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Jurisdictional and Institutional Issues: Public Lands

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JURISDICTIONAL AND INSTITUTIONAL
ISSUES: PUBLIC LANDS

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EXTERNAL DEVELOPMENT AFFECTING THE
NATIONAL PARKS: PRESERVING "THE
BEST IDEA WE EVER HAD"

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I. INTRODUCTION

A. Summary

Many of our national parks are surrounded by federal and state public lands that are managed under principles much different from those governing the parks. While the National Parks Organic Act mandates preservation of park resources, most other public land management agencies operate under multiple use statutes authorizing resource consumption and development. Planning statutes, such as NEPA and NFMA, may require some consideration of park interests when federal agencies undertake development activities on nearby lands, but they do not require deference to the parks. Resource protection legislation, such as the Endangered Species Act and the Wilderness Act, may protect some shared wildlife species and bordering lands and thus afford protection to an adjacent park, but these statutes are only helpful to the parks when the designated resource is present. Other federal and state statutes regulating land use and resource development activities, as well as certain common law doctrines, may also impose some limitations on the actions of the national parks' public neighbors. None of these statutes, however, specifically addresses the question of park protection. Thus, despite the Organic Act's preservation mandate, the national parks are not securely protected against threatening activities occurring on adjacent public lands.

B. Selected References

1. Comment, Protecting National Parks From Developments Beyond Their Borders, 132 U. Pa. L. Rev. 1189 (1984).
2. Keiter, On Protecting the National Parks From the External Threats Dilemma, 20 Land & Water L. Rev. 355 (1985).
3. Hiscock, Protecting National Park System Buffer Zones: Existing, Proposed, and Suggested Authority, 7 J. of Energy Law & Policy 35 (1986).
4. The Conservation Foundation, NATIONAL PARKS FOR A NEW GENERATION 141-154 (1985).

II. National Parks Legislation

A. The Organic Act, 16 U.S.C. §1- 460 hh-6.

The Organic Act provides that the fundamental purpose of the national parks is to conserve the parks' scenery, and natural and historic objects, and

wildlife, while providing for public use in a manner that will leave the parks "unimpaired for the enjoyment of future generations." 16 U.S.C. §1. No court has yet directly addressed the question of how the inherent conflict between the statute's preservation and use mandates is to be resolved. Because the Act's public use provision is qualified by such strong preservation language, it has been forcefully argued that the parks should be administered to protect their natural resources, even if this means limiting public use opportunities. Lemons & Stout, *A Reinterpretation of National Park Legislation*, 15 *Env. Law* 41 (1984). See also J. Sax, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 79-90 (1980).

B. The Section 1a-1 Amendment

In 1978 Congress amended the Organic Act to provide that "the protection, management and administration of those areas [national parks] 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..." 16 U.S.C. §1a-1. The courts have ruled that the amendment imposes a responsibility on the Secretary of Interior to protect park resources from threatening activities. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980); *National Rifle Ass'n. v. Potter*, 628 F. Supp. 903, 910 (D.D.C. 1985). According to the courts, the Secretary has considerable discretion in determining how to discharge his §1a-1 responsibility, and he will only be held accountable if he acts unreasonably. *Sierra Club v. Andrus*, *id.* Cf. *Clark v. Community for Creative Non Violence*, 104 S. Ct. 3065 (1984) (holding that the judiciary does not have "the authority to replace the Park Service as the manager of the Nation's parks or ... the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.").

Section 1a-1 does not provide the Park Service with any authority to regulate developments occurring on public or other lands outside the parks. Therefore, the Park Service must rely upon other environmental statutes as a basis for challenging threatening external activities. But federal agencies do not litigate against each other, so this ordinarily means that these statutes will only be used by the Park Service to negotiate with sister land management agencies. Environmentalists and other interested parties, however, might point to the Secretary's Section 1a-1 responsibility and applicable environmental statutes to challenge the Secretary's inaction in pursuing park protection goals. Cf. *Sierra*

Club v. Andrus, id.

