 79, entry 6, box 23).

89. Letter from Olmsted to Frank Pierce, Acting Secretary of the Interior (Dec. 31, 1910) (*Olmsted Papers*, *supra* note 78). This document, retyped, also appears in Olmstead [*sic*] Portfolio (on file with the Bancroft Library, University of California (Berkeley)), and in the National Archives (R. Group 79, entry 6, box 783).

90. Letter McFarland to Olmsted (Sept. 5, 1911) (*Olmsted Papers*, *supra* note 78); *see also* Olmstead Portfolio, *supra* note 80.

Gifford Pinchot, the former head of the Forest Service, over the matter of the Hetch Hetchy. Pinchot had implied that the initial framers of the park service bill had a pecuniary interest in the parks and was reported to have said that Interior was "where all the crooks are." This was an echo of his furious feud with Ballinger, as well as a statement, about which he was equally direct, concerning his conviction that the national parks should be administered by the Forest Service, with parks to be "handled with the same government purpose which must control" the National Forests. He also belittled McFarland's vision, suggesting that the American Civic Association simply wanted to apply the methods of a city park to vast areas of wilderness, concluding that McFarland did not know what a "park" was.[91]

Pinchot's letter struck McFarland, who felt he quite clearly understood what a park was, as arrogant and ill-informed. National Parks could not be managed by individuals trained in "forest principles" only. The principles governing national parks were quite different—he did not invoke the "higher standard" argument in this response, as he would do later—and the National Parks would not be safe in the hands of such a man as Pinchot. He attacked Pinchot for having given up the "wonderful territory" of the Hetch Hetchy Valley, violating a national park, without ever having personally viewed the area. The implication was clear: that a Park Service was necessary to prevent any future violations of this nature.[92]

To Chief Forester Graves, who he regarded as more sympathetic to a park service, McFarland wrote that "a declaration of the real purpose of a National Park" was important in order to correct misconceptions about a park as a small or curried area. The purpose had to be "declared in unmistakable terms," and McFarland quoted Olmsted's draft.[93] Of two Senate bills then proposed, McFarland preferred the shorter one—this was Senator Smoot's bill—both strategically and functionally, and he asked Smoot to insert in his bill, S.3463, the section on purpose. Again, is it likely that a person of such persistence, who regarded a general statement of purpose essential to any bill, and who preferred a short bill with such a statement, would have thought the final language used in the preamble to the Organic Act had created a logical contradiction?[94]

Other members of the House Committee on the Public Lands, and most members of the Senate, were silent on the purposes of the Act of 1916, speaking in hearings only to specific points, usually economic and financial, or in debate in favor of the act or on whether grazing should be permitted in parks. Edward T. Taylor of Colorado had made his views known the previous

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91. Letter from Gifford Pinchot, former head of the Forest Service [hereinafter Pinchot] to McFarland (Mar. 4, 1911) (*Olmsted Papers*, *supra* note 78).

92. Letter from McFarland to Pinchot (Mar. 6, 1911) (copy) (*Olmsted Papers*, *supra* note 78).

93. Letter from McFarland to Graves (Feb. 21, 1911) (R. Group 79, entry 6, McFarland file).

94. The bills were S.9816, S.3463, and H.R.32265, 61st Cong., 3d Sess. *See* Letter from McFarland to Reed Smoot, Senator [hereinafter Smoot] (n.d.) (R. Group 79, entry 6, box 783); Letter from McFarland to Olmsted (Jan. 18, 1911) (Olmstead Portfolio, *supra* note 80); Letter from Richard B. Watrous, Secretary of the American Civic Association, [hereinafter Watrous] to McFarland (Jan. 17, 1911) (Olmsted Papers, *supra* note 78).

year during efforts to create the Rocky Mountain National Park, and he was largely silent on the National Parks Act, other than commenting favorably on the Colorado National Monument, created by executive act in 1911, which he hoped might become Colorado's third national park, following Mesa Verde and Rocky Mountain. Congressman Nicholas J. Sinnott of Oregon spoke up only to express the hope that a proposed Park-to-Park Highway, which Stephen Mather promoted during the 1916 hearings, would extend from Mount Rainier through Oregon to California. While Congressman Irvine Lenroot of Wisconsin was active throughout, he did not comment on general purposes or standards, being primarily interested in the language that would assure the Secretary of the Interior the authority to grant or deny leases. Congressman Scott Ferris of Oklahoma, the chairman of the House committee in 1916, was most interested in his own bill on water resources. Congressman Robert LaFollette, usually vocal on any issue concerning the public interest, was planning to run for the presidency and appears to have attended only one of the hearings. Floor debate was short, to the point, and no new light was thrown on Congressional intent.

There is, as a final approach to the "contradictory mandate," the logic of rhetoric. Many of those involved in framing the Organic Act, and certainly the former judges, school teachers, and present Congressmen, were well accustomed to the use of rhetoric, or the study of the effective use of language. As rhetoricians, Senator Smoot and Congressmen Kent, Ferris,[95] and Lenroot were highly regarded. The classical education of the time—and Olmsted and Raker had such an education—included rhetoric as a formal study. The principles of rhetoric held that, when listing two or more elements to an argument, the most important be stated first, and when speaking in public debate, a significant element of the argument which was not, however, the most significant, should be stated last in order to allow for an "Attic fall." If the principles of rhetoric were applied to the language of the preamble, then conserving "the scenery and the natural and historic objects and the wild life" within a park took precedence over providing for public "enjoyment," and there was no contradiction between two elements of equal weight for the elements were not, in fact, equal.

The Senate passed its bill on August 5. S. 9969, Reed Smoot's bill of 1911, was recycled in slightly altered form. While he was opposed to the "socialism" of state promotion of water resources, Smoot was otherwise in agreement with Kent on conservation matters. He wished to see more national parks, in part because they preserved God's handiwork, in part because they would bring visitors and better roads, and to that end he was pleased when it was suggested that Mukuntuweap National Monument in the remote southwest desert of Utah might become a national park, since he knew that dusty roads deterred traffic. (In 1919 Mukuntuweap became Zion National Park.) However, the Senate bill did contain one significant difference. At the insistence of Senator Clarence D. Clark of Wyoming, who was fearful that references to

95. Congressman Ferris was a lay preacher. See his use of rhetoric in his scant papers, held by the Museum of the Great Plains in Lawton, Oklahoma.

grazing would mean that permits might be issued for Yellowstone, the bill had no provision for grazing.

The need to reconcile the two bills meant further delay, though the public band wagon mounted by McFarland and others had helped to carry bills for three new parks—Sieur de Monts (later, Acadia), Hawaii, and Lassen Volcanic—while House and Senate conferred. Then the chairman of the Senate public lands committee, Senator Henry L. Myers of Montana, and the House chairman, Congressman Ferris, agreed to allow grazing in all national parks with the explicit exception of Yellowstone. At the last minute a powerful Congressman from Wisconsin, William Stafford, who opposed new bureaus on principle, sought to bottle up the bill that had emerged from the conference committee, and Kent was able to persuade him to stand down.[96] Approval in the Senate quickly followed.[97]

Explication of Text, 1916-1976

A recent historian of the national parks, Alfred Runte, has argued that though Congress wished to create a "system" in 1916, there was still relatively little awareness that this system involved more than setting aside lands that had little or no prevailing economic value. Known as the "worthless lands" thesis, Runte's argument is that Congress had not thought through such terms as "unimpaired" or "enjoyment" largely because it imagined the parks would not be the objects of commercial or industrial threats, since they were basical-

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96. The papers of Clarence D. Clark, at the University of Wyoming, consist only of scrapbooks. On Clark, see Albert G. Anderson, Jr., The Political Career of Senator Clarence D. Clark (1953) (unpublished M.A. thesis, University of Wyoming). No Myers papers have survived save for fugitive letters in the papers of Montana Senators Thomas J. Walsh and Burton K. Wheeler at the Montana Historical Society in Helena and his death certificate at the Western Heritage Center in Billings, Montana. There is a sketch of his career in the Billings *Gazette* of November 12, 1943. All efforts to locate the papers of Senator William Stafford failed.

In addition to the major collection of Smoot papers at Brigham Young University, there are Smoot papers at the Library of Congress and at the Library of the University of West Virginia. An article, the title of which offers promise—Thomas G. Alexander, *Senator Reed Smoot and Western Land Policy, 1905-1920*, ARIZ. AND WEST, Autumn 1971, at 245, 245-64—proved to contain only passing references to the national park bill. The best biography is Milton R. Merrill, Reed Smoot: Apostle in Politics (1950) (unpublished Ph.D. dissertation, Columbia University). The other Senators who served on the Committee on the Public Lands and Surveys, or who spoke on the floor of the Senate, were Colorado's John F. Shafroth and Charles S. Thomas, California's James D. Phelan and John D. Works, and Thomas J. Walsh of Montana.

The writer was unable to examine the papers of the Coloradoans, Edward T. Taylor, Charles B. Timberlake, John F. Shafroth, and Charles S. Thomas. The Taylor papers, at the Colorado State Historical Society and the University of Colorado, were examined for him and revealed nothing of relevance. Two collections might prove of value: the Thomas papers, which consist of 15,000 items, also at the Colorado State Historical Society, and the papers of Burton L. French, a Congressman from Idaho, who interested himself in the act though he did not attend the hearings. This last collection is at Miami University in Oxford, Ohio.

With respect to the NPS Act, the Papers of Woodrow Wilson, at Princeton University, are silent (Arthur Link to writer, telephonic communication).

97. WILLIAM C. EVERHART, THE NATIONAL PARK SERVICE 19-20 (1972), states that before 1915 only a "scattered few members of Congress" could have spoken on the national parks for longer than five minutes. In 1916, debate in the Senate was almost nonexistent, but debate in the House showed that a number of members had formulated views on what parks should and should not be.

ly worthless in economic terms, and that impairment was thus not likely to occur, or if it did occur, such impairment would relate almost entirely to providing for "enjoyment," not to other issues.[98]

Certainly there is some truth in this statement. Wild lands were, by 1916, coming to be valued, but few people conceived that there would be any serious scarcity of them, and some people of exquisite urban sensitivities still held to the view to be found in Jane Austen's *Pride and Prejudice*, that mountains were "horrid." Years earlier Frederick Law Olmsted (Sr.) had, while manager of the Mariposa Estate and a frequent visitor to the Yosemite Valley, advocated the construction in that valley of graceful arched bridges in the manner of Central Park in order to humanize the landscape; he hated "the wilderness & wild," he wrote to his wife. In the 1890s, Senator Richard F. Pettigrew of South Dakota said that Mount Tacoma (now Mount Rainier) "with its perpetual snow and . . . rocky crags" was a "worthless land."[99]

In this sense, and for the 1890s, Professor Runte's "worthless lands" thesis is correct, though his argument tends to ignore the fact that by 1911 many in Congress attached economic value to park proposals for tourist purposes and that others understood that as technologies changed, as old minerals might be extracted at lower costs and new minerals be found, these "worthless lands" would take on economic value. There is no convincing evidence that by 1916 the majority of legislators believed that they were protecting lands that would be worthless for all time, and an abundance of evidence that virtually all considered that the parks had commercial value as tourist attractions.

Nonetheless, the notion of useless or worthless lands may help to account for why many in Congress felt no urgency to define the signifying terms within Olmsted's draft. In 1915, Representative Edward T. Taylor of Colorado, then a ranking member of the House Committee on the Public Lands, spoke of the beauty of the proposed Rocky Mountain National Park, comparing it to Switzerland, and said that it had "no value for anything but scenery." He was careful to assuage the feelings of forestry and farming interests by stating that the park would contain "little timber of merchantable value" and that its elevations were too high for farming.[100] Thus language was used in 1915-16 somewhat differently than we use it today.

While the crucial words from the preamble to the Organic Act of 1916 have traditionally been viewed as the statement of "fundamental purpose" already examined here, there is other language in the act that requires consid-

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98. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE (2d rev. ed. 1987). For discussion of the "worthless lands" thesis, see Richard W. Sellars et al., *The National Parks: A Forum on the "Worthless Lands" Thesis*, J. FOREST HIST., July 1983, at 130, 130-45. John C. Freemuth has posed the question whether mineral extraction would be permitted from under the water impounded behind a dam within a National Recreation Area, since such an area was not created because of its inherent commercial worthlessness, the reservoir so impounded—and thus proposed for possible violation—being an aspect of the worth of the area. *See* JOHN C. FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS 54 (1991).

99. Quoted in GUSTAVUS MYERS, HISTORY OF THE GREAT AMERICAN FORTUNES 223-24 n.23 (1936); *see also* ROBIN W. WINKS, FREDERICK BILLINGS: A LIFE 291 (1991).

100. 63 CONG. REC. 1,789-91 (1915).

eration. Let us read the preamble again:

> The service thus established shall *promote* and *regulate* the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will *leave* them unimpaired for the enjoyment of future generations.[101]

Thus, the primary goal of the new Service is to "leave" the parks and monuments unimpaired, placing clear priority on protection as opposed to restoration of landscapes and by implication arguing for a presumption of inaction in the face of any request for what may be viewed as "impairment." Arguably any action taken prior to passage of the Organic Act that might be viewed as impairment represented an action that could be, in so far as possible, undone, reversed, or nullified.

But what of "shall promote and regulate" in reference to the parks and monuments? Here arises the true source of the dichotomy of purpose, between preservation and use, conservation and enjoyment.[102] It may well be argued that the order in which these two objectives are set forth, as well as the sequence by which taken together they precede other terms in the statement, is significant, with "enjoyment" circumscribed by "unimpaired."[103] The legislative history of the act would appear to support this view, and successive Directors of the National Park Service, and for the most part Secretaries of the Interior, as well as chairpersons of the relevant committees and subcommittees in Congress, have usually acted in such a manner as to suggest that the Park Service's first priority should be preservation.

The "governing sentence" and the sections that follow are silent on questions of water or timber use, and one must infer intent from that which is said. In a circular letter to his colleagues on April 27, Kent supplied the amended bill as reported out following the mid-April hearings. He drew attention to its provisions.[104] Cutting of timber was to be permitted only in order to control insect attack or disease or to conserve the scenery or the natural or historic objects: that is, one resource that was specified was to be altered only with a view to conservation purposes. While permits could be granted for use of the land, these permits were to be "only for the accommodation of visitors in the

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101. 16 U.S.C. § 1 (1994) (emphasis added).

102. On this point see THOMAS J. CAROLAN, JR., U.S. DEP'T OF STATE, THE POLITICAL DYNAMICS OF THE NATIONAL PARK SERVICE (1980-81), especially pages 2-5.

103. The act refers to "enjoyment" by "future generations," not to "the people," which introduces an expectation of changing definitions of "enjoyment" by reference to the future. This makes legitimate an examination of changing perceptions relating to the signifying terms in the statement of purpose. Significantly, "the people" are acknowledged not to be static. Even were the term used in its customarily monolithic way, courts have interpreted "the people"—as in decisions involving the right to bear arms, for example—to mean the people as a group not as individuals, thus opening the way to barring certain individuals. The same is true of use of grandfathered privileges within a park: they might apply to "the people" but not necessarily to any given person.

104. William Kent Papers, *supra* note 51 (box 24, folder 476).

various parks," so that land grants were to be denied save to meet the needs of accommodation. "No natural curiosities, wonders or objects of interest" could be leased, rented, or granted on terms that would "interfere with free access to them by the public," which placed the public interest first while permitting rental or lease that presumably went beyond accommodation, to which grants were limited. The Secretary could grant grazing rights when they were not detrimental to "the primary purpose" of a park, which was enjoyment by the people and preservation of wild life and natural features. Section 6 declared that all acts or parts of acts "inconsistent herewith" were repealed.

The intent of Congress as expressed in 1916 must also be seen as modified in light of the acts of 1970 and 1976. The act of 1970 introduces somewhat revised language, for unlike the act of 1916, it does refer to "the people." The act arose in the context of a growing concern for recreational opportunities in the United States, recognized by the Outdoor Recreation Resources Review Commission appointed by President Dwight D. Eisenhower, which reported to President John F. Kennedy in 1962.[105] In 1970, President Richard M. Nixon's "Legacy of the Parks" program held that the government should be "taking parks to the people," an idea which was supported on a bipartisan basis in Congress. The result was the Act of August, 1970, which in addition to reasserting the significance of the national parks, remarked upon their "increased national dignity" both "individually and collectively," so that an infringement upon the dignity of one was an infringement upon the dignity of all. This, some commentators thought, meant that each park superintendent had the responsibility to act aggressively with respect to threats against his or her unit rather than awaiting a directive by the Director of the National Park Service.

Less commented upon, but important, is the language by which "the people" are invoked: the parks, which must represent "superb environmental quality," also acquire their significance by virtue of their "inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people." In addition to the explicit citation to the people, the act added to the linked criteria of 1916, unimpaired preservation and access for enjoyment, the new, if parallel, concepts of "inspiration" and "benefit." As these words are at least as open to subjective interpretation as were those of 1916, they gave rise to renewed debate.

However, "benefit" and "inspiration" need not be placed in opposition to each other. The context makes clear that "inspiration" refers to the re-creation of the spirit that comes from gazing upon or walking amidst a sublime scene, or from examining an historical remnant relating to an event or achievement presumably inspiring to most Americans; it may, of course, also refer to the "inspiration" that arises from the healthy use of recreational outlets, mastery over one's body, or simply a sense of well-being. Indeed, since Congress proceeded to create, under the 1970 act, a number of new National Recreation Areas, including so-called "urban parks," at the least this reading seems es-

105. See ROBIN W. WINKS, LAURANCE S. ROCKEFELLER: CATALYST FOR CONSERVATION (Washington's Island Press (1997)), on the significance of the Review Commission.

sential. It does not follow, however, that "recreation" was given priority over "re-creation." The 1970 act clearly strengthened the Congressional mandate placed upon the Park Service to protect park units in the fullest sense of the word.

"Benefit" requires less parsing, though in conjunction with "the people" it does require a textual comment. As stated, this linkage had not been made explicit in previous legislation. By the linkage, Congress appears to have been saying that management principles must look to actions that would benefit "all the people" (indeed, the 1970 act used precisely this language) rather than decisions that would redound primarily to the benefit of a minority, be it local, an interest group, or an ethnic community. Thus guidance was given to the Park Service to exercise the broad powers it either possessed or would acquire over the next decade.

The act of 1970 also expanded the definition of the Park System to include "any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes." While this provision was directed to the concept of national seashores, national lakeshores, and wild and scenic rivers, no distinction of this nature was made in the act itself, and thus the language is quite sufficiently broad to admit of all water and land resources within a park.[106]

In Section 8 of the Act of October, 1976, Congress directed the Secretary of the Interior to "investigate, study and continually monitor the welfare of areas whose resources exhibit qualities of national significance and which may have potential for inclusion in the National Park System." While this section did not, as some critics suggested, lessen the actual criteria for inclusion in the system, it did lead to many new additions; more important is the fact that it also gave the Secretary an essential advisory authority on resource issues outside the boundaries of any of the existing parks. From this it was a short step, through four key acts already on the books—the Wilderness Act of 1964, Wild and Scenic Rivers Act of 1968, Clean Water Act of 1972, and Endangered Species Act of 1973—to charging other government agencies with cooperating with the National Park Service.

In the 1970s, the Park System grew at a nearly unprecedented rate, especially under the impetus of Representative Phillip Burton of California. As Chairman of the House Subcommittee on National Parks and Insular Affairs, Burton required that twelve potential park proposals be reviewed each year. Thus Congress took over an initiatory rôle, not waiting for the Park Service to propose units. As Congress increasingly took primary responsibility for the creation of new units, in view of what it regarded as a default on this responsibility by the Executive Branch and the Park Service, dozens of acts were

106. One may well argue that in creating national recreation areas, national seashores, national lakeshores, and other more clearly recreational units, Congress was intending to put distance between the National Parks, unqualified by any adjective, and other types of units, thus suggesting a preference for the strictest application of protection to the National Parks, so called, as distinct from the other designations.

passed. While each of these was specific to a unit, some contained varied language concerning that unit, or on occasion units collectively. It is an interesting question (and a nightmarish one), therefore, as to whether in order to interpret or understand the intent of Congress *today* one needs to examine each of the nearly four hundred individual acts in search of language that would effect the collectivity.[107]

A NOTE ON SOME SUBSEQUENT LEGAL INTERPRETATIONS OR ACTIVITY OUTSIDE THE PARKS: WATER BY WAY OF EXAMPLE

The Organic Act establishing the National Park Service in 1916 provided that the National Park Service (NPS) was to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[108] This act was amended in 1970 and in 1978—those amendments are found at 16 U.S.C. § 1a-1 (1994). The purpose of those amendments was to reiterate the NPS's duty to maintain and protect parks in the spirit of the 1916 act. As we have seen, none of these statutes provides any scheme for how the NPS is supposed to fulfill the lofty objectives in the statutes.[109]

I have tracked how courts have interpreted these statutes. A vast majority of cases involve challenges to NPS regulation *within* parks. With a few exceptions courts overwhelmingly defer to the discretion of the NPS to regulate within the parks in carrying out the mandates of the legislation.[110] This closing note will, therefore, focus on the more difficult question of power to control or affect activity *outside* the parks.

Some courts, even before 1916, have held that the Secretary of the Interior has a trust obligation to protect public lands. In *Knight v. United Land Ass'n*,[111] the Supreme Court said that the Secretary of the Interior is the guardian of the people of the United States over the public lands. The extent

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107. This writer is attempting precisely this task for a work in progress, *The Rise of the National Park Ethic* (forthcoming).

108. 16 U.S.C. § 1 (1994).

109. In 1946 Congress also gave the NPS the power (financially) to acquire rights in accordance with local customs or laws if "necessary or beneficial in the administration" of the National Parks and Monuments. 16 U.S.C. §17j-2(g) (1994).

110. *See, e.g.*, United States v. Vogler, 859 F.2d. 638 (9th Cir. 1988) (stating that the NPS can require permits to transport off-road vehicles through park land in Alaska); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979) (stating that the NPS can allocate commercial and non-commercial boating on Colorado River); Town of Beverly Shores v. Lujan, 736 F. Supp. 934 (N.D. Ind. 1989) (stating that the NPS can pave parking area at Indiana Dunes, balancing natural preservation with public access). For an example of a case where NPS regulations were held invalid, see Wilkenson v. Dep't of Interior, 634 F. Supp. 1265 (D. Colo. 1986) (holding that the NPS could not charge fee for travel through Colorado National Monument because roads through the park were a public right of way, being State Highway 340, a portion of the only all-weather road to the settlement of Glade Park). I choose court decisions concerning water rights, as these, together with grazing and the extraction of minerals, were at issue in all early park legislation, and access to water is more nearly a universal question throughout all types of National Park System units than questions relating to grazing or mineral extraction are likely to be. I wish to thank Janet Satterthwaite for assistance with this note.

111. 142 U.S. 161 (1891).

of this duty was highlighted in litigation involving Redwood National Park in the 1970s. The unique legislation that created the park in 1968 contemplated that problems would arise from external logging and gave the NPS the authority to acquire interests in land outside the park to minimize ecological damage within the park.[112] The Sierra Club sued the NPS to force the NPS to exercise this power.[113] Courts will usually overturn an agency's exercise of discretion only upon a showing of abuse of that discretion. Nevertheless, after reviewing the evidence, the court ordered the NPS to exercise its power to acquire interests in land outside the park.

Although the court in the Redwood cases relied on the unique statute creating the park, the case nevertheless has implications for other parks. The court also invoked the general duties under 16 U.S.C. § 1 and a general trust obligation of the NPS to protect parks.[114] The court noted that the NPS had failed to "exercise and perform duties imposed upon them by [16 U.S.C. § 1] and the Redwood National Park Act . . . and duties otherwise imposed on them by law."[115] (After the Department of the Interior had submitted reports to the court, the court found that the Department was attempting to comply with the law.)[116]

After the Redwood litigation, Congress passed another statute for Redwood National Park. To clarify the confusion over the duties of the NPS generally, Congress added a rider to the statute to reinforce 16 U.S.C. § 1.[117] The Senate Report accompanying the bill emphasized that the purpose was to refocus and insure that the basis for decision-making concerning the National Park System continues to be the criteria provided by 16 U.S.C. § 1 because the committee had been concerned that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service.

> Accordingly . . . The Secretary is to afford the highest standard of protection and care to the natural resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided.[118]

In 1980 the U.S. district court in the District of Columbia relied on this language to reject the notion of a separate public trust outside the statutory duties imposed on the NPS.[119] On the other hand, the court found that the NPS had very broad discretionary power from several sources.

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112. 16 U.S.C. §§ 79c(a), (e) (1994).

113. Sierra Club v. Dep't of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Dep't of Interior, 398 F. Supp. 284 (N.D. Cal. 1975).

114. *Sierra Club*, 376 F. Supp. at 95-96.

115. *Sierra Club*, 398 F. Supp. at 293.

116. Sierra Club v. Dep't of Interior, 424 F. Supp. 172 (N.D. Cal. 1976).

117. *See* 16 U.S.C. § 1a-1.

118. S. REP. NO. 528, 95th Cong., 1st Sess. 13-14 (1977); *see also* H.R. REP. NO. 581, 95th Cong., 1st Sess. (1977).

119. Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

In *Andrus*, the Sierra Club sued to force the Interior Department to assert federal water rights in water courses affecting the Grand Canyon and Glen Canyon, both within units of the National Park System.[120] The court agreed that in the event of a real threat to the water supply for scenic, biotic or natural purposes in those areas, the Secretary would be required to take action.[121] The Court noted that the statutes do not provide a mechanism for how this action is to be taken, but found that the Secretary had broad (although not unlimited) discretion to take action, including but not limited to:

(1) asserting reserved water rights;

(2) acquiring water rights under 16 U.S.C. § 17j-2(g);

(3) denying land exchanges and rights of way; and

(4) bringing trespass or nuisance actions.[122]

The court deferred to the Secretary's discretion and declined to force him to assert the rights the Sierra Club wanted.[123]

The NPS may also have authority under the property clause of the Constitution to control activity outside park boundaries as that activity impinges upon public property. In *Minnesota v. Block*,[124] the Eighth Circuit Court of Appeals found that Congress could make regulations outside the Boundary Waters borders because of the property clause. The same court later found that the NPS also had this power and could regulate delivery of canoes along public roads leading into NPS riverways in Missouri, even were the canoe-renting people never to enter park property.[125] Under the property clause, Congress has power to protect public lands. The Eighth Circuit applied this doctrine to find that this power extended to regulation on or off public land in order to protect public land.[126]

There is thus tentative authority for the NPS to act outside its borders. Still, as the *Andrus* court pointed out, it is not entirely clear from NPS statutes alone how this is to be done. In addition to the methods suggested by the *Andrus* court, there are several other possible sources of authority to act, however.

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120. *Id.* at 445.

121. *Id.* at 448.

122. *Id.*

123. *Id.* at 452. In *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985), *vacated sub nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), the district court in Colorado agreed with the *Andrus* decision and rejected the notion of a public trust separate from statutory powers. Since that opinion was vacated for other reasons (see *infra* note 20), it has no force; however, it illustrates a trend in light of the 1978 amendments to reject the idea of public trusteeship while simultaneously beefing up the authority imputed to the government by statutes.

124. 660 F.2d 1240 (8th Cir. 1981).

125. Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983).

126. *Minnesota*, 660 F.2d at 1249; *accord Free Enter. Canoe*, 711 F.2d at 856. It is one thing to say Congress can do something, and another to say that the NPS can do it absent specific action by Congress. Nevertheless, see also Blake Shepard, Note, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479 (1984).

Conservation and Environmental Statutes

Various environmental statutes may be able to be exploited to help the NPS protect resources such as water *in* the parks. Among the statutes to consider are (1) the Clean Water Act, (2) the Endangered Species Act, (3) the Wilderness Act, and the Wild and Scenic Rivers Act.[127]

Implied Reserved Federal Water Rights

Another potential source of NPS power, depending on the circumstances, might allow the NPS to assert "implied reserved federal water rights" in land outside the park. This doctrine, developed in the courts, provides that when the government withdraws land from the public domain for a federal purpose (such as a national park or forest) the government impliedly reserves, as against future users, whatever water rights are needed to effectuate the purpose for which the land was reserved, but *only* the amount necessary to accomplish those purposes. The key is the intent of Congress for the use of the land at the time it was withdrawn from the public domain for a use such as a park or forest.[128] This intent is applied vertically, that is, chronologically, and it is this intent we have sought in the body of this monograph.

The Supreme Court restated this doctrine in a case involving the NPS in 1976: "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[129] This right *vests* (*i.e.*, you get it) on the date of the reservation and is superior to future appropriators. In other words, at the time the government creates a park or a forest, it gets the rights and no subsequent user can impair them.

Cappaert was a rancher who owned land near Devil's Hole National Monument (now functionally part of Death Valley National Monument) in Nevada.[130] President Harry S Truman had reserved the monument in 1952 in part because of unique fish that lived in a pool in a cavern, and protection of the pool was specifically mentioned in his proclamation reserving the monument.[131] The Supreme Court held that the NPS could stop Cappaert from pumping groundwater on his ranch in amounts that were diminishing the level

127. For a discussion of how some of these statutes might apply, see Mark T. Pifner, *Quality versus Quantity: The Continued Right to Appropriate—Part II*, 15 COLO. LAW. 1204 (1986); *see also* John W. Hiscock, *Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority*, 7 J. ENERGY L. & POL'Y 35 (1986). In *Sierra Club v. Block*, discussed *supra* note 16, the Court found that the Wilderness Act created implied federal reserved water rights (this doctrine is explained below). The opinion attracted some attention from commentators, but as noted above has since been vacated as not "ripe" for adjudication in the courts.

128. For a discussion of the historical basis of federal reserved water rights, see A. Dan Tarlock, *Protection of Water Flows for National Parks*, 22 LAND & WATER L. REV. 29, 38-48 (1987).

129. Cappaert v. United States, 426 U.S. 128, 138 (1976).

130. *Id.* at 133.

131. *Id.* at 131-32.

of the pool and threatening the fish.[132]

The key issue in *Cappaert* was whether maintaining the level of the pool was *necessary* to the purpose of the reservation of the monument. Moreover, since the doctrine of implied reservation of water rights reserves only the amount necessary to accomplish the purpose of the reservation, Cappaert was allowed to pump some water so long as the level of the pool did not drop to such a low level that it harmed the fish and other scientifically valuable aspects of the pool.[133]

Compare *United States v. New Mexico*,[134] where the Supreme Court held that the United States had not impliedly reserved water rights for aesthetic wildlife preservation, or recreational purposes when it created the Gila National Forest.[135] The Court noted that the purposes for which national forests are reserved are to protect timber and watershed.[136] The court contrasted the much broader purposes for which National Parks are reserved, citing the language of 16 U.S.C. § 1.[137]

What of National Parks created from National Forest land? The lands of Rocky Mountain National Park (RMNP) were originally reserved as a national forest and were only later made a national park, in 1915. As seen in *New Mexico*, the purposes, and correspondingly the extent of water rights, are much narrower for national forests than for parks. Technically, it might be argued that only national forest rights were reserved at the time of initial reservation from the public domain. However, this question has been addressed and resolved favorably to the NPS by the Supreme Court of Colorado. In *United States v. City of Denver*,[138] the court was asked to determine the extent of federal reserved water rights in the Colorado, Gunnison, North Platt, White and Yampa River Basins in Colorado.[139] Relying on *New Mexico* and *Cappaert*, the court focused on the precise federal purposes (including the priority date) for which the lands had been reserved.[140]

With respect to RMNP, the court held that the priority dates for water rights related to forest purposes (*i.e.*, protection of watershed and timber) dated from the creation of the national forest, but that additional, broader rights consistent with the purposes of a park obtained when the park was created in 1915.[141] (The court found that the purpose of a national forest was a subset of the broader purposes of a park, so that simply adding new water rights onto

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132. *Id.* at 147.

133. *Id.* at 141. Neither Cappaert nor anyone else had any rights to the water before 1952. The Court thus did not address what happens when the government reserves land and there are already persons with rights over the appurtenant water. Note also that this case established that the implied reserved federal rights doctrine applies to ground water as well as surface water. *Id.* at 144.

134. 438 U.S. 696 (1978)

135. *Id.* at 711.

136. *Id.* at 718.

137. *Id.* at 709.

138. 656 P.2d 1 (Colo. 1982) (en banc).

139. *Id.* at 4.

140. *Id.* at 17.

141. *Id.* at 30.

existing forest-related rights would not be consistent with the purposes of a park.) The court thus implied a second reservation from the public domain when the park was created.[142] The court sent the case back to the water court to determine the specificity of those rights.[143]

Third, the RMNP legislation of 1915 made specific reference to "homestead, mineral, right of way" and to "private, municipal, or State ownership"; that is, it made no reference in these contexts to another government agency, such as the Forest Service, thus implying that upon the designation of the land as a national park rather than national forest, the Forest Service no longer had authority within those lands. Much subsequent legislation has made this point abundantly clear. The act did refer to "rights of way in certain national parks and the national forests for irrigation and other purposes," but did not ascribe any authority with respect to those rights of way in national parks to any other body, and by virtue of specific reference to both national parks and national forests made it clear that the two were seen as mutually exclusive. The Secretary of the Interior was given the discretion to grant "easements or rights of way for steam, electric, or similar transportation upon or across the park," but no reference was made to having discretion to grant such rights of way or easements for the purposes of irrigation, thus suggesting that the Secretary had no such discretionary power in this area.

Conclusion

Where water is involved, one may not invariably separate issues of quantity from issues of quality, of course, since a diminution in quality may well require an increase in quantity to achieve the same purposes, if indeed, one may in any measure be said to have preserved the natural conditions if there is a significant change in *either* quantity or quality. It appears that the federal reserved water right doctrine would not be applied in a way that would make

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142. *Id.* This approach is similar to that used in the now vacated opinion in *Sierra Club v. Block*, discussed *supra* note 16. The Court ruled that even though the Wilderness Act withdrew wilderness areas from existing national forests, such areas constituted a "second" withdrawal from the public domain so that broader water rights relevant to a wilderness as opposed to a forest were created by the act. *Block*, 622 F. Supp. at 862. Indeed, the *Block* Court referred to *City of Denver* in its opinion. *Id.* In vacating the opinion, the 10th Circuit avoided ruling on whether the Wilderness Act implied any new reserved water rights, but referred to them as "alleged" rights. *Yeutter*, 911 F.2d at 1419. Essentially, the Court vacated the opinion because it thought it was too early to decide whether any public harm would result from the Forest Service's alleged failure to act, so that it could not be determined whether the Forest Service was abusing its discretion. *Id.* at 1414.

143. *City of Denver*, 656 P.2d at 36. Since passage of the McCarran Act, the United States may be brought in as a party to a state court water rights adjudication proceeding. Simply stated, the basic premise of Colorado water rights law is that a person who appropriates water for a beneficial use acquires rights to that water as against future users. For an explanation of how this works *vis-à-vis* federal reserved rights, see Navajo Dev. Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982) (en banc). For example, *Navajo* notes that, if the government wants to acquire water rights beyond those implied by reservation, it must use state appropriation proceedings or must condemn the rights. *Id.* at 1379. Other cases to keep in mind are: Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *Yeutter*, 911 F.2d at 1419; United States v. Bell, 724 P.2d 631 (Colo. 1986) (en banc); *see also* Aaron H. Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L.J. 1 (1982).

it meaningless—that is, if it is necessary to accomplish the purpose for which land was reserved to have clean, as well as sufficient, water, then presumably a right to clean water applies.

If any issue of water quantity (or quality) arises from conflict or interpretation with another federal government agency, the various court decisions that suggest national parks are to be held to a higher standard of preservation than lands administered by another agency would seem to apply. In the Committee Report accompanying the 1916 bill for the NPS, Congress noted that there was not supposed to be any conflict of jurisdiction among the agencies, but it is not clear what the Committee meant in practical terms.[144] Most of the legislation seems to contemplate that the NPS is to work in cooperation with other agencies, with no implication of any form of subordination.[145]

There is also the simple force of history, public opinion, and common sense. Whatever may have been read into certain words in 1916, those words now have relatively agreed upon meanings. The NPS is to "preserve" and "protect"—that is, make certain through management that a sufficient quantity of those elements natural to the landscape are retained unto future generations to carry out the purpose of the establishment of a given park unit; it is to apply this conservation to the "scenery"—that is, to the aggregate landscape as broadly perceived to the senses, and most particularly to the eye; it is to apply it to the "natural" objects—that is, to those individual constituent elements of the landscape that are "perceptible to one or more of the senses, especially something that can be seen and felt" (surely a definition applicable to water, to restrict this commentary to our one sustained example); and it is to apply it to "historic" objects as well—that is, to individual constituent elements that are historically part of the landscape to be conserved (and clearly a flow of water, a pond or lake, that form part of the historic landscape would thus be covered); as well as to "wild life"—which, were there to be dramatically altered stream flows, lake levels, or ground water would be seriously affected. Thus, quite without invoking that most famous portion of the legislation, which refers to leaving the resources of a park "unimpaired for the enjoyment of future generations," one may readily argue that the purposes of a national park have preeminence over other federal agencies and goals absent specific legislation to the contrary.

CONCLUSION

Arguably the intent of Congress with respect to any single act cannot be perfectly devined or proven. The intent of Congress across a number of related acts, and as adumbrated by other acts that bear upon the related group, may more nearly be understood. This paper has attempted to judge that intent. It has argued that the language contained in the preamble to the National Park

144. H.R. REP. NO. 700, 64th Cong., 1st Sess. 3 (1916).

145. *See* Julie A. Bryan, Comment, *The National Park Service Organic Act Prohibits Turning the Doorstep of Canyonlands National Park into a Nuclear Wasteland*, 7 J. ENERGY L. & POL'Y 95 (1986). A comment—indeed, any law school journal article at all—does not have the force of law, of course, though the argument may be found convincing to a court at the appropriate time.

Service Act of 1916 is not, in fact, contradictory and that Congress did not regard it as contradictory; that to the extent that a contradictory interpretation can be imputed to the sentence to the preamble quoted in the Introduction to this paper, that contradiction can be eliminated by reference to the printed record of Congress at the time, to the private papers of those individuals most directly responsible for framing the language of the act, and to the prevailing canons of rhetoric in 1916. Further, it is argued that subsequent legislation, and numerous interpretations of related legislation by the courts (taking water as a resource by way of example) sustain the view that there was and is no inherent contradiction in the preamble to the Act of 1916. The National Park Service was enjoined by that act, and the mission placed upon the Service was reinforced by subsequent acts, to conserve the scenic, natural, and historic resources, and the wild life found in conjunction with those resources, in the units of the National Park System in such a way as to leave them unimpaired; this mission had and has precedence over providing means of access, if those means impair the resources, however much access may add to the enjoyment of future generations.

THE UNITED STATES FOREST SERVICE AND NATIONAL PARK SERVICE: PARADOXICAL MANDATES, POWERFUL FOUNDERS, AND THE RISE AND FALL OF AGENCY DISCRETION

FEDERICO CHEEVER*

There was no harm in getting a purpose down, even though the only purpose admissible raises more questions than it answers.[1]

I. INTRODUCTION

On September 18, 1996, President Clinton announced the designation of the Grand Staircase-Escalante National Monument in southern Utah. Although a national monument in an area long targeted for protection by the National Park Service,[2] President Clinton's announcement made it clear that the monument's initial management plan would be prepared by another agency of the Department of the Interior, the Bureau of Land Management (BLM). President Clinton's action implied that the BLM might be more accommodating to local interests than the Park Service.[3] Other sources suggest that the local interests in question include not only those concerned about the fate of the Andalex Resources Inc. mining enterprise within the monument, but also local

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1. ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS, 101 (1951) (discussing purpose language in National Park Service Organic Act of 1916).

2. Christopher Smith, *Feds Seek a Truce with Utah*, SALT LAKE TRIB., Nov. 9, 1996, at A5. George Frampton, Assistant Secretary of the Interior, referring to management of Grand Staircase-Escalante National Monument by the Bureau of Land Management, rather than the Park Services, stated:

> I realize it may be controversial within the Park Service but I'm very comfortable with it. . . . The Park Service is more preservationminded, [sic] but BLM has the skills and science available to uphold the mandate in the [monument's] proclamation. I would like to see this as a test for BLM and I would not like to see the monument go to the Park Service.

Id. Sen. Orrin Hatch, Utah, fumed "Indeed, this is the mother of all land grabs" when referring to the creation of the national monument. Laurie Sullivan Maddox, *Taking Swipes at Clinton, Utahans Vow to Fight Back*, SALT LAKE TRIB., Sept. 19, 1996, at A5.

3. *Details of the Monument*, SALT LAKE TRIB., Sept. 19, 1996, at A4 (quoting President Clinton's assurances that with BLM management, the public will be able to hunt, fish and graze livestock in the monument).

environmentalists concerned about the Park Service's management approach in some of the canyon parks in southern Utah.[4]

Although almost unnoticed in the fanfare surrounding the monument's designation, this exclusion from coveted terrain is a blow to the Park Service and suggests a level of controversy about the agency unparalleled in its eighty-year history. The Park Service remains one of a very few federal government icons in an anti-government age. The flat brimmed hats and brown uniforms of the park ranger evoke a sense of well being in most Americans.[5] At the same time, with various interest groups, the Park Service is running into trouble, attacked both for its protectiveness of the lands it manages[6] and for its traditional methods of facilitating human access to the national parks.[7] Long standing contradictions in our national image of what national parks should be are generating new tension. Scholars have a role to play in describing these disputes and seeking out their sources. This symposium in the *Denver University Law Review* comes at a propitious time.[8]

This essay provides one cautionary observation: The Park Service may be following the road followed a few decades before by its sister agency, the United States Forest Service.[9] Into the 1960s, the forest rangers and their mas-

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4. Both federal land managers and nonprofit organizers expressed local environmental concerns:

> "It's a good laboratory," said Eric Howard of the Grand Canyon Trust, which would like to see "local control with local dollars, *not falling prey to chain-store development patterns.*"
>
> . . .
>
> "We want to do a good job and show everybody we can," said Gregg Christiansen, one of six employees in the BLM Escalante office. "I think we can if we don't screw up, if they give us the money and don't give it to the National Park Service."
>
> And the first issue will likely be paving the roads.
>
> . . .
>
> "Don't pave it," said Grant Johnson, a SUWA founder and outfitter who leads walks into Escalante. "The monument will never be better. Right now the trailhead is unmarked. *Next thing you know they'll put up a sign, and then you'll have a ranger patrolling with a gun.*"

Jim Carrier, *The Last Place*, DENV. POST (Empire Mag.), Nov. 17, 1996, at 18 (emphasis added).

5. In August 1996, developers outside Denver, Colorado, opened the Park Meadows Mall. The mall uses the traditional motifs of the National Park Service and National Park architecture to sell the usual mix of housewares, clothes and self-help literature:

> At the main entrance, shoppers are greeted by nothing resembling a traditional mall entrance. Park Meadows' sandstone-and-rounded-timber-beam entrance, topped by a pediment, is certainly different and larger than life, but definitely not intimidating.
>
> The unmistakable national parks-lodge lines are warmer and more friendly than the standard, chilly steel-and-glass mall entrances that have held sway for the past two decades.

J. Sebastian Sinisi, *Inviting Park Meadows Embraces Shoppers*, DENV. POST (EMPIRE MAG.), Nov. 10, 1996, at 18. The developer's choice is, if nothing else, a testament to the esteem in which most Americans still hold the National Parks and National Park Service.

6. In 1995, Congress appropriated a mere $1 to fund the Mojave National Preserve. H.R. 1977, 104th Cong. (1995). President Clinton vetoed the appropriations bill, specifically targeting the lack of funding for the preserve. Veto of H.R. 1977, 104th Cong. (1995).

7. *See* Sierra Club v. Lujan, 716 F.Supp. 1289, 1293 (D. Ariz. 1989) (ordering preliminary injunction halting construction of a restaurant, hotel, and related structures on the north rim of the Grand Canyon).

8. Symposium, *The National Park System*, 74. DENV. U. L. REV. 567 (1997).

9. At a 1991 conference held in Yellowstone National Park for the Park Service managers

cot, Smokey Bear,[10] enjoyed great popular esteem. Even Lassie spent some time in the Forest Service.[11] In thirty years, strong popular reaction to Forest Service logging practices and increased concern for the species, ecosystems, and scenery harmed by those practices wrought dramatic changes in a timber-oriented agency.[12] Changes in traditional Forest Service practices, in turn, provoked strong, if localized, popular reaction to change.[13] Smokey Bear receives death threats.[14] The Forest Service is attacked from both ends of the political spectrum and pleases almost no one. The fabric of Forest Service agency culture is in jeopardy.[15]

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of the large western "backcountry parks," such as Yellowstone, Rocky Mountain, Glacier, and Olympic national parks, a manager admitted that although the public still views the Park Service as "America's favorite agency," he and other wilderness managers knew otherwise; that, in fact, the Park Service was losing the battle to maintain natural systems in the parks. Interview with Chad Henderson, former public policy manager of the National Outdoor Leadership School, in Denver, Colo. (Jan. 12, 1997).

10. References to "Smokey the Bear" are not only incorrect, but also contradict federal law. *See* 16 U.S.C. § 580p (1994) (establishing use and protection for the characters Smokey Bear and Woodsy Owl).

11. Evolution of attitudes toward the Forest Service:

> The 1950s and '60s were kind to the Forest Service. The image of the ranger in the green uniform, there to protect the woods and rescue stray kids, dominated the national psyche. The Forest Service was trusted as the paternal land manager, its rangers as true as Smokey Bear; on TV, one of them was cast as fitting companion to no less a hero than Lassie.
>
> But that image devolved with the social revolution that swept America in the late 1960s and early 1970s. The Forest Service drew a more critical stare from a public awakening to warnings of environmental catastrophe.
>
> Then came the first Earth Day, the Endangered Species Act and the National Forest Management Act. Charges surfaced of illicit ties between the agency and the CIA; news accounts revealed below-cost timber sales and logging thefts.
>
> By the late 1980s, the Forest Service was driving on its rims, battered and lackluster. Trust in the agency's stewardship had all but dissolved.

Peter D. Sleeth, *Even in Washington, D.C., Thomas Keeps Forest Close*, PORTLAND OREGONIAN, July 14, 1996, at A1.

12. In 1971, the "Church committee" examined Forest Service timber management. *See* STAFF OF THE SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92d CONG., CLEARCUTTING ON FEDERAL TIMBERLANDS 1 (Comm. Print 1972) [hereinafter 1972 COMMITTEE REPORT]. The hearings and subsequent report contributed to congressional unease over Forest Service clearcutting practices, and contributed to passage of the National Forest Management Act in 1976. 16 U.S.C. 1600, 1611-1614, 472a, 521b (1994). Focus shifted from modifying silviculture practices to protection of values beyond timber production in the late 1980s with the northern spotted owl controversy. By 1991, the Forest Service faced dramatic reductions in timber harvests from Pacific Northwest national forests as a result of lawsuits seeking protection for the threatened spotted owl. *See* Alyson C. Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261 (1993) (discussing Pacific Northwest logging and its effects on native ecosystems contrasted with the costs of environmental protection and economic transitions of local communities).

13. *See, e.g.*, Gail Kinsey Hill, *Shortfall in Timber Sales Doubles; The Forest Service Revises Previous Estimates of Timber That Won't Be Cut, and Mill Owners Say Thousands of Workers Will Lose Their Jobs*, PORTLAND OREGONIAN, Aug. 8, 1990, at B1. Timber workers in the communities where the Forest Service proposed large reductions in the timber harvest were upset, some of them feeling a "sense of doom." *Id.*

14. In the spring of 1989, court injunctions had effectively shut down Pacific Northwest timber sales on national forests. Angry members of the affected communities sent death threats to Forest Service mascots Smokey Bear and Woodsy Owl. STEVEN LEWIS YAFFEE, THE WISDOM OF THE SPOTTED OWL xv (1994) (providing an exhaustive analysis of the northern spotted owl controversy in the years 1989 to 1993).

15. Forest Service Chief Jack Ward Thomas commented on the deterioration of agency mo-

The Park Service and the Forest Service are different. The Forest Service authorizes logging, oil and gas development, mining and hunting in the national forests.[16] The Park Service (with a few exceptions)[17] permits none of these uses in National Parks. In other senses, however, the agencies share significant attributes. Both are agencies of long standing, progeny of the Progressive era. The Forest Service took on its current form in 1905 and 1906.[18] The Park Service came into being in 1916.[19] Congress created both to manage public land reserved considerably earlier. Grover Cleveland set aside the first "forest reserves" in 1891.[20] Congress set aside the first national park, Yellowstone, in 1872.[21]

More significantly for our purposes, both agencies were shaped by a type of person, rare then and almost non-existent now: wealthy, energetic visionaries who saw the reserves of public lands under their influence as a canvas for their ideas and who used the machinery of government to further their vision. Gifford Pinchot imagined the United States Forest Service and then created it.[22] His vision still shapes that agency's view of itself and the land it manages eighty-seven years after his tenure as its chief. Steven Mather had an equally significant role in the creation of the National Park Service. Like Pinchot's, Mather's vision haunts the agency he helped create.[23]

Finally, and not coincidentally, both agencies operate under "paradoxical"[24] legislative mandates. The National Park Service Organic Act of

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rale. He stated, "This demonization [of the Forest Service] is on the verge of bringing down this agency." *Forest Service "No Demon,"* DENV. POST, Sept. 18, 1996, at B1.

16. 7 C.F.R. § 2.60 (1997). This regulation delegates authority to the Chief of the Forest Service to manage the National Forest System and defines the chief's responsibility for "forestry" to include:

> renewable and nonrenewable resources of forests, including lands governed by the Alaska National Interest Lands Conservation Act, forest-related rangeland, grassland, brushland, woodland, and alpine areas including but not limited to recreation, range, timber, minerals, watershed, wildlife and fish; natural scenic, scientific, cultural, and historic values of forests and related lands; and derivative values such as economic strength and social well being.

Id.

17. Congress allowed hunting and certain off-road motorized access to national preserves in Alaska, managed by the Park Service. *See* Deborah Williams, *ANILCA: A Different Legal Framework for Managing the Extraordinary National Park Units of the Last Frontier*, 74 DENV. U. L. REV. 859, 860-64 (1997).

18. Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 23 OR. L. REV. 1, 15-19 (1985), Michael Frome, THE FOREST SERVICE 12-25 (1984).

19. National Park Service Organic Act, 16 U.S.C. §§ 1-4 (1994); *see* Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate?"*, 74 DENV. U. L. REV. 575, 583-85 (1997).

20. Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103 (repealed in 1976); *see* Wilkinson & Anderson, *supra* note 18, at 17-18.

21. Yellowstone National Park Act of 1872, 16 U.S.C. § 21 (1994).

22. MICHAEL WILLIAMS, AMERICANS AND THEIR FORESTS 417-421 (1989).

23. DYAN ZASLOWSKY & T.H. WATKINS, THESE AMERICAN LANDS 22-27 (1994).

24. I offer two definitions of "paradox" that may apply here: "a statement that is seemingly contradictory or opposed to common sense and yet is perhaps true" and "a self-contradictory statement that at first seems true." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 842 (10th ed. 1993).

1916[25] declares that the purpose of the national parks is to "conserve" scenery, "natural and historic objects" and "wild life" and provide for their enjoyment "by such means" as to leave them "unimpaired for the enjoyment of future generations."[26] Congress did not specify by what means the Park Service was to "conserve" "unimpaired" the national parks while providing for their "enjoyment." In the 1897 "Organic Act"[27] authorizing management of what were to become the national forests, Congress provided a mandate to "improve and protect the forest" while at the same time "securing favorable conditions of water flows" and furnishing "a continuous supply of timber for the use and necessities of citizens of the United States."[28] Again, how to use the resources while protecting them remains unspecified.

At present, the paradoxical mandates of the two agencies facilitate the generation of perceptions of agency purpose at odds with actual agency conduct. They allow those of us who are interested in public land management to project our vision and values onto the language Congress used to instruct these agencies. This almost insures that some significant part of the interested public will believe that the agencies conduct is not only wrong but illegal.

Federal officials are fond of saying that when they anger both sides in a dispute, they are probably doing their jobs. In fact, operating in a manner that defies the expectations of interested outside groups has a corrosive quality. It corrodes working relationships between the agency and its potential partners in the community in which it operates, and it corrodes judicial deference to agency action. When a Winnebago tourist, who believes the national parks exist for his enjoyment, hears that the Park Service is planning to ban cars from Zion National Park,[29] he feels betrayed. When a wilderness enthusiast, who believes the national parks exist to preserve natural wonders, finds the equivalent of a shopping mall in Yosemite Valley, she feels betrayed.[30] When a timber

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25. 16 U.S.C. §§ 1-4 (1994).

26. 16 U.S.C. § 1. The National Park Service Organic Act declares that:

> The service thus established shall promote and regulate the of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . which purpose is *to conserve* the scenery and the natural and historic objects and the wild life therein and to *provide for the enjoyment* of the same in such manner and by such means as will *leave them unimpaired* for the enjoyment of future generations.

Id. (emphasis added).

27. Forest Service Organic Administration Act of June 4, 1897, 16 U.S.C. § 473-482, 551 (1994). The Forest Service's pre-1976 authorizing legislation includes: Forest Transfer Act, 16 U.S.C. §§ 472, 615b, 554, 524 (1994); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994).

28. 16 U.S.C. § 475. The Forest Service Organic Administration Act states that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." *Id.*

29. See Tom Kenworthy & Gary Younge, *Falling into a Hole at Grand Canyon; Nation's Parks Face Severe Budget Crunch*; WASH. POST, Aug. 21, 1996, at A23 (stating that Zion National Park officials are considering a ban on automobiles in the park to address visitation pressures and limited funds).

30. George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 740 (1997) (discussing only one instance in which the National Park Service has been enjoined from allowing facility development to accom-

mill worker who believes that the purpose of the Forest Service is to furnish "a continuous supply of timber" learns the Forest Service will sell less timber in order to protect owl habitat, the timber mill worker feels betrayed.[31] When a judge who believes that the purpose of the Forest Service is to protect national forest resources for future generations sees pictures of national forest land that look more like a clipped poodle than a landscape, the judge is inclined to believe the agency has broken the law.[32]

So how did these agencies get stuck with such counter-productive mandates, and why did it take the better part of the twentieth century for the mandates to create such problems? I suggest that these paradoxical mandates once served to enhance agency prestige and esprit de corps by giving the powerful men who influenced the agencies' early years language onto which they could project *their* vision and that, in a world in which Congress and the Cabinet provided the only arenas for disputes about the public land, their opacity did little or no harm. Times have changed; ambiguity which once provided agencies necessary latitude before Congress and the Cabinet now inspire sophisticated western interest groups to challenge agency policy. Mandates which once contributed to the rise of agency discretion now contribute to its decline.

II. VISIONS, WEALTH AND CRAMPED GOVERNMENT OFFICES

Stephen Mather was 47 and a Borax tycoon when he made his tour of the western national parks in 1914.[33] A promoter, originator of the "twenty mule team" borax slogan,[34] and a business strategist who had bested Francis Marion "Borax" Smith in the business Smith had originated,[35] Mather was also an outdoorsman, member of John Muir's tiny Sierra Club and participant in the Club's 1905 Mount Rainier expedition.[36] Mather did not find the management of the western parks to his liking.[37] He wrote Franklin Lane, Secretary of the Interior and a friend from Mather's college days at Berkeley.[38] Lane wrote back telling Mather that if he didn't like the way the national

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modate visitation within a national park).

31. President Clinton addressed the timber-spotted owl conflict in the Pacific Northwest by forming the "Forest Ecosystem Management Assessment Team." The team presented a plan, and the plan's "Option 9" was selected as the approach to limit timber harvest in order to protect the owls. Local opposition was fierce. Sue Kupillas, an Oregon county commissioner, testified before a House subcommittee, stating "Our worst fears were realized when the FEMAT [Forest Ecosystem Management Assessment Team] group emerged from its secret deliberations and handed down plans that included an 80-percent reduction in timber harvests, with corresponding losses of revenues upon which we depend." *Hearing on President Clinton's Forest Plan for Spotted Owl Before the Subcommittee on National Parks, Forest, and Lands, House Committee on Resources*, 104 Cong. (1996) (statement of Sue Kupillas, Commissioner, Jackson County, Oregon).

32. *See, e.g.*, Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704-05 (9th Cir. 1993) (affirming injunction of Forest Service from awarding timber contracts in Pacific Northwest national forests that would log habitat suitable for the spotted owl until the agency complies with the National Environmental Policy Act and the National Forest Management Act).

33. SHANKLAND, *supra* note 1, at v.

34. *Id.* at 27-28.

35. *Id.* at 33-39.

36. *Id.* at 9.

37. *Id.* at 7.

38. *Id.*

parks were run, he could come down to Washington and run them himself.[39] Mather did.[40]

Mather left a life of comfort in Chicago, moved into a small office in the Department of the Interior, and through a decade and one-half of almost incessant labor left an indelible impression on the national parks and the people who run them. Mather supplemented his employees' salaries out of his own pocket[41] and purchased significant assets for the parks with his own money, including the Tioga Road, the only eastern, and most spectacular, entrance into Yosemite National Park.[42] He used his personal connections in business and government to further the interests of the national parks as he saw them, and he had much to do with the passage of the National Park Service Organic Act of 1916.[43] Mather knew what he wanted the national parks to be, and he used every asset at his disposal to remake them in that image.[44]

Mather's mixture of vision and philanthropy in government service strikes us as alien and even slightly disturbing. He was of another time, not so much in his willingness to spend almost unlimited quantities of his money and time to further his version of the public good,[45] but rather in his choice of the federal government as the instrument of his will.

Mathers are rare in any age, but Stephen Mather was not unique in his time. He operated in the wake of a better known and similar man. Gifford Pinchot was not a businessman. He was rich. Few would deny that Pinchot's gifts for promotion and organization would have made him an excellent businessman had his vision not taken him in another direction. As a very young man he travelled to Europe to study forestry and encountered there the perpetually harvested and perpetually maintained forests of France, Germany and Switzerland.[46] As Pinchot wrote in his autobiography:

> The Forests of Haye and Vandoeuvres are . . . hardwood forests, managed on a system of coppice (sprouts cut once every thirty years) under standards (seedling trees cut once in 150 years). They gave me my first concrete understanding of the forest as a crop, and I became deeply interested not only in how the crop was grown, but also in how it was harvested and reproduced.

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39. *Id.*
40. *Id.*
41. Winks, *supra* note 19, at 58.
42. Mather's generosity described:

> Congress would get around to voting the parks an ample appropriation only when it heard a loud enough public demand, but it would hear a loud enough public demand only after an ample appropriation had been spent on publicity and improvements. A cash primer was called for to set the process off. Mather thought about this and had a familiar reaction. He hauled out his checkbook. For a curtain-raiser to his park administration he wanted to make some noise . . . . Casting about for an idea, he remembered the Tioga Road, a broken-down east-west thoroughfare, fifty-six miles long that bisected [Yosemite National] [P]ark.

Id. at 57-58.
43. SHANKLAND, *supra* note 1, at 100-06.
44. *Id.* at 243.
45. Witness Ross Perot.
46. GIFFORD PINCHOT, BREAKING NEW GROUND 10-22 (1947).

> Work in these woods was assured for every year, and would be, barring accidents, world without end. The forest supported a permanent population of trained men . . . and not only a permanent population but also permanent forest industries, supported and guaranteed by a fixed annual supply of trees ready for the ax.[47]

Pinchot brought the vision of sustained yield forestry back to the United States in the early 1890s and spent most of the next twenty years lobbying for the creation of the national forests and creating the organization that would manage them, the United States Forest Service.[48] Like Mather, he moved into cramped government offices and created an agency which eventually grew to include tens of thousands of employees controlling millions of acres of land.[49]

Pinchot's philanthropy was not as ostentatious as Mather's. However, the Yale Forestry School, established to train his successors in the Forest Service, owes much to his largess.[50]

Like Mather, Pinchot used the government to further his vision. As Mather saw the national parks on his 1914 trip, so Pinchot saw the Department of the Interior "forest reserves" when he inspected them on his visit to the west as a "confidential forest agent" in 1897.[51] Like Mather, he used all the assets at his disposal to remake the reserve system in the image of the perpetual forestry he brought from Europe, personally reformulated for his native country.[52]

III. GETTING "CARTE BLANCHE" FROM CONGRESS

A. *Personal Vision and Washington Politics*

In the age of Mather and Pinchot, there were two significant obstacles to using the machinery of the federal government to realize a personal vision: Congress and cabinet-level officials. Both Mather and Pinchot became masters at manipulating Congress and the various secretaries of Interior and Agriculture.

Generating benign popular interest has always been a key to congressional support. Michael Frome, a journalist himself, observes that Gifford Pinchot "may have been the best press agent of his time"[53] As Theodore Roosevelt, an intimate friend of Pinchot's, notes in his autobiography:

> It is doubtful whether there has ever been elsewhere in the Gov-

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47. *Id.* at 13.

48. *Id.* at 188-262.

49. In 1898 Pinchot Succeeded Bernhard Fernow as chief of the division of Forestry in the Department of Agriculture. He began with eleven employees "the nucleus of the Forest Service today." FROME, *supra* note 18, at 19.

50. FROME, *supra* note 18, at 298-299.

51. PINCHOT, *supra* note 46, at 122-132.

52. Pinchot had considerable disdain for those who wished to apply European forestry principles unaltered in the United States. *Id.* at 147. However, it is far from clear how his personal vision differed from theirs.

53. FROME, *supra* note 18, at 45 (Frome quickly notes that Mather ran a close second).

> ernment such effective publicity [as that of the Forest Service]—purely in the interest of the people—at so low a cost. Before the educational work of the Forest Service was stopped by the Taft Administration, it was securing the publication of facts about forestry in fifty million copies of newspapers a month.[54]

Pinchot lobbied for the 1897 "Forest Service Organic Act"[55] which gave authority to sell timber to whomever managed the national forests.[56] Pinchot termed it a "door wide open to the forester."[57] Pinchot mounted a lengthy political campaign which finally resulted in the 1905 Transfer Act[58] which transferred authority over the forest reserves from the Department of the Interior, where Pinchot had made some enemies,[59] to the Department of Agriculture, where he had good friends.[60] The hallmark of his victory over Congress was his establishment of a significant federal agency authorized by only a few paragraphs of congressional mandate. Pinchot did not want Congress interfering which his Forest Service or his vision of the national forests, and he significantly advanced that end by preventing Congress from imposing any significant legal standards on himself or his agency.

Similarly, Mather worked for enthusiastic congressional support of the national parks without congressional participation in their management. Between his arrival in Washington in early 1915 and passage of the National Park Service Organic Act on August 25, 1916, he marshalled his friends in the press to cover the parks,[61] and, in the summer of 1915 he took a select group of influential people on a tour of the western parks.[62] The party contained a number of well positioned members of Congress, including Gilbert Grosvenor of the National Geographic Society and the United States Geological Survey's most prized trail cook, Ty Sing.[63] Mather was a Republican who "took the Bull Moose turn-off" in 1912.[64] He worked happily and effectively in Democratic administrations. When Republicans of a very different sort recaptured the White House in 1920, and Albert Fall, of Teapot Dome fame, became Secretary of the Interior, Mather had established a sufficient network of influential friends to prevent Fall from doing much damage to the national parks.[65]

Professor Fischman points out that scholars have focused considerable attention on a single prescriptive phrase in the National Park Service Organic

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54. *Id.* at 45-46.
55. 16 U.S.C. §§ 473-482, 551.
56. 16 U.S.C. § 475.
57. PINCHOT, *supra* note 46, at 117.
58. 16 U.S.C. §§ 472, 615b, 524, 554.
59. WILLIAMS, *supra* note 22, 105, at 418 (describing Pinchot's attack on the Department of the Interior's General Land Office for its incompetence in managing the forest reserves).
60. Notably "Tama" Jim Wilson, Secretary of Agriculture, who Pinchot described:
> He was a grand man to work for. He knew enough, as plenty of executives do not, to give a man his head—let him alone, so long as he stayed on the right track.

PINCHOT, *supra* note 46, at 137.
61. SHANKLAND, *supra* note 1, at 83-99.
62. *Id.* at 68.
63. *Id.*
64. *Id.* at 42.
65. *Id.* at 217-18.

Act of 1916:[66]

> [T]o conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.[67]

They have done so, in part, because it is the *only* prescriptive provision in the 1916 law. In that act, Mather gained the authority to hire employees, the authority to make and publish rules and regulations "necessary or proper for the use and management of the parks," the authority to sell and dispose of timber "in order to control the attacks of insects or diseases or otherwise conserve the scenery," the authority to destroy "detrimental" animals and plants, the authority to grant "privileges, leases, and permits for the use of land for the accommodation of visitors," and the authority to permit cattle grazing "when [in the judgment of the Secretary of the Interior] such use is not detrimental to the primary purpose for which such park . . . was created."[68] The law granted this authority subject to the limitations imposed in specific acts establishing parks[69] and the paradoxical provision quoted above.

B. *The Promise of Balance*

The success Pinchot and Mather enjoyed in their dealings with Congress and the Cabinet had something to do with their promises, explicit and implicit, to do the difficult job of striking a balance between preservation and use. The texts of the laws Congress enacted clearly indicated congressional awarenesss of the need for such a balance.[70] While the legislators of the first decades of the century could not imagine the effect of chainsaws, snowmobiles and interstate highways, they understood that managing the public lands required trade-offs.

The creation of the original forest reserves in 1891 was intended to stop unregulated timber harvest on sensitive public lands and provided no authority for the sale of federal timber.[71] This set off a backlash among those who benefitted from logging on public land and led to the 1897 Organic Act which authorized regulated timber cutting.[72] Pinchot obtained control of the national forests in 1905 by telling Congress that he and the agency he created could regulate the timber harvest to the benefit of all the people without damaging the national forest resources or draining the treasury.[73]

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66. Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 779-80 (1997).

67. 16 U.S.C. § 1.

68. 16 U.S.C. § 3.

69. Fischman, *supra* note 66, at 779-80; *see also* Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 16-31 (1992).

70. *See supra* notes 16-28, and accompanying text.

71. Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103, (repealed 1976).

72. FROME, *supra* note 18, at 18-19.

73. *See* Robert E. Wolf, *National Forest Timber Sales and the Legacy of Gifford Pinchot:*

The seminal policy document for Pinchot's Forest Service, the document that acted "to crystallize the purpose and spirit of the new enterprise in terms that are as valid today [1946] as they were forty years ago [1905]"[74] was a letter transmitted to Pinchot by his friend, Secretary of Agriculture James "Tama Jim" Wilson, dated the day of the transfer of authority over the forest reserves into Pinchot's hands.[75] In his autobiography, Pinchot coyly noted "[t]hat letter, it goes without saying, I had brought to the Secretary for his signature."[76] The letter states:

> In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people . . . . All the resources of the forest reserves are for *use*, and this use must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources. . . . The permanence of the resources of the reserves is . . . indispensable to continued prosperity, and the policy of this department for their protection and use will invariably be guided by this fact, always bearing in mind that the *conservative use* of these resources in no way conflicts with their permanent value.
>
> You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the homebuilder first of all . . . .[77]

Reading through the text of Pinchot's letter, one senses the oscillation between declarations in favor of use and of preservation. In the first two sentences, use is paramount, modified by the need for permanence. However, by the end of the paragraph, "permanence" and even "protection" dominate, modified by allegedly consistent "conservative use."

The tension between use and preservation framed the debate surrounding enactment of the National Park Service Organic Act of 1916 (1916 Act). The debate took place in the shadow of the 1913 Hetch-Hetchy dam controversy, in which federal agencies, supported by Pinchot and opposed by his former friend John Muir, allowed the City of San Francisco to build a dam in Yosemite National Park and flood one of its most beautiful valleys.[78] Mather was still in the Borax trade when the Hetch-Hetchy controversy took place, but the fight spurred the movement to establish a separate agency to manage the national parks,[79] a movement that Pinchot opposed.[80] The promise in the

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Managing A Forest and Making It Pay, 60 U. COLO. L. REV. 1037, 1045-51 (1989) (discussing Pinchot's promises to Congress regarding the Forest Service's profitability and budget).

74. PINCHOT, *supra* note 46, at 261.

75. *See id.* at 260-61.

76. *Id.* at 260.

77. *Id.* at 261.

78. FROME, *supra* note 18, at 276.

79. *Id.*

80. When the idea of a separate national park service was first introduced, Pinchot scoffed that it "was no more needed than two tails to a cat." FRANK E. SMITH, THE POLITICS OF CONSERVATION 155 (1966). Pinchot believed the Forest Service should run the National Parks. Hetch-Hetchy among other things made that impossible. *Id.*

1916 Act to preserve the parks while facilitating their enjoyment suggested that there would be no more need to resolve Hetch-Hetchy-like controversies in Congress. Two prominent sponsors of the 1916 Act, Congressmen John E. Raker and William Kent, had been in the thick of the debate and strong proponents of the Hetch-Hetchy dam. Kent, an outdoorsman, suffered the loss of his friendship with John Muir as a result of the Hetch-Hetchy dispute.[81] Franklin Lane, the Secretary of the Interior who hired Mather, had also supported the Hetch-Hetchy dam.[82] The single prescriptive provision of the 1916 Act, quoted above, requires both use and preservation.[83] From now on, balancing would be done at the agency level.

Many of the current balancing acts regarding both national parks and national forests center around one extremely useful and destructive technology, internal combustion vehicles and the roads on which they travel. Some of the damage and pressure associated with roads, cars, campers, snowmobiles and all-terrain vehicles can be traced to Stephen Mather's enthusiastic acceptance of automobiles as a means of access to the national parks. While much of the current problems may have been inevitable in light of America's romance with the automobile, some can be traced to Mather's personal romance with the automobile:

> As (in the jargon of the early motor age) an "auto crank," Mather belonged to the American Automobile Association and the Chicago Automobile Association and operated a car of his own in Washington. He knew what agonies the motorist suffered. Once, in the spring of 1916, he invited Grace and Horace Albright on a spin to Richmond, but they stopped spinning in a sea of mud in Fairfax Court House on the outskirts of the national capital.[84]

Mather's biographer observes that "[f]rom the start [Mather] touted the automobile as a source of abundant strength to the national parks," an assertion, he adds, "inescapable [as] it seems now, that most of his colleagues fiercely resisted."[85]

In 1916, Congress delegated Mather the authority to set the balance between use and preservation in the national parks.[86] In setting that balance, he decided automobiles were a good thing for use and not a bad thing for preservation.[87] In 1915, he had opened Yellowstone National Park to automobiles,[88] and was present at the dedication of Rocky Mountain National Park and "the greatest automobile demonstration ever seen in Colorado [300 cars]."[89] Additionally, Mather is credited with inspiring the National Park-to-Park Highway Association dedicated to connecting the national parks by high-

81. RODERICK NASH, WILDERNESS AND THE AMERICAN MIND at 173-175 (3d ed. 1982).
82. *Id.* at 170.
83. *See supra* note 16.
84. SHANKLAND, *supra* note 1, at 148.
85. *Id.* at 147.
86. 16 U.S.C. §§ 1-4.
87. SHANKLAND, *supra* note 1, at 154.
88. *Id.* at 151.
89. *Id.* at 79.

way so that "the people can tour all the national parks by machine."[90]

Robert Sterling Yard recalled Mather's statements inducing one reluctant developer to build a hotel in Yosemite Valley: "Why, look at those cars!" he snorted. "There must be close to two hundred of them. Where's your imagination, man? Some day there'll be a thousand!"[91]

In the long run, the significance of Stephen Mather's enthusiastic acceptance of the automobile as a method of enjoying national parks, dwarfs the significance of the Hetch-Hetchy dispute. Some modern visitors to Yosemite find the valley saved—the Yosemite valley, with its grand hotels, stores, crowds and armed rangers—far less evocative of any spirit of natural grandeur than its flooded sister, Hetch-Hetchy.[92] Stephen Mather may not have imagined the "industrial tourists" of Edward Abbey's famous polemic on tourism in the national parks, but he certainly had a hand in creating them.[93]

C. *Carte Blanche*

The better part of a century of public land management controversies demonstrate that there is at best a tension and at worst a direct contradiction in a mandate that directs an agency to exploit a public land resource and preserve it at the same time. The American people are "loving their parks to death":[94] using them to a degree that will ultimately degrade their value for future use. Forest Service logging and road building, even when subject to political scrutiny, continues to silt-up salmon runs, cause landslides,[95] reduce the habitat for

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90. *Id.* at 150 (quoting Gus Holms of Cody, Wyoming, one of the organization's founders).

91. *Id.* at 147.

92. Summertime in Yosemite:

> Yosemite Valley feels enclosed and civilized, tamed and overrun by humans, swarmed upon in the 1850s by Gold Rush zealots and subsequently by entrepreneurs eager to take advantage of a new concept in leisure: tourism.
>
> . . .
>
> Last summer, visitors without camp or lodge reservations had to be turned away for six straight weekends. As autumn approached, park officials were experimenting with weekend changes in the traffic patterns, making some roads one-way and closing a few others.

Robert Cross, *The Weeping Face: Indian Legend or Glacier?* SUN-SENTINEL (Ft. Lauderdale), July 14, 1996 at 1J.

93. EDWARD ABBEY, *Polemic: Industrial Tourist and the National Parks*, in THE SERPENTS OF PARADISE 110 (John Macrae ed. 1995). The modern version of Mather's credo emerges in the statement of the road crew surveying boss Abbey encounters in Arches National Park half a century later:

> "Look," the [surveying] party chief explained, "[Y]ou *need* this road." He was a pleasant-mannered, soft-spoken civil engineer with an unquestioning dedication to his work. A very dangerous man. . . . "When this road is built you'll get ten, twenty, thirty times as many tourists in here as you get now." His men nodded in solemn agreement, and he stared at me intently, waiting to see what possible answer I could have to that.
>
> "Have some more water," I said. I had an answer all right but I was saving it for later. I knew I was dealing with a madman.

Id. at 114.

94. *See* Jan G. Laitos, *National Parks and the Recreation Resource*, 74 DENV. U. L. REV. 847 (1997), Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649 (1997).

95. A cause of landslides:

> "It was no act of God that caused these landslides," said Andy Stahl of the Association

forest species and ultimately reduce the ability of the forests to produce timber.[96]

The conflict between use and preservation leads many scholars to ponder the language of the various laws and quasi-legal documents that outline the institutional missions of the Park Service and Forest Service. Scholars endeavor to discover, through close reading of the texts, what Congress might have told Stephen Mather or Gifford Pinchot to do in a world with chainsaws, snowmobiles, and Cinemax theaters.[97]

But consideration of these mandates in the context of the history of their times suggests a disturbing alternative: These mandates have no content. Men like Mather and Pinchot sought support from Congress, but not direction. The legislative mandates they lobbied for and, in large part, achieved, were so broad they were almost meaningless. They received the authority to operate with the blessing of Congress, but without congressional supervision. Mather and Pinchot received *carte blanche*. Neither man was a lawyer and therefore both lacked a lawyer's customary veneration of legislative text and history. Both men were instrumentalists when it came to Congress, using the assets at their disposal to extract from Congress the authority they needed to further their visions for the public land. Paradoxical mandates were a particularly useful form of legislative carte blanche. They appear to have substance be-

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of Forest Service Employees for Environmental Ethics. "With few exceptions, the slides resulted form [sic] clearcutting and logging roads on steep hillsides." Many of the assessments were made by aerial surveys, Stahl said, adding the damage to the region's threatened salmon runs must await more detailed ground inspections.

Forest employees: Logging worsened landslides, GANNETT NEWS SERV., Feb. 15, 1996, *available in* 1996 WL 4374215.

96. The ability of forest soils to remain productive through repeated timber harvests has been debated for decades. In, 1971, Dr. Robert R. Curry, Professor of Environmental Geology at the University of Montana, testified before the Church committee. Curry discussed the "long range adverse effects of clear-cutting on soil nutrients." STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., "CLEAR-CUTTING" PRACTICES ON NATIONAL TIMBERLANDS: HEARINGS BEFORE THE SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS 158 (Comm. Print 1971) [hereinafter 1971 COMMITTEE REPORT]. Curry's issue was one of the few issues discussed during the hearings specifically referenced in the subcommittee's subsequent report. 1972 COMMITTEE REPORT, *supra* note 12, at 1. During the hearings, Chairman Church called the "question of loss of nutrient and adequate management of the soil" a "most critical question that has been uncovered in the course of these hearings." 1971 COMMITTEE REPORT, *supra* at 829.

97. Consider:

> While in Springdale [Utah], treat yourself to a visit to the new large-screen Zion Canyon Cinemax Theatre, opened in May 1994. The theater has been showing a spectacular film on Zion and nearby scenic areas called "Zion Canyon—Treasure of the Gods." Early this month, the theater began showing a second film entitled "The Great American West." The films are each about 40 minutes in length and shown on alternating hours. The $7 ticket may seem a bit pricey until you have viewed either of the films.
>
> The two films are presented in an indoor auditorium on a six-story-high screen. The sound system is terrific. The projected images are splendid and hard to describe. Either film will give you an eagle-eyed view of scenery only a handful of photographers will ever see firsthand. It is no substitute for visiting Zion and other scenic treasures of the West yourself, but you will get an introduction to scenery so difficult to access that you may never see it on your own.

Margo Bartlett Pesek, *Autumn Helps Make Zion National Park a Must See Destination*, LAS VEGAS REV.-J., Nov. 17, 1996, at 8K.

cause they speak of general values in mandatory terms. However, they do not significantly constrain agency action. Almost anything can be justified between the two poles of "use" and "preservation", extensive clearcuts[98] and swank hotels[99] as well as limitations on rafting access[100] and livestock trains.[101] The resolution of the paradox required balancing, and balancing traditionally fell within the expert agencies' discretion.

IV. A CHANGED WESTERN LANDSCAPE

The political landscape of the American west has changed dramatically since Mather and Pinchot's time. The level of use on the public lands has multiplied many times. Use pressures come from both within and without national park boundaries. Visitation has increased over 800% in the last forty years.[102] The constituency for preservation has grown almost as fast. Mather's small social Sierra Club now contains more than half a million people.[103] Development near park borders increasingly causes conflict.[104] New parks and monuments are subject to intense political debates that lead to compromises in establishment legislation, often at the expense of traditional park purposes and prohibitions.[105]

As significantly, battles over western public land policy, which once took place almost exclusively in the halls of Congress, now take place in federal court,[106] state court, before county commissioners[107] and governors' com-

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98. FROME, *supra* note 18, at 108-12.

99. Consider:

> The Ahwahnee Hotel at Yosemite National Park is hosting its midwinter Chef's Holiday program Feb. 2-5. Chefs from restaurants throughout California will hold morning and afternoon cooking demonstrations in the main ballroom. A reception on the first evening will allow tour participants to meet the chefs. A final banquet Feb. 5 will be prepared by the chef-instructors. Guests stay three nights at the Ahwahnee or at the nearby Yosemite Lodge, take three cooking classes and tour the historic Ahwahnee and its kitchen. Cost: $499 per person, double occupancy at the Ahwahnee; $379 per person, double occupancy at Yosemite Lodge. Both prices include transportation via Amtrak, cooking demonstrations and two meals.

Tours, ARIZ. REPUBLIC, Jan. 5, 1997, at T4.

100. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1251 (9th Cir. 1979).

101. High Sierra Hikers Ass'n v. Kennedy, 1995 WL 382369, at *17 (N.D. Cal. June 14, 1995).

102. *See* Laitos, *supra* note 94, at 851.

103. As of May, 1996, the Sierra Club had 587,000 members. Alex Barnum, *A Fresh Look for Sierra Club*, S.F. CHRON., May 25, 1996, at A1.

104. *See, e.g.*, Al Knight, *The Real Story of Mine Swap at Yellowstone*, DENV. POST, Aug. 14, 1996, at B9 (discussing President Clinton's agreement with a Canadian company to swap land to stop a proposed gold mine development near Yellowstone National Park). For a discussion of park boundaries and their relationship to wildlife management and ecological processes, see Keiter, *supra* note 94.

105. For example, traditional prohibitions against hunting and off-road vehicle access were expressly eliminated from the Alaska National Interest Lands Conservation Act, the 1980 legislation that created or expanded 13 of Alaska's 15 national park units. *See* Williams, *supra* note 17 (discussing greater statutory detail in national park establishment legislation that results from the increasingly complex land use system that exists under new parks and creeps closer to established parks).

106. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 577 (1987).

107. City of Colorado Springs v. Board of County Comm'rs of County of Eagle, 895 P.2d 1105, 1109 (Colo. Ct. App. 1994).

missions.[108] The once hierarchical public land management regime—with Congress and the Cabinet at the top, the agencies below and the users below them—has given way to a much more pluralistic, sometimes anarchic political process. Expertise and resources once concentrated in federal agencies are now spread among local governments, industry groups and public interest groups, to name only the most obvious.[109]

In 1985, the United States Supreme Court held that state agencies could regulate mining operations on national forest land.[110] This holding represents and accelerates a trend toward more local and state participation in federal land use decisions.[111] More recently, western counties have been declaring themselves masters of federal land within their borders in an apparent attempt to usurp the Forest Service's functions completely.[112]

This new political pluralism has transformed the effect of paradoxical agency mandates. Interest groups are willing to exploit congressionally-created ambiguity to further their goals. "Carte blanche" mandates, rather than providing a vehicle for pursuing personal or agency vision, allow interest groups to project *their* visions onto the congressional mandates. This provides the interest groups with something far more significant than legal arguments; it provides the conviction that they are right.

In his book-length attack on federal land management in the west, *War on the West*,[113] William Perry Pendley, a lawyer who, in his own words, "represents hundreds of westerners in the battle against environmental oppression,"[114] takes the Park Service to task for ignoring its legislative mandate:

> Congress saw parks as preforming two missions: "to *conserve* the scenery and the natural and historic objects and the wildlife therein and to provide for the *enjoyment* of the same in such a manner and by such means as to leave them unimpaired for the *enjoyment* of future generations" (emphasis added). Note that Congress chose the word "conserve," not "preserve," . . . . In other words, the National Park Service was to utilize those natural resources wisely, not place them off limits to the people.
>
> The National Park Service is currently busy putting a creative spin on the statutes under which it is supposed to operate. . . . The

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108. *See, e.g.*, D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303 (1996). The Western Governor's Association and Western States Water Council sponsored workshops in 1993 and 1994 to develop western states capacity to deal with complex water issues. *Id.* The workshops led to the adoption of the "Park City Principles" which attempt to define the relationships and roles of different levels of government and private users with respect to water rights. *Id.*

109. *See* WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 4-6 (Charles Davis ed. 1997)

110. *California Coastal Comm'n*, 480 U.S. at 613-14.

111. *See City of Colorado Springs*, 895 P.2d at 1120.

112. *See* United States v. Nye County, Nev., 920 F.Supp. 1108, 1109, 1120 (D. Nev. 1996) (granting summary judgement to the federal government against the claim that Nye County owns disputed federal lands in the county).

113. WILLIAM PERRY PENDLEY, WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA'S GREAT FRONTIER xvii-xx (1995).

114. *Id.* at 231.

> NPS's views coincide with those of environmental extremists, the self-proclaimed protectors of the nation's parks.[115]

Environmentalists, concerned about the future of the national parks, see the mandate of the 1916 Act in quite a different way:

> The Organic Act of 1916 stipulated that the parks were to be preserved "unimpaired, for the enjoyment of future generations." By the year 2010, visitation to the parks is expected to reach an astonishing half-billion people a year, and if we do not take action, those "future generations" may have little to enjoy that has not been significantly, perhaps permanently, impaired.[116]

Paradoxical agency mandates can be used to challenge agency action in court. Most notably, in 1978, in *United States v. New Mexico*,[117] five justices of the United States Supreme Court affirmed the State of New Mexico's use of the language of the Forest Service Organic Act to reduce the water rights the Forest Service could claim in the Rio Mimbres by finding narrow limits to the preservation component in the 1897 Forest Service Organic Act:

> The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—"[t]o conserve the water flows, and to furnish a continuous supply of timber for the people." . . . National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.[118]

Justice Powell, joined by three other justices in dissent, championed a more preservation-oriented view of the Organic Act:

> I do not agree . . . that the forests which Congress intended to "improve and protect" are the still, silent, lifeless places envisioned by

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115. *Id.* at 101-02 (citations omitted).

116. Zaslowsky & Watkins, *supra* note 23, at 51. Another writes:

> Preservation has been a guiding mandate for the National Park System from the moment Yosemite and Yellowstone were set aside for the enjoyment of future generations of park visitors. The mission of the parks is to provide visitors with a natural experience in a natural setting, to challenge people to meet nature on its own terms and come away with an appreciation of the importance of the natural world. In carrying out this mission, the National Park Service must refuse the whims and desires of popular demand and instead exert a strong hand in shaping both the type and scale of development to create an experience worthy of this mandate.

Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 66 (1992).

117. 438 U.S. 696, 697 (1978).

118. *New Mexico*, 438 U.S. at 707-09. Interestingly, the majority bolstered their narrow view of the language of the Forest Service Organic Act by citing the purportedly broader language of the Park Service mandate:

> Any doubt as to the relatively narrow purposes for which national forests were to be reserved is removed by comparing the broader language Congress used to authorize the establishment of national parks. In 1916, Congress created the National Park Service and provided that the "fundamental purpose of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations."

Id. at 709 (footnotes omitted).

> the Court. In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. . . .
>
> My analysis begins with the language of the [Organic Administration Act of 1897] . . . . Although the language of the statute is not artful, a natural reading would attribute to Congress an intent to authorize the establishment of national forests for three purposes . . . "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber."[119]

The effect of paradoxical mandates reaches beyond cases in which the language of the statutes are at issue and color a range of legal disputes about the balance between preservation and use. In 1973, Congress passed the Endangered Species Act.[120] The first show-downs between this national mandate to protect biological diversity and agency agendas involved the Little Tennessee River and the Tennessee Valley Authority,[121] and the slopes of Moana Kai and the Hawaii Department of Lands and Natural Resources.[122] However, since the middle 1980s, the United States Forest Service has borne the brunt of the Endangered Species Act's effect. Efforts to enforce the act—mostly in the form of federal court cases brought by environmental groups—have severely curtailed agency discretion in the Forest Service's two most valuable timber producing regions: the forests of the southeast—home of the Red-Cockaded Woodpecker[123]—and the forests of the Northwest, home of the Northern Spotted Owl[124] and various runs of protected salmon.[125] Forest Service timber production has dropped precipitously in recent years[126]

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119. *Id.* at 719-20 (Powell, J., dissenting) (citing Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615, 617 (N.M. 1977)).

120. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1973).

121. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172 (1978) (holding that Endangered Species Act prohibited Tennessee Valley Authority from completing dam where construction of the damn threatened to eradicate the snail darter, an endangered species).

122. Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106, 1110-11 (9th Cir. 1988) (holding that the state agency's permitting of sheep of on the slopes of Moana Kai constituted a "taking" under the Endangered Species Act because the sheep ate the mamane trees essential for the habitat of the palila, an endangered bird); Palila v. Hawaii Dept. of Land and Natural Resources, 639 F.2d 495, 495-96 (9th Cir. 1981) (affirming summary judgment against the state agency and order to remove feral sheep and goats from palila's critical habitat).

123. The red-cockaded woodpecker has been the subject of numerous federal court decisions. *See* Sierra Club v. Glickman, 67 F.3d 90, 91 (5th Cir. 1995); Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994); Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 802 (11th Cir. 1993); Sierra Club v. Lyng, 694 F. Supp. 1260, 1262 (E.D. Tex. 1988), *aff'd in part, vacated in part sub nom.* Sierra Club v. Yeutter, 926 F. 2d 429 (5th Cir. 1991).

124. *See, e.g.*, Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 707-09 (9th Cir. 1993) (affirming standing, possibility of injunction and order of supplementary environmental impact statements for environmental groups suing to protect northern spotted owl habitat).

125. *See, e.g.*, Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) (affirming injunction against Forest Service that prevents agency from proceeding with forest projects authorized under management plans that violated the Endangered Species Act consultation requirement).

126. Timber production declined to 4.8 billion board feet in fiscal year 1994, down from annual harvests regularly exceeding 10 billion board feet in the previous three decades. U.S. Forest Service, *Timber Sale Program Annual Report FY1994*, fig. 3 <http//:www.-

and not as a result of agency decisions.

In these situations, one can perceive a gap between what the Forest Service is doing and what a powerful interest group believes they should be doing. In each case that gap leads to conflict and, in many cases, an erosion of Forest Service prestige and discretion. Generally, Congress and the Cabinet, the primary concerns of Pinchot and Mather, are not involved. When they do take a hand it is usually in support of the agency and is often indecisive.[127]

Court decisions reveal evidence of a similar gap between interest groups' expectations of the Park Service and Park Service actions. Groups are bringing "Organic Act" claims against the Park Service. The Park Service still usually wins these cases.[128] In *Wilkins v. Lujan*,[129] a United States District Court used the language of the National Park Service Organic Act to support its argument that the Park Service had made a "clear error of judgment" in its decision to remove wild horses from the Ozark National Scenic Riverways.[130] The United States Court of Appeals for the Eighth Circuit subsequently reversed.[131] The circuit decision used the National Park Service Organic Act language concerning removal of "detrimental" animals and plants to support Park Service discretion:

> Our conclusion is supported by the 1916 Organic Act . . . "The obvious purpose of [organic act] language is to require the Secretary to determine when it is necessary to destroy animals which, for any reason, may be detrimental to the use of the [national] park."[132]

However, Judge Loken dissented:

> To suit the Park managers' convenience and preconceived notions of culture and history, we will now incur significant expense and short-term environmental damage to remove a small band of wild horses

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fs.fed.us/land/fm/tspirs/tspirs.html>.

127. In 1995, Congress passed a "salvage rider" to allow logging of insect and fire-damaged old-growth timber in the Pacific Northwest, bypassing environmental regulations. Emergency Salvage Timber Sale Program, Pub. L. 104-19 § 2001, 109 Stat. 240 (1995). In 1993, President Clinton held a "Timber Summit" to address timber management issues in the Pacific Northwest. Kathie Durbin, *Forest Conference Reaches Harvest Point*, PORTLAND OREGONIAN, Apr. 2, 1993, at A1.

128. *See* Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996); Greater Yellowstone Coalition v. Babbitt, 952 F.Supp. 1435 (D. Mont. 1996). The court in *Greater Yellowstone Coalition* stated:

> Title 16 of the United States Code, section one, requires NPS to conform its actions to its purpose, which "purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for their enjoyment and leave them unimpaired for future generations." 16 U.S.C. § 1. Plaintiffs argue that by this statutory language Congress has clearly required NPS to leave the Yellowstone bison absolutely untouched. But the statutory purpose language obviously gives park managers broad discretion in determining how best to conserve wildlife and to leave them unimpaired for future generations.

Greater Yellowstone Coalition, 952 F.Supp. at 1441.

129. 798 F.Supp. 557 (E.D. Mo. 1992), *rev'd sub nom.* Wilkins v. Secretary of Interior, 995 F.2d 850 (8th Cir. 1993) [hereinafter *Wilkins II*].

130. *Wilkins*, 798 F.Supp. at 562-63.

131. *Wilkins II*, 995 F.2d at 853.

132. *Id.* at 853. (quoting New Mexico State Game Comm'n v. Udall, 410 F.2d 1197, 1199 (10th Cir.1969)).

> from the 65,000-acre Ozark National Scenic Riverways. Most users of the Park believe (and the record establishes it is a reasonable belief) that these animals reflect the cultural heritage of the region and contribute toward what Congress intended to foster, with only negligible impact on the Park's other resources and attractions. I am hard-pressed to find a clearer example of arbitrary and capricious agency action.[133]

While a victory for the Park Service, the decision demonstrates the willingness of judges at both the district and circuit level to question Park Service decisions about what "preservation" means.

The Park Service has begun losing a few cases to park user groups unhappy with the balance it has struck between use and preservation. In *Mausolf v. Babbitt*,[134] the United States district court in Minnesota granted summary judgment to snowmobilers challenging the Park Service's determination to prohibit snowmobiling on frozen lake shores in Voyageur National Park.[135] While the Park Service provided some "anecdotal" evidence that the snowmobiling disrupted the feeding patterns of protected eagles and wolves, the court did not find the evidence convincing.[136]

In another access case, a federal court in California enjoined the Park Service from expanding the number of pack animals allowed for each party in the wilderness area in Sequoia-Kings Canyon National Park. According to the court in *High Sierra Hikers Association v. Kennedy*,[137] the Park Service had failed to justify its decision not to prepare an environmental impact statement analyzing its decision to alter its stock animal limits in the wilderness.[138]

> The finding that the proposed increase in the stock limit would result in little or no change in actual stock use is inconsistent with the premise on which the proposal is itself based. The EA [justifying not preparing an EIS] explicitly states that the proposal is premised in

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133. *Id.* at 853-54 (Loken, J., dissenting).

134. 913 F.Supp. 1334 (D. Minn. 1996).

135. *Mausolf*, 913 F.Supp. at 1344.

136. The court wrote:

> A generous review of defendants' evidence reveals: Snowmobilers and other winter recreationists have apparently displaced some wolves feeding on kills along shorelines, but scientific evidence shows the likelihood of permanent displacement is less than minimal. Of the four validated reports of wolf takings, two were aerial gunnings, bearing no relation to snowmobile trail closures. One poacher drove a wolf off a kill and scavenged the remains, with neither evidence nor suggestion that a snowmobile was present. Finally, one snowmobiler apparently permanently displaced a wolf feeding on a kill. The only formal, scientifically prepared reports indicate that snowmobilers have no significant impact on wolf or eagle populations, although "generally accepted" principles indicate that increased Park access, by whatever means, will likely result in increased mortality among individual animals.

Mausolf, 913 F.Supp. at 1343. The court continued:

> This "generally accepted" principle applies equally to any mode of transportation—snowmobiles, motor vehicles, skis, snowshoes, hiking, or aircraft. The value, if any, of a snowmobile bar on the basis of such evidence is purely speculative.

Id. at 1344.

137. No. C-94-3570 CW, 1995 WL 382369 (N.D. Cal. 1995).

138. *High Sierra*, 1995 WL 382369, at *16.

> part on the existence of stock parties exceeding 20 animals who have been "blocked" from entering the park by the pre-existing policy. Since an express purpose of the proposal is to permit such previously blocked parties to enter, it is arbitrary and capricious to assume that they will not in fact enter.[139]

The Court cited the high level of controversy concerning alteration in the stock animal limits as one of the factors supporting its decision.[140]

While specifically about Park Service failures to justify important decisions, these two opinions speak directly to the balance between use and preservation and the discretion of the Park Service to strike that balance. Snowmobilers and hikers, like the environmental groups and local and state governments that batter the Forest Service, have the power to use the Park Service's ambiguous mandate against it, projecting their values—preservation (in the case of the hikers) or motorized use (in the case of the snowmobilers)—on Congress' ambiguous language.

V. CONCLUSIONS

It would be alarmist and intellectually myopic to say that federal land management agencies are being torn apart by their inadequate legislative mandates. It is fair to say, that in an age fraught with contradictory forces, amounting, perhaps, to a complete reformulation of the American perception of public land, the paradoxical mandates of the Forest Service and Park Service are not helping any and may be hurting some. The differing interpretations of these mandates express a deeper cultural disconformity which may indeed be tearing the agencies apart.

It also seems fair to observe that these mandates once made more practical sense than they do now. That congressional mandates to "go forth and do good" had a place in a world of people like Pinchot and Mather, masters of Washington politics, who were innocent of the organized, powerful indigenous western interest groups so evident in today's public land disputes.

Congress could pass organic legislation telling the Forest Service and the Park Service exactly what to do. Those who supported Jennings Randolph's prescriptive Forest Service reform legislation in 1976,[141] subscribed to something approaching this idea. Randolph's bill was defeated, and Hubert

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139. *High Sierra*, 1995 WL 382369, at *9.

140. The court wrote:

> The Administrative Record demonstrates that the increased stock limit was highly controversial from the moment it was proposed. The Wilderness Managers Group's proposal of a standardized 25 stock animal limit, [The Park Service's] draft wilderness management plan incorporating the stock limit increase and SEKI's 1993 EA supporting the increase all generated substantial opposition. While much of the public comment merely expressed opposition to the proposed increase itself, some of the objecting comments explicitly addressed the "size, nature or effect" of the increase and called into question [the Park Service's] representations regarding those issues.

Id. at *15.

141. *See* DENNIS C. LE MASTER, DECADE OF CHANGE: THE REMAKING OF FOREST SERVICE STATUTORY AUTHORITY DURING THE 1970S 58-59 (1984).

Humphrey's National Forest Management Act endeavored to preserve much of the discretion traditionally granted to the Forest Service.[142] The battering the Forest Service has taken over the last twenty years suggests the curse embodied in retention of that discretion. Professor Fischman's analysis of the increased prescriptiveness of national park legislation suggests that some limitation of discretion is already happening piecemeal.[143]

Yet there is much more going on here than law. To take management discretion away from an agency like the Forest Service or the Park Service also have a negative effect on agency culture. The effectiveness of law, any law, on the public lands depends completely on a healthy agency culture. Neither industry representatives nor environmental activists will ever manage the public lands, staff the regional offices, collect the data, inspect the range, control the run-off, welcome and manage the visitors. Legislation which furthers ideological goals at the cost of destroying the agencies which might effectuate them is a victory for no one.

At the same time, it would be useful to have agency mission statements that were more than mirrors, reflecting back the values of each interest group on itself. A clearer mission statement, conveying the same message to all interested parties, would not guarantee enhanced agency stature and discretion, but would at least make it possible. While we cannot all agree on what should be done on the public lands, we all have at least grudging respect for a job well done.

Effective "new law"—legislative, administrative or judicial—must be grounded in an historical understanding of the original purposes of the agencies and the evolution of those purposes over time. To a considerable degree, it must be a rearticulation (and perhaps redirection) of established agency values and not the imposition of alien congressional mandates.

So what should the new law/old law be? Professor Winks argues that the framers and supporters of the 1916 Organic Act knew exactly what they meant by "to conserve the scenery . . . and to provide for the enjoyment of the same."[144] Professor Winks informs us that, in 1916, preservation did come first.[145] Through judicial and administrative action, and perhaps legislation, we can make it clear that there is a traditional hierarchy of values in national park management with preservation at the top.

In recent years, the Park Service itself has begun reasserting its mandate for preservation. First, in the 1960s, a Department of Interior committee of

142. *Id.* at 58-79.

143. Fischman, *supra* note 66, at 782. Fischman notes that while the purpose clause of the National Park Service Organic Act has received generous attention over the years, over 120 national parks and monuments were created by establishment legislation containing, in many cases, specific mandates that direct agency management of the unit. *Id.* at 775-76.

144. Winks, *supra* note 19, at 623.

145. *Id.* Winks' thorough analysis of the legislative and social history of the Organic Act supports his conclusion. For example, Congressman Kent, one of the principal authors of the act, believed that national parks should be maintained "in a state of nature", "forever free from molestation." *Id.* at 601. Mather himself believed that national parks "must be maintained in absolutely unimpaired form," though this comment came in 1918, and he apparently did not comment on the purpose clause during the act's deliberations by Congress. *Id.* at 607.

scientists produced the influential "Leopold Report" pronouncing a "primary goal" of national park management to be preservation of biotic systems "in the condition that prevailed when the area was first visited by white men."[146] Second, the Park Service produced a report, the Vail Agenda, during its 75th anniversary in 1991.[147] The agenda stated the Park Service's central objective as "protection of park resources from internal and external impairment."[148]

The new emphasis on preservation has roots not only in the creation of the Park Service but also in the birth of the concept of national parks. In 1865, fifty years before Congress created the Park Service, Frederick Law Olmstead[149] wrote a report on "The Yosemite Valley and the Mariposa Big Trees." In this report, Olmstead articulated an early preservatoinist vision:

> The first point to be kept in mind then is the preservation and maintenance as exactly as possible of the natural scenery; the restriction, that is to say, within the narrowest limits consistent with the necessary accommodations of visitors of all artificial constructions and the preventions of all constructions markedly inharmonious with the scenery or which would unnecessarily obscure, distort or detract from the dignity of the scenery.
>
> Second: it is important that it should be remembered that in permitting the sacrifice of *anything* that would be of the slightest value to future visitors to the convenience, bad taste, playfulness, carelessness, or wanton destructiveness of present visitors, we probably yield in each case the interest of uncounted millions to the selfishness of a few individuals.[150]

While this report did not persuade California's legislators to establish a park in 1865, John Muir sought Olmstead's assistance to establish Yosemite National park in 1890.[151]

One could hear an echo of Olmstead's prescription in January, 1996, when the Park Service proposed to ban at least four-fifths of all automobiles from Grand Canyon National Park.[152] By proposing such a ban, the Park Service appeared to turn away from Stephen Mathers' inspired but outdated

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146. Leopold et al., *Wildlife Management in the National Parks*, in 28 Transactions of the N. Am. Wildlife & Nat. Resources Conf. 29, 29-44 (1963). For a discussion of the report and its influence, see Keiter, *supra* note 94, at 656-57.

147. NATIONAL PARKS FOR THE 21ST CENTURY—THE VAIL AGENDA (National Park Foundation 1992).

148. *Id.* at 17.

149. Olmstead influenced both Pinchot and Mather. He encountered Pinchot when Pinchot, just back from Europe, arrived in the Biltmore Estate near Ashville, North Carolina:

> Mr. Olmstead was to me one of the men of the century. He was a quiet-spoken little lame man with a most magnificent head and one of the best minds I have ever had the good luck to encounter. His knowledge was far wider than his profession.

PINCHOT, *supra* note 46, at 48.

150. Frederick Law Olmsted, *The Value and Care of Parks, in* THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 23-24 (Roderick Nash ed. 2d ed. 1976) (emphasis added). For a provocative analysis of Olmstead's statement, see JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS 19-24 (1980).

151. *Id.* at 18-19.

152. *U.S. Seeks to Cut Grand Canyon Park's Traffic*, L.A. TIMES, Feb. 1, 1997, at A4.

solution to the use/preservation quandary and implementing—in a modest way—Edward Abbey's prescription for preserving the national parks.[153]

Reemphasizing preservation will require hard, unpopular choices. William Lowry, in *Capacity for Wonder: Preserving National Parks,* his comparison of the American and Canadian Park systems related a story about a grizzly bear in a Canadian park:

> [Superintendent Church] described an incident at Lake O'Hara, the most acclaimed destination in Yoho National Park. Visitors need reservations months in advance to camp or stay at the lodge there. The Canadian Park Service (CPS) already imposes limits on visitation and use, but on the preceding weekend, with beautiful weather and a full load of visitors anxious to go hiking, Church had shut the area down. A grizzly bear, a threatened species, had wandered into a campsite looking for food. To protect the bear, the CPS required people to stay inside the lodge from which they were bussed out to designated hiking areas . . . . Being smart means allowing only use of parks that does not compromise the preservation of natural features such as grizzly bears.[154]

Examples of positive approaches to preservation abound. The fundamental question remains: As a nation, are we wise enough to support a public land management agency that "conserves" or "preserves" natural wonders *for* our children by preserving them *from* us.

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153. Abbey wrote:

> No more cars in the national parks. Let the people walk. Or ride horses, bicycles, mules, wild pigs—anything—but keep the automobiles and the motorcycles and all their motorized relatives out. We have agreed not to drive our automobiles in cathedrals, concert halls, art museums, legislative assemblies, private bedrooms and other sanctums of our culture; we should treat or national parks with the same deference, for they, too, are holy places.

ABBEY, *supra* note 93, at 121-22.

154. WILLIAM R. LOWRY, THE CAPACITY FOR WONDER: PRESERVING NATIONAL PARKS 153 (1994).

PRESERVING NATURE IN THE NATIONAL PARKS: LAW, POLICY, AND SCIENCE IN A DYNAMIC ENVIRONMENT

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I. INTRODUCTION

America's national parks represent a major national commitment to nature preservation. Begun in 1872 when Congress created Yellowstone National Park, the United States' national park system has grown to 369 designated park sites located in each of the fifty states and several territories.[1] Since 1916, the National Park Service has been responsible for managing the national park system to promote public understanding and appreciation of the nation's wilderness heritage and its natural splendor.[2] What controversy originally surrounded establishment of the national park system and the then-suspect idea of removing public lands from settlement or development has largely dissipated; the American public strongly supports the concept of national parks and has a high regard for the Park Service as a public institution.[3] Nevertheless, the Park Service and its resource management policies are under intense scrutiny over what it means to preserve nature.

National parks are generally regarded as pristine settings where nature is preserved in a fundamentally unaltered state. Originally conceived as a tribute to monumentalism,[4] the national park system is governed by organic legislation that encourages human visitation and provides that park resources are to be "conserved" in an "unimpaired" condition for future generations.[5] For over half a century, the National Park Service pursued its preservationist mission by managing its lands primarily to accommodate visitors: hotels and other tourist facilities were constructed in the parks, often on environmentally sensitive lands; "bad" animals, such as wolves and other predators, were systematically eradicated; yet other animals were put on display for the public's easy viewing pleasure.[6] During the 1960s, however, following publication of the landmark Leopold Report,[7] the Park Service was admonished to manage its natural ar-

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1. *See* NATIONAL PARK SERV., NATIONAL PARK SERVICE STRATEGIC PLAN FINAL DRAFT 2-3, 10 (1996) [hereinafter 1996 NPS STRATEGIC PLAN]; NATIONAL PARK SERV. STEERING COMM., NATIONAL PARK SERV., NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA 10 (1992) [hereinafter THE VAIL AGENDA].

2. *See* National Park Service Organic Act, 16 U.S.C. §§ 1-18f (1994). *See generally* WILLIAM C. EVERHART, THE NATIONAL PARK SERVICE (1983) (detailing the history of the National Park Service); JOHN ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY (1961) (chronicling the development of national park policy through successive administrations).

3. *See* JEANNE NIENABER CLARKE & DANIEL C. MCCOOL, STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCE AGENCIES 82 (2d ed. 1996).

4. *See* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 11-47 (rev. 2d ed. 1987); JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 7 (1980).

5. 16 U.S.C. § 1 (1994). *See* Robert B. Keiter, *National Park Protection: Putting the Organic Act to Work*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 75 (D. Simon ed., 1988); John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 53 (1984).

6. RUNTE, *supra* note 4, at 138-54; *see* Richard West Sellars, *Manipulating Nature's Paradise: National Park Management Under Stephen T. Mather, 1916-1929*, 43 MONT.: MAG. W. HIST. 2 (1993).

7. Leopold et al., *Wildlife Management in the National Parks*, *in* TRANSACTIONS OF THE TWENTY-EIGTH NORTH AMERICAN WILDIFE & NATURAL RESOURCES CONFERENCE 29, 29-44 (1963), *reprinted in* AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 237, 237-

eas "toward maintaining, and where necessary re-establishing, indigenous plant and animal life."[8] In response, national park preservation policy was revised: The Park Service implemented controversial nonintervention and restoration policies, based on the related premises that human interference with ecological processes generally should be avoided or corrected where necessary to restore a functioning ecological complex.[9]

Nowhere is this revised preservation policy more controversial than in Yellowstone National Park.[10] Critics charge that Yellowstone's nonintervention management policy was responsible for the summer 1988 conflagration that engulfed much of the park in flames, threatened surrounding communities, and ruined the local tourist season.[11] Critics also charge that the same policy is responsible for the gradual destruction and imminent ecological collapse of Yellowstone's northern range to an uncontrolled ungulate population.[12] In addition, the livestock industry is convinced that the Park Service's nonintervention policy has allowed Yellowstone's bison population to proliferate beyond the park's carrying capacity, thus essentially forcing the bison to migrate out of the park where they may spread brucellosis to local cattle.[13] Moreover, critics have assailed the Park Service's wolf reintroduction program as an ill-advised attempt to reconstruct a past landscape.[14] At bottom, Yellowstone's critics are convinced that any attempt to manage national parks by discounting

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51 (Lary M. Dilsaver ed., 1994) [hereinafter Dilsaver]. Dilsaver's useful volume assembles and organizes most of the key statutes, policy statements, and other documents relating to the evolution of national park policy. Citations to key Park Service and related documents in this article will be cross-referenced to this volume.

8. Memorandum from Secretary of the Interior Stuart Udall, on Management of the National Park System to National Park Service Director, (July 10, 1964), *reprinted in* Dilsaver, *supra* note 7, at 272, 273 [hereinafter 1964 Udall Memorandum].

9. NATIONAL PARK SERV., ADMINISTRATIVE POLICIES FOR NATURAL AREAS (1968), *reprinted in* Dilsaver, *supra* note 7, at 354 [hereinafter 1968 NPS NATURAL AREAS POLICIES].

10. *See, e.g.*, ALSTON CHASE, PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK (1986) (hereinafter CHASE, YELLOWSTONE); FREDERIC H. WAGNER ET AL., WILDLIFE POLICIES IN THE U.S. NATIONAL PARKS (1995); Steve W. Chadde & Charles E. Kay, *Tall-Willow Communities on Yellowstone's Northern Range: A Test of the "Natural Regulation" Paradigm*, *in* THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 231-262 (Robert B. Keiter & Mark S. Boyce eds., 1991) [hereinafter THE GREATER YELLOWSTONE ECOSYSTEM]; Frederic H. Wagner & Charles E. Kay, *"Natural" or "Healthy" Ecosystems: Are U.S. National Parks Providing Them?*, *in* HUMANS AS COMPONENTS OF ECOSYSTEMS: THE ECOLOGY OF SUBTLE HUMAN EFFECTS AND POPULATED AREAS 257, 257-270 (Mark J. McDonnell & Steward T.A. Pickett eds., 1993).

11. *See The Economic Impact of Fires in Yellowstone National Park and Western Montana on Small Business: Hearing Before the Subcomm. on Rural Econ. and Family Farming of the Senate Comm. on Small Business*, 100th Cong. 50 (1988) [hereinafter *Economic Impact Hearings*]; *see also infra* notes 99-103 and accompanying text.

12. *See* WAGNER ET AL., *supra* note 10, at 48-53; Chadde & Kay, *supra* note 10, at 231. *See also infra* notes 65-74 and accompanying text; *see generally* DON DESPAIN ET AL., WILDLIFE IN TRANSITION: MAN AND NATURE ON YELLOWSTONE'S NORTHERN RANGE (1986).

13. *See* Robert B. Keiter & Peter H. Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 LAND & WATER L. REV. 1 (1993); E. Tom Thorne et al., *Brucellosis in Free-Ranging Bison: Three Perspectives*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 275. *See also infra* notes 75-84 and accompanying text.

14. *See* L. David Mech, *Returning the Wolf to Yellowstone*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 309-22 (discussing wolf reintroduction criticisms); *see also infra* notes 85-89 and accompanying text.

a human presence in nature is flawed historically and doomed to fail in today's ever more populated world.

The stakes in this controversy should not be underestimated. America's national parks play a prominent role in national and international conservation efforts. Domestically, the national parks occupy a critical niche in current efforts to preserve the nation's biological legacy; many parks are situated at the core of larger ecosystems, which contain species facing imminent decline due to surrounding habitat degradation.[15] In these threatened ecosystems, the parks are regarded as vital sanctuaries in regional, ecosystem-based management initiatives, where the idea of minimizing human intervention into natural systems is an important goal.[16] Internationally, the American national park system—the first one ever established in the world—continues to serve as a model for preservation policy,[17] which includes a major biodiversity conservation campaign that has been enshrined in an international treaty.[18] If the Park Service's critics are correct that its preservation policy is unsound or if the policy is legally vulnerable, then the agency may have little choice but to alter its basic approach to managing national park resources. Not only would such a policy shift significantly affect America's national parks, but it could also impact international conservation policy.

This article will examine the policy implications and legal underpinnings of the Park Service's preservation policy. The article begins by reviewing the evolution of resource management policy in the national parks and by defining the contours of current preservation policy. The article then recounts how preservation policy has been applied in the Yellowstone setting to illustrate why it has been so controversial. Next, the article identifies and rejoins the principal criticisms that have been leveled against the policy. The article then examines the legal basis for the policy as well as related legal ramifications to assess its legitimacy. The article concludes with observations endorsing the basic philosophy underlying national park preservation policy, but also suggests that the policy should be further clarified and legitimized.

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15. *See* R. EDWARD GRUMBINE, GHOST BEARS: EXPLORING THE BIODIVERSITY CRISIS (1992); REED F. NOSS AND ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY 71-72 (1994); William D. Newmark, *Legal and Biotic Boundaries of Western North American National Parks: A Problem of Congruence*, 33 BIOLOGICAL CONSERVATION 197, 197-208 (1985).

16. *See* Robert B. Keiter & Mark S. Boyce, *Greater Yellowstone's Future: Ecosystem Management in a Wilderness Environment*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 379; Hal Salwasser et al., *The Role of Inter-Agency Cooperation in Managing for Viable Populations*, *in* VIABLE POPULATIONS FOR CONSERVATION 160 (Michael E. Soule ed., 1987).

17. THE VAIL AGENDA, *supra* note 1, at 1; 1996 NPS STRATEGIC PLAN, *supra* note 1, at 45.

18. Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818 (1992). *See* Catherine J. Tinker, *Introduction to Biological Diversity: Law, Institutions, and Science*, 1 BUFF. J. INT'L LAW 1 (1994).

II. HISTORICAL BACKGROUND: THE EVOLUTION OF NATIONAL PARK PRESERVATION POLICY

A. *Early Preservation Policy, 1872-1962*

The national park concept first gained official recognition in 1872, when Congress designated Yellowstone National Park as "a pleasuring-ground for the benefit and enjoyment of the people."[19] Through enabling legislation, Congress instructed the Secretary of the Interior to preserve the park "from injury or spoilation, of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition."[20] The Secretary also was instructed to "provide against the wanton destruction of the fish and game within said park."[21] To accomplish these preservation objectives, Congress gave the Secretary power to promulgate regulations.[22] And to enforce this preservation mandate, the United States cavalry was enlisted to protect the new park's resources from early interlopers and poachers.[23]

The Yellowstone Park Act of 1872 represented the first time that any nation had preserved such a large block of undeveloped public land—nearly 2 million acres—from settlement or development, and then opened it for public enjoyment. Until then, the nation's public lands were available for settlement or disposition, following the general policy that cheap land would promote development of the Western frontier.[24] The designation of Yellowstone changed that and formally introduced the notion of setting some public lands aside for nature conservation purposes.[25] Following the Yellowstone designation, Congress soon proceeded to protect several other Western scenic marvels, including Yosemite, Mount Rainier, and Glacier.[26] But given its prominence, Yellowstone has become a crucible for formulating and testing preservation policies, making it both an international model as well as a symbolic battleground over competing park management philosophies.[27]

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19. 16 U.S.C. § 21 (1994). *See generally* AUBREY L. HAINES, THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK (rev. ed. 1966) (providing a historical account of the social and political forces behind the designation of the Park).

20. 16 U.S.C. § 21 (1994).

21. *Id.*

22. *Id.*

23. *See* H. DUANE HAMPTON, HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS 165-67 (1971).

24. On the settlement and development of the western United States, see PAUL W. GATES, PUBLIC LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1979); *See generally* W. WYANT, WESTWARD IN EDEN: THE PUBLIC LANDS AND THE CONSERVATION MOVEMENT (1982) (discussing the settlement and development of the western United States).

25. *See* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 108 (3d ed. 1982). *See generally* MICHAEL COHEN, THE PATHLESS WAY: JOHN MUIR AND THE AMERICAN WILDERNESS (1984); STEPHEN FOX, THE AMERICAN CONSERVATION MOVEMENT: JOHN MUIR AND HIS LEGACY (1985).

26. *See* RUNTE, *supra* note 4, at 65-81. *See generally* ISE, *supra* note 2, at 51-182 (detailing the history and characteristics of Yosemite, Mount Rainier, and Glacier national parks).

27. John J. Craighead, *Yellowstone in Transition*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 27-39. *See, e.g.*, TIM W. CLARK & STEVEN C. MINTA, GREATER YELLOWSTONE'S FUTURE: PROSPECTS FOR ECOSYSTEM SCIENCE, MANAGEMENT, AND POLICY

In 1916, Congress formally established the National Park Service and vested it with management responsibility for the nation's fledgling park system. In the National Park Service Organic Act of 1916,[28] Congress mandated that the national parks were to be managed to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[29] The Secretary of the Interior was given responsibility for the new National Park Service, and empowered to promulgate rules and regulations deemed "necessary or proper for the use and management of the parks."[30] In 1918, to implement these statutory mandates, Secretary of the Interior Franklin Lane instructed Stephen Mather, who had been named the first Park Service Director, that "every activity of the Service is subordinate to the duties imposed on it to faithfully preserve the parks for posterity in essentially their natural state."[31] With this instruction, the Secretary officially acknowledged that the goal of national park management was to preserve natural conditions,[32] thus establishing an important standard that has since become a dominant park management goal. However, defining exactly what "natural" means and then reconciling competing visitor and other interests to accomplish naturalness goals has proven more elusive.

Indeed, the Park Service has frequently subordinated its statutory preservationist obligation to its public use obligation. Early management of the national parks was primarily designed to encourage visitation to these remote areas. Railroad lines, hotels, roads, and other facilities were constructed with the dual objectives of promoting tourism and cultivating a national constituency to support the Park Service in the congressional legislative arena.[33] While

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(1994); THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE (Robert B. Keiter & Mark S. Boyce eds., 1991); THE YELLOWSTONE PRIMER: LAND AND RESOURCE MANAGEMENT IN THE GREATER YELLOWSTONE ECOSYSTEM (John A. Baden & Donald Leal eds., 1990).

28. 16 U.S.C. §§ 1-18f (1994).

29. *Id.* § 1.

30. *Id.* § 3.

31. Letter from Franklin K. Lane, Secretary of the Interior, to Stephen W. Mather, Director, Nat'l Park Serv. (May 13, 1918), *reprinted in* Dilsaver, *supra* note 7, at 48-52.

32. In his 1918 letter, Secretary of the Interior Lane also set forth three important national park management principles:

> First that the national parks must be maintained in absolutely unimpaired form for the use of future generations as well as those of our own time; second, that they are set apart for the use, observation, health, and pleasure of the people; and third, that the national interest must dictate all decisions affecting public or private enterprise in the parks.

Id. at 48.

33. *See* RUNTE, *supra* note 4, at 82-105; Sellars, *supra* note 6, at 2. *See generally* HORACE M. ALBRIGHT & ROBERT CAHN, THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913-33 (1985) (detailing the passage of the National Parks Act and the formation of the National Park Service); ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS (1951) (providing insight into Mather's role as Assistant to the Secretary in raising the National Park System to its present day status); DONALD C. SWAIN, WILDERNESS DEFENDER: HORACE M. ALBRIGHT AND CONSERVATION (1970) (discussing Albright's role as a leading spokesperson for conservation during the 1920s and 1930s).

park facilities were usually constructed with a view toward minimizing intrusiveness on the surrounding scenery, little concern was paid to the impact these facilities may have on wildlife habitat.[34] With its emphasis on providing visitors a pleasurable experience and with no regard for ecological consequences, the Park Service undertook to eliminate wolves and other predators, to suppress fires throughout the system, to introduce exotic game fish species, and to promote wildlife spectacles by feeding bears at garbage dump sites.[35] Upon reviewing how strongly the Park Service's early preservation policies were oriented toward scenic resources, the agency's own historian has labeled this approach "facade management."[36] In short, ecology and the role of ecological processes were given short shrift in most early park policies.

In the early 1930s, Park Service biologist George Wright spearheaded a major initiative to elevate the stature of scientists within the agency and to integrate scientific principles into park management policy. Wright and his colleagues published a ground-breaking Faunal Survey report, which recommended restoring park fauna to its pristine state and acquiring necessary winter habitat.[37] Wright's far-sighted report, however, had little immediate impact on Park Service policy. Shortly after the report was published, Wright was tragically killed in an automobile accident. His scientific colleagues soon found themselves again subordinated within the Park Service's hierarchy to its rangers, landscape architects, and engineers, a situation that continued over the next thirty years.[38] As a result, the Park Service lacks a strong tradition of scientific research or management—a shortcoming that has rendered it vulnerable to charges of mismanagement and biological indifference, even after explicitly incorporating ecological considerations into its management philosophy.[39]

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34. *See, e.g.*, NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, YELLOWSTONE NATIONAL PARK MASTER PLAN 17-18 (1973).

35. *See* RUNTE, *supra* note 4, at 111, 168-69; R. GERALD WRIGHT, WILDLIFE RESEARCH AND MANAGEMENT IN THE NATIONAL PARKS 35-42, 55, 59-69 (1992). *See also* Richard West Sellars, *The Rise and Decline of Ecological Attitudes in National Park Management, 1929-40* (pts. 1-3), 10 GEORGE WRIGHT FORUM 38, 55, 79 (1993) (providing a concise early history of the Park Service's biological resource management policies).

36. Sellars, *supra* note 6, at 6.

37. GEORGE WRIGHT ET AL., U. S. DEP'T OF THE INTERIOR, FAUNA OF THE NATIONAL PARKS OF THE UNITED STATES: A PRELIMINARY SURVEY OF FAUNAL RELATIONS IN NATIONAL PARKS (1932), *reprinted in* Dilsaver, *supra* note 7, at 104, 109.

38. Sellars, *supra* note 35, at 107-08.

39. NATIONAL ACADEMY OF SCIENCES COMM. ON IMPROVING SCIENCE & TECH. PROGRAMS OF THE NAT'L PARK SERV., SCIENCE AND THE NATIONAL PARKS (1992), *partially reprinted in* Dilsaver, *supra* note 7, at 446 [hereinafter NATIONAL ACADEMY OF SCIENCES]; COMMISSION ON RESEARCH & RESOURCE MANAGEMENT IN THE NAT'L PARK SYS., NATIONAL PARKS & CONSERVATION ASS'N, NATIONAL PARKS: FROM VIGNETTES TO A GLOBAL VIEW (1989); *see also* Ervin H. Zube, *Management in National Parks: From Scenery to Science*, *in* SCIENCE AND ECOSYSTEM MANAGEMENT IN THE NATIONAL PARKS 11-22 (William L. Halvorson & Gary E. Davis eds., 1996) [hereinafter SCIENCE AND ECOSYSTEM MANAGEMENT].

B. *The Leopold Report and Its Aftermath, 1963-Present*

During the 1960's, almost half a century after its creation, the Park Service finally elevated scientific management to a prominent position on the agency's policy agenda. Confronted with an adverse public reaction to the shooting of elk on Yellowstone National Park's northern range, the Secretary of the Interior appointed a committee of prominent scientists, under the direction of Starker Leopold, to provide advice on how to address the park's elk population problem.[40] The ensuing recommendations, since dubbed the Leopold Report,[41] profoundly reshaped how the Park Service views its natural resource management role. These same recommendations also set the stage for the ongoing debate over the Park Service's revised preservation policy.

The concise yet eloquent 14-page Leopold Report made a powerful case for revising the Park Service's natural resource management policies. In its most widely quoted statement, the Committee concluded:

> As a primary goal, we would recommend that the biotic associations within each park be maintained, or where necessary recreated, as nearly as possible in the condition that prevailed when the area was first visited by the white man. A national park should represent a vignette of primitive America.[42]

Calling for "an overall scheme to preserve or restore a natural biotic scene," the report proposed restoring missing species, eliminating exotic species, stopping artificial feeding programs, reducing road construction, eliminating inappropriate tourism facilities, and enhancing the Park Service's scientific research capabilities.[43] Notwithstanding the reference to "a natural biotic scene," the report acknowledged that intensive management, based on the best ecological data available, would be necessary to accomplish these policy objectives, including the controlled use of fire and the shooting of excess ungulates.[44] Moreover, the report noted that most parks were too small to contain all of the habitat required by resident species, and that past human manipulations or intrusions had so altered ecological processes that active intervention would be necessary to restore anything approaching a natural ecological order.[45] The Leopold Report's recommendations were reinforced by a contemporaneous National Academy of Sciences study, which likewise concluded that national parks should be managed to maintain and perpetuate natural features and processes.[46]

The Leopold Report had an immediate and far-reaching impact on Park Service management policies. In 1964, relying upon the Report's recommen-

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40. WRIGHT, *supra* note 35, at 27-28; WAGNER ET AL., *supra* note 10, at 22.
41. Leopold, et al., *supra* note 7.
42. WRIGHT, *supra* note 35, at 31; Leopold et al., *supra* note 7, at 239.
43. WRIGHT, *supra* note 35, at 33-37; Leopold et al., *supra* note 7, at 241-45.
44. WRIGHT, *supra* note 35, at 37-42; Leopold et al., *supra* note 7, at 244-49.
45. WRIGHT, *supra* note 35, at 33-34; Leopold et al., *supra* note 7, at 240-41.
46. NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, A REPORT BY THE ADVISORY COMMITTEE TO THE NATIONAL PARK SERVICE ON RESEARCH (1963) [hereinafter NATIONAL RESEARCH COUNCIL], *partially reprinted in* Dilsaver, *supra* note 7, at 253.

dations, Secretary of the Interior Stewart Udall instructed the Park Service to manage national parks "toward maintaining, and where necessary reestablishing, indigenous species" while "preserving the total environment."[47] In 1968, the Park Service issued a policy document providing that national parks should be managed as ecological entities. The document stated that "the concept of preservation of a total environment, as compared with the protection of an individual feature or species, is a distinguishing feature of national park management."[48] Noting that national parks were becoming "islands of primitive America" impacted by development activities on surrounding lands and by escalating visitation numbers, the document called for "active management" of the natural environment.[49] It then concluded that such an approach will entail "application of ecological management techniques to neutralize the unnatural influence of man, thus permitting the natural environment to be maintained essentially by nature."[50]

More recently, in its 1988 Management Policies document,[51] the Park Service reaffirmed and refined its commitment to an ecologically-driven preservation policy. As a general goal, the Park Service will "try to maintain all the components and processes of naturally evolving park ecosystems, including the natural abundance, diversity, and ecological integrity of the plants and animals."[52] Committing itself to "perpetuate the native animal life . . . as part of the natural ecosystems of parks," the document calls for "minimizing human impacts on natural animal population dynamics."[53] The document also provides that "[n]atural processes will be relied on to control populations of native species to the greatest extent possible."[54] Park management goals and practices are to be based on the best scientific information available, established through comprehensive planning processes, and subjected to public review.[55] In short, building upon the Leopold Report, the Park Service now defines its statutory preservation responsibilities in terms of maintaining and restoring native species and processes, while minimizing human intervention into natural ecological processes.

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47. 1964 Udall Memorandum, *supra* note 8, at 272, 273, 275; *see also* text accompanying *supra* note 8.

48. 1968 NPS NATURAL AREAS POLICIES, *supra* note 9, at 354.

49. *Id.*

50. *Id.*

51. NATIONAL PARK SERV., U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES (1988) [hereinafter 1988 NPS MANAGEMENT POLICIES]. For purposes of establishing natural resource management policies, the document divides national park lands into three zones: natural zones, cultural zones, and park development zones. The references throughout this article are to policies that prevail in natural zones.

52. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 4:1. In addition, the document recognizes that "interference with natural processes . . . will be allowed . . . to restore native ecosystem functioning that has been disrupted by past or ongoing human actions." *Id.* at 4:2.

53. *Id.* at 4:5. The document also states that the Park Service will strive "to protect the full range of genetic types (genotypes) native to plant and animal populations in parks by perpetuating natural evolutionary processes and minimizing human interference with evolving genetic diversity." *Id.* at 4:10.

54. *Id.* at 4:6.

55. *Id.* at 4:6.

III. THE YELLOWSTONE CONTROVERSIES: TO INTERVENE OR NOT

A. *Yellowstone and Its Ecological Systems*

Most challenges to the Park Service's preservation policy have focused on Yellowstone National Park's management policies. As the world's first national park and the site of recurrent, high-profile controversies, Yellowstone serves as a bellwether for defining resource management policies for national parks.[56] Encompassing approximately two million acres of high plateau and mountainous terrain, Yellowstone National Park has the full assembly of wildlife species that historically populated the region, including recently reintroduced gray wolves.[57] Because the park is mostly surrounded by undeveloped national forest lands, much of which is protected as wilderness, the region's ecological systems have not been significantly disturbed by human actions. Knowledgeable observers refer to the park and surrounding lands as the Greater Yellowstone Ecosystem, labeling it the world's largest relatively intact temperate ecosystem.[58] But with annual park visitation approaching 3 million visitors, with subdivisions beginning to dot perimeter ranch lands, and with development pressures mounting in the surrounding national forests, the park often seems more like an endangered island than the vibrant core of a healthy ecosystem.[59]

Nonetheless, the Greater Yellowstone region offers one of the few locations where natural processes still operate on an expansive scale. In Yellowstone, therefore, the Park Service has sought to maintain and restore ecological processes with minimal human intervention.[60] The policy—sometimes labeled "a grand experiment"[61]—directly influences how the Park Service manages ungulate populations, bison, predators, and fires, which are examined in more detail below.[62] In each instance, drawing upon Leopold Report recommenda-

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56. *See, e.g.*, RICHARD A. BARTLETT, YELLOWSTONE: A WILDERNESS BESIEGED (1985); CHASE, YELLOWSTONE, *supra* note 10.

57. JOHN J. CRAIGHEAD ET AL., THE GRIZZLY BEARS OF YELLOWSTONE: THEIR ECOLOGY IN THE YELLOWSTONE ECOSYSTEM, 1959-1992, at 3-7 (1995); DESPAIN, ET AL., *supra* note 12. On wolf reintroduction, see HANK FISCHER, WOLF WARS: THE REMARKABLE INSIDE STORY OF THE RESTORATION OF WOLVES TO YELLOWSTONE (1995); GARY FERGUSON, THE YELLOWSTONE WOLVES: THE FIRST YEAR (1996).

58. *See, e.g.*, Duncan T. Patten, *Defining the Greater Yellowstone Ecosystem*, in THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 19-26; RICK REESE, GREATER YELLOWSTONE: THE NATIONAL PARK AND ADJACENT WILDLANDS (2d ed. 1991); GREATER YELLOWSTONE COALITION, AN ENVIRONMENTAL PROFILE OF THE GREATER YELLOWSTONE ECOSYSTEM (1991).

59. GREATER YELLOWSTONE COALITION, SUSTAINING GREATER YELLOWSTONE: A BLUEPRINT FOR THE FUTURE (1994); GREATER YELLOWSTONE COALITION, AN ENVIRONMENTAL PROFILE OF THE GREATER YELLOWSTONE ECOSYSTEM (1991).

60. YELLOWSTONE NATIONAL PARK, RESOURCE MANAGEMENT PLAN 2 (1995); YELLOWSTONE NAT'L PARK, NATURAL RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT 7 (1983); *see also* DESPAIN ET AL., *supra* note 12, at 6-13, 27.

61. DESPAIN, ET AL., *supra* note 12, at 10; *see also* WAGNER ET AL., *supra* note 10, at 152.

62. The ensuing sections briefly describe several controversial management policy shifts that were implemented in Yellowstone in the aftermath of the Leopold Report to address these resources. The account of these controversies is truncated due to space limitations; it is offered as an overview of how the Park Service has interpreted and implemented its revised preservation poli-

tions, the Park Service has reversed longstanding, interventionist policies and implemented new ones designed to maintain or restore ecological systems.[63] Where the ecological system has been severely disrupted, the Park Service has actively intervened to restore missing ecological components and processes, such as wolves and fire, and to eliminate exotic intruders, such as lake trout.[64] However, in the face of often heavy criticism and recurrent political pressure, the Park Service has also modified its preservation policy for nonecological reasons, thus raising both consistency and legitimacy concerns.

B. *Ungulates and the Northern Range*

The Park Service's decision to withdraw from actively managing Yellowstone's northern range elk population has generated charges of biological mismanagement. Prior to the Leopold Report, Yellowstone's northern elk herd was intensively monitored and managed to control the population size. Despite public protests, the Park Service culled (*i.e.* shot) elk from the herd to limit its size based on the northern range's perceived limited carrying capacity.[65] Following the Leopold Report, the Park Service concluded that the northern range could support substantially more elk than previously believed. Park officials terminated the controversial culling program and began relying upon natural factors, mainly the region's harsh winters and limited habitat, to control the elk population.[66] In addition, the elk continued to be hunted in Montana during their fall migration from the park to lower elevation winter habitat.

Following implementation of this nonintervention policy, many elk perished during periodic harsh winters, but overall elk population numbers steadily mounted. Critics responded by asserting that the park's elk population had grown too large, that elk were overbrowsing the northern range and permanently altering its ecological character.[67] They argued that the northern range's aspen stands were being virtually eliminated by overbrowsing, as was the beaver population that relied upon these trees.[68] In short, critics concluded

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cies. More detailed and nuanced discussions of these issues can be found in the general references that are cited in the accompanying footnotes.

63. WRIGHT, *supra* note 35, at 35-59; WAGNER ET AL., *supra* note 10, at 10-43. *See generally* DESPAIN ET AL., *supra* note 12; *see also* Alston H. Chase, *How to Save Our National Parks*, ATLANTIC MONTHLY, July 1987, at 35.

64. *See* WRIGHT, *supra* note 35, at 35-39. During this century, Yellowstone's fisheries management policy has undergone a profound evolution that raises related ecological restoration and intervention issues. After first importing exotic game species of fish to establish a world class fishery, the Park Service has sought to restore a native cutthroat trout fishery by eliminating exotic species. Limited space does not permit a full recounting of this preservation management issue. *See generally* John D. Varley & Paul Schullery, *Yellowstone Lake and its Cutthroat Trout*, *in* SCIENCE AND ECOSYSTEM MANAGEMENT, *supra* note 39, at 49.

65. DOUGLAS HOUSTON, THE NORTHERN YELLOWSTONE ELK: ECOLOGY AND MANAGEMENT 18 (1982); *see also* WAGNER ET AL., *supra* note 10, at 48-50.

66. DESPAIN ET AL., *supra* note 12, at 22-36; WAGNER ET AL., *supra* note 10, at 48-54.

67. *See* CHASE, YELLOWSTONE, *supra* note 10, at 14-91; Chadde & Kay, *supra* note 10, at 231; WAGNER ET AL., *supra* note 10, at 48-54.

68. Id. *But see* Francis J. Singer et al., *Ungulate Herbivory of Willows on Yellowstone's Northern Winter Range*, 47 J. RANGE MGMT. 435 (1994); Michael B. Coughenor & Francis J.

that the proliferating elk had taken over the northern range and were eating it into ecological collapse.[69] They advocated establishing elk population goals so park officials could actively control elk numbers to achieve a healthy ecological balance.

The Park Service, however, has adhered to a nonintervention policy and resisted calls for more intensive management. Yellowstone officials and other scientists believe that elk population numbers have always fluctuated widely depending upon seasonal weather and other conditions, and that similar fluctuations occur regularly in most wildlife populations.[70] Although the northern elk population has exceeded original Park Service projections, Yellowstone officials believe the population remains within an ecologically acceptable range.[71] Various scientists basically concur, and also observe that there is insufficient trend data to draw any definitive biological conclusions.[72] They also note that the recent wolf reintroduction will affect the elk population,[73] and that hunting outside the park will continue to help limit the population.[74] As a result, park officials have not resumed active elk management.

C. *Bison, Brucellosis, and Domestic Livestock*

As with elk management, Yellowstone's bison management policy has evolved through several distinct phases. At the turn of the century, Yellowstone's military caretakers imported bison to supplement the park's

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Singer, *The Concept of Overgrazing and Its Application to Yellowstone's Northern Range*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 209. While acknowledging that elk may account for the decline in aspen on the Northern Range, Yellowstone officials also cite other potential causes, including plant succession, climate change, and fire suppression. *See* HOUSTON, *supra* note 65, at 129.

69. In addition, a dispute continues over whether elk historically used Yellowstone's northern range as winter habitat. *See* HOUSTON, *supra* note 65, at 23-25; *see also* Cathy Whitlock et al., *A Prehistoric Perspective on the Northern Range*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 289.

70. DESPAIN ET AL., *supra* note 12, at 32-36; Michael B. Coughenor & Francis J. Singer, *Elk Population Processes in Yellowstone National Park Under the Policy of Natural Regulation*, 6 ECOLOGICAL APPLICATIONS 573 (1996). *But see* WAGNER ET AL., *supra* note 10, at 145-49. *See generally* James G. MacCracken, *Managing and Understanding Wild Ungulate Population Dynamics in Protected Areas*, in NATIONAL PARKS AND PROTECTED AREAS: THEIR ROLE IN ENVIRONMENTAL PROTECTION 249 (R. Gerald Wright ed., 1996); NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, EFFECTS OF GRAZING BY WILD UNGULATES IN YELLOWSTONE NATIONAL PARK (1996) [hereinafter EFFECTS OF GRAZING].

71. DESPAIN ET AL., *supra* note 12, at 32-36; Coughenour & Singer, *supra* note 68.

72. Coughenour & Singer, *supra* note 68; *Yellowstone Science Interview: Sam McNaughton, Grazing and Yellowstone*, 4 YELLOWSTONE SCI. 12, 13 (1996). *See generally* EFFECTS OF GRAZING, *supra* note 70; YELLOWSTONE NAT'L PARK RESEARCH DIV., INTERIM REPORT YELLOWSTONE NATIONAL PARK NORTHERN RANGE RESEARCH (1992).

73. Before wolves were reintroduced to Yellowstone, scientists predicted that they would have an inhibiting (but not devastating) effect on elk population numbers. *See* Mark S. Boyce, *Wolf Recovery for Yellowstone National Park: A Simulation Model*, *in* 2 YELLOWSTONE NAT'L PARK ET AL., WOLVES FOR YELLOWSTONE?: A REPORT TO THE UNITED STATES CONGRESS 3-3, 3-5 (1990); Edward O. Garton et al., *The Potential Impact of a Reintroduced Wolf Population on the Northern Yellowstone Elk Herd*, *in id.* at 3-61.

74. Montana's revised late season elk hunt along the park's northern border is generally seen as complimenting the park's elk management policies. DESPAIN ET AL., *supra* note 12, at 35; HOUSTON, *supra* note 65, at 199-200. *But see* CHASE, YELLOWSTONE, *supra* note 10, at 77-78.

small remnant bison population.[75] The experiment was successful, and the herd gradually grew in size.[76] In 1917, however, a contagious livestock disease—brucellosis—was discovered in Yellowstone's bison.[77] Because brucellosis can cause cattle to abort, the Park Service began to test bison for the disease and to slaughter those testing positive. During this period, most of the park's bison were managed on the Buffalo Ranch; the herd was periodically culled to keep population numbers within the perceived range carrying capacity. After World War II, however, the Park Service closed the Buffalo Ranch, though culling still continued.

In the mid 1960's, following the Leopold Report, Yellowstone officials ceased culling bison and adopted a nonintervention management approach. The bison population rose sharply[78] and began moving outside the park during winter months to access new forage areas.[79] Local ranchers, joined by Montana livestock and federal agriculture officials, became increasingly concerned that park bison might transmit brucellosis to area cattle and jeopardize the state's brucellosis-free status.[80] However, whether Yellowstone's wild bison actually can transmit brucellosis to domestic livestock in the region's wilderness environment is a hotly contested matter.[81] When hazing failed to deter

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75. HAMPTON, *supra* note 23, at 165-67; HAINES, *supra* note 19, at 3-21. For an historical overview of Yellowstone's bison, see generally MARY MEAGHER, NATIONAL PARK SERV., THE BISON OF YELLOWSTONE NATIONAL PARK (1973) (Scientific Monograph Series Number One, U.S. Government Printing Office, Washington, D.C.).

76. By 1930, Yellowstone's bison population had grown to over 1,000 bison. MEAGHER, *supra* note 75, at 32.

77. Ironically, scientists generally agree that brucellosis was originally passed to Yellowstone's bison by diseased livestock. *See* Mary Meagher & Margaret E. Meyer, *On the Origin of Brucellosis in Bison of Yellowstone National Park: A Review*, 8 CONSERVATION BIOLOGY 645 (1994); James D. Herriges, Jr. et al., *Vaccination to Control Brucellosis in Free-Ranging Elk on Western Wyoming Feed Grounds*, *in* THE BIOLOGY OF DEER 107 (Robert D. Brown ed., 1992).

78. The park's bison population grew from 397 bison in 1967 to more than 3000 bison in 1988, and currently totals approximately 3000-3500 bison. NATIONAL PARK SERV. & STATE OF MONT., INTERIM BISON MANAGEMENT PLAN DRAFT ENVIRONMENTAL ASSESSMENT 2 (1995).

79. Different theories have been put forth to explain the recent bison migration pattern. It has been argued that the bison are migrating because the park ranges are depleted from overgrazing. It also has been suggested that hard-packed park roads, which have been groomed for winter snowmobile traffic, are responsible because they make it possible for bison to exit the park despite the deep winter snows. And it has been noted that the bison may simply have found new forage areas and are naturally migrating to them. *See* Robert B. Keiter, *Greater Yellowstone's Bison: Unraveling of an Early American Wildlife Conservation Achievement*, 61 J. WILDLIFE MGMT. 1, 3 (1997) [hereinafter Keiter, *Greater Yellowstone's Bison*].

80. During the late 1940s, relying upon the amended Animal Industry Act, 21 U.S.C. §§ 111-143 (1994), the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), the states, and the livestock industry initiated an aggressive national effort to eradicate brucellosis from livestock herds. 21 U.S.C.A. § 114a. Among other things, APHIS has promulgated regulations dividing states into different classes according to the prevalence (or absence) of brucellosis in livestock. *See* 9 C.F.R. §§ 78.1-78.44 (1995). States classified as brucellosis-free can freely market cattle interstate while nonbrucellosis-free states face inspection and other requirements before selling cattle interstate. 9 C.F.R. §§ 78.40-78.43 (1995). Montana is classified as a brucellosis-free state, but has been threatened with loss of that status based on the presence of brucellosis-exposed bison from Yellowstone on lands outside the park. For a more detailed description of the legal and regulatory structure governing brucellosis, see Keiter & Froelicher, *supra* note 13, at 21-27.

81. Margaret E. Meyer & Mary Meagher, *Brucellosis in Free-ranging Bison (Bison bison) in Yellowstone, Grand Teton, and Wood Buffalo National Parks: A Review*, 31 J. WILDLIFE DISEASES

bison from leaving the park, Montana instituted a controversial public bison hunt that was quickly cancelled following public protests.[82]

Meanwhile, Montana and federal agriculture officials continued to voice concern over the Park Service's basically "laissez faire" bison management policy, asserting that depleted range conditions attributable to overgrazing were precipitating the winter exodus. Faced with litigation challenging its bison management policies,[83] the Park Service has agreed to implement an intensive bison management plan that entails capturing, testing, and slaughtering bison within the park to protect adjacent landowners and grazing allotments.[84] In the case of bison, therefore, the Park Service has essentially abandoned its nonintervention preservation policy and is poised to begin managing bison as if they were livestock rather than wildlife.

D. *Wolves, Grizzly Bears, and Endangered Species Management*

Yellowstone's controversial predator management policies have changed dramatically over the past century. During the early 20th century, the Park Service systematically eliminated wolves from the park, subscribing to the view that wolves were "bad" animals that killed valuable wildlife as well as domestic livestock.[85] But following the Leopold Report and the subsequent listing of wolves under the Endangered Species Act,[86] the U.S. Fish and Wildlife Service, with strong support from the Park Service, adopted a wolf recovery plan in 1987 that called for reintroduction in Yellowstone.[87] However, in response to local political opposition, actual reintroduction was delayed as proponents and opponents vigorously debated the impact wolves would have on livestock and the ramifications of endangered species protection.

In 1994, gray wolves were finally reintroduced into the park as a nonessential "experimental population."[88] These reintroduced wolves, which were

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579 (1995); *see also* Keiter, *Greater Yellowstone's Bison*, *supra* note 79, at 4; Keiter & Froelicher, *supra* note 13, at 27-32.

82. The contemporary bison-brucellosis controversy is recounted in Keiter & Froelicher, *supra* note 13. *See also* Thorne et al., *supra* note 13, at 275.

83. *See infra* note 197 for a brief discussion of this litigation.

84. *See* YELLOWSTONE NAT'L PARK & MONT. DEP'T OF LIVESTOCK, INTERIM BISON MANAGEMENT PLAN (1996); Keiter, *Greater Yellowstone's Bison*, *supra* note 79, at 8. Under this interim policy, 1080 bison were slaughtered by federal and state employees during the 1996-1997 winter. James Brooke, *Yellowstone Bison Herd Cut in Half Over Winter*, THE N.Y. TIMES, April 13, 1997.

85. Sellars, *supra* note 6, at 7-8. *See generally* BARRY HOLSTUN LOPEZ, OF WOLVES AND MEN (1978) (discussing the relationship between wolves and humans).

86. 16 U.S.C. § 1533 (1994); 50 C.F.R. § 17.11 (1995). Under the Endangered Species Act, terrestrial species listed as endangered or threatened are managed by the Secretary of the Interior through the U.S. Fish and Wildlife Service; similarly listed marine species are managed by the Secretary of Commerce through the National Marine Fisheries Service. 16 U.S.C. § 1532(15) (1994).

87. U.S. FISH & WILDLIFE SERV., NORTHERN ROCKY MOUNTAIN WOLF RECOVERY PLAN (1987); Robert B. Keiter & Patrick T. Holscher, *Wolf Recovery Under the Endangered Species Act: A Study in Federalism*, 11 PUB. LAND L. REV. 19 (1990); *see* Mech, *supra* note 14, at 309-22.

88. 16 U.S.C. § 1539(j); 50 C.F.R. § 17.80-84 (1995); *see* 1982 U.S.C.C.A.N., 2833-35, 2845-46, 2857, 2870-76 (discussing "experimental population" provisions of the Endangered Spe-

initially live-captured in Canada and then held in acclimation pens, are being intensively monitored through radio collars; they can be removed if found preying on domestic livestock.[89] With wolf reintroduction, Yellowstone now has a full compliment of its original predators, and traditional predator-prey relationships are being reestablished with the abundant ungulate population. To accomplish its wolf reintroduction ecological goals, however, the Park Service has committed itself to active, interventionist management and made key political compromises to accommodate local interests.

In the case of Yellowstone's grizzly bears, Park Service policy has been quite different from the wolf, yet equally contentious. Because the grizzly bear is a top-of-the-food-chain carnivore, ecologists have long regarded Yellowstone's grizzly bear population as an important barometer for measuring the health of the regional ecosystem.[90] By the mid 20th century, Yellowstone's bears had grown habituated to people; they frequented campgrounds and roadways, and were fed at park garbage dumps.[91] Following the Leopold Report, however, the Park Service summarily closed the garbage dumps and left the bears to fend for themselves from natural food sources. Local wildlife biologists protested vehemently, arguing that the bears were not adequately accustomed to foraging in the wild and that the garbage dumps should therefore be phased out.[92] As was predicted, several bear-human conflicts ensued and problem bears were killed, which raised concern about overall grizzly bear population numbers. Nonetheless, the Park Service persisted with its revised nonintervention policy.

In 1975, the grizzly bear was listed under the Endangered Species Act as a threatened species,[93] and a recovery plan was prepared to protect the bear and its habitat.[94] When the Park Service, in a controversial decision, declined to close Yellowstone's Fishing Bridge campground to protect grizzly habitat, it

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cies Act). Under the "experimental population" designation, the wolves are treated as a threatened—rather than endangered—species, and they do not enjoy the full protections of the Endangered Species Act, principally the jeopardy review process. On the experimental population provision, see Keiter & Holscher, *supra* note 87, at 36-37. *See also* Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 HARV. ENVTL. L. REV. 101 (1992). *See generally* U.S. FISH & WILDLIFE SERV., THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO: FINAL ENVIRONMENTAL IMPACT STATEMENT (1994) (describing alternative ways for re-introducing gray wolves into Yellowstone).

89. *See* FISCHER, *supra* note 57, at 150; Robert C. Moore, Comment, *The Pack is Back: The Political, Social, and Ecological Effects of the Reintroduction of the Gray Wolf to Yellowstone National Park and Central Idaho*, 12 T.M. COOLEY L. REV. 647 (1995); *see also* James M. Peek & John C. Carnes, *Wolf Restoration in the Northern Rocky Mountains*, *in* NATIONAL PARKS AND PROTECTED AREAS, *supra* note 70, at 325; Edward E. Bangs, *Restoring Wolves to the West*, in RECLAIMING THE NATIVE HOME OF HOPE: COMMUNITY, ECOLOGY, AND THE WEST (Robert B. Keiter, ed., 1998) (forthcoming) (*hereinafter* RECLAIMING THE NATIVE HOME OF HOPE).

90. *See* U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN 28 (1993) [hereinafter 1993 GRIZZLY BEAR RECOVERY PLAN]; GRUMBINE, *supra* note 15, at 66; *see also* CRAIGHEAD ET AL., *supra* note 57; FRANK C. CRAIGHEAD, JR., TRACK OF THE GRIZZLY (1979); THOMAS MCNAMEE, THE GRIZZLY BEAR (1984).

91. RUNTE, *supra* note 4, at 168-69.

92. *See* CRAIGHEAD, *supra* note 90, at 192-94; MCNAMEE, *supra* note 90, 90, at 107-22.

93. 16 U.S.C. § 1533 (1994); 50 C.F.R. § 17.11 (1995).

94. U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN (1982). For the latest update and revisions to the plan, see 1993 GRIZZLY BEAR RECOVERY PLAN, *supra* note 90.

was sued—unsuccessfully—for violating its Organic Act and Endangered Species Act obligations.[95] According to federal officials, grizzly bear population numbers have gradually increased in the Greater Yellowstone region and the bear's range has expanded.[96] Several observers, however, believe that current population figures are unreliable and that grizzly habitat is not secure either inside or outside the park.[97] Moreover, problem bears (*i.e.* those posing a threat to human life or property) are monitored intensively and continue to be removed to minimize bear-human conflicts. Against the backdrop of the Endangered Species Act, the Park Service has therefore generally adhered to a nonintervention policy with Yellowstone's grizzly population, while selectively intervening on occasion for nonecological purposes.

E. *Fire as an Ecological Process*

The Park Service's revised preservation policy has also triggered a reversal in its approach to fire management. Through the mid 1960s, Yellowstone officials actively suppressed all fires within the park. Across the public domain, fire was viewed only as a destructive force that burned forests and rangelands, threatened human lives and property, and scarred aesthetic landscapes.[98] During this total suppression period, Yellowstone's lodgepole pine forests continued to mature and die, creating a heavy fuel load. Following the Leopold Report, however, park officials adopted a new fire management policy, generally allowing natural fires to burn while still suppressing human-ignited blazes.[99] The policy did not authorize active intervention through the use of prescribed (*i.e.* human-ignited) fires to reduce the fuel load.

The revised fire policy worked reasonably well until the summer 1988 season when multiple fires—some natural and others human-caused—charred nearly one third of the park.[100] Although several fires were fought aggressively from the outset, the heavy fuel load and extreme weather conditions caused the fires to burn out of control for over a month. Local politicians and other critics blamed the conflagration on the Park Service's laissez faire policy

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95. National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 385-86 (D. Wyo. 1987); *see also* Brian L. Kuehl, Comment, *Conservation Obligations Under the Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear*, 64 U. COLO. L. REV. 607, 636 (1993).

96. *See* 1993 GRIZZLY BEAR RECOVERY PLAN, *supra* note 90, at 2-12, 41-58.

97. *See* Fund for Animals v. Babbitt, 903 F. Supp. 96 (D.D.C. 1995); *see also* MARK L. SHAFFER, THE WILDERNESS SOCIETY, KEEPING THE GRIZZLY BEAR IN THE AMERICAN WEST: A STRATEGY FOR REAL RECOVERY (1992). In addition, some biologists argue that supplemental food sources (*i.e.* ecocenters) are necessary to ensure full grizzly bear recovery. *See* CRAIGHEAD ET AL., *supra* note 57, at 484.

98. *See* STEPHEN J. PYNE, FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE (1982).

99. *See* YELLOWSTONE NAT'L PARK, U.S. DEP'T OF THE INTERIOR, YELLOWSTONE NATIONAL PARK WILDLAND FIRE MANAGEMENT PLAN 11 (1992) [hereinafter YELLOWSTONE FIRE MANAGEMENT PLAN]; Paul Schullery, *The Fires and Fire Policy*, 39 BIOSCIENCE 686 (1989); Dennis H. Knight, *The Yellowstone Fire Controversy*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 87, 90-91.

100. *See* MICAH MORRISON, FIRE IN PARADISE: THE YELLOWSTONE FIRES AND THE POLITICS OF ENVIRONMENTALISM (1993); NATIONAL PARK SERV., THE YELLOWSTONE FIRES: A PRIMER ON THE 1988 FIRE SEASON (1988).

and labeled the park a disaster.[101] Park Service and other scientists responded that large forest fires had historically occurred in Yellowstone's lodgepole pine forests and represented an ecological renewal.[102]

Following an extensive policy review, Department of the Interior officials have reaffirmed the basic scientific validity of the Park Service's fire management policy, though with some modifications.[103] Under its revised fire management plan, Yellowstone officials will continue allowing some naturally-caused fires to burn subject to tighter controls (or prescriptions) to protect park resources and neighboring property owners.[104] These controls include regular monitoring of weather and fuel conditions, application of detailed standards to predict fire behavior, delineation of predetermined fire management zones, daily monitoring of fire progress, and maintenance of adequate fire suppression equipment and personnel.[105] And the Park Service has begun experimenting with a prescribed burning program, though critics question whether it can adequately reduce the remaining fuel load.[106] In the case of fire, therefore, Yellowstone's nonintervention policy has been substantially modified to address political as well as ecological concerns.

F. *Preservation Policy Elsewhere*

Beyond Yellowstone, the Park Service has pursued similarly controversial preservation policies with a view toward maintaining or restoring ecological processes. In Rocky Mountain National Park, as in Yellowstone, the Park Service's decision not to regulate the park's elk population has led to charges that the proliferating herd is destroying native trees and grasses in its quest for food.[107] At Grand Canyon National Park, following recent recommendations triggered by the Grand Canyon Protection Act of 1992,[108] federal reclamation officials have experimented with increased release flows from the upstream Glen Canyon Dam.[109] This experimental release regime is designed to simu-

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101. *See Economic Impact Hearings*, *supra* note 11, at 43, 48-51.

102. THE GREATER YELLOWSTONE POSTFIRE ECOLOGICAL ASSESSMENT WORKSHOP, ECOLOGICAL CONSEQUENCES OF THE 1988 FIRES IN THE GREATER YELLOWSTONE AREA: FINAL REPORT (1989); Christensen et al., *Interpreting the Yellowstone Fires of 1988*, 39 BIOSCIENCE 678, 679-80 (1989).

103. YELLOWSTONE FIRE MANAGEMENT PLAN, *supra* note 99; *see also* U.S. DEPT. OF THE INTERIOR AND U.S. DEPT. OF AGRICULTURE, FEDERAL WILDLAND FIRE MANAGEMENT: POLICY & PROGRAM REVIEW FINAL REPORT (1995) [hereinafter 1995 FEDERAL WILDLAND FIRE MANAGEMENT].

104. YELLOWSTONE FIRE MANAGEMENT PLAN, *supra* note 99, at 12-13; *see* 1995 YELLOWSTONE NATIONAL PARK RESOURCE MANAGEMENT PLAN, *supra* note 60, at YELL-N-020.000.

105. YELLOWSTONE FIRE MANAGEMENT PLAN, *supra* note 99, at 52-57.

106. *Id.* at 50-52; *see* Paul Schullery & Don G. Despain, *Prescribed Burning in Yellowstone National Park: A Doubtful Proposition*, 15 W. WILDLANDS 30 (1989).

107. *See* KARL HESS, JR., ROCKY TIMES IN ROCKY MOUNTAIN NATIONAL PARK: AN UNNATURAL HISTORY 15-49 (1993). Moreover, the Park Service's fire suppression policy, which was adopted to protect nearby residents from uncontrollable forest fires, has been criticized as an example of too much intervention into ecological processes. *Id.* at 51-76.

108. Pub. L. No. 102-575, 106 Stat. 4669; *see* Michael Conner, *Extracting the Monkey Wrench from Glen Canyon Dam: The Grand Canyon Protection Act — An Attempt at Balance*, 15 PUB. LAND L. REV. 135 (1994).

109. *See* BUREAU OF RECLAMATION, U.S. DEPT. OF THE INTERIOR, OPERATION OF GLEN

late the original hydrologic impacts that Colorado River spring floods had on adjacent river banks and sandbars, but critics are concerned that it could disrupt power distribution in the Southwest and destroy the cold water trout fishery below the dam.[110] In Yosemite National Park, the Park Service is actively involved in restoring natural fire to the landscape and reintroducing bighorn sheep.[111] In Olympic National Park, the Park Service has invoked ecological restoration goals to support proposals to remove two small hydropower dams on the Elwha River[112] and to cull exotic mountain goats that are destroying vegetation on the park's fragile mountain slopes.[113] Similar resource management policies have been implemented—and often criticized—in other parks where the Park Service has sought to maintain or restore ecosystems by curtailing human intervention into ecological processes.[114]

IV. PRESERVATION POLICY EXAMINED: A CRITICAL ANALYSIS

Since adopting the Leopold Report recommendations, the Park Service has been dogged with controversy over its revised preservation policy. Critics have attacked the policy on philosophical and scientific grounds. Local communities and residents have secured notable modifications to the policy. The ensuing discussion first puts the Park Service's preservation policy in historical context and then sets forth the principal criticisms against it. It then responds to these criticisms, concluding that the related nonintervention and ecological restoration concepts represent a viable though still experimental preservation policy. As a consequence, without further clarification and legitimization, the policy will remain vulnerable in political and other arenas.

A. *Nonintervention, Restoration, and its Critics: An Overview*

Because the Park Service's preservation policy represents a significant departure from conventional natural resource management practices, it has been subject to intense scrutiny and criticism. Two dimensions of the policy have come under repeated attack. The Park Service's nonintervention philosophy has been criticized as an ill-conceived biocentric policy that ignores the human presence in nature, lacks a credible scientific basis, and is unattainable

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CANYON DAM: FINAL ENVIRONMENTAL IMPACT STATEMENT (1995).

110. *See id.* at 122-25, 166-73.

111. ALFRED RUNTE, YOSEMITE: THE EMBATTLED WILDERNESS 216-17 (1990); *see also* WAGNER ET AL., *supra* note 10, at 67.

112. Elwha River Ecosystem and Fisheries Restoration Act of 1992, Pub. L. No. 102-495, 106 Stat. 3173, 3174. NATIONAL PARK SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ELWHA RIVER ECOSYSTEM RESTORATION IMPLEMENTATION, OLYMPIC NATIONAL PARK, WASHINGTON (1996); *see* Catherine Hawkins Hoffman & Brian D. Winter, *Restoring Aquatic Environments: A Case Study of the Elwha River*, *in* NATIONAL PARKS AND PROTECTED AREAS, *supra* note 70, at 303.

113. WRIGHT, *supra* note 35, at 101-05; WAGNER ET AL., *supra* note 10, at 61-62.

114. *See* EVERGLADES: THE ECOSYSTEM AND ITS RESTORATION (Steven M. Davis & John C. Ogden eds., 1994); David J. Parsons & Jan W. van Wagtendonk, *Fire Research and Management in the Sierra Nevada National Parks*, *in* SCIENCE AND ECOSYSTEM MANAGEMENT IN THE NATIONAL PARKS, *supra* note 39, at 25.

in the altered national park environment. The related ecological restoration policy, which paradoxically often involves active human intervention into ecosystem processes, has been attacked on similar grounds, primarily by local property owners who view reintroduced predators or officially sanctioned fires as a direct threat. In both cases, the policies under attack reflect a renewed faith in the value of maintaining and restoring relatively pristine ecological conditions in national parks.

Historically, natural resource management policy has focused on managing select resources on clearly defined land designations for productive purposes. Early on, natural resources were viewed as discrete commodities, and laws were adopted establishing detailed management regimes for water, minerals, timber, forage, and wildlife.[115] The goal was production for human consumption and enjoyment.[116] State game agencies, for example, focused wildlife management efforts on featured hunting species; population targets were established, necessary habitat was acquired and then managed for select species, and other species were largely ignored.[117] Perceived negative natural influences, such as fire and predators, were systematically eliminated to protect more valuable resource commodities. A similar philosophy prevailed in the national parks, which were managed to produce "good" scenic, wildlife viewing, and recreation experiences for visitors.[118]

During the late 20th century, drawing upon the insights of Aldo Leopold and others, this resource production focus has begun to change, with resource managers beginning to view the landscape as an ecological entity.[119] Gradually, a consensus is emerging that resource management efforts must be expanded to encompass the entire ecological complex, both species and processes.[120] As a legal matter, the first shifts in this direction were manifested in legislation like the Endangered Species Act and National Forest Management Act.[121] Recent administrative initiatives promoting ecosystem management

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115. *See* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992).

116. R. McGreggor Cawley & John Freemuth, *Tree Farms, Mother Earth, and Other Dilemmas: The Politics of Ecosystem Management in Greater Yellowstone*, 6 SOC'Y & NAT. RESOURCES 41, 44-46 (1993); Winifred B. Kessler, *A Tale of Two Paradigms: Multiple Use and Ecosystem Management*, 8 GEORGE WRIGHT FORUM 13-20 (1992).

117. *See* THOMAS A. LUND, AMERICAN WILDLIFE LAW 60-79 (1980); George Cameron Coggins & Michael E. Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 ORE. L. REV. 59, 62-63 (1981); *see also* ALDO LEOPOLD, GAME MANAGEMENT 3-21 (1933).

118. Sellars, *supra* note 6, at 11-13; *see supra* notes 33-36 and accompanying text.

119. *See generally* ECOSYSTEM MANAGEMENT FOR PARKS AND WILDERNESS 9-10 (James K. Agee & Darryll R. Johnson eds., 1988); SAMUEL P. HAYS, BEAUTY, HEALTH AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-1985 (1987); DONALD WORSTER, THE WEALTH OF NATURE: ENVIRONMENTAL HISTORY AND THE ECOLOGICAL IMAGINATION 108-09 (1993); DONALD WORSTER, NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS (1994). *See* ALDO LEOPOLD, A SAND COUNTY ALMANAC (1966).

120. *See, e.g.*, 1 INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES: OVERVIEW REPORT 31-34 (1995) [hereinafter HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES I]; SOCIETY OF AM. FORESTERS, TASK FORCE REPORT ON SUSTAINING LONG-TERM FOREST HEALTH AND PRODUCTIVITY (1993).

121. *See* Robert B. Keiter, *Beyond the Boundary Line: Constructing A Law of Ecosystem*

among the federal land management agencies are a further example of this shift.[122] For national parks, the Leopold Report—with its recommendations for applying these new ecological insights for preservation purposes—represents an early manifestation of this new philosophical approach to natural resource management. But as the Park Service has withdrawn from intensive, manipulative management and simultaneously promoted controversial reintroductions, it has met a skeptical response from those accustomed to a more active and goal-driven (or quantitative) management approach.

Criticism of the Park Service's preservation policy has focused on its nonintervention or natural regulation approach,[123] which is designed to let nature take its course with minimal human interference. Convinced that the concept of naturalness is ambiguous, subjective, and value-laden, critics have asked, what exactly is "natural" and how can it be defined?[124] Does "natural" imply the complete absence of humans and human influence from nature? Or does "natural" contemplate the presence of Native Americans during the pre-European settlement period?[125] Few if any places on earth, they argue, have not been trammeled by man, which means the human presence must be integrated into any natural resource management policy.[126] Asserting that Native American hunting and burning practices had profound effects on the early American landscape,[127] they contend that the Park Service cannot recreate a natural setting in that image without knowing these effects.[128] Moreover, arguing that "natural" is a subjective construct, critics assert that the idea of

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Management, 65 U. COLO. L. REV. 294, 314-16 (1994); 2 INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES: IMPLEMENTATION ISSUES 69 (1995) [hereinafter HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES II].

122. For examples of these initiatives, see CONGRESSIONAL RESEARCH SERV., ECOSYSTEM MANAGEMENT: FEDERAL AGENCY ACTIVITIES (1994); GENERAL ACCOUNTING OFFICE, ECOSYSTEM MANAGEMENT: ADDITIONAL ACTIONS NEEDED TO ADEQUATELY TEST A PROMISING APPROACH (1994); THE KEYSTONE CTR., THE KEYSTONE NATIONAL POLICY DIALOGUE ON ECOSYSTEM MANAGEMENT: FINAL REPORT (1996).

123. The term "natural regulation" has often been used to describe the Park Service's basic management philosophy in the aftermath of the Leopold Report, but the term does not appear in official Park Service documents. *See infra* notes 138-40 and accompanying text. The term "nonintervention" is therefore used throughout this article to describe this aspect of Park Service preservation policy. However, this term is also not entirely accurate: Park Service policy provides for limited interventions, and park officials have often intervened into park ecosystems, both for ecological and other purposes. *See supra* notes 65-106 and accompanying text.

124. ALSTON CHASE, IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE RISING TYRANNY OF ECOLOGY 2-3, 411, 413 (1996) [hereinafter CHASE, DARK WOOD]; HESS, *supra* note 107, at 94-95.

125. CHASE, YELLOWSTONE, *supra* note 10, at 92-115; WAGNER ET AL., *supra* note 10, at 139-45.

126. HESS, *supra* note 107, at 95; WAGNER ET AL., *supra* note 10, at 139-45. The human presence also means that resource managers must employ the social sciences as well as natural sciences in establishing natural resource policy. CHASE, YELLOWSTONE, *supra* note 10, at 320-21.

127. *See* Charles E. Kay, *Aboriginal Overkill and Native Burning: Implications for Modern Ecosystem Management*, 10 W.J. APPLIED FORESTRY 121 (1995).

128. This raises additional problems: because nature is not static but rather constantly changing, it is both misleading and undesirable to recreate a static former condition, even if it could be reliably defined. It is likewise impossible to calculate how an area like Yellowstone would have evolved over nearly two centuries since it was first explored by white men. *See generally* WAGNER ET AL., *supra* note 10, at 139-45.

recreating nature represents a romantic ideal not a viable scientific or objective standard.[129]

How to achieve naturalness goals in a national park setting engenders perhaps even more controversy. According to one critic, the Park Service's preservation policy is based upon the erroneous notion of ecosystem stability; it blindly accepts the premise that nature—knowing what is best and tending toward equilibrium—can take care of itself.[130] Observing that national parks often lack original predators and have evolved under a regime of fire suppression, critics also contend that national park environments are so altered that a natural regulation policy could actually jeopardize park ecosystems when so many critical ecological components are missing.[131] And observing that national parks are not defined by actual ecosystem boundaries, critics note that park resources are subject to pervasive development activity and human influences from beyond the border that fragment wildlife habitat and otherwise adversely affect park ecology, making it impossible for ecological processes to function.[132] Moreover, critics note that the Leopold Report did not endorse "hands off" management; rather, it expressly acknowledged the continuing need to intervene to ensure a functional ecological setting.[133] In short, the critics believe that more rather than less intervention is necessary to sustain park ecosystems.

The Park Service's preservation policies have also engendered less philosophical but more concrete local opposition, which has led to significant policy modifications. In the case of Yellowstone, adjacent landowners and gateway communities have actively resisted efforts to restore species or ecological processes. Believing that wolves and natural fire threaten paramount human safety and property concerns, park neighbors have applied intense political and legal pressure to stop or modify specific restoration efforts.[134] Similarly, local hunters, ranchers, and state wildlife officials, often imbued with a traditional range carrying capacity philosophy, have vigorously challenged Yellowstone's elk and bison management policies.[135] Responding to these constituencies, regional congressional delegations have exerted their political influence and sought modifications to these preservation policies. As a result, reintroduced wolves are radio collared and subject to strict limitations, tight monitoring controls have been placed on natural fires, and park bison migrating toward private property are being captured and slaughtered.[136] Thus, despite its ostensible commitment to a nonintervention preservation policy, the Park Service has made significant modifications for political rather than ecological reasons.

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129. *See* HESS, *supra* note 107, at 77-100.
130. CHASE, YELLOWSTONE, *supra* note 10, at 318-19.
131. *See* WAGNER ET AL., *supra* note 10, at 145. *See generally* CHASE, YELLOWSTONE, *supra* note 10.
132. WAGNER ET AL., *supra* note 10, at 145.
133. *Id.* at 28-30.
134. *See* Mech, *supra* note 14, at 312; *Economic Impact Hearings*, *supra* note 11.
135. *See* DESPAIN ET AL., *supra* note 12, at 26, 35, 42.
136. *See supra* notes 83-84, 88-89, 103-06 and accompanying text.

B. *Clarifying Preservation Policy: Further Perspectives*

Nonetheless, the Park Service's basic preservation policy remains largely intact and can be generally sustained against these criticisms. Much of the criticism either mischaracterizes the basic policy itself or reflects a fundamental disagreement with policy objectives. Other criticism raises difficult scientific issues on which no consensus has yet emerged.[137] The fact that the Park Service has regularly adjusted its preservation policy to accommodate the concerns of neighbors indicates that it is acutely aware of the environmental and human pressures on national parks. Nevertheless, the criticisms suggest the need for further clarification of national park preservation policy and for additional public involvement in defining and implementing policy objectives.

Park Service preservation policy is not framed in terms of an absolute "hands off" or natural regulation policy. The term "natural regulation" does not appear in Park Service management documents.[138] In the 1988 Management Policies statement,[139] the Park Service establishes a biological resource management goal of perpetuating native animal life and natural evolutionary processes by "minimizing human impacts on natural animal population dynamics."[140] The document frames Park Service preservation policy in aspirational terms: Managers are enjoined to utilize natural processes "to the greatest extent possible."[141] Strictly speaking, national park preservation policy is not simply natural regulation; rather, the policy is based on minimizing human interventions and on using scientific data as the basis for intervention decisions. Indeed, there are numerous examples of Park Service intervention into natural systems to achieve ecological as well as nonecological objectives, including bison, fire, and fisheries management. In cases where Park Service officials have not intervened in ecological processes, as is true with elk on Yellowstone's northern range, the policy decision seems to reflect a scientific as well as philosophical judgment.

Park Service preservation policy does not contemplate a static environment or a stable ecosystem. The 1988 Management Policies document recognizes that "change . . . [is] an integral part of the functioning of natural systems," which will not be preserved "as though frozen at a given point in time."[142] It also provides for perpetuating "park natural resources and natural

137. This article, written by a nonscientist, focuses on the legal and policy dimensions of the controversy over national park preservation policy. Points of scientific disagreement are noted, but no effort is made to resolve these differences. The role of science in policy formulation, however, is examined.

138. *See supra* note 123; *see also* DESPAIN ET AL., *supra* note 12, at 6-13. *But see* Douglas B. Houston, *Ecosystems of National Parks*, 172 SCIENCE 648 (1971) (calling for "natural regulation of animal numbers" as a means of maintaining national park ecosystems in "as nearly pristine a condition as possible").

139. For a description of this document, see *supra* notes 51-55 and accompanying text.

140. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 4:5, 4:10.

141. *Id.* at 4:6. Similarly, the Leopold Report only provided for park managers to recreate primitive vignettes "as nearly as possible." *See* Leopold et al., *supra* note 7, at 239.

142. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 4:2.

processes,"[143] and instructs park managers to "try to maintain all the components and processes of naturally evolving park ecosystems."[144] Similarly, Yellowstone's 1995 Resource Management Plan "focuses on preserving the components and processes of naturally evolving ecosystems."[145] Thus, the policy recognizes the dynamic and evolutionary nature of park ecosystems and is not designed to capture a snapshot in time.

The Park Service, however, has not adequately addressed either the naturalness concept or the vignette of primitive America metaphor, which have been the focus of much criticism. Although the principal policy documents contain several references to the term "natural,"[146] it is not otherwise defined or placed in historical context. The "primitive America" metaphor[147] also is not referenced or discussed, though such discussion might clarify whether national park ecological maintenance and restoration goals are tied to an historical target. Viewed from a traditional natural resource management perspective and its commitment to objective production standards, these omissions further the perception that park preservation policy is ambiguous, unquantifiable, and standardless. Moreover, a policy framed in general rather than specific ecological terms leaves the agency open to the charge that it is basically unaccountable for its management decisions and actions.[148]

These omissions are not, however, fatal to the policy itself, particularly given the experimental nature of this new approach to natural resource management and the complexities involved in implementing such a policy in the modern world. As a conceptual matter, the term "natural" can—and should—be interpreted in a relative sense to distinguish among potential influencing events, recognizing that some of these events may involve human presence or intervention.[149] For example, spontaneous occurrences in a pristine

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143. *Id.* at 4:2, 4:10.

144. *Id.* at 4:1.

145. YELLOWSTONE NAT'L PARK, NATIONAL PARK SERV., RESOURCE MANAGEMENT PLAN 1 (1995) [hereinafter 1995 YELLOWSTONE RESOURCE MANAGEMENT PLAN]. For example, despite political recriminations in the aftermath of the 1988 Yellowstone fires, the park's plan acknowledges that fire is a critical ecological process and provides that natural fires will be allowed to burn, albeit subject to more rigorous limitations than before. *Id.* at Yell-N-020.000.

146. *See, e.g.*, 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 4:5, 4:6; 1995 YELLOWSTONE RESOURCE MANAGEMENT PLAN, *supra* note 145, at 1, 2. *But see* NATIONAL PARK SERV., NATURAL RESOURCE MANAGEMENT GUIDELINES NPS-77, at 3 (1991) (defining "natural conditions" as "those that would exist today in the absence of the effects of European man"). Significantly, the NPS-77 document is an internal policy manual prepared for Park Service resource managers, but not generally available or circulated to the public.

