THE NATIONAL PARK SERVICE ACT OF 1916: "A CONTRADICTORY MANDATE"?

ROBIN W. WINKS*

INTRODUCTION

Historians concerned with the National Park Service, managers in the Park Service, and critics and defenders of the Service, frequently state that the Organic Act which brought the National Park Service into existence in 1916 contains a "contradictory mandate." That "contradictory mandate" is said to draw the Park Service in two quite opposite directions with respect to its primary mission; the contradiction is reflected in management policies; the inability to resolve the apparent contradiction is blamed for inconsistencies in those policies.

The apparent contradiction is contained in a single sentence of the preamble to the act. That sentence reads, in addressing the question of the intent of the Service to be established by the act, that the Service is

> to conserve the scenery and the natural and historic objects and the wild life therein [within the national parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[1]

This paper is an attempt to determine the intent of Congress with respect to the Act of 1916. It is the work of an historian, not a legal scholar. The historian recognizes that the intent of the whole of Congress in passing an act, and the intent of the individuals who framed that act, do not perfectly coincide; that intent must nonetheless be interpreted as individual; that intent changes; and that the law of unintended consequences looms large in any legislation.

A MOMENT FOR CONTEXT

The National Park System of the United States is unique among the world's systems of government preserves. Because of this uniqueness, reference to attitudes, legislation, or management practices elsewhere, even if legally admissible, is of little help in understanding the American National Parks. One says of "little help," however, rather than of no help, precisely because the system's unique characteristics may be brought into focus best by a comparison with park systems elsewhere. Consider these aspects of the system's uniqueness.

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* Randolph W. Townsend Professor of History; Chair, Program in Environmental Studies, Yale University.

1. 16 U.S.C. § 1 (1994).

The Unique System

The National Park System of the United States is the world's largest, both in the number of units (375 as of June 1997) and in total land area. Thus, legislation passed with respect to the Park System, beginning with the National Park Service Act signed by President Woodrow Wilson on August 25, 1916 (also referred to as the Park Service's "Organic Act"), whether generic to the system as a whole or specific to an individual unit, has more extensive application than any other park system in the world. Such legislation influences, is affected by, and is of concern to all Americans.

The National Park System of the United States is the most complex, the most carefully articulated, and thus the most specific system in the world. There are twenty-one types of units (national park, national monument, national preserve, national reserve, national seashore, national lakeshore, national historical park, national battlefield park, national military park, national battlefield, national battlefield site, national historic site, national memorial, national wild, scenic, and/or recreational river, national parkway, national scenic and historic trail, national memorial, national recreation area, national scientific reserve, national capital parks and a miscellany of units grouped simply as "other") that are administered directly by the Park Service.[2] Several units exist in forms of partnership and loose affiliation, and three programs (national historic landmarks, national natural landmarks, the national registry of historic places) are run by the Park Service with respect to properties that, in general, it neither owns nor administers. Despite the care with which these various types of parks are designated, and the high degree of specificity that applies to the laws creating specific units, all are governed by the Organic Act.

The National Park System of the United States is genuinely national, for there are units in all but one state and in all dependencies. In some nations, such as Australia, areas designated national parks are in fact administered by state and local authorities. In some nations, such as Canada, resources adhere to the individual province, so that national park legislation may be substantially compromised at a more local level, as in the province of Quebec.

The National Park System of the United States is the world's most intellectually elegant system, for it has grown, and in more recent years has most consciously been added to, by the application of a National Park System Plan to which a series of Theme Studies is central. These Theme Studies, ranging over a number of subjects, both with respect to natural areas and to cultural and historical experiences of significance to the nation as a whole, have been conducted with care and imagination, with both Park Service professionals and informed non-governmental experts involved. While Canada, and to a lesser

2. Omitted from this list of types of units are (a) units with slight variations in title which are, despite those variations, clearly of one of these types; (b) seven properties administered through the National Capital Parks but not in fact included in those parks, such as the White House, and (c)—quite confusingly—several national recreation areas, one "national volcanic monument," and three national monuments which, despite the use of titles generally specific to the National Park Service, are in fact administered by the National Forest Service or the Bureau of Land Management.

extent New Zealand, have imitated the Theme Study approach to the evaluation and designation of potential Park System units, neither has applied this approach so fully. While at times a unit may be added to the U.S. System through more local political pressure, the overwhelming body of units reflect a close awareness on the part of the Park Service of Congress's desire to adhere to Theme Studies and to carry them out expeditiously.

The National Park System of the United States also has the warm support of the American people, who clearly cherish the system even when they do not fully understand it. This has not always been the case, of course, and any given unit may at some point have been the object of hostility, especially locally, but there can be no doubt that by the 1970s the system was embedded within a vigorous, growing, wide-spread public sentiment for conservation and protection of the environment. This sentiment has not abated, and the public brooks little compromise with what it understands to be the System's mission. The same may be said of National Park Systems in few if any other countries.

To be sure, public—and thus legislative—awareness of this mission has changed across time. For example, the initial campaign for the creation of national parks was strongly supported by the tourism industry, most particularly by railroads and, soon after, by automobile associations. At the time of passage of the Organic Act of 1916, the railroad was a power in the land, the only feasible means of mass transport to the great Western parks, while the automobile was being admitted to parks in ever greater numbers. The goal of the Park Service created by the act was to "preserve, forever unimpaired, the sublime beauty, dignity, and nobility of national park landscapes";[3] the Organic Act was silent on issues of biological preservation as we would understand the term today. But then, so too was the Constitution of the United States initially silent on such issues as privacy or anti-trust goals, though language was present by which courts would, in this century, find implied constitutional intent.

Acts Subsequent to 1916

Whatever the intent of Congress in 1916, with the enactment of the National Park Service Act, Congress may change its intent by subsequent acts. The Act of 1916 is examined in its full legislative history in the material that follows. But first, a sense of context requires some comment on the manner in which Congress added to the intent of the original act.

That intent has been Congressionally modified by two types of acts. There are broad-ranging acts relating to natural resources which impact upon the national parks, and there have been specific acts, notably those of 1970 and 1978, that have extended the discussion of the purposes of parks. Of the first type of act, there have been four above all that apply to the national park system. The Wilderness Act of 1964 created a National Wilderness Preservation System, prohibited all commercial activities, motorized vehicles, perma-

3. Richard West Sellars, *The Roots of National Park Management: Evolving Perceptions of the Park Service's Mandate*, J. FORESTRY, Jan. 1992, at 16, 17.

nent roads, or development of any kind within designated wildernesses, and provided that portions of National Park System units might be so designated. The Wild and Scenic Rivers Act of 1968 designated segments of rivers as part of a system in which waterways were to be maintained in or returned to a pristine state. (Subsequently a designation of Recreational River was added.) The Clean Water Act of 1972 set as a national goal the elimination of all pollutant discharges into waters and making waters safe for fish, wildlife, and people. While the deadline mandated by Congress was relaxed, the act continues to apply within national parks. The Endangered Species Act of 1973 defined endangered and threatened species and required the government to draw up lists of these species and to acquire lands and waters necessary to their protection. As many national park units function as wildlife preserves, the act has direct application to the parks.

Additionally, a series of acts relating to natural resources broadly, notably the National Environmental Policy Act, the National Forest Management Act, and the Federal Land Policy and Management Act, are also relevant to the parks. The last two acts require the U.S. Forest Service and the Bureau of Land Management to coordinate their resource management plans with other agencies, including the National Park Service. These acts quite obviously tilted the 1916 mandate toward a more compatible interpretation of the Park Service's responsibilities. To be sure, none of these acts defined the key word "unimpaired" in the 1916 act, but taken together, they provided a functional definition that went beyond "preserve unimpaired" virtually to call for the restoration of the ecological integrity of the National Parks.

National Park Acts of the 1970s

Congress went some distance toward functional definitions in two park-specific acts in 1970 and 1978. In an amendment to national park legislation, Congress declared that National Parks "derive *increased* national dignity and recognition of their *superb environmental quality* through their *inclusion* . . . in one national park system preserved and managed for the benefit and inspiration of all the people."[4] Clearly here Congress was holding National Parks to an "increased" or higher standard of protection, this higher standard was based on the maintenance or achieving of superb "environmental quality," and each park benefitted by being included in a system that benefitted all: that is, a threat to one was a threat to all. Further, Congress now called for preservation and management that would benefit and inspire "all the people," thus by implication ruling out management decisions that would redound to the benefit of only "some of the people": interest groups, local parties, one might argue even historically vested bodies that lacked clear national significance.

In 1978, Congress reaffirmed the Organic Act and declared that parks must be protected "in light of the high public value and integrity" of the park system in a way to avoid "derogation of the values and purposes" for which

4. National Park System General Authorities Act, Pub. L. No. 91-383, § 1, 84 Stat. 825 (1970) (emphasis added) (codified as amended at 16 U.S.C. § 1a-1 (1994)).

the parks, collectively and individually, were created.[5] "High public value" is somewhat subjective and clearly changes over time; by the use of this criterion, Congress appears to have instructed the National Park Service to manage parks in relation to public sentiment and, in effect, sociological jurisprudence. By this standard in 1978 Congress gave a powerful mandate to the Park Service, a mandate which would prohibit actions that could have the effect of "derogation" of park values. Virtually all commentators at the time and since have concluded that the 1978 provision added to the Park Service's mandate to protect ecological values.

Of course, the amendments of 1970 and 1978 apply to actions, not to inaction. That is, where an invasive activity, practice, or structure already existed, was the Park Service required to take action to eliminate it, or to mitigate its effects, or was the Park Service merely required to brook no future intrusions? In some measure the answer to this question requires site-specific knowledge, since national parks clearly are meant to be held to a higher standard than other, nearby, surrounding, or environing federal lands and one must know what those standards are, and thus what the specific threat, incursion, or compromising situation may be. Does, for example, an historic ditch that conveys water from, across, through, or into national park lands, for the benefit of private persons or municipalities, now require removal? That such a ditch requires mitigation there can be no question, under the expectation of parks being held to higher standards; that a local ditch, used for irrigation, would not meet park criteria is abundantly clear; that such a ditch impairs the "values and purposes" of parks also seems clear in the context of modern sensitivities and the legislation of 1970 and 1978. But neither act directs the Park Service specifically to remove such a ditch. Absent such instruction, a question is, may or should the Park Service do so?

Historic Structures within National Park Units

Today, more than half of the 375 units of the National Park System are primarily cultural/historical in their purpose, and there is likely to be greater growth in the future of such parks than there will or can be of natural/scenic reserves. Further, public awareness of historical structures, and public concern for their protection, has grown at least as rapidly as public awareness and concern for specified sites within the natural environment. It is not, therefore, a digression to comment briefly on how the Antiquities Act of 1906, and other legislation relating to historical preservation, would bear upon an historic object within a national park that had been set aside primarily for natural and scenic purposes. The example already proposed, an "historic ditch," may be used.

Might a ditch on park lands be an "historic object" in the meaning of the Organic Act, and thus entitled to consideration for protection on that ground? If the ditch were present in 1916, surely the answer is yes; if the ditch were

5. Act of Mar. 27, 1978, Pub. L. No. 95-250, § 101(b), 92 Stat. 166 (codified as amended at 16 U.S.C. § 1a-1 (1994)).

constructed after 1916, the answer is far more ambiguous. However, on either side of the date of the Organic Act, management would not be *required* to protect the ditch either as a structure or object or in its historic use unless it clearly met certain criteria.

In August of 1916 the Department of the Interior was responsible for twenty-one national monuments and one archaeological reservation. Of these, nine were defined as being primarily of historical significance, and therefore these units may be taken to suggest what Congress meant at that time by an "historic object." Of these units, five were purely archaeological in their intent (e.g., Chaco Canyon, Gran Quivira). These ancient ruins would more commonly be referred to today as "cultural" rather than "historical." One unit, Dinosaur National Monument, was set aside for the fossil record, that is, for paleontology rather than history as commonly understood. Only three units provide any functional definition of what Congress may have had in mind when it referred to "historic objects" in 1916: El Morro, a great rock on which Spanish, Mexican, and American explorers had inscribed their names; Tumacacori, the ruins of a significant mission church near the Arizona-Mexico border; and Sitka, site of a Tlingit village in Alaska. These were quite major, visible, and substantial sites. Clearly an historic ditch, no more than an historic cabin, was envisioned by Congress in 1916 as automatically embraced by the act.

Whatever Congress may have had in mind in 1916, the Historic Sites Act of 1935 provided criteria for the protection, selection, or conservation of "objects" that qualified for the attention of the National Park Service, so that thereafter decisions with respect to the protection of historically-used structures, or other alterations of nature within a national park, could be made on the basis of relatively clear principles. The Act of 1935 built upon the Antiquities Act of 1906, and it specifically required that to be of significance under the Act a site, building, or object must:

1) Be associated with and now be the "primary tangible resource" that illustrates, recalls, or characterizes "individuals, groups, events, processes, institutions, movements, lifeways, folkways, ideals, beliefs, or other patterns or phenomena that had a decisive impact on or pivotal role in the historic or prehistoric development of the Nation as a whole." By this criterion, an irrigation ditch—to continue with the example chosen—would be worthy of protection provided it were the "primary tangible resource" illustrative of the process of irrigation, or of a folkway that hinged upon the practice of irrigation, provided that the ditch in question were, indeed, "primary," "tangible"—for which read, retaining its substantial integrity as a structure—and relating to the Nation "as a whole." Thus a ditch that served or serves local purposes would not qualify, while a ditch that served wide-spread purposes illustrative of national growth would qualify, provided it were the "primary" (best surviving or most important) example illustrative of irrigation.

2) A ditch might qualify provided it were a "masterpiece of type," or had a "pivotal influence" in the later development of its type of construction as an aspect of "technological or engineering design." Thus the Park Service could recognize different stages in the development of irrigation, and protect

more than one ditch, provided each was an exemplar of a stage of development that transcended local use. This would require passing a test of integrity, or primacy, and finally of significance to the development of a particular application of engineering that had national impact.

3) A ditch might be protected if, in its structure, it provided "information" that was "essential to professional or public understanding of human development," such information not being obtainable by example elsewhere; and

4) The ditch would have to "possess an exceptionally high degree of integrity of form, material, and setting."

These criteria were subsequently expanded so that, in 1996, they number six. To the four stated above, one must add that such an historic place, site, structure, or object may be designated if it is a) representative of some "great idea or ideal of the American people" and/or b) is "associated importantly with the lives of persons nationally significant."[6]

There are also negative criteria. Ordinarily reconstructed structures do not fall under the act. Nor do structures that have achieved significance within the last fifty years. Nor do structures, even though they may have integrity, which have been moved from their original locations, unless the structure is historically significant for reasons of architectural merit.

There are two programs under which a site already within a national park unit can be formally designated as historic: the National Landmarks and the National Register.

There are now nearly 2,200 National Historic Landmarks. While one might argue that historic structures within a national park's borders automatically are entitled to special consideration, the fact that several structures that are inside park boundaries have been designated independently as National Historic Landmarks suggests that to guarantee preservation, or to cause the localized setting aside of criteria relating to natural preservation within a park that has been created primarily for landscape/scenic/wildlife purposes, such structures need be given the highest consideration only if they meet the separate Landmark criteria. In other words, historic structures that do not meet such criteria may be removed—or not—depending upon management decisions relating to the overall purpose of an individual park as stated in that park's enabling act.

Within Rocky Mountain National Park, for example, twenty-three structures or sites (including the old Fall River Road) had been placed on the National Register of Historic Places as of 1988.[7] There is no requirement that a structure be nationally significant to be placed on the National Register, for "properties significant to the nation, a state, or a community" may be nominated by states, federal agencies, and others. There are well over 50,000 places on the Register, including over 900 within units of the National Park System.

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6. *See* HISTORY DIVISION, U.S. DEP'T OF THE INT., CATALOG OF NATIONAL HISTORIC LANDMARKS (1987).

7. NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, U.S. DEP'T OF THE INT., NATIONAL REGISTER OF HISTORIC PLACES, 1966-1988 (1989).

In this way the Park Service has honored its obligation, as stated in the Organic Act, to recognize historic objects.

However, the continued presence of an "historic object" may militate against the primary purpose of a park unit, and unless that object is judged to be of National Landmark status, the Park Service may override the preservation of the historic object in the interests of the park's primary purpose. Nor does placement on the National Register assure any form of protection, local, state or federal; indeed, some two percent of National Register places have been destroyed.

The "historic object" reference within the Organic Act of 1916 has bedeviled historians and non-historians alike. Within the original national parks, those "historic" objects overwhelmingly were fences and gates used to control grazing, ditches and other structures to effect irrigation, or cabins used by hunters, foresters, and recreationists prior to the creation of a unit. The question has arisen often—most dramatically in Grand Teton and Olympic national parks in recent years—as to whether any or all of these three categories of "objects" either require protection, or may receive protection, under the Organic Act. The conclusion is that such "objects" do not require protection, and that the burden of proof is on the advocates of such protection, given the criteria relating to national significance, integrity, and "exhibit" value.[8]

Contextually, in addition to considering the impact of post-1916 natural resource legislation, of acts specific to the national parks, and of acts relating to historical preservation, on the Organic Act of 1916, one must consider one other aspect of the intent of Congress: how the meaning of language changes. One need not belabor the point here beyond observing that in usage and meaning, terms like "conserve" and "preserve" have functionally changed across time. Thus, the use of such terms in legislation subsequent to 1916 may not have precisely the same connotations as these words had at the time.

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8. In fact, few irrigation ditches would be likely to qualify in future for protection under these criteria, since the Park Service has, for example, already designated its choice of eight National Historic Landmarks with respect to the sub-theme of irrigation under the broad theme of engineering. Roosevelt Dam in Arizona, the first major project completed under the Reclamation Act of 1902, was designated in 1963, and in the citation of designation was meant to stand for the entire Salt River Irrigation Complex; San Bernardino Ranch, also in Arizona, designated in 1964, commemorates and illustrates ranch irrigation through the use of springs; the Folsom Powerhouse, in California, was designated in 1981 in recognition of the first use of high-voltage alternating current from a hydroelectric generating plant (1895); the Columbia Historic District, also in California, was designated in 1961, in part to include millraces and sluice boxes relating to gold mining; the Old Mission Dam, near San Diego, was demarked in 1963 to commemorate the first major irrigation-engineering project on the Pacific Coast undertaken by Spanish inhabitants; the Carlsbad Reclamation Project, dating from the 1880s, was designated in 1964 to commemorate the earliest extensive irrigation project built by private enterprise, and to honor the inhabitants of the Pecos Valley for their achievements; and Bonneville Dam and adjacent structures were honored in 1987 as the best example of a water diversion project. The Espada Aqueduct, in Bexar County, Texas, was designated in 1964 as the only remaining Spanish structure of its type in the United States. It is now part of San Antonio Missions National Historical Park. With this articulation of sites illustrative of the theme of irrigation, it is difficult to imagine that a case could be made for the national protection of other structures or objects relating to the more-or-less routine transport of water in the 19th- or 20th-century West.

CREATING A NATIONAL PARK SERVICE: THE ACT OF 1916

The National Park Service was created by Act of Congress in August, 1916, and President Woodrow Wilson signed the Organic Act on August 25. The act was the result of some six years of discussion, intense lobbying by a variety of interest groups, and growing public concern. The leaders of the campaign to establish a Park Service were, in the House, Congressmen William Kent and John Raker, both of California, and in the Senate, Reed Smoot of Utah. Congressman Kent had the close advice of Frederick Law Olmsted, Jr., son of the founder of American landscape architecture and creator of Central Park. Stephen T. Mather, a wealthy borax industry executive (who later would become the first full-time Director of the new National Park Service created by the act) was heavily involved, as were a number of recreational, outdoor, tourist, and automobile associations, of which the American Civic Association was the most important.

These advocates spoke of most of the thirty-seven parks that then existed, as well as the wide range of park proposals pending before Congress, in terms of scenic reserves, often invoking a comparison with Switzerland, which it was invariably argued had capitalized on its natural scenery more effectively than any other nation. Both railroad and automobile interests advocated more consistent administration of the existing parks in order to protect them more effectively, and also to make certain that accommodations and campgrounds were held to a consistent standard for the public's pleasure. While the railroads wished to bring spur lines to the borders of the parks, they seldom argued for actual entry. Automobilists wished to see roads to and within the parks upgraded so that visitors could tour the parks in greater comfort. All spoke of "scenery" with respect to the principal natural parks, though with a variety of qualifiers, and all referred to the need for preservation of that scenery while also making the scenery accessible for the "enjoyment" of the public. Thus, any discussion of Congressional intent in 1916 involves some understanding of what was meant at the time by "scenery," as well as the specific references to it in hearings, debate, legislation, and the correspondence of the key legislators.

In 1915-16, during the Congressional session which enacted the Organic Act, there were twenty-one members of the House Committee on the Public Lands, eleven of whom had served on the Committee in one or more previous Congresses and had experience with earlier omnibus park bills. Of these members, some were silent throughout, speaking neither at hearings nor in debate. The papers of sixteen of these members have survived. Debate, and the members' papers, make it abundantly clear that the key members in the House, with respect both to the Organic Act and to specific national park bills during this time, were Congressmen Kent and Raker, Congressman Irvine Lenroot of Wisconsin, who was a watchdog preoccupied with scrutinizing all bills for their financial impact on government spending, and Congressman Edward T. Taylor of Colorado, who was an advocate of the bill that created Rocky Mountain National Park in 1915 and who saw the two acts as closely related. While other members spoke on occasion, their concerns were to clarify matters relating to grazing, roads, or fire protection, and almost never did

any Congressman other than these four speak to general principles of preservation and protection or to matters concerning water. Indeed, many key members of the Committee, who were active with respect to other matters that came before it, were silent on the Organic Act of 1916. Their papers are also silent: in the hundreds of volumes of manuscripts in the Carl Hayden Collection at Arizona State University, for example, there are frequent references to national parks from the 1930s forward, but the collection is, except for a single document, utterly silent on the act of 1916. To cite a second example, the papers of Congressman Addison T. Smith of Idaho, now in the Idaho State Historical Society in Boise, are "a dead collection" on any matters relating to the public lands.[9] Thus, in the House one best focuses on Congressman Kent, whose bill, H.R. 8668, was ultimately enacted (with slight modifications) as H.R. 15522, and whose papers are voluminous.

The story is similar in the Senate. While several Senators spoke with respect to their final bill, S.9969, which was offered by Senator Smoot, almost no one took up broad questions of the language of the bill. An examination of the surviving papers of all members of the Senate Committee on the Public Lands and Surveys for 1915-16 reveals that only Smoot was closely attentive to the legislation. His papers, most particularly his diary, in the library of Brigham Young University, supplement his public remarks.

The preamble, or "statement of fundamental purpose" for the Act of 1916, was drafted by Frederick Law Olmsted, Jr., at the request of Congressman Kent. Thus Olmsted's views, though he was not a member of the legislature, are also important to understanding Kent's intent. Fortunately, his papers survive at the Library of Congress (and, to a lesser extent, at the former Olmsted offices and studios in Brookline, Massachusetts).

The governing sentences of the National Park Service Act of 1916 read 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 by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reserva-

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9. The Hayden manuscripts are typical of those of members of the House Committee. In 1915 he was involved in an International Irrigation Congress but saw no need to mention this subject when discussing the Rocky Mountain National Park Act that year, and his papers are silent except for a copy of Enos Mills' *What We Owe to Our National Parks.* In 1916 Hayden was fully engaged in speaking out on women's suffrage, the European war, and prohibition; if he ever spoke in public on the Organic Act, there is no record of it in his papers. When Hayden did refer to parks, the content of his papers is typical for the time: in 1913 he apparently agreed that an archaeological site near Phoenix should be saved because it was a commercial asset, and he apparently agreed with the Phoenix Board of Trade in its demand for auto roads along the Grand Canyon. The Smith Collection contains a clipping file on Good Roads and nothing on parks. The Papers of James Wickersham, in the Alaska State Library in Juneau, show diary entries for the months in which the Park Service Act was discussed, and though Wickersham comments on other bills to come before the Committee on the Public Lands, he is quite silent on the Organic Act. *See* Hayden MSS (on file with Arizona State University (Tempe) box 607, folder 20, and box 631, folders 13 & 14); Addison Taylor Smith Collection MS (Idaho State Historical Society, 22 finding aid); James Wickersham Papers MS (Alaska State Library (Juneau) 107 Inventory and Diaries (photo.)).

> tions, 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.[10]

It is this language which requires explication, and it is the path to this language, beginning with the first suggestion that there should be a National Park service or bureau, that requires tracing if we are to understand Congressional intent.

Taft and Ballinger Recommend a Bureau

Beginning early in 1910 the American Civic Association had declared the need for a special bureau, most likely within the Department of the Interior, to administer the nation's national parks, of which by then there were eleven, with a twelfth to be added in May. (There were also eleven units with other designations.) There also were by the end of that year seventeen national monuments, under the administration of the Department of the Interior or the Department of Agriculture, and the Association wished to see common principles of administration applied, certainly to the parks and perhaps to the monuments. In his annual report for 1910, the Secretary of the Interior, Richard Ballinger, recommended that Congress should create a "bureau of national parks and resorts" in order to assure future generations competent administration of the parks.[11] This statement was immediately taken up by the American Civic Association though never again was there reference to "and resorts" in relation to a bureau's prospective title.

This did not mean that some of the parks were not seen in some measure as resorts, of course, but rather that those groups lobbying for creation of more parks, and more consistent administration of them by a central bureau, preferred different terminology. The lobbyists often referred to the parks as "the nation's playgrounds," as "havens of rest," as places where the public might enjoy solitude, recreation, and "a sense of good health." To some, however, "resort" carried a somewhat undemocratic connotation, while "playground"—which was universal, for the people—became the preferred term at the time. In all the lobbying, Congressional hearings, and debates to follow, emphasis remained upon ways of bringing benefits "to the people," and the only analogous discussion to "resorts" vs. "playgrounds" would occur in 1916, when the automobile was seen by some, as it was being admitted to the parks, to be an instrument of the rich. By the time the Kent bill was before Congress, most members spoke little of the parks being resorts, and virtually all used as preferred language, "the nation's playgrounds," a term also used by the American Civic Association.

Secretary Ballinger was in the midst of a major scandal at the time he

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10. 16 U.S.C. §1 (1994).

11. *Bills to Establish a National Park Service and for Other Purposes: Hearing on H.R. 434 & H.R. 8668 Before the House Comm. on the Public Lands*, 64th Cong., 1st Sess. 3 (1916) [hereinafter *Hearing 1916*].

made his recommendation. The primary student of Richard Ballinger's land policies, James Penick, Jr., has argued that the scandal that surrounded Ballinger in his last months, prior to his resignation on March 11—usually referred to in standard textbooks as the "Ballinger-Pinchot" controversy, in which Ballinger lost, at least in the eyes of the public (and of historians subsequently), to Gifford Pinchot, the dynamic director of the U.S. Forest Service—was not in fact a scandal so much as a clash between theories. Ballinger ran the General Land Office—the primary agency for disposing of the public domain—according to nineteenth-century principles while new theories of land management had, by 1907, won over a large public who believed that private individuals ought not to be able to control essential public resources such as water power. Penick astutely observes that "[t]he same generation which would soon sanction immigration laws to protect the genetic purity of the American population and would support a National Park Service to protect the heritage of natural beauty awoke somewhat earlier to the revelation that the material wealth had been acquired by a few men who used their great economic power to exploit the farmer and laborer."[12] These people, associated with the Progressives though not necessarily Progressives themselves, felt the General Land Office had "abetted [a] great betrayal."[13]

"These people," largely middle class, wished to see the grand scenery of America preserved virtually as a patriotic act. They did not want any of the natural scenery within the national parks to be used to private ends. A shift "from the general to the particular" had occurred, so that there was an informed public ready to argue the merits of damming the Hetch Hetchy Valley in Yosemite National Park, for example, as there were those who were promoting a National Park Service to be concerned with the integrity of all parks.

On February 11, 1911, when President William Howard Taft sent his special message on conservation to Congress, he omitted any reference to "resorts" altogether, recommending the establishment of a bureau of national parks, as essential to the "proper management of those wondrous manifestations of nature," which were, he said, "so startling and so beautiful that every one recognizes the obligations of the Government to preserve them for the edification and recreation of the people."[14] He thus combined the inspirational, educational, and recreational purposes of the parks in a lockstep that would become fixed in the minds of park proponents. On February 12, 1912, Taft spoke in public, listed some of the national parks (to which he added the Grand Canyon, which was then a national monument), and declared that in "consideration of patriotism and the love of nature and of beauty and of art" it was essential to spend the money needed to "bring all these natural wonders within easy reach of our people."[15] A bureau would improve the parks' "ac-

12. JAMES PENICK, JR., PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR 24 (1968).

13. *Id.*

14. President William Howard Taft, (Feb. 11, 1911) *in Hearing 1916, supra* note 3, at 4.

15. Taft's address on parks appears in *A Bill to Establish a National Park Service and for Other Purposes: Hearing on H.R. 104 Before the House Comm. on the Public Lands*, 63d Cong., 2d Sess. 6 (1914) [hereinafter *Hearing 1914*] (introduced by Congressman Raker).

cessibility and usefulness," he concluded.[16] These were common themes at the time, for parks were likened to "nature's cathedrals" through which the United States, a raw young country, matched in splendor the great human-built cathedrals of Europe (a commonplace comparison, especially for Yosemite), and in which nature imitated the colors of art (usually said in reference to Yellowstone or the Grand Canyon). Such messages made clear that the President regarded, and believed that the American people regarded, the parks as symbols of the nation and thus of vital importance. However, Taft's words did nothing to define standards of protection, much less of administration. This would be left to Congress.

President Taft's concern had grown directly from the first major conference devoted specifically to national parks, held at Yellowstone in 1911. There, in a park policed by the U.S. Army, where different concessionaires charged different prices for transport from different entrances, where hotel facilities were deemed on the whole inadequate and automobiles were not yet permitted, a number of interested parties, including members of the House and Senate, spoke of the need for national parks to serve the nation's health, preserve its great scenic wonders, and provide for recreational outlets for the people. Nature was compared to architecture, Providence (and at times God) were invoked, and most speakers believed that these wonders were intended for human "delight."[17]

The Hearing of 1912

The first substantive discussion of the purposes of a National Park Service or Bureau occurred during the House hearings on H.R. 22995 on April 24 and 25, 1912.[18] During the discussion much was revealed concerning what, in the eyes of individual members of the House and in the mind of the Secretary of the Interior, Walter Lowrie Fisher, national parks were meant to be. The hearing moved expeditiously, with significant questions being fed to the Secretary by Congressman Raker, who clearly was committed to the creation of some type of professional service. Though the hearing was ill-attended—of twenty members of the House Committee on the Public Lands, only ten were present, and but half of these spoke—it brought forth several basic points.

After noting that the Secretary of Agriculture, James Wilson, approved of the proposed Park Service, while offering some amended language to the bill calculated to put greater distance between parks and national forests, the Committee called upon Secretary Fisher, who in his prepared statement gave six reasons why a bureau or service was desirable. (In subsequent discussion he elaborated upon some of these and added two additional reasons.) Interestingly, his first goal was to establish criteria for national park status and to hold to

16. *Id.*

17. The background to the post-1911 bills is explored in Donald C. Swain, *The Passage of the National Park Service Act of 1916*, WIS. MAG. HIST., Autumn 1966, at 4, 4-17.

