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Preservation and Use: Concessions in the National Parks

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The [National Park Service] shall promote and regulate the use of [national parks] . . . by such means and measures as conform to the fundamental purpose of the said parks . . . 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.¹

INTRODUCTION

The National Park Service Organic Act of 1916² reflects the important purpose of the national parks to preserve certain beautiful and significant areas. It also reflects a design, balanced with this policy of preservation, of providing for public enjoyment of such areas. The creation of national parks to effectuate such goals, beginning with Yellowstone National Park in 1872, marked a radical departure from the federal government's land giveaway programs of the nineteenth century. The Organic Act mandates that the National Park Service (NPS) manage the parks in a manner which conforms to their purposes. In

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1. 16 U.S.C. § 1 (1976).

2. Act of Aug. 25, 1916, ch. 408, 39 Stat. 535 (current version at 16 U.S.C. §§ 1-4 (1976)).

the history of park management by NPS, however, these purposes have been obscured.

National parks have become increasingly popular since their creation. Early efforts to encourage use of the parks contributed to a steady rise in visitation during the 1920's and 1930's. Intense use of the parks which accelerated greatly after World War II continues to increase each year.³

For historical reasons, the use function of the parks embodied in the NPS Organic Act has received far more congressional and managerial attention than the preservation function. In the early years, policies were devised to encourage public use of the new parks. Increased use was necessary to justify existing parks and the establishment of additional ones, and to counter continued threats to the parks from com-

3. The number of visits for the following years indicates the parks' increasing popularity (figures are solely for national parks unless otherwise indicated):

Year	Number of Visits
1904 ^a	120,690
1917 ^b	487,368
1925 ^c	1,760,872
1932 ^d	2,948,507
1941 ^e	8,388,909
1946 ^f	6,318,481
1947 ^g	9,812,090
1959 ^h	22,392,000
1972 ⁱ	54,369,000
1976 ^j	58,220,700

^a DEP'T OF THE INTERIOR, REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1917, at 190 (1917).

^b *Id.*

^c DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1932 AND THE TRAVEL SEASON, 1932, at 85 (1932).

^d *Id.*

^e DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR 348 (1946) [hereinafter cited as 1946 ANNUAL REPORT]. There were 21,050,426 visitors to all areas administered by NPS. *Id.* at 350.

^f *Id.* at 348. There were 16,094,834 visitors to all areas administered by the NPS. *Id.* at 350.

^g DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR 341 (1947). There were 22,926,675 visitors to all NPS administered areas. *Id.* at 344.

^h There were 62,812,000 visits to all NPS administered areas. J. ISE, OUR NATIONAL PARK POLICY 623 (1961).

ⁱ There were 211,621,000 visits to all NPS administered areas. NATIONAL PARK SERVICE, PUBLIC USE OF THE NATIONAL PARK SYSTEM CALENDAR YEAR REPORT—1973, at 7, 9 (1974).

^j There were 238,849,100 visits to all NPS administered areas. NATIONAL PARK SERVICE, PUBLIC USE OF THE NATIONAL PARK SYSTEM 13-14 (1976).

For a discussion of the problems of overuse, see Gapay, *National Parks Battle to Deal with Crowds but Seem to be Losing*, Wall St.J., Sept. 15, 1976 at 1, col. 1.

mercial interests and the utilitarian conservation movement.⁴ A primary method to promote and accommodate use was the establishment of concessions in the national parks—to lodge, feed, entertain, and service visitors. Early park supporters devised policies to encourage development of inside-the-park concessions that they felt were necessary to attract the tourist of that era. As park use increased, concessioners enlarged and diversified their services. In more recent times, the preoccupation of management was with accommodating the rapidly increasing number of park visitors. Laws and administrative policies were enacted to protect concessioner investment and to stimulate concessions development to meet increased demand. In the last decade, management has endeavored to discern and satisfy the desires of park visitors.⁵ Hotels, cabins, dining facilities of all types, curio shops, laundromats, gas stations, grocery stores, and employee dormitories have become integral features of almost every national park.

Overwhelming popularity and the resulting increase in facilities⁶ now threaten the parks' ability to achieve their original purposes. Wildlife has been disrupted,⁷ recognizable air and water pollution exist in heavily-used areas,⁸ and commercial construction has usurped important park land.⁹ With respect to current use, the crowds and large number of constructed facilities significantly affect the quality of the experience the parks can provide.¹⁰ The proper function of the park resource is to provide an experience which contrasts with one's daily life,¹¹ and to bring people and their environment into closer harmony.¹²

4. See note 61 *infra* and text accompanying notes 61-67 *infra*.

5. See text accompanying notes 253-61 *infra*.

6. In addition to 1498 lodging units which have a pillow count of 4668, concession facilities inside Yosemite Valley, a small, but heavily visited portion of Yosemite National Park, include

3 restaurants; 2 cafeterias; 1 hotel dining room; 4 sandwich centers; 1 seven-lift garage; 2 service stations with a total of 15 pumps; 7 gift shops; 2 grocery stores; 1 delicatessen; 1 bank; 1 skating rink; 3 swimming pools; 1 pitch-and-putt golf course; 2 tennis courts; 33 kennels; 114 horse and mule stalls; 1 barber shop; 1 beauty shop; and 13 facilities for the sale of liquor.

National Park Service Planning and Concession Operations: Joint Hearing Before Certain Subcommittees of the Committee on Government Operations and the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. 120 (1974) [hereinafter cited as *1974 Joint Hearings*].

According to 3 COUNCIL ON ENVIRONMENTAL QUALITY, ANNUAL REPORT 326 (1972) [hereinafter cited as CEQ REPORT]:

Within the five percent of the area of Yellowstone National Park that receives most of the visitor use, the developments include 750 miles of roads, 2100 permanent buildings, 7 amphitheaters, 24 water systems, 30 sewer systems, 10 electric systems with 93 miles of transmission lines, and a number of garbage dumps.

7. CEQ REPORT, *supra* note 6, at 327.

8. See *id.* at 327-28. See also Kellog, *The Shame of the Parks*, NEWSWEEK, May 10, 1976, at 70.

9. See note 6 *supra*.

10. See text accompanying notes 247-49 *infra*.

11. See note 274 *infra* and accompanying text.

12. W. EVERHART, THE NATIONAL PARK SERVICE 241 (1972). In a 1971 memorandum

But certain concessions bring many visitors to the parks only to encounter familiar, routine, or even suburban surroundings.¹³ It is the parks—"the scenery and the natural and historic objects and the wild life therein"¹⁴—which should provide the enjoyment; the concessions should only provide access to these amenities. Additionally, crime against persons and property inside the parks has increased dramatically.¹⁵ Thus, concern with both overuse and appropriate use of the parks raises serious issues concerning the proper role of concessions inside the parks.

Despite the problems presented by increasing use, NPS and Congress have chosen, at each opportunity for reassessment of the concessioner's role within the parks, to maintain policies almost identical to those which originated in the early years when the motivation for encouraging concession development was to promote national park use. Such reaffirmations have come largely without questioning whether the assumptions underlying previous policies were still valid, or whether all of the uses accommodated and encouraged by the concessioners conformed to the purposes of the national parks.

With congressional support for continued park development and NPS attempts to satisfy user demands, concessioners in the 1970's have attempted to become the parks' dominant planning force.¹⁶ They have at times been treated by the Park Service as if they were the exclusive representatives of the public interest.¹⁷ The interests of future genera-

to the Director of NPS, George Hartzog, then Secretary of the Interior Rogers C.B. Morton wrote:

[W]hen Congress determined to "dedicate and set apart" the Yellowstone country as a "public park or pleasing ground for the benefit and enjoyment of the people," it reaffirmed the belief that . . . [people have] moral and spiritual needs, and that in utilizing the earth's resources, we must preserve sanctuaries where our kinship with all nature can be constantly renewed, and understood.

Memorandum from Rogers C.B. Morton to Director, NPS [George Hartzog] (June 17, 1971), *reprinted in* DEPT. OF INTERIOR, ADMINISTRATIVE POLICIES FOR HISTORICAL AREAS OF THE NATIONAL PARK SYSTEM 105 (1973) [hereinafter cited as DOI, ADMINISTRATIVE POLICIES]. John Muir, an early park proponent, wrote:

Yosemite Park is a place of rest, a refuge from the . . . dust and weary, nervous, wasting work of the lowlands, in which one gains the advantages of both solitude and society. Nowhere will you find more company of a soothing peace-be-still kind. Your animal fellow beings, so seldom regarded in civilization, and every rock brow and mountain, stream, and lake, and every plant soon come to be regarded as brothers; even one learns to like the storms and clouds and tireless winds. . . . This one noble park is big enough and rich enough for a whole life of study and aesthetic enjoyment. . . . None can escape its charms. Its natural beauty cleanses and warms like fire, and you will be willing to stay forever in one place like a tree.

JOHN OF THE MOUNTAINS, THE UNPUBLISHED JOURNALS OF JOHN MUIR 350 (L. Wolfe ed. 1938).

13. See note 6 *supra*, and text accompanying notes 236, 328-30 *infra*.

14. 16 U.S.C. § 1 (1976). See text accompanying note 1 *supra*.

15. See note 246 *infra* and accompanying text.

16. See text accompanying notes 224, 231 *infra*.

17. See note 293 *infra* and text accompanying notes 293-98 *infra*.

tions remain undefined and have gone largely unconsidered as NPS, Congress, and concessioners attempt to justify current policies by pointing to nebulous public desires.¹⁸

This Article argues for urgent reevaluation by policy makers of concessions management. Reexamination of the concessioners' role inside the national parks is necessary if they are to remain America's "crown jewels." Sections I and II, following this Introduction, examine the history of concessions in the parks: how they were initially encouraged by an unlikely alliance of the railroads and the preservationists, and how they later became entrenched through NPS management policies, statutory endorsement, and abuse of the modern park planning processes. Consideration of how concessions policies have evolved will permit a better understanding of current park management. Section III then explores the conflicts which must be understood before a modern concessions policy can be devised: first, the conflicts created by heavy visitation and concessioner encouragement of more park use; second, the inconsistency between certain types of use and the statutory purpose of the parks to provide for the enjoyment by current users of natural park assets; and third, the problem of assuring concessioners a reasonable profit while inducing them to offer only services consistent with this park purpose of providing for enjoyment of the natural assets and in a manner that leaves them "unimpaired for the enjoyment of future generations."¹⁹ Is it possible to provide economic incentives for private development and at the same time to limit the scope of that development? Finally, section IV of this Article offers recommendations as to the proper resolution of these conflicts and suggests specific proposals for future concessions management. However, the complexity of issues presented by inside-the-park concessions is not to be underestimated; a complete resolution of the various conflicts will not be presented.²⁰

I

ENCOURAGEMENT OF CONCESSIONS IN THE PARKS

According to popular folklore, the national park concept was born during a campfire discussion of profit-making schemes.²¹ When some of the other members of a Yellowstone expedition in 1870 expressed

18. See text accompanying notes 258-61 *infra*.

19. 16 U.S.C. § 1 (1976).

20. The type of concessions to be permitted and the precise administrative regulations to govern and protect their legitimate business interests are a few of the problems involved. This paper will not attempt to resolve fully the issues it discusses; the lines of reasoning are intended to be suggestive, not dispositive.

21. There is also evidence that the national park concept first arose in connection with Yosemite in the 1860's. See H. HUTH, *NATURE AND THE AMERICAN* 224 n.13 (1972); Sax, *America's National Parks*, *NAT. HIST.*, October 1976, at 57, 63.

their intention to file claims on land near geysers, Cornelius Hedges objected. Hedges argued against private ownership of any portion of the region and proposed instead that Yellowstone be set aside as a great national park.²² Nathaniel P. Langford, another expedition member who later became the first superintendent of Yellowstone, agreed. Both men supported the creation of a park of moderate size, designed primarily to provide several acres of protection around each of the scenic wonders. This would preserve the scenery, while permitting the public to view the sights.²³

Yellowstone's initial supporters were not motivated by the desire to preserve vast wilderness; "they acted to prevent private acquisition and exploitation of geysers, hot springs, waterfalls, and similar curiosities."²⁴ The strategy for congressional debate was not to portray the park as wilderness, but to emphasize that these features were especially appropriate for preservation in view of the area's lack of material exploitability. At the same time, the possible existence of undiscovered waterfalls and geysers argued for wider park boundaries.²⁵

This strategy proved successful. In 1872, President Ulysses S. Grant approved legislation establishing Yellowstone National Park²⁶ whereby over two million acres of northwestern Wyoming and southwestern Montana were "reserved and withdrawn from settlement, occupancy, or sale . . . and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people."²⁷ According to provisions of an 1894 Act, the Secretary of the Interior was to make regulations providing "for the preservation . . . of all timber, mineral deposits, natural curiosities, or wonderful objects within said park."²⁸

The idea of creating national parks enjoyed early industrial support. Railroad interests were instrumental in promoting the establishment and use of many national parks. The firm of Jay Cooke and Company, promoters and financiers of the Northern Pacific Railroad extension project through Montana, had actively lobbied for the legislation preserving Yellowstone. These interests foresaw that Yellowstone would become a noted tourist attraction like Niagara Falls, providing substantial profit to the transportation company serving it.²⁹

22. R. SHANKLAND, *STEVE MATHER OF THE NATIONAL PARKS* 44 (1970).

23. R. NASH, *WILDERNESS AND THE AMERICAN MIND* 112 (1973).

24. *Id.* at 108.

25. *Id.* at 112.

26. Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32 (current version at 16 U.S.C. § 22 (1976)).

27. *Id.*

28. Act of May 7, 1894, ch. 72, § 4, 28 Stat. 74 (codified at 16 U.S.C. § 26 (1976)).

29. R. NASH, *supra* note 23, at 111. Completion of the railroad simultaneously with the opening of the park was backed by park proponents in an exchange of political support. Runte, *Pragmatic Alliance, Western Railroads and the National Parks*, *NAT'L PARKS AND CONSERVATION MAGAZINE*, April 1974, at 14.

The Act establishing Yellowstone contemplated that private enterprise would provide visitor facilities. The Secretary of Interior was authorized to grant leases of small parcels of land for terms not exceeding ten years at places in the park where visitor accommodations were needed.³⁰ There was no assurance of renewal. Expecting rents charged to concessioners to produce sufficient revenues, Congress did not even vote funds for administration and protection of the park; there was no proposal that the government furnish facilities and services.³¹ Congress did not appropriate any funds for Yellowstone in the first five years of the park's existence.

In 1880, eight years after its creation as a national park, Yellowstone contained nine buildings: the government headquarters, seven frontier-type log cabins, and a small hotel built under an informal permit.³² Riding-horse and pack-train accommodations were available, with guides and stagelines provided.³³

Monopolistic leasing and the possibility that natural features might be despoiled or exploited led to a special clause in an 1883 appropriations bill.³⁴ The Secretary was to lease only tracts of ten acres or less for ten years and one person could not be granted more than ten leases.³⁵ A further restriction specified that the leased land should neither include any natural wonders nor be within one-quarter mile of any geysers or the Yellowstone Falls.³⁶

Northern Pacific had created the Yellowstone Park Association which added five hotels, and soon controlled the transportation be-

30. Act of March 1, 1872, ch. 24, § 2, 17 Stat. 32 (codified at 16 U.S.C. § 22 (1976)). The ten year lease period has been raised to a maximum of thirty years for all national parks, including Yellowstone. 16 U.S.C. § 3 (1976) (originally enacted as Act of Aug. 24, 1916, ch. 408, § 3, 39 Stat. 535, *as amended by* Act of May 29, 1958, Pub. L. No. 85-434, 72 Stat. 152).

31. Late nineteenth century fiscal policy precluded Congress from spending revenues on lands which had been set aside and withheld from materially productive use. Congress' attitude toward the parks was consistent with its policy of not furthering the fine arts with public funds. H. HUTH, *supra* note 21, at 154.

32. R. SHANKLAND, *supra* note 22, at 115.

33. J. ISE, *supra* note 3h, at 32.

34. It had come to Congress' attention that one concessioner, the Yellowstone National Park Improvement Co., had leased seven parcels of park land totalling seven square miles that included all of the geyser basins and other scenic attractions. The concessioner had begun chopping park trees to build new facilities and contracted to get thousands of pounds of meat from park wildlife to feed employees. *Id.* at 35-37. See also R. SHANKLAND, *supra* note 6, at 115. Also, a general political climate disfavoring monopolies was emerging. Only a few years later, in 1890, the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1976), was enacted.

35. Act of March 3, 1883, ch. 143, 22 Stat. 626.

36. *Id.* The 1883 policy was reaffirmed in 1894, but with some important changes. The distance was lowered to within one-eighth mile, but coverage was extended to include the Grand Canyon, the Yellowstone River, Mammoth Hot Springs and "any object of curiosity" in the park. Furthermore, leases could be entered into with one entity for twenty acres total, not exceeding ten acres per tract. Act of Aug. 3, 1894, ch. 198, 28 Stat. 222 (codified at 16 U.S.C. § 3 (1976)).

tween the park and the train.³⁷ In 1891, though, the Secretary, in deference to congressional disapproval of monopolies, broke up the holdings of the Association, allowing it to keep only the hotels.³⁸

In 1890, three more national parks were created, most notably Yosemite.³⁹ Yosemite Valley had already been granted to California as a state park, largely in response to articles on the beauty of the Valley and the efforts of Frederick Law Olmstead.⁴⁰ The railroad industry, this time in the form of the Southern Pacific, was an active supporter of a national park at Yosemite, just as it had been involved in Yellowstone's creation.⁴¹ Unlike Yellowstone, however, Yosemite was born largely through the open expression of concern for wilderness preservation, primarily in the influential writings of John Muir.⁴² Muir helped to focus national attention on the Sierra around Yosemite, and as a measure of his impact, the national park there closely followed his specifications.⁴³

Similar to the Yellowstone legislation, the Yosemite legislation empowered the Secretary to grant leases of land in Yosemite National Park for not more than twenty years, with a maximum of twenty acres per lease. An entity could be granted no more than ten leases.⁴⁴ The first simple accommodations, like Yellowstone's, were constructed

37. R. SHANKLAND, *supra* note 22, at 117.

38. *Id.* at 118.