147. Holmes Rolston III, *Biology and Philosophy in Yellowstone*, 5 BIOLOGY & PHILO. 241, 245 (1990). *See also* Dan E. Huff, *Wildlife Management in America's National Parks: Preparing for the Next Century*, 12(1) GEORGE WRIGHT FORUM 25, 30-31 (1997).

148. *See infra* notes 279-89 and accompanying text.

149. It has been argued that these problems could be addressed and national park preservation policy clarified if the Park Service adopted the terminology "ecological process management." Mark S. Boyce, *Natural Regulation or the Control of Nature*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 183, 190. This terminology would avoid the term "natural," cast management policy in scientific terms, and acknowledge that human intervention may be required to achieve these goals. *Id.* at 183, 203. Boyce asserts that the Park Service's management goal is not merely to abstain from any intervention into the natural system, but to promote ecosystem integrity by sustaining and restoring ecological processes that have shaped dynamic landscapes

setting are one matter, human interventions to restore species or mimic processes are another, and human interventions for other purposes are yet another matter.[150] As for the vignette of primitive America metaphor, the Park Service should clarify whether its ecological management and restoration goals are historically defined or whether ecological history simply serves as a general point of reference.[151] A forthright discussion of the difficulties involved in defining and recreating a past ecological setting in today's world would lend additional credibility to a preservation policy not tied inextricably to the past. In the final analysis, concepts like nature, naturalness, and wilderness are cultural—and not just scientific—constructs that society regularly employs to define and characterize relatively undisturbed environmental settings.[152]

The Park Service's preservation policy cannot be said to ignore human values or concerns. At one level, by seeking to minimize human intrusions into park ecosystems, the policy is consistent with the strong national commitment—reflected in the law—to preserve national park lands and resources in an "unimpaired" condition for the enjoyment of future generations.[153] Human values and contemporary priorities, as manifested in endangered species legislation and related laws,[154] are similarly reflected in national park management decisions protecting and restoring dwindling species, such as grizzly bears and wolves.[155] At another level, the Park Service has taken account of competing human concerns by authorizing managers to intervene aggressively when problem animals or fire directly threaten human lives or property.[156] Park Service policy documents also specify that park planning and resource management decisions should provide for public involvement,[157] which rep-

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within the national parks. *Id.* at 183, 190. He concludes that ecological process management more accurately reflects park management goals and more closely tracks the Leopold Report's recommendations. *Id.* at 190.

150. Rolston, *supra* note 147, at 244-46.

151. DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY 194-97 (1990). For example, the Forest Service has proposed using the "identification of trends and historic conditions" as one factor in an ecosystem analysis that would become part of the forest planning process under proposed revisions to the National Forest Management Act regulations. National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18886, 18925 (1995) (to be codified at 36 C.F.R. § 219.7) (proposed Apr. 13, 1995).

152. Dan Flores, *Making the West Whole Again: An Historical Perspective on Restoration*, in RECLAIMING THE NATIVE HOME OF HOPE, *supra* note 89. *See also* 16 U.S.C. § 1131(c) (defining "wilderness" as "an area of undeveloped Federal Land retaining its primeval character and influence, without permanenent improvements or human habitation . . . and which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work subatantially unnoticed . . . .").

153. 16 U.S.C. §§ 1, 1a-1 (1994). For a discussion of the national park organic legislation, see *infra* notes 171-89 and accompanying text. *Cf.* 16 U.S.C. § 1132(c) (1994) (authorizing Congress to designate national park lands as wilderness).

154. For a discussion of the Endangered Species Act, see *infra* notes 213-21 and accompanying text.

155. *See* Alistair J. Bath, *Public Attitudes about Wolf Restoration in Yellowstone*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 367.

156. *See supra* notes 83-84, 88-89, 103-06 and accompanying text.

157. *See* 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 6. *Cf.* 16 U.S.C. § 1a-10 (1994) (requiring the Secretary of the Interior to provide for public involvement in preparing a periodic report on "current and future needs of each unit of the National Park System for resource management, interpretation, construction, operation and maintenance").

resents an opportunity to inject human values and concerns into preservation policy. However, whether the public has been afforded an adequate opportunity to participate in defining and implementing preservation policy is another question.[158]

The altered state of national park ecosystems is not a basis for rejecting the Park Service's predominantly nonintervention preservation policy. Although most national park ecosystems were historically impacted by Native Americans and early settlers, they have since been much less affected by human activities than most other locations. By law, most national parks do not allow hunting, trapping, or other extractive uses,[159] which means the human imprint has diminished over time. To be sure, visitor facilities and roads are located within national parks, and growing visitation numbers mean these settings are not free from a human presence. In Yellowstone and elsewhere, however, this disturbance is generally limited to discrete visitor areas and road corridors; it has not significantly affected the expansive back country regions or most wildlife species. To the extent that earlier fire suppression and predator elimination policies altered park ecosystems, current preservation policy—often through human intervention—is designed to reverse these impacts by reintroducing fire and extirpated species. Although it may be neither possible nor desirable to recreate the original ecological setting, it is still possible to re-establish the principal ecological components and processes that shaped national park environments.

National park preservation policy does not—and cannot—ignore the impact that development on adjacent public and private lands may have on park resources. National parks are no longer isolated; they are part of larger ecosystems and are affected by activities occurring beyond their borders.[160] Adjacent development, in the form of proliferating subdivisions, timber harvesting, or similar intensive activities, has fragmented sensitive ecosystems and displaced wildlife species. These developments highlight the important yet fragile role national parks play as reserves in biodiversity conservation efforts.[161] An increased human presence on park borders, however, has also brought pressure to bear on park officials to protect neighbors from fire, predators, and foraging wildlife. Given its uncertain jurisdictional authority over adjacent lands,[162] the Park Service has sought to address external concerns through cooperative

158. WAGNER ET AL., *supra* note 10, at 161-62; *see infra* notes 260-61 and accompanying text.

159. 16 U.S.C. § 1; Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 203 (6th Cir. 1991); National Rifle Ass'n v. Potter, 628 F. Supp. 903 (D.D.C. 1985).

160. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 1:4, 2:9-10. *See generally* JOHN C. FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS (1991); GENERAL ACCOUNTING OFFICE, PARKS AND RECREATION: LIMITED PROGRESS MADE IN DOCUMENTING AND MITIGATING THREATS TO THE PARKS (1987); NATIONAL PARK SERV., STATE OF THE PARKS, 1980: A REPORT TO CONGRESS (1980); Robert B. Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985) [hereinafter Keiter, *Protecting the National Parks*]; William J. Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STANFORD ENVTL. L.J. 3 (1997).

161. *See supra* notes 15-18 and accompanying text.

162. *See infra* notes 205, 231-21 and accompanying text.

planning and similar processes.[163] More recently, these efforts have been advanced under the rubric of ecosystem management.[164] Whether the Park Service's preservation goal of perpetuating and restoring park ecosystems with minimal human intervention can be maintained in this venue remains to be seen. There is mounting evidence, as reflected in the Yellowstone bison management controversy, that park preservation goals may be subordinated to the interests of neighboring land owners and managers to minimize political repercussions.[165]

The Leopold Report indicated that human intervention, including culling, may be required to protect park resources.[166] Park Service policies acknowledge that aggressive intervention may sometimes be necessary to protect human safety, to remove exotic species, to promote genetic diversity, and to restore missing ecological components.[167] In Yellowstone, the Park Service plainly has not adhered to a strict nonintervention policy; it has intervened, sometimes aggressively, to control bears, wolves, bison, and fire.[168] Given these interventions, the fact that Yellowstone officials have not culled the park's northern elk herd may represent less a rigid adherence to a nonintervention philosophy and more a scientific disagreement over the propriety of intervention to achieve specific ecological goals.[169] Or, since powerful political forces have influenced other interventions, the park's reluctance to intervene in the elk controversy may reflect a calculated political judgment about the public's tolerance for ungulate culling.[170] In any event, given the complex jurisdictional setting and often volatile political climate that surrounds most national parks, intervention decisions under the Park Service's preservation policy will undoubtedly continue to reflect a combination of ecological and political judgments.

This cursory review of the Park Service's preservation policy suggests that it represents a viable though controversial natural resource management policy. The basic goal of maintaining and restoring the ecological landscape while minimizing human intervention in the national park setting is plainly

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163. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 2:9-10. *See generally* Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study in Federal Interagency Relations*, 14 ECOLOGY L.Q. 207 (1987).

164. *See, e.g.*, Keiter, *supra* note 121; CLARK & MINTA, *supra* note 27; *see also* THE KEYSTONE CENTER, *supra* note 122.

165. *See supra* notes 75-84 and accompanying text.

166. *See supra* note 44 and accompanying text.

167. 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 4:6, 4:10. In fact, current Park service policy provides for fencing and culling to manage large ungulates at Theodore Roosevelt, Wind Cave, and Badlands national parks. *See* Huff, *supra* note 147 at 26.

168. For a description of how Yellowstone has managed these resources, see *supra* notes 75-106 and accompanying text.

169. *See* YELLOWSTONE NAT'L PARK RESEARCH DIV., INTERIM REPORT: YELLOWSTONE NATIONAL PARK NORTHERN RANGE RESEARCH (1992).

170. Indeed, the Park Service's original decision to cease culling elk was adopted, at least in part, to appease animal humane groups. *See* DESPAIN ET AL., *supra* note 12, at 24-27; *see also* Allen T. Rutberg & Wayne Pacelle, *Embracing Humane Value in National Park Management*, 14(1) GEORGE WRIGHT FORUM 38 (1997) (arguing that the Park Service is the principal communicator of the Federal Government's ethical views on wildlife).

consistent with the preservationist purpose underlying the national park system and is still achievable within many national park settings. Nonetheless, the Park Service's preservation policy could be fortified by further clarifying the ecological goals and by involving the public in this process. Additional clarification of the role that historic ecological conditions play in establishing restoration and other objectives (or why this is not possible or desirable), would help address lingering accountability concerns. Public involvement in the policy definition and implementation process would help build support from myriad constituencies and add legitimacy to these new preservation concepts.

V. LAW AND PRESERVATION POLICY: ASSESSING THE LEGAL FOUNDATION

Despite the critical scrutiny directed toward the Park Service's revised preservation policy and related management decisions, the fundamental legality of the policy has not been seriously questioned. Several laws directly support the policy itself, while other laws governing Park Service management decisions can be reconciled with it. The principal legal basis for the policy is the amended National Park Service Organic Act as well as the enabling legislation for individual parks. General administrative law principles can be squared with the Park Service's decision adopting this new preservation policy, and will govern its implementation and any significant modifications. Other statutes, such as the National Environmental Policy Act (NEPA), the Endangered Species Act, and the Federal Tort Claims Act, may affect or modify the policy, but do not undermine it. Moreover, because the policy can impact adjacent landowners, its implementation raises difficult but not fatal legal questions concerning the scope of Park Service authority and its potential liability beyond park boundaries.

A. *The Organic Act*

The National Park Service Organic Act of 1916 establishes the basic legal framework governing the Park Service's management authority and responsibility. Under the Organic Act, the Park Service is obligated to administer national parks to conserve scenery, wildlife, natural and historic objects, and to provide for public enjoyment, while ensuring that parks are left "unimpaired for the enjoyment of future generations."[171] Although the Act speaks in terms of both preservation and public use, the statutory "nonimpairment" standard indicates that resource preservation responsibilities should take precedence over public use in the event of conflict.[172] The 1978 amendments to the Or-

171. 16 U.S.C. § 1 (1994).

172. Keiter, *Protecting the National Parks*, *supra* note 160; Lockhart, *supra* note 160; Lemons & Stout, *supra* note 5; Robin Winks, *Dispelling the Myth*, 70 NAT'L PARKS 52 (1996). In 1918, in his seminal letter defining the fledgling Park Service's role, Secretary of the Interior Franklin Lane reached this same conclusion: "Every activity of the Service is subordinate to duties imposed upon it to faithfully preserve the parks for posterity in essentially their natural state." *See supra* note 31 and accompanying text; *see also* 1988 NPS MANAGEMENT POLICIES, *supra* note 51, at 1:3-4.

ganic Act, which provide that national parks shall be protected and managed "in light of the high public value and integrity" of the system, reaffirms and strengthens Congress' commitment to the basic Organic Act preservation tenets.[173] Indeed, several courts have concluded that the amended statute clearly gives primacy to resource preservation over competing uses or interests.[174] This construction of the Organic Act, with its emphasis on preserving nature, supports the basic nonintervention and ecological restoration premises of the Park Service's preservation policy.

Under the Organic Act, the Secretary of the Interior is vested with broad regulatory authority over the national parks.[175] This provision provides the Secretary with adequate legal authority to implement nonintervention and restoration preservation policies. The courts have consistently sustained Park Service regulations and policies designed to protect park resources, including limitations on hunting, fishing, rafting, mountain biking, and vehicle use within the parks.[176] Where the Park Service has sought to limit visitor activities in deference to protecting the ecological health or appearance of park resources, the courts have deferred to the agency's judgments.[177] Even in the face of a First Amendment constitutional challenge to Park Service regulations prohibiting camping on park grounds, the Supreme Court concluded that the judiciary does not have "the authority to replace the Park Service as the manager of the Nation's parks or . . . the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."[178] Nevertheless, despite its considerable authority, the Park Service generally has not translated its resource management policies into governing regulations,[179] choosing instead to define its preservation policies through general policy statements.[180]

The Park Service has implemented its preservation policy through the park planning process. Under the Organic Act, the Park Service is obligated to develop general management plans "for the preservation and use of each unit

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173. 16 U.S.C. § 1a-1 (1994).

174. *See* Bicycle Trails Council v. Babbitt, 82 F.3d 1445, 1468 (9th Cir. 1996); Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 204-05 (6th Cir. 1991); National Rifle Ass'n v. Potter, 628 F. Supp. 903, 910 (D.D.C. 1985).

175. 16 U.S.C. § 3 (1994).

176. *See Bicycle Trails Council*, 82 F.3d at 1450-51 (mountain biking); *Michigan United Conservation Clubs*, 949 F.2d at 210-11 (trapping); Conservation Law Found. v. Hodel, 864 F.2d 954 (1st Cir. 1989) (motorized vehicles); Organized Fishermen v. Hodel, 775 F.2d 1544 (11th Cir. 1985) (fishing); Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979) (rafting); *National Rifle Ass'n*, 628 F. Supp. at 909 (hunting).

177. *See, e.g., Bicycle Trails Council*, 82 F.3d at 1445 (applying Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to invoke principles of judicial deference to agency statutory interpretations to sustain Park Service regulations and management plans); *National Rifle Ass'n*, 628 F. Supp. at 909-12 (applying the same principles of judicial deference to sustain Park Service regulations). For a discussion of the *Chevron* principle, see *infra* notes 191-97 and accompanying text.

178. Clark v. Community for Creative NonViolence, 468 U.S. 288, 299 (1984).

179. *See* Robert B. Keiter, *Ecosystem Management: Exploring the Legal-Political Framework*, *in* NATIONAL PARKS AND PROTECTED AREAS, *supra* note 70, at 82-83.

180. *See, e.g.*, 1988 NPS MANAGEMENT POLICIES, *supra* note 51; 1968 NPS NATURAL AREA POLICIES, *supra* note 9.

of the National Park system."[181] General management plans are required to address park resource preservation measures, visitor facilities plans, visitor carrying capacities, and boundary modifications.[182] Most national parks, including Yellowstone, have prepared management plans that contain general wildlife and fire management principles as well as policies governing individual species and ecological processes.[183] These general management plans are sometimes supplemented by more specific management plans, such as Yellowstone's rather detailed bison and fire management plans.[184] Given the environmental consequences attached to both types of plans, they ordinarily should be subject to NEPA compliance requirements.[185] This would provide the public an opportunity to participate in formulating and implementing preservation policy, and subject underlying ecological assumptions to some degree of scrutiny. However, it is unclear whether preservation policies established in general management plans would be subject to judicial review at this planning stage.[186]

The Organic Act and individual park enabling statutes also contain specific exceptions to the notion that national parks are inviolate natural sanctuaries. Under the Organic Act, the Secretary of the Interior may cut timber to protect park resources and scenery against insects or disease, and destroy animals or plants "as may be detrimental to the use of . . . parks."[187] These provisions evidently allow the Secretary to elevate other park resource considerations above preservation, so long as intervention can be reconciled with these statutory responsibilities. Individual park enabling acts also may require or authorize management approaches inconsistent with general preservation policy. For example, elk hunting is statutorily sanctioned in Grand Teton National Park,[188] and Yellowstone National Park is authorized to "sell or otherwise dispose of" its surplus bison.[189] Although neither provision precludes Park Service officials from pursuing a nonintervention preservation policy, they

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181. 16 U.S.C. § 1a-7(b) (1994).

182. *Id.*

183. *See* YELLOWSTONE NAT'L PARK, RESOURCE MANAGEMENT PLAN (1995); YELLOWSTONE NAT'L PARK, NATURAL RESOURCES MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT (1982); *see also* YELLOWSTONE NAT'L PARK, STATEMENT FOR MANAGEMENT (1991).

184. *See, e.g.*, STATE OF MONT. & NAT'L PARK SERV., INTERIM BISON MANAGEMENT PLAN (1996); YELLOWSTONE FIRE MANAGEMENT PLAN, *supra* note 99.

185. For a discussion of NEPA procedures, see *infra* notes 205-12 and accompanying text.

186. *Cf.* Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994) (denying environmental oganizations standing to challenge adoption of a format plan for lack of a concrete and particularized inquiry in fact); Wilderness Soc'y v. Alcock, 867 F. Supp. 1026 (N.D. Ga. 1994), *aff'd*, 83 F.3d 386 (11th Cir. 1996) (concluding that adoption of a forest plan does not present a justiciable controversy subject to judicial review until a more specific project level decision is made). *But see* Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) (rejecting justiciability arguments and reviewing legal challenges to a forest plan). Of course, park general management plans should at least be subject to judicial review for NEPA compliance. *See infra* notes 205-12 and accompanying text.

187. 16 U.S.C. § 3 (1994); *see* New Mexico State Game Comm'n v. Udall, 410 F.2d 1197, 1199-1201 (10th Cir. 1969).

188. 16 U.S.C. § 673(c)(a) (1994). *See* Huff, *supra* note 147 at 26, 28 (noting significant variation in the legislation mandate governing individual park units).

189. 16 U.S.C. § 36 (1994).

nonetheless indicate that other specified considerations may take precedence.

B. *Administrative Law Principles*

Although the Leopold Report recommendations called for a major shift in the Park Service's general preservation policy, the ensuing change in direction should not undermine its legal validity. Under well-established administrative law principles, a federal agency is free to change policy direction, so long as the changes do not violate its organic mandate and it provides a reasoned explanation for the shift.[190] Moreover, in the absence of clear statutory language, the courts generally must defer to an agency's reasonable legal interpretation of its own statutory mandates.[191] Thus, even significant administrative policy shifts that can be squared with governing legal obligations should ordinarily escape judicial reversal.[192] Of course, because the Park Service's preservation policy was revised nearly thirty years ago, these doctrines may have limited application to this initial policy shift.[193]

Nonetheless, measured by these administrative law principles, the Park Service's original 1968 decision to adopt nonintervention and ecological restoration preservation policies plainly passes muster.[194] The Organic Act, as interpreted by the Secretary of the Interior, clearly supports a preservation policy that gives precedence to maintaining and restoring ecological conditions in national parks while minimizing human intervention into these processes.[195] Besides the Leopold Report, several Park Service documents explain the governing principles underlying the modified preservation policy and the rationale for its adoption.[196] However, even though the basic preservation policy may be safe from challenge, proposed applications as well as modifications are still subject to legal challenge. In fact, recent litigation involving Yellowstone's bison management policy has raised the question of whether the Park Service violated its Organic Act responsibilities by not constraining bison within the park.[197] Moreover, any shift or modification in the policy would at least re-

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190. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 57 (1983); Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 806-09 (1973).

191. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984); Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981). *See generally* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

192. Sunstein, *supra* note 191, 191, at 2101-04.

193. Not only are these doctrines of relatively recent origin, but the Park Service's Leopold Report-based policy decision is probably no longer ripe for judicial review.

194. For a description of the Park Service's policy shift, see *supra* notes 40-50 and accompanying text.

195. *See supra* notes 171-89 and accompanying text. *Cf.* Bicycle Trails Council v. Babbitt, 82 F.3d. 1445, 1468 (9th Cir. 1996) (sustaining a Park Service regulation limiting bicycle use in national parks to protect natural resources); Michigan United Conservation Clubs v. Lujan, 949 F.2d 202, 210-11 (6th Cir. 1991) (sustaining a Park Service regulation prohibiting trapping in national parks unless Congress has specifically authorized it).

196. *See, e.g.*, 1988 NPS MANAGEMENT POLICIES, *supra* note 51; 1968 NPS NATURAL AREA POLICIES, *supra* note 9; 1964 Udall Memorandum, *supra* note 8.

197. In 1995, the state of Montana sued the National Park Service, alleging that Yellowstone's nonintervention bison management policy violated its Organic Act responsibilities.

quire a clear explanation and compliance with NEPA procedures prior to implementation.

Under the Administrative Procedures Act (APA),[198] a Park Service decision to translate its preservation policies into legally binding rules would require adherence to statutory rulemaking procedures and be subject to judicial review.[199] To promulgate a rule, informal rulemaking procedures require public notification and comment opportunities, as well as preparation of a concise basis and purpose statement.[200] The Park Service has translated some of its natural resource management responsibilities into legal rules,[201] but it has not formalized its basic preservation policy in this manner. Although this limits the agency's ability to enforce these policies against the public,[202] it means that the Park Service has retained considerable discretion in implementing—and even changing—its approach to preservation. Indeed, the policy can evidently be modified without public involvement or any meaningful threat of judicial review so long as a reasonable explanation is provided.[203] Some opportunity for public involvement may be available under NEPA during the park planning process and when implementation decisions are made.[204] But

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The litigation was settled, with the Park Service agreeing to implement an interim, interventionist bison management policy, including capturing, testing, and slaughtering bison within the park. Montana v. United States, No. 95-6-H-CCL (D. Mont. 1995). For a brief description of this controversy, see *supra* notes 83-84 and accompanying text. In subsequent litigation, environmental organizations sued the Park Service, alleging that its interventionist interim bison management policy violates the Organic Act. Greater Yellowstone Coalition v. Babbitt, 952 F.Supp. 1435 (D. Mont. 1996). That argument was rejected by a Montana federal district court, which concluded that "park managers [have] broad discretion in determining how best to conserve wildlife and to leave them unimpaired for future generations." *Id.* at 1441. The denial of interim injunctive relief was affirmed on appeal. Greater Yellowstone Coalition v. Babbitt, 1997 WL 121046 (9th Cir.(Mont.). On the Yellowstone bison controversy, see generally Keiter & Froelicher, *supra* note 13.

198. 5 U.S.C. §§ 551-612 (1994).

199. Significantly, the APA rulemaking procedures do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). For a general discussion of the legal difference between substantive rules, interpretive rules, and statements of policy, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

200. 5 U.S.C. § 553. *See generally* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 161-222 (3d ed. 1991). The Park Service, however, may not be legally obligated to adhere to the APA's informal rulemaking procedures: 5 U.S.C. § 553(a)(2) excepts matters involving "public property" from these rulemaking procedures. *See* Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979); Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1, 3 (D.D.C. 1994). While recognizing this exception, courts also have ruled that it should be narrowly construed. United States v. Picciotto, 875 F.2d 345, 347 (D.C. Cir. 1989). Even if the Park Service is exempt from § 553 compliance, it still must comply with 5 U.S.C. § 552(a)(1), which requires public notification through the Federal Register of substantive rules or general statements of policy. In any event, Park Service regulations addressing preservation policy are subject to judicial review under an "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A) (1994).

201. *See, e.g.*, 36 C.F.R. pts. 2, 3, 6 (1996); *see also* Keiter, *Ecosystem Management*, *supra* note 179, at 82-83.

202. *Cf.* United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) (reversing a criminal conviction based on a Park Service regulation not adopted in compliance with APA requirements). *See generally* Anthony, *supra* note 199.

203. *See supra* notes 190-93 and accompanying text.

204. *See infra* notes 205-12 and accompanying text.

otherwise, the APA's commitment to public participation in rulemaking and to judicial oversight seems to have limited application to the formulation of national park preservation policy, which can only exacerbate accountability concerns.

C. *Related Concerns: NEPA, Endangered Species, and Tort Liability*

Although the Park Service has broad legal authority to define its own preservation policy, additional statutory obligations may affect the scope and implementation of the policy. When a park decides to adopt or pursue a specific nonintervention or restoration policy, its decision is potentially subject to National Environmental Policy Act (NEPA) procedural requirements.[205] Under NEPA, a major federal action significantly affecting the quality of the human environment requires preparation of an Environmental Impact Statement (EIS).[206] This EIS requirement is designed to ensure fully informed administrative decisions by requiring public disclosure of the environmental consequences of proposed actions and public involvement in the decision process.[207] These NEPA procedural requirements are subject to judicial oversight,[208] though the courts have not consistently required federal agencies to prepare full EISs before taking action.[209]

Significantly, the Park Service's general preservation policy has not been subject to NEPA review. The 1988 Management Policies document, for example, was not prepared under NEPA procedures.[210] This means that the general policy has escaped the harsh glare of public scrutiny that accompanies NEPA disclosures, and that it has been effectively insulated from judicial review. Moreover, very few General Management Plans for individual parks have been accompanied by EISs. And the same is true for specific policy applications, such as Yellowstone's northern range elk management policy. But even when the Park Service policy calls for nonintervention or "no action," NEPA procedural obligations would seem to attach, because such a decision could have potentially significant environmental ramifications.[211]

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205. 42 U.S.C. §§ 4321-4347 (1994). *See generally* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9 (2d ed. 1994).

206. 42 U.S.C. § 4332(2)(C) (1994).

207. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

208. *See, e.g.*, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

209. *See, e.g.*, Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982); Park County Resource Council, Inc. v. United States Dep't of Agric., 817 F.2d 609 (10th Cir. 1987).

210. Some opportunity, however, for public comment on the policy proposal was provided, though the agency made no formal response to these comments. 53 Fed. Reg. 9821 (1988). Earlier policy documents, such as the 1968 NPS NATURAL AREAS POLICIES, *supra* note 9, predated NEPA and could not be expected to address NEPA concerns. *See* John Donahue, *Wildlife in Parks: Policy, Philosophy and Politics*, 14(1) GEORGE WRIGHT FORUM 47, 53-55 (advocating preparation of a programmatic action plan with NEPA documentation to examine wildlife management alternatives for the national parks).

211. *See* 40 C.F.R. § 1508.18 (1996) (providing that failure to act can constitute agency action). Whether NEPA compliance attaches to a federal nonintervention decision raises an interesting legal question; it might be argued that no "action" has been taken that "significantly af-

Ignoring NEPA may be counterproductive. The NEPA process provides the Park Service with an opportunity to clarify its preservation policies, to garner public support for them, and to respond directly to scientific and other criticisms. It also provides the public with an opportunity to inject its values and concerns into the decision process. Moreover, NEPA processes can—and should—be employed to assess the full ecological dimensions of implementation decisions, to engage other affected agencies in the implementation process, and to promote ecosystem management initiatives, which is particularly important given the transboundary impacts that accompany many Park Service preservation policies.[212] In short, by ensuring broad involvement in defining and implementing Park Service preservation policy, NEPA procedures can be used to legitimize nonintervention and ecological restoration decisions.

The powerful Endangered Species Act (ESA),[213] which is administered by the U.S. Fish and Wildlife Service, also impacts national park preservation policy. Designed to protect any species facing possible extinction and its habitat,[214] the ESA prohibits federal agencies from jeopardizing a "listed" species or from adversely modifying its habitat.[215] It also prohibits anyone from "taking" a "listed" species, which includes habitat modification.[216] Finding that the Endangered Species Act is fundamentally preservationist in nature, the Supreme Court has ruled that it gives species protection priority over other considerations.[217]

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fects" the environment. One court has ruled that the Secretary of the Interior's decision not to intervene into Alaska's decision authorizing a wolf hunt on federal lands did not constitute a major *federal* action for NEPA purposes. Defenders of Wildife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980). However, in the case of the Park Service's preservation policy, it seems clear that a *federal* resource management action has occurred when park officials implement a nonintervention management policy for certain species of wildlife, such as elk.

212. In short, NEPA can be used to broaden the Park Service's environmental focus and to promote interjurisdictional cooperation for its preservation policies. NEPA processes also can be used to inject biodiversity considerations into resource management policy and decisions. *See* Dinah Bear, *Using the National Environmental Policy Act to Protect Biological Diversity*, 8 TUL. ENVTL. L.J. 77, 80-83 (1994); Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43, 44-54 (1990); Cynthia Carlson, *NEPA and the Conservation of Biological Diversity*, 19 ENVTL. L. 15 (1988); HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES II, *supra* note 121, at 69.

213. 16 U.S.C. §§ 1531-1543 (1994). *See generally* George Cameron Coggins & Irma S. Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433 (1982) (discussing the developments leading to the enactment of and the implications of the Endangered Species Act).

214. 16 U.S.C. § 1531(b) (1994). Under the ESA, among other things, a species facing possible extinction is to be "listed" as either endangered or threatened, a recovery plan is to be prepared, and critical habitat is to be designated. 16 U.S.C. § 1533 (1994); *see* Federico M. Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1 (1996); Katherine Simmons Yagerman, *Protecting the Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990).

215. 16 U.S.C. § 1536(a)(2) (1994). *See, e.g.*, Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

216. 16 U.S.C. § 1538 (a)(1)(B) (1994); *see* Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995). *See generally* Federico M. Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991) (discussing the history, importance, and future of section 9).

217. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

In national parks where ESA-listed species are present, the Endangered Species Act has become the driving force behind species preservation efforts. For example, Yellowstone's grizzly bear management and wolf reintroduction programs are being implemented under the Endangered Species Act rather than the National Parks Organic Act.[218] Should a conflict arise between these two statutes, the more specific and protective Endangered Species Act provisions would appear to take precedence over any less protective park management policies.[219] To facilitate controversial species reintroductions, such as Yellowstone's wolf reintroduction, the ESA contains an "experimental population" provision, which authorizes special rulemaking and limited taking to address the concerns of nearby landowners and others.[220] In addition, because the ESA prohibition on takings extends to private as well as public land, it provides a legal basis for extending preservation efforts beyond park boundaries.[221] Thus, when ESA-protected species are involved, the Endangered Species Act can be viewed as supplementing and strengthening national park preservation efforts.

The threat of tort liability, based upon the Federal Tort Claims Act (FTCA),[222] generally should not deter the Park Service from pursuing its preservation policy. In the national park setting, the typical FTCA case involves a personal injury claim based on the Park Service's alleged negligence for not protecting visitors from wilderness hazards.[223] When faced with such claims, the courts have consistently relied upon the FTCA's "discretionary function" provision[224] to reject attacks on the Park Service's resource man-

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218. *See supra* notes 85-97 and accompanying text.

219. In other words, the ESA's species protection requirements should prevail over any national park management policies that might "jeopardize" or "take" a protected species. For example, a Park Service decision to locate visitor facilities or to construct a road in critical habitat for an ESA-listed species would be subject to challenge under the Endangered Species Act. *Cf.* National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 390-91 (D. Wyo. 1987) (rejecting both ESA and Organic Act claims in a challenge to Yellowstone's decision not to close the Fishing Bridge campground despite its location in prime grizzly bear habitat). However, Park Service limitations on visitor activities to protect endangered species are subject to review under an arbitrary and capricious standard and must be based on real not speculative evidence. Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996) (enjoining the Park Service from closing part of Voyageurs National Park to snowmobiling to protect ESA-listed wolves because there was no evidence of potential harm to wolves). Nonetheless, the Park Service would appear to have the authority under the Organic Act to adopt and implement more protective policies than are required under the Endangered Species Act, so long as the policy is reasonably related to conserving park resources in an unimpaired condition and is supported by credible factual evidence. 16 U.S.C. § 1 (1994). In short, the Endangered Species Act establishes a maximum threshold but not a minimum governing the protection of natural resources in national parks.

220. 16 U.S.C. § 1539(j) (1994). On the use of the "experimental population" provision to facilitate wolf reintroduction in Yellowstone, see Steven H. Fritts, *Management of Wolves Inside and Outside Yellowstone National Park and Possibilities of Wolf Management Zones in the Greater Yellowstone Area*, in WOLVES FOR YELLOWSTONE?, *supra* note 73, at 1-9.

221. *See infra* Parts V.D, V.D.1.

222. 28 U.S.C. §§ 2671-2680 (1994).

223. *See, e.g.*, Johnson v. United States, 949 F.2d 332 (10th Cir. 1991); Zumwalt v. United States, 928 F.2d 951 (10th Cir. 1991); Martin v. United States, 546 F.2d 1355 (9th Cir. 1976); Smith v. United States, 546 F.2d 872 (10th Cir. 1976).

224. 28 U.S.C. § 2680(a) (1994). *See generally* Gisele C. DuFort, Note, *All the King's Forces or The Discretionary Function Doctrine in the Nuclear Age:* Allen v. United States, 15 ECOLOGY L.Q. 477 (1988).

agement policies. Under the discretionary function doctrine, government agencies are absolved from liability for public policy judgments "grounded in social, economic and political policy."[225] In *Martin v. United States*,[226] for example, Yellowstone officials were not responsible for a deadly grizzly bear attack attributed to their decision closing the park dumps to bears. Concluding that Yellowstone's grizzly bear management policy involved discretionary judgments, the court observed that Congress did not intend to make the United States "an insurer of the safety of all Yellowstone National Park visitors."[227]

In the national park setting, however, the courts have not consistently accepted the discretionary function defense when the tort claim is based on a failure to warn of a hazardous condition. In *Smith v. United States*,[228] for example, the court found that the government's duty to warn visitors of a potential national park hazard (*i.e.* thermal pools) provided a separate basis for potential liability and did not involve a discretionary policy judgment. But where the hazard is apparent and merely reflects the fact that national parks are wilderness settings, the courts generally have rejected failure-to-warn claims.[229] Only in cases where the hazard was not evident and was known to the Park Service have the courts found liability. Yet even in these cases, the Park Service can avoid the risk of liability by providing an adequate warning. Thus, the threat of FTCA liability for visitor injuries should not be a significant limitation on national park preservation policy.

D. *Beyond the Boundary: Regulation and Liability*

In implementing its preservation policy, the Park Service must acknowledge that park wildlife and ecological processes will not respect park boundaries. Predators may prey on domestic livestock outside the park, ungulates may graze on adjacent private lands, and fire may burn beyond the boundary and destroy adjoining property. When this occurs, park neighbors may respond by killing park wildlife or suing for damages. These ecological and practical realities raise two important legal questions.[230] First, does the Park Service have any legal authority to protect park resources beyond the boundary line? Second, does the Park Service face any liability for damages that occur beyond park boundaries?

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225. United States v. Varig Airlines, 467 U.S. 797, 814 (1984); *see* Berkovitz v. United States, 486 U.S. 531, 536-39 (1988).

226. 546 F.2d 1355 (9th Cir. 1976).

227. *Martin*, 546 F.2d at 1360. Similarly, in *Johnson v. United States*, 949 F.2d 332 (10th Cir. 1991), the discretionary function doctrine was invoked to reject liability claims predicated on the Park Service's alleged failure to regulate mountain climbing activities in Grand Teton National Park. *Id.* at 337; *see also Zumwalt*, 928 F.2d at 954-56.

228. 546 F.2d 872 (10th Cir. 1976); *see also* Boyd v. United States *ex rel.* U.S. Army, Corps of Engineers, 881 F.2d 895 (10th Cir. 1989).

229. *See, e.g.*, Kiehn v. United States, 984 F.2d 1100, 1102-06 (10th Cir. 1993); *Johnson*, 949 F.2d at 337-38; *Zumwalt*, 928 F.2d at 955-56.

230. Transboundary impacts also may raise legal issues under NEPA and the Endangered Species Act. *See supra* notes 205, 231-43 and accompanying text for a brief discussion of how these statutes may apply beyond park boundaries.

1. Regulatory Authority on Adjacent Lands

Although national park wildlife ordinarily can be expected to stray beyond park boundaries, the Park Service has only limited authority to regulate these animals once they leave the park. Whether the expansive regulatory power that the Park Service enjoys within its own domain extends beyond the boundary line remains an uncertain and contentious issue. As a result, when wildlife cross the boundary, they are ordinarily subject to state jurisdictional authority.[231] State wildlife agencies are not governed by a preservation mandate, and they generally do not practice nonintervention management.[232] Rather, state wildlife agencies are primarily devoted to producing an annual big game crop to meet the demand of local hunters. In some cases, state wildlife management policies can serve to compliment the Park Service's ecological goals, as in the case of Yellowstone's northern elk herd.[233] In other cases, however, these policy differences could threaten the integrity of national park ecosystem components or processes.

To address these policy differences, the Park Service may consider extending its regulatory authority onto adjacent lands for ecological purposes. Under the Property Clause,[234] Congress plainly has the authority to regulate activities on adjoining nonfederal lands that could harm public lands or resources.[235] Congress can also delegate its regulatory power to the federal agencies that are responsible for those lands.[236] According to one court, a general congressional grant of regulatory power is sufficient to enable federal public land management agencies to regulate threatening activities on adjacent nonfederal lands. In *United States v. Lindsey*,[237] the Ninth Circuit Court of Appeals upheld a Forest Service regulation prohibiting fires—even on nonfederal lands—within the boundaries of a national recreation area.[238]

Congress has not expressly delegated extra-territorial regulatory powers to the Park Service that might be invoked to protect park ecological resources beyond park boundaries.[239] Nonetheless, Congress has imposed a responsibility on the Park Service, through the 1978 amendments to the Organic Act, to protect park resources against threatening activities, whether those activities arise on park lands or adjacent lands.[240] The so-called Redwood Amendment

231. 16 U.S.C. § 528 (1994); 43 U.S.C. § 1732(b) (1994). *See generally* Coggins & Ward, *supra* note 117 (providing an historical overview of public land wildlife management policy and arguing for consideration of wildlife when making any resource decision).

232. *See generally* Coggins & Ward, *supra* note 117; LUND, *supra* note 117.

233. *See supra* note 74 and accompanying text.

234. U.S. CONST. art. IV, § 3, cl. 2.

235. Kleppe v. New Mexico, 426 U.S. 529 (1976); Camfield v. United States, 167 U.S. 518 (1897); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981); *see* GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW 3-17 (1996).

236. *See* United States v. Grimaud, 220 U.S. 506 (1911).

237. 595 F.2d 5 (9th Cir. 1979).

238. *Lindsey*, 595 F.2d at 6; *see also* United States v. Arbo, 691 F.2d 862 (9th Cir. 1982); Free Enter. Canoe Renters Ass'n v. Watt, 549 F. Supp. 252 (E.D. Mo. 1982), *aff'd*, 711 F.2d 852 (8th Cir. 1983).

239. However, the Park Service has been given general regulatory powers that might be extended beyond park boundaries under the *Lindsey* rationale. *See Lindsey*, 595 F.2d at 6.

240. National Park Service Act Amendments of 1978, Pub. L. No. 95-250, § 101, 92 Stat.

provides that "the protection, management and administration of [national parks] shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which those areas have been established."[241] Although courts have ruled that the amended Organic Act imposes a legal duty on the Secretary of the Interior to protect park resources, they have not affirmatively obligated park officials to intervene into the natural resource management judgments made by neighboring agencies.[242] Given the contentious federalism and property rights issues at stake, Park Service officials have been reluctant to assert their authority aggressively beyond park boundaries.[243] Thus, although the Park Service may have the latent power to pursue its preservation objectives beyond park boundaries, legal ambiguities as well as practical realities may effectively prevent it from doing so.[244]

2. Tort and Takings Liability

Under its preservation policy, a Park Service decision not to intervene with wildlife or natural processes raises the specter of liability for injuries that occur outside park boundaries. Is the Park Service, for example, liable under the Federal Tort Claims Act for damages caused by wildlife that wander outside the park or by wildfires that burn beyond the boundary? Or is the Park Service liable, under constitutional takings doctrine, if park wildlife impair the value of adjacent property? In each case, the answer appears to be no.

Under the Federal Tort Claims Act, the same analysis that applies to injuries within national parks would apply to claims arising beyond park boundaries.[245] Because the Park Service's nonintervention and ecological restoration policies are based upon a legally permissible preservation policy judgment, they should be protected under the discretionary function doctrine.[246] In the case of Yellowstone, the Park Service should be immunized from tort liability if bison carrying brucellosis wander unchecked beyond park boundaries or if a lightning-caused fire should burn beyond park boundaries. In both cases, the preservation policy decision can be traced directly to a judgment

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163, 166 (codified as amended at 16 U.S.C. § 1a-1 (1994)); *see* Robert B. Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355, 370-75 (1985); George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 15-19 (1987); William J. Lockhart, *External Park Threats and Interior's Limits: The Need for an Independent Park Service*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS, *supra* note 5, at 3, 30-36.

241. 16 U.S.C. § 1a-1 (1994).

242. *See* Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980); *see also* Sierra Club v. Department of the Interior, 424 F. Supp. 172 (N.D. Cal. 1976).

243. *See* Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923, 948-51 (1989); Sax & Keiter, *supra* note 163, at 217-22; THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR A NEW GENERATION: VISIONS, REALITIES, PROSPECTS 151 (1985).

244. *But see supra* notes 213-21 and accompanying text (suggesting that the Endangered Species Act's protection against takings effectively extends federal regulatory power beyond national park boundaries).

245. *See supra* notes 222-29 and accompanying text.

246. *See supra* notes 225-29 and accompanying text.

consistent with the Park Service's organic responsibilities. The fact that no FTCA claims were successfully litigated in the aftermath of Yellowstone's 1988 fires further supports the conclusion that tort liability concerns generally should not deter the Park Service from pursuing its preservation policy.[247]

There is, however, one ruling that raises the specter of potential tort liability. In *Parker Livestock and Cattle Co., Inc. v. United States*,[248] a Wyoming federal district court summarily rejected the argument that the discretionary function doctrine barred a FTCA claim based on transmission of a wildlife disease and found that the Park Service had a duty to warn of the potential for disease transmission. In *Parker*, a Wyoming rancher claimed that his cattle herd contracted brucellosis from bison or elk that had wandered outside Yellowstone National Park. The court did not explain its discretionary function ruling, even though it is inconsistent with other Federal Tort Claims Act decisions. It is particularly difficult to reconcile the *Parker* ruling, which effectively reviews a national park wildlife management policy, with the ruling in *United States v. Martin*,[249] which clearly immunized Yellowstone's grizzly bear management policy from tort suits.[250] Nonetheless, the *Parker* court ultimately ruled the rancher did not establish that park wildlife were responsible for infecting his cattle herd.[251] Thus, even without FTCA discretionary function immunity, causation proof problems make it difficult to challenge national park preservation policies through the medium of a tort suit.

A constitutional takings claim is also unlikely to succeed against Park Service preservation policies that might indirectly damage adjacent property. Although the Supreme Court has recently reinvigorated constitutional takings doctrine, these cases have involved government zoning limitations imposed on private landowners.[252] In cases involving public land and resources, the courts have continued to reject most takings claims.[253] This is particularly true in cases involving takings claims against federal officials responsible for wildlife that allegedly damaged private property. In *Mountain States Legal Foundation v. Hodel*,[254] for example, the court ruled that no taking occurred when wild horses protected by federal law consumed forage on private land, finding that a reduction in the value of property was not a taking.[255] Similar-

247. Relatedly, the federal government does not offer compensation for livestock or other damages attributed to reintroduced wolves. FISH & WILDLIFE SERV., DEP'T OF THE INTERIOR, THE REINTRODUCTION OF GRAY WOLVES TO YELLOWSTONE NATIONAL PARK AND CENTRAL IDAHO: DRAFT ENVIRONMENTAL IMPACT STATEMENT 2-5 (1993).

248. 796 F. Supp. 477 (D. Wyo. 1992); *see also* Parker Land & Cattle Co. v. Wyoming Game & Fish Comm'n, 845 P.2d 1040 (Wyo. 1993).

249. 546 F.2d 1355 (9th Cir. 1976); *see supra* notes 226-27 and accompanying text.

250. For a detailed analysis of the *Parker* ruling and its treatment of the FTCA discretionary function doctrine, see Keiter & Froelicher, *supra* note 13, at 38-45.

251. *Parker*, 796 F. Supp. at 488.

252. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

253. *See* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 228-51 (3d ed. 1993).

254. 799 F.2d 1243 (10th Cir. 1986).

255. *Mountain States Legal Found.*, 799 F.2d at 1431.

ly, in *Christy v. Hodel*,[256] the court rejected a takings challenge to the Endangered Species Act, concluding that the Act's prohibition against killing grizzly bears depredating on livestock was a legitimate exercise of federal regulatory power.[257] Given the well-known risks associated with property ownership in the Yellowstone region and other national park settings, adjacent property owners can—and should—reasonably expect some losses attributed to the national park's presence and its preservation management policies.[258] When these management policies are clearly established and well-known, any other result would essentially make the government an unlimited insurer and give adjacent landowners a virtual veto over national park preservation policy.

VI. PRESERVATION REVISITED: EXPANDING THE VISION AND PROCESS

A. *A Policy at Risk*

Despite its apparently firm legal foundation, the Park Service's preservation policies still appear curiously vulnerable. Persistent criticism has taken a toll on national park preservation policy and called into question its validity in today's world. In part, this is because the related concepts of nonintervention and ecological restoration represent such a significant departure from earlier resource management policies. In part, it is because the national parks are no longer isolated islands, but must coexist with neighbors who are also part of the larger ecological complex. And in part, it is because the scientific assumptions and conclusions supporting specific preservation policies have not been fully accepted. As a result, national park preservation policy is in danger of being modified to accommodate more rather than less intensive management, which could render the basic policy suspect as well as the Park Service's commitment to it.

The greatest risk to the policy is its incremental or piecemeal erosion in the face of local political pressure and scientific criticism. In Yellowstone's case, significant adjustments already have been made to address adjacent landowner concerns in the case of bison, wolves, and fire.[259] In each instance, the Park Service has modified its nonintervention approach to address nonecological concerns, even agreeing to erect corrals to capture park bison. At the same time, Yellowstone's ungulate management policies are also under attack, primarily on scientific grounds for allegedly ignoring ecological con-

256. 857 F.2d 1324 (9th Cir. 1988).

257. *Christy*, 857 F.2d at 1335.

258. *See* Joseph L. Sax, *Ecosystems and Property Rights in Greater Yellowstone: The Legal System in Transition*, *in* THE GREATER YELLOWSTONE ECOSYSTEM, *supra* note 10, at 77, 77-82. *See generally* Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993) (discussing private land ownership and its relationship to ecology); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989) (explaining that existing use zoning will survive under the U.S. Supreme Court interpretations of the takings clause); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 ENVTL. L. REP. 10231 (1994) (discussing the limits of the rights of property owners).

259. See *supra* notes 83-84, 88-89, 103-06 and accompanying text for descriptions of these modifications.

cerns. Should the Park Service decide to intervene in this case, then Yellowstone's commitment to limited intervention will have been effectively compromised in each instance where it has come under attack.

The risk to national park preservation policy is exacerbated by the Park Service's traditional insularity, which further exposes its policy to powerful political, scientific, and other pressures. Historically, Park Service management has rarely reached beyond park boundaries; resource policy and implementation decisions have been viewed primarily as internal park matters and not subjected to much outside scrutiny.[260] Even when outside experts have been consulted (*e.g.* the Leopold Report), the resulting policy recommendations have ordinarily been promulgated internally without public involvement or consultation.[261] When national park preservation policy was refined in the 1988 Management Policies document,[262] it was not subjected to formal public involvement, through either NEPA review, APA rulemaking, or like procedures.[263] In addition, site-specific applications of the policy have not always been subject to full NEPA review.[264] At the same time, the Park Service's science program has been repeatedly criticized because it lacks independent stature and funding within the agency, has not taken full advantage of independent scientists, and does not consistently subject park research to outside peer review.[265] With limited public involvement in the policy formula-

260. This traditional insularity may reflect several related factors: Until recently national parks were physically isolated from most neighbors and park policies therefore did not often affect others; operating under a single-use (preservation) mandate, park management decisions generally have not been as controversial as those made by the multiple-use agencies; and environmental and other watchdog organizations have been preoccupied elsewhere on the public domain because development and other environmental pressures have been greater outside the national parks. *See generally* Sax & Keiter, *supra* note 163.

261. See *supra* notes 40-41 and accompanying text for a description of the origins of the policy.

262. *See supra* notes 51-55 and accompanying text.

263. WAGNER ET AL., *supra* note 10, at 161-62. Indeed, the Park Service has not regularly employed the law and legal procedures for resource management purposes. *See* Keiter, *Ecosystem Management*, *supra* note 179, at 82-83; Sax & Keiter, *supra* note 163, at 217-22; *see also* CLARKE & MCCOOL, *supra* note 3, at 205-207 (noting that the Park Service, in comparison to other federal resource management agencies, has not fully integrated NEPA processes into its policymaking or decisionmaking). However, in the case of the 1988 Management Policies document, the Park Service did announce preparation of the document in the Federal Register and solicit public comment. 53 Fed. Reg. 9821 (1988).

264. Rather than prepare full EISs on resource management decisions, the Park Service has often prepared less rigorous environmental assessments, which provide fewer opportunities for public involvement and entail less detailed environmental analysis. For example, Yellowstone's revised fire management policy and interim bison management policies are based on environmental assessments rather than EISs. *See supra* notes 83-84, 103-06 and accompanying text. Moreover, many park General Management Plans have been based on EAs rather than EISs, which is again true in Yellowstone's case. *See supra* note 60; *see also* WAGNER ET AL., *supra* note 10, at 161-62.

265. NATIONAL PARKS & CONSERVATION ASS'N, *supra* note 39, at 11; NATIONAL ACADEMY OF SCIENCES, *supra* note 39, at 446; *see also* Ervin Zube, *supra* note 39; U.S. DEP'T OF THE INTERIOR, OFFICE OF INSPECTOR GENERAL, AUDIT REPORT, NATURAL RESOURCE ACTIVITIES: NATIONAL PARK SERVICE, RPT. NO. 90-19 (1989). Recently, following creation of the Biological Resource Division in the U.S. Geological Survey, many Park Service were transferred to this new entity, further diminishing the agency's own scientific resources. *See* Zube, *supra* note 39, at 20-21. *See also* Huff, *supra* note 147, at 27 (noting that the Park Service "employs very few wildlife biologists and has no Service-wide organizational structure to support wildlife management profes-

tion process and diminished public confidence in the underlying scientific research, it is difficult for the Park Service to rebut the twin charges that national park preservation policies lack scientific justification and are insensitive to human concerns.

Of course, because the national parks are legislatively created entities, political reality will dictate some compromise and adjustment in management policy.[266] Moreover, any preservation policy that is based on ecological goals will require periodic adjustment as new scientific information becomes available and as environmental conditions change. But if incremental policy modifications and adjustments are not carefully conceived, supported by well-accepted scientific data, and harmonized with fundamental ecological preservation goals, then the policy itself may disappear in a welter of exceptions. As exceptions and implementation inconsistencies mount, preservation policies will become even more vulnerable to legal and political attack and will require more rather than less justification.[267] Should this occur, the American public will find the national parks subject to the same intensive management that prevails on all other public lands.

B. *Broadening the Policy Debate*

When national park preservation policy is placed in a larger historical and ecosystem context, several powerful arguments can be advanced to support the basic nonintervention and ecological restoration policies. These arguments are grounded in legal, scientific, and political considerations that highlight the unique and important role national parks play in the nation's commitment to promoting biological conservation and to advancing scientific knowledge.

The national parks occupy a unique legal position among the nation's public lands and thus offer otherwise unavailable resource management opportunities. By law, the national parks are the only federal lands where wildlife are preserved and not managed intensively for harvest purposes.[268] On national forest and BLM multiple-use public lands, wildlife are managed by state game and fish agencies primarily as a harvestable resource.[269] In federally

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sionalism . . .").

266. *See* John Freemuth, *The National Parks: Political Versus Professional Determinants of Policy*, 49 PUBLIC ADMIN. REV. 278 (1989). *See generally* James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241 (1994) (concluding that as long as the political process controls resources on public lands, special interest politics will play a role in establishing management policy).

267. *See supra* Part V.B.

268. *See supra* note 159 and accompanying text. *See also* John Freemuth, *Our national Park Policy: Some Thoughts on Politics and the Role of Science*, 14(1) GEORGE WRIGHT FORUM 34, 37 (1997) (arguing that the Park Service's statutory obligation to manage national parks "for future generations" requires a "long term 'public interest' perspective," which distinguishes national park management from the management standards governing other public land management agencies).

269. *See supra* notes 232-33 and accompanying text. Although the Forest Service has a biodiversity conservation responsibility, 16 U.S.C. § 1604(g)(3)(B) (1994), this mandate is qualified by multiple-use language and has not been consistently enforced by the courts. *See, e.g.*, Leavenworth Audubon Adopt-a-forest Alpine Lakes Protection Soc. v. Ferraro, 881 F. Supp. 1482 (W.D. Wash. 1995); Sierra Club v. Robertson, 845 F. Supp. 485 (S.D. Ohio 1994). *But see* Seattle

designated wilderness areas, state game and fish agencies are also responsible for wildlife management,[270] and the emphasis is on maintaining harvestable populations of big game species. Even in national wildlife refuges, which are designed to protect wildlife habitat, hunting is permitted as are other secondary activities.[271] The national parks are therefore the sole public land designation where the legal opportunity exists to pursue a noninterventionist wildlife management policy.[272] Moreover, as relatively isolated enclaves of undisturbed lands, the national parks offer one of the few suitable locations for controversial species recovery and reintroduction efforts.

Indeed, important national ecological preservation goals are inherently linked to the Park Service's preservation policies. An emerging yet powerful national commitment to biodiversity conservation is reflected in such laws as the National Park Service Organic Act, Endangered Species Act, Wilderness Act, Wild and Scenic Rivers Act, and National Forest Management Act.[273] Scientists agree that effective biodiversity conservation requires an ecosystem-oriented strategy that transcends the boundaries of current land designations.[274] The national parks, which often contain extensive expanses of undeveloped lands, are vital components in these ecosystem-based conservation efforts. In Yellowstone's case, for example, the park is a critical refuge for grizzly bears, wolves, bison, and other wide-ranging and controversial species that do not coexist easily with people. In essence, the park serves as a protected ecological core, where human intrusions into biological processes are limited and where dwindling species can be nurtured back to health. A national park preservation policy emphasizing limited intervention and ecological restoration should help ensure the integrity of this ecosystem core, and thus supplement broader biological conservation goals.

The national parks also have enormous scientific value as large outdoor

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Audubon Society v. Evans, 952 F.2d 297, 301 (9th Cir. 1991) (treating the NFMA biodiversity provision as a substantive restraint on Forest Service resource management decisions). *See generally* Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 68-77 (1994).

270. 16 U.S.C. § 1133(b)(8) (1994 & Supp. 1997).

271. 16 U.S.C. §§ 668dd-668ee (1994); Humane Society v. Lujan, 768 F. Supp. 360 (D.D.C. 1991); Defenders of Wildlife v. Andrus, 455 F. Supp. 446 (D.D.C. 1978). *See generally* Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENVTL. L. REV. 1 (1994).

272. The same is also true regarding national parks and fire management policy, though federal policy is moving toward allowing some natural and prescribed fires to burn on other public lands. This is particularly true in designated wilderness areas, which are usually large enough to allow lightning caused fires to burn without threatening private property or lives. *See* 1995 FEDERAL WILDLAND FIRE MANAGEMENT, *supra* note 103.

273. See *Biodiversity Symposium*, 8 TUL. ENVTL. L.J. 1 (1994); William M. Flevares, *Ecosystems, Economics, and Ethics: Protecting Biological Diversity at Home and Abroad*, 65 S. CAL. L. REV. 2039 (1992); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265 (1991); *see also* BIODIVERSITY AND THE LAW (W.J. Snape, ed. 1995); ENVIRONMENTAL POLICY AND BIODIVERSITY (R.E. Grumbine, ed. 1994). Beyond these statutes, biodiversity considerations are now being integrated into NEPA processes. *See* Bear, *supra* note 212; Carlson, *supra* note 212; OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, TECHNOLOGIES TO MAINTAIN BIOLOGICAL DIVERSITY (1987); *see also* Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435 (1992).

274. See *supra* notes 15-18 and accompanying text.

biological laboratories.[275] As a scientific matter, the Park Service's nonintervention and restoration policies represent an important experiment in understanding ecological processes on a broad scale. Not subject to extensive human intervention, national park ecosystems provide scientists with the opportunity to study how a basically unaltered ecosystem functions. This opportunity is unique: Outside the national parks, most landscapes have been altered by intensive human management to promote agricultural cultivation, resource extraction, housing developments, and the like. National park ecosystems also provide scientists with an important baseline for measuring the impact that human intrusions have on ecological processes.[276] By understanding how an undisturbed ecosystem functions and evolves, scientists are better able to assess the impact that human activities may have on ecological processes and to determine when intervention may be necessary to protect critical components.[277]

As a practical matter, much of the data necessary to make informed ecological intervention judgments concerning park ecosystems is not available. Scientists now understand that ecosystem processes are dynamic and often chaotic, tending toward disequilibrium rather than stability and balance.[278] To manage these dynamic ecological systems effectively, more rather than less scientific information and historical data is necessary. But there is little long term scientific data available to predict how national park ecosystems function or how they will respond to human interventions or perturbations.[279] In short, scientists often do not know enough about national park biological resources and ecological processes to offer reliable predictions that can serve as the basis for an informed interventionist policy. In the face of this uncertainty, the national parks represent particularly appropriate locations for gathering this scientific information over ecologically significant time periods.[280]

Moreover, the Park Service's commitment to minimal intervention represents a singular acknowledgment of the complexities involved in ecological management. In the history of utilitarian resource management, scientific management techniques based on human manipulation of ecological systems have often failed and imperiled important biological resources. Public land manage-

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275. *See, e.g.*, Boyce, *supra* note 149, at 203; NATIONAL RESEARCH COUNCIL, *supra* note 46, at 261; NATIONAL PARKS & CONSERVATION ASS'N, *supra* note 39, at 6-7.

276. NATIONAL PARKS AND PROTECTED AREAS, *supra* note 70, at 415-49; NATIONAL PARKS & CONSERVATION ASS'N, *supra* note 39, at 7, 11.

277. Jane Lubchenco et al., *The Sustainable Biosphere Initiative: An Ecological Research Agenda*, 72 ECOLOGY 371, 397-401 (1991).

278. *See* DANIEL B. BOTKIN, DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY (1990); A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 Loy. L.A. L. Rev. 1121 (1994). *See generally* Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847 (1994).

279. Boyce, *supra* note 149, at 184-89; NATIONAL PARKS & CONSERVATION ASS'N, *supra* note 39, at 5-7; Huff, *supra* note 147 at 29.

280. This endorsement of long term monitoring and data gathering is not a recommendation against any interventionist management; rather, it is consistent with the concept of adaptive management and the need for caution before intervening in the face of scientific uncertainty. *See infra* notes 289-91 and accompanying text.

ment agencies have not always accurately predicted or understood how ecosystems will react to manipulation or disturbance. The Forest Service, despite its sustained yield mandate and its extensive scientific research program, has not been able to operate a sustainable timber harvest program on the national forests.[281] Similarly, the BLM's range management program has left federal rangelands in poor ecological condition.[282] As often as not, the scientific assumptions underlying established thresholds of intervention have proven wrong, leaving natural resource managers unsure how to manipulate complex ecological systems. Given this recurrent pattern of failure in applying interventionist management techniques, the Park Service's preservation policy should not be faulted for advocating less rather than more intervention in the face of uncertainty.

C. *Toward Enhanced Legitimacy and Accountability*

But these arguments—no matter how compelling—can not alone sustain and validate national park preservation policy. Underlying legitimacy and accountability concerns also must be addressed. The legitimacy concern reflects the fact that the scientific and other assumptions underlying preservation policy have not been opened widely to outside review or scrutiny through public involvement or related processes,[283] which means the policy has not been validated outside of the agency. The related accountability concern is based upon the asserted lack of objectively verifiable management standards or goals,[284] which makes it difficult to determine whether national park preservation policy is working or not.[285] Additional public involvement and scientific review opportunities would address most of these legitimacy and accountability concerns; it would provide a forum to evaluate policy assumptions, it would obligate agency officials to respond to criticisms, and it would promote public education and understanding.

Legal opportunities are available to open Park Service preservation policy more broadly to public and scientific scrutiny. During the past several decades, as public confidence in agency expertise throughout the federal bureaucracy

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281. *See* PAUL W. HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO 271-78 (1994); DAVID A. CLARY, TIMBER AND THE FOREST SERVICE 195-99 (1986).

282. *See* BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, RANGELAND REFORM '94: DRAFT ENVIRONMENTAL IMPACT STATEMENT (1994); Joseph M. Feller, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555 (1993-94); U.S. HOUSE OF REP. COMM. ON GOVERNMENT OPERATIONS, FEDERAL GRAZING PROGRAM: ALL IS NOT WELL ON THE RANGE, 99TH CONG., 2D SESS., H. RPT. 99-593 (1986).

283. *See supra* notes 260-65 and accompanying text.

284. *See supra* notes 123-29 and accompanying text.

285. To the extent that national park preservation policy is based on general, nonquantifiable standards (*i.e.* limited intervention and ecological restoration) rather than specific, quantifiable standards, the lack of accountability criticism is not entirely fair. As noted earlier, these general preservation policies are significant departures from conventional natural resource management approaches, and should therefore not be judged solely by traditional criteria. *See supra* notes 115-22 and accompanying text. However, the Park Service still must be accountable for its policies, which can be achieved by ensuring that the policies are subject to public scrutiny and judicial oversight under NEPA, the APA, and related laws.

has waned,[286] multiple laws have been passed opening administrative decision processes to public scrutiny and judicial review. The NEPA EIS process and APA rulemaking procedures both offer opportunities for public review and comment on national park preservation policy and specific applications of the policy.[287] These laws also require the Park Service to respond to the public comments,[288] a process designed to promote thoughtful and accountable administrative decisionmaking. Alternatively, under the Federal Advisory Committee Act,[289] the Park Service could utilize a neutral advisory committee to review the scientific conclusions and assumptions underlying controversial preservation policies. The FACA imposes specific neutrality, openness, and public notification requirements, which should ensure an open and even-handed assessment of basic policy assumptions and of the ramifications of specific applications. Moreover, judicial review is available to ensure procedural compliance and rational decisionmaking.

National park preservation policy can also be validated through the use of adaptive management techniques.[290] Much of the criticism directed toward the policy is based on fundamental disagreement over scientific assumptions and interpretations.[291] Whether or not, for example, Yellowstone's northern range is on the verge of ecological collapse from ungulate overbrowsing raises difficult scientific questions. Adaptive management, which contemplates regular monitoring and assessment of ecological conditions along with periodic adjustments (or adaptations), can be employed to test scientific assumptions.[292] Other criticism of national park preservation policy reflects a basic

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286. Neither the Park Service nor other federal agencies any longer enjoy an unqualified public trust or ready deference to claims of agency expertise. An often skeptical public readily understands that most policy decisions are based upon value judgments rather than objective, value-free determinations. *See* Freemuth, *supra* note 266; WAGNER ET AL., *supra* note 10, at 158-63.

287. See *supra* notes 198-12 and accompanying text for a brief description of the EIS and APA rulemaking processes. Use of these procedures would provide Park Service officials with a basis for determining whether the policy is consistent with contemporary public values. It also would provide an opportunity to test the Park Service's scientific justifications for the policy against the claims of its scientific critics. And it would provide an opportunity to coordinate national park policy with neighboring agencies, which is an important dimension of any ecological management policy.

288. 40 C.F.R. § 1503.4 (1996) (requiring agencies preparing EISs to respond to comments); 5 U.S.C.A. § 553(c) (1994) (requiring a concise statement of the basis and purpose of the rule); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (establishing the "hard look" doctrine for judicial review purposes, which effectively requires federal agencies to prepare an administrative record to facilitate judicial review in rulemaking challenges); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 2.1.5 (1993).

289. 5 U.S.C. app. § 2 (1994); *see* Sheila Lynch, Note and Comment, *The Federal Advisory Committee Act: An Obstacle to Ecosystem Management by Federal Agencies?*, 71 WASH. L. REV. 431 (1996).

290. On adaptive management, see generally KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993); C.J. WALTERS, ADAPTIVE MANAGEMENT OF RENEWABLE RESOURCES (1986).

291. *See supra* notes 123-33 and accompanying text.

292. However, to the extent that adaptive management also contemplates aggressive intervention as part of the experimental adjustment process, this approach—which runs contrary to the Park Service's basic nonintervention policy—should only be employed after sufficient ecological data has been acquired over a long enough time frame. Moreover, in a region like Greater Yellowstone with expansive and ecologcially intertwined public lands, it would generally be preferable to experiment with manipulative management approaches on multiple-use public lands outside the national park, while using the park as a baseline for long term study of nonintervention manage-

disagreement over policy objectives and their impact on human interests. Adaptive management, which acknowledges that human value judgments and interests are critical dimensions of any natural resource policy, also contemplates the regular assessment and reevaluation of public concerns. This process can be used to secure public involvement in formulating and implementing preservation policy, which should ensure that it takes account of changing public concerns. In short, an adaptive management approach can be used to clarify policy objectives and assumptions, to address scientific complexity and uncertainty concerns, and to build needed support from myriad constituencies.

To be sure, utilizing these legal and adaptive management processes to validate national park preservation policy is not risk free. The processes can be cumbersome and expensive; they will almost certainly entail some diminution of managerial discretion; and they will subject the Park Service to additional public and even judicial scrutiny. But when the controversy involves a disagreement among scientific experts, the advisory committee and adaptive management processes provide a useful forum for addressing such problems. And when the controversy is over public values and concerns, the various public involvement processes offer an appropriate forum for identifying and addressing such differences. If the concern is that local rather than national resource management values may prevail in these settings, the Organic Act's clear preservationist mandate as well as the strong national constituency for national park protection should protect against most local excesses.[293] In sum, the openness, neutrality, responsiveness, and judicial review requirements that attach to these processes should promote accountability, which can only strengthen and further legitimize national park preservation policy.

VII. CONCLUSION

National park preservation policy embodies a fundamental shift in natural resource management philosophy. With its emphasis on minimizing human intervention into ecological systems and its commitment to ecological restoration, the policy has acknowledged a vital, new relationship between humans and the environment. Not surprisingly, this unconventional and largely untested preservation policy has been met with skepticism and resistance from several quarters. Yet drawing upon its flexible legal authority, the Park Service has administratively charted a new course, and done so without express congressional guidance. But the national parks are public lands, which means the

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ment techniques.

293. Indeed, the legal processes described here are double-edged swords that can be invoked by any interested party, including those who advocate less intervention and more aggressive restoration efforts. If concerned about undue local influence, the Park Service would be well advised to motivate its national constituency to participate in formulating and implementing critical preservation policies. Not only would this counterbalance parochial participants, but it also would provide some protection against intermeddling by local congressional delegations. For a discussion of these problems in the Yellowstone context, see Robert B. Keiter, *Greater Yellowstone: Managing a Charismatic Ecosystem*, 3 UTAH ST. UNIV. NAT. RESOURCES & ENVTL. ISSUES 75 (1995); R. McGreggor Cawley & John Freemuth, *Tree Farms, Mother Earth, and Other Dilemmas: The Politics of Ecosystem Management in Greater Yellowstone*, 6 SOC'Y & NAT. RESOURCES 41 (1993); *see also supra* note 32 (noting that Secretary of the Interior Lane asserted, as early as 1918, that "the national interest must dictate all decisions affecting public and private enterprise in the parks").

ultimate validity of the policy is as much a political as a scientific question. Not only must these new ecological preservation policies be squared with prevailing social norms and preferences, but they must be sustained or at least tolerated in the arena of public opinion.

In the dynamic natural and political environment that engulfs the national parks, the Park Service faces manifold challenges maintaining and implementing its revised preservation policy. Often without complete knowledge, it must address scientific complexity and uncertainty, and it must respond to competing social and economic concerns. In this volatile atmosphere, it must seek to guard against incremental erosion of its basic commitment to nonintervention and restoration. The existing legal structure not only provides firm support for this new approach to preservation, but it is also flexible enough to allow further experimentation, clarification, and adjustment. However, neither the law nor the political system will long sustain an unaccountable policy or its consequences. The Park Service, therefore, should take full advantage of the existing legal flexibility to garner public support and to respond to its critics. In the final analysis, the continuing validity of national park preservation policy depends on the agency's ability to justify these new conceptions of the human relationship with nature.

ECOSYSTEM MANAGEMENT AND ITS PLACE IN THE NATIONAL PARK SERVICE

JOHN FREEMUTH*

The National Park Service (NPS), along with other federal land management agencies, has been called on to participate in a federal-land policy and management experiment. A much heralded and so-called new management paradigm, *ecosystem management*,[1] has emerged to capture both the time and interest of practitioners and scholars of natural resource policy. This essay will examine the role of ecosystem management within the NPS from the perspective of public policy and public administration. The paper begins with a brief look at the development of the first major resource management regime in the United States. A clear understanding of the development of that regime during the Progressive Era at the turn of the century is important because it allows us to compare the style and substance of that early era with today's attempt to implement ecosystem management. Following this discussion will be a brief overview of certain key institutional realities within which NPS must function. The paper then examines the effort to bring ecosystem management to a unit of the national park system by focusing on the development of the *Vision* document and process in and around Yellowstone National Park. Following that discussion, the current status of ecosystem management is examined, concluding with an analysis of the likelihood of successful implementation of this confusing, yet interesting, natural resource policy.

THE FIRST GOSPEL: PROGRESSIVE CONSERVATION

To some in various government bureaus, ecosystem management has an almost religious appeal, as it is offered as the answer to a wide range of federal land and resource policy issues and problems. Efforts to bring about ecosystem management have important parallels with an earlier time in natural resource policy. NPS personnel, as well as park policy scholars interested in the implementation of ecosystem management, would do well to revisit the time of the Progressive Movement for clues as to how to develop and implement a management regime which came to be accepted by most of American society. For, if ecosystem management is not accepted by the American public, then it

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1. *See infra* note 89.

will likely fail.

We recall the Progressive Era as the time of Gifford Pinchot, Teddy Roosevelt, and the growth of the Conservation Movement. It was also the first time that an attempt was made to develop and apply somewhat universal principles to the tasks of natural resource management. The Progressive Era institutionalized expert-centered public land management. The federal bureau which best represented the Progressive Era in land management is the United States Forest Service (USFS). Samuel Hays, in his seminal work *Conservation and the Gospel of Efficiency*, summarized the beliefs of this time when he noted that:

> Conservationists were led by people who promoted the "rational" use of resources, with a focus on efficiency, planning for future use, and the application of expertise to broad national problems. But they also promoted a system of decision-making consistent with that spirit, a process by which the expert would decide in terms of the most efficient dovetailing of all competing resource users according to criteria which were considered to be objective, rational, and above the give-and-take of political conflict.[2]

In the case of the USFS, the expertise brought to bear on forest management questions came, not surprisingly, from the science and profession of forestry. One important observation, then, is that ecosystem management can be viewed as a new iteration of the expertise theme of the Conservation Movement, with other sciences such as ecology taking the place of forestry. The faith in expertise and professional judgement, as it did earlier, remains at the core of ecosystem management.

Perhaps more important about the Conservation Movement, however, may well be how its themes caught the public imagination. Advocates of ecosystem management should pay close attention to that earlier time. An article written about the *Vision* process in Greater Yellowstone, which took place in the late 1980s, offers us an insight into understanding those earlier successes of the Conservation Movement.

Shortly after the end of the Yellowstone area *Vision* process, three Yellowstone National Park officials who were intimately familiar with it wrote about their grueling effort to manage it. Bob Barbee, John Varley, and Paul Schullery, in discussing the role of public involvement in the *Vision* process, quoted a passage from one of the letters of Teddy Roosevelt: "I want to go just as far in preserving the forests and preserving the game and wild creatures as I can lead public sentiment. But if I try to drive public sentiment I shall fail, save in exceptional circumstances."[3] This is a vital observation, because it reflects Roosevelt's views on how a leader should bring about policy change, in this case replacing indiscriminate resource use with the new policy

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2. SAMUEL P. HAYS, *Preface to the Atheneum Edition* of CONSERVATION AND THE GOSPEL OF EFFICIENCY vii (Atheneum 1980).

3. Robert D. Barbee et al., *The Yellowstone Vision: An Experiment That Failed or a Vote for Posterity?, in* PARTNERSHIPS IN PARKS & PRESERVATION 81 (Nat'l Park Serv. et al. eds., 1991).

of resource conservation. One might well be able to influence public opinion regarding policy change, indeed even "lead" public opinion, but one could not force public opinion where it did not wish to go, as Roosevelt noted. Of equal importance is the emphasis on engaging the public with proposed policy changes, rather than merely pronouncing that change will happen.

Roosevelt's closest natural resource advisor also understood this observation about public opinion. Early in his career, Gifford Pinchot noted that "in the long run, Forestry cannot succeed unless the people who live in and near the forest are for it and not against it."[4] Pinchot, of course, helped lead the effort for professional management of the national forests. But the key to Pinchot's success lay not in his advocacy of professionalism and expertise, but in the service of both to a democratic vision of forests and natural resources. In the words of political theorist Bob Pepperman Taylor, "For Pinchot, the conservation of natural resources is of fundamental *democratic value* because it allows for the possibility of equality of opportunity for all citizens."[5] Forests were to be managed for the good and the use of all. Taylor added, "If we remove the vision of Progressive democracy from Pinchot's work, we are left merely with the scientific management and control of natural resources for no other purpose than brute human survival."[6] It is unfortunately true that later foresters "became progressively more narrow in outlook as a result of the kind of specialized education they [Pinchot] encouraged."[7] Expertise was on the ascendancy, while its service to a democratic vision receded. This change was probably due to the very success of the vision of Pinchot. The point which is vital is that early public land management was successful as public policy because of its link to a democratic vision accepted by the majority of society at that time. As Greg Cawley and I have noted in the *George Wright Society Forum*:

> The federal lands, whether as national parks, national forests, or ecosystems, are owned by the American public. But they are also places in which local communities have developed. In consequence, management decisions are as much about defining the character of those local communities as they are about defining land use practices. It would be misdirected, of course, to allow local desires to dictate national policy. However, it is not only misdirected but ultimately counterproductive to dismiss local concerns as somehow not part of the public discourse over national policy.
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> What early conservationists like Pinchot understood was that major policy shifts required developing a discourse in which scientists, professionals, local publics, and national publics could find common meanings. It was not an easy task, nor did it occur overnight. Nevertheless, conservation did, at least for a time, define a *consensus position* about the management of the federal estate. To expect that the

4. GIFFORD PINCHOT, BREAKING NEW GROUND 17 (1947).
5. BOB PEPPERMAN TAYLOR, OUR LIMITS TRANSGRESSED 19 (1992) (emphasis added).
6. *Id.* at 26.
7. DAVID A. CLARY, TIMBER AND THE FOREST SERVICE 17 (1986).

> changes implied by ecosystem management will be realized without an equally lengthy and difficult effort is to doom the project to failure.[8]

It is thus clear that Progressive-era public lands management was centered as much on a vision of what type of society we ought to desire, as it was on an expert centered land management regime. It was a vision accepted by a majority of Americans, representing an underlying consensus about how a large amount, but not all, of our federal estate should be managed.

Early national park management history lies within—but not at the center of—the Progressive realm. On the one hand, Pinchot opposed the notion of a separate national park bureau, while supporting the damming of Hetch Hetchy valley in Yosemite.[9] The conclusion, obviously, is that appreciating the need of others for national parks was one of Pinchot's blind spots. Thus, the parks' democratic qualities spoken about so eloquently by Wallace Stegner were ignored by Pinchot, because he couldn't conceive of resource preservation for "enjoyment" as a valid use in his vision of conservation, unless an area was also open for development at the same time.

On the other hand, the fledgling NPS was not able to institute the strong educational/professional component which forestry, and a forestry degree, represented for the Forest Service. Park rangers became known more as "generalists," and there was no specific educational requirement for new park rangers at NPS. Thus, NPS was not able to obtain the degree of professional autonomy achieved by the Forest Service.

However, the "founders" of NPS management in the post-Organic Act Era, Stephen Mather and Horace Albright, certainly had a democratic component which was central to their strategic vision about the purposes of the early parks.[10] Put simply, the parks were to be used in order to build up a constituency which would support them and the NPS. That vision was successfully put into place. Ronald Foresta, in his landmark *America's National Parks and Their Keepers* illustrates the power and significance of that earlier vision when he reminds us that "[a] park is anthropocentric; its special quality comes from its appeal to humans. It strikes people as grand or sublime, or it just makes people happy to be there, for whatever reason."[11] In a later passage, Foresta offered an insight which proponents of ecosystem management might take as a warning of a trap to avoid: "By and large, the most vocal advocates of biocentric management, the environmental activists, have been the most contemptuous of the park visitor."[12] In sum, the legacy of the parks has been their use and preservation vision. One question is whether ecosystem management should fit into this policy of use and preservation, or whether it some-

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8. John Freemuth & R. McGreggor Cawley, *Ecosystem Management: The Relationship Among Science, Land Managers and the Public*, GEORGE WRIGHT F., 1993, at 26, 31-32 (emphasis added).

9. HAYS, *supra* note 2, at 38, 193.

10. *See, e.g.*, R. GERALD WRIGHT, WILDLIFE RESEARCH AND MANAGEMENT IN THE NATIONAL PARKS 10-14 (1992).

11. RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 268 (1984).

12. *Id.* at 270.

how will alter this policy, without any clear articulation that alteration of park policy has already occurred. That, of course, depends on who controls the definition of the term.

Those interested in ecosystem management might also do well to examine the history of park management and policy development for clues as to any lessons about what policies have worked and why, as well as for how that history may provide insights on ecosystem management. One example has just been provided. Certainly, the extension of the park system into historic preservation, urban parks, and the multiple use national recreation area, suggests that ecosystem management may play a more central role in some types of units than in others. Also, those who develop and think about management policy ought to pay special attention to the successes and failures in implementation of past policy initiatives such as the Leopold Report,[13] or what has come to be called by many the "vignettes of primitive America" policy.[14] Observers of wildlife policy in the national parks have noted that the Leopold Report did call for an active *resource management* stance; it was not a laissez faire or a so-called "natural regulation" approach, as some came to call it.[15] The point here is that many aspects of NPS culture contributed to (and continue to contribute to) the role and place of science and resource management within the bureau, and they have rendered the policy prescriptions made in the Leopold report, and later reports, more difficult to achieve. How many of those organizational barriers still remain perhaps needs more systematic research, especially if ecosystem management turns out to be about policy change. Organizational culture change is difficult enough in the private sector; in the public sector it may often be impossible.[16]

Second, there is a fundamental arbitrariness in the choosing of a certain time—pre-European settlement, "primitive America"—as some sort of ideal towards which to manage. The time period is both arbitrary and heavily value-laden with severe implications for society. Yet such efforts continue, for example, with the Forest Service-Bureau of Land Management's Upper Columbia River Basin Ecosystem Management project discussions over returning part of the Pacific Northwest to "pre-settlement conditions."[17] The only way such a management goal can, and should, be set would be through an active public dialogue which discusses all of the possible economic and noneconomic costs and benefits associated with such an approach. Perhaps such an approach with the context of ecosystem management is more feasible in the units of the

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13. ADVISORY COMM. ON WILDLIFE MANAGEMENT, U.S. DEP'T OF THE INTERIOR, A STUDY OF THE NATIONAL WILDLIFE REFUGE SYSTEM (1969) [hereinafter Leopold Report].

14. *See* Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 58 (1990) (citing Richard W. Sellars, *Science or Scenery? A Conflict of Values in the National Parks*, 52 WILDERNESS 29, 30 (1989)).

15. FREDERIC WAGNER ET AL., WILDLIFE POLICIES IN THE U.S. NATIONAL PARKS 26-27 (1995).

16. For an excellent introduction to the concepts of organization culture, see generally HARRISON TRICE & JANICE BEYER, THE CULTURE OF WORK ORGANIZATIONS (1993).

17. *See, e.g.*, Henry B. Lacey, *New Approach or Business as Usual: Protection of Aquatic Ecosystems Under the Clinton Administration's Westside Forests Plan*, 10 J. ENVTL. L. & LITIG. 309 (1995).

park system than in multiple-use areas.

LIMITS TO ECOSYSTEM MANAGEMENT: THE INSTITUTIONAL SETTING

Natural resource professionals struggle daily with trying to better understand the ecosystem(s) within which their various management units are placed. Yet it is the institutional setting, within which agencies such as NPS function, which will have more influence on the development and success of ecosystem management. For the purposes of this essay, the most important aspect of that institutional setting is the role of a public sector bureau, NPS, in American democracy. As surprising as it may seem to some readers, there is an amazing theoretical and practical uncertainty about what that role should be. Put simply, there is no mention of the public bureaucracy in the Constitution—at least in terms that would be recognizable as referring to the large apparatus of modern government, with its important discretionary powers of public policymaking. This gap means that there is no clear consensus in political theory about the roles and powers of a large section of the modern American state, a section which has come to be as significant as Congress or the courts. For example, some argue that the bureaucracy must pay due attention to the demands and requirements of the Congress which created and continues to fund it.[18] Others argue that bureaucracies have been delegated policymaking authority and thus may use professional judgement in making decisions.[19] What, then, is the best way is for NPS to understand and defend the *legitimacy* of what it does in the name of park policy? This question deserves some consideration as the bureau moves towards ecosystem management, or any other policy change for that matter.

EXPERTISE AND SCIENCE

One model of legitimacy which has great appeal to bureau professionals is built around expertise. NPS decisions have legitimacy because NPS knows the most about the parks, and has been given that decision-making authority by Congress.[20] Congress created both the parks and NPS, then delegated the day-to-day management responsibility to the bureau. The bureau uses its professional judgement (hence discretion) on how to manage the park system. This model works well, to a point. Indeed, NPS is constantly at the top of the most admired federal bureaus, perhaps due in part to what the public asso-

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18. *See, e.g.*, Philip Brashier, Comment, *The United States Struggles with Past Judicial Interpretations Defining the Modern Law of Immigration*, 37 S. TEX. L. REV. 1357, 1378 (1996) ("An executive agency . . . which is supposed to carry out the intent of a congressional statute must be restricted from overreaching and should not possess greater authority than the President and Congress.").

19. *See, e.g.*, Clayton L. Riddle, Comment, *Protecting the Grand Canyon National Park from Glen Canyon Dam: Environmental Law at Its Worst*, 77 MARQ. L. REV. 115, 126 (1993) ("In 1916, Congress adopted the National Park Service Organic Act . . . fully intending the newly created NPS to coordinate and rationalize America's national park development. Congress envisioned one agency administering existing and future park lands in accordance with a prevailing feeling that the parks had a necessary place in America's development.").

20. National Park Service Organic Act, 16 U.S.C. § 1 (1994).

ciates with NPS, but also because NPS must be doing a few things *right*. Yet, as readers are well aware, there are many NPS decisions which are *not* left to the bureau; there is not complete deference to the bureau's expertise *because* of that expertise. I have argued elsewhere that many other actors in the political system—members of Congress, their staff, political appointees, concessionaires, environmentalists and others—constantly seek to interfere with NPS decisionmaking.[21]

This "interference" is common to many, but not all, federal bureaus. For example, Barbara Romzek and Melvin Dubnick once described the National Aeronautics and Space Administration (NASA) as having what they term a "professional accountability" system during the 1960s.[22] Under this system "public officials must rely on skilled and expert employees to provide appropriate solutions."[23] Under a professional accountability system, the general public also shows deference to expertise and thus there is not nearly as much outside interference in bureau decisionmaking.

Even though their histories are different, both NPS and the USFS today are not expert-centered agencies but more responsive ones. A "responsive agency," in the words of Romzek and Dubnick, is concerned with questions of representation, access, and responsiveness to public demands.[24] "The potential constituencies include the general public, elected officials, agency heads, agency clientele, other special interest groups, and future generations. Regardless of which definition of constituency is adopted, the administrator is expected to be responsive to their policy priorities and programmatic needs."[25]

The notion of bureau responsiveness to other political actors fits our expectations of democratic theory. We do not expect our public bureaucracies to do things without taking the opinions and values of others' into their decisionmaking calculus. Expectations that ecosystem management will bring about deference to the expertise of scientifically trained professionals needs to be understood in this context. If such deference does develop, it will only happen after a long public discourse with others—a "leading" of public sentiment, to put it in Roosevelt's terms.[26] That appears to be the "proper" relationship between expertise and democracy. To phrase it differently, what do resource managers do if the public decides that ecosystem management is not a worthwhile public policy?

Also, countless examples of expertise/professionalism have lead to bad decisions, to the point that expertise itself is somewhat suspect in our society at this moment. Consider the current arguments over forest health. The USFS is essentially asking the American public to trust it to manage the forests to make them more "healthy."[27] The bureau notes that one reason the forests are

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21. John Freemuth, *The National Parks: Political Versus Professional Determinants of Policy*, 49 PUB. ADMIN. REV. 278, 281 (1989).

22. Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons From the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 230-31 (1987).

23. *Id.* at 229.

24. *Id.* at 229-30.

25. *Id.* at 229.

26. *See supra* text accompanying note 3.

27. *See* Richard Haeuber, *Setting the Environmental Policy Agenda: The Case of Ecosystem*

not healthy is because of the many years of fire suppression.[28] But wasn't it USFS who spent years suppressing fire and years telling the American public that only "they" could prevent forest fires? Now it admits that policy was in error.[29] Can some in the public be blamed for being suspicious of claims of forest health problems, even if those claims are accurate?

Finally, it is questionable whether many decisions which are presented as "science-based" (a form of expertise) are that at all. They are often political decisions at their core. For example, I am sure a science-based strategy could be concocted to close a good percentage of many of the national parks in the name of "biodiversity." This would look like a scientific decision but it would not be. It would be a political decision redefining the mission and purpose of the parks, without any public discussion of the need or desirability of the change, with biodiversity as a "scientific stalking horse" for a certain set of values (diminished resource use) which seek to subordinate other legitimate public values (public enjoyment, natural resource use) in the name of a scientific imperative. Science and expertise should best be understood in this context then, as necessary but insufficient conditions for providing legitimacy for NPS decisions. Without "good science," decisions are hard to justify, yet science alone cannot make decisions for us.

