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National Park Law in the U.S.: Conservation, Conflict, and Centennial Values

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**NATIONAL PARK LAW IN THE U.S.: CONSERVATION,
CONFLICT, AND CENTENNIAL VALUES**

DENISE E. ANTOLINI*

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[W]ildness is a necessity [and] mountain parks and reservations are useful not only as fountains of timbers and irrigating rivers, but as fountains of life.

—John Muir¹

While probably no federal agency is as well regarded by the public as the National Park Service, its lofty standing can be, and is being, eroded to the extent that it remains passive in the face of damaging assaults on the parks.

—Joseph L. Sax²

INTRODUCTION

From the rugged shores of Maine to the active volcanoes in the Hawaiian Islands, the stunning variety of majestic national parks in the

¹ JOHN MUIR, OUR NATIONAL PARKS 1 (Houghton Mifflin Co. 1901).

² Joseph L. Sax, *Foreword* to NATIONAL PARKS AND CONSERVATION ASSOCIATION, OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS xv (David J. Simon ed., Island Press 1988). This view of the National Park Service (“NPS”) as a “white hat agency” may have limited the litigation against it and led to “exceedingly deferential” judicial review. Robert Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. L.R. 779, 813 (1997) [hereinafter Fischman, *Statutory Detail*]; see also Lindsey Shaw, *Land Use Planning at the National Parks: Canyonlands National Park and Off-Road Vehicles*, 68 U. COLO. L. REV. 795, 797 (1997) (noting that NPS is generally a “well regarded” agency “and has a reputation for careful stewardship”).

United States “embody and symbolize our rich national heritage”³ and have inspired the creation of protected areas around the world.⁴ Preparing to celebrate its 100th anniversary in 2016, the U.S. National Park Service (“NPS”) has grown from its famous inaugural parks (Yosemite in 1864⁵ and Yellowstone in 1872⁶) to over 390 park system units nationwide, today covering 83 million acres.⁷ The American national park system has much to offer to other countries seeking to create a unified system of parks,⁸

³ Richard J. Ansson, Jr. & Dalton L. Hooks, Jr., *Protecting and Preserving Our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act?*, 62 MONT. L. REV. 213, 214 (2001).

⁴ See NATIONAL PARK SERVICE, U.S. DEPT OF THE INTERIOR, MANAGEMENT POLICIES 8 (2006) (stating that national parks are “an American invention of historic consequence, marking the beginning of a worldwide movement that has subsequently spread to more than 100 countries”) [hereinafter NPSMP 2006]; see also M.I. Jeffrey, *National Parks and Protected Areas—Approaching the Next Millennium*, 1999 ACTA JURIDICA 163 (1999)

Although it is generally acknowledged that the impetus for the creation and preservation of the natural environment and heritage areas for the use and the enjoyment of the public at large had its genesis in the United States in the late 1800’s, the underlying concept of delineating and protecting vast areas of virgin or sparsely populated lands in their natural state for future generations soon gained momentum world-wide to the point that there are now well over 4000 national parks and protected areas in more than 100 countries.

Id.

⁵ Yosemite’s protection dates back to the days of President Abraham Lincoln. In the 1864 Act, Congress reserved “the ‘cleft’ or ‘gorge’ in the granite peak of the Sierra Nevada Mountains” known as “Yo-Semite valley” [sic] to the State of California for “public use, resort, and recreation.” Yosemite Park Act of 1864, ch. 184, § 1, 13 Stat. 325 (1864). In 1906, California ceded the land back to the United States who officially created Yosemite National Park. See 16 U.S.C. § 48 (2006).

⁶ Congress established Yellowstone as the nation’s first national park in 1872. Yellowstone Park Act, ch. 24, 17 Stat. 32 (1872) (codified as amended at 16 U.S.C. § 21 (2006)).

⁷ National Parks and Conservation Association, About National Parks, http://www.npca.org/parks/park_system.html (last visited Jan. 26, 2009). These system units include national parks but also “national monuments, seashores, recreation areas, historic sites, military parks, battlefields, and other designated units.” *Id.*

⁸ See Jeffrey, *supra* note 4, at 170-71. The Canadian national park system traces its origins to the creation of Banff National Park in 1866, to the establishment of the first agency in the world dedicated to national parks in 1911, and to its National Parks Act in 1930. See *id.* Other countries soon followed suit: Australia, New Zealand, and Mexico created national park systems in the 1890s; Africa in 1925; and, in 1909, Europe established four national parks. See *id.* at 175. Some scholars argue that the classical U.S. wilderness paradigm may need to change to ensure a more robust future for U.S. national parks. See Federico Cheever, *British National Parks for North Americans: What We Can Learn from a More Crowded Nation Proud of Its Countryside*, 26 STAN. ENVTL. L.J. 247, 256, 312 (2007) (advocating protection of “mixed landscapes” such as public and privately

but it also has much to learn from an increasingly rich international definition of "national park."⁹ Yet, the U.S. national parks risk a steady erosion

owned lands and criticizing the "North American preoccupation with unaltered landscapes" as a "crutch" that "has prevented us from developing a coherent system for preserving public values" on such lands).

