

The Lesson of National Rifle Association v. Potter

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November, 1992

ABSTRACT:

A 1986 U.S. District Court for the District of Columbia decision (National Rifle Association v. Potter) is one of the most significant extant cases that interprets the language of the Organic Act (16 U.S.C. 1-3, et seq.).

The National Rifle Association (NRA) case did two things. First, the case enlightened the Service as to the correct interpretation of its single mission, namely "conservation." Secondly, the court defined "conservation" to mean "preservation" rather than "wise use."

In 1983, the National Park Service revised its regulations at 36 CFR Parts 1 and 2 to preclude certain recreational and commercial consumptive uses of natural resources in parks, except where such activities were specifically and directly provided for in law. Consequently, the NPS moved to halt trapping in a number of units whose enabling acts did not specifically provide for trapping.

The NRA sued the NPS, seeking to forestall the elimination of trapping from the units in question. The NRA argued that the Organic Act directive to the NPS "to conserve...wild life" is "certainly not inconsistent with properly regulated hunting and trapping." A reasonable person, they argued, could interpret "conserve" to mean "limited and wise use." The NRA's interpretation, though reasonable, was incorrect.

The NPS contended that, absent a specific grant of authority to permit a consumptive use of park wildlife by trapping, the word "conserve" precluded the Service from permitting trapping. The NPS interpretation that "conserve" means "preserve" or "no consumptive use" prevailed in court.

The NPS has woven into its regulations the principle that consumptive use of natural resources (with the notable exception of recreational fishing) may be permitted in parks, ONLY where specifically provided in law.

I. THE EVOLUTION OF AN IDEA

Laws, like ideas, evolve with time. In 1936 Franklin Roosevelt described the Supreme Court as having a "horse and buggy" interpretation of the Interstate Commerce Clause, as that Court struck down several key pieces of New Deal legislation.

But by 1964, 28 years later, the Congress enacted a law banning discrimination on the basis of race in the provision of public accommodations, and based that law on that same Interstate Commerce Clause of the Constitution. The Supreme Court, under Chief Justice Earl Warren, found in the Interstate Commerce Clause a sufficient constitutional basis for the Civil Rights Act of 1964.

Similarly, the notion of the National Park Service's responsibilities have also evolved. I have no doubt that historians of the National Park Service are correct when they say that NPS founders were more intent on public enjoyment than they were on resource preservation.

We need only realize that even in Yellowstone, when established in 1872, one could hunt wildlife, though not wantonly. Not until 1894, twenty-two years later, did Congress proscribe hunting in that park (16 U.S.C. 26).

In the 1916 Organic Act (16 U.S.C. 1) that prescribed the mission of the National Park Service, Congress used the phrase "to conserve the scenery and the natural...objects and the wild life therein...unimpaired for the enjoyment of future generations." In context of the time, people like Gifford Pinchot (Chief Forester of the U.S. Forest Service until 1910) used the word "conservation" to mean a utilitarian form of stewardship. Could the word "conservation" in the Organic Act mean the same? Was it reasonable to allow consumptive uses in parks, as long as such uses were guided by principles of sound stewardship?

Even the early leadership of the parks, represented by Mather and Albright believed that public enjoyment should take precedence over park's primeval character. It was in the Forest Service, not the NPS, that a group Federal employees formed who advocated "preservation." Among these were Arthur Carhart, Aldo Leopold and Robert Marshall.

The notion of parks as areas of grand geologic scenery, of natural wonders like geothermal features, gave way slowly to a notion that parks conserve ecological integrity. When Congress directed the Secretary of the Interior in 1929 (45 Stat. 1443) to study the Everglades of South Florida, Congress did so with some doubt as to whether the area merited inclusion in the National Park System. Today, if an area like the Everglades were not protected, few would doubt its merit for inclusion in the National Park System. Our ideas about parks and the laws that govern parks have changed.

II. CONGRESS REVISITS THE NATIONAL PARK SYSTEM

To a group of National Parks and Monuments, largely carved from the public domain of the West, Congress and the President, beginning in 1933, added units with new designations. Parkways, Seashores, Recreation Areas, Historic Sites, Battlefields, and Memorials appeared on the NPS map.

After a relatively quiet period during the 1950's, a new surge of growth from 1961 to 1980, transformed the National Park System still further. While some new units were reserved from the public domain or pre-existing National Forest (e.g. Canyonlands and North Cascades), many more units were added to the roster of less traditional titles. New kinds of National Park System units appeared, e.g. National Preserves, National Rivers.

In response to the growth of the 1960's under Presidents Kennedy and Johnson, the Secretary of the Interior prescribed a management scheme that classified units according to type: natural, historical and recreational. The management categories specified lesser protection of resources in recreational units. The NPS regulations at 36 CFR also reflected the lesser standards of protection afforded natural resources in recreational units.

In 1970, Congress passed an Act for the Administration of the National Park System (16 U.S.C. 1a-1 and 1c(b)). That act made clear that NPS managers were not to construe the types of units, based upon title, as three different park systems, each governed by disparate principles. The 1970 law said: "Each area within national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area. In addition the provisions of this Act, and the various authorities relating to the administration and protection of the areas under the administration of the Secretary of the Interior through the National Park Service, including but not limited to the Act of August 25, 1916, as amended...shall, to the extent that such provisions are not in conflict with any such specific provision, be applicable to all areas within the national park system and any reference in such Act to national parks, monuments, recreation areas, historic monuments, or parkways shall hereinafter not be construed as limiting such Acts to those areas." (emphasis added)

In 1978, Congress, in a law expanding the boundaries of Redwood National Park, amended the 1970 Act for Administration with the following language: "Congress further reaffirms, declares, and directs that the promulgation and regulation of the various areas of the National Park System shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916...The authorization of activities...shall not be exercised in derogation of the values and purposes for which these various areas have been established except as may have been or shall be directly and specifically provided by Congress." (16 U.S.C. 1a-1) (emphasis added)

III. THE NPS REVISES ITS REGULATIONS

Heeding the Congress' reaffirmation and clarification of the Organic Act responsibilities, the Service proposed a thorough revision of regulations at 36 CFR Parts 1 and 2. Proposed on March 17, 1982 and made Final on June 30, 1983, the regulations adopt a philosophy that would ultimately be tested and upheld in the case of National Rifle Association v. Potter.