There may be a more useful way to think about managing parks, however, which can build on the expertise which NPS has. The 1916 Organic Act[30] charges NPS to manage parks "for future generations."[31] The clause gives NPS a focus which is different than all of the other actors who claim to have an interest, or power, over bureau decisions. It allows NPS to act in the name of park resources, and in the name of visitor experiences with a long term "public interest" perspective.[32] But, it requires NPS to speak in those terms, rather than solely in the language of expertise. There is no guarantee, of course, that NPS perspectives on park management issues will prevail, but such a public interest perspective is different than a perspective which looks out for constituents or is based on political ideologies and agendas at play at a certain time. The future generations who might visit the parks would become a benchmark by which parks are managed today, and thus this long term perspective can legitimately be inserted into debates over park management. Expertise and science remain *necessary* tools, however, in this debate. NPS could then present to its public(s) and other interests management decisions framed with a long term perspective and designed to help those interests deliberate over choices NPS must make. Ecosystem management then becomes framed in terms of the public interest.

Management, 36 NAT. RESOURCES 1, 25 (1996).

28. William Hart, *Smokey Bear Changes His Tune*, DALLAS MORNING NEWS, Sept. 16, 1984, at 45A.

29. *Id.*

30. 16 U.S.C. § 1 (1994).

31. *Id.*

32. Organic Act of 1916, 16 U.S.C. § 1 (1994); The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1994).

CASE STUDY: A VISION FOR THE FUTURE: ECOSYSTEM MANAGEMENT IN GREATER YELLOWSTONE

Ecosystem management first received focused attention by federal land managers during a symposium held at the University of Washington in the mid-1980s.[33] A book with a series of articles written by key participants, and edited by James K. Agee and Darryll Johnson, illustrates the cautious, yet hopeful, approach taken by those involved with the concept at that time:

> Therefore, ecosystem management in parks and wilderness should explicitly reflect multiple, measurable goals defining both natural environmental conditions and socioeconomic concerns. These goals should acknowledge the fact that social values, political pressures, and biological knowledge may be different ten to twenty years from now, and that park and wilderness management should be responsive to such changes within defined legal limits.[34]

Not too long after the book's publication, the first large scale experiment with ecosystem management began in the area in and around Yellowstone National Park.

THE YELLOWSTONE EXPERIMENT

The Yellowstone area has often reflected the most important public policies about the public lands of the United States. It is, as most readers know, the location of the world's first national park, so designated by Congress in 1872.[35] The area is also the site of the first national forest of the United States, proclaimed initially as the Yellowstone National Park Timber Land Reserve by President Harrison in 1891.[36] We know these places today as integral parts of our federal lands, managed by the two most prominent land management bureaus, NPS and USFS. We also know these places as home for the two dominant approaches to public land management in the United States.

The national parks are viewed as representing the "preservation" approach to public land management.[37] These lands were often set aside from resource development and other uses to be "conserved"—interestingly, today we say

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33. *See supra* note 18, at vii. This publication is a collection of papers presented at the Ecosystem Management Workshop, held Apr. 6-10, 1987, at the University of Washington's Pack Forest.

34. James K. Agee & Darryll Johnson, *A Direction for Ecosystem Management, in* ECOSYSTEM MANAGEMENT FOR PARKS AND WILDERNESS 229 (James K. Agee & Darryll R. Johnson eds., 1988).

35. 16 U.S.C. § 21 (1994) (setting forth the parameters of Yellowstone, from the Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32); *see also* RICHARD A. BARTLETT, NATURE'S YELLOWSTONE 194-210 (1974) (presenting history of the creation of Yosemite and Yellowstone Parks).

36. *See* Robert B. Keiter, *An Introduction to the Ecosystem Management Debate, in* THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 3 (Robert B. Keiter & Mark S. Boyce eds., 1991).

37. SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 45 (2d ed. 1980); *see also* STEPHEN FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT (3d ed. 1982) (relating a biography of John Muir in the first part of the book, and a chronological history of the Conservation Movement in part two).

"preserved"—in more or less a natural state.[38] Yet *pure* protection was not the goal. These places were also to be visited or "enjoyed" by people, as stated in the 1916 Organic Act which created the bureau.[39] This so-called "use and conservation" management task facing the NPS has never been an easy one, and has been well documented.[40] Yet there is no doubting that the national park idea well represents the preservation theme in public land management.

The other theme is represented by what is known today as the "multiple-use" approach to land management.[41] The essence of this approach is that national forest lands allow for a wide variety of activities, which interestingly were also viewed as "conservation."[42] Those activities can include grazing, timber harvesting and mining; they can also include wilderness recreation and scientific research.[43] National forests can include preservation as a goal, but they also include a great number of other uses.

There is no better illustration of the importance of these differences than the ongoing battle over the New World Mine proposal adjacent to Yellowstone National Park.[44] It is clear that bureau differences are well illustrated by the positions of NPS and USFS on the proposed mine. NPS is opposed, while USFS is not—they are undertaking various environmental reviews of the proposal. Parenthetically, readers and observers of the debate over this project might wish to note whether ecosystem management played any role in the decision process, and how that role compared with the role of laws already in place which are being used by proponents and opponents of the project. Currently, ecosystem management does not appear to have played a very major role. Another case worth examining is NPS/USFS conflict over the protection of the cave resources in Oregon Caves National Monument.[45] Once again, bureau missions appear to be driving the conflict, rather than ecosystem management.

Some students of national forest policy have argued that Congress did not originally intend to create such a clear difference between the management of the forests and the management of the national parks. Sally Fairfax has effec-

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38. *Id.* at 45.

39. 16 U.S.C. § 1 (1994).

40. *See generally* Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 296-98 (1994) (detailing the history of ecosystem management and putting forth an agenda for statutory reform thereof).

41. *See* 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, NATURAL RESOURCES LAW § 16 (1996). This section of the treatise gives a history and analysis of multiple-use, as well as theorizing on its applicability in the future.

42. *Id.*

43. *See* The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1994) (mandating there be a multiple-use scheme of management utilized on National Forest Service land); DANA & FAIRFAX, *supra* note 27.

44. See James Gerstenzang, *2 GOP Leaders Question Cost of Land Swap*, L.A. TIMES, Jan. 24, 1997, at A3. For a critique of the current National Forest Service regulations and some suggested reform measures, see generally Joel A. Ferre, Note, *Forest Service Regulations Governing Mining: Ecosystem Preservation Versus Economically Feasible Mining in the National Forests*, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 351 (1995) .

45. *See* Jeff Barnard, *Logging Foes are a Mixed Group: Young, Old Protest in Northwest Woods*, SEATTLE TIMES, Aug. 4, 1996, at B1.

tively argued the point that "during the 1890s . . . both Congress and the public viewed parks and forests as interchangeable."[46] It was the somewhat later influence of Gifford Pinchot that transformed USFS into much more of a "silviculture regime," as Fairfax puts it.[47] Scholars, however, continue to debate the role and philosophy of Pinchot; he has also been seen as linking forest management to his vision of the public good.[48]

Readers familiar with public land history, and public land policy, know that public land law is often ambiguous, contradictory, and inconsistent. Thus both park and forest management has hardly been uniform or consistent. For example, the USFS manages several national recreation areas such as the Sawtooth, in Idaho, that are almost indistinguishable from some national park units. The NPS, on the other hand, must manage grazing, mining and even hunting in some of its units.[49] The point, however, is that the two dominant approaches in United States public land management are found in the Yellowstone area.

Although interagency cooperation and communication may lie at the core of many people's conception of ecosystem management today, such behavior came relatively recently to Greater Yellowstone. It was not until the early 1960s that the region's managers saw the need for the creation of the Greater Yellowstone Coordinating Committee (GYCC).[50] Today's managers, however, have noted that "natural resource issues were not a major focus of attention" during the early days of the GYCC.[51]

That focus began to change in the early 1970s. Perhaps the most important instigator of that change was growing alarm over the status of the grizzly bear in and around the national park.[52] Here was a natural resource issue which demanded attention. What began to be recognized was that some type

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46. Sally Fairfax, *The Forest Service/National Park Service Relationships, in* PARKS IN THE WEST AND AMERICAN CULTURE 7 (Inst. of the Am. W. eds., 1985).

47. *Id.*

48. *See* BOB PEPPERMAN TAYLOR, OUR LIMITS TRANSGRESSED: ENVIRONMENTAL POLITICAL THOUGHT IN AMERICA 18-19 (1992).

49. JOHN FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS 50-51 (1991) (discussing the implementation of policy, in the form of management, in Glen Canyon, Utah).

50. Thomas T. Ankersen & Richard Hamann, *Ecosystem Management and the Everglades: A Legal and Institutional Analysis*, 11 J. LAND USE & ENVTL. L. 473, 521-22 (1996); John Mamma & Paul Grigsby, *A Vision for Yellowstone's Forests*, 15 PUB. LAND L. REV. 11, 16 (1994).

51. U.S. FOREST SERV., DEP'T. OF AGRIC. & U.S. NAT'L PARK SERV., DEP'T. OF INTERIOR, VISION FOR THE FUTURE: A FRAMEWORK FOR COORDINATION IN THE GREATER YELLOWSTONE AREA (1990) (draft) [hereinafter USFS & USNPS]

52. *See* Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 47-48 (1996); Kyla Seligsohn-Bennett, Comment, *Mismanaging Endangered and "Exotic" Species in the National Parks*, 20 ENVTL. L. 415 (1990) (relating the threatened status of the grizzly bear and feral horse to mismanagement by the National Park Service and calling for reform in order to attain species preservation); David P. Sheldon, Comment, *A Threatening Turn for a Threatened Species: The Impact of* Natural Wildlife Federation v. National Park Service, 10 PUB. LAND L. REV. 157 (1989) (addressing the policy of the National Park Service towards the grizzly bear in light of the Ninth Circuit's decision); *see also* R. Edward Grumbine, GHOST BEARS: EXPLORING THE BIODIVERSITY CRISIS (1991) (illustrating a biodiversity crisis of epidemic proportion using the plight of the grizzly bear in the Greater North Cascades).

of "cross-boundary" management was needed, and that the interested public was increasingly seeing the need for that management as well.[53]

A FOCUSING EVENT: THE 1985 HOUSE OVERSIGHT HEARINGS

The problems facing species like the grizzly bear were obvious catalysts for better coordination. Yet it was most likely the actions of a House subcommittee which precipitated a more rapid response by federal land mangers in the region. By 1985, Congress had begun to pay attention to the management of the Yellowstone region.[54] In the fall of that year, the House Subcommittee on Public Lands of the Interior Committee (now Resources) held hearings on what was coming to be called by many the "Greater Yellowstone Ecosystem" (GYE).[55] It is likely that Congressional concern at that time was in part centered on what was then called the "external threats" problem to national parks, rather than an explicit need for ecosystem management.[56] For example, in a report prepared for Congress by the Congressional Research Service (CRS),[57] much was made of legal park boundaries said to be inadequate because many park resources crossed those boundaries.[58] Yellowstone National Park was the "heart" of an area whose plants, water, and wildlife depended on that entire area.[59] That area, not definitively defined, was the GYE. The GYE included parts of six national forests (Beaverhead, Bridger-Teton, Custer, Gallatin, Shoshone, and the Targee), two national parks (Yellowstone and Grand Teton), two wildlife refuges (the National Elk Refuge and Red Rocks Lake), a small amount of Bureau of Land Management (BLM) land, private land, and was part of three states.[60] Coordinating all of these disparate "sovereigns" in the name of the core values of the heart of the ecosystem would seem a massive undertaking.

It is essential to closely read the 1985 hearings in light of the later events surrounding the publication of the *Vision* document for the GYE. We need to determine if the members of Congress who were actively involved in the hearings sent a clear message to the NPS and USFS regarding their expectations for the area. Did, for example, Congress expect merely better interagency coordination and consultation, or did it expect to see an entirely new management approach for the area? Were the members unified in their concerns and expectations, or were they divided? Did they have a clear understanding of what constituted a ecosystem?

At the outset of the hearings, Subcommittee Chair John Seiberling (D-

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53. *Id.*

54. *See Greater Yellowstone Ecosystem: Oversight Hearing Before the Subcomm. on Pub. Lands and the Subcomm. on Nat'l Parks and Recreation of the Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 2 (1985) [hereinafter *Oversight Hearing*].

55. *Id.* at 1.

56. CONGRESSIONAL RESEARCH SERVICE, ISSUES SURROUNDING THE GREATER YELLOWSTONE ECOSYSTEM: A BRIEF REVIEW (1985).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Oversight Hearing, supra* note 47, at 2-3.

Ohio) remarked that "the issues that affect the Greater Yellowstone Area are ones that transcend park boundaries."[61] He went on to note that the "so-called Greater Yellowstone Ecosystem is not a statutory or official or even a clear scientific designation."[62] These two introductory remarks suggest both concern with park protection, as well as recognition that the ecosystem concept remained ambiguous in the mind of Seiberling. Later comments by Seiberling confirm this assessment that these hearings, in his mind, were about threats to parks:

> When we started out with the National Park Protection Act [in 1982] we tried to get a system of all the various agencies to coordinate with the Park Service where there were possible threats to parks. Everybody objected to that . . . and said we ought to do this on a case-by-case basis. So that is what we are doing.[63]

Congressman Richard Cheney of Wyoming noted in his opening remarks that "an effort is going to have to be made by those who would recommend a change to show that somehow the current system . . . is not functioning properly."[64]

A panel of public land managers was the first group to testify at the oversight hearings. William Penn Mott, then NPS Director, stated what might be viewed as common themes of ecosystem management: "Technically, the ecosystem system should be referred to as a biographic province rather than the ecosystem. Generally speaking, the art of the *ecosystem management* is in its infancy mainly because one must first ask, 'How is that ecosystem defined? By whom? From what perspective?'"[65] Mott seemed be urging caution in two directions. First, he questioned the choice of the word "ecosystem." Second, he drew attention to the fact that the word "management" was fraught with many conceptual difficulties. The questions Mott asked are at the core of the debate over ecosystem management. They seek answers that are political at their most fundamental.

Superintendent Barbee appeared to have trouble with the word ecosystem as a useful term, noting it wasn't "something you can define definitely, *at least as a practical or pragmatic management tool*, but it is a term that we are having to deal with. I don't think it is going to go away."[66] Barbee's observation on the inadequacy of ecosystem management as a management tool should be remembered, in light of later events.

PUBLIC COMMENTS

A review of the testimony of interested groups and parties who were invited to testify at these hearings conveys a sense that the groups and individuals invited had no uniform sense of ecosystem management. Some, like Franz

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61. *Id.* at 1.
62. *Id.*
63. *Id.* at 40.
64. *Id.* at 3.
65. *Id.* at 16 (emphasis added).
66. *Id.* at 47 (emphasis added).

Camenzind, a private ecologist, envisioned an idealized management regime where the migratory birds who had winter range in Yellowstone would also have their summer ranges in the American south protected.[67] To him, such a scenario was possible eventually. "Politically . . . we cannot accept all of these areas *at this moment* for consideration of the ecosystem."[68] To the president of the Wilderness Society, William Turnage, the solution was a change in the management direction of USFS: "The Wilderness Society calls on the U.S. Forest Service to change its priorities, to make ecosystem protection in the Yellowstone its highest value rather than taxpayer-subsidized commodity production."[69] This comment later led Representative Cheney of Wyoming to ask Turnage whether he would eventually ban timbering in Greater Yellowstone.[70] Turnage responded that it was possible "within a decade."[71] A 1996 vote by members of the Sierra Club to oppose logging in national forests suggests that intense debate over forest management continues in this direction.[72]

Christopher Duerksen of the Conservation Foundation supported a process-based approach calling for "consensus building in negotiation patterned after the habitat protection plans of the Endangered Species Act and the Coastal Zone Management Act."[73] In testimony as part of a later panel, Amos Eno, Director of Wildlife Programs at the Audubon Society, said "we wish instead to accentuate the positive by focusing on the concept of Yellowstone as an ecosystem which could be managed within existing governmental frameworks and statutory mandates."[74]

Resource users had other concerns. Brad Penn, representing Rocky Mountain Oil and Gas Association viewed an ecosystem approach as a further limitation of resource development. "[M]ore restrictive management of multiple use activities would have a devastating impact on local communities and multiple uses, including oil and gas activities."[75] In a certain sense, then, both Penn and Turnage anticipated less resource use as the result of an ecosystem approach. As Congressman Cheney put it, later in the hearing:

> [M]any people perceive it as a way for some of the environmental groups to seek to pursue a hidden agenda, which is to get ranchers off the lands, close down timbering, and so forth. I think it is very important to be precise as to what is intended here . . . .[76]

Cheney's comments echo those of Director Mott. They also suggest a problem which may continue to haunt the development and implementation of current ecosystem management policy. Cheney expressed concern that certain environ-

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67. *Id.* at 90.
68. *Id.* (emphasis added).
69. *Id.* at 99.
70. *Id.* at 107.
71. *Id.*
72. Kim Murphy, *Sierra Club Votes to Oppose Logging on Federal Lands; Timber: Action Is a Turning Point for Moderate Group and Sets Stage for Tougher Bargaining Over U.S. Forests*, L.A. TIMES, April 23, 1996, at 3.
73. *Oversight Hearings*, *supra* note 44, at 103.
74. *Id.* at 138.
75. *Id.* at 113.
76. *Id.* at 122.

mental groups were perceived as using ecosystem approaches as a stalking horse for other issues. It would seem fair to conclude that in some people's minds ecosystem management-like regimes meant a curtailment of multiple use. Thus any definition of what other people would later try to develop for ecosystem management would be colored by what people already thought it meant. Had future federal agency efforts already been limited by these perceptions?

The 1985 oversight hearings did not lead to a firm conclusion or direction about the management of the Yellowstone area. As the testimony above indicates, opinion was widespread. To put it another way, these hearings do not convey any sense of a "mandate" from Congress to the federal land management agencies to do anything radically different.

Land managers did however, find further impetus in the hearings for increasing coordination efforts. The impetus had begun earlier that spring, at a meeting of the Greater Yellowstone Coordinating Committee where the "Blackwater Concept" was developed. That concept called for a direction to interagency coordination including (1) defining the Greater Yellowstone Area, (2) desired future conditions for the area in the period 1995-2000, (3) what the area would look like in the years 1995-2000 under current plan implementation, (4) changes need to reconcile (2) and (3), and (5) actions needed to implement those changes.[77]

The next stage in the evolution of policy in the Greater Yellowstone Area (GYA) was the publication of a document which listed all of the federal land management plans for the region. That document, called the "Aggregation," made no policy decisions, but simply provided one place where key aspects of forest and park plans could be found. It was a precursor to events which would capture the attention of the nation for a time.

BATTLE OVER THE VISION

The Blackwater Concept led to the creation of a group, or "team", which would manage the development of a new framework for the coordination and management of the Yellowstone area. From that document it was hoped that relevant forest and park plan revisions would be made.

The planning team, headed by Jack Troyer of USFS and Sandra Key of NPS, developed a public involvement and response process. That process included a number of meetings, briefings, open houses and so on. What emerged was a list of fourteen draft goals written by the forest supervisors and park superintendents of the region. Those goals became the key components of a mailing sent to interested members of the public for comment. In addition, another round of meetings was held. The result was the release of the draft version of *Vision for the Future: A Framework for Coordination in the Great-*

77. National Park Service,"Cooperation in the Greater Yellowstone Area," Memo from Director, National Park Service, to Director, Bureau of Land Management (1986)and Mealey, Steve, interview with author, (1993). Mealey was Forest Supervisor on the Shoshone National Forest in 1986 and was Supervisor of the Boise National Forest at the time of the interview.

er Yellowstone Area, in the summer of 1990.[78] That document would set the stage for a major federal land policy battle.

The draft *Vision* document proposed three primary goals[79] for future management of the GYA on lands under either USFS or NPS administration: 1) Conserve the Sense of Naturalness and Maintain Ecosystem Integrity,[80] 2) Encourage Opportunities That Are Biologically and Economically Sustainable,[81] and 3) Improve Coordination.[82] It then went on to identify numerous sub-goals and "coordinating criteria." Implementation of this strategy offered the bureau's promise that the "GYA can serve many people well at the same time that its fundamental values are adequately protected."[83] Yet, the document also recognized that "there will be disputes and controversies over [the proposed] management direction."[84]

Robert Keiter has suggested that the political climate of the GYA has been shaped by three influences. First, environmentalist pressures to "protect the ecosystem;" second, fears of traditional multiple-use constituents that their use might be curtailed; and third, desires by the agencies themselves to assert better control over the management process (the return of the progressive model).[85] Traces of these influences are clearly evident in the *Vision* document. For example, the terms Greater Yellowstone Area and Greater Yellowstone Ecosystem (GYE) were used interchangeably throughout the document. Also, the overall approach proposed in the document was described as an attempt to "pioneer ecosystem management."[86] These concerns were close to those expressed by the environmental community. Yet at the same time, they met the concerns of traditional multiple-users: "Opportunities for recreation and commodity development, including timber harvesting, grazing and mineral development will be provided for on appropriate federal lands."[87] Finally, the attempt to define and clarify explicit management goals was certainly a step in the understandable direction of reinforcing agency control over the management process.

In short, the draft *Vision* document appeared to offer a rather sophisticated response to the political landscape surrounding Yellowstone. However, the document failed to recognize a fundamental tension in federal land administration and in consequence it exacerbated, rather than resolved, conflict. As a

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78. USFS & USNPS, *supra* note 23.

79. USFS & USNPS, *supra* note 51, at iii. An earlier version of this discussion of the Vision process can be found in R. McGreggor Cawley & John Freemuth, *Tree Farms, Mother Earth, and Other Dilemmas: The Politics of Ecosystem Management in Greater Yellowstone*, 6 SOC'Y & NAT'L RESOURCES 41 (1993).

80. *Id.* at 3-7 to 3-24.

81. *Id.* at 3-25 to 3-36.

82. *Id.* at 3-37 to 3-42.

83. USFS & USNPS, *supra* note 23, at 3-1.

84. *Id.*

85. Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923, 933 (1989) (discussing ecosystem management and its implementation in the national parks through legal mechanisms).

86. USFS & USNPS, *supra* note 20, at 4-2.

87. *Id.* at 3-1.

starting point, consider the term ecosystem. The draft *Vision* document defined ecosystem as

> Living organisms (biotic) together with their nonliving environment (abiotic) forming an interacting system inhabiting a defined area of interest. There is not an obvious boundary to separate an individual ecosystem from its surroundings. Scientists have used the term to refer to systems as small as an individual pond, and as large as the planet.[88]

At this point we find several administrative and management issues. First, and perhaps most obvious, the document's definition created an administrative dilemma by prescribing a management regime for an area lacking boundaries based on scientific consensus. This criticism has also been leveled at ecosystem management more generally.[89] Indeed, at one point the document admits that "the actual boundaries of this area are the subject of ongoing discussion among many parties."[90] Second, the promise that the USFS and USNPS will not abandon their separate and often quite distinct mandates rings rather strangely, since potentially the most intriguing aspect, however idealistic, of the proposal was that the USFS, at least in the Yellowstone region, was willing to abandon its traditional management regime in favor of an ecosystem regime.[91] Herein lies a third issue.

The broad, almost tautological definition of ecosystem offered in the draft *Vision* document is certainly consistent with current scientific conclusions regarding the complex and interrelated structure of nature. Yet, as Keiter argues: "[S]cience itself cannot define a new ethic (or management priorities) in an area like Greater Yellowstone. Science attaches no significance or value to the many human interests that figure prominently in policy judgments about the public lands."[92] Science strives to construct a picture of the physical world based on empirical observation. A management regime, in contrast, must pay attention to the impact human values and interests have on allocating meanings to scientific observations. For example, scientific observation is supposed to remain more or less content with the conclusion that a sixteen ounce container has eight ounces of fluid in it. From a management perspective, however, the crucial question may very well be whether the container is "half-full" or "half-empty." It is this question which determines the appropriate course of action—whether or not more fluid is needed or, to extend the analogy, whether or not someone should stop drinking the water. The problem, of course, is that "half-full/half-empty" are value judgments derived from the interests of people. As such, they are open to a discourse at any given moment and over time, unless we assume that values and interests remain constant,

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88. *Id.* at G-2.

89. *See* Allan K. Fitzsimmons, *Sound Policy or Smoke and Mirrors: Does Ecosystem Management Make Sense?*, 32 WATER RESOURCES BULLETIN 217, 218 (1996) (discussing the difficulty of reconciling ideas on ecosystem management with public policy concepts).

90. USFS & USNPS, *supra* note 51, at 1-1.

91. *Id.* at 4-1.

92. Keiter, *supra* note 85, at 1003.

which is a difficult assumption to make in the context of ecosystem management. Scientists, and managers who center decisions solely on science, do not have any special position in negotiations over value questions, something which may not be as evident a fact as it might appear.[93]

There was a variant of the "half-full/half-empty" dilemma at work in the Yellowstone controversy. Consider the following passage:

> The *Vision*, therefore, does not define resource protection and resource use as being mutually exclusive. Instead it introduces principles and processes that will help ensure that no matter what the resource use—be it the recreational needs of an individual, protection of biological diversity for the greater good of human society, or timber harvest for national and international markets—ecosystem values are considered *first* in how the resource is used.[94]

From a scientific standpoint, this statement is essentially accurate, because production science and ecology are potentially compatible. Nevertheless, as a statement of management priorities, it set the stage for confrontation rather than compromise, because it appeared to preclude the public negotiation required above.

Once again, the broad definition of ecosystem, in combination with the suggestion that a "measure" of naturalness was the "extent to which natural processes . . . are functioning without major disruptions by humans," created room for suspicions among some members of the public regarding the actual outcome of ecosystem management.[95] This language could have been interpreted as a subtle (perhaps even covert) call for excluding increasing portions of the GYA from traditional multiple-use activities. Whether or not such an interpretation was "accurate" is ultimately beside the point. What is important is that this interpretation had (and has) currency among public land interests. Indeed, the Wyoming Legislature passed a resolution calling for the withdrawal of the draft *Vision* document. Primary among the justifications for this action was the belief that the "[*Vision*] document will create a de facto Yellowstone National Park management philosophy on adjacent forests, diminishing or totally excluding multiple use activities."[96]

When placed in the context developed here, the Wyoming resolution can be understood as multiple use advocates protesting the potential shift to a management regime grounded in ecosystem management. Another way to say this is that multiple use advocates saw ecosystem management as a negative, while ecosystem advocates saw it as a positive. What is so important about the protest is the currency it (and similar protests) has in the intermountain West, an area which is seemingly central to ecosystem management. Whether the author or readers agree or disagree with the resolution is not the point; the

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93. Robert Lackey, *Seven Pillars of Ecosystem Management*, LANDSCAPE & URB. PLAN. (in press).

94. USFS & USNPS, *supra* note 51, at 4-1 (emphasis added).

95. *Id.* at 3-9.

96. H.R.J. Res. 16, 51st Leg., Gen Sess. (Wyo. 1991).

point is that many people may well view ecosystem management as a *problem* in federal land management, rather than as the *solution* it purports to be.

Moreover, the *Vision* document is not the only source of apprehension for multiple use advocates. In the mid-1980s, a group composed primarily of natural resource professionals in the NPS formed the Yellowstone Park Preservation Council (YPPC) to counter what they believed to be a "pro-development" bias in park management.[97] A related development is the recent creation of the Association of USFS Employees for Environmental Ethics (AFSEEE) as a protest against a perceived overemphasis on timber harvesting in National Forest management.[98] The point here is that the YPPC and AFSEEE both represent outcroppings of ecosystem management within the management agencies. It is not difficult to understand, therefore, why multiple use advocates might view the *Vision* document as something more than an effort to balance ecology and production science. They appear to pay attention to what is said by others. To take this point further, some USFS managers familiar with the *Vision* process have noted that the Greater Yellowstone Coalition was perceived as being very influential in the writing of the document.[99]

There is one final issue, relating to both the science and management concern, and the character of the conflict over Yellowstone, which warrants attention. "What happens," asks former NPS official William Brown,

> when park science is viewed as an end in itself rather than as a tool of park management? When significant numbers of scientific and lay people view certain parks primarily as scientific benchmarks, gene pools, and relict environments of inestimable value to mankind in a trembling biosphere?

Answering his own questions, Brown continues.

> An extreme scenario might go like this: First, certain parks or segments thereof are designated ecological reserves. Second, scientific study, not enjoyment and use, becomes the controlling purpose in such reserves. Third, traditional park management is relieved in favor of a science management board.[100]

In short, an over zealous application of ecosystem management in GYE might alter the traditional park management regime as well as forest management. It is clear that some in NPS see this as a desired outcome.

The broader issue here centers on the *public* character of the federal lands and the agencies expressed desire to "satisfy the wishes of human soci-

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97. Freemuth, *supra* note 21, at .

98. Pat Ford, *Jeff DeBonis: 'So Far It's All Talk,'* HIGH COUNTRY NEWS, Feb. 26, 1990, at 1; *see also* Jim Stiak, *Forester Challenges His Agency to a Discussion*, HIGH COUNTRY NEWS, June 5, 1989, at 1 (relating the efforts of Jeff DeBonis in protecting the public domain's old-growth forests).

99. Interview with Steve Mealey, *supra* note 77.

100. William Brown, *Preamble Grist*, GEO. WRIGHT F., at 21-22.

ety."[101] By almost any definition, the GYA is an ecosystem worth protecting. Moreover, as the first national park and national forest in the United States, which nonetheless has remained relatively unharmed, the GYA is an ideally suited site for experimentation with new management techniques. The question to be asked, however, is whether a possible narrowing of the area's use and enjoyment by people serves the *public's* interest, or the interests of land managers and scientists. In a related vein, was the process initiated by the draft *Vision* document intended to solicit the public's perspective on the future of the GYA, or rather intended to convince the public that the management professionals' view should determine the GYA's future? As Benjamin Barber has suggested, "Where there is certain knowledge, true science, or absolute right, there is no conflict that cannot be resolved by reference to the unity of truth, and thus there is no necessity for politics."[102] Those who believe that ecosystem management has reached the status of unchallengeable truth might do well to pay close attention to Barber's concern.

It is apparent that the original *Vision* document, while very farsighted, suggested a consensus that did not yet exist. Thus it became liable, on the one hand, to environmentalist criticism that it lacked "clout" due to its vagueness, and on the other hand, to multiple-use group criticism that it was too pro-environment.[103] Illustrative of the problem is an observation made by Marshall Gingery, assistant superintendent of Grand Teton National Park. Conceding the likely demise of the *Vision* document, Gingery noted "it will still come down to how much pressure the public will put on us to manage the right way."[104] This remark suggests a possible failure to recognize that the *public* is not yet willing to grant ecosystem management the status of "certain knowledge," and therefore, there is as yet no "right" way to manage the area.

In September 1991 a revised *Vision* document was released. The final *Vision* document was a drastic revision of the original text, having been shortened from over 80 pages to 10 pages. Moreover, the original goal to "Maintain Ecosystem Integrity"[105] was replaced with the principle to "Maintain Functional Ecosystems,"[106] a shift predicated on the admission that "there is more than a single ecosystem in the GYA."[107] In short, this new version offered a "statement of principles and guidelines to coordinate management of the national forests and parks in the GYA," which also "reinforces the separate missions of the USFS and NPS."[108]

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101. USFS & USNPS, *supra* note 51, at 4-1.

102. BENJAMIN R. BARBER, STRONG DEMOCRACY 129 (1984).

103. Michael Milstein, *A Fading Yellowstone 'Vision,'* HIGH COUNTRY NEWS, June 3, 1991, at 1.

104. *Id.*

105. USFS & USNPS, *supra* note 51, at 3-7.

106. U.S. NAT'L PARK SERV., DEP'T OF INTERIOR & U.S. FOREST SERV., DEP'T OF AGRIC., A FRAMEWORK FOR COORDINATION OF NATIONAL PARKS AND FORESTS IN THE GREATER YELLOWSTONE AREA 4 (1991) [hereinafter FRAMEWORK].

107. U.S. NAT'L PARK SERV., DEP'T OF INTERIOR & U.S. FOREST SERV., DEP'T OF AGRIC., SUMMARY OF COMMENTS ON THE DRAFT GREATER YELLOWSTONE FRAMEWORK 1 (1991) [hereinafter SUMMARY].

108. FRAMEWORK, *supra* note 106, at 1.

This change in direction might be, as one disgruntled environmentalist suggested, "another example of the industry-controlled politicians affecting the outcome from the agency."[109] But it might also suggest that the political process was, at that point, functioning as it should. Indeed, a purpose of democratic and participatory politics is to make "preferences and opinions earn legitimacy by forcing them to run the gauntlet of public deliberation and public judgement."[110] The revised *Vision* document simply acknowledged that ecosystem management had not earned legitimacy in the eyes of the public *at that point.*

What occurred at Yellowstone, then, was a showdown over the political legitimacy of ecosystem management. Consider, for example, Robert Barbee's (Yellowstone's Superintendent), Paul Schullery's (Yellowstone environmental specialist and journalist) and John Varley's (Yellowstone Chief of Research in 1991) thoughtful and spirited discussion of what went wrong with the *Vision* process. In their view, the only players that openly endorsed the draft *Vision* document were the NPS and USFS. But even that support was not complete: "[T]hough forest supervisors and park superintendents involved were strongly committed to the *Vision*, many staff members weren't."[111]

Some local environmental groups endorsed the *Vision* process, but most of the national groups simply "bowed politely toward the process," while refusing to "jump in with both feet and take a major part in the dialogues."[112] This is remarkable departure from some of the strong support given ecosystem protection at the House hearings. It also reminds us of the difficulties faced by federal land managers as they attempt to offer their versions of land management policy; most of the time they are criticized and second guessed, while rarely being supported. In this case, lack of support may have a lot to do over the uncertainty surrounding ecosystem management and its definition. There were also "commodity groups of many persuasions" who mounted a "powerful regional campaign" by convincing their members that the proposal represented a "giant land-grab, another Federal lockup."[113]

In short, the *Vision* process submitted ecosystem management to public judgement which determined that the idea, in its current form, had not yet earned legitimacy. Aside from a relatively small group of agency personnel, the members of the Yellowstone community were either not interested in the principles of the draft *Vision* document, or openly hostile to them. To proceed with the proposal under these conditions, therefore, would be tantamount to turning control of the GYA over to a small group of resource professionals, which of course is an increasingly problematic action throughout the area of resource policy.

This assessment is based on the premise that the Yellowstone controversy

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109. Dan Whipple, *All Sides Fault Final 'Vision' Document*, CASPER STAR TRIB., Sept. 12, 1991, at A1.

110. Barber, *supra* note 102, at 136.

111. Barbee et al., *supra* note 3, at 84.

112. *Id.* at 82, 85.

113. *Id.*

represented a public deliberation. There is another possibility however. As Barbee, Schullery, and Varley argue, "Public sentiment did not have a great deal to do with the process. The American public, the owners of the parks and foresters of the greater Yellowstone area, played virtually no role at all."[114] This is a reference, of course, to the fact that "attempts to hold hearings on the *Vision* in other parts of the country—far from intense local pressures—failed."[115]

Moreover, this view of the situation has received additional support. A fifteen month investigation into "alleged improprieties in the directed reassignments" of Lorraine Mintzmeyer and John Mumma by the Subcommittee on the Civil Service of the U.S. House of Representatives "revealed a conspiracy by powerful commodity and special interest groups and the Bush Administration to eviscerate the DRAFT *Vision* document."[116] Some of the steps in this "conspiracy" were "(1) closing previously planned national hearings to avoid anticipated positive public comment; (2) employing outside groups to 'rig' the appearance of negative public opinion at a few, select, local public meetings; (3) maneuvering the scientific interdisciplinary team out of the revision process, and (4) using the manufactured, negative, public comment to explain why the revisions were allegedly necessary."[117] It might be noted, parenthetically, that part of the evidence used to support these charges was the account by Barbee, Schullery, and Varley.

Several issues emerge at this point. First, it seems that dubbing opposition to the draft *Vision* document a "conspiracy" is overstating the case. For example, Barbee, Schullery, and Varley note that the "governors of Montana, Wyoming, and Idaho wrote a joint letter criticizing the process."[118] It is doubtful that these actions were part of a conspiracy. The then governor of Idaho, Cecil Andrus, a life-long Democrat and President Carter's Secretary of Interior, hardly strikes one as a likely participant in any conspiracy of the Bush Administration.

Second, the suggestion that "negative public opinion" was "manufactured" simply demonstrates a lack of understanding about the *Vision* process and public land conflicts in general. The entire *Vision* document process confirms that its version of ecosystem management encountered opposition from the beginning. Barbee, Scullery, and Varley note that "repeated meetings . . . with mining associations and other commodity extraction groups" led inevitably to the conclusion that "you can meet forever with opponents, and if they truly disagree with your position, you will not change their position."[119] Finally, as noted above, anyone familiar with contemporary public land conflicts knows

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114. *Id.* at 85.
115. *Id.*
116. STAFF OF REPRESENTATIVE SUBCOMM. ON THE CIVIL SERV., 99TH CONG., REPORT ON INTERFERENCE IN ENVIRONMENTAL PROGRAMS BY POLITICAL APPOINTEES 2 (Subcomm. Print 1992).
117. *Id.* at 11.
118. Barbee et al., *supra* note 3, at 82.
119. *Id.* at 84-85.

that ecology and ecosystem have often been political code words guaranteed to meet opposition from commodity user groups. In short, if negative public opinion was manufactured, the draft *Vision* document was what helped produce it.

Third, and perhaps most intriguing, the account by Barbee, Schullery, and Varley, as well as the Subcommittee's report, contains a view of the public which is understandable but problematic. On the one hand, if the national parks and forests are owned by the "American public," then how can there be "outside groups?" On the other hand, what criteria are used to determine that opponents of the draft *Vision* document, which included governors and legislators as well as commodity users, are excluded from the American public?

The point here, of course, is that the political boundaries in question were not between the "American public" and some other public, but rather between supporters and opponents of the draft *Vision* document. Stated differently, supporters understood that local hearings would be heavily populated by their opponents. The public input during the early stages of the *Vision* process made that abundantly clear. Their belief, then, was that hearings held in places outside of the region would be populated by interests sympathetic to the process.

If Barbee, Schullery, and Varley's assessment was an accurate reading of the political landscape, then it was not at all clear that hearings outside of the region would have produced different results. One of their key complaints was that national environmental groups expressed very little interest in the proposal. What is missing here, then, is evidence that these groups would have been more interested in the proposal had the hearings been held in some other location. At the same time, given the intensity of opposition to the proposal, there is every reason to believe that opponents might well have been "brought in by the bus-load" wherever the hearings were held.[120]

In sum, it seems that the various accounts about what went wrong with the *Vision* process lead back to an earlier contention—the managers involved simply did not understand the dynamics of public discourse. Rather than trying to *build* a public consensus around the idea of ecosystem management, the *Vision* process ended up playing one part of the public against other parts. It is not surprising, therefore, that the document became the focal point of divisiveness and acrimony, replete with charge and countercharge about conspiracies. We must remember that ecosystem management is a public policy idea. As Deborah Stone reminds us about the role of ideas in political discourse

> Ideas are the very stuff of politics. People fight about ideas, fight for them, and fight against them . . . . Every idea about policy draws boundaries. It tells us what or who is included or excluded in a category. These boundaries are more than intellectual—they define people in and out of a conflict or place them on different sides.[121]

Finally, the *Vision* process forces us to think about the role of Congress in

120. *Id.* at 82.

121. DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 25 (1988).

these sorts of policy debates. The most important way that policy is legitimized in the United States is when Congress passes a law after time for public debate. Although Congress held oversight hearings on the management of the Greater Yellowstone Area, it never gave any indication that it wished the two federal agencies to embark on the *Vision* process. Should the two bureaus have sought a clear signal from Congress, before proceeding, by trying to interest it in ecosystem management legislation? That has certainly been tried successfully in the past. Yet others might argue that USFS and NPS exercised leadership when they developed the *Vision* document. Parts of the public, however, seemed to view the *Vision* process as a major policy shift and have rebelled. It has already been noted that it wasn't clear whether the two bureaus thought what they were doing was a major change in policy direction. Was their version of ecosystem management about process or substance, interagency coordination or a deliberate change in resource management focus? It seems clear that without congressional support for substantive change, that change would be impossible to sustain, and thus the only change would be that of process.

ECOSYSTEM MANAGEMENT SINCE THE VISION DAYS

The election of Bill Clinton, in November of 1992, greatly accelerated the adoption of ecosystem management. Vice-President Gore's National Performance Review called for the federal government to develop a "proactive approach to ensuring a sustainable economy and a sustainable environment through ecosystem management."[122] This Administrative directive began the federal rush towards ecosystem management, eclipsing the smaller and more piecemeal efforts such as that around Yellowstone. Much of that effort initially focused on the Pacific Northwest and the controversy over protecting the spotted owl.[123] In 1993, a federal interagency ecosystem management task force was formed to study and make recommendations concerning what would come to be called the "ecosystem approach." This section focuses on NPS efforts regarding ecosystem management, while drawing on other federal activities where important.

In September of 1994, the Ecosystem Management Working Group of the Resource Stewardship Team of the Vail Office issued its draft report, *Ecosystem Management in the National Park Service*. The report was one of a number issued by working groups and teams formed as a result of the Vail, Colorado, meeting titled "National Parks for the 21st Century," which coincided with the seventy-fifth anniversary of the creation of NPS in 1991.[124]

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122. INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, 2 THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES 1 (1995).

123. For two diverse but greatly informative accounts of that controversy, see STEVEN LEWIS YAFFEE, THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY (1994); ALSTON CHASE, IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE RISING TYRANNY OF ECOLOGY (1995).

124. The Vail conference resulted in a report from the Sterling Committee of the 75th Anniversary Symposium, *National Parks For The 21st Century* (1992), to the Director of the National Park Service. A number of working groups issued reports on a number of topics, including eco-

The report defined the NPS version of ecosystem management by first noting that because ecosystems were interconnected, bureau managers needed to "shift from a primary park-or resource-specific approach to a wider systems and process approach to management."[125] Hence the need for ecosystem management, which was defined as a "[l]ong term approach, with the goal to preserve, protect, and/or restore ecosystem integrity and also maintain sustainable societies and economies."[126] One of the key ways to ensure this would happen was through a "fluid zone of cooperation."[127] This concept led to the assertion that attempts to define a "definitive ecosystem boundary" were "rarely constructive or useful," hence the need for multiple boundaries for multiple ecosystem processes.[128]

Herein lies a major problem which plagues ecosystem management. The NPS assertion that clear boundary definition was unnecessary contradicts both the Blackwater Concept discussed earlier, as well as a recent report by the General Accounting Office (GAO), discussed below, that delineating ecosystem management boundaries were a "prerequisite" for planning, budgeting, and so forth.[129] This is no mere quibble, and may lie at the core of problems in both defining and implementing ecosystem management.

Boundary definition is stunningly problematic. For example, parts of eastern Idaho fall into both the Greater Yellowstone Ecosystem *and* the Upper Columbia River Basin Ecosystem, which residents of this area would seemingly wish reconciled. The acreage of the Greater Yellowstone Ecosystem alone has been identified as being from 5 to 19 million acres, depending on which group is doing the reporting.

Allan Fitzsimmons has remarked on the differences between USFS, U.S. Fish and Wildlife Service, and Environmental Protection Agency ecosystem maps. He notes the observation of Bruce Hannon that "the delimitation of the system is strictly at the discretion of the observer, i.e. the system boundaries and the list of internal elements may be chosen at will."[130] It is hard to see how much public support can be expected for ecosystem management when there is fundamental disagreement over whether or not one needs definable and clearly fixed boundaries for ecosystems, or whether there even are clearly defined ecosystems which are agreed upon. Also, given widespread public distrust of the federal government, the power given federal "observers" to define things in whatever way they may wish might create even more backlash

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system management.

125. NAT'L PARK SERV., ECOSYSTEM MANAGEMENT WORKING GROUP OF THE RESOURCE STEWARDSHIP TEAM, ECOSYSTEM MANAGEMENT IN THE NAT'L PARK SERV. 5 (1994).

126. *Id.*

127. *Id.* at 11.

128. *Id.*

129. U.S. GEN. ACCOUNTING OFFICE, ECOSYSTEM MANAGEMENT— ADDITIONAL ACTIONS NEEDED TO ADEQUATELY TEST A PROMISING APPROACH, at 32 (1994), *available in* 1994 WL 810514.

130. Fitzsimmons, *supra* note 89, at 218 (quoting Bruce Hannon, *Accounting in Ecological Systems*, *in* ECOLOGICAL ECONOMICS: THE SCIENCE AND MANAGEMENT OF SUSTAINABILITY 234, 238 (Robert Costanza ed., 1991)).

once the uncertainty of key principles of ecosystem management becomes widely understood.

Recently, the USFS definition of ecosystem management added to the uncertainly by pointing to the need for defined boundaries using the phrase "defined area or region of interest" in the bureau definition.[131] Again, one is tempted to ask—defined by whom, using what criteria—while at the same time noting that USFS is arguing that definition *is* important. The NPS report had several other important orientations. The first continued a growing trend in NPS which recognizes that park resources are impacted from sources and activities internal and external to park units. Second, the call for more research and monitoring extended another trend which has been growing over the past few years. Third, the report acknowledged that park units were human constructs (Congress creates national parks, they are not "natural"), as well as part of a larger world with human and nonhuman components.

ECOSYSTEM MANAGEMENT ON THE GROUND

NPS claims to have applied what it terms "ecosystem management principles" in a number of areas, although the final bureau ecosystem management report is apparently still being written.[132] It is not clear what the bureau means by the claim as yet, given the continued lack of clarity concerning the definition of ecosystem management. What appears implied by the assertion, however, is more cooperation and sharing of information and concerns, both within the NPS, and between NPS and other entities—governmental and otherwise. For example, NPS reported on park units in the Colorado Plateau region of the West, where better coordination and sharing of information and research data are being actively promoted. Whether that sharing of information is ecosystem management or just better intra-agency communication is an interesting question, and worth consideration. If ecosystem management turns out to really be about coordination, sharing of information and so forth, it is hard to see how anyone can be opposed. But, that said, what remains unclear are whether ecosystem management is anything more.

The report of the Vail ecosystem management working group provides a number of regional examples of ecosystem management. It notes that two regions of concern to NPS, South Florida and the Southern Appalachians, are "sharing budget plans" and "coordinating closely on planning projects."[133] Again, this report suggests more of a process change where bureaus cooperate more than they have before, while the substance of policy outcome remains unclear.

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131. *See* U.S. FOREST SERV. & BUREAU OF LAND MANAGEMENT, SUMMARY OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE UPPER COLUMBIA RIVER BASIN 16 (1997) (stating that ecosystems can be "viewed as organized within a hierarchy, with each level having a variety of time and space scales"). The phrase "defined area or region of interest" was noted in an unpublished document located at the office of the Upper Columbia River Basin Assessment Team project office in Boise, Idaho.

132. U.S. GEN. ACCOUNTING OFFICE, *supra* note 129, at 4-5.

133. INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, *supra* note ? , at 8.

A key reason for some of the institutional "slowness," however, does not have much to do with a lack of understanding of ecosystem management. NPS has just completed a major reorganization effort, while at the same time complying with numerous Administration/management directives such as Total Quality Management[134] and the National Performance Review.[135] The effects of increasing "management-by-buzzword" demands placed on federal bureaus like NPS, by Administrations of both political parties, are something which deserves much more attention. As one example, it is not clear how the personnel and budgets cuts brought about by the National Performance Review have been meshed with the ecosystem management policies of the current administration. That is, all federal bureaus with environmental protection responsibilities are being asked to do more with less resources.[136] Often those resources include the loss of personnel with political and administrative experience who could have helped with the implementation of ecosystem management. Public bureaus appear to spend an increasing amount of time complying with the new management initiatives, rather than concentrating on core areas of bureau mission requirements; in this case, managing parks.

An examination of one these new management initiatives, this time from Congress, shows how difficult it may to be for NPS to implement ecosystem management, as it is currently understood, and to mesh it with other requirements. In 1993, Congress passed the Government Performance and Results Act of 1993 (GPRA);[137] NPS is one of several "pilot" bureaus attempting to implement the Act. GPRA is a congressional mandate to link the mission of a bureau to outcome-related goals, how the goals will be achieved, and program evaluations of whether the goals are achieved or not.[138] For example, one goal of the NPS mission has already been interpreted through GPRA procedures as "protect park resources."[139] From this goal statement, a number of park unit-specific actions that can be documented and evaluated through budgets, quantitative measures of performance, and so on, are supposed to follow. The congressional intent of the GPRA is to measure and evaluate outcomes rather than outputs.[140] In this example, one would evaluate "results"—was a resource protected—rather than "processes" (money spent, personnel activities, and so on).

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134. Quality Envtl. Mgmt. Subcomm., President's Commission on Environmental Quality, Total Quality Management: A Framework for Pollution Prevention (1993) (creating a task force by Clinton Administration).

135. AL GORE, THE NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS (1993) (directing all agencies to implement ecosystem management).

136. This is a rather common, yet anonymous, complaint of officials in NPS and other bureaus.

137. Government Peformance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993).

138. *Id.* §§ 2, 3, 4.

139. U.S. Nat'l Park Serv., *GRPA-izing the NPS Strategic Plan* (1995) (unpublished NPS document).

140. Government Performance and Results Act, § 2(b)(3).

There are, of course, problems with the GPRA. In the field of education, we might term this the "teach the test problem." Let us suppose a Board of Education mandated a similar approach to measuring teacher success by requiring a certain percentage of students to score above the seventieth percentile on a standardized test. If the percentage is not reached then the teacher has not met the required outcome measure. One way for a teacher to increase the percentage would be to spend a lot of time focusing on passing the test by essentially teaching the test to students. We would likely be able to see a higher student success rate, but we would have no way of knowing whether the students were actually better educated. More fundamentally, it has never been clear that tests can measure all attributes of an education, or that what is measured is what ought to be, but cannot be, measured. Thus, NPS might find ways to measure certain attributes of resource protection, but will that be because those attributes are easier to quantify?

These outcome measures are all actions that look as though they are under NPS management control. Cross boundary issues and actions related to them, such as air pollution, may also be able to be documented, but they relate to another aspect of GPRA, as well. Under that act, each federal bureau is to have a plan which, among other things has an "identification of those key factors *external to the agency and beyond its control* that could significantly affect the achievement of the general goals and objectives" (such as protecting park resources).[141] This is clearly a fortuitous time for NPS to document more clearly what aspects of protecting park resources are beyond bureau control, since this law requires such documentation. NPS should seize this opportunity to clarify the scope and extent of the "external threats'" problem, an action which might help clarify what is or is not resolvable by the principles of ecosystem management. Yet what is most striking about how NPS is dealing with this new law is how bureau action compares with ecosystem management efforts. The "cooperative" or "collaborative" aspects of ecosystem management may not fit well with the GPRA. NPS training materials have already interpreted actions such as "forge strong collaborative relations with all partners and integrate them in all operations" as *not* appropriate GPRA goal criteria.[142] Compare this statement with the following one from the NPS ecosystem management document which is also very similar to some government-wide ecosystem management definitions: "Ecosystem Management is a collaborative approach to natural and cultural resource management . . . ."[143]

By GPRA standards, it is hard to show how such collaboration has been accomplished, and what the measurable outcomes would be. The difficult question for NPS is whether it ought to spend more time on process (collaboration) or on results (outcomes), because Congress has asked one thing and the

141. 5 U.S.C. § 306(a)(5) (1994) (emphasis added).

142. U.S. Nat'l Park Serv., *Examples of Goals Not Meeting GRPA Criteria* (1997) (internal NPS document).

143. ECOSYSTEM, *supra* note 125, at 3.

Clinton Administration, another. Yet, until a better definition of ecosystem management is achieved, it may make sense for NPS to pay more attention to GPRA. There are several reasons why the bureau might wish to do so. First, there is a growing critique of ecosystem management from a number of directions and perspectives, which illustrates that the term is amorphous and somewhat questionable scientifically.[144] Allan Fitzsimmons has made the following scathing observation about the USFS's 1995 rule calling for the implementation of ecosystem management throughout the forest system. The

> rule calls for the Forest Service to oversee the National Forest System in order to sustain undefined conditions on undefined landscape units that exist in limitless numbers in undefined locations and that are dynamic and constantly changing over time and space in unclear ways. . . . This is an unintelligible bias for managing the National Forest System.[145]

Put simply, because of fundamental vagueness in key parts of its definition, ecosystem management is becoming a target, and one possibility would be to move slightly and subtly away from the line of fire, rather than spend inordinate bureau resources and energies trying to define and implement a policy that many view as both ill-defined and without necessary public support at this time.

Second, the GPRA, while flawed, sets out a process that appears a bit more specific; a process that the bureau as well as its interested public might be able to use to get a better understanding of what actually is being valued, as well as accomplished, by NPS. GPRA might even provide NPS a means to define what it means by ecosystem management and how the bureau will measure whether ecosystem management is successful. Given the huge public disagreement over the goals and purposes of much of the federal estate, this understanding would be no mean accomplishment.

ANALYSIS AND CONCLUSION

Ecosystem management may be an idea whose time came, began to prosper, and then came under severe criticism, all in short order. The initial days of ecosystem management seemed much like other periods of policy development in the United States. In this case, land managers, resource managers and scientists, and scholars began to explore new ways to think about and manage the resources under their care. Ecosystem management was, at that point, an idea about federal land and resource management which, while exciting, needed more refinement before being implemented.

Then came the Yellowstone experiment analyzed above. It would be fair to characterize the Yellowstone effort as a policy experiment, one that perhaps "failed," yet at the same provided much information about how one might try such a thing the next time. In other words, policy learning could have led to

144. *See generally* CHASE, *supra* note 81; LACKEY, *supra* note 51.
145. FITZSIMMONS, *supra* note 47, at 221.

policy refinement. But then other events intervened, and ecosystem management hit the policy "fast track" with the Clinton Administration. Bureau learning opportunities were lost in this orchestrated environment.

Analysis of Clinton Administration efforts leads to some puzzling questions. First, it remains unclear what ecosystem management actually is, and whether it is more about changes in bureau decision processes or decision outcomes. The current definition of ecosystem management is both vague and process-oriented. As was already mentioned, any policy that would ensure inter-bureau coordination and communication is laudable and uncontroversial. The logic of such a position implies that more could be done, but it is unlikely that a fundamental reorganization of the federal land management bureaus will take place. Although many have asked whether it is essential that the United States have four land bureaus, the political capital needed to effect that sort of change is hard to come by.

What remains unanswered is whether or not ecosystem management will lead to changes in policy. On the one hand, federal officials constantly refer to the "integration" of economic, social and environmental goals. Yet on the other hand, we are warned by other advocates of ecosystem management to *avoid* giving equal weight to economic and environmental goals. In the words of Ed Grumbine, "[w]e must avoid the *democratic trap* of giving equal weight to all interest groups: many would destroy biodiversity for short-term economic gain."[146] Understandably, such a stance makes many people nervous about the real goals of ecosystem management, even if federal officials rightly deny that they hold such views. Grumbine's position once again assumes the stance of ultimate "truth" which denies the need for democratic discourse, a stance warned against earlier by Benjamin Barber. What remains unclear are whether ecosystem management implies a "trumping" of resource use by resource protection, and whether the American public has acquiesced in such a policy change.

It remains unclear how ecosystem management will benefit NPS decisionmaking. Park management issues coalesce around the proper balance between visitor enjoyment and resource protection, and the appropriate level of visitor services which will also leave park resources available for the enjoyment of future visitors. The heady goals of balancing cultural socioeconomic and ecological systems are absurdly overdrawn for the real management questions facing NPS. Paradoxically, the balancing of goals creates the opportunity for economic interests to argue that parks should do more to contribute to the economic well-being of the "system" they are in. Perhaps what is most needed—though not likely to happen—is a long period where federal bureaus like NPS are spared from any more management buzzwords until they are able to deal with their core missions. Superintendent Barbee's testimony at the 1985 House hearings noted that ecosystem management was something federal land

146. FITZSIMMONS, *supra* note 89, at 220 (quoting Edward Grumbine, *Protecting Biological Diversity Through the Greater Ecosystem Concept*, 10(3) NAT. AREAS J. 114, 117 (1990) (emphasis added)).

managers were going to have to deal with.[147] At the same time, he felt that the concept was somewhat questionable as management tool. These are sound observations. Perhaps we need to think about ecosystem management more than we have.

147. *Greater Yellowstone Ecosystem: Oversight Hearing Before the Subcomm. on Pub. Lands and the Subcomm. on Nat'l Parks and Recreation of the Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 99-18 (1985) (statement of Robert D. Barbee, Superintendent, Yellowstone Nat'l Park).

CONCESSIONS LAW AND POLICY IN THE NATIONAL PARK SYSTEM[1]

GEORGE CAMERON COGGINS*
ROBERT L. GLICKSMAN**

About 270 million Americans and foreign guests visit the 368 units of the National Park System every year.[2] Catering to the visitor's needs for food, lodging, transportation, recreation, and other services is big business.[3] The National Park Service (NPS), the agency within the Department of the Interior that manages the national parks, contracts with private entities called concessionaires[4] to provide those services. In 1989, the NPS possessed about 1,000 long-term contracts and many more short-term licenses.[5] National Park concessionaires grossed about $1.4 billion and paid fees to the government of $35 million, a 2.4% return, in that year.[6] The National Tour Association estimates that the presence of national parks contributes over $10 billion and 230,000 jobs to nearby communities.[7] Tourism in the United States generally generates about $417 billion in gross receipts.[8]

Several aspects of Park Service concession policies have been highly controversial in recent years. Most complaints revolve around asserted overdevelopment of visitor facilities,[9] monopolistic concessionaire arrangements and practices,[10] artificial stimulation of visitor demand,[11] meager financial return

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1. Parts of this article were adapted from GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW ch. 17 (1990, supplemented) [hereinafter PNRL].

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2. James T. Yenckel, *Fearless Traveller: The Park System Squeeze, Visitors Will Feel the Pinch of Budget Cutbacks*, WASH. POST, May 19, 1996, at E01. The six federal agencies that grant concession contracts recorded 1.6 billion visits to federal lands in 1991. *Park Issues: Before the Subcomm. of National Parks, Forests, and Public lands of the House Comm. on Natural Resources, Hearings on H.R. 1527 & 2028*, 104th Cong. (1995) (statement of David Unger, Forest Service).

3. *See, e.g.*, Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. COLO. L. REV. 369 (1994).

4. The federal law refers to concession contractors as "concessioners," 16 U.S.C. §§ 20-20g (1994), but the dictionary and these writers prefer the original term, "concessionaires." *See, e.g.*, WEBSTER'S DICTIONARY 376 (1977).

5. U.S. GEN. ACCOUNTING OFFICE, FEDERAL LANDS: IMPROVEMENTS NEEDED IN MANAGING CONCESSIONS 4 (June 1991) [hereinafter GAO, IMPROVEMENTS].

6. *Id.* at 2. In 1993, more than 9,000 concessionaires on federal lands grossed in excess of $2 billion. H.R. REP. NO. 104-280, pt. 1, at 566 (1995).

7. *Hearing on Recreation Fees at Public Parks Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Natural Resources.*, 104th Cong. (1995) (statement of James D. Santini, NTA Rep.).

8. *Id.*

9. *See infra* part IIA.

10. *See infra* part IIB.2.b.ii.

to the government,[12] inadequate facility maintenance, administrative secrecy in the contracting processes,[13] and general lack of competition.[14] A bill to reform NPS concessions law was passed overwhelmingly by both Houses of Congress in 1995 but died as the session expired.[15] Rival bills on the same subject were pending in 1996.[16]

This article explicates current law governing NPS concessions and assesses ideas and proposals for reform. Part I outlines the factual background concerning the National Park System, the NPS, and current concession operations, and compares the NPS situation with that of the other three major federal land management agencies. The second part investigates NPS concession law and policy in some detail. The National Parks System Concessions Policy Act of 1965[17] and related rules create a unique contractual milieu for the agency, the contractors, and the public. Part III catalogues the complaints that various parties have leveled against the current system. It also recounts and evaluates a wide spectrum of proposals for change.

I. THE NATIONAL PARK SYSTEM AND ITS CONCESSIONAIRES

A. *The National Park System*

America's national parks often have been characterized as the best idea the United States Congress ever had.[18] Since the creation of Yellowstone and Yosemite National Parks a century and a quarter ago, Congress has expanded the National Park System to 368 units encompassing over 83 million acres; a majority of the park acreage is in Alaska. The process is ongoing: 5.5 million acres in the California Desert Conservation area were designated as Mohave National Park in 1994,[19] and sentiment for park establishment in other areas is a political constant.[20] The rest of the world took notice and flattered the United States by emulation: virtually every country on the globe now has its own national parks.

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11. *See infra* part IIIC.1.
12. *See infra* part IIB.2.d.
13. *See infra* notes 198-200 and accompanying text.
14. *See infra* part IIID.1.
15. 141 CONG. REC. S1945 (daily ed. Feb. 1, 1995) (statement of Sen. Bennett).
16. H.R. 2028, 104th Cong. (1995) (introduced by Rep. Hansen); H.R. 773, 104th Cong. (1995) (introduced by Rep. Meyers); S. 309, 104th Cong. (1995) (introduced by Sen. Bennett); *see also Reform in Concessions Mgmt. in Fed. Agencies: Oversight Hearing Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Resources*, 104th Cong. (1996); and *Concession Reform is Needed: Testimony of Victor S. Rezendes Before the Subcomm. on National Parks, Forests, and Lands of the House Comm. on Resources*, 104th Cong. (1996) (detailing several aspects of the debate over the issue of concessions reform).
17. National Park System Concession Policy Act of 1965, 16 U.S.C. §§ 20-20g (1994).
18. *See, e.g.*, David J. Simon, *Preface to* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS xii (David J. Simon ed., Island Press, 1988) (defending the national park concept); Paul C. Pritchard, *The Best Idea America Ever Had*, Nat'l Geographic, Aug. 1991, at 36 (supporting the establishment of national parks).
19. California Desert Protection Act of 1994, 16 U.S.C. §§ 410aaa - 410aaa-83 (1994); *see* 140 CONG. REC. S14961-03 (daily ed. Oct. 8, 1994).
20. *E.g.*, H.R. 1449, 104th Cong. (1995) (establishing Tallgrass Prairie National Preserve); H.R. 2763, 104th Cong. (1995) (establishing Boston Harbor Islands National Recreation Area).

Establishment of national parks in the United States might not have been possible without the tourist industry. The Northern Pacific Railroad was an enthusiastic booster of the original Yellowstone bill because its owner correctly foresaw that a large number of people would need the railroad to visit this fabled, mysterious place.[21] The informal alliance between environmentalists and preservationists and tourist service providers has endured, with occasional strains, ever since.

By 1900, Congress had created five more national parks in addition to Yellowstone. The park unit creation process exploded in this century, and the expansion promises to continue into the 21st century. In 1906, Congress delegated to the President the power to designate areas as national monuments.[22] After 1916, when Congress formalized the National Park System,[23] the monuments were included within it. National park creation became politically popular, in part because local citizens realized that park designation usually resulted in increased economical activity near, as well as in, the park area.[24] In the early 1980s, Interior Secretary James Watt decried that popularity, stating that he would end "park barrel politics" and new "park-a-month" policies.[25]

Congress gradually added new zoning categories for park system units in addition to parks and monuments. The more important of the twenty current categories other than parks proper are national preserves, national recreation areas, wild and scenic river segments, national seashores, and national battlefield monuments. National preserves (e.g., Big Cypress[26]) are similar to national parks, but Congress differentiated the categories to allow more human uses, notably hunting, on the preserves than in the parks.[27] National recreation areas (NRAs) primarily are of two kinds: lands surrounding and including reservoirs, for example, Lake Mead[28] set aside for recreational pursuits; and excess federal holdings near urban areas (e.g., Golden Gate NRA[29]). National rivers (e.g., Buffalo NR[30]) and wild and scenic river segments[31] are ribbon-like parks along selected river corridors.[32] Battlefield monuments (e.g., Gettysburg[33]) are premised more on historical than ecological or recreational

21. *See* ALFRED RUNTE, JR., TRAINS OF DISCOVERY, WESTERN RAILROADS AND THE NATIONAL PARKS 19 (rev. ed. 1990).

22. Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1994).

23. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-4 (1994).

24. *See* John L. Giesser, *The National Park Service and External Development: Addressing Park Boundary Area Threats Through Public Nuisance*, 20 B.C. ENVTL. AFF. L. REV. 761, 770-71 (1993).

25. George Cameron Coggins & Robert L. Glicksman, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125, 166 (1984); *see also* George Cameron Coggins & Doris K. Nagel, *"Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).

26. 16 U.S.C. §§ 698f - 698m-4 (1994).

27. *See, e.g.*, 36 C.F.R. § 7.86(e) (1996) (hunting in Big Cypress National Preserve).

28. 16 U.S.C. §§ 460n - 460n-9 (1994).

29. 16 U.S.C. §§ 460bb - 460bb5.

30. 16 U.S.C. §§ 460m-8 - 460m14.

31. 16 U.S.C. §§ 1271-1287 (1994).

32. *See generally* PNRL, *supra* note 1, ch. 15.

33. 16 U.S.C. §§ 430g - 430g-10 (1994).

significance. Other categories of lands that Congress has added to the National Park System include lake shores, trails, historical sites, a cultural area, a train museum, and scenic highways.[34] Offshore parks, called national marine sanctuaries, are not included within the park system.[35]

In spite of its continuing growth, the National Park System is still the smallest federal land management system by acreage. National wildlife refuges (90 plus million acres), national forests (about 190 million acres), and Bureau of Land Management public lands (about 270 million acres) are all larger but less well known. Even the relative newcomer, the Wilderness Preservation System, created in 1964,[36] has more acreage (about 100 million acres),[37] but roughly forty million of its acres are within the park system.

Resource management within the national park system has come under increasing attack in recent years. Some writers decry the wildlife management practices of the NPS.[38] Other critics are concerned about external threats to park amenities stemming from such causes as adjacent timber harvests,[39] power plant emissions,[40] water diversions,[41] ranching,[42] and commercial and residential development.[43] Controversy over facilities and concessions policy also has erupted in several instances in recent years, the most notable being the replacement of the Yosemite concessionaire.[44]

B. *The National Park Service (NPS)*

Congress chartered the NPS in 1916.[45] The NPS is a line agency within the Department of the Interior. Its structure, a hierarchy, runs from the lowliest temporary worker to the Interior Secretary. In 1994, the NPS had a budget of about $972 million, which rose to about $1.1 billion in fiscal year 1996.[46] The agency takes in about 33 cents per visit, but each visit costs the NPS about $4.12.[47]

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34. *See generally* WILLIAM EVERHARDT, THE FAMILY TREE OF THE NATIONAL PARK SYSTEM (1972).

35. Pursuant to the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1447 (1994), marine sanctuaries are under the jurisdiction of the Department of Commerce.

36. Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1994).

37. *See* George Cameron Coggins & Robert L. Glicksman, *Power, Procedure, and Policy in Public Lands and Resources Law*, 10 NAT. RESOURCES & ENV'T 3, 82 (1995); William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1010 (1994).

38. *See* ALSTON CHASE, PLAYING GOD IN YELLOWSTONE (1986).

39. *See* Sierra Club v. Department of the Interior, 398 F. Supp. 284 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (N.D. Cal. 1976).

40. *See* Central Ariz. Water Conserv. Dist. v. EPA, 990 F.2d 1531 (9th Cir. 1993).

41. *See* United States v. South Fla. Water Management Dist., 28 F.3d 1563 (11th Cir. 1994).

42. *See* Defenders of Wildlife v. Lujan, 792 F. Supp. 834, 835 (D.D.C. 1992).

43. *See* United States v. County Bd. of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979) [hereinafter *Arlington County*]. *See generally* PNRL, *supra* note 1, § 14.03; JOHN L. FREEMUTH, ISLANDS UNDER SIEGE (1991); Giesser, *supra* note 24; Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1987).

44. *See infra* Part II.B.2.b.

45. National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-4 (1994).

46. GAO, IMPROVEMENTS, *supra* note 5, at 23, 30.

47. *Id.* at 30.

The NPS is headquartered in the nation's capital. The NPS headquarters staff develop NPS policies, programs, and regulations, and coordinate NPS activities with Congress, the Office of Management and Budget, and other government entities. The Headquarters Office consists of the Office of the Director and five Associate Directors. The Office of the Director includes the Director and Deputy Director, the Assistant Director for External Affairs, and the Chief of the Office of International Affairs.[48] The Associate Directors include Park Operations and Education,[49] Natural Resource Stewardship and Science,[50] Cultural Resource Stewardship and Partnerships,[51] Professional Services,[52] and Administration.[53]

The NPS field units (or parks) are organized into a maximum of 16 "ecological-cultural-geographical clusters of 10-35 units each."[54] Seven Field Director Offices supervise budgetary matters, media relations, and policy direction for the field units within their boundaries.[55] Sixteen System Support Offices, each headed by a Superintendent, provide professional, technical, and administrative services, serve as liaisons with other agencies and interests, and participate in ecosystem management for a specific cluster of field units.[56] The larger parks have staff members for law enforcement,[57] interpretation, and maintenance, as well as biologists, ecologists, and even landscape architects.[58]

The National Park System Act endows the NPS with the mission to pre-

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48. National Park Service Reorganization, 60 Fed. Reg. 40,601 (1995).

49. This Associate Director supervises the Statistical Unit and the Field Operations Technical Support Center in Denver, Colorado; the National Interagency Fire Center in Boise, Idaho; and the Interpretive Design Center in Harpers Ferry, West Virginia. *Id.* at 40,601-02.

50. This Associate Director is in charge of environmental quality in park system units and supervises the Chief Scientist for the NPS and the Natural Resources Program Center in Denver and Fort Collins, Colorado. *Id.* at 40,602.

51. This Associate Director supervises grants administration, rivers, trails, and conservation assistance, and state program review. He or she also oversees the Cultural Resources Program Support Center, the Partnership Programs Service Center, and the National Center for Preservation Technology and Training. *Id.*

52. This official is responsible for land resources and strategic planning and supervises Centers for Planning, Design and Construction (in Denver) and Information and Telecommunications (in Denver and Washington, D.C.). *Id.*

53. This Associate Director is the Chief Financial Officer for the NPS and supervises two Administrative Service Centers in Denver and the District of Columbia, as well as several National Program Centers for Accounting Operations and Employee Development. *Id.*

54. *Id.* "The cluster serves as a framework for cooperation and decision-making rather than a staffed organizational entity." *Id*; *see also* Change in Organizational Title from Regional Director to Field Director, 61 Fed. Reg. 28,504 (1996).

55. The Seven Field Director Offices are for the Northwest (in Philadelphia), Southeast (in Atlanta), Midwest (in Omaha), Intermountain (in Denver), Pacific West (in San Francisco), Alaska (in Anchorage), and National Capital (in Washington, D.C.). National Park Service Reorganization, 60 Fed. Reg. at 40,602.

56. *Id.* Regulations governing management of each NPS unit are published at 36 C.F.R §§ 7.1-7.100 (1996).

57. In 1994, the FBI began training park rangers to investigate crimes in or near the parks. Until recently, most criminal matters involving the parks were theft-related, but the focus of law enforcement in the parks has shifted to activities that result in resource degradation, including waste dumping, acid mine drainage, wetlands destruction, and oil spills. *See* 24 Env't Rep. (BNA) 2075 (1994).

58. *See* Audubon Wildlife Report — 1986 at 468.

serve the scenery, wildlife, and other attributes of "parks, monuments, and reservations" for the benefit of present and future generations.[59] That mission involves an inherent tension between recreation and preservation, a tension highlighted in the matter of concession facility development and promotion.[60] The 1965 Concessions Policy Act authorizes facility development but specifically subordinates development to the basic preservational purposes of national park establishment.[61]

The mission of the NPS has been diluted and fragmented by additional tasks and duties assigned to it by Congress over the years. The NPS acts as the overseer for federal areas in Washington, D.C.,[62] the landlord for spas and resorts,[63] the custodian of important (and some historically marginal) houses and sites,[64] the patrolman for two scenic highways,[65] the curator of a railroad museum,[66] and the administrator of a cultural area.[67] Twenty years ago, former Professor Futrell suggested that the agency and the nation would be better served if the NPS reverted to its earlier, purer mission.[68] A bill introduced in 1995 would have required a study to determine whether and to what extent the Park Service should divest itself of its less significant holdings.[69]

Congress gave the NPS ample regulatory authority and discretion, although the agency seldom possesses sufficient funds to carry out its mandate fully.[70] The agency is severely restricted in the fees it can charge for park admission,[71] and its appropriations have fallen drastically compared to visitor

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59. 16 U.S.C. § 1 (1994).

60. *See infra* Part II.A.

61. National Park Systems Concessions Policy Act, 16 U.S.C. § 20 (1994).

62. 40 U.S.C. § 804 (1988).

63. 16 U.S.C. §§ 361-374 (1994).

64. *See* Weir Farm National Historic Site Establishment Act of 1990, Pub. L. No. 101-485, 104 Stat. 1171 (1990).

65. 16 U.S.C. §§ 460a-1 to 460a-11 (1994).

66. 16 U.S.C. §§ 410vv to 410vv-8 (1994) (Marsh-Billings National Historic Park).

67. 16 U.S.C. §§ 284-284j (1994) (Wolf Trap Farm Park).

68. J. William Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255, 269-71, 316 (1976).

69. H.R. 260, 104th Cong., 1st Sess. (1995). The proposed National Park System Reform Act is described at 141 CONG. REC. H9083-01 (1995). Congress evidently dropped the divestiture notion in the face of concerted public opposition.

70. *See* U.S. GEN. ACCOUNTING OFFICE, NATIONAL PARKS - DIFFICULT CHOICES NEED TO BE MADE ABOUT THE FUTURE OF THE PARKS (1995) [hereinafter GAO, DIFFICULT CHOICES]. The GAO reported in 1995 that:

> [t]here is cause for concern about the health of national parks for both visitor services and resource management. The overall level of visitor services was deteriorating at most of the park units that GAO reviewed. Services were being cut back, and the condition of many trails, campgrounds, and other facilities was declining.

Id. Between 1988 and 1995, the dollar amount of the NPS maintenance backlog increased from $1.9 billion to over $4 billion. The GAO attributed this increase to a combination of additional operating requirements placed on parks by laws and administrative requirements and increased visitation, which drives up the parks' operating costs. The GAO concluded that the principal options for dealing with the problem are increasing the amount of financial resources going to the parks, limiting or reducing the number of units in the park system, and reducing the level of visitor services. *Id.*

71. 16 U.S.C. §§ 460*l*-6a, 460*l*-6c (1994). *Cf.* 16 U.S.C. § 460k-3 (1994) (Interior Secretary may establish reasonable charges and fees for public use of national wildlife refuges).

levels.[72]

Unlike the other federal land management agencies, the NPS is not required to defer to state law in wildlife management or similar matters.[73] The courts are virtually unanimous in their deference to NPS exercises of its discretionary authority in this area. Courts have deferred to the NPS in its efforts to remove wild horses,[74] enforce quotas on river rafting,[75] ban hunting,[76] trapping,[77] and fishing,[78] allow promotional advertising,[79] regulate[80] and terminate[81] concessionaires, allow snowmobile use,[82] and restrict biking.[83] The agency has complete authority over access.[84] The only instances located in which courts enjoined NPS proposals involved plans for a hotel[85] and for increased stock animals in park wilderness areas.[86]

The NPS enjoys a unique niche in the pantheon of federal land management agencies. Its mission is far more circumscribed than those of the Fish and Wildlife Service (FWS), the Bureau of Land Management (BLM), and the Forest Service (FS). These all have some responsibilities for production of commodities from the natural resources under their jurisdictions;[87] the NPS does not. Consequently, the NPS is relatively immune from the political pressures imposed by loggers and miners, although it has experienced difficulties caused by ranchers,[88] water diverters,[89] hunters,[90] developers,[91] and states.[92] Further, the NPS is far more visible (and politically protected) than the other agencies because it is the custodian of the nation's most beloved scenic treasures.

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72. *See* 140 CONG. REC. S4102, S4106, S4108 (daily ed. Apr. 12, 1994) (statement of Sen. Wallop).

73. *See* PNRL, *supra* note 1, § 18.02[4][b][i].

74. Wilkins v. Lujan, 995 F.2d 850, 852-53 (8th Cir. 1993).

75. Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1251, 1254 (9th Cir. 1979).

76. United States v. Brown, 552 F.2d 817, 819, 821-23 (8th Cir. 1977).

77. NRA v. Potter, 628 F. Supp. 903, 909-14 (D.D.C. 1986).

78. Organized Fishermen of Fla. v. Hodel, 775 F.2d 1544, 1546 (11th Cir. 1985).

79. Friends of Yosemite v. Frizzell, 420 F. Supp. 390, 395-96 (N.D. Cal. 1976).

80. *See* Universal Interpretive Shuttle Corp. v. Washington Metro Area Transit Comm'n, 393 U.S. 186, 188-89, 194 (1968).

81. *See* YRT Servs. Corp. v. United States, 28 Fed. Cl. 366, 417-18 (1993).

82. Voyageurs Region Nat'l. Park Ass'n v. Lujan, 966 F.2d 424, 426, 428 (8th Cir. 1992). *But cf.* Mausolf v. Babbitt, 913 F. Supp. 1334, 1335-36, 1344 (D. Minn. 1996) (remanding closure of lakeshore area to snowmobiling for lack of adequate explanation from the lower court).

83. Bicycle Trails Council v. Babbitt, 82 F.3d 1445 (9th Cir. 1996).

84. *See* Christianson v. Hauptman, 991 F.2d 59, 61 (2d Cir. 1993); Biderman v. Morton, 507 F.2d 396, 398 (2d Cir. 1974).

85. Sierra Club v. Lujan, 716 F. Supp. 1289, 1291, 1293 (D. Ariz. 1989).

86. High Sierra Hikers Ass'n v. Kennedy, No. C-94-3570 CW, 1995 WL 382369 (N.D. Cal. June 14, 1995), *vacated pursuant to settlement*, 1996 WL 421435 (N.D. Cal. Apr. 5, 1996).

87. *See generally* PNRL, *supra* note 1, chs. 19-20, 22-25.

88. For example, ranchers bitterly opposed the reintroduction of wolves into the Yellowstone National Park ecosystem. *See id.* § 15C.04[3].

89. *See* Cappaert v. United States, 426 U.S. 128, 131-38, 143 (1976).

90. *See* NRA v. Potter, 628 F. Supp. 903, 910-11 (D.D.C. 1986).

91. *See Arlington County*, 487 F. Supp. at 141-44.

92. United States v. Denver, 656 P.2d 1, 4 (Colo. 1982).

C. *National Park Concessions*

It is difficult to describe all of the concession contracts and licenses entered into by the NPS. The NPS uses the "contract" mechanism for larger, long-term agreements that often contemplate construction or maintenance of physical facilities.[93] Commercial use licenses, on the other hand, are used to authorize smaller scale services, usually without construction of fixtures or improvements.[94] The presence of a national park obviously benefits tourist businesses in nearby communities,[95] but this subsection discusses only the services delivered or facilities operated within the boundaries of park system units.

1. Facilities

Most facilities within national parks were constructed by the NPS, but some concessionaires are required by their contracts to construct, repair, maintain, or improve physical facilities. Record title to such improvements remains in the United States, although the concessionaires, as beneficial owners, have certain statutory rights to compensation if the agreement is terminated.[96] Park roads, perhaps the most important facilities from the perspective of the average visitor, almost always are built and maintained by the agency.[97] Likewise, visitor centers and campgrounds tend to be constructed and operated by the NPS.[98] Still, the galaxy of products and services demanded or desired by visitors is vast, and concessionaires usually provide them. These include the basic human needs of food and shelter: private entrepreneurs commonly provide restaurants, hotels, motels, and permanent tent installations. In some park system units, concessionaires also operate ski areas, marinas, boat and snowmobile rentals, gift and souvenir shops, photo labs, and gas stations.[99]

2. Services

Many facilities in parks exist to provide services. Nevertheless, certain service concessions are less dependent upon physical facilities. For example, some canoe renters are located outside parks and merely launch or pick up canoes within parks.[100] Similarly, float trips often travel through parks but depend on base facilities outside parks to store equipment and organize trips

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93. *See infra* Part I.C.1.
94. *See infra* Part I.C.2.
95. *See* Rhonda Bodfield, *New Funds Will Keep Canyon Open*, TUCSON CITIZEN, Jan. 3, 1996, at 1B (stating that Grand Canyon tourists add $250 million to Arizona economy).
96. 16 U.S.C. § 20e (1994); *see infra* Part II.B.2.c.
97. *See* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 843 (1993).
98. *Id.*
99. *See* YRT Servs. Corp. v. United States, 28 Fed. Cl. 366 (1993).
100. *See* Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983); United States v. Carter, 339 F. Supp. 1394 (D. Ariz. 1972).

(as do air tours).[101] Guides and outfitters,[102] firewood merchants,[103] shuttle bus companies,[104] houseboat[105] and boat slip rentals,[106] camper and fishing goods suppliers,[107] marine fuel distributors,[108] hot shower providers,[109] trail ride and horse boarding services,[110] pack animal providers,[111] and sanitary napkin providers[112] all supply goods or services for use inside the parks.

D. *Concessions in Other Federal Land Management Systems*

Six federal land management agencies grant concession contracts to private entities; 80% of such contracts are let by the NPS, the FS, and the BLM.[113] The General Accounting Office (GAO) identified about 9,000 such agreements in 1991, but its information concededly was incomplete.[114] The 100 largest concessions generated about sixty-five percent of total revenues.[115] In fiscal year 1994, the GAO identified 10,427 concession agreements entered into by the six land management agencies, representing ninety-two percent of all such agreements with the federal government.[116] NPS and FS concession operations accounted for about ninety percent of these six agencies' reported concessionaires' gross revenues and fees paid to the government.[117]

Although eleven different federal statutes impact public land concessions,[118] no other agency is subject to a statute comparable to the NPS's Concessions Policy Act. This section briefly summarizes the concessions law and policy of the three other major land management agencies—the FS, the BLM, and the FWS. Special purpose policies of the Bureau of Reclamation[119] and of the Army Corps of Engineers[120] are not discussed except

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101. *See* Grand Canyon Dories, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974); Concession Permit, 61 Fed. Reg. 1401 (1996).

102. *See* United States v. Patzer, 15 F.3d 934 (10th Cir. 1993).

103. *See* Lewis v. Babbitt, 998 F.2d 880 (10th Cir. 1993).

104. *See* Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Cl. Ct. 1978).

105. *See* Roosevelt Recreation Enterprises, 56 Fed. Reg. 55,685 (1991).

106. *See* Lake Mohave Boat Owners Ass'n v. National Park Serv., 78 F.3d 1360 (9th Cir. 1995); Lake Mead Nat'l Recreation Area Operation of a Marine at Willow Beach, 61 Fed. Reg. 37,923 (1996).

107. *See* Concession Permit, 61 Fed Reg. 1401 (1996); Concession Contract Negotiations, 54 Fed. Reg. 18,941 (1989).

108. Concession Contract Negotiations, 54 Fed. Reg. 18,941 (1989).

109. *See* Proposal to Award Concession Permits, 61 Fed. Reg. 30,637 (1996).

110. *See* 61 Fed. Reg. 37,077 (1996); Notice of Intention to Extend Existing Concession Contracts, 61 Fed. Reg. 26,204 (1996).

111. *See* Notice of Intent to Issue a Prospectus for the Operation of Pack Station Servs. and Facilities within Sequoia Nat'l Park, 61 Fed. Reg. 24,950 (1996).

112. *See* Concession Permit Proposal, 60 Fed. Reg. 52,411 (1995).

113. GAO, IMPROVEMENTS, *supra* note 5, at 4.

114. *Id.*

115. *Id.* at 5.

116. U.S. GEN. ACCOUNTING OFFICE, CONCESSIONS CONTRACTING: GOVERNMENTWIDE RATES OF RETURN (1996) [hereinafter GAO, CONCESSIONS CONTRACTING].

117. *Id.*

118. GAO, IMPROVEMENTS, *supra* note 5, at 3.

119. *See, e.g.*, 138 CONG. REC. S11,006, S11,030 (daily ed. July 31, 1992) (proposing legislation concerning concession operation at Lake Berryessa).

120. *See, e.g.*, 141 CONG. REC. H10,995, H11,073 (daily ed. Oct. 26, 1995) (proposing legis-

where they may intersect with or influence the other agencies.

1. Forest Service

Ski areas are the most important types of concessions in the national forests.[121] Before 1986, the FS typically granted ski area operators a term permit for the use of eighty acres for the main facilities and revocable special use permits for the area necessary for ski runs, lifts, and so forth.[122] The National Forest Ski Area Permit Act of 1986[123] gives the Agriculture Secretary authority to issue forty-year leases for the amount of acreage he "determines sufficient and appropriate."[124] Ski area developers must pay fair market value for the permit privilege.[125]

For other types of concessions, the FS has general authority to regulate occupancy and use of the national forests[126] and specific authority to permit visitor facility development.[127] Except for casual recreational use, uses of the national forests for profit require permits.[128]

2. BLM

The BLM lacks a specific concessions statute. BLM's power to authorize the provision of visitor services stems from its general authority under the Federal Land Policy and Management Act (FLPMA).[129] Therefore, BLM concession law is found in the agency's rather cursory regulations[130] and in decisions of the Interior Board of Land Appeals (IBLA).[131] Fair market value guides the permit fee for permits conveying a possessory interest in land,[132] but special recreation permits are available at administrative cost.[133] The authorized BLM officer possesses large discretion in the issuance of permits and land use authorizations.[134]

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lation concerning commercial concessions at Corps of Engineers Projects); *Park Issues Before the Subcomm. on Nat'l Parks, Forests, and Lands of the House Comm. on Resources* 1995 WL 446825 (F.D.C.H.) (July 25, 1995) (statement of Barry J. Frankell, Army Corps of Engineers).

121. In 1995, 143 ski areas occupied about 183,000 acres of national forestland. S. REP. NO. 104-183, at 3 (1995). This amounts to about 0.1 % of all FS lands. H.R. REP. NO. 104-280, pt. 1, at 566 (1995).

122. *See* Wilson v. Block, 708 F.2d 735, 756, 758 (D.C. Cir. 1983).

123. National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b (1994).

124. *Id.* § 497b(b)(3).

125. *Id.* § 497b(b)(8). *See generally* PNRL, *supra* note 1, § 17.04[3][b].

126. 16 U.S.C. § 551 (1994).

127. *Id.* § 497.

128. *See* United States v. Hells Canyon Guide Serv. Inc., 660 F.2d 735 (9th Cir. 1981). *Cf.* 36 C.F.R. § 251.53 (1996) (listing Forest Service authorities for issuance of special use permits).

129. 43 U.S.C. §§ 1732, 1733, 1740 (1994).

130. 43 C.F.R. §§ 2820, 2920, 8372 (1995).

131. *See* PNRL, *supra* note 1, § 17.04[4].

132. 43 C.F.R. § 2920.0-6 (1995).

133. *Id.* § 8372.4.

134. *Id.* §§ 2920.2-2, 2920.5-4, 8372.5(b).