The American experience is also not easily translated into the context of developing countries. See Jeffrey, *supra* note 4, at 163 (stating that "the American model is more often than not inappropriate and difficult to implement in less developed countries"); see also *id.* at 177 (noting that developing countries have a much greater need than the U.S. to consider "resident peoples" in their park systems). This is also true of many developed countries' park systems, such as European parks, including, for example, parks in Italy, where parks typically include rather than exclude historical communities. See MINISTERO DELL'AMBIENTE E DELLA TUTELA DEL TERRITORIO (MINISTER OF THE ENVIRONMENT AND REGIONAL PROTECTION), AP: IL SISTEMA NAZIONALE DELLE AREE PROTETTE NEL QUADRO EUROPEO: CLASSIFICAZIONE, PIANIFICAZIONE E GESTIONE 185 (2003) (noting that the Italian park system's emphasis on cultural and working landscapes is part of the international re-evaluation of the traditional (American) park notion that parks are "apart" from people and exist only for nature; like Italy, many protected areas in Europe are "intensively humanized" and therefore have high cultural values). For more information on European protected areas, see Centro Europeo di Documentazione sulla Pianificazione dei Parchi Naturali ("CEDPPN"), Politecnico di Torino, http://www.diter.polito.it/strutture_interne/ced_ppn_centro_europeo_di_documentazione_sulla_pianificazione_dei_parchi_naturali; see also Cheever, *supra* note 8 (discussing the British park model of rural landscapes).⁹ The International Union for Conservation of Nature ("IUCN") adopted a definition in New Delhi in 1969:

A national park is a fairly large territory:

1. where one or more ecosystems are not materially altered by human exploitation and occupation, where the vegetable and animal species, geomorphological sites and habitats are of scientific, educational and recreational interest or where there are natural landscapes or great aesthetic value;
2. where the highest official authority in the country has taken measures to prevent, or eliminate as soon as possible, exploitation or occupation in the whole area, and to make sure that the ecological, geomorphological or aesthetic features which justified its creation are respected; and
3. where visiting is authorized under certain conditions, for inspirational, recreative, educational and cultural purposes."

Jeffrey, *supra* note 4, at 174 n.62. This international consensus on a definition followed years of groundbreaking work by the IUCN. Founded in 1948, the IUCN established the International Commission of National Parks in 1960. *Id.* at 175. For more information about the IUCN, see International Union for Conservation of Nature, <http://www.iucn.org> (last visited Feb. 25, 2009). The IUCN World Commission on Protected Areas is the premier global organization that networks scientific, governmental, and advocacy efforts to improve protected areas worldwide, spanning over 140 countries. See International Union for Conservation of Nature, About, <http://www.iucn.org/about/> (last visited Feb. 25,

of their unique, world-class resource values in the next century unless a stronger policy is implemented that gives priority to the *places* that must be preserved for generations over the *people* who are currently here to enjoy them.

Despite the classic image of U.S. national parks as unpopulated jewels of American wilderness, the parks have long been subjected to a continuous stream of anthropogenic influences, from throngs of adoring visitors who seek an increasingly commercialized park experience, to an amazing range of avid recreational sports enthusiasts and their sometimes destructive gear.¹⁰ As many commentators have noted, the 1916 Organic Act that created the park system is itself a key reason why this conflict seems to continue unabated.¹¹ The Act deliberately embodies a

2009). Spurred by the IUCN's leadership, the international park movement also recognizes the vital role that indigenous populations can play in the long-term preservation of the natural and cultural values protected by parks. See Jeffrey, *supra* note 4, at 178 (noting the growing recognition of this "heretical departure from the hitherto orthodox view").

The American model also oversimplifies and ignores the historical facts regarding the prior existence of native peoples on lands considered by new settlers as "wilderness." *Id.* at 177. Thus, exportation of the U.S. model to countries with indigenous populations is often viewed with suspicion and concern for preservation of cultural heritage and ancestral homelands. *Id.* Even for policymakers in the developed countries, many innovative approaches can be learned from the experiences of countries that are radically different from the U.S. experience. See Jeffrey, *supra* note 4, at 179-80 (citing examples from Africa). In its Centennial Report, the National Park Service itself recognizes it has much to contribute but also much to learn from global protected areas partners. MARY A. BOMAR, NATIONAL PARK SERVICE DIRECTOR, CENTENNIAL REPORT 1 (2007) ("Parks will support the role of America's national park system as the worldwide leader in conservation, sustainability and technology. We will research, test, and exchange best practices with protected areas throughout the world.").

¹⁰ See Nathan L. Scheg, *Preservationists vs. Recreationists in Our National Parks*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 47, 51 (1998) (this conflict is "one of the most volatile controversies in recent history"). Professor Dan Tarlock refers to this trend with market terminology, stating that "as the stock of unique areas on the original retained public lands has been exhausted, the Park Service, like all good government firms, has sought to expand its product lines to attract congressional support." A. Dan Tarlock, *For Whom the National Parks?*, 34 STAN. L. REV. 255, 257 (1981) (reviewing JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (Univ. of Mich. Press 1980)). He notes that the newer parks, in particular, were designed to "get parks to people," in contrast to the older parks, which he considers "[l]ike Mozart's operas, Milton's poems, and ancient Jerusalem, areas of awesome scenic grandeur [and] treasures of Western civilization." *Id.* at 262-63.

¹¹ See, e.g., Kamron Keele, Comment, *Preservation and Use: Road Building, Overcrowding, and the Future of Our National Parks*, 11 TUL. ENVTL. L.J. 441, 442 (1998) (stating that the dual mandate "has sparked an historical and long-lasting debate" which "has pervaded every decision, small or large" and "has affected the parks since the day the Organic Act

conflicting "dual mandate" that requires the National Park Service ("NPS") constantly to juggle the demands of resource conservation¹² versus human use.¹³ Although for many decades the well-regarded NPS usually has given conservation a higher priority, the pendulum of national politics has swung back and forth¹⁴ from the traditional conservation approach to a "users first" philosophy, especially in the last eight years.¹⁵

One useful barometer of the shifts in priorities of the NPS is citizen suit litigation. The judicial forum is frequently sought by competing stakeholder groups asking for review of NPS decisions. Typically, the federal courts defer to the judgment of the NPS.¹⁶ Indeed, an agency such as the

was initially passed"); see also Jan Laitos & Rachel Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091, 1106-07 (2004) (stating that the NPS dual mandate is "unique" in allowing broad discretion); David W. Edgar, Comment, *Yellowstone to Yukon: Can It Ever Become a Reality?*, 67 UMKC L. REV. 111, 121 (1998) (stating that the user-preservation dichotomy "is often quite difficult to reconcile" and discussing the threats to the parks from "aggressive" tourism). But see Fischman, *supra* note 2, at 781 (noting that the overarching mandate in the Organic Act is important but the specific establishment legislation for each park is deserving of substantially more attention and a better indication of changing attitudes in Congress).

