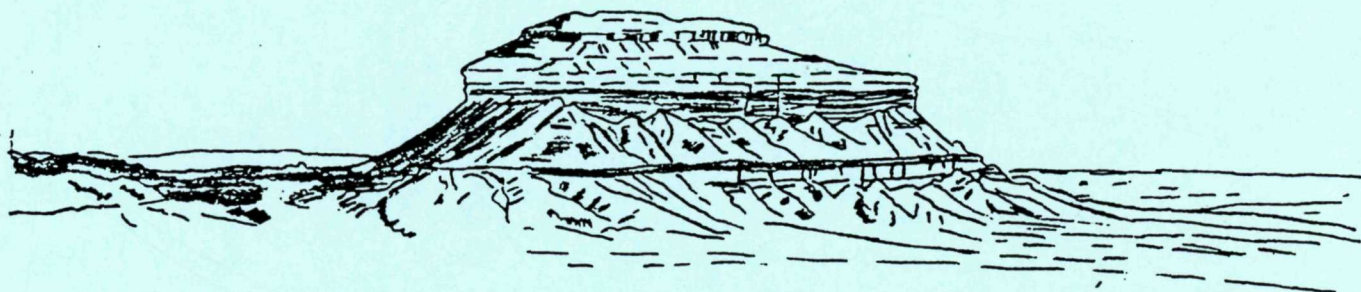


DRAFT

GLEN CANYON
National Recreation Area

GRAND CANYON
National Park

LAKE MEAD
National Recreation Area



**AUTHORITIES FOR
WATER RESOURCES
DECISION MAKING
ON THE COLORADO RIVER**

U.S. Department of the Interior · National Park Service
Water Resources Division
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DRAFT

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I. Introduction

A. Authority to Make Decisions Affecting Natural Resources in National Parks

The task of managing the natural resources of our national parks is becoming increasingly complex. Park natural resources are being impacted by internal pressures created by expanding visitation and use, as well as external pressures caused by activities outside the borders of the parks. There is no question that park managers need good technical information in order to assess these impacts and make appropriate resource management decisions. But park managers also need to be able to make decisions that can be implemented in the face of competing uses and demands, both inside and outside the parks. In order to do this, park managers need a clear understanding of the legal and institutional bases of their authority to interpret and discharge their resource management responsibilities.

The critical question facing park officials in this regard is, "What is the basis of my authority to take this action?" This first involves an inquiry into whether the National Park Service (NPS) itself is empowered to make the kinds of decisions at issue. Such determinations likely depend upon an analysis of the pertinent Constitutional provisions, the enabling statutes for the NPS and for the specific park unit, and the various regulations that have been promulgated pursuant to these statutes. The analysis may also require an understanding of how courts have interpreted the agency's constitutional, statutory and regulatory authority in analogous situations.

But even if this analysis leads to the conclusion that the proposed action is within the authority of the park official to make, the inquiry may not be over. If there are competing demands and pressures on the resource in question, the park official will need to expand his or her analysis to consider other policies and actors. Within the NPS itself there may be policies or practices that conflict with the proposed action. Such conflict may require the park manager to explore in greater detail the support for the proposed action in the statutes and regulations pertaining to his or her specific park unit to determine whether it is adequate to overcome countervailing pressures within the agency.

Even more problematic for the park manager, he or she may also need to determine whether there are other governmental entities that have shared or supervening authority to make conflicting decisions affecting the resource. This determination will likely require an analysis of the statutory and regulatory mandates of these other entities. Where another agency or a neighboring State or Indian tribe has authority to take action that may affect a natural resource within park boundaries, the analysis must focus on who has paramount authority in this particular instance.

To the extent the pertinent statutory language or legislative histories indicate Congressional awareness of the potential for such conflict and provide guidance as to how it is to be resolved, this analysis may be quite straightforward. In most instances,

however, the supremacy of NPS authority over decisions affecting the resource is not made explicit in the statutes and if it exists at all it must be implied from general Constitutional and statutory directives.

B. Decisionmaking Authority of NPS Units on the Colorado River

In the case of the NPS units on the Colorado River, the difficulty of the task of sorting out conflicting authorities to make resource management decisions is particularly apparent. The existence of several NPS units on the Colorado River, including Grand Canyon National Park, Lake Mead National Recreation Area and Glen Canyon National Recreation Area, attests to the unsurpassed scenic and natural values of the Colorado River region. But the fact that the Colorado River is also one of the world's most regulated water systems points to the existence of competing demands for its scarce water resources.

Many of the customary and familiar methods park managers use to protect natural resources within park borders are either inapplicable or ineffectual on the Colorado River where the mandates of outside agencies, States and Indian tribes often differ with, and in some cases render impossible, traditional NPS approaches to managing resources. Institutional factors, which include the legal, political and administrative structures and processes through which public policy decisions are made and implemented, have proved to be among the most difficult challenges for NPS managers along the Colorado River.¹

C. Study Organization and Methodology

The purpose of this study is to provide park managers on the Colorado River with the tools they need to conduct an analysis of their authority to make water resource management decisions. The starting point for this analysis must be the statutory and regulatory mandates of the NPS itself and of each of the respective park units. However, because of competing demands and pressures on these resources, the analysis cannot end there. Park managers also need an understanding of their authority to manage water resources vis a vis State and tribal governments that border the park units.

1. National Park Service

For the NPS, the statutes reviewed include the Act of August 25, 1916,² and subsequent amendments to it. Because questions related to regulatory control and authority are central to the study, other statutes that affect water and which can influence the ways in which water resources are managed or controlled by the NPS are evaluated.

The enabling statutes and Executive Orders for the individual NPS units that are the subject of the study have been surveyed. Special attention is given to unique provisions of enabling statutes and orders or other laws that have resulted in differing or atypical management strategies for each of the parks.

2. Bureau of Reclamation

Another purpose of the study is to impart an understanding of other Federal bureau and agency mandates and responsibilities for management of water and water-related resources on the Colorado River. The Bureau of Reclamation has been guided by the Reclamation Act of 1902³ as well as the laws that authorized and established management standards for reclamation projects on the mainstem of the Colorado--the Boulder Canyon Project Act,⁴ Colorado River Storage Project Act,⁵ and the Colorado River Basin Salinity Control Act.⁶ Congressional intent and questions related to the links between parks and these projects are discussed. Several court cases have investigated issues relevant to this inquiry and are also discussed.

3. Other Statutes

The Congress has enacted a number of statutes of general applicability that are relevant to the management of water and water-related resources on the Colorado River, particularly in recent years. Understanding the effect and relevance of these statutes to management questions in the area of the study's focus is central to the evaluation and resolution of issues. Among the statutes examined are the Endangered Species Act,⁷ the National Environmental Policy Act,⁸ the Clean Water Act,⁹ and the Fish and Wildlife Coordination Act.¹⁰

4. Intergovernmental Relations--States and Tribes

In general, the powers of the Federal Government are limited and defined by the Constitution. Actions and programs undertaken by Federal agencies must, therefore, be based on specific Constitutional provisions. The study discusses the bases for Federal actions in the context of these Constitutional provisions, with special attention to the ways in which interpretations of Constitutional foundations have evolved over time. The evolution of Constitutional interpretation has accompanied changes in popular perception of the proper role of governments. In some arenas, such as the complex and costly fields of resources management and environmental protection, an increasingly prominent role for Federal action has developed in policy areas that were previously the sole province of the States, both by tradition and practice. As a consequence of these shifts in the division between Federal and State authority and responsibility, park managers have posed questions concerning the extent of their authority when faced with State assertions of authority to regulate activities and programs in park units. Obviously, this analysis cannot conclusively resolve these issues, nor does it intend to. Rather, its purpose is to provide background and analysis that will foster conflict avoidance or resolution, and enhance coordination between park professionals and the States.

The study also briefly examines similar opportunities for coordination with Indian tribes in the study area. Federal-State relations have their counterpart in Federal-tribal

relations and the management of park resources and the exercise of regulatory responsibility are examined in light of their unique status.

5. Case Studies

Finally, the study presents three different issues (one for each park) that relate to water resources and which, in one way or another, are relevant to the general and specific concerns of the study. Of special note is the question of NPS authority to regulate activities occurring within park boundaries on non-NPS lands or activities occurring outside park boundaries that can adversely affect NPS resources. This case-study approach is designed to be responsive to park management while illustrating different aspects of the regulatory context for water and water-related resources on the Colorado River.

D. Study Steering Committee

This study was precipitated by a request to the Water Resources Division from the Superintendent of Lake Mead National Recreation Area (Lake Mead) who asked the Water Resources Division to prepare an institutional analysis of the differing agency and bureau mandates that affect water and water-related resources on the Colorado River. He also asked that the Division look at certain Federal-State water-related issues.

The Division agreed to undertake the study and suggested that other units along the Colorado, in addition to Lake Mead, be included. Initially, the Division hoped to include every NPS unit on the Colorado River in the study but concluded the scope was too broad, given available staff and resources. So the Division chose three units--Lake Mead and Glen Canyon National Recreation Areas and Grand Canyon National Park--as the focus for the study.

A study steering group was established to insure that the water-related issues of greatest consequence to the parks and regions were included and addressed in the study. Each of the parks and regions is represented as is the Washington Office through the Office of Policy. (Bill Burke, LAME; Mietek Kolipinski, Western Region; Chuck Wood, GLCA; Jerry Mitchell, GRCA; Tom Wylie, Rocky Mountain Region; and Carol Aten, WASO.) The steering group has met three times to review the study outlines and draft sections and has also served to redirect and refine the approach and content of the study sections at various points in their evolution.

Also important to the completion of the study has been the involvement of Nancy Laney, M.P.A., J.D., of the University Attorney's Office of the University of Arizona. Through the Cooperative Park Study Unit (CPSU) at the University of Arizona (and the personal attention and assistance of Denny Fenn, former NPS-CPSU Chief at the University), the Water Resources Division was able to obtain Ms. Laney's services.

E. What the Study Does Not Address

There are several water-related topics the study does not address either because of their complexity or tangential relevance to the concerns of the study, or both. These are water rights, off-stream (as opposed to instream) uses, and power generation.

Water rights and their adjudication are complex, are governed by different law in each of the States, and though relevant, are somewhat beyond the scope of the study. Obviously, the use of water from the water development projects on the Colorado River is governed by those holding rights to the water stored by these projects. Though the study makes reference to this as an ancillary issue, it is not a primary focus of the study.

The ultimate disposition of water from the Colorado--its off-stream uses--is also not a subject of this analysis. The uses of water outside the channel of the river are, in most instances, outside the control of the NPS and of little consequence to NPS management concerns. If there are instances where such off-stream uses affect NPS resources or values or can affect NPS management, they are noted. By and large, however, this analysis concentrates on water and its uses in the stream channel.

Fluctuating flows for electrical generation from the dams are of interest and concern to the NPS, but are not addressed here. The Glen Canyon Environmental Studies (GCES) and the Glen Canyon Environmental Impact Statement (EIS), which represent the joint effort of several agencies including the NPS and the Bureau of Reclamation, are evaluating the effects of dam operations on the Colorado River and related resources. This study does not duplicate that work. Similarly, no other issues related to electrical generation by the Bureau of Reclamation or the sale of that power by the Western Area Power Administration (WAPA) are addressed.

SECTION I ENDNOTES

1. Ingram, Mann, Weatherford, and Cortner, "Guidelines for Improved Institutional Analysis in Water Resources Planning," Water Resources Research, Volume 20, No. 3, pp. 323-334, March, 1984, p. 323
2. 16 U.S.C. 1 et. seq. (1916)
3. 43 U.S.C. 371 et. seq. (1902)
4. 43 U.S.C. 613 (1928)
5. 43 U.S.C. 620 et. seq. (1956)
6. 43 U.S.C. 1592 (1974)
7. 16 U.S.C. 1531 et. seq. (1973)
8. 43 U.S.C. 4321 et. seq. (1970)
9. 33 U.S.C. 1251 et. seq. (1972)
10. 16 U.S.C. 661 (1934)

II. Analysis of Key Concepts

A. Constitutional Provisions

At the heart of any discussion of Federal institutions and authorities is the ultimate basis for the Federal role: the Constitution. All actions of the President and all laws passed by the Congress must be rooted in the Constitution. Having said this, however, it must be noted that Constitutional interpretation is fluid and evolving. What was considered to be the basis for Congressional action has dramatically expanded over the past century. The evolution in the ways in which the Congress has chosen to view its authority is, in part, a consequence of the ways in which the Courts have chosen to interpret the foundations for Federal action.

The Constitutional basis for the management of Federal land flows primarily from three clauses. They are the Property Clause, the Supremacy Clause, and a distant third, the Cession Clause. One scholar has stated, "Early water resource and regulatory policies rested on the Commerce Clause; national defense, public health, and public welfare underlie many other Federal policies. With respect to Federal lands and resources, these underpinnings are firmly buttressed by the Property Clause." This section discusses those clauses and also discusses some key terms that are central to understanding how NPS management is related to the management responsibilities and authorities of the States and other Federal agencies.

The discussion of authority and courts' interpretations should be read with some caution, however. What may seem to be clear statements of the rights or authorities of the Federal government in the cases that are discussed have been enunciated in the context of specific factual situations. While useful general principles are stated in those cases, it is dangerous to assume that a Court decision in one case will dictate actions or results in another case where the factual situation is different. In addition, since most of the discussion in this study relates to the actions of agencies of the Federal government and the States, the legal resolution of issues is customarily a last resort: shared authority and compromise are more likely to be the method for conflict resolution in such political environments. This study may be useful in such situations by providing NPS managers with an understanding of some of the parameters that might apply to negotiation and compromise in a Federal-State and interagency context.

