

The Requirement to Leave Park Resources and Values “Unimpaired”

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HOW SHOULD THE SCIENCE COMMITTEE OF THE NATIONAL PARK SERVICE ADVISORY BOARD interpret the key statutory directive “to leave [park resources and values] unimpaired for the enjoyment of future generations”? How does this part of the “fundamental purpose” of the national park system, included in the National Park Service (NPS) Organic Act and reinforced by the NPS General Authorities Act, guide or constrain the work of the Science Committee in revisiting the Leopold Report? In this era when the sources of impairment are overwhelmingly external and often pervasive, what direction does the statutory lodestar provide this committee? And what is “impairment” of park resources and values?

To begin to answer these questions, this essay will review how the “statement of fundamental purpose,” and particularly its impairment prohibition, has been interpreted over the years. It will use the lawyer’s approach of looking at the law’s plain language, legislative history, and administrative interpretation, peppered with selected case law and commentary. It will show that the intent from the beginning and reinforced through the years is that the resources and values in the national park system are to be held as a public trust for future generations. And this essay will reveal how increasing knowledge and changing circumstances have provided the basis for evolving interpretations of the law. This observation will then let the Science Committee work through the difficult questions of how best, in challenging times, to preserve park resources and values to perpetuate their worth for future generations.

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The plain language of the foundational statutes: Creating a public trust

The “foundational statutes” for the National Park Service are the 1916 Organic Act and the 1970 General Authorities Act, including its significant 1978 “Redwoods Amendment” (16 USC §§ 1, 1a-1; Appendix 1). Parse the “plain language” of the statutes, beginning with the 1916 Organic act, to determine meaning and identify ambiguities:

The service . . . shall promote and regulate the use of the . . . areas . . . by such means and measures as conform to the fundamental purpose . . . 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.

Note the key words and phrases in the 1916 act. For example, the new service is both to “promote” and “regulate” the “use of park areas. The legislators and activists who created the National Park Service believed that promotion of the parks, through the media and tourism, was critical to garnering support for their establishment and funding. But they also wanted the secretary of the interior to have broad discretion to “make and publish such rules and regulations as he may deem necessary or proper for the use and management” of park areas. And governing all is the “fundamental purpose” of parks established by the 1916 act: “to conserve” and “provide for the enjoyment of” the identified resources so as to “leave them unimpaired for the enjoyment of future generations.” While the thrust of this language is clearly preservationist and trust-like, the meaning of the words “conserve,” “enjoyment,” and “unimpaired” is not entirely plain, and the words’ essential ambiguities provide fertile ground for evolution of meaning with increasing knowledge and changing circumstances.

As for the resources that should be left unimpaired, the terms are broad so as similarly to invite new meaning over time. “Scenery,” possibly the pre-eminent asset to the publicists, landscape architects, civic leaders, politicians and other non-scientists who worked to create the National Park Service, connoted the grand, majestic, undisturbed (and therefore, in those men’s minds, unimpaired) views.¹ The phrase “natural and historic objects” resembled the phrase used in the 1906 Antiquities Act with respect to the national monuments that the Park Service’s creators coveted for the new bureau; moreover, the phrase cast a wide net beyond antiquities, as exemplified by such “objects” as the “greatest eroded canyon” and the Olympic elk in early presidential proclamations (Grand Canyon National Monument, 1908; Mount Olympus National Monument, 1909). Finally, “wild life”—two words—encompassed both flora and fauna. The comprehensive character of all these identified resources, and the redundancies among them even in the lexicon of 1916, have justified the evolution of their meaning to extend today to concepts such as ecosystem management and landscape conservation.

The plain meaning of the General Authorities Act of 1970 is that all areas administered by the National Park Service—natural, historical, and recreational, as grouped by NPS at that time—are part of “one national park system preserved and managed for the benefit and inspiration of the people of the United States,” and all are subject to the same high standards (e.g., non-impairment) except as Congress has specifically provided otherwise. Note that the word “preserved” has supplanted the 1916 word “conserve,” consistent with the long-

standing connotation of “conserve” with respect to national park areas. Note, too, that the phrase “benefit and inspiration” has perhaps trumped, or at least embellished, the 1916 word “enjoyment.”