¹² Many commentators have drawn a firm distinction between the terms "conservation" and "preservation." See, e.g., Tarlock, *supra* note 10, at 256-57; Harmony Mappes, Comment, *National Parks: For Use and "Enjoyment" or for "Preservation"? and the Role of the National Park Service Management Policies in That Determination*, 92 IOWA L. REV. 601, 628 (2007) (noting that the finer distinctions drawn in the academic world are not made in the management arena). This article attempts to honor the academic distinction but also uses the term conservation broadly in a practical context.

¹³ See Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 236 (2004) (suggesting that the "contested language often leaves the NPS in politically dangerous territory" and, thus, "[c]ommitted agency personnel are often caught in the crossfire").

¹⁴ See Robert L. Rabin, *The Preservation Ethic and National Parks*, 90 YALE L.J. 1896, 1896 (1981) (reviewing JOSEPH SAX, *MOUNTAINS WITHOUT HANDRAILS*) (proving personal examples of increasing commercialization in the parks).

¹⁵ The first major wave of the modern users-first philosophy was in the early 1980s under the presidency of Ronald Reagan. His controversial Secretary of Interior James Watt undertook a series of decisions shifting national public lands priorities. Tarlock states that litigation about the discretion of the NPS was "inevitable" under Watt because he wanted "to follow park management policies that [were] diametrically opposed to the historic preservationist vision of the parks" and wanted to "err on the side of public use versus preservation." Tarlock, *supra* note 10, at 257. He concludes that "because of the substantial discretion delegated to the Park Service, some park management decisions are bound to accommodate the pressures for greater access opportunities. The discretion of the Secretary then can lead to user encouragement policies." *Id.* at 267.

¹⁶ See Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649, 676 (1997) (noting that courts have consistently sustained NPS regulations and policies designed to protect park resources).

NPS, which has considerable expertise in natural resources and people management, should be, and in fact usually has been, afforded considerable discretion in carrying out its administrative responsibilities.¹⁷ An independent and strong judiciary is essential to resolving conflicts over agency interpretation of fundamental park laws and policies in a civilized society.¹⁸ Yet, when faced with an Organic Act that expresses two conflicting values, the courts have tended to be overly deferential, allowing the political pendulum too much leeway, which ultimately risks the diminution of the integrity of our National Parks.¹⁹

As the U.S. National Park Service plans ahead for its next century, its conservation mandate is vulnerable. A more enduring and up-front prioritization of the agency's unique mission to preserve some of the most treasured wild places in our country is warranted.²⁰ Congress should break the dual mandate, stop the pendulum,²¹ and re-orient the NPS more firmly toward the overriding national policy of "non-impairment" in perpetuity.

¹⁷ But see Federico Cheever, *The United States Forest Service and the National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 630 (1997) (discussing how "[t]imes have changed; ambiguity which once provided agencies necessary latitude before Congress and the Cabinet now inspire sophisticated western interest groups to challenge agency policy. Mandates which once contributed to the rise of agency discretion now contribute to its decline.").

¹⁸ An independent judiciary is recognized as an essential component of the global "rule of law" concept. See Rory Brady, *Terrorism and the Rules of Law: A European Perspective*, 48 VA. J. INT'L L. 647, 649-50 (2008) (noting that "a robust and independent judiciary at both the national and international level" is a "fundamental common value . . . at the heart of the rule of law"); Sidney B. Brooks, *Building Blocks for a Rule of Law*, COLO. LAW., Dec. 2007, at 19, ("A fair and effective judicial system may be the single most critical element in building and sustaining a Rule of Law, especially for new democracies and emerging market economies.").

¹⁹ See, e.g., Mappes, *supra* note 12, at 632 (referring to the Bush Administration's changes to the NPS Management Policy in 2005, noting that the new more user-enjoyment oriented policy would receive "the same judicial approval" as the prior conservation-oriented 2001 policy because the policies are reasonable under the dual mandate and "not contrary to legislative intent" even if the agency has the burden of explanation when a policy shift occurs).

²⁰ See Kyla Seligsohn-Bennett, Comment, *Mismanaging Endangered and "Exotic" Species in the National Parks*, 20 ENVTL. L. 415, 439-40 (1990) (suggesting that the Bush Administration may not "value the wild nature of parks over economic concerns" and therefore "rather than allowing NPS management policies to change with every administration, Congress should clarify the dual mandate that it set out more than seventy years ago" in favor of preservation of wildlife).

²¹ See Mappes, *supra* note 12, at 633 (referring to the change in NPS management policies from 2001 to 2005 and noting "this flip flopping of policy is undesirable and unhealthy").

This article suggests that such an amendment should unequivocally put conservation of the parks' unique resources first and promotion of human "enjoyment" second.²² Both values are important, both should be continuing goals of NPS, and both can be compatible; but only one—conservation—should be legally paramount.

These next few years leading up to the anniversary of the U.S. park system in 2016 will be an ideal time to lock in a policy that permanently favors the conservation of the parks' unique natural resources. Particularly with the recent "green" shift in national politics and the interest of the new Congress in refocusing on core conservation values, a viable political window has now opened up for restraining the contemporary American appetite for personal enjoyment. Despite the vigorous objections that human users will undoubtedly pose to a tiered mandate, such a proposal should be given serious consideration because it would provide a much stronger touchstone for judicial review. Additionally, it holds much greater promise for the long-term endurance of our parks for the next century.

Section I of this article reviews the "conservation v. enjoyment" dual mandate of the U.S. national park system. Section II examines some of the conflict arising from the current major management and regulatory challenges facing the U.S. park system. Section III focuses on how the conflict in organic values is expressed through judicial review in a variety of statutory enforcement contexts. It analyzes the major judicial decisions in the past eight years of litigation involving National Parks, suggesting that the dual mandate has created an unpredictable system of judicial review. Section IV makes a specific proposal for a simple amendment to the Organic Act and discusses the likely criticism of such an approach. This article concludes that, with a re-oriented mandate, the U.S. will be better enabled to fulfill its high standards for preserving our unique natural lands and can begin to address the secondary need for recreation-first areas within the federal land system more honestly and satisfactorily.²³

²² This proposal is consistent with the National Park Service's 2006 *Management Policies* view that there should be a preference for "forms of enjoyment that are uniquely suited to the superlative natural and cultural resources found in parks." NPS MP 2006, *supra* note 4, at 13.