Congress directed that the NPS may not authorize activities in parks in derogation of park values and purposes EXCEPT where specifically and directly provided in law.

Specific sections of the 1983 regulations, consistent with that directive, prohibit certain commercial and recreational natural resource consumptive activities in parks EXCEPT as may be specifically and directly provided in law. Among the prohibited activities that require specific provision in law before they are allowed in a park are:

- * gathering natural products (36 CFR 2.1), including such gathering for ceremonial or religious purposes (36 CFR 2.1(d));
- * hunting, trapping (36 CFR 2.2);
- * commercial fishing (36 CFR 2.3(d)(4)), and
- * grazing of livestock (36 CFR 2.60).

Moreover, the preamble to the final rulemaking of June 30, 1983 adds other activities to the category of generally prohibited activities. The preamble states that "...activities such as timber harvesting...mining¹...are generally prohibited." in parks. (48 FR 30253).

The new regulations halted on-going trapping in 11 NPS units. The enabling acts for the 11 units had neither prohibited nor specifically and directly provided for trapping. Under the previous regulatory scheme, the NPS interpreted this legislative silence as sufficient for the NPS to permit regulated and controlled trapping. Now, the Service interpreted its mandate as requiring a halt to trapping EXCEPT in those units where directly and specifically provided in law. Since no specific law prohibits trapping (or hunting, timber harvesting, mining, or commercial fishing in the National Park System), one can only conclude that the Service finds trapping, and similar activities, in derogation of park values and purposes, and therefore generally prohibited under the Redwood Amendments of 1978. Thus the Service may permit such activities only where provided for in law.

1. The NPS need not rest solely on the Redwood Amendment argument that mining Federally-owned minerals in parks is in derogation of park values and purposes and therefore may be permitted only in units where provided in law. Units of the NPS are closed (implicitly or explicitly) to the location of mining claims, closed by law to leasing Federal minerals and to sale or other disposition of Federal mineral materials.

IV. THE NRA SUES AND THE COURT DECIDES

The National Rifle Association did not accept the principle in the new 36 CFR 2.1, that trapping was in derogation of park values and purposes, and therefore was prohibited in parks EXCEPT where provided in law.

Instead, the NRA believed that the NPS possessed discretion to allow trapping in its units, EXCEPT where Congress had specifically prohibited trapping. The NRA position was not a radical one. The NRA position was exactly the position that the NPS itself followed prior to the 1983 rulemaking. Moreover, the NRA argued that trapping should be allowed to continue in the 11 national recreation areas because it was an "historical" activity¹.

Taking this position to court, the NRA sued the Department of the Interior, represented, at the time, by J. Craig Potter, Acting Assistant Secretary of the Interior for Fish and Wildlife and Parks.

The contrasting arguments of the NRA and the NPS were mirror images. The NRA said that the NPS could permit trapping, (controlled and regulated so as not to derogate park values), EXCEPT where specifically prohibited by law. The Service argued that trapping may not be permitted under any circumstances in a park, EXCEPT where provided for in law.

In February, 1986, The U.S. District Court for the District of Columbia found that the NPS interpretation of its protective mandate was the correct one.

1. In many existing units of the System, mining, timber harvesting, including clear-cutting, water diversion, grazing, occupancy, farming, hunting and trapping have occurred. The "historical activity" argument ignores that Congress established many National Park System units precisely to safeguard parks from such activities, not to perpetuate them.

V. THE CONSEQUENCES

What consequences would result, if the case of NRA v. Potter had been different?

Under the NRA's logic, the NPS could permit trapping, and presumably hunting, commercial fishing, and subsistence uses, in parks if such activities simply met two tests.

The two tests are that:

1. Congress did not specifically prohibit the activity; and
2. The activity would be conducted in a limited fashion that did no long term harm to park purposes and values.

Had the NRA position prevailed in court, the NPS could permit trapping (or hunting) in the 11 national recreation areas. The NPS could permit trapping or hunting in many other units, such as Canyonlands National Park or Chaco Culture National Historical Park, whose enabling acts neither provide for, nor prohibit trapping or hunting. If trapping could be conducted so as not to harm the purposes and values of the above-mentioned units, then the NPS could still permit trapping in them.

The NPS position that trapping may not be permitted in the national recreation areas, (or in a Canyonlands or a Chaco Culture), prevailed. The NPS rested its position solely on the argument that the units' enabling laws do not specifically and directly provide for trapping. Simply stated, trapping in National Park System units requires explicit authority in law.

Even were studies to show that the NPS could permit a certain take of wildlife by trapline or gun in these units, the NPS argued that it could not permit trapping or hunting in them. Thus, the conduct of such studies would be pointless. The study findings would be immaterial. It is likely a waste of valuable research dollars to study the effects of hunting in Canyonlands, or trapping in Pictured Rocks. Since hunting and trapping are not specifically and directly authorized in those units, they are, therefore, not permitted.

VI. THE FUTURE

Will the Park Service adhere to the position it won in court in 1986? Or will the NPS surrender unilaterally, and, adopt the NRA position under the weight of political pressure? It would not be the first time the NPS gave up administratively what it had won judicially.

The NPS is considering a rule at Glacier Bay that proposes the continuation of commercial fishing in those parts of the unit not open by law to commercial fishing, IF studies show no lasting harm to park resources. The rule, by permitting commercial fishing in parts of Glacier Bay where not specifically provided in law, adopts the logic of the NRA's defeated argument in support of trapping.

The proposed rule reverses the principle of the 1983 regulations, fought for and won in court, that commercial fishing in parks, like trapping and hunting, requires specific authority in law.

A second question: Will the NPS apply the regulatory principle governing trapping, hunting and commercial fishing to recreational fishing? Recreational fishing is a glaring anomaly. Recreational fishing in parks still rests on the premise that recreational fishing is permitted except where specifically prohibited. Someday we will have to address this inconsistency.

For now, and for the future, the Service would do well, to adhere to the principle that imbues its regulations, for which it fought in court, and won. The principle is that the NPS will not permit hunting, trapping, commercial fishing, timber harvesting and subsistence activities in parks except where provided for in law.