The 1978 amendment to the General Authorities Act, often called the “Redwoods Amendment” because it was enacted as part of the legislation expanding Redwoods National Park and responding to litigation concerning that park, reiterates the high standard for the national park system and reinforces the notion that parks are public trusts:

Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System . . . shall be consistent with and founded in the purpose established by [the 1916 act], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

A basic canon of statutory construction is that no words are “mere surplusage,” and here Congress employs three verbs of past, present, and future intent—“reaffirms, declares, and directs”—to stress the continued importance of the fundamental purpose of parks “to the common benefit” of all. Note, too, that the fundamental “purpose” remains singular as in the 1916 legislation: it is not dual—conservation *and* use—but rather, it is a singular purpose including conservation and enjoyment and, most importantly, subject to the impairment prohibition. And like the 1916 act, the 1978 legislation speaks of “promotion and regulation,” but now of park areas and not, as in 1916, of their “use.” Proclaiming the “high public value and integrity of the National Park System,” Congress now states explicitly that park areas are to be “protected” as well as managed and administered, and all related activities “shall not be exercised in derogation of . . . [park] values and purposes. . . .” This is the language of a public trust, with implied fiduciary responsibilities, as created and defined by statute.² Of course, the passive tense of the verbs (e.g., “[t]he authorization of activities shall be construed”) obscures who, exactly, bears a fiduciary obligation for preserving park resources and values—certainly the NPS, but the secretary of the interior? the executive branch? everyone?—and this question is still asked today.³ The last clause of the 1978 Redwoods Amendment is the “exception clause,” stating that park resources and values may be impaired or derogated only when Congress “directly and specifically provide[s].” While the language may leave some ambiguity as to what Congress must say, the emphatic reiteration of the adverbs (“directly” *and* “specifically”) suggests that a high degree of clarity is necessary to authorize derogation.

The legislative history: Preserve them intact, safeguard them

In addition to the statutory language, the legislative history can provide insight into the congressional intent behind the “fundamental purpose” of the national park system.⁴ Regrettably, the Congressional reports, hearings, and remarks reveal little about the meaning of “unimpaired” in the 1916 Organic Act, other than a reference to “the preservation of nature

as it exists” that recalls the requirement in the 1872 Yellowstone National Park enabling act for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders ... and their retention in their natural condition.

Transcending the congressional documents, however, to include the historian’s investigation into the key players and events provides a fuller appreciation of the NPS creators’ intent.⁵ For example, in his memoirs, Horace Albright—who represented the Department of the Interior (DOI) in the legislative process and later wrote the first administrative interpretation of the enacted legislation—gave several reasons for the Organic Act’s “somewhat vague” language, including the increased likelihood of achieving legislative agreement before the end of the 64th Congress, the confidence of park proponents in the ability of first NPS Director Mather and Assistant Director Albright to implement understood philosophies after enactment, and—significantly for the work of the Science Committee—the need for management flexibility in order for parks to adjust to changing future conditions. Despite the breadth of the statutory language, Albright’s memoirs focus clearly on the core ideal and principle of parks: “to retain them totally intact for the future,” “to preserve, intact, the heritage we were bequeathed.”

The legislative history of the 1978 Redwoods Amendment, like its plain language, reinforces what the House Report unreservedly refers to as “trust responsibilities” regarding park resources and values, as demonstrated by these uncontroverted highlights:

The protection of the units of the system is to be carried out in accordance with the maintenance of the integrity of this system, and management of these areas shall not compromise these resource values except as Congress may have specifically provided. Thus, the Secretary is to afford the highest standard of protection and care [to park lands]. [H.R. Rep. No. 95-581, p. 21 (1978)]

The Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever action and seek whatever relief as will safeguard the units of the National Park System. [S. Rep. No. 95-528, p. 9]

The committee fully expects and intends that the executive branch will utilize every authority to protect and safeguard the property of the United States from adverse activities outside the park boundaries. [S. Rep. No. 95-528, p. 13]

Again, going beyond the congressional documents provides greater insight into legislative intent. According to DOI lawyer Jim Webb, who drafted the legislation, the Carter administration sought with this language to reinforce the public trust nature of the national park system’s fundamental purpose, as requested by the legislation’s chief sponsor, Chairman Phil Burton of the House Subcommittee on National Parks and Insular Affairs.⁶

Administrative interpretation: The paramount duty

The plain language and legislative history of the NPS foundational statutes reveal a resolute congressional intent to preserve park resources and values for present and future generations. Neither of these sources, however, provides much specific direction on how to manage and

protect these assets. The sparse statutory and legislative text has meant that, in the words of author Paul Schullery, “We’ve been creating the National Park Service idea ever since.”⁷ Indeed, in some ways the administrative interpretation of the foundational statutes, including the impairment prohibition, encompasses much of the history of the National Park Service. This essay can only hope to focus on highlights that might prove particularly relevant to the Science Committee; and, by virtue of its author’s area of expertise, this essay tends to focus on the legally relevant interpretations.⁸

From a legal perspective, it is the interpretation of the statutes by the agency charged with their administration (i.e., DOI, NPS), through regulations, policies, solicitor’s opinions, and other actions, that puts flesh on the statutory bones. The most influential agency interpretations are often those that are relatively contemporaneous with the congressional enactment, those that stand the test of time, and those that Congress appears to have affirmed by some action or even inaction.⁹ Furthermore, the law recognizes that, with justification, agency interpretations may change over time as long as the new interpretation fits reasonably within the statutory language and intent.