39. Act of Oct. 1, 1890, ch. 1263, §§ 1, 3, 26 Stat. 650 (current version at 16 U.S.C. §§ 471c, 471d (1976)). The others were Sequoia and General Grant, the latter subsequently incorporated into Kings Canyon by Act of March 4, 1940, § 2, 54 Stat. 43 (current version at 16 U.S.C. § 80a (1976)).

40. The initial preservation of Yosemite Valley in California actually provided the historical precedent for Yellowstone. It marked the first instance where public domain was set aside by the federal government to protect an area and conserve it for recreational enjoyment. In 1864, Congress granted approximately ten square miles of federal land, including Yosemite Valley and part of the Mariposa Grove of "Big Trees," to California as a state park. The grant required "that the premises be held for public use, resort and recreation and shall be held inalienable for all time." Act of June 30, 1864, ch. 184, § 1, 13 Stat. 325. The creation of Yosemite Valley State Park is discussed in L. ROPER, *F.L.O.: A BIOGRAPHY OF FREDERICK LAW OLMSTED* 282 (1973). On March 3, 1905 the California Legislature approved an act to cede Yosemite Valley and the Mariposa Big Tree Grove back to the United States. 1905 Cal. Stats. 54. The land was annexed to the national park by Act of June 11, 1906, Pub. Res. No. 27, § 1, 34 Stat. 831 (current version at 16 U.S.C. § 48 (1976)).

Yellowstone's location in a territory precluded it from being given in trusteeship to a state as was done with Yosemite Valley. The only method available to set it aside as a public recreation area was to designate it as a park and to place it directly under federal administration. Therefore, while Yosemite Valley provided the historical precedent for congressional designation of parkland, the creation of Yellowstone eight years later marks "the legal beginning of federal administration of parks." H. HUTH, *supra* note 21, at 153.

41. R. NASH, *supra* note 23, at 132.

42. J. ISE, *supra* note 3h, at 56. For examples, see J. Muir, *The Treasures of the Yosemite*, 40 *CENTURY MAGAZINE* 483 (1890), and J. Muir, *Features of the Proposed Yosemite National Park*, *id.* at 656.

43. R. NASH, *supra* note 23, at 132.

44. 16 U.S.C. § 55 (1976).

under an informal permit system by people who settled on the land hoping eventually to gain title to it. By 1899, however, the Curry Company had become established as a major concessioner and its event, "firefall,"⁴⁵ a noted attraction.

Upon Theodore Roosevelt's request, Muir accompanied him on an excursion through Yosemite. One of the results of the journey was a proposal that California transfer the Valley back to the federal government for inclusion in the adjacent national park.⁴⁶ California agreed and Congress acted in 1906.⁴⁷ Upon the Valley's return, the Secretary found twenty-seven concessions in force with great discrepancies in fees charged and types of services provided.⁴⁸ By 1908, the number had been reduced to nineteen and inequalities lessened.

The success of Yellowstone in attracting visitors and stimulating business adjacent to the park provided the impetus for national park extension. Congress established parks in many parts of the West: Mt. Rainier National Park in Washington was designated as a national park in 1899;⁴⁹ Crater Lake National Park in Oregon in 1902;⁵⁰ Mesa Verde National Park in Colorado in 1906;⁵¹ Glacier National Park in Montana in 1910;⁵² and Rocky Mountain National Park in Colorado in 1915.⁵³ Other areas were preserved as national monuments, including Grand Canyon in 1908⁵⁴ and Mount Olympus in Washington in 1909.⁵⁵ Both were subsequently designated national parks.⁵⁶

As scenic preservation gained support, other railroads followed the early examples of the Northern and Southern Pacific in courting the national parks. Santa Fe Railway completed a line up to the South Rim of the Grand Canyon; Glacier National Park was primarily sup-

45. Firefall involved setting fire to a pile of wood at Glacier Point at night and pushing the glowing ashes over the cliff to fall the long distance to the Valley floor. It has been discontinued. J. ISE, *supra* note 3h, at 82.

46. L. ROPER, *supra* note 40, at 282.

47. 16 U.S.C. § 48 (1976); see note 40 *supra* for the statutory history. The Antiquities Act, also passed in 1906, authorized the President, by proclamation, to set aside as national monuments, "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated on public lands. *Id.* § 431.

48. J. ISE, *supra* note 3h, at 82. Ise indicates a complete mismanagement of the park by California, fiscally and preservation-wise, with corruption in the determination of concessioner rates. *Id.* at 75, 82.

49. 16 U.S.C. § 91 (1976) (originally enacted as Act of March 2, 1899, ch. 377, § 1, 30 Stat. 993).

50. *Id.* § 121 (originally enacted as Act of May 22, 1902, ch. 820, § 1, 32 Stat. 202).

51. *Id.* § 111 (originally enacted as Act of June 29, 1906, ch. 3607, § 1, 34 Stat. 616).

52. *Id.* § 161 (originally enacted as Act of May 11, 1910, ch. 226, § 1, 36 Stat. 354).

53. *Id.* § 191 (originally enacted as Act of Jan. 26, 1915, ch. 19, § 1, 38 Stat. 798).

54. Presidential Proclamation of Jan. 11, 1908, 35 Stat. 2175.

55. Presidential Proclamation of March 2, 1909, 35 Stat. 2247.

56. The Grand Canyon became a national park in 1919. Act of Feb. 26, 1919, ch. 44, § 1, 40 Stat. 1175 (current version at 16 U.S.C. § 221 (1976)). Mount Olympus National Monument became Olympic National Park in 1938. Act of June 29, 1938, ch. 812, § 1, 52 Stat. 1241 (current version at 16 U.S.C. § 251 (1976)).

ported by Great Northern and its president, Louis W. Hill. A few years later Union Pacific began developing facilities at Zion, Bryce, and the North Rim of the Grand Canyon.⁵⁷

The motivation for strong railroad support of the parks was simply to encourage travel on their lines to the West. The railroads observed that Americans were traveling to foreign natural sights, *e.g.* the Swiss Alps, because places of extraordinary beauty in the United States were not preserved and properly managed.⁵⁸

Railroad officials realized that simply preserving scenic areas would not be sufficient to lure visitors. Since it was the affluent who comprised the majority of vacationers at this time, accommodations to serve the wealthy had to be developed. The establishment of hotels became an integral part of railroad operations in the parks.⁵⁹

Preservationists similarly were concerned about how to increase park tourism, though for different reasons than the railroads. The success of parks depended on the number of people who used them. Congressional interest in the parks was directly related to the extent of park use.⁶⁰

More importantly, while the park concept from the start had been unpopular with hunting, mining, logging, and grazing interests, greater use of the parks was needed to counter the influence of the newly emerging utilitarian school of conservation⁶¹ which clearly threatened continued park existence. Preservationists had welcomed the passage of the Forest Reserve Act⁶² in 1891 which authorized the creation by

57. See Letter from Stewart L. Udall, Secretary of the Interior, to Wayne N. Aspinall, Chairman, House Committee on Interior and Insular Affairs (May 14, 1965) [hereinafter cited as Udall Letter], reprinted in H.R. REP. NO. 591, 89th Cong., 1st Sess. 7 (1965) [hereinafter cited as H.R. REP. NO. 591], and [1965] U.S. CODE CONG. & AD. NEWS 3495.

58. Runte, *supra* note 29, at 14-15.

59. *Id.* In 1904, the South Rim of the Grand Canyon became the site of Santa Fe's El Tovar Hotel. Northern Pacific had continuously built houses in Yellowstone. And the Great Northern Railway provided the accommodations in Glacier National Park, including three large lodges and twelve alpine chalets constructed between 1911 and 1915. *Id.*

60. D. SWAIN, WILDERNESS DEFENDER: HORACE M. ALBRIGHT AND CONSERVATION 54 (1970).

61. According to Swain, *The Passage of the National Park Service Act of 1916*, 50 WIS. MAGAZINE OF HIST. 1 (1966):

Glorifying scientific efficiency and technical expertise, they [the utilitarians] advocated giant multiple-purpose development programs that provided for the full and efficient utilization of timber, grasslands, irrigation sites, mineral deposits, and hydroelectric power. Their elaborate plans almost always downgraded aesthetic considerations.

Id. at 4-5.

62. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792):

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

Presidential proclamation of "forest reserves" (later named "national forests") on federal public lands. Muir and others believed the Act was intended to preserve forests in their undeveloped condition,⁶³ but this belief was short-lived. The passage of the Forest Management Act in 1897⁶⁴ and the appointment of Gifford Pinchot, pioneer of the utilitarian school, in 1898⁶⁵ as Chief Forester of the Forest Division signaled the future course for the forest reserves. The transfer of the Forest Division (renamed Forest Service) to the Department of Agriculture in 1905⁶⁶ indicated that the reserves were for commercial use, not wilderness preservation. Pinchot's management instructions were clear: "All of the resources of forest reserves are for use . . . [W]here conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run."⁶⁷

The cohesiveness of the conservation movement was destroyed. To the utilitarian conservationists, reclamation, sustained-yield logging, and damming rivers were the proper management of resources; not scenic preservation in national parks.⁶⁸ Struggles between utilitarians and preservationists over future land designations created instability for the national parks,⁶⁹ and in many ways affected their future.

The conflict came to a dramatic head with the controversy concerning the flooding of Hetch-Hetchy Valley, an aesthetic and geographical complement to the Yosemite Valley in Yosemite National Park.⁷⁰ The City of San Francisco continually confronted a water shortage and the earthquake and fire of 1906 made the need for an adequate source even more imperative.⁷¹ About 150 miles to the east, the Tuolumne River flowed through the granite-walled Hetch-Hetchy Valley providing the possibility of damming its narrow western end to create a reservoir, which additionally could be used to generate hydroelectric power. After years of intense debate, Congress yielded to the utilitarian views and the needs of the City of San Francisco by author-

63. R. NASH, *supra* note 23, at 133.

64. Act of June 4, 1897, ch. 2, § 1, 30 Stat. 35 (codified at 16 U.S.C. §§ 475-482 (1976); repealed in part by Pub. L. No. 94-588, § 13, 90 Stat. 2958 (1976)).

65. G. PINCHOT, *BREAKING NEW GROUND* 135-37 (1947); M. MCGEARY, *GIFFORD PINCHOT, FORESTER-POLITICIAN* 45 (1960).

66. G. PINCHOT, *supra* note 65, at 254-62. M. MCGEARY, *supra* note 65, at 61.

67. Letter from James Wilson, Secretary of Agriculture, to Gifford Pinchot (Feb. 1, 1905), *reprinted in* G. PINCHOT, *supra* note 65, at 261 (emphasis in original). Mr. Pinchot actually drafted the letter to himself which the Secretary of Agriculture then signed, G. PINCHOT, *supra* note 65, at 260. *See also* M. MCGEARY, *supra* note 65, at 61.

68. *See* note 61 *supra*.

69. Pinchot and the utilitarians, gaining in popularity, might convince Congress to abolish existing national parks and turn the land over to the Forest Service for "wise-use" management. *See generally* R. NASH, *supra* note 23, at 133-40.

70. For a detailed account of the controversy, *see id.* at 161-181.

71. *Id.* at 161.

izing the construction of the Hetch-Hetchy dam in Yosemite National Park.⁷²

Though a defeat for the preservation movement, the Hetch-Hetchy controversy had important implications for national parks. Without question, the fact that the controversy even existed was significant. National park preservation had become a viable political force. Moreover, it had become valid to consider wilderness preservation along with traditional American values concerning the use of land, *i.e.*, conquering and manipulating it.⁷³

Additionally, the loss of the Valley forced preservationists to reevaluate their movement and strategies as it became apparent that the very survival of the national parks depended on the number of people who visited them. Dam proponents had continually argued that only a few hundred people enjoyed Hetch-Hetchy during one summer. More use was needed to justify the parks' worth. Yet the dynamics of tourism were still against the parks. Every national park was in the West, distant from the population centers and noted tourist sights in the East.

Responding, the preservationists determined that the use of the national parks for outdoor recreation had to be more vividly demonstrated. Thus, whatever was necessary to increase visitation had to be encouraged. The commitment to aesthetic preservation was not discarded but had to be compromised to meet the political strength of the utilitarians and avoid greater scenic intrusions. Additional roads, hotels, and other visitor facilities seemed more tolerable than dams or aqueducts.

But upon examination, park management looked chaotic. Each park had separate, and often dissimilar regulations for concessions operation. Management functions among the parks, and even inside a single park were undefined.⁷⁴ A borax millionaire, Stephen Mather, had written a letter citing these problems to Interior Secretary Franklin K. Lane, a college acquaintance. An interchange of letters led to Mather's appointment in 1915 as Special Assistant to the Secretary of Interior.⁷⁵

72. Act of Dec. 19, 1913, ch. 4, § 9(k), 38 Stat. 242.

73. See R. NASH, *supra* note 23, at 181: "[V]ery few favored the dam because they opposed wilderness. Even the partisans of San Francisco phrased the issue as not between a good (civilization) and an evil (wilderness) but between two goods."

74. R. SHANKLAND, *supra* note 22, at 104. An Army Corps of Engineers officer, who was responsible to neither the Interior Department nor the Park Superintendent, administered all construction and its funding in Yellowstone. Yellowstone's Supervisor was an Army officer, appointed by the Secretary of War, yet park administration was under the jurisdiction of the Secretary of the Interior. Army Corps personnel were used for road building in Crater Lake and Mt. Rainier, as in Yellowstone, however, in those two parks the Superintendent was appointed by and responsible to the Secretary of the Interior. *Id.*

75. *Id.* at 7.

The need for increased use, coupled with the realization that existing management was self-defeating and Mather's efforts to correct the situation, led to the passage of the National Park Service Organic Act in 1916,⁷⁶ and the creation of the National Park Service. The Secretary was authorized to make all rules deemed necessary or proper for the use and management of the parks,⁷⁷ and could grant "privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks . . . for periods not exceeding twenty years."⁷⁸

The Act stipulated that use and enjoyment were to be provided in a manner compatible with preservation.⁷⁹ In interpreting the Park Service Organic Act, the Secretary outlined the administrative policy and management principles for the national parks in a now famous letter referred to as the "Magna Carta of the National Parks." These are:

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.⁸⁰

Mather became the first NPS director and devoted his initial energies to promoting the parks. The thirty-seven areas administered by the Park Service in 1916 had fewer than 400,000 visitors.⁸¹ Mather was convinced that publicity was needed to gain public support, and he hired Robert Sterling Yard to do the writing and organizing necessary

76. Act of Aug. 25, 1916, ch. 408, 39 Stat. 535 (current version at 16 U.S.C. §§ 1-4 (1976)). Congressional debate centered primarily on grazing issues and whether certain monuments would be included within forest reserves. The question of who should have the right to add more staff—Congress or the Interior Department was also considered. 53 CONG. REC. 10,363-64 (1916). See also R. SHANKLAND, *supra* note 22, at 100-13.

77. 16 U.S.C. § 3 (1976).

78. Act of Aug. 25, 1916, ch. 408 § 3, 39 Stat. 535. The Act was amended by an Act of May 29, 1958, Pub. L. No. 85-434, 72 Stat. 152 to change twenty years to thirty years (current version at 16 U.S.C. § 3 (1976)).

79. 16 U.S.C. § 1 (1976). See text accompanying note 1 *supra*. Swain, *supra* note 61, lists three reasons for the Act's significance:

1. [I]t foretold the birth of a new Federal Conservation agency designed specifically to protect and improve the administration of the national parks . . . ;
2. [I]t marked the emergence of the aesthetic conservationists . . . as an effective, organized force within the national conservation movement;
3. [I]t forecast the end of Gifford Pinchot's domination of national conservation affairs and the decline of his strictly utilitarian conservation philosophy.

Id. at 4.

80. Letter from Franklin K. Lane, Secretary of the Interior, to Stephen T. Mather, Director, NPS (May 13, 1918), reprinted in DOI, ADMINISTRATIVE POLICIES, *supra* note 12, at 81. The letter is referred to as the "Magna Carta." *Id.* at 90.

81. CEQ REPORT, *supra* note 6, at 318. "The entire budget for the new directorate, including salaries, travel, and office expenses was \$19,500, together with about half a million dollars for operating all the parks and monuments." *Id.* See also Act of Aug. 25, 1916, ch. 408, § 1, 39 Stat. 535.

to publicize the parks and to encourage tourist travel to them.⁸² Mather looked to the railroads for support, capitalizing on their slogan "See America First," and using their finances for the program. Portrayals of parks appeared in motion pictures, booklets, and paintings. Additionally, Mather made a habit of inviting national political, literary, and other influential figures to accompany him on camping excursions into the parks.⁸³

Mather's other priority was to develop tourist facilities. About Yellowstone, he wrote: "Golf links, tennis courts, swimming pools, and other equipment for outdoor pastime and exercise should be provided by concessions, and the park should be extensively advertised as a place to spend the summer instead of five or six days of hurried sight-seeing"⁸⁴ Upon taking office, Mather found the concessions highly competitive and uneconomical. They consumed too much parkland and yet none of the parks except Yellowstone offered the tourist "half enough of the comforts of life."⁸⁵ To Mather, "scenery [was] a hollow enjoyment to a tourist who sets out in the morning after an indigestible breakfast and a fitful sleep on an impossible bed."⁸⁶

Mather favored monopolies within the parks both as an effective management tool and, more importantly, as an inducement for investment. Other inducements for new capital included:

- (1) a preferential right to provide additional services, if and when required; (2) recognition of the concessioner's equity in the facilities provided by him; (3) the right to be reimbursed for the facilities if someone else was granted the privilege of operating such facilities; (4) the opportunity to earn a reasonable profit in the overall operation; and (5) a franchise fee provision under which concessioners would be entitled to earn net profits equal to 6 percent of their investment before paying a franchise fee.⁸⁷

These policies were effective. By 1924 the concession business in Yel-

82. See, e.g., R.S. YARD, *THE NATIONAL PARKS PORTFOLIO* (3rd ed. 1921) and R.S. YARD, *THE BOOK OF THE NATIONAL PARKS* (1919).

