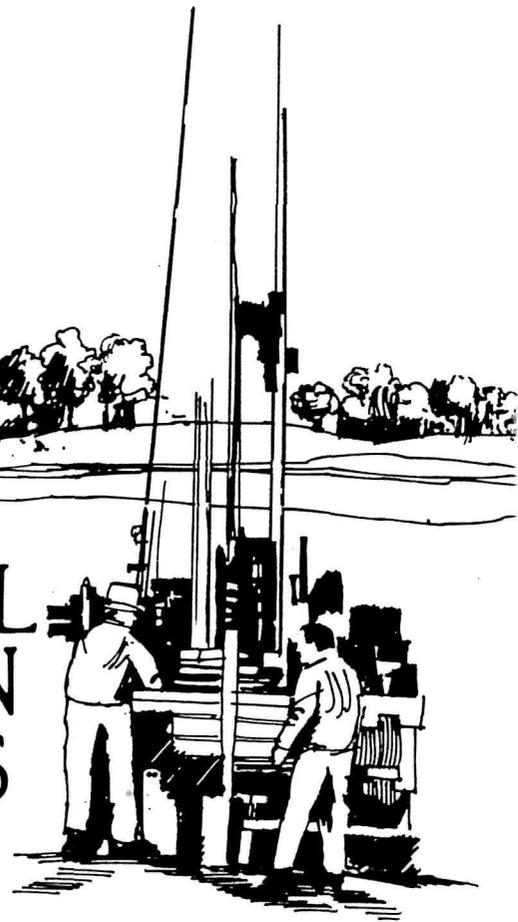


Natural Resources Report Series 86-2

REGULATING MINERAL
ACTIVITY IN
NPS UNITS



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REGULATING MINERAL ACTIVITY IN NATIONAL PARK SYSTEM UNITS
Natural Resources Report Series No. 86-2

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I. PURPOSE

The three purposes of this report are: 1) to explain the basis for the general prohibition of mineral activities within National Park Service (NPS) units; 2) to describe the three types of mineral situations NPS personnel may encounter in NPS units; and 3) to discuss how the NPS regulates mineral activities in each situation. This report focuses on mineral activities that occur within NPS units. Future reports will examine the effects on park resources caused by mineral activities occurring outside NPS units.

The belief that mineral development does not take place in National Park System units is quickly shattered for anyone who works in or visits Death Valley National Monument, Padre Island National Seashore, or any of several National Park System units in Alaska. In a system as large and varied as the National Park System, one is likely to encounter more than a few exceptions to the general rule.

The Congress established the NPS on August 16, 1916 in a statute commonly known as the Organic Act. That Act prescribes the principal mandate of the NPS as follows:

. . .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. (16 U.S.C. §1 et seq.)

This mandate from the Congress precludes activities that remove or destroy natural resources, activities such as mining, within NPS units.

Yet, mining and mineral activity do occur in NPS units under two -- and only two -- circumstances.

- where the Congress has authorized mineral activity in an NPS unit by law; or
- where the United States does not own the mineral rights within an NPS unit, and the NPS has decided, through its planning process, not to acquire them.

II. MINING ACTIVITY IS GENERALLY PROHIBITED IN NPS UNITS

The general prohibition of mineral activities in NPS units is based both upon the Organic Act and the Act for Administration of the National Park System of 1970 (16 U.S.C. §1a), as amended in 1978.

The Organic Act provides an unambiguous statement of purpose for the national parks, monuments and other reservations under the administration of the NPS. This Act directs that conservation and preservation of natural and historic resources are fundamental to the existence of NPS units.

In 1970, the Congress enacted the Act for Administration in response to difficulties that had arisen as a result of the dramatic expansion of the

number of units under NPS jurisdiction. The NPS had divided its management direction so as to address three distinct types of units -- natural, historical, recreational -- but the Congress enacted this additional legislation to clearly state that, despite differences in their unit titles, all units under the administration of the NPS are part of the National Park System. The Congress further emphasized that while each unit of the System is to be managed according to its own specific enabling statute, each unit is also subject to the purpose and mandates established by the Organic Act to the extent that those mandates do not conflict with the provisions of the unit's enabling legislation.

This act made it clear that the Organic Act and other protective mandates applied equally to all units of the National Park System, regardless of the type of unit. There is no basis for the idea that the System contains some units of greater value, some of lesser.