To permit hunting, commercial fishing, trapping, logging of Federal timber, subsistence in parks, without specific authority of law, even if "no harm to park purposes and values" is alleged, does harm to the very notion of a park. Such a standard would result in long term erosion of NPS protective authority. For there are, in fact, enabling acts for many National Park System units that are silent on a host of consumptive or commercial uses of natural resources. Such silence must never be interpreted as permissive.

Congress has provided for commercial and recreational consumptive uses of natural resources in a wide number and variety of units. Congress knows how to provide for such uses. May the NPS continue to argue that ONLY Congress may provide for such uses in parks, and then, only under the conditions and terms specified in law.

APPENDIX I

NATIONAL RIFLE ASSOCIATION v. POTTER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL RIFLE ASSOCIATION)
OF AMERICA, et al.,)

Plaintiffs,)

v.)

J. CRAIG POTTER, Acting)
Assistant Secretary for)
Fish and Wildlife and Parks,)
et al.,)

Defendants.)

Civil Action No. 84-1348

FILED

FEB 24 1986

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

In this action for declaratory and injunctive relief plaintiff National Rifle Association of America ("NRA") and plaintiff-intervenor Wildlife Legislative Fund of America ask the Court to set aside a certain regulation promulgated under the aegis of the Secretary of the Interior which prohibit hunting and trapping in the National Park system except where specifically contemplated by Congress.¹ Upon consideration of cross-motions for summary judgment - the principal legal issue being the accuracy of the Secretary's divination of legislative intent and the material facts largely matters of history - the Court finds that the regulation is not "arbitrary, capricious, an abuse of

¹ The Court has jurisdiction under 28 U.S.C. §§ 1331 and 2201 (1982); review is in accordance with the Administrative Procedure Act ("APA") 5 U.S.C. § 701 et seq. (1982 & Supp. II 1985).

discretion, or otherwise not in accordance with law," 5 U.S.C. § 706, and defendants' motions for summary judgment will, accordingly, be granted and that of plaintiff denied.²

I.

The first national park, Yellowstone, was created by Congress in 1872 as a "public park or pleasuring ground for the benefit and enjoyment of the people." 16 U.S.C. § 21 (1982). By 1916, 13 national parks and 19 national monuments had been established, responsibility for their administration, however, having been dispersed among a number of government agencies, including the Departments of Interior, Agriculture and War. To provide more cohesive management for this expanding corpus of publicly-owned repositories of the nation's natural and historic heritage, Congress in that year created the National Park Service ("NPS"), whose mission, it said, was:

[To] promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified ... by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic

² Named Defendants are J. Craig Potter, Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, and the National Park Service. Defendant-intervenors are the National Parks and Conservation Association, Defenders of Wildlife, the Humane Society of the United States, the Wilderness Society, and the Sierra Club. All parties except plaintiff-intervenor Wildlife Legislative Fund of America have filed motions for summary judgment, defendant-intervenors filing jointly.

objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (1982) (hereinafter, the "Organic Act"). The Secretary of the Interior was authorized to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks" 16 U.S.C. § 3 (1982). Although the Secretary was permitted in his discretion to provide "for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations," id., the paramount objective of the park system with respect to its indigenous wildlife, and the philosophy which came to pervade the new Park Service to whom it was entrusted, was, from the beginning, one of protectionism. Witness an early directive from the Secretary of the Interior to NPS' first director: "[h]unting will not be permitted in any national park." Administrative Record ("A.R.") Doc. 1 at 70.

Beginning in the late 1930's, Congress began to add to the system a number of "nontraditional" park areas, such as national seashores, lakeshores and scenic riverways, in many of which Congress itself specifically undertook to authorize hunting, trapping and fishing as permitted recreational activities. In the 1960's, in recognition of the heterogeneous character of the territories it was now overseeing, the Park Service evolved on its own a concept of "management categories" as a means to

differentiate the administration required for them. Under the new taxonomy, outlined in a memorandum in July of 1964 from then-Secretary of the Interior Udall to the Director of the Park Service, the park system was divided into three categories - natural, historical and recreational - with the policies for their governance to reflect the nature of the areas and the uses to which they had historically been put. See A.R. Doc. 6. Thus, in the case of recreation areas, which had traditionally accommodated multiple uses, the Park Service began to allow hunting, trapping and fishing on its own initiative if otherwise in accordance with federal, state and local laws. See A.R. Doc. 9 at 32; 31 Fed. Reg. 12,750, 12,754 (1966).

Two subsequent amendments to the Organic Act, however, caused the Park Service to doubt the extent of its autonomy in the matter. In a 1970 amendment, known as the General Authorities Act, 16 U.S.C. §§ 1a-1, 1c (1982), Congress declared:

[T]hat the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States . . . ; that 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; . . . and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system.

16 U.S.C. § 1a-1 (emphasis added). The Act continued: "[e]ach area within the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area," as well as any other applicable authorities, "including, but not limited to the [Organic Act]."

16 U.S.C. § 1c (1982). Eight years later, in a rider to the Redwood National Park Expansion Act, Pub. L. No. 95-250, 92 Stat. 163, Congress reiterated its intention that:

[T]he 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], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

16 U.S.C. § 1a-1 (emphasis added). Perceiving in these amendments an implied reproof for having strayed from the true purpose of the Organic Act (and, specifically, for its "management categories" system), NPS concluded that Congress conceived of the park system as an integrated whole, wherein the Park Service was to permit hunting and trapping only where it had been specifically authorized, or discretion given it to do so, by Congress in the applicable enabling act. See A.R. Doc. 40; NPS Management Policies (1975), A.R. Doc. 18 at I-3; NPS Management Policies (1978), A.R. Doc. 19 at I-3.

Shortly thereafter NPS began the task of revising its regulations to bring them into harmony with the revealed congressional will by abandoning the "management categories." Proposed regulations were first published in the Federal Register on March 17, 1982, 47 Fed. Reg. 11,598 (1982), and, after consideration of the comments received, final regulations, including that presently in dispute, were published on June 30, 1983, to take effect on October 3, 1983. 48 Fed. Reg. 30,252 (1983).³ The contested regulation reads as follows:

§ 2.2 Wildlife protection.

(a) The following are prohibited:

(1) The taking of wildlife, except by authorized hunting and trapping activities conducted in accordance with paragraph (b) of this section.

. . .

(b) Hunting and trapping

(1) Hunting shall be allowed in park areas where such activity is specifically mandated by Federal statutory law.