18. *A Bill to Establish a National Park Service, and for Other Purposes: Hearing on H.R. 22995 Before the House Comm. on the Public Lands*, 62d Cong., 2d Sess. (1912) [hereinafter *Hearing 1912*].

these criteria in the face of local pressure (in which he included political figures and associations).[19] Reverting to this point later, Fisher observed that there were among the now twelve existing national parks three that were not of national significance (while he did not name them, correspondence at the time makes it clear he had in mind Platt National Park in Oklahoma, Sullys Hill National Park in North Dakota—both ultimately demoted or abolished—and the Hot Springs Reservation in Arkansas). The twelve parks included duplications, were an "accumulation," and were not all of equal significance. A bureau would give the Department added strength in resisting future inappropriate proposals.[20]

Fisher also cited as justification for a bureau the need for coordination in policy and funding. Lacking a bureau, any experience gained in one park was of little practical use in another park (here he spoke of the need for an engineer who could formulate and apply common policies with respect to roads and bridges, and the development of such "incidental power" from the natural waterfalls as could appropriately be developed for lighting hotels and roads without interfering with scenic values). He cited the need for continuity and consistency in granting leases for accommodation, in order to avoid the chaos inherent in policies that ranged from no provision for granting leases through ten- to twenty-year leases (and one instance—Mount Rainier National Park—where the enabling act was silent on any time limit).[21] Finally, a bureau could set administrative and management policy on a range of problems in order to assure visitors some common standard of experience, whether in hotels, campgrounds, or transport. As something of an afterthought, Fisher added in closing that a bureau would make possible "scientific" determinations (he cited the question of the effect of the use of oil on roads within the parks) not then available.[22] Under questioning, Clement S. Ucker, the chief clerk then responsible for the parks, pointed out that the intention also was to bring the existing national monuments and the Casagrande Ruin (as then spelled) Reservation in Arizona under the proposed bureau's jurisdiction.[23]

Throughout testimony, Fisher, Ucker, and those Congressmen who spoke, reflected a desire to see the lands administered by the proposed bureau viewed as being unique, nationally significant, and a coherent whole rather than an "accumulation." When discussing the "automobile question," Fisher noted that "to help the scenic beauty of the parks," they ought "to be kept properly" and asserted that there was "a park point of view": "The Forest Service, for instance, in its regulations, treats of the matter only from a timber point of view and not from a scenic point of view at all."[24] One important goal of management was "not to destroy the scenic effect." Congressman Raker concluded, in response to a colleague's observation that the parks were "simply large areas," that "you do not find any on earth that contains the scenic beauty and gran-

19. *Id.* at 4-6.
20. *Id.* at 17.
21. *Id.* at 7-9.
22. *Id.* at 10.
23. *Id.* at 12.
24. *Id.* at 13.

deur and necessity for preservation as in those national parks."[25]

What Is Scenery?

This hearing in 1912 was typical of discussion to follow. For the most part, both members of the House and witnesses from the executive branch restricted themselves to mid-level generalities. No one asked probing questions about precisely how scenic values were to be preserved or, indeed, what scenery was. Nonetheless, three generalizations emerged. Parks were to be held to a higher standard of preservation because of their grandeur and (with monuments) scientific values than were other federally-administered lands; this would best be achieved through a separate bureaucracy which would understand these different needs and values; and while roads, accommodations, and other man-made intrusions were necessary in order to enhance the recreational purposes of the national parks, such physical objects were to be subordinate to the preservation of the "scenery." Never, however, was *scenery* defined, for clearly all believed they understood its meaning.

There is no doubt that Congress wished to protect the scenery of the national parks. (Protection is not, of course, preservation, a word more commonly applied through the Antiquities Act of 1906 to national monuments, especially of an archaeological nature.) Though "scenery" is to some extent subjective, one should note that the word has certain agreed meanings which have not changed substantially. "Scenery" is "the *aggregate* of features that give character to a landscape"—a definition that allows for scenery to fall well short of "grandeur" and which thrusts a significant burden onto "landscape," which is defined (somewhat circuitously) as "a section or portion of scenery, usually extensive, that may be seen from a single viewpoint."[26] This sense of "scenery"—that it represented a viewpoint, or perspective, that was wholly to be determined by humans—is reinforced when one notes the second definition, "the painted backdrops on a theatrical stage."[27] When Peter Roget first prepared his now famous thesaurus in 1853, he noted as synonymous terms for "scenery" the words "view," "scene," "sight," "prospect," "outlook," "lookout," "vista," "perspective," and "landscape."[28] (Other terms, such as "panorama" or "waterscape," are products of the twentieth century.) One may argue, then, that if one may assume those who used the term "scenery" in conjunction with "protection" knew the value of the words they chose, they intended that priority should be given to land that embraced several natural features (an aggregate) that were capable of being viewed from some point, whether road, trail, outlook, above or below, and that any alteration of timber cover, water course, rock face, or naturally occurring floral or faunal presence was to be avoided.

In 1911 the Century Company had issued a new *Dictionary and Cyclope-*

25. *Id.* at 23.

26. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1176 (Coll. ed. 1968) (emphasis added).

27. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1979).

28. ROGET'S INTERNATIONAL THESAURUS § 446.6 (4th ed. 1911)

dia which had become the favored reference of Congress. In addition to invoking the words "aggregate of features or objects" and "character," this authoritative dictionary had added a definition of *scenery* which also included the notion of the "picturesque or pictorial point of view."[29] Thus, no matter which dictionary one might consult, "scenery" is tied to "a place," or "features"; involves more than one "object"; and derives special value from the "aggregate" or conjunction of those objects, as viewed from some undefined but nonetheless human vantage point.

The Hearing of 1914

The National Park Service bill was introduced again at the 63d Congress, and as H.R. 104 it was the subject of another hearing before the Committee on the Public Lands on April 29, 1914, at which the idea of a "scenic point" was introduced by one of the speakers, Henry S. Graves, the Chief Forester for the Department of Agriculture.[30] However, this hearing turned largely upon the practical question of whether a separate service would reduce expenses, be more efficient, and eliminate the need to use U.S. Army troops in some of the parks, a practice against which the War Department was protesting. Well attended, this hearing was particularly revealing on the army question but did little to advance general definitions of parks; there was no discussion of natural resources or of the meaning of protection. Congressman Raker again made the running, referring to the parks as "playgrounds," embracing the widely held language of the good roads, health, and recreation interests that were pressing both for a uniform service and for additional parks.[31]

President Taft's statements were placed on the record. He clearly felt there should be more national parks; equally, he wanted a bureau so that the parks "may become what they are intended to be when Congress creates them."[32] He made no effort to suggest what that intention was, since quite properly this was a matter for the legislative branch. Raker was the only member of the Public Lands committee who appeared to be concerned with the fact that there was no clear definition of the purposes of parks beyond being in themselves "great natural wonders" preserved for the benefit of the people, and he introduced to the hearing an address by Secretary Fisher made the previous year in which Fisher remarked that while he did not wish to intrude upon the terrain of such men as J. Horace McFarland, the President of the American Civic Association, or Senator Smoot, who had spoken strongly about the need for parks at the 1911 Yellowstone conference, he nevertheless found "there is no consistent theory of legislation with regard to the national parks."[33] Fisher addressed himself to the concerns he had laid out in the 1912

29. DICTIONARY AND CYCLOPEDIA VIII, 5385 (1911).

30. The Papers of Henry S. Graves are in the Yale University Library Archives. Though rich and relatively extensive (53 boxes), they contain no topical files on national parks. They do cover the period under scrutiny here, 1910-16, and were searched on all points on which Graves is mentioned hereafter.

31. *Hearing 1914*, *supra* note 7, at 75.

32. *Id.* at 6.

33. *Id.* at 7.

hearing, adding two additional reasons for creating a park service: the need to protect the public and enhanced effectiveness in publicizing the parks. He commended the great railroads, and the Northern Pacific in particular, for their enlightened practices in promoting but not penetrating parks.[34]

Thus, little that was new emerged from the 1914 hearings, except for the revealing comments of Adolph C. Miller, assistant to the Secretary of the Interior, who after much praise for the soldiers who patrolled Yellowstone and Yosemite parks, and some battering by members of the committee who feared the growth of another expensive government bureaucracy, found that his most persuasive case appeared to be in demonstrating that the public did not like the presence of the army in the parks.[35] "Military rule," said Denver S. Church, Congressman from California, "spoils the scenery and makes cold water taste flat."[36] Miller did make it clear that the parks were faced with requests that a bureau could best resist, citing the case of an effort by the power and electric company operating in Sequoia National Park to change the location of their conduits and intakes, moving nearer a waterfall, that ought not to be permitted if a move was to the "detriment" of the "scenery of the park," a judgment best made on the spot by a trained individual.

The Department of Agriculture, which administered the national forests and the national monuments within forest boundaries, was a consistent supporter of the 1914 and 1916 national park service bills. Here the commonly held notion that Interior and Agriculture were in opposition to each other is quite untrue. Graves had been dubious about national parks prior to 1914, but he had changed his mind by then. He reasoned that a separate park service, which could hold to higher standards of protection and scenic values, taking in only areas of truly national significance, would in fact protect the forest service in its holdings, since so many proposed parks were in Forest Service lands but were not of national significance. As Graves said, the Grand Canyon should be a national park—thus he helped make clear the criteria, at least of size and splendor, for inclusion in the system—while other areas (he named Mount Hood, Estes Park—the current way of referring to what would become Rocky Mountain National Park, or the Mount of the Holy Cross, all of "a special scenic character") might begin as national monuments administered by the Department of Agriculture and then, upon further study, become parks. In short, a vigorous, well-managed, and clearly-defined system of national parks would protect the forest department from poaching by local interests that thought the name "national park" would bring in more tourists and more quickly lead to good roads.[37]

Later, after a National Park Service was created, the NPS proved Graves to be accurate in his prediction. Between 1916 and 1932 over thirty-five national park proposals came before the Park Service, and its Director, or the Secretary of the Interior, declared with respect to twenty of these proposals

34. *Id.*
35. *Id.* at 74-75.
36. *Id.* at 75.
37. *Id.* at 79.

that the areas in question were not worthy of national park status, leaving the lands in the hands of those then administering them, usually the Forest Service.[38]

The Hetch-Hetchy Factor

After 1913 discussion of national park bills, and of any bill to require the application of uniform policies to parks, was constrained by bitter and recent memories on all sides of the great battle over the Hetch Hetchy Valley in Yosemite National Park. Many conservationists felt betrayed by President Wilson when, in December, 1913, he signed a bill authorizing the building of a great dam that flooded the Hetch Hetchy, thus infringing in the most basic and dramatic way on a park and most clearly contradicting any rhetoric to that point about scenic preservation and recreation being the highest values. Most of the players in the Rocky Mountain National Park and National Park Service bills were involved in these heated debates, and at times virtually coded remarks were made in hearings and in correspondence which, read in the context of the Hetch Hetchy, carried more pointed meanings than they may appear to do today.[39] Certainly this was the case with Congressman Kent, who in favoring the dam had lost the affection of "the father of national parks," John Muir, and had gained the suspicion of the American Civic Association and the Sierra Club. For Congressman Raker, the situation was especially difficult, for it had been his bill that created the dam, and taken together with other efforts on his part to bring water to his northern California constituents, he did not, in fact, appear to most proponents of parks to be a firm friend. This may well account for his emotional commitment to the park service bill, and especially a somewhat remarkable outburst during the hearings of 1916,[40] and surely contributes to the silence of many members of Congress on water matters, in particular, as they related to parks in 1914 to 1916.

Historians of public land policy for this period often detect four separate and distinct political groups which, depending upon the issue at hand, interacted in alliance. One, who called themselves the preservationists, were opposed to virtually any use of natural resources that would lead to their unnatural alteration. A second group, the "advanced progressives," advocated federal development as opposed to state or private enterprise. A third group, business-minded conservationists, were at the center of an emerging alliance between commerce and conservation; they wished to see private business, and sometimes the states, directly involved in both development and protection. It was this group that was most vocal on the national park issue, for they recognized that a magnificent protected area might be of great local commercial value. (Some subsequent scholars have referred to those who espoused such an alliance, especially when they worked with the advanced progressives, as "utili-

38. These are spread throughout the National Park Service records in the National Archives *seriatim.*

39. Hetch Hetchy is put into perspective by SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

40. *Hearing 1916, supra* note 3, at 119-20.

tarian-conservationists.") A fourth group simply opposed any federal regulation of resources within the states, invoked arguments of states' rights, and are usually referred to as the laissez-fairists.[41]

The significance of the Hetch Hetchy controversy to understanding the language used in discussing national parks subsequent to 1913 is that these four groups changed positions respective to each other during the affair, producing much bad feeling, and many who were involved in the bills of 1915 and 1916 had been burned over the Yosemite "violation," as some called it. Kent, for example, had been thought to be in the first group and then moved to the second; Robert LaFollette of Wisconsin had been so outspoken a member of the second, he was expected to be a champion of subsequent bills but remained largely silent on national park issues; Smoot, Lenroot, and Senator Henry Lee Myers of Montana belonged to the third group and would ordinarily have been opposed to President Wilson, but the war in Europe had muddied alliances, and they frequently proved to be the most powerful voices of moderate conservatism. Senators John F. Shafroth of Colorado and Clarence D. Clark of Wyoming were ideological laissez-fairists on most positions, and yet Shafroth would, after much soul-searching, support the Rocky Mountain National Park and Clark would defend a no-grazing provision for Yellowstone.[42]

Again, the person most alert to the damage the Hetch Hetchy type of controversy could do was William Kent. He had been a municipal reformer in Chicago who, despite having moved to California, with a home in Marin County, had remained active in Chicago politics until 1907. He disliked crowded cities and ordinarily favored any bill that would provide parks and playgrounds within the cities or would slow the pace of urbanization outside them. With the Hetch Hetchy he found himself in conflict, for he did not want to see a national park lessened and yet he believed that an assured supply of fresh water to San Francisco would so enhance health as to outweigh his convictions about the psychological and spiritual benefits of solitude and nature. As one scholar has remarked, "Kent was progressive except on the question of progress itself" while J. Horace McFarland, President of the American Civic Association, who opposed Hetch Hetchy, "was conservative except regarding conservation."[43] Thus Congressional discussions of both the Rocky Mountain bill in 1915 and, more directly, the Park Service bill in 1916, were shaped by memory of the wounds inflicted upon each other only a few years before, and no one appeared to want to directly confront the question of whether, in the

41. On these groups see in particular ELMO R. RICHARDSON, THE POLITICS OF CONSERVATION: CRUSADES AND CONTROVERSIES, 1897-1913 (1962).

42. These divisive woundings are discussed in Roderick Nash, *John Muir, William Kent, and the Conservation Schism*, 36 PAC. HIST. REV. 423, 423-33 (1967).

43. STEPHEN FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT 138 (1981). The Raker Bill to dam the Hetch Hetchy was proposed in the Senate by Nebraska's "fighting liberal," George W. Norris. *See* NORMAN L. ZUCKER, GEORGE W. NORRIS: GENTLE KNIGHT OF AMERICAN DEMOCRACY (1966); RICHARD LOWITT, GEORGE W. NORRIS: THE PERSISTENCE OF A PROGRESSIVE, 1913-1933 (1971). Lowitt points out that Norris favored protection of scenery but that he felt the beauty of the Hetch Hetchy valley would be enhanced by a lake with a dam the color of the surrounding mountains. LOWITT, *supra*, at 23. This was in keeping with the view, popular early in the century, that a "water feature," even if artificial, enhanced a view.

event of a conflict between good health through pure drinking water or good health through protected and open spaces, they would favor one over the other. Kent, having seen the divisiveness of the issue, appears to have deliberately avoided it.