The legislation that expanded Redwood National Park in 1978 also contained an important section that amended the Act for Administration as follows:

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916 [the Organic Act], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. (16 U.S.C. §1a-1)

Although it is not apparent that any one specific incident or policy caused the Congress to so firmly restate its position, it is clear that the Congress believed it necessary to state that activities not specifically authorized or directed by the Congress are not permitted in units of the National Park System if those activities are in derogation of the values and purposes for which the unit was established. Mineral development is such an activity.

In addition to the general NPS authorities these statutes provide, the Congress has enacted specific statutes that directly address minerals management and development in the National Park System as a whole. The Mining in the Parks Act of 1976 (16 U.S.C. §1901 et seq.) is an example of such a statute (the provisions of this statute are reviewed in Section IV A of this report.) Also, in a number of statutes generally applicable to Federally-owned minerals, the Congress has repeatedly chosen to exclude lands in the National Park System from disposal or mineral development. Examples include:

- The Mineral Leasing Act of 1920, as amended (30 U.S.C. §181 et seq.), prohibits leasing of all Federal minerals in parks and monuments;*

* The NPS Act for Administration made clear that when the Congress used the phrase "national parks and monuments" in a statute, it intended that the provisions of the statute be applicable to all units of the National Park System and should not be restricted to "parks and monuments."

- The Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. §351 et seq.), prohibits leasing of Federal minerals in parks and monuments;
- The Materials Act of 1947 (30 U.S.C. §601) prohibits disposal of mineral materials (e.g., sand, gravel and building stone) from within national parks and monuments;
- The Geothermal Steam Act of 1970 (30 U.S.C. §1001) prohibits leasing of Federal geothermal resources in units of the National Park System;
- The Federal Coal Leasing Amendments Act of 1976 (30 U.S.C. §202a et seq.) prohibits leasing Federal coal in units of the National Park System; and
- The Surface Mining Control and Reclamation Act of 1978 (30 U.S.C. §1201 et seq.) prohibits surface coal mining within units of the National Park System, subject to valid existing rights, and prohibits surface coal mining operations that would adversely affect any "publicly owned park" unless approval is given by the agency with jurisdiction over the park.

All of these statutes, including the NPS authorities and those laws dealing with all Federal minerals, establish and mutually reinforce the precept that NPS units are closed to development of Federally-owned minerals unless explicitly authorized by the Congress.

III. THE THREE TYPES OF MINERAL RIGHTS IN NPS UNITS

The three types of mineral rights within NPS units are:

- mining claims;
- Federal mineral leases; and
- nonfederally owned minerals

Each of these types of mineral rights constitute a legally recognized and protected property interest.

A. Mining Claims

The Mining Law of 1872 (30 U.S.C. §21 et seq.) allows citizens of the United States to enter vacant and open public lands and stake a claim to such lands if they contain a valuable mineral. Although enacted when most mineral development was conducted by mule and pick-axe prospectors, this law is still in effect. In addition, the Mining Law of 1872 allows mining claimants to establish a millsite upon which to process minerals taken from a claim. There are two general types of claims: lode claims, associated with a vein or ore deposit; and placer claims, associated with minerals deposited in the beds of streams.

Both lode and placer claims are approximately twenty acres in size. A millsite can be no more than five acres in size. Claimants can locate as many claims as they wish. Claims located contiguously by one claimant are known as a claim group.

Claims can be located for certain types of minerals such as gold, silver, tin, lead and uranium, generically known as "hardrock" or "locatable" minerals. A properly located claim, if valid, gives the claimant a property right to the minerals in the claim and the right to use so much of the surface and its resources as are necessary to extract the minerals. In addition, the Mining Law of 1872 provides claimants an implied right of access to their claims. When a claim is located, the United States retains ownership of both the minerals and the surface. Title to the minerals passes to the claimant when the minerals are extracted. This is known as an unpatented claim.

The Mining Law of 1872 also establishes a process by which a claimant may bring the claim to patent. When patented, actual ownership (title) to the minerals, and in most cases the surface and its resources, passes from the United States to the claimant.