(2) Hunting may be allowed in park areas where such activity is specifically authorized as a discretionary activity under Federal statutory law if the superintendent determines that such activity is consistent with public safety and enjoyment, and sound resource management principles. Such hunting shall be allowed pursuant to special regulations.

(3) Trapping shall be allowed in park areas where such activity is specifically mandated by Federal statutory law. . . .

³ Implementation of the hunting regulation was delayed three times, see 48 Fed. Reg. 43,174 (Sept. 22, 1983); 48 Fed. Reg. 54,977 (Dec. 8, 1983); 49 Fed. Reg. 7,125 (Feb. 27, 1984), but they finally took effect on April 30, 1984. The trapping regulation was also delayed until January 15, 1985, at the request of trapping supporters, to allow Congress to act on proposed legislation specifically authorizing trapping in certain areas, but the legislation was never passed.

(4) Where hunting or trapping or both are authorized, such activities shall be conducted in accordance with Federal law and the laws of the State within whose exterior boundaries a park area or a portion thereof is located. Nonconflicting State laws are adopted as a part of these regulations.
. . .

36 C.F.R. § 2.2 (1985) (emphasis added).⁴

II.

Plaintiff NRA filed this action on April 30, 1984, contending that the regulation arbitrarily and capriciously reverses a by-now venerable, and beneficent, Park Service policy of permitting hunting and trapping in recreational areas of the park

⁴ The regulations apply to all 338 units of the National Park System (including four areas administered by the Park Service under cooperative agreements with other agencies), of which 44 are considered recreation areas. See 36 C.F.R. § 1.2(1) (1985). Of these, 40 were established by federal enabling acts, 31 of which expressly permit hunting, and three of which leave the matter to the Secretary's discretion. Six units have enabling acts which are silent as to hunting: Padre Island National Seashore, Cuyahoga National Recreation Area, Golden Gate National Recreation Area, Indiana Dunes National Lakeshore, Santa Monica Mountains National Recreation Area, and Chattahoochee River National Recreation Area. In one of these, Padre Island National Seashore, the Park Service permits hunting because it reads the legislative history to evince Congress' intent to allow it. In another, Chattahoochee River National Recreation Area, hunting is not permitted, but plaintiff concedes that the legislative history indicates Congress' intent to prohibit it.

There are 11 recreation areas whose enabling acts are silent as to trapping: Assateague Island National Seashore, Bighorn Canyon National Recreation Area, Buffalo National River, Cape Cod National Seashore, Delaware Water Gap National Recreation Area, John D. Rockefeller, Jr. Memorial Parkway, New River Gorge National River, Ozark National Scenic Riverways, Pictured Rocks National Lakeshore, Saint Croix National Scenic Riverway, and Sleeping Bear Dunes National Lakeshore.

system in the sound, i.e., conservation-conscious, discretion of individual park superintendents, and that no express congressional command is, or has ever been, necessary to empower it to do so.⁵ Defendants respond that the philosophy of the Park Service, since its first expression in the Organic Act, has always been exclusively protectionist; that hunting and trapping have never been permitted in traditional parks and monuments; and that, while the Service may have succumbed to error in the late 1960's and 1970's, it has now acted to restore itself to grace by conforming its policy to a constant congressional intent of which it was pointedly reminded by the 1970 and 1978 amendments to the Organic Act.

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- ⁵ The predecessor regulation read, in pertinent part:
- (a) In natural and historical areas and national parkways.
 - (1) The hunting, killing, wounding, frightening, capturing, or attempting to kill, wound, frighten, or capture at any time of any wildlife is prohibited, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury.
 - . . .
 - (b) In recreational areas (except national parkways).
 - (1) Except as otherwise provided herein, hunting and trapping are permitted in accordance with all Federal, State and local laws and regulations applicable to these areas or portions thereof
- 36 C.F.R. § 2.32 (1982).

Standing

At the threshold the Court must determine whether plaintiff NRA has standing to bring this action, either on its own behalf or as the representative of its members. It is now familiar learning that Article III requires a plaintiff to show that it has suffered some actual or threatened injury as a result of the defendant's allegedly illegal conduct, that its injury is fairly traceable to the challenged action, and that it is likely to obtain redress by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). See also Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). In addition, the plaintiff must satisfy the so-called "prudential" requirement, viz., that its asserted interests "fall within the 'zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 475 (quoting Association of Data Processing Service Organization v. Camp, 397 U.S. 150, 153 (1970)); accord, American Friends Service Committee v. Webster, 720 F.2d 29, 49-52 (D.C. Cir. 1983); FAIC Securities, Inc. v. United States, 768 F.2d 352, 356-57 (D.C. Cir. 1985).

An organization has standing to sue in its representational capacity when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

The NRA asserts without contradiction that it is a not-for-profit organization with approximately three million members, many of whom are hunters and trappers who would like to pursue their avocations in the areas affected by the offending regulation. See Affidavits of James M. Norine, Director of Hunter Services, NRA. The Association's by-laws state that the purpose of the organization is "to promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth, conservation, and wise use of our renewable wildlife resources." First Aff. of James M. Norine at 2.⁶ Plaintiff contends that its members have suffered injury both in their inability to hunt and trap in the now-proscribed areas, and in their loss of the opportunity to convince individual park superintendents of the

⁶ Plaintiff also asserts that it represents the interests of trappers, as evidence of which it tenders its 1974 resolution endorsing trapping "as a legitimate use of our renewable wildlife resources when carried out by methods which are in full compliance with existing laws."

desirability of permitting hunting and trapping where those superintendents formerly had discretion to do so.⁷ The NRA reminds that regulations governing the park system should endeavor to accommodate the interests of all Americans in a safe and enjoyable National Park System, of whom hunters and trappers, too, must be numbered and, thus, fall within the relevant "zone of interests."

The Court concludes that the NRA does have standing to pursue this action in its representational capacity.⁸ NRA members have suffered a specific injury which is traceable to the federal defendants' actions and would be redressed by a favorable decision.⁹ Furthermore, the interests of its members are indisputably within the zone of interests protected by the regulations, namely, the right of all citizens to use the national parks in any manner consistent with the congressional mandate.

⁷ As an example plaintiff cites the Cuyahoga Valley National Recreation Area which had previously been the subject of a study as to the feasibility and desirability of permitting hunting therein. The effect of the new regulation, however, is to foreclose absolutely the Park Service's discretion to permit hunting notwithstanding an eventual favorable determination.