Through their successive introduction, the Raker and Smoot bills to establish a national park service remained unaltered, save for one change in punctuation which unlike such changes in diplomatic documents, had no apparent significance. Congress intended to leave to the Secretary of the Interior the actual task of determining policies which, by their nature, would more clearly define what parks were to be. Section 4 of the bills consistently instructed the Secretary to "make and publish such rules and regulations as he may deem necessary and proper . . . for the management, use, care, and preservation of such parks, monuments, and reservations [this word was retained throughout to accommodate Hot Springs Reserve], and for the protection of property and improvements, game, and natural scenery, curiosities, and resources therein."[44] This remained the language of H.R. 424, introduced on December 6, 1915, on which the Committee on the Public Lands held hearings on April 5 and 6, 1916.

The Hearings of 1916

The House hearings of April, 1916, dealt with two bills, H.R. 434 (Raker's bill) and H.R. 8668, a new bill introduced by Congressman Kent. H.R. 8668 differed from H.R. 434 in that it contained the significant preamble quoted at note 2 above. The Chairman of the Committee on the Public Lands, Scott Ferris of Oklahoma, perhaps sensing that victory could be achieved in this session of the 64th Congress, let Kent virtually run the hearing, though Raker also was present. Since his first attempt to sponsor a successful bill, Raker had visited Yellowstone, several monuments and all the parks in California, Yosemite being in his district and Lassen and Cinder Cone monuments having been so prior to a revision of district boundaries. He entered a formal written statement into the record in which he told of his long-standing interest in the parks and endorsed the views of several men who had testified or offered statements at previous hearings, including Secretary of the Interior Fisher, Chief Forester Graves, and J. Horace McFarland.[45] He also commended the work of Rowland B. Grant, a conservation writer, and described the park bill as his "pet project," as the matter uppermost on his mind. "[M]y whole soul is wrapped up in this legislation," he told his colleagues, in an emotional appeal to have the bill passed within the next few days.[46]

Congressman Kent was no less concerned with speed, however, and being a more seasoned politician and more popular colleague, he was both more active behind the scenes and more effective in the committee. Remarking that

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44. *Hearing 1914*, *supra* note 7, at 3.

45. *Hearing 1916*, *supra* note 3, at 93. On McFarland, see ERNEST MORRISON, J. HORACE MCFARLAND: A THORN FOR BEAUTY (1995) (see especially chapter 11).

46. *Hearing 1916*, *supra* note 3, at 120.

he had no desire to have his name attached to the legislation, and bowing to Judge Raker's primacy in having brought a bill to the House, he unsuccessfully sought to put aside the single issue which all agreed had sidetracked Raker's earlier bills: the question of costs. These hearings were better attended than any previous ones on the issue, and as Kent noted privately, with war in Europe and a national election fast approaching, it was now or never if this bill—any bill, his or Raker's—were to be passed. Kent believed his position was clear enough. What he wanted when he agreed to introduce a bill in place of Congressman Raker's was a document that was "as short and uncluttered as possible," knowing that this meant that language would not be provided to clarify all future areas of conflict and ambiguity. The resulting act was only two and a half pages long.[47]

The 1916 hearings substantially repeated the previous hearings, even to the extent of reading into the record the text of those hearings. The Secretary of the American Civic Association, Richard B. Watrous, as well as McFarland, spoke, rehearsing the history of previous efforts to create a service and invoking the spirit of John Muir, who had died two years before. Watrous more than any other commentator argued that parks were a "business undertaking," that public ignorance kept them from being the profitable enterprises they could be, and that Switzerland and Canada had well-organized park systems which led to large sums of money for their governments as well as for private enterprise.[48] Speaking first, he set the tone for the hearing, which overwhelmingly focused on the twin financial questions, could the parks make money and would a bureau be costly, by reminding the Congressmen that during the recent international expositions in San Francisco and San Diego, to which many thousands of visitors travelled from the East, perhaps 75 percent of all tourists had chosen to go or return via the Canadian railroads because of the existence of national parks in the Canadian Rockies, parks that were well publicized by the Canadian Commissioner of National Parks, R.B. Harkin. Watrous quoted Harkin approvingly when the commissioner declared that parks "will pay not only in the strictly commercial dollars and cents way but they will also pay in a still more important way—by adding to the efficiency and virility of the nation."[49]

Thereafter the hearing focussed upon the costs of maintaining the parks, especially the expense of building and maintaining roads and the merits of charging a fee to those who entered in automobiles, and on whether a bureau would make for such efficiencies as actually to save the government money. Congressman Ferris declared that the hearing would concern itself only with "the general subject," and when it appeared that the committee might again

47. On the framing of the bill, see HORACE M. ALBRIGHT & ROBERT CAHN, THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913-33 34-45 (1985). This is a primary source, being Albright's memoirs. He was present at the meetings in Kent's home. Albright appears to have been the first administrator to refer to a national park "system." *See* DWIGHT F. RETTIE, OUR NATIONAL PARK SYSTEM: CARING FOR AMERICA'S GREATEST NATIONAL AND HISTORIC RESOURCES 13 (1995).

48. *Hearing 1916*, *supra* note 3, at 5.

49. *Id.* at 8.

fail to report out a park bill, and especially when there was a possibility that some members would delay the bill by demanding more information on the question of tolls, Kent spoke up vigorously to cut off discussion on the issue until some future time when it would become apparent whether or not the automobile would be the standard means of transportation to the parks. He told the committee that the time had come to "get action" and that matters of detail could wait.[50]

In the hearings only two new points were made. For the first time the phrase "national park system" was used, involving the image of a systematic inventory of the nation's grandest scenic landscapes and natural and scientific curiosities, all to be combined (with the ultimate transfer of national monument properties then under the jurisdiction of the Department of Agriculture) within one efficient and consistent administration.[51] Secondly, for the first time the notion of the parks as great educational enterprises, places to which the public could come to learn about nature, geology, fossils or sedimentation, while also increasing their working efficiency, their health, and their patriotism, was set out clearly, in this case by McFarland and by R.B. Marshall, the Superintendent of the National Parks, a newly-created position.[52] The "great parks are, in the highest degree, as they stand today, a sheer expression of democracy, the separation of these lands from the public domain, to be held for the public, instead of being opened to private settlement."[53] McFarland read into the hearing the sentence Frederick Law Olmsted, Jr. had framed as the preamble to Kent's bill and declared that this statement must "remain as it is, unless it can be strengthened; it should never be weakened."[54]

Olmsted's Statement of "Fundamental Purpose"

Frederick Law Olmsted, Jr. is important to understanding the language of Kent's bill. The son of Frederick Law Olmsted, the great creator (with Calvert Vaux) of Central Park, the person who had been one of the first to promote the idea of a Yosemite National Park, and the "father of American landscape architecture," the younger Olmsted had by 1916 long emerged from his distinguished father's shadow and was both a famed designer of major parks in his own right and a member of the federal government's Commission of Fine Arts. Olmsted shaped his language in conjunction with Kent, Raker, and others. The key provision Olmsted originally wrote for H.R. 8668 read:[55]

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50. *Id.* at 76.
51. *Id.* at 56.
52. *Id.* at 54.
53. *Id.* at 53.
54. *Id.* at 54.
55. In 1911 Olmsted and McFarland had used this language:

> That the parks, monuments and reservations shall not at any time be used in any way contrary to the purpose thereof as agencies for promoting public recreation and public health through the use and enjoyment by the people of the said parks, monuments and reservations, and of the natural scenery and objects of interest therein, or in any way detrimental to the value thereof for such purpose.

Letter from J. Horace McFarland, President of the American Civic Association, [hereinafter McFarland] to Richard Ballinger, Secretary of the Interior, [hereinafter Ballinger] (Jan. 3, 1911)

> The fundamental object of these aforesaid parks, monuments, and reservations is to conserve the scenery and the natural and historical objects therein and to provide for the enjoyment of said scenery and objects by the public in any manner and by any means that will leave them unimpaired for the enjoyment of future generations.

This would be very slightly altered in its final form, to state (as we have seen) that the "fundamental purpose" of the parks was "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."[56] Each signifier here has undergone change since 1916; a linguist might argue that the change is somewhat differential between sections of the country, but none would argue that change has not occurred or that such change has not tended in one direction, toward a wider interpretation of the key words "conserve," "natural," "historic," "objects," "wildlife," and "unimpaired." As this last word set the only actual standard (as opposed to purpose), it has been seen as most open to attack, interpretation, expansion, and ambiguity.

What may we reasonably believe Congress, and those who framed the legislation, meant by "unimpaired"? To stalk this question, one must turn to the papers, first, of Frederick Law Olmsted, Jr., and then to those of Congressman William Kent, for it was Olmsted who had insisted that there must be an overriding and succinct statement of purpose (today one would say "mission statement"). Since he expected and hoped for substantial public use of the parks, he was not content with leaving an area "unimpaired for future generations," but inserted the key words, "for the enjoyment of" those generations.

Herein lay an ambiguity and a potential source for future conflict. "Enjoyment" reasonably required access, and at the time roads, trails, hotels, campgrounds, and administrative facilities did not seem unduly invasive. The act cannot have meant that "unimpaired" was to be taken in its strictest sense, particularly since the act included specific approval for certain inevitably compromising actions: leasing for tourist accommodation was the most obvious example.

The Organic Act also contained a provision likely to affect natural resources in parks. By reaffirming an act of 1901 that authorized the Secretary of the Interior to permit rights of way in Yosemite, Sequoia, and General Grant national parks, for pipelines, canals, ditches, water plans, dams, and reservoirs "to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber outside the parks," the act of 1916 showed that public use of the national parks might, when approved by the Secretary, extend to consumption of some of the park's resources. Did the statement of "fundamental purpose" temper this section of the bill?

(on file with the National Archives, R. Group 79, entry 6, box 783, 61st Cong.). Ballinger had promptly accepted this language. Letter from Ballinger to Frederick Law Olmsted, Jr. [hereinafter Olmsted] (Jan. 4, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783, 61st Cong.).

56. 16 U.S.C. § 1 (1994) (emphasis added).

One should not make too much of this provision. First, it applied by name to only three national parks, all in California, where water interests were powerful and historically entrenched within and around the three parks in question. That the act was silent on other parks may be taken to mean that the provision did not—or at least did not readily—apply to them, unless specific legislation with respect to a park mentioned such rights of way (the 1915 act creating Rocky Mountain National Park did contain such a provision). Second, to the degree that multiple use was peculiar to the mandate of the National Forest Service, other language in the Organic Act of 1916, and most particularly in subsequent amendments to that act in 1970 and 1978, clearly meant to provide national parks with a higher standard of protection than in national forests or, conversely, those acts were less permissive of the application of a policy of multiple use. Third, across time the conflict between any grant of authority to the Secretary to provide for multiple use and the language relating to "unimpaired" and "for future generations" was interpreted by the courts to stricter and stricter (that is, more protective) meanings of "unimpaired."

What did Olmsted mean at the time? We have a commentary by him, written in 1937, in which he provides a gloss on his meaning. In the midst of debate in Colorado over the Colorado-Big Thompson Project, a water diversion plan that would bring water from the western slope of the Continental Divide to the parched agricultural lands on the eastern slope, in part by the use of a tunnel that would pass through, or under, Rocky Mountain National Park, Olmsted wrote of what he deemed the "common sense" approach to the question of impairment.[57] An editorial had appeared shortly before in the journal *American Forests*, arguing that, were a decision made "to subordinate the principles of National Park conservation to principles of economic exploitation within the limits of the Rocky Mountain National Park," then the park would lose the central value by which it was worthy of national park status, and that the land should be withdrawn and transferred to the Forest Service as a National Forest. The editorial further suggested that any diminution of the park's natural scene should lead to the transfer of the entire park, not merely of the portion visibly affected by the Colorado-Big Thompson irrigation project.

While Olmsted found this reaction excessive, it is instructive to note that he had clear criteria in mind by which he would define a rational position on the question of invasions of the park in relation to water needs outside the park. First, he argued that a stand on "absoluteness" was not "sane" in a "world of relativities," acknowledging that an absolutely unbending position would lose support for the park since the Park Service would appear to be opposing a goal that was "for the good of society." Second, he thought that an unduly "academic conception" (in this case, of landownership "as extending vertically from the center of the earth indefinitely upward into space") would be, and would be seen to be, non-rational. Third, he specifically argued that a tunnel a mile below the surface would not necessarily or invariably inflict harm on the park; rather, the test to be applied should be one of the "probable

57. Letter from Olmsted to Bradford Williams (Oct. 22, 1937) (on file with the Library of Cong., American Soc'y of Landscape Architects).

degree of its adverse influences." Fourth, not content with so general an argument, he proposed actual criteria, in keeping with the original intentions of the Organic Act, that should be applied when issues of this nature arose.

Olmsted proposed five criteria. 1) The burden of proof—"and thoroughly well-considered and convincing proof"—must rest upon the advocates of "any enterprise for non-park purposes within the theoretical limits of jurisdiction of a National Park"; 2) the enterprise must be of "real social importance from a *national* [italics added] standpoint and is not to be practically attainable" elsewhere; 3) the enterprise must not "endanger the value of the park for its proper purposes to the slightest appreciable degree"; 4) the danger must be "so slight and of such a nature that the land if subject to it in advance would nevertheless have been wisely considered eminently suitable for selection and permanent maintenance as a National Park"; and 5) the non-park purpose must be "of so much more importance nationally than the purposes of the park" as to justify the lessening of the park. Olmsted concluded that, while he was open to reason, he did not find the arguments for the Colorado-Big Thompson Project complete or convincing.

Of course, Olmsted's reasoning was not law (and this expression of his view came over twenty years after he had drafted the 1916 preamble). Congress and the President, in their wisdom, did in due course approve the Colorado-Big Thompson project.[58]

Congressman Kent's Views

What did the principal formal author of the National Park Act of 1916, Congressman William Kent, say about it himself? Kent often is singled out as the "father of the National Park System," and his views deserve some extended analysis.[59]

Kent was a Chicago businessman who had bought a home in Marin County, California, in 1899 and moved there in 1907. He was adding to an already substantial fortune through land in California and in Nevada. A Progressive, he had stood with Theodore Roosevelt in 1912, and after 1912 he was a somewhat ambiguous independent supporter of Woodrow Wilson. Elected to Congress in 1910, he brought with him a reputation as a conservationist, and he quickly went on record in favor of public power. He wished to see the nation's flooding rivers brought under control, advocated extensive irrigation projects for California's Owens Valley, strongly supported public water power projects on the Suwanee, the Susquehanna, and the Mississippi rivers, and was an early proponent of the Tennessee Valley Authority. As he championed public power, he also opposed private power, and he was particularly ambiva-

58. *See* C.W. BUCKHOLTZ, ROCKY MOUNTAIN NATIONAL PARK: A HISTORY 188-91 (1983).

59. The Kent Papers are in the Sterling Memorial Library at Yale University. I have also examined his correspondence with his son Sherman Kent, later director of the Office of National Estimates at the Central Intelligence Agency (these papers are under restricted access at the Yale University Library), and inquired of the family, through Mrs. Sherman Kent, and through a grandson, whether any papers remain at the family home in Kentfield, California, to which the answer was no.

lent toward a bill put forward by his colleague on the Committee on the Public Lands, Congressman Scott Ferris of Oklahoma. This bill, H.R. 16673, came before Congress in January, 1915, to authorize the Secretary of the Interior to lease to American citizens "for purposes of constructing dams, water controls, reservoirs, transmission box lines" "any part of the public lands . . . including lands in national forests, the Grand Canyon and Mount Olympus national monuments, and other reservations, not including national parks" for a period of fifty years. Kent vigorously opposed this bill, pouncing upon its reference to the Grand Canyon, and even though Ferris added the provision that leases were to be granted only if they were not inconsistent with the purpose for which a national park or national monument was created, Kent remained adamant. Water, Kent maintained, should belong to the people.[60]

A second consistent strain in his thought was revealed in his persistent efforts to transfer to public ownership a large area of Mt. Tamalpais, in Marin County. Kent owned much of the mountain and an outstanding grove of coastal redwoods that nestled in one of its valleys, and beginning shortly after his arrival in California he had wished to see this land become a state park or, as later phrased, national monument—the first national monument having been created by executive action at Devil's Tower, Wyoming, in 1906—in part because the growing population of Marin County was creating pressure for more water, and he wanted both to protect the purity of the watershed and to assure the towns of the county an adequate public water supply. In 1908 he was successful in these endeavors, and his redwood grove became Muir Woods National Monument. From 1903 forward he spoke of the need for more national parks and the necessity to keep lands in or destined for parks out of local politics.