Almost all NPS units, when created by an act of Congress or presidential proclamation, were closed to mineral entry under the mining laws. Thus, persons could no longer locate new claims on these lands and any claims filed would be null and void. Nonetheless, there are over 3,000 mining claims within NPS units today. This is so because:

- 1) the Congress allowed a handful of National Park System units, such as Death Valley and Organ Pipe Cactus National Monuments, and Crater Lake and Mount McKinley National Parks, to remain open to the location of mining claims even after the units were established; and
- 2) when certain units were established or expanded, those units incorporated lands that were already encumbered with existing mining claims. Among such units are Denali and Wrangell-St. Elias National Parks and Preserves.

Mining claims within NPS units are primarily found in Alaska on lands that came under NPS jurisdiction in 1978 and 1980, and in Death Valley National Monument in California and Nevada.

B. Federal Mineral Leases

Nearly fifty years after establishing the mining claim method of transferring Federally-owned minerals into private hands, the Congress created another method for disposing of certain Federally-owned minerals that would return substantially greater revenues to the Federal government. This method, known as the Federal mineral leasing system, is governed by the Mineral Leasing Act of 1920 on public domain lands and by the Mineral Leasing Act for Acquired Lands of 1947 on acquired Federal lands. Under the leasing system, a citizen obtains a lease which constitutes a right to develop certain Federal minerals in exchange for paying the United States a royalty (a percentage of the value of the minerals produced). The United States decides which lands and minerals will be leased.

Under this system, as with mining claims, the United States retains ownership of both the lands and minerals. The party leasing these minerals receives title only to those minerals actually extracted. The minerals that can be leased are oil and gas, tar sands, oil shale, coal, potassium, phosphate and sodium. These minerals are generically known as the "leasables." The line between the leasable and locatable minerals is not always firm. The Congress has occasionally authorized the leasing of locatable minerals, which normally are subject only to the mining laws.

In the Combined Hydrocarbon Leasing Act of 1981 (30 U.S.C. §181 et seq.), the Congress redefined oil and gas to include tar sands, thus adding tar sands to the list of leasable minerals. This Act allows persons with existing oil and gas leases within areas designated as Special Tar Sand Areas (STSAs) a limited time to convert such leases to combined hydrocarbon leases. The Act also provides that new combined hydrocarbon leases can be issued. One of the designated STSAs, known as the Tar Sand Triangle, lies partially within the Glen Canyon National Recreation Area (NRA) and adjacent to Canyonlands National Park.

There are approximately 15 NPS units containing Federal mineral leases. These leases exist because the Congress specifically authorized leasing of Federal minerals in the enabling acts for five NRAs (Lake Mead, Whiskeytown, Glen Canyon, Ross Lake and Lake Chelan) and because lands already encumbered by existing Federal leases were incorporated into the National Park System when several NPS units were created or enlarged. Examples of such units are Chaco Culture National Historical Park and Fossil Butte National Monument. Such leases, like a valid mining claim, are a legally-recognized and protected property interest.

C. Nonfederally Owned Minerals

The United States now holds title to almost all lands within park boundaries in units created before 1961. Between 1961 and 1980, however, the National Park System underwent a rapid expansion akin to its growth in the 1920s and 1930s. Unlike that earlier period of expansion, many of the newer units were carved from nonfederal lands in the eastern half of the United States. In many of these units the NPS has yet to acquire some lands and mineral rights that may thus be devoted to non-park purposes by their nonfederal owners.

The Congress, in establishing several of these newer units, specifically provided for the exercise of nonfederally-owned mineral rights, in particular oil and gas. Enabling acts for units such as Padre Island National Seashore, Big Cypress and Big Thicket National Preserves, and Jean Lafitte National Historical Park permit the continued development of nonfederally-owned oil and gas. The Congress acted as it did because several of these new units contain large oil and gas deposits, acquisition of which could have been prohibitively expensive.

As long as lands and mineral interests in NPS units remain non-federally-owned, their owners possess the rights of any other landowner to occupy, develop or otherwise use their property. Still, like all property owners, owners of lands and mineral interests in NPS units are subject to legitimate governmental controls that seek to protect the broad public interest. These controls, most familiar in the form of local zoning regulations, are generally upheld by the courts if they seek to achieve some reasonable public good

(such as the purposes or values for which a park unit has been created) and do not deny property owners beneficial use of their property.

IV. REGULATING MINERALS IN NPS UNITS

A. Mining Claims

The Mining in the Parks Act of 1976 closed to the location of mining claims the last six NPS units that had remained open under their enabling acts or other statutes. This law also directed the Secretary of Interior to regulate all activities within NPS units in connection with the exercise of mineral rights on claims. This authority to regulate mineral activity is equally applicable to both unpatented and patented mining claims.