Property Clause

The most commonly cited Constitutional basis for Federal authority for national park system units is what is called the Property Clause (Article 4, section 3, Clause 2) which states:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...

Management of the units of the National Park System comes under the framework of "needful rules and regulations respecting ... property belonging to the United States." The Supreme Court has said in commenting on the scope of the Property Clause, "We have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.' " ² In fact, in other cases, the Court has found that the Federal government may exercise regulatory jurisdiction outside Federal lands "so long as such power is directed solely to its own protection."³

The Supreme Court's decision in Kleppe v. New Mexico⁴ gives a succinct discussion of its more recent and expansive reading of the Property Clause. The Court stated:

It is the Property Clause that provides the basis for governing the Territories of the United States. *** We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them ..." *** In short, Congress exercises the powers of both a proprietor and of a legislature over the public domain. *** In our view the "complete power" that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there.⁵ [References omitted.]

Later in the same opinion, the Court went on to say,

But while Congress can acquire exclusive or partial jurisdiction over lands within a State or by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over Federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.⁶ Emphasis added. [Reference omitted.]

A recent case that reiterates this general principle is United States v. Lindsey⁷, in which two rafters made camp and built a fire on the banks of the Snake River in Idaho. Their campsite was below the high-water mark of this navigable stream and was, consequently, on State-owned land surrounded by National Forests. Forest Service regulations prohibited camping and building fires near the National Forests without permits. The

Circuit Court upheld the validity of the regulations and said that the Property Clause "grants to the United States power to regulate conduct on non-Federal land when reasonably necessary to protect adjacent Federal property or navigable waters."⁸ The rafters who were not on Forest Service, or Federal, lands were found to be wholly subject to the Forest Service regulations.

A recent analysis of the Property Clause suggests that physical protection of Federal property in the context of the Camfield, Alford, and Kleppe cases has evolved to mean protection of the Federal policy or purpose.⁹ The Property Clause can thus be read to protect the Organic Act purpose of the National Park System--the Congressional policy in establishing the System--as well as any additional purposes enumerated.¹⁰ This clearly suggests that the NPS may move to protect its policies and purposes whether or not physical harm has been demonstrated.

Supremacy Clause

Another Constitutional provision that affects management and jurisdiction in the context of the NPS is the Supremacy Clause--Article VI, Clause 2 of the Constitution--which states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; *** shall be the supreme Law of the Land.

Thus, when the Congress acts within its Constitutional authority, "the Federal legislation necessarily overrides conflicting State laws under the Supremacy Clause."¹¹ In a case at Voyageurs National Park, the NPS cited a man for violating NPS regulations that prohibited hunting and possession of a loaded firearm within park boundaries. The Eighth Circuit Court of Appeals found that the NPS regulations were a reasonable proscription designed to promote the purpose for which the national park was established and under the Supremacy Clause, Federal law overrode conflicting State law that allowed hunting within the park.¹²

Cession Clause

Finally, Article I, section 8, clause 17 of the Constitution provides that Congress shall have the power:

To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same

shall be, for the Erection of Forts, Magazines, Arsenals,
dock-Yards, and other needful buildings ...

Areas acquired under this authority have commonly been referred to as "enclaves," and have been considered to be "Federal islands within States."¹³ Federal ownership of land does not create legislative authority over such lands unless jurisdiction is ceded. Consequently, in the absence of a cession, the States retain general police powers over such Federally owned lands as parks.¹⁴ The clause has been broadly construed, however. The Supreme Court has found acquisition of partial or exclusive jurisdiction over properties for "any legitimate governmental purpose beyond those itemized" to be permissible.¹⁵ Thus, most areas of the National Park System which have exclusive Federal jurisdiction do so because of the authority granted by the Cession Clause.

This is not to say, however, that status as an enclave and the exercise of exclusive jurisdiction are essential for the exercise of Federal authority.¹⁶ Rather, the Cession Clause provides one basis for Federal authority that is separate from and largely unrelated to other Constitutional bases for authority.¹⁷

B. Jurisdiction

The term jurisdiction comes from the Latin words juris meaning law and dictio meaning declaration. Taken together, the word is defined as "The right and power to interpret and apply the law, [and] authority or control, [or] the extent of authority or control."¹⁸ Jurisdiction, especially when considered in the context of authority between Federal agencies or between the Federal government and the States, is rarely straightforward and clear, largely because "jurisdiction" for one purpose does not convey jurisdiction for other purposes. The real questions for NPS in this study are what kinds of jurisdiction are exercised that affect or are of concern to the NPS units on the Colorado River? Who exercises that control or authority? What is the basis for the exercise of that authority? To what end is the authority or control exercised?

The focus of the examination of types of jurisdiction will be on NPS authorities in comparison with those of the States or other Federal agencies. This is in contrast to the most common analyses of these kinds of issues. Most legal proceedings that involve jurisdiction deal with questions of whether individuals are subject to certain government authorities. They do not often involve allocation of jurisdiction between different units of government.

Because of the dearth of materials on intergovernmental jurisdiction, the literature on "takings" provides a useful analogue for this discussion. For evaluating whether or not a taking has occurred, the Courts view the property at issue as a "bundle of rights."¹⁹ They have said, "[t]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."²⁰ Similarly, jurisdiction can be viewed as a bundle of authorities; there is jurisdiction for tax purposes, for making land or wildlife

management decisions, for allocating and using water and for other purposes. Some types of jurisdiction are not relevant to our inquiry here. Others are important and will be discussed as separate strands in the bundle.

In the NPS, the term "jurisdiction" usually refers to legislative jurisdictional status--exclusive, concurrent, or proprietary. Exclusive jurisdiction, in this context, means those situations where the United States has received, by whatever method, all the authority of the State, with no reservations made except the right to serve process resulting from activities that occurred off the land involved. In some cases, Federal legislation has been enacted to extend State laws to enclaves (areas of exclusive legislative jurisdiction) within those States--such as for unemployment compensation and workmen's compensation. And in other cases, States themselves have voluntarily granted rights and privileges to residents of areas of exclusive Federal jurisdiction.

Concurrent jurisdiction is the term used to describe those situations where the Federal Government has been granted certain of the State's authorities, but where the State has reserved for itself the right to exercise (either alone or concurrently with the Federal government) other authorities. Proprietary jurisdiction is the term used to describe those situations where the Federal Government has acquired right or title to an area but has not obtained any measure of the State's authority over the area. However, the fact that the United States may have only a proprietorial jurisdiction in a Federally owned area, such as a park, does not mean that the agencies of the United States are without power to carry out the functions and duties assigned to them under the Constitution and statutes of the United States.²¹

In the context of this study, jurisdiction--in the sense of allocating control or authority between the Federal government and the States--is of secondary importance to the issue of the jurisdictional relationship between Federal agencies. While of primary importance, the issue of interagency jurisdiction is also the most difficult to analyze. It requires an understanding of the differing statutory mandates of the agencies in question and an assessment of Congressional intent where those mandates overlap or conflict. The information provided in this study should create better understanding of the relationship between the Federal agencies in exercising authority and control of water and water-related activities on the Colorado River.

C. Terms

Water and Water-Related Resources

In this study, water and water-related resources will refer to the water of Lakes Powell, Mohave and Mead and the water in the Colorado River between them. Water-related resources will include such things as water quality, recreation in or near the water, aesthetics and scenery, and water as habitat or as an element of habitat for fish and wildlife.

Parks

When the term park is used, it means any unit of the National Park System, whether a national recreation area, national monument, or national park. This is consistent with Congressional direction for managing the National Park System.²² "These titles reflect the diversity of the national park system but they should not be interpreted as implying differences in importance. Each unit is to be given the full protection of the laws affecting the system and the full accountability of the NPS in applying the policies and practices of park management."²³

Administration

The term administration as used here will mean all those activities conducted under the authority of the NPS for the purposes of safeguarding persons or property, implementing management plans and policies developed in accordance and consistent with the regulations in the Code of Federal Regulations, or repairing or maintaining government facilities.²⁴ The Management Policies of the NPS will be used as the basis for determining what actions are appropriate as part of park management plans and policies.

Reservations

In this study, the term reservation is used to mean "a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc."²⁵ In this context, reservations includes all areas set aside and dedicated to public purposes. In the study area, there are reservations established for different purposes that overlap--the power site reservations within Lake Mead, for example. For the most part, the initial reservation is the controlling or "dominant" reservation. That is to say, the purpose (or purposes) for which the original reservation was made is the primary purpose of the reservation, unless there is something which would indicate otherwise like explicit statutory language. In most instances of overlapping reservations in the study area, the legislation establishing the NPS unit recognizes and makes explicit references to preexisting reservations. These will be highlighted in the discussions of the enabling statutes for the individual parks and in the discussions of the other agencies.

SECTION II ENDNOTES

1. "Federal-State Relationships in Federal Land and Resource Management," D. Michael Harvey, Denver Law Journal, Public Land Law Symposium, Vol. 54 (1977), p. 585
2. Kleppe v. New Mexico, 426 U.S. 529 (1976) quoting United States v. San Francisco, 310 U.S. 29, 84 L. Ed. 1050, S. Ct. 749
3. Camfield v. United States, 167 U.S. 526 (1897), United States v. Alford, 274 U.S. 264 (1927)
4. 426 U.S. 529 (1976)
5. Ibid. at 541
6. Ibid. at 543
7. 595 F.2d 5 (9th Cir. 1979)
8. Ibid. at 6
9. Shepard, The Scope of Congress' Constitutional Power Under the Property Clause:Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas, B. C. Env. Aff. L. Rev., Vol 11., (1984) p. 503
10. See the discussion in Chapter IV, "National Park System," below
11. Kleppe, at 543
12. United States v. Brown, 552 F.2d 823 (1977)
13. "Jurisdiction Over Federal Areas Within the States," Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Report to the President, April 1956, p. 2

14. Sax, Helpless Giants: The National Parks and Regulation of Private Lands, 75 Mich. L. Rev. 246 (1976)
15. Collins v. Yosemite Park Co. 304 U.S. 518, 528-30 (1938)
16. In New Mexico State Game Commission v. Udall, 410 F. 2d 1197, 1201 (10th Cir. 1969), the U.S. Circuit Court said, "In protecting park property it is immaterial that the United States does not have exclusive jurisdiction over the lands within [a national park]"
17. In United States v. Brown, 552 F. 2d 817 (1977), the Eighth Circuit Court of Appeals, in deciding a case where National Park Service regulations prohibiting hunting in Voyageurs National Park said, "Assuming arguendo that the state did not cede jurisdiction over the waters in the park, we further conclude that the federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause." In a footnote, that Court further stated, "The presence or absence of federal jurisdiction obtained through a state's consent or cession is unrelated to Congress' power under the Property Clause. Kleppe v. New Mexico, 426 U.S. 529 (1976)"
18. American Heritage Dictionary, Second College Edition, Houghton Mifflin Company, Boston, 1982, p. 694
19. Andrus v. Allard, 444 U.S. 51 (1979)
20. Ibid. at 66
21. "Jurisdiction Over Federal Areas Within the States," op. cit., Part II, June, 1957. p. 11
22. See Chapter IV, "General Authorities Act of 1970"
23. National Park Service, Management Policies, December, 1988, Chapter 1:3

24. This definition is based on the definition of "administrative activities" in 36 CFR section 1.4 (1987 edition)

25. Black's Law Dictionary, Fifth Edition, p. 1175

III. National Park Service

Yellowstone National Park was founded in 1872, the first unit of what would become a system of over 350 parks, monuments and other areas. When Yellowstone was established, it was not at all clear how such national parks would be managed. The Yellowstone legislation gave the Secretary of the Interior the authority to issue regulations for preserving "all timber, mineral deposits, natural curiosities, or wonders within said park and their retention in natural condition¹." Other early parks had similar language directing the Secretary to protect the parks and their resources from "injury or spoilation."²

In 1906, the Antiquities Act empowered the President to establish national monuments by proclamation without separate Congressional approval. The Act was initially aimed at protecting cultural artifacts of early Native American civilization in the Southwest, but also included the authority to protect areas of scientific interest such as unique geological features or evidence of singular natural processes. Under this authority, a portion of the eroded canyon of the Colorado River in Arizona was designated as Grand Canyon National Monument in 1908.

Organic Act

The National Park Service was created by the Act of August 25, 1916, otherwise known as the Organic Act, as follows:

The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.³

The parks and monuments then existing were put under the management of the newly established National Park Service. Some believe that the construction of the Hetch-Hetchy Dam in Yosemite National Park served to galvanize the movement for the formal creation of a national park system, with the implicit understanding that national parks and monuments were to be off-limits for future dam construction. (That implicit prohibition was made explicit March 3, 1921, in an amendment to the Federal Power Act,⁴ which provides that dams may not be constructed in units of the national park system without specific Congressional approval.)⁵

The management of the National Park System has hinged on how key words in this succinct and eloquent statement of purpose, above, are or should be defined. Unlike many other areas of public policy where the courts have conclusively ruled on the meanings or interpretations of words and phrases, there has been little litigation concerning the meaning of key words in the 1916 Act. In addition, there has been a national consensus that parks are worthwhile and important to the nation. This may be the reason why substantive legislative histories for both the Organic Act and amendments to it that illuminate issues and that direct the NPS are often lacking as well.

What, in the context of managing a park, does "unimpaired" mean? Does it mean unchanged? Undamaged? Or does it mean "changed only in ways we choose." Does "unimpaired for future generations" mean only longer term effects constitute impairment? And what is the reach of the term, "natural and historic objects"? Does it mean only "objects" or does it include the geological or ecological processes by which those "objects" are perpetuated. These questions are central to this study where the NPS's definitions of what terms mean may not be shared by other actors in the policy arena. To the extent we can define and clarify these terms in light of legislation and policy so as to minimize conflict and lead toward shared understandings of these terms, we will do so. What is not clear from the plain language of the statute is what the Secretary does when two responsibilities conveyed to him by Congress in different statutes are in conflict or may be interpreted to be in conflict. This issue is at the heart of our inquiry.