⁸ It need not, therefore, decide whether plaintiff has standing to sue in its own right.

⁹ It is well-established that the injury need not be economic in nature to satisfy Art. III requirements. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

Review of Agency Action

The Court of Appeals for this circuit has recently restated the analysis to be undertaken in determining whether agency action conforms to law:

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If, however, "the statute is silent or ambiguous with respect to the specific issue," we are not to give effect to our own estimation of intent, but must accept the agency's if it is "based on a permissible construction of the statute." A "permissible construction" has been helpfully defined as one that is "sufficiently reasonable to be accepted by a reviewing court."

FAIC Securities, Inc. v. United States, 768 F.2d at 361 (quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council, ___ U.S. ___, 104 S. Ct. 2778 (1984) and FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981)) (emphasis in original). The reviewing court is, thus, forbidden to substitute its judgment for that of the agency, but must consider only "'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc., 419 U.S. 281, 285 (1974) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971)), reh'g denied, 420 U.S. 956 (1975). See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S.Ct. 2778.

In the instant case, it is the intent of Congress, as expressed in the Organic Act, the amendments, and the enabling acts creating the individual park units, which is to be ascertained. Specifically, the Court must determine whether the Park Service has made a "permissible construction" of them as precluding hunting and trapping unless Congress says otherwise, or whether, as plaintiff argues, the absence of a direct prohibition should be construed as authorizing the Secretary to exercise his own good judgment in the matter.

"The starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). The Organic Act directs the Park Service to promote and regulate the use of the national parks "by such means and measures as conform to [their] fundamental purpose . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (emphasis added). Plaintiff contends that this language is certainly not inconsistent with properly regulated hunting and trapping, while defendants argue that "conservation" of wildlife means just that: safeguarding it from harm, whether from natural or human causes.

Although the language of the Organic Act, standing alone, may not be plainly inconsistent with the concept of limited hunting and trapping, plaintiff's interpretation of it is nevertheless inconsistent with that principle of statutory interpretation known as expressio unius est exclusio alterius, i.e., that omissions from enumerated specifics are generally presumed to be deliberate exclusions from the general unless otherwise indicated. See Sutherland, Statutes and Statutory Construction § 47.23 (1984). In the Organic Act Congress speaks of but a single purpose, namely, conservation; and the fact that Congress thereafter saw fit in the various acts creating individual units of the Park System to authorize hunting and/or trapping expressly (or to leave such matters to NPS' discretion)¹⁰ leads to a supposition that it expected that they would not be allowed to take place elsewhere.

It may also be significant that section three of the Organic Act permits the Secretary to "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any . . . parks, monuments, or reser-

¹⁰ See, e.g., 16 U.S.C. § 460n-4 (1982) (hunting and trapping shall be permitted in Lake Mead National Recreational Area); 16 U.S.C. § 460m-20 (1982) (Secretary "may permit hunting and fishing" in New River Gorge National River); 16 U.S.C. § 460m-10 (1982) (Secretary "shall permit hunting and fishing" in Buffalo National River); 16 U.S.C. § 460q-4 (1982) (Secretary "shall permit hunting and fishing" in Whiskeytown-Shasta-Trinity National Recreation Area).

vations." 16 U.S.C. § 3. Had Congress intended section one of the Act to allow the Secretary discretion to permit hunting and trapping - certainly a most efficient form of destruction of undesirable wildlife - it would hardly have been necessary to grant him specific authority elsewhere to destroy for purpose of preventing "detriment." Finally, in its 1978 rider to the Redwood National Park Expansion Act, Congress reiterated its intention that the National Park System be administered in furtherance of the "purpose" (not "purposes") of the Organic Act, that being, of course, the conservation of, inter alia, wildlife resources. See 16 U.S.C. §§ 1a-1, 1c.

Nonetheless, if the statutory language may still be thought to be inconclusive (which it may in truth be; Congress is surely able to say "no hunting or trapping" in the park system unless it ordains) the Court must therefore turn to other sources, including the legislative histories of the various acts, for such light as they may shed on the issue.

Although the legislative history of the Organic Act itself is not teeming with references to the taking of fauna, such as there are lead to the conclusion that Congress did not contemplate any so-called "consumptive" uses of the new park system it was creating. For example, there is a House Report that states that the overriding purpose of the bill was to preserve "nature as it exists." H.Rep. No. 700, 64th Cong., 1st Sess. 3

(1916). Another speaks of a unit of the park system as a "game preserve," see H.Rep. No. 1763, 53d Cong., 3d Sess. 2 (1895). Then again, the act creating Yellowstone directed the Secretary to "provide against the wanton destruction of the fish and game found within the park, and against their capture or destruction for the purposes of merchandise or profit." 16 U.S.C. § 22 (1982). Subsequent legislation, enacted in response to a series of buffalo-poaching incidents in Yellowstone, imposed criminal penalties for hunting or other killing of animals or birds, except in self-defense. See 16 U.S.C. § 26 (1982); H. Rep. No. 658, 53d Cong., 2d Sess. 1 (1894); Sen. Rep. No. 295, 53d Cong., 2d Sess. 1-2 (1894).¹¹

Moreover, the interpretations given the Organic Act and the first enabling acts by those officials initially charged with their implementation in the early days of the park system reveals that they understood hunting and trapping were not to be permitted. Secretary of the Interior Franklin Lane emphasized in a 1918 memo to the first director of the Park Service that "[h]unting will not be permitted in any national park." A.R. Doc. 1 at 70. In 1925, Secretary Work used similar language in a directive to the then-director, noting that Mount McKinley

¹¹ Similar statutes imposing penalties for hunting and trapping in other national parks followed. See, e.g., 16 U.S.C. §§ 60, 63, 98, 117c, 127, 170, 198c, 204c, 256b, 395c, 403c-3, 403h-3, 404c-3 and 408k (1982).

National Park was a lone exception to the no-hunting rule because its own enabling act said otherwise. A.R. Doc. 2 at 74.

Secretary Work emphasized that "[t]he duty imposed upon the National Park Service in the organic act creating it to faithfully preserve the parks and monuments for posterity in essentially their natural state is paramount to every other activity," id. at 72, and he contrasted the consumptive resource management philosophy of the Forest Service with NPS policy.