The first NPS management policies, drafted by Horace M. Albright and published as a letter dated May 13, 1918, from Secretary Franklin K. Lane to Director Stephen T. Mather, constitute the contemporaneous interpretation of the 1916 statute. Albright seized this opportunity to “clarify and elaborate the ideas and goals set for the National Park Service in the brief organic act....”¹⁰ The “Lane letter,” as it is known, lays the foundation for park management:

For the information of the public, an outline of the administrative policy to which the new Service will adhere may be announced. This policy is based on three broad principles: First that the national parks must be maintained in absolutely unimpaired form for the use of future generations as well as those of our own time; second, that they are set apart for the use, observation, health, and pleasure of the people; and third, that the national interest must dictate all decisions affecting public or private enterprise in the parks.

Every activity of the Service is subordinate to the duties imposed upon it to faithfully preserve the parks for posterity in essentially their natural state (emphasis added).

Thus, the Lane letter makes clear that the first and paramount principle of park management is non-impairment, and especially preservation of the natural conditions of parks.¹¹

In the updated administrative policies of 1925 from Secretary Hubert Work, ghost-writer Albright again seized the opportunity to restate but also to strengthen the 1918 policies for park resource protection, as in the following revision of the Lane letter’s first administrative principle:

[T]he national parks and national monuments must be maintained untouched by the inroad of modern civilization in order that unspoiled bits of native America may be preserved by future generations as well as our own.

The Work letter further declared that the “national parks . . . remain under Nature’s own chosen conditions.” Like Secretary Work, later secretaries of the interior, including those as ideologically diverse as Stewart Udall, Walter Hickel, and James Watt, wholeheartedly reaffirmed the Lane letter principles in their own letters to the NPS director. And later volumes of NPS management policies, including the current 2006 version, explicitly built upon these principles.

Of the many other issues covered in NPS management policies, two that may be of particular interest to the Science Committee—the educational/scientific role of parks and their role as wildlife sanctuaries—deserve more than the following brief mention:

First, NPS management policies have always envisioned an educational and scientific role for parks. Both the Lane and Work letters directed the Park Service to encourage educational use “in every practical way,” and specifically identified two of those ways: using parks as science classrooms for university and high school students and establishing park museums for natural resource collections. The 1932 edition of NPS management policies stated, “Education is a major phase of the enjoyment and benefit to be derived by the people from these parks. . . . Containing the supreme in objects of scenic, historical, or scientific interest, the educational opportunities are preeminent. . . .”¹² Later management policies have expanded these concepts significantly (see, e.g., Chapters 7, 4, and 5 of *NPS Management Policies 2006*).

Second, the Park Service has interpreted its preservation mandate to mean no hunting in parks unless Congress expressly provides otherwise.¹³ The creators of the National Park Service in 1916 were aware that Congress made Yellowstone a game sanctuary by outlawing hunting in 1894, through a statutory provision that would be incorporated in many other parks’ enabling acts. The Lane and Work letters include an express prohibition on hunting, even though the 1916 Act did not.

While the non-impairment principle has been unassailable in NPS policy, history shows that the Park Service’s interpretation of what activities are compatible with, or essential to, its implementation has been debatable. Issues such as development of park roads and buildings, authorization of motorized uses, and imposition of carrying capacity limits have often sparked controversy, both within NPS and between it and outside groups. The most serious controversies in recent decades, such as the battle over revising *NPS Management Policies 2001*, have involved political appointees attempting to impose their views on an uncooperative Park Service dug in to defend the NPS core principles.

In this recent battle, as in certain previous controversies when forces perceived as anti-preservation have tried to change park policies, the Park Service prevailed with the help of the press, the public, and key congressional officials.¹⁴ Thus, *NPS Management Policies 2006* differs little from the 2001 version; and, in fact, the core principles have changed little since 1918. The 2001 and 2006 versions, however, do parse the language of the foundational statutes in more detail than previous versions, primarily because litigation in the late 1990s

(*Southern Utah Wilderness Alliance (“SUWA”) v. Dabney*) was threatening to establish a problematic interpretation if the Park Service did not provide its own detailed interpretation. Ultimately, the court determined in a 2005 opinion that the plain statutory language, the legislative and administrative history, and the majority of relevant court opinions supported the Park Service’s “well-reasoned, thorough, and persuasive” 2001 interpretation of its foundational statutes. This interpretation, now embodied in Section 1.4 of *NPS Management Policies 2006*, merits a full and close reading (see Appendix 2).