83. J. ISE, *supra* note 3h, at 197.

84. See *id.* at 198. In a similar vein, Horace Albright, as Superintendent of Yellowstone in the 1920's, developed a miniature zoo as one of the park's feature attractions. His philosophy was that visitors had a right to see wildlife whenever possible. Corrals were built to house buffaloes, deer, elk, coyotes, bears, porcupines, and badgers. Bear-feeding stations near the park's hotels provided nightly entertainment to a seated audience as the bears fed on food scraps and garbage from the hotel dining rooms. D. SWAIN, *supra* note 60, at 170.

85. R. SHANKLAND, *supra* note 22, at 121.

86. *Id.* at 134.

87. As explained in Udall Letter, *supra* note 57, reprinted in H.R. REP. NO. 591, *supra* note 57, and [1965] U.S. CODE CONG. & AD. NEWS 3495. The six percent was cumulative; if the concessioner made only three percent one year, it could take nine percent the next year before paying the government. *Id.*

In 1928, Congress amended the National Park Service Act so the Secretary could enter into concession lease contracts without advertising and without securing competitive bids. Act of March 7, 1928, ch. 137, § 1, 45 Stat. 235 (current version at 16 U.S.C. § 3 (1976)).

lowstone was operating as a regulated monopoly,⁸⁸ and tourist accommodations were improved and expanded.⁸⁹

This preoccupation with use and development of tourist facilities is not to suggest a total disregard of the parks' preservation function. The Park Service supported and established limits on use. Mather refused to permit railroad lines within Yellowstone, although he had encouraged railroad lines to the park.⁹⁰ He resisted tremendous pressures during and shortly after World War I from grazing, mining, and lumbering interests. Grazing was permitted in only a few areas. Serious proposals for a cable or bridge to link the rims of the Grand Canyon were effectively fought off by Mather. Threats of resignation by Mather and Horace Albright, Superintendent of Yellowstone, worked to defeat a Department of the Interior-sponsored, Bureau of Reclamation proposal for a series of dams in Yellowstone.⁹¹

Mather clearly viewed the national parks as unique entities. He began a tradition of resisting park additions of inferior quality, those which would degrade the system as a whole and duplicate state and municipal areas.⁹² To make the park visit more enjoyable and meaningful, he developed NPS educational and interpretive functions and professionalized the field staffs.⁹³

But Mather and Albright (who succeeded Mather as NPS director) were persuaded that the economics of tourism gained for the parks more support than their pristine beauty; the Park Service's management posture was that national parks be made attractive for use. This was a position of compromise and accommodation. Mather and Albright probably never considered that their continuous efforts to increase the number of park visitors might eventually conflict with the parks' purpose to preserve a beautiful natural setting unimpaired for future generations. Still under pressure from the utilitarians, these men were "pragmatic preservationists" and must have realized that current political reality made increased park use essential.⁹⁴ If it was in the public interest to maintain existing parks and establish new ones, then it was in the public interest that they be noticeably used.

88. J. ISE, *supra* note 3h, at 211. D. SWAIN, *supra* note 60, at 133.

89. D. SWAIN, *supra* note 60, at 133.

90. While Mather believed in encouraging the railroads to provide inns and hotels in the parks, he occasionally found it necessary to exercise his authority over concessions. When the Great Northern Railroad had finished a hotel in Glacier National Park, Mather reminded the company that its sawmill and sawdust must leave. At the company's request, Mather granted it more time. The deadline expired and the railroad company again asked for additional time, although the hotel was already receiving guests. Mather was in the park at the time, so that afternoon he rounded up NPS trail crews and had the sawmill blown up. R. SHANKLAND, *supra* note 22, at 209.

91. CEQ REPORT, *supra* note 6, at 319.

92. J. ISE, *supra* note 3h, at 296.

93. *Id.* at 199.

94. D. SWAIN, *supra* note 60, at 54.

Policies to encourage use continued during the 1930's as the Park Service was transformed into a multi-purpose, but primarily recreational, agency. In 1933, most federal parks became NPS-administered: historical parks, battlefields, and cemeteries were transferred from the Department of War,⁹⁵ and the parks and buildings of the nation's capital were placed under Park Service jurisdiction.⁹⁶ The Park Service began administering historic sites of national significance under the Historic Sites Act of 1935.⁹⁷ A planning function was added to the Park Service by the Park, Parkway and Recreation Study Act of 1936⁹⁸ which authorized recreation planning and an inventory of national recreation needs. Lastly, Park Service jurisdiction was expanded to encompass national seashore areas, of which Cape Hatteras was the first in 1937.⁹⁹

During the Depression, the character of concession services demanded by visitors and provided by the concession operators changed significantly in national parks, especially in response to shifts in modes of travel. Visitors who had formerly reached the parks by rail were now driving in automobiles. Previously, hotels accommodated the wealthy tourist, and concessioner profits were derived primarily from sight-seeing transportation, a service not needed by the car owner. As a result, the 1930's saw the beginning of a change to lower-priced and more diverse services. Cabins, cafeterias, coffee shops, souvenir stores, and grill facilities yielded a larger portion of the concessioner's revenue and, with use of the parks steadily increasing, most concessioners were investing in more of these facilities.¹⁰⁰

The advent of World War II halted concession growth. Many large concessioners were forced to curtail drastically their operations or even close completely.¹⁰¹ Appropriations for the parks declined severely, closely following the decline in the number of visitors,¹⁰² and

95. Appropriations for the Treasury and Post Office Dep'ts, fiscal year 1934, ch. 212, title IV, 47 Stat. 1517 (1933). See CEQ REPORT, *supra* note 6, at 319.

96. CEQ REPORT, *supra* note 6, at 319.

97. Historic Sites Act, ch. 593, § 2, 49 Stat. 666 (1935).

98. Park, Parkway and Recreation Study Act, ch. 735, 49 Stat. 1894 (1936).

99. 16 U.S.C. § 459 (1976) (originally enacted as Act of Aug. 17, 1937, ch. 687, § 1, 50 Stat. 669).

100. J. ISE, *supra* note 3h, at 429-30. The figures for visits to the entire national park system are:

Year	Number of Visits
1933	3,481,000
1936	11,989,000
1940	16,755,000

Id. at 429.

101. *Id.* at 448. Udall Letter, *supra* note 57, reprinted in H.R. REP. NO. 591, *supra* note 57, at 7, and [1965] U.S. CODE CONG. & AD. NEWS 3495. See 1946 ANNUAL REPORT, *supra* note 3e, at 310.

102.

Appropriations
1940—\$21 million^a

Visitors
21,050,426^c

only began to rise when visitation returned to pre-War levels.¹⁰³

II

ENTRENCHMENT OF CONCESSIONS IN THE FACE OF EMERGING CONFLICTS

At the end of World War II, a sudden acceleration in the number of park visitors left concessioners unprepared. Hotel and cabin accommodations were lacking and food services had to turn people away. Facilities had deteriorated and were understaffed.

New problems not foreseen by the early park supporters resulted. It took just a few years to realize the implications of such intensive use. In 1949 the NPS Director wrote an article entitled "The Dilemma of Our Parks" stating that on some days as many as 30,000 tourists visited Yosemite, that there were serious impacts on the vegetation, and that problems with trash and sanitation existed in the parks, especially at Yellowstone.¹⁰⁴ The article went on to state that naturalist-led walks in many parks were attracting excessive crowds, and that more camping space, trails, and roads were needed. Vandalism, particularly the destruction of natural objects, had also become a serious problem.¹⁰⁵

Problems were also created by the newer types of transportation. Parks previously planned for visitors coming by rail contained very few spaces for automobiles. In the 1940's the increasing use of trailers also demanded new types of facilities.¹⁰⁶ In 1950, the Secretary of the Interior was given authority, after consultation with other agencies, to develop airports in, or in close proximity to, national parks, monuments, and recreation areas.¹⁰⁷ The first one was constructed near the west entrance of Yellowstone.¹⁰⁸

Numerous policies were discussed to resolve the problems of increased use. Among those considered was a proposal that concessions and administrative buildings be moved out of congested park areas, but this was regarded as a long-term program offering no immediate solution.¹⁰⁹ Another idea was to limit the length of stays at campgrounds,

1943—\$ 5 million^b

6,908,749^d

a. J. ISE, *supra* note 3h, at 452.

b. *Id.*

c. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1952, at 171 (Table No. 203) (73rd ed. 1952).

d. *Id.*

103. J. ISE, *supra* note 3h, at 452. See CEQ REPORT, *supra* note 6, at 320.

104. Drury, *The Dilemma of Our Parks*, 55 AM. FORESTS, June 1949, at 6.

105. *Id.* at 9.

106. J. ISE, *supra* note 3h, at 486.

107. 16 U.S.C. § 7a (1976). J. ISE, *supra* note 3h, at 486.

108. J. ISE, *supra* note 3h, at 486.

109. *Id.* at 458.

hotels, and cabins in crowded areas during peak seasons.¹¹⁰

In 1946, the Department of the Interior decided to revise concession policy. The Solicitor of the Department provided the groundwork by concluding that upon the expiration of a concession contract, the concessioner had no property right in the facilities it had erected on government-owned land. Thus, it was not entitled to government compensation when the contract expired.¹¹¹ The Solicitor concluded that any rights or interests which a concessioner had in these improvements were derived from the contract which provided for reimbursement for the value of the concessioner's improvements only if the premises were leased to a successor. The Solicitor found that the contract failed to recognize a similar right to reimbursement in case of any other termination of the concessioner's possession of improvements or for a renewal or new contract to the same concessioner. Therefore, the Secretary had no obligation and possibly no authority to recognize in a new contract with the same concessioner any right or interest in the concessioner's improvements.¹¹²

As a result of highly adverse concessioner reaction (no existing concessioner would renew its contract and the Department could not find successors¹¹³), a concessioners' advisory group was appointed to investigate and report on national park concession operations.¹¹⁴ The report, completed in early 1948, approved the general policy of NPS in the preceding thirty-two years. It concluded:

[I]nvestment by private capital was . . . preferable to government ownership; contracts should provide for the concessioners to have equitable title to all property acquired through the investment of their funds; . . . and concessioners should be entitled to an opportunity to earn a minimum return on investment with a further right to additional earnings to

110. *Id.*

111. Even prior to 1946, contracts did not allow for a recognition of the concessioners' equity in their improvements. Rather, the NPS, through administrative interpretation and practice had recognized an "undefined 'beneficial ownership'" held by the concessioners in their improvements. When there was a change in concession leaseholders, arrangements were made for the successor to purchase the improvements from the prior concessioner. *Park Concession Policy: Hearings on H.R. 5872 and H.R. 5886 Before the Subcomm. on National Parks of the House Committee on Interior and Insular Affairs*, 88th Cong., 2d Sess. 127 (1964); (written memorandum submitted by Herman H. Hoss, Attorney for the Western Conference National Park Concessioners) [hereinafter cited as *1964 Hearings*]. The hearings provide a legal history of the possessory interest concept.

112. *Id.* at 127-28; Udall Letter, *supra* note 57, reprinted in H.R. REP. NO. 591, *supra* note 57, at 7.

113. *1964 Hearings*, *supra* note 111, at 128. Between 1946 and 1950, twenty concession contracts expired with the Department of the Interior unable to find new concessioners. H.R. REP. NO. 3133, 81st Cong., 2d Sess. 2 (1950) [hereinafter cited as H.R. REP. NO. 3133].

114. To insure a fair report, five private citizens representing the accounting profession, travel industry, hotel industry, the general public, and conservation interests composed the group. Udall Letter, *supra* note 57, reprinted in H.R. REP. NO. 591, *supra* note 57, at 8, and [1965] U.S. CODE CONG. & AD. NEWS 3495.

compensate for risks assumed and to provide incentive for good operation.¹¹⁵

The tone of the report and the concepts discussed reflect a design to meet the increased use of the parks by improving the climate for concession investment and by making such investment secure.

Meanwhile, the question of whether a concessioner's property right existed when a contract expired was submitted to the Comptroller General. He ruled that new contracts could be entered into providing 'that legal title to all buildings, structures, and other improvements erected upon the lands by the concessioner shall be in the United States subject to certain rights in the concessioner with respect to these structures;' and that such a recognition 'would not involve the conveyance to the concessioner of any vested right of the United States in the property.'¹¹⁶

This ruling permitted "a recognition of the capital investment of the concessioners in the facilities developed by them," and entitled the concessioner "to reimbursement for the facilities if a successor concessioner took over an operation."¹¹⁷ Some immediate progress was then achieved in securing renewals of contracts and construction of facilities.¹¹⁸

In 1949 the Public Lands Committee of the House of Representatives held hearings on various legislative proposals for concession policies.¹¹⁹ Concessioners and the Department of the Interior presented their views. The committee found that significant new investment was needed immediately since physical developments had not kept pace with increased use:

There is . . . today an urgent need for substantial additional investment, largely as a result of the necessary postponement of construction and replacement due to World War II, and the continuing increase in the number of visitors. It is the duty of Congress to recognize this need and act consistently in bringing about such circumstances as will encourage the needed development.¹²⁰

Before legislation emerged, the Secretary, upon review of the is-

115. *See id.* at 9.

116. *1964 Hearings, supra* note 111, at 128 (quoting from Opinion of the Comptroller General (Oct. 28, 1948)).

117. Udall Letter, *supra* note 57 reprinted in H.R. REP. NO. 591 *supra* note 57, at 9, and [1965] U.S. CODE CONG. & AD. NEWS 3495.

118. The one-hundred room Lake Hotel in Yellowstone, previously closed, was rehabilitated and fifty new cabins were added. At Shenandoah, a ten-room visitor building was constructed. Yosemite, Zion, and Bryce Canyon received numerous additions, including rooms and cabins with baths which increased the NPS responsibilities for water and sewage facilities. J. ISE, *supra* note 3h, at 463-64. *See also* H.R. REP. NO. 3133, *supra* note 113, at 8.

119. H.R. REP. NO. 3133, *supra* note 113, at 2. Congress had three general proposals for concession policy before it: "(1) to provide outright Government ownership of the concessions, (2) to provide encouragement to private investors in the national parks and monuments, and (3) to provide a mean between the two foregoing proposals." *Id.*

120. *Id.*

sues, directed NPS to follow certain practices thereafter in managing concessions.¹²¹ This memorandum to a large extent reiterated past policies, and also directed implementation of a new policy of canceling existing contracts prior to their expiration and immediately granting new contracts for up to twenty years.¹²² NPS was to make these contract substitutions in return for a concessioner's promise to construct additional facilities. This was a further inducement for new investment and intended to help the concessioners secure longterm financing.¹²³

The concessioners accepted the memorandum as providing for fair contracts with adequate safeguards for investment. Their agreement with the enunciated policies resulted in the passage of a resolution by the House Committee on Public Lands approving the Secretary's memorandum.¹²⁴ The committee was satisfied that subsequent contracts could be negotiated which would provide security for the concessioner's investment, "and at the same time provide adequate facilities and services to the public without undue charges."¹²⁵

In response to the committee's findings and resolution, NPS prepared a formal statement of concessions policies which was approved by the Department of the Interior on October 13, 1950.¹²⁶ Past policies which were superimposed upon modern park uses became the foundation for present day concessions management.¹²⁷ The policy statement endorsed having one concessioner for the major facilities in each area and the granting of possessory interests.¹²⁸ Also endorsed was the policy of canceling existing contracts prior to their expiration while granting new ones.¹²⁹ Franchise fees would be based upon what NPS perceived as its primary obligation in regulating use of the parks—that of furnishing services to visitors at reasonable rates.¹³⁰ Yet the Park Service was to approve rates charged to the public that would be large enough to encourage further investment.¹³¹

The primary purpose behind these NPS concessions policies was to encourage investment in new facilities in order to meet existing demands but, unlike past efforts, the motivation was not to create additional use of the parks. One general provision of the 1950 NPS

121. Memorandum of Oscar Chapman, Secretary of the Interior, to Director, NPS [Newton B. Drury] (May 6, 1950), *reprinted in* H.R. REP. NO. 3133, *supra* note 113, at 4-5.

122. *Id.* See note 87 *supra* and accompanying text.

123. See note 87 *supra* and accompanying text.

124. See H.R. REP. NO. 3133, *supra* note 113, at 5-6.

125. *Id.* at 6.

126. Concessions Policies of the National Park Service (1950) [hereinafter referred to as NPS Concessions Policies], *reprinted in* 1964 *Hearings*, *supra* note 111, at 26-31.

127. See text accompanying note 193 *infra*.

128. 1964 *Hearings*, *supra* note 111, at 26-27 (reprint of NPS Concessions Policies, *supra* note 126).

129. *Id.* at 28.