"Hunting is permitted in season in national forests but never in the national parks, which are permanent game sanctuaries. In short, national parks unlike national forests, are not properties in a commercial sense, but natural preserves for the rest, recreation and education of the people. They remain under Nature's own chosen conditions." Id. at 75. In fact, the first official regulations ever promulgated by the Park Service declared that "parks and monuments are sanctuaries for wildlife of every sort, and all hunting, or the killing, wounding, frightening, capturing, or attempting to capture at any time of any wild bird or animal . . . is prohibited. . . ." 1 Fed. Reg. 673-74 (1936). It is a well-recognized principle of statutory construction that contemporaneous interpretations of dated legislation are ordinarily given considerable deference when its meaning is later questioned. See Udall v. Tallman, 380 U.S. 1, 16 (1965); Norwegian Nitrogen Products Co. v. United States, 288

U.S. 294, 315 (1933); State of Oklahoma v. Schweiker, 655 F.2d 401, 416 (D.C. Cir. 1981); Lenkin v. District of Columbia, 461 F.2d 1215, 1227 (D.C. Cir. 1972).

The language and legislative histories of the several enabling acts creating park areas which are "silent" as to hunting are similarly subversive of plaintiff's position. For example, the enabling act for the Padre Island National Seashore says nothing with respect to hunting, but it does state that the Organic Act governs its administration, "except that authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes" of the enabling act. 16 U.S.C. § 459d-4 (1982) (emphasis added). The accompanying Senate Report states that the "otherwise available" language was seen to give the Secretary authority to permit hunting, and so the Park Service allows it. S. Rep. No. 1226, 87th Cong., 2d Sess. 11 (1962). Comparable language appears in the committee report for the Cuyahoga Valley National Recreation Area, H. Rep. No. 1511, 93rd Cong., 2d Sess. 10 (1974), and the NPS is, accordingly, considering permitting hunting there. A.R. Doc. 40 at 4.

There is no such permissive language to be found in any of the enabling acts of the other recreation areas, however, and their legislative histories do not imply the same congressional

tolerance towards hunting and trapping in them. The committee report for Golden Gate National Recreation Area, for example, stresses the need for expanded outdoor recreation opportunities but makes no mention of hunting, or any "otherwise available" authority of the Secretary. H. Rep. No. 1391, 92d Cong., 2d Sess. 2 (1972). The House Report on the Indiana Dunes National Lakeshore similarly omits hunting from an extensive list of acceptable recreational activities, H. Rep. No. 1782, 89th Cong., 2d Sess. 3 (1966), and the act itself commands that the lake-shore shall be "permanently preserved" in its present state. 16 U.S.C. § 460u-6(b) (1982). And again, the committee report on the Santa Monica Mountains National Recreation Area states that the park was created to preserve the natural resources of the area and to assure that they would not be lost "through adverse actions by special interest groups." H. Rep. No. 1165, 95th Cong. 2d Sess. 58 (1978).

Finally, with respect to the extent trapping must be regarded as a discrete predatory activity, plaintiff submits that the use of the word "hunting" in the relevant legislation implicitly subsumes trapping as a subset. However, although the enabling acts for two parks do contain provisions allowing hunting, fishing and trapping despite titles reading simply "Hunting and Fishing," 16 U.S.C. §§ 459i-4, 460dd-4 (1982), when Congress has intended to provide for trapping, it has generally

done so explicitly, and its omission in other statutes must be presumed to be intentional. Thus, hunting and trapping have been expressly authorized in 20 park areas, but in 25 others Congress authorized only hunting. On this record, the Court cannot but find that Congress considers the two activities to be distinct.¹²

In sum, upon review of the relevant legislative histories and the statutes themselves, the Court is satisfied that the Park Service's reading of the statutory law comports with the apparent legislative intent; its interpretation is at least a reasonable one, and that is all it need be in the circumstances. The Secretary and the Park Service have been charged by Congress with the responsibility for achieving the sometimes conflicting goals of preserving the country's natural resources for future generations while ensuring their enjoyment by current users. Notwithstanding his recent predecessors may have permitted hunting and trapping in selected park areas of their choosing, the present Secretary has re-examined the subject in the light of

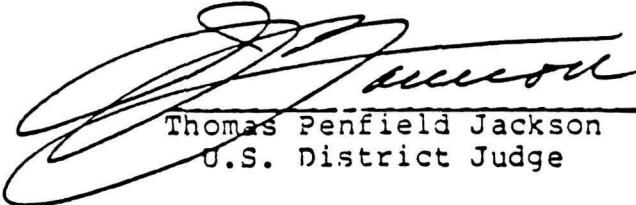
¹² The Court notes that comments received by the NPS following publication of its proposed regulations in the Federal Register in 1982 favored a trapping ban in parks whose enabling acts were silent on the subject by a 1584 to 137 margin. A.R. Doc. 45 at 2. In adopting the new regulations, the Park Service explained that trapping reduced the opportunities for the public to view certain wildlife species, that it was predominantly a commercial activity which also threatened public safety, and that it could be allowed only in park areas whose enabling acts specifically provided for it. A.R. Doc. 46 at 2.

recent amendments to the Organic Act and has concluded that his primary management function with respect to Park wildlife is its preservation unless Congress has declared otherwise. The regulation thus issues rationally from that conclusion, and if relief is to be forthcoming, plaintiff must look to Congress for it, not the courts.

Therefore, for the foregoing reasons, it is, this 24th day of February, 1986,

ORDERED, that plaintiff's motion for summary judgment is denied; and it is

FURTHER ORDERED, that defendants' motions for summary judgment are granted, and the complaint is dismissed with prejudice.


Thomas Penfield Jackson
U.S. District Judge



APPENDIX II

COMMERCIAL/RECREATIONAL
CONSUMPTIVE USES OF NATURAL RESOURCES IN NPS UNITS
AS PROVIDED IN LAW

NOTE: Anyone who knows of additional provisions of law with regard to consumptive use of natural resources, please contact the author at (602) 638-2691.