3. FWS

The FWS regulations merely recite that concessions contracts may be granted "where there is a demonstrated justified need for services or facilities,"[135] that "a person granted economic use privileges" needs to observe the agreement conditions,[136] and that concessionaires cannot discriminate on racial or similar grounds.[137]

II. THE LAW OF CONCESSIONS IN THE NATIONAL PARK SYSTEM

The law governing the granting of concessions contracts for facilities and services in the national parks is much more extensive than the parallel body of law applicable to the other federal land management agencies. The Concessions Policy Act grants broad authority to the NPS to contract with concessionaires located both within and outside the parks. Although the exercise of this authority creates the potential for conflict with the NPS's obligation to subordinate the provision of resources within its jurisdiction for recreational use to preservational needs, the courts have been loathe to interfere with the balance struck by the agency.

Concessions contracts with the NPS form a unique niche in the laws governing contractual relations. They differ from other contracts with the federal government in that the application of normal federal procurement rules is unclear. They depart from contracts between purely private entities because concessionaires may have rights typically not available to other contractors, such as protections against loss of investment and preferential renewal rights. Part II of this article describes the unique attributes of NPS concessions contracts, while Part III analyzes the policy implications of those attributes.

A. *Propriety of Facility Development*

Concessionaire charters for recreational facilities and services raise two fundamental issues: first, when and where such facilities are permissible and appropriate; and, what the relative rights and responsibilities are of the concessionaire, the government, and the user public. The propriety of furnishing recreational facilities is partly a function of the law governing the particular land management system. Usually, it is also a function of land management agency discretion. The FS and the BLM must balance the recreational benefits against the environmental or resource costs of such facilities in the context of multiple use, sustained yield management of all surface resources. The NPS (and, to a lesser extent, the FWS) must insure that recreational development does not unduly detract from its preservational mission. The underlying policy considerations and conundrums are delineated in Professor Sax's excellent 1980 book, *Mountains Without Handrails*.[138] Groups challenging proposed

135. 50 C.F.R. § 25.61 (1995).
136. *Id.* § 26.25.
137. *Id.* § 3.3(a).
138. JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980).

recreational facilities on federal lands because of asserted environmental problems have had little success.

The National Park System Act authorizes the Secretary of Interior to manage the parks and other units in the system for present enjoyment as well as preservation.[139] It also explicitly empowers the Secretary to contract for recreational services.[140] The NPS Concessions Policy Act (CPA)[141] subordinates facility development to the basic preservation mission:

> Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided . . . should be provided only under carefully controlled safeguards against unregulated and indiscriminate use . . . . It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment . . . and that are consistent to the highest practicable degree with the preservation and conservation of the areas.[142]

The judiciary has not defined the outer boundaries of the resulting discretion to encourage recreational use at the arguable expense of preservation.[143] Only one court has enjoined an NPS-approved facility or contract on grounds that approval would have exceeded the statutory limits or contravened the statutory purposes.[144]

Many environmentalists assert that some national parks and other federal areas have become festooned with restaurants, shops, campgrounds, ski areas, roads, lodges, and like facilities to an entirely inappropriate degree.[145] They argue that the preservation purpose of park establishment should outweigh visitor accommodation desires for development beyond bare necessities. Whatever the intrinsic merits of that argument, it must be made in a political or administrative forum to succeed because the courts appear emphatically disinclined to overturn NPS discretion in licensing recreational facilities.[146] Some of the allegedly more abusive situations, however, apparently have not been the subjects of litigation.[147]

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139. 16 U.S.C. § 1 (1994).

140. *Id.* §§ 3, 17b.

141. National Park System Concessions Policy Act of 1965, 16 U.S.C. §§ 20-20g (1994).

142. *Id.* § 20.

143. *Cf.* Conservation Law Found. v. Secretary of the Interior, 864 F.2d 954 (1st Cir. 1989) (upholding National Park Service plan that authorized off-road vehicle use on Cape Cod National Seashore); Sierra Club v. Watt, 566 F. Supp. 380 (D. Utah 1983) (upholding regulation allowing leasing of "locatable" minerals within national recreation area); Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (N.D. Cal. 1976) (challenging construction of sanitation and housing facilities in national park).

144. Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989). *Cf. High Sierra Hikers Ass'n*, 1995 WL 382369 (enjoining increase in use of stock animals in wilderness area).

145. *See* Michael Mantell, *Preservation and Use: Concessions in the Nat'l Parks*, 8 ECOLOGY L.Q. 1 (1979); THE CONSERVATION FOUND., NAT'L PARKS FOR A NEW GENERATION (1985).

146. The political process is not a negligible factor in such disputes. Public pressure led to a new Yosemite National Park concessionaire contract that will raise the government's revenue share about 2500 %. *U.S. Picks Concessionaire for Yosemite Park*, N.Y. TIMES, Dec. 18, 1992, at A22.

147. The influence of the concessionaire at Yosemite, and the intensive road and facility development at Yellowstone, are examples of arguable abuses of discretion. *See* ALFRED RUNTE,

Judicial opinions in several cases endorse NPS actions relating to recreational facilities and concessionaires. Park Service discretion to limit recreational activities and facilities by commercial enterprises has been upheld in every litigated instance located.[148] In the *Grand Canyon Access* case,[149] the reviewing court upheld an NPS allocation of most rafting rights to commercial outfitters, even though the general quota meant reduced rafting opportunities for individuals. Similarly, a court refused injunctive relief to a cruise ship operator to which the NPS denied permits to enter Glacier Bay because of a previous collision.[150] Conversely, environmentalists' efforts to force closure of a campground in Yellowstone to assist grizzly bear recovery were unavailing,[151] and a California court found no need for the NPS to restrict its concessionaire's advertising campaigns in the face of allegations linking advertising to overuse of Yosemite National Park.[152]

Research has disclosed only a single instance in which NPS discretion in allowing more intensive recreation through facility development has been judicially disturbed.[153] That instance should give the NPS pause, however. The agency entered into a contract for construction of a hotel without NEPA compliance and in seeming conflict with the policies of the master plan for the area. Its later environmental evaluation evidently was limited to where the hotel should be located, not whether it should be built.[154] The court preliminarily enjoined construction by the concessionaire because it thought that dual noncompliance was probably arbitrary and capricious.[155] This decision is only a blip on the screen of deference, but it illustrates that NPS discretion has some bounds.[156]

Despite the absence of a significant body of case law questioning the propriety of the NPS's exercise of its authority to grant concessions, the devel-

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NATIONAL PARKS: THE AMERICAN EXPERIENCE 169 (2d ed. 1987) (addressing Yosemite); CHASE, *supra* note 38 (addressing Yellowstone).

148. *E.g.*, Free Enter. Canoe Renters Ass'n v. Watt, 771 F.2d 852 (8th Cir. 1983); United States v. Carter, 339 F. Supp. 1394 (D. Ariz. 1972). *See also* Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir. 1989).

149. Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1254 (9th Cir. 1979); *see also* United States v. Garren, 893 F.2d 208 (9th Cir. 1989) (upholding procedures for allocating use of Rouge River between commercial and non-commercial uses).

150. Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1 (D.D.C. 1994).

151. National Wildlife Fed'n v. National Park Serv., 699 F. Supp. 384 (D. Wyo. 1987). The court stressed that the Secretary's discretion in balancing "promotion" and "preservation" was "very broad." *Id.* at 391; *see also* Grand Canyon Dorries, Inc. v. Walker, 500 F.2d 588 (10th Cir. 1974) (disallowing an injunctive claim under implied contract to keep dam discharges steady).

152. *Friends of Yosemite*, 420 F. Supp. at 393.

153. Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989).

154. *Sierra Club*, 716 F. Supp. at 1291-92.

155. *Id.* at 1293.

156. In *High Sierra Hikers Ass'n*, the district court enjoined the Park Service from increasing the number of stock animals allowed in wilderness areas of the Sequoia and Kings Canyon National Parks because the agency failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994). The court acknowledged NPS findings that the increase would result in little or no change in use patterns and that the impact of any change on the environment would be sufficiently mitigated to be "badly flawed." *High Sierra Hikers Ass'n*, 1995 WL 382369, at *9. In addition, the agency failed to address adequately the affect of the increase on a threatened species of bighorn sheep. *Id.* at *13-*14. The decision holds limited precedent value, however, since it is unpublished and was later vacated.

opment of the facilities and the provision of services covered by these contracts may conflict with the NPS's raison d'être, the preservation of America's unique national heritage. Incantations of judicial deference to agency balancing of objectives can easily substitute for meaningful analysis of the limits of agency discretion. The subordination of the NPS's recreational mandate to its preservational mission in the CPA, however, takes the form of a policy statement[157] rather than being an enforceable, non-discretionary decree. The courts are loathe to translate such precatory admonitions into "real law." Absent legislative reform, litigants probably will continue to have a better chance of successfully challenging the particular provisions of an NPS concessions contract as contrary to agency regulations and guidance than they have of blocking the issuance of the contract on the ground that it exceeds the agency's statutory authority.

B. *The NPS Relationship with Concessionaires and Permittees*

1. Park Service Authority

The CPA of 1965[158] clarifies contractual rights and responsibilities of private entrepreneurs in national park system units.[159] Recognizing that the parks faced danger of irreparable damage from heavy visitation, Congress in the CPA reaffirmed conservation as the primary park management goal.[160] Facility developments must be consistent to the "highest practicable degree" with preservation goals.[161]

The CPA is not the exclusive authority for awarding park concessions. The National Park System Act of 1916 instructs the Secretary to "promote" as well as "regulate" park use and empowers the Secretary to make necessary rules,[162] "grant privileges, leases, and permits,"[163] and enter into contracts for visitor accommodation.[164] The NPS regularly granted monopolies and preference renewal rights to concessionaires before enactment of the CPA.[165] Legislation establishing individual park system units may provide additional

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157. 16 U.S.C. § 20.

158. *Id.* §§ 20-20g.

159. Senate Comm. on Interior and Insular Affairs, National Parks Concessions Policies, S. REP. NO. 89-765 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3489-3501. *See generally* National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976).

160. 16 U.S.C. § 20 (1994). NPS regulations reflect this priority:

> [I]t is the policy of the Secretary of the Interior, as mandated by law, to permit concessions in park areas only under carefully controlled safeguards against unregulated and indiscriminate use so that heavy visitation will not unduly impair park values and resources. Concession activities in park areas shall be limited to those that are necessary and appropriate for public use and enjoyment of park areas in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the park areas.

36 C.F.R. § 51.2 (1996).

161. 16 U.S.C. § 20 (1994).

162. 16 U.S.C. §§ 1, 3 (1994).

163. *Id.* § 3.

164. *Id.* § 17b.

165. *See* United States v. Gray Line Water Tours, 311 F.2d 779 (4th Cir. 1962).

authority and guidance on concessions for those units.[166] The National Visitor Center Facility Act,[167] for instance, governs tours within Washington, D.C. and it preempts contrary local law.[168]

The United States Supreme Court has affirmed the Secretary's broad powers to contract with concessionaires.[169] That power extends not only to all lands and waters within the park system,[170] it also covers businesses that only enter the park to pick up canoes launched outside the park.[171] The Secretary may prohibit solicitation of tourist business on federal property.[172]

Whether or to what extent NPS concessionaire contracting is subject to general government contract and procurement law are issues that apparently have not been completely resolved. In a 1978 decision, the Court of Claims stated that it was "not convinced that the NPS . . . can avoid normal, legally mandated, procurement procedures, simply by characterizing the procurement of transportation services for the public as the granting of a 'concession' to a specific contractor."[173] The concession in that case differed from the norm in that the NPS had agreed to pay the concessionaire for providing shuttle bus services. Because the general procurement contract requirements applied, the contract was invalid for violation of those restrictions. Despite that invalidity, the contractor could recover in *quantum meruit* for the reasonable value of the services performed.[174] The same court, in 1982, opined that a Bureau of the Budget Circular on cost recovery applied to an NPS agreement to provide electricity to a concessionaire.[175] In 1989, the Interior Board of Contract Appeals ruled that NPS concessions agreements were procurement contracts and thus within the ambit of the federal Contract Disputes Act (CDA).[176]

Several developments cast doubt on whether the full panoply of federal procurement law applies to NPS concession contracts. First, the NPS altered its regulations to read that its concession contracts "are not Federal procurement contracts . . . within the meaning of statutory or regulatory requirements applicable to Federal procurement actions."[177] Administrative interpretations are ordinarily entitled to some judicial deference.[178] Second, the Court of Federal Claims thereafter ruled in *YRT* that the NPS was not subject to the

166. *See* 16 U.S.C. § 22 (1994) (Yellowstone National Park).

167. National Visitor Center Facility Act of 1968, 40 U.S.C. §§ 801-831 (1994).

168. United States v. District of Columbia, 571 F.2d 651, 657 (D.C. Cir. 1977).

169. *Universal Interpretive Shuttle Corp.*, 393 U.S. at 188-90.

170. *Carter*, 339 F. Supp. at 1397.

171. *Free Enter. Canoe Renters Ass'n*, 711 F.2d at 856; *cf. Carter*, 339 F. Supp. at 1399 (holding that the NPS may regulate service contract for rental of boats on lake within national recreation area, even though contract may be entered into outside the area).

172. Washington Tour Guides Ass'n v. National Park Serv., 808 F. Supp. 877, 881 (D.D.C. 1992).

173. *Yosemite Park & Curry Co.*, 582 F.2d at 558.

174. *Id.* at 560-61.

175. *Id.* at 928; *see also* Concessions Rate Administration Program, 58 Fed. Reg. 64,800, 64,800 (1993) (describing OMB Circular A-25, User Charges, which outlines the scope of user charges for government services such as utilities).

176. Appeal of R & R Enters., 96 Interior Dec. 313 (1989). *See generally* PNRL, *supra* note 1, § 9.03 (discussing the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994)).

177. 36 C.F.R. § 51.1 (1996).

178. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965).

Competition in Contracting Act or the federal acquisition regulations.[179] Although the Board of Contract Appeals refused to follow *YRT* the following year, its ruling was limited to pre-regulation contacts; those concession agreements were subject to the CDA.[180] The Interior Department continues to insist that concessions contracts awarded pursuant to the CPA are not subject to the Federal Acquisition Regulations applicable in other procurement contexts.[181] Third, the Comptroller General has concluded that the procedures mandated by the Competition in Contracting Act[182] do not apply to NPS concessions agreements.[183]

No "better view" of this technical difficulty is readily apparent. The CPA preceded the CDA and neither mentions the other. NPS concessions agreements clearly are for "the procurement of services" (and often for "the procurement of construction . . . of real property"), terms defining the scope of the CDA.[184] On the other hand, the services are for third parties and the public, not for the agency itself. Contrary to the usual service contract, the contractor pays the landlord for the privilege of operating. Concessions agreements are more like leases and permits than ordinary bilateral contracts. On balance, the NPS should stick to the interpretation in its regulation unless Congress decides otherwise or a court definitively rules otherwise.

2. The Contractual Relationship

a. *General*

The CPA grants or clarifies certain rights accruing to those contracting with the NPS. The Act, adopted in reaction to the disruption in park concessions experienced during World War II,[185] was intended to allow concessionaires a fair return on their investments (but not excessive profits), while insuring that NPS concessions facilities would be affordable and available to ordinary, middle class users.[186]

Concessionaires contracting with the NPS are better situated than many parties to private bilateral contracts. Concessionaires have a compensable possessory interest in improvements they make,[187] are protected against loss of investment,[188] are guaranteed a reasonable opportunity to make a profit,[189]

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179. YRT Servs. Corp. v. United States, 28 Fed. Cl. 366, 392-93 (1993).

180. Appeal of National Park Concessions, Inc., 101 Interior Dec. 92, 106 (1994).

181. *See YRT Servs. Corp.* 28 Fed. Cl. at 392 (1993); *see also* Concessions Contracts and Permits, 57 Fed. Reg. 40,496, 40,498 (1992) (stating that "concessions contracts are not federal procurement contracts" and "statutory and regulatory requirements relating to federal procurement actions do not apply to concessions contracts or permits").

182. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at scattered sections throughout titles 31 and 41 of the U.S.C).

183. *YRT Servs. Corp.*, 28 Fed. Cl. at 392-93 (1993).

184. 41 U.S.C. § 602(a) (1994); *see* PNRL, *supra* note 1, § 9.03[2].

185. *Lake Mohave*, 78 F.3d at 1366. The *Lake Mohave* opinion contains a good description of the background and legislative history of the CPA. *Id.* at 1366-67.

186. *Id.* at 1366.

187. 16 U.S.C. § 20e.

188. *Id.* § 20b(a).

189. *Id.* § 20b(b).

have preferential renewal status,[190] and may receive preference rights to offer new services.[191] Congress in 1965 thought that these rights were necessary to induce concessionaires into providing adequate service in the adverse commercial conditions under which businesses in remote areas often operate.[192] To obtain these benefits, a business must enter into an actual written contract with the Park Service because a contractual relationship will not be implied circumstantially.[193] Nevertheless, when a written contract is held invalid, the concessionaire may be entitled to *quantum meruit* recovery.[194]

Concession agreements typically come in two varieties: contracts and permits called "commercial use licenses." The NPS regulations governing concession arrangements,[195] as revised in 1992,[196] use the single term "concession contract" to refer in most instances to both contracts and permits.[197] The agency has not published all of the rules governing the issuance and administration of these agreements. The NPS can operate in this somewhat cavalier fashion because the courts agree with the agency that the public property exemption from rulemaking in the Administrative Procedure Act (APA)[198] allows the NPS to operate informally.[199] Despite this judicial stamp of approval, the agency seems more inclined now than it has been previously to publish its concession arrangement rules. It continues to maintain, however, that nothing requires it to do so.[200]

The NPS concession contract regulations are silent on contract terms and requirements. Instead, the regulations briefly cover definitions,[201] contract solicitation where no right of preference exists,[202] solicitation when a right of preference exists,[203] preferential rights for new services,[204] assignment of

190. *Id.* § 20d.
191. *Id.* § 20c.
192. *See* THE CONSERVATION FOUND., *supra* note 145, at 178.
193. Yachts Am., Inc. v. United States, 779 F.2d 656, 661 (Fed. Cir. 1985).
194. *Yosemite Park & Curry Co.*, 582 F.2d at 560. *See generally* PNRL, *supra* note 1, ch. 9 (describing the law of contract remedies).
195. 36 C.F.R. pt. 51 (1996).
196. Concession Contracts and Permits, 57 Fed. Reg. 40,496 (1992).
197. *Id.* at 40,498.
198. 5 U.S.C. § 553(a)(2) (1994).
199. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 776 n.1 (1969) (Douglas, J., dissenting); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979); Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1, 3 (D.D.C. 1994). A federal magistrate recommended in 1996, however, that the Park Service's concession contracting manual, NPS-48, be declared subject to the notice and comment rulemaking requirements of the APA and that its provisions not be applied to concessionaires pending lawful readoption of the manual. National Park Concessions, Inc. v. Kennedy, No. A-93-CA-628JN, 1996 WL 560310, at *51 (W.D. Tex. Sept. 26, 1996). (The magistrate's decision did not mention the public property exemption or cite to the cases construing it.).
200. *See* Revision of Certain Concession Policies, 60 Fed. Reg. 37,469 (1995); Concessions Rate Administration Program, 58 Fed. Reg. 64,800 (1993).
201. 36 C.F.R. § 51.3 (1996).
202. *Id.* § 51.4.
203. *Id.* § 51.5.
204. *Id.* § 51.6.

concession contracts,[205] and information collection[206] and availability.[207] For new contracts, an NPS prospectus defines the contractual terms and conditions.[208] The three principal factors used in judging applications are less than definitive:

(1) The experience and related background of the offeror;

(2) The offeror's financial capability; and

(3) Conformance to the terms and conditions of the prospectus in relation to quality of service to the visitor.[209]

b. *Solicitation and Award of Concession Contracts*

i. In the Absence of Preference Renewal Rights

The NPS published a standard form concession contract to guide its officers in drafting large concession contracts. Each individual contract contains unique provisions and the agency frequently alters the standard provisions.[210] The regulations specify in some detail how the agency must solicit and award contracts. The procedures differ in some respects depending upon whether an existing concessionaire holds a right of preference to renew its contract.[211]

Where no preference right exists, the agency must advertise through various publications, and must issue a prospectus describing the concession operations sought and the material provisions of the contract.[212] If exceptional circumstances exist, the agency may negotiate a concession contract with any qualified party without public notice or advertising.[213] The principal factors for selecting the best offer in response to the solicitation include: "[t]he experience and related background of the offeror, the offeror's financial capability, and conformance to the terms . . . of the prospectus in relation to quality of service to the visitor."[214]

The NPS reserves the right to reject all offers and resolicit or cancel a solicitation at any time.[215] Failure of the selected contractor to execute a final

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205. *Id.* § 51.7.
206. *Id.* § 51.9.
207. *Id.* § 51.8.
208. *Id.* § 51.4(a).
209. *Id.* § 51.4(b).
210. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).
211. *See* 36 C.F.R. 51.4 and 51.5. The regulations define a right of preference as:
> the right of an existing satisfactory concessioner to a preference in the extension or renewal of its contract or a new contract concerning all or part of substantially the same accommodations, facilities and services as provided by concessioner under the terms of its existing contract if the [NPS] Director chooses to continue to authorize all or part of such accommodations, facilities and services in an extended, renewed or new contract as necessary and appropriate concession activities.

36 C.F.R. § 51.3(b) (1996).
212. *Id.* § 51.4(a).
213. *Id.* § 51.4(f).
214. *Id.* § 51.4(b).
215. *Id.* § 51.4(c).

contract within the time specified by the NPS results in cancellation and resolicitation.[216] The NPS must forward concession contracts with anticipated annual gross receipts of $100,000 or more or for a five-year term or more to the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources before execution.[217]

The NPS may terminate the award of a concession contract before execution by the government and either resolicit or cancel the solicitation. No offeror obtains compensable or other legal rights if a contract that has been solicited is subsequently resolicited or canceled.[218] In *Seva Resorts*,[219] the Ninth Circuit held that the Secretary acted within the scope of the CPA when a contract signed by the concessionaire but not the government, due to fears relating to the concessionaire's ability to perform, was canceled.[220]

The most comprehensive treatment of the NPS concession contracting process, the 1993 *YRT Services Corporation* concessions case,[221] occurred in the absence of a preference renewal right. The Yosemite concessionaire, MCA, received much criticism after it became known that in 1992 MCA paid the government only three-fourths of one percent of its gross revenues of over ninety-two million dollars.[222] The long-time concessionaire, now under foreign ownership, bowed to public pressure and agreed to relinquish the profitable concession.[223]

With preference renewal no longer in the picture, the contracting process was opened to all. The NPS conducted the search in two phases. It first required applicants to show that they were managerially competent and had equity capital of at least twelve million dollars.[224] Thereafter, the applicants responded in writing to the NPS Statement of Requirements (SOR), a long invitation to bid containing sixteen evaluation criteria.[225] Some of the criteria were quite broad and vague, for example, "the extent to which the [bidding] entity reflects an understanding of the [NPS] mission and a concessioner's role in carrying out that mission."[226] The process of evaluating submissions is outlined in an agency manual, NPS-48.[227] Evaluation panels determine whether bidders meet each criterion, prepare a matrix, and, based on an assessment of the benefits to the public and the impact on the park of each pro-

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216. *Id.* § 51.4(d).
217. 16 U.S.C. § 1a-7(c) (1994); 36 C.F.R. § 51.4(d).
218. 36 C.F.R. § 51.4(d).
219. Seva Resorts, Inc. v. Hodel, 876 F.2d 1394, 1399-1400 (9th Cir. 1989).
220. *Seva Resorts, Inc.*, 876 F.2d at 1400-01.
221. YRT Servs. Corp. v. United States, 28 Fed. Cl. 366 (1993).
222. *See* Carl Nolte, *New Firm Replaces Curry Co. as Yosemite Concessionaire*, L.A. DAILY NEWS, Oct. 1, 1993, at N7.
223. *See* Frank Clifford, *Curry Co. Turns Over Yosemite Concessions Parks*, L.A. TIMES, Oct. 2, 1993, at A18.
224. *YRT Servs. Corp.*, 28 Fed. Cl. at 372.
225. *Id.* at 374-76 (listing evaluation criteria).
226. *Id.* at 376.
227. *Id.* at 372. "NPS-48 is a 900-page concession management manual containing detailed instructions for how to judge comparability" of concessionaire proposals, including rates. *Lake Mohave*, 78 F.3d at 1363 n.3. The NPS has published in the Federal Register the chapter of NPS-48 that governs the establishment of rates charged by concessionaires. Concessions Rate Administration Program, 58 Fed. Reg. 64,800 (1993). *See infra* Part II.B.2.d.

posal, recommend to the executing official which bid to accept.[228] The NPS contracting process is relatively flexible, with criteria other than fees likely to be determinative in the semi-subjective evaluations.[229]

The NPS decided that only one bidder, Delaware North, met all sixteen criteria and awarded it the concession.[230] YRT, a disappointed bidder, brought suit for an injunction, claiming that the process was flawed and the decision arbitrary.[231] In a lengthy opinion, Judge Horn of the Court of Federal Claims rejected those allegations. Characterizing CPA agreements as "unique,"[232] the judge opined that "because the criteria for determining bidder responsibility are not readily susceptible to reasoned judicial review and essentially involve a matter of business judgment, . . . affirmative determinations of responsibility generally will not be overturned absent allegations of fraud or bad faith."[233] In the end, the decision was relatively easy since the losing bidder did not demonstrate the requisite capital and sought to change the proposal terms. YRT also did not prove any of the four factors set forth in the earlier *Keco*[234] decision for overturning a contract award on the ground that the government treated the bidder arbitrarily: "(1) whether the government procuring officials acted in bad faith. . .;[235] (2) whether there was a reasonable basis for the government's decision; (3) the degree of discretion given to the procurement officials by applicable statutes and regulations; and (4) whether government officials violated pertinent statutes or regulations . . . ."[236]

The *YRT* decision demonstrates that, at least when an existing concessionaire is not entitled to preferential treatment in the contract renewal process, the NPS has discretion to choose among prospective concessionaires analogous to the freedom a private business has in selecting its contractors. Absent proof of a violation of agency regulations, unsuccessful bidders will have a difficult time foisting themselves upon an unwilling NPS.

ii. Mónopolies and Preference Renewal Rights

Concessionaires, at the Secretary's option, may be given monopolies and preferential contract renewal rights.[237] The Secretary appears to have virtual carte blanche to grant long-term monopolies of public services in national parks.[238] In *Lake Berryessa*,[239] for example, the Ninth Circuit upheld the

228. *YRT Servs. Corp.*, 28 Fed. Cl. at 372.

229. *See* Concession Contracts and Permits, 57 Fed. Reg. 40,496, 40,500 (1992) (stating "franchise fees will continue to be only a secondary factor in the evaluation of offers.").

230. *YRT Servs. Corp.*, 28 Fed. Cl. at 380-81.

231. *Id.* at 369.

232. *Id.* at 393.

233. *Id.* at 394.

234. Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203-04 (1974).

235. *Cf.* National Park Concessions, Inc. v. Kennedy, No. A-93-CA-628JN, 1996 WL 560310, at *15 (W.D. Tex. Sept. 26, 1996).

236. *YRT Servs Corp.*, 28 Fed. Cl. at 387.

237. 16 U.S.C. §§ 20c, 20d.

238. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 (D.C. Cir. 1976) (citing 16 U.S.C. § 20c). *But see* Willow Beach Resort, Inc. v. United States, 5 Cl. Ct. 241, 245 (1984) (rejecting the argument that preference renewal right gave existing contract holder a mo-

government's action requiring the removal of all docks and structures from a federal lake except those of the licensed concessionaires.[240] NPS regulations limit the circumstances in which concession contracts may be assigned.[241]

The CPA requires the Interior Secretary to "encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits . . . to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary."[242] The Secretary, "in his discretion," may extend or renew a contract or permit or grant a new contract or permit to the same concessionaire upon termination of a previous contract or permit.[243] This opportunity to provide additional services usually takes the form of a right of first refusal.[244] One court has interpreted these provisions as making the grant of a right of preference for new or renewal contracts mandatory, while the decision whether to renew is discretionary.[245] In other words, the government has the discretion not to renew at all, but if it does, it must afford a right of preference to a concessionaire who has performed satisfactorily. The regulations track the statute by distinguishing between a "right of preference"[246] and a "preferential right."[247] The former applies to renewal of existing concessions and the latter refers to "new or additional services."[248]

When the agency considers renewal of an existing concession, the Secretary must publish a notice of intent to grant or renew concession contracts and invite bids.[249] The preference renewal right runs only to concessionaires who have performed "to the satisfaction of the Secretary."[250] Thus, before issuing a prospectus, the NPS must determine, based on annual evaluations during the term of the contract, whether the existing concessionaire has performed in a satisfactory, marginal, or unsatisfactory manner. If the agency rates the concessionaire's performance as unsatisfactory in the year preceding issuance of the prospectus, or marginal during the two preceding years, the

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nopoly on the performance of marine services on portion of the Colorado River).

239. Lake Berryessa Tenants' Council v. United States, 588 F.2d 267 (9th Cir. 1978).

240. *Id.* at 270 (holding that the action did not amount to a taking).

241. 36 C.F.R. § 51.7 (1996); *see also* Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140, 3147 (1993) (explaining that "there is no inherent right to assign or sell to a third party the rights and obligations of a government contract").

242. 16 U.S.C. § 20d.

243. *Id.*

244. *See* S. REP. NO. 89-765, at 5 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3489, 3492-93 (The security of tenure provided by preference renewal rights "permit[s] both the government and the concessionaire to know where they will stand in the future and thus to assure continuity of park operations.").

245. Current-Jacks Fork Canoe Rental Ass'n v. Clark, 603 F. Supp. 421, 425 (E.D. Mo. 1985). The court disavowed dicta to the contrary in Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852, 858 n.8 (8th Cir. 1983). *See Current-Jacks*, 603 F. Supp. at 426-27.

246. 36 C.F.R. § 51.3(b).

247. *Id.* § 51.3(c).

248. *Id.*

249. 16 U.S.C. § 20d (1994). The NPS invites bids only from those within a "zone of active consideration" for award of a contract. *See* Washington Tour Guides Ass'n v. NPS, 808 F. Supp. 877, 882 (D.D.C. 1992).

250. 16 U.S.C. § 20d.

concessionaire's overall performance is unsatisfactory.[251] If the concessionaire's overall performance over the term of the contract was satisfactory, it is entitled to preference in the renewal of its contract.[252] "[I]f, after a prospectus which recognizes a right of preference is issued," a concessionaire receives an unsatisfactory rating in an annual evaluation, the NPS "shall cancel the solicitation or contract award and reissue the solicitation without a right of preference."[253] A concessionaire with an overall performance rating that is less than satisfactory is not entitled to a right of preference.[254]

Concessionaires must keep detailed records documenting contractual performance.[255] Some of these records are available to the public,[256] although information concerning profits, salaries, or expenses of existing concessionaires need not be disclosed.[257] NPS regulations additionally mandate continuous, complex reporting on all phases of concessionaire operations and authorize periodic audits.[258]

Satisfactory performance does not automatically entitle the existing concessionaire to the contract. The incumbent must meet the Secretary's contract bid criteria; it has no right to renewal on terms identical with the original contract, but is limited to an opportunity to meet the terms of competing proposals.[259] More specifically, a concessionaire with a right of preference must submit a timely offer which meets the terms and conditions of the prospectus. If the concessionaire fails to do so, its right of preference is waived, and the agency must award the contract to the party submitting the best responsive offer.[260] If the agency received no other responsive offer, it may resolicit without affording any right of preference, unless the resolicitation consists of terms and conditions that differ substantially from the terms of the initial prospectus.[261] The same procedures apply where a concessionaire with a right of preference receives a contract but fails to execute it within the time period established by the NPS.[262]

The regulations require equal evaluation of all responsive offers received where a right of preference applies.[263] If a person other than the holder of

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251. 36 C.F.R. § 51.5(a).

252. *National Park Concessions, Inc.*, 1996 WL 560310, at *11-*12 (ruling by a federal magistrate that issuance of a marginal rating was arbitrary given the concessionaire's minor transgressions).

253. 36 C.F.R. § 51.5(a).

254. *Id.*

255. 16 U.S.C. § 20g.

256. 36 C.F.R. § 51.8.

257. Concession Contracts and Permits, 57 Fed. Reg. 40,496, 40,502 (1992).

258. 36 C.F.R. § 51.9.

259. Canyoneers, Inc. v. Hodel, 756 F.2d 754, 759 (9th Cir. 1985); *see also* Lewis v. Babbitt, 998 F.2d 880, 882 (10th Cir. 1993) (declining to decide whether the concessionaire with a preference right must match an unresponsive proposal). Requiring the concessionaire to match an unresponsive proposal would make little sense. A non-responsive proposal should be treated as no proposal at all.

260. 36 C.F.R. § 51.5(c).

261. *Id.*

262. *Id.*

263. *Id.* § 51.5(d).

the right of preference submits the best offer, that party gains entitlement to the contract, provided the agency provides the existing concessionaire an opportunity to amend its offer to meet the terms and conditions of the best offer.[264] In *Hotcaveg*,[265] the disappointed incumbent bidder argued that this regulation conflicted with Congress's desire to encourage the continuity of concessionaires. The district court, however, upheld the Secretary's decision to cut off the incumbent's preference renewal right due to the unresponsive nature of its bid, stating that "[a]lthough continuity is a goal, it cannot be sought recklessly."[266] If the existing concessionaire submits on a timely basis an amended offer that is at least substantially equal to the best offer and the existing concessionaire is capable of carrying out its terms, it is entitled to the contract.[267]

Preferential rights are governed by different rules. Those rights apply when the NPS decides to contract for new or additional accommodations, facilities, and services of generally the same character as provided by an existing concessions contract, and the existing concessionaire by contract has a right to provide those additional services.[268] In those circumstances, the agency must describe the new or additional services and the terms and conditions upon which they are to be provided, and give the existing concessionaire a reasonable opportunity to offer to provide the services.[269] If the existing concessionaire makes such an offer, the procedures that apply to contracts not subject to preference rights apply.[270] In *Willow Beach Resort*,[271] the court held that the NPS did not violate a concessionaire's preferential rights by rejecting its "non-responsive" proposal and awarding a contract for new services to another company.[272]

The dividing line between a right of preference applicable to renewal of existing concessions and a preferential right applicable to new or additional services is not always clear. In *Hamilton Stores*,[273] two operators held concession contracts within Yellowstone National Park. The performance of one operator was deemed unsatisfactory, and the NPS assigned its operations to a new concessionaire.[274] When the new concessionaire began expanding its services, the remaining old concessionaire objected, claiming that its right of preference had not been observed in the original assignment. The Tenth Circuit in 1991 affirmed a judgment dismissing the claim because the expanded services were not new or additional, but rather a continuation of existing concessions, and the claimant's contract limited the preference to renewal of the

264. *Id.*
265. Hotcaveg v. Kennedy, 883 F. Supp. 428 (E.D. Mo. 1995), *aff'd*, 72 F.3d 133 (unpublished table decision), 1995 WL 739991 (8th Cir. Dec. 15, 1995).
266. *Hotcaveg*, 883 F. Supp. at 430.
267. 36 C.F.R. § 51.5(d).
268. *Id.* § 51.6.
269. *Id.*
270. *Id.*
271. Willow Beach Resort, Inc. v. United States, 5 Cl. Ct. 241 (1984).
272. *Willow Beach*, 5 Cl. Ct. at 245.
273. Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272 (10th Cir. 1991).
274. *Hamilton Stores*, 925 F.2d at 1274-75.

same concessions.[275]

The CPA does not provide disappointed bidders with a private right of action, but they can seek judicial review pursuant to the APA.[276] Failure to follow solicitation and award procedures requires remand for reconsideration.[277] Reversal on substantive grounds creates more difficulties. In the 1977 *Fort Sumter Tours* case,[278] the court enjoined the Secretary from awarding a contract to a competitor of the incumbent on the basis that the procedures used raised a substantial question whether the NPS adequately observed the incumbent's preference rights.[279] *Fort Sumter Tours* notwithstanding, judicial review of contractor selection tends to be deferential.[280] The disappointed bidder bears the burden of showing that the agency's selection was irrational or involved statutory or regulatory violations, and therefore that the agency breached its duty to consider the proposal fairly and honestly.[281] Proof that the procuring officials acted in bad faith or that no reasonable basis for the award existed satisfies that burden.[282]

c. *Possessory Interests*

Under the CPA, a concessionaire has "all incidents of title" to structures, fixtures, or similar improvements constructed or acquired by it "except legal title," which is retained in the United States.[283] Equitable title vests in the concessionaire even if not recognized in the contract.[284] Legislation adopted in 1986 requires that all concession contracts provide that termination for cause extinguishes all possessory interests beyond depreciated book value.[285] If the government otherwise terminates the contract, the concessionaire receives entitlement either to an agreed amount or to "sound value . . . not to

275. *Id.* at 1281-82.

276. Glacier Park Found. v. Watt, 663 F.2d 882 (9th Cir. 1981); *cf.* National Parks & Conservation Ass'n v. Hodel, 679 F. Supp. 49, 54 (D.D.C. 1987) (asserting that there is no private right of action for the public to challenge concession contracts).

277. *See* Glacier Park Found. v. Watt, 663 F.2d 882 (9th Cir. 1981).

278. Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119 (4th Cir. 1977).

279. *Fort Sumter Tours*, 564 F.2d at 1125. The NPS apparently must provide a copy of a competing applicant's proposal to an incumbent seeking to exercise its preference rights, although the agency may delete confidential financial information and trade secrets. Lewis v. Lujan, 826 F. Supp. 1302, 1308 (D. Wyo. 1992), *aff'd*, 998 F.2d. 880 (10th Cir. 1993).

280. Piscataway Co. v. United States, 861 F.2d 265 (unpublished table decision), 1988 WL 109267 (4th Cir. 1988) (holding that a statute authorizing the NPS to cooperate with the State of Maryland to promote preservation of the Piscataway National Park authorized the agency to enter into a cooperative agreement with the State to renovate and manage a marina instead of renewing a contract with a former concessionaire). Judicial review of a preaward NPS procurement decision is particularly limited in scope. *YRT Servs. Corp.*, 28 Fed. Cl. at 386-87 (citing RADVA Corp. v. United States, 17 Cl. Ct. 812, 818 (1989), *aff'd*, 914 F.2d 271 (Fed. Cir. 1990)).

281. *YRT Servs. Corp.*, 28 Fed. Cl. at 387 (citing Quality Transp. Servs., Inc. v. United States, 12 Cl. Ct. 276, 281 (1987)).

282. *YRT Servs. Corp.*, 28 Fed. Cl. at 387 (citing Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974)).

283. 16 U.S.C. § 20e.

284. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 676 (D.C. Cir. 1976).

285. Act of Oct. 18, 1986, Pub. L. No. 99-500, 100 Stat. 1783-247 (1986); Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341-247 (1986).

exceed fair market value."[286] A 1981 Court of Claims decision confirmed that "sound value" is not book value.[287]

A pre-CPA decision illustrated the meaning of "book value."[288] The plaintiff's concession agreement terminated in 1958; it provided that the plaintiff had a possessory interest (not legal title) and that upon termination, the Secretary would compensate the concessionaire "for its possessory interest in such improvements in an amount not less than their book value."[289] Plaintiff claimed that he was entitled to replacement cost as compensation. The court rejected this claim, holding that the concessionaire was due only the depreciated value of his original investment, roughly 1/40 of what he sought.[290] Contract principles, not statutory provisions, determined the outcome.[291]

After enactment of the CPA, the Court of Claims reached a different result in *Fordyce*,[292] where the contract also specified that compensation for extinguishment of the possessory interest would be "not less than book value."[293] The government argued for book value as the standard, but the court determined instead that book value set only the minimum, and that the "sound value" rule of the CPA established the appropriate standard.[294] The court refused to speculate on how to calculate "sound value," except that the statute specifies that it cannot exceed fair market value. Because book value is subject to accounting manipulation, sound value is undefined, and market value is an empty abstraction in the absence of a market, the interaction of contractual and statutory provisions is unnecessarily confused and confusing.

On remand, the lower court determined "sound value."[295] The statute says that sound value shall be "determined upon the basis of reconstruction cost less depreciation evidenced by [the improvement's] condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value."[296] This standard differs drastically from "book value" since it ignores depreciation of the asset claimed for tax purposes and instead deducts from reconstruction (or replacement) cost *physical* depreciation of the improvement. In *Fordyce*, reconstruction cost would have been high, and deduction of physical depreciation of the massive bathhouse at issue would still leave a substantial sum, an amount far in excess of what the government's experts testified was fair market value.[297] Plaintiff argued that fair market value did not apply in this instance because there was no market. The court disagreed, holding that a bathhouse was not a "special-use property" lacking a clear market such as a sewer or a church, because "market

286. 16 U.S.C. § 20e.
287. Fordyce v. United States, 650 F.2d 1191 (Ct. Cl. 1981).
288. Bishop v. United States, 164 Ct. Cl. 717 (1964).
289. *Bishop*, 164 Ct. Cl. at 722.
290. *Id.* at 737-38.
291. *See also* Schoeffel v. United States, 193 Ct. Cl. 923 (1971).
292. *Fordyce*, 650 F.2d at 1195.
293. *Id.* at 1194. Most pre-CPA contracts specified book value as the standard.
294. 16 U.S.C. § 20e.
295. Fordyce v. United States, 7 Cl. Ct. 591, 600 (1985).
296. 16 U.S.C. § 20e.
297. *Fordyce*, 7 Cl. Ct. at 594-96.

comparables" existed in the area.[298] "Highest and best use" determines market value.[299] Holding that the highest use for a bathhouse was as an office building (although the NPS intended to convert it to a visitor center), the court accepted the government's valuation and awarded $152,000.[300]

When the NPS amended its standard form concession contract in 1993,[301] it altered the method for measuring the compensation due a concessionaire for its possessory interest by replacing sound value with a redefined "fair value."[302] Instead of basing compensation on the appreciated value of the improvements, the new standard contract authorizes a calculation based on the actual cost of constructing an improvement, less straight line depreciation over the estimated useful life of the improvement according to Generally Accepted Accounting Principles. According to the NPS, sound value compensation likely provides higher compensation to the concessionaire than the new fair value measure, although the latter continues to ensure that the concession holder will be able to recover the investment it makes in a concession building. The NPS explained its jettisoning of the sound value compensation provision contained in the old contract form because sound value compensation imposes unnecessary financial liability on the government, inhibits fair competition in the award of concession contracts, and impairs the NPS's ability to undertake changes in the location and uses of concession facilities required for preservation of park resources and their enjoyment by park visitors.[303] The latter adverse effect occurred because if the NPS sought relocation of a concession facility, it had to pay compensation in the amount of the sound value of the structures removed.[304]

d. *Opportunity to Profit and Franchise Fees*

Loss-of-investment protection is more tenuous than protection of possessory interests. At the Secretary's discretion, the contract may include a clause providing for protection against loss of investment in structures, fixtures, improvements, supplies, and other tangible property. However, protection is afforded only against subsequent discretionary secretarial actions or policies.[305] Additionally, the CPA requires the Secretary to exercise his authority in a manner consistent with a reasonable opportunity for the concessionaire to realize a profit commensurate with the capital invested and the obligations assumed.[306] While this provision prevents the Secretary from sabotaging or

298. *Id.* at 598-99.
299. *Id.* at 599.
300. *Id.* at 600-01.
301. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).
302. The new calculation methodology has been challenged as inconsistent with the CPA in a suit brought by the National Park Hospitality Association. GAO, CONCESSIONS CONTRACTING, *supra* note 116.
303. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. at 3142-43.
304. *Id.* at 3145.
305. 16 U.S.C. § 20b(a).
306. *Id.* § 20b(b).

undermining the concessionaire's operation, it does not guarantee a profit, only an opportunity to realize a profit.[307]

The CPA also governs the establishment and adjustment of franchise fees. Franchise fees must be determined based on consideration of the "probable value" of the contract to the concessionaire.[308] Probable value "is the opportunity for net profit in relation to both gross receipts and capital invested."[309] The government must subordinate consideration of its revenue to the objectives of protecting the area related to the contract and providing adequate services for visitors at reasonable rates.[310] Contracts must provide for reconsideration of franchise fees at least once every five years.[311]

The Concession Guidelines contained in NPS-48[312] establish a methodology for calculating concessionaire franchise fees.[313] Chapter eighteen of NPS-48, which governs the approval of concessionaire rates, has been published in full in the Federal Register.[314] The manual describes the objective of rate approval as "assur[ing] that concessioner rates and charges to the public are commensurate with the level of services and facilities provided, as well as reasonable and comparable with similar services and facilities provided by the private sector."[315]

Rates are established pursuant to one of seven methods. The preferred method is a "review of similar services." This method applies where comparable businesses exist in a competitive market and focuses on the quality of service and amenities in establishing prices.[316] Its purpose is to offset the possibility of monopoly pricing by concessionaires.[317] The second method, "simplified review of similar services," is a quick, relatively cost-efficient method of review which is available for low volume sales when a service is not covered by the full review method.[318] Simplified review of similar services entails a comparison of the concessionaire's prices with those of selected private businesses located, if possible, on non-federal lands.[319] Third,

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307. Yachts Am., Inc. v. United States, 779 F.2d 656, 662 (Fed. Cir. 1985); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976); *cf.* National Park Concessions, Inc. v. Kennedy, Civ. No. A-93-CA-628 JN, 1996 WL 560310 (W.D. Tex. Sept. 26, 1996) (determining that NPS denied concessionaire reasonable opportunity to earn a profit by refusing to allow it to use Special Account Fee fund to pay for improvements and by failing to approve its food rates).

308. 16 U.S.C. § 20b(d).

309. *Id.*

310. *Id.*

311. *Id.*

312. *See supra* note 227 and accompanying text.

313. *Lake Mojave*, 78 F.3d at 1363 n.3. The manual assesses the comparability of a concessionaire's rates with those of other facilities under similar conditions.

314. Concessions Rate Administration Program, 58 Fed. Reg. 64,800 (1993). But a federal magistrate found that the Park Service did not comply with the APA's notice and comment rulemaking procedures in issuing NPS-48 and recommended that the agency be enjoined from applying its provisions to a concessionaire until that defect was cured. *Kennedy*, 1996 WL 560310, at *50.

315. Concessions Rate Administration Program, 58 Fed. Reg. at 64,800.

316. *Id.* at 64,802.

317. *Id.* at 64,803.

318. *Id.* at 64,802-03.

319. *Id.* at 64,811.

"specified rate on authorization" is used when the business involves a limited number of unique items or services (such as seaplane excursions, horseback rides and mountain-climbing), a simple rate structure, and no comparable businesses are readily available.[320]

"Merchandise pricing" is the preferred method for establishing retail prices for goods (e.g., curios and groceries) in which there exists the industry practice of setting prices according to the desired margin for a product line by a percent markup.[321] Merchandise pricing is not permitted for service-related businesses in which quality of service and amenities are important factors (e.g., restaurants, hotels, transportation, marina operations, etc.).[322] If a highly competitive market exists in the immediate vicinity of the park and the pricing of unique items (e.g., handicrafts) is routinely negotiated between the vendor and the customer, the "competitive market declaration" method may be used.[323] The competitive market method reduces the agency's administrative burden in determining rates because competition forces the concessionaire to charge comparable rates.[324] The "indexing" method is used in conjunction with, or subsequent to, rates established by another method. It is especially useful for interim rate approvals and situations when the agency faces management constraints on time, travel, or money.[325] The final authorized method of establishing prices is by "financial analysis." This method involves a process by which the agency determines on an ad hoc basis if the prices are comparable with the industry after considering and exhausting all other methods.[326] Rate approval decisions may be appealed to the Regional Director.[327]

A concessionaire unsuccessfully challenged the application of both the CPA's franchise fee provisions and NPS-48 in the 1995 *Fort Sumter Tours* case.[328] The Secretary notified the concessionaire (FST) that it was considering renegotiation of the franchise fee pursuant to the CPA. Instead of negotiating with the government, FST filed a declaratory judgment action to determine its rights under the contract. After the government increased the fee, FST's action became an administrative appeal of the increase decision. FST argued first that the CPA prohibits the NPS from considering profits when determining franchise fees. The court found this argument to be inconsistent with the plain language of the CPA.[329] FST also claimed that NPS-48 impermissibly sought to limit concessionaire profits, but the court determined that the function of the guidelines was to provide a framework for the reporting of financial data and the determination of an appropriate franchise fee. Contrary to FST's contention, the agency properly used a comparison of the

320. *Id.* at 64,803, 64,813.
321. *Id.* at 64,803.
322. *Id.* at 64,814.
323. *Id.* at 64,803.
324. *Id.* at 64,815.
325. *Id.* at 64,803.
326. *Id.*
327. *Id.* at 64,802.
328. Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1327 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1848 (1996).
329. *Fort Sumter Tours*, 66 F.3d at 1329 (citing 16 U.S.C. § 20b(b), (d)).

concessionaire's returns with the profits of other companies in the industry as a factor in determining an appropriate fee.[330] According to FST, the CPA authorizes unilateral reconsideration but not adjustment of franchise fees. The court, however, deferred to the Secretary's contrary interpretation because a provision authorizing unilateral reconsideration would be meaningless in the absence of the ability to adjust.[331] Finally, the court rejected FST's claim that the contract provision relating to adjustment of franchise fees was so broad that it afforded the government "an absolute right to sabotage the entire contract."[332] The contract included sufficient procedural constraints and safeguards to "provide a check on random adjustment of fees."[333]

Similar in effect was the 1982 *Yosemite Park*[334] decision. The NPS raised the rates it charged its concessionaire for electricity, using a different computation based on comparable private costs. The court agreed with the agency that this readjustment was "reasonable" within the meaning of the contract.

According to Interior Department investigators in their testimony before Congress in 1990, the Interior Department is losing tens of millions of dollars each year as a result of poorly drafted concession contracts.[335] The inadequacy of the fee provisions of these contracts is even more troublesome because there is no private right of action under the CPA to challenge a concession contract on the ground that it charges unreasonably low fees.[336] Similarly, members of the public may not sue for breach of a concession contract as third party beneficiaries.[337]

In 1993, the NPS amended the standard concession contract that provides a guide for the execution of large concession contracts.[338] Among other things, the 1993 contract reduces the compensation to which concessionaires are entitled upon termination of possessory interests.[339] In 1995, the NPS announced that it had begun a review of all of its policies concerning concession management activities.[340] In the interim, it eliminated a policy (set forth in

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330. *Id.* at 1329. The concessionaire argued that such a comparison would tailor profits to the average profitability of the industry, thereby encouraging mediocrity and discouraging efficiency. *Id.*

331. *Id.* at 1330.

332. *Id.* at 1331.

333. *Id.* at 1332. The concessionaire argued that the contract was inconsistent with the common law of contracts because it allowed for modification without consideration from the party opposing the modification. But the court regarded a fee adjustment as an action that takes place pursuant to the terms of the contract itself, rather than as a modification of the contract. *Id.*

334. Yosemite Park & Curry Co. v. United States, 686 F.2d 925 (Cl. Ct. 1982).

335. John Lancaster, *Profiteering in the Parks?; Concessionaires' Contracts Cost U.S. Tens of Millions, Hill Is Told*, WASH. POST, May 25, 1990, at A19.

336. National Parks & Conservation Ass'n v. Hodel, 679 F. Supp. 49, 54 (D.D.C. 1987)(citing Glacier Park Found. v. Watt, 663 F.2d 882 (9th Cir. 1981)).

337. *Id.* at 54 (citing Berberich v. United States, 5 Cl. Ct. 652, 655 (1984), *aff'd mem.*, 770 F.2d 179 (unpublished table decision) (Fed. Cir. 1985)).

338. Final Revision of National Park Service Standard Concession Contract, 58 Fed. Reg. 3140 (1993).

339. *See supra* Part II.B.2.c.

340. Revision of Certain Concession Policies, 60 Fed. Reg. 37,469 (1995); Concession Contract Policies, 60 Fed. Reg. 3435 (1995).

Chapter 24 of NPS-48) which limited a concessionaire's franchise fee to 50% of its pre-tax, pre-franchise fee profit.[341] Although the policy was intended as a guideline to aid in the establishment of fees, it was interpreted as setting a firm cap. The agency conceded that the policy lacked either an empirical or a theoretical justification and that it could result in the recovery of fees that amount to less than probable value. According to the NPS, the policy favored large concessionaires and reduced the fees payable to the government over a five-year period by as much as $1.8 million on one concession contract alone.[342] Franchise fees may now exceed the old fifty percent figure, provided the amount is otherwise consistent with a reasonable opportunity for profit and with the objectives of providing adequate and appropriate service to park visitors.[343] Despite the change in policy, concessionaires with less than $100,000 in annual gross receipts must still pay only two percent of those receipts as fees.[344]

The 1995 interim policy change also clarified that the NPS need not approve an interim rate schedule. This clarification addressed the practice of some concessionaires of accepting deposits for individual reservations without securing the rates for the facility or service reserved, but including in the confirmation notice a caveat that rates are subject to change without notice. This policy had led to increased rates that were not always justified.[345]

Finally, the NPS eliminated the interim right to appeal the selection of comparable businesses. Pursuant to the CPA,[346] the NPS determines rates primarily by comparison with the rates charged for facilities and services of comparable character under similar conditions, giving consideration to factors such as the length of the season, peakloads, average percentage of occupancy, accessibility, availability and cost of labor and materials, and type of patronage.[347]

The pre-1995 procedures allowed concessionaires to appeal the selection of comparables[348] and, if that appeal failed, to file a second appeal of the approved rate. A concessionaire whose appeal of the approved rate was rejected could also appeal the basis of the comparables selected. The elimination of the "comparable appeal" was meant to remove that duplicative appeal and expedite the appeals process.[349]

Commentators have criticized Park Service concessions policy on the grounds that relationships are too cozy, concessionaires are over-insulated from competition, and commercial development is harmful to park purposes.[350] Given the extremely broad secretarial latitude to regulate concessions

341. Revision of Certain Concession Policies, 60 Fed. Reg. 37,469 (1995).
342. Concession Contract Policies, 60 Fed. Reg. at 3435.
343. *Id.*
344. Revision of Certain Concession Policies, 60 Fed. Reg. at 37,470.
345. *Id.*
346. 16 U.S.C. § 20b(c).
347. Revision of Certain Concession Policies, 60 Fed. Reg. at 3435.
348. "The selection of comparables is the cornerstone of the entire process." Concessions Rate Administration Program, 58 Fed. Reg. 64,800, 64,803 (1993).
349. Concession Contract Policies, 60 Fed. Reg. at 3436.
350. *See, e.g.*, Mantell, *supra* note 145; A. RUNTE, *supra* note 147.

in existing law, and judicial reluctance to interfere with exercise of that discretion (except to require procedural compliance), the issue is more political than legal. This Part has described some recent NPS reforms intended to enhance competition and the Park Service's share of concession revenues. Nevertheless, if the law of national park concessions is to be changed in anything other than an incremental manner, park advocates will have to convince Congress to change it.

III. REFORM OF NATIONAL PARK CONCESSIONS LAW AND POLICY: THE QUESTIONS

Evidently, no one who is willing to put his or her opinions in print is satisfied with NPS concessions law and policy. Park users, environmentalists, concessions contractors, academics, the General Accounting Office (GAO), legislators, and the NPS itself—all decry one or more aspects of the current situation. Nearly all concerned agree that some share of concession revenues ought to be returned to the national park system for maintenance and other needs. Most seem to agree that the anti-competitive aspects of the current system deprive the national park system of needed revenue while making service improvement more difficult. Preferential rights and possessory interests in particular are the objects of critical outrage. Most commentators apparently accept the appropriateness and desirability of contracting with private entities for visitor services, but many disagree on the optimum degree of facility development. In the overall scheme of things, overcrowding (which may contribute to overuse of park resources) and facility deterioration are more important than return to the government, but the latter problem certainly is not negligible.

A. *A Hierarchy of Reform Questions*

The present system, whereby the NPS chooses private entities to provide visitor services, began as a pragmatic administrative solution and later was embodied into the CPA. Interested parties now are virtually unanimous that the CPA is inadequate and should be heavily amended if not repealed. The reform fervor naturally raises a galaxy of questions. Competing versions of pending concessions reform legislation provide conflicting answers to some but not all such questions.

In assessing Park Service concessions law and policy, the issues can be divided into three categories: preliminary, greater, and lesser. The preliminary questions are very basic and can generally be answered without analysis. Those questions include:[351]

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351. Another preliminary question is whether Congress should have a uniform concessions policy for all land management agencies. The concessions reform bill introduced by Rep. Hansen in 1995, which is discussed below, would have put all of the concession-granting federal land management agencies under a single legal regime. H.R. 2028, 104th Cong. (1995). Rep. Meyers' competing bill, also discussed below, is confined to the National Park System. H.R. 773, 104th Cong. (1995). The other federal land management agencies have strongly resisted a unitary system, claiming that their situations and practices are necessarily and rightfully different. Uniformity

Should the park system have any developed visitor facilities?

Assuming some agreed level of facility development, should that development, maintenance, and operation be carried out by private or public entities?

The "greater" questions that any reform effort must answer, explicitly or implicitly, go to the basic structure and outlines of a new concessions regime. They include:

What are the optimum degrees of recreation facility development and provision of recreational services in national parks?

Are special incentives still necessary to induce businesses to bid for NPS concession contracts?

To which uses should concession franchise fees (and entrance fees) be directed?

To what extent, if at all, should the United States rely on private entrepreneurs to provide capital improvements?

Which entities should be responsible for which aspects of setting prices for tourist services?

Should the NPS be required to comply with the Administrative Procedure Act in promulgating concessions regulations?

Should NPS concession contract mechanisms be required to comply with all or some of the panoply of federal laws otherwise applicable to government contracts?

To what extent should NPS concessions law be spelled out by statute rather than delegated to administrative discretion?

Should NPS concessions contracts take the form of arms-length business transactions?

Answers to the greater questions will, to an extent, dictate the answers to the lesser questions. The characterization as lesser questions does not indicate importance. However, because they relate more to means than to ends, they necessarily have a lower priority. Assuming that the initial premises will lead to a concessions system resembling, at least in broad outline, the current system, the lesser questions will include:

Should preference rights to renewal or to provision of additional services be allowed, and, if so, to what extent?

Should the NPS treat large and small concessionaires differently, and, if so, to what extent?

When, if ever, are departures from competitive bidding justified?

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has obvious benefits to all concerned, but some of those differences are unquestionably real. Although uniform concessions policy is beyond the scope of this article, the answer ought to depend upon whether the benefits to be derived from the simplicity of administering a uniform system would exceed the costs of applying such a system to agency contracts not well suited to the template chosen. *See supra* notes 119-120 and accompanying text; Statement of David Unger, Forest Service, Before the Subcomm. on National Parks, Forests, and Public Lands of the House Comm. on Resources, July 25, 1995.

Should the value of improvements be measured by straight-line depreciation or by some other method?

Should franchise fees be based on percentages of gross receipts or on net profits or on some other basis?

What appeal mechanism, if any, would best provide an efficient means of dispute resolution?

What mechanism will provide the best evaluation of concessionaire performance?

Members of Congress, the GAO, NPS personnel, current concessionaires, the National Parks and Conservation Association, and many more groups and individuals have debated some of these issues at length over the past decade in several forums. The remainder of this section takes up each of the foregoing questions in the context of that continuing debate. Because the answer to any of those questions necessarily implicates a value judgment of a policy or political nature, there necessarily is no single right answer. Sharply differing versions of reform legislation were introduced in 1994 and 1995. Representative Meyers's (R. Kan.) 1995 bill, H.R. 773,[352] is the same as a bill that passed overwhelmingly in the House in 1994 but did not survive to enactment.[353] Representative Hansen (R. Utah) introduced a competing measure, H.R. 2028, in 1995 that is far more favorable to existing concessionaires.[354] It formed the basis for the Visitor Facilities and Services Enhancement Act of 1995,[355] which was passed by both houses of Congress as part of a reconciliation budget bill but was vetoed by President Clinton.[356] The two bills together offer a starting point for analysis of reform possibilities and approaches. The following subsections summarize the major arguments and positions adduced by legislators, commentators, witnesses, etc., and the authors will also assess the merits of the competing positions. The next subsection examines the two "preliminary" questions, and following subsections attempt to provide reasonable answers or approaches to the "greater" and "lesser" questions identified above.

B. *The Preliminary Questions*

1. Outlaw Facility Development?

It is far too late in history to argue that national parks should be left totally in a state of nature, without any facilities or amenities for human visitors. National parks were established for present enjoyment as well as preserva-

352. H.R. 773, 104th Cong. (1995).

353. Statement of Rep. Jan Meyers Before the Subcomm. on National Parks, Forests, and Public Lands of the House Comm. on Resources, July 25, 1995, 1995 WL 443431.

354. H.R. 2028, 104th Cong. (1995).

355. *See* H.R. REP. NO. 104-280, pt. 1, at 581 (1995).

356. President Clinton vetoed H.R. 2491, the Seven-Year Balanced Budget Reconciliation Act of 1995, which included the Visitor Facilities and Services Enhancement Act of 1995. THE WHITE HOUSE OFFICE OF COMMUNICATIONS, PRESIDENT'S MESSAGE TO CONGRESS ON VETO OF H.R. 2491 (1995) (1995 WL 723231).

tion,[357] and most Americans could not use them without some support services, whether guides or buses or roads or food.[358] As a matter of elementary fairness, closing the parks, our nation's crown jewels, to all but hardy backpackers would be politically and popularly disastrous. Neither the Hansen nor Meyers bill considered the possibility of parks free of all facilities.

And, of course, the primitive recreation function is already served by the National Wilderness Preservation System.[359] In 1964, Congress prohibited development in wilderness areas, and the only human activities allowed are forms of nonmotorized recreation.[360] Roughly half the acreage of the park system has been designated as wilderness,[361] so those opportunities for a primitive wilderness experience are alive and well in the parks for those who choose to forgo facilities and amenities.

Even if abolition or phasing out of facilities in national parks were desirable, it would be highly impractical. The existing investment, which, under current law and the Fifth Amendment would have to be condemned,[362] runs into many millions of dollars. Razing and reclamation would add billions more to the federal bill.

2. Ban Private Entrepreneurs?

The powers-that-be have long assumed that private enterprise should provide national park services and facilities whenever and wherever it might be profitable and appropriate to do so. Both the Meyers and Hansen bills proceed on this assumption. Even though sentiment for turning that job over to the NPS or any other public agency seems to be completely lacking in any political quarter, and recent proposals have urged privatization of public resources rather than the reverse,[363] it still may be useful to examine the implicit assumption that private entities are the best service and facility providers before conforming all proposals for concessions reform to that assumption.

As matters now stand, private concessionaires receive monopolies to cater to captive markets for any service that someone will pay for. The NPS, on the other hand, builds the main infrastructure such as roads and bridges and provides services such as visitor centers, lectures, trail maintenance, hiker rescues, firefighting, security, campgrounds, clean ups, and so forth. All of these facilities and amenities are free to the visiting public—and to concessionaires. The concessionaires take large profits away from the parks while paying the United States a relative pittance that goes into the general fund, not to the park sys-

357. 16 U.S.C. §§ 1 to 1a-1.

358. *See, e.g.*, J. SAX, *supra* note 138.

359. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (1994); PNRL, *supra* note 1, ch. 14B.

360. 16 U.S.C. § 1133 (c).

361. As of 1992, Congress had designated 39 million acres of the park system as official wilderness. PNRL, *supra* note 1, §§ 2.04[2], 14B.02[2]. Congress carved additional wilderness areas out of the California Desert Conservation Area in 1994. California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (1994).

362. On the subject of federal liability for takings, see PNRL, *supra* note 1, §§ 4.04-4.06, ch. 10B.

363. *E.g.*, S. 1031, 104th Cong. (1995); H.R. 2032, 104th Cong. (1995) (bills that would transfer to the states title to lands currently administered by the BLM).

tem.[364] The NPS collects admission fees at many units, but those small fees also go to the Treasury in Washington, D.C.[365] These facts support the argument that the NPS should provide the profitable as well as the unprofitable services to visitors. Public utilities traditionally were required to serve customers in relatively unprofitable outlying areas in exchange for the grant of exclusive access to more profitable population centers.[366] Permitting private concessionaires to reap the profits of a monopoly market without bearing a fair share of the cost of providing service to a captive market runs against this tradition; allocating the risk of gain as well as loss to the government would be consistent with it. Running a restaurant or gift shop is less complicated and demanding than running a spy satellite system or building a dam. Government personnel could pump gas, cut firewood, or run a canoe livery just as well as corporate employees, and they would likely have more solicitude for the parks' natural resources and values.

Certainly, elimination of private concessionaires would simplify many conundrums and avoid many sources of inefficiency. To avoid knotty compensation problems, it would be advisable, if not necessary, to impose such a prohibition on a prospective basis only. Existing concession contracts would be permitted to run their course but would not be renewed. If private concessions were phased out in this manner, the whole bidding system and its thousands of pages of regulations and its episodic bouts of litigation could be jettisoned (although the government would still have to enter into procurement contracts for construction materials, supplies, and the like). Most of the major concessionaire problems identified by critics of the current system—monopoly, possessory interests, preference renewal rights, low fees, and so forth—would be mooted.

Due to the political environment, the counter arguments will likely prevail, even though they are not nearly as strong as some of their advocates seem to believe. The truism that this country is founded on private enterprise, not socialistic public enterprise, has been forgotten or ignored whenever the Congress has realized that private companies cannot or will not accomplish what it deems to be a national priority. TVA, the irrigation of the West, Comsat, the Postal Service, rural electrification, Head Start, FDIC, agricultural extension offices, and indeed, the national parks themselves, are but a few examples. Still, the federal government has seldom ventured into profit-making activities, and tradition militates against it. That tradition owes much to the

364. The federal government earned a 3.6% rate of return on all of its concessionaires' gross revenues in fiscal year 1994. It earned only a 2.8% rate of return on the six land management agencies' concessions. By way of contrast, the states of California, Maryland, Michigan, and Missouri received a 12.7% rate of return on a similar range of concessions contracts during that period. GAO, CONCESSIONS CONTRACTING, *supra* note 116.

365. Those fees are restricted by law. 16 U.S.C. § 460*l*-6a.

366. The practice of restricting service to the most profitable segments of a market is called cream-skimming. *See* City of Morgan City v. South La. Elec. Coop. Ass'n, 31 F.3d 319, 324 (5th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995); Associated Gas Distribs. v. F.E.R.C., 824 F.2d 981, 1035 (D.C. Cir. 1987), *modified*, 41 F.E.R.C. # 61,351 (1987); *see also* Danya B. Matthew, *Doing What Comes Naturally: Antitrust Law and Hospital Mergers*, 31 HOUS. L. REV. 813, 833 (1994); Tony Prosser, *Social Limits to Privatization*, 21 BROOK. J. INT'L L. 213, 237 (1995).

initial premise that government cannot operate as efficiently as private industry, another shibboleth more often recited than proven. The functioning of the federal government when it acts in its sovereign capacity is designed to be inefficient as a safeguard against tyranny.[367] Similar safeguards are less necessary when the government acts as a proprietor, and the government's exercise of its sovereign functions do not disable it from acting efficiently as a proprietor. Moreover, private sector monopolies are hardly a paradigm of efficient behavior.[368] Monopolistic concessionaires have not offered evidence that their performance is superior to what the government could achieve if it appropriated the profit-making potential of park concessions to itself.

Even if concessionaires could supply such proof, it is not clear that economically efficient provision of goods and services is the appropriate yardstick of concessionaire performance. In national park concessions policy, service at the least cost, generating the highest profits, should not necessarily be high on the public priority list. Public policy should be more concerned with the quality of visitors' park experiences than with who provides them and at what profit margin. "National Park Service, Inc." is not going to displace private concessionaires on any large scale. Still, the idea that the agency is capable of providing services if and when private services are absent or unsatisfactory is not immoral or un-American, and it should not be automatically rejected. It might even be worthwhile establishing a pilot project where the Park Service operates expired concessions contracts at selected parks for several years.[369] At the end of that time, Congress could assess, using whatever criteria it devises to gauge conformity with the objectives of park concession operations, how the NPS concessions performed compared to previous private concessions at the same parks and to contemporaneously operated private concessions at other parks.

In any event, it seems clear that national parks will continue to have developed facilities for visitors and that private entities will continue to provide the lion's share of facilities and services. But, as earlier noted, nearly all concerned argue or concede that the present system is seriously flawed. How, then, should the system be changed? That question cannot be answered until Congress decides what the national parks should be, and for whom.

Concern with day-to-day crises often causes relative disregard for ultimate ends. Managers (and academics) often lack the time (or inclination) to envision the best resolution of the entire problematic subject, when they are beset

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367. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Frankfurter, J., concurring).

368. "[F]irms in a monopoly position can restrict output, increase profits, and consequently impose a social welfare loss by charging higher than competitive prices." SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY 43-44 (1993).

369. Congress has often authorized pilot projects to determine whether to embark on new directions in natural resource law and policy. *See, e.g.*, 7 U.S.C. § 2669 (1994) (establishing pilot projects for production and marketing of industrial hydrocarbons and alcohols from agricultural commodities and forest products); 16 U.S.C. § 1682 (1994) (implementing wood residue utilization pilot projects); 16 U.S.C. § 5403(j)(2)(E) (1994) (describing pilot projects for innovative approaches to management of maritime and underwater cultural resources at national parks and similar sites).

with putting out the daily fires. A vision of the optimum policy for concessions in the national park system is, of course, a statement of political and policy preference, but the task cannot be avoided if coherence is desired for any particular proposal.

The object of concessions reform should not be to punish present or past concessionaires for their real or imagined sins. They were, after all, merely taking advantage of a favorable package of benefits that Congress had decided was necessary and appropriate. Instead, the object should be promoting the public interest in future concessions. Although the public interest in any particular situation can be uncertain and controversial, the public interest in this case inheres in the nature of the national parks and the reasons they were reserved as parks. The parks were reserved, first, for the enjoyment of the American people. The organic Park Service statute specifically states that the "curiosities" in the parks must be available to all and cannot be monopolized by any one group.[370] Equally clearly, Congress never intended the national parks to be amusement parks, devoted entirely to human entertainments and comforts. Parks were created because Congress deemed each such area to be unique and awe-inspiring in its natural attributes, and Congress specified that those attributes (scenery, wildlife, etc.) were to be preserved for the enjoyment and wonder of future generations.[371] Hotels, gift shops, and canoe rentals may be enjoyable and may even conceivably inspire wonder, but they are not natural objects or systems worthy of preservation. Indeed, commercial enterprises are antithetical to basic park reservation purposes just as often as they are necessary to full enjoyment of the parks by some.

The major objects of national park concessions policy, therefore, should be to restrict and confine as much if not more than to enable. While the policy should ensure equal access and full enjoyment for all Americans, it should also strictly forbid overdevelopment of facilities. And while such a policy must be fair to concessionaires, it should not overcompensate them either by charging the government too little or by allowing them to charge the patrons too much. These of course are fine lines, but line-drawing cannot be avoided when achievement of conflicting aims is desired.

C. *The Greater Questions*

1. Limit or Lessen Facility Development?

The appropriate degree of development is a political question on a par with whether any development should be allowed. Political questions should be answered by Congress. In this case, Congress has already spoken to the issue generally by requiring the Secretary of the Interior to encourage the private provision and operation of "desirable" facilities and services for the accommodation of park visitors,[372] but its general answer controls relatively few specific problematic instances.

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370. 16 U.S.C. § 3 (1994).
371. *Id.* § 1.
372. *Id.* § 20a.

The National Park Service's charter speaks both to recreation ("enjoyment") and preservation.[373] Where the two collide, present recreation should yield to future preservation.[374] The harm to the scenic and biotic resources caused by intensive recreation is incompatible with future preservation, but current preservational policies are usually compatible with future recreation possibilities. In any event, the CPA codifies the notion of preservational precedence in the realm of facility development.[375]

The competing Meyers and Hansen bills diverge very sharply in describing the desired ends of a park concessions policy. Hansen's H.R. 2028 spells out only two purposes: (1) recognizing the importance of public-private partnerships; and (2) utilizing a competitive process to ensure fair prices, a fair return, and "a reasonable opportunity for the economic viability of the concessioner."[376] This assumes the appropriateness of existing and future facilities. In contrast, the Meyers bill, H.R. 773, is replete with references to the original park preservation purpose. Under this bill, Congress would find that facilities "should be provided *only* under carefully controlled safeguards against unregulated and indiscriminate use . . . and . . . should be limited to locations and designs consistent to the highest practicable degree with the preservation and conservation of park resources and values."[377]

Whether any particular recreational or commercial development is desirable or excessive is necessarily a circumstantial inquiry. If the appropriateness of the proposal is in doubt, the better view, given the statutory strictures, is to decide against it or to move the facility outside park boundaries. In many cases, lands surrounding or adjacent to parks are under the control of the BLM, the FWS, or, especially, the Forest Service. Gas stations, restaurants, gift shops, and even campgrounds seem better suited for lands not subject to the NPS's fundamentally preservational mandate. Coordination of concessions policy among the federal land management agencies may be inconvenient and require statutory amendments, but it will likely result in the achievement of a better balance between resource protection and the provision of efficient and adequate services to federal land users than the current patchwork arrangements do.

By the same token, the Park Service should accelerate its efforts to reduce private motor vehicles in parks. Shuttle bus systems can transport hikers to trailheads, campers to sites outside the back country, students to visitor centers, and all to the more popular attractions. Situations such as the overcrowding in Yosemite Valley and traffic jams around Old Faithful in Yellowstone

373. *Id.* §§ 1 to 1a-1.

374. *See* William Andrew Shutkin, Note, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345 (1991) (arguing that Congress intended to subordinate use to preservation in the park system). The Eighth Circuit recently recognized that the national parks were "established for both recreational and conservationist purposes. These purposes will sometimes, unavoidably, conflict, and even the Government cannot always adequately represent conflicting interests at the same time." Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996).

375. 16 U.S.C. § 20a.

376. H.R. 2028, 104th Cong. § 2 (1995).

377. H.R. 773, 104th Cong. § 2(a) (1995) (emphasis added).

should not be tolerated. In some cases, rationing of recreational opportunities will be necessary. The NPS naturally is loathe to deny access to its clientele, but some situations demand restrictions on visitor numbers.[378] The Park Service closes hiking trails when continued use creates a risk of resource degradation and also limits back country camping permits to avoid overuse. There is no reason not to regulate access to services and amenities when a failure to do so would create similar risks.

2. Are Special Incentives Still Necessary?

No.[379]

3. Keep the Franchise Fees?

Virtually all concerned seem to agree that concessionaire franchise fees (and entrance fees) should be kept within the park system, not remitted to Treasury's general accounts. The GAO reported in 1996 that the rate of return on fiscal year 1994 concessions contracts was 3.3 times higher when the contracting agencies were allowed to retain over fifty percent of fees than when they were not. "[A]gencies authorized to retain fees reported obtaining more fees in proportion to their concessioners' gross revenues than agencies [including the land management agencies] that were not authorized to retain fees."[380] The GAO concluded that agencies not able to use concessions fees have less incentive to collect them, while those authorized to use fees to support agency operations "put forth extra effort to obtain a high rate of return on concessions."[381]

The Meyers bill, H.R. 773, would have created a special account; half the fee proceeds would be rebated to the park unit of origin, and half used anywhere in the park system "on the basis of need."[382] Additionally, H.R. 773 would have empowered the Secretary to establish park-by-park Park Improvement Funds from franchise fees.[383] The Hansen bill, H.R. 2028, included a similar provision, except that seventy-five percent of the receipts would be reserved for use in the area of origin.[384] The other differences between the rival provisions were not substantial.

These writers suggest that, while retention of fees within the NP system is an excellent and necessary step, it is only a first step. Even vastly increased fees will not begin to make a substantial dent in the backlog of needed park maintenance and rehabilitation.[385] If Congress seriously intends to maintain

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378. *Cf.* Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979) (stating that since boating and rafting on the Colorado River posed a threat to the ecology of the river, the NPS could limit usage to 96,600 user days per year).

379. *See infra* Part III.C.8.

380. GAO, CONCESSIONS CONTRACTING, *supra* note 116.

381. *Id.*

382. H.R. 773, 104th Cong. § 9(a) (1995).

383. *Id.* § 9(b)

384. H.R. 2028, 104th Cong. § 10 (1995).

385. *See supra* note 70 (describing the backlog of NPS maintenance needs).

the national parks as the nation's crown jewels, further funding from some other source or sources will be requisite. A national heritage preservation fund, along the lines of the Land and Water Conservation Fund,[386] would be appropriate.

4. Who Should Own Park Improvements?

The "possessory interest" given concessionaires by current law has been a considerable stumbling block to the introduction of competitive forces in NPS concessions policy.[387] Current concessionaires and their lenders and organizations remain zealous in defense of this concept, arguing that it is both necessary and fair. The Hansen version recites that the policy of the United States is "to encourage the private sector to develop, own and maintain" park facilities.[388] Should the concession contract terminate, the Hansen bill would allow the contractor to remove the improvements or be paid by the successor concessionaire "fair market value" as determined by independent appraisal.[389] The appraiser is to use an "income approach."[390] As to NF and BLM lands, the Hansen bill would have allowed the Secretaries to sell outright the lands and facilities to concession holders, the value again to be determined by appraisal.[391]

The Meyers bill, on the other hand, clearly states that title is to be vested and is to remain in the United States.[392] For concessionaires with existing possessory interests on the date of enactment, their rights upon termination remain governed by prior law.[393] For new contracts involving existing possessory interests, however, the value of the improvement is to be reduced annually by the straight-line depreciation provided by the tax code.[394] The improvement cannot be revalued upon transfer to another concessionaire,[395] but the Secretary can suspend the depreciation mechanism if necessary to obtain a satisfactory bid.[396] All new structures are treated the same way: the concessionaire's interest is limited to depreciated value as determined by the straight-line method.[397]

In essence, Representative Hansen would give concessionaires permanent property interests in whatever improvements they erect or purchase on the federal lands—and, for NF and BLM lands, the Hansen approach would go further and allow the concessionaires to obtain full fee title. The Meyers ap-

386. 16 U.S.C. §§ 460*l*-4 to 460*l*-11. *See* Coggins & Glicksman, *supra* note 25.
387. *See supra* notes 301-304 and accompanying text.
388. H.R. 2028 § 11(a).
389. *Id.* § 11(c)(1).
390. *Id.* § 11(c)(2).
391. *Id.*
392. H.R. 773, 104th Cong. § 15 (1995).
393. *Id.* § 12(a). This approach has the merit of minimizing takings questions. *See supra* note 362 and accompanying text.
394. H.R. 773 § 12(b)(1)(B).
395. *Id.* § 12(b)(1)(D).
396. *Id.* § 12(b)(2).
397. *Id.* § 12(c).

proach would phase out private ownership of the facilities on park lands. From the public interest standpoint, the Meyers approach is clearly preferable. Possessory interests now operate to reduce or eliminate competition among putative concessionaires, and permanent monopolies nearly always result in price-gouging to the captive public. The GAO reported that in fiscal year 1994, new and extended concessions agreements that granted possessory interests to private contractors resulted in a rate of return of 3.8%, while the government reaped a 4.5% rate of return on contracts that did not provide for such a grant.[398] Whether or not privatization is a good idea for NF and BLM lands, it most certainly is a bad and politically unacceptable approach to the national parks.[399]

5. Who Should Set Service Prices (and How)?

The Hansen bill generally would let concessionaires set rates and prices for services to the public.[400] Prices pursuant to "concession service agreements" (formal written contracts) would be subject to secretarial approval only if insufficient competition existed in the vicinity.[401] The approval determination would be based primarily on "comparable" services, but other factors could be considered. The Meyers bill assumes secretarial approval of all service charges and instructs the Secretary to consider the same factors as listed in the Hansen bill.[402]

It seems abundantly clear both that the concessionaire must have some primary controls over the prices it charges and also that some oversight mechanism is necessary to protect the captive public from monopolistic price-gouging. "Comparable" rates are an uncertain guide because many out-of-national-park services simply are not comparable to in-park services. A raft trip through the Grand Canyon, for instance, is not really comparable even to a raft trip of similar length further up the Colorado River, much less in other venues. In contrast, prices for goods (hot dogs, film, etc.) usually can be rated on comparability. Loose administrative oversight to curb the worst abuses probably is the best available mechanism in the circumstances, and the comparable rate at least is an objective starting point for reference.

6. External Procedures: Should the NPS Comply with the APA or General Government Contract Law?

Section 12(d) of the Hansen bill would deny GAO jurisdiction under the Competition in Contracting Act of 1984,[403] supersede seven other resource laws,[404] exempt the NPS from NEPA compliance in connection with contract

398. GAO, CONCESSIONS CONTRACTING, *supra* note 116 at 34.
399. *See generally* Coggins & Nagel, *supra* note 25.
400. H.R. 2028, 104th Cong. § 5 (1995).
401. *Id.*
402. H.R. 773, 104th Cong. § 13 (1995).
403. Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered section of 31 U.S.C. and 41 U.S.C.).
404. H.R. 2028 § 16.

renewals,[405] and require the agencies to promulgate a single set of implementing regulations.[406] The Meyers bill would exempt the NPS from the general federal leasing statute,[407] and require regulation promulgation in several situations,[408] but it otherwise does not address those procedural compliance issues.

Whatever legislative reasons underlie the APA public property exemption from rulemaking requirements,[409] they are not sufficient to overcome the presumption that legal rules governing national parks should be accessible without undue effort by any interested party. Neither prospective contractors nor the general public should have to resort to obscure and unpublished agency manuals to determine the rules of the concessions contract game. The Park Service, by expanding its use of rulemaking procedures in recent years,[410] implicitly recognizes the validity of that proposition. There is no good reason why the NPS should not be required to make its rules public and available.

The advisability of subjecting concessions contracts to general government contracting law is a more abstract and more difficult question.[411] Given the specifics in either the Meyers or Hansen bills, however, and the safeguards each contains (Meyers more than Hansen), it seems unduly duplicative and inefficient to import other sets of criteria probably intended for use in ordinary government procurement, not provision of visitor services.

7. Statutory Rules or Administrative Discretion?

Neither the Hansen nor the Meyers bill directly confronts the questions whether and to what extent Congress should delegate administrative "flexibility" to the National Park Service. Implicitly, the Hansen bill, by calling for "partnerships" and not limiting facility development, opts for much administrative discretion except in the realm of impinging on concessionaire rights and interests.[412] This version avoids "micromanagement" while allowing contractors property rights that could preclude effective, discretionary regulation. The Meyers bill is stricter on both the agency and its concessionaires. It too necessarily delegates considerable administrative authority, but it has both clearer directives on how such authority is to be exercised and also limits assertions of private property rights in various ways.

We submit that the Meyers approach is preferable, although it probably does not go far enough in channeling administrative discretion. The history of federal public land law in general is replete with instances where agencies have abused administrative discretion to accommodate commodity land us-

405. *Id.* § 7(e).
406. *Id.* § 18(a).
407. H.R. 773 § 16.
408. *Id.* §§ 6(a), 7(b), 8(b).
409. 5 U.S.C. § 553(a)(2) (1994). *See supra* notes 198-199 and accompanying text. *See generally* Arthur Earl Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).
410. *See supra* note 200 and accompanying text.
411. *See supra* notes 177-184 and accompanying text.
412. H.R. 2028, 104th Cong. § 2 (1995).

ers.[413] The extremely low return to the government from national park concessions can be added to that list. Some degree of flexibility and discretion is inevitable, otherwise the land managers would be mere ciphers. Nevertheless, Congress traditionally has erred on the side of too much flexibility and too few concrete legal guidelines.

8. "Partnerships" or Arms-Length Relations?

In any assessment of the Hansen and Meyers concessions reform legislation, a very basic question is whether the relationships between the United States and its contractors are to be paternalistic or businesslike. Paternalism (through subsidies, preferences, forgiveness, gifts, etc.) traditionally has been rife throughout federal land law,[414] and contemporary instances still abound. In most cases, special treatment of this ilk has done more harm than good, leaving such legacies as sterile, eroding grazing land, wasteful, inappropriate agricultural practices, mine-scarred landscapes, poisoned watercourses, and ugly clearcuts. We submit that the far superior policy is for the United States to act in a businesslike arms-length fashion when dealing with for-profit institutions, whatever their size.

D. *The Lesser Questions*

1. Preference in Renewal or New Services?

The Meyers version recites that "a competitive selection process" is good public policy and goes on to reject flatly preference in renewals[415] or in contracting for additional services,[416] subject to two exceptions. Providers of "outfitting guide, river running, or other substantially similar services within a park" are entitled to preference renewal if their performances were satisfactory."[417] Small concessionaires (gross receipts under $500,000) similarly have a right to meet competing bids.[418] The Hansen bill stresses "economic viability" as well as the need for a "competitive process."[419] That process is watered down, however, by the provisions which would award existing concessionaires "renewal incentives." If the prior concessionaire exceeded the contract requirements, it would be entitled to a renewal incentive of twenty percent "of the maximum points available" under performance evaluations;[420] a concessionaire who merely "meets" those agreement requirements would get five percent.[421] The Hansen bill would also empower the Secretary to "modify" existing agreements to allow the concessionaire to provide "closely relat-

413. *See, e.g.*, PNRL, *supra* note 1, §§ 19.01[2], 21B.04[1].
414. *See generally id.*
415. H.R. 773, 104th Cong. §§ 2(b)(5), 7(g) (1995).
416. *Id.* § 7(j).
417. *Id.* § 7(h).
418. *Id.* § 7(i).
419. H.R. 2028, 104th Cong. § 2(2) (1995).
420. *Id.* § 7(d)(2)(A).
421. *Id.* § 7(d)(2)(B).

ed" services, evidently without any competitive process.[422]

Hansen's bill implicitly recognizes the anticompetitive effects of preferences by reducing their scope considerably. Still, the Meyers approach is preferable (although it arguably does not go far enough) because it is a clear statement that largely avoids the squabbles that will be inevitable in the Hansen partial credit scheme. The existence of the preference renewal right was a primary reform impetus; rooting it out as completely as possible should be the first task of such reform. The GAO reported that in 1994, new NPS contracts that included preferential rights of renewal generated a 3.8% rate of return. Contracts without a preference resulted in a 6.4% rate of return.[423] These figures confirm the obvious: "concessions agreements entered into on a competitive basis had higher rates of return than those that were not competed."[424] Preferential renewal rights deprive prospective concessionaires of much of their incentive to spend time and money preparing bids because of the likelihood that the incumbent concessionaire will again wind up with the contract.[425]

Representative Meyers's preference for guide services makes little difference in practice because such services seldom constitute monopolies and usually do not require elaborate in-park facilities. Preference renewal for relatively small concessionaires, however, effectively insulates what may be the least efficient providers from competition by other small businesses.