130. *Id.*

131. *Id.*

Concessions Policies statement marked the first recognition of the potential preservation-use conflict:

[I]t shall be the policy of the Department to permit the development of accommodations within the areas administered by the National Park Service . . . only to the extent that such accommodations are necessary and appropriate for the public use and enjoyment of the areas, consistent with their preservation and conservation.¹³²

This provision, in part, still exists today as the only articulated attempt to harmonize preservation and use-accommodation.¹³³

In one sense this was an articulation of the past Park Service policy, somewhat arbitrarily implemented, of excluding some uses as being incompatible with park purposes.¹³⁴ Yet implicit was a recognition of development of accommodations *infringing upon the mandate of preservation*: "Where adequate accommodations exist or can be developed by private enterprise outside of such areas, accommodations shall not be provided within the areas."¹³⁵

It is questionable whether this policy purportedly limiting development only to those facilities which are "necessary and appropriate" has been effectively implemented.¹³⁶ To be sure, the more "exotic" proposed developments have been rejected by NPS as they had been before the formal articulation of these policies.¹³⁷ But other uses of questionable necessity and appropriateness, although less dramatic, still had significant impacts and were sanctioned by this same 1950 NPS policy statement. For example, the sale of souvenirs and jewelry associated with the park areas was to be encouraged by the Department of the Interior¹³⁸ and NPS was given the authority to permit the sale of alcohol within the parks.¹³⁹ Arguably, the Department of the Interior's approval of the NPS statement placed a burden of justification on NPS to show that any proposed facility could not be adequately provided outside the park. However, when interposed with the provisions authorizing gift shops and liquor stores in a policy statement designed to encourage more facilities overall, the precise meaning and goal of the "necessary and appropriate" limitation becomes unclear.

132. *1964 Hearings, supra* note 111, at 26 (reprint of NPS Concessions Policies, *supra* note 126).

133. The surviving provisions of the NPS Concessions Policies, *supra* note 126, may be found in 16 U.S.C. §§ 20-20g (1976). See text accompanying notes 191-95 *infra*.

134. See text accompanying note 90 *supra*.

135. *1964 Hearings, supra* note 111, at 26 (reprint of NPS Concessions Policies, *supra* note 126).

136. See discussion in text following note 267 *infra*.

137. Such proposals have included mountain-top tramways, artificial controls to regulate the flow of Yosemite Falls, and a phonograph and amplifier to accompany the setting of the sun over the Grand Canyon. R. SHANKLAND, *supra* note 22, at 308.

138. *1964 Hearings, supra* note 111, at 29 (reprint of NPS Concessions Policies, *supra* note 126).

139. *Id.* at 30.

While creating new problems, the growing use of the parks had demonstrated the public interest in the parks questioned during the Hetch-Hetchy battle. Studies of Yellowstone and Glacier showed that the parks were economically justifiable as recreational facilities. A study of Yellowstone disclosed that 4200 people who earned a total of \$1,250,000 to \$1,500,000 a year, were employed in the park in the late 1940's, most of them for periods of three to five months of the year.¹⁴⁰ In 1941, travelers spent \$3,000,000 in Yellowstone and \$6,500,000 in the states adjacent to the park. In 1950, these figures were \$6,000,000 and \$13,000,000 respectively.¹⁴¹ A 1949 study concluded that 75% of the visitors who came to Montana came principally to visit Glacier National Park.¹⁴² National parks were contributing to economic prosperity in their respective areas.¹⁴³

The 1950's saw tremendous increases in visitation to the parks¹⁴⁴ and a continuation of NPS attempts to accommodate all the visitors. By 1954, the National Park System was receiving thirty-seven million more visits a year than in 1940. However, the level of staff and facilities had remained the same.¹⁴⁵

In 1955, NPS devised a new development plan for the parks entitled "Mission '66"—a master plan for the next ten years when eighty million annual visits were expected.¹⁴⁶ A total of one billion dollars was appropriated to develop the parks over this period so they could provide for the expected visitors.¹⁴⁷ Government spending was de-

140. J. ISE, *supra* note 3h, at 445.

141. *Id.*

142. *Id.*

143. National parks are generally perceived as non-economic entities; many consider it impossible to place a monetary value on their unique natural and cultural assets. Nevertheless, a 1969 economic study determined that the National Park System had an asset structure virtually unparalleled in the country. *Small Business Opportunities in Outdoor Recreation and Tourism: Hearings Before the Subcomm. on Environmental Problems Affecting Small Business of the Select Comm. on Small Business*, 92d Cong., 2d Sess. 55 (1972) (reprint of E. SWANSON, *TRAVEL AND THE NATIONAL PARKS—AN ECONOMIC STUDY* (1969)). To illustrate this finding, a 1971 update of the 1969 study estimated that:

National Park System visitors contributed some \$11.1 billion in travel expenditures to the economy in 1971. This outlay generated \$8.3 billion in personal income throughout the nation, accounted for \$10.0 billion of Gross National Product, and returned \$1.6 billion in Federal taxes.

The 1971 National Park Service appropriations of \$164.3 million were exceeded almost 10 times over by Federal taxes resulting from national park travel, 50 times over by the personal income generated, and 60 times over by the Gross National Product created.

Id. at 84 (reprint of E. SWANSON, *TRAVEL AND THE NATIONAL PARKS—AN ECONOMIC STUDY* (1971)).

144. The number of visits for the entire park system increased from 37,000,000 in 1951 to 54,923,000 in 1956. Twenty million of those were visits to the national parks. J. ISE, *supra* note 3h, at 534.

145. CEQ REPORT, *supra* note 6, at 320.

146. J. ISE, *supra* note 3h, at 546.

147. CEQ REPORT, *supra* note 6, at 320. For fiscal year 1959 the total appropriations for

voted to road building, staff housing and services, and parking facilities. In some parks money was appropriated to move administrative sites outside of heavily used areas.¹⁴⁸

Concessioners expanded existing operations and developed new facilities.¹⁴⁹ Instead of simply providing "necessary" services, some facilities—hotels, restaurants, and curio shops for example—became centers of attraction for many visitors.¹⁵⁰ With the concentration of people and development often located in the most scenic areas, *e.g.* Old Faithful (in Yellowstone) and Yosemite Valley, congestion became a familiar sight. Resulting increases in Park Service and concession staffs necessitated an amount of services and goods equal to the requirements of small cities. Modern sewage systems, utilities, hospitals, and schools were constructed in the more heavily used parks.¹⁵¹

Three different government reports, issued in 1963, urged that the concession contracts made little economic sense and that the government's policies amounted to subsidization of an industry that no longer needed it. The first report, "Efficiency and Economy in the Department of the Interior," was based on a study by the House Government Activities Subcommittee for the House Committee on Government Operations.¹⁵² The Committee found several Park Service practices concerning concessioners questionable, including

governmental subsidy of some concessionaires through undue reductions of franchise fees; failure to apply franchise fees percentages in accordance with each type of business conducted by the concessionaire; and failure, as well as lack of uniform criteria, to achieve a reasonable relationship between franchise fees and the profits and other benefits realized by some concessionaires.¹⁵³

NPS were \$79,962,600, apportioned as follows: \$16,056,200 to management and protection; \$12,477,100 to maintenance and rehabilitation of physical facilities; \$50,000,000 to construction; and \$1,429,300 to general administrative expenses. J. ISE, *supra* note 3h, at 625.

148. An example was in Yosemite National Park where money was appropriated to move some facilities from the Valley to El Portal. 16 U.S.C. § 47-1 (1976) (originally enacted as Act of Sept. 2, 1958, Pub. L. No. 85-922, 72 Stat. 1772). See text accompanying note 109 *supra*.

149. See J. ISE, *supra* note 3h, at 546-50. During this time Congress enacted another piece of legislation to assist concessioner financing, Act of May 29, 1958, Pub. L. No. 85-434, 72 Stat. 152 (codified in 16 U.S.C. § 3 (1976)), which increased the authorized limitation on the terms of concession contracts from twenty to thirty years.

150. CEQ REPORT, *supra* note 6, at 326. See note 6 *supra*.

151. CEQ REPORT, *supra* note 6, at 326.

152. H.R. REP. NO. 306, 88th Cong., 1st Sess. (1963).

153. *Id.* at 2. The Report cited the following example:

[T]he concessionaire at Grand Canyon National Park (Fred Harvey Co.) was required under its previous concession contract to pay a franchise fee of 3 percent of its gross receipts over \$600,000. The contract was renewed in 1954 to reduce the franchise fee to \$5,000 per year plus three-quarters of 1 percent of the gross receipts and the company agreed to expend \$1 million for new construction during the first 5 years of the renewal contract. On the basis of the company's gross receipts in the period from August 1, 1954, to December 31, 1961, the revision in the fee formula will amount to a total fee reduction of approximately \$1,140,000 over the life of the

The Committee also concluded that the Park Service's practice of requiring concessioners to supply services to government employees either free, or at lower rates than charged to the general public, raised conflict of interest issues.¹⁵⁴ It recommended a complete review of Park Service concession policies to eliminate the weaknesses disclosed by the report.¹⁵⁵

The House Appropriations Committee, which issued the second report,¹⁵⁶ made ten policy guideline recommendations which deviated materially from the existing policies. Among these were: charging of higher franchise fees and changing the methodology of their computation; instituting competitive bidding for contracts instead of granting preferential rights to existing concessioners to negotiate new contracts; and amending the policy of granting possessory interests to concessioners "to provide that for purposes of any termination settlement the value of improvements made by the concessioner should be based on actual cost less accumulated depreciation."¹⁵⁷ Furthermore, the Appropriations Committee suggested that concession contracts contain a provision permitting the Comptroller General to examine all concessioner records.¹⁵⁸

The General Accounting Office (GAO) issued the final 1963 report to Congress on certain deficiencies in the negotiation and administration of concession contracts.¹⁵⁹ The deficiencies described, were similar to those expressed in the prior reports. They concerned such Park Service practices as reducing franchise fees for building commitments, granting concessioners permanent possessory interests in constructed facilities, and honoring preferential rights to construct additional facilities. After review, GAO concurred in the recommendations of the House Appropriations Committee.¹⁶⁰

Concessioners attacked the GAO report for failing "to discuss or

contract. Thus, the reduction in franchise fees will probably exceed the company's expenditures for new construction, and in addition the company will, under the contract, be entitled to effective beneficial ownership of the improvements.

Id. at 5.

154. *Id.* at 8.

155. *Id.* at 3.

156. H.R. REP. NO. 177, 88th Cong., 1st Sess. (1963).

157. *Id.* at 9-10.

158. *Id.*

159. COMPTROLLER GENERAL, REPORT ON REVIEW OF RECOMMENDED POLICY GUIDELINES FOR ADMINISTRATION OF CONCESSION CONTRACTS, NATIONAL PARK SERVICE, DEPARTMENT OF [THE] INTERIOR (1963) [hereinafter referred to as COMPTROLLER GENERAL REPORT], reprinted in 1964 Hearings, *supra* note 111, at 34-49.

160. Letter from Joseph Cambell, Comptroller General of the United States to Representative Wayne Aspinall, Chairman, House Committee on Interior and Insular Affairs (July 19, 1963), reprinted in 1964 Hearings, *supra* note 111, at 34. The review also disclosed subconcession arrangements which profited the concessioner enormously. In one subconcession contract involving automobile service stations, the concessioner received approximately \$100,000 in commissions from the subconcession oil company. The concessioner only had to

recognize the objectives of present concession policies [to encourage private enterprise and provide adequate and appropriate services at reasonable rates] and [for not] attempt[ing] to relate its recommendations to those objectives."¹⁶¹ They argued that such drastic changes in present policies on possessory interests, preferential operating rights, preferential opportunity of renewal, and franchise fees would discourage investment of private capital. An increase in franchise fees would reduce amounts presently available for reinvestment, repayment of loans, attraction of equity capital, improvement of service and reduction of fees, and would thus, conflict with administrative policies of subordinating fees to the provision of services at reasonable rates.¹⁶²

A. *The Concessions Policy Act of 1965*

With the use of parks continually increasing and concession policies in a cyclical tide of uncertainty, there was a need for Congress to clarify the objectives and establish the guidelines for concessions management. Congress responded with the Concession Policies Act of 1965.¹⁶³

The Act and its legislative history reveal motivations and concerns similar to the memoranda and policies set forth in 1950.¹⁶⁴ Governmental policies and the methods by which they were implemented had not provided the proper atmosphere for private investment to meet the demands of increased use.¹⁶⁵ Additional incentives were needed. The Act mandates the Secretary to exercise authority "in a manner consistent with a reasonable opportunity for the concessioner to realize a profit."¹⁶⁶ Practices to be continued included: (1) allowing monopolies and granting existing concessioners a preferential right to provide new or additional facilities;¹⁶⁷ (2) granting possessory interests;¹⁶⁸ (3) subor-

pay about \$4,000 of this to the government in franchise fees. *1964 Hearings, supra* note 111, at 42 (reprint of COMPTROLLER GENERAL REPORT).

161. *1964 Hearings, supra* note 111, at 242 (Comments of Western Conference, National Park Concessioners on Statement of General Accounting Office).

162. *Id.* at 243. Nothing was mentioned in the three reports or the concessioner response regarding the preservation function of the national parks.

163. Pub. L. No. 89-249, 79 Stat. 969 (codified at 16 U.S.C. §§ 20-20g (1976)).

164. Compare S. REP. NO. 765, 89th Cong., 1st Sess. 1, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3489:

The principal purpose of [the Act] is to put into statutory form policies which, with certain exceptions, have heretofore been followed by the National Park Service in administering concessions within units of the national park system and in writing contracts for concessionaire services there. These policies have been in force since 1950. . . .

See also notes 120-35 *supra* and accompanying text.

165. 111 CONG. REC. 23,636 (1965) (remarks of Rep. Aspinall).

166. 16 U.S.C. § 20b(b) (1976).

167. *Id.* § 20c.

168. *Id.* § 20e. Possessory interest is the right of the concessioner to be compensated for the value of improvements it has made if the government should fail to renew its contract or

dinating franchise fees to the objectives of preserving the areas and providing adequate and appropriate services at reasonable rates;¹⁶⁹ and (4) extending or renewing contracts or permits, or granting new ones to promote continuity of operation.¹⁷⁰ The Act also gives the Secretary discretion to include provisions in contracts that will assure the concessioners adequate protection against loss of investment, but not of anticipated profits, caused by discretionary acts of the Secretary.¹⁷¹ This protection can extend to an obligation on the part of the government to compensate the concessioner for such loss.

Relying on the three 1963 reports,¹⁷² opponents of the Act, most notably Representative Jack Brooks of Texas, argued that it created an imbalance among the interests of the concessioner, the government, and the public in favor of the concessioners.¹⁷³ Specific provisions, Brooks argued, created windfalls for the concessioners and the Act placed the government in an unfavorable bargaining position by granting concessioners an almost permanent right to do business.¹⁷⁴

Representative Brooks found the granting of possessory interests to be the most objectionable feature of the legislation.¹⁷⁵ This grant would enable the concessioner to pass its government-created possessory interest on to the highest bidder, thus allowing the concessioner to realize a windfall profit on its investment in addition to profits from its services. If the government purchased the possessory right, it would be required to "pay the concessioner reconstruction cost at the time of taking less physical depreciation even though the concessioner has fully amortized his costs and the rates charged the public have included the full return of his investment."¹⁷⁶ Opponents suggested the government should pay only the unamortized book value of the facilities to the concessioner. Thus the concessioner would be guaranteed recovery of its

otherwise deprive it of the use and benefits of those improvements. The Act provides for the measure of compensation as follows:

Unless otherwise provided by agreement of the parties, just compensation shall be an amount equal to the sound value of such structure, fixture, or improvement, at the time of taking by the United States determined upon the basis of reconstruction cost less depreciation evidenced by its condition and prospective serviceability in comparison with a new unit of like kind, but not to exceed fair market value.

Id.

169. *Id.* § 20b(d).

170. *Id.* § 20d.

171. *Id.* § 20b(a).

172. See text accompanying notes 152-60 *supra*.

173. 111 CONG. REC. 23,635 (1965) (remarks of Rep. Brooks).

174. *Id.* at 23,634-35 (remarks of Rep. Brooks).

175. *Id.* at 23,634 (remarks of Rep. Brooks).

176. *Id.* at 23,635. Consider a concessioner who in 1920 invested \$100,000 in a facility which would currently cost \$500,000 to build. The concessioner long ago may have recovered its \$100,000, but if the contract is not renewed, the government could divest the concessioner of its possessory interest only by paying the \$500,000 reconstruction cost, less physical depreciation. *Id.*

investment, but its profit would be made only on the services provided.¹⁷⁷

Brooks also opposed the exemption of concession contracts from section 321 of the Economy Act of 1932.¹⁷⁸ The exemption allows the Secretary to reduce franchise fees when the concessioner agrees to construct additional facilities. This practice was viewed as subsidizing construction of facilities with money that belonged to the United States Treasury.¹⁷⁹ The new facilities effectively would belong to the concessioner.

Opponents attacked these provisions as unnecessary to provide concessioners with the security needed to obtain financing,¹⁸⁰ especially when coupled with the provisions that allowed the granting of preferential rights to construct new or additional facilities,¹⁸¹ the assuring of compensation for loss of investment caused by discretionary acts of the Secretary,¹⁸² and the letting of contracts without competitive bidding.¹⁸³ Proponents of the measure, however, suggested that the peculiarities of the concession business make investment insecure.¹⁸⁴ These difficulties included: a short season with large capital investments lying dormant part of the year; a labor force which cannot commute; higher costs for supplies that must be transported to places miles from main routes; and complete government regulation of location, goods, and prices.¹⁸⁵ Yet the Act, opponents argued, created a windfall because subsidies resulting from other governmental policies compensated for these anomalies.¹⁸⁶ In addition to providing and maintaining all access roads, the government provided millions of dollars of advertising annually which encouraged the public to visit the parks, and thus, patronize the concessions.¹⁸⁷ Furthermore, once the visitor was inside the park, the concessioner had a monopoly on all of his or her potential business, and rates and franchise fees were set so that the concessioner realized a profit on its investment.¹⁸⁸

The potential conflict between preservation and certain manners

177. *Id.*

178. 40 U.S.C. § 303(b) (1976), exempted in 16 U.S.C. § 20f (1976). See 111 CONG. REC. 23,635 (1965) (remarks of Rep. Brooks).