Despite principled policies, park management over the years has not been perfect. Congress, the courts, and the scientific community, among others, have had occasion to point out the shortcomings. For example, only a few years after NPS decided to group its increasing diversity of areas into three categories—natural, historical, and recreational—and to develop different policies and regulations for each category, Congress impliedly rebuffed the categorization scheme in the 1970 General Authorities Act and again in the 1978 Redwoods Amendment. The national park system, Congress said, is a “single national heritage” greater than the sum of its parts, and all areas are subject to the general systemwide authorities except as Congress specifically provides otherwise. As a consequence, the Park Service revised its general regulations, and several courts upheld the changes.¹⁵

The courts, too, have sometimes found fault. For example, in the Redwoods National Park litigation of the 1970s, the court compelled the secretary of the interior, based on his “paramount legal duty,” “to take reasonable steps within a reasonable time to afford as full protection as possible” to protect the eponymous trees from the logging operations *outside* the park boundaries. As another example, in the 1990s litigation referenced above (*SUWA v. Dabney*), the court initially determined that the Park Service’s authorization of motorized use in a certain streambed in Canyonlands National Park violated the impairment prohibition, leading NPS to reassess the authorization and, in the end, prohibit all motorized use in that streambed. As a final example, in the litigation concerning winter use at Yellowstone National Park, one of the involved courts vacated the 2007 plan for snowmobiles and snowcoaches based on the plan’s adverse impacts on the park’s soundscape, air quality, and wildlife, concluding that the “[p]lan clearly elevates use over conservation of park resources and values and fails to articulate why ... [these adverse impacts] are “necessary and appropriate to fulfill the purposes of the park.” The Park Service is still working on a final plan that can, among other things, survive judicial review. Despite these examples of courts finding fault, the general rule for park litigation is that, if NPS acts to protect park resources and values, the courts are likely to uphold the action unless Congress has specifically directed otherwise.

In addition to Congress and the courts, at several points in NPS history scientists have pushed park management in new directions. While others will provide the Science Committee more background on the evolution of scientific management in the Park Service, this essay will mention the evolution (if not “revolution”¹⁶) precipitated by George Melendez Wright, including his 1932 report *Fauna of the National Parks*, and 31 years later by the Leopold report (“Wildlife Management in the National Parks”) and the Robbins report (“A Report by the Advisory Committee to the National Park Service on Research”). Although the recommendations of the Leopold and Robbins reports may still lack full implementation,¹⁷ NPS policy and viewpoint started to change immediately after their publication, as evidenced

by Secretary Udall's 1964 directive that park natural areas be managed "toward maintaining, and where necessary reestablishing, indigenous plant and animal life, in keeping with the March 4, 1963, recommendations of the ... [Leopold Report]." Thus, bringing science to bear has led—and should continue to lead—to critically important changes in NPS management direction.

But what is impairment?

National park resources and values are a public trust created by compelling statutory language and intent. The core administrative principles provide that the Park Service must manage park resources and values so as to prevent or, if necessary, remedy impairment. Section 1.4 of *NPS Management Policies 2006* sets forth the authoritative agency interpretation of this duty. As a guide (but not substitute) for reading Section 1.4, consider the following highlights:

- Section 1.4.2 concludes that both the term "unimpaired" in the 1916 Organic Act and the term "derogation" in the 1978 Redwoods Amendment are used to describe a "single standard" of "what the National Park Service must avoid" in managing park resources and values.
- Section 1.4.3 explains how the Park Service should both conserve resources and values and provide for their enjoyment, but also declares that "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant."
- Section 1.4.4 identifies the impairment prohibition—separate from the above conservation mandate—as the "cornerstone of the Organic Act."
- Section 1.4.6 defines "what constitutes park resources and values" with a comprehensive list, including tangible resources of every kind from individual to landscape in scope; "the ecological, biological, and physical processes that created the park and continue to act upon it"; sensory experiences like visibility, natural soundscapes, and smells, with both tangible and intangible aspects; "appropriate opportunities to experience enjoyment" of all the listed resources, but "without impairing them"; the park's contribution to the values of the National Park System; and any additional specific attributes of the particular park.

But what is "impairment" of park resources and values? The most recent NPS management policies (2001, 2006) wrestled mightily with the concept before settling on the following Section 1.4.5:

The impairment that is prohibited by the [foundational park statutes] is an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.

An impact to any park resource or value may, but does not necessarily, constitute an impairment. An impact would be more likely to constitute impairment to the extent that it affects a resource or value whose conservation is

- necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park, or
- key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park, or
- identified in the park's general management plan or other relevant NPS planning documents as being of significance.