General Authorities Act of 1970

As a result of the explosive growth of the National Park System in the decade of the 60's, the Congress definitively addressed some questions related to park management in the General Authorities Act in 1970. It defined the "national park system" to "include any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational or other purposes."⁶

The Act also declared, "each area within the national park system shall be administered in accordance with provisions of any statute made specifically applicable to that area"⁷ and with the various authorities relating to the national park system unless specific legislative provisions conflict with the broader mandates.⁸ "These areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage ... 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 Organic Act.⁹ The overall effect of this Act on NPS management was to eliminate any differences in management standards that may have been attributable to differences in nomenclature for individual units. It also clarified the relationship between the individual enabling statutes and the Organic Act. That is to say, the Organic

Act and other relevant statutory authorities generally applicable to parks are the basis for management standards unless there is specific legislative provision to the contrary.

Redwood Amendment

In 1978, the Congress amended the General Authorities Act (called the Redwood Amendment because the act expanded Redwood National Park) as follows:

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.¹⁰

Because this statement is written in the passive voice, it not clear to whom its strictures apply. One interpretation is that the provisions of this statement apply to all Federal actions; the NPS has argued that it applies to the Secretary of the Interior as well. It has encouraged an interpretation that would have it apply to all Federal agencies. Other Federal agencies and bureaus with differing mandates have interpreted its responsibilities to be inapplicable outside the NPS. The language of the statute is somewhat confusing but coming as it does in 16 U.S.C. 1a-1 which begins with the words, "Congress declares ..." could be construed to indicate that the reach of the Amendment is equal to the reach of the Congress. The term "authorization of activities" seems to apply to actions that can be approved or permitted by the Federal Government. It is not clear whether such authorizations apply broadly to any activities that could affect park resources and values or apply only to authorizations by the NPS.

The term "derogation" in the Redwood Amendment has not been conclusively defined, either in the legislative history or in any subsequent rulings by the courts. For the purposes of this study, "derogation" is a management standard or criterion against which management decisions can be measured and which amplifies what unimpaired means. There is nothing to indicate that the Congress intended there to be any lesser standard for management resulting from the Amendment. Rather, it appears to have intended to say again in a slightly different way what it has said before--that parks and park resources are to be protected and conserved unless Congress provides otherwise.

Water-Related Provisions

In 1976 in the General Authorities Act, Congress expanded the Secretary of Interior's authorities to "facilitate the administration of the national park system ... under such terms and conditions as he may deem advisable."¹¹ The Act allows the Secretary to:

Promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System, including waters subject to the jurisdiction of the United States: Provided, That any regulations adopted pursuant to this subsection shall be complementary to, and not in derogation of, the authority of the United States Coast Guard to regulate the use of waters subject to the jurisdiction of the United States. Emphasis added.¹²

The sparse legislative history of this provision includes a letter from Interior Assistant Secretary, John Kyl, to James A. Haley, Chairman of the House Committee on Interior and Insular Affairs,¹³ commenting on the proposed language. The letter, which constituted the Department's position on the pending legislation, indicates that the NPS interest in the amendment was not limited to regulating boating or recreation on the water; it says:

Enactment of section 1 of the bill would clarify the authority of the Secretary of the Interior to regulate recreational, commercial and other uses of and activities relating to all waters of the National Park System. Such regulations would be promulgated for the purposes of improving administration, providing for the public safety, use and enjoyment and protecting the natural, wildlife, cultural and historical resources. We would, therefore exercise authority concurrent with the Coast Guard in many instances, but could provide for more restrictive regulation consistent with these enumerated purposes when necessary. Emphasis added.

This comment in the legislative history lends support to broadly reading the statute's applicability for protecting park water and water-related resources.

Another water-related statute that affects NPS management of water resources is the Clean Water Act. That Act was designed to restore and maintain the integrity of the nation's water, including the waters of the National Park System. As part of the Act, the Congress recognized the primary role of the States in managing and regulating the nation's water quality, within the general framework developed by Congress. Part of that framework, namely section 313, requires that all Federal agencies, including the NPS,

comply with the requirements of State law for water quality management regardless of other jurisdictional status or land ownership. The Act states:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernment entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.¹⁴

As a consequence of this provision, the regulatory framework for protecting water quality in NPS units along the Colorado River is provided by the States. Each State--Utah, Arizona, and Nevada--has a different regulatory scheme for protecting water quality with different standards and regulations.

Key Terms from the Organic Act

The Management Policies of the NPS do not define "impairment." They point out that changes may occur in NPS units but that change alone does not constitute impairment. Rather they state that whether an action may be an "impairment is a management determination."¹⁵ In coming to such a conclusion, "the manager should consider such factors as the spatial and temporal extent of the impacts, the resources being impacted and their ability to adjust to those impacts, the relation of the impacted resources to other park resources, and the cumulative as well as the individual effects."¹⁶ The responsibility for managing resources "unimpaired" goes to the Director of the NPS who is responsible to the Secretary of the Interior.

The terms "promote and regulate the use" of the areas included in the NPS will be understood to mean those actions under the direct control of the NPS in the context of this analysis. The term use, in this context will not apply to those actions taken by other agencies within park boundaries unless the NPS can exercise some level of control.

The term "Federal areas" will be used here to mean all lands within the exterior NPS unit boundaries as defined by Congress. Where another bureau or agency has explicit responsibility or explicit regulatory control over specified activities, the term will not be used. In this analysis, no distinction will be made between federal lands under the control of the NPS and federal lands under the control of other federal agencies within park boundaries, unless there is specific Congressional or legal responsibility to do otherwise.

SECTION III ENDNOTES

1. 16 U.S.C. 22

2. 16 U.S.C. 61

3. 16 U.S.C. 1

4. Water and Power Projects in National Parks, March 3, 1921. "Hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, powerhouses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits now constituted of any national park or national monument shall be granted or made without specific authority of Congress and so much of the Act of Congress approved June 10, 1920 ... as authorizes licensing for such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed." (41 Stat. 1353)

5. The Federal Energy Regulatory Commission (FERC) apparently takes the position that the term "national parks and national monuments" does not encompass national recreation areas. This is not the interpretation of the Department of the Interior. In a September 26, 1985, letter to Gentry Resources, the Assistant Secretary for Fish and Wildlife and parks said, "We strongly disagree with this interpretation and believe that Congress clearly addresses this issue in the General Authorities Act of 1970, 16 U.S.C. 1c ... As a result, we believe that FERC had no authority to issue this permit for a proposed project within Glen Canyon National Recreation Area. Besides the matter of FERC's improper issuance of the preliminary permit the Department would also like to make clear its position that a FERC permit does not entitle the permittee to enter onto National Park Service lands without specific permission from the National Park Service." (Letter from Assistant Secretary, Fish & Wildlife and Parks to Dr. Darold E. Proctor, Gentry Resources Corporation, September 26, 1985)

6. 16 U.S.C. 1c(a)

7. 16 U.S.C. 1c(b)

8. 16 U.S.C. 1c(b)

9. 16 U.S.C. 1a-1
10. 16 U.S.C. 1a-1
11. 16 U.S.C. 1a-2
12. 16 U.S.C. 1a-2(h)
13. April 8, 1976
14. 33 U.S.C. 1251 et. seq.
15. Management Policies. Chapter 1:3
16. ibid.

IV. Units of the System

While the general statutes discussed in the preceding section apply to all the units of the National Park System, each of the parks of concern--Lake Mead, Grand Canyon and Glen Canyon--has specific provisions in its enabling legislation that apply only to that park. This section will discuss the parks' histories and will examine the park-specific provisions in their enabling statutes or proclamations.

A. Lake Mead National Recreation Area

Background

Lake Mead was created in 1935 with the completion of Hoover Dam, one of the engineering marvels of the early 20th century. In 1936, the NPS entered into an agreement with the Bureau of Reclamation to manage the area (then called Boulder Dam National Recreation Area) for outdoor recreation. Davis Dam, on which construction was completed in 1953 for the purposes of further regulating flows, resulted in the formation of Lake Mohave and the expansion of the recreation area to include it and several miles of river below the dam. The Bureau retained control of the dams and other facilities relating to control of water flow and power development and a limited area around the dam, whereas the NPS became responsible for the administration and development of recreational facilities on the lakes and management of the remaining land area covered by the reclamation withdrawal.¹

Hoover Dam was built largely as a consequence of the fact that the pace of agricultural development in the lower Colorado region had far outstripped such development in the Upper Basin States. It became clear that if Federally-financed development of water resources for water storage and regulation was to continue in California, then there must be agreement between the Colorado River States on the entitlement for water for the States. The Colorado River Compact of 1922 was the result.

The Compact did not determine the water rights for each of the States; rather, it divided the use of the water between two interstate "basins"--the Upper Basin (Colorado, Wyoming, New Mexico, Utah, and a portion of Arizona) and the Lower Basin (Arizona, California and Nevada.) The apparent intent of the Compact was to evenly divide the waters of the Colorado River. In fact, the Compact requires the Upper Basin to deliver 75 million acre feet (maf) to the lower basin every ten years for an annual average of 7.5 maf. Because the estimates of flow were optimistic, the Upper Basin often has less than 7.5 maf but is required by the terms of the Compact to deliver 7.5 maf, nonetheless.

Lake Mead Legislation

It was not until 1964 that Lake Mead NRA was established for "the general purposes of public recreation, benefit, and use," to be administered "in a manner that will preserve, develop and enhance ... the recreation potential and ... that will preserve, the scenic, historic, scientific, and other important features of the area, consistently with applicable reservations and limitations relating to such area and with other authorized uses of the lands and properties within such area."¹² Lands of the Hualapai Indians were not to be included within the recreation area without the approval of the Tribal Council. Because the Tribal Council has never acted to approve such an inclusion, the NPS exercises no administrative jurisdiction over Hualapai lands. Moreover, the legislation states, "Nothing ... shall deprive the members ... of hunting and fishing privileges presently exercised by them nor diminish those rights and privileges of that part of the [Hualapai] reservation which is included in the Lake Mead Recreation Area."¹³

Bureau of Reclamation

The other existing reservations are lands under the administration of the Bureau of Reclamation for power production and flood control purposes. At one time, virtually all the lands of the recreation area were withdrawn for reclamation purposes, even though they were under the management of the NPS. Since 1984, however, the Bureau of Reclamation has pursued a program of revoking withdrawals no longer needed or suitable for their purposes.⁴

The legislation that established Lake Mead recognizes the "national significance"⁵ of the park and requires that the establishment of its boundaries "shall not adversely affect any valid rights in the area, nor shall it affect the validity of withdrawals heretofore made for reclamation or power purposes."⁶ It goes on to say, "All lands in the recreation area which have been withdrawn or acquired by the United States for reclamation purposes shall remain subject to the primary use thereof for reclamation and power purposes so long as they are needed for such purposes."⁷

While the Congress states with some force that the reclamation and power generation purposes are primary on lands withdrawn for those purposes, its declaration of "the national significance of the park" seems to suggest that, where choices are available to serve both ends, they should be selected. The phrases, "shall remain subject to the primary use" and "shall not adversely affect the validity of withdrawals," as well as the legislative history suggest that the Bureau of Reclamation's activities within the park take precedence over the actions of any other bureau where the withdrawals have not been revoked. Where the reclamation or power withdrawals have been revoked, it would appear that NPS management objectives would take precedence.

What the legislative provisions appear to say is that, where activities of both agencies can take place, those of the Bureau are primary on lands subject to reclamation or power

withdrawals. It is not at all clear whether Bureau of Reclamation activities may invariably wholly supplant the management activities of the NPS. A reasonable presumption would be that Bureau actions should, where there are any reasonable or equally effective alternatives, be consistent with NPS management objectives, and that only when agency objectives are incompatible or opposed would the primacy language be tested or needed.

It should also be noted that Congress' action to create the recreation area in 1964 under the management of the NPS argues that more protection of natural resource values and protection than was possible under the cooperative agreement was considered necessary or desirable. When dealing with issues of Congressional intent and the precise meaning of the quoted phrases, it is important to note that each of these must be evaluated in the context of specific factual situations. Obviously, the NPS must defer to most Bureau actions related to power generation and dam operations. In situations where such Bureau actions could adversely affect NPS resources and management objectives, it is reasonable to assume that there may be some room for compromise and that the Congress so intended. The foregoing assumes the NPS has clearly stated management objectives, has carefully and fully evaluated both the resources it manages and the strategies designed to protect those resources, and that the actions of both agencies are undertaken after public review and evaluation of alternatives.

Special Provisions

There are additional provisions of the Lake Mead legislation that should be noted. First, the statute permits grazing and mineral leasing to the extent that such uses are consistent with recreational uses and the "primary use" of the areas withdrawn for reclamation purposes.⁸ Additionally, the statute specifically permits hunting, fishing, and trapping in accordance with both Federal law and State law.