²³ As Robert Rabin commented, giving priority to wilderness "simply acknowledge[s] the pluralistic character of outdoor leisure activities." Rabin, *supra* note 14, at 1903. This concept that recreation has alternatives (but nature does not) is imbedded in the NPS's 2006 *Management Policies*. The policies state a goal to provide appropriate high quality opportunities for visitors to enjoy the parks, and the Service will maintain within the parks an atmosphere that is

I. CONSERVATION: THE U.S. FEDERAL PARK SYSTEM

The development of the U.S. national park system has truly been an intricate process, rich in variety and legal expression. This section briefly reviews the history of the national parks system in the U.S., describes the conflicting dual mandate of the system set forth in its Organic Act of 1916, and discusses some of the interrelated “units” of the U.S. protected areas system that complement the “crown jewels” designated as our national parks.

A. *A Brief History of the U.S. National Parks*

The public preservation of monumental wild landscapes is quite an American paradigm.²⁴ Famous 19th century American writers such as Thoreau, Emerson, and George Perkins Marsh “provided the initial intellectual ferment that led eventually to federal reservation of land for purposes of recreation, conservation, and preservation.”²⁵ The American national park system traces its roots to the late 1800s²⁶ when, as part of the westward settlement of the “vast public domain,” the U.S. Government began to reserve “large areas of remote and scenic land to be held permanently in public ownership.”²⁷

open, inviting, and accessible to every segment of American society. However, many forms of recreation enjoyed by the public do not require a national park setting and are more appropriate to other venues. The Service will therefore . . . provide opportunities for forms of enjoyment that are *uniquely suited* and appropriate to the superlative natural and cultural resources found in the parks.

NPS MP 2006, *supra* note 4, at 99 (emphasis added). For an insightful analysis of the recreational pressures on the National Parks, see Laitos & Reiss, *supra* note 11, at 1121; see also John C. Gallagher III, Note, *Sweet Music Lost: Mountain Biking Banished from Federal Lands Under the National Park Service Organic Act of 1916*, 31 SUFFOLK U. L. REV. 665 (1998) (advocating a coexistence for recreational uses, especially mountain bikes).

²⁴ For a detailed and colorful analysis by a historian on the origins of the National Park System and the dual mandate, see generally Robin W. Winks, *The National Park Service Act of 1916: A Contradictory Mandate?*, 74 DENV. U. L. REV. 575 (1997); see also ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 28-29 (1987) (discussing monumentalism).

²⁵ GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 1 PUB. NAT. RESOURCES L. § 2:10 (2d ed. 2007).

²⁶ Jeffrey, *supra* note 4, at 164 (tracing the origins of the American idea of national parks to landscape painter George Caitlin, who was “concerned about the preservation of the buffalo as well as Native American culture”).

²⁷ JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 5 (1980).

Today, Americans almost take for granted the complex network of U.S. national park system "units"—over 390 in total—which range from Florida to Alaska to Hawaii. When the nation set aside its first parks—Yosemite Valley in California, reserved by the U.S. Congress and President Lincoln for the State of California in 1864,²⁸ and then Yellowstone in Wyoming in 1872²⁹ weighing in at two million acres³⁰—the idea of preserving wilderness areas for their own sake was still novel in the U.S. and elsewhere.³¹

In the U.S., the early preservation ethic and popularity of rugged outdoor recreation sparked the public imagination and gave early support to the park movement. In 1892, John Muir founded the Sierra Club, whose mission was "to explore, enjoy and render accessible the mountain regions of the Pacific Coast . . . [and preserve] the forest and other natural features of the Sierra Nevada Mountains."³² Muir had an indelible imprint on the creation and history of U.S. parks, particularly in the West, and the preservationist vision for those lands.

Yet, the early growth of the U.S. park system was more opportunistic than planned. No clear vision for an interconnected national parks system was evident until many years later. As Professor Sax relates, national parks were not so much a "product of a prophetic public ecological conscience" as they were a reflection of "a fascination with monumentalism as well as biological ignorance or indifference."³³ Parks were also a reaction to sometimes shocking instances of exploitation of the West's natural resources, such as rampant homesteading and the destruction of large trees for commerce.³⁴

Through the early 1900s, Congress passed broad federal land statutes and issued numerous ad hoc park and refuge designations.³⁵ By 1902, Congress has designated six national parks.³⁶ After Yellowstone was protected in 1872, thirteen national parks were created before the surging popularity of the parks led to the establishment of the National Park Service.³⁷

²⁸ See *supra* note 5; see also SAX, *supra* note 27, at 5 n.4.

²⁹ See *supra* note 6.

³⁰ COGGINS & GLICKSMAN, *supra* note 25, § 2:11.

³¹ SAX, *supra* note 27, at 5.

³² BENJAMIN KLINE, *FIRST ALONG THE RIVER: A BRIEF HISTORY OF THE U.S. ENVIRONMENTAL MOVEMENT* 60 (1997).

³³ SAX, *supra* note 27, at 7.

³⁴ See *id.* at 8.

³⁵ See COGGINS & GLICKSMAN, *supra* note 25, § 2:10.

³⁶ *Id.* § 2:11 (citing RUNTE, *supra* note 24, at 29-68).

³⁷ KLINE, *supra* note 32, at 62.