An impact would be less likely to constitute impairment if it is an unavoidable result of an action necessary to preserve or restore the integrity of park resources or values and it cannot be further mitigated.

The Park Service has continued to wrestle with this definition. Both natural and cultural resource professionals have attempted to provide more detailed guidance documents on impairment to aid “the responsible NPS manager” in exercising “professional judgment.” To date, however, the Park Service has relied more heavily on case-by-case determinations, taking into account available information and compiling an administrative record that can withstand scientific and judicial review.¹⁸

Conclusion

The 1963 Leopold Report began with reference to the “fundamental purpose” set forth in National Park Service Organic Act of 1916. It proceeded to recount how the National Park Service had interpreted this fundamental purpose through the years with respect to wildlife management, revealing an evolution in philosophy and practice with changing circumstances and increasing knowledge and understanding. Then, of course, the Leopold Report itself made a substantial contribution to this management evolution.

So, too, this Science Committee can begin with an understanding of the park foundational statutes and proceed to advise the National Park Service what must be done now, based on the best scientific knowledge available, to protect and preserve park resources and values for present and future generations. The committee now knows that the words of the park statutes are broad, the intent to create a public trust is clear, and the core administrative principles have remained constant through the years. The committee also should feel free to consider a broad range of preservation options consistent with the words and intent of the foundational statutes, as made clear by the first court to interpret park law after passage of the Redwoods Amendment:

Certainly the Secretary is not restricted in the protection and administration of Park resources to any single means.... [The Secretary and the Park Service] have broad discretion in determining what actions are *best calculated to protect Park resources...* (emphasis added).¹⁹

Indeed, in this age of climate change and more, what actions are best calculated to protect and preserve park resources and values for the present and future generations?

Appendix 1: 16 US Code Sections 1 and 1a-1 – The Statutory Foundation

§ 1. Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall have substantial experience and demonstrated competence in land management and natural or cultural resource conservation. The Director shall select two Deputy Directors. The first Deputy Director shall have responsibility for National Park Service operations, and the second Deputy Director shall have responsibility for other programs assigned to the National Park Service. There shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the 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.

§ 1a-1. National Park System: Administration; declaration of findings and purpose

Congress declares that the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possessions; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system. Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 2 of this Act [16 USCS § 1c], shall be consistent with and founded in the purpose established by the first section of the Act of August 25, 1916 [16 USCS § 1], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

Appendix 2: Excerpts from *National Park Service Management Policies 2006*, Section 1.4, “Park Management”

1.4.1 The Laws Generally Governing Park Management

The most important statutory directive for the National Park Service is provided by interrelated provisions of the NPS Organic Act of 1916 and the NPS General Authorities Act of 1970, including amendments to the latter law enacted in 1978.

The key management-related provision of the Organic Act is as follows:

[The National Park Service] 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. (16 USC 1) Congress supplemented and clarified these provisions through enactment of the General Authorities Act in 1970, and again through enactment of a 1978 amendment to that act (the “Redwood Amendment,” contained in a bill expanding Redwood National Park), which added the last two sentences in the following provision.

The key part of that act, as amended, is as follows:

Congress declares that the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possessions; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superlative environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system. Congress further reaffirms, declares, and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 1c of this title, shall be consistent with and founded in the purpose established by section 1 of this title [the Organic Act provision quoted above], to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas

have been established, except as may have been or shall be directly and specifically provided by Congress (16 USC 1a-1).

This section of *Management Policies* represents the agency's interpretation of these key statutory provisions.

1.4.2 “Impairment” and “Derogation”: One standard

Congress intended the language of the Redwood amendment to the General Authorities Act to reiterate the provisions of the Organic Act, not create a substantively different management standard. The House committee report described the Redwood amendment as a “declaration by Congress” that the promotion and regulation of the national park system is to be consistent with the Organic Act. The Senate committee report stated that under the Redwood amendment, “The Secretary has an absolute duty, which is not to be compromised, to fulfill the mandate of the 1916 Act to take whatever actions and seek whatever relief as will safeguard the units of the national park system.” So, although the Organic Act and the General Authorities Act, as amended by the Redwood amendment, use different wording (“unimpaired” and “derogation”) to describe what the National Park Service must avoid, they define a single standard for the management of the national park system—not two different standards. For simplicity, *Management Policies* uses “impairment” (or a variation thereof), not both statutory phrases, to refer to that single standard.

1.4.3 The NPS Obligation to Conserve and Provide for Enjoyment of Park Resources and Values

The fundamental purpose of the national park system, established by the Organic Act and reaffirmed by the General Authorities Act, as amended, begins with a mandate to conserve park resources and values. This mandate is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired. NPS managers must always seek ways to avoid, or to minimize to the greatest extent practicable, adverse impacts on park resources and values.