There is a proviso that states that the Secretary of the Interior may issue regulations "designating zones where and establishing periods when no hunting, fishing, or trapping shall be permitted for reasons of public safety, administration, or public use and enjoyment,"⁹ after "consultation with the respective State fish and game commissions." It is useful to note that the statute says, "consultation with," rather than "concurrence of," in referring to actions the NPS may take with respect to hunting, fishing, and trapping. This provision argues strongly against certain State assertions that "States own the wildlife," and because of this purported ownership, States have absolute control over the disposition of wildlife species, regardless of the jurisdictional status of the land or waters in (or on) which the wildlife species are resident. The assertion of ownership may hold true with respect to private parties but it is not so with respect to units of government like the NPS. This section, read along with the Organic Act mandate to "conserve ... the wildlife therein" bolsters the contention that NPS controls management of wildlife (including fish) within park boundaries with the States in a subordinate position with respect to decision-making for wildlife management.¹⁰ This is especially the case because of differing wildlife management philosophies: the NPS generally manages for indigenous wildlife in natural

conditions while the States often manage species for harvest and in harvestable numbers. The NPS recognizes that the fact that Lake Mead is a reservoir influences the purposes for which the fishery resources are managed. The NPS Management Policies states that NPS "management activities will give precedence to native species over exotics whenever natives are adaptable to the altered environment."¹¹

Wilderness

The NPS evaluated the lands of Lake Mead for wilderness suitability in 1974 and proposed 409,000 acres for designation. The Department of the Interior suggested that any official action by the Congress should be delayed until the Bureau of Reclamation completed a pending study of western power needs. After the study's completion and with the information provided by the Bureau, 418,000 acres were proposed for designation in 1979. Another 262,000 acres were proposed at that time as potential wilderness (eligible for designation in the event nonqualifying conditions should be eliminated.) The NPS held hearings in 1979 on the 418,000 acre wilderness proposal but did not forward the recommendation to the Department at that time. In 1986, as a result of the removal of some of the reclamation withdrawals affecting the park, the acreage suitable for wilderness designation increased to 558,675 acres. The potential wilderness correspondingly was reduced to 115,700 acres.¹² In accordance with the Management Policies, NPS manages the lands eligible for wilderness designation in Lake Mead to protect their wilderness character until official action is taken on their designation.

Special Regulations

The special regulations in 36 CFR 7.48 deal with Lake Mead. They concern restrictions on aircraft landing areas, powerless flight, parking, and water sanitation for boats. There is also a regulation with respect to fishing that largely accedes to State control. None of the regulations affects NPS jurisdiction with respect to the States, the Bureau of Reclamation, or the Hualapai Tribe.

Cooperative Agreements

The NPS entered into a Master Memorandum of Understanding (MOU) with the Nevada Department of Wildlife (then, Fish and Game) in 1971 concerning joint management of wildlife resources, search and rescue and law enforcement at Lake Mead and Death Valley and (then) Lehman Caves National Monuments. The agreement has been renewed several times; the latest expiration date is July 1993. At the time the MOU was first agreed to, several important lawsuits (discussed in Sections Three and Seven) dealing with the extent of Federal control over wildlife resources--including Kleppe, Brown, and U.S. v. Moore--had not been decided. The agreement does not specifically refer to the Service's Organic Act responsibilities for conservation or management of wildlife in the National Park System, but makes reference only to NPS responsibility to "administer and

manage the lands and waters and natural and historic resources ..." There is no specific acknowledgement that "natural resources" includes wildlife.

The agreement requires that NPS obtain the "concurrence" of the State for programs that pertain to "capturing and killing wildlife," except in circumstances where the Secretary of the Interior determines that such compliance would prevent him from carrying out statutory responsibilities. The State agrees to "consult" with the Service in establishing seasons and implementing management programs, but not to obtain "concurrence."

The NPS is also party to an agreement under the Master MOU that permits the operation and maintenance of a State fish hatchery on lands within the Recreation Area. The agreement does not address NPS involvement in the selection of species and where and when the fry are released to the waters of Lake Mead. The objectives of Lake Mead's Statement for Management¹³ concerning fisheries could provide a basis for renegotiation if the park wishes to pursue it.

The NPS, in addition, has entered into an MOU with the State of Nevada concerning water development for wildlife, especially bighorn sheep. The thrust of the MOU does not appear to be consonant with the NPS Management Policies regarding population management¹⁴ and may also warrant further review. In this particular case, State preferences for certain types of wildlife species may differ with NPS management responsibilities. Again, the park's Statement for Management with respect to bighorn sheep could serve as a starting point for reevaluating the MOU.¹⁵

Lake Mead is also party to an MOU with the State of Arizona Game and Fish Commission that is similar in many respects to the MOU with Nevada. Like the Nevada MOU, it makes no reference to NPS responsibilities for the conservation of wildlife and states that the Commission is the "agency having primary responsibility for the management of wildlife resources." The agreement makes no reference to the fact that the Lake Mead legislation makes provision for the NPS to designate zones where or times when fishing, hunting, or trapping are not permitted for NPS purposes.

Additional such agreements include: a lease for the management and operation of the Overton Arm Wildlife Management Area (which includes the use of water rights held in the name of the United States); loan of boating equipment from the State of Nevada to the NPS; Bureau of Land Management (BLM) - NPS agreements on fire management, geothermal leasing adjacent to parks, burros, the National Atmospheric Deposition Program sampling, and grazing; an agreement with the Coast Guard for boating safety, radio frequency assignments, navigational aids; an agreement for fire and ambulance service from the Bullhead City Fire Department; an agreement with the U.S. Fish and Wildlife Service to provide fire protection at the Willow Beach Fish Hatchery; agreements with the U.S. Park Police and Mohave County for law enforcement services; an interagency agreement concerning fire management between the bureaus of the Department of the Interior and the U.S. Forest Service; an agreement with the National

Weather Service for a demonstration flash flood alarm system; and an MOU with the Soil Conservation Service for soil surveys.

B. Glen Canyon National Recreation Area

Background

The construction of the Glen Canyon Dam, and the consequent formation of Lake Powell, resulted from the Colorado River Storage Project Act of 1956. The principal purpose of that Act was to ensure the development of the waters of the Upper Basin for the benefit of the Upper Basin States--parts of Arizona and New Mexico, and all of Colorado, Utah, and Wyoming. The comprehensive scheme to develop the water of the Upper Basin involved a number of dams--including a proposal for a dam in Dinosaur National Monument at Echo Park. In 1953, the NPS published a report that stated, "The greatest peril to parks from dam proposals comes from the plans and programs of the governmental dam building agencies themselves and the pressures which their activities generate in the various sections of the country."¹⁶

The political controversy that ensued over the Echo Park dam is considered by some to have been the first modern "environmental" battle. Glen Canyon Dam was proposed as an alternative to the Echo Park Dam, as were dams at Flaming Gorge, Curecanti, Navajo, and Cross Mountain. The debate centered on questions of storage, evapo-transpiration rates, energy production and economics. Successive Congresses argued the merits of various permutations on the proposals until 1956. At that time, the coalition of conservationists that opposed the Act withdrew their opposition if two amendments would be added to the bill--the first, that the Secretary of the Interior would "take adequate measures to preclude impairment of the Rainbow Bridge National Monument," and the second, that "no dam or reservoir constructed ... shall be within any national park or monument."¹⁷ The Act that was signed into law by President Eisenhower included the Glen Canyon Dam and did not include the Echo Park Dam.

There is no indication in the legislative history of the Act that Congress was aware of potential adverse effects to Grand Canyon National Park from changes in the flows of the Colorado River. Rather, the attention to national park values was focused on preventing the construction of Echo Park Dam in Dinosaur National Monument and on protecting the integrity of Rainbow Bridge National Monument from encroachment of the waters of Lake Powell.

Glen Canyon Legislation

Glen Canyon National Recreation Area was established in 1972, after several years of management by the Bureau of Reclamation for recreation, "In order to provide for public outdoor recreation use and enjoyment of Lake Powell and lands adjacent thereto ... and

to preserve scenic, scientific, and historic features contributing to public enjoyment of the area ..."¹⁸ The Act directs the Secretary to "administer, protect, and develop the recreation area in accordance with" the Organic Act and any other authority available to him for "the conservation and management of natural resources to the extent he finds such authority will further the purposes" of Glen Canyon.¹⁹ Congressional action to establish Glen Canyon under the NPS recognizes the natural resource values and processes as well as recreational opportunities. There is an important proviso, however.

The Act further states:

Provided, however, that nothing in this subchapter shall affect or interfere with the authority of the Secretary granted by Public Law 485, Eighty-fourth Congress, second session [43 U.S.C. 620 et seq.], to operate Glen Canyon Dam and Reservoir in accordance with the purposes of the Colorado River Storage Project Act [43 U.S.C. 620 et seq.] for river regulation, irrigation, flood control, and generation of hydroelectric power.²⁰

In the Lake Mead legislation, there is a hierarchy of purposes--flood control, reclamation, power, etc. The plain language of this statutory provision would seem to indicate that each of the purposes enumerated for the Act is equal to the other purposes. No one purpose appears to have been considered to be superior to the others, at least insofar as its relationship to Glen Canyon NRA is concerned.

Like Lake Mead, there is evidence of clear Congressional intent that the Bureau of Reclamation's activities are to take precedence over the NPS management activities. It is also clear that the establishment of Glen Canyon was secondary to the purposes of providing water and power for other uses.

Bureau of Reclamation

A discussion of Bureau of Reclamation issues at Glen Canyon is substantially similar to the discussion of such issues at Lake Mead. If there is any difference, it is that there are substantially fewer reclamation withdrawals at Glen Canyon and that 75 maf of water must be delivered through the dam every ten years. Otherwise, the stipulations to NPS management that govern at Lake Mead also govern at Glen Canyon.

Special Provisions

There are several special provisions in the Glen Canyon legislation that are central to the resolution of management issues at Glen Canyon. First, the statute withdrew the lands of the recreation area from location, entry and patent under the mining laws,²¹ but

directed that the Secretary "shall permit the removal of the nonleasable minerals ... and shall permit the removal of leasable minerals ... if he finds that such disposition would not have significant adverse effects on the Glen Canyon Project or on the administration of the recreation area."²² As a consequence of this and general planning requirements, the park has developed a comprehensive zoning scheme designating areas where mineral leasing is permitted ("recreation and resource utilization zones") and areas where it will not be permitted ("natural zones," "development zones," and "cultural zones") that has been adopted in the park's Minerals Management Plan.

The legislation also directs that the Secretary "shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the boundaries of the recreation area in accordance with applicable laws of the United States and the States of Utah and Arizona, except that the Secretary may designate zones where and establish periods when, no hunting, fishing, or trapping shall be permitted for reasons of public safety, administration, or public use and enjoyment. Except in emergencies, any regulation of the Secretary pursuant to this section shall be put into effect only after consultation with the appropriate State fish and game department." Again, as was the case at Lake Mead, the statute says, "consultation," rather than "concurrence." This, coupled with the straightforward statement related to "lands and waters under his jurisdiction," argues for NPS primacy in wildlife management within the recreation area. Certainly the States are in a position to advise and make suggestions, but these provisions reinforce NPS's Federal authority to manage wildlife in accordance with the Organic Act's direction. The park, as part of the Superintendent's Compendium, has closed certain areas to hunting within one-half mile of developed areas, mostly for public safety reasons.

The Glen Canyon legislation permits grazing within the recreation area. Responsibilities for the administration of grazing leases are allocated in a national MOU between the NPS and the Bureau of Land Management, which has been further defined in an MOU between the Rocky Mountain Region and the Arizona and Utah Offices of the BLM.

The authorizing statute permits the granting of easements and rights-of-way "upon, over, under, across, or along any component of the recreation area" unless they would have "significant adverse effects on the administration of the area." The park has established utility corridors as part of its General Management Planning (GMP) process. This provision contrasts with the Lake Mead legislation which makes no reference to rights-of-way or easements.

An additional special provision concerns lands of the Navajo Tribe within the recreation area. Tribal trust lands may only be acquired by the Secretary with the concurrence of the tribal council and nothing in the legislation is to be construed as affecting "the mineral rights reserved to the Navajo Indian Tribe" or "the rights reserved to the Navajo Indian Tribal Council ... with respect to use of" the so-called Parcel B lands, which were formerly part of the Navajo Reservation.²³

Wilderness

As part of its GMP process, the park's wilderness suitability study was completed in 1979 but has, to date, not been forwarded to the Secretary. For management purposes, the natural zone outlined in the GMP protects the wilderness values on those lands, in the interim, which are considered potential wilderness.

Special Regulations

The special regulations concerning Glen Canyon are found at 36 C.F.R. 7.70. They deal with designation of airstrips; responsibility for unattended property; discharge of sanitary wastes from boats; requirements for Colorado River white-water boat trips; and requirements for assembling and launching river rafts and boats.

Cooperative Agreements

The park has entered into a number of MOU's and cooperative agreements with the BLM dealing with the myriad of issues that arise in managing neighboring lands--for grazing management, coordination at the field level, coordination of wilderness studies, administration of river use, and similar issues. The park has also entered into agreements with the Navajo Tribe and Bureau of Reclamation concerning administration and management near tribal or reclamation lands.

Unlike Lake Mead, Glen Canyon has not entered into comprehensive MOU's with either the State of Arizona or the State of Utah for wildlife management. Its limited agreements with the States concern reintroduction of bighorn sheep, boating law administration, radio frequencies, and law enforcement. The remainder of agreements are with local units for government or universities and are not related to water resources. A complete listing of the agreements is available in the park's Statement for Management.