Thus Kent favored the development of water power through public means, the protection of watersheds, and the creation of national parks and monuments to preserve scenic and natural areas. At Muir Woods he was insistent on the highest standards of protection, and the early wardens, who were in his pay, even kept local societies that had been accustomed to walking in the park to "botanize"—the contemporary term for taking plants for educational purposes, pressing them in "flower books," and identifying them—from picking wild flowers. At Muir Woods, he wrote all was to be left natural, with no plants to be removed and no naturally downed trees to be cleaned up from the valley floor.[61] He also proposed a park for Lake Tahoe, on which he was unable to obtain effective support.

As a member of Congress, Kent was not dogmatic on the water issue, save for his insistence on public power, and he was not invariably a supporter of undisturbed wilderness even in national parks. After all, he was among those who pressed for opening up Yosemite National Park to the Hetch Hetchy reservoir, for he felt constrained to put the water needs of his Bay

60. William Kent Papers (on file with Yale University Library, R. Group 309, box 71, folder 125).

61. *Id.* (box 25, folder 499).

Area constituents first.[62] For whatever reason, he was silent on water issues when both the 1915 and 1916 park service bills were introduced, though in 1913, during an early discussion of Rocky Mountain National Park, he observed that scenic judgments were subjective and that he preferred a "mirror lake" to a mud flat.[63]

Kent's views on what a national park should be had been made clear, however, across several park proposals. In 1913 he had offered up a national monument on the Middle Fork of the Feather River in northern California and a Redwood National Park on the California north coast and in January, 1915, he had come out strongly in House debate for the Rocky Mountain National Park bill, declaring that the preservation of scenery is a "most valuable purpose." He drew a distinction between national forest, national monument, and national park land, asserting that a national park must be held "in a state of nature" and that animal life must be "forever free from molestation."[64] One may reasonably conclude that this was still his view only a year later, as sponsor of H.R. 8668.

Kent's position thus seems clear. He promoted his own park bill because he thought it, and not Raker's, would pass and also because it was the better bill. It contained Olmsted's preamble and Raker's had none. In close touch with President Wilson, Kent was cautioning him weekly on the need to keep the United States out of the war that had broken out in Europe, and he intended to withdraw from the Congressional race in the first district of California (though he postponed an official announcement until June to allow for an appropriate successor to test the waters) because of ill health. Thus, he also felt a sense of urgency in getting the bill to the President. For reasons of health, Kent's focus on his bill clearly declined after it was reported out of committee in May, but he could well feel he had made his position abundantly clear already, and he knew that Senator Smoot would carry the bill in the Senate.

During this time letters poured in from a wide range of constituents, organizations state and national, and fellow members of Congress, praising him for his park bill. Examples of letters of commendation and support received in March of 1916 alone include the Washington State Federation of Women's Clubs, Seattle *Daily Times*, Fortuna (CA) Women's Civic Club, City Shade Tree Commission of York, PA, College Women's Club of San Diego, the Henry Street Settlement in New York City, The Appalachian Club, Tramp and Trail Club, Erie (PA) Board of Commerce, Corona Club of San Francisco, Twentieth Century Club of Berkeley, California Development Board, Hebrew Educational Society of Brooklyn, Los Angeles City Teachers' Club, Miss Haskell's School of Boston, *National Magazine*, American Society of Landscape Architects, South Bend (IN) Chamber of Commerce, Highland Park Ebell of Los Angeles, and Herbert W. Gleason of Boston (a lecturer on

62. *Id.* (box 67, folders 83-85).
63. *Id.* (folders 86-91).
64. *Id.* (Scrapbook B, microfilm reel 4, §§ 8-10).

parks).[65]

Kent was particularly concerned with standards, and with the rumor that the chief forester, Henry S. Graves, was opposed to his bill, and on this he sought out assurances. Graves responded to Kent on March 17, declaring that he fully favored the bill. The Department of the Interior was facing pressure for economic use of natural resources in the parks and chose to meet this by granting grazing privileges similar to the national forests. This would affect the forests too, and as we have seen, Graves wanted to see a national park service created so that a national park would be clearly distinct from a national forest, "almost wholly protective," set aside to preserve "exceptional natural wonders," "segregated," for "exclusively . . . recreation and scenic purposes." The goal was to "preserve these areas in their natural condition." Congress must, Graves concluded, be certain that national parks are "really distinctive" and then hold them to a higher standard than other public lands, with the proposed National Park Service to have "its own separate and distinct field."[66]

Nothing could have seemed clearer, and Kent and Graves were in agreement that precisely because a higher standard was to be applied to national parks, one must resist the growing demand at the local level to create parks primarily to attract tourists. Graves noted that there were fifteen or more bills pending to create new parks; many of the bills would not prohibit industrial use and would authorize grazing, mineral development, the sale of timber or the use of streams for water power. This must not happen, he said, and Kent agreed. Late in 1916, Kent was unhappy with power companies in the Mono Lake Valley for obtaining rights under the guise of irrigation, and for being allowed to effect a change in the Yosemite Park line, to the loss of two magnificent waterfalls.[67]

Had Kent intended any emphasis on recreational purposes for the parks—one of the purposes to which Graves referred—he surely would have said so, for at the time Kent was a Vice President of the Playground and Recreation Association of America. Had he believed that he could leave interpretation of the bill to the Secretary of the Interior, Frederick K. Lane, he surely would not have written to Woodrow Wilson on July 24, when the bill was soon to be on the President's desk, advising him that Interior was abandoning sound policy. The Assistant Secretary, A.A. Jones, was not to be trusted, and Lane himself "had broken down to a considerable extent in his conservation policies."[68]

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65. *Id.* (box 24, folders 468-72).

66. Letter from Henry S. Graves, Chief Forester [hereinafter Graves], to William Kent, Congressman, [hereinafter Kent] (Mar. 17, 1916) (William Kent Papers, *supra* note 51 (box 24, folder 470)).

67. Letter from Wallis D. McPherson to Kent (Dec. 14, 1916) (William Kent Papers, *supra* note 51 (box 25, folder 507)).

68. Letter from Kent to Woodrow Wilson, President, (July 24, 1916) (William Kent Papers, *supra*, note 51 (box 25 folder 493)); *see also* William Kent Papers, *supra*, note 51 (folder 500). Lane's views were, indeed, moving more toward commerce than conservation in 1916, but on the national park bill itself he remained supportive. The sparse Lane Papers at the Library of Congress do not help us here, nor does THE LETTERS OF FRANKLIN K. LANE: PERSONAL AND POLITICAL (Anne Wintermute Lane & Louise Herrick Hall, eds. 1922). Having had a heart attack, Lane was

Until his death William Kent tracked the national parks. In 1922 he marked a passage in an article by Barton Warren Evermann, that "National parks should be maintained as *natural* parks and not be marred by artificiality of any avoidable kind."[69] In 1925, when a Senate Subcommittee of the Committee on the Public Lands held hearings on the national forests, Arno B. Cammerer, Assistant Director of the National Park Service, appeared before it, and Kent noted his remarks with approval. Cammerer asserted that the parks "were established to be kept absolutely in their natural condition," except for roads and hotels: it was, he felt, preferable to lose land and change boundaries than to permit an incompatible act within a park.[70] Reservoirs, for example, were clearly incompatible, Cammerer noted, pointing out that Congress had, by amendment to the Federal water power act of 1920, gone on record that before any ditches, reservoirs, etc., could go into any national park, they would have to be specifically authorized by an act of Congress. Kent appears to have felt that his basic principles had at last been clearly recognized.

A Contradictory Mandate?

Several commentators on the National Park Service Act of 1916 have concluded that the preamble, or statement of fundamental purpose, presented the Service with a contradictory mandate. There are three possible sources of contradiction: doubt as to whether the 1916 act applied to parks existing before that time; conflict between federal agencies; and ambiguities in the language of the act. The first two possible sources of conflict do not arise, for Congress was clear with respect to them. In the debates on the bill, Senator Reed Smoot of Utah, sponsor in the Senate, specifically said that the bill was intended to apply to the then existing parks.[71] In the Committee Report accompanying the 1916 bill, Congress noted that there was not supposed to be any conflict of jurisdiction among the agencies.[72] Thus, if the new National Park Service was handed a contradictory mandate by Congress, the contradiction arose from the language of the bill, and in particular from its statement of "fundamental purpose." Whether such a contradiction exists or not now requires further examination.[73]

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not vigorous and would die in 1921. The only biography, KEITH W. OLSON, BIOGRAPHY OF A PROGRESSIVE: FRANKLIN K. LANE, 1864-1921 (1979), is silent on parks. An unpublished M.A. thesis that apparently shows access to additional materials, Henry W. Wiens, The Career of Franklin K. Lane in California Politics (1936) (unpublished M.A. thesis, University of California), has been reported lost by the Berkeley institution.

69. Dr. Barton Warren Evermann, *Conservation and Proper Utilization of Our Natural Resources*, SCI. MONTHLY, Oct. 1922, at 293, 294 (emphasis in original).

70. William Kent Papers, *supra* note 51 (April 1925) (pamphlet file (copy)).

71. 64 CONG. REC. 12,151 (1916).

72. H.R. REP. NO. 700, 64th Cong., 1st Sess. 3 (1916).

73. Many standard books on the National Park Service, or in conservation or environmental history, devote a paragraph or so to the act, usually in much the same language. When one pursues these paragraphs through the references supplied, one finds a nearly infinite regression, each leaning upon the previous secondary statement, most virtually devoid of any independent examination. For the most part these accounts pass over the actual framing of the bill and raise no questions about Congressional intent, simply celebrating (in words attributed to Wallace Stegner) "the best idea America ever had." Perhaps half the secondary works conclude that the preamble to

These recent commentators ask, in one form or another, how a management policy can both accommodate use and preserve a natural area. These commentators, often in very similar terms, conclude that the Park Service was presented by the act with a "fundamental dilemma," that the Service was asked to attempt "harmonizing the unharmonizable," and that the dilemma is not capable of either logical or historical resolution.[74] None of these authors appears to have examined the bills that led to the Act of 1916, the hearings, the debates—that is to say, the legislative history—much less having sought out and explored the private papers of the members of the Committee on the Public Lands.

To accept the conclusion that the preamble presented the Park Service with an inherent contradiction, that it is illogical, is to conclude that Congress had no clear intent, that it either did not know what it was doing when it posed a dilemma, that it did not care, or that there is no inherent contradiction in the preamble. While Congressional acts undeniably contain unclear language, and (when acted upon administratively) unresolved issues, it seems unreasonable to so summarily dismiss Congressional intent when the act was the product of well-informed men, especially Raker and Kent, both of whom had studied the issue with care, one of whom declared the act to be his "pet" and the other, by evidence of his correspondence, having spent much time upon it; when the act was the last of a series, each of which had benefitted from the clarification of hearings; when the co-sponsor in the senate, Reed Smoot, confided to his diary that this act was one of the most important of his accomplishments;[75] and when such careful and scholarly individuals as Frederick Law Olmsted and Robert B. Marshall had a hand in its language.

We have Raker's testimony to the importance he attached to this legislation. Though his papers apparently have not survived[76] in public hands, we know that Raker (and Kent) met regularly in 1916 at the apartment of Robert

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the act contains a "logical contradiction" (the words of Ronald A. Foresta in RONALD A. FORESTA, AMERICA'S NATIONAL PARKS AND THEIR KEEPERS 100 (1984)), or appears to. However, not one of these books or articles is based on an examination of the Kent, Olmsted, or other relevant papers, and Swain's 1966 article, *supra* note 8, on which most of the recent writings are based, is drawn almost wholly from the papers of Horace Albright, secondary accounts, and a limited survey of Congressional Debates and Interior Department annual reports, with no reference to Congressional Hearings or other manuscript collections.

74. Upon examination more recently, this conclusion is often cited to an unpublished Master's thesis, Daniel McCool, The National Park Service: The Politics of Appropriations (1980) (unpublished M. thesis, University of Arizona), which is in fact about funding rather than purpose; or from political scientists and sociologists whose primary inquiry is into the theory of management. A check of five frequently quoted articles shows that not one of the authors went beyond what they construed to be the common sense meaning of the language, which they found on the face of it contradictory. However, if one is to construe, deconstruct, or (as an historian) explicate a text, one generally may not do so without going behind the text.

75. Diary of Reed Smoot (July 11, Aug. 6, 1916) (Reed Smoot Papers, on file with Brigham Young University). See also his biographical sketch (which he himself wrote) in 35 THE NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 63-64 (1949).

76. The Congressional Information Office has found no papers. This writer called all major depositories in California, the local historical societies of Susanville and Alturas (where Raker had his law offices), the alumni office of San Jose State University (from which he graduated in 1884, when it was a normal school), and a variety of repositories in Washington, DC, where he died in 1926, all without success.

Sterling Yard, a journalist working for the United States Geological Survey in Washington, and that the final bill was drafted by these men, joined by three officers of the American Civic Association, McFarland, Richard B. Watrous, and Henry A. Barker; by Enos Mills, Huston Thompson (the Assistant Attorney General), Gilbert Grosvenor, editor of *The National Geographic Magazine*, Emerson Hough, a leading exponent of reforestation, and Herbert Quick of the *Saturday Evening Post*. Except for Mills, who was popularly dubbed "the father of Rocky Mountain National Park," which had been created by act of Congress earlier in 1915, these men were professional publicists, editors of travel and outdoors oriented magazines, or officers of similarly inclined associations. As noted earlier, McFarland and Watrous would testify at the 1916 hearings on the National Park Service Act. Yard had been editor of *Century Magazine* and of the Sunday magazine of the *New York Herald*, but he had recently come to Washington to be head of any future national parks information office, and he was writing a booklet on the parks. (Stephen Mather, future director of the National Park Service, had arranged for Yard to be employed through the Geological Survey, since there was as yet no park bureau that could hire him.[77]).

Once Kent agreed to sponsor a new parks bill, these men moved their meetings to his home on F Street in Washington, where they met "fairly regularly," according to the young Horace Albright,[78] who was Mather's assistant and a regular member of the group. He recalled Kent, McFarland, Marshall, and Yard as the core group, with Olmsted, Grosvenor, Quick, Hough, Barker, Watrous, and Mills present from time to time. Thus there was reasonable continuity of attendance at these meetings. It seems unlikely that such a group, even though they wanted a simple and uncluttered bill and wished it in a hurry, would allow a glaring contradiction to be part of the statement of "fundamental purpose" over which Olmsted labored, producing at least three versions. One must presume that the language was deliberate and that it is worthy of the closest attention.

Not present at the F Street meetings was Stephen Mather himself. Mather had brought Yard to Washington and had persuaded Albright to give up a career in the law to be his assistant; a rich man, he paid both out of his own pocket, an unusual but not illegal arrangement. Mather had taken pains to get to know the people who ran the national parks, by calling a national park conference for Berkeley, California, in March of 1915, and asking all park superintendents to attend. He also had invited most of the concessionaires from the parks and took with him from Washington several key players. One member of the House Committee on the Public Lands, Denver S. Church of Fresno, California, had attended. At Berkeley, Mather had spoken of the need for a park service and had shared with Albright his sense that many of the

77. ALBRIGHT & KAHN, *supra* note 38, at 24; *see also* ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 100-01 (2d ed. 1954). I have examined the Mather Papers, in the Bancroft Library of the University of California, Berkeley, but do not cite to them here since all relevant quotations and statements drawn from them in Shankland, or Albright and Cahn, are accurate, and citation to the more readily available source is preferable.