However, the laws do give the Service the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values.

The fundamental purpose of all parks also includes providing for the enjoyment of park resources and values by the people of the United States. The enjoyment that is contemplated by the statute is broad; it is the enjoyment of all the people of the United States and includes enjoyment both by people who visit parks and by those who appreciate them from afar. It also includes deriving benefit (including scientific knowledge) and inspiration from parks, as well as other forms of enjoyment and inspiration. Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. This is how courts have consistently interpreted the Organic Act.

1.4.3.1 Park Purposes and Legislatively Authorized Uses

Park purposes are found in the general laws pertaining to the national park system, as well as the enabling legislation or proclamation establishing each unit. In addition to park purposes, in many cases the enabling legislation or proclamation for a park unit may also identify uses that are either mandated or authorized. In the administration of mandated uses, park managers must allow the use; however, they do have the authority to and must manage and regulate the use to ensure, to the extent possible, that impacts on park resources from that use are acceptable. In the administration of authorized uses, park managers have the discretionary authority to allow and manage the use, provided that the use will not cause impairment or unacceptable impacts. In determining whether or how to allow the use, park managers must consider the congressional or presidential interest, as expressed in the enabling legislation or proclamation, that the use or uses continue. Where there is strong public interest in a particular use, opportunities for civic engagement and cooperative conservation should be factored into the decision-making process.

1.4.4 The Prohibition on Impairment of Park Resources and Values

While Congress has given the Service the management discretion to allow impacts within parks, that discretion is limited by the statutory requirement (generally enforceable by the federal courts) that the Park Service must leave park resources and values unimpaired unless a particular law directly and specifically provides otherwise. This, the cornerstone of the Organic Act, establishes the primary responsibility of the National Park Service. It ensures that park resources and values will continue to exist in a condition that will allow the American people to have present and future opportunities for enjoyment of them.

The impairment of park resources and values may not be allowed by the Service unless directly and specifically provided for by legislation or by the proclamation establishing the park. The relevant legislation or proclamation must provide explicitly (not by implication or inference) for the activity, in terms that keep the Service from having the authority to manage the activity so as to avoid the impairment.

1.4.5 What Constitutes Impairment of Park Resources and Values

The impairment that is prohibited by the Organic Act and the General Authorities Act is an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values. Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.

An impact to any park resource or value may, but does not necessarily, constitute an impairment. An impact would be more likely to constitute impairment to the extent that it affects a resource or value whose conservation is

- necessary to fulfill specific purposes identified in the establishing legislation or proclamation of the park, or

- key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park, or
- identified in the park's general management plan or other relevant NPS planning documents as being of significance.

An impact would be less likely to constitute an impairment if it is an unavoidable result of an action necessary to preserve or restore the integrity of park resources or values and it cannot be further mitigated.

An impact that may, but would not necessarily, lead to impairment may result from visitor activities; NPS administrative activities; or activities undertaken by concessioners, contractors, and others operating in the park. Impairment may also result from sources or activities outside the park. This will be addressed consistent with sections 1.6 and 1.7 on Cooperative Conservation and Civic Engagement.

1.4.6 What Constitutes Park Resources and Values

The "park resources and values" that are subject to the no-impairment standard include

- the park's scenery, natural and historic objects, and wildlife, and the processes and conditions that sustain them, including, to the extent present in the park: the ecological, biological, and physical processes that created the park and continue to act upon it; scenic features; natural visibility, both in daytime and at night; natural landscapes; natural soundscapes and smells; water and air resources; soils; geological resources; paleontological resources; archeological resources; cultural landscapes; ethnographic resources; historic and prehistoric sites, structures, and objects; museum collections; and native plants and animals;
- appropriate opportunities to experience enjoyment of the above resources, to the extent that can be done without impairing them;
- the park's role in contributing to the national dignity, the high public value and integrity, and the superlative environmental quality of the national park system, and the benefit and inspiration provided to the American people by the national park system; and
- any additional attributes encompassed by the specific values and purposes for which the park was established.

1.4.7 Decision-making Requirements to Identify and Avoid Impairments

Before approving a proposed action that could lead to an impairment of park resources and values, an NPS decision-maker must consider the impacts of the proposed action and determine, in writing, that the activity will not lead to an impairment of park resources and values. If there would be an impairment, the action must not be approved.

In making a determination of whether there would be an impairment, an NPS decision-maker must use his or her professional judgment. This means that the decision-maker must consider any environmental assessments or environmental impact statements required by the National Environmental Policy Act of 1969 (NEPA); consultations required under section 106 of the National Historic Preservation Act (NHPA), relevant scientific and scholarly

studies; advice or insights offered by subject matter experts and others who have relevant knowledge or experience; and the results of civic engagement and public involvement activities relating to the decision. The same application of professional judgment applies when reaching conclusions about “unacceptable impacts.”