2. Distinguish Between Large and Small Contracts?

Representative Hansen's H.R. 2028 differentiates between "concession service agreements" and "concession licenses."[426] The former is the usual concession contract while the latter may be given for "infrequent" activities where either any number can supply the goods or services involved or the situation lacks "competitive interest."[427] Concession licenses may not exceed three years[428] and are nontransferable,[429] but no fee setting mechanism is indicated. The Meyers bill, on the other hand, makes size distinctions in several contexts. As mentioned above, concessionaires who either have annual gross receipts of less than $500,000 or provide guide services (evidently assumed to be small entities) remain entitled to preference renewal rights.[430] H.R. 773 would also provide different rules for "concession contracts" and "commercial use authorizations."[431] The latter would be relatively rare because the secretarial authority to issue them would be tightly restricted. They would be available only if:

422. *Id.* § 7(f).
423. GAO, CONCESSIONS CONTRACTING, *supra* note 116, at 35.
424. *Id.* at 6.
425. *Id.* at 7.
426. H.R. 2028 § 4.
427. *Id.* § 4(a)(2).
428. *Id.* § 4(b)(1).
429. *Id.* § 6(b).
430. H.R. 773, 104th Cong. §§ 7(h), 7(i) (1995).
431. *Id.* §§ 3(2), 6.

The applicant has gross revenues of not more than $25,000 (or operates outside a park, using the park only incidentally);[432]

The use will have "minimal impact" on park resources and is consistent with park preservation;[433] and

In the aggregate, the uses do not harm park values.[434]

Only a "reasonable" fee need be paid for commercial use authorizations, which are limited to two-year terms.[435]

The United States and individual states long have had laws and policies that discriminate in favor of smaller business entities, the Small Business Administration subsidies being only one of many examples. That policy preference is rife in many areas of public natural resources law, from reclamation limitations[436] to mining claim assessment work fees.[437] Still, it is not beyond reasonable contention that such discrimination is inappropriate when dealing with for-profit businesses. As argued above, it is a bad idea to make renewal preferences available and such preferences should be jettisoned entirely from NPS concessions law. The case is even stronger for abolishing preferences for relatively small concessionaires because the competitors being precluded usually are also small businesses.

The distinction between contracts and licenses, however, is sensible in several contexts. The difference between, say, a hotel complex concession and permission to conduct horse rides along park trails is enormous in most ways of measuring. Representative Meyers' limitations on licenses, stressing minimal impact on park resources, would be consistent with basic park policies—although the $25,000 gross revenue limitation seems overly restrictive.

3. Should Departures from Competitive Bidding be Allowed, and If So, When?

Both the Hansen and Meyers bills are full of exceptions to competitive bidding, and, indeed, the main contract award mechanisms of each contain subjective standards that detract from pure competition. Preferences, possessory interests, and noncompetitive licenses (not to mention the natural advantages of an entrenched operation) also lower the quantum of competition. In line with the recommendation above that the United States eschew paternalism in favor of treating businesses as businesses, we submit that any concessions reform legislation expressly adopt competitive bidding as the norm and tightly restrict any administrative discretion to depart from that norm. An obvious situation where a departure probably will be justified is when no bids are received in response to a proposal.[438] But such exceptions should be rare.

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432. *Id.* § 6(c)(1).
433. *Id.* §§ 6(b)(1) to 6(b)(2)(B).
434. *Id.* § 6(b)(2)(D).
435. *Id.* §§ 6(b)(2)(A), 6(d).
436. *See* PNRL, *supra* note 1, §§ 21B.03[4], 21B.04[3].
437. *See id.* § 25.03[6].
438. *Cf.* PNRL, *supra* note 1, § 20.03[3] (discussing the Forest Service's authority to reject

4. Depreciation or Appraisal as a Valuation Method?

The Hansen bill in essence continues the present system whereby a concessionaire whose contract is terminated is entitled to compensation for the "fair market value" of any improvements to be used by the successor, and it establishes income-approach appraisal as the method for determining that value.[439] The Meyers bill, on the other hand, would phase in straight-line depreciation as the valuation method for concessionaire built improvements.[440] The difference is fundamental. The Hansen approach gives contractors a perpetual near-fee interest in facilities on park lands, while the Meyers approach would result in eventual public ownership of those facilities. For all of the reasons elicited in sections IIB.2.c and IIIC.4 above, straight-line depreciation is a far better measuring standard. Indeed, we urge Congress to consider whether to go an additional step and deduct from initial cost of improvement the depreciation actually claimed by the concessionaire on its income tax returns.

5. Franchise Fees: Gross or Net?

Both the Meyers and Hansen bills finesse the problem of franchise fee calculation. The Meyers version recites that:

> Franchise fees, however stated, shall not be less than the minimum fee established by the Secretary for each contract. The minimum fee shall be determined in a manner that will provide the concessioner with a reasonable opportunity to realize a profit on the operation as a whole, commensurate with the capital invested and the obligations assumed under the contract.[441]

This standard, of course, says virtually nothing. The Hansen bill is only a little more forthcoming. The Secretary is to set a minimum fee based on "historical" data, but the final fee will be the amount actually bid.[442] The fee thereafter can be modified only for inflation unless the concessionaire agrees.[443]

Publicity about seemingly absurdly low franchise fees fueled the concern that led to these reform proposals, yet neither directly confronts the problem.[444] In other contexts, Congress has set minimum royalties for mineral extraction[445] and park entrance fees are also dictated by legislation.[446] A private lessor seldom guarantees its lessee commensurate profits. The Meyers version, with its generous grant of discretion to the NPS to set minimum fees, is better than the Hansen version, but a statutory provision setting a minimum at some percentage of gross revenues appears even more preferable.

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all bids on timber sale contracts).

439. H.R. 2028, 104th Cong. § 11(c)(1995).
440. H.R. 773, 104th Cong. § 12 (1995).
441. *Id.* § 8(a).
442. H.R. 2028 § 9(b).
443. *Id.* § 9(c).
444. *See supra* notes 221-223 and accompanying text.
445. *See* PNRL, *supra* note 1, §§ 22.03[3][d], 23.03[2][b][iv], 24.04[3][b].
446. 16 U.S.C. § 460*l*-6a.

6. How to Resolve Disputes?

The Hansen bill provides for establishment of a Board of Concession Appeals which, although similar to the Interior Board of Land Appeals, would be "an independent administrative review board."[447] It would have jurisdiction over all concessions matters except "expiration of a concession authorization."[448] Thereafter any person may seek judicial review in the Court of Federal Claims pursuant to the Tucker Act.[449] "Concession license" decisions would be reviewed in federal district court.[450] Then, in a curious provision, the Hansen bill says that "[i]f the Secretary concerned breaches a concession authorization, the Secretary shall pay just compensation to the concessioner."[451] The Meyers bill contains no equivalent provision, leaving matters to review under the Administrative Procedure Act or to contract damage actions under the Tucker Act. It does instruct the Secretary to promulgate dispute resolution regulations in the sole context of contract awards.[452]

We agree with Representative Hansen that a reform bill ought to spell out a dispute resolution mechanism, but we disagree with the version he has proposed. First, the "just compensation" provision is unprecedented, unwarranted, and little short of silly. Just compensation is the appropriate remedy for a Fifth Amendment taking;[453] damages are appropriate for a breach of contract. The agency is already liable for contract breaches under the current law.[454] Second, creation of an independent board makes sense only if the legislation covers all concession-granting agencies—a question beyond the scope of this article. Third, the exception from review of concession authorization expiration is at best mysterious: if preference rights are to be retained at all, then those with some form of preference certainly have a legitimate interest in seeking review if they are terminated.

A faster and cheaper alternative mechanism would be assignment of a single administrative law judge to the National Park Service to make the initial ruling on NPS/concessionaire disputes, with one appeal to the Secretary. The statute should specify periods of time in which both the ALJ and the Secretary must rule. Thereafter, review would be in the appropriate federal court, depending on whether the relief sought is equitable (federal district court) or damages (Court of Federal Claims).

447. H.R. 2028 § 12(a)(1).
448. *Id.* § 12(a)(2).
449. *Id.* § 12(c)(2).
450. *Id.* § 12(c)(3).
451. *Id.* § 13.
452. H.R. 773, 104th Cong. § 7(a)(2) (1995).
453. U.S. CONST. amend. V.
454. *See* PNRL *supra* note 1, ch. 9.

7. How to Evaluate Concessionaire Performance?

The Meyers and Hansen bills do not differ very drastically in the matter of evaluating concessionaire performance. The Meyers bill requires only "periodic" (as opposed to annual) evaluations, does not define performance criteria, and generally gives the Secretary more authority to discipline or terminate unsatisfactory concessionaires.[455] The Hansen version contains sketchy criteria and in general is more solicitous of concessionaire interests.[456] Neither provision adds much to either bill, and neither seems to change current law very much.

The Court of Federal Claims in the 1993 *YRT* case[457] formulated a rather restrictive test for the judicial review of NPS selection of concessionaires, which, according to the court, "essentially involve[s] a matter of business judgment."[458] This deferential review posture is appropriate, but for reasons somewhat different from those stated by the court. As indicated above,[459] the Park Service ought to engage in arms-length transactions with its concessionaires, rather than bestowing upon them unwarranted and preferential treatment not available to businesses normally operating in a competitive market. But Park Service concessions are not just businesses designed to maximize profit for their operators. Instead, they have been authorized by Congress to enhance the recreational experiences enjoyed by Park Service visitors, and that ought to be an important touchstone of concessionaire performance. It is therefore appropriate, as Meyers's bill does, to vest in the NPS considerable discretion to select, evaluate, and terminate concessionaires in conformity with that goal. The agency's efforts to implement its responsibilities typically will require a balancing of potentially conflicting aspects of recreation, such as the provision of more campgrounds and the preservation of unspoiled natural areas. In exercising that discretion, the Park Service should of course assess the concessionaire's managerial competence and financial solvency;[460] poorly supplied concessions facilities that are in physical disrepair are not likely to meet the demands of park visitors, and they may detract from visual enjoyment of the parks. These are likely to be the easy cases, however. How should the NPS regard an efficient concessionaire whose operations appear to reflect less than an optimal sensibility for the scenic wonders amidst which the concession is located? The criterion referred to in the *YRT* case—the extent to which the concessionaire understands the NPS mission and the concessioner's role in carrying out that mission[461]—is obviously quite amorphous, but at bottom the priorities it reflects are sound. Concessionaire evaluations should be based on factors that include quality of visitor services, financial perfor-

455. H.R. 773 § 14.
456. H.R. 2028, 104th Cong. § 8 (1995).
457. YRT Servs. Corp. v. United States, 28 Fed. Cl. 366 (1993); *see supra* Part II.B.2.b.i.
458. *YRT Servs. Corp.*, 28 Fed. Cl. at 394.
459. *See supra* Part III.B.8.
460. *See YRT Servs. Corp.*, 28 Fed. Cl. at 371-72.
461. *Id.* at 376.

mance, and compliance with the provisions of the contract and applicable laws.[462]

CONCLUSION

Millions of visitors each year stream through the national parks. Many if not most of them seek out goods or services to embellish some aspect of their visits. The management of national parks concessions is therefore big business. The consensus of opinion from all corners seems to be that this business has not been functioning smoothly. The excessive development of concessions facilities, the shielding of concessionaires from normal competitive processes, the provision of an inadequate share of concessions revenues to the government, and the inability of the Park Service to devote the government's revenue share to needed facility maintenance and other park improvement projects all have been raised as negative features of the status quo.

Although a consensus in favor of reform has emerged, the shape of that reform has been harder to agree upon. The two major reform vehicles debated in Congress during the 104th Congress represent incremental reform, although one of the reform bills, H.R. 1028, seems more heavily weighted in favor of concessionaire interests than the other, H.R. 773. We have suggested in this article that a broader inquiry is called for, one which takes nothing for granted and which questions even heretofore unassailable premises such as the assumptions that the parks ought to be developed and that concessions facilities are best run by private entrepreneurs. We also recognize, however, that, even revolutions in administrative structuring hailed as fait accomplis often wind up as revolutions that never were. Radical reforms engendered by reassessments of initial premises are therefore unlikely.

The less fundamental but still important questions implicated in national park concessions reform include determination of the optimal level of recreation facility development and recreational services, of the uses to which concession fees should be allocated, of the locus of responsibility for and the mechanisms that govern the establishment of fees for goods and services, and of the degree to which concessionaires should be treated in a manner apart from other government contractors. It will be impossible for policymakers to resolve these questions without an overriding conception of the role that the parks should play, which in turn may entail establishing a hierarchy among the functions served by the national parks. In our view, the most fundamental tension is between developing the parks in a manner that increases access to park resources and developing them in a manner that removes from the parks the natural attributes responsible for their designation as national parks in the first place. There is certainly ample room in many instances to achieve the first goal without sacrificing the second. If, however, conflict becomes un-

462. *See, e.g.*, H.R. REP. NO. 104-280, pt. 1 (1995), *available in* 1995 WL 646552 (§ 9306(a)(1) of the Visitor Facilities and Services Enhancement Act of 1995).

avoidable, then we submit that the preservation purposes of the parks should take precedence over their recreational aspects, as Congress appears to have intended both when it enacted the Park Service's organic act and when it adopted the CPA. Having faced the essential policy conundrums involved in resolving this tension, policymakers should find it relatively easy to answer the more prosaic questions raised in section IIID above, or at least to conclude that these questions can be addressed by analogy to government contract mechanisms in other areas.

THE PROBLEM OF STATUTORY DETAIL IN NATIONAL PARK ESTABLISHMENT LEGISLATION AND ITS RELATIONSHIP TO POLLUTION CONTROL LAW

ROBERT L. FISCHMAN*

INTRODUCTION

Legal scholarship examining national park management focuses almost exclusively on the so-called "Organic Act" describing the overarching mandate for the National Park Service ("NPS" or "Service"). Title 16 of the United States Code prominently proclaims in its first section the famous kernel of this 1916 law, significantly clarified in 1978, that the purpose of national parks, monuments, and reservations is

> to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[1]

This visionary mandate is what most commentators home in on when they discuss national park management.[2] Certainly, it is what Wallace Stegner had in mind when he referred to the national parks as "the best idea we ever had."[3]

But the bright fame of this broad statement of purpose has blinded many scholars to several hundred sections that follow it in Title 16. These are the

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1. 16 U.S.C. § 1 (1994) [hereinafter Organic Act].

2. *See, e.g.*, Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 4 (1992); Robert B. Keiter, *National Park Protection: Putting the Organic Act to Work*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 75 (David J. Simon ed., 1988); John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41, 42 (1984); William Andrew Shutkin, Note, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345, 361 (1991); *see also* Clayton L. Riddle, Comment, *Protecting the Grand Canyon National Park from Glen Canyon Dam: Environmental Law at Its Worst*, 77 MARQ. L. REV. 115, 126-29 (1993) (describing constraints on NPS power to protect parklands).

3. William J. Lockhart, *External Park Threats and Interior's Limits: The Need for an Independent National Park Service*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 3, 3 (David J. Simon ed., 1988) (quoting Wallace Stegner, *The Best Idea We Ever Had*, 46 WILDERNESS 4 (1983)).

sections that establish to which lands the overarching mandate will apply and, increasingly in recent years, detail how the Organic Act will apply to the specifically reserved units managed by the Service. The Organic Act would be nothing more than a distant vision, with no on-the-ground application, were it not for the establishment statutes that have created 54 national parks, 73 national monuments, and a variety of other reservations in the 374-unit national park system.[4]

There are good reasons why the literature on national park management focuses on the Organic Act. Certainly, the overarching mandate is one of the most important statements of American cultural values enacted as environmental law. Also, it is the fundamental interpretive rule in exercising and reviewing the proprietary management discretion of the Service. The Organic Act, unlike establishment legislation, applies comprehensively to the entire geographic sweep of the national park system.[5] Finally, the Organic Act sets up an elegant tension between providing for enjoyment (often interpreted as recreation) and leaving units unimpaired (often interpreted as preservation). This tension has stoked the furnace of countless heated arguments over management direction for the Service.[6]

Unfortunately, this deserved interest in the NPS organic legislation has almost completely eclipsed searching analysis of establishment legislation. This Article is an initial step toward addressing the importance of establishment legislation. Although examination of establishment legislation cannot substitute for application of the Organic Act, it is critical to understanding the changing role of Congress in the actual management of the national park system and important trends in environmental law. The first Section of this Article outlines the importance of establishment legislation to legal scholarship. Section Two describes the general trend in environmental law for Congress, through greater statutory detail, to assume an ever larger role in specifying how agencies should implement delegated programs. This Section also

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4. *List of Units in the National Park System* (visited Nov. 10, 1996) <http://www.nps.gov/legacy/npslist.html> [hereinafter *List*]. All of the reserved lands managed by the Service, not just designated "national parks," are part of the national park system. 16 U.S.C. § 1c(a) (1994). All national park system units are subject to the same organic legislation to the extent that it does not conflict with provisions specifically applicable to them. *Id.* § 1c(b)7. Specifically applicable provisions generally appear in establishment legislation.

5. 16 U.S.C. § 1c(b). Units of the park system range from the modest, such as Fort Stanwix National Monument, New York, to the vast, such as Wrangell-St. Elias National Park, Alaska. *List*, *supra* note 4. Delaware is the only state unrepresented in the over 80 million acres of the national park system. *Id.*

6. *Compare* Herman, *supra* note 2 (arguing for narrow Service discretion in balancing competing interests), *with* Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 49 (1990) (arguing for a new balancing approach emphasizing the human experience), *and* Riddle, *supra* note 2 (arguing for legislative restructuring of park management), *and* Robin Winks, *Dispelling the Myth*, NAT'L PARKS, July/Aug. 1996, at 52 (arguing that the tension is contrived because unimpairment concerns supersede all else). *See generally*, George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 15-27 (1987) (proposing legislative changes and approaches to reduce external threats); Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 296-312 (1994) (discussing the current state of ecosystem management under the Organic Act).

reviews the trend as it has appeared in pollution control legislation and describes the parallel trend in establishment legislation, highlighting similarities and differences. Section Three explores the reasons for the growth in statutory detail in environmental law, and establishment legislation in particular. In both the pollution control and national park context, specific congressional management mandates become more prevalent in legislation addressing second-generation problems. Second-generation problems are those that remain after Congress and agencies address the relatively low-cost, easy issues in a field. Section Four discusses the effects of the growth of statutory detail on the NPS. On balance, this growth frustrates the objective of systemic management of national park units. Section Five outlines a course of reform to facilitate systemic management.

SECTION I: LEARNING FROM NPS ESTABLISHMENT LEGISLATION

There are two reasons why scholars should turn their attention to NPS establishment legislation. First, from a purely descriptive point of view, establishment legislation indicates the changing attitude of Congress toward parks. Establishment legislation is an increasingly important but almost uniformly overlooked source of objectives for management of the national park system. One simply cannot understand the priorities and decisions that guide planning for the national park system without reviewing establishment legislation. Second, as a classic example of the proprietary strand of environmental law,[7] establishment legislation provides an instructive contrast with pollution control law. Existing literature describing the reasons for and the effects of statutory detail in pollution control law provides a benchmark for evaluating the role of Congress in the management of the national park system. The study of establishment legislation highlights important areas of unity in these two disparate strands.

A. *The Role of Congress in the Management of the National Park System*

Any single statute is a snapshot of the congressional landscape at the time of its enactment. Important legislation, such as the Organic Act, conveys a great deal about the compromises and accommodations necessary to secure enactment. However, because Congress seldom amends overarching legislation, these statutes have limited use as indicators of trends. Establishment statutes, because Congress regularly enacts them, serve well as indicators of the expanding role of congressional involvement in national park system management. Perhaps the most important trend revealed by establishment legislation over the past few decades is the expansion in the number of units composing the national park system.[8]

Less noted but equally important, however, is the tendency in recent de-

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7. The proprietary strand of environmental law governs management of publicly owned resources.

8. *See infra* note 53 and accompanying text.

cades for Congress to specify in greater detail the management tasks for newly established units of the national park system. In its simplest form, establishment legislation would specify the metes and bounds of an area to be reserved or acquired for management by the Service under the Organic Act.[9] However, during the past twenty-five years, Congress has rarely limited its lawmaking to simple area designation in establishment legislation. As the discussion in Section Two of this article will show, Congress increasingly tailors management instructions to the Service for each unit established. Congress may specify management constraints on park administration with respect to visitor activities such as fishing, hunting, or grazing.[10] It also may set out a particular process for planning, involving public hearings and consultations; and, it may require the management plan itself to address certain issues.[11]

The greater congressional attention to management detail in establishment legislation gives rise to an increasingly important but frequently overlooked source of law for management of the national park system. Although the Organic Act remains an important interpretive tool, Service decision-makers must look first to establishment legislation to determine whether it speaks to an issue that an NPS unit needs to deal with.[12] In the past decade, commentators have increasingly called for management reform to strengthen the Service's efforts in preservation. As the biological diversity of the United States continues to erode, for instance, the national park system becomes ever more valuable to maintain the biological integrity of representative ecosystems throughout the country.[13] An examination of establishment legislation reveals that simple clarification of the Organic Act to stress the preservation prong of the Service's dual mandate, or even amending the Organic Act to embrace explicitly biological diversity, would not be sufficient to achieve comprehensive reform. Establishment legislation, which guides the management and planning for individual parks would also need to be revisited.[14]

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9. The establishment legislation for Haleakala National Park illustrates this bare-bones approach. *See* 16 U.S.C. § 396b, c (1994).

10. The establishment legislation for Great Basin National Park for instance, discusses zoning waters for fishing and limiting grazing. *See id.* § 410mm-1(b), (c) (1994).

11. The establishment legislation for Channel Islands National Park, for instance, provides a deadline for a management plan, requires consultation with certain interested parties, mandates certain contents of the plan, requires public hearings in particular locations to discuss certain issues, specifies low-intensity and limited entry management, prohibits entry fees, and mandates certain studies. *See id.* § 410ff, ff-2, ff-3, ff-6.

12. *Id.* § 1c(b); NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES 2:6 (1988) [hereinafter MANAGEMENT POLICIES] ("Congressionally directed plans will be given a priority that enables their completion within the required time frame."). *See, e.g.*, NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT: CARLSBAD CAVERNS 4 (1996) [hereinafter FINAL GENERAL MANAGEMENT PLAN] (recognizing establishment legislation to describe park purpose); Todd Wilkinson, *Crowd Control: With a Pilot Program at Arches National Park, the National Park Service Is Charting a Promising New Course for Visitor Management*, NAT'L PARKS, July/Aug. 1995, at 36, 39 (describing a resource management program in Arches National Park that begins with a re-examination of the establishment legislation).

13. *See* Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems, and Private Property Rights*, 14 PUB. LAND L. REV. 5, 5-8 (1993); Linder, *supra* note 6, at 63-69.

14. Organic Act reform could, say, mandate restoration and preservation of biological diver-

Furthermore, the current climate of fiscal austerity heightens the importance of establishment legislation. As federal budgets for NPS management constrict, the Service has ever-diminishing resources to dedicate to discretionary activities.[15] Management mandates contained in establishment legislation are always a high funding priority compared to discretionary activities; but, as budgets become tighter, the mandates may be the only activities that the Service can afford. Even where the establishment legislation contains recommendations and not mandates, these expressions of congressional preference must be accorded high priority. As federal budgets chop lower priority programs off the Service's agenda, increasingly the activities actually funded will be those mentioned in establishment legislation. These establishment activities are the inner core of programs most protected from the fiscal ax.

Perhaps most important from a park management perspective, the trend of increasing congressional management through establishment legislation thwarts efforts to manage the national park system as a *system* rather than a mere collection of lands. Whether to conserve representative ecosystems or create an outdoor university for environmental and cultural appreciation, any comprehensive attempt at management of the national park system must stumble over the scores of hurdles erected by establishment legislation provisions. To some extent, this is precisely the design of increased congressional involvement in NPS unit management: to impede executive branch power to change the course of land management policy.

But, the units managed by the Service purport to be part of a national park *system*. A system is a group of interrelated elements forming a collective entity;[16] a complex unity formed of many diverse parts subject to a common plan or serving a common purpose; an aggregation or assemblage of objects joined in interdependence.[17] Establishing a framework within which units can interrelate is important not simply to fulfill the semantic promise of a national park system. It also allows each unit to contribute to a purpose broader than mere individual conservation of a unit's particular resources in its local context. At its outset, the national park system was infused with cultural meaning:

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sity. If Congress provided that this mandate superseded all establishment legislation provisions incompatible with achieving the biological diversity goals, it might solve the problem of amending each establishment statute separately. This blanket solution, however, would not express congressional intent as clearly as identifying just which establishment legislation provisions should be deemed incompatible. In any event, the existence of the establishment legislation management provisions cannot be overlooked in any reform proposal. See *infra* Section IV for consideration of a wider range of possible Organic Act reforms.

15. When the NPS celebrated its 75th anniversary, it participated in an intensive evaluation of its performance, commonly identified by the name of the town where the park management syumposium was held: Vail, Colorado. At the time, the results of the study were published in 1993, the core operating budget of the agency had "remained flat in real terms since 1983" while recreational visits to the system had risen 25 percent. NATIONAL PARK SERVICE STEERING COMMITTEE, NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA 11 (1993) [hereinafter THE VAIL AGENDA]. In 1994, the Service fielded one ranger for every 80,000 visitors to the system, compared with one ranger for every 59,000 visitors in 1980. Michael Milstein, *National Park Service Is Put on a Starvation Diet*, HIGH COUNTRY NEWS, May 16, 1994, at 3.

16. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1823 (3d ed. 1992).

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2322 (1986).

monumentalism was the principle that linked park units.[18] Over time, the principle of protecting healthy functioning ecosystems emerged as an aspirational, systemic theme.[19] However, as this theme emerged, scores of new units were added to the system, many (such as the 112 historical parks and sites) with no monumental scenery or ecological significance.

In recent years, many critics of the national park system have called for paring down the number of units managed by the Service.[20] However, without a clear consensus on just what is the purpose of the system, any effort to decommission units will miss the mark. This points to the need for reform and clarification of the Organic Act to better describe the goals of the national park system. After that is accomplished, the critics who complain of dilution of the mission of the Service through pork-barrel parks can look to establishment legislation for clues as to which units are the least consistent with the broad charge of the NPS. Extensive management mandates in establishment legislation may be an indication that a unit does not fit very well within the existing framework of the national park system.

B. *The Instructive Contrast with Pollution Control Law*

The relative silence in legal scholarship on the trend toward more detailed management mandates in establishment legislation for the NPS contrasts starkly with the widely noted trend in pollution control law of more congressional involvement in regulatory matters. One task of this Article is to describe the extent to which these two trends are actually manifestations of a single development in the relationship between Congress and agencies in environmental law.[21] The contrast in the literature reflects a wider gulf between the pollution control and the natural resource management strands of environmental law. This gulf frustrates the borrowing of insights from one strand that might apply to the other. This Article explores the extent to which fruitful cross-fertilization may result from efforts to reweave these divergent strands of environmental law.

Beginning with the proliferation of federal statutes regulating polluting activities in the early 1970s, environmental law commentary and practitioners have split into two distinct branches, or strands. The first, and newest, deals with pollution control. It is generally characterized by legislation authorized by the Commerce Clause[22] that employs agencies to regulate activities to control

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18. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 33-35 (2d ed. 1987).

19. *See id.* at 65-67; Robert B. Keiter & Mark S. Boyce, *Greater Yellowstone's Future: Ecosystem Management in a Wilderness Environment*, *in* THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 379, 379-82, 402-07 (Robert B. Keiter & Mark S. Boyce eds., 1991).

20. *See* 141 CONG. REC. H9085 (daily ed. Sept. 18, 1995) (statement of Rep. Hansen); JAMES M. RIDENOUR, THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES 16-19 (1994).

21. *See infra* Section III. The broader trend of increasing statutory detail outside of environmental law is undeniable but beyond the scope of this article.

22. U.S. CONST. art. I, § 8, cl. 3.

pollution. The other strand, with roots in the conservation movement of the early twentieth century, is generally characterized by legislation authorized by the Property Clause[23] that employs agencies to act as proprietors of natural resources. These distinctions are reflected in the organization of agencies as well as the committee structures of Congress.

Historically, pollution control law has focused on controlling use of the environment as a sink for environmentally undesirable substances. Natural resources law has focused on controlling use of the environment as a source of environmental goods. Increasingly, however, these distinctions are fading. One reason for this merging is that, after early, relatively easy successes, each strand now requires coordination with the other to achieve its goals. For instance, reducing water pollution in order to sustain high quality uses of a river may require restrictions on public logging in the watershed (natural resources law) as well as the application of best technology to dischargers along the river (pollution control law).[24] Similarly, maintaining viable populations of wildlife essential to a national park (natural resources law) may require restrictions on air emissions (pollution control law).[25]

Another trend pulling together the divergent strands of environmental law is the heightened recognition of ecological integrity (or biological diversity) as a goal that undergirds the maintenance of environmental quality. Ecological integrity depends upon resource use that both designates for preservation core refuge areas and minimizes destructive impacts of commodity uses. It also depends upon pollution control that considers effects of pollutants on wildlife and plants as well as the more traditional human health criterion.[26] Many environmental law programs, such as regulating dredge or fill activities,[27] blur the distinction in the sense that they employ the tools of one field (such as permitting from pollution control) to zone and manage natural resources (such as wetlands). These programs complicate the simplified model of two distinct strands but nonetheless may be placed on a spectrum defined by the two branches.

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23. U.S. CONST. art. IV, § 3, cl. 2.

24. Siltation is the leading cause of impairment of rivers and streams in the United States. U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY: 1992 REPORT TO CONGRESS 3. In its 1992 inventory, the Environmental Protection Agency [EPA] attributed impairment through silviculture as the source of seven percent, and resource extraction as the source of eleven percent, of the assessed river miles impaired by pollution. *Id.* at 20. In many states, these activities are managed on federal public lands. Another example of a public land management activity that impacts ambient environment quality is prescribed burning, which contributes to air pollution problems in many parts of the country. *See, e.g.*, GRAND CANYON VISIBILITY TRANSPORT COMMISSION, PROPOSED RECOMMENDATIONS ii, 49-51 (April 1996 Draft for Public Comment); JANICE PETERSON & DAROLD WARD, USDA FOREST SERVICE PACIFIC NORTHWEST RESEARCH STATION, AN INVENTORY OF PARTICULATE MATTER AND AIR TOXIC EMISSIONS FROM PRESCRIBED FIRES IN THE UNITED STATES FOR 1989.

25. Atmospheric deposition of mercury interferes with the reproductive success of Florida panthers in Everglades National Park. C. Facemire et al., *Impacts of Mercury Contamination in the Southeastern United States*, 80 WATER AIR & SOIL POLLUTION 923, 925 (1995).

26. Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435, 487-88 (1992) (addressing biological resource protection through the use of EPA authorities).

27. 33 U.S.C. §§ 1344(a)-(t) (1994).

National park legislation, however, is not such a complicated program. In fact, it illustrates the classic natural resources law characteristics. The Service is an agency in the Interior Department with a proprietary ethic, operating under legislation that focuses on allowing certain uses of public resources. Therefore, the extent to which aspects of NPS law currently are converging with aspects of pollution control law demonstrates the strength of their fundamental affinity after twenty-five years of isolated specialization. The convergence is partly driven by issues such as the effects of polluting activities on NPS goals (e.g., visibility of scenic wonders in the Southwest), and the effects of NPS resource management on ambient environmental standards (e.g., winter air quality in West Yellowstone, Montana).

This Article reveals another respect in which NPS law illustrates convergence. Establishment legislation, the day-to-day, on-the-ground guidance for Service management, has come to resemble, more and more, pollution control statutes in its level of detail. Congress is far more engaged today in the details of park management in a manner similar to its increased involvement in setting pollution control standards. Certainly, some of the explanations for this trend in national park system management are not applicable to the pollution control context. However, many of them are. A more integrated view of environmental law aids in the understanding of both the similarities and differences.

Finally, this analysis of establishment legislation raises the normative question of how much detail Congress ought to inscribe in statutes delegating authority for agencies to implement. A pluralist model of interest group negotiation might suggest that there is little to say about what Congress should prescribe to agencies: whatever compromise is reached by a fair political process is appropriate for legislation. But, a comparison of Congress and agencies suggests that too much statutory detail impedes an agency from realizing its institutional strengths in technical expertise and flexibility. Section Four of this Article will outline the benefits and detriments of statutory detail in environmental law. The most serious problem with statutory detail in establishment legislation is that it thwarts systemic management for the national park units.

SECTION II: A DESCRIPTION OF THE TREND TOWARD GREATER STATUTORY DETAIL

Establishment legislation, at its core, delegates to the NPS authority to manage a unit of the national park system. But, at the same time that Congress gives power to the Service, it also limits that power through management mandates. In a similar way, in pollution control legislation, Congress typically creates the framework for a regulatory program and delegates its implementation to the Environmental Protection Agency (EPA). Increasingly, Congress specifies details about how, what, and when the EPA should regulate. This Section describes and compares the ways in which Congress has limited discretion of the NPS in establishment legislation and the EPA in pollution control statutes.

A. *Congressional Management of Pollution Regulation*

Many commentators have observed the rise of statutory detail in pollution control law.[28] For anyone who works with these "statutes of numbing complexity and detail"[29] it is a difficult trend to ignore. The increased congressional involvement in the details of pollution regulation takes many guises.

From the earliest days of modern federal pollution control legislation, Congress established deadlines to constrain the discretion of the EPA. Instead of delegating entirely to the agency the task of prioritizing activities, Congress mandated that certain actions, especially standard-setting, be conducted within certain time frames. The 1970 Clean Air Act established deadlines for overall compliance, and, within the framework of those deadlines, created strict timetables for state preparation and EPA review of implementation plans.[30] The 1972 Clean Water Act called for "fishable, swimmable" waters everywhere by July 1, 1983,[31] and more detailed deadlines for the implementation of technology-based standards for over 500 separate categories of industries.[32] By 1989, Congress and the courts had imposed 800 deadlines on the EPA.[33] Subsequent enactments brought yet more deadlines.[34]

Most of these deadlines were too ambitious for the EPA to meet.[35] As a result, the agency missed many deadlines and also adopted more streamlined procedures for standard-setting than those "apparently contemplated by the statute."[36] Still, the deadlines aided congressional oversight of the EPA by

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28. *See, e.g.*, ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW v (4th ed. 1995); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 102-114 (2d ed. 1996); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY xxvii-xxix (1992); 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 3.1A, at 43-44 (Supp. 1996); J. William Futrell, *Environmental Law History, in* SUSTAINABLE ENVIRONMENTAL LAW 3, 43 (Celia Campbell-Mohn et al. eds., 1993); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819. *See generally*, Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 ENVTL. L. REP. 10,251 (1989) (discussing professors' frustration with teaching environmental law in light of complex, changing statutes).

29. Sax, *supra* note 28, at 10,251.

30. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 3.6, at 198 (2d ed. 1994).

31. 33 U.S.C. § 1251(a)(2) (1994).

32. *Id.* § 1311(b) (1994).

33. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (citing William K. Reilly, The Turning Point: An Environmental Vision for the 1990s, Address for the Marshall Lecture before the Natural Resources Defense Council, Nov. 27, 1989, *in* 20 ENV'T REP. (BNA) 1386, 1389 (Dec. 8, 1989)); *see* Shapiro & Glicksman, *supra* note 28, at 828-30 nn.42-48 (citing numerous deadlines established by Congress for the EPA).

34. RODGERS, *supra* note 28, § 3.1A, at 44 ("The 1990 Clean Air Act Amendments call for more than one hundred seventy-five new regulations, in excess of thirty guidance documents, some thirty-five studies and reports, and more than fifty new research and investigation initiatives."). A substantial number of these requirements have deadlines attached to them.

35. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1651-52 (1991) (discussing the many reasons why agencies fail to meet deadlines).

36. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 122-36 (1977) (upholding the EPA's technology based effluent limitations under § 301 of the Clean Water Act even though they were promulgated without prior adoption of § 304 guidelines to set out the methodology the agen-

establishing clear benchmarks. They also facilitated environmental group monitoring and enforcement of the pollution control programs through citizen suit provisions.

Beginning in the 1980s, particularly with reauthorization legislation for the Resource Conservation and Recovery Act (RCRA)[37] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[38] and continuing into the 1990s, with the Clean Air Act revision,[39] Congress began to employ with greater frequency statutory tools that restricted EPA discretion more than mere deadlines.[40] Congress employed "hammer" provisions to improve the EPA's compliance with deadlines. A hammer provision operates by providing a draconian (prohibitive) rule that will take effect on a particular date unless the agency has promulgated a substitute regulation. For instance, the 1984 RCRA amendments would have virtually banned the land disposal of any hazardous waste for which the EPA had not promulgated a treatment standard by a specified date.[41] A hammer provision creates incentives for regulated entities to promote compromise to ensure swift agency action rather than delay. The hammer provisions of RCRA were entirely successful in spurring the EPA to meet the deadlines for promulgating treatment standards.[42]

In some instances, Congress goes beyond time frames and specifies in detail which substances the EPA should regulate. This is what Professors Shapiro and Glicksman label restriction of regulatory discretion.[43] While Congress determines for the agency whether to regulate certain pollutants, it gives the agency discretion over how to regulate the pollutants. For instance, in the 1984 RCRA amendments, Congress specified particular solvents, dioxins, and "California-list" wastes for the EPA to establish treatment standards by certain dates.[44] The EPA, though, retained a great deal of control over the process for setting the treatment standards themselves. Similarly, the 1990 Clean Air Act amendments listed 189 hazardous air pollutants for the EPA to establish emission standards.[45] Before Congress established the list of pollutants, the EPA had promulgated emission standards for only six hazardous air pollutants since Congress first authorized it to regulate these contaminants.[46]

In other instances, Congress specified *how* the EPA should regulate pollu-

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cy would use in determining § 301 standards).

37. Hazardous and Solid Waste Amendments for 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6992 (1994)).

38. Pub. L. No. 96-510, 94 Stat. 2767 (1980); Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

39. Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)).

40. *See*, Lazarus, *supra* note 28, at 340-42 (commenting on congressional prescription).

41. 42 U.S.C. § 6924 (1994).

42. ROBERT L. FISCHMAN ET AL., AN ENVIRONMENTAL LAW ANTHOLOGY 130-31 (1996).

43. Shapiro & Glicksman, *supra* note 28, at 822.

44. 42 U.S.C. § 6924(e)-(f). "California-list" wastes were regulated at the time under a California state land disposal program. Schedule for Land Disposal, 51 Fed. Reg. 19,300 (1986) (codified as amended at 42 U.S.C. § 6924(d)).

45. 42 U.S.C. § 7412(b)(1). The EPA can modify or accept petitions to modify the list. *Id.* § 7412(b)(2).

46. *See* RODGERS, *supra* note 30, at 135-37.

tion. This type of statutory detail restricts what Shapiro and Glicksman call legislative discretion.[47] For instance, in the 1984 RCRA Amendments, Congress gave the EPA some discretion in classifying certain substances as hazardous. But, once the agency classifies a substance as hazardous, it must require tanks used to store the substance to obtain approved leak detection and other protective systems.[48]

More commonly in pollution control statutes, when Congress restricts legislative discretion it also restricts regulatory discretion.[49] For instance, the 1984 RCRA amendments outright banned the disposal of bulk or noncontainerized liquid hazardous wastes in any landfill.[50] This approach leaves virtually no discretion for the agency outside of enforcement. Congress was exceedingly specific on what the regulations regarding disposal of containerized liquid hazardous wastes in landfills should state: "Such regulations shall also prohibit the disposal in landfills of liquids that have been absorbed in materials that biodegrade or that release liquids when compressed as might occur during routine landfill operations."[51] In these 1984 RCRA Amendments, Congress went so far as to set out design standards for hazardous waste landfills.

B. *Congressional Management of NPS Units*

During the same period when modern federal pollution control law emerged and amassed layers of statutory details through amendments and reauthorizations, NPS establishment legislation similarly evolved toward greater statutory detail. Although the pollution control field has displayed a proliferation of statutes protecting various media and dealing with a diverse assortment of polluting activities, most of the statutory detail has encrusted on the dozen or so central statutes, which Congress revisits periodically for planned reauthorizations and occasional amendments. In contrast, although Congress has amended several existing NPS establishment statutes to add specific management mandates,[52] it is legislation establishing new units that best manifests the trend toward increased statutory detail.

Before illustrating the trend of increased statutory detail in NPS establishment legislation, it is important to acknowledge two related, but different and more widely noted trends. First, in recent decades Congress has added a great

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47. Shapiro & Glicksman, *supra* note 28, at 822.
48. 42 U.S.C. § 6924(o)(4); *see* Shapiro & Glicksman, *supra* note 28, at 837 n.86.
49. Shapiro & Glicksman, *supra* note 28, at 837.
50. 42 U.S.C. § 6924(c)(1).
51. *Id.* § 6924(c)(2).
52. Congress frequently amends establishment statutes to adjust boundaries. But, for the purposes of this Article, I am concerned only with amendments that mandate or constrain specific management activities. *See, e.g.*, Acadia National Park, Pub. L. No. 99-420, 100 Stat. 955 (1986) (codified as amended at 16 U.S.C. § 341 (1994)); Voyageurs National Park, Pub. L. No. 97-405, 96 Stat. 2028 (1983) (codified as amended at 16 U.S.C. § 160a-1 (1994)); Redwood National Park, Pub. L. No. 95-250, 92 Stat. 163, 163-66 (1978) (codified as amended at 16 U.S.C. § 79b (1994)); Canyonlands National Park, Pub. L. No. 92-154, 85 Stat. 421 (1971) (codified as amended at 16 U.S.C. § 271a (1994)).

many units to the national park system. A review of park unit establishment shows a surge in the early- and mid-1930s,[53] followed by lull until the modern heyday in the 1960s and 70s. The rate of new park unit establishment then dropped with the start of the Reagan Administration, but remained greater than the lull of the 1940s and 50s.

Second, the national park system has evolved from the basic bipartite design of parks and monuments to a diverse taxonomy of fifteen different categories, including a miscellaneous category for *sui generis* units such as the White House and Prince William Forest Park, Virginia.[54] Although these sheer numbers and categories account for much of the proliferation of provisions in the first part of the Conservation Title of the U.S. Code,[55] the focus of this Section is a shift in the content of the establishment legislation toward greater specificity in management instructions to the Service. Although this shift appears in the full range of national park system categories, this Section limits discussion of statutory detail to national parks and monuments.[56] Because these units are the oldest categories, there is a longer span of history to observe. Even more importantly, the purposes of these reservations tends to provide a better fit with the Organic Act goals than do any of the other categories.[57] If there is a true system to be discerned in the assemblage of national park units, it should be manifest in national parks and monuments.

Many of the statutory tools Congress uses to limit the proprietary discretion of the NPS bear a close resemblance to the ones in pollution regulation. For instance, Congress has increasingly employed deadlines to limit the Service's discretion.[58] Deadlines most frequently set time limits on the Service to publish mandated studies and management plans. The use of deadlines in establishment legislation was relatively rare until the 1980s.[59]

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53. Contributing significantly to this surge was the transfer of over 30 military parks and cemeteries from the War Department to the Service in 1933.

54. See *infra* text accompanying note 173 for a description of many of these categories.

55. *See, e.g.*, 16 U.S.C. §§ 21-460 (1994).

56. Unlike the other categories of reserved units of the National Park System, which are designated by Congress, the President may exercise authority under the 1906 Antiquities Act to reserve as national monuments landmarks, structures, and other objects of historic or scientific interest situated on public lands. *Id.* § 431 note. Many national monuments, however, have establishment legislation endorsing their designation. Where they do not, the executive orders serve as substitutes for establishment statutes. A small number of national monuments are not managed by the Service and are therefore not part of the national park system. *See, e.g.*, Proclamation No. 4611, 3 C.F.R. § 69 (1978) (establishing Admiralty Island National Monument, managed by the U.S. Forest Service); Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996) (establishing Grand Staircase-Escalante National Monument, managed by the Bureau of Land Management).

57. Some categories, such as national historic sites, national battlefields, and national memorials are too small to be key elements in a system. Other categories, such as military parks, scenic trails, and parkways serve purposes too specific to contribute significantly to understanding the systemic relationship between establishment legislation and the Organic Act. Still other categories, such as national lakeshores, national seashores, national preserves, and national recreation areas, are excluded from the analysis because they contain few units or are relatively recent inventions, and therefore frustrate reasonable comparison of trends through time. *See generally* 16 U.S.C. §§ 21-460 (identifying the park system categories).

58. MANAGEMENT POLICIES, *supra* note 12, at 2:6 ("Congressionally directed plans will be given a priority that enables their completion within the required time frame.").

59. An interesting topic for further research would be to determine how many of the con-

Just as Congress has restricted the EPA's regulatory discretion by specifying what substances will be subject to restrictions, so too it has restricted the Service's discretion by specifying what uses will be addressed by studies and plans. Commentators frequently call for more research on the condition of park resources and the effects of visitors and environmental stressors on the national park system.[60] Chronically tight budgets make the congressionally mandated studies the top funding priorities. Common subjects specified in establishment legislation for study are suitability of lands for inclusion in a park unit,[61] potential wilderness designations,[62] transportation,[63] and park resources.[64] In the absence of this statutory detail, the Service would have greater discretion for setting its research priorities systemically. In many cases, the subjects mandated by Congress reflect key issues that the Service would be remiss in neglecting, such as the study of rock art in Petroglyph National Monument or erosion and sedimentation in Redwood National Park. However, Congress does mandate action on other subjects that might not warrant a great deal of attention from the standpoint of system management in an era of fiscal austerity. One example is the 1988 mandate in amendments to the Olympic National Park establishment legislation to study the location, size, and costs of

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gressional deadlines the NPS actually met. If the Service's compliance record is better than the EPA's, it may explain the absence of the more draconian tools, such as hammers, in the establishment statutes.

60. *See* COMMISSION ON RESEARCH AND RESOURCE MANAGEMENT POLICY IN THE NATIONAL PARK SYSTEM, NATIONAL PARKS: FROM VIGNETTES TO A GLOBAL VIEW 6-8 (1989) [hereinafter VIGNETTES] (calling for broad-based, on-going research by the NPS); THE VAIL AGENDA, *supra* note 15, at 32 ("The National Park Service must engage in a sustained and integrated program of natural, cultural, and social science resource management and research aimed at acquiring and using the information needed to manage and protect park resources."); Herman, *supra* note 2, at 6-11 (discussing that from the inception of the National Park System, preservationists warned of the dangers of excessive use); National Parks and Conservation Association, *Parks in the Next Century*, NAT. PARKS, Mar./Apr. 1988, at 18, 20 (calling for a threefold increase in natural, cultural, and social science research staff).

61. *See, e.g.*, Grand Canyon National Park, Pub. L. No. 93-620, 88 Stat. 2090 (1975) (codified as amended at 16 U.S.C. § 228b(c) (1994)).

62. *See, e.g.*, Death Valley National Park, Pub. L. No. 103-433, 108 Stat. 4485 (1994) (codified as amended at 16 U.S.C. § 410aaa (1994)); Conagree Swamp National Monument, Pub. L. No. 100-524, 102 Stat. 2606 (1988) (codified as amended at 16 U.S.C. § 431 note (1994)); Biscayne National Park, Pub. L. No. 96-287, 94 Stat. 600 (1980) (codified as amended at 16 U.S.C. § 410gg-3 (1994)); Channel Islands National Park, Pub. L. No. 96-199, 94 Stat. 77 (1980) (codified as amended at 16 U.S.C. § 410ff-5 (1994)); Voyageurs National Park, 84 Stat. 1972 (codified as amended at 16 U.S.C. § 160f(b)).

63. *See, e.g.*, Grand Canyon National Park, 88 Stat. 2091 (codified as amended at 16 U.S.C. § 228b(c)) (regulating dangerous or detrimental aircraft use); Arches National Park, Pub. L. No. 92-155, 85 Stat. 422 (1971) (codified as amended at 16 U.S.C. § 272c (1994)) (designating driveways); Voyageurs National Park, 84 Stat. 1973 (1971) (codified as amended at 16 U.S.C. § 160j(1) (authorizing provisions for roads); Canyonlands National Park, Pub. L. No. 88-590, 78 Stat. 938 (1964) (codified as amended at 16 U.S.C. § 271c (1994)) (providing for construction of roads).

64. *See, e.g.*, Petroglyph National Monument, Pub. L. No. 101-313, 104 Stat. 276 (1990) (codified as amended at 16 U.S.C. § 431 note (1994)) (establishing a Rock Art Research Center); Channel Islands National Park, Pub. L. No. 96-199, 94 Stat. 75 (1980) (codified as amended at 16 U.S.C. § 410ff-2 (1994)) (providing for a natural resources study report); Capitol Reef National Park, Pub. L. No. 92-207, 85 Stat. 740 (1971) (codified as amended at 16 U.S.C. § 273b (1994)) (discussing grazing privileges); Redwood National Park, Pub. L. No. 90-545, 82 Stat. 931 (1968) (codified as amended at 16 U.S.C. § 79c(e) (1994)) (discussing erosion and sedimentation).

a year-round visitor center in the Kalaloch area.[65]

Mandated studies on particular subjects are related to planning, because new information on the condition of resources or the effects of activities will raise issues that a plan must address. For instance, a study of the effects of grazing is likely to lead to information relevant to restricting, expanding, and/or zoning with respect to grazing in the park unit. Congress increasingly goes beyond specifying what the Service should study to list topics that the Service must address in its management plan. Beginning in 1978, Congress has required every unit of the national park system to prepare and "revise in a timely manner" a general management plan (GMP).[66] Congress requires that each plan include, but not limit itself to, four items: measures for resource preservation, indications of types and intensities of development, identification of and implementation commitments for visitor carrying capacities for all areas of the unit, and potential boundary modifications.[67] These 1978 requirements replaced an older provision which mandated plans that focused on development of visitor facilities.[68] After 1978, planning has been more broadly directed toward resource management and conservation. Although Service policy commits units to discuss a more detailed list of topics in plans, such as zoning and environmental impacts,[69] Congress supplements the four-part planning mandate only through establishment legislation.[70] Although Congress did not explicitly mandate that the GMPs bind the subsequent management actions of the Service, as it has done with planning mandates for the BLM and the Forest Service,[71] the GMPs nonetheless play a principal role in guiding management.

The specific mandates for plan content in establishment legislation vary widely but demonstrate the same trend of increased congressional involvement over the past few decades. Congress began mandating the contents of plans two years before it required GMPs for all units.[72] Since then, it has increasingly specified certain topics that must be addressed in the GMPs. Common topics include identification of adjacent lands necessary to accomplish the

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65. Olympic National Park Wilderness Act, Pub. L. No. 100-668, 102 Stat. 3961 (1988).

66. 16 U.S.C. § 1a-7(b).

67. *Id.*

68. Act of Oct. 7, 1976, Pub. L. No. 94-458, 90 Stat. 1942 (codified as amended at 16 U.S.C. § 1a-7 (1994)).

69. MANAGEMENT POLICIES, *supra* note 12, at 2:8.

70. Congress has mandated additional details in comprehensive planning for units established or expanded under the Alaska National Interest Lands Conservation Act of 1980. 16 U.S.C. § 3191. Also, the National Environmental Policy Act requires that the Service consider a range of alternatives and their environmental consequences when proposing a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332 (1994). Service policy is to prepare environmental impact statements for all GMPs. 42 U.S.C. § 4332(2)(C).

71. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 10F.02[3] (1995).

72. Congaree Swamp National Monument, 90 Stat. 2518 (codified as amended at 16 U.S.C. § 431 note) (requiring the Service to prepare a management plan indicating: property adjacent or related to the monument which is necessary to fulfill monument purposes, the number of visitors and the uses which the monument should accommodate, and the location and cost of facilities on the monument site).

purposes of the unit, location and cost of facilities, and the carrying capacity of the unit for different types of activities. These topics all would likely be addressed in a GMP even without a congressional mandate. Other establishment statutes, however, specify contents for the plan that seek to focus the attention of the Service on particular management issues that might not otherwise receive special consideration. The 1978 amendments to the Redwood National Park establishment legislation, in addition to mandating the usual topics to be covered in the GMP, also required the Service to include:

> the specific locations and types of foot trail access to the Tall Trees Grove, of which one route shall, unless shown by the Secretary to be inadvisable, principally traverse the east side of Redwood Creek through the essentially virgin forest, connecting with the roadhead on the west side of the park east of Orick.[73]

This is an example of deeper congressional involvement in park management. Similarly, Congress required Petroglyph National Monument to prepare a GMP containing an implementation plan for the American Indian Religious Freedom Act of 1978,[74] proposals for a visitor's center, and a plan for a Rock Art Research Center.[75]

Another type of congressional mandate specifies not what the subjects of park unit management should be but rather how the Service should engage in management and planning decisionmaking. This type of statutory detail is analogous to the restrictions on legislative discretion of the EPA discussed above.[76] Congress imposes procedural mandates primarily in three ways. First, many establishment statutes require Service *consultation* with a state or tribe in preparing a management plan[77] or a study.[78] The establishment legis-

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73. 16 U.S.C. § 79m(b)(4) (1994).

74. 42 U.S.C. § 1996, as amended by Pub. L. No. 103-344, 108 Stat. 3125 (1994).

75. 104 Stat. 276 (codified as amended at 16 U.S.C. § 431 note (1994)).

76. *See supra* Section IIA.

77. *See* Joshua Tree National Park, Pub. L. No. 103-433, 108 Stat. 4487 (1994) (codified as amended at 16 U.S.C. § 410ff-3(c) (1994)) (requiring that the Secretary of State consult with the Metropolitan Water District in developing emergency access plans); Petroglyph National Monument, 104 Stat. 272 (1990) (codified as amended at 16 U.S.C. § 461 note (1994)) (stating that the management plan be prepared in consultation with the New Mexico Preservation Office, an advisory committee, and other interested parties); El Malpais National Monument, Pub. L. No. 100-225, 101 Stat. 1539 (1987) (codified as amended at 16 U.S.C. § 460uu-41 (1994)) (requiring management plans to be developed in consultation with the Advisory Council on Historic Preservation, local Indian people, the New Mexico Historic Preservation Office, and the State of New Mexico); Acadia National Park, Pub. L. No. 97-335, 96 Stat. 1627 (1982) (codified as amended at 16 U.S.C. § 341 note (1994)) (requiring the preparation of a report establishing the carrying capacity for the Isle au Haut portion of Acadia National Park in consultation with the town); Channel Islands National Park, 94 Stat. 76 (codified as amended at 16 U.S.C. § 410ff-3(c)) (stating that the Secretary must consult with the Nature Conservancy and the State of California in preparing a GMP); Congaree Swamp National Monument, 90 Stat. 2517 (1976) (codified as amended at 16 U.S.C. § 431 note (1994)) (requiring consultation with the governor of South Carolina in preparing GMP).

78. *See* Channel Islands National Park, 94 Stat. 75 (codified as amended at 16 U.S.C. § 410ff-2(a)) (requiring consultation with the Secretary of Commerce, the State of California, and others on a study of natural resources); Arches National Park Establishment Act, 85 Stat. 422 (codified as amended at 16 U.S.C. § 272) (requiring consultation with appropriate State and Federal entities on a study of road alignments); Canyonlands National Park, 85 Stat. 421 (codified as

lation for Great Basin National Park is typical, requiring consultation with appropriate state agencies before implementation of the GMP.[79] Frequently, Congress will require the Service to consult with an appropriate state agency before restricting fishing in a park unit.[80]

Second, a strong trend in recent establishment legislation (particularly since 1986) is the creation of *advisory commissions* for unit management.[81] Congress can shape national park system management by specifying the compositions of advisory committees to oversee and offer management advice to park units. For instance, the establishment legislation for the Little Bighorn Battlefield National Monument stipulates that its eleven-member advisory commission include six representatives from Native American tribes that participated in the Battle of Little Bighorn or now live in the area, two nationally recognized artists, and three individuals with knowledge of history, historic preservation and landscape architecture.[82] Advisory commissions generally are given the duty to advise the NPS on matters of park management,[83] as well as to help develop and implement a new or revised GMP.[84]

Third, and less commonly, establishment legislation may require the Service to *report back* to Congress itself.[85] For example, the 1978 Redwood National Park amendments required that the NPS submit its GMP to the relevant House and Senate committees by Jan. 1, 1980.[86] In addition, Congress mandated the Service to submit annual written reports to Congress for ten years on

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amended at 16 U.S.C. § 271) (requiring consultation with the Secretary of Commerce, the State of California, and others on a study of natural resources).

79. Great Basin National Park, Pub. L. No. 99-565, 100 Stat. 3181, 3182 (1986) (codified as amended at 16 U.S.C. § 410mm-1 (1994)) (prohibiting adoption of GMP provisions relating to grazing, and fish/wildlife management until after consultation with the State agency having jurisdiction over fish and wildlife).

80. *See* Great Basin National Park, 100 Stat. 3181; Biscayne National Park, 94 Stat. 599 (codified as amended 16 U.S.C. § 410gg-2(a)); Congaree Swamp National Monument, 90 Stat. 2517 (codified as amended at 16 U.S.C. § 410mm-1); Voyageurs National Park, 84 Stat. 1970 (1971) (codified as amended at 16 U.S.C. § 160g).

81. *See* Death Valley National Park, 108 Stat. 4487 (codified as amended at 16 U.S.C. § 410aaa-6); Joshua Tree National Park, 108 Stat. 4489 (codified as amended at 16 U.S.C. § 410aaa-27); Little Bighorn Battlefield National Monument, 105 Stat. 1631 (1991) (codified as amended at 16 U.S.C. § 431 note); American Samoa National Park, 102 Stat. 2879, 2882 (1988) (codified as amended at 16 U.S.C. § 410qq-2(g)); Poverty Point National Monument, 102 Stat. 2803, 2804 (1994) (codified as amended at 16 U.S.C. § 431 note (1994)); Acadia National Park, Pub. L. No. 99-420, 100 Stat. 955, 959 (1986) (codified as amended at 16 U.S.C. § 341 note).

82. Little Bighorn Battlefield National Monument, 105 Stat. 1631 (1991) (codified as amended at 16 U.S.C. § 431 note).

83. *See* American Samoa National Park, 102 Stat. 2882 (codified as amended at 16 U.S.C. § 410qq-2(g) (1994)); Acadia National Park, 100 Stat. 959 (1986) (codified as amended at 16 U.S.C. § 341 note).

84. *See* Joshua Tree National Park, 108 Stat. 4489 (codified as amended at 16 U.S.C. § 410ff-27); Death Valley National Park, 108 Stat. 4487 (codified as amended at 16 U.S.C. § 410aaa-6).

85. *See* Petroglyph National Monument, 104 Stat. 276 (codified as amended at 16 U.S.C. § 431 note) (requiring report to Congress on location, condition, and technical assistance needed for care of related rock art located outside of the monument boundaries); Grand Canyon National Park Enlargement Act, 88 Stat. 2091 (codified as amended at 16 U.S.C. § 228g) (requiring report to Congress of any dangerous or detrimental aircraft use); Canyonlands National Park, 85 Stat. 42 (codified as amended at 16 U.S.C. § 271f) (requiring report to Congress on road alignments).

86. 16 U.S.C. § 79m(b).

the status of: payment for property acquired; actions taken regarding land management practices and watershed rehabilitation efforts; efforts to mitigate adverse economic impacts; special employment requirements; a new bypass highway and an agreement for the donation of state lands; and the GMP.[87]

Finally, just as Congress has become more assertive by regulating directly in pollution statutes, it has also in some establishment legislation made zoning and management decisions directly. This contrasts with the traditional, and still-predominant, approach of delegating management decisions in reliance on the expert judgment of the Service and/or on the procedural safeguards of planning and consultation. Consider Congress's approach to the question of an entrance fee to Channel Islands National Park. Use of the approaches described above might require the NPS to study the issue of an entrance fee, or even to make the fee decision in consultation with an advisory committee or some other entity (such as a state agency). Instead, though, Congress simply declared: "Notwithstanding any other provision of law, no fees shall be charged for entrance or admission to the park."[88]

In the western contiguous states, newly established or enlarged parks and monuments often occur where ranchers have existing federal permits to graze cattle. Congress frequently specifies precisely how much longer grazing will be allowed in these units.[89] Although the Service retains authority to regulate the conditions of grazing, Congress here makes the principal management decision of condoning grazing use for a specified period of time.

Two observations emerge from this Section's exploration of statutory detail in establishment legislation. First, and more important, the establishment statutes manifest a strong trend of increased congressional involvement in national park system management. This Section discussed only provisions unambiguously containing requirements or mandates. These provisions contain the statutory term "shall." There are additional provisions in establishment legislation that illustrate the trend of statutory detail but that use the more permissive terms, "may" or "is authorized to."[90] Congress likely uses these

87. *Id.* § 79m(a).

88. *Id.* § 410ff-6 (1994).

89. *See, e.g.*, Death Valley National Park, 108 Stat. 4486 (codified as amended at 16 U.S.C. § 410aaa-5) (stating that "grazing shall continue at no more than the current level"); El Malpais National Monument, 101 Stat. 1542 (codified as amended at 16 U.S.C. § 460uu-32) (extending existing permits until December 31, 1997); Great Basin National Park, 100 Stat. 3182 (codified as amended at 16 U.S.C. § 410mm-1) (allowing grazing to the same extent as permitted on July 1, 1985); Fossil Butte National Monument, 86 Stat. 1069 (grazing shall be allowed for at least ten years); Capitol Reef National Park, 85 Stat. 740 (codified as amended at 16 U.S.C. § 273(b)) (grazing permits to be allowed for one lease period with the possibility for one renewal); Arches National Park, 85 Stat. 422 (codified as amended at 16 U.S.C. § 272b) (permitting grazing privileges to continue for the remainder of the term and one subsequent period); Canyonlands National Park, 78 Stat. 938 (codified as amended at 16 U.S.C. § 271b) (permitting grazing privileges to continue for the remainder of the term and one period subsequent).

90. *See, e.g.*, Petroglyph National Monument, 104 Stat. 272 (codified as amended at 16 U.S.C. § 431 note) ("is authorized to undertake research and assist in the management and protection of Rio Grande style rock art sites"); Everglades National Park and Expansion Act, 103 Stat. 1947 (codified as amended at 16 U.S.C. § 410r-6) ("is authorized to enter" into concession contracts with owners of tour and airboat facilities); North Cascades National Park, 102 Stat. 3963 (codified as amended at 16 U.S.C. § 1132 note) ("is authorized" to remove and dispose of trees to

terms to indicate a desire for, without actually mandating, the Service to engage in a particular task. Congress may even express this desire explicitly, as when it states that the Service "is authorized and encouraged to enter into cooperative agreements . . . for the protection and interpretation of the Grand Canyon."[91] Even where Congress does not link permissive language with explicit encouragement, it still may influence NPS management. The Service generally seeks the good favor of Congress, particularly for appropriations or boundary expansion. The Service likely would try to avoid harsh congressional oversight hearings. Noncompliance with permissive statutory details in itself may not create problems for the agency in Congress. However, the Service surely would first seriously consider management preferences expressed in establishment legislation and then establish a record to justify noncompliance. This, in itself, helps shape national park system management.

Second, the statutory detail Congress has incorporated into establishment legislation parallels in kind the statutory details circumscribing the EPA's discretion in implementing pollution regulation. The common use of deadlines, the specification of what substances or subjects to address in implementation and management, and the specification of how the agencies are to proceed with their tasks suggest that the better ventilated discussion of the increased statutory detail in pollution control may illuminate issues associated with management of the national park system. The next Section reviews explanations offered to explain this trend in the pollution control field and discusses whether they may aid in understanding the similar trend in NPS legislation. It also offers an explanation that ties together both strands of environmental law.

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protect power lines); Olympic National Park, 102 Stat. 3961 (codified as amended at 16 U.S.C. § 1132 note) ("is authorized" to upgrade, maintain, and replace an underground pipeline); El Malpais National Monument, 101 Stat. 1548 (codified as amended at 16 U.S.C. § 460mm-1) ("is authorized and encouraged" to enter into cooperative agreements with other Federal, state, and local agencies, Indian tribes, and non-profit entities; "is authorized" to establish an advisory committee comprised of Indians to help implement access rules); Great Basin National Park, 100 Stat. 3182 (codified as amended at 16 U.S.C. § 410mm-2) ("may" maintain existing water-related range improvements); Kenai Fjords National Park, 94 Stat. 2379 (codified as amended at 16 U.S.C. § 431 note) ("is authorized" to develop access to and allow use of mechanized equipment on the Harding Icefield); Grand Canyon National Park Enlargement Act, 88 Stat. 2090 ("is authorized to" enter into cooperative agreements with other entities to protect the canyon); Voyageurs National Park, 84 Stat. 1970 (codified as amended at 16 U.S.C. § 160 (1994)) (authorizing roads as are needed for public access); Voyageurs National Park, 84 Stat. 1972 (codified as amended at 16 U.S.C. § 160 (1994)) ("may" include subjects of winter sports, seaplane use, and watercraft use in comprehensive plan; "is authorized" to make provisions for any roads as are necessary for public access); Great Smoky Mountains National Park, 83 Stat. 100 (codified as amended at 16 U.S.C. § 403h-15) ("is authorized to" convey rights-of-way to Tennessee; "is authorized to" construct an entrance to the park in North Carolina); Canyonlands National Park, Pub. L. No. 88-590, 78 Stat. 934 (codified as amended at 16 U.S.C. § 271) ("may" select the location(s) for entrance road(s) and construct any structure necessary for the park; "is authorized" to consult with the Secretary of Agriculture on the location and extension of a forest development road); Carlsbad Caverns National Park, 77 Stat. 818 (codified as amended at 16 U.S.C. § 407e-407h) ("is authorized to" convey a right-of-way to New Mexico); Wupatki National Monument, Pub. L. No. 87-136, 75 Stat. 337 ("may" accept donation of a road right-of-way).

91. 16 U.S.C. § 228e (1994).

SECTION III: EXPLANATIONS FOR THE GROWTH IN STATUTORY DETAIL

The literature that describes the trend of increasing statutory detail in pollution control law also offers a range of explanations for the trend. While many of these explanations apply as well to the parallel trend in national park system management, a comparison of the two strands of environmental law reveals a broader pattern that accounts for increasing statutory detail. In both the pollution control and the national park system legislation, increased statutory detail is associated with second-generation problems. Second-generation problems arise after initial approaches that address abatement or conservation have reached the limits of relatively low-cost solutions. This Section will describe the transition from first- to second-generation legislation after first reviewing the more frequently offered, specific explanations for increased statutory detail.

As a preliminary matter, we can reject some explanations for the rise in statutory detail in the pollution control area which are not applicable to national park establishment legislation.[92] Professors Shapiro and Glicksman explain increased congressional management of the EPA beginning in the 1980s, in part, as a reaction to shifts in oversight by federal courts and the president's Office of Management and Budget (OMB). President Reagan's appointments of judicial conservatives, increased deference to agencies under these judges and the *Chevron*[93] doctrine, and tightening standing requirements for citizens seeking review of agency action[94] all left a void in judicial oversight of the EPA that Congress sought to fill by establishing more specific requirements in legislation.[95] At the same time, Congress sought to counter-balance more intensive scrutiny of EPA's proposed regulations by the OMB, an executive

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92. We can also put aside a possible explanation for statutory detail generally, which has little application in pollution control law. When Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 959 (1983), declared unconstitutional the legislative veto, Congress lost a tool of retrospective oversight. Although this might contribute somewhat to the greater prospective limitations through statutory mandates, the legislative veto was not a common tool in pollution control law before *Chadha*. ENVIRONMENTAL LAW INSTITUTE, 1 LAW OF ENVIRONMENTAL PROTECTION 4-9, 4-10 (Sheldon M. Novick, ed. 1996) (citing only two legislative veto provisions in pollution control law: the Federal Insecticide, Fungicide, and Rodenticide Act § 25, 7 U.S.C. § 136(w) (1994), and the Comprehensive Environmental Response, Compensation, and Liability Act § 305, 42 U.S.C. § 9655 (1994)). In natural resources law, the legislative veto appears significantly and repeatedly in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1994), but I found no trace of it in NPS establishment legislation. Retrospective oversight through reporting requirements, however, does appear in establishment legislation. *See, e.g.*, Petroglyph National Monument, 104 Stat. 276 (requiring a report to congressional committees of the location, condition, and the technical assistance needed for care of related rock art located outside of the monument boundaries); Redwood National Park, 92 Stat. 170 (codified as amended at 16 U.S.C. § 79m) (requiring Service to submit plan to congressional committees); Grand Canyon National Park Enlargement Act, 88 Stat. 2090 (codified as amended at 16 U.S.C. § 228g) (requiring a report to Congress of any dangerous or detrimental aircraft use); Canyonlands National Park, 85 Stat. 421 (codified as amended at 16 U.S.C. § 271f) (requiring a report to Congress on a road alignment study).

93. Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984).

94. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Fed., 497 U.S. 871 (1990).

95. Shapiro & Glicksman, *supra* note 28, at 845-70.

office closely controlled by the White House and widely viewed as hostile to strict pollution abatement.[96]

While these developments certainly can spur Congress to assert greater control over agency behavior through more specific mandates in statutes, they are of little relevance to national park system management. Proprietary management of federal resources has traditionally enjoyed greater deference than the regulation of the private sector that EPA conducts. In particular, the Service has never been a popular target for judicial review. Interest groups hardly relish the prospect of challenging the agency that retains a wholesome reputation in the public mind. Moreover, the Service has always enjoyed great deference by the federal courts, even as other land management agencies have lost some of their traditional insulation from judicial oversight.[97] Therefore, the trends that diminished the oversight role of courts over the EPA have had little impact on NPS behavior, which has been enjoined by courts only in exceptional cases.[98]

Furthermore, OMB oversight has focused on "notice and comment," informal rulemaking under section 553 of the Administrative Procedure Act.[99] Most management decisions and all national park unit GMPs are made outside of this regulatory framework.[100] So, the Service has not faced the intense oversight by the OMB that has shaped the behavior of the EPA.

Another role played by the OMB, however, the compilation of the president's proposed federal budget, has had some, though minor, relevance in explaining increased statutory detail. Historically, an important tool of congressional control over agency behavior has been appropriations. If Congress is displeased with the direction an agency is taking, it may threaten to reduce the agency's budget. This tool, however, became less effective in the environmental area throughout the Reagan and Bush administrations because budget requests by the executive branch consistently fell below actual appropriations. The congressional threat of reducing budgets is a less effective tool when the administration actually wants lower appropriations than Congress in the first place. With reduced maneuverability in the appropriations process for shaping environmental policy, Congress might turn to actual authorization legislation in order to influence agencies. This may explain some of the increased statutory detail in both pollution control and in NPS establishment legislation.

Regardless of the disparity between executive budget requests and con-

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96. *Id.* at 842; Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 194-97 (1991); *see* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 571 (D.D.C. 1986) (providing a specific example of OMB hostility to environmental regulation). Recent charters for OMB oversight can be found in Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted as amended in* 5 U.S.C. § 601 (1994); and Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted as amended in* 5 U.S.C. § 601.

97. *See* 2 COGGINS & GLICKSMAN, *supra* note 71, at §§ 10F.02[3], 14.01, 14.02[2].

98. *See, e.g.*, Sierra Club v. Lujan, 716 F. Supp. 1289, 1293 (D. Ariz. 1989) (enjoining the Service from allowing construction of new facilities on the north rim of the Grand Canyon until it complied with the National Environmental Policy Act and its own management policies).

99. Administrative Procedure Act, 5 U.S.C. § 553 (1994).

100. *Id.* § 553(a)(2).

gressional appropriations, the overall fiscal austerity of the past fifteen years created a vicious cycle that now drives Congress to impose ever more mandates on both the EPA and the NPS. As budgets get tighter, agencies are able to do less.[101] Therefore, statutory mandates, which are always a priority for agencies, command a greater proportion of total agency activities. With a diminishing likelihood that agencies will have the resources to engage in discretionary tasks, a member of Congress seeking to influence an agency to do something will be more motivated to place a mandate in legislation than to lobby the agency informally. The cycle worsens as Congress legislates more mandates and squeezes further the agency's ability to engage in discretionary activities. This dynamic has been noted in the context of legislative deadlines for the EPA.[102] Every time Congress imposes a new deadline on the EPA, the agency is less able to accomplish tasks for which no statutory deadline exists. Therefore, Congress must continue to impose deadlines whenever it wants the agency actually to do something. The EPA priorities are now so driven by meeting congressional deadlines that the agency cannot comprehensively plan effectively to implement broad goals, such as reducing exposure to contaminants that generate the greatest health risks.[103] The growth in statutory detail in NPS establishment legislation evinces this same dynamic, especially in the deadline and mandated study provisions.

The most widely noted reason why Congress has not given the EPA flexibility to set its own priorities based on broad principles, such as risk reduction, is distrust of the ability and the resolve of the agency to achieve the goals of environmental protection. Although distrust is a characteristic tension of divided government, when one party controls the White House and another the Congress, the policies and appointments of the Reagan administration raised the level of distrust in the environmental area to unprecedented heights.[104] Professors Shapiro and Glicksman document the extensive legislative history showing that Congress believed that the EPA refused to act when it should have, delayed regulations, and implemented pollution control programs in a manner inconsistent with the intent of authorizing legislation.[105] The scandals involving EPA Administrator Anne Gorsuch-Burford and her deputies also severely eroded congressional trust.[106] The polarization of congressional-executive relations in the early 1980s accelerated the momentum of the trend of increased statutory detail.

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101. *See supra* note 15 and accompanying text (describing NPS budget trends).

102. William D. Ruckelshaus, *Risk, Science, and Democracy*, ISSUES IN SCI. & TECH., Spring 1985, at 19.

103. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR THE ENVIRONMENTAL PROTECTION AGENCY 8, 131 (1995).

104. James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 352-53 (1986); Percival, *supra* note 96, at 147-54; Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. ON LEGIS. 517, 524-28 (1992). The antecedents to the rise in congressional distrust of the EPA in the 1980s date back to the birth of the agency. *See* Lazarus, *supra* note 33, at 323.

105. Shapiro & Glicksman, *supra* note 28, at 826-27.

106. Futrell, *supra* note 28, at 50.

Although Congress distrusted Secretary of the Interior James Watt to implement an environmental agenda at least as much as Anne Gorsuch-Burford, the NPS did not become a lightning rod for implementation controversy to the extent that the EPA did. Certainly, the Department of the Interior made a number of controversial decisions that undercut national park system stewardship.[107] However, with its longer tradition of non-partisan professionalism, its widespread public support for conservation, and its less threatening proprietary mandate, the NPS found itself more insulated from both stark policy reversals and intense congressional reaction than the EPA.[108] Still, it is likely that the spirit of distrust in the pollution control area permeated NPS establishment legislation somewhat and amplified the trend toward statutory detail.

Another contributing factor noted in the pollution control area also helps explain increased congressional management of the national park system. Congress legislates more detailed management mandates because it can. The proliferation of professional committee staffs in all areas of national legislation increases statutory detail.[109] Longstanding or ambitious committee or subcommittee chairs may also sponsor investigations and long-term projects that lead to detailed legislation.[110]

For all the applicability of the manifold explanations for statutory detail in pollution control law to NPS establishment legislation, there are still a couple of missing pieces to the puzzle. One explanation for the statutory detail in establishment legislation relates to the Organic Act, which has no analog in pollution control. It may well be that the tension between providing for enjoyment (recreation) and leaving units unimpaired (preservation) creates an impossible paradox for the NPS to solve. When important issues are irreconcilable under the Organic Act (including the 1978 clarifying amendments), Congress needs to intervene with specific instructions for the Service. This may be an important factor in major NPS issues, such as restoration of the Everglades.[111] However, it fails to explain the majority of the statutory mandates

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107. JONATHAN LASH ET AL., A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT 279-298 (1984); John Kenney, *Interior* Sub Rosa*: Political Appointees Use the Parks as Pawns*, NAT. PARKS, Sept./Oct. 1989, at 12.

108. Congress legislated, in part, in response to a high level of public concern about the dangers of toxic pollution. *See* Shapiro & Glicksman, *supra* note 28, at 842; Corwin, *supra* note 104, at 532.

109. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 43-45 (1982); James P. Hill, *The Third House of Congress Versus the Fourth Branch of Government: The Impact of Congressional Committee Staff on Agency Regulatory Decision-Making*, 19 J. MARSHALL L. REV. 247, 247-48 (1986); Shapiro & Glicksman, *supra* note 28, at 841.

110. Examples include former representatives Philip Burton and John Seiberling in the area of NPS establishment legislation and former representative James Florio in the area of hazardous waste legislation. Congressional oversight of the EPA is particularly zealous. Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA*, 54 LAW & CONTEMP. PROBS. 205, 206, 210-12 (1991).

111. The 1989 amendments to the establishment legislation expanded the size of Everglades National Park; closed the park to the operation of airboats, subject to certain variances; and modified water delivery projects in the region to restore the natural hydrologic conditions. Everglades National Park, 103 Stat. 1946 (codified as amended at 16 U.S.C. §§ 410r-5 to 410r-8).

that involve less profound issues of national park system management, such as the establishment of advisory commissions or the preparation of particular studies. It does highlight, though, the close relationship between the lack of statutory detail in the overarching mandate and the need for greater elaboration in the implementing statutes.

The second missing piece of the puzzle of statutory detail more robustly applies to both pollution control and natural resource management. In both areas, Congress turns to greater statutory detail after it has delegated to agencies the straightforward, "first-generation," problems. "Second-generation"[112] problems are those that remain after Congress and agencies address the relatively lower-cost, easier issues in a field. In the pollution control context, the classic first-generation problems were the stationary point sources of contamination that were employing virtually no abatement technology before 1970. Professor Elliott observes that these "easy sources: the large coal-fired utility boilers, the large chemical plants, the refineries," have been successfully regulated to reduce large discharges.[113] We are then left with "small, diffuse sources that will prove very difficult to regulate using traditional techniques."[114] When Congress legislated in general terms that the EPA should begin requiring polluters to apply abatement technology, the "first burst" of marginal environmental improvement was great. However, as Professor Krier observes, the next increment of improvement is more difficult to accomplish due, in part, to increased marginal costs of abatement and, in part, to polluters learning how to evade expensive regulation.[115] Therefore, Congress returns to draft more elaborate schemes to catch evaders, squeeze less environmental improvement out of greater marginal costs, exempt industries that face severe financial hardship, and experiment with new programs to prospect for new "first bursts."

In the NPS context, the first-generation problems were the earlier-designated units which had fewer existing uses that would be incompatible with national park system status.[116] There have always been some political conflicts over foreclosing potential economic uses of lands designated as national

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112. Other commentators have used the terms "first-generation" and "second-generation" to refer to different aspects of environmental law. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1352-55 (1985) (describing two phases of a reform proposal to create a market-based system of pollution control through tradeable permits).

113. E. Donald Elliott, *Environmental Law at a Crossroad*, 20 N. KY. L. REV. 1, 10 (1992).

114. *Id.; see also*, Samuel A. Bleicher, *Regulation of Pollution: Is the System Mature or Senile*, 10 VA. ENVTL. L.J. i, iii (1990) (noting that the first wave of environmental statutes "quickly ran up against many economic and technical realities that made enforcement politically unacceptable").

115. *See* James E. Krier, *The Political Economy of Barry Commoner*, 20 ENVTL. L. 11, 17, 23-24 (1990) ("[G]enerally speaking, the marginal costs of control go up the more one has already controlled. It is one thing to cut emissions from a source by ninety percent, for example, and quite another to cut the remaining ten percent by ninety percent again . . . ."); Arnold Reitze Jr., *Environmental Policy—It Is Time for a New Beginning*, 14 COLUM. J. ENVTL. L. 111, 116-117 (1989).

116. *See generally* JOHN ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY (1961) (presenting a thoroughly comprehensive history of park administration that describes all of the serious conflicts affecting the first-generation park units).

parks or monuments. Alfred Runte makes a strong case for the "worthless lands" hypothesis, that Congress was willing to withdraw from economic development as national parks only those areas for which there was no evidence of commercial value for mining, farming, and logging.[117] He reviews the legislative history of a number of early parks, including Yellowstone,[118] Sequoia,[119] Mt. Rainier,[120] and Crater Lake,[121] to show that boundaries and park proponents' arguments were crafted to avoid the taint of economic development obstructionism.

But, beginning in the 1960s and 1970s, conflicts which had been mapped outside of park boundaries began creeping into existing units as well as creating problems for additions to the park system. For instance, in 1933, when President Hoover established Death Valley National Monument, a portion of the eastern border was shifted to exclude an existing mining operation.[122] By 1975, Tenneco Corp. was poised to increase mining on claims it owned within the monument. Congress held hearings on mining in the parks and enacted the National Park Mining Regulation Act.[123] The legislation struck a compromise between mining interests and preservationists, who sought a prohibition of mining in the national park system. For Tenneco, the new law did little more than regulate its mining, which it could continue on all claims it was currently working.[124] Congress also required the Service to identify portions of the monument that might be abolished "to exclude significant mineral deposits and to decrease possible acquisition costs."[125] Alfred Runte notes that "[t]hose portions of Death Valley that survived, in short, apparently would contain nothing of lasting economic value."[126]

Over the past thirty years, as economic development and other forms of use incompatible with national park system status have pervaded more of the public domain, the conflicts over uses to be allowed in new units have increased. Congress already has added the easy lands to the national park system.[127] Newly designated units are more difficult in the sense that there are more stakeholders who currently use the land. More people have more expectations of continued use of the public lands than ever before. Users of lands subject to proposed establishment legislation, which might interfere with or prohibit continued use, face an easier task organizing to gain special provi-

117. RUNTE, *supra* note 18, at 1-9.
118. *Id.* at 48-55.
119. *Id.* at 60-64.
120. *Id.* at 65-67.
121. *Id.* at 67-68.
122. *Id.* at 193.
123. 16 U.S.C. §§ 1901-1912 (1994).
124. The statute gave the Service authority to regulate mining to ensure that it is conducted so as to prevent or minimize damage to the environment and park resources. *Id.*
125. Act of Sept. 28, 1976, Pub. L. No. 94-429, 90 Stat. 1342 (codified as amended at 16 U.S.C. § 1905 (1994) (expired two years after enactment)). The California Desert Protection Act, discussed *infra* notes 151-155 and accompanying text, abolished Death Valley National Monument in 1994. 90 Stat. 1342.
126. RUNTE, *supra* note 18, at 194.
127. *Id.* at 213.

sions than do the more diffuse interests concerned about the collective benefits of the national park system.[128]

Even relatively small units, such as Petroglyph National Monument may present Congress with complex land use problems because of their proximity to development which may threaten park unit resources. Petroglyph National Monument's 7000 acres lie on an escarpment along the western edge of Albuquerque. Residential development bumps up against the eastern boundary of the monument, and development of the city is planned to leapfrog over to the west of the monument as well.[129] The close proximity of such a large number of people creates intense disputes over the appropriate balance between recreation (in this case, access to pristine areas of the monument, and horse and bicycle trails) and preservation (in this case, protection of rock art from vandalism and erosion).[130] Perhaps the most acute conflict arises over proposals to develop more trails in and to build a new road through the monument. These proposals generate heated opposition from those who want the monument managed to accommodate the earth-based religious practices of local Pueblo Indians, who view the monument area as sacred.[131] Not surprisingly, these conflicts shaped the 1990 establishment legislation. To protect the rock art, Congress mandated not only a resource protection program in the GMP but also a plan to establish a Rock Art Research Center.[132] Congress also authorized the Service to participate in the dispute over the proposed road through the monument.[133] Finally, the establishment legislation includes avenues for Native Americans to advance their interests in monument management.[134]

To compromise with ranchers holding federal grazing permits in the area established as Great Basin National Park in 1986, Congress required the NPS to allow grazing to continue to the same extent as was occurring on July 1, 1985.[135] In addition to removing management discretion to reduce grazing from the Service, Congress also required the agency to submit, within three

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128. Professors Krier and Gillette note this problem of collective action in the pollution control context. James E. Krier & Clayton P. Gillette, Essay, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405, 426 (1985). *See generally*, RUSSELL HARDIN, COLLECTIVE ACTION (1982) (analyzing the theory of collective action itself); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965) (analyzing the general theory of collective action).

129. Tony Davis, *Sunbelt Confrontation*, HIGH COUNTRY NEWS, Nov. 1, 1993, at 1, 10-13.

130. *Id.*; Ruth Haas, *An Urban Park Is Surrounded by Controversy*, HIGH COUNTRY NEWS, Dec. 12, 1994, at 13.

131. Haas, *supra* note 130, at 13.

132. Petroglyph National Monument, Pub. L. No. 101-313, § 108, 104 Stat. 272, 276 (1990) (codified as amended at 16 U.S.C. § 431 note (1994)).

133. *Id.* § 106, 104 Stat. 275. "The Secretary may participate in land use and transportation management planning conducted by appropriate local authorities for lands adjacent to the monument and may provide technical assistance to such authorities and affected landowners for such planning." *Id.*

134. *Id.* § 108(c), 104 Stat. 276 (consultation on GMP with Indian tribes); *id.* § 110, 104 Stat. 277 (establishment of an advisory commission including "one member, who shall have professional expertise in Indian history or ceremonial activities, appointed from recommendations submitted by the All Indian Pueblo Council"); *id.* § 108(a)(4), 104 Stat. 276 (inclusion in the GMP of a plan to implement the Native American Religious Freedom Act).

135. 16 U.S.C. § 410mm-1(e) (1994).

years, to relevant congressional committees a management plan that included discussion of grazing.[136] The establishment legislation also states: "Existing water-related range improvements inside the park may be maintained by the Secretary or the persons benefitting from them, subject to reasonable regulation by the Secretary."[137] A final provision on grazing authorizes negotiations to occur for the purpose of exchanging grazing permits on land within the park for allotments outside of the park.[138] In these restrictions, Congress established an oversight mechanism, substituted its own mandate for the agency's judgment on grazing, and limited the agency's ability to respond to public opinion.[139]

The Petroglyph and Great Basin examples from the past decade illustrate, in part, the trend of greater statutory detail described in Section Two of this Article. But, they also illustrate how the second-generation problem of a more complex existing land use overlay for park units creates conflicts that Congress addresses in establishment statutes. Although Congress has addressed land use conflicts in the national park system for many decades, the increasing numbers of conflicts generate more detailed amendments to existing units and more elaborate establishment statutes for new units. Congressional mandates often may be the only way to win the necessary support to create new park units.[140] Nonetheless, the statutory detail does hamper systemic management of the national park system by the Service. The next Section considers this and other burdens of statutory detail, as well as the benefits.