C. The Section 1a-1 Exceptions Clause

The Section 1a-1 amendment to the Organic Act contains an exceptions clause which provides that the protection and management of the national parks "shall not be exercised in derogation of the values and purposes for which the various areas have been established, except as may have been or shall be directly and specifically provided by Congress." Unless the exceptions clause is narrowly interpreted (which it might be since it speaks in terms of direct and specific congressional action), the provision seems to authorize incompatible multiple use activities on public lands adjacent to the parks, so long as these activities are being carried out in accordance with the federal land management agency's organic legislation. Cf. Sierra Club v. Watt, 566 F. Supp. 380 (D. Utah 1983) (citing the §1a-1 exceptions clause to sustain NPS-BLM plans for mining in National Recreation Areas). This exceptions clause also calls into question whether the Interior Secretary can rely upon the Organic Act to promulgate regulations protecting the parks from threatening activities arising on adjacent federal lands by limiting the management authority of the agencies responsible for these lands. Cf. Free Enterprise Canoe Renters Ass'n. v. Watt, 711 F.2d 852 (8th Cir. 1983); United States v. Brown, 552 F.2d 817 (8th Cir. 1977) cert. denied, 431 U.S. 949 (1977) (both cases sustain regulations limiting activities on state or private property within the parks).

D. The Property Power

It is clear that Congress has the power under the property clause, U.S. Const., art. IV, sec. 3, to regulate developments on public lands adjacent to the parks. Kleppe v. New Mexico, 426 U.S. 520 (1976). Cf. Sax, Helpless Giants: The National Parks and the Regulation of Private Lands, 75 Mich. L. Rev. 239 (1976). Congress therefore has the constitutional power to adopt legislation such as the recently proposed Parks Protection Act which would mandate consultation between the Interior Secretary and other federal agencies before these agencies could take actions that might harm the parks. See H.R. 2379, 98th Cong., 1st Sess. (1983); See generally, Keiter, 20 Land & Water L. Rev. 355, 396-403 (1985).

E. Park Establishing Statutes

Park protection may also be achieved by amending the establishing legislation creating the individual units of the national park system. In the case of

Redwood National Park and Grand Canyon National Park, Congress has recently revised their boundaries in response to external threats from adjacent lands. See 16 U.S.C. §79b-79q (Redwood), 16 U.S.C. §228-a - 228-j (Grand Canyon). See generally, Hudson, *Sierra Club v. Dept. of the Interior: The Fight to Preserve Redwood National Park*, 7 Ecology L. Q. 781 (1978); Note, *The Grand Canyon Park Enlargement Act: Perspectives on Protection of a National Resource*, 18 Ariz. L.Rev. 232 (1976). Congress has also written protective provisions limiting adjacent land uses into the establishing legislation for new park units, but these provisions have been used sparingly and they have been aimed primarily at adjacent state and private landowners or managers. See e.g., 16 U.S.C. §459b-3(b)(2) (establishing minimum federal zoning requirements at Cape Cod National Seashore that local governments must meet, otherwise the Secretary may invoke his eminent domain power to protect the park against nonconforming property uses).

III. Federal Planning Legislation

A. National Environmental Policy Act, 42 U.S.C. §4321-4370.

NEPA requires federal agencies contemplating actions "significantly effecting the quality of the human environment" to prepare an EIS identifying the environmental impacts of the proposal and alternatives to the action. 42 U.S.C. §4332(c). Most development activities proposed for federal lands bordering national parks will be covered by NEPA, and the responsible land management agency will be required to prepare an EIS, or at least the less rigorous Environmental Assessment (EA). This will provide interested parties, including the Park Service, with an opportunity to comment on the proposal and suggest alternatives or additional considerations related to the park's interests. However, the agency responsible for the proposal is the ultimate decisionmaker, and it is not bound by NEPA to select the most environmentally sound alternative.

The CEQ's regulations on NEPA indicate that one factor to be considered in determining whether land management agencies must prepare an EIS evaluating the environmental impact of proposed projects is the proximity of the project to park lands, historic or cultural resources, or ecologically critical areas. 40 CFR 1508.27 (b) (3). Thus, park officials' comments on a project should carry substantial weight with the managing agency in determining the extent of environmental analysis required under NEPA. See

Glacier-Two Medicine Alliance et al., 88 IBLA 133, 141 (1985). Park protection advocates can also draw upon the Park Service's public comments in arguing for full EIS review of a proposed project.