When an NPS decision-maker becomes aware that an ongoing activity might have led or might be leading to an impairment of park resources or values, he or she must investigate and determine if there is or will be an impairment. This investigation and determination may be made independent of, or as part of, a park planning process undertaken for other purposes. If it is determined that there is, or will be, an impairment, the decision-maker must take appropriate action, to the extent possible within the Service’s authorities and available resources, to eliminate the impairment. The action must eliminate the impairment as soon as reasonably possible, taking into consideration the nature, duration, magnitude, and other characteristics of the impacts on park resources and values, as well as the requirements of the National Environmental Policy Act, National Historic Preservation Act, the Administrative Procedure Act, and other applicable laws.

1.4.7.1 Unacceptable Impacts

The impact threshold at which impairment occurs is not always readily apparent. Therefore, the Service will apply a standard that offers greater assurance that impairment will not occur. The Service will do this by avoiding impacts that it determines to be unacceptable. These are impacts that fall short of impairment, but are still not acceptable within a particular park’s environment. Park managers must not allow uses that would cause unacceptable impacts; they must evaluate existing or proposed uses and determine whether the associated impacts on park resources and values are acceptable.

Virtually every form of human activity that takes place within a park has some degree of effect on park resources or values, but that does not mean the impact is unacceptable or that a particular use must be disallowed. Therefore, for the purposes of these policies, unacceptable impacts are impacts that, individually or cumulatively, would

- be inconsistent with a park’s purposes or values, or
- impede the attainment of a park’s desired future conditions for natural and cultural resources as identified through the park’s planning process, or
- create an unsafe or unhealthful environment for visitors or employees, or
- diminish opportunities for current or future generations to enjoy, learn about, or be inspired by park resources or values, or
- unreasonably interfere with
 - park programs or activities, or
 - an appropriate use, or
 - the atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.
 - NPS concessioner or contractor operations or services.

Figure 1 illustrates the relationship between appropriate use, unacceptable impacts, and impairment.

Managing for Resource Conservation

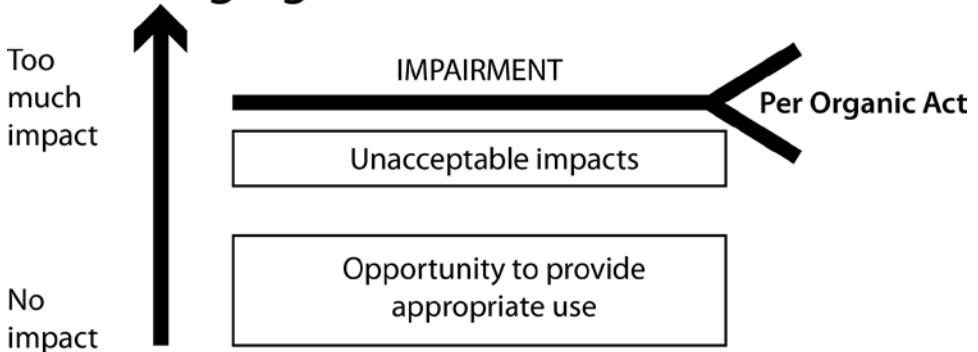


Figure 1. The relationship between appropriate use, unacceptable impacts, and impairment.

1.4.7.2 *Improving Resource Conditions within the Parks*

The Service will also strive to ensure that park resources and values are passed on to future generations in a condition that is as good as, or better than, the conditions that exist today. In particular, the Service will strive to restore the integrity of park resources that have been damaged or compromised in the past. Restoration activities will be guided by the natural and cultural resource-specific policies identified in chapters 4 and 5 of these *Management Policies*.

Endnotes

1. In his article entitled “The National Park Service Act of 1916: A ‘Contradictory Mandate’?,” (*Denver University Law Review* 74(3), 575–623 [1994]) Robin W. Winks suggests that we consider carefully the meaning and implications of “scenery,” thereby realizing the term’s potential for evolution in meaning. The historian Richard West Sellars has also explored the importance and role of scenery in the creation and management of national parks, especially at times when science had little influence.
2. Congress, a federal court, and others have noted that since the 1978 Redwoods Amendment, it is the park statutes, and not federal common law, that impose trust-like duties to protect park resources and values.
3. There have been answers that suggest the responsibility is broad. For example, the relevant legislative history states that the 1978 Redwoods Amendment “is intended to serve as the basis for any judicial resolution of competing private and public values and interests in ... areas of the National Park System.” Furthermore, in the so-called “Doe Run opinion,” the solicitor of the Department of the Interior (DOI) concluded that the secretary of the interior bears responsibility both for determining whether the activities of other DOI bureaus threaten park resources and values and—as implied in the solicitor’s description of the secretary’s options—for protecting them, as long as the statutes governing those non-NPS activities provide the secretary sufficient discretion. Solicitor’s Opinion M-36993 (1998).