C. Grand Canyon National Park

Lands now included in Grand Canyon National Park were originally withdrawn by Presidential Proclamation in 1893 for the Grand Canyon Forest Reserve. This was expanded in 1906 by the Grand Canyon Game Reserve to protect game animals. And, Grand Canyon National Monument was established by proclamation in 1908, subsuming most of the lands of the Game Reserve, to protect "this object of unusual scientific interest."²⁴ Congressional action to protect Grand Canyon came in 1919 when Grand Canyon National Park was reserved and withdrawn and "dedicated and set apart as a public park for the benefit and enjoyment of the people."²⁵

The legislation that established the park specified that the Organic Act was to be the basis for the administration, protection and promotion of the park. The Congress

explicitly addressed how the recreation areas--Lake Mead and Glen Canyon--are to be managed in their enabling statutes. Unfortunately, that same meticulous attention to interagency questions did not extend to Grand Canyon National Park. The legislation states:

Whenever consistent with the primary purposes of said park, the Secretary of the Interior is authorized to permit the utilization of areas therein which may be necessary for the development and maintenance of a Government reclamation project.²⁶

This provision was at the center of the controversy over the Central Arizona Project (CAP) in the 1960's. Dams above and below the park were proposed as a method to raise the revenues necessary to finance the CAP and to provide the power to pump the water to the Phoenix area. Conservationists opposed these dams because of the effects of reduced flow into the park from a dam at Marble Canyon and because Bridge Canyon Dam, downstream from the park, would back up water into Grand Canyon National Monument, and at times, into the park. As a result of the debates on the CAP, President Johnson, on his last day in office (1969), established Marble Canyon National Monument, thought by many to be a method to impede further consideration of the Marble Canyon Dam. The Presidential Proclamation said, "The Marble Canyon of the Colorado River in Arizona, a northerly continuation of the world-renowned Grand Canyon, possesses unusual geologic and paleontologic features and objects and other scientific and natural values."²⁷ The proclamation went on to say, "Any reservations or withdrawals heretofore made which affect the lands described are hereby revoked."²⁸ As a consequence, by abolishing the underlying reclamation withdrawals, the proclamation made authorizing a dam in Marble Canyon somewhat more difficult than it might otherwise have been.

When the Grand Canyon Enlargement Act was enacted in 1975, both Grand Canyon and Marble Canyon National Monuments were abolished and the lands formerly included in them were added to the park. The Enlargement Act stated,

It is the object ... of this title to provide for the recognition by Congress that the entire Grand Canyon, from the mouth of the Paria River to the Grand Wash Cliffs, including tributary side canyons and surrounding plateaus, is a natural feature of national and international significance. Congress therefore recognizes the need for ... the further protection and interpretation of the Grand Canyon in accordance with its true significance.²⁹

The Act further provided that the only lands subject to the provision for Government reclamation projects were "those lands formerly in Lake Mead National Recreation Area immediately prior to January 3, 1975 and added to the park by sections 228a to 228j ..."³⁰

No evidence was found during this study which showed that this provision nor any subsequent actions by Congress directly addressed the question of diminished flows or their consequent environmental effects. At the time the Act was passed, the Glen Canyon Dam had been operating since 1963, so it is reasonable to assume that had Congress recognized the potential adverse effects from the operation of Glen Canyon Dam on the resources of the Grand Canyon, it would have acted on the situation at that time. It may well have been one of those issues which was not of importance until the cumulative effects of many years became evident.

Special Provisions

In 1979, under the Convention Concerning Protection of the World Cultural and Natural Heritage (or World Heritage Convention) of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) to which the United States became a party in 1975, Grand Canyon National Park became a World Heritage Site. Article 2 of the Convention explains that for the purposes of the Convention,

The following shall be considered as natural heritage: natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation, or natural beauty.

Designation of Grand Canyon as a World Heritage Site represents international recognition that it is a singular resource, graphically demonstrating the geological processes associated with the action of the waters of the Colorado River over time. In addition, there is unparalleled biological diversity associated with the changes in elevation from the rim to the river. It was for these reasons and because of its exceptional scenic and natural beauty that Grand Canyon was singled out for special recognition. The nomination for World Heritage status recognizes the fact that Glen Canyon Dam, upstream, has affected the natural ecosystem of the Canyon.

As a signatory to the World Heritage Convention, the United States agreed to "assume responsibility for taking appropriate legal, scientific, technical, administrative, and financial measures necessary for the ... protection, conservation, presentation, and rehabilitation of World Heritage properties within its borders."³¹ Moreover, the National Historic Preservation Act Amendments of 1980³², require that nominations for World Heritage status contain "evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, or other forms of protection.)"³³ When the Grand Canyon was added to the World Heritage List, this provision was not in regulation and the nomination recognized environmental effects associated with Glen Canyon Dam upstream. It would seem likely

that the fact that Grand Canyon is a World Heritage Site would have some influence on the ways in which the United States, through the Secretary of the Interior, implements its responsibilities for managing both the Glen Canyon Dam and Grand Canyon National Park.

Wilderness

There is no designated wilderness within Grand Canyon at this time. Preliminary studies in 1976 by the park led to draft recommendations to manage 82% of the park as wilderness with an additional 10% to be managed as potential wilderness. The final wilderness recommendations were forwarded to Washington. There has been no subsequent action but lands are to be managed to protect wilderness values in accordance with NPS Management Policies.

Special Regulations

The special regulations applicable to Grand Canyon are found at 36 CFR 7.4. They concern commercial passenger-carrying motor vehicles, Colorado River boat trips, and immobilized and legally inoperative vehicles. Only the regulations concerning the boat trips are in any way related to issues addressed in the study.

Cooperative Agreements

The park has a number of MOU's with concessionaires in the park. It also has an MOU with the town of Tusayan for water sales. In addition, the park is a party to an "Annual Operating Plan" with the BLM Arizona Strip District, Kaibab National Forest and the Arizona State Land Department dealing with joint procedures and services for fire protection. It is also a party to an agreement with the Federal Highway Administration. There are no agreements with the States concerning wildlife.

SECTION IV ENDNOTES

1. "Briefing Document," Lake Mead National Recreation Area, Denver Service Center, 1977, p. 4
2. (emphasis added) 16 U.S.C section 460n-2(a)
3. 16 U.S.C. 460n-2(d)
4. General Management Plan, Lake Mead National Recreation Area, National Park Service, 1986, p. 52
5. 16 U.S.C. 460n
6. 16 U.S.C 460n-1
7. 16 U.S.C. 460n-1
8. 16 U.S.C. 460n-3(b)
9. 16 U.S.C 460n-4
10. See U.S. v. Moore, 640 F. Supp. 164 (S.D.W.Va. 1986) The court found the NPS' authority to manage wildlife virtually all-inclusive -- so broad as to include insects.
11. NPS Management Policies, p. 4:8
12. General Management Plan, page 52
13. "Five Year Strategic Plan -- Statement for Management," Lake Mead National Recreation Area, July 27, 1989, page 17

14. Management Policies, Chapter 4:6, "Population Management"
15. Statement for Management, page 18
16. Quoted in Mann, D., Weatherford, G., and Nichols, P., Legal-Political History of Water Resource Development in the Upper Colorado River Basin, Lake Powell Research Project Bulletin, Number 4, September, 1974, p. 9
17. Ibid., p. 19
18. 16 U.S.C. 460dd
19. 16 U.S.C. 460dd-3
20. 16 U.S.C. 460dd-3
21. 16 U.S.C. 460dd-2(a)
22. 16 U.S.C. 460dd-2(a)
23. 16 U.S.C. 460dd-1(a) and (b) and P.L. 85-868, section 2
24. Presidential Proclamation Number 794, January 11, 1908
25. 16 U.S.C. 221
26. 16 U.S.C. 227 This section was amended to apply only to the lands formerly within Lake Mead National Recreation Area added to Grand Canyon National Park in 1975.
27. Presidential Proclamation for Marble Canyon National Monument, January 22, 1969

28. Ibid.

29. 16 U.S.C. 228a

30. 16 U.S.C. 227.

31. Federal Register, Final Rule, 36 C.F.R. 73, preamble, May 27, 1982 page 23392

32. P.L. 96-515

33. Federal Register, op. cit., page 23392

V. Bureau of Reclamation

The Reclamation Act of 1902¹ was passed in the context of the land disposal laws of the 19th century, such as the Homestead Act² which enabled settlers to establish family farms in 160 acre units. The Timber Culture Act³ and the Desert Land Act⁴ had similar purposes. The Homestead Act's approach was successful for the fertile East and Midwest, but was less successful in the arid West where 160 acre farms were often useless without additional water. Moreover, the capital needed to deliver water on a scale necessary to enable the settlement of the West was beyond the means of the private sector.⁵ With this historical perspective, the Reclamation Act was enacted to deliver water for irrigation. In order to deliver the water, dams, canals, ditches, laterals and associated works had to be built and the Reclamation Service, later the Bureau of Reclamation (Bureau), in the Department of the Interior was founded to build these massive projects.

The Act created the Reclamation Fund which provided that monies from the sale and disposal of public lands in the western states would be deposited in the fund. The fund was later augmented by the addition of royalties derived from mineral leasing on the public lands. The fund was to be used "in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories."⁶ Its use was limited to the seventeen western states unless Congress specifically authorized use elsewhere. Projects undertaken under the fund were, theoretically at least, self-financed since the charges for construction of the projects were to be returned to the fund, initially within a ten year period, later extended to twenty years, still later to forty years.

The dams originally constructed by the Bureau were wholly for irrigation. In the late thirties, the power-generating capacities of such dams became an important consideration since monies produced by hydropower sales could be used to lower water rates and defray the costs of construction. By the mid-fifties (even earlier in some States), most of the good sites for dams with good irrigable lands had been developed. In addition, the Corps of Engineers had been able to build dams for flood control (and other purposes) with much less restrictive conditions attached--no requirement for repayment, for example. Eventually, in 1979, the name of the Bureau was changed to the Water and Power Resources Service, in recognition of the fact that the West was largely "reclaimed" and that the bureau's purpose had changed. Then-Secretary of the Interior Cecil Andrus said, "National needs now call for greater efficiency in the operation of existing structures and their integration in new programs for renewable resources and alternative energy." (Emphasis added.)⁷ (In 1981, the name Bureau of Reclamation was reinstated.)

Projects

Boulder Canyon Project Act

Hoover Dam (originally Boulder Dam) was completed in 1934. It was then and continues to be a major feat of modern engineering; it was the central feature of the Boulder Canyon Project Act⁸ enacted in 1929. Its purposes, as articulated in the Act which authorized it, are:

controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior ... is authorized to construct, operate, and maintain a dam and incidental works ... at ... Boulder Canyon.⁹

The Act goes on to specify that the purposes of the dam and reservoir are: "first, for river regulation, improvement of navigation, and flood control; second for irrigation and domestic uses and satisfaction of present perfected rights ... of said Colorado River compact; and third, for power."¹⁰ The Act finally states that it is supplemental to the Reclamation Act which provides the basis for the construction, management and operation of the dam and incidental facilities and works authorized by the Act.¹¹ There is no explicit reference to recreation or any recreational purposes of the lake to be formed by the dam even though the Bureau entered into an agreement with the NPS for management of the area for recreation purposes in 1935.

Colorado River Storage Project Act

In 1956, the Colorado River Storage Project Act¹² (CRSPA) was enacted. Its primary purpose was to provide for development of water resources in the Upper Basin states (Colorado, Wyoming, Utah and New Mexico). Passage of the Act was particularly hard-fought and centered on the question of whether a dam would be built in Dinosaur National Monument. The Bureau proposed the Echo Park section of the Monument as the site for the primary water storage project in the Upper Basin.

The NPS and a coalition of conservation groups were essentially able to hold the Act hostage until the proposal to dam Echo Park was dropped. The Act contains the following statement: "It is the intention of Congress that no dam or reservoir constructed under the authorization of this section shall be within any national park or monument."¹³ The legislative history indicates that this provision was intended to address not only the

Echo Park dam but also any potential effects to Rainbow Bridge National Monument from the construction of Glen Canyon Dam.

The statement of purposes of the Act reads as follows:

In order to initiate the comprehensive development of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize ... the apportionments ... made to them in the Colorado River Compact ... providing for the reclamation of arid and semi-arid land, for the control of floods, and for the generation of hydroelectric power ... Provided further, That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate measures to preclude impairment of the Rainbow Bridge National Monument.¹⁴

Unlike previous major reclamation projects, the Act made specific provisions for the recreational use of the reservoirs. The Act authorized the Secretary to "investigate, plan, construct, operate and maintain (1) public recreational facilities on lands withdrawn or acquired for the development of said project or of said participating projects, to conserve the scenery, the natural, historic, and archaeologic objects, and the wildlife on such lands, and to provide for public use and enjoyment of the same and of the water areas created by these projects by such means as are consistent with the primary purposes of said projects; and (2) facilities to mitigate losses of, and improve conditions for, the propagation of fish and wildlife." This section, it can be argued, broadened the Bureau's responsibilities at a minimum, with respect to Glen Canyon. However, the fact that Congress acted in 1972 to establish Glen Canyon under NPS management would seem to indicate that NPS could provide for management of these resources in ways the Bureau could not or did not.

A recent Bureau publication prepared for the Glen Canyon Environmental Studies¹⁵ makes no reference to this provision in its discussion of dam operations nor in its reference to the development of operating criteria for the dam (which was supplemented but not deleted by the Glen Canyon enabling legislation). And indeed, this provision does not seem to have explicitly influenced the Bureau's view of its responsibilities in the operation of Glen Canyon.

Arguably, the phrase "consistent with the primary purposes of said projects," could mean that the conservation purposes are only to be dealt with after the water storage, power generation and flood control purposes have been dealt with. That is not necessarily, however, the only reasonable reading of the language of the statute. Indeed, the "law of the river"--the collection of Acts of Congress, court decisions, treaties, compacts, and

policies--upon which the Bureau bases its management decisions, may require a somewhat broader scope and interpretation than has characterized the Bureau's interpretation heretofore. This is especially so in light of the park and environmental statutes (discussed in Sections Four and Six) enacted in the last twenty years, well after the enactment of the Colorado River Storage Project Act (CRSPA).