SECTION IV: THE EFFECTS OF STATUTORY DETAIL

Statutory detail in establishment legislation benefits the national park system in many respects. Most important, as the second-generation problem illustrates, statutory detail that manifests delicate political compromise allows meritorious additions to the system that, without compromise, might not garner sufficient support for establishment. As a representative democratic institution, Congress might give voice to interests that would otherwise go unrecognized by the Service. Particularly in national park system management, where application of the Organic Act may not offer clear management guidance, statutory detail can provide helpful guideposts for agency discretion.[141]

Agency decision-makers often welcome congressional mandates on controversial issues because the mandates relieve the officials of responsibility for politically sensitive decisions. For instance, in the Barataria Marsh Unit of Jean Lafitte National Historical Park and Preserve establishment legislation,

136. *Id.* § 410mm-1(c).
137. *Id.* § 410mm-1(g).
138. *Id.* § 410mm-1(f).
139. Jon Christensen, *A Bitter Rancher and a Failed Compromise*, HIGH COUNTRY NEWS, Apr. 3, 1995, at 11 ("Since Great Basin National Park was put on the map, staff have been inundated with complaints" about grazing.).
140. *See id.*
141. Shapiro & Glicksman, *supra* note 28, at 844 (citing the benefit of congressional mandates in pollution control statutes).

Congress explicitly commanded the Service to continue to permit hunting, fishing, and trapping.[142] This shields the NPS from the criticism it would receive if it resolved the land use dispute itself.[143] Professors Shapiro and Glicksman observe that "[d]eadlines can assist agency decisionmaking by mitigating outside pressures to avoid reaching a decision and giving the agency a reason to end its analysis and make a difficult, but necessary decision."[144] Particularly because the effects of many resource management decisions are indeterminate,[145] deadlines may speed the process of formulating and implementing management plans.

Of course, there are problems associated with all of these benefits. Although Congress is, indeed, a democratically elected institution, its committee structure operates much like medieval fiefdoms. Committees wield power, particularly over issues such as park establishment that are not at the fore of social controversy, that receive little scrutiny by Congress at large, and that therefore create "serious problems of political responsibility."[146] The splintered jurisdiction and closely guarded turf of congressional committees, which drive the routine legislative process, insulate much establishment legislation from the deliberative spotlight.[147] As Professor Stewart observes, this leaves the statutory details to "a submerged micropolitical process without open and regular procedures."[148] In establishment legislation, this process favors stakeholders with concentrated interests in park unit management, who can most easily organize to lobby subcommittee chairs and staff.[149] Thus, the "Christmas Tree" provisions criticized in detailed pollution control statutes and designed to benefit particular regions and stakeholders[150] also appear in detailed establishment legislation.

For instance, the detailed California Desert Protection Act[151] grandfathers specific mining claims, by name, to protect them from more stringent regulation resulting from the designation of the Mojave National Preserve.[152] Congress sought to satisfy regional concerns by establishing advisory commissions with members that include an elected official for each county within the

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142. Jean Lafitte National Historical Park, Pub. L. No. 95-625, 92 Stat. 3536 (1978) (codified as amended at 16 U.S.C. § 230(d) (1994)). See note 89 for other examples of congressional grazing prescriptions.

143. Professor Yaffee observed that statutory prohibitions, although they restrict agency discretion, may help agencies that would otherwise not muster the political will to drive a hard bargain with stakeholders. STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY 149-62 (1982).

144. Shapiro & Glicksman, *supra* note 28, at 830.

145. Professor Latin discusses this as a reason why environmental agencies avoid resolving disputed issues. Latin, *supra* note 35, at 1659.

146. Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 332 (1987).

147. *See* J. William Futrell, *The Administration of Environmental Law*, *in* SUSTAINABLE ENVIRONMENTAL LAW, *supra* note 28, 93, 97-102.

148. Stewart, *supra* note 146, at 332.

149. *See supra* note 128 and accompanying text.

150. *See* David Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 748-51 (1983); Stewart, *supra* note 146, at 332.

151. Death Valley National Park, Pub. L. No. 103-433, 108 Stat. 4471 (1994) (codified as amended at 16 U.S.C. §§ 410aaa to 410bbb-6 (1994)).

152. Death Valley National Park, 108 Stat. 4491 (codified as amended at 16 U.S.C. § 410aaa-49 (1994)).

unit and representatives of private property owners, grazers, and miners, for Death Valley National Park,[153] Joshua Tree National Park,[154] and Mojave National Preserve.[155] These commissions advise the Service on the development and implementation of comprehensive management plans. Also, tacked onto the end of the statute are provisions establishing a New Orleans Jazz National Historical Park, and a "Christmas Tree" provision (however worthy) that has no bearing on California desert protection.

Moreover, the statutory mandates inserted by the congressional committees assert control of national park system management at the expense of the president. The Department of the Interior officials would otherwise exercise discretion in the service of the chief executive. Professor Mashaw asserts that:

> The president has no particular constituency to which he or she has special responsibility to deliver benefits. Presidents are hardly cut off from pork-barrel politics. Yet issues of national scope and the candidates' positions on those issues are the essence of presidential politics. Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies.[156]

Although this might be true as a general matter, the particular issues of park management are so low on the national agenda that the Service might be as susceptible to the compromise of national interests for parochial politics as Congress.[157]

An important criticism of statutory detail contrasts the review for rationality that agency regulations would need to pass before these sorts of provisions could be implemented. This criticism applies more strongly in the pollution control area, where the EPA makes most of its decisions through rulemaking, and where the OMB is extensively involved in cost-benefit review. Even in the area of judicial review, the NPS enjoys an especially high degree of deference.[158] Still, judicial review, even of informal unit-specific management, will nonetheless require an administrative record showing that the agency's decision was "based on a consideration of the relevant factors,"[159] and "a reasoned assessment of competing values."[160] Of course, statutory management prescriptions need not meet even this deferential standard.

In the case of the NPS, far more important than the relative benefits of an agency's national political agenda and judicial oversight, is its technical expertise. However strengthened the staffs of congressional committees have be-

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153. 16 U.S.C. § 410aaa-6.
154. *Id.* § 410aaa-27.
155. *Id.* § 410aaa-58.
156. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).
157. *See, e.g.*, Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 ECOLOGY L.Q. 207 (1987).
158. *See* 2 COGGINS & GLICKSMAN, *supra* note 71, at § 10F.02[3].
159. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).
160. *See* Mashaw, *supra* note 156, at 93.

come over the past thirty years, they still cannot compare with the thousands of people employed by the Service in positions both to observe resources and people, and to engage in scientific management. The literature on the relative institutional strengths of agencies (as compared to Congress) stresses the superior managerial efficiency and expertise of agencies.[161]

Former Representative Florio notes that decisions in Congress are based on compromise rather than application of technical expertise to answer important questions.[162] Certainly, some of the issues addressed in establishment legislation are value judgments not susceptible to the application of physical or social science expertise. However, many are not. The increase in management mandates comes at a time when the Service, like the other federal land management agencies, must transform from an agency driven by the seat-of-the-pants experience of hierarchical managers to one that applies the interdisciplinary findings of technical staff who specialize in a range of fields.[163] Statutory detail hampers the ability of the NPS to base its decisions on the findings of biologists, ecologists, educators, geologists, archeologists, historians, anthropologists, and economists. The National Research Council describes the potential benefits of a science-based management model: "Although an adequate science program alone cannot ensure the integrity of the national parks, it can enable faster identification of problems, greater understanding of causes and effects, and better insights about the prevention, mitigation, and management of problems."[164] The Council also notes that, although a dozen major reviews of NPS science and management over a period of 30 years all advocated strengthening science to improve management, few of the recurring recommendations have been implemented.[165]

Furthermore, statutory detail impairs the flexibility required to manage resources in the face of changing (usually growing) public demands to use park units, and increased scientific understanding of the condition of resources and the impacts of use on resources. Once management issues are resolved by Congress, they are frozen in place and much more difficult to modify than agency decisions.[166] The emerging consensus favoring the use of adaptive management as a form of ecosystem planning necessitates continual monitoring and iteration of management decisions as hypotheses.[167] Professor Keiter notes that ecosystem management must draw heavily on scientific principles and research so that it "can be designed and adjusted to minimize disruption

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161. *See* Mashaw, *supra* note 156, at 82; Shapiro & Glicksman, *supra* note 28, at 844; Corwin, *supra* note 104, at 521-22.

162. Florio, *supra* note 104, at 379. This may be one of the few issues on which former Democratic Representative Florio and former Republican Senator Symms agreed. *Id.* at 371.

163. THE VAIL AGENDA, *supra* note 15, at 11.

164. NATIONAL RESEARCH COUNCIL, SCIENCE AND THE NATIONAL PARKS 2 (1992).

165. *Id.* at 6; *see also* VIGNETTES, *supra* note 60, at 1 (recommending both a new research program to support ecosystem management and a shift in NPS professional staffing from generalists to specialists); THE VAIL AGENDA, *supra* note 15, at 107 (recommending more research to aid management);.

166. Florio, *supra* note 104, at 379-80.

167. *See* KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 53 (1993).

of natural processes."[168]

Statutory detail frustrates more than just the ability to adapt and apply technical expertise to changing circumstances and new information with respect to individual units. It also frustrates the ability of the Service to set priorities for comprehensive planning. The VAIL AGENDA cited "new, costly, and sometimes ill-conceived responsibilities" that thwart the Service's ability to set funding priorities.[169] Austere budgets force the agency to direct its precious resources toward politically mandated activities rather than toward activities that are most rational from a scientific management perspective. If the Service is to shift from its traditional, reactive role as a custodian without a comprehensive agenda, it must have broad flexibility to set its own priorities.[170] Statutory constraints limit the Service's capability to realize the potential of the GMP process to set priorities for individual park units.

Even more deleterious is the manner in which Congress frustrates the ability of the Service to manage its units together in an integrated system.[171] Commentators have criticized congressional management in the pollution control area, where statutory detail thwarts comprehensive planning that would focus EPA regulation in areas where the greatest amount of environmental benefits result per unit of agency effort (or national expense).[172] The relatively slight benefit of clarifying management objectives on the scale of a park unit that comes from detailed establishment legislation counterbalances a fundamental problem with the national park system. The combination of a vague Organic Act mandate coupled with the bewildering assortment of unit categories makes coordinated system management a Herculean task. Like a rotten roof riddled with leaks, the current framework cries out for replacement. Although one can applaud Congress's actions to patch individual holes through establishment statutes, the overall effort ultimately is ill-suited to curing the structural defect.

Over the past 75 years, a proliferation of land management categories have accreted around the core national park and monument units of the national park system. The national park system now includes units designated as:

National Preserve: National preserves are areas having character-

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168. Keiter, *supra* note 6, at 302; *see also* National Parks and Conservation Association, VIGNETTES, *supra* note 60, at 20 (recommending adequate funding for scientific research to provide effective resource management); NATIONAL RESEARCH COUNCIL, *supra* note 164.

169. THE VAIL AGENDA, *supra* note 15, at 36.

170. Marion Clawson identified custodial management as a predominant theme in federal public land policy in the middle of this century. MARION CLAWSON, THE FEDERAL LANDS REVISITED 31-37 (1983). I borrow the term to suggest management focused on responding to particular issues that arise rather than management that takes an active role in setting the agenda for a system of lands.

171. THE VAIL AGENDA notes that, in addition to the hurdles created by statutory details, the "Service, partly through its own inaction and partly due to constraints emanating from the executive branch during the 1970s and 1980s, has lost the credibility and capability it must possess in order to play a proactive role in charting its own course, in defining and defending its core mission." THE VAIL AGENDA, *supra* note 15, at 11.

172. *See, e.g.*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 103, at 1, 132; Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 192 (1987); Shapiro & Glicksman, *supra* note 28, at 844.

istics associated with national parks, but in which Congress has permitted continued public hunting, trapping, [and] oil/gas exploration and extraction. Many existing national preserves, without sport hunting, would qualify for national park designation.

National Historic Site: Usually, a national historic site contains a single historical feature that was directly associated with its subject. Derived from the Historic Sites Act of 1935, a number of historic sites were established by secretaries of the Interior, but most have been authorized by acts of Congress.

National Historic Park: This designation generally applies to historic parks that extend beyond single properties or buildings.

National Memorial: A national memorial is commemorative of a historic person or episode; it need not occupy a site historically connected with its subject.

National Battlefield: This general title includes national battlefield, national battlefield park, national battlefield site, and national military park. In 1958, an NPS committee recommended national battlefield as the single title for all such park lands.

National Cemetery: There are presently 14 national cemeteries in the National Park System, all of which are administered in conjunction with an associated unit and are not accounted for separately.

National Recreation Area: Twelve NRAs in the system are centered on large reservoirs and emphasize water-based recreation. Five other NRAs are located near major population centers. Such urban parks combine scarce open spaces with the preservation of significant historic resources and important natural areas in locations that can provide outdoor recreation for large numbers of people.

National Seashore: Ten national seashores have been established on the Atlantic, Gulf and Pacific coasts; some are developed and some relatively primitive. Hunting is allowed at many of these sites.

National Lakeshore: National lakeshores, all on the Great Lakes, closely parallel the seashores in character and use.

National River: There are several variations to this category: national river and recreation area, national scenic river, wild river, etc. The first was authorized in 1964 and others were established following passage of the Wild and Scenic Rivers Act of 1968.

National Parkway: The title parkway refers to a roadway and the parkland paralleling the roadway. All were intended for scenic motoring along a protected corridor and often connect cultural sites.

National Trail: National scenic trails and national historic trails are the titles given to these linear parklands (over 3,600 miles) authorized under the National Trails System Act of 1968.

Other Designations: Some units of the National Park System bear unique titles or combinations of titles, like the White House and

Prince William Forest Park.[173]

The interrelationship between these categories, let alone between the units themselves, is tenuous at best. The categories provide for such diverse purposes as corridor protection, historic preservation, urban access to recreation, buffer zone maintenance (many national preserves serve this function), and scenic motoring. No other public land system is fragmented into subcategories to the extent of the national park system. The national forest system, managed by the U.S. Forest Service, for instance, consists almost exclusively of national forests managed under a mandate of multiple use and sustained yield of natural resources.[174] Furthermore, periodic national reports provide national strategic objectives for the national forest system.[175] Individual forest plans each contribute to the national objectives.[176] Congress has subjected few individual national forests to site-specific mandates. Even the national wilderness preservation system, where management is divided among the several federal public land agencies (including the NPS) and where each unit is established by statute, is unitary in its management nomenclature and mandate for strict preservation.

Still, it is conceivable that the multiple categories of reservations in the national park system could be managed as interrelated elements. Key to most conceptions of a system is a unifying common plan or purpose. The Organic Act mandate to conserve and provide for enjoyment serves as guidance for permissible park uses but fails to articulate an answer to the systemic question: what are parks for? Professor Sax's advocated purpose of parks to cultivate our reflective or contemplative faculties is broad enough to unify both the historical and the natural units.[177] But, without that or some other, more exclusive objective to provide systemic guidance, it will continue to be impossible to make comprehensive, reasoned management and funding choices. Moreover, the absence of cohesion among the units invites even more congressional tailoring of establishment statutes and "park-barrel"[178] additions that fall short of national significance. Over time, the vicious cycle operates to create more diffusion.

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173. *Designation of National Park System Units* (visited Nov. 13, 1996) <http//www.nps.gov/legacy/nomenclature2.html#top>. The best discussion of this nomenclature appears in DWIGHT F. RETTIE, OUR NATIONAL PARK SYSTEM 40-58 (1995).

174. 16 U.S.C. §§ 528-531 (1994).

175. *Id.* §§ 1601, 1602, 1606.

176. *Id.* § 1604(e).

177. *See* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 108 (1980).

178. RIDENOUR, *supra* note 20, at 16-19; James M. Perry, *A Shrine Suffers As Pork for Parks Is Larded Unevenly*, WALL ST. J., Jan. 11, 1991, at A1 (discussing, *inter alia*, Steamtown and Weir Farm National Historic Sites). Criticism of "park-barrel" politics dates at least as far back as the debate over federal funding of the Blue Ridge Parkway. ISE, *supra* note 116, at 417.

SECTION V: SYSTEMIC REFORM

The Steering Committee of the Vail Agenda despaired at structural reform. After politely characterizing the hodgepodge of units Congress has placed in the national park system as encompassing a "markedly diffuse range of public values," the group stated: "Effective management of such a diffuse system requires the abandonment of any hope for a single, simple management philosophy."[179] Of course, this is true if we seek to arrive at a systemic management philosophy by finding common objectives that suit the existing units in the system. If, instead, we were to create a philosophy based on normative principles of what we would wish a park system to accomplish for the nation, then we could use the systemic philosophy as a basis for deciding which units are suitable for park system management and which are better suited for other management systems.

Some units might be transferred to the Bureau of Land Management or the U.S. Forest Service for multiple use-sustained yield management.[180] Other units, primarily valuable as feeding, breeding, and resting refuges for particular animals might be transferred to the Fish and Wildlife Service.[181] Lands with wilderness character could be managed as wilderness within the park system if they advanced the systemic goals; otherwise, wilderness lands could be managed by any of the federal land management agencies.[182] Perhaps a new recreation-oriented agency would need to be established to manage some current park units whose characteristics would not contribute to systemic goals.[183]

There are a number of possible systemic philosophies the nation could adopt for the national park system.[184] Commentators have discussed systemic park management goals based on an ethic of place,[185] a biodiversity restoration—ecosystem maintenance goal,[186] an educational purpose,[187] a cultivation of the contemplative faculties,[188] wilderness restoration,[189] and

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179. THE VAIL AGENDA, *supra* note 15, at 9. Dwight Rettie observed that "[f]or all of its history, the national park system has been essentially an improvisation." RETTIE, *supra* note 173, at 14.

180. 16 U.S.C. §§ 1701-1784 (1994) (creating the Federal Land Policy and Management Act of 1976, which established management scheme for the BLM); *Id.* §§ 528-531, 1600-1614 (creating the Multiple-Use, Sustained Yield Act of 1960, Forest and Rangeland Renewable Resources Planning Act of 1974, and National Forest Management Act of 1976, which established a management scheme for the U.S. Forest Service).

181. *Id.* §§ 668dd-668ee (creating the National Wildlife Refuge Administration Act of 1966, which established a management scheme for the national wildlife refuge system).

182. *Id.* §§ 1131-1136 (creating the Wilderness Act of 1964, which established the scheme for management of the national wilderness preservation system).

183. Robin Winks suggests that "[t]he agency spends 90 percent of its budget servicing visitors (building roads and paving trails, for example) rather than protecting resources. This is the wrong ratio." Robin W. Winks, *National Parks Aren't Disneylands*, N.Y. TIMES, Apr. 19, 1993, at A19.

184. Dwight Rettie reviews many of the efforts to apply comprehensive blueprints for management of the national park system. RETTIE, *supra* note 173, at 16-37.

185. *See* CHARLES F. WILKINSON, THE EAGLE BIRD: MAPPING A NEW WEST 132-86 (1992).

186. *See* Dave Foreman, *Wilderness: From Scenery to Nature*, WILD EARTH, Winter 1995/96, at 8; Keiter, *supra* note 2, at 75.

187. THE VAIL AGENDA, *supra* note 15, at 108-11.

188. SAX, *supra* note 177, at 80.

maintenance of national symbols.[190] Choosing among these goals will be important and will instigate a long-neglected national debate. However, choose we must in order to realize the potential of the vast majority of national park system lands which ought to be valued not simply for their individual attributes but also for their contribution toward a larger systemic goal.

Congress will need to amend the Organic Act to incorporate a comprehensive systemic goal and perhaps to create new agencies. Some commentators call for a supplemental, recreation-oriented agency,[191] others for an independent park service.[192] The institutional structures must await the definition of substantive goals.

Professor Wilkinson has coined the term "lords of yesterday" to describe the "battery of nineteenth-century laws, policies, and ideas that arose under wholly different social and economic conditions but that remain in effect due to inertia, powerful lobbying forces, and lack of public awareness."[193] Wilkinson has in mind laws, such as the prior appropriation doctrine allocating water in western states[194] and the General Mining Law of 1872,[195] that promote resource extraction and are rooted in the allocation of property rights. In this respect, the 1916 Organic Act is not a "lord of yesterday" because it reflects twentieth-century ideas of public administration. Additionally, it contains the seed of modern notions of sustainable conservation. Indeed, all of the plausible goals for a systemic management philosophy implement some vision of this sustainable mandate, conservation of the parks and only such use as to leave them unimpaired for future generations.[196] Abolition of the sustainable, conservation mandate would disconnect the national park system from its noble and innovative history and destroy the potential for further progress.

Nonetheless, the Organic Act's systemic management mandate, enacted when only thirty-five composed the national park system[197] and clarified only slightly in 80 years, begs for reform. But, we must learn the lessons of the unfulfilled preservationist promise of the 1978 amendments to the Organic Act. Actual park unit management will not automatically shift direction, like a compass exposed to a new magnetic field, with the enactment of Organic Act reform legislation. Before any changes can be felt on the ground, Congress will have to lift the establishment legislation mandates that shatter the

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189. *See generally* Michael McCloskey, Essay, *What the Wilderness Act Accomplished in Protection of Roadless Areas within the National Park System*, 10 J. ENVTL. L. & LITIG. 455 (1995) (discussing the history and protection of the National Park System under the Wilderness Act); Michael Frome, *Protecting Park Values*, DIFFERENT DRUMMER, Winter 1995, at 42.

190. Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 206 (1974).

191. Winks, *supra* note 183, at A19.

192. Lockhart, *supra* note 3, at 3; Editorial, *Serving Two Masters: Park Service's Dilemma*, ARIZ. REPUBLIC, Oct. 15, 1991, at A12.

193. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 17 (1992).

194. *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Owen L. Anderson, *et al.*, *Prior Appropriation*, *in* 2 WATERS AND WATER RIGHTS 65-446 (Robert E. Beck, ed. 1991).

195. 30 U.S.C. §§ 21-42 (1994).

196. 16 U.S.C. § 1.

197. RETTIE, *supra* note 173, at 47.

Service's vision and divert the Service's resources.

Once Congress enacts a modern, comprehensive mandate that not only describes how park lands are to be managed but also sets out a purpose for the system, then the task of sorting through existing and potential units for suitability in the system may begin. Organic Act reform, by itself, will not succeed in the face of Service management primarily driven by establishment statutes. The 104th Congress acted prematurely in considering legislation to create a commission to recommend termination or modification of existing NPS management of park units.[198] However, reform of the national park system must ultimately examine the issue of whether park units themselves or statutory details dilute and detract from integrated management to achieve systemic goals. In the meantime, Congress should resist entangling the Service in more statutory detail, which impedes progress toward better park administration.

CONCLUSION

In addition to the recommendations for systemic reform of the statutory basis of national park system management, the lessons of this Article are twofold. First, establishment legislation plays a critical role in driving NPS management and deserves more attention from commentators. Drafting decisions for establishment legislation are the most important choices that are made for the national park system. Therefore, it is critical that legal commentators direct their attention to Congress. A conceptual framework for statute drafting, provided by a systemic mandate, is likely to have a much more profound effect than refined judicial doctrines. As a "white hat" agency, the Service has not faced the intense scrutiny by environmental groups as have other public land managers, especially the U.S. Forest Service and the Bureau of Land Management, which operate massive commodity extraction programs for minerals, timber, and range. Even where the Service has taken controversial steps, potential plaintiffs rightly hesitate to litigate against an agency with an image of purity that represents cherished American values. In those few instances of litigation, judicial review of proprietary decisions generally, and national park system management in particular, is exceedingly deferential to the agency. So, courts play a relatively insignificant role in national park system management, other than ensuring that the Service adhere to specific directives of Congress. And, of course, those specific directives are found in the establishment legislation.

Second, the relative insularity of legal scholarship in the natural resource management and pollution control fields obscures important connections. A comparative examination of trends in statute-drafting reveals parallel developments in pollution control (widely noted) and national park system administration (not widely noted). Congress has assumed a more active role in both areas of environmental law as it addresses second-generation problems where

198. H.R. 260, 104th Cong., § 103 (1995).

the stakes involved are greater (and the potential benefits relatively smaller) than in earlier lawmaking. The literature studying the trend of more pollution control statutory detail proves helpful in describing different types of congressional mandates, in understanding the reasons for the trend, and also in evaluating whether the trend is a constructive development for environmental law. The consensus in the literature that Congress has gone too far in micro-managing the EPA offers applicable wisdom for criticizing the similar behavior in park establishment legislation. More scholarship that applies lessons from the pollution control area to natural resources management[199] and *vice versa*[200] will strengthen the foundations of environmental law.

199. *See, e.g.*, Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?*, 3 WEST-NORTHWEST 193 (1996) (applying federalism lessons from pollution control law to natural resource management).

200. *See, e.g.*, Fischman, *supra* note 26, at 439 (addressing biological resource protection through the use of EPA authorities).

REPAIRING THE WATERS OF THE NATIONAL PARKS: NOTES ON A LONG-TERM STRATEGY

ERIC T. FREYFOGLE*

INTRODUCTION

For years, the National Park Service (the "Service") has worried about the condition of its various waterways and water sources, and with abundant reason. Dams block many rivers. Pollution diminishes aquatic life. Diversions disrupt original flow regimes. Groundwater pumping lowers water tables. The particulars in many settings are poorly studied and thus poorly known, but the general shape of the problem is as familiar as it is disheartening.[1] Too many waters are impaired, and despite well-intended and sometimes effective efforts, the overall situation worsens.

The old way of attacking the water problem—the analytic, bureaucratic way—was to divide the whole into its parts and then divide the parts further, separating and dissecting until the pieces became something an individual scientist or lawyer could hold on to. Thus, we isolated the issues of water rights (reserved and nonreserved), discrete pollution sources, run-off pollution, flooding, low-flow regimes, stream obstructions, declining water tables, endangered species, reservoir siltation, and so on. These issues, in turn, were sometimes divided by state or region, by the particular legal regimes implicated, and by the bureaucratic unit charged to deal with them. Some of this division grew out of our ignorance: we did not know how surface water and ground water were connected, so we addressed them discretely. For this and other reasons we ended up with a multitude of little pieces, hard to address coherently and hard to resolve before they became intractable.

What the Service needs today to repair its waters is less analysis and more synthesis. The legal issues are many and complex, but they are well known and well studied.[2] The basic scientific knowledge is also in place, even

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1. *See generally* NATIONAL PARKS AND CONSERVATION ASS'N, PARK WATERS IN PERIL (1993) [hereinafter PARK WATERS IN PERIL] (summarizing the most pressing problems associated with the protection of park waters).

2. *See generally* ROBERT W. ADLER ET AL., THE CLEAN WATER ACT: TWENTY YEARS LATER (1993) (discussing the successes and failures of the Clean Water Act); MANAGING PARK SYSTEM RESOURCES: A HANDBOOK ON LEGAL DUTIES, OPPORTUNITIES, AND TOOLS (Michael A. Mantell ed., 1990); OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (David J. Simon ed., 1988) (detailing the scope and application of the varying legal protections available for na-

while extensive data collection remains needed. The next step, the urgently needed step, is to articulate a long-term goal for the Service's water-repair efforts, a goal that provides focus and polestar for the day-to-day work of hundreds of lawyers, scientists, educators, community relations specialists, and managers. That goal should tie into the Service's charter, particularly and emphatically its legal obligation to manage its resources without impairment.[3]

If the strategic goal for park waters is set as high as it ought to be, its achievement will take decades of effort, which means a strategy is needed—a strategy that guides budgets and work and employee evaluations, not just a report to stick on a shelf. The strategy needs to bring firm pressure to bear on the many forces of waterway degradation, moving step by step toward the repair of park waters while recognizing and respecting the constraints on quick action. A realistic water strategy will inevitably entail compromises; to think otherwise is to invite political disaster. Yet, compromises come in various shapes, some acceptable, some much less so. A sound strategy needs to identify and pursue the more attractive compromises, the temporary ones that avoid irreversible harm while leaving open the opportunity to revisit issues as public values shift, as scientific data is accumulated, and as technical and economic developments make repair efforts more appealing and affordable. Parts of the Service's water strategy will necessarily require new resources, mostly in research, data collection, legal representation, training, and relations with state, local, and private parties. Every part of the strategy will take sustained commitment and political will.

Except in the case of extinct species, the repair of waterways is largely achievable in scientific terms. That is the good news, and it is heartening news indeed. The repair of park waters does not need to be a five-year or ten-year goal; it can be extended over a longer period, and realistically must be. The danger, plainly, is that the effort will drift off course, or seem insufficiently urgent to warrant the resources and political capital it needs, or otherwise suffer from some debilitating strain of bureaucratic inertia. Without devoted leadership, park waters will remain in peril. No legal strategy can cure that ill.

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tional parks); Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 ECOLOGY L.Q. 445 (1992) (discussing the federal and tribal governments' protection of instream flows); James D. Crammond, *Leasing Water Rights for Instream Flow Uses: A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest*, 26 ENVTL. L. 225 (1996) (discussing the advantages and disadvantages of leasing water rights to improve instream flows); Brian T. Hansen, *Reserved Water Rights for Wilderness Areas: Current Law and Future Policy*, 9 VA. ENVTL. L.J. 423 (1990) (analyzing federal reserved rights for wilderness areas); Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems, and Private Property Rights*, 14 PUB. LAND L. REV. 5 (1993) (discussing the Yellowstone geothermal controversy and the ramifications on national parks); Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 ROCKY MTN. MIN. L. INST. 24-1 (1995) (addressing the manner by which federal agencies obtain water rights for use for federal purposes); Teresa Rice, *Beyond Reserved Water Rights: Water Resource Protection for the Public Lands*, 28 IDAHO L. REV. 715 (1991-92) (discussing the protection of water sources on public land); A. Dan Tarlock, *Protection of Water Flows for National Parks*, 22 LAND & WATER L. REV. 29 (1987) (examining water use conflicts involving the park service).

3. *See* 16 U.S.C. § 1 (1994). *See* Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. U. L. REV. 575 (1997).

The comments below draw heavily upon several of the good studies already done of park waters and ecological restoration. Many of the recommendations mimic, or reshape only modestly, comments that the Service has already heard, sometimes repeatedly. Any sound strategy is likely to contain many already-familiar pieces, and include ideas the Service has picked up and worked with, half-heartedly or seriously, for years. A few new pieces need crafting, to be sure, but the chief task is synthesis—setting the goal, constructing the strategy, identifying the initial steps, and mustering the money and motivation to move things forcefully ahead.

I. SETTING THE GOAL

One of the chief legal obligations of the Service is to manage its lands and waters without impairment.[4] Its tandem obligation is to make those resources available for public recreational use.[5] Public use sometimes rubs roughly against the nonimpairment standard, causing managerial challenges. In the case of water, however, conflicts like this are uncommon. In a few park settings, to be sure, water is so scarce that even minimal consumption by park users can threaten waterway integrity. In other settings, sewage treatment and roadway run-off create pollution problems that are solvable but not yet solved. For the most part, however, public uses of water do not conflict with management for impairment, a happy reality that eases the goal-setting task. Park visitors use waters simply by viewing them. They use them indirectly whenever they enjoy the natural areas that waters help sustain. Rafters and canoeists are equally well served by original flow regimes, and rarely call for intentional changes.

In some manner, the Service needs to decide what it means for park waters to be unimpaired, which is to say it needs to translate its legal charter into an expressed vision of ecological well being. Waters, of course, are components of larger natural mosaics, and it is not possible for waters to remain vibrant unless other components of the mosaic are vibrant. Water quality is directly linked to land uses, inside and outside the parks. Riparian vegetation is an important part of the water picture, and so is drainage. Given this integration, the goal of water policy needs to be something larger than water. It needs casting in terms of the health or integrity or natural productivity of the larger communities of which the water is an indispensable part.

One useful source on this issue, as on many other park issues, is the recent report, *National Parks for the 21st Century*, known as the *Vail Agenda*.[6] The *Vail Agenda* presents, as its first strategic objective and as the Service's "primary responsibility," the protection of park resources from internal and

4. 16 U.S.C. § 1 (1994) (stating that the service has a duty to manage parks "in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

5. *Id.* (stating that the service shall "provide for the enjoyment of [parks, monuments, and reservations]").

6. NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA (1992) [hereinafter VAIL AGENDA].

external impairment.[7] The *Vail Agenda* elaborates upon that objective at some length, although it does not quite translate the term impairment into a single ecological phrase. Protecting park resources, the *Vail Agenda* states, means managing them "under ecological principles that prevent their impairment."[8] Ecological management, the *Vail Agenda* states,

> requires the maintenance or restoration of native ecosystems and resistance to the establishment of alien organisms. Where possible, ecosystem management should attempt to preserve natural processes, operating at a scale consistent with the evolution of the ecosystem being managed. Preserving the evolutionary matrix of environment and organisms is the overarching task of managing ecosystem processes, and in those instances where the ecological balance is under threat or is uniquely fragile, this task may require that access be limited.[9]

Readers of the *Vail Agenda* familiar with conservation biology will understand what a lofty goal this is, calling as it does not just for the preservation of species, but their preservation in such numbers, and with sufficient habitat, that they can continue their evolutionary processes.[10] The restoration of "native ecosystems" and the management of "ecosystem processes" presumably require the restoration or mimicry of original disturbance regimes like fires, floods, and disease infestations. The *Vail Agenda* shies away from any particular phrase to capture this vision of unimpaired land; it does not speak directly in terms of ecosystem health, or ecological integrity, or sustainability, or any other now fashionable phrase. Yet, the aim of the recommendation is as clear as it can be, given the limitations on our science; it is the maintenance "of functioning natural systems that are not characterized by human domination . . . ."[11]

A second useful source in setting a long-term goal is the *Report of the Interagency Ecosystem Management Task Force*,[12] prepared by representatives of many federal agencies (including the Interior Department) and released in June 1995. The *Interagency Ecosystem Report* is a political document, aimed mostly at audiences outside the federal government and designed to quell fears that ecosystem management will mean a surge in intrusive feder-

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7. *See id.* at 17.
8. *Id.* at 18.
9. *Id.* at 105.
10. *See generally* GARY K. MEFFE & C. RONALD CARROLL, PRINCIPLES OF CONSERVATION BIOLOGY (1994) (examining conservation issues); REED NOSS & ALLEN Y. COOPERRIDER, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY (1994) (providing management guidelines and techniques for maintaining biodiverity); Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875 (1994) (discussing how emerging concepts in biology may affect environmental management, legislation, and regulation); Reed F. Noss, *Some Principles of Conservation Biology as They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893 (1994) (offering principles and concepts relating to conservation biology that may assist ecosystem management).
11. VAIL AGENDA, *supra* note 6, at 105.
12. 1 REPORT OF THE INTERAGENCY ECOSYSTEM MANAGEMENT TASK FORCE, THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS *AND* SUSTAINABLE ECONOMIES (1995) [hereinafter INTERAGENCY ECOSYSTEM REPORT].

al power. Like most political documents, this one contains inconsistencies, calculated inconsistencies in this case, intended to make the document palatable to readers with differing views. The *Interagency Ecosystem Report's* inner tensions are nowhere more plain than in its expressed goal for ecosystem management. The ecosystem approach, we are told at one point, is merely "a *process*,"[13] the neutral aim of which is to achieve the "desired ecosystem outcome"[14] that has been set collectively by the people and entities (including federal agencies) whose lives and activities are bound with and to the ecosystem. Federal agencies interested in the ecosystem are encouraged "to play the role of facilitator and assistant in the development of a [desired, shared] vision; they should avoid imposition of a solely *federal* vision upon local communities."[15] The shared ecosystem vision that comes out of this "process" is expected to "take[] into account existing social and economic conditions in the ecosystem, and identify ways in which all parties can contribute to, and benefit from, achieving ecosystem goals."[16]

This soothing language is aimed, evidently enough, at calming the fears of critics of expansive federal power. It allows them to hope that ecosystem management, in practice, might be just a modified version of business-as-usual exploitation. Here and in other places, the *Interagency Ecosystem Report* suggests that affected ecosystem members are free to set whatever goals they like, whether or not consistent with lasting ecological health. Elsewhere, however, the *Report* contains far different language, intended probably for consumption by the agencies themselves and revealing much more about the real hopes of the people who did the drafting. Notwithstanding the process language, the ecosystem approach, we are told, is a "goal driven" enterprise; it is "a method for sustaining and restoring natural systems and their functions and values"; it has an established, background goal—"to restore and sustain the health, productivity, and biological diversity of ecosystems . . . ."[17] Federal agencies are instructed to "[u]se ecological approaches that restore or maintain the biological diversity and sustainability of the ecosystem."[18] They are to generate "protocols establishing ecological indicators for monitoring ecosystem sustainability,"[19] as if ecosystem sustainability were an assumed element of every "desired ecosystem outcome." Volume One of the *Interagency Ecosystem Report* draws to a close with a further critical point, quietly slipped in: the "shared vision," we are told, "should be consistent with the overarching goal of sustaining biological diversity of the ecosystem . . . ."[20]

On first reading, the *Interagency Ecosystem Report* seems inconsistent, pushing both a process model that allows local people to set their own goals and an alternative management method that comes with a goal already out-

13. *Id.* at 26.
14. *Id.* at 6, 9-10, 19, 31.
15. *Id.* at 9-10 (emphasis in original).
16. *Id.* at 19.
17. *Id.* at 3.
18. *Id.* at 20.
19. *Id.* at 13.
20. *Id.* at 49.

lined—a quickly sketched goal that includes not just the maintenance but the restoration of the "health" and "biological diversity" of ecosystems.[21] Is it possible to bring these sentences together, to reduce or eliminate the seeming inconsistency? Are they more artfully written than first meets the eye? Is there a lesson here for the Park Service, as it sets out to construct its own water strategy?

What the authors of the *Interagency Ecosystem Report* knew all too well is that many people across the land know little about matters of ecological health and, for that reason and others, value it rather little. They are out to make a living, whether meager or opulent, and want little interference from a meddling, distant government. Vast numbers of businesses are adamantly opposed to environmental protection and to anything that smacks of land-use regulation, without regard for long-term communal well-being. For people concerned about land health, these are tough nuts to crack; they are potent obstacles that have to be dealt with, and cannot simply be bypassed.

They cannot be bypassed, but they can be pushed and cajoled and educated and encouraged to reflect on the long-term good of the land and its human inhabitants; they can, that is, be moved along, step by step, lesson by lesson, in the direction of valuing the land more highly and considering longer-term perspectives. In the short term, resistant voices need to speak out, or the resistance and backlash can bring everything to a halt. In the long-run, there is less need to accept views inconsistent with land health. Short-term planning processes largely take people as they are, hoping to educate them a bit and draw upon their more virtuous natures, but in the end letting them express and act upon their antecedent, exogenous views. Over time, more flexibility is possible. A well-constructed strategy has more room to maneuver, more chances to accentuate some views over others and shape public understanding and values. It offers the opportunity, that is, to lead.

The surface inconsistencies in the *Interagency Ecosystem Report* exist largely because the Report deliberately consolidates the long term with the short term, to the confusion of both. In the short term, ecosystem management is a process-based system of communal decisionmaking, aimed at getting people together, sharing ecological data with them, and hoping that as a group they can think and act more virtuously than they would as individuals. But as the process continues, federal agencies are expected to keep pushing and working to promote the substantive parts of the *Report*, the parts that speak to land health as an established goal and to biodiversity maintenance as a central element of that goal. These, it seems, are the goals that the federal actors are to promote in the many ways listed in the Report—by gathering and disseminating data, by making research capabilities available, by convening study groups, by issuing reports, by public education measures, by working closely with nonfederal groups with similar ecological aims, and so forth.[22]

Over time, this effort is expected to pay off in the form of increased in-

21. *Id.* at 3.
22. *See id.* at 8-15.

fluence in the ecosystem management process. Step by step, the journey toward land health is expected to continue, as people become more familiar with the environmental degradation around them and more aware of the causes of that degradation; as they see the costs and limitations of old ways of living; as people out for quick exploitation move to other places, taking their destructive attitudes with them; and as the people who stay see the benefits, to them and their children, of a land that is healthy and aesthetically pleasing.

Written as it was for broad applicability, the *Interagency Ecosystem Report* includes compromises and vague phrasings that a Park System document need not and should not contain. Unlike most federal agencies, the Service by law is obligated to manage its resources without impairment.[23] It has no choice but to vest that important term with meaning, and it can rightly do so in ecological terms. Just as important as the legal charter is the favorable reality of a public that expects the Service to promote natural well-being; the Service is not in the tree-cutting or mining or grazing business, and people do not want it to start. Setting aside the cranky few, people hold the Service in high esteem and support it enthusiastically. It can be more bold than other agencies in its push for ecological health. It can take—it simply must take—a vigorous leadership role within the federal system.

Setting a goal for park water policy would be a good deal easier if ecologists and other scientists could offer a settled and useable definition of land health. Given the vagaries of nature and our sizeable ignorance of it, there is no such definition, nor is there likely soon to be such a definition. Land managers have to live with uncertainty on issues of land health, and the sooner they become comfortable with this plight the sooner they can get to work. In the end, terms like land health and ecological integrity are more metaphor than scientific state. And yet they are the best terms that we have, and are as useful as any. The time has come for the Service to announce, as its goal, that its waterways will regain their ecological health; that they will return, not necessarily to their flow profiles before humans arrived, but to some rough approximation of original flows and water quality, sufficient to maintain their surrounding ecological communities. However it is exactly phrased, this goal ought to be viewed as an elaboration of the legal commitment to unimpaired resources. It should become the guiding light of water policy, and remain as such until it is ultimately achieved.

As the Service goes about articulating its long-term water goal, it has a sizeable scientific literature to draw upon, all aimed at giving meaning to the suggestive but ultimately vague ideas of ecosystem health and ecological integrity. One of the urgent agenda items for scientists today is to give more concrete meaning to these ideas, or at least to develop practical measures for

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23. *See supra* text accompanying notes 3-4. The BLM and Forest Service also have charters with nonimpairment clauses. Their charters also include responsibilities relating to mining, grazing, and timber harvesting that are far less consistent with nonimpairment than the Park Service's recreational responsibilities. *See* 16 U.S.C. §§ 529, 531 (1994) (codifying Forest Service: management "without impairment of the productivity of the land"); 43 U.S.C. §§ 1702(c), 1712(c)(1), 1732(a) (1994) (codifying BLM: management "without permanent impairment of the productivity of the land").

estimating whether a natural community is or is not in good condition. The *Interagency Ecosystem Report* recognized this need in its particular call for federal agencies to generate ecological indicators for monitoring ecosystem health.[24] In the area of water, Professor James Karr's work stands out as particularly useful.[25] The work now being done on biological water-quality standards also shows near-term promise.[26] At a more general level, writings by environmental policy specialists have considered the ecological bases of community stability, exploring the various meanings of the term "stability" and considering whether, given our knowledge, it even makes sense to claim that we can do anything more than estimate the relative health of alternative ecosystem states.[27] Taken as a whole, this literature is more suggestive than it is conclusive, and it is best used, as many scholars have noted, by mixing it with a liberal dose of humility so that we might protect ourselves from the errors of our ignorance. The sensible way to deal with the current limits of science—aside from pushing hard to learn more—is to mix our knowledge with a guiding land ethic, a holistic ethic that admits the reality of the larger natural whole and that recognizes and respects the moral value of that whole.[28]

Once the Service articulates an overall goal—a simple goal, in plain English, easily repeated by Service employees everywhere—it needs to augment that goal with key management parameters.[29] Some parameters are likely to derive from measures of water quality. Others, the most important ones for many parks, will likely come from studies of threatened and endangered aquatic species. Across the nation, aquatic species—mussels, fish, amphibians—are under assault, to a greater extent than terrestrial species.[30] The management of a resource to promote only a single species is fraught with dangers, but there is the opposite problem of managing at such a high level of generality as to lose the essential connection with scientific defensibility.[31] Nonimpairment

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24. INTERAGENCY ECOSYSTEM REPORT, *supra* note 12, at 13 (Recommendation 23).

25. *See generally* James R. Karr, *Biological Integrity: A Long-Neglected Aspect of Water Resource Management*, 1 ECOLOGICAL APPLICATIONS 66 (1991); James R. Karr, *Ecological Integrity: Protecting Earth's Life Support Systems, in* ECOSYSTEM HEALTH: NEW GOALS FOR ENVIRONMENTAL MANAGEMENT 223 (Robert Costanza et al. eds., 1992); James R. Karr, *Clean Water is Not Enough*, 11 ILLAHEE 51 (1995); James R. Karr & Ellen W. Chu, *Ecological Integrity: Reclaiming Lost Connections, in* PERSPECTIVES ON ECOLOGICAL INTEGRITY 34 (Laura Westra & John Lemons eds., 1995); James R. Karr, *Defining and Assessing Ecological Integrity: Beyond Water Quality, in* 12 ENVTL. TOXICOLOGY AND CHEMISTRY 1521 (1993).

26. *See generally* BIOLOGICAL ASSESSMENT AND CRITERIA: TOOLS FOR WATER RESOURCE PLANNING AND DECISION MAKING (Wayne S. Davis & Thomas P. Simon eds., 1995); E.P.A., BIOLOGICAL CRITERIA: NATIONAL PROGRAM GUIDANCE FOR SURFACE WATERS (April 1990).

27. *See, e.g.*, STUART L. PIMM, THE BALANCE OF NATURE (1991); K.S. SHRADER-FRECHETTE & E.D. MCCOY, METHOD IN ECOLOGY: STRATEGIES FOR CONSERVATION (1993); J. Baird Callicott, *Do Deconstructive Ecology and Sociobiology Undermine Leopold's Land Ethic?*, 18 ENVTL. ETHICS 353 (1996).

28. *See* Callicott, *supra* note 27, at 368-69.

29. One problem with both the VAIL AGENDA, *supra* note 6, and the INTERAGENCY ECOSYSTEM REPORT, *supra* note 12, is that they do not offer clear, single phrasings of the desired state of ecological well-being. Alternative phrasings might well be equally good, but the practical needs of implementation are better met by a single phrasing, easily remembered and suitable for endless repetition.

30. *See* ADLER ET AL., *supra* note 2, at 59-69.

31. Problems with management at a high level of generalization are considered in Richard Haeuber, *Setting the Environmental Policy Agenda: The Case of Ecosystem Management*, 36 NAT.

ought to mean the protection of all species, and the health of particular waterways is often best approximated by studying carefully and putting to practical use the particular needs of selected imperiled species.[32] Managing resources for thousands of species is an impossibly complex job; managing for a handful of key species is more tractable, and is a useful managerial approach in the absence of something better.[33]

Once the Service formulates an overall goal and puts at least minimal flesh on the goal, it needs to consider how best to use it. Given the impairment of many waterways, particularly old diversions and obstructions, the repair of all waters makes sense only as a long-term endeavor. For many rivers, restoration will require steps that lose their feasibility as time passes. For these rivers, which present frequent and nagging problems, the goal needs to remain on the horizon, guiding the short-term efforts that move slowly toward it. Those short-term efforts, as the *Interagency Ecosystem Report* artfully notes, need to arise from consensus, from processes that bring local people together and give them a voice in the future of their home ecosystems.[34] Measures implemented in a given place simply must enjoy support by local landowners, local communities, and the like, particularly when those measures disrupt existing economic activities.[35] Nonetheless, it is not just appropriate but legally essential that the Service become an active player in such discussions, always expressing its own legally based goal and doing what it can to move people toward that goal. It should not—as the *Interagency Ecosystem Report* warns—impose its own goal on a recalcitrant or uncomprehending citizenry. It can do a lot of pushing and persuading.

II. A STRATEGY FOR IMPLEMENTATION

Once the Service articulates its long-term goal, it needs to develop a strategy for implementation that will guide budget decisions, hiring practices, employee evaluations, and other real-life decisions. The goal needs to become part of the general management plans of all major park units, with responsibility for promoting the goal vested in the superintendent or other site manager.

A. *General Elements*

An effective strategy to repair park waters will need many elements, all linked by the contribution they make to the overall goal. As it puts together a strategic plan, the Service has many good reports and studies to draw upon,

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RESOURCES J. 1 (1996).

32. *See* ADLER ET AL., *supra* note 2, at 127-28, 245-47.

33. *Id.*; *see generally* NOSS & COOPERRIDER, *supra* note 10.

34. *See* INTERAGENCY ECOSYSTEM REPORT, *supra* note 12, at 19, 21, 31-39.

35. There is a lesser yet still weighty need to gain public consensus for measures that restrict options for future economic development, particularly development that has progressed to the point of specific proposals that have gained public attention and support.

including the *Vail Agenda*,[36] the *Interagency Ecosystem Report*,[37] reports by the National Parks and Conservation Association[38] and The Conservation Foundation,[39] The *Keystone National Policy Dialogue on Ecosystem Management*,[40] analyses by prior Service leaders,[41] studies of particular legal issues (including watershed planning),[42] and reports on successful, community-based ecosystem management efforts.[43] The Service could draft a solid strategy simply by drawing upon these sources. An even better strategy would arise by adding to those sources the considerable expertise of Service employees, who know more than anyone else about the conditions and needs of park units. The Service's ultimate strategy needs to come largely from within the Service, and needs to make sense and prove effective within the bureaucratic structures of the agency. Nonetheless, it is possible to identify a number of elements that ought to become part of that strategy:

Monitoring and Research—Although Service employees know a good deal about park units, they do not possess anything like the technical data that they need on hydrological flows and the types and sources of water-quality degradation. A massive increase is needed in water monitoring, undertaken at far more locations and done with greater regularity. Along with simply gathering more data the Service needs to increase many-fold its scientific research efforts. Many of those efforts will focus on water-quality issues, particularly related to biological water criteria. Other efforts will focus on the exact needs and recovery options of imperiled aquatic species. Still other work needs to

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36. VAIL AGENDA, *supra* note 6.

37. INTERAGENCY ECOSYSTEM REPORT, *supra* note 12.

38. NATIONAL PARKS AND CONSERVATION ASS'N, INVESTING IN PARK FUTURES - THE NATIONAL PARK SYSTEM PLAN: A BLUEPRINT FOR TOMORROW (1988).

39. THE CONSERVATION FOUND., NATIONAL PARKS FOR A NEW GENERATION: VISIONS, REALITIES, PROSPECTS (1985).

40. THE KEYSTONE CTR., THE KEYSTONE NATIONAL POLICY DIALOGUE ON ECOSYSTEM MANAGEMENT (1996).

41. *See, e.g.*, DWIGHT F. RETTIE, OUR NATIONAL PARK SYSTEM (1995); JAMES M. RIDENOUR, THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES (1994).

42. *See, e.g.*, Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973 (1995); David S. Baron, *Water Quality Standards for Rivers and Lakes: Emerging Issues*, 27 ARIZ. ST. L.J. 559 (1995); Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1 (1996); Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201 (1996); Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 U.C.L.A. J. ENVTL. L. & POL'Y 61 (1993); Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ENVTL. L. RPTR. NEWS & ANALYSIS 10528 (1991) [hereinafter Houck, *Regulation of Toxic Pollutants*]; Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993) [hereinafter Houck, *Endangered Species Act*]; Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994); John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501 (1994); Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479 (1989); J.B. Ruhl, *Section 7(A)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107 (1995); *see also* sources cited *supra* note 2.

43. *See, e.g.*, W. WILLIAM WEEKS, BEYOND THE ARK: TOOLS FOR AN ECOSYSTEM APPROACH TO CONSERVATION (1997); STEVEN L. YAFFEE ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES: AN ASSESSMENT OF CURRENT EXPERIENCE (1996).

reach well beyond park boundaries to identify, quantify, and study significant diversions, pollution sources, and flow disruptions, all with the aim of protecting waters against further degradation and otherwise moving toward the goal of repairing park waters. Much of this work ought to entail collaboration with others, as noted below.[44] All of the data and studies need widespread dissemination.

Water Rights—The Service needs a clear strategy on the assertion of water rights, particularly reserved water rights, and the acquisition of other types of water rights.[45] The water rights issue is a sensitive one, given that the assertion of federal rights is often viewed as disrupting vested private property rights—a particularly onerous act. An effective strategy needs to recognize this political reality and somehow deal with it. Yet, there are ways of dealing with it that do not require the Service to roll over and lie mute, as the government has largely done in the case of water rights for wilderness areas. A good strategy will reduce antagonism while protecting future options for progressing toward the overall goal. An important part of the Service's water strategy ought to entail a push for reform of state water laws, particularly on the issues of beneficial and reasonable use.[46]

Water Quality—More important than water quantity is water quality, and the Service needs to work harder on this issue than any other.[47] Its efforts should link directly with the work of state water-quality officials, both helping them do their work and encouraging them to do it well—that is, to do it in such a way as to progress further toward the goals of the Clean Water Act.[48] State water-quality offices ought to become important allies of the Service in its efforts to repair park waters, given their similar goals. The Service also needs to work with the federal EPA, another underused ally.

Biodiversity—One reason for repairing park waters is to sustain and restore populations of native species, particularly animal species. Aquatic species are under assault everywhere and their survival is of popular interest. The Service's water strategy needs to include biodiversity preservation as a major element, focusing not just on species now federally listed as threatened or endangered but on species proposed for listing, candidate species, and species identified by scientific groups as declining or at risk.[49] In some park settings, the needs of key species might furnish the central management criteria for defending park waters against further degradation; they might also serve to give sound scientific bases to particular repair goals, in terms of desired flow regimes, water-quality levels, and the like. The Service needs to become more involved in the administration of the Endangered Species Act. It also needs to look forward to increased state roles in the administration of that Act.

Education—No strategy has much chance of success without a significant

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44. *See infra* text following note 57 and text accompanying notes 60-62.
45. *See infra* text accompanying notes 63-69.
46. *See infra* text accompanying notes 70-73.
47. *See infra* text accompanying notes 77-101.
48. *See* ADLER ET AL., *supra* note 2, at 6-10.
49. *See infra* text accompanying notes 102-17.

education component, aimed at promoting the long-term water goal and educating the public and local decisionmakers on the benefits of ecologically healthy waterways.[50] Education is already an important Service task. That work needs to expand and become focused on ecological restoration, ecosystem planning, imperiled aquatic species, and similar issues related to the Service's legally based goal.

Technical Help—As the Service upgrades its scientific data collection and its technical expertise on such issues as water flows, water quality, and conservation biology, it needs to reach out to its neighbors with generous offers of technical help.[51] The data that it collects and the studies that it performs must, of course, gain wide distribution. Beyond that, the Service needs to help states perform their water-quality tasks. It needs to help local governments conduct studies of local activities and needs, whether they have to do with water supply, sewage disposal, water conservation, erosion control, irrigation return flows, recreation, or waste disposal.

Gaining Support—As it does the above tasks, the Service will find itself working more closely with state and local governments and private groups of various types, each of which is more or less supportive of park goals. The Service cannot achieve its water goal without help from other groups and a liberal measure of popular support. In many cases the steps needed to repair park waters are ones that are best done, or can only be done, by actors other than the Service. Intergovernmental relations need a dramatic increase in park budgets, particularly if present political trends continue and states assert more independence with regard to water-quality and endangered-species issues. The Service also needs to identify and cultivate groups that are likely to support its efforts, like river-recreation groups, fishing groups, and tourist and travel organizations, in part to bolster its claim that healthy waters make economic sense.

Visibility—Finally, the Service's strategy needs to keep the long-term goal front and center, not just in the minds of Service employees but at the forefront of all discussions about surrounding ecosystems and watersheds. The Service should present its goal primarily as a desirable end state for all community members, as a goal good for local human communities as well as native wildlife, not just as a requirement of federal law. It should not shy away from discussing the goal in ethical and even religious terms, nor should it avoid calmly criticizing more exploitive approaches to land use by pointing out their unsustainability, their hidden economic costs, and their deleterious community impacts.

B. *Getting the Science Right*

For decades the park ranger has stood as the paradigm of Service professionalism—the dedicated employee, at home in the outdoors, helpful to visitors and learned in natural lore. Without downgrading the prestige of that job, the Service needs to find ways to upgrade markedly its technical scientific

50. *See infra* text accompanying notes 58-60.
51. *See infra* text accompanying notes 60-62.

expertise so that it can generate the kind of data and studies that are essential if park waters are going to revive. Critics of the Service, internal and external, have long noted the Service's trouble in putting together a credible program of first-class science.[52] Some of the troubles have had to do with funding issues, although Service budgets over the past decade have done better than the budgets of most federal agencies.[53] Other troubles are internal ones, having to do with the aura of the all-purpose ranger and resistance to bringing in specially trained employees at high civil service levels.[54]

In recent years the Service has made steps toward more strategic planning, and has begun pooling its meager scientific resources with other federal agencies to create the National Biological Service. These steps could help, but more funding is urgently needed. In addition, any shared research office needs to remain responsive to the particular needs of individual park units. Much of the needed scientific work includes data collection on stream flows, water-quality levels, and species populations. This work requires professional oversight and ultimate reporting to the park superintendent or site manager, but chiefly entails tasks that nonscientists can perform.

One of the top research tasks, once existing conditions are known at a given park, is to identify scientific measures that give particular, local meaning to the general goal of waterway health. These measures would serve as benchmarks or goals—minimum standards for a waterway to remain or become healthy. In most cases, these measures would have to do with water-flow regimes (particularly low flows), water-quality levels, riparian vegetation, and habitat for sensitive aquatic species. This work will not be easy, to say the least. It can be done only upon completion of extensive background research, particularly on the needs of imperiled or otherwise sensitive aquatic life. In the case of many waterways, the most useful water-quality criteria will be biological ones, developed not just in the abstract—using common fish and crustaceans—but with attention to the particular needs of the actual species that inhabit local waters.[55] This work on biological criteria will likely fit closely with studies of threatened and endangered species and the preparation of multi-species recovery plans under the Endangered Species Act.

When Service officials put together their education programs and public ecosystem study centers, and when they attend meetings with state and local government officials or local citizen groups, they need to have their science done correctly. Service officials need to carry in their briefcases scientifically sound studies of particular waterways and aquatic species. They need scientifically justified models of alternative flow regimes so that they can predict the impacts of diversions, drainage activities, wetlands restoration efforts, stormwater control measures, water conservation measures, and other alter-

52. *See* VAIL AGENDA, *supra* note 6, at 31 (stating that "the National Park Service is extraordinarily deficient in its capacities to generate, acquire, synthesize, act upon and articulate to the public sound scientific research and scientific information"); RETTIE, *supra* note 41, at 114-15, 220-21.

53. RETTIE, *supra* note 41, at ch. 9, App. 5.

54. *Id.* at 152-59.

55. *See* ADLER ET AL., *supra* note 2, at 127-28; *see also* sources cited *supra* note 25.

ations, for better or worse, of existing hydrological conditions. Additionally, good science is essential whenever the Service shows up in court, as plaintiff or defendant, particularly when water rights are involved or imperiled species are at risk.

This research work, it must be understood, will not happen once and then be done. Monitoring will become a perpetual undertaking, and models will require constant tinkering and testing. Any action taken within a watershed will need follow-up study to determine its actual impacts and to compare these impacts with predicted results. Water management, that is, will entail a great deal of trial and error; it will require what has come to be called adaptive management, management that regularly monitors results and makes corrective changes in plans and operations.[56] Adaptive management, everyone seems to agree, is an essential part of ecosystem and watershed management, and the Service needs to embrace it.[57] The Service can do so, however, only with a dedicated research effort and a constantly engaged planning team empowered to redirect research efforts and to revisit resource management plans whenever data arrive that call into question present ways of doing business, and not just on specified multi-year schedules.

Aside from doing its own research and working with the National Biological Service, the Service needs to encourage affirmative work on park properties by other federal agencies, particularly the Fish and Wildlife Service and the EPA. To the extent that these agencies have research tasks to perform, the Service should invite them (and their contract researchers) to research within park units. The Service's water strategy should also bring in as many nonfederal researchers and data collectors as possible. On major installations, the Service might establish ecosystem study centers with multiple aims—educating park visitors (particularly local visitors), providing a reading or research center for interested parties, and coordinating research efforts by nonfederal parties. University researchers should receive enthusiastic invitations, and Service officials should draw upon university expertise through grants and research contracts when possible. Other groups should find warm welcomes as well, including volunteer environmental groups such as Riverwatch, the Audubon Society, and even high-school science classes and clubs and scout troops. Particular efforts should aim at bringing local people into the data-collection process, to learn more about park properties and become comfortable with technical data that otherwise appear esoteric and threatening.

C. *Responding to Ecological Ignorance*

One of the sobering realities that the Service faces in implementing a water strategy is the public's considerable ignorance on matters of ecological

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56. A good examination is KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993).

57. YAFFEE ET AL., *supra* note 43, at 37-38; THE KEYSTONE CTR., *supra* note 40, at 15-16; INTERAGENCY ECOSYSTEM REPORT, *supra* note 12, at 46-47; *see also* R. Edward Grumbine, *What is Ecosystem Management?*, 8 CONSERVATION BIOLOGY 1 (1994) (summarizing studies of ecosystem management and noting common embrace of adaptive management).

health.[58] Activities that a trained scientist can readily spot as harmful are often not seen that way by ordinary citizens. The gains of economic activities are usually apparent and readily grasped; the associated ecosystem costs are often hidden, and their long-term impacts underappreciated or missed entirely. Americans often rsent it when governments preach to them about "doing good." Citizens are far more receptive when actions cause palpable harms to themselves or to their social communities and local lands. We understand that we should not cause harm, and are more likely to change our ways and rethink competing options when harms are brought to our attention.

One of the main aims of a water strategy is to enlist public support for the attainment and maintenance of healthy waterways. This aim will take a great deal of patient, well-orchestrated work spread over decades and perhaps continuing forever. Ordinary people need not become ecologists, but they deserve more than vague generalizations. An important few will want to look closely at the scientific details. Far more of them will want the sense that the conclusions they hear are grounded in scientific fact, and they will listen when Park Service critics line up to challenge what the Service says. Education needs to take many forms, and needs to be directed toward diverse audiences from casual visitors to knowledgeable state officials.

As it pieces together an education program, the Service needs to aim high, realizing that it is not out for quick gains. Recent experiences with the Endangered Species Act ("ESA") offer some useful lessons. When the ESA came under attack, supporters felt pressed to respond with arguments that made immediate sense and that accepted the broad public audience as it was, in all its ecological ignorance. The chief arguments supporting the Act focused on the direct value of species to individuals, including their potential medicinal value. The arguments were utilitarian and anthropocentric. They did not require the listener to digest the concept of an ecological community, nor did they seriously press claims of intrinsic worth in the nonhuman sphere. A separate line of argument was aimed at conservative Christian voters, who were asked to link the ESA to biblical duties of stewardship for all parts of God's creation. As a whole, the pro-ESA argument did not promote ecological literacy because there simply was not time, or so it seemed.

Unlike defenders of the ESA, the Service is not under the gun to avert a looming legislative disaster. It can aim higher with its educational programs, and needs to do so. It needs to explain to people how their lives and fates are intertwined with the land around them. If people want healthy lives, if they want to leave a sound legacy for later generations, they need to promote the ecological integrity of surrounding natural areas. Little-known species are part of nature's fabric, playing roles that we little understand but contributing in some way, small or large, to the well being of the whole. The Service need not cover up valid debates on scientific issues, but it also need not be so "balanced" as to repeat every relevant view, regardless of merit.[59] Educational

58. A good critique, focused on the failings of our educational system, is DAVID W. ORR, ECOLOGICAL LITERACY: EDUCATION AND THE TRANSITION TO A POSTMODERN WORLD (1992).

59. The Service ought to be particularly aggressive in challenging anti-environmental views

programs should talk often about ecosystem management and watershed planning, with specific examples of what it can mean and how the lack of such planning and management has caused problems for the land and its human inhabitants. Scientific information needs translation into plain English, but the detail is important, too. A discrete but influential group of people will want to see it.

One of the most promising educational steps could be the creation of watershed or ecosystem study centers at key park facilities, aimed at public education and at the more focused educational and community planning needs of local people. An ecosystem study center might have public display rooms with maps, graphs, species distribution information, and samples of monitoring data, all aimed at getting people to understand how components of the landscape interrelate. Separate rooms might bring together data on local ecosystems, and serve as reference centers and meeting places for local people interested in working on the issue, including environmental groups, students, local government officials, developers, farmers, and others. Information, of course, is a potent tool. In this instance, information furthers the goals of the Service; ignorance, by and large, has the counter effect.

One final element on the matter of education: the Service would err hugely if it avoided or shortchanged matters of ethics and aesthetics and assumed that economics and self-interest alone rule the popular mind. It would err also by embracing a short-term perspective, as if people were solely interested in the here and now. People do care, of course, about economic options, and so should the Service. They do care about whether they can make ends meet tomorrow. Yet, when people get together to talk about their homes and consider the legacies they want to leave, they are quick to speak in terms of right and wrong and to lengthen their planning time-frames. In calm moments they talk about the beauty of the land and the hold it has on their imagination.

American culture took a sharp turn against nature a number of generations back, and it has had trouble reversing its course. Sometimes we still view nature as a stockpile of resources awaiting the human call to serve. We still divide animals into those we can eat or otherwise use directly, and the many others that are just part of the scenic background, enjoyable to watch so long as they stay out of the way. Many of us ask why a particular mussel or crustacean ought to hold up an otherwise appealing construction project. This strand of thought is both familiar and potent. Yet, it does not represent our only thought. With many people, these views reflect not so much disinterest in the environment as a desire to see proof; it is the popular show-me mentality. Ethics change over time, and a land ethic has begun to take root in the United States, shallow though it may be. Aesthetic sensibilities also change, and we are slowly coming to value the natural more than ever before. Ecological knowledge remains elementary, yet most of us do know that chemicals move

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based on an unrealistic and ethically misguided burden of proof—views that assume humans can reshape nature at will unless and until there is irrefutable proof of imminent harm. *See generally* ERIC T. FREYFOGLE, JUSTICE AND THE EARTH: IMAGES FOR OUR PLANETARY SURVIVAL (1993) (assessing possible responses to our ignorance of the nonhuman natural realm).

around, that waste does not disappear when the garbage truck leaves, and that erosion destroys reservoirs. The idea of interconnection is not an alien one.

This common, though elementary, understanding offers a foundation for educators to build on, scientifically, ethically, and aesthetically. With prodding and chances to think and speak, people can and do lengthen their planning horizons. They do let ethical judgments creep in. They know what humility is all about and why it is our prime virtue. They know that by acting together they can often do more than when they go their separate ways.

D. *Becoming a Responsible Neighbor*

Aside from talking and promoting its own cause, the Service needs to listen well and take seriously what it hears.[60] Local people degrade their natural homes with particular goals in mind. If the Service wants them to act differently, it can do so by helping them find less damaging ways of achieving their goals. Some alternatives will require technical help—finding alternative water supplies, developing water-conservation measures, or constructing new wetlands. Other alternatives will require money, and the Service can alleviate that need, not be putting up money itself (at least as a regular matter), but by lending support for money requests aimed elsewhere. On this general issue, the *Interagency Ecosystem Report* offers good advice.[61] Local people need a say in shaping the future of their natural home. The Service needs to help them do that, working as hard as it can to encourage ends and means that are consistent with sound water flows.

As it ventures more often into local communities, the Service needs to exercise caution. People soon look to it for every answer and blame it for all failed hopes. It should not promise what it cannot deliver. If local economic activities are simply unsustainable, the Service should not prop them up. If a waterway development project is unacceptably destructive, the Service needs to say so. Being a responsible neighbor does not mean acting as servant of local interests or endorsing every local desire; it means considering the well being of the whole and working to promote that well being, to the extent that this furthers the Service's water goal. Clashes are inevitable, particularly with irrigation projects and extraction operations that bring private gain at massive communal cost. The Service should not shy away from conflict. It should respond with compassion, sound science, and a clear articulation of values. It should seek common ground when feasible, and encourage others to do the same. Daniel Kemmis's much-cited book offers good insight on this issue.[62] It belongs on the shelf of every park superintendent and every community-relations employee.

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60. DANIEL KEMMIS, COMMUNITY AND THE POLITICS OF PLACE (1990) (providing a thoughtful critique of the typical government "hearing" process); Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996) (calling for reform in the context of the National Environmental Policy Act).

61. *See* INTERAGENCY ECOSYSTEM REPORT, *supra* note 12, at 34-39.

62. KEMMIS, *supra* note 60.

Two local needs will likely be so common that Service officials everywhere need to stand prepared to deal with them. Many communities will want to know about economic development, particularly how to deal with job losses in extractive industries and irrigated agriculture. Even more communities will need help with nonpoint-source pollution problems, including abandoned waste dumps and mining sites. If the Service can help deal with local problems like these, it will smooth considerably its own path.

III. WATER RIGHTS AND RESPONSIBILITIES

Years ago, when scholars talked about the water problems of the national parks, they began with the subject of water rights, and often traveled little beyond it. That mentality does more harm than good today, given how it shortchanges many matters and how it pushes so many problems onto the most contentious of terrains. Still, water rights count for a good deal today. The Service needs to think more about both its own water rights and those of others.[63]

The anti-government rhetoric that has arisen recently reaches its peak on matters of private property rights. Given this sensitivity, the Service needs a well-considered strategy for dealing with the matter. The centerpiece of the strategy, without question, ought to be the avoidance of framing an issue in terms of water quantity and priority whenever possible. A second element of the strategy, when quantification is unavoidable, should be a push for temporary deals and arrangements instead of specifications of perpetual water rights; a push, that is, for ad hoc truces that give the Service more time to progress on other parts of its strategy.

The Service's main concern is not with who *owns* water so much as with how water is *used*. The Service need not own massive water rights. Others may own them, so long as they use the water in ways consistent with the Service's long-term water goal. That outcome, to be sure, is more easily stated than achieved, and water rights problems will long prove annoying. Still, there is a useful distinction between ownership and use, just as there is a useful distinction between short-term compromises and long-term settlements. A focus on water use turns discussions to matters of water quality, biodiversity, flooding, and recreation. It turns the issue from abstract entitlements to real-life impacts of particular water uses—often damaging impacts, which current water users ought to explain.

In one form or another, the following elements should fit into the Service's water rights strategy:

Vigorous Assertion, only when needed—Given the sensitivity of property rights issues, the Service should rarely go out of its way to bring up the matter of water rights. Nonetheless, when dragged into court it ought to fight hard, asserting its rights vigorously. As it does so, it ought to make clear its own

63. Two useful studies are Charles F. Wilkinson, *Water Rights and the Duties of the National Park Service: A Call for Action at a Critical Juncture*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS, *supra* note 2, at 261; and Tarlock, *supra* note 2.

preference for other solutions, for temporary deals that do not require litigation and that leave room for later renegotiations. At present, the government does not enjoy the reputation of being a tough litigator on water rights issues. It needs to earn that reputation, if only to reduce the occasions when people challenge it.

Linkage to Goal—When the Service asserts its reserved water rights, it should claim ownership of water flows of sufficient quantity and quality to achieve its long-term water goal—the ecological health and integrity of waterways that flow through park units. Nonimpairment is a primary purpose of national parks, set forth clearly in the Service's charter. To the extent possible, the Service should tie its water rights directly into its charter language, and make little use of the individual statutes that gave rise to particular park units.[64] Rights based on the nation-wide charter are simpler to explain and litigate. Resulting precedents from one park unit are more readily applied to other park units. The exact quantity and quality of water needed to achieve nonimpairment will vary from unit to unit, and the Service today is far from having the scientific data in place to specify that quantity and quality, much less defend it against attack. One reason to prefer temporary deals rather than permanent quantifications is so that the Service might get its homework done. A few years from now it might be better able to defend itself.

Litigation Strategy—Service lawyers already know well the law on reserved water rights.[65] They are familiar with the many gaps in that law. The few reported appellate rulings addressing park waters hardly begin to provide a full picture of where things stand. Almost nothing is known about reserved water rights in wilderness areas and on waterways protected as wild or scenic rivers.[66] Little more is known about the water rights of park units not classified as national parks and national monuments.[67] Even in the case of true parks and monuments, the case law is modest and still subject to question. One particular need is to build precedents that counteract the damaging Colorado opinion dealing with Dinosaur National Monument.[68]

One of the Service's strategic aims should be to fill in the gaps in this law, and to do so by way of well-planned test cases. Outside the criminal

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64. This approach was embraced in the important Solicitor's Opinion, Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553, 595-602 (1979).

65. *Id.*; Federal Reserved Water Rights in Wilderness Areas, 96 Interior Dec. 211 (1988).

66. *See* Blumm, *supra* note 2, at 456, 458; *see generally* Brian E. Gray, *No Holier Temples: Protecting the National Parks Through Wild and Scenic River Designation*, *in* OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS, *supra* note 2, at 331; Federal Reserved Water Rights in Wilderness Areas, *supra* note 65. Existing federal policy may be under reconsideration. *See* Water Rights Under the Wilderness Act, 58 Fed. Reg. 68,629 (1993) (requesting public comment as to whether federal agencies should begin asserting reserved water rights for wilderness areas).

67. Blumm, *supra* note 2, at 460. The leading case on national monuments is *Cappaert v. United States*, 426 U.S. 128 (1976).

68. United States v. City and County of Denver, 656 P.2d 1, 27-29 (Colo. 1982) (rejecting instream flows for timber and watershed protection purposes; rejecting a 1960 priority date, based on the Multiple Use-Sustained Yeild Act, for nonconsumptive uses in a national forest; and rejecting flows for whitewater rafting in a national monument); *see also* Blumm, *supra* note 2, at 457; Wilkinson, *supra* note 63, at 267.

enforcement area, the federal government rarely mounts the kind of long-term litigation strategies that nonprofit groups have used to great effect. In this setting, it should do so. Given the hostility of many state courts to federal reserved rights, litigation should typically occur in federal courts, in districts where judges do not have known hostilities to either environmental protection or assertions of federal power. Federal courts are also preferable because their rulings are more persuasive to state courts around the country. The scope of reserved water rights is a question entirely of federal law; it is only proper that federal courts have a chance to explore that law.

Test cases should be brought with care. The background science and data must go beyond the ample to the unassailable. Water uses that are challenged should, ideally, be ones that can end without major losses of employment. They should also be ones involving pollution and uses of the waterways that otherwise disrupt ecosystems; the harm in such cases is easier for everyone to see. For years the Service has taken a relatively passive approach to water-rights issues, defending itself when necessary but rarely addressing the issue with vigor. That attitude needs to change. The Service needs to become, to use the word of the day, more pro-active;[69] it needs to fight hard in court, even while crafting a conciliatory, sympathetic face outside the courtroom.

Redefining Beneficial Use—Aside from protecting its own water rights, the Service needs to take a serious interest in state water law, particularly on the issue of beneficial use. Perhaps the most grave problem today in western water law is that it allows water owners to exercise their rights in ways that cause grave communal harm, by polluting, draining, and obstructing waterways to the detriment of aquatic life and human users.[70] The root problem is the out-of-date definition of beneficial use, which remains altogether too vigorous. By law, all water uses must be beneficial; in many states they also must be reasonable.[71] When diversions occurred a century or more ago, nearly every economic use of water was deemed beneficial. Today, many water uses are under siege, and rightfully so. Urban areas have higher priority uses for the water. More to the point, instream-flow values have risen sharply in prevailing value schemes; harms to these values have made many longstanding water uses appear patently unreasonable.

The Service needs to become involved in this issue. It needs to become a leader in the push to get "beneficial use" linked to water quality, aquatic life, and ecosystem integrity. Somehow, the idea of beneficial use has drifted away from any clear vision of communal well being. In practice, it is defined as beneficial to the user of the water, or beneficial in the abstract, without regard for its impacts on the stream. This kind of reasoning needs to find its way to the trash heap, and soon. Beneficial use needs to mean, overtly, beneficial to

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69. *See* VAIL AGENDA, *supra* note 6, at 26-30.

70. *See* Eric T. Freyfogle, *Water Rights and the Common Wealth*, 26 ENVTL. L. 27, 39-42 (1996).

71. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5.16 (1996). For an assessment of the beneficial-use doctrine in its early manifestation up to the advent of the age of environmentalism, see Frank J. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1 (1957-58).

the community, taking into account all ecological impacts.[72] It should link directly to state water-quality standards and to control measures aimed at reducing nonpoint-source water pollution. Beneficial use should also link to biological diversity and the implementation of recovery plans for threatened and endangered species. A common situation on many streams, of course, is to have numerous water users whose actions become deleterious only in combination, with no single user to blame. The better solution in such cases is for all users to make changes, yet the prior appropriation system already has a built in solution: when problems exist, junior users are the ones that get the blame; they are the ones who must change, absent another agreed-upon solution.

Although Service water rights are framed by federal law, the Service is directly and greatly affected by state water law. It cannot ignore the issue, as if it were someone else's business. By pushing hard on the issue of beneficial use—not alone, but together with environmental groups, recreational groups, cities, and others—it can help clean up rivers generally, thereby benefiting itself. The Service, to reiterate, does not need to own the water that flows through its units so long as the water does flow and is clean. The more water conservation and pollution reduction that occurs by dint of a tightened beneficial-use requirement, the less water the Service needs to own. As part of its water-rights litigation strategy, Service lawyers should prepare top-notch briefs on the issue of beneficial use, arguing for new definitions and backing their arguments with both sound science and opinion-poll evidence of shifting public values.

Softening Forfeiture Rules—One particular aspect of the beneficial-use issue is sufficiently knotty to merit special attention. One problem that state courts face when asked to redefine beneficial use is that they can do so only retroactively, or so they think. Under established precedent, an owner can only use water in ways that are beneficial, and any nonbeneficial use is illegitimate.[73] Under forfeiture and abandonment laws, a water user who has engaged only in a nonbeneficial use has lost his or her water right[74]—it simply does not exist, and the water owner has no chance to change to other uses. That outcome is harsh, and courts are understandably reluctant to impose it. That reluctance quickly turns into a reluctance to alter definitions of beneficial use, and so the old ideas linger on.

The Service should give courts a more attractive option. It should not insist that a finding of nonbeneficial use lead immediately to forfeiture.[75] The Service's argument instead should go something like this: (i) ideas of benefi-

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72. Freyfogle, *supra* note 70, at 42-46; David H. Getches, *Changing the River's Course: Western Water Policy Reform*, 26 ENVTL. L. 157, 161-63, 169-71 (1996). Thoughtful proposals for the reform of western water law are set forth in SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY (1993); *see generally America's Waters: A New Era of Sustainability: Report of the Long's Peak Working Group on National Water Policy*, 24 ENVTL. L. 125 (1994).

73. Freyfogle, *supra* note 70, at 43, 51 n.56.

74. TARLOCK, *supra* note 71, § 5.18.

75. Freyfogle, *supra* note 70, at 43, 51 n.56.

cial use change over time, and rightfully so; (ii) if a particular water use is now nonbeneficial, than the use must come to an end as soon as possible; (iii) the finding that a water use is nonbeneficial today, however, is not the same as saying that it was nonbeneficial in the past nor does it not mean the water owner has gone years without using the water beneficially; and (iv) given that no forfeiture has occurred, the water owner still controls the flow, and still has the chance to do something else with it—sell it, lease it, or shift to a use that is deemed beneficial.

The virtue of this approach is that it allows courts to change the law prospectively—a more palatable option, particularly when private property is at risk. By employing this strategy the Service can make clear that it is not out to grab water rights from private owners. It is out instead to end damaging water uses, for the common good; it is out to restore the health of waterways that many people share. As a side benefit, this approach could stimulate water markets, including water leasing, thereby aiding other elements of the Service's water strategy.

Keeping Options Open—In many settings, the Service's long-term goal will require significant changes in current water-use practices, changes that will not come quickly. In such settings, the Service needs to plot its course carefully, always striving for forward steps and avoiding settlements that endanger later progress. When disputes remain outside the courtroom, more flexibility is possible than when a matter comes down to a decision about perpetual private rights in precisely defined quantities. To be sure, even high-priority rights are subject to shifting definitions of beneficial use. Yet, the imprimatur of a court ruling, upholding a particular water use, gives it an aura of respectability. To avoid that problem and preserve future options, the Service ought to push for out-of-court deals, preferably temporary arrangements that nudge things along at a pace consistent with continued support from the local public.

An important part of such negotiated deals could well be leases of water flows, with the Service more likely a lessee but conceivably on either side.[76] Leases sit better with local communities than outright sales of water. Even when a private owner is willing to sell, water transfers can engender hostile reactions of a kind that the Service does not need. Leases might prove attractive as a way of avoiding protracted litigation. When the Service acquires water by way of a lease, the status quo changes. People get used to having the water left in the stream. Proponents of instream values become accustomed to the better conditions. The power of inertia shifts from the opposing side over to the Service, making more likely a permanent arrangement that improves a waterway's health.

For somewhat similar reasons the Service ought to become a strong proponent of water rights in the form of term permits. Although permits that last for twenty or forty or more years seem long, the Service is in business forever; it can be patient as long as progress is being made and irreversible harms

76. *See generally* Crammond, *supra* note 2 (discussing leasing possibilities and strategies).

(like species extinctions) do not happen in the meantime.

IV. WATER QUALITY

In the long run, water-quality issues are likely to prove more important for the Park Service than issues of water quantity. If states can clean their waters to the point where they support aquatic life and come somewhere close to the Clean Water Act's goal of zero discharges of pollutants,[77] the Service will be quite close to its own goal.

The literature on water-quality issues is extensive and useful, particularly the recent study of the Clean Water Act by key principals of the Natural Resources Defense Council.[78] Even more so than with water quantity, the Service's task today is to sift through the literature, identify potential courses of action, and put together a coherent strategy for improving water quality that makes scientific as well as political sense. Water quality is largely the domain of the states; little local regulation exists, and the federal role chiefly takes the form of providing guidance for implementation by the states. Except in coastal areas, the main legal engine for improving waterways is the Clean Water Act, which divides pollution-generating activities into point sources (mostly discrete pollution outfalls) and everything else—known as nonpoint sources.[79] The latter category is vast and includes such things as farm-field runoff, construction site runoff, timber harvesting, and atmospheric deposition. The rules that states put together to implement the Clean Water Act apply more or less in full to federal lands, including the National Parks.[80] Thus, water quality within the parks, and sources of water pollution within park boundaries, are fully subject to state law.

Prior scholarly discussions of water-quality issues have tended to focus disproportionately on the EPA's antidegradation policy, particularly the provisions in that policy aimed at protecting high-quality waterways—what the policy terms Outstanding National Resource Waters.[81] That issue is an important one, but so are many others. Attention to it should not undercut work on other matters that hold as much or more promise in reducing pollution loads and mitigating damaging land uses.

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77. 33 U.S.C. § 1251 (1994); *see* ADLER ET AL., *supra* note 2, at 6-9.

78. *See generally* ADLER ET AL., *supra* note 2.

79. *See* 33 U.S.C. § 1362(14) (1994) (setting forth the definition of point source); 33 U.S.C. § 1342 (requiring permit for point source discharges but not nonpoint discharges). Nonpoint source pollution issues are considered in Mandelker, *supra* note 42.

80. *See* 33 U.S.C. §§1323, 1370 (1994); Glicksman, *supra* note 42. Under the Clean Water Act, Indian tribes can also set water quality standards to the same extent as states. Those standards bind not just polluters on tribal lands, but upstream polluters as well. *See* City of Albuquerque v. Browner, 97 F.3d 415, 421-23 (10th Cir. 1996) (upholding tribal water quality standards that are more stringent than federal standards, including a standard protecting ceremonial uses of waters). Although the discussion in the text refers only to states, the Service should pay similar attention to water-quality work by tribes, which in particular settings could be even more useful allies than states.

81. *See* Barbara West, *The Clean Water Act and Other Tools for Managing Water Resources*, *in* MANAGING PARK SYSTEMS RESOURCES: A HANDBOOK ON LEGAL DUTIES, OPPORTUNITIES, AND TOOLS, *supra* note 2, at 67, 71-76; PARK WATERS IN PERIL, *supra* note 1, at 37-38.

In the Service's strategy for working with states to improve water quality, the following elements are likely to arise:

Monitoring by States—States need to increase considerably their monitoring of water flows and water quality, as well as their testing of effluent from key point sources.[82] Monitoring in many states is shockingly incomplete. Without more data, it simply is not possible to understand existing problems and bring polluters into account. The Service ought to push states on this issue. It can also help by improving its own monitoring, and piping results directly to state water-quality offices.

Screening NPDES Permits—The Service needs to identify major point sources of pollution that degrade park waters, and take an interest in the terms of their National Pollutant Discharge Elimination System (NPDES) permits. Many states are subject to considerable pressure from major polluters, and issue permits with unduly favorable terms. The Service can work with state officials on this point, collaboratively where possible but holding out the possibility of challenging a permit that is unduly lax. Given resource limitations, the Service cannot do this with many polluters, but it is a useful tool in selected settings. More broadly, the Service can push states to employ whole effluent testing (WET) methods[83] which more accurately and quickly determine the adverse biological impacts of particular effluent flows.[84]

Redefining Point Source—Most of the pollution reduction that has occurred across the country is traceable to tough limits on *point* sources. The control of *nonpoint* sources remains leisurely and haphazard.[85] One way of dealing with certain nonpoint-pollution generators is to reclassify them as point sources. The point-nonpoint line is a thin one, and precedent exists for phasing in point-source controls on former nonpoint polluters. In selected cases, the Service can take an interest in this project and encourage action by states and the federal EPA.

Water-Quality Standards—Every three years states revisit their water-quality standards and have the opportunity to amend them.[86] The Service needs to become involved in this process, both the designation of protected uses for particular waterways and the development of criteria and standards to protect those uses. The Service plainly has an interest in the quality of park waters, and it hardly seems out of line for it to encourage a state to designate the full range of possible uses, and set the highest water-quality standards, for waterways that flow through parks. Much of the most interesting work today on water-quality issues deals with biological criteria, used as supplements to or

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82. *See* ADLER ET AL., *supra* note 2, at 129-35 (criticizing spotty records by states on water-quality monitoring). States are obligated to undertake monitoring by 40 C.F.R. §130.4 (1996).

83. Houck, *Regulation of Toxic Pollutants*, *supra* note 42, at 10555-58.

84. ADLER ET AL., *supra* note 2, at 162 (noting limitations on whole effluent testing).

85. *See generally* Mandelker, *supra* note 42 (noting the poor record of states in dealing with nonpoint source pollution); Brian Weeks, *Trends in Regulation of Stormwater and Nonpoint Source Pollution*, 25 ENVTL. L. RPTR. NEWS & ANALYSIS 10300 (1995). Nonpoint source pollution now represents "the dominant fraction of the Nation's remaining surface water pollution problem." E.P.A., NONPOINT SOURCES: AGENDA FOR THE FUTURE 2 (1989).

86. 33 U.S.C. § 1313(c)(1) (1994).

even replacements for chemical and physical criteria.[87] Biology-based standards come in many forms. The Service ought to push for standards that take into account the particular needs of sensitive local aquatic species. Biological standards have many virtues, not the least being that they make more sense to ordinary people. Chemical standards expressed in numeric terms come across as abstract and arbitrary. It is easier to understand whether a particular river is or is not clean enough for fish and other aquatic species. The Service ought to become a leader in the development and implementation of biological water-quality standards, supplemented as needed with numeric limits on toxic pollutants.

Antidegradation—State water-quality standards include, as an important element, some version of the federal EPA's antidegradation policy, which states are obligated to embrace.[88] That policy protects all waterways, including those that meet or exceed prevailing water-quality standards. An important part of that policy is the strict protection of waterways designated as Outstanding National Resource Waterways (ONRWs).[89] As implemented, the federal policy gives states discretion in deciding whether a particular waterway does or does not deserve protection as an ONRW. Read literally, however, the EPA's regulations are much less clear; one obvious interpretation is that park waterways are automatically protected, without need for individual evaluation.