179. 111 CONG. REC. 23,635 (1965) (remarks of Rep. Brooks). For an example, see note 153 *supra*.

180. *Id.*

181. 16 U.S.C. § 20c (1976).

182. *Id.* § 20b(a).

183. *Id.* § 3.

184. Letter from Representative Aspinall to Chairman and Members of the House Rules Committee (July 29, 1965), reprinted in 111 CONG. REC. 23,633-34 (1965).

185. *Id.* See also *id.* 23,646 (remarks of Rep. Taylor).

186. *Id.* at 23,635 (remarks of Rep. Brooks). Brooks recognized that concessioners "have many unique problems." *Id.*

187. *Id.*

188. *Id.* at 23,634-35.

of use was expressly acknowledged by Congress in the Concessions Policy Act. Repeating the intent to preserve the parks that was expressed in the Park Service Organic Act,¹⁸⁹ Congress declared:

[T]he preservation of park values require that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused.¹⁹⁰

Moreover, the NPS policy to limit development to that "necessary and appropriate"¹⁹¹ became the mandate of Congress: "[S]uch development 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 preservation and conservation of the areas."¹⁹²

In the 1965 Concessions Policy Act, Congress affirmed the conflicting management strategy embodied in the 1950 NPS Concessions Policy statement.¹⁹³ The "necessary and appropriate" limitation was given the force of law yet its meaning was not clarified.¹⁹⁴ The Park Service was also to limit development of concessions to those consistent to the highest practical degree with preservation and prevent heavy visitation from impairing park values. Yet the intent of the Act was to encourage more development and use of concessions facilities and to assure concessioners an opportunity to realize a profit.¹⁹⁵

189. 16 U.S.C. § 1 (1976). See text accompanying note 1 *supra*.

190. *Id.* § 20.

191. See text accompanying note 132 *supra*.

192. 16 U.S.C. § 20 (1976). The limitation is also to "locations where the least damage to park values will be caused." *Id.*

193. See text accompanying notes 138-39 *supra*.

194. Past Park Service policy and legislative history indicate that the limitation applies both to the number and types of facilities. See 111 CONG. REC. 23,641 (1965) (remarks of Rep. Udall). Yet nothing in these documents evidences any questioning beyond this as to what level of services should be provided. What is seen is a reiteration of a reiteration of past policies.

195. Some of the conflict may stem from the administration by the Park Service of many diverse areas that demand different policies and programs. See text accompanying notes 95-99 *supra*. Some areas call for recreational programs, some historical programs, and some, like the national parks, preservation. Use is a component of all Park Service areas. Constantly under-budgeted, the Park Service has had difficulty maintaining the distinct functions and needs of each unit. The Secretary of the Interior has attempted to guide management by dividing the areas into three types—natural, historic, and recreational—and establishing principles for each. Memorandum from Stewart Udall, Secretary of the Interior, to Director, NPS, concerning management of the National Park System (July 10, 1964), reprinted in DOI, ADMINISTRATIVE POLICIES, *supra* note 12, at 89. Yet the Concessions Policy Act governs all areas, and personnel are regularly transferred among the areas. It becomes easy to think that a single broad management concept exists for all three types of areas.

Concession policies for recreational or historical areas may not be compatible with

The parks of today are a testament to the success of the past congressional and Park Service policies of first encouraging use and then encouraging concession development to accommodate it. By fiscal year 1976, visitation to the 286 areas administered by NPS had reached an estimated 240 million visitor days, doubling the 1965 figure.¹⁹⁶ At the end of 1974, 348 concessioners had grossed more than \$130.3 million and netted more than \$7.6 million within the eighty-seven areas of the National Park System.¹⁹⁷

However, a relatively small number of concessioners receive a disproportionately large share of total concessions income. For instance, in 1974 just fifty-six of the 348 concessioners grossed more than \$110.8 million in sum, or eighty percent of the grand total, and netted \$6.4 million.¹⁹⁸ Moreover, while the number of concessioners with gross receipts in excess of \$500,000 increased only by a third from 1970 to 1974, the net income of this group more than doubled.¹⁹⁹ Meanwhile, some of the nation's largest corporations have acquired ownership of concessions at many parks. Conglomerates such as TWA Services, Inc., AMFAC, Music Corporation of America, Inc. (MCA), and General Host have replaced the traditional one park, one type of service operation.²⁰⁰

those needed in natural areas. Congress should reexamine the needs of the three types of areas and devise independent policies for each. Arguably, the Park Service should not transfer management personnel back and forth without compelling reasons as this may hamper the development of management expertise for each type of area.

196. H.R. REP. NO. 869, 94th Cong., 2nd Sess. 4 (1976) [hereinafter cited as 1976 REPORT].

197. *Id.* Ten more concessioners were added in 1975. *Id.* at 5.

198. *Id.* at 4.

199. *Id.* at 85 app. 1. Interestingly, in 1973, the gross receipts of all concessioners totaled more than \$120,000,000 and \$2,166,000 were paid in franchise fees. In 1974, the receipts rose to more than \$130,000,000 (up 8.3%), but the fees paid increased by only \$121,000 (up 5.6%). *Id.*

200. Large corporations holding national park concession contracts include:

1. TWA Services, Inc., at Zion, Bryce Canyon, and the North Rim of Grand Canyon National Parks, and at Death Valley National Monument;
2. Everglades Park Co., subsidiary of General Host, at Everglades National Park;
3. Yellowstone Park Co., subsidiary of General Host, at Yellowstone National Park;
4. Fred Harvey, Inc., subsidiary of AMFAC, at Grand Canyon National Park (South Rim);
5. Grand Teton Lodge Co., subsidiary of Rockresorts, Inc., at Grand Teton National Park;
6. Caneel Bay Plantation Inc., subsidiary of Rockresorts, Inc., at Virgin Islands National Park;
7. ARA Virginia Sky-line Co., Inc., subsidiary of ARA Services, Inc., at Shenandoah National Park;
8. Yosemite Park & Curry Co., subsidiary of MCA, Inc., at Yosemite National Park (MCA subsidiaries also provide the concessions at National Capital Parks); and
9. Kilauea Volcano House, Ltd., subsidiary of C. Brewer & Co. Ltd., at Hawaii Volcano National Park.

1974 Joint Hearings, *supra* note 6, at 110-11.

B. Concessioner Influence in Park Planning

The influence of concessioners in park planning—particularly the larger and more powerful ones—has kept pace with the significant increases in visitation which have raised the stakes in the concessions business. Concessioners were given financial security and inducement for more development by the Concessions Policy Act of 1965.²⁰¹ Largely unchecked by Park Service management, concessioners, seeking always to expand and increase use of their services, have attempted, in the 1970's, to become the parks' dominant planning force.

After the expiration of the Mission '66 ten year development plan for the parks,²⁰² NPS instituted individual park master planning.²⁰³ In order better to implement the National Environmental Policy Act of 1969 (NEPA),²⁰⁴ the planning process was refined in 1971-72 in accordance with NEPA requirements²⁰⁵ and other pertinent legislation.²⁰⁶

The planning process currently employed consists of three major steps. Initially, a Statement for Management is prepared which sets forth "the conditions to be achieved to realize the park's purpose."²⁰⁷ The next phase is collection and analysis of natural, historic, social, economic, and demographic data necessary for the planning and man-

201. 16 U.S.C. §§ 20-20g (1976).

202. See text accompanying notes 146-47 *supra*.

203. As of December, 1974, the Park Service had 140 active master plan projects under way. 1974 *Joint Hearings*, *supra* note 6, at 126-28.

A Master Plan identifies and evaluates alternative plans for land use, development, and public use of the proposed area. Such considerations identify and evaluate feasible alternative courses of action for protection, development, interpretation, and public use of the area under study, and consider the environmental impacts of these management alternatives.

NATIONAL PARK SERVICE, PLANNING AND DESIGN PROCESS 1 (1973).

204. 42 U.S.C. §§ 4321-4367 (1976).

205. To protect and enhance the environment, *id.* § 4321, NEPA mandates that the federal government take action only after all environmental consequences and alternative actions have been considered. *Id.* § 4332. To insure that this information is included in the decisionmaking process, an Environmental Impact Statement (EIS) is required for all "major federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(c).

206. Desiring to comply more fully with environmental legislation and arguably to correct some deficiencies which had arisen in the process, see text accompanying notes 222, 224, 230-31 *infra*, NPS significantly revised planning procedures in 1975. THE NATURE CONSERVANCY, 1 PRESERVING OUR NATURAL HERITAGE—FEDERAL ACTIVITIES 35 (1975) (prepared for the National Park Service) [hereinafter cited as THE NATURE CONSERVANCY].

207. NATIONAL PARK SERVICE, MANAGEMENT POLICIES, at II-1 (1978) [hereinafter cited as MANAGEMENT POLICIES].

An impact analysis is not prepared on the statement for management because the statement provides information and policy guidance only, and does not in itself authorize actions. Proposed actions are subject to impact analysis and public scrutiny during the planning process.

The approved statement for management is distributed by the superintendent to interested citizens, concessioners and park employees.

THE NATURE CONSERVANCY, *supra* note 206, at 36.

agement of the park.²⁰⁸ The third step is the development of the General Management Plan (GMP) which was formerly called the "Master Plan."²⁰⁹ The GMP includes separate plans for resource management, interpretation, visitor use, and general development.²¹⁰ It also contains a statement of management objectives and designates strategies for zoning all lands and waters within the parks.²¹¹ A final component in the development of the GMP is an assessment of alternative actions considered during its formulation.²¹² Park Service guidelines require "positive actions" to ensure public participation throughout the entire planning process, particularly at the earliest possible stage before planning decisions have been made.²¹³

Through participation in park master planning, concessioners have promoted their own interests in additional park development. In some areas concessioners temporarily succeeded virtually in writing the entire master plan,²¹⁴ and in others the plan apparently has been drafted around the concession contract.²¹⁵ In still other areas, concessioners have built major facilities completely outside the master planning process.²¹⁶ Examination of master planning for Crater Lake and Yosemite Parks will serve to illustrate the concessioner's role in formulation of the plan.

In 1967, a Park Service master plan team prepared a draft master plan for Crater Lake National Park after consulting with various organizations and individuals outside the government.²¹⁷ At the end of 1967, a new thirty year concession contract was executed with Crater

208. MANAGEMENT POLICIES, *supra* note 207, at II-1.

209. *Id.* at II-2.

210. *Id.* at II-3. Other items can be contained within the GMP as needed. These might include, for example, recommendations for wilderness designations or boundary adjustments, or more detailed interpretive or resources management strategies. *Id.*

211. *Id.* at II-3. The management zones are of four primary types:

1. Natural zones or areas largely unaltered by human activity;
2. Historic zones for "all lands managed primarily to preserve cultural resources or to commemorate historical subjects" (generally not applicable to national park lands);
3. Park development zone or land used "to support nonhistoric park development and intensive public use which substantially alter the natural environment;" and
4. Special use zones for "lands and waters to be used by other agencies or interests for purposes not permitted in natural, historic or development zones."

Id. at II-3 to II-4.

212. *Id.* at II-5. It is at this step that an EIS pursuant to NEPA is prepared if required.

Id. See note 205 *supra* and accompanying text.

213. *Id.* at II-6. Public participation is encouraged through workshops, meetings, and comments on the assessment of alternatives and the Draft EIS. *Id.* at II-7.

214. See text accompanying notes 230-31 *infra*.

215. See text accompanying note 224 *infra*.

216. See text accompanying note 221 *infra*.

217. The description of Crater Lake master planning in this article is derived from materials in the "Crater Lake" file of the Oregon Environmental Council, Portland, Oregon [hereinafter cited as OEC file].

Lake Lodge, Inc.,²¹⁸ and shortly thereafter the Park Service ordered substantial revision of the draft master plan. Throughout 1968 and 1969, new park planners reworked the 1967 draft. They concluded that it was unnecessary to meet again with the organizations and individuals consulted in the previous study. In 1970 the Director of the Park Service approved a master plan and preliminary wilderness proposal for presentation to the public. Hearings were held in 1971, after which the Park Service began preparing a final draft of the plan and an environmental impact statement.²¹⁹

In 1972, before completing the final plan, the Park Service allowed construction of a two-story employees' dormitory and a parking lot at Rim Village. An environmental assessment found that "the impact on the environment from the proposed construction will be neither irreversible nor catastrophic," and therefore opined "that a fully detailed environmental impact study is not required."²²⁰ Thus the Service determined this was not a major federal action having significant impact on the human environment.²²¹ The master plan and its EIS were subsequently rejected by the Department of the Interior. The dormitory had been completed independently of the master planning process, along with an addition to the cafeteria, a gift shop, and a new sewage system.²²²

The rejected master plan reflected provisions in the thirty year concessioner contract. The plan called for replacement of cold water cabins on the rim with modern units and construction of a fifty-unit motel and coffee shop at Munson Valley. The contract called for the completion of similar projects by the concessioner as part of its responsibilities.²²³ Although this construction was intended both to increase the capacity and to extend the season for overnight accommodation,

218. In 1976, Crater Lake Lodge, Inc., with NPS approval, assigned its concession contract to Canteen Corp., a subsidiary of TWA Services, Inc., which already was the concessioner at four other national parks. See note 200 *supra*.

219. See generally Letter from Raymond L. Freeman, Associate Director, NPS, to Senator Alan Bible, Chairman, Subcommittee on Parks and Recreation (April 1973) (found in OEC file, *supra* note 217). See also Letter from Rogers C.B. Morton, Secretary of the Interior, to Larry Williams, Executive Director, Oregon Environmental Council (undated letter) (found in OEC file, *supra* note 217) [hereinafter cited as Rogers Morton Letter].

220. Assessment of the Environmental Impact of Proposed Construction of Employee Dormitory at Rim Village, Crater Lake National Park (April 7, 1972) (found in OEC file, *supra* note 217).

221. Rogers Morton Letter, *supra* note 219, at 2.

222. *Id.* at 3. See also Letter from Russell Train, Chairman, Council on Environmental Quality, to Nathaniel Reed, Assistant Secretary of the Interior for Fish and Wildlife and Parks (Aug. 30, 1973) (found in OEC file, *supra* note 217), reprinted in 119 CONG. REC. 33,963-64 (1973) [hereinafter cited as Train Letter].

223. 119 CONG. REC. 33,963 (1973) (remarks of Sen. Packwood). This obligation arguably could have been changed by the NPS, either on a showing that construction has become unnecessary and inappropriate, 16 U.S.C. § 20 (1976), or through a clause in the contract allowing the NPS the right to redetermine the issue.

there was no evidence in the master plan that this expansion was needed. The Assistant Secretary of the Interior pointed out that no motel had found it economically desirable to provide winter accommodations immediately adjacent to the park boundary. He requested that the contract be revised to omit the modern units planned at the rim and the motel at Munson Valley and ordered the master plan redone, complaining that “[t]hese inconsistencies and the almost complete absence of rationale to support them indicate to me that the present master plan . . . is an attempt to write a plan around the 1967 concessioner’s contract.”²²⁴ Such unquestioned adherence to contract provisions neglects the flexibility needed by the Park Service to revise its plans for in-park development in light of changing park needs during the term of the contract. As a result of Crater Lake, CEQ recommended that the Park Service first formulate master plans and impact statements for all National Park System areas independently of concession contracts, and afterwards review all existing contracts and renegotiate to ensure full conformity with such master plans.²²⁵

Yosemite master planning efforts, the entire cost of which will easily exceed one million dollars,²²⁶ have a remarkable history.²²⁷ They began with public meetings held by the Park Service in 1968. A draft master plan was prepared by the Park Service, working with a citizens’ advisory team and with the park concessioners. It was presented to the public in September 1971. There was strong public “support for reducing automobile use in the park, for completely eliminating the car from Yosemite Valley, and for removing National Park Service and concessioner administrative and maintenance facilities from the Valley.”²²⁸ In response the Park Service contracted with a private firm of engineers, architects, and planners to identify more fully the implications and feasibility of the public’s proposals. This firm concluded its study, and in early 1974 another draft master plan for Yosemite was being readied for public hearings.

A rough draft of this master plan, dated July 19, 1974, was distributed to the park concessioners for their comments. This practice complied with directives issued in 1973 by the NPS to its regional offices that concessioners must “be involved in master planning at all

224. Memorandum from Nathaniel Reed, Assistant Secretary of the Interior for Fish and Wildlife and Parks, to Ronald Walker, Director, NPS 1-2 (Oct. 26, 1973) (found in OEC file, *supra* note 217).

225. Train Letter, *supra* note 222.

226. 1976 REPORT, *supra* note 196, at 62.

227. For a description of master planning efforts for Yosemite until 1974, see *1974 Joint Hearings*, *supra* note 6, at 58-109 and Appendix 1. See also 1976 REPORT, *supra* note 196, at 56-63.

228. NATIONAL PARK SERVICE, YOSEMITE NATIONAL PARK—HISTORY AND SUMMARY OF PLANNING DOCUMENTS 1 (1974) [hereinafter cited as NPS].

stages."²²⁹ The general public was not afforded the same opportunity.