78. ALBRIGHT & CAHN, *supra* note 38, at 35.

superintendents, being political appointees, were not up to their tasks, a deficiency a park service would remedy.

Mather also took the trouble to get to know the key members of the House and Senate committees. He was on social terms with Congressmen Kent, Raker, Carl Hayden, Addison Smith, and Louis C. Cramton of Michigan, all members of the Committee on the Public Lands, as well as with Senators Smoot and Norris. He talked with them about the need for a service, shared with them his philosophy of what the parks should be, and urged them to move forward as quickly as possible with a new bill. Kent did so at a time when Raker was ill, mindful of the fact that his California colleague was unpopular and maladroit on the floor of the House, as well as disliked by the House minority leader, James R. Mann, who came from Kent's former district in Illinois. Thus the working group got behind Kent's bill quickly, knowing that it had a far greater prospect of being reported out of committee than Raker's bill did.

Finally, it was Mather who orchestrated the presence of powerful journalists at the planning meetings on F Street. He took a party into Sequoia National Park in July of 1915, including local newspaper editors, natural scientists, the head of the American Museum of Natural History, the ranking Republican on the House Appropriations Committee, the vice-president of the Southern Pacific Railroad, photographers, magazine writers, and travel editors. Following this visit to Sequoia and the Kings River and Kern River canyons, Mather and Albright brought a number of national magazines into line, and then promoted meetings at the Yard and Kent residences. Given this careful preparation, it is also unreasonable to assume that Mather would have allowed a "logical contradiction" to emerge from Olmsted's pen.[79]

Mather testified during the hearings of April, 1916. He frequently noted that an act was needed quickly, given uncertainties in Europe, and admitted that from his perspective the bill did not deal in detail with all matters of importance.[80] He did not pronounce upon the language of the Kent/Olmsted preamble at the time, though in 1918 he agreed with Secretary of the Interior Lane that the parks "must be maintained in absolutely unimpaired form." If he believed this in 1918, he surely believed it in 1916, and it seems reasonable to conclude that, given the care with which he orchestrated the shaping and passage of the Organic Act, he believed that the statement of "fundamental purpose" supported his view.[81]

We also have the commentary of two men who were consistently present at the meetings in Yard's and Kent's residences. One was Robert Sterling Yard himself. Early in 1916 Yard compiled a lengthy booklet, *Glimpses of Our National Parks*, which he wished to get into public schools.[82] He told

79. SHANKLAND, *supra* note 68, at 83-99; ALBRIGHT & CAHN, *supra* note 38, at 24-26; Swain, *supra* note 8, at 8-15; DONALD C. SWAIN, WILDERNESS DEFENDER: HORACE M. ALBRIGHT AND CONSERVATION 41-60 (1970).

80. *Hearing 1916*, *supra* note 3, at 11-25.

81. On this early period see also JOHN C. MILES, GUARDIANS OF THE PARKS: A HISTORY OF THE NATIONAL PARKS AND CONSERVATION ASSOCIATION 12-16 (1995).

82. ROBERT STERLING YARD, U.S. DEP'T OF THE INT., GLIMPSES OF OUR NATIONAL PARKS

Kent there was a great demand in Congress for this publication, with many members wanting 2500 copies while he could provide each with only 25, and he asked Kent to sponsor a rider to an appropriations bill that would make the booklet a public document. *Glimpses* would be transmuted by Yard first into a substantial book of photographs with modest text, *National Parks Portfolio*, and then, with greatly extended text, into *The Book of the National Parks*.[83] In the last Yard wrote that "[o]riginally the motive in park-making had been unalloyed conservation"; indeed, he used the controversial language, that Congress had said it wished to "lock up" certain places.[84] However, after the creation of great parks such as Yellowstone and Yosemite, local pride had led to the enactment of units "better fitted for State parks" (this was with reference to Sullys Hill, Wind Cave, and Platt national parks), so that "the modern period" had followed, the period of "definite policy" represented by the act of 1916, after which parks had to be of "distinguished company" and embrace "the nation's noblest landscapes and sites."[85]

Horace Albright, likewise present at the creation, is the only one of those who helped to talk out the proposed bill who would later explicitly confront the presumed contradiction in the act. In his memoirs, published in 1985, he noted that contrary to some scholars' accounts Olmsted did not write the full bill itself, though he was "responsible for the wording of the governing sentence," and that all present wanted the bill "to carry a clear definition of what the Park Service should be." They were aware of the "inherent conflicts between use and preservation," he wrote—he did not say "contradiction"—but they were facing the political reality that this issue could not be resolved by the organic act alone.[86]

National Park Services files at the National Archives reveal hundreds of letters written by many dozens of organizations and individuals in favor of the proposed National Park Service Act of 1916. These letters invariably focus, as we have noted, on scenic values, road access, the quality of accommodations, and the notion that the parks were the nation's playgrounds. The most prolific correspondents were the officers and members of the American Civic Association; and, as we have seen, three of those officers, McFarland, Watrous, and Barker were present, the first almost always and the others less frequently, at the meetings in Yard's apartment and Kent's house when the bill was drafted and Olmsted completed his statement of "fundamental purpose." Thus their voices are also entitled to be heard on the allegedly contradictory mandate.

McFarland commended Olmsted's preamble. "There is no better service we can render to the masses of the people than to set about and preserve for them wide spaces of fine scenery for their delight," he wrote.[87] In truth,

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(1916).

83. ROBERT STERLING YARD, THE BOOK OF THE NATIONAL PARKS (1919).

84. *Id.* at 24.

85. *Id.* at 24-26.

86. ALBRIGHT & CAHN, *supra* note 38, at 35. In particular, see Albright's exchanges with Huston Thompson. Horace Albright Papers (Feb. 23, 27, 1916, March 26, 1964 (typescript interview)) (on file with University of California (Los Angeles)).

87. Letter from McFarland to Olmsted (Oct. 13, 1910) (Frederick Law Olmsted Papers, on

McFarland had first drawn Olmsted into the cause, and the language of both the House and, even more, the Senate bills from the first proposal in 1911 had been deeply influenced by McFarland's views. Further, McFarland appears to have persuaded Secretary of the Interior Ballinger as early as 1910 that Olmsted was "the man who ought to do the thing that is in mind with relation to these national parks"—that is, prepare a statement of purpose.[88] Ballinger had sent that portion of his 1910 annual report in which he proposed a national park bureau to McFarland for comment, and the American Civic Association had immediately begun a public campaign. At McFarland's urging, Olmsted had submitted directly to the Department of the Interior his first attempt at a general statement to accompany the first draft bill. The statement in the draft read:

> That the parks, monuments, and reservations herein provided for shall not at any time be used in any way detrimental or contrary to the purpose for which dedicated or created by Congress.

Olmsted said this was not adequate and added to the bare bones section the additional proviso that the parks, etc., should not be used in any way contrary to "promoting public recreation and public health through the use and enjoyment by the people . . . of the natural scenery and objects of interest" in the parks. Olmsted was particularly concerned that the word "scenery" be inserted in connection with "natural" throughout the document. Olmsted sent copies of this correspondence to McFarland.[89]

McFarland told Olmsted that he regarded him as "the wisest man in America" on park subjects, and that his "conception of what a park is . . . " was most important.[90] He argued Olmsted's view at the Yellowstone Park conference of 1911, in correspondence with Ballinger, and consistently each year thereafter, seeing to it that Olmsted was always in a prominent position to comment on, and thus help shape, the language of any subsequent bills. The Olmsted Papers, the Marshall and Mather manuscripts, and the files of the National Park Service are filled with letters from McFarland, showing that he remained carefully in touch with each development. Surely it is unlikely that McFarland would have allowed the final product of all this effort, the Act of 1916, to contain a "fundamental statement" of purpose which he thought was weak or contradictory?

Indeed, McFarland made his position clear in a heated interchange with

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file with the Library of Congress) [hereinafter *Olmsted Papers*].

88. Letters from McFarland to Ballinger (Nov. 10, 12, 16, 1910, Jan. 3, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from Ballinger to McFarland (Nov. 11, 1910) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from McFarland to Knute Nelson, Chairman, Senate Committee on the Public Lands (Jan. 4, 1911) (on file with the National Archives, R. Group 79, entry 6, box 783); Letter from McFarland to Ballinger (Dec. 22, 1910) (on file with the National Archives, R. Group 79, entry 6, box 23).

89. Letter from Olmsted to Frank Pierce, Acting Secretary of the Interior (Dec. 31, 1910) (*Olmsted Papers*, *supra* note 78). This document, retyped, also appears in Olmstead [*sic*] Portfolio (on file with the Bancroft Library, University of California (Berkeley)), and in the National Archives (R. Group 79, entry 6, box 783).

90. Letter McFarland to Olmsted (Sept. 5, 1911) (*Olmsted Papers*, *supra* note 78); *see also* Olmstead Portfolio, *supra* note 80.

Gifford Pinchot, the former head of the Forest Service, over the matter of the Hetch Hetchy. Pinchot had implied that the initial framers of the park service bill had a pecuniary interest in the parks and was reported to have said that Interior was "where all the crooks are." This was an echo of his furious feud with Ballinger, as well as a statement, about which he was equally direct, concerning his conviction that the national parks should be administered by the Forest Service, with parks to be "handled with the same government purpose which must control" the National Forests. He also belittled McFarland's vision, suggesting that the American Civic Association simply wanted to apply the methods of a city park to vast areas of wilderness, concluding that McFarland did not know what a "park" was.[91]

Pinchot's letter struck McFarland, who felt he quite clearly understood what a park was, as arrogant and ill-informed. National Parks could not be managed by individuals trained in "forest principles" only. The principles governing national parks were quite different—he did not invoke the "higher standard" argument in this response, as he would do later—and the National Parks would not be safe in the hands of such a man as Pinchot. He attacked Pinchot for having given up the "wonderful territory" of the Hetch Hetchy Valley, violating a national park, without ever having personally viewed the area. The implication was clear: that a Park Service was necessary to prevent any future violations of this nature.[92]

To Chief Forester Graves, who he regarded as more sympathetic to a park service, McFarland wrote that "a declaration of the real purpose of a National Park" was important in order to correct misconceptions about a park as a small or curried area. The purpose had to be "declared in unmistakable terms," and McFarland quoted Olmsted's draft.[93] Of two Senate bills then proposed, McFarland preferred the shorter one—this was Senator Smoot's bill—both strategically and functionally, and he asked Smoot to insert in his bill, S.3463, the section on purpose. Again, is it likely that a person of such persistence, who regarded a general statement of purpose essential to any bill, and who preferred a short bill with such a statement, would have thought the final language used in the preamble to the Organic Act had created a logical contradiction?[94]

Other members of the House Committee on the Public Lands, and most members of the Senate, were silent on the purposes of the Act of 1916, speaking in hearings only to specific points, usually economic and financial, or in debate in favor of the act or on whether grazing should be permitted in parks. Edward T. Taylor of Colorado had made his views known the previous

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91. Letter from Gifford Pinchot, former head of the Forest Service [hereinafter Pinchot] to McFarland (Mar. 4, 1911) (*Olmsted Papers*, *supra* note 78).

92. Letter from McFarland to Pinchot (Mar. 6, 1911) (copy) (*Olmsted Papers*, *supra* note 78).

93. Letter from McFarland to Graves (Feb. 21, 1911) (R. Group 79, entry 6, McFarland file).

94. The bills were S.9816, S.3463, and H.R.32265, 61st Cong., 3d Sess. *See* Letter from McFarland to Reed Smoot, Senator [hereinafter Smoot] (n.d.) (R. Group 79, entry 6, box 783); Letter from McFarland to Olmsted (Jan. 18, 1911) (Olmstead Portfolio, *supra* note 80); Letter from Richard B. Watrous, Secretary of the American Civic Association, [hereinafter Watrous] to McFarland (Jan. 17, 1911) (Olmsted Papers, *supra* note 78).

year during efforts to create the Rocky Mountain National Park, and he was largely silent on the National Parks Act, other than commenting favorably on the Colorado National Monument, created by executive act in 1911, which he hoped might become Colorado's third national park, following Mesa Verde and Rocky Mountain. Congressman Nicholas J. Sinnott of Oregon spoke up only to express the hope that a proposed Park-to-Park Highway, which Stephen Mather promoted during the 1916 hearings, would extend from Mount Rainier through Oregon to California. While Congressman Irvine Lenroot of Wisconsin was active throughout, he did not comment on general purposes or standards, being primarily interested in the language that would assure the Secretary of the Interior the authority to grant or deny leases. Congressman Scott Ferris of Oklahoma, the chairman of the House committee in 1916, was most interested in his own bill on water resources. Congressman Robert LaFollette, usually vocal on any issue concerning the public interest, was planning to run for the presidency and appears to have attended only one of the hearings. Floor debate was short, to the point, and no new light was thrown on Congressional intent.

There is, as a final approach to the "contradictory mandate," the logic of rhetoric. Many of those involved in framing the Organic Act, and certainly the former judges, school teachers, and present Congressmen, were well accustomed to the use of rhetoric, or the study of the effective use of language. As rhetoricians, Senator Smoot and Congressmen Kent, Ferris,[95] and Lenroot were highly regarded. The classical education of the time—and Olmsted and Raker had such an education—included rhetoric as a formal study. The principles of rhetoric held that, when listing two or more elements to an argument, the most important be stated first, and when speaking in public debate, a significant element of the argument which was not, however, the most significant, should be stated last in order to allow for an "Attic fall." If the principles of rhetoric were applied to the language of the preamble, then conserving "the scenery and the natural and historic objects and the wild life" within a park took precedence over providing for public "enjoyment," and there was no contradiction between two elements of equal weight for the elements were not, in fact, equal.

The Senate passed its bill on August 5. S. 9969, Reed Smoot's bill of 1911, was recycled in slightly altered form. While he was opposed to the "socialism" of state promotion of water resources, Smoot was otherwise in agreement with Kent on conservation matters. He wished to see more national parks, in part because they preserved God's handiwork, in part because they would bring visitors and better roads, and to that end he was pleased when it was suggested that Mukuntuweap National Monument in the remote southwest desert of Utah might become a national park, since he knew that dusty roads deterred traffic. (In 1919 Mukuntuweap became Zion National Park.) However, the Senate bill did contain one significant difference. At the insistence of Senator Clarence D. Clark of Wyoming, who was fearful that references to

95. Congressman Ferris was a lay preacher. See his use of rhetoric in his scant papers, held by the Museum of the Great Plains in Lawton, Oklahoma.

grazing would mean that permits might be issued for Yellowstone, the bill had no provision for grazing.

The need to reconcile the two bills meant further delay, though the public band wagon mounted by McFarland and others had helped to carry bills for three new parks—Sieur de Monts (later, Acadia), Hawaii, and Lassen Volcanic—while House and Senate conferred. Then the chairman of the Senate public lands committee, Senator Henry L. Myers of Montana, and the House chairman, Congressman Ferris, agreed to allow grazing in all national parks with the explicit exception of Yellowstone. At the last minute a powerful Congressman from Wisconsin, William Stafford, who opposed new bureaus on principle, sought to bottle up the bill that had emerged from the conference committee, and Kent was able to persuade him to stand down.[96] Approval in the Senate quickly followed.[97]

Explication of Text, 1916-1976

A recent historian of the national parks, Alfred Runte, has argued that though Congress wished to create a "system" in 1916, there was still relatively little awareness that this system involved more than setting aside lands that had little or no prevailing economic value. Known as the "worthless lands" thesis, Runte's argument is that Congress had not thought through such terms as "unimpaired" or "enjoyment" largely because it imagined the parks would not be the objects of commercial or industrial threats, since they were basical-

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96. The papers of Clarence D. Clark, at the University of Wyoming, consist only of scrapbooks. On Clark, see Albert G. Anderson, Jr., The Political Career of Senator Clarence D. Clark (1953) (unpublished M.A. thesis, University of Wyoming). No Myers papers have survived save for fugitive letters in the papers of Montana Senators Thomas J. Walsh and Burton K. Wheeler at the Montana Historical Society in Helena and his death certificate at the Western Heritage Center in Billings, Montana. There is a sketch of his career in the Billings *Gazette* of November 12, 1943. All efforts to locate the papers of Senator William Stafford failed.