4. Courts routinely state that, if the statutory language is clear, it is not necessary to consider extraneous sources of legislative intent. Many courts nevertheless find some reason to examine legislative history. Of course, in the case of the foundational NPS statutes, the statutory language provides sufficient ambiguity to invite further inquiry.
5. Especially helpful are the remarkably detailed recollections of Horace M. Albright set forth in two memoirs and other publications, the aforementioned article by Robin W. Winks, and Dayton Duncan's research in *The National Parks: America's Best Idea* (New York: Alfred A. Knopf, 2009), which he co-authored with Ken Burns.
6. In a 1986 letter written to document this legislative intent, former DOI Associate Solicitor Webb wrote, "I got out [Joe] Sax's [1970 seminal law review] article, went to his description of the elements of a public trust, and wrote each of them into a provision that became [the Redwoods Amendment]. . . . I returned promptly to the White House with the draft, it was explained to Burton, approved all around and, eventually, enacted." As a strictly legal matter, Webb's 1986 letter would likely carry little weight with a court, but it appears to reflect accurately the intent of key players and is therefore of significant value. The 1970 article referred to is Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," *Michigan Law Review* 68(3): 471-566.
7. Schullery's quoted comment was about the Yellowstone National Park enabling act, but applies equally to the foundational statutes. See the interview with him in Duncan and Burns' *The National Parks: America's Best Idea*, pp. 252-255.
8. In 1994, Lary M. Dilsaver published *America's National Park System: The Critical Documents* (Lanham, MD: Rowman & Littlefield), which includes influential policy documents through 1992 (see www.nps.gov/history/history/online_books/anps/).
9. Under administrative law principles developed in recent decades, courts also pay more deference to agency interpretations that have taken into consideration public comments as part of a formalized process, thus according codified regulations the most deference.
10. As noted earlier, the 1916 Organic Act authorized the secretary of the interior to promulgate rules and regulations for park management. Before the advent of the *Federal Register* (1936) and Code of Federal Regulations (1938), the administrative policies set forth in the Lane letter partially filled this function.
11. Many park documents, especially those prior to the 1930s, focus on park natural resources even to the exclusion of historic resources despite the mention of "historic objects" in the Organic Act and the existence of national parks and monuments based on such objects. It was not until the 1930s, however, that NPS acquired substantial responsibility for historic properties by virtue of a 1933 FDR executive order transferring many historic properties to its administration. With this increased responsibility over historic resources as well as the subsequent enactment of detailed historic preservation laws (e.g., the Historic Sites Act of 1935, the National Historic Preservation Act of 1966), the Park Service policies began to pay greater attention to historic resources.
12. Interestingly, the author of this edition of management policies was Louis C. Cramton, then a special attorney to the secretary of the interior but formerly a congressman who sat on the House Committee on Public Lands in 1916 during the consideration of the NPS Organic Act.

13. See, e.g., *National Rifle Ass'n. v. Potter*, 628 F. Supp. 903 (D.D.C. 1986), discussing the roots of the NPS hunting prohibition and upholding the 1983 regulatory revision to retract a presumptive allowance of hunting in the “recreational areas” of the 1960s and 1970s.
14. In the article referenced above (footnote 1), Robin W. Winks wrote, “The National Park System of the United States . . . has the warm support of the American people. . . . [T]he public brooks little compromise with what it understands to be the System’s mission.”
15. See, e.g., *National Rifle Ass'n. v. Potter* (footnote 13, above), upholding change in regulations with respect to hunting in former “recreational areas,” and *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445 (9th Cir. 1996), upholding change in regulations with respect to bicycle use in these areas.
16. Paul Schullery characterized Wright’s impact this way: “The effect of George Wright and his colleagues—this group of ecological thinkers and students—was, in an institution that’s always evolving anyway, like a perpetual revolution. The things they were suggesting were such a reversal of the way society saw nature that I don’t think it’s an overstatement to call it a revolution.” Duncan and Burns, *The National Parks: America’s Best Idea*, p. 253.
17. See the National Research Council’s 1992 report on *Science and the National Parks* (Washington, DC: National Academy Press).
18. Legislation enacted in 1998 requires the secretary of the interior to “take such measures as are necessary to assure the full and proper utilization of the results of scientific study for park management decisions. In each case in which an action undertaken by the National Park Service may cause a significant adverse effect on a park resource, the administrative record shall reflect the manner in which unit resource studies have been considered. . . .”
19. *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.D.C. 1980).

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