The final version of the preliminary draft, dated August 12, 1974, included several major changes suggested by the Music Corporation of America, a Yosemite concessioner.²³⁰ The changes inserted by the MCA included the replacement of tent structures with the construction of higher priced all-season cabins, the addition of over 150 units to the Wawona Hotel, construction of a complete day-use facility at Glacier Point, and development of a major ski resort at Tuolumne Meadows. The plan rejected the earlier proposals of the public and the findings of the private study thereon. Indeed, MCA's involvement was so great that the Assistant Secretary of the Interior for Fish and Wildlife and Parks remarked that the plan appeared to have been written by the concessioner.²³¹

New public hearings on the plan had been scheduled for late 1974. Adverse congressional and public opinion, however, convinced the Park Service to reject the draft.²³² A moratorium on construction was announced and a fresh start was ordered.²³³

NPS inaugurated a series of public workshops and provided for public participation in the development of the plan. This time the public was to have an opportunity to provide initial input, and not merely to react to draft plans which already had been put down on paper.²³⁴ The Park Service held public workshops in various California locations and in seven cities across the country.²³⁵

A new draft plan, Yosemite's ninth, was submitted for public review in September, 1978, and appears to mark a major recognition of the conflict between continued development and the "fundamental purpose" of the parks embodied in the Organic Act.²³⁶ In an introduction to an NPS summary of the plan, the Park Service states:

229. Memorandum from Russell E. Dickenson, Acting Director, NPS, to Regional Directors of NPS (Sept. 20, 1973), entitled "Concessioners' participation in NPS planning," reprinted in 1974 *Joint Hearings*, *supra* note 6, at 101-02.

230. NPS, *supra* note 228, at 3.

231. Memorandum by Leslie P. Arnberger, Yosemite Park Superintendent, regarding the briefing of Nathaniel Reed, Assistant Secretary of the Interior, on Yosemite planning (Sept. 13, 1974), reprinted in 1974 *Joint Hearings*, *supra* note 6, at 84.

232. NPS, *supra* note 228, at 3-4. For a description of NPS attempts under the Freedom of Information Act, 5 U.S.C. § 552 (1976), to exclude the draft master plan and MCA's comments from public inspection per *id.* § 552(b)(5), see 1976 *REPORT supra* note 196, at 56-57.

233. National Park Service, News Release: NPS Orders Fresh Start on Yosemite Planning Process (Dec. 13, 1974).

234. Wanted: Your Ideas on Yosemite National Park's Future, Wilderness Report, Vol. 12, No. 2, at 4 (April 1975). See also National Park Service, News Release: Workshops on Yosemite Planning Start Feb. 5 (Jan. 28, 1975).

235. Wanted: Your Ideas on Yosemite National Park's Future, Wilderness Report, Vol. 12, No. 2, at 4 (April 1975).

236. See text accompanying note 1 *supra*. This conflict is discussed at text accompanying notes 250-68 *infra*.

We have perceived our great natural parks quite differently over the years As advancing urbanization presses our tolerance of asphalt and concrete and noise and pollution, we are becoming aware that what is truly valuable about places like Yosemite is their scenery, their quietness, and the opportunity they provide for escape from city life. Accompanying this awareness is a recognition that we have been destroying these qualities by trying to transport our city lifestyles into the parks.²³⁷

The draft plan embodies many of the proposals originally made by the public.²³⁸ In addition to a slight reduction in accommodations parkwide, a dramatic transformation of Yosemite Valley is foreseen. Facilities such as the concessioner administrative center, beauty shop, swimming pool, golf course, and auto repair garage are to be removed. Private automobile traffic is to be significantly curtailed and transportation provided by a massive shuttle bus system.²³⁹ Of course, given concessioners' past perseverance, it remains to be seen whether and to what extent these proposals will be preserved in the final master plan and actually implemented.²⁴⁰

III

AN EVALUATION OF PAST POLICIES

A. Sharpening the Conflicts

The Organic Act mandates that the Park Service promote and regulate the use of the parks in a manner which conforms to their "fundamental purpose." According to the Act, the purpose of the parks is to conserve their scenery, natural and historic objects, and wildlife, and also to provide for enjoyment of these aesthetic values while preserving them for future generations.²⁴¹

There was no conflict between this fundamental purpose of simultaneously enjoying and preserving these park virtues and promoting park use in nineteenth century America. In fact, once the parks were

237. NATIONAL PARK SERVICE, YOSEMITE SUMMARY OF THE DRAFT GENERAL MANAGEMENT PLAN 4 (1978) [hereinafter cited as YOSEMITE DRAFT GENERAL MANAGEMENT PLAN].

238. See text accompanying note 228 *supra*.

239. NATIONAL PARK SERVICE, DRAFT GENERAL MANAGEMENT PLAN: VISITOR USE/PARK OPERATIONS/DEVELOPMENT (1978). The Natural Resources Management Plan for Yosemite was approved in December 1977. YOSEMITE DRAFT GENERAL MANAGEMENT PLAN, *supra* note 237, at 41.

240. NPS officials reportedly have conceded that there is "no way that the Curry Co. will agree to the most crucial proposals—such as removing swimming pools, stores, a number of lodging facilities, parking lots, service stations, warehouses and employee dwellings," and that NPS "doesn't have the legal leverage to force the company to comply" implicitly because the contract runs until 1993. S.F. Sunday Examiner & Chronicle, Feb. 11, 1979, § A, at 7.

241. See text accompanying note 1 *supra*.

established, encouraging their use became a primary concern of their supporters.

But the very success of past policies²⁴² now plagues the parks with some severe environmental problems. Wildlife distribution and behavior patterns have been drastically altered.²⁴³ Significant air pollution from auto exhaust fumes occurs in parks that once contained pristine air used by researchers for comparison purposes.²⁴⁴ Crowds may cause serious impacts on vegetation and problems with trash and sanitation.²⁴⁵ Crimes against persons and property have become an increasing problem with a 153% rise in serious crime inside national parks from 1966 to 1970.²⁴⁶ In short, parks that were created to epitomize the pristine environment now present a microcosm of some of contemporary America's worst environmental problems.

In addition to causing ecological problems and thereby conflicting with preservation, heavy visitation may lessen the quality of the experience some parks provide as the number of visitors simply exceeds the psychological carrying capacity of these parks. Carrying capacity refers to "the ability of something to absorb outside influence and still retain its essence."²⁴⁷ Psychological carrying capacity of a park more specifically refers to "the effect of other visitors on the mind of the individual visitor."²⁴⁸ Although individual levels of tolerance vary, when in a group of several hundred people or when competing for a campsite, one may find it difficult to retain the perception of a preserved natural area; "a certain atmosphere or setting is necessary in order that certain attributes of an environment be perceived and enjoyed."²⁴⁹ Thus, heavy visitation may directly conflict with enjoyment of park values.

Development of concessions facilities is of course interrelated with use. It may contribute to the problems of heavy visitation if it promotes increased use or new types of uses rather than simply providing necessary accommodations for those who would visit the parks to enjoy the scenery, natural objects, and wildlife. Encouragement of park use is no longer a proper management role. Quite the contrary, parks to-

242. See text accompanying note 196 *supra*.

243. CEQ REPORT, *supra* note 6, at 327.

244. *Id.* Park air may also be degraded by campfires and to some degree by the spread of pollution from outlying areas.

245. Drury, *supra* note 104. See also text accompanying note 104 *supra*.

246. CEQ REPORT, *supra* note 6, at 326. See generally, *Hearings on Policies, Programs and Activities of the National Park Service and the Bureau of Outdoor Recreation Before the Subcommittee on National Parks and Recreation of the House Committee on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971).

247. THE CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 35 (1972) [hereinafter cited as THE CONSERVATION FOUNDATION].

248. *Id.*

249. *Id.*

day contain user limitations and quotas.²⁵⁰ Surely concessioners should be prevented from promoting use where the Park Service has found it inadvisable to do so.

Even in providing necessary accommodations, development of concessions facilities, at least to a limited extent, conflicts with the preservation function of the parks in that construction of new facilities necessarily means alteration of park land. This alters, sometimes permanently, the atmosphere or setting of the attributes to be enjoyed.

Moreover, certain kinds of facilities and certain manners of use are unnecessary or even inconsistent with providing for the enjoyment of *park* values. Park Service recognition of this conflict was evident in the "necessary and appropriate" limitations of the 1950 Concession's Policies statement.²⁵¹

In adopting the "necessary and appropriate" language for the Concessions Policy Act of 1965, Congress made no attempt to define these terms. Furthermore, there was no real examination of the underlying assumptions and needs of the past policies. Use had been created. Large scale accommodations and services had been developed adjacent to many parks, or might easily be developed where needed. Automobiles and shuttle buses continually transported visitors in and out of the parks. If facilities just outside the park boundary could not survive economically then what justification could be made for them inside the park?²⁵² In addition, the Act's legislative history indicates a perceived management role of accommodating the assumed expectations of the modern park user: "[v]isitors who formerly did not demand so much as a private bath now expect modern-type accommodations plus such features as self-operated laundries and automatic vending machines."²⁵³

Through imprecise statutory mandates,²⁵⁴ a Park Service history of use-promotion,²⁵⁵ and congressional acquiescence in past practices,²⁵⁶ the notion of accommodating public desires has evolved into a Park Service management philosophy. This philosophy is best exem-

250. Precise limitations and quotas are specific to each park set according to the amount of use and biological carrying capacity, although every park has established some in one form or another, e.g., no camping for more than fourteen days at a time. Federal regulations empower individual park superintendents to establish quotas and to close areas after assessing relevant data. 36 C.F.R. § 2.6(a), .6(b) (1977). Park superintendents may establish limitations on camping time. *Id.* § 2.5(c).

251. See text accompanying notes 132-34 *supra*.

252. See text accompanying note 135 *supra*.

253. Letter from John H. Carver, Jr., Assistant Secretary of the Interior to Representative Wayne Aspinall, Chairman, House Committee on Interior and Insular Affairs (Feb. 26, 1964), reprinted in 1964 *Hearings, supra* note 111, at 15-16. See also 111 CONG. REC. 23,641 (1965) (remarks of Rep. Udall); *id.* at 23,636 (remarks of Rep. Aspinall).

254. See text accompanying notes 193-95 *supra*.

255. See text accompanying notes 74-83 *supra*.

256. See note 164 *supra*.

plified by the remarks of NPS Deputy Director Russell E. Dickenson made during congressional hearings held in 1974 on NPS planning and concession operations.²⁵⁷ In a series of questions regarding the necessity and appropriateness of liquor stores inside national parks, the Deputy Director responded:

Whether or not it should be available . . . is a matter of expression of the public will or the public desire, and it has been our experience that the public desires to have alcoholic beverages available for their use within the national parks. . . .²⁵⁸

[O]ur position as administrators of public parkland is to reflect the appropriate requests and views and needs of public services, and it is our view that the public has sought and has wanted the sale of alcoholic beverages where the public accommodations are.²⁵⁹

The Park Service's preoccupation with public participation in master planning is, in large part, a reflection of this desire to manage the parks for what it perceives the public wants.

While the Park Service has relied on "public desires" to justify the manner in which it regulates use of the parks, NPS literature is noticeably silent as to who comprise the public for purposes of participation in decisionmaking.²⁶⁰ From the Deputy Director's comments, above, it is not possible to discern whose interests were most highly regarded concerning the availability of intoxicants in liquor stores within the parks. Does the Park Service seek to accommodate park users, public accommodation users, non-park users, or every conceivable interest? While open public participation serves as a procedural safeguard to ensure that various park interests are represented, its tremendous increase is also an indication of Park Service efforts to find a consensus for its management policies.²⁶¹

257. *1974 Joint Hearings, supra* note 6, at 120.

258. *Id.* (remarks of Russell E. Dickenson). *See also* 1976 REPORT, *supra* note 196, at 65.

259. *1974 Joint Hearings, supra* note 6, at 125 (remarks of Russell E. Dickenson). *See also* 1976 REPORT, *supra* note 196, at 65.

260. A serious consequence of management based upon public opinion is that the Park Service can generally find support within some segment of society to justify whatever types of management it chooses. *See* R. CAHN, WILL SUCCESS SPOIL THE NATIONAL PARKS? 46-47 (1969), for a survey taken through the Christian Science Monitor in 1968 demonstrating overwhelming support for moving facilities out of the parks to relieve over-crowding. The NPS Director stated that it was the largest public survey conducted on national park policy. *Id.* at 49. On the other hand, a representative of Yosemite's concessioner has stated that a survey conducted by Stanford Research Institute pursuant to a contract with the Conference of National Park Concessioners found that persons using the national parks, by overwhelming majority, were opposed to the removal of any concession lodging facilities. Letter from Edward C. Hardy, Chief Operating Officer of Yosemite Park and Curry Co. (MCA, Inc.) to Alan Larsen (Aug. 18, 1976) (a copy of which is on file in the offices of the Ecology Law Quarterly).

261. There have been many years of hearings and much public controversy concerning the Yosemite Master Plan. *See* text accompanying notes 232-39 *supra*.

It is highly questionable whether the Park Service should even be attempting to figure out what the public wants in order to accommodate it. The Service must follow the statutory mandate to regulate use in a manner which conforms to the fundamental purpose of the parks. To this extent, the statutes enacted by Congress, representing the interests of the nation, must be taken by the Park Service as expressing public desires.²⁶² The Service may defer to perceived user desires only within the limitations imposed by the statutes.²⁶³

The statutes, however, appear conflicting and imprecise. The Organic Act mandates that the parks be used in a manner which leaves them unimpaired for future generations.²⁶⁴ Yet it is far from clear what "unimpaired" means, especially in conjunction with the enjoyment function of the parks.²⁶⁵ The 1965 Concessions Policy Act limits development of facilities to those which are necessary and appropriate,²⁶⁶ but the primary function of this statute was to encourage, and protect concession growth.²⁶⁷ Facilities questionable in terms of necessity, such as barber shops, fishing tackle shops, curio centers, and laundromats, were endorsed by Congress at the time of the statute's enactment.²⁶⁸ And if the Park Service is not to follow perceived public desires in regulating the parks, what is it to follow?

B. *The Seemingly Forgotten National Park Idea*

What have sometimes been overlooked by both the Park Service and Congress in managing the national parks are the original purposes for creating them. Those purposes contain a practicable recreation

262. In an early interpretation of the Organic Act, the Secretary of the Interior noted that "the national interest must dictate all decisions affecting public or private enterprise in the parks." See note 80 *supra* and accompanying text.

263. The draft Yosemite Plan, see text accompanying notes 236-39 *supra*, if adopted, can be interpreted as a vindication of the virtues of public participation in park planning. Years of hearings and public comment will have contributed greatly to the making of a plan that is preservation oriented and removes certain facilities not in conformity with original park purposes.

There is no question that public participation in all resource decisions is of important value. The issue with national parks, however, is that the Park Service must not allow certain park interests undue influence and, more importantly, must consider the interests of future generations who cannot directly be represented at public hearings. For this reason public participation should perhaps not be so revered as to consume years and millions of dollars (see text accompanying note 226 *supra*), and public opinion should not provide automatic justification for management decisions (see text accompanying note 259 *supra*).

264. See text accompanying note 1 *supra*.

265. The term "unimpaired" taken to its logical extreme would mean that almost no one could use the parks, but this conclusion is assuredly not contemplated by the statute which concurrently calls for the parks to be used and enjoyed by the public.

266. See text accompanying notes 190-92 *supra*.

267. See text accompanying notes 165-66 *supra*.

268. See 111 CONG. REC. 23,641 (1965) (remarks of Rep. Udall); *id.* at 23,636 (remarks of Rep. Aspinall). See also text accompanying note 253 *supra*.

management philosophy and effectively distinguish national parks from all other public recreational lands.

In any definition of national park purposes, primary attention must be given to the work of Frederick Law Olmsted.²⁶⁹ Olmsted, author, historian, Director of the United States Sanitary Commission, and renowned landscape architect,²⁷⁰ was uniquely involved in the early management of Yosemite Valley State Park. Creation of the Park—the first time federal land was set aside to be protected and conserved for recreational use—came largely in response to Olmsted's efforts and writings.²⁷¹ As director of the first Yosemite Commission charged with administering the Valley grant, Olmsted issued a report in 1865²⁷² for the California Legislature defining the management policies of the grant and offering specific proposals for their implementation. In this report, "Olmsted formulated a philosophic base for the creation of state and national parks."²⁷³

To Olmsted, the primary purpose for the park's creation was to provide a contrast to people's daily routines. Such a contrast would result in reinvigoration of one's intellect and emotions.²⁷⁴

It therefore results that the enjoyment of scenery employs the mind without fatigue and yet exercises it; tranquilizes it and yet enlivens it; and thus, through the influence of the mind over the body, gives the effect of refreshing rest and reinvigoration to the whole system.²⁷⁵

The writings of John Muir, another important contributor to the national park idea,²⁷⁶ similarly contain this concept of contrast and the unique function natural scenery performs in providing it.²⁷⁷

269. See Sax, *supra* note 21, at 71. See also note 21 *supra* and accompanying text.

270. See L. ROPER, *supra* note 40, at xiii (foreword).

271. See note 40 *supra* and accompanying text. Interestingly, Olmsted's son, Frederick Law Olmsted, Jr., is credited with authoring the key language in the NPS Organic Act, text accompanying note 1 *supra*. R. SHANKLAND, *supra* note 22, at 101; W. EVERHART, *supra* note 12, at 21.

272. Olmsted, *The Yosemite Valley and the Mariposa Big Trees*, reprinted in 43 LANDSCAPE ARCHITECTURE 12 (1952).

273. *Id.* at 13 (introductory note by L. Roper).

274. *Id.* at 17, 20. See note 12 *supra* and accompanying text. According to Prof. Sax's interpretation of Olmsted's report: "[T]he purpose of the parks is to draw people out of the routine of daily life, to create a total and encompassing experience, to change the entirety of their pace and permit the rhythm of the park to take over." Sax, *supra* note 21, at 81.