In 1916, President Woodrow Wilson and the U.S. Congress enacted the Organic Act for the National Park System, creating the National Park Service to promote the use of national parks while protecting them from impairment.³⁸ With few visitors in the early years, the park system had less difficulty than today in achieving that potentially conflicting mandate.³⁹

By the 1920s, national parks were “a solidly entrenched feature of American life.”⁴⁰ By 1940, the national park system encompassed 22 million acres for 130 million U.S. citizens.⁴¹ This number grew rapidly along with public demand. By the 1960s, the system had not grown much, but the population had increased to 183 million.⁴² By 1986, the system had designated 49 national parks.⁴³ By the mid-1990s, the system consisted of 80 million acres in 376 national parks, monuments, seashores, recreation areas, and other units, with about 60% of this total in Alaska.⁴⁴ Today, the system includes over 84 million acres in nearly 400 national park system units.⁴⁵

The American park system is a complex, diverse, and sweeping national system for conserving the nation’s most valuable natural, historical, and cultural resources, but it has also become an important national playground for millions of increasingly demanding human-powered and motorized recreational users.

B. The Organic Act: The Dual Mandate

When Congress passed the Organic Act⁴⁶ in 1916, it stated a firm vision for perpetual protection but simultaneously created a confounding

³⁸ SAX, *supra* note 27, at 11.

³⁹ *Id.*

⁴⁰ *Id.* at 9.

⁴¹ See KLINE, *supra* note 32, at 74.

⁴² See *id.*

⁴³ See COGGINS & GLICKSMAN, *supra* note 25, § 2:11.

⁴⁴ See Bradley Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 37 (1997).

⁴⁵ See CAROL HARDY VINCENT, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, NATIONAL PARK SYSTEM: ESTABLISHING NEW UNITS 1 (Sept. 28, 2006). The CRS Report estimates that nearly two-thirds of this acreage is in Alaska. *Id.* The Bush Administration has not supported expanding the national park system. *Id.* at 3, 5. Thus, the size and budget of the system have stalled in recent years. Despite the possible change in orientation that may come with President Obama, the American fiscal crisis may inhibit major policy shifts in the short-term.

⁴⁶ Organic legislation is defined as “a basic statute providing a mission for the System, policy direction, and management standards for all units of the System.” See Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L. Q. 457, 501 (2002) [hereinafter Fischman, NWRS]. Professor

dual mandate.⁴⁷ Congress directed the agency to “*promote and regulate* the use of the Federal areas known as national parks, monuments, and reservations” and “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.”⁴⁸ As discussed in more detail later in this article, the dual mandate of recreation (“promote the use” and “provide for the enjoyment”) versus conservation (“regulate the use,” “conserve,” and “leave unimpaired”) creates inherent conflicts.⁴⁹ The overriding value of “unimpairment,” which is the balance point between conservation and use, is both a navigational star when viewed inter-generationally and a fulcrum for the present because it creates an entry point for judicial review.

In 1970, Congress amended the Organic Act with the General Authorities Act, which attempted to unify the scattered national park units into a cohesive system.⁵⁰ In so doing, Congress declared 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.”⁵¹ The amendments emphasized the high regard in which the nation holds its national parks, calling them “superlative natural, historic, and recreation areas,” an expression of “national dignity and . . . superb environmental quality,” and having

Fischman notes that the Organic Act was not originally called that and the earliest reference he found to that term was in the 1950s. By the 1970s, the term was in widespread use. The term has rhetorical value and specialized meaning. *Id.* at 503-507.

⁴⁷ See Mappes, *supra* note 12, at 610 & n.62; Cheever, *supra* note 17, at 629; Winks, *supra* note 24, at 575; LARY M. DILSAVER, AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS, Chapter 1: The Early Years, 1864-1918 (1994), available at http://www.nps.gov/history/history/online_books/anps/anps_1.htm, (noting the Organic Act's “difficult charge to both preserve park resources and make them available to tourists”).

⁴⁸ National Park System Organic Act of 1916, ch. 408, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1 (2006)) (emphasis added) [hereinafter NPS Organic Act].

⁴⁹ JEFFREY, *supra* note 4, at 165 (discussing the “two overriding and often conflicting visions of what the purpose of a national park should be”).

⁵⁰ For an in-depth examination of the 1970 and 1978 amendments, see Winks, *supra* note 24, at 577-79. See also *National Rifle Association v. Potter*, 628 F. Supp. 903, 905-06 (D. D.C. 1986) (reciting history of park units and congressional reaction); Keiter, *supra* note 16, at 676 (suggesting that the 1978 amendments “reaffirms and strengthens Congress’ commitment to the basic Organic Act preservation tenets”).

⁵¹ 16 U.S.C. §1a-1 (2006). After this lofty beginning, the rest of the Act addresses a rather mundane series of administrative issues such as leasing, air conditioning, relinquishment of property, uniforms for personnel, law enforcement, general management plans, and periodic reviews of the system. *Id.* §§ 1a-2 to 1a-9.

“high public value and integrity.”⁵² Later amendments in 1978 also gave the NPS “a stronger mandate to protect parks.”⁵³

At the same time, Congress recognized the anthropogenic purposes of the parks, stating that they are “preserved and managed for the benefit and inspiration of all the people of the United States” and that the “promotion and regulation” of the park units shall be “to the common benefit of all the people of the United States.”⁵⁴ The amendment echoed the Organic Act’s “unimpairment” standard with “non-derogation” language.⁵⁵ “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 to which these various areas have been established.”⁵⁶

Originally, the NPS “championed preservation over economic use,” but the increasing pressures of “recreational and cultural responsibilities”

⁵² *Id.*

⁵³ Michael McCloskey, *What the Wilderness Act Accomplished in Protection of Roadless Areas Within the National Park System*, 10 J. ENVTL. L. & LITIG. 455, 470-71 (1995) (noting, however, that the 1978 amendments did not “go so far as to remove discretion to build some roads and structures for public enjoyment”).

⁵⁴ 16 U.S.C. § 1a-1 (2006).

⁵⁵ The NPS construes the “non-derogation” standard as a “reiteration of the non-impairment standard” in the Organic Act. See NPS MP 2006, *supra* note 4, § 1.4.2.