The NPS has implemented the Mining in the Parks Act by promulgating regulations at 36 C.F.R. §9, Subpart A. The primary method the NPS uses to enforce these regulations is to require a plan of operations for all mineral exploration and development activities proposed for patented and unpatented mining claims within NPS units. The NPS also requires that operators post a bond to ensure that mining operations conform to the plan, and to ensure that reclamation will be completed. The regulations are designed to permit claimants to exercise their rights while minimizing adverse impacts to the integrity of National Park System units.

B. Federal Mineral Leases

In the five NPS units open by law to Federal mineral leasing and development (Lake Mead, Glen Canyon, Whiskeytown, Lake Ross and Lake Chelan NRAs) leasing may be permitted only if it will not have a significant adverse effect upon the resources or administration of the unit. The NPS must make this same determination before consenting to the conversion of existing oil and gas leases within Glen Canyon NRA to combined hydrocarbon (oil, gas and tar sand) leases.

The appropriate NPS Regional Director must make this determination before the Bureau of Land Management can issue a lease or permit in an NPS unit. In addition, every lease issued in an NPS unit must contain a stipulation that the NPS must approve the conduct of all site-specific activities. For combined hydrocarbon leases, the NPS must also determine that the conversion, issuance or development of such leases within Glen Canyon NRA will not have a significant adverse effect on any contiguous units of the National Park System.

The regulations that control activities on federal mineral leases within NPS units are the same as those that apply to all federal mineral leases on any federal lands: 43 C.F.R. §3100 for the leasing and development of federal oil and gas, and 43 C.F.R. §3500 for the leasing and development of federal solid minerals other than coal and oil shale. Both parts of the regulations cited above require NPS concurrence and approval before the Bureau of Land Management may take any action with respect to a lease or permit on lands under the jurisdiction of the NPS. In practice this means that the NPS is able to attach special stipulations and operating conditions to leases and permits in NPS units, making it possible to preserve and protect NPS resources to the maximum extent compatible with Congressional direction to permit mineral leasing and development.

C. Nonfederally Owned Minerals

The Congress, in the Organic Act and in unit-specific enabling legislation, has authorized the Secretary of the Interior to develop regulations for the park units under the Secretary's jurisdiction. In addition the Congress has specifically authorized the Secretary to promulgate regulations for the development of nonfederal oil and gas in units such as Big Thicket and Big Cypress National Preserves, Padre Island National Seashore and Jean Lafitte National Historical Park.

Based upon these authorities, the NPS has promulgated regulations governing the exercise of nonfederal oil and gas rights in units of the National Park System. These regulations, found in 36 C.F.R. §9, Subpart B, do not apply to NPS units in Alaska (36 C.F.R. §13.15(d)(2)). The regulations for nonfederal oil and gas, just as those for mining claims, require NPS approval of a plan of operations before the nonfederal party may conduct operations. Plans of operations and reclamation bonds form the basis for NPS regulatory control of these nonfederal mineral rights.

V. MINERAL ACTIVITIES IN NPS UNITS THAT ARE NOT NOW REGULATED

There are several important types of mineral development activities that currently are not regulated by the NPS, either because the NPS has concluded that there is a lack of clear Congressional direction to control those activities, or because to date, no significant adverse effects to unit resources have resulted from such activities. In two cases, the NPS has declined to control certain mineral activities in Alaska because of controversial interpretations of existing statutes. Mineral activities within NPS units presently unregulated by the NPS are:

A. Nonfederal Oil and Gas Where Access Is Not On, Through or Across Federal Lands

The regulations that control activities associated with nonfederal oil and gas rights within units of the NPS apply only when the potential operator must cross Federally-owned or controlled lands or waters in order to exercise those privately held mineral rights. At present these rules, if diligently enforced, appear sufficient to protect NPS unit resources. The possibility remains, however, that the exercise of nonfederal oil and gas rights could cause unacceptable damage to unit resources in those instances where operators may gain access to their nonfederal oil and gas within a park without crossing Federally-owned or controlled lands or waters.