275. Olmsted, *supra* note 272, at 21.

276. See note 42 *supra* and accompanying text.

277. See the quote from Muir's writings contained in note 12 *supra*. Nash explains that to Muir, "[w]ilderness was medicinal to lives 'bound by clocks, almanacs . . . and dust and din' and limited to places where 'Nature is covered and her voice smothered.'" R. NASH, *supra* note 23, at 128 (quoting John Muir). Further, "[w]ild country, according to Muir, had a mystical ability to inspire and refresh." *Id.*

Muir's thinking, in many respects, paralleled that of Henry David Thoreau, *see id.*, whose writings similarly contain the notion of nature providing contrast and reinvigoration. Thoreau continually alluded to the "'tonic' effect of wild country on his spirit" and its strengthening influence on all people. *Id.* at 88-89. A central idea in Thoreau's thinking

Olmsted believed that the opportunity to experience the contrast provided by natural scenes was essential to the pursuit of happiness:

It is a scientific fact that the occasional contemplation of natural scenes of an impressive character, particularly if this contemplation occurs in connection with relief from ordinary cares, change of air and change of habits, is favorable to the health and vigor of men and especially to the health and vigor of their intellect beyond any other conditions which can be offered them, that it not only gives pleasure for the time being but increases the subsequent capacity for happiness and the means of securing happiness.²⁷⁸

By setting aside impressive natural lands, the government prevented private ownership, permitted free access and better enabled the citizenry to pursue long-term happiness.²⁷⁹

Olmsted recognized that the United States was following Europe in preserving areas of exquisite natural scenery.²⁸⁰ In Europe, however, the lands were privately owned and only for the "governing classes" or the wealthy to enjoy. What made preservation particularly unique in America was that it was for the "humble toilers,"²⁸¹ the common person, or those "who suffer most from lack of recreation."²⁸²

Olmsted maintained that in Europe the ordinary people were denied use and enjoyment of natural scenery because they were thought incapable of genuinely enjoying natural scenery:

It has always been the conviction of the governing classes of the old world that it is necessary that the large mass of all human communities should spend their lives in almost constant labor and that the power of enjoying beauty either of nature or of art in any high degree, requires a cultivation of certain faculties, which is impossible to these humble toilers. . . . [I]t is thought better, so far as the recreations of the masses of a nation receive attention from their rulers, to provide artificial pleasure for them, such as theatres, parades, and promenades where they will be amused by the equipages of the rich and the animation of the

was that natural scenery enabled people to achieve a sense of balance or equilibrium in their lives. *Id.* at 94-95. "Instead of coming out of the woods with a deepened appreciation of the wilds, Thoreau felt a greater respect for civilization and realized the necessity of balance." *Id.* at 91.

278. Olmsted, *supra* note 272, at 17.

279. In Olmsted's view, it was the main, if not the sole duty of government to protect its citizens in the pursuit of happiness and to remove any obstacles that prevented individuals from that pursuit. *Id.* See L. ROPER, *supra* note 40, at 283.

280. Olmsted, *supra* note 272, at 20. See also text accompanying note 58 *supra*.

281. Olmsted, *supra* note 272, at 21.

282. *Id.* at 20. Olmsted wrote:

But in this country at least it is not those who have the most important responsibilities in state affairs or in commerce, who suffer most from the lack of recreation; women suffer more than men, and the agricultural class is more largely represented in our insane asylums than the professional, and for this, and other reasons, it is these classes to which the opportunity for such recreation is the greatest blessing.

crowds.²⁸³

Thus a program of artificial pleasures planned according to the perceptions of the ruling elite was to satisfy the recreational needs of the masses. This philosophy resulted in the treatment of "ordinary people as passive objects to be entertained at the most superficial level."²⁸⁴

Recreational policy was to be different in America's democratic society. Olmsted too, thought that "the power of scenery to affect men is, in a large way, proportionate to the degree of their civilization and the degree in which their taste has been cultivated."²⁸⁵ Yet, it was the function of a democratic government, in Olmsted's mind, to cultivate and elevate people's taste.²⁸⁶

The first point to be gleaned from Olmsted's park concept is that national parks were not set aside to provide artificial pleasures. Central to Olmsted's notions of contrast and reinvigoration is that the natural scenery provide the enjoyment; buildings and entertainment should not draw visitors or their attention away from the physical landscape.

The main duty with which the Commissioners should be charged should be to give every advantage practicable to the mass of the people to benefit by that which is peculiar to this ground and which has caused Congress to treat it differently from other parts of the public domain.

This peculiarity consists wholly in its natural scenery.²⁸⁷

Quite simply, golf courses, liquor stores, and tennis courts are not unique to national parks; they do not provide the kind of contrast envisioned.

Secondly, since the parks could provide effectively the intended

283. *Id.* at 21.

284. Sax, *supra* note 21, at 74.

285. Olmsted, *supra* note 272, at 20.

286. *Id.* at 21.

287. Olmsted, *supra* note 232, at 22. In determining what is peculiar to national park ground, it is useful to consider the criteria currently used in designating national parks. Initially an area must be of national significance which is defined as possessing "exceptional value or quality in illustrating or interpreting the natural heritage" of the United States. Ten types of natural features that may be nationally significant are described. Suitability is also a criterion and the following four factors are listed:

1. National parks should be relatively spacious land and water areas so outstandingly superior in quality and beauty as to make imperative their preservation by the Federal Government for the enjoyment, education and inspiration of all people.
2. They should embrace a sufficiently comprehensive unit as to permit public use and enjoyment and effective management of a continuing representation of its flora and fauna.
3. They should be adaptable to a type of management that can provide a wide range of opportunities for human enjoyment, such as camping, picnicking, hiking, horseback riding, and sightseeing in a natural setting consistent with the preservation of the characteristics or features that merited their establishment.
4. They will most often contain a diversity of resources and values, including scenic and scientific.

Hearings on H.R. 7167, a Bill to Establish the Cuyahoga Valley Natural Historical Park and Recreation Area, Before the Subcommittee on National Parks and Recreation, 93rd Cong., 2nd Sess. 55 (1974) (reprint of NPS Criteria for Parklands (rev. ed. 1971)).

contrast only if human improvements remained minimal, the primacy of preserving the natural assets was essential to an effective management policy: "The first point to be kept in mind then is the preservation and maintenance as exactly as is possible of the natural scenery"²⁸⁸ Nothing in Olmsted's thinking suggests a total prohibition on constructed facilities or roads inside national parks. Discussions of such improvements were in fact contained in the 1865 Yosemite Report.²⁸⁹ In favor of some construction, Olmsted established a policy that all human improvement within the parks have the sole purpose of facilitating the use and enjoyment of the natural scenery. The purpose of a national park road was not to provide access to the greatest number at the greatest speed, but rather to stimulate the traveler to confront and contemplate the scenery at a leisurely pace.²⁹⁰

The most difficult and perhaps irreconcilable conflict regarding current park management is the notion of a capitalistic concessions system providing the minimal accommodations embraced by Olmsted's park concept. Recreational use of a resource is directed at mental or physical return whereas commercial development looks toward economic return.²⁹¹ The ownership of concessions by large corporations which are managed by leading financial experts²⁹² has served to sharpen the conflict by establishing a profit demanding business in areas set aside to be preserved.

Whereas careful regulation of concessions inside the parks provides a theoretical resolution of this conflict, at a minimum the Park Service should not bow to the wishes of the concessioner in formulating regulatory and management policies. Yet, significantly, NPS efforts to provide what the public desires has, in a number of specific park areas, been reduced to what the concessioner desires.²⁹³

The Park Service has, at times, apparently treated the concessioner as representing the public via the market place. This is evidenced by incidents where the Park Service allowed the concessioner to write master plans,²⁹⁴ construct facilities independently of plans,²⁹⁵ and pro-

288. Olmsted, *supra* note 272, at 22. In proposing a particular design for a road suggested in the Yosemite Report, Olmsted wrote: "The object of this arrangement is to reduce the necessity for artificial construction within the narrowest practicable limits, destroying as it must the natural conditions of the ground and presenting an unpleasant object to the eye in the midst of the scenery." *Id.* at 24.

289. *Id.*

290. See generally Sax, *supra* note 21, at 80.

291. McNally, *The Grand Canyon National Park Enlargement Act: Perspectives on Protection of a National Resource*, 18 ARIZ. L. REV. 232, 234 n.14 (1976).

292. See text accompanying notes 198-200 *supra*.

293. The congressional committees conducting the 1974 Joint Hearings, *supra* note 6, found that: "In certain instances it appears that the concessioner, not the Park Service, operates the park area." 1976 REPORT, *supra* note 196, at 5.

294. See text accompanying note 231 *supra*.

295. See text accompanying notes 220-22 *supra*.

vide for new types of park uses and thereby justify the need for more development.²⁹⁶ The identification of the public with the concessioner has developed because the concessioner, in a close relationship with an agency which by law must promote it,²⁹⁷ repeatedly argues for more park development.

Were the situation one of perfect competition among concessioners, they might accurately represent all concession users but certainly not the broader spectrum of all park users.²⁹⁸ Moreover, explicit in Olmsted's insistence on preservation of park values was a recognition that the demands of current users may have to yield at times to the interests of future generations: "This duty of preservation is the first which falls upon the state under the Act of Congress, because the millions who are hereafter to benefit by the Act have the largest interest in it, and the largest interest should be the first and most strenuously guarded."²⁹⁹ And, it is most debatable that the concessioner can ever represent, through the market place, the interests of future generations.

More importantly, according to Olmsted the government was not to acquiesce in consumer demands but was to cultivate people's tastes.³⁰⁰ Similarly, Aldo Leopold wrote: "Recreational development is a job, not of building roads into lovely country, but of building receptivity into the still unlovely human mind."³⁰¹ There is a role for leadership in recreational management.³⁰²

The use of the parks for conventions and business meetings illustrates well both the economic and the conceptual conflicts between concession policy and the national park idea. A study of seven western parks by the General Accounting Office revealed that 143 conventions or group meetings were held in these parks in 1974.³⁰³ Furthermore,

296. See text accompanying notes 214-16 *supra*.

297. See notes 166-71 *supra* and accompanying text.

298. In a simplified analysis, there are four types of park interests: (1) the park user and concession user; (2) the park user but non-concession user; (3) the non-park and non-concession user (recognizing that national parks are for all of society and that some benefit accrues to every member by merely having the resource, regardless of recreational use); and (4) future generations. The concessioner can, through the marketplace, justifiably represent only number one above.

299. Olmsted, *supra* note 272, at 23. The report also stated:

[I]t should be remembered that in permitting the sacrifice of anything that would be of 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.

Id. at 22.

300. See text accompanying notes 283-86 *supra*.

301. W. EVERHART, *supra* note 12, at 242. The life and philosophies of Aldo Leopold, whose work led to the administrative designations of wilderness areas beginning in 1924, are discussed in R. NASH, *supra* note 23, at 182-99.

302. Sax, *supra* note 21, at 71, 76.

303. COMPTROLLER GENERAL, CONCESSION OPERATIONS IN THE NATIONAL PARKS—IMPROVEMENTS NEEDED IN ADMINISTRATION 9 (1975). [hereinafter cited as COMPTROLLER GENERAL].

fifty-three were held during the peak visitation season, June through September.³⁰⁴ This new type of park use, primarily advertised by the large concessioner,³⁰⁵ has at times denied use of the resource to the general public.³⁰⁶

Until congressional hearings in 1974, Park Service policy failed to address the convention issue.³⁰⁷ The Park Service had been aware of widespread convention advertisement but considered such use of concession facilities, at least in the off-season, a wise business practice. The Service further contended that it provided some people with the opportunity to visit the park who otherwise probably would not do so.³⁰⁸

Initially, a conflict arises between conventions and the prescribed recreation function of the parks. The Park Service Organic Act describes what is to be enjoyed in the parks—"the scenery and the natural and historic objects and the wildlife therein."³⁰⁹ The purpose of a convention is not to enjoy these amenities, but to transact business or organizational affairs in a relaxed setting. Appreciation of park values is secondary at best.³¹⁰

Secondly, conventions require facilities—meeting rooms, dining halls, and lodging. They have become a justification for even more park development. In fact, one rationale put forth by Music Corporation of America for its proposed Curry Village project in Yosemite, involving replacement of 150 tent cabins which had outdoor plumbing and rented for \$6.50 per night with modern winterized units to rent for

304. *Id.* During 1974, 2.6% of the available lodging at Yosemite (10,000 room nights) was occupied by people attending conventions. *Id.* at 10. At the Awahnee Hotel in Yosemite, fifty-one conventions and group meetings were scheduled in 1975, occupying twenty-three of the total room nights available. *Id.* The peak season of May through September had nineteen percent of the total room nights scheduled for conventions and other group meetings. *Id.* On one June weekend, forty-one percent of the capacity of the Awahnee Hotel was tied up for group meetings or conventions. 1976 REPORT, *supra* note 196, at 53-54.

305. *Cf.* Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (N.D. Cal. 1976), where the court held *inter alia*, that the publicity campaign of Yosemite's concessioner, which was designed to bring more visitors including conventions, was not a major federal action subject to the requirements of NEPA. The decision appears to be inconsistent with the "enablement theory" of NEPA. See National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973).

306. See 1976 REPORT, *supra* note 196, at 50. See also note 304 *supra*. See generally COMPTROLLER GENERAL, *supra* note 303, at 8-13.

307. See note 316 *infra* and accompanying text.

308. COMPTROLLER GENERAL, *supra* note 303, at 9.

309. 16 U.S.C. § 1 (1976). See text accompanying note 1 *supra*.

310. See note 287 *supra* and accompanying text. See also text accompanying notes 132-34 *supra*. Thus, in carrying out its mandate to regulate use of the parks by such measures as conform to their purpose, the Park Service is especially justified in restricting conventions where they interfere with use by those who would visit the parks primarily to appreciate park values. See note 316 *infra*.

\$19.00 per night, was to permit increased off-season convention use.³¹¹ As an excuse for development, conventions can conflict with the preservation function of the parks by altering the setting in which park values will be perceived.³¹² Additionally, "improvements" of the type necessary to accommodate convention-goers raise questions concerning the provision of adequate services at reasonable rates. It is entirely possible that large numbers of visitors would prefer saving \$12.50 per night to having modernized accommodations.

C. Congressional Investigation

The specter of concessioner-run parks, with such activities as conventions, concessioner master planning, and concessioner use of a park as a television studio,³¹³ prompted Congress in 1974 to hold hearings on Park Service Planning and Concession Operations.³¹⁴ The committees conducting the hearings issued a report³¹⁵ stating that NPS had not been discouraging conventions during peak or near-peak seasons;³¹⁶

311. 1974 Joint Hearings, *supra* note 6, at 230 (Statement of Charles M. Clusen, Sierra Club Representative).

312. See text accompanying note 249 *supra*.

313. Universal Studios, a subsidiary of MCA, Inc., filmed a prime-time television series about park rangers in Yosemite in 1974. The filming was during the peak visitation season and film crews and casts took a large number of park lodging units out of public service. Some guests' reservations had to be cancelled. Off-duty uniformed park rangers were paid by MCA to direct and control traffic and to act as extras. Helicopters continually flew over the park and natural features were damaged to achieve cinematic effects, *e.g.*, painting on rocks. The filming was cancelled six months after it began due to "low ratings." Letter from Toby Cooper, Administrative Assistant, National Parks and Conservation Association to Ronald Walker, Director, NPS (Sept. 6, 1974), *reprinted in 1974 Joint Hearings, supra* note 6, at 228. Under 43 C.F.R. § 5.1 (1976), commercial filming in national parks without a permit is prohibited. From 1971 until 1974, NPS issued approximately twenty commercial filming permits for such diverse things as the advertising of Stag Cigars, Datsun cars, Goodyear Tire and Rubber Co., Kaiser Aluminum, Ford Motor Co., and the MCA Show "Sierra." 1974 Joint Hearings, *supra* note 6, at 356 (Appendix I).

314. 1974 Joint Hearings, *supra* note 6.

315. 1976 REPORT, *supra* note 196. The report is entitled "National Park Service Policies Discourage Competition, Give Concessioners Too Great a Voice in Concession Management."

316. The Park Service responded to this point with a directive which stated "that convention-type use of overnight accommodations and related services 'shall be confined to off-season periods and then only to the degree of utilizing expected surplus accommodations.'" 1976 REPORT, *supra* note 196, at 54. Concessioners must now notify the park superintendent of bookings at least thirty days in advance of such use of their facilities. The Park Service defends off-season convention use by arguing that a prohibition would raise the rates charged to the public. *Id.* Such business activity during non-peak season offsets operating costs and, thus, maintains reasonable prices during peak visitation periods. See *id.* at 55.

The adverse effects on rates charged to the public, however, does not necessarily justify permitting convention use of the parks. If policies are being implemented to limit use and its impact, concessioners may be undermining this effort by promoting more use, and in the case of conventions, a type of use which may demand more facilities and is not contemplated by the Organic Act. See text accompanying notes 250-51 *supra*. Also, little visitation during the non-peak season may be necessary for park preservation. If intense park use

the role of the concessioners in master planning had been disproportionately greater than that of the public; and some of the facilities and services within Yosemite were inconsistent with the natural surroundings.³¹⁷

In other areas, the committees' findings were similar to those of the three reports issued by various governmental bodies in 1963³¹⁸ and the arguments originally voiced by the opponents of the Concessions Policy Act of 1965.³¹⁹ Generally, the report states that NPS implementation of the Concessions Policy Act created monopolies in existing concessions and gave concessioners windfall profits. Monopolies resulted from Park Service practices of automatically granting to a single concessioner preferential rights to provide all existing and new facilities in an individual park, and renewing contracts before expiration to encourage continuity of operation.³²⁰

A primary deterrent to allowing competition for contracts at renewal time was the possessory interests granted to concessioners in improvements they constructed or acquired.³²¹ The Park Service was discouraged from terminating concession contracts where large possessory interests existed because new concessioners with sufficient funds were difficult to find and appropriated funds were not available for the Park Service to compensate for the possessory interests.³²² Conceivably, the Park Service could refuse to renew a concession contract because of sub-standard performance and still be required to compensate the concessioner for its possessory interest. The purpose for granting possessory interests was to provide security necessary for the concessioner to acquire financing for construction of more facilities. The

occurring during peak seasons is impairing preservation, can steps be taken during the off-season which will restore damaged areas?

317. 1976 REPORT, *supra* note 196, at 5-7.