⁵⁶ 16 U.S.C. § 1a-1 (2006). Congress reserved its right to override the organic values, however, in specific units, by adding “except as may have been or shall be directly and specifically provided by Congress.” *Id.* For an excellent analysis of this kind of establishment legislation and its relationship to the Organic Act, see Fischman, *Statutory Detail*, *supra* note 2, at 811-13; see also *Fund for Animals v. Mainella*, 294 F.Supp.2d 46, 53-55 (D.D.C. 2003) (finding that legislation enabling the Delaware Water Gap National Recreation Area, which provided for black bear hunting, trumped the Organic Act and therefore the court deferred to the agency decision to allow the bear hunt and declined to find a NEPA violation); *id.* at 55 (noting that the Organic Act, while “granting general authority to the NPS to manage and conserve the national parks, is silent as to whether the NPS has a duty to conduct an impact study of a proposed hunt”); *Fund for Animals v. Mainella*, 335 F.Supp.2d 19 (D.D.C. 2004) (finding a second attempt to stop bear hunt moot); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1227 (9th Cir. 2004) (upholding the NPS decision to undertake redevelopment of buildings within the Golden Gate National Recreation Area as consistent with the amendments to the Organic Act, 16 U.S.C. § 1a-1). Similarly, in *Voyageurs National Park Association v. Norton*, 381 F.3d 759 (8th Cir. 2004), the Eighth Circuit Court of Appeals rejected the claim of the friends group that the NPS violated NEPA, the APA, and the ESA when it decided to allow snowmobiles into eleven frozen “bays” of the Voyageurs National Park in Minnesota. The court found that Congress created the Park with specific legislation in 1971 to protect this “vast wilderness area,” its wildlife (notably the bald eagle and the gray wolf), and recreational values, including specifically boating, camping, hiking, fishing, and snowmobiling. *Id.* at 762. The plan to re-open the areas to snowmobiles was, therefore, allowed to proceed.

shifted that dominant emphasis.⁵⁷ The tension between these two goals is often vividly reflected in the litigation in the past eight years against the National Park Service, with legal arrows being slung by friends and foes alike, reviewed in Section II below.

C. *A Framework for the System*

Although the Organic Act provides the broad framework for the system, each specific park is created either by congressional legislation or by executive order.⁵⁸ This means that each park's act must be examined to determine the specific scope and intent of the designation.⁵⁹ It also means that there can be significant variation in the characteristics of each park, appropriate to the uniqueness of each unit.⁶⁰ Overall, however, the legal-administrative overlay is consistent among units.⁶¹ As part of its authority, the NPS has broad power to undertake a variety of administrative actions to expand, protect, and maintain the parks.⁶²

The parent agency of the National Park Service is the U.S. Department of Interior.⁶³ Sometimes the NPS shares management responsibilities with other land management agencies within the Department of Interior, including the Fish and Wildlife Service ("FWS") and the Bureau of Land Management ("BLM").⁶⁴ The NPS and the FWS are under the supervision

⁵⁷ COGGINS & GLICKSMAN, *supra* note 25, § 2:11.

⁵⁸ VINCENT, *supra* note 45, at 1-2. As Vincent explains: "An act of Congress creating a Park System unit may explain the unit's purpose; set its boundaries; provide specific directions for land acquisition, planning, uses, and operations; and authorize appropriations for acquisition and development." *Id.* at 2. The process for establishing national park system units was amended in 1998 to regularize the process and to conduct annual internal studies of areas of national significance prior to submitting a list of Congress for possible designation. *Id.*

⁵⁹ See Fischman, *Statutory Detail*, *supra* note 2, at 781-84.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² 59 AM. JUR. 2D *Parks, Squares, and Playgrounds* § 3 (200) (observing that the NPS "is authorized to regulate and implement rules regarding transportation, recreation, park equipment purchases, services, resources or water contracts, advisory committees, and exhibits and demonstrations" under 16 U.S.C. § 1a-2; law enforcement, under 16 U.S.C. § 1a-6; and utilities, concessions, transportation, equipment operation, and emergency rescue, 16 U.S.C. § 1b.). The NPS's planning obligations were strengthened in the 1978 National Parks and Recreation Act. 16 U.S.C. §§ 1a-1 to 1a-8, renamed in 2004 as the National Park System General Authorities Act (see 16 U.S.C. § 1 note).

⁶³ COGGINS & GLICKSMAN, *supra* note 25, § 7:4.

⁶⁴ *Id.*

of the Assistant Secretary for Fish and Wildlife and Parks.⁶⁵ The legal work for NPS is done by the Department of Interior's Office of the Solicitor (for routine legal matters) and by the Department of Justice (for litigation).⁶⁶ The Department of Interior includes an Office of the Inspector General (which can investigate and report on administrative deficiencies), an internal Office of Hearings and Appeals (which handles quasi-judicial functions), administrative law judges, and three formal boards of appeal.⁶⁷

The NPS headquarters office in Washington, D.C. is responsible for policies, programs, and regulations.⁶⁸ The NPS field units are organized into sixteen "clusters" of 10-35 units each.⁶⁹ NPS has seven regional director offices, responsible for strategic planning, policy, public involvement, and media relations, and it has sixteen system support offices—each headed by a Superintendent—that provide professional, technical, and administrative services.⁷⁰ The larger parks have their own staff for law enforcement, interpretation, and maintenance, including biologists, ecologists, and landscape architects.⁷¹

The NPS has interpreted the Organic Act through its own national guidance document called the NPS Management Policy ("MP").⁷² The current MP, finalized in 2006, is much friendlier to user groups than the prior 2001 policy⁷³ and appears to represent an attempt to shift the core values of the parks away from conservation and toward recreation.⁷⁴ An in-depth review of the politics behind that shift called the October 2005

⁶⁵ *Id.*

⁶⁶ *Id.* § 7:5.

⁶⁷ *Id.*

⁶⁸ *Id.* § 7:7. The regulations governing management of the NPS units are contained in 36 C.F.R. §§ 7.1 to 7.100.