In addition to the major collection of Smoot papers at Brigham Young University, there are Smoot papers at the Library of Congress and at the Library of the University of West Virginia. An article, the title of which offers promise—Thomas G. Alexander, *Senator Reed Smoot and Western Land Policy, 1905-1920*, ARIZ. AND WEST, Autumn 1971, at 245, 245-64—proved to contain only passing references to the national park bill. The best biography is Milton R. Merrill, Reed Smoot: Apostle in Politics (1950) (unpublished Ph.D. dissertation, Columbia University). The other Senators who served on the Committee on the Public Lands and Surveys, or who spoke on the floor of the Senate, were Colorado's John F. Shafroth and Charles S. Thomas, California's James D. Phelan and John D. Works, and Thomas J. Walsh of Montana.

The writer was unable to examine the papers of the Coloradoans, Edward T. Taylor, Charles B. Timberlake, John F. Shafroth, and Charles S. Thomas. The Taylor papers, at the Colorado State Historical Society and the University of Colorado, were examined for him and revealed nothing of relevance. Two collections might prove of value: the Thomas papers, which consist of 15,000 items, also at the Colorado State Historical Society, and the papers of Burton L. French, a Congressman from Idaho, who interested himself in the act though he did not attend the hearings. This last collection is at Miami University in Oxford, Ohio.

With respect to the NPS Act, the Papers of Woodrow Wilson, at Princeton University, are silent (Arthur Link to writer, telephonic communication).

97. WILLIAM C. EVERHART, THE NATIONAL PARK SERVICE 19-20 (1972), states that before 1915 only a "scattered few members of Congress" could have spoken on the national parks for longer than five minutes. In 1916, debate in the Senate was almost nonexistent, but debate in the House showed that a number of members had formulated views on what parks should and should not be.

ly worthless in economic terms, and that impairment was thus not likely to occur, or if it did occur, such impairment would relate almost entirely to providing for "enjoyment," not to other issues.[98]

Certainly there is some truth in this statement. Wild lands were, by 1916, coming to be valued, but few people conceived that there would be any serious scarcity of them, and some people of exquisite urban sensitivities still held to the view to be found in Jane Austen's *Pride and Prejudice*, that mountains were "horrid." Years earlier Frederick Law Olmsted (Sr.) had, while manager of the Mariposa Estate and a frequent visitor to the Yosemite Valley, advocated the construction in that valley of graceful arched bridges in the manner of Central Park in order to humanize the landscape; he hated "the wilderness & wild," he wrote to his wife. In the 1890s, Senator Richard F. Pettigrew of South Dakota said that Mount Tacoma (now Mount Rainier) "with its perpetual snow and . . . rocky crags" was a "worthless land."[99]

In this sense, and for the 1890s, Professor Runte's "worthless lands" thesis is correct, though his argument tends to ignore the fact that by 1911 many in Congress attached economic value to park proposals for tourist purposes and that others understood that as technologies changed, as old minerals might be extracted at lower costs and new minerals be found, these "worthless lands" would take on economic value. There is no convincing evidence that by 1916 the majority of legislators believed that they were protecting lands that would be worthless for all time, and an abundance of evidence that virtually all considered that the parks had commercial value as tourist attractions.

Nonetheless, the notion of useless or worthless lands may help to account for why many in Congress felt no urgency to define the signifying terms within Olmsted's draft. In 1915, Representative Edward T. Taylor of Colorado, then a ranking member of the House Committee on the Public Lands, spoke of the beauty of the proposed Rocky Mountain National Park, comparing it to Switzerland, and said that it had "no value for anything but scenery." He was careful to assuage the feelings of forestry and farming interests by stating that the park would contain "little timber of merchantable value" and that its elevations were too high for farming.[100] Thus language was used in 1915-16 somewhat differently than we use it today.

While the crucial words from the preamble to the Organic Act of 1916 have traditionally been viewed as the statement of "fundamental purpose" already examined here, there is other language in the act that requires consid-

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98. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE (2d rev. ed. 1987). For discussion of the "worthless lands" thesis, see Richard W. Sellars et al., *The National Parks: A Forum on the "Worthless Lands" Thesis*, J. FOREST HIST., July 1983, at 130, 130-45. John C. Freemuth has posed the question whether mineral extraction would be permitted from under the water impounded behind a dam within a National Recreation Area, since such an area was not created because of its inherent commercial worthlessness, the reservoir so impounded—and thus proposed for possible violation—being an aspect of the worth of the area. *See* JOHN C. FREEMUTH, ISLANDS UNDER SIEGE: NATIONAL PARKS AND THE POLITICS OF EXTERNAL THREATS 54 (1991).

99. Quoted in GUSTAVUS MYERS, HISTORY OF THE GREAT AMERICAN FORTUNES 223-24 n.23 (1936); *see also* ROBIN W. WINKS, FREDERICK BILLINGS: A LIFE 291 (1991).

100. 63 CONG. REC. 1,789-91 (1915).

eration. Let us read the preamble again:

> The service thus established shall *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 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.[101]

Thus, the primary goal of the new Service is to "leave" the parks and monuments unimpaired, placing clear priority on protection as opposed to restoration of landscapes and by implication arguing for a presumption of inaction in the face of any request for what may be viewed as "impairment." Arguably any action taken prior to passage of the Organic Act that might be viewed as impairment represented an action that could be, in so far as possible, undone, reversed, or nullified.

But what of "shall promote and regulate" in reference to the parks and monuments? Here arises the true source of the dichotomy of purpose, between preservation and use, conservation and enjoyment.[102] It may well be argued that the order in which these two objectives are set forth, as well as the sequence by which taken together they precede other terms in the statement, is significant, with "enjoyment" circumscribed by "unimpaired."[103] The legislative history of the act would appear to support this view, and successive Directors of the National Park Service, and for the most part Secretaries of the Interior, as well as chairpersons of the relevant committees and subcommittees in Congress, have usually acted in such a manner as to suggest that the Park Service's first priority should be preservation.

The "governing sentence" and the sections that follow are silent on questions of water or timber use, and one must infer intent from that which is said. In a circular letter to his colleagues on April 27, Kent supplied the amended bill as reported out following the mid-April hearings. He drew attention to its provisions.[104] Cutting of timber was to be permitted only in order to control insect attack or disease or to conserve the scenery or the natural or historic objects: that is, one resource that was specified was to be altered only with a view to conservation purposes. While permits could be granted for use of the land, these permits were to be "only for the accommodation of visitors in the

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101. 16 U.S.C. § 1 (1994) (emphasis added).

102. On this point see THOMAS J. CAROLAN, JR., U.S. DEP'T OF STATE, THE POLITICAL DYNAMICS OF THE NATIONAL PARK SERVICE (1980-81), especially pages 2-5.

103. The act refers to "enjoyment" by "future generations," not to "the people," which introduces an expectation of changing definitions of "enjoyment" by reference to the future. This makes legitimate an examination of changing perceptions relating to the signifying terms in the statement of purpose. Significantly, "the people" are acknowledged not to be static. Even were the term used in its customarily monolithic way, courts have interpreted "the people"—as in decisions involving the right to bear arms, for example—to mean the people as a group not as individuals, thus opening the way to barring certain individuals. The same is true of use of grandfathered privileges within a park: they might apply to "the people" but not necessarily to any given person.

104. William Kent Papers, *supra* note 51 (box 24, folder 476).

various parks," so that land grants were to be denied save to meet the needs of accommodation. "No natural curiosities, wonders or objects of interest" could be leased, rented, or granted on terms that would "interfere with free access to them by the public," which placed the public interest first while permitting rental or lease that presumably went beyond accommodation, to which grants were limited. The Secretary could grant grazing rights when they were not detrimental to "the primary purpose" of a park, which was enjoyment by the people and preservation of wild life and natural features. Section 6 declared that all acts or parts of acts "inconsistent herewith" were repealed.

The intent of Congress as expressed in 1916 must also be seen as modified in light of the acts of 1970 and 1976. The act of 1970 introduces somewhat revised language, for unlike the act of 1916, it does refer to "the people." The act arose in the context of a growing concern for recreational opportunities in the United States, recognized by the Outdoor Recreation Resources Review Commission appointed by President Dwight D. Eisenhower, which reported to President John F. Kennedy in 1962.[105] In 1970, President Richard M. Nixon's "Legacy of the Parks" program held that the government should be "taking parks to the people," an idea which was supported on a bipartisan basis in Congress. The result was the Act of August, 1970, which in addition to reasserting the significance of the national parks, remarked upon their "increased national dignity" both "individually and collectively," so that an infringement upon the dignity of one was an infringement upon the dignity of all. This, some commentators thought, meant that each park superintendent had the responsibility to act aggressively with respect to threats against his or her unit rather than awaiting a directive by the Director of the National Park Service.

Less commented upon, but important, is the language by which "the people" are invoked: the parks, which must represent "superb environmental quality," also acquire their significance by virtue of their "inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people." In addition to the explicit citation to the people, the act added to the linked criteria of 1916, unimpaired preservation and access for enjoyment, the new, if parallel, concepts of "inspiration" and "benefit." As these words are at least as open to subjective interpretation as were those of 1916, they gave rise to renewed debate.

However, "benefit" and "inspiration" need not be placed in opposition to each other. The context makes clear that "inspiration" refers to the re-creation of the spirit that comes from gazing upon or walking amidst a sublime scene, or from examining an historical remnant relating to an event or achievement presumably inspiring to most Americans; it may, of course, also refer to the "inspiration" that arises from the healthy use of recreational outlets, mastery over one's body, or simply a sense of well-being. Indeed, since Congress proceeded to create, under the 1970 act, a number of new National Recreation Areas, including so-called "urban parks," at the least this reading seems es-

105. See ROBIN W. WINKS, LAURANCE S. ROCKEFELLER: CATALYST FOR CONSERVATION (Washington's Island Press (1997)), on the significance of the Review Commission.

sential. It does not follow, however, that "recreation" was given priority over "re-creation." The 1970 act clearly strengthened the Congressional mandate placed upon the Park Service to protect park units in the fullest sense of the word.

"Benefit" requires less parsing, though in conjunction with "the people" it does require a textual comment. As stated, this linkage had not been made explicit in previous legislation. By the linkage, Congress appears to have been saying that management principles must look to actions that would benefit "all the people" (indeed, the 1970 act used precisely this language) rather than decisions that would redound primarily to the benefit of a minority, be it local, an interest group, or an ethnic community. Thus guidance was given to the Park Service to exercise the broad powers it either possessed or would acquire over the next decade.

The act of 1970 also expanded the definition of the 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." While this provision was directed to the concept of national seashores, national lakeshores, and wild and scenic rivers, no distinction of this nature was made in the act itself, and thus the language is quite sufficiently broad to admit of all water and land resources within a park.[106]

In Section 8 of the Act of October, 1976, Congress directed the Secretary of the Interior to "investigate, study and continually monitor the welfare of areas whose resources exhibit qualities of national significance and which may have potential for inclusion in the National Park System." While this section did not, as some critics suggested, lessen the actual criteria for inclusion in the system, it did lead to many new additions; more important is the fact that it also gave the Secretary an essential advisory authority on resource issues outside the boundaries of any of the existing parks. From this it was a short step, through four key acts already on the books—the Wilderness Act of 1964, Wild and Scenic Rivers Act of 1968, Clean Water Act of 1972, and Endangered Species Act of 1973—to charging other government agencies with cooperating with the National Park Service.

In the 1970s, the Park System grew at a nearly unprecedented rate, especially under the impetus of Representative Phillip Burton of California. As Chairman of the House Subcommittee on National Parks and Insular Affairs, Burton required that twelve potential park proposals be reviewed each year. Thus Congress took over an initiatory rôle, not waiting for the Park Service to propose units. As Congress increasingly took primary responsibility for the creation of new units, in view of what it regarded as a default on this responsibility by the Executive Branch and the Park Service, dozens of acts were

106. One may well argue that in creating national recreation areas, national seashores, national lakeshores, and other more clearly recreational units, Congress was intending to put distance between the National Parks, unqualified by any adjective, and other types of units, thus suggesting a preference for the strictest application of protection to the National Parks, so called, as distinct from the other designations.

passed. While each of these was specific to a unit, some contained varied language concerning that unit, or on occasion units collectively. It is an interesting question (and a nightmarish one), therefore, as to whether in order to interpret or understand the intent of Congress *today* one needs to examine each of the nearly four hundred individual acts in search of language that would effect the collectivity.[107]

A NOTE ON SOME SUBSEQUENT LEGAL INTERPRETATIONS OR ACTIVITY OUTSIDE THE PARKS: WATER BY WAY OF EXAMPLE

The Organic Act establishing the National Park Service in 1916 provided that the National Park Service (NPS) was 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."[108] This act was amended in 1970 and in 1978—those amendments are found at 16 U.S.C. § 1a-1 (1994). The purpose of those amendments was to reiterate the NPS's duty to maintain and protect parks in the spirit of the 1916 act. As we have seen, none of these statutes provides any scheme for how the NPS is supposed to fulfill the lofty objectives in the statutes.[109]

I have tracked how courts have interpreted these statutes. A vast majority of cases involve challenges to NPS regulation *within* parks. With a few exceptions courts overwhelmingly defer to the discretion of the NPS to regulate within the parks in carrying out the mandates of the legislation.[110] This closing note will, therefore, focus on the more difficult question of power to control or affect activity *outside* the parks.

Some courts, even before 1916, have held that the Secretary of the Interior has a trust obligation to protect public lands. In *Knight v. United Land Ass'n*,[111] the Supreme Court said that the Secretary of the Interior is the guardian of the people of the United States over the public lands. The extent

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107. This writer is attempting precisely this task for a work in progress, *The Rise of the National Park Ethic* (forthcoming).

108. 16 U.S.C. § 1 (1994).

109. In 1946 Congress also gave the NPS the power (financially) to acquire rights in accordance with local customs or laws if "necessary or beneficial in the administration" of the National Parks and Monuments. 16 U.S.C. §17j-2(g) (1994).

110. *See, e.g.*, United States v. Vogler, 859 F.2d. 638 (9th Cir. 1988) (stating that the NPS can require permits to transport off-road vehicles through park land in Alaska); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979) (stating that the NPS can allocate commercial and non-commercial boating on Colorado River); Town of Beverly Shores v. Lujan, 736 F. Supp. 934 (N.D. Ind. 1989) (stating that the NPS can pave parking area at Indiana Dunes, balancing natural preservation with public access). For an example of a case where NPS regulations were held invalid, see Wilkenson v. Dep't of Interior, 634 F. Supp. 1265 (D. Colo. 1986) (holding that the NPS could not charge fee for travel through Colorado National Monument because roads through the park were a public right of way, being State Highway 340, a portion of the only all-weather road to the settlement of Glade Park). I choose court decisions concerning water rights, as these, together with grazing and the extraction of minerals, were at issue in all early park legislation, and access to water is more nearly a universal question throughout all types of National Park System units than questions relating to grazing or mineral extraction are likely to be. I wish to thank Janet Satterthwaite for assistance with this note.

111. 142 U.S. 161 (1891).

of this duty was highlighted in litigation involving Redwood National Park in the 1970s. The unique legislation that created the park in 1968 contemplated that problems would arise from external logging and gave the NPS the authority to acquire interests in land outside the park to minimize ecological damage within the park.[112] The Sierra Club sued the NPS to force the NPS to exercise this power.[113] Courts will usually overturn an agency's exercise of discretion only upon a showing of abuse of that discretion. Nevertheless, after reviewing the evidence, the court ordered the NPS to exercise its power to acquire interests in land outside the park.