Several recent court decisions address NEPA issues involving management decisions on public lands near national parks, and they therefore have some relation to park protection concerns. In Sierra Club v. Peterson, 717 F. 2d 1409 (D.C. Cir. 1983), the court held that NEPA required the Forest Service to prepare an EIS, not an EA, in evaluating the environmental consequences of their decision to issue oil and gas leases on nonwilderness forest lands where the lease did not contain a no surface occupancy clause. See also Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985) reaching a similar result with respect to leases with a no surface occupancy stipulation. Conner is currently under appeal to the Ninth Circuit. In Thomas v. Peterson, 753 F. 2d 754 (9th Cir. 1985), the court recognized that cumulative effects analysis was required under NEPA. The court ruled that the Forest Service must prepare an EIS analyzing the combined effect of the potential management actions contemplated upon completion of the challenged road, including possible timber sales in the area. See 40 CFR 1508.25(a)(1)(1984).

The CEQ's NEPA regulations recognize the possibility of an unresolvable interagency conflict respecting a project proposal, and they provide for a referral to CEQ for its recommendations. 40 CFR 1504 (1984). Since interagency litigation is not an alternative available to the Park Service, this provides the Park Service with a mechanism to escalate a disagreement with a bordering land management agency. However, there is an understandable reluctance among agencies to air their disagreements publicly or to pass decisionmaking authority (even if only for a recommendation) to another entity. It is therefore unlikely that this CEQ referral process represents a viable alternative for resolving agency disagreements on park protection issues.

B. National Forest Management Act, 16 U.S.C. §1600-1687.

NFMA mandates forest planning in accordance with multiple use principles. 16 U.S.C. §1602. See Multiple Use-Sustained Yield Act, 16 U.S.C. §528-542. But the Act requires that the Forest Service utilize NEPA procedures in developing its forest plans. 16 U.S.C. §1602. The Act specifically recognizes "the fundamental need to protect, and where appropriate,

improve the quality of soil, water, and air resources." Id. at §1602(5)(c). It also provides for consideration of "the economic and environmental aspects of various systems of renewable resource managements, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish." Id. at §1604 (g)(3)(A). These provisions indicate that the planning process must include consideration of environmental values that the Forest Service has not always regarded equally with its traditional missions of timber harvesting, grazing and mineral exploration. The plans will set the management direction of the national forests for a least the next ten years. See generally Wilkinson & Anderson, Land and Resource Planning in the National Forests, 64 Ore. L. Rev. 1 (1985).

NFMA requires the Forest Service to coordinate its planning process with other federal agencies. 16 U.S.C. §1604(a); 36 CFR 219.7. Public participation is also contemplated. Id. at §1604(d). This provides the Park Service and park protection advocates with an opportunity to comment on and influence forest plans. Forest plans that ignore adjacent park lands or overlook park values by providing for inconsistent resource development on park borders might be subject to appeal on the grounds that they violate statutory intent to achieve a relatively harmonious land use pattern between forest and neighboring lands. See 16 U.S.C. §1604 (a); 36 CFR 219.1 (b)(3) (Forest Service is to recognize forest lands as ecosystems); 36 CFR 219.1 (b)(9) (Forest Service is to coordinate with others). But the Forest Service has adopted the policy that buffer zones are inappropriate next to designated wilderness areas; adjacent lands are thus open to multiple use activities. Since we do not yet have any court decisions reviewing final forest plans, we don't know what substantive requirements the courts might impose on the Forest Service respecting the treatment of forest lands adjacent to national parks.

C. Federal Land Policy and Management Act, 43 U.S.C. §1701-1784.

FLPMA endorses multiple use management for BLM lands, 43 U.S.C. §1732(a), and provides that environmental values should be taken into account in management decisions. 43 U.S.C. §1701(a)(8), §1702(c), §1711(a), §1732(b). FLPMA also creates a planning process which provides for the BLM to coordinate its planning with other public agencies. Id. at §1712(c)(9). The Act anticipates broad public participation and judicial review. Id. at §1701(a)(5), §1701(a)(6), §1702(d). Furthermore, the Act mandates

that the BLM review its roadless lands for possible wilderness designation. *Id.* at §1782. Thus, as in the case of NFMA, the Park Service and park protection advocates may take advantage of the FLPMA planning and participation provisions to influence BLM decisions respecting public lands adjacent to the national parks. See generally Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 *Envtl. Law* 1 (1983).