⁶⁹ COGGINS & GLICKSMAN, *supra* note 25, § 7:7.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Whether the NPS management policies are binding has not been fully settled by the courts. The D.C. Circuit has held that the NPS's interpretation of its own management policies is discretionary. *See Davis v. Latschar*, 202 F.3d 359, 367 (D.C. Cir. 2000) ("While the language of the Management Policies could be interpreted either as plaintiffs read it or as the Park Service does, the interpretation of the Park Service is plausible; it certainly is not 'plainly erroneous or inconsistent' with the policies and therefore must prevail over plaintiffs' reading."); *see also Keiter*, *supra* note 16, at 678 (noting that agencies are "free to change policy direction, so long as the changes do not violate its organic mandate and it provides a reasoned explanation for the shift").

⁷³ The 2001 Management Policy's "interpretation of the Organic Act resolves the debate in favor of preservation and nonimpairment," making conservation "predominant." *See Mappes*, *supra* note 12, at 623-24.

⁷⁴ *See id.* at 624.

draft of that document by the Bush Administration a “nearly complete reversal of position, favoring use and enjoyment.”⁷⁵ The draft “lit a fire,” sparked harsh criticism, and prompted nearly 45,000 public comments.⁷⁶ The new draft deleted conservation as an independent goal, specifically removed all uses of the term “preservation,” and emphasized use and recreation.⁷⁷ The final draft was substantially toned down and “no longer a threat to the NPS system, thanks to the democratic process of notice and comment.”⁷⁸ The 2006 Management Policy states that “[t]he 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.”⁷⁹ At the same time, the policy also includes “providing for the enjoyment of park resources and values by the people of the United States.”⁸⁰ If there is a conflict, according to the Policy, “conservation is to be predominant.”⁸¹ This roller-coaster ride for the Management Policy suggests that both substantial support from the public for a strong conservation mandate and reliance upon agency policy alone to express that priority can be an unreliable approach.

D. *A System of Units and Overlapping Jurisdiction*

The U.S. system of national parks is a complicated system of “units”—only a minority of which are “National Parks”—and a myriad of related federally designated areas and management entities. A brief overview of some of these related laws and units provides useful context for the administrative law discussion below.

As of the late 1990s, an estimated 650 million acres were owned by the U.S. federal government, mostly in the Western states and Alaska.⁸² Most of that land is managed by four federal agencies: (1) the Forest Service (192 million acres),⁸³ (2) the Bureau of Land Management (267

⁷⁵ *Id.* at 603.

⁷⁶ *Id.* at 604 n.10, 626-27. *See, e.g.*, NPS MP 2006, *supra* note 4, § 8.

⁷⁷ *See* Mappes, *supra* note 12, at 629-30.

⁷⁸ *Id.* at 635.

⁷⁹ NPS MP 2006, *supra* note 4, § 1.4.3.

⁸⁰ *Id.*

⁸¹ *Id.* The policy further notes that “this is how courts have consistently interpreted the Organic Act.” *Id.* The Policy notes that impairment cannot be allowed “unless a particular law directly and specifically provides otherwise.” *Id.* § 1.4.4.

⁸² *See* Karkkainen, *supra* note 44, at 14.

⁸³ For more information on the Forest Service, part of the Department of Agriculture, *see id.* at 27-32 and COGGINS & GLICKSMAN, *supra* note 25, § 2:12.

million acres),⁸⁴ (3) the Fish and Wildlife Service (87 million acres),⁸⁵ and (4) the National Park Service (77 million acres).⁸⁶ About “forty-four percent of [these] lands . . . [were] . . . designated for some kind of ‘conservation’ purpose, including national parks and monuments, recreation areas, research areas, and wildlife refuges, and wilderness areas.”⁸⁷ By 2007, nearly 83 million acres were included in the national park system.⁸⁸

As of 2006, the National Park “System” included over twenty different types, and over 390 discrete, units. Of these, 58 are called “National Parks,” considered the “crown jewels” of the system.⁸⁹ The other types of units include: “national historic sites (78), national monuments (74), national historical parks (42), national memorials (28), national recreation areas (18), and national preserves (18).”⁹⁰ To add to the complexity, some classifications, such as the “national parks” are unique to the National Park Service, while other designations are shared with other agencies and may involve overlapping jurisdiction.⁹¹ Two types of units particularly relevant to the preservation goal of the National Park System deserve mention.

⁸⁴ For more information on BLM, part of the Department of Interior, see Karkkainen, *supra* note 44, at 24-27.

⁸⁵ For more information on the National Wildlife Refuge System, part of the Department of Interior, see *id.* at 32-36 and COGGINS & GLICKSMAN, *supra* note 25, § 2:13; see also National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (2006), and National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997). As of 2007, the national wildlife refuge system included 535 units on more than 92 million acres, primarily in Alaska and the western states. See COGGINS & GLICKSMAN, *supra* note 25, § 2:13.

⁸⁶ See Karkkainen, *supra* note 44 at 15. The “multi-headed federal land management administration organization” is considered a weakness in modern U.S. public natural resources law. COGGINS & GLICKSMAN, *supra* note 25, § 2:25 (observing that “[t]he five major federal land systems have evolved separately, with little legal or geographic coordination, and independent of any overall plan or blueprint”).

⁸⁷ See Karkkainen, *supra* note 44, at 15.

⁸⁸ See COGGINS & GLICKSMAN, *supra* note 25, § 2:11. About half of this acreage comes from the 1980 Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233, which contributed 43.5 million acres to the national park system, 53.7 million acres to the national wildlife refuge system, 56.4 million acres to the national wilderness preservation system, and added 13 wild and scenic river segments. *Id.* § 2:17.

⁸⁹ See VINCENT, *supra* note 45, at 2.

⁹⁰ *Id.*

⁹¹ *Id.* Some expansion and pro-recreation designations are ad hoc, such as national seashores, national lakeshores, and national rivers, but “wild and scenic rivers” and “national trails” are designated by specific statutes and sometimes under NPS jurisdiction. See COGGINS & GLICKSMAN, *supra* note 25, §§ 2:11, 2:11 n.21, 2:17.