UNITS OPEN BY LAW TO SPORT HUNTING

GENERAL AUTHORITY: None

SPECIFIC UNIT AUTHORITY:

Amistad National Recreation Area
Aniakchak National Preserve
Apostle Islands National Lakeshore
Assateague Island National Seashore
Bering Land Bridge National Preserve
Big Cypress National Preserve
Bighorn Canyon National Recreation Area
Big South Fork National River and Recreation Area
Big Thicket National Preserve
Bluestone National Scenic River
Buffalo National River
Canaveral National Seashore
Cap Cod National Seashore
Cape Hatteras National Seashore
Cape Lookout National Seashore
Chickasaw National Recreation Area
City of Rocks National Preserve
Cumberland Island National Seashore
Delaware Water Gap National Recreation Area
Denali National Preserve
Fire Island National Seashore
Gates of the Arctic National Preserve
Gateway National Recreation Area
Gauley River National Recreation Area
Glacier Bay National Preserve
Glen Canyon National Recreation Area
Gulf Islands National Seashore
Haggarman Fossil Beds National Monument (only between Snake River
and 50' elevation line above the Snake River)
Jean LaFitte National Historical Park (Barataria Marsh Unit only)
John D. Rockefeller Memorial Parkway
Katmai National Preserve
Lake Chelan National Recreation Area
Lake Clark National Preserve
Lake Mead National Recreation Area
Lake Meredith National Recreation Area
Lower St. Croix National Scenic Riverway
Mississippi National River and Recreation Area
New River Gorge National River
Niobrara Scenic River
Noatak National Preserve
Obed Wild and Scenic River
Ozark National Scenic Riverway
Padre Island National Seashore (based on legislative history)
Point Reyes National Seashore
Pictured Rocks National Lakeshore
Rio Grande Wild and Scenic River (outside Big Bend NP only)
Ross Lake National Recreation Area
Sleeping Bear Dunes National lakeshore

St. Croix National Scenic Riverway
Timucuan Ecologic and Historic Preserve
Whiskeytown National Recreation Area
Wrangell-St. Elias National Preserve
Upper Delaware Scenic and Recreational River
Yukon-Charley National Preserve

UNITS OPEN BY LAW TO TRAPPING

GENERAL AUTHORITY: None

SPECIFIC UNIT AUTHORITY:

Aniakchak National Preserve
Apostle Islands National Lakeshore
Bering Land Bridge National Preserve
Big Cypress National Preserve
Big South Fork National River and Recreation Area
Big Thicket National Preserve
Canaveral National Seashore
Cumberland Island National Seashore
Denali National Preserve
Gates of the Arctic National Preserve
Gateway National Recreation Area
Glacier Bay National Preserve
Glen Canyon National Recreation Area
Jean LaFitte National Historical Park (Barataria Marsh Unit only)
Katmai National Preserve
Lake Clark National Preserve
Lake Mead National Recreation Area
Noatak National Preserve
Wrangell-St. Elias National Preserve
Yukon-Charley National Preserve

UNITS OPEN BY LAW TO COMMERCIAL FISHING

GENERAL AUTHORITY: None

SPECIFIC UNIT AUTHORITY:

Buck Island Reef National Monument (protects existing fishing and laying of fishpots by residents of the Virgin Islands)

Cape Hatteras National Seashore (16 U.S.C. 459a-1 provides only for legal residents of villages within the Seashore boundaries).

Cape Krusenstern National Monument (16 U.S.C 410hh-4 provides for valid rights or privileges obtained pursuant to existing law only).

Glacier Bay National Preserve (16 U.S.C. 410hh-4 for Dry Bay area, only for valid rights or privileges obtained under existing law).

Jean LaFitte National Historical Park (16 U.S.C. 230d only for the Barataria Marsh Unit).

Wrangell-St. Elias National Preserve (16 U.S.C. 410hh-4 for Malaspina Glacier Forelands Unit, only for valid rights or privileges obtained under existing law).

UNITS OPEN BY LAW TO GRAZING/CULTIVATION

GENERAL AUTHORITY: The Organic Act, at 16 U.S.C. 3, provides that the Secretary of the Interior, may, under rules and regulations he may prescribe, grant the privilege to graze livestock within any national park, monument or other reservation, except Yellowstone.

The Secretary published the regulation that governs grazing in the National Park System at 36 CFR 2.60 and listed three conditions under which grazing may occur in a given unit of the National Park System. The three conditions are:

- 1) as specifically authorized by Federal statutory law; or
- 2) as required under a reservation of use rights arising from acquisition of a tract of land; or
- 3) as designated, when conducted as a necessary part of a recreational activity (e.g. horseback riding) or required in order to maintain a historic scene (e.g. at Grant Khors Ranch, or Lyndon B. Johnson National Historical Park).

SPECIFIC UNIT AUTHORITY: The following units' enabling acts specifically authorize grazing in some fashion, and therefore meet the first condition of 36 CFR 2.60:

Arches National Park (16 U.S.C. 272b allows renewal of existing grazing permit, license or lease for one additional term; 16 U.S.C. 272c provides for stock driveways).

Badlands National Park (16 U.S.C. 441n provides for grazing by Oglala Sioux in what is now the South Unit).

Bering Land Bridge National Preserve (16 U.S.C. 410hh provides for reindeer grazing).

Big Cypress National Preserve (16 U.S.C. 698i(b)).

Big Thicket National Preserve (16 U.S.C. 698c(b)).

Black Canyon of the Gunnison National Monument (Act of July 13, 1984 allows Secretary to permit grazing at levels of 1983 on lands in which the U.S. acquires less than fee interest).

Canyon De Chelly National Monument (16 U.S.C. 445a protects the rights of the Navajo to graze in monument).

Canyonlands National Park (16 U.S.C. 271b allows renewal of existing grazing permit, license or lease for one additional term).

Capitol Reef National Park (16 U.S.C. 273b allows renewal of existing grazing permit, license or lease for one additional term. 16 U.S.C. 272c provides for stock driveways).

Chaco Culture National Historical Park (16 U.S.C. 410ii-5(d) provides for continued grazing on properties within the park for which the NPS and the property owners have entered into cooperative agreements; Act of February 17, 1931 provided stock driveway privileges to certain former owners of patented lands with the Monument).

Coronado National Memorial (16 U.S.C. 450y-2 provides for grazing to the extent existing on August 18, 1941).

Dinosaur National Monument (Act of September 8, 1960, not codified in U.S.C., provides for protection of existing grazing leases, licenses or permits).