IV. Federal Resource Protection Legislation

A. Endangered Species Act, 16 U.S.C. §1531-1543.

Parks that are bordered by public lands which provide habitat for endangered or threatened species listed under the ESA derive some protection from the Act. Adjacent federal land management agencies contemplating any action that might effect the listed species are required to consult with the U.S. Fish and Wildlife Service (FWS) to insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat of such species." 16 U.S.C. §1536(a)(2). Usually the consultation process is integrated into the NEPA analysis. A FWS jeopardy opinion blocks the project until the initiating agency redesigns it and can demonstrate "no jeopardy."

The ESA can be enforced by a citizen suit, thus any interested individual or organization can sue to insure compliance with the statute. Parks with migratory wildlife populations which include a listed species that utilizes adjacent public lands will therefore be the direct beneficiary of a FWS jeopardy opinion or a successful citizen suit. E.g., The North Fork Road controversy on Glacier National Park's western border; Conner v. Burford, supra. See Professor Coggin's materials for additional information on the ESA and relevant cases.

B. Wilderness Act, 16 U.S.C. §1131-1136.

Parks that are bordered by designated wilderness areas are provided maximum protection against threatening development activities since wilderness lands must be preserved in their natural state under the Wilderness Act. An important park protection strategy, therefore, is pursuing legislation to designate adjacent Forest Service or BLM lands as wilderness. The opportunity to promote additional wilderness designation is afforded under NFMA, 16 U.S.C. §1604(e)(1), and at least one court has ruled that the Forest Service must specifically review all

roadless lands for their wilderness potential. California v. Block, 690 F. 2d 753 (9th Cir. 1982). See also FLPMA, 16 U.S.C. §1782. While this presented a golden opportunity for the Park Service to address publicly the question of whether undeveloped public lands adjoining the parks should be designated as wilderness, it does not appear to have done so--perhaps, out of deference to the prerogatives of neighboring land management agencies.

C. Wild & Scenic Rivers Act, 16 U.S.C. §1271-1287

Parks bordered by classified rivers under the Wild and Scenic Rivers Act will receive some protection from the Act. The Act provides that each component of the national wild and scenic rivers system is to be administered "to protect and enhance the values which caused it to be included in said system." 16 U.S.C. §1281(a). The Act limits development activity in the river corridor to minimize the possibility of harm to the river or the immediately surrounding lands. The Act specifically provides that the agency responsible for managing the river must carefully regulate timber harvesting, road construction and mining activities near the designated river. 16 U.S.C. §1283(a), §1280(a).

Because inclusion of rivers bordering national parks in the Wild and Scenic Rivers System will protect the lands immediately surrounding the rivers, it would make sense for the Park Service to participate actively in the legislative designation process. Where the Park Service already shares management responsibility for a classified river with another agency, the Park Service has a unique opportunity to promote park values with a view toward influencing management decisions beyond the immediate river corridor. See, e.g., The North Fork of the Flathead River where Glacier National Park and the Flathead National Forest share management responsibility for the river.

D. National Historic Preservation Act, 16 U.S.C. §470-470t.

The NHPA provides for the establishment of a list of historic properties titled the National Register of Historic Places. Whenever a federal agency undertakes a project that may affect a designated historic property, it must consider the effect of its actions on that property and attempt to minimize harm to it. 16 U.S.C. at §400f, §470h-2(f). The historic properties included in the national park system should therefore receive some protection under the Act.

E. Clean Air Act, 42 U.S.C. §1857-1857L.

The Clean Air Act provides the national parks with protection against deterioration in their air quality. The Act classifies national parks as Class I air sheds and mandates special protection to guard their air quality and insure that visibility standards are met. 42 U.S.C. §7472(a), §7492. The Act covers public and private pollution sources, thus air pollution that arises on public lands and threatens park air quality is regulated and subject to challenge under the statute. More detailed information on air quality issues should be available from the materials prepared by Ms. Molly Ross.

F. Clean Water Act, 33 U.S.C. §1251-1376.

Park water quality is protected by the Clean Water Act which establishes general water quality standards and limits the discharge of effluents into the nation's waterways. The Act applies to public agencies; thus, land management agencies responsible for public lands adjacent to national parks must observe the Act's water quality standards. This means, for example, that the Forest Service is responsible for regulating commercial activities such as timber harvesting to assure compliance with the Act. Similarly, the Forest Service must conduct its own activities, such as road construction projects, to comply with the Act.

Since park water quality is usually designated at the highest standard, the Act imposes significant responsibilities on adjacent landowners or managers. To the extent that adjacent land management agencies meet their responsibilities under the Act, the parks are assured that waters they share with these agencies are protected. To the extent that these agencies do not meet their responsibilities, they are subject to enforcement proceedings and suit by interested individuals or organizations.