The enabling statutes for the various park units containing nonfederal oil and gas do not condition the authority of the NPS to regulate nonfederal oil and gas activities within those units on access over Federally-owned or controlled lands or waters. Although the Congress has conferred on the NPS the general authority to control the exercise of nonfederal oil and gas activities within NPS units irrespective of the operator's means of access, NPS regulations at 36 C.F.R. §9B currently restrict NPS regulatory authority to that of an ordinary proprietor of land, rather than a governmental agency. The NPS is presently considering regulatory changes that address this issue.

B. Nonfederal Minerals Other Than Oil and Gas

The NPS has not promulgated regulations governing development of nonfederal minerals, other than oil and gas, in NPS units. To date this has generally not posed major difficulties for the NPS, nor has it resulted in significant adverse effects to park unit resources on a Systemwide basis. This is so primarily because there has been little demand to date for developing nonfederal mineral resources (other than oil and gas) within NPS units. Still, nonfederal mineral activity, such as the extraction of sand and gravel, does pose a problem in some units. Among these are Bighorn Canyon NRA and Chatahoochee National River.

In some units, NPS resource managers have used Special Use Permits to authorize and regulate the extraction of nonfederal sand and gravel. Several of the general NPS authorities, codified in 36 C.F.R. Parts 1, 2, 4, 5 and 14, may also be used to control certain aspects of potential nonfederal mineral operations. However, no comprehensive regulatory scheme now exists by which to control mineral development operations conducted for nonfederal minerals other than oil and gas.

The NPS is considering developing regulations for nonfederal minerals other than oil and gas under the general regulatory authorities of the Secretary of the Interior contained in 16 U.S.C. §1. This, however, poses a thorny policy question. First, while the Congress has specifically directed the NPS to regulate nonfederal oil and gas activities, no explicit Congressional direction exists for regulating the extraction of other nonfederal minerals (with some exceptions, for example Big Thicket and Big Cypress National Preserves).

In the absence of such authority from the Congress, the NPS may not have the statutory basis to promulgate such regulations. Second, such regulations, if promulgated, would likely mirror the provisions of 36 C.F.R. Part 9, under which the operator submits a plan of operations for NPS approval. In the event such regulations are promulgated, the NPS could be in the position of approving mineral activity in parks without clear Congressional authority to do so, and perhaps in violation of the unambiguous Congressional mandate to protect and preserve the units of the National Park System.

In addition, the NPS cannot summarily deny the mineral rights of non-federal owners. The Fifth Amendment of the U.S. Constitution prohibits the "taking" of private property by the federal government without just compensation to the owner. Thus, some have argued that as long as non-federal mineral rights exist within NPS units, the NPS should make the best of them, and at least regulate these rights in order to protect park resources and values. This argument has practical merit.

A suggested solution to this dilemma is to accept mineral activities as compatible uses in NPS units even where Congress has not spoken to authorize such activities. Such a redefinition of park purposes and values, however, would conflict directly with the NPS Act for Administration, as amended by the Redwood Act. From those Acts, it is axiomatic that activities in derogation of park purposes and values are not permitted in NPS units unless explicitly and specifically authorized by law.

Perhaps the case can be made that mineral activities are not in derogation of the purposes and values for which parks units have been created. However, such an interpretation would differ significantly from traditional NPS management policies. More importantly, this assertion is counter to a long history of Congressional acts that have explicitly prohibited Federal mineral development in units of the National Park System and generally limited the exercise of private mineral rights in these units as well. Exceptions to this exist in only a handful of circumstances and under certain limited conditions intended to prevent injury to park resources and values.

Another solution to this dilemma is that the NPS should not permit mineral development of any kind in an NPS unit except where specifically authorized by Congress, as at Glen Canyon NRA, or where Congress has specifically countenanced the development of non-federal mineral rights, subject to NPS regulatory control, as at Padre Island National Seashore. In all other units, the NPS would make every effort to preclude mineral development as incompatible with preservation and inappropriate without explicit Congressional authorization. This could be accomplished by acquisition of the mineral rights by purchase, exchange or donation. The statutes reviewed earlier provide a strong basis from which to argue that the NPS must seek to acquire mineral rights in units where Congress has provided neither for the conduct of mineral development nor for NPS regulation of such development.