The environmental statutes discussed below are tangible statements of the values of this society--values that have evolved and changed over time. The public agencies would do well to demonstrate that those environmentally-influenced sentiments that have been translated into statements of the public interest have had some effect upon Bureau decision-making and upon their interpretation of what the "law of the river" means. It is likely that such modifications could be made without adversely affecting the primary purposes for which the CRSPA was enacted.

Other Projects

In 1968, the Colorado River Basin Project Act was passed, including as its primary feature the Central Arizona Project (CAP). Its passage represented a victory for the NPS and conservationists in protecting Grand Canyon from Bureau proposals to construct regulating dams in the Grand Canyon itself. As an alternative the Act authorized the construction of the Navajo Power Plant to provide coal-fired energy generation to replace the energy foregone by not building dams in the Grand Canyon. The Act also recognized the responsibility of the United States to deliver water to Mexico under the 1945 Treaty, requiring delivery of water to Mexico as its first priority.

The Colorado River Salinity Control Act¹⁶ was also influenced by the needs of Mexico. The Act, in concert with an agreement reached between the two countries under the International Boundary and Water Commission, requires the United States to deliver relatively non-saline waters to Mexico.¹⁷ To achieve the levels of water quality necessary to meet U.S. obligations to Mexico, a desalinization plant has been constructed and a number of projects have been undertaken to limit the natural sources of salinity in the Colorado River drainage.

SECTION V ENDNOTES

1. (1902) 43 U.S.C. 371 et. seq.
2. 43 U.S.C. 161 et. seq.
3. 18 Stat. 605 (March 3, 1873)
4. 43 U.S.C. 321 et. seq.
5. Wallace Stegner's Pulitzer Prize-winning novel, Angle of Repose, takes place, in part, against the backdrop of a failed privately capitalized irrigation project in the Boise Valley of Idaho
6. 16 U.S.C. 391
7. Department of the Interior news release, November 6, 1979
8. 43 U.S.C 617 et. seq.
9. 43 U.S.C. 617a
10. 43 U.S.C. 617e
11. 43 U.S.C. 617m
12. 43 U.S.C. 620 et.seq.
13. 43 U.S.C. 620b
14. 43 U.S.C. 620

15. Wegner, David L. Colorado River Storage Project Constraints and Operation of Glen Canyon Dam, Bureau of Reclamation, Upper Colorado Region, Salt Lake City, Utah. 1987. PB89-143515, National Technical Information Service, GCES/32/87

16. 43 U.S.C. 1571 (1974)

17. It requires that the water delivered to Mexico have no more than 115 ppm over the average salinity of Colorado River waters that arrive at Imperial Dam

VI. General Statutes Affecting Jurisdiction

There are several statutes of general applicability which influence and affect the management of lands and resources along the Colorado River. Statutes such as the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act are powerful and effective legal tools. We will discuss several of them here so as to add dimension to the discussion of authorities and responsibilities for water and water-related resources. It should be noted that these laws may not only prescribe NPS actions, but may also present opportunities for the NPS to influence decision-making processes of other units of government with respect to activities outside park boundaries that may affect park resources.

A. National Environmental Policy Act

The National Environmental Policy Act of 1969¹ (NEPA) serves as the framework for establishing federal environmental policy and for evaluating the environmental effects of major federal actions. The Act created the Council on Environmental Quality (CEQ) in the office of the President which advises the President on environmental issues, much as the Council of Economic Advisors provides counsel on issues affecting the economy.

An important function of CEQ has been to issue guidelines that provide specific regulations for federal agencies to follow when they prepare environmental impact statements (EIS) and other analyses (environmental assessments or EA) under the purview of NEPA. EISs are prepared to evaluate the consequences of major federal actions affecting the environment; EAs are prepared to evaluate the environmental effects of routine federal actions. Both allow for public scrutiny of federal proposals for action. For this study's purposes, the evaluation of potential effects of other agencies actions and the opportunity for public scrutiny of alternatives are of significant benefit to the NPS. Any federal actions that affect the waters or resources of the Colorado River are evaluated and analyzed in depth through the NEPA process.

One of the primary benefits of NEPA has been the fact that most of the tenets of environmental law were engendered by this statute. The courts have played a significant role in interpreting the somewhat vague language of the statute, with the result that agency actions really are evaluated before major federal commitments of resources are made. NEPA's primary thrust is "procedural"² rather than substantive, but this has allowed for participation in decision-making processes that was unthinkable before NEPA, for both the public and other federal agencies.

NEPA in the NPS provides a framework for compliance with other relevant statutes, such as the Endangered Species Act and the National Historic Preservation Act, as well as a framework for public participation. NEPA serves to influence decision-making on actions undertaken by the NPS and also provides NPS access to the decision-making processes

of other Federal agencies. It has proved to be a helpful tool in evaluating proposed projects and programs in areas of complex administration and jurisdiction like the Colorado River.

B. Endangered Species Act

The purpose of the Endangered Species Act³ is to preserve and protect the nation's fish, wildlife, and plant species threatened with extinction. Because it was initially thought to be a non-controversial statute, it had widespread bi-partisan support when it was enacted. The legislators may not have been fully aware of the particular consequences of section 7 of the Act, "Interagency Cooperation," which has been interpreted to make it "one of the most rigid and protective federal environmental laws in existence."⁴

Section 7 is directed at federal agencies and their actions. The first part of Section 7 requires that agencies use their existing authorities and programs to further the purposes of the Act--to conserve threatened and endangered species.⁵ In so doing, the section makes the protection of endangered species--and their habitats--a part of the bureau or agency mission. For the NPS, this provision, for the most part, represented no major change from its mandates. For others, such as the Bureau of Reclamation, this represented a significant change.

The second part requires federal agencies to insure that "any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat.⁶ The two distinct parts of this subsection--the prohibition of jeopardy and the proscription against destruction or adverse modification of habitat--represent separate processes that must be independently determined. The Fish and Wildlife Service (FWS) assists federal bureaus in determining the impacts of proposed undertakings--through both informal and formal consultations--and issues "biological opinions" regarding the undertaking's effects. The courts have accorded a great deal of deference to biological opinions; if the FWS finds "jeopardy" or adverse modification of habitat, the project probably will not proceed. This is not because FWS has veto power over agency actions, but because of the weight and consideration given to such scientific determinations by the courts.

As part of the "jeopardy" biological opinion, FWS is required to provide "reasonable and prudent" alternatives for the protection of the species. In most cases, all that has been necessary has been the adoption of such alternatives. In the event none of the alternatives is acceptable or feasible, a Cabinet-level review committee has the authority to waive all or part of the Act, a process that has been used only twice since 1978.

The Act also provides for cooperation with the States for furthering the conservation of endangered and threatened species. By and large, even where NPS must seek a biological opinion from the FWS in order to proceed with a project in a park, it is infrequent that

NPS administrative decisions are dramatically affected since preservation of wildlife and habitat is a normal part of NPS decision-making. Other agencies, like the Bureau of Reclamation, for example, may find that their operations are affected in major ways. This is particularly the case because balancing competing environmental and economic values is usually part of the decision-making process in development-oriented agencies and bureaus; the Act does not permit such balancing.

C. Clean Water Act

The Clean Water Act⁷ (CWA) was designed to restore and maintain the integrity of the nation's waters. As part of the Act, the Congress recognized the primary role of the States in managing and regulating the nation's water quality, within the framework developed by the Congress. Federal agencies, including the NPS and Bureau of Reclamation, are required to comply with State requirements for water quality management regardless of jurisdictional status or land ownership.

The method used by the CWA to control degradation of water resources has been based on water quality standards applicable to point source discharges. Water quality standards, which are developed by the States, define uses of water bodies or segments of water bodies and define the criteria (or limits) necessary to achieve that use or uses. Water quality standards also require that existing uses be protected so that there is no lowering of water quality from what it is today. The prohibition against changes in water quality is called the "antidegradation policy." State antidegradation policies can be useful in maintaining and protecting the waters of parks.

In recent amendments to the CWA, more attention was focussed on nonpoint sources of pollution, that is pollution from diffuse sources, such as run-off from urban areas or agricultural operations. To control pollution from such sources, States have developed "best management practices" (BMPs). BMPs are specific to the type of activity (i.e., road construction, grazing, silviculture) and are designed to ensure that nonpoint source pollution will be reduced or eliminated.

Also regulated under the CWA are such activities as dredging and filling waters of the United States (under the general authority of the U.S. Army Corps of Engineers); oil spill contingency planning (under the general authority of the Coast Guard); and programs for protecting the quality of water in lakes from nonpoint source discharges of pollutants. Protection and preservation of wetlands is also under the general purview of the CWA.

Regulation under the CWA is the one area where jurisdiction over actions within units of the NPS lies unequivocally with the States. Congress has clearly stated that federal agencies must comply with State water pollution control requirements in the same manner and to the same degree as non-federal entities.

D. Fish and Wildlife Coordination Act

The purpose of the Fish and Wildlife Coordination Act⁸ was to recognize the importance of wildlife and to ensure that wildlife conservation would receive equal consideration with other features of water resource development programs. Among other things, the Act authorizes the Secretary of the Interior to provide assistance to and cooperate with Federal, State, public and private agencies in "the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat ..."⁹

The programs for land management and use of Federal lands are exempt from the provisions of the Act.¹⁰ As a consequence, NPS management of wildlife resources in units of the national park system is not subject to the Fish and Wildlife Coordination Act. Since the overall purpose of the NPS stated in the Organic Act provides for conservation of wildlife, the fact that the Fish and Wildlife Coordination Act is not applicable to NPS activities has little practical import. The Act is also not applicable to Bureau of Land Management and Bureau of Reclamation land management activities.

**SECTION VI
ENDNOTES**

1. 42 U.S.C. 4321 et. seq.
2. Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, 435 U.S. 519 (1978)
3. 16 U.S.C. 1531 - 1543
4. Don Barry, "The Endangered Species Act," in Managing National Park System Resources, Michael Mantell, editor, Conservation Foundation, 1990, page 86
5. 16 U.S.C. 1536(a)(1)
6. 16 U.S.C. 1536(a)(2)
7. 33 U.S.C 1251 et. seq.
8. 16 U.S.C. sections 661 - 666
9. 16 U.S.C. 661
10. Section 662(h) states:
The provisions of section 661 to 666c of this title shall not be applicable ... to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

VII. State - Federal and Federal-Tribal Relationships

This section deals with general principles of State-Federal relations--through policies, laws, and authorities--that may be helpful in illuminating or explaining how some differences in points of view between States and Federal agencies have been or may be resolved.

A. State-Federal Ownership of Wildlife

At the center of many issues of regulation and control of wildlife has been the question of who "owns" wildlife. As this discussion will demonstrate, ownership may not be the appropriate standard for addressing the question. As one commentator has suggested, wildlife is not amenable to ownership. Its very wildness is what makes ownership a somewhat anomalous notion.

Under Roman law, wildlife had a somewhat unique status: ferae naturae, or wild animals had a status like air, in that they belonged to no one. Legal concepts evolved in English law which gave complete authority to the King and parliament "to determine what rights others might have with respect to the taking of wildlife." After the American Revolution, when States were created, they became the purported "owners" of the wildlife, as the sovereign that replaced the Crown.¹ This view was further buttressed by Geer v. Connecticut², which said States had the right "to control and regulate the common property in game," which right was to be exercised "as a trust for the benefit of the people."³ The decision in Geer was conditioned on the fact that such power of the States could only exist "in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution."⁴ As a result of a partial reading of the holding in Geer and the persistence of the English model, the fiction of State ownership of wildlife has persisted.

This is so even in light of the fact that there has been significant and continuing legislation by the Congress concerning wildlife since 1900⁵. Several cases have been decided that have dealt directly or tangentially with the question of State ownership of wildlife. In Missouri v. Holland⁶, the Court based its decision on the treaty-making authority of the Federal government and said:

The State ... founds its claims of exclusive authority upon an assertion of title ... No doubt it is true between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone, and possession is the beginning of ownership ... ⁷

Among the first Federal actions in wildlife management was the prohibition of hunting in Yellowstone National Park in 1894, an exercise of the Federal property power. Similarly, in 1906, the Congress prohibited bird hunting on all lands reserved or set apart as breeding grounds for birds. In New Mexico Game Commission v. Udall⁸, the Tenth Circuit Court of Appeals ruled that the NPS was not obliged to obtain a State permit in order to kill deer in Carlsbad Caverns National Park as part of a study because of the Secretary's necessary power to determine what "may be detrimental" to the use of the park.⁹ In Kleppe v. New Mexico¹⁰, the Supreme Court noted that the "furthest reaches of the power granted by the property clause have not yet been definitively resolved." The Court further said that power "necessarily includes the power to regulate and protect the wildlife living there."¹¹ This case is particularly seminal because it involves the authority of the Secretary to regulate wildlife on lands of the public domain, not just lands such as those in parks that have been set apart or reserved for specific purposes related to wildlife¹².

The final blow to the assertions of State ownership of wildlife may have been dealt by the Supreme Court in Hughes v. Oklahoma.¹³ In Hughes, the Court explicitly overruled the finding in Geer and referred to the "19th century legal fiction of ownership."¹⁴ It suggested instead that wildlife is not conceptually different from other natural resources.

A final case involving the NPS that demonstrates Federal authority to prevent actions of the States that may adversely affect wildlife is U.S. v. Moore¹⁵. In that case, the United States sought to prevent the State of West Virginia from spraying pesticide to eliminate black flies in New River Gorge National River. The Federal District Court found black flies to be "wildlife" and therefore under the general authority of the Secretary to regulate and protect.