The antidegradation issue has drawn enough attention to need little comment at this point, except to reiterate its considerable potential. The Service ought to develop its own guidelines for identifying waterways that qualify for protection as ONRWs. Having done this, the Service can give the guidelines to the EPA for comment, and encourage the EPA to add the guidelines to its own antidegradation policy. Given that the antidegradation policy is a federal one, and given particularly that the ONRW designation is intended to protect waterways of *national* significance, it makes little sense to leave the matter to the discretion of each state. In the alternative, the Service ought to compile the needed data and studies and push states to designate its major waterways.

Nonpoint-Source Pollution—Many water-quality problems in park waterways are caused by nonpoint sources of pollution. Most states have done little to address this problem, largely because the federal government has not pushed them. Area-wide plans under sections 208 and 319 of the Clean Water Act often yield little more than demonstration projects and sporadic public education.[90] Congress remains worried about the problem, and has put the

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87. *See* Robert W. Adler, *Filling the Gaps in Water Quality Standards: Legal Perspectives on Biocriteria*, *in* BIOLOGICAL ASSESSMENT AND CRITERIA: TOOLS FOR WATER RESOURCE PLANNING AND DECISION MAKING, *supra* note 26, at 345 (discussing legal and scientific aspects); Houck, *Regulation of Toxic Pollutants*, *supra* note 42, at 10558-59.

88. *See* 40 C.F.R. § 131.12 (1996). The application of the policy to the Park Service is ably considered in WEST, *supra* note 81, at 71-76.

89. 40 C.F.R. § 131.12(a)(3) (1996).

90. *See* ADLER ET AL., *supra* note 2, ch. 6; Mandelker, *supra* note 42, at 498-501. Assessments by the EPA include: MANAGING NONPOINT SOURCE POLLUTION: FINAL REPORT TO CONGRESS ON SECTION 319 OF THE CLEAN WATER ACT (1992); SUMMARY OF CURRENT STATE NONPOINT SOURCE CONTROL PRACTICES FOR FORESTRY 6 (1993); E.P.A. SECTION 319 SUCCESS STORIES: A CLOSE-UP LOOK AT THE NATIONAL NONPOINT SOURCE POLLUTION CONTROL PRO-

item high on its legislative agenda. Current law pushes states to develop and promulgate best management practices (BMPs) for a wide range of chiefly land-use pollution-causing activities, but BMPs are largely voluntary and often inadequate.[91] The Service needs to push states to take more serious steps, including the development of enforceable BMPs. Useful sources for guidance are the plans being developed for coastal areas under the 1990 amendments to the Coastal Zone Management Act.[92] Those amendments direct states to implement the "best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives."[93] These new control practices will apply directly to park waters in coastal areas. Elsewhere, the amendments could serve as models for tightening control methods under sections 208 and 319 of the Clean Water Act.[94]

In recent years the EPA, prodded by environmental groups, has taken a different tack on nonpoint-source pollution issues. Section 303(d) of the Clean Water Act requires states to identify stream segments that cannot, without further action, meet water-quality standards.[95] Once designated, these water-quality limited segments (WQLSs) are studied further to calculate the total amount of a given pollutant that each segment can handle each day and still comply with applicable standards, including (significantly) antidegradation standards. These calculations of total maximum daily loads (TMDLs), once made, become legal limits on the maximum amount of pollution that can enter into the waterway. Once it completes a TMDL calculation, the state then must make a tough allocation decision: who gets to keep polluting, and who must cut back. Under current EPA guidance, the place to begin the cutbacks is with point-source polluters.[96] A state cannot plan on cutbacks from nonpoint sources—thereby allowing point sources to continue polluting at higher levels—unless the nonpoint sources are subject to *enforceable* BMPs or other pollution-control limits. In states where limits on nonpoint sources are merely voluntary, point-source polluters are in serious danger.

Environmental groups and the EPA have taken a strong interest in the

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GRAM (1994).

91. *See* Mandelker, *supra* note 42, at 483-85.

92. 16 U.S.C. §§ 1451-1464 (1994).

93. 16 U.S.C. § 1455b(g)(5).

94. ADLER ET AL., *supra* note 2, at 191-93; *see generally* Perrin Q. Dargan III, *Staking Out New Territory: CZMA Reauthorization Amendments*, 9 Nat. Resources & Env't 32 (1995) (discussing the nonpoint pollution control programs required by the 1990 Amendments).

95. *See* 33 U.S.C. § 1313(d)(1) (1994). The EPA's power to enforce this provision against the states was upheld in Scott v. City of Hammond, 741 F.2d 992, 996-98 (7th Cir. 1984). An illustration of recent interest in the provision by environmental groups is Sierra Club v. Hankinson, 939 F. Supp. 865 (N.D. Ga. 1996) (successfully forcing EPA to disallow Georgia's lax schedule for making TMDL calculations and compelling the EPA to intervene).

96. *See* 40 C.F.R. § 130.7 (1996) (setting forth general procedures for TMDL calculations); E.P.A., GUIDANCE FOR WATER QUALITY-BASED DECISIONS: THE TMDL PROCESS 2, 15, 24 (1991) (allowing reduced allocations for nonpoint sources only if there are "specific assurances" that such sources will reduce their pollution). Aside from this rule, the EPA has given little guidance on the highly political act of determining which pollution sources will reduce, and by how much. 2 LAW OF ENVIRONMENTAL PROTECTION § 12.05(3)(c)(i)(B), at 12-116 (Sheldon M. Nozick et al. eds., 1996). A recent decision involving TMDL calculations on a waterway traversing federal land is Idaho Conservation League v. Thomas, 91 F.3d 1345 (9th Cir. 1996).

TMDL calculation and allocation process because it holds out the promise of accomplishing what has long remained elusive—putting real pressure on states to deal with nonpoint-source pollution. If a state does not designate its WQLSs, the EPA can and must do so instead. If a state does not then proceed to calculate TMDLs for each section, the EPA again can act. If, once a TMDL calculation is made, a state fails to divide the overall load among the various pollution sources, thereby identifying which pollution types must cut back, the EPA can intervene. As cutbacks become imminent, a decidedly potent force is likely to join forces against nonpoint sources: the point-source polluters themselves.[97] Faced with the prospect of drastic cutbacks, point-source polluters will have an incentive to push state officials on this issue. If a state does not get tough with nonpoint-source polluters, the point-source polluters themselves will inevitably suffer.

The Service has good reason to become involved in this entire process, and soon. It can do so by starting with its own waters—identifying those that have water-quality violations and making, on the states' behalf, the needed TMDL calculations. This information should all go to the state for incorporation into state water-quality plans. TMDL calculations are also needed on waterways that satisfy basic water-quality standards, given that the same process is used to implement antidegradation policies. Once the Service has exact information on existing pollution loads for its waterways, it can step forward and comment or complain when a new pollution source, including a nonpoint source, threatens to diminish existing water quality to any appreciable degree.

Other State Laws—Some states have dealt with nonpoint-source pollution problems more selectively, by adopting laws that address particular pollution sources or that attempt to buffer pollution once it is generated. Streamside-protection laws provide examples of this approach, as do forestry practices statutes.[98] State laws like these hold considerable promise for improving water quality. As part of its overall water strategy, the Service ought to encourage states to consider them.

Section 401 Power—A final tool states have to improve water quality is their power to veto any federal license or permit if the action being authorized is inconsistent with state water-quality standards. This power, contained in Section 401 of the Clean Water Act,[99] has gained heightened attention as a result of the Supreme Court's decision in *PUD No.1 v. Washington Department of Ecology*,[100] which interpreted the statute so as to give states broad powers over federal actions, including federal licenses governing dams and

97. Oregon is one state in which point-source polluters have begun to awaken to the potential impacts of the TMDL allocation process, and to their consequent need to pay attention to limits on nonpoint sources of pollution. Tom Alkire, *Final 303(d) CWA List Released; Next Step is Development of TMDLs*, STATE ENV'T DAILY (BNA), July 18, 1996.

98. *See* Montana Streamside Management Act, MONT. CODE ANN. §§ 77-5-301 to -307 (1995); Oregon Forest Practices Act, OR. REV. STAT. §§ 527.610 to 527.770, 527.990(1), 527.992 (1994). Another category of limited-purpose statutes is illustrated by North Carolina's Sedimentation Pollution Control Act of 1973, N.C. GEN. STAT. §§ 113A-50 to -66 (1994).

99. *See* 33 U.S.C. § 1341(a) (1994).

100. 114 S. Ct. 1900 (1994). A thoughtful consideration is Donahue, *supra* note 42.

other hydropower projects.[101] The statute has gained additional visibility because of a recent federal district court ruling that applied the section to a grazing permit issued by the Forest Service.[102] If that ruling stands, states could exercise broad powers over a wide variety of pollution-causing activities on federal lands, including timber harvesting, grazing, mining, and oil and gas development.

Most federal agencies will likely react with concern or alarm to this enlargement of state power under section 401. The Service, on the other hand, has good reason to smile. Working with state water-quality officials it can challenge pollution-generating activities undertaken by other federal agencies and press them to make changes aimed at protecting water flows. Some of the worst pollution problems in western waterways come from federal lands, and the Service to date has had no good way to deal with them. Section 401 offers new hope, albeit hope that depends on the policy decisions of state officials who will often favor the very activities that give rise to the pollution.

V. BIODIVERSITY

The final prong of the Service's water strategy should focus on the protection and recovery of imperiled aquatic species, particularly species listed under the Endangered Species Act.[103] Many species are imperiled because of alterations to their habitats—disruptions of flow regimes, diversions, changes in sedimentation, alterations of stream vegetation and obstructions, changes in temperature, and other forms of pollution. Legal protections for such species provide a potent tool for the Service in achieving its long-term goal. Indeed, if all native species were protected to the point of flourishing, the goal would likely be met.

Like the other legal regimes that implicate park waters, the Endangered Species Act (ESA) is a well-known, well-studied body of law. Service lawyers and biologists are already familiar with the ESA and rightfully so, given that the nonimpairment duty in the Service's charter plainly has a great deal to do with the protection of native plant and animal species. Under section 7(a)(1) of the ESA,[104] the Service is obligated to use its powers to further the purposes of the ESA, which are the "conservation" of listed species and the protection of the ecosystems on which those species depend.[105] Conservation means the recovery of a species to the point where it no longer needs protection under the ESA.[106] The general duty to conserve, set forth in section 7(a)(1), is vaguely phrased yet potent, particularly as applied to an agency like the Service that has few if any obligations in conflict with the goals of the Act. The

101. *PUD*, 114 S.Ct. at 1914.

102. Oregon Natural Desert Ass'n. v. Thomas, 940 F. Supp. 1534, 1541 (D. Or. 1996) (concluding that cattle grazing that resulted in water pollution amounted to a "discharge" of pollution within the meaning of the CWA, hence triggering duty of permit applicant to get certification from state under Section 401).

103. 16 U.S.C. §§ 1531-1544 (1994).

104. 16 U.S.C. § 1536(a)(1).

105. *See* 16 U.S.C. § 1531(b).

106. 16 U.S.C. § 1532(3).

breadth of this language and its mandatory tone have led one scholar to call Section 7(a)(1) the "sleeping giant" of the ESA, a provision that "has the potential to eclipse all other ESA programs."[107]

An important step in clarifying and implementing section 7(a)(1) was taken in 1994, when various federal agencies (including the Service) entered into a Memorandum of Understanding (MOU) covering their responsibilities under the ESA.[108] There, the Service agreed to carry out programs for the conservation of listed species, including implementing appropriate recovery actions specified in the plans for listed species.[109] The MOU called upon agencies to work cooperatively, through regional working groups, and to develop and implement recovery plans on an ecosystem basis. According to one commentator, this MOU appears to translate the section 7(a)(1) duty of each signatory agency into an affirmative obligation to implement recovery plans and other conservation agreements.[110] Another scholar has argued that section 7(a)(1), even aside from the new MOU, is best understood as imposing such an affirmative obligation directly, along with a more broad obligation to engage in multi-jurisdictional, cooperative planning based on sound ecological science.[111]

The Service ought to draw upon this MOU not just to bolster the authority underlying its own species conservation efforts, but to call other federal agencies to task, principally the Forest Service and BLM, since they too have pledged to perform the same work. Recovery plans for aquatic species will often amount to recovery plans for park waters.

As it works vigorously on endangered species issues, the Service needs to take an interest in all aspects of the ESA process, from the identification and study of individual species considered for listing to the monitoring and revision of recovery plans. The Fish and Wildlife Service (FWS) has too few resources to study promptly all species that are candidates for listing. The Service ought to help do that work in the case of species on or near park lands, particularly aquatic species. When it gains evidence about a species, it should not delay in bringing that evidence to the attention of the FWS (or National Marine Fisheries Service, in appropriate cases), and pushing for prompt listing. It should also encourage the FWS to designate park lands and park waterways as critical habitat under the ESA—a move that, in practice, increases its protection against direct and indirect degradation.[112] Private and public landowners, by and large, resist critical habitat designations, but designation can help the Service considerably, and it has good reason to support it.

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107. Ruhl, *supra* note 42, at 1109-10.

108. Memorandum of Understanding Between Federal Agencies on Implementation of the Endangered Species Act Signed Sept. 28, 1994, [July-Dec.] Daily Env't Rep. (BNA) No. 188, at E-1 (Sept. 30, 1994) [hereinafter MOU]. *See also* Ruhl, *supra* note 42 (discussing the MOU).

109. MOU, *supra* note 108, § III.A.1.

110. *See* Ruhl, *supra* note 42, at 1111, 1145.

111. *See* Cheever, *supra* note 42, at 59-60.

112. The role of critical habitat is considered in Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVTL. L. 811 (1990). A particularly penetrating critique of the implementation of the ESA, including the significant underprotection of critical habitat, is Houck, *Endangered Species Act*, *supra* note 42.

Under section 7(a)(2) of the ESA, federal agencies must avoid actions that jeopardize the continued existence of listed and proposed species, and they must consult with the FWS about the likely impacts of a proposed course of conduct before undertaking it.[113] Such consultations are not public affairs, which grieves environmental groups considerably. Yet, the Service ought to have sufficient influence to become actively involved in any consultation, by any agency, that could affect park properties, including its waterways. It should stick its nose in, even if uninvited. The 1994 MOU expressly calls for interagency cooperation, as does the recent *Interagency Ecosystem Report.* The Service has a legitimate interest that needs protecting.

Aside from monitoring and participating in ESA consultations, the Service ought to take an interest in the enforcement of the ban against takings of listed species[114] by federal agencies and private parties, particularly in the form of water diversions, flow disruptions, riparian habitat destruction, and pollution. Takings can occur by way of habitat alterations.[115] The Service need not become unduly confrontational, filing suit whenever it spots potentially damaging conduct; it should be quick to knock on doors and express its desire for modifications that are less damaging to waterway integrity.

The implementation of the ESA in recent years has come to focus increasingly on area-wide conservation planning activities aimed at protecting multiple species, including proposed and candidate species.[116] Some of that planning is done by federal agencies under section 7(a); other planning is conducted by private parties under section 10 in an effort to avoid takings of listed species and to gain permission to engage in incidental takings of species.[117] The section 10 planning work—known as habitat conservation planning—has become particularly popular as the FWS has streamlined processes in an attempt to give the ESA greater flexibility.[118] Area-wide planning offers per-

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113. *See* 16 U.S.C. § 1536(a)(2).

114. *See* 16 U.S.C. § 1538(a)(1)(B).

115. The definition of "take" includes actions that "harm" listed species. 16 U.S.C. § 1532(19) (1994). The term "harm" includes "significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (1996). The validity of this regulation was sustained against a facial challenge in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2412-16 (1995). A case that extends the regulation to its limit, if not beyond, is Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 788 (9th Cir. 1995) (taking occurs where timber harvesting would disrupt breeding of a single pair of endangered owls).

116. *See generally* U.S. C.E.Q., LINKING ECOSYSTEMS AND BIODIVERSITY (1992); U.S. Dept. of Interior, Protecting America's Living Heritage: A Fair, Cooperative and Scientifically Sound Approach to Improving the Endangered Species Act, March 6, 1995; MOU, *supra* note 108.

117. *See* MICHAEL BEAN ET AL., RECONCILING CONFLICTS UNDER THE ESA: THE HCP EXPERIENCE (1991); TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING (1994); Christopher H.M. Carter, Comment, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENVTL. AFF. L. REV. 135 (1991); Lindell L. Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm for Conserving Biological Diversity*, 8 TUL. ENVTL. L.J. 97 (1994).

118. *See, e.g.*, U.S. FISH & WILDLIFE SERVICE, HANDBOOK FOR HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING (1996); Eric Fisher, Comment, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371 (1996); Albert C. Lin, Comment, *Participants' Experiences with*

haps the greatest hope for the protection of species. The Service ought to be right in the middle of this work, helping bring parties together, giving them technical support and encouragement, and reviewing draft plans to ensure that they make enough progress toward the relevant goals. Aside from the Service's direct interest in the species themselves, habitat conservation planning can greatly aid waterway integrity; it deserves a central spot in the Service's long-term strategy.

One of the chief complaints against the ESA in recent years has been its allegedly harsh impact on private lands. That complaint could lead Congress and the executive branch to look even more closely at federal lands for the promotion of imperiled species. Indeed, the protection of such species could well become one of the most vital ecological functions of many categories of federal lands, including the parks. The Service ought to welcome such a shift—not just because it would give heightened value to the Service and its activities but because it could lead agencies like the Forest Service and BLM to give the matter high priority, to the ultimate benefit of parks.

Finally, no species protection effort is likely to get far without a well-funded education program, and no federal agency is better equipped to do than work that the Service. People who visit parks are often interested in learning about nature, and the public has a particularly strong interest in stories about rare species. Efforts to promote waterway health can play upon this interest, explaining the needs of particular species in terms of water flow, water quality, temperature, instream habitat, and the like, and describing efforts to protect those species. The stories of individual species can bring a waterway protection plan to life. It can give a plan faces—albeit nonhuman faces—that will benefit immediately if a waterway regains its health.

VI. A CONCLUDING WORD

The above suggestions, broad and costly as they are, do not cover all matters that need attention in a well-crafted water strategy for park system waters. Other matters, more narrow yet vital, also need a place—like a plan for dealing with the relicensing of hydropower projects, a plan for gaining greater say in dredge-and-fill permits issued by the Corps of Engineers under section 404 of the Clean Water Act, and the definition of reasonable use under riparian water-rights schemes. These subjects and others have natural places in the strategy, once the Service puts together its long-term goal and gets serious about promoting it. The nonhuman natural realm has great resilience to it, and park waterways can recover much of what they have lost. The Service's strategic plan need not rely on quick action; it can spread work out over time, thereby softening economic impacts and allowing public knowledge and values to advance. Yet, time is an ally only if the Service becomes far more serious than it has been about protecting park waters. The legal tools for moving

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Habitat Conservation Plans and Suggestions for Streamlining the Process, 23 ECOLOGY L.Q. 369 (1996).

ahead are many; vast new statutes are not needed. More than legal change, the Service needs courage and vision. Without that, park waters will continue their slide.

NATIONAL PARKS AND THE RECREATION RESOURCE

JAN G. LAITOS*

National Parks are a favorite destination of American tourists and international visitors. The popularity of the National Parks of America is an outgrowth of the rising popularity of recreation in general, and outdoor recreation in particular. Recreation is a significant industry in the United States,[1] and the National Parks have reflected America's interest in outdoor recreation by recording a steady increase in recreational visits over the past few decades.[2] National Parks are also a category of land within the public lands owned by the United States, which themselves have become areas where recreation is the most popular, and dominant, federal land use.[3]

This recreational pressure on National Parks has important implications for the long-term management of park resources. If the recreation resource is dominant within National Parks, then the competing use for these lands—preservation—is jeopardized.[4] If human recreation is overwhelming the Parks' infrastructure, then the case for biocentric ecosystem management within the National Parks is weakened.[5] If the United States Congress provides neither a fee structure nor an annual appropriation amount that keeps up with recreational demands for National Parks, then the very viability of these parklands is threatened. This essay examines how recreation has grown as a use of leisure time, how the public lands (and National Parks) have increasingly become the prime destination of those wishing to enjoy an outdoor experience, and how the resulting dominant recreation resource will shape fundamental management policies for national parklands.

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1. *See generally* ZBIGNIEW MIECZKOWSKI, 3 WORLD TRENDS IN TOURISM AND RECREATION 78-80 (Am. Univ. Studies Series XXV Geography, 1990); DOUGLAS M. KNUDSON, OUTDOOR RECREATION 72 (1980) (discussing the increase internationally in expenditures for recreation).

2. CHARLES I. ZINSER, OUTDOOR RECREATION: UNITED STATES NATIONAL PARKS, FORESTS, AND PUBLIC LANDS 89-90 (1995).

3. 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §17.01 (1996).

4. 16 U.S.C. § 1 (1994).

5. *See generally* WAYNE A. MORRISSEY ET AL., LIBRARY OF CONGRESS, CRS REPORT FOR CONGRESS: ECOSYSTEM MANAGEMENT: FEDERAL AGENCY ACTIVITIES (1994) (discussing the philosophy of the Park Service toward ecosystem management) [hereinafter MORRISSEY].

I. THE RECREATION RESOURCE

By the end of the twentieth century, public willingness to use leisure time for outdoor recreation had reached an all-time high. The North American tourism industry was among the fastest growing in the world. Americans were spending more of their disposable income on leisure pursuits and recreation activities.[6] Recreation was increasingly seen not as a luxury, but as a necessity of modern life.[7] Such widespread interest in recreation will obviously have an effect on our National Parks.

A. *The Preconditions to Recreation*

Before recreation can become popular, certain preconditions must be present. If these do not exist, recreation will be a relatively unimportant feature of a society's activities. At the turn of the twentieth century, all these preconditions were present in America, and recreation was thriving.

For recreation to establish a foothold in a society's consciousness, the people of that society must have the time to spend on recreational activities.[8] Economic, technological, and social progress have all increased the amount of leisure time that Americans enjoy.[9] The average American worker has as much as forty hours of free time every week.[10] This time is not spent on second jobs, but on leisure. One of the most popular leisure pursuits is recreation during vacationing.[11]

A second precondition is sufficient discretionary income to spend on recreation. By the latter half of the twentieth century, the United States enjoyed a large middle class.[12] This segment of the population was able to afford home ownership, food, clothing, and schooling, and still have disposable income available for recreation.[13] This income has been largely devoted to recreational spending.[14] Interest in recreation is not confined to America's middle class. Upper income families spend much of their disposable income on more expensive activities, such as skiing, while lower income groups spend money on less expensive recreational activities, such as hiking.[15] Better retirement plans and

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6. MIECZKOWSKI, *supra* note 1, at 78; KNUDSON, *supra* note 1, at 70-72. *See* Jim Spring, *Seven Days of Play*, AM. DEMOGRAPHICS, March 1993, at 50 (breaking down how Americans spend their duty free hours on a daily basis).

7. MIECZKOWSKI, *supra* note 1, at 80.

8. MIECZKOWSKI, *supra* note 1, at 81-82.

9. *Id.* at 83.

10. Spring, *supra* note 6, at 50. *See generally* KNUDSON, *supra* note 1, at 72 (documenting a dramatic growth in the amount of leisure time in America, following the turn of the century).

11. ZINSER, *supra* note 2, at 3-4. *See generally* MIECZKOWSKI, *supra* note 1, at 97-98 (discussing trends in vacation time).

12. MIECZKOWSKI, *supra* note 1, at 77-78.

13. *See* MIECZKOWSKI, *supra* note 1, at 78; KNUDSON, *supra* note 1, at 70-71.

14. Elia Kacapyr, *Jumping for Joy*, AM. DEMOGRAPHICS, June 1996, at 10. *See* CHARLES J. CICCHETTI, FORECASTING RECREATION IN THE UNITED STATES 80 (1973) (finding a correlation between family income and income-related variables, such as home ownership, and participation in certain recreational activities).

15. ZINSER, *supra* note 2, at 5. *See generally* CICCHETTI, *supra* note 14, at 80, 86 (discussing the correlation between family income and income related variables).

pensions also allow the elderly to spend their money on recreation.[16]

Better education and access to medical care enhance the opportunities for a society to pursue recreation. Education opportunities are more available to American citizens, and educated workers are more likely to engage in outdoor recreational activities, particularly those considered strenuous.[17] Healthier lifestyles and better medical care allow individuals to enter the outdoors and participate in sports that require fitness, such as skiing, backpacking, hiking, swimming, and river rafting. Good health permits older persons to enjoy recreation for a longer time span.[18]

Another precondition to recreation is good, efficient, affordable, convenient transportation.[19] When such transportation exists, people will travel great distances to enjoy recreation.[20] The ubiquitous automobile and interstate highway system provide this transportation to the American public.[21] So too does the airline industry.[22] Every year millions of Americans drive their cars or fly in airplanes to their recreation destinations.[23]

Finally, for outdoor recreation to become a preferred use of leisure time, individuals must appreciate the aesthetic and environmental qualities of nature. By the latter half of the twentieth century, Americans had a strong environmental awareness and a love for unspoiled nature. For example, in one poll, most westerners stated that they enjoyed outdoor recreation because of "an appreciation of nature."[24] Concern for the natural environment extended to wildlife. For many communities, the economic impact of wildlife viewing may even surpass consumptive uses of wildlife, such as hunting and fishing.[25]

B. *The Growing Popularity of Outdoor Recreation*

Since all the preconditions to recreation have been met, it is not surprising that Americans believe that recreation is a necessity of life, and that recreational opportunities should be provided to the general public.[26] Outdoor recreation is particularly popular, especially among persons living in the West.[27] Indeed, nearly three-fourths of all Americans consider outdoor recreation to be a priority in their lives,[28] and two-thirds of all Americans participate yearly in

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16. MIECZKOWSKI, *supra* note 1, at 160.
17. *Id.* at 165; KNUDSON, *supra* note 1, at 77.
18. *See* MIECZKOWSKI, *supra* note 1, at 160.
19. *Id.* at 100.
20. *Id.* at 108.
21. ZINSER, *supra* note 2, at 5.
22. MIECZKOWSKI, *supra* note 1, at 108.
23. *Id.*
24. Paul McHugh, *Outdoor Recreation Participation is Up*, S.F. CHRON., May 4, 1995, at D7.
25. MIECZKOWSKI, *supra* note 1, at 239.
26. *See* David E. Gray & Seymour Greben, *Future Perspectives*, *in* LAND AND LEISURE: CONCEPTS AND METHODS IN OUTDOOR RECREATION (Carlton S. Van Doren et al. eds., 2d ed. 1979) [hereinafter Gray & Greben].
27. McHugh, *supra* note 24.
28. Mary Klaus, *Group Says Campers on the Rise*, HARRISBURG PATRIOT & EVENING NEWS (Pa.), March 26, 1995, at F1.

outdoor recreational activities.[29] The Outdoor Recreation Coalition of America confirms that there has been an enormous increase in outdoor recreation in recent years,[30] caused in part by an influx of international visitors.[31]

Several outdoor recreational activities tend to be preferred by the public. General hiking is the fastest growing form of outdoor recreation.[32] Bicycling is quite popular, too, particularly mountain biking.[33] Nearly one-third of Americans consider camping a favorite recreational activity.[34] Even birdwatching is cited by one in five Americans as an enjoyable outdoor sport.[35]

II. NATIONAL PARKS AS A RECREATION DESTINATION

A. *Recreation on the Public Lands*

Recreation is a permissible use of all federally owned land. Applicable federal statutes permit recreation as the only human use in wilderness areas,[36] and recreation is deemed to be an important secondary use of national wildlife refuges.[37] Recreation is a coequal multiple use of national forests,[38] and a principal multiple use of Bureau of Land Management (BLM) lands.[39] Within National Parks, recreation and preservation are the two dominant park system purposes.[40] On public lands, recreation is by statute a preferred value. It has also become, by actual use, a resource equivalent to the more conventional commodity resources (timber, minerals, water, rangeland) found there.[41]

Since outdoor recreation is experiencing unprecedented growth, one could ask where all this activity is taking place. Those who are responsible for this growth wish to travel to locations where their recreational time will be spent on lands with a relatively pristine natural environment.[42] Public lands, especially National Parks, wilderness areas, National Forests, and BLM lands, provide such an environment. Americans interested in outdoor recreation are in-

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29. *Daybreak-Recreation & Fitness*, SALT LAKE TRIB., May 21, 1995, at G3.

30. Michael Levy, *Environment, Public Land Laws Under Attack*, BUFFALO NEWS, May 9, 1996, at F5.

31. 2 WORLD TRAVEL AND TOURISM REVIEW: INDICATORS, TRENDS AND ISSUES 74 (J.R. Brent Ritchie et. al. eds., 1992). In 1991, the United States received more international visitors than any country, with the exception of France. *Id.* The United States tourist/travel industry is a $417 billion business. COGGINS & GLICKSMAN, *supra* note 3, at 17-2 n.4.

32. *See* John Harmon, *Building the Outback*, ATLANTA CONST., Sept. 10, 1995, at H5.

33. Catherine Salfino, *Outdoor Sports Having a Field Day*, DAILY NEWS REC., Aug. 16, 1993, at 25.

34. Klaus, *supra* note 28.

35. Lyn Dobrin, *Friends on the Wing*, NEWSDAY, Nov. 10, 1995, at B5.

36. 16 U.S.C. § 1133(d)(5) (1994).

37. 16 U.S.C. § 668dd (1994).

38. 16 U.S.C. § 528 (1994).

39. 43 U.S.C. § 1702(c) (1994).

40. 16 U.S.C. § 1 (1994). *Cappaert v. U.S.*, 426 U.S. 128 (1976) (stating that preservation is a primary purpose of the national parks).

41. *See* COGGINS & GLICKSMAN, *supra* note 3.

42. RONALD A. FORESTA, AMERICA'S NATURAL PARKS AND THEIR KEEPERS 97 (Ruth B. Hass ed. 1984).

creasingly turning to these federal lands as their recreation destination.[43] These lands are located primarily in the Intermountain West.[44] It is in the West that recreational opportunities are in large part responsible for the economic and population growth experienced there over the past few decades.[45]

B. *Recreation in National Parks*

There are over forty million acres of National Park lands available for recreational opportunities.[46] Americans and foreign visitors, who are certainly aware of the availability of these opportunities in National Parks, have collectively decided to spend much of their outdoor leisure time there.[47] As a result, there is much demand for recreation on national park lands.[48] Recreational visits to the National Parks have increased steadily and dramatically. In 1904, the first year accurate records were kept, 121,00 people visited National Parks.[49] In 1950, the number of visitors had reached 33 million,[50] and by 1995 the National Parks were experiencing nearly 270 million recreational visits per year.[51]

People participate in virtually every outdoor recreational activity imaginable on federal park lands.[52] Perhaps because National Parks provide a pristine environment relatively unaffected by civilization, recreationalists go to them to enjoy largely natural conditions. They visit the deserts, rainforests, grasslands, canyons, and mountains of National Parks in order to more fully appreciate a truly natural environment.[53] Since the Park Service is also responsible for the preservation of historic and cultural values, some recreationalists at National Parks are amateur archaeologists or historians.[54] For many persons, recreation in federal parks is a way to regenerate "spiritual and emotional well-being."[55]

Whether the recreation is based on a back-to-nature desire, or scientific

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43. *American Survey*, ECONOMIST, Dec. 23, 1995 - Jan. 5, 1996, at 31, 33; Harmon, *supra* note 30; *Federal Lands Concessions Reform: Hearings on H.R. 1527 & 2028 Before the Subcomm. on Nat'l Parks, Forests, and Lands of the House Comm. on Resources*, 104th Cong. 32 (1995) (testimony of David G. Unger, Associate Chief, Forest Service).

44. *See* ZINSER, *supra* note 2, at 85-89.

45. *See generally* Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Public Lands*, 65 U. COLO. L. REV. 369 (1994) (examining the economic role that public lands play in the Western United States).

46. DYAN ZASLOWSKY & THE WILDERNESS SOCIETY, THESE AMERICAN LANDS 10 (1986) [hereinafter ZASLOWSKY].

47. *See* Edward O. Wilson, *The Environmental Ethic*, 3 HASTINGS W-N.W.J. ENVTL. L. & POLICY 327, 331 (1996).

48. *See* FORESTA, *supra* note 42, at 29.

49. ZINSER, *supra* note 2, at 89.

50. *Id.*

51. Nat'l Park Serv., U.S. Dep't Interior, National Park Service Recreation Visits (1995) (intern document from the Nat'l Park Serv. Socio-Econ. Studies Div.) [hereinafter Recreation Visits].

52. LILLIAN B. MORAVA & MICKEY LITTLE, CAMPER'S GUIDE TO U.S. NATIONAL PARKS: VOLUME 1: WEST OF THE ROCKIES 1 (1993).

53. FORESTA, *supra* note 42, at 97.

54. *See* KNUDSON, *supra* note 1, at 239, 270.

55. ZASLOWSKY, *supra* note 46, at 35.

curiosity, or a semireligious need to better understand oneself amidst beautiful surroundings, people are coming to National Parks in greater numbers. The effects of this surge in recreational demand are not insignificant.

III. RECREATION IN NATIONAL PARKS: IMPLICATIONS AND NEGATIVE CONSEQUENCES

All this recreational pressure on the nation's park system has yielded severe consequences for park lands, which in turn may require a rethinking for how National Parks should be funded and managed. Increasing numbers of tourists and recreationalists in National Parks have produced three important issues that must soon be addressed by policy-makers: (1) Is there sufficient funding to permit the National Parks to cope with the rising tide of recreational interest? (2) Has recreation overwhelmed preservation as the dominant use in National Parks? (3) What implications does a dominant recreation use have for ecosystem management within National Parks?

A. *National Parks: Overused but Underfunded*

Without sufficient funding, heavily used federal park lands will likely deteriorate irreparably. Yet, despite this reality, current federal policy not only encourages excessive use, it has also failed to pay for the costs incurred by the Park Service as a result of this increased pressure put on National Parks.[56] Indeed, access to park system lands is intentionally made easy by federal law. Access to such lands is even subsidized.[57] But, as will be seen below, the logical consequence of this effort by the federal government to lure people (and recreationalists) to National Parks—overuse—is not being taken into account when the federal government makes funding decisions.

1. Easy Access

Two developments have facilitated easy access to Park System lands: private vehicle use and a liberal concessions policy. Although the Park Service has statutory power to limit and regulate motorized use anywhere in the park system,[58] it is loathe to do so. The Park Service simply does not want to inconvenience recreational visitors.[59] It is true that some national parks, such as Yosemite, have by necessity prohibited private vehicle access to the most popular regions of the park except by government shuttle bus.[60] Nonetheless,

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56. *See* James M. Ridenour, Our National Parks: The Slide Towards Mediocrity 2, Paper Presented at the Conference on Challenging Federal Ownership and Management: Public Lands and Public Benefits, Natural Resources Center, Univ. of Colo. School of Law, (Oct. 11-13, 1995) (transcript available in the University of Colorado Law School Library).

57. Dale A. Oesterle, *Public Land: How Much is Enough?*, 23 ECOLOGY L.Q. 521, 564-65 (1996).

58. 16 U.S.C. §§ 1-3 (1994).

59. COGGINS & GLICKSMAN, *supra* note 3, at 17-13.

60. *See* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 158-79 (2d ed. 1987).

such draconian means of alleviating congestion remain the exception. For most units of the Park System, the rule is unrestricted private vehicle access to the park, unrestricted access to all the roads in the park, and intensive road development within the park.[61]

If recreationalists are attracted to National Parks in part because they can easily drive their private cars there, they can comfortably stay in a park because of the Park Service's concessions policy. While the National Park Service Concessions Policy Act of 1965 specifically subordinates concessions facility development to the Park Service's preservation mission, this statute also gives the National Parks (through the Secretary of Interior) the discretion to decide whether to permit visitor amenities and accommodations on park lands.[62] This discretion has generally been exercised to make the nation's parks more attractive to visitors. As a result, National Parks often are dominated by facilities that are antithetical to a preservationist or environmentally natural condition—restaurants, shops, lodges, campgrounds, ski areas, grocery stores, and commercial enterprises.[63]

When the Park Service has exercised its discretion to permit concessions that encourage recreational use at the expense of preservation, the courts have rarely halted the construction of the recreational facility.[64] For example, one court refused to require the Park Service to restrict a concessionaire's advertising campaigns, even though the advertising was causing overuse of the park.[65] Another court rejected an attempt by an environmental organization to close a campground, despite arguments that overuse of the campground was preventing grizzly bear recovery.[66]

2. Subsidized Access

Another reason for the popularity of National Parks is that it is so inexpensive to visit them. Moreover, those who take advantage of the recreational amenities offered by National Parks rarely pay for them. Rather, the entrance fee to gain admission to federal park lands represents a tiny percentage of the budget needed to maintain these lands. The American taxpayer makes up the difference, and park users are thereby subsidized.

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61. *See generally* ALSTON CHASE, PLAYING GOD IN YELLOWSTONE 204-10 (1986); JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS (1980) (discussing the politics of tourism).

62. 16 U.S.C. § 20 (1994).

63. COGGINS AND GLICKSMAN, *supra* note 3, at 17-24.

64. See Conservation Law Found. v. Secretary of Interior, 864 F.2d 954 (1st Cir. 1989); Sierra Club v. Watt, 566 F. Supp. 380 (D. Utah 1983). *But see* Sierra Club v. Lujan, 716 F. Supp. 1289 (D. Ariz. 1989) (holding that Congress authorized leasing of locatable minerals at Lake Mead National Recreation Area; and that the regulations established by the Bureau of Land Management and National Park Service, with respect to mineral leasing, do not violate the organic legislation establishing the National Park Service).

65. Friends of Yosemite v. Frizzell, 420 F. Supp. 390, 395 (N.D. Cal. 1976).

66. National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384 (D. Wyo. 1987).

The National Park System consists of 369 parks, monuments and historic sites.[67] Of them, only 186 collect an entrance fee.[68] These fees totaled $80 million in 1995, which represents just five percent of the Park Service's $1.4 billion annual budget.[69] The Park Service has been frighteningly slow to raise entrance fees. At Yellowstone National Park, the world's first national park, a five dollar car fee was authorized in 1915, and remained at that level for seventy-three years, until it was grudgingly raised to ten dollars in 1988. The 1996 Omnibus Parks and Public Lands Bill (HR 4236) contained provisions that would have permitted expanded entrance fees, but at President Clinton's insistence, these provisions were deleted before the bill became law.[70]

One can surmise that it is politically unpopular to make more expensive the opportunity to visit public lands "owned" by the taxpayers of the United States. Consequently, visitation fees are rarely raised, and there is no financial disincentive preventing overuse of park lands.[71]

3. Increased Use But Reduced Funding

Although the American taxpayer subsidizes the recreational visitor that uses a National Park, this subsidy has declined over the past two decades, while recreational use of these lands has increased. As a consequence, the units of the National Parks have suffered from decreased public funding at the same time that the public is overrunning the parks with sheer numbers. If the American public is encouraged to visit National Parks, if those who do go to the parks are not charged a fee which reflects the true cost of their visit to the parks, and if public spending on park lands is declining in real dollars, then park managers will not have the financial ability to maintain, repair, or protect our National Parks.

The table below presents data from the 1977-1995 period which demonstrates that recreational use of the National Parks has been increasing (Column 1),[72] while overall funding for the Park System has declined over the same period (Column 2).[73]

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67. Vic Ostrowidzki, *Fee Hikes Planned for U.S. Park System*, DENVER POST, Nov. 20, 1996, at B12.

68. *Id.*

69. *Id.*

70. *Congress Approves Omnibus Parks Bill, Drops 13 Sections*, FED. PARKS & RECREATION, Oct. 19, 1996, at 1.

71. The Omnibus Public Lands Act that was enacted into law on Oct. 3, 1996, Public Law 104-208, does contain a four year pilot program that permits entrance fees to rise in selected national parks and other public lands. *National Forests Sprouting Fees*, DENVER POST, Nov. 27, 1996, at A2.

72. Column 1 in the Table shows that recreational visits to National Parks rose from 210.6 million in 1977 to 269.6 million in 1995, amounting to a 28% increase.

73. All budget figures have been converted to real 1994 dollars using the Consumer Price Index.

Year	(1) NPS Recreation Visits (million)[74]	(2) All Accounts to National Park Service ($ million)	(3) Operation of the National Park System ($ million)	(4) Construction ($ million)	(5) NPS Land Acquisition & State Assistance ($ million)
1977	210.6	2,287	722	320	1,065
1978	222.2	2,945	776	367	1,549
1979	205.4	2,555	792	242	1,287
1980	198.0	2,171	703	202	849
1981	210.1	1,454	748	71	516
1982	213.7	1,184	801	147	205
1983	216.9	1,597	896	237	352
1984	218.1	1,299	879	94	290
1985	216.0	1,273	863	153	233
1986	237.1	1,117	826	152	127
1987	246.4	1,193	921	115	144
1988	250.5	1,126	916	117	76
1989	256.1	1,222	920	190	87
1990	263.2	1,225	871	224	99
1991	267.8	1,467	954	294	149
1992	274.7	1,518	1,031	317	111
1993	273.1	1,422	1,009	234	121
1994	268.6	1,452	1,062	215	97
1995	269.6	1,330	1,047	158	71
% Change 1977-95	28.0%	-41.9%	45.1%	-50.79%	-93.3%

B. *Recreation Dominant Over Preservation*

The Organic Act of 1916 made preservation of wildlife and scenery the primary purpose of the National Parks.[75] That preservation was intended to be the goal of the nation's parks reflects the context during which the Organic Act was enacted. During the World War I period, Americans were concerned about the conservation of natural resources, and National Parks were a logical response to this fear.[76]

Since the Organic Act's adoption, the United States Congress has given recreation management priority with respect to several categories of park system lands.[77] This congressional direction, plus the growing demand for the

74. Recreation Visits, *supra* note 51; Nat'l Park Serv., U.S. Dep't of Interior, National Park Service Current Budget Authority Requested and Enacted Since FY 1977 (1996) (internal document from Budget Team-Operations Formulation Branch); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 492 (115th ed. 1995); Bureau of Labor Statistics, U.S. Dep't of Labor, *Monthly Labor Review*, July 1996, at 88, 88.

75. 16 U.S.C. § 1 (1994); William Andrew Shutkin, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345, 345 (1991); *see also* Cappaert v. United States, 426 U.S. 128 (1976).

76. FORESTA, *supra* note 42, at 12.

77. Scott M. Meis, *The Socio-Economic Function of the Canadian Parks Service as a Model for the U.S. National Parks Service and Other Agencies: An Organizational Framework for Managing Natural Recreation Research*, *in* SOCIAL SCIENCE AND NATURAL RESOURCE RECREATION MANAGEMENT 35 (Joanne Vining ed., 1990) (emphasizing the importance of management to accommodate a diverse collection of visitors); J. William Futtrell, *Parks to the People: New Direc-*

recreation resource within National Parks, has caused recreation to dominate as the principal use of national park lands.[78] Preservation has been largely shunted aside, recreational facilities and concessionaire have been supported, and protection of park resources from recreationalists has been jeopardized.[79]

The Park Service's shift in emphasis from preservation to recreation has been furthered by congressional and judicial acquiescence. Congress has delegated to the National Park Service the authority to resolve recreation versus preservation conflicts to Park Service managerial discretion.[80] When the Park Service exercises its discretion in favor of recreational interests and facilities, which it often does,[81] the courts generally defer to these decisions.[82] Courts tend to use the arbitrary and capricious standard when reviewing exercises of Park Service discretion.[83] When this standard is applied to a case where there is an allegation that the Park Service is erring too much in favor of recreation at the expense of preservation, the judicial attack on the Park Service typically fails.[84]

Of course, judicial deference cuts both ways. Reviewing courts have upheld the Park Service when it has decided that visitors might overwhelm the recreational carrying capacity of a given park system unit, and as a result has either refused to issue visitation permits,[85] or restricted access.[86] Courts have also sustained the Park Service when it refused to allow exploitative use of park wildlife.[87] However, despite the willingness of courts to uphold Park Service actions that are inconsistent with a dominant recreation use policy, preservation will never become a primary Park Service mission until park managers decide that rising recreational demand is threatening, or has already damaged, the scenic and ecological resources of the National Parks.[88]

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tions for the National Park System, 25 EMORY L.J. 255, 272 (1976); 16 U.S.C. § 460n-3(b) (1994); Idaho v. Hodel, 814 F.2d 1288, 1294-96 (9th Cir. 1987).

78. *See* ZASLOWSKY, *supra* note 46, at 35 (relating National Park policy not only to the reservation of resources, but also the recreational needs of society); WILLIAM C. EVERHART, THE NATIONAL PARK SERVICE (1983); COGGINS & GLICKSMAN, *supra* note 3, at § 14.01.

79. *See* FORESTA, *supra* note 42, at 28 (noting that development of recreation facilities and concessionaire to accommodate recreational use was a priority in the 1950s and 1960s). *See generally* Gray & Greben, *supra* note 26, at 3, 6 (proposing that recreation is a basic need that should be provided to the public).

80. 16 U.S.C. § 3 (1994).

81. FORESTA, *supra* note 42, at 54.

82. *See* Conservation Law Found., 864 F.2d at 957; National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384 (D. Wyo. 1987).

83. Wilkins v. Secretary of Interior, 995 F.2d 850, 852 (8th Cir. 1993).

84. *See* Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd on other grounds*, 659 F. 2d 203 (D.C. Cir. 1981).

85. Clipper Cruise Line, Inc. v. United States, 855 F. Supp. 1 (D.D.C. 1994).

86. Christianson v. Hauptman, 991 F.2d 59 (2d Cir. 1993); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979).

87. NRA v. Potter, 628 F. Supp. 903 (D.D.C. 1986).

88. *See* FORESTA, *supra* note 42, at 28.

C. *Implications for Ecosystem Management*

Many federal agencies are exploring whether (or how) to integrate the concept of ecosystem management into their management decisions.[89] Each major land and natural resource management agency, including the National Park Service, has drafted policy guidelines regarding ecosystem management approaches.[90] Although the Park Service is at this point more interested in ecosystem management as a general concept, rather than as a defined strategy,[91] the dominance of recreation over preservation in the National Parks will have important implications if the Park Service were eventually guided by an ecosystem management policy.[92]

While ecosystem management has come to mean different things to different people, the term generally encompasses the idea of an ecological and systemic approach to managing natural resources at a nonboundaried, regional scale.[93] For federal managers, an ecosystem management policy requires integration of decisionmaking with respect to both federal and nonfederal landholders. There are also two basic ecosystem management schools—one advocates a natural "biocentric"[94] approach, while the other is "anthropocentric," which assumes that inevitable human activity must be a critical part of management decisions about natural resources.[95]

The tentative definition of ecosystem management adopted by the National Park Service takes the approach that a park management philosophy "respects all living things and seeks to sustain natural processes and the dignity of all species."[96] If this definition assumes (as it should) that humans are "living things" and "species," then the Park Service has correctly adopted the anthropocentric school of ecosystem management. With human recreation dominating park lands, park management must proceed on the basis that humans are ecosystem components, whose activities cannot be separated from nature. Human recreational uses of the National Parks are increasing and threaten to impact (if not overwhelm) ecological systems. These uses must be taken into account when developing management policies.

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89. *Cf.* MORRISSEY, *supra* note 5 (stating that eighteen federal agencies demonstrated ecosystem management activities).

90. Richard Haeuber, *Setting the Environmental Policy Agenda: The Case of Ecosystem Management*, 36 NAT. RESOURCES J. 1, 2 (1996).

91. COGGINS & GLICKSMAN, *supra* note 3, at 14-7.

92. See Robert B. Keiter, *An Introduction to the Ecosystem Management Debate*, *in* THE GREATER YELLOWSTONE ECOSYSTEM 3, 10-11 (Robert B. Keiter & Mark S. Boyce eds., 1991).

93. MARGARET A. MOOTE ET. AL., PRINCIPLES OF ECOSYSTEM MANAGEMENT 2 (1994).

94. The "biocentric" approach "considers human use of resources to be constrained by the primary goal of maintaining ecological integrity." Thomas R. Stanley, Jr., *Ecosystem Management and the Arrogance of Humanism*, 9 CONSERVATION BIOLOGY 255, 256 (1995).

95. *Id.* at 255, 256.

96. Haeuber, *supra* note 90, at 25; MORRISSEY, *supra* note 5, at CRS-91.

CONCLUSION

The recreation resource is fast becoming a dominant use on all public lands. On National Park lands, it has already outpaced preservation as the predominant use. There are important budgetary, ecological, and management consequences of a national park system that is catering primarily to tourists and recreationalists. The pressure of recreation on sensitive park lands and sometimes fragile park ecosystems is mounting, and is unlikely to decline in the near term. Federal policy-makers and National Park officials cannot ignore the effect this widespread interest in recreation is having throughout the National Park System. They must address and plan for this dominant use in their budget and park management decisions.

ANILCA: A DIFFERENT LEGAL FRAMEWORK FOR MANAGING THE EXTRAORDINARY NATIONAL PARK UNITS OF THE LAST FRONTIER

DEBORAH WILLIAMS*

Alaska's National Park units can be characterized by a long list of superlatives. Alaska contains the most acres of national parks—over 54 million acres, representing 66% of the total park land base in the entire United States.[1] The largest park unit, Wrangell-Saint Elias National Park and Preserve, is in Alaska.[2] Denali National Park and Preserve features Mt. McKinley, the tallest mountain in North America.[3] There are over 32 million acres of national park wilderness in Alaska, compared to approximately 6 million acres in the remainder of the United States.[4] And, of particular significance to the legal profession, national parks in Alaska are governed by laws unlike those found anywhere else in the United States.

On December 2, 1980, President Jimmy Carter signed into law the Alaska National Interest Lands Conservation Act (ANILCA), which created or enlarged 13 of Alaska's 15 national park units.[5] ANILCA represented an extraordinary and unprecedented physical expansion of national park units. Furthermore, ANILCA sets forth a substantially different management scheme for the national parks in Alaska.

The purpose of this essay is to highlight the most important aspects of the

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1. Interview with Diane Ross, Division of Realty, Alaska Field Office of the National Park Service (Aug. 19, 1996).

2. Wrangell-Saint Elias National Park and Preserve is over 13 million acres in size. *Id.* This makes it larger than the combined acreage of Maryland, Massachusetts and Delaware. Bureau of Land Management, U.S. Dep't. of the Interior, Public Land Statistics 5 (1993).

3. The other national park units in Alaska are: Aniakchak National Monument and Preserve, Bering Land Bridge National Preserve, Cape Krusenstern National Monument, Gates of the Arctic National Park and Preserve, Glacier Bay National Park and Preserve, Katmai National Park and Preserve, Kenai Fjords National Park, Kobuk Valley National Park, Lake Clark National Park and Preserve, Yukon Charley National Preserve, Klondike Gold Rush and Sitka Historical Park. Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 (partially codified in scattered sections of 16 U.S.C. and 43 U.S.C.) [hereinafter ANILCA].

4. Interview with Diane Ross, *supra*, note 1.

5. ANILCA, *supra* note 3. Prior to ANILCA, Alaska contained only five national park units—Glacier Bay, Katmai, Mt. McKinley, Klondike Gold Rush, and Sitka Historical Park. ANILCA expanded and redesignated Glacier Bay, Katmai and Mt. McKinley, and renamed Mt. McKinley as Denali National Park and Preserve. 16 U.S.C. § 410hh-1 (1994).

unique statutory framework pertaining to national parks in Alaska.[6] The author urges legal scholars and others to scrutinize and assess ANILCA's legislative structure further to determine whether certain components of ANILCA should be exported to parks outside of Alaska, either nationally or internationally, particularly if major expansions are being considered. Additionally, the author opposes the amendments to ANILCA that would eviscerate ANILCA's carefully balanced approach.[7]

I. HUNTING

There are many dramatic management differences between national parks in Alaska and national parks in the remainder of the United States, but one difference stands out most starkly. Hunting is allowed on most of the acreage managed by the National Park Service (NPS) in Alaska.[8] This is accomplished through two statutory mechanisms: the creation of "national preserves," and the authorization of subsistence uses on most park and preserve lands.

A. *National Preserves*

ANILCA created approximately 9.4 million acres of a distinct type of park unit known as national preserves.[9] Pursuant to ANILCA, "hunting *shall* be permitted in areas designated as national preserves."[10] ANILCA further provides that:

> A National Preserve in Alaska shall be administered and managed as a unit of the National Park System in the same manner as a national park except as otherwise provided in this Act and except that the taking of fish and wildlife for sport purposes and subsistence uses, and trapping shall be allowed in a national preserve under applicable

6. From a Congressional perspective, Alaska's model is important to understand because of the unprecedented leadership positions of Alaska's Congressional delegation. Senator Ted Stevens is Chair of the Appropriations Committee; Senator Frank Murkouski is Chair of the Senate Energy and Natural Resources Committee (the Senate Committee that oversees the National Park Service); and Congressman Don Young is Chair of the House Resources Committee (the House Committee that oversees the NPS).

7. Senator Murkowski introduced a package of amendments during the 104th Congress: S.1920. *The Alaska National Interest Lands Conservation Act Amendment Act of 1996: Hearings on S. 1920 Before the Senate Comm. on Energy and Natural Resources*, 104th Cong. (1996) (statement of Sen. Murkouski on June 27). The Committee held one hearing on the bill very late in the session, and neither the Senate nor the House took further action on the legislation. It is likely that amendments to ANILCA will be pursued in the 105th Congress.

8. 16 U.S.C. § 410hh-2.

9. In most instances, preserve lands are part of a combined park/preserve unit or national monument/preserve unit. For example, Wrangell-St. Elias National Park and Preserve contains approximately 8,147,000 acres of national park and 4,171,000 acres of national preserve. Other combined units include Aniakchak, Gates of the Arctic, Lake Clark, Glacier Bay, Katmai and Denali. But in three instances, ANILCA created a stand alone preserve: Bering Land Bridge National Preserve (2,457,000 acres), Noatak National Preserve (6,460,000 acres), Yukon-Charley Rivers National Preserve (1,713,000 acres). ANILCA, *supra*, note 3.

10. 16 U.S.C. § 410hh-2 (emphasis added).

State and Federal law and regulation.[11]

The public, particularly outside of Alaska, often has a difficult time accepting that hunting is permissible in National Parks in Alaska. For example, there have been numerous letter writing campaigns decrying wolf trapping in Denali National Park and Preserve. Since 1990, approximately four wolves a year have been legally killed in, or near, the preserve portion of the unit.[12] For floral and faunal protection and other prescribed reasons, however, the Secretary may designate zones where and periods when no hunting or trapping may occur in preserves.[13]

B. *Subsistence*

Subsistence hunting and fishing activities are authorized on all national preserve lands and on a large portion of national park lands where such uses are traditional.[14] The term "subsistence uses" is defined as:

> [T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for the direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of non-edible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.[15]

"Subsistence [by rural Alaskans is] accorded [a] priority over the taking . . . of fish and wildlife for other purposes."[16]

As evidenced in the Purposes section of ANILCA, subsistence was singled out as a critical component of the Act. The third, of only four purpose statements, declares:

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence

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11. 16 U.S.C. § 3201.

12. Alaska Department of Fish and Game Sealing Records. Memorandum from Ken Stahlnecker (Sept. 9, 1996) (on file with author). It is not currently possible to specify the numbers trapped solely within the Preserve because the reporting units include lands both within and outside the Preserve.

13. 16 U.S.C. § 3201.

14. 16 U.S.C. § 410hh-2. There are a few parks areas in Alaska where subsistence hunting is explicitly not authorized, *e.g.*, Kenai Fjords, Glacier Bay, Katmai, a portion of Denali, and the Klondike Gold Rush and Sitka Historical National Parks. The Secretary has the authority to prohibit subsistence activities for several reasons, including to assure the continued viability of a fish or wildlife population. 16 U.S.C. 3126(b).

15. *Id.* § 3113.

16. *Id.* § 3114.

way of life to continue to do so.[17]

There is no other provision in ANILCA that has aroused, and continues to arouse, more controversy and litigation than subsistence.[18] When Congress passed ANILCA, both the State of Alaska and the federal government anticipated that the State would be able to manage fish and wildlife consistent with a rural subsistence priority.[19] Unfortunately, nine years after the passage of ANILCA, the Alaska Supreme Court, in a 3-2 decision disagreed, concluding that a rural subsistence priority is unconstitutional under Alaska's state constitution.[20] As a result, the Departments of Interior and Agriculture created a federal subsistence board, and have been managing subsistence hunting on public lands since 1989.[21]

For several reasons, subsistence provides tremendous challenges and opportunities for the National Park Service. Subsistence oversight requires considerable time and resources (which in Alaska are scarce, particularly for the NPS), and creates in Alaska a disfavored dual management regime for fish and wildlife.[22] On the positive side, however, subsistence provides the NPS an opportunity to work closely with rural Alaskans on a matter of tremendous importance[23] and underscores the critical role of parks and preserves in sustaining Alaska Native physical, economic, traditional and cultural existence and non-Native physical, economic, traditional and social existence.[24] The Department of Interior continues to work with the State of Alaska on achieving the preferred resolution, State resumption of an excellent, responsive subsistence management program.

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17. 16 U.S.C. § 3101(c) (1994).

18. *See e.g., Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996); *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir. 1994); *United States v. Alexander*, 938 F.2d 942 (9th Cir. 1991); *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312 (9th Cir. 1988); *Bobby v. Alaska*, 718 F. Supp. 764 (D. Alaska 1989); *Totemoff v. Alaska*, 905 P.2d 954 (Alaska 1995), *cert. denied*, 116 S. Ct. 2499, 135 L.Ed.2d 190 (1996); *Alaska v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995); *Alaska v. McDowell*, 785 P.2d 1 (Alaska 1989).

19. This expectation is embodied in 16 U.S.C. § 3115(d).

20. *McDowell*, 785 P.2d at 1.

21. The federal subsistence board regulations are set forth at 50 C.F.R. § 100.1-100.27 (1996). Currently the federal subsistence board does not manage fish in navigable waters. The Ninth Circuit recently ruled that the Title VIII subsistence priority applies to waters in Alaska in which the United States has a reserved water right. *Alaska v. Babbitt*, 72 F.3d at 703-04. The Department has published an advance notice of proposed rulemaking to define its expanded jurisdiction. Subsistence Management Regulations for Public Lands in Alaska, 61 Fed. Reg. 15,014 (1996) (to be codified at 36 C.F.R. pt. 242 and 50 C.F.R. pt. 100) (proposed Apr. 4, 1996). Because of continuing Congressional moratoria, the Department is precluded from publishing final regulations. 142 CONG. REC. H11,704 (daily ed. Sept. 28, 1996). (to be Omnibus Appropriations Act § 317 when a Public Law number becomes available).

22. The State of Alaska has tried on several occasions to formulate and place on a ballot a State constitutional amendment. Each attempt has failed in part because the threshold for placing a constitutional amendment on the ballot is so high: a two-thirds vote of the State House and State Senate independently.

23. In implementing the subsistence priority, the NPS works with two sets of councils: the regional advisory councils established by 16 U.S.C. § 3115, and, for park issues only, the subsistence resource commissions, 16 U.S.C. § 3118. The purpose of the park-specific advisory commissions is to "devise and recommend to the Secretary and the Governor a program for subsistence hunting" within the park unit. The regional advisory councils address subsistence issues on all Federal public lands in their areas and report to the Federal Subsistence Board. *Id.* § 3115.

24. 16 U.S.C. § 3111.

II. ACCESS, WILDERNESS MANAGEMENT AND PREFERENCES

There are many other important differences found in the statutory structure for national parks in Alaska.[25] The following discussion focuses on three significant differences: access, wilderness management and preferences.

A. *Access*

Recognizing that Alaska's transportation network in 1980 was largely undeveloped, Congress devoted an entire title of ANILCA to the issue of access, seeking to create "a single comprehensive statutory authority" for access concerns.[26] In Title XI, three primary types of access are discussed: special access,[27] access to inholdings,[28] and access associated with transportation or utility systems.[29] This note will briefly address the first two.[30]

From a day-to-day management perspective, the special access provision has the broadest implications. ANILCA allows certain transportation based uses of park land unless there is a determination that such uses would be detrimental to the resource values of the park.[31] Specifically, ANILCA provides:

> Notwithstanding any other provision of this Act or other law, the Secretary shall permit, on conservation system units, [including Park Units] . . . the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and nonmotorized surface transportation methods for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units . . . and shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or areas, the Secretary finds that such use would be detrimental to the resource values of the unit or area. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law.[32]

There are very few instances in which park lands have been closed,[33] but

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25. For example, the NPS is prohibited from charging entrance fees to any park in Alaska except Denali. *Id.* §§ 4601-6a(a)(12); *Id.* § 410hh-2.

26. 16 U.S.C. §§ 3161-3173.

27. *Id.* § 3170(a).

28. *Id.* § 3170(b).

29. *Id.* §§ 3164-3173.

30. The provisions governing access associated with transportation and utility systems are worth reviewing, particularly for scholars in this area. However these provisions have been applied only infrequently in Alaska, since capital project budget constraints have minimized the possibilities for building major new systems.

31. 16 U.S.C. § 3170(a).

32. *Id.*

33. For example, NPS recently closed certain areas to Glacier Bay National Park to motor-

those instances are the exception. Virtually all of Alaska's park units are open to the types of special access described above. On the whole, Alaskans have vigorously defended and continue to vigorously defend their ability to use boats, airplanes, and snowmobiles on park units to engage in hunting, berry picking, camping and other activities.

Insuring adequate access to inholdings within parks has been the second major access issue in the implementation of ANILCA. ANILCA specifies that inholders "shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes."[34] However, such rights shall be subject to reasonable regulations issued by the Secretary to protect the natural and other values of such land.[35] There are sizable "inholdings" in national park units, particularly lands owned by Alaska Native Corporations created by the Alaska Native Claims Settlement Act (ANCSA).[36]

Achieving access to these lands while minimizing environmental damage will be one of the most important management issues facing parks in the future as development of these Native lands becomes more economic.[37]

A. *Wilderness Management*

ANILCA explicitly establishes different rules with respect to wilderness management.[38] Perhaps most significantly, the provisions in ANILCA governing special access apply to wilderness areas.[39] In other words, ANILCA au-

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ized access. *See* Glacier Bay National Park, Alaska: Vessel Management Plan Regulations, 61 Fed. Reg. 27,008 (1996) (to be codified at 36 C.F.R. pt. 13).

34. 16 U.S.C. § 3170(b).

35. *Id.* One of the more interesting questions presented by this provision is known as the Denali lemonade stand quandary. Currently, there is a single developed road into Denali, Alaska's most popular and famous park. Measuring approximately 90 miles in length, this road not only serves as the basis of most visitor's wildlife and mountain viewing experience in Denali, but it also leads to the Kantishna area, an area of private property in the middle of the park. To protect wildlife resources, the Park carefully restricts the number of vehicles on the road and requires virtually everyone to ride a bus. The demand for spots on the buses exceeds the supply. Additionally, the Park must allow reasonable access to inholders in Kantishna, including lodge owners. Here is the dilemma: what if someone sets up the equivalent of a lemonade stand in Kantishna and provides a day trip over the Denali Road, featuring the wildlife viewing opportunities and views of North America's largest peak, serves the bus passengers a glass of lemonade on their inholding and turns around to spend the remaining time watching wildlife and the mountain. Should the NPS under § 3170(b) be required to provide access for this purpose?

36. Passed in 1971, the Alaska Native Claims Settlement Act (ANCSA) created two primary types of Alaska Native owned corporations: Village Corporations and Regional Corporations. 43 U.S.C. §§ 1601-1629 (1994). As a result of ANCSA, Alaska Native Village and Regional Corporations are entitled to receive approximately 44 million acres of land, a significant amount of which is within the boundaries of Alaska's national park and refuge units.

37. The regulations implementing these special access provisions are found at 43 CFR §§36.10 (access to inholdings); 36.11 (special access); see also 36 CFR Part 13 (Closure Procedures found at §13.30).

38. In recognizing the differences, Congress clearly provided that "[t]he provisions of this section are enacted in recognition of the unique conditions in Alaska. Nothing in this section shall be construed to expand, diminish, or modify the provisions of the Wilderness Act or the application or interpretation of such provisions with respect to lands outside of Alaska." 16 U.S.C. § 3203(a) (1994). The extensive park wilderness areas created by ANILCA are in eight park units. *See supra* note 5 and accompanying text.

39. *See* 16 U.S.C. § 3170. This section of ANILCA applies to all "conservation system

thorizes the use of snowmachines, motorboats, and airplanes for traditional activities in wilderness study areas in Alaska, unless, after a notice and a hearing process, the Secretary finds that such use "would be detrimental to the resource values of the unit or area."[40] Encountering motorized vehicles in a wilderness area, together with encountering a hunter on park lands, are the two most publicly apparent differences between authorized human activity on park lands in Alaska versus park lands in the rest of the nation.

Recently the Department established several motor-free zones in Glacier Bay National Park wilderness area as part of a larger rulemaking.[41] The resource value being protected was natural quiet, and was balanced against increases in motorboat and cruise ship traffic in the rest of Glacier Bay. This rulemaking represents the first time a closure has occurred for wilderness value reasons in a park unit in Alaska.

There are other ANILCA specific wilderness provisions that affect management. The Secretary can construct new cabins in wilderness areas[42] and hunters and fishermen can continue to use "temporary campsites, tent platforms, shelters, and other temporary facilities and equipment directly and necessarily related to such activities."[43] More generally, wilderness designations do not preclude subsistence hunting and fishing, or sport hunting and fishing, where such activities are otherwise permitted by statute.[44]

B. *Preferences*

Because ANILCA vastly expanded parks and refuges, many Alaska Native groups feared that their economic opportunities would be jeopardized. To address this concern, and related concerns, Congress established three preference provisions that affect national parks. These involve administrative and visitor facilities, visitor services, and local hire.

Unlike in the continental United States, the Park Service in Alaska has the explicit authority to establish administrative sites and visitor facilities "*outside the boundaries of*" the park unit.[45] In fact, Congress went one step further and directed the Park Service in Alaska "[t]o the extent practicable and desirable" to "attempt to locate such sites and facilities on Native lands in the vicinity of the unit."[46] This provision not only protects the natural integrity of Park lands within the boundaries of a unit, but also encourages partnerships with local Alaska Natives.

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units" and public lands designated as wilderness study. *Id.* "Conservation system unit" is defined to include "any unit in Alaska of the . . . National Wilderness Preservation System," including park system units. *Id.* § 3102(4).

40. 16 U.S.C. § 3170(a). Neither ANILCA nor departmental regulations define "traditional activities." *See id.* § 3102 (defining other applicable terms).

41. 61 Fed. Reg. 27,008 (1996) (to be codified at 36 C.F.R. pt. 13).

42. 16 U.S.C. § 3203(d).

43. *Id.* § 3204.

44. See definition of "public lands" at 16 U.S.C. § 3102(3), which includes lands designated as wilderness. *See also id.* § 3114.

45. *Id.* § 3196(a)(2) (emphasis added).

46. *Id.* § 3196(a).

Recently the Park Service published binding guidelines on how to implement this preference.[47] Since the publication of these guidelines, several projects have been initiated which have successfully used the preference. It is important to continue to utilize fully this preference when more administrative sites and visitor facilities are built to accommodate the growth of visitorship to Alaska's Parks. By this means, the economic benefits accompanying this growth will be proactively shared with adjacent Native land owners.

Pursuant to ANILCA, the Park Service in Alaska also has a two-tiered preference system for the awarding of visitor services.[48] Visitor Services are defined as: "any service made available for a fee or charge to persons who visit a conservation system unit [including parks], including such services as providing food, accommodations, transportation, tours, and guides excepting the guiding of sport hunting and fishing."[49]

The highest preference is awarded to historic operators—persons who were previously engaged in providing the service within an area established as or added to a park unit by ANILCA.[50] The next highest preference goes to the Native Corporation most directly affected by the establishment or expansion of the park unit under ANILCA, and a co-equal preference goes to persons who are local residents.[51] In October 1996 the Park Service published its first set of regulations implementing the visitor service preference provisions.[52]

It is hoped and expected that the Section 1307 regulations will be enthusiastically applied as new visitor service opportunities arise, particularly in the less well known parks. For example, there are many guided sight-seeing opportunities to world class attractions, such as the Kobuk Sand Dunes, that, once initiated, would benefit the Park, the public, nearby Alaska Native Corporations, and local residents. It will be important, however, to insure that new visitor services are designed in such a manner that the underlying park values are protected, and that Alaska's unparalleled and unreplaceable wild, scenic and biological grandeur is sustained for future generations.

The third provision in ANILCA that recognizes the value of involving local residents in the future of parks is Section 1308, which authorizes local hire.[53] Specifically, this section provides that the Secretary shall:

> [E]stablish a program under which any individual who, by reason of having lived or worked in or near [a conservation system unit, including park units], has special knowledge or expertise concerning the natural or cultural resources of [such unit] and the management there-

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47. *United States Department of the Interior Guidelines for Implementing Section 1306 of the Alaska National Interest Lands Conservation Act Relating to the Establishment of Administrative Sites and Visitor Facilities in Alaska Conservation System Units* (Aug. 22, 1995). Unfortunately there were no guidelines published during the first 12 years of ANILCA's implementation under the Reagan/Bush administrations.

48. *See* 16 U.S.C. § 3197(b).

49. *Id.* § 3197(c).

50. *See id.* § 1397(a).

51. *See id.* § 3197(b)(1)-(2).

52. 61 Fed. Reg. 54,334 (1996) (to be codified at 36 C.F.R. pt. 13).

53. 16 U.S.C. § 3198.

> of . . . without regard to . . . formal training [requirements] . . . [any other] . . . employment preference[s] . . . and any numerical limitation on personnel otherwise applicable.[54]

To further reinforce the Congressional directive that local hire employees are not to be counted against "FTE ceilings," the section underscores that "[i]ndividuals appointed under this subsection shall not be taken into account in applying any personnel limitation[s] . . . ."[55] In this era of downsizing, and omnipresent FTE ceilings, this exemption is significant.

The local hire program in Alaska boasts many successes and demonstrates the value of incorporating into the ranks of the Park Service people who know and love the area in which the park unit is located. The full implementation of the program has been hampered, however, by static or declining budgets, precluding much new hiring.[56]

The Park Service, nevertheless, is implementing new initiatives such as hiring on site at the widely attended Alaska Federation of Natives Convention.[57] Developing an effective and equitable way to convert local hires into permanent employees, after a certain length of meritorious service, is also a priority. This is necessary to attract, retain and promote good local hire employees.

III. CONCLUSION

The management structure for park units in Alaska represents a historic and delicately balanced compromise. When ANILCA was initially debated, the tradeoff was clear: if Alaska and the nation were to obtain over 35 million acres of new national park land in Alaska with the stroke of a pen, then there would have to be numerous compromises in how the land was to be administered. In 1980, many interest groups were dissatisfied with the compromises contained in ANILCA, feeling they went too far or not far enough in liberalizing traditional park management practices. Many still are disgruntled.

For over a decade, Congress intentionally refrained from re-opening ANILCA's provisions on park management, likening a Congressional re-examination to opening the proverbial Pandora's box. Unfortunately, the truce was broken with the introduction of S. 1920. Among other amendments, this bill proposed to significantly alter ANILCA's carefully achieved balances on access, cabins and wilderness-study management.

In each instance, the changes proposed by the amendments in S. 1920 lessened the protections afforded on-the-ground park resources. This is unacceptable. The park units in Alaska represent one of the earth's most extraordi-

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54. *Id.*

55. *Id.*

56. Although the NPS in Alaska manages over 66% of the nation's park land, it only employs 2% of NPS's total work force. Communication from Paul Anderson, Deputy Field Director (Oct. 21, 1996). Most parks in Alaska are woefully understaffed. This will present an ever-greater problem as visitorship in Alaska increases and budgets remain static or decline in actual or real dollars. *Id.*

57. Over 3,000 Alaska Natives from throughout Alaska attend this annual convention. *Id.*

nary legacies. As trustees of that legacy, we must continue to respect the integrity of the law that created these national park units. These are, after all, *national* parks and were created for the entire nation to cherish. Attempts to weaken their protection must be met with a resounding "No." The children and grandchildren of the twenty-first century and beyond must be given the opportunity to enjoy, learn from and cherish the incomparable beauty and biological richness of the parks of the Last Frontier.

LAWYERING FOR THE NATIONAL PARK SERVICE

GINA GUY*

I. ORGANIZATIONAL SETTING

The Office of the Solicitor, or General Counsel, of the Department of the Interior, provides "in-house" legal services to all the constituent bureaus of the Department, including the National Park Service (NPS), which nearly everyone has heard of, while public awareness of the Department itself is quite limited. Established on March 3, 1849, Interior is the fifth-oldest cabinet department.

The Solicitor is a Presidential appointee and the third-ranking official in the Department after the Secretary and the Deputy Secretary. Attorneys specializing in NPS legal issues are located in Washington, D.C. and various locations within the seven Solicitor's Office Regions. Since 1946, the Solicitor has been charged by statute[1] with responsibility for all the legal work in the Department, and neither the NPS nor other bureaus may employ lawyers in legal positions. The legal work in the Department continues to grow in volume and complexity without equivalent increases in staffing or funding. Sometimes NPS managers feel short-changed because of inadequate legal resources to assist them.

The NPS is a large (about 20,000 employees) and diverse organization operating in all 50 states, the Virgin Islands, the Commonwealth of Puerto Rico, and the Pacific Trust Territories, and, in an advisory capacity, in various foreign countries. The sheer size and diversity of the workforce mean that the Office of the Solicitor must be prepared to provide advice in labor law and increasingly, in all areas of employment discrimination law. It also has a sizeable budget each fiscal year for contracting for the construction of visitor facilities and infrastructure projects, which generates the need for expertise in federal procurement law counseling and, sometimes, litigation in which millions of dollars are at stake.

Attorneys often spend their entire careers in the Office of the Solicitor, and develop highly specialized legal knowledge. In the NPS, there is a fair amount of mobility throughout the country, which results in turnover of managers at nearly all levels. Most attorneys have the most significant attorney-client relationships with park superintendents and their immediate staffs, fol-

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1. 43 U.S.C. § 1455.

lowed by Washington office managers and staff of the seven geographic Regions. The turnover rate requires some adjustment on both sides, as the stationery lawyer may have related in a particular way with the prior manager, while the new manager may have the done the same with a particular attorney. Decisions often have to be made quickly, and by telephone or e-mail between people who have never met each other in person. The distance between lawyer and client can make it very difficult for a park manager to identify a legal problem or for the lawyer to interact sufficiently with clients. For example, counsel for Glacier National Park is in Billings, for Everglades in Atlanta, for Grand Canyon in San Francisco, for Big Bend in Santa Fe, for Yellowstone and the Gateway Arch (St. Louis) in Denver.

Many NPS properties are located in remote and thinly-populated areas. Employee housing is sometimes substandard, and resources for families limited. Interaction with the local community can present particular problems in these situations, such as pressure to provide improved, but perhaps more damaging access or to grant special use permits which may be questionable from a resource protection perspective. Even in metropolitan areas, the NPS staff may be the only federal employees many people in the area deal with on a regular basis. In most cases, relationships are cordial, but park staff must often walk a fine line between meeting park needs and local interests. In some cases longtime NPS employees develop close family or personal connections with the community, which can result in conflict-of-interest situations in procurement or land acquisition and even careless talk that can prejudice law enforcement operations. In a few places NPS contributes much of the funding for the local school district, which can be the source of numerous legal problems as well as disagreements between NPS parents and the community about curriculum or how the schools should be managed. Legal problems with local law enforcement and social service agencies often need to be worked through, particularly in parks such as Yellowstone in which jurisdiction is exclusively federal concerning such questions as jurisdiction over juvenile offenders and child protection proceedings. Geographic proximity, human relationships, and genuine institutional efforts to be responsive to local needs mean that the NPS may, unwittingly and after having acted in total good faith over time, find itself in a situation that may suddenly require decisive, and perhaps unpopular legal action. Our attorneys must be prepared to analyze the application of the Federal Advisory Committee Act with respect to efforts by NPS to involve non-federal entities in management and planning decisions.

II. BROAD AUTHORITIES

All units of the National Park System, whether called national parks, national monuments, national recreation areas, or otherwise, are subject to the broad mandate of the National Park System's Organic Act of 1916[2] which requires a high level of deference to the preservation of natural values.

Each park unit was created by Congress through enabling legislation or

2. 16 U.S.C. § 1 (1994).

Executive Order, which may specifically provide for uses the NPS would otherwise prohibit, such as hunting or livestock grazing. All NPS discretionary decisions that are not categorically excluded require compliance with the National Environmental Policy Act, which means attorneys must have expertise in that area.

The Antiquities Act of 1906[3] authorized the President to create, by public proclamation (Executive Order) historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest "that are situated upon the lands owned or controlled by the Government of the United States." The statute also requires that the reservation be confined "to the smallest area compatible with the proper care and management of the objects to be protected." The Antiquities Act was passed ten years before the Park Service was created, and only the passage of the Organic Act cited above vested management authority for "national parks, monuments, and reservations" in the NPS. Once the boundaries for a monument have been established, land use and management decision tend not to differ significantly from those for parks because the Antiquities Act charges the NPS with "proper care" and the protections afforded by the Organic Act also apply. On occasion, such as the quantification of reserved water rights or expansion of a road easement, questions have arisen about the purposes for which a monument was established and what is needed to effectuate the intention of the Executive Order.

III. LEGAL SERVICES PROVIDED

The types of legal services to NPS can be broadly categorized as dealing with:

(1) organizational and institutional support (employment, contracting, land and water acquisition and management, admiralty law, environmental compliance and environmental quality), and

(2) external affairs and visitor-generated issues.

Organizational/Internal Issues. Lands become part of the NPS system in three major ways: (1) reservation from the public domain by Congress or by Executive Order, (2) acquisition by purchase (including exchanges) or (3) by condemnation, all of which require varying degrees of legal assistance. Easements and rights-of-way are also routine, both as to NPS as grantor and grantee. In parks within which there are significant amounts of lands held privately (inholdings), these issues can become quite complex, and may present many questions about the nature and extent of valid existing rights. Another variation occurs when lands are owned by a non-federal entity and managed for park purposes, such as the trust holding much of the land in the newly-established Tall Grass Prairie National Preserve in Kansas. Water rights in the West may be either reserved or appropriative; both can require intense legal work at times by lawyers familiar with the needs of the particular park and the water law system of the state in which the park is located.

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3. 16 U.S.C. § 431 (1994).

Historic preservation law issues arise from time to time, both because the NPS must comply with the National Historic Preservation Act, and also because the "keeper" of the National Register of Historic Places in an NPS employee, who acts on the findings of each state's Historic Preservation Officer with respect to National Register listings. All too frequently, other federal agencies and the public at large are simply not aware of the requirements of Section 106 of the National Historic Preservation Act, and legal advice must be furnished quickly and informally.

Environmental compliance laws in which the Congress has waived sovereign immunity for federal agencies and delegated enforcement authority to states have generated considerable legal work and sometimes, confusion, among both state and federal agencies, including the NPS, in such matters as Federal Water Pollution Control Act (Clean Water Act) permits, landfills, and underground storage tank permitting. The NPS also owns some sites which are subject to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) on which it is seeking to conduct or participate in the remediation. The Office of the Solicitor also provides assistance to the NPS concerning air quality issues and hydropower licensing actions by the Federal Energy Regulatory Commission.

External/Visitor-Service Issues

Controversy abounds relative to the duty of the NPS to preserve the areas charged to its care vis-a-vis the duty to make those areas accessible to the increasing numbers of visitors, including access for those with disabilities. As more than one observer has noted, "Americans are loving their parks to death". Some of the most significant visitor-generated legal issues arise from the fact that the National Park Service includes both rangers who hold federal law enforcement commissions and the Park Police. Several attorneys provide essentially full-time support to the Park Police, principally in the National Capital Region, and other attorneys who advise NPS on law enforcement matters must work closely with the Department of Justice and local law enforcement authorities. Major, often violent crimes occur every day in national parks, and some areas, because of geography and market proximity, are the location of choice for drug shipments and sales. Wildlife poaching is also a serious problem in some parks.

Each year visitors to the national parks suffer a variety of personal injuries and fatal accidents. Congress, in enacting the Federal Tort Claims Act, has partially waived sovereign immunity for the negligence of federal employees under certain circumstances. Tort claims (a jurisdictional prerequisite to suit) have been received (and denied) in many cases in which the claimant seemed to have alleged that the United States was an insurer of visitor safety, especially in claims involving injuries from wildlife (bears, moose, and bison), climbing accidents, rescue operations, and falls off clearly visible cliffs or into signed thermal areas. Sometimes the liability of United States is also affected if the state where the claim arose has enacted a type of recreational use statute which generally absolves a landowner from liability if the injured party has

not paid an entrance or use fee.

In recent years some parks have become the focal point for First Amendment cases involving freedom of speech and the free exercise of religion. The NPS has attempted to address the speech issues by allowing each park to designate a "free-speech" or designated area where individuals may speak, distribute leaflets or sell published materials. More recently, several groups have asserted a Constitutionally-protected right to sell message-bearing Tshirts, which has received mixed reviews from courts. The most noted cases have involved the Mall in Washington, D.C., which the NPS asserts would become a "flea market" if all groups wishing to sell T-shirts could do so at will. Some of cases involving T-shirt sales, speaking and leafleting, and even begging for alms also present free-exercise issues if the group claims that its religious beliefs require the conduct.

The final major group of legal issues relating to visitor use and presence in parks relate to concessions management and contracting. The activities of concessioners providing lodging, campgrounds, restaurants, shopping, and recreational activities such as canoeing, rafting, scenic flights and riding are governed by the Concessions Policy Act. The policy of the Congress is that all development for visitor services "shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area. . . and that are consistent to the highest practicable degree with the preservation and conservation of the areas."[4] The concession businesses often involve very large operating budgets with hundreds of employees. The negotiation and review of concession contracts consumes a significant amount of attorney time each year both in Washington and elsewhere. The concession operators are always represented by counsel, and this work requires expertise in contract law, accounting practices, and sometimes, knowledge of business practices in the hospitality industry. The review and renewal of concession contracts sometimes falls behind schedule, and attorneys can be faced with convincing both the client NPS manager and the concessioner that changes may be needed either to address changed circumstances or to assure contract compliance over time.

CONCLUSION

The legal issues confronted by attorneys in the Solicitor's office dealing with the National Park Service are unfailingly interesting. Some are fleeting; others are of monumental and lasting importance, such as the transfer of the Presidio of San Francisco from the Army to the NPS as part of the Golden Gate National Recreation Area or the multilateral effort to restore the Everglades after decades of dewatering and contamination from agricultural runoff. Our concerns are twofold: first, to be as effective and responsive as possible in our day-to-day legal tasks, and secondly, in spite of distance and resource limitations, to assist the NPS in all appropriate ways in its efforts to arrive at

4. 16 U.S.C. § 20 (1994).

often difficult and controversial decisions about how these precious natural, historic and cultural resources should be managed for the present and conserved for posterity.

EDITOR'S NOTE

The *Denver University Law Review*'s 1997 Symposium Conference, entitled "Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law," brought together doctors, law professors, philosophers, and attorneys. The Conference, the culmination of several months of weekly group discussions, consisted of two days of panel presentations and debate in an informal setting. This format permits the free exchange of ideas between professionals and academics, across disciplines and often across ideological gulfs.

Past Symposia have concentrated upon new trends in the law. The topic of coercion, at the intersection of law, psychology and philosophy, is our first truly interdisciplinary topic. It is therefore appropriate that this issue open with a paper that attempts to identify and resolve the problems raised by interdisciplinary efforts. Professor Catherine Kemp writes:

> subject matters, controversies, and strands of theoretical development located in one discipline often appear out of context to scholars trained in another. . . . [D]egrees and types of abstraction form a notable instance of this phenomenon, especially for interdisciplinary work in law and philosophy.[1]

Thus forewarned, we proceed to the remarks of Professor Alan Wertheimer, a philosopher whose books *Coercion* and *Exploitation* were central to this year's Symposium.

Our first topic centers on coercive and exploitative bargaining. Professor John Lawrence Hill offers an overview and critical analysis of Professor Wertheimer's moralized theory of coercion. Professor Penelope Bryan's commentary on the coercion of women in divorce settlement negotiations discusses concrete examples of systemic coercion. David Kaplan and Lisa Dixon provide the practitioner's viewpoint on coerced waiver and consent in the context of criminal procedure.

Professor Albert Alschuler opens the section on coerced confessions, arguing that in order to determine whether a confession is "voluntary," one need look no further than the conduct of the government employees who extracted that confession. As the exchange that follows indicates, not all commentators are prepared to accept that analysis. An unexpected benefit of our Symposium format is that it permits discussions that begin at the Conference to continue in print. Professors Richard Leo and Richard Ofshe resume their dialogue on coerced confessions with Professor Paul Cassell in our pages. We hope you will find their spirited exchange informative.

Dr. Robert Miller and Professor Bruce Winick debate involuntary commit-

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1. Catherine Kemp, *The Uses of Abstraction: Remarks on Interdisciplinary Efforts in Law and Philosophy*, 74 DENV. U. L. REV. 877, 877-78 (1997).

ment in the next section. Dr. Miller's novel analysis examines both internal and external coercion as it relates to all aspects of the mental health care profession. Professor Winick examines the interplay of legal rules and therapeutic values.

We close the issue with a series of trans-substantive themes. Professor Wertheimer discusses exploitation and commercial surrogacy. Professor Ian Ayres relates a fascinating account of coercion, extortion, and judicial corruption in Cook County, Illinois. The paradox described by Professor Jennifer Brown challenges a fundamental assumption of the foregoing papers: that choice itself is always preferable. Finally, Professor Nancy Ehrenreich treats the analytical approach employed by Professor Wertheimer as it reflects the interaction between theoretical perspectives in legal academia. She issues a warning against the formalist analysis of sociolegal issues.

The faculty of the University of Denver College of Law, especially Professors David Barnes and Roberto Corrada, Nancy Ehrenreich, and Martha Ertman, were generous with their time. This Symposium would not have been possible without their participation and guidance. Dean Dennis Lynch, a mainstay of the Symposium from its inception, has provided invaluable assistance over the last three years. We are indebted, as ever, to the Hughes Research and Development Fund for their sponsorship of the Symposium Conference. Dean Robert Yegge provided the unusual and enjoyable forum for the Conference's second day, high in the Rocky Mountains atop Yegge Peak.

With this issue, Volume 74 of the *Denver University Law Review* draws to a close. It has been a pleasure editing the most thematically varied (and largest) volume in recent memory. Chad Henderson, Editor-in-Chief of Volume 75 of the *Review*, has been indispensable to the production of this Symposium issue. We leave the *Review* in his capable hands and wish him the best of luck.

S. Tarek Younes
Editor-in-Chief

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