El Malpais National Monument (16 U.S.C. 460uu-3 protects grazing until December 31, 1997).

Gettysburg National Military Park (16 U.S.C. 430g authorizes lease of lands in park to former owners, or other persons, for agricultural purposes).

Glen Canyon National Recreation Area (16 U.S.C. 460dd-5).

Golden Gate National Recreation Area (16 U.S.C. 460bb-2(i) authorizes lease of property that was agricultural at time of acquisition for agricultural purposes).

Grand Canyon National Park (16 U.S.C. 221(e) allows livestock to drift across a small portion of lands added in 1928; 16 U.S.C. 228(f) provides for lifetime grazing continuance for existing grazers on lands added in 1975).

Grand Teton National Park (16 U.S.C. 406d-2 provides for protection of existing grazing leases, licenses, permits, and for stock driveways).

Great Basin National Park (16 U.S.C. 410mm-1).

Lake Mead National Recreation Area (16 U.S.C. 460n-3(b)).

Lassen Volcanic National Park (16 U.S.C. 202).

Mesa Verde National Park (16 U.S.C. 115 does not specifically authorize grazing but authorizes lease or permits for use of the land and development of its resources, and could be logically interpreted to include grazing).

Point Reyes National Seashore (16 U.S.C. 459c-5 authorizes lease property that was agricultural at time of acquisition for agricultural purposes).

Sequoia National Park (16 U.S.C. 45c).

Shiloh National Military Park (16 U.S.C. 430f-1 provides authority to lease to former owners lands for occupancy and cultivation).

Vicksburg National Military Park (16 U.S.C. 430h authorizes agreements or lease with occupants or tenants on 2/21/1899 to occupy and cultivate the lands).

UNITS OPEN BY LAW TO SUBSISTENCE USES

GENERAL AUTHORITY: None

SPECIFIC UNIT AUTHORITY:

American Samoa National Park (agricultural, cultural uses, and gathering that are prior existing uses, but only by traditional manner and methods).

Aniakchak National Monument and Preserve*

Bering Land Bridge National Preserve*

Big Cypress National Preserve (Miccosukee and Seminole Tribe members permitted usual and customary use and occupancy of Federal lands, including hunting, fishing and trapping for subsistence).

Cape Krusenstern National Monument*

Denali National Park (only lands added in 1980) and Preserve*

Gates of the Arctic National Park and Preserve*

Glacier Bay National Preserve*

Katmai National Preserve*

Kobuk Valley National Park*

Lake Chelan National Recreation Area (disposal of renewable natural resources permitted in non-wilderness areas of unit).

Lake Clark National Park and Preserve*

Noatak National Preserve*

Wrangell-St. Elias National Park and Preserve*

Yukon-Charley National Preserve*

* Taking of wild, renewable natural resources for direct personal and family use and sustenance by rural residents of Alaska only.

UNITS 'OPEN BY LAW TO TRADITIONAL/CEREMONIAL/RELIGIOUS USES,
INCLUDING THE GATHERING OF NATURAL RESOURCES

GENERAL AUTHORITY: None. Congress enacted the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996) in 1978. The purpose of the law was "...to insure that policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no law abridging the free exercise of religion." (AIRFA Legislative History, House Report No., 95-1308) Some perceive in AIRFA an authority to permit American Indian hunting or gathering of natural resources within units of the National Park System. However, AIRFA contains no specific and direct authorization for American Indian hunting or gathering of natural resources from within units of the National Park System.

The NPS published in Final the regulations that now appear at 36 CFR Part 1 and 2, on June 30, 1983 (48 Federal Register (FR) 30252). The Final Rule contains the following provision at 36 CFR 2.1:

(a) Except as otherwise provided in this chapter, the following is prohibited:

(1) Possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state:

(i) Living or dead wildlife or fish, or the parts or products thereof, such as antlers or nests.

(ii) Plants or the parts or products thereof...

(iv) A mineral resource or cave formation or the parts thereof...

(d) This section shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights, or in accordance with 2.2 or 2.3.

The Preamble to the Final Rule states:

Paragraph (d) is intended to clarify the Service's policy on the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes. Such taking, use or possession is prohibited except where specifically authorized by Federal statutory law, treaty rights, or in accordance with 2.2 or 2.3. This section is also intended to cover activities undertaken by Native Americans. (Emphasis added).

SPECIFIC UNIT AUTHORITY: The following units enabling acts provide for Native American religious gathering of certain natural resources.

Big Cypress National Preserve (Miccosukee and Seminole Tribe members permitted usual and customary use of Federal lands, for traditional tribal ceremonials).

Chaco Culture National Historical Park (Provides for continuation

of traditional Native American religious uses of (non-federal) properties in the park that are the subject of cooperative agreements).

El Malpais National Monument (nonexclusive rights of access to the monument by Indian people for traditional religious or cultural purposes, including the harvesting of pine nuts).

Pipestone National Monument (American Indians of all tribes permitted to quarry catlinite for making traditional pipes).

UNITS OPEN BY LAW TO DISPOSAL OF FEDERAL MINERALS

GENERAL AUTHORITY: None

SPECIFIC UNIT AUTHORITY:

A. Leasing of Federal Minerals:

Glen Canyon National Recreation Area

Lake Mead National Recreation Area

Whiskeytown National Recreation Area

B. Sale or Other Disposal of Federal Mineral Materials

Lake Chelan National Recreation Area (Sale of sand, rock and gravel from non-wilderness areas permitted to local residents of Stehekin only).

UNITS OPEN BY LAW TO SALE OF WATER OR OTHER RESOURCES

GENERAL AUTHORITY: The NPS has statutory authority since 1970 to "(e)nter into contracts which provide for the sale or lease to persons, States, or their political subdivisions, of...resources* or water available within an area of the national park system,...if such person, State, or political subdivision-- (1) provides public accommodation or services within the immediate vicinity of an area...to persons visiting the area; and (2) has demonstrated...that there are no reasonable alternatives..." (16 U.S.C. 1a-2(e))

SPECIFIC UNIT AUTHORITY:

Grand Canyon National Park (16 U.S.C. 222 authorizes Secretary to sell water from the park for the use of customers within Tusayan, Arizona).

* NPS policy, in NPS Guideline 66, Chapter 7, Page 1 specifically interprets "resources" not to include any mineral resource.