The thrust of most of these conflicts between the States and the Federal government concerning wildlife has been to affirm Federal authority, but one principle has been repeatedly reaffirmed: the States have authority to control the activities of their citizens with respect to the taking of wildlife through licenses, establishing seasons, bag limits, areas open or closed to hunting, and the like. However, such authority does not, as demonstrated by the cases cited, extend to controlling the NPS manager in exercising his wildlife management responsibilities under the Organic Act and other related statutes.

In spite of clear interpretations of Federal authority respecting wildlife and equally clear rejection of assertions of State ownership of wildlife by a number of courts, these same claims continue to be made.¹⁶ Perhaps the best course for the NPS to take is to continue to manage wildlife as the resource demands and to avoid debates with the States as to who owns what; long-standing convictions are apparently slow and difficult to change.

B. Federal-Tribal Relations

In the context of this study, some attention to the relations between the NPS and Indian tribes is useful because in each of the park units in the study, there are, in the enabling statutes, specific exceptions to NPS mandates respecting Indian tribes. At the center of U.S. Indian policy has been the view that independent, established Indian tribes that were self-governing and sovereign existed before the colonization of the United States by the European powers.

Relations with Indian tribes are a function of the Federal government, not the States, based on the provision in the U.S. Constitution, Article I, section 8, clause 3 that gives specific Federal authority "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Constitution further states that all treaties (including treaties with Indian Tribes) "shall be the supreme law of the land; ... anything in the Constitution or laws of any State to the contrary notwithstanding."¹⁷

Because of the fiduciary, or trust, responsibility which requires the United States to hold the property of tribes for the benefit of those tribes, the United States (acting through the Secretary of the Interior) is required to adhere to even higher standards of protection and management for Indian lands than for lands owned by the Federal government. Thus, in the case of the Navajo, Havasupai and Hualapai tribes in the study area, the United States is obliged to act on behalf of those tribes in a manner that provides their properties with protection from harm, protection that exceeds the standards required for ordinary Federal land. As a consequence, in each of the park enabling statutes that are the subject of the study, special provisions for Indian tribes have been made.

Grand Canyon National Park

The Havasupai Tribe was granted a reservation, centering on Havasu Canyon (a tributary of Grand Canyon in Arizona) by Executive Order in 1888¹⁸. The size of the reservation was severely reduced just two years later--from 34,420 acres to 518 acres. Until the Grand Canyon Enlargement Act (the Enlargement Act) in 1975, the Secretary was authorized to allow use of lands within the park for "agricultural purposes"¹⁹ in his discretion.

The Enlargement Act dealt directly with the question of occupancy and use of the lands of Grand Canyon National Park. First, it declared a reservation of approximately 185,000 acres to be held in trust for the tribe. It declared conditions on the uses of those trust lands²⁰, and made provision for protection and management of the lands. The Enlargement Act also provided for an addition 95,300 acres as "Havasupai Use Lands," where the Secretary is permitted to allow tribal uses "subject to such reasonable regulations as he may prescribe to protect the scenic, natural, and wildlife values thereof."²¹ The Act declared finally that any Havasupai claims to title or interest in lands not specified were extinguished.

The terms of the Enlargement Act permit the use of park lands for purposes not normally permitted in national parks. Its terms also severely limit tribal use of reservation lands in ways that, if not unprecedented, are at least extraordinarily rare. Like many compromises, the terms of the Enlargement Act created some management difficulties for NPS but because the language of the statute recognizes the ecological or environmental bases for such uses, NPS is in a position to manage lands within the park by consistent standards, even though some are Indian lands.

Lake Mead National Recreation Area

The provisions relating to the Hualapai Tribe in the Lake Mead enabling statute are much less comprehensive than those discussed above. The Hualapai reservation was established by Executive Order in 1883 and has been expanded a number of times since then. The Lake Mead legislation contains the stipulation that the lands of the Hualapai Tribe may not be considered to be part of Lake Mead unless the Tribal Council acts affirmatively to effect such an inclusion. The Council has never so acted and as a consequence, the lands are not within the exterior boundaries of the recreation area.

The exceptions to customary NPS management options that are listed in the statute would have been applicable had the Hualapai Tribe acted to be included within the recreation area. Since it did not do so, the exceptions have no practical effect. (They would have required that any mineral development and leases of lands be made in accordance with Indian mineral and land leasing schemes.²² The statute also states that nothing "shall deprive the members of the Hualapai Tribe of hunting and fishing privileges presently exercised by them, nor diminish those rights and privileges of that part of the reservation which is included in the Lake Mead Recreation Area."²³)

The Act states, " Nothing in this subchapter shall modify or otherwise affect the existing jurisdiction of the Hualapai Tribe."²⁴ The clear thrust of the legislation was to effect no change in the rights and privileges of the Hualapai Tribe. As a consequence, the NPS may not exercise any significant degree of regulatory jurisdiction over the lands of the Hualapai Tribe as it could if the lands were privately held. It is, therefore, essential for the park and the Tribe to cooperate in land management activities so that the actions of neither will have an adverse effect on the management objectives and values of the other.

Glen Canyon National Recreation Area

The passage of the Colorado River Storage Project Act and its authorization of dam construction at Glen Canyon required subsequent action to facilitate and permit the exchange of lands between the Navajo Tribe and the Federal government. The Navajo Reservation in Arizona, New Mexico, and Utah encompasses about 23,000 square miles and is the nation's largest Indian reservation. Its boundaries have been changed a number of times by Executive Order and legislation. As part of a land exchange²⁵, the mineral rights to some of the lands exchanged were reserved to the Navajo Tribe.

Similarly, the tribe retained certain other rights for land uses to the exchanged lands.²⁶ The lands were classified as part of Parcel A or Parcel B; the Parcel B lands may not be used for recreational facilities without the approval of both the Navajo Tribal Council and the NPS.

The Glen Canyon enabling legislation reiterates those protections and also prohibits the Secretary from acquiring lands held in trust for any Indian Tribe "without the concurrence of the tribal council." As is the case in Lake Mead, the NPS may not exercise significant regulatory control over the actions of the Navajo Tribe on Navajo lands. On NPS lands, the regulatory controls that are otherwise applicable to persons are equally applicable to Navajos and other Native Americans. In most circumstances, NPS and the Tribe should be able to work together to accomplish mutually desirable goals and objectives.

SECTION VII

ENDNOTES

1. In 1842, Martin v. Waddell (41 U.S. at 416 stated, "When the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged to the crown or the parliament, became immediately and rightfully vested in the state."
2. 161 U.S. 519 (1896)
3. Ibid. at 522
4. Ibid. at 528
5. Including among others: the Lacey Act (which prohibits interstate transportation of wild animals or birds killed in violation of state law; prohibits the importation of certain bird species; and authorizes federal action to protect and restore game and wild birds. 16 U.S.C. 701 et. seq.); the Migratory Bird Act in 1913 and the Migratory Bird Treaty Act in 1918; the Fish and Wildlife Coordination Act in 1934 (16 U.S.C. 661 - 667e); and the Endangered Species Act (16 U.S.C. 1531 - 1543) in 1976.
6. 252 U.S. 416 (1920)
7. Ibid. at 434-5 (emphasis added)
8. 410 F. 2d 1197 (1969)
9. Ibid. at 1201 (emphasis in the original)
10. 426 U.S. 529 (1976)
11. 426 U.S. 539, 541

12. 16 U.S.C. 1 ("The service thus established ... shall promote and regulate the use of the Federal areas known as parks, monuments, and other reservations ... which purpose is to conserve the scenery and the natural and historic objects and the wild life therein ...") Emphasis added.
13. 441 U.S. 322 (1979)
14. Ibid. at 336
15. 640 F. Supp. 164 (S.D.W.Va. 1986)
16. U.S. v. Moore, 640 F. Supp. 164 ("In support of its position, the State submits that ownership of the river bed and all wild animals are vested in the State as sovereign..." The Court responded to this contention by saying "... the power of the United States to regulate and protect the wildlife living on federally controlled property cannot be questioned.")
17. U.S. Constitution, Article VI
18. 1 C. Kappler Indian Affairs -- Laws and Treaties 809
19. 16 U.S.C. 223 (repealed by Grand Canyon Enlargement Act, January 3, 1975)
20. The lands may be used for traditional purposes, the lands are available for agricultural and grazing purposes on a sustainable basis, a study of land uses that "shall not be inconsistent with, or detract from, park uses and values" was to be undertaken, that no commercial mining or mineral production, timber production, or commercial or industrial development is permitted on the reservation lands, that hunting and recreational uses of the lands by non-members is permitted, and that except for the uses specified, the lands were to remain "forever wild and no uses shall be permitted ... which detract from the existing scenic and natural values of such lands." 16 U.S.C. 228i(b)(7).
21. 16 U.S.C. 228i(e)
22. 16 U.S.C 460n-2(b) and (c)

23. 16 U.S.C. 460n-2(d)
24. 16 U.S.C. 460n-6
25. P.L. 85-868, September 2, 1958
26. 16 U.S.C. 460dd-1(b)

VIII. Issues

In this section, we will examine three issues, one from each of the three parks. Each draws, in part, on some of the principles discussed in the preceding sections. The purpose is to provide relevant background and analysis that may assist park managers in reaching decisions or that may help them proceed once those decisions are made. Obviously, there may be factors not taken into account in these analyses that might also influence the manager's decisions.

A. Glen Canyon National Recreation Area

The State of Utah has proposed the introduction of an exotic species--the rainbow smelt--into Lake Powell. At the time the lake first filled, there were fairly high levels of nutrients--nitrogen and phosphorus--available in the lake from the decomposition of vegetation flooded by rising waters and from initial dissolution of available minerals in the rocks. Because of the high levels of nutrients, the fishing was quite remarkable. The quantity and size of the catch put Lake Powell in the category of world class fisheries. As the lake reached capacity and the natural sources of nutrients in the system declined to levels consonant with normal reservoir levels, the fishery began to decline, in both numbers and size of fish caught. The State has indicated that it would like to introduce rainbow smelt because it believes the smelt would function as a forage fish in the deeper waters of the lake where there is limited forage available now. Fisheries biologists are not sure whether the smelt will serve that role and there is continuing debate as to the effects of the smelt in the Colorado River ecosystem. Of particular concern are the potential effects to several endangered species in the Colorado River system downstream from Glen Canyon Dam and NPS is its responsibilities under the Endangered Species Act.

The NPS Management Policies state that "reservoirs ... in special use zones represent altered environments that may reduce populations of some native species of fish and encourage others. The NPS may cooperate with state fish and game officials to work out programs of stocking reservoirs ... for purposes of recreational fishing, using either exotic or native species, or both."¹ They go on to say, however, "The new ecological environments and niches created by the alteration of natural waterways may be most successfully filled by exotic fish species; nevertheless, management activities will give precedence to native species over exotics wherever natives are adaptable to the altered environment." (emphasis added)²

There appear to have been only minor efforts to determine whether (1) a new forage fish is warranted, or (2) a native species could serve the proposed function in the ecosystem. Glen Canyon has been most concerned with the virtual certainty that any fish introduced to Lake Powell will migrate to the Grand Canyon.

The discussions in Sections Three and Seven above have examined in some depth the extent of Federal authority to regulate activities related to NPS purposes and about which the NPS has developed a regulatory scheme. In this case, the Secretary has promulgated regulations which specifically address this issue and state, at 36 CFR 2.1 (a)(2), "Introducing wildlife, fish, or plants, including their reproductive bodies, into a park area ecosystem" is prohibited. The regulations in 36 CFR 2.1 are applicable to all units of the system regardless of jurisdictional status. Of primary importance to the question at hand is the degree to which natural ecosystems (i.e., the San Juan River, the Colorado River upstream of the recreation area, and tributaries like the Dirty Devil, Escalante and Paria Rivers) could be adversely affected by such introductions if the regulation is not adhered to by the State of Utah.

Other regulations promulgated by the Service in 36 CFR 2.2 and 2.3 that relate to wildlife and fishing are not applicable to lands and waters under proprietary jurisdiction³. It should be noted that, by and large, the NPS regulations are directed at protecting parks from the activities of individuals and while their strictures may also apply to some actions anticipated or proposed by the States, that is not their primary intent.

A permit to allow otherwise prohibited activities may be permissible under the NPS regulatory scheme under certain limited conditions. NPS must find under section 1.6 that "the activity authorized by the permit" is "consistent with applicable legislation, Federal regulations and administrative policies, and based upon a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted."⁴ Given the potential effects to endangered species downstream and the uncertain effects on the lake ecosystem, it is unlikely that section 1.6 could be successfully invoked in this case at Lake Powell. Moreover, at least a part of the differences between the State and the NPS appears to be based on the "type" of recreational experience for which NPS manages Glen Canyon. The State apparently wishes to manage for a trophy-type fishery while the NPS management focusses more on a mix of recreational activities that includes fishing but not to the exclusion of perpetuation of the remnants of the pre-existing ecosystem. The NPS has indicated that it believes there are alternative, equally valid objectives for the fishery that do not include smelt and has proposed that the State, NPS, and the U.S. Fish and Wildlife Service jointly prepare a fisheries management plan for Glen Canyon.

Numerous statutes and policy statements anticipate and direct cooperation between the Federal Government and the States where wildlife and their management are of concern⁵. The State and NPS have cooperated successfully on a number of wildlife management issues--in circumstances where the goals of the State and NPS management responsibilities were consonant. The problem here is a conflict between goals and responsibilities. Analyses of similar issues would suggest that were this situation to end up in the courts, it is likely that the NPS would prevail as a matter of law. However, it

does not seem particularly productive at this point to contemplate legal action; cooperation and a process by which mutual understanding and acceptance of an alternative that satisfies both is preferable.

