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The latest edition of the National Park Service (NPS) management policies (2001) was approved in December 2000. It builds upon the framework of the 1988 version, while allowing NPS to keep pace with new laws, changes in technology and American demographics, and new understandings of what we must do to protect the natural and cultural resources of the national parks. As the foundation document for the NPS directives system, it is intended to serve as a reference manual to aid in policy searches.

Several key updates are based on the National Parks Omnibus Management Act of 1996 (P.L. 104-333) and that of 1998 (P.L. 105-391), various provisions contained in appropriations acts, and other laws and executive orders enacted since 1988. New concepts and topics have been added or expanded, such as sustainability and environmental leadership, management accountability, managing information resources, "partnering" with others to help protect parks and serve the public, and dealing with management challenges that originate outside park boundaries.

A key section of the new management policies that was discussed during the George Wright Society conference concerned park management and the impairment issue. For many decades NPS has provided opportunities for enjoyment without impairing park resources and values, and we will continue to do so. Updates on the impairment issue and other helpful information can be found on the World Wide Web at http://www.nps.gov/protect. The following compilation, created by Chick Fagan, program analyst in the NPS Office of Policy, gives answers to many of questions that came up during the conference regarding park management in Section 1.4 in the 2001 management policies.

Why is the "impairment" issue so important?

Eighty-five years ago, President Woodrow Wilson signed into law the NPS Organic Act. There is an important provision in the law that tells us the purpose for which we manage the national parks:

> …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.

This is our core mission in managing the parks. Since passage of the act, we have had recurring discussions among ourselves—and with others—over what it means. We have often characterized the Organic Act as giving us a "contradictory mandate" that requires us to perform a "balancing test"—balancing between resource protection and public enjoyment. But we have argued at other times that it is *not* a balancing test—that resource protection is paramount. In short, we have not had within NPS a

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common and consistent interpretation of our mandate under the Organic Act. This has led to inappropriate and, at times, illegal decisions being made with respect to park resources and values.

Why are we now focusing so intensely on the "no-impairment" clause of the Organic Act?

Arguments about the "contradictory mandate" have sometimes led us into the courtroom. One of the more recent court cases occurred at Canyonlands National Park and Glen Canyon National Recreation Area, where the parks had prepared a backcountry management plan (BMP). Informally referred to as the SUWA (for "Southern Utah Wilderness Alliance") case *(SUWA v. Dabney)*, it has caused us to scrutinize, perhaps more closely than we have in the last 85 years, each and every word in the Organic Act. The following is a very brief summary:

- The administrative record showed that levels of motorized vehicle use were increasing, and the use was adversely affecting park resources.
- The draft BMP included a preferred alternative that would have eliminated off-road vehicle (ORV) use on a 10-mile segment of Salt Creek Road in Canyonlands.
- The administrative record showed that Salt Creek was the only perennial freshwater stream in Canyonlands.
- The ORV user groups were very distressed by the proposed closure.
- The park then adopted a plan that would allow some limited continued use under a permit system, while conducting monitoring and assessment activities that would determine whether the reduced level of use still caused harm to the area.
- The park was then sued by the Southern Utah Wilderness Alliance on the ORV issue and several other issues. The ORV groups intervened in support of the NPS decision.
- The park won on most of the issues, but lost on the Salt Creek issue.

The District Court decision. In these kinds of cases, the court applies what the Supreme Court has established as the "Chevron 2-step test" (named for the case known as *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*) to determine whether an agency's reading of a statute it administers is correct. Under step 1, if Congress has spoken to the precise question at issue, then that controls the court's—and the agency's—interpretation of the statute.. At that point, there is no need to go to step 2. However, if the statute is silent or ambiguous, the court defers under step 2 to the agency's interpretation so long as it is a reasonable interpretation of the statute. Our defense contended that Canyonlands was a "Chevron 2" case, whereby we are allowed to strike a balance between competing mandates of resource conservation and visitor enjoyment. The District Court ruled where there is "permanent impairment of unique park resources," then the Organic Act is not ambiguous: the activity cannot be allowed. The District Court ordered that the park could not allow motorized vehicle use on the 10-mile section of trail.

The appeal. The ORV groups then appealed the District Court's decision. This caused NPS to consider whether the court had properly articulated the standard for determining when the agency is in violation of the Organic Act. The timing of the ruling allowed the office of the assistant secretary of the interior and NPS to consider the issue in the context of the revision of the new management policies (in which Chapter 1 outlines the legal and philosophical foundations of the National Park System) and use the SUWA case as an opportunity to articulate an official Department of the Interior (DOI) and NPS interpretation of the Organic Act. So we filed a brief to advise the court of DOI's views on the proper interpretation of the Organic Act. This interpretation was *different* from that which we had offered previously, wherein we

contended that the law authorizes NPS to balance between competing mandates of resource conservation and visitor enjoyment.

Since the policy interpretation offered by DOI was technically still in draft form (the 2001 management policies had not yet been approved), the Court of Appeals did not consider the position we offered. But it also said that the District Court erred in its decision, and found that:

- The Organic Act is a Chevron 2 case, not a Chevron 1 case.
- ORV use is not explicitly prohibited by the Organic Act.

The court also said: "We read the Act as permitting the NPS to balance the sometimes conflicting policies of resource conservation and visitor enjoyment in determining what activities should be permitted or prohibited." But the court added: "The test for whether the NPS has performed its balancing properly is whether the resulting action leaves the resources 'unimpaired' for the enjoyment of future generations."

The park is now re-working that portion of the BMP addressing Salt Creek Road in light of the court's decision. It has closed the road pending a new environmental assessment. The environmental assessment will consider the ongoing studies and monitoring that have taken place on the road since the district court closed it in 1998. The environmental assessment will also include an impairment finding, as required by the management policies and the NPS Director's Order #12.