V. Federal Resource Management Statutes

A variety of federal resource management statutes may have some limited application to the park protection issue, either by establishing standards that a public agency responsible for managing the resource must meet or by implementing procedures that must be met before development projects proceed. The statutes are too many and varied to discuss here usefully. They include: the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201-1328; the Geothermal Steam Act, 30 U.S.C. § 1001-1025; the Mining Law of 1872, 30 U.S.C. §21-77; the Mineral Leasing Act of 1920, 30 U.S.C. §181-287; etc.

VI. Federal Common Law

A. Nuisance Doctrine

It has been argued that the common law doctrine of public nuisance might be available to protect the national parks against harmful external activities, and that the appropriate public nuisance doctrine is one formulated under the federal common law. See United States v. County Board of Arlington County, 487 F. Supp. 137 (E.D. Va. 1979). However, the Supreme Court's second decision in Illinois v. City of Milwaukee, 451 U.S. 304 (1981), holds that where Congress has adopted legislation regulating an area (water pollution in this case), common law nuisance remedies will no longer be available because Congress has preempted the field. See Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (holding that a federal common law remedy may be fashioned where overriding federal interests are present). In the aftermath of the second Milwaukee decision, it is likely that the courts will only recognize a common law remedy if Congress has not legislated in the area. In the case of the national parks, this at least leaves open the possibility of asserting a public nuisance claim against aesthetic and noise intrusions.

The Park Service may therefore assert such claims in litigation against private entities presenting visual or auditory threats to a park, and a forceful argument can be made that the appropriate law to apply would be the federal common law. But see United States v. County Board of Arlington County, *supra*. But it is not likely that the Park Service will litigate such claims against another public agency. If this type of threatening activity arises on public lands adjacent to a park, the only realistic plaintiff is a private party who would seek to assert the park's interests. This raises a threshold question of standing. However, if the plaintiff can establish standing, it seems clear that the appropriate law to apply, in the absence of a controlling statute, would be the federal common law of nuisance since the primary interests at stake would be federal ones

B. Public Trust Doctrine

It has also been argued that the public trust doctrine might provide the parks with legal protection that they may not otherwise have under existing statutes. Although one court initially relied upon a public trust argument to protect Redwood National Park against nearby logging activities harmful to the park's watershed, Sierra Club v. Dept. of Interior, 376 F.

Supp. 90 (N.D. Cal. 1974), the same court virtually ignored the public trust claim in its later opinions in the same case. See 398 F. Supp. 284, and 424 F. Supp. 172. Subsequently, another district court held that any public trust responsibilities the Secretary of the Interior owed to the national parks were identical to his statutory responsibilities under the Organic Act, and the court refused to recognize a distinguishable public trust duty. This precedent respecting the national parks, as well as the historical underpinnings of the public trust doctrine, suggests that it does not hold much promise as a viable legal tool to use in arguing for park protection. See generally Sax, The Public Trust Doctrine in Natural Resources Law Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. Davis L. Rev. 269 (1980).

VII. Adjacent State Lands

Several of the federal statutes cited above, particularly those protecting resources or regulating pollution, would apply to activities occurring on state lands adjacent to national parks and might be relied upon to protect parks against threatening activities. Otherwise park protection will depend upon state law. Several states have adopted environmental protection statutes similar to NEPA which require state agencies to review the environmental consequences of their actions. See, e.g., Mont. Code Ann. §75-1-101 et. seq., (1983). A few states have adopted more rigorous environmental rights statutes. See e.g., Mich. Stat. Ann. § 14.528 (201) (Callaghan 1968). Some state land use planning statutes, particularly those providing for "areas of critical concern", might require state and local planning officials to consider nearby national parks. See, e.g., Wyo. Stat. Ann. §9-8-202 (1985). The Park Service and park protection advocates can look to this type of legislation to challenge externally threatening activities originating on state lands adjacent to a national park. Because this legislation varies noticeably state by state, it is impossible to cover it here. See generally Keiter, On Protecting the National Parks From the External Threats Dilemma, 20 Land & Water L. Rev. 355, 391-393 (1985); Comment, State Participation in Federal Policy Making for the Yellowstone Ecosystem: A Meaningful Solution or Business as Usual?, 21 Land & Water L. Rev. 397 (1986).