B. Lake Mead National Recreation Area

A number of entities have apparently applied to Lake Mead to obtain rights-of-way for water pipelines to cross lands of the recreation area. In some cases, these applicants may have been granted conditional rights to the water under the State's water rights system. This case study deals with the question of whether the park is obliged to issue rights-of-way to these applicants.

Volume 36, of the Code of Federal Regulations section 14.10, states:

(a) The Act of March 3, 1921 (41 Stat. 1353; 16 U.S.C. 797) provides that no right-of-way for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits as then constituted of any national park or monument, shall be approved without the specific authority of Congress.

As discussed above, the term "national park or monument," has been expanded to mean any unit of the "national park system," which is defined in 16 U.S.C. 1c to "include any area of land and water now or hereafter administered by the Secretary of the Interior through the NPS for park, monument, historic, parkway, recreational, or other purposes." Lake Mead is a unit of the national park system and as a consequence, the quoted section of the Code of Federal Regulations applies to Lake Mead as it applies to all units of the system. It also appears that the phrase "within the limits" should be interpreted to mean within the exterior boundaries of the park so that the limitations of the statute apply to all lands within the recreation area not merely those that are Federally owned.

In the specific case of Lake Mead, the legislation that established the park in 1964,⁶ states:

All lands within the recreation area which have been withdrawn or acquired by the United States for reclamation purposes shall remain subject to the primary use thereof for reclamation or power purposes so long as they are withdrawn or needed for such purposes.

Thus, any "works for the storage or carriage of water" associated with the reclamation purposes for which Lake Mead was constructed are permissible within the recreation area. However, the language of the statute apparently limits "reclamation purposes" to those

exercised by the Bureau of Reclamation (or its agents) rather than those exercised by any private individuals, because it limits those purposes to lands owned by the United States.

There are no explicit references to rights-of-way in the Lake Mead legislation. This is in contrast to the legislation for Glen Canyon, for example, which contains the following section:

The Secretary shall grant easements and rights-of-way on a non-discriminatory basis upon, over, under, across, or along any component of the recreation area unless he finds that the route of such easements and rights-of-way would have significant adverse effects on the administration of the recreation area.⁷

Other parks that have specific right-of-way authorities include Yosemite, Hawaii Volcanoes, and Rocky Mountain National Parks.⁸ While the Lake Mead legislation lacks specific authority, other statutes have been interpreted to confer such authority.

16 U.S.C. 79 (entitled "Rights-of-Way for Public Utilities") states:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electric power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses ... Provided, that such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: ... And provided further, That any permission given by the Secretary of the Interior under the provisions of this section, ... may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

REPEALS

Section repealed by Pub. L. 94-579, title VIII, § 706(a), Oct. 21, 1976, 90 Stat. 2793, effective on and after Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System.⁹

The phrase, "other reservations of the United States" in this statute has been interpreted by the Solicitor's legal staff of the Department of the Interior to include all units of the National Park System, in addition to Yosemite and Sequoia National Parks which are named in the statute. Consequently, if a water pipeline is proposed that would promote the purposes enumerated in the Act (irrigation, mining, quarrying, manufacturing or cutting of timber or supplying water for domestic, public or other beneficial uses) and would be compatible with the public interest in a finding by the Secretary of the Interior, permission may be given for such a right-of-way. Such a right-of-way may be revoked and conveys no interest in land.¹⁰ As a consequence of these interpretations and statutes, it appears permissible to issue such rights-of-way. There is not requirement, however, that requires the issuance of such rights-of-way. A finding that issuance is "not incompatible with the public interest" is required.

C. Grand Canyon National Park

The staff of Grand Canyon National Park has expressed some concern over proposals to engage in activities that would take place solely on lands below the high water mark of the Colorado River as a way to evade NPS regulation of those activities. As a consequence, this case study examines ownership of the bed of navigable bodies of water and the regulatory authorities related to such ownership. The question of the ownership of the bed of the Colorado River in Grand Canyon is relevant here because ownership has been cited as the basis (or as a basis) for the exercise of jurisdiction or control over actions and activities on the surface of waters. For navigable waters, the bed of the waterbody passes from the Federal Government to the State upon its admission to the Union.

This has been explained as follows:

For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and soil under them for their absolute common use, subject only to rights surrendered by the Constitution to the general government.¹¹

States admitted to the Union after the original thirteen receive the same rights as the original States under what has been called the "equal footing doctrine." That theory assumes that the lands acquired by the United States were held in trust for new States so

that they might be admitted to the Union under the same conditions--on an "equal footing"--as the original States.¹² Because the Colorado River is navigable for most of its length in the study area, the bed of the Colorado is owned by the States of Arizona, Utah, California, and Nevada as it flows through the respective States' lands.

There was some question, until recently, as to whether a Federal withdrawal of land prior to statehood would result in the riverbed's not passing to the State upon statehood. Two cases have recently been decided that have resolved the issue firmly for the States--one involving a withdrawal for an Indian reservation, the other involving a withdrawal for other Federal purposes. In Montana v. United States¹³, the State sued the Federal Government for the title of the bed of the Big Horn River. Because the river is encompassed within the Crow Indian Reservation which was established in 1868, long before Montana was admitted to the Union in 1889, the Crow Tribe asserted that it could regulate the hunting and fishing of nonmembers of the Tribe based on that ownership. In its decision, the U.S. Supreme Court said:

Rather, the ownership of land under navigable water is an incident of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, title to the land is governed by State law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce ... A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain"..."¹⁴

Thus, in this case, the Court found for the State and its claims of ownership. In Utah Division of State Lands v. United States¹⁵, the Supreme Court held that in the Federal withdrawal of Utah Lake, a navigable body of water, " ... Congress did not clearly express an intention to defeat Utah's claim to title to the lakebed under the equal footing doctrine upon entry into statehood."¹⁶ In the case at Grand Canyon, several reclamation withdrawals and withdrawals for Indian reservations (Navajo, Havasupai, and Hualapai) preceded Arizona's admittance to the Union in 1912. Following the decisions in Montana and Utah Division of State Lands, in the absence of specific and explicit language in the treaties and reservations for other Federal purposes and in the statute that admitted Arizona to the Union, we must assume that Arizona holds title to the bed of the Colorado River in Grand Canyon.

Assuming then that the bed of the Colorado River has passed to the State (and not, consequently, to any Indian tribes), what authority or control may the Federal Government exercise over such waters? Does State ownership of the bed of the River impinge on or supersede Federal authority? Again, we are fortunate to have a case to which the NPS was a party to illustrate and clarify this issue, a case briefly described in another context above. In an action concerning Voyageurs National Park in Minnesota, U.S. v. Brown¹⁷ was decided by the Eighth Circuit Court of Appeals in 1977. Mr. Brown was cited by the NPS for violating NPS regulations that prohibited possession of a loaded firearm and hunting wildlife in a national park. Among other arguments, Mr. Brown contended that the "state had not relinquished ownership of the waters." The Court essentially found the question of ownership to be irrelevant. It said:

Assuming arguendo that the state did not cede jurisdiction, we conclude that the Federal regulations prohibiting hunting in Voyageurs Park were a constitutional exercise of congressional power under the Property Clause.

The Property Clause of the Constitution provides that 'Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' When Congress acts, the Federal legislation necessarily overrides conflicting state laws under the Supremacy Clause," [references omitted]¹⁸

The Court of Appeals went on to say:

Again assuming the state did not cede jurisdiction over the waters to the Federal Government, the instant case presents the question left open in Kleppe: whether the Property Clause empowers the United States to enact regulatory legislation protecting Federal lands from interference occurring on non-Federal public lands, or, in this instance, waters...

... we view the congressional power over Federal lands to include the authority to regulate activities on non-Federal public waters in order to protect wildlife and visitors. [references omitted]¹⁹

The Court expressly addressed the question of the ability of the NPS to regulate activities within park boundaries where the waters (and the beds of the waterbodies) are owned by the State. It said the ownership is not relevant when the Federal Government is acting under the Property Clause to regulate activities to protect visitors and wildlife. Therefore,

under this reasoning, if there is a reasonable connection between the regulation and the purpose for which the park was established, the NPS can act to promote and protect park purposes even when such actions may conflict with State authorities.

Of course, the Federal Government will not in all circumstances and under any conditions want or need to act in ways that override State law. There are times when the Federal Government may "choose to select a state rule as the Federal rule."²⁰ Succinctly stated, it is the option of the Federal Government to control activities incident to or in pursuit of the Federal purpose, even where there may be conflicting State law.

SECTION VIII ENDNOTES

1. NPS Management Policies, Chapter 4:8
2. op. cit., Chapter 4:8
3. For example, 36 CFR 2.3(g) which deals with fishing states, "The regulations in this section shall be applicable on privately owned lands and waters under the legislative jurisdiction of the United States." "Legislative jurisdiction" is defined in section 1.4(a) as "lands and waters under the exclusive or concurrent jurisdiction of the United States." Thus, where NPS has proprietary jurisdiction as at Glen Canyon and parts of Lake Mead, the limitations on privately owned lands and waters do not apply, not because of Congressional direction but because that policy choice has been made by the NPS. None of the Court cases reviewed has dealt with a situation where NPS has chosen not to exercise authority over privately-owned lands within NPS units.
4. 36 CFR 1.6(a)
5. For example, the Sikes Act (not applicable to NPS lands but applicable to Forest Service, Department of Defense and BLM lands among others) which provides for the application of State hunting, fishing and trapping laws on the Federal lands subject to jointly developed conservation and rehabilitation programs. Fish stocking programs have been jointly operated by the States and the Federal government.
6. 16 U.S.C. 460n
7. 16 U.S.C. 460dd-6
8. See 16 U.S.C 79, 16 U.S.C 393, and 16 U.S.C. 193
9. Feb. 15, 1901, ch. 372, 31 Stat. 790; Mar. 4, 1940, ch. 40 § 2, 54 Stat. 43
10. The Federal Land Policy and Management Act (FLPMA) repealed this section for rights-of-way on the public lands and for lands in the National Forest System. FLPMA, 90 Stat. 2793, was enacted October 21, 1976.

11. 41 U.S. (16 Pet.) 367, 410 (1842)
12. 44 U.S. (3 How.) 212 (1845)
13. 450 U.S. 544, 67 L Ed 2d 493, 101 S Ct 1245 (1981)
14. 67 L Ed 2d 501-2 (reference omitted)
15. 482 US 193, 96 L Ed 2d 162, 107 S Ct 2318 (1987)
16. 96 L Ed 2d 163
17. 552 F. 2d 817 (1977), cert. denied, May 21, 1977, 97 S. Ct. 2666
18. U.S. v. Brown, 552 F. 2d 817, 821 (1977)
19. Ibid., at 822
20. Hughes v. Washington, 389 US 290 (1967)

IX. Recommendations

In preceding sections we have addressed some of the Constitutional bases for Federal authority and action. As evidenced there and in the discussion of NPS authorities to regulate activities, State-Federal relations, especially related to environmental protection and natural resources policy are evolving. The same is true of relations between Federal agencies. Changes in public attitudes and demands for action have resulted in Federal initiatives in policy areas formerly reserved to the States by tradition and practice. This has been especially so with respect to national parks.

Traditional ways of dealing with conflicts between the States and Federal government have tended to center on either a case-by-case solution to the perceived problem or, if that fails, by Federal preemption of State interests. Neither approach has been particularly successful--largely because both result in conflict and uncertainty. Both approaches also generally result in responses that fail to address either the national constituency of parks in favor of local interests or the converse--accommodation of local interests without attention to precedence and at the expense of the national integrity of the national park system.

In considering any of the issues related to NPS administration of resources along the Colorado River, it may be useful to keep in mind different ways that the NPS can encourage improvements in communication with the States--both with respect to the general principles of NPS stewardship of resources and the specifics of any proposals for projects or programs in parks. The more that States and NPS share a vision of what parks are for and are intended to be, the more likely it will be that conflicts will be avoided or defused.

Among the potential tools available for NPS managers in this context are:

1. Planning processes at the State, Federal, and local level that are integrated with or take account of NPS planning processes. It is axiomatic that conflict often arises when expectations are thwarted. If the planning processes of other Federal agencies, the States or localities are fully cognizant of and coordinated with NPS planning processes, unreasonable or unwitting expectations may not develop. Adopting such a method puts a burden on the NPS to address its planning documents not just to an internal audience; planning documents need to effectively communicate the full range of NPS responsibilities and needs to a broader audience that includes all who might be affected by NPS decision-making. It also puts a responsibility on NPS staff to communicate with this broader constituency on a regular basis.
2. Help to develop an ethic that views NPS lands and resources not as commodities but as an expression of the national conservation and stewardship of unique resource values. So long as States, other Federal agencies, and localities view NPS

lands as commodities to profit from or to exploit, it will be difficult to ensure that there is cooperation toward mutually acceptable means and objectives. The widespread participation of private industry in the 20th anniversary of Earth Day may signal significant changes in public attitudes toward resource protection and conservation.

3. Work with other Federal agencies to ensure that critical resource issues are addressed in broad terms and that the compartmentalization that often characterizes Federal resource management is avoided. Differences in agency and bureau mandates can result in blind adherence to policy positions that serve neither the public nor the Congressional mandate. Only an education process that helps each bureau understand the constraints and mandates under which other bureaus act can serve to limit such ineffectual and pointless activities. It is hoped that this study, or parts of it, may prove to be an effective tool for communicating NPS management responsibilities to a broader Federal audience.

In any area involving resources management, there are always issues where judgment and flexibility will be required. Effective use of the skills of negotiation and mediation are necessary as are preserving NPS prerogatives. The issues discussed in the preceding section demonstrate just how difficult and complex protecting and managing parks can be.

