The Organic Act—A User's Guide: Further Thoughts on Winks' "A Contradictory Mandate?"

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Robin Winks' article "The National Park Service Act of 1916: 'A Contradictory Mandate'?" *(Denver University Law Review,* Volume 74, No. 3, 1997, abridged above) is the most definitive statement on the origins and meaning of the Organic Act, but it has not ended the debate about its nuances.

In the recent arguments over the re-write of the National Park Service's 2001 *Management Policies,* four congressional hearings were held to examine the proposed changes. The subject that consumed the most time was the meaning of the Organic Act. The Winks article was read into the record and excerpted in testimony by those who shared his view. In the way of most hearings, there were witnesses and members of Congress who did not share that view. They charged his supporters with wanting to "lock up the parks." The appropriate "balance" between visitor use and enjoyment and the protection of resources was discussed for four hours at one of the House hearings.

The plain language of the act and the experience of the National Park Service in administering it provide some guidance to its everyday application. This article accepts Winks' view that there is no fundamental contradiction in its construction.

Consider some hypothetical situations. Imagine Yellowstone were still in its 1872 condition. A proposal is advanced to lay a cable on the ground from its boundary to Old Faithful. There, a camera would transmit images of the geyser to television sets across the nation. No other development would be permitted and no visitors would cross the park boundary. There would be enjoyment for those who watched at home and little impact. Since the enjoyment of future generations would be maintained, there would be no impairment.

Now consider a competing proposal to cap the geyser and use the thermal energy to heat the buildings presently at Old Faithful. Future generations would be denied any opportunity to "enjoy" the geyser. That's impairment.

Before analyzing other applications, let's pause and look at what the Organic Act authorized. Taken as a whole it did eleven things:

1. Created a National Park Service in the Department of the Interior and provided staff and salaries for the new bureau;
2. Directed the service to "promote and regulate the use of … national parks, monuments and reservations";
3. Specified the "fundamental purpose" by which the service is to promote and regulate the parks;
4. Gave the new director "supervision, management, and control" of areas then under the Department of the

Interior and areas created by future congressional action;
5. Authorized the publication of rules and regulations and provided penalties for their violation;
6. Permitted the secretary of the interior to destroy those animals and plants "detrimental to the use" of the parks;
7. Authorized the secretary to grant leases, etc., "for the use of land for the accommodation of visitors";
8. Allowed the secretary to permit grazing (except in Yellowstone) when it "is not detrimental to the primary purpose" of the parks;
9. Authorized leases, "without securing competitive bids";
10. Permitted the secretary to authorize permittees to issue bonds, etc., for "improving … and extending facilities for the accommodation of the public"; and
11. Recognized existing rights of way in some of the parks (Winks points out that there were three parks where this provision applied: Yosemite, Sequoia, and General Grant).

This article will not discuss all of these provisions, but the list does provide insight to the view that Congress held of national parks. There was to be development for visitors. It could be provided by non-governmental entities at the discretion of the secretary. These developments, while constrained by the "fundamental purpose," were not inconsistent with that purpose.

For ready reference I have inserted the key provisions of the act:

> [The National Park Service] shall promote and regulate the use of the federal areas known as 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.

Few discussions of the Organic Act concentrate on the word "promote." In 1916, as noted clearly in Winks' article, there was a desire to make the parks more popular; "it was essential to spend the money needed to 'bring all these natural wonders within easy reach of our people.' A bureau would improve the parks' 'accessibility and usefulness.'" Stephen Mather, the first director of the National Park Service, was known for his public relations skills. Given the significant popularity of the parks today, it is of some value to think about the word "promote" anew. There remains a need to promote the parks, not to bring people to them, but to promulgate the values they have come to represent. In over a century of existence, the things preserved in them are rarer and more valuable now than in 1872 or 1916. The actions that must be taken by all to continue that preservation have become actions that must be taken by all to maintain the planet. The last two sentences of the National Park System Advisory Board's 2001 report, *Rethinking the National Parks for the 21st Century,* said it well: "By caring for the parks and conveying the park ethic, we care for ourselves and act on behalf of the future. The larger purpose of this mission is to build a citizenry that is committed to conserving its heritage

and its home on earth." For "conveying the park ethic," read "promote."