318. See notes 152-60 *supra* and accompanying text.

319. See text accompanying notes 175-79 *supra*.

320. 1976 REPORT, *supra* note 196, at 12.

321. *Id.* at 23. The committees found illegal and reprehensible the NPS Director's reversal, upon the request of the concessioners and without opportunity for public comment, of a 1965 policy which precluded concessioners from obtaining a possessory interest in government owned buildings. *Id.* at 28.

322. A related situation has occurred in Everglades National Park where a subsidiary of General Host has been the concessioner since 1966. The Park receives 1.2 million visitors annually. General Host's contract expired in 1975 and the concession facilities had a book value of \$1,260,168.78. The company decided not to renew the contract because from 1966 through 1974 it had sustained losses of over \$650,000. Due to the large capital investment needed to acquire the possessory interest, no private business made an offer acceptable to General Host and the Park Service was to acquire it. *Id.* at 24-25.

In 1975, Everglades Park Catering Inc. was assigned the concessions contract from General Host's subsidiary. 1976 REPORT, *supra* note 159, at 25. See also NATIONAL PARK SERVICE, VISITOR ACCOMMODATIONS FACILITIES AND SERVICES 1978/1979, at 26 (1978) which indicates that Everglades Park Catering, Inc. was the park concessioner as of January, 1978.

committees determined that this was no longer necessary for the large businesses dominating the field.³²³

Another major conclusion of the report was that contract provisions concerning the determination and reconsideration of franchise fees resulted in subsidization of concessioners.³²⁴ Concession contracts generally contain a provision that the franchise fees are to be reviewed every five years, but adjustments can only be made with the concurrence of both parties. If they cannot agree on the amount of a new fee, neither party can require a revision. The end result is that the concessioner rarely consents to an upward revision and the rate remains the same throughout the duration of the contract.³²⁵ On the other hand, concessioners show no hesitancy in requesting franchise fees waivers when unanticipated circumstances beyond the concessioner's control cause financial losses. During a recent two and a half year period, the Park Service considered twenty-two requests, and approved eleven for a total of \$121,235 lost in franchise fees.³²⁶

IV

RECOMMENDATIONS

Concession operations inside the parks need urgent reevaluation. Some of them are simply incompatible with national park purposes and there is a possibility that still others no longer perform a necessary function. Stephen Mather's idea that a variety of concession services are needed inside the parks to lure visitors is outdated. Use of the parks no longer appears dependent upon providing extensive concession services actually located inside the parks.³²⁷

323. 1976 REPORT, *supra* note 196 at 24.

324. *Id.* at 36.

325. The Yosemite Park and Curry Co., (YPCC) contract provides an example. When renewed in 1963 for a thirty-year period, the annual franchise fee rate was set at three-fourths of one percent of the gross receipts plus a flat fee of \$5,000. At the end of the first five-year period, NPS determined that the flat rate should be reduced to \$3,800 and the percentage increased to 1.55%, but decided that YPCC's rates of return on investment (7.64%) and gross receipts were reasonable. NPS did not request a rate change. At the end of the second five-year period, NPS attempted to raise the franchise fee because YPCC's (now MCA-owned), 1973 net income after taxes of \$1,600,000 was nearly double that for 1972. The company refused, citing the energy crisis and planned improvements. The result is that MCA's subsidiary, which increased its gross sales over \$5,000,000 from 1973 to 1974 in Yosemite, continues to pay the original 0.75% of such gross receipts, plus a \$5,000 flat fee. 1976 REPORT, *supra* note 159, at 37. The committee urged adoption of an arbitration proposal or a limited appeals procedure as a remedy. *Id.* at 42. See also COMPTROLLER GENERAL, *supra* note 303, at 24.

326. COMPTROLLER GENERAL, *supra* note 303, at 25. The committees' report also notes that practices at Yosemite requiring concessions to give discounts to NPS employees were not proper. 1976 REPORT, *supra* note 196, at 44. See text accompanying note 154 *supra* for the same type of finding in 1963.

327. Thousands more people visit the parks than the concession facilities can probably accommodate. For example, Yosemite National Park contained the concession facilities

Urbanized areas inside the parks tend to create a market for the type of services they provide.³²⁸ This results in visitors who are not brought to the parks to experience a contrast as Olmsted hoped. People now come to the parks to experience the familiar and the routine, albeit in a more aesthetic setting.³²⁹ Congress and the Park Service have assumed that because the modern park visitor leaves an environment where fast food, laundromats, shopping facilities, and electronic entertainment are readily available, these luxuries must be provided if the park experience is to be enjoyable.³³⁰ Interrelated is the profit-seeking concessioner's objective to generate more and more demand for its services. The result is that facilities are built and services are supplied to accommodate a market which, arguably, the Park Service and the concessioner—not the parks—have created.

Regardless of the exact lines drawn on permissible park uses and concession operations, the intrinsic park values should provide the enjoyment. The purpose of the Park Service and the concessioner is only to facilitate that enjoyment. Recreational use should be related to that which is unique to the land in its natural state, and not based primarily on constructed facilities.³³¹ The visitor should therefore use the park on nature's terms, and not simply as a scenic backdrop for "just another vacation stop."

One management goal should be to effect compatibility between concession services and national park purposes. Only those concessions which serve an interpretative function or relate to an aspect of the parks and the experience they provide, such as burro trips, rafting and canoe excursions, and bus sightseeing should be given incentives to develop or expand. These are the services which enhance the contrast and reinvigoration that parks are to provide. Prospective concessions

listed in note 4 *supra*, yet received 2,339,400 visitors in 1973. NATIONAL PARK SERVICE, PUBLIC USE OF THE NATIONAL PARK SYSTEM 47 (1974).

It may be argued that concepts discussed in this Article regarding permissible concession facilities inside the parks could lead to increased non-concession use, thereby impacting areas which are ecologically more fragile than the already damaged concession areas. Initially, use of fragile areas is already subject to stringent NPS regulations and biological carrying capacity quotas, a topic beyond the scope of this Article. Secondly, there is no reason to assume that removal of some concession facilities from the parks will prompt previous concession-users to turn to hiking and camping in the back country, for instance. It is likely that many of them would turn to outside-the-park accommodations, and those who come purely for non-park values, *e.g.*, golf, swimming pools, etc., would more likely turn elsewhere, opening use of the park resources to more people who wish to experience what is peculiar to the land. Finally, the recommendations presented here are primarily directed at future concessions management, to be retroactive only after a thorough review of all the issues and a proper accounting for the legitimate business interests of the concessioner.

328. Sax, *supra* note 21, at 83.

329. See text accompanying note 237 *supra*.

330. Consider the absence of recreational use leadership propounded by Olmsted, text accompanying notes 285-87 *supra*.

331. See note 287 *supra* and accompanying text.

which indirectly facilitate experiencing these aspects of the parks, *i.e.*, lodging and food, should be placed under a system of management which is primarily concerned with preserving and promoting park values and only secondarily with concessioners' income.³³²

Unambiguous policy directives to accomplish this and to reiterate the important national park purposes should be enacted by Congress. Furthermore, legislation must translate the recognition that use is threatening the parks into effective management norms. Congress should consider requiring the Park Service, before signing a concession contract or approving construction, not only to comply with NEPA, but also to demonstrate in writing:

1. That a facility or service is necessary for visitor enjoyment of the park in conformity with national park purposes;
2. That it is infeasible for the service or facility to be outside the park, (this could include cost-benefit analysis and comparison with alternatives);
3. That anticipated adverse environmental impacts affecting the park's ability to achieve national park purposes will be minimized; and
4. That interests of future generations have been duly considered.

The Park Service should be assisted by statute in reasserting its leadership role in park recreational policy. The functions of education and interpretation, heretofore only statutorily implied and inadequately provided for in Department of the Interior budgets,³³³ should

332. The Park Service began to experiment with a new type of concession operation in 1941 when Mammoth Cave was established as a National Park. 16 U.S.C. § 404 (1976). National Park Concessions, Inc., was established to develop facilities and provide services "solely in the interest of the public welfare." J. ISE, *supra* note 3h, at 459. In the event of the corporation's dissolution, proceeds from the sale of its assets along with all other money belonging to the corporation would be entrusted to the Secretary to be used only for the benefit of the park system. *See id.* This type of operation, reflective of New Deal thinking, was an attempt to resolve the paradox of relying on the profit motive to encourage business efficiency in a business that was not permitted a high rate of return. *Id.* at 614. The corporation has since expanded to include concessions operations in Isle Royal, Olympic, and Big Bend National Parks. *Id.* at 460.

An examination of National Park Concessions, Inc., should be made to determine whether, given national park purposes, it would be sound policy to expand that type of operation to other parks. This author's attempts to obtain relevant financial information concerning NPC, Inc., have been met by NPS claims of exemption under the Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1976). Letter from William Briggie, Deputy Director, NPS, to Michael Mantell (Aug. 9, 1976) (a copy of which is on file in the office of the Ecology Law Quarterly), as elaborated upon in a telephone conversation between William Briggie and Michael Mantell (Sept. 1976).

333. In its budget for fiscal year 1977, the Department of the Interior requested an appropriation for all NPS administered areas of \$266,331,000. U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATION, FISCAL YEAR 1977, 10 (1976). Of this figure, \$123,918,000 was allocated to "maintenance," *i.e.*, park roads, buildings, trails, sewage treatment plants, etc., while \$31,177,000 was for "interpretive services." *Id.* at 9. It must be remembered that in

be expressly delegated to the Park Service.

As pointed out in the 1976 report on NPS planning and concession operations,³³⁴ the practice of granting possessory interest as it now exists inhibits phasing out concession operations that are no longer consistent with park purposes or unresponsive to Park Service management.³³⁵ This practice should be eliminated or at least modified as to prospective concession operations and contract renewals. The "taking" of concessioner buildings or improvements by a Park Service decision not to renew an expiring contract, or to terminate an existing one for good cause, can be distinguished from an eminent domain proceeding, for example to acquire land needed for a highway. The park concessioner receives a profit on the services it provides, is effectively protected against loss,³³⁶ is subsidized by government road building and advertising, and is insulated from competition. Fairness may call for some compensation for actual loss of investment if contracts are not renewed, but some accounting should be made for these other factors. The current computation method³³⁷ needs revision at least with respect to compensatory rights of future concessioners.³³⁸ Because of contractual obligations and existing policies, it would require enormous expenditures of money to implement necessary changes immediately. Therefore, interim measures need to be devised to prevent any further incompatible concession intrusion, and to facilitate achievement of management goals. Economic incentives should be provided to concessioners who develop facilities outside the parks, if less costly to the government than outright possessory interest compensation. These

some NPS units, particularly in historical or cultural areas, interpretive services are a primary attraction and thus comprise a large part of the budget. Referring to the \$2,680,000 increase in the interpretive services budget over the preceding year's request, the Department said:

Visitor participation in conducted interpretive services has accelerated greatly in recent years. However, the number of permanent interpreters assigned to supervise these services has not kept pace [S]upervision over these programs . . . has become increasingly inadequate, resulting in a deteriorating quality of presentations. . . . A significant portion of the requested increase will be applied toward restoring the quality and quantity of interpretive services offered to the public.

Id. at 12-13. Additionally, THE CONSERVATION FOUNDATION, *supra* note 247, at 50, recommended "that the NPS receive more adequate appropriation for interpretation and activity training programs." It found that the NPS would disband interpretation programs long before it would cut such programs as "mowing the grass." *Id.* at 65.

334. 1976 REPORT, *supra* note 196, discussed in text accompanying notes 200-210 *supra*.

335. 1976 REPORT, *supra* note 196, at 27.

336. See text accompanying notes 166, 171 *supra*.

337. See note 168 *supra*. Indeed, reconstruction cost less depreciation for actual wear and tear may greatly exceed original cost to the concessioner long after this original investment has been recovered.

338. The extent to which amendments to statutory provisions such as that in note 138 *supra* may be applied to existing contracts without violating the Contract Clause, U.S. CONST. art. 1, § 10, cl. 1, is beyond the scope of this Article.

incentives might be coupled with increases in the costs of doing business inside the parks, *e.g.*, higher franchise fees.

While the 1976 report's proposal for restoring competition in the granting and renewing of concession contracts may provide incentive for concessioners to operate in a manner more compatible with park purposes, the proposal to limit concessioner influence by prohibiting monopolies inside the parks³³⁹ is misplaced. This is so whether or not one agrees with the Park Service contention that granting a preferential right to one concessioner to operate all facilities is necessary to guarantee a profit and thus enable the concessioner to provide high quality service to the public.³⁴⁰

Competition as a means of preventing concessioner over-reaching poses a greater threat to park preservation than the present management system. Having different concessioners for each service and/or facility would demand more Park Service management and would likely result in more park development. Each concessioner would seek to increase its share of park business and more public land would be necessary for fragmented facilities and for their support, *i.e.*, maintenance, warehousing, repair shops, and office space. Competitive advertising to promote the use of individual facilities would increase demand and could result in a need to develop more facilities to accommodate the increased use.³⁴¹ A natural area that is intended to be preserved is not the proper place for a rigorous commercial competition which encourages rapid exploitation of resources.

Policies need to be devised which will not only reduce the influence of concessioners, but also free the Park Service from excessive management burdens. NPS resources would be better put to preservation and visitor education programs. The concessioners' role in management decisions might be reduced by an unambiguous congressional restatement that the Park Service is to accord priority first to preserving park values, second to facilitating enjoyment of these values, and only third to the economic well-being of the concessioner.³⁴²

CONCLUSION

The Concessions Policy Act of 1965, outdated when written,³⁴³ has provided concessioners with too much protection. It has helped entrench concessioners in the parks and has enabled them to wield an

339. 1976 REPORT, *supra* note 196, at 19.

340. *Id.* at 26.

341. See text accompanying notes 81-100 *supra*.

342. Congressional action aside, one can hope that the new draft plan for Yosemite National Park, see text accompanying notes 236-39 *supra*, signals an enduring change in future national park and concession policy on the part of the Park Service.

343. See notes 193-98 *supra* and accompanying text.

unjustifiable degree of influence over management policy³⁴⁴ and to obscure the purpose of the parks.³⁴⁵ In order to stimulate investment and create more services, the Act's design was to assure the concessioners a profit. As a result, those services with a low cost, but high return ratio, such as souvenir stores, snack bars, and liquor stores are particularly favored.

The Park Service has been entangled in a statutory web of promoting and encouraging use of concessions. Park preservation and the concept of the park experience providing a contrast which reinvigorates have been virtually forgotten, giving way initially to the political necessity of creating park use, then acceding to concessioner pressure and, finally, to "user" desires.

The parks should not be made to conform to the desires of vacationers.³⁴⁶ There is a need in America's recreation scheme for the experience national parks were originally designed to offer.³⁴⁷ National parks can provide the casual recreationist a nature experience in one of the nation's prime scenic areas and guarantee a similar opportunity to future generations.

The Wilderness Act³⁴⁸ arguably has displaced some of the parks' functions, and certain areas within most parks have been or will be designated as wilderness. Wilderness areas, though, are to be managed strictly so as to maintain carefully the existing ecology. No structures, visitor centers, ranger-designed educational programs, or services are permitted. Non-wilderness areas in national parks can be managed to some extent anthropocentrically. The recommendations discussed herein do not contemplate for the parks the restrictions on facilities or use applicable in wilderness areas. Educational programs, visitor information centers, and concession services that facilitate experiencing park values are endorsed to continue or grow inside the park.³⁴⁹

344. See note 293 *supra*. See also text accompanying notes 293-98 *supra*.

345. See text accompanying notes 274-90 *supra*.

346. "[P]eople should expect to meet the parks on the parks' terms, rather than expect to significantly modify the parks to the terms of the users." NATIONAL PARKS CENTENNIAL COMMISSION, PRESERVING A HERITAGE, FINAL REPORT TO THE PRESIDENT AND CONGRESS 102 (1973).

As to those park users who are restricted in mobility, *i.e.*, the physically handicapped, the very young or old, their park experiences would not be adversely affected by any of the proposals presented here; in fact, educational programs, visitor centers, shuttle and tour bus services are encouraged to proliferate. These would enhance the visits of the less mobile. Certain other types of facilities are more appropriate and could still be available outside the park.

347. See notes 12, 274 *supra* and accompanying texts.

348. 16 U.S.C. §§ 1131-1136 (1976).

349. It must be remembered that the feeling of contrast, like the concept of psychological carrying capacity, see text accompanying note 162 *supra*, is relative to the individual user. Therefore, driving through portions of the park, riding on a bus, participating in an interpretive program, or staying at an inside-the-park hotel do not conflict with the parks' use function; each provides or facilitates the enjoyment of intrinsic park values.

The need to encourage more park use has long disappeared. Shorter work weeks, more leisure time, and spreading urbanization can only portend a continuing rise in demand for what the national parks have to offer. Indeed, as is the case for wilderness, park values face the alarming possibility of being "loved to death."³⁵⁰ Increasing use and the nature of certain concessions require that the more destructive and incompatible uses be curtailed to ensure park preservation and enable more of the kind of use originally intended—the experience of a contrast.³⁵¹ Additionally, the Park Service's concessions management burden must be eased. The Park Service must be able to direct its attention to management policies which will lessen visitor impact and provide meaningful park visits. The national park idea must be revived and, most importantly, the methods now designed to accommodate use must have preservation and the interests of future generations as primary considerations.³⁵²

350. Sax, *supra* note 21, at 83. See THE CONSERVATION FOUNDATION, *supra* note 247, at 36.

351. Some may argue that the Park Service has an obligation to satisfy the class of users that previous government policies have created. If uses have been *improperly* created, however, and are contrary to national park purposes or law, then they should not be continued. One does not have a right to continue improperly using a resource simply because ill-advised government policies previously catered to that use.

352. See notes 288, 299 *supra* and accompanying texts.