Although the court in the Redwood cases relied on the unique statute creating the park, the case nevertheless has implications for other parks. The court also invoked the general duties under 16 U.S.C. § 1 and a general trust obligation of the NPS to protect parks.[114] The court noted that the NPS had failed to "exercise and perform duties imposed upon them by [16 U.S.C. § 1] and the Redwood National Park Act . . . and duties otherwise imposed on them by law."[115] (After the Department of the Interior had submitted reports to the court, the court found that the Department was attempting to comply with the law.)[116]

After the Redwood litigation, Congress passed another statute for Redwood National Park. To clarify the confusion over the duties of the NPS generally, Congress added a rider to the statute to reinforce 16 U.S.C. § 1.[117] The Senate Report accompanying the bill emphasized that the purpose was to refocus and insure that the basis for decision-making concerning the National Park System continues to be the criteria provided by 16 U.S.C. § 1 because the committee had been concerned that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park Service.

> Accordingly . . . The Secretary is to afford the highest standard of protection and care to the natural resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided.[118]

In 1980 the U.S. district court in the District of Columbia relied on this language to reject the notion of a separate public trust outside the statutory duties imposed on the NPS.[119] On the other hand, the court found that the NPS had very broad discretionary power from several sources.

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112. 16 U.S.C. §§ 79c(a), (e) (1994).

113. Sierra Club v. Dep't of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Dep't of Interior, 398 F. Supp. 284 (N.D. Cal. 1975).

114. *Sierra Club*, 376 F. Supp. at 95-96.

115. *Sierra Club*, 398 F. Supp. at 293.

116. Sierra Club v. Dep't of Interior, 424 F. Supp. 172 (N.D. Cal. 1976).

117. *See* 16 U.S.C. § 1a-1.

118. S. REP. NO. 528, 95th Cong., 1st Sess. 13-14 (1977); *see also* H.R. REP. NO. 581, 95th Cong., 1st Sess. (1977).

119. Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd sub nom.* Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

In *Andrus*, the Sierra Club sued to force the Interior Department to assert federal water rights in water courses affecting the Grand Canyon and Glen Canyon, both within units of the National Park System.[120] The court agreed that in the event of a real threat to the water supply for scenic, biotic or natural purposes in those areas, the Secretary would be required to take action.[121] The Court noted that the statutes do not provide a mechanism for how this action is to be taken, but found that the Secretary had broad (although not unlimited) discretion to take action, including but not limited to:

(1) asserting reserved water rights;

(2) acquiring water rights under 16 U.S.C. § 17j-2(g);

(3) denying land exchanges and rights of way; and

(4) bringing trespass or nuisance actions.[122]

The court deferred to the Secretary's discretion and declined to force him to assert the rights the Sierra Club wanted.[123]

The NPS may also have authority under the property clause of the Constitution to control activity outside park boundaries as that activity impinges upon public property. In *Minnesota v. Block*,[124] the Eighth Circuit Court of Appeals found that Congress could make regulations outside the Boundary Waters borders because of the property clause. The same court later found that the NPS also had this power and could regulate delivery of canoes along public roads leading into NPS riverways in Missouri, even were the canoe-renting people never to enter park property.[125] Under the property clause, Congress has power to protect public lands. The Eighth Circuit applied this doctrine to find that this power extended to regulation on or off public land in order to protect public land.[126]

There is thus tentative authority for the NPS to act outside its borders. Still, as the *Andrus* court pointed out, it is not entirely clear from NPS statutes alone how this is to be done. In addition to the methods suggested by the *Andrus* court, there are several other possible sources of authority to act, however.

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120. *Id.* at 445.

121. *Id.* at 448.

122. *Id.*

123. *Id.* at 452. In *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985), *vacated sub nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990), the district court in Colorado agreed with the *Andrus* decision and rejected the notion of a public trust separate from statutory powers. Since that opinion was vacated for other reasons (see *infra* note 20), it has no force; however, it illustrates a trend in light of the 1978 amendments to reject the idea of public trusteeship while simultaneously beefing up the authority imputed to the government by statutes.

124. 660 F.2d 1240 (8th Cir. 1981).

125. Free Enter. Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983).

126. *Minnesota*, 660 F.2d at 1249; *accord Free Enter. Canoe*, 711 F.2d at 856. It is one thing to say Congress can do something, and another to say that the NPS can do it absent specific action by Congress. Nevertheless, see also Blake Shepard, Note, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479 (1984).

Conservation and Environmental Statutes

Various environmental statutes may be able to be exploited to help the NPS protect resources such as water *in* the parks. Among the statutes to consider are (1) the Clean Water Act, (2) the Endangered Species Act, (3) the Wilderness Act, and the Wild and Scenic Rivers Act.[127]

Implied Reserved Federal Water Rights

Another potential source of NPS power, depending on the circumstances, might allow the NPS to assert "implied reserved federal water rights" in land outside the park. This doctrine, developed in the courts, provides that when the government withdraws land from the public domain for a federal purpose (such as a national park or forest) the government impliedly reserves, as against future users, whatever water rights are needed to effectuate the purpose for which the land was reserved, but *only* the amount necessary to accomplish those purposes. The key is the intent of Congress for the use of the land at the time it was withdrawn from the public domain for a use such as a park or forest.[128] This intent is applied vertically, that is, chronologically, and it is this intent we have sought in the body of this monograph.

The Supreme Court restated this doctrine in a case involving the NPS in 1976: "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[129] This right *vests* (*i.e.*, you get it) on the date of the reservation and is superior to future appropriators. In other words, at the time the government creates a park or a forest, it gets the rights and no subsequent user can impair them.

Cappaert was a rancher who owned land near Devil's Hole National Monument (now functionally part of Death Valley National Monument) in Nevada.[130] President Harry S Truman had reserved the monument in 1952 in part because of unique fish that lived in a pool in a cavern, and protection of the pool was specifically mentioned in his proclamation reserving the monument.[131] The Supreme Court held that the NPS could stop Cappaert from pumping groundwater on his ranch in amounts that were diminishing the level

127. For a discussion of how some of these statutes might apply, see Mark T. Pifner, *Quality versus Quantity: The Continued Right to Appropriate—Part II*, 15 COLO. LAW. 1204 (1986); *see also* John W. Hiscock, *Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority*, 7 J. ENERGY L. & POL'Y 35 (1986). In *Sierra Club v. Block*, discussed *supra* note 16, the Court found that the Wilderness Act created implied federal reserved water rights (this doctrine is explained below). The opinion attracted some attention from commentators, but as noted above has since been vacated as not "ripe" for adjudication in the courts.

128. For a discussion of the historical basis of federal reserved water rights, see A. Dan Tarlock, *Protection of Water Flows for National Parks*, 22 LAND & WATER L. REV. 29, 38-48 (1987).

129. Cappaert v. United States, 426 U.S. 128, 138 (1976).

130. *Id.* at 133.

131. *Id.* at 131-32.

of the pool and threatening the fish.[132]

The key issue in *Cappaert* was whether maintaining the level of the pool was *necessary* to the purpose of the reservation of the monument. Moreover, since the doctrine of implied reservation of water rights reserves only the amount necessary to accomplish the purpose of the reservation, Cappaert was allowed to pump some water so long as the level of the pool did not drop to such a low level that it harmed the fish and other scientifically valuable aspects of the pool.[133]

Compare *United States v. New Mexico*,[134] where the Supreme Court held that the United States had not impliedly reserved water rights for aesthetic wildlife preservation, or recreational purposes when it created the Gila National Forest.[135] The Court noted that the purposes for which national forests are reserved are to protect timber and watershed.[136] The court contrasted the much broader purposes for which National Parks are reserved, citing the language of 16 U.S.C. § 1.[137]

What of National Parks created from National Forest land? The lands of Rocky Mountain National Park (RMNP) were originally reserved as a national forest and were only later made a national park, in 1915. As seen in *New Mexico*, the purposes, and correspondingly the extent of water rights, are much narrower for national forests than for parks. Technically, it might be argued that only national forest rights were reserved at the time of initial reservation from the public domain. However, this question has been addressed and resolved favorably to the NPS by the Supreme Court of Colorado. In *United States v. City of Denver*,[138] the court was asked to determine the extent of federal reserved water rights in the Colorado, Gunnison, North Platt, White and Yampa River Basins in Colorado.[139] Relying on *New Mexico* and *Cappaert*, the court focused on the precise federal purposes (including the priority date) for which the lands had been reserved.[140]

With respect to RMNP, the court held that the priority dates for water rights related to forest purposes (*i.e.*, protection of watershed and timber) dated from the creation of the national forest, but that additional, broader rights consistent with the purposes of a park obtained when the park was created in 1915.[141] (The court found that the purpose of a national forest was a subset of the broader purposes of a park, so that simply adding new water rights onto

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132. *Id.* at 147.

133. *Id.* at 141. Neither Cappaert nor anyone else had any rights to the water before 1952. The Court thus did not address what happens when the government reserves land and there are already persons with rights over the appurtenant water. Note also that this case established that the implied reserved federal rights doctrine applies to ground water as well as surface water. *Id.* at 144.

134. 438 U.S. 696 (1978)

135. *Id.* at 711.

136. *Id.* at 718.

137. *Id.* at 709.

138. 656 P.2d 1 (Colo. 1982) (en banc).

139. *Id.* at 4.

140. *Id.* at 17.

141. *Id.* at 30.

existing forest-related rights would not be consistent with the purposes of a park.) The court thus implied a second reservation from the public domain when the park was created.[142] The court sent the case back to the water court to determine the specificity of those rights.[143]

Third, the RMNP legislation of 1915 made specific reference to "homestead, mineral, right of way" and to "private, municipal, or State ownership"; that is, it made no reference in these contexts to another government agency, such as the Forest Service, thus implying that upon the designation of the land as a national park rather than national forest, the Forest Service no longer had authority within those lands. Much subsequent legislation has made this point abundantly clear. The act did refer to "rights of way in certain national parks and the national forests for irrigation and other purposes," but did not ascribe any authority with respect to those rights of way in national parks to any other body, and by virtue of specific reference to both national parks and national forests made it clear that the two were seen as mutually exclusive. The Secretary of the Interior was given the discretion to grant "easements or rights of way for steam, electric, or similar transportation upon or across the park," but no reference was made to having discretion to grant such rights of way or easements for the purposes of irrigation, thus suggesting that the Secretary had no such discretionary power in this area.

Conclusion

Where water is involved, one may not invariably separate issues of quantity from issues of quality, of course, since a diminution in quality may well require an increase in quantity to achieve the same purposes, if indeed, one may in any measure be said to have preserved the natural conditions if there is a significant change in *either* quantity or quality. It appears that the federal reserved water right doctrine would not be applied in a way that would make

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142. *Id.* This approach is similar to that used in the now vacated opinion in *Sierra Club v. Block*, discussed *supra* note 16. The Court ruled that even though the Wilderness Act withdrew wilderness areas from existing national forests, such areas constituted a "second" withdrawal from the public domain so that broader water rights relevant to a wilderness as opposed to a forest were created by the act. *Block*, 622 F. Supp. at 862. Indeed, the *Block* Court referred to *City of Denver* in its opinion. *Id.* In vacating the opinion, the 10th Circuit avoided ruling on whether the Wilderness Act implied any new reserved water rights, but referred to them as "alleged" rights. *Yeutter*, 911 F.2d at 1419. Essentially, the Court vacated the opinion because it thought it was too early to decide whether any public harm would result from the Forest Service's alleged failure to act, so that it could not be determined whether the Forest Service was abusing its discretion. *Id.* at 1414.

143. *City of Denver*, 656 P.2d at 36. Since passage of the McCarran Act, the United States may be brought in as a party to a state court water rights adjudication proceeding. Simply stated, the basic premise of Colorado water rights law is that a person who appropriates water for a beneficial use acquires rights to that water as against future users. For an explanation of how this works *vis-à-vis* federal reserved rights, see Navajo Dev. Co. v. Sanderson, 655 P.2d 1374 (Colo. 1982) (en banc). For example, *Navajo* notes that, if the government wants to acquire water rights beyond those implied by reservation, it must use state appropriation proceedings or must condemn the rights. *Id.* at 1379. Other cases to keep in mind are: Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *Yeutter*, 911 F.2d at 1419; United States v. Bell, 724 P.2d 631 (Colo. 1986) (en banc); *see also* Aaron H. Hostyk, *Who Controls the Water? The Emerging Balance Among Federal, State, and Indian Jurisdictional Claims and Its Impact on Energy Development in the Upper Colorado and Upper Missouri River Basins*, 18 TULSA L.J. 1 (1982).

it meaningless—that is, if it is necessary to accomplish the purpose for which land was reserved to have clean, as well as sufficient, water, then presumably a right to clean water applies.

If any issue of water quantity (or quality) arises from conflict or interpretation with another federal government agency, the various court decisions that suggest national parks are to be held to a higher standard of preservation than lands administered by another agency would seem to apply. In the Committee Report accompanying the 1916 bill for the NPS, Congress noted that there was not supposed to be any conflict of jurisdiction among the agencies, but it is not clear what the Committee meant in practical terms.[144] Most of the legislation seems to contemplate that the NPS is to work in cooperation with other agencies, with no implication of any form of subordination.[145]

There is also the simple force of history, public opinion, and common sense. Whatever may have been read into certain words in 1916, those words now have relatively agreed upon meanings. The NPS is to "preserve" and "protect"—that is, make certain through management that a sufficient quantity of those elements natural to the landscape are retained unto future generations to carry out the purpose of the establishment of a given park unit; it is to apply this conservation to the "scenery"—that is, to the aggregate landscape as broadly perceived to the senses, and most particularly to the eye; it is to apply it to the "natural" objects—that is, to those individual constituent elements of the landscape that are "perceptible to one or more of the senses, especially something that can be seen and felt" (surely a definition applicable to water, to restrict this commentary to our one sustained example); and it is to apply it to "historic" objects as well—that is, to individual constituent elements that are historically part of the landscape to be conserved (and clearly a flow of water, a pond or lake, that form part of the historic landscape would thus be covered); as well as to "wild life"—which, were there to be dramatically altered stream flows, lake levels, or ground water would be seriously affected. Thus, quite without invoking that most famous portion of the legislation, which refers to leaving the resources of a park "unimpaired for the enjoyment of future generations," one may readily argue that the purposes of a national park have preeminence over other federal agencies and goals absent specific legislation to the contrary.

CONCLUSION

Arguably the intent of Congress with respect to any single act cannot be perfectly devined or proven. The intent of Congress across a number of related acts, and as adumbrated by other acts that bear upon the related group, may more nearly be understood. This paper has attempted to judge that intent. It has argued that the language contained in the preamble to the National Park

144. H.R. REP. NO. 700, 64th Cong., 1st Sess. 3 (1916).

145. *See* Julie A. Bryan, Comment, *The National Park Service Organic Act Prohibits Turning the Doorstep of Canyonlands National Park into a Nuclear Wasteland*, 7 J. ENERGY L. & POL'Y 95 (1986). A comment—indeed, any law school journal article at all—does not have the force of law, of course, though the argument may be found convincing to a court at the appropriate time.

Service Act of 1916 is not, in fact, contradictory and that Congress did not regard it as contradictory; that to the extent that a contradictory interpretation can be imputed to the sentence to the preamble quoted in the Introduction to this paper, that contradiction can be eliminated by reference to the printed record of Congress at the time, to the private papers of those individuals most directly responsible for framing the language of the act, and to the prevailing canons of rhetoric in 1916. Further, it is argued that subsequent legislation, and numerous interpretations of related legislation by the courts (taking water as a resource by way of example) sustain the view that there was and is no inherent contradiction in the preamble to the Act of 1916. The National Park Service was enjoined by that act, and the mission placed upon the Service was reinforced by subsequent acts, to conserve the scenic, natural, and historic resources, and the wild life found in conjunction with those resources, in the units of the National Park System in such a way as to leave them unimpaired; this mission had and has precedence over providing means of access, if those means impair the resources, however much access may add to the enjoyment of future generations.