The act enumerates what we are to conserve "the natural and historic objects and the wild life therein." This listing directs the Park Service to conserve *everything*, from bacteria to biomes, from middens to mansions. Parks are placed at the center of a set of concentric circles that form the conservation estate that Congress has created over time. Winks uses the term "higher standard" to place the parks in a geometry that has come to include many other forms of conservation and preservation, e.g., national forest acts, historic preservation, wild and scenic rivers, heritage areas, national trails, wilderness, federal land policy and management, and endangered species. While these acts encompass more than conservation, each of them provide for and permit some measure of protection. Taken together, they direct a multitude of approaches to save valuable parts of the nation. National park units are the "anchor store" of this construction.

The word "therein" is worth consideration. The duty to conserve applies even if there is an abundance of similar resources outside the parks.

Two forms of enjoyment are recognized in the act. The first, by implication, applies to us, the present generation. The second protects the enjoyment of future generations, explicitly directing us to manage so that future enjoyment is ensured. They must receive things "unimpaired." The "unimpaired" standard is a *duty* of the present generation to those who are the future. It's about an obligation to our children and grandchildren.

It's important to distinguish the application of the impairment standard from the duty to conserve. The 2006 *Management Policies* got it right: "This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values."

Recognizing that this higher standard applies to all resources, all the time, inside of parks, it is the impairment standard that must give us pause. The hearings on the proposed re-write of the 2001 *Management Policies* stimulated much discussion about "balance" in park decision-making. Experienced park managers know that virtually all of their actions involve trade-offs, or "acceptable impacts" in the 2006 document. Balance does not apply in the case of impairment. Actions that impair are prohibited.

There is no "fundamental contradiction" in the Organic Act if one can define impairment. The complexity arises because one person's "impairment" is another's "acceptable impact." Nevertheless, the plain language of the statute provides some guidance.

There is a time factor—a generation—and so any action in a park that removes a particular resource that will not recover in twenty-five years or so, should give us pause. In the original draft of the 1988 edition of the *Management Policies,* officials in Interior put forth language that I characterized as "the broken leg theory of impairment": that is, if a resource would heal at some point in time, even though that point in time is left unspecified, then it wasn't impairment. The public comment on the draft soundly rejected that approach and

the final text was made consistent with earlier (and subsequent) policies.

Actions that remove *all* of any resource within a park raise the impairment question.

In addition to the text of the act, there is guidance in decisions that have caused courts to rule on the question. In the case *SUWA vs. Dabney* involving Canyonlands National Park, a district court ruled that an NPS decision to leave the only perennial stream in the park open to off-road motorized vehicles was inconsistent with the Organic Act. At Glacier National Park, a decision to remove old-growth trees to enlarge a parking lot was questioned by a court. There has been litigation on the conflict between nesting shore birds and off-road vehicles. If the accommodation of the vehicles results in the extirpation of the birds in the park, it is impairment.

There are also non-judicial examples. The removal of the development at Giant Forest in Sequoia National Park can be characterized as the avoidance of impairment. There the maintenance of an 80-year-old development was threatening the roots of 3,000-year-old trees. A decision on the collection of eaglets at Wupatki National Monument for Native American religious purposes has not been required because there have been no eaglets fledged there. If a decision has to be made in the future, there should be careful consideration of the impairment standard.

These examples do not provide a "bright line" to recognize impairment, but they do illustrate the kinds of decisions that should cause managers to think and analyze "impairment" as opposed to "balance."

The Organic Act is frequently cited as the mission of the National Park Service. The statement is incorrect because it is incomplete. Congress has given the National Park Service other duties, many of them outside the boundaries of the national park system. As many of the forces now threatening impairment come from outside the parks, these cooperative programs provide an opportunity for the agency to influence others to make decisions in favor of the parks. Collectively, the park and cooperative programs need to be seen as a single mission that can, in part, achieve the purposes of the Organic Act. But that's another discussion.

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