Since similar lawsuits have been adjudicated before, why has the SUWA case been singled out?

The SUWA case has become the focal point for the no-impairment issue mainly because it is the first case to find that NPS had violated the Organic Act by not protecting park resources and, in doing so, it articulated a new standard for finding such a violation. It also became a focal point of the no-impairment issue because the court's decision coincided with our re-drafting of the management policies, allowing us to determine whether we should adopt the court's standard or not. In focusing on the SUWA case, we must resist the temptation to be overly judgmental. The decisions that were made there, and the political realities and tensions that the superintendent had to deal with, are mirrored all across the National Park System. Making the right decisions under those circumstances is difficult at best; being a Monday-morning quarterback is always easy. But we know that park-level decisions sometimes have Servicewide repercussions. The main point is that we all learn as much as we can from these sorts of lessons.

Where does this now leave the rest of NPS?

Even though the interpretation of the Organic Act we offered to the Court of Appeals was not considered because it was not final, we continued to work on it, under the leadership of the assistant secretary's office. Initially, we adopted our interpretation as Director's Order #55. But that was superseded by Section 1.4 ("Park Management") of the new management policies, approved December 22, 2000. Thoughtful consideration was given to virtually every word in Section 1.4. The policy's wording was selected—or not selected—for important reasons, namely:

- To leave as little room as possible for misinterpreting or deviating from the course it sets;
- To help ensure that we are consistent in the way we make decisions;
- To show the courts we have thoroughly thought through the instructions given to us in the Organic Act; and
- To convince the courts in future challenges that our interpretation is logical and reasonable, and should be shown deference.

What does Section 1.4 of the management policies say?

Section 1.4 tells us that:

- The no-impairment requirement of the Organic Act and the no-derogation requirement of the Redwood Act amendment define a single standard for management of the parks, and the terms can be used interchangeably.
- In addition to avoiding impairment, we have an ongoing responsibility to conserve park 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 USA.
- "Enjoyment" means enjoyment both by people who directly experience parks and by those who appreciate them from afar, and includes more than recreation.
- When there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.
- NPS has management discretion to allow certain impacts within parks, but not to allow impacts that would leave resources and values impaired (unless Congress explicitly provides for the impairing activity).
- Whether an impact would harm the integrity of park resources or values is a decision left to the responsible NPS manager.
- Impairment may occur from visitor activities, NPS activities in the course of managing a park, or activities undertaken by concessioners, contractors, or others operating in the park.
- Park resources and values include virtually all cultural resources and all natural resources and processes, as well as opportunities to experience enjoyment of them.
- Ongoing activities that might have led or might be leading to an impairment must be investigated and, if there is or will be an impairment, the impairment must be eliminated as soon as reasonably possible.

How will we implement this new policy?

For some in the Park Service, this interpretation is not really "new." Many have operated under the assumption that the law means what it says—we cannot take actions that impair park resources. But Section 1.4 formally adopts a single interpretation that everyone must live by. And the basic framework has been in place for a long time.

- For more than 30 years, we have been required by Section 106 of the National Historic Preservation Act to take into account the effects our proposed "undertakings" will have on National Register or Register-eligible sites.
- For more than 30 years, we have had the National Environmental Policy Act (NEPA) requirement that we address the effects of our actions on the human environment.
- For nearly as long, we have had procedures in place to address these requirements.

But Section 106 and NEPA require merely that we fully analyze and disclose the adverse consequences of our proposed actions. As long as we take all the steps required under those laws, and do the best we can to mitigate or avoid adverse impacts, they allow us to pretty much do whatever we want. And that is why the clear, unequivocal interpretation of Section 1.4 is so important to us: it requires one more critical step in the decision-making process. We must ask the question: Is the impact of this action going to be so bad that it will *impair* park resources or values? If the answer is "yes," then we cannot undertake the action.

Does this mean that everything we do will be an impairment, and therefore we cannot do anything that will affect park resources or values?

No, it does not mean that. As stated in Section 1.4.3 of the management policies:

> T]he 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.

Furthermore, Section 8.1 of the management policies states:

> The fact that a park use may have an impact does not necessarily mean it will impair park resources or values for the enjoyment of future generations. Impacts may affect park resources or values and still be within the limits of the discretionary authority conferred by the Organic Act.

We must recognize that there are many types and degrees of impact. Some impacts may be beneficial, while others may be adverse. Some of the adverse impacts may be so adverse as to significantly affect the quality of the human environment. When they reach that level, NEPA requires that an environmental impact statement be prepared. When a significant adverse impact reaches the level of impairing park resources or values, it is prohibited under the Organic Act.

How do we distinguish an impact that is adverse from one that would constitute an impairment?

This is the most difficult task we now face. Section 1.4.5 says the impairment that is prohibited:

> [I]s 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 and 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 would be more likely to constitute an 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;
- Key to the natural or cultural integrity of the park or to opportunities for enjoyment of the park; or
- Identified as a goal in the park's general management plan or other relevant NPS planning documents.

"An impact would be less likely to constitute an impairment to the extent that it is an unavoidable result, which cannot reasonably be further mitigated, of an action necessary to preserve or restore the integrity of park resources or values" (Section 1.4.5).

Rarely will there be clear-cut evidence that impairment will occur. Superintendents and other decision-makers must apply their professional judgment to the facts of each case, taking into account technical and scientific studies and other information provided by subject-matter experts within and outside NPS. We are in the process of developing the criteria and understandings we will need to carry out this responsibil-

ity efficiently. This is being done mainly by a task force with natural and cultural resource expertise.

Reference

National Park Service. 2000. *Management Policies 2001.* Washington, D.C.: National Park Service.