The NPS "Policy on Use of the Federal Portion of the Land and Water Conservation Fund" (48 F.R. 21121, May 11, 1983) states that the NPS shall utilize the minimum effective land protection tool necessary to fulfill the management objectives of the NPS. As discussed earlier, the NPS management objectives for each unit include fulfillment of the provisions of both the unit enabling legislation and the Organic Act. Acquisition of nonfederal mineral rights may often be the minimum effective land protection tool capable of fulfilling the protection and preservation mandates of the Organic Act and enabling legislation.

C. Nonfederal Coal

Any need for the Service to develop regulations for nonfederal coal was thought to be eliminated with the enactment of the Surface Mining Control and Reclamation Act (30 U.S.C. §1201 et seq.) in 1977. The issue is now less clear.

In the Surface Mining Control and Reclamation Act, Congress states that surface coal mining operations (defined to include the surface effects of underground mining) are prohibited in units of the National Park System, subject to valid existing rights.

In promulgating regulations to implement this Act, the Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior, divided between itself and state enforcement agencies the responsibility for making valid existing rights determinations. For Federal lands, OSM makes such determinations (30 C.F.R. §740.4(a)(4)), while for nonfederal lands, the state agency does so. Thus in any NPS unit where there are extensive nonfederal holdings of coal and very little Federal land, such as New River Gorge National River, a state government agency would make the valid existing rights determinations.

Moreover, the definition of valid existing rights initially adopted by the OSM was a very restrictive one which no one appeared to meet in NPS units. In 1983, however, OSM changed the definition of valid existing rights in such a way that a strong possibility existed that anyone owning coal in units of the National Park System would qualify as having a valid existing right and therefore would be able to develop the coal notwithstanding its location within an NPS unit. Several environmental organizations brought suit against OSM over the definition of valid existing rights adopted in 1983. The issue of what constitutes valid existing rights is thus currently unresolved.

D. Patented Claims In Alaska Where Access Is Not Across Parklands

Section 1110(b) of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (16 U.S.C. §3101 et seq.) guarantees adequate and feasible access to all inholdings, including valid mining claims within park units in Alaska, notwithstanding any other law. As defined in 36 C.F.R. §13.1(a), the term "adequate and feasible access" means "a reasonable method and route of pedestrian or vehicular transportation which is economically practicable for achieving the use or development desired by the applicant on his/her nonfederal land or occupancy interest, but does not necessarily mean the least costly alternative."

The regulations in 36 C.F.R. §13.15(d)(1) state that while plans of operations are required for both patented and unpatented claims under 36 C.F.R. §§9.9 and 9.10, no plan of operations is required for "patented claims where access is not across federally-owned parklands." This means that some mining claims in Alaska NPS units are effectively exempt from the regulations in 36 C.F.R. §9A. Few claims, however, appear to qualify for this exemption.

E. Non-Federal Oil and Gas in Alaska

NPS regulations at 36 C.F.R. §13.15(d)(2) state that because ANILCA guarantees adequate and feasible access to inholdings, and because the NPS regulations applicable to nonfederal oil and gas are predicated upon the Superintendent's discretion to condition or restrict access, 36 C.F.R. §9B is not applicable in Alaska. As a consequence, activities undertaken to develop oil and gas owned by entities other than the Federal government, such as the State of Alaska or Native Corporations, are not regulated in NPS units in Alaska.

VI. CONCLUSION

The conduct of mineral operations is, per se, an activity in derogation of park purposes and values. Therefore, mineral operations are permitted in NPS units only when authorized by the Congress. Mineral operations must also be permitted where nonfederal parties exercise valid mineral rights, until such time as these mineral rights may be acquired by the NPS.

There are three basic types of mineral rights that may be encountered within the National Park System: mining claims, federal mineral leases and nonfederally owned minerals. The NPS now regulates only some of these classes of mineral activity.

There is some ambiguity about the limits of the broad powers the general statutes discussed above confer on the NPS. This is clearly demonstrated by the situations in which the NPS currently does not regulate or control various kinds of mineral development activities within units of the National Park System.

The Mining in the Parks Act is unequivocal in its direction to the NPS to minimize or prevent damage to park resources. Its direction is limited, however, to mineral activity on mining claims associated with the 1872 Mining Law. Without a similar statute to address other mineral development activities, the NPS is proceeding cautiously under the broad discretion and authorities of the Organic Act, the Act for Administration and the Redwood Act amendments, to fulfill the clear direction of Congress that all units of the National Park System be preserved and protected in perpetuity.

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