1. Wilderness Areas

Responding to increasing development pressures that threatened "protected" areas, the Wilderness Act of 1964 authorized Congress to designate land already owned by the federal government for "wilderness" protection.⁹² The Act designated 9.1 million acres as wilderness and laid out a "long-term study process for additional designations."⁹³ This "overlay" designation process starts when federal land agencies study lands already under their jurisdiction, and it then is followed by a Presidential recommendation to Congress, which can designate, release, or take no action on the recommendations.⁹⁴ Once designated, the areas must be managed to preserve their wilderness character.⁹⁵ As of June 2007, "about 43 million acres of the parks system and about 21 million acres of the refuge system" and "about 7.8 million acres of BLM public lands" were designated wilderness.⁹⁶ The Wilderness Act arguably zones the national parks into conservation-first and other, recreation-first, areas.⁹⁷ Even in non-wilderness areas, however, the parks cannot abandon conservation values and must work with the dual mandate of the Organic Act. The Wilderness Act does, however, provide a useful example of how judicial review positively responds to congressional expression of an overriding core value.

2. National Monuments

In 1906, Congress passed the Antiquities Act, aimed at protecting archaeological sites primarily in the Southwest.⁹⁸ Some of these sights eventually became national parks.⁹⁹ Despite its brevity and old age, the 1906 Antiquities Act is still used today by U.S. Presidents exercising their executive authority to elevate the protected status of lands already under federal control.¹⁰⁰ Notwithstanding frequent criticism, the unilateral

⁹² See 16 U.S.C. §§ 1131-1136 (2006) [hereinafter Wilderness Act].

⁹³ COGGINS & GLICKSMAN, *supra* note 25, § 2:17.

⁹⁴ See Wilderness Act, *supra* note 92, § 1132.

⁹⁵ See *id.* § 1133(b). See generally Karkkainen, *supra* note 44, at 40-41.

⁹⁶ COGGINS & GLICKSMAN, *supra* note 25, § 2:17.

⁹⁷ See, e.g., Mappes, *supra* note 12, at 618 (suggesting that the Wilderness Act's preference for wilderness strengthens the argument that the other parts of the National Parks should give priority to use and enjoyment).

⁹⁸ See 16 U.S.C. §§ 431-433 (2006); see also KLINE, *supra* note 32, at 62.

⁹⁹ VINCENT, *supra* note 45, at 2.

¹⁰⁰ See Christine Klein, *Preserving Monumental Landscapes under the Antiquities Act*, 87 CORNELL L. REV. 1333 (2002); see also Scott Nishimoto, *President Clinton's Designation*

presidential use of the Act to preserve America's special lands has remained remarkably unchanged and popular.¹⁰¹ Approximately 120 monuments have been designated since 1906, most of which are managed by the National Park Service.¹⁰²

This Act was the legal basis upon which President George W. Bush declared the Northwestern Hawaiian Islands a marine national monument on June 15, 2006.¹⁰³ Now known as Papahānaumokuākea Marine National Monument, it is the largest marine conservation area in the world, encompassing 137,797 square miles of the Pacific Ocean.¹⁰⁴

The continuing designation of monuments under the Antiquities Act, even by President Bush, is an interesting indication of the underlying popularity of preservation and the strong desire of political leaders to leave a legacy of protected areas for future generations.

E. Friends of the National Parks and Standing

A major strength of the American national park system is the vitally important network of "friends" organizations, including John Muir's Sierra Club, which sparked the park movement. Today, the NPS has many national advocacy organizations supporting its conservation mission and vigilantly defending it from attack. Hundreds of individual national park units also have ad hoc "friends" groups, which are non-profit organizations organized by citizens to supplement the limited financial resources and staffing of the park units, and to maintain policy pressure on park directions.¹⁰⁵

of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act, 17 J. ENVTL. L & LITIG. 51 (2002).

¹⁰¹ See KLEIN, *supra* note 32, at 1403 ("Although beleaguered and berated, the Antiquities Act has enjoyed consistent support from a broad spectrum of forces.").

¹⁰² VINCENT, *supra* note 45, at 2.

¹⁰³ Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006), available at http://sanctuaries.noaa.gov/management/fr/71_FR_36441.pdf.

¹⁰⁴ See NOAA, About the Papahānaumokuākea Marine National Monument, <http://hawaiiireef.noaa.gov/about/welcome.html> (last visited Jan. 27, 2009).

¹⁰⁵ See, e.g., Friends of Hawai'i Volcanoes National Park, <http://www.fhvn.org/history.htm> (stating its mission "to support and promote the protection, restoration, understanding and appreciation of Hawai'i Volcanoes National Park"). The FHVNP group also raises funds for park projects, coordinates volunteers, hosts educational events, and administers grants to support the park. Similarly, there is a "friends" group to support Haleakalā National Park on Maui. See Friends of Haleakalā National Park, Home, <http://www.fhnp.org> (last visited Feb. 25, 2009). Like FHVNP, the FHNP group's mission is "to support

A particularly American concept, these organizations operate outside of the agency structure, advocate on behalf of frustrated staff and managers and concerned citizens, and are an important supplement to the formal legal and management structure of the NPS. At the national level, there are two major "parks advocacy" organizations, in addition to major conservation organizations like the Sierra Club, that play a vital role in supplementing governmental resources and willpower: the National Parks Trust ("NPT") and the National Parks Conservation Association ("NPCA").

Founded in 1983, the NPT's mission is to "champion the acquisition and preservation of America's critical parklands through education, partnerships, and community-building."¹⁰⁶ One of the NPT's first acquisitions was to purchase private land around the headwaters of the Arctic National Park and Preserve, part of a wild and scenic river threatened by private development.¹⁰⁷ The NPT accomplishes its mission by working closely with the National Park Service,¹⁰⁸ raising funds, then purchasing or accepting donated land from willing sellers, such as land within or adjacent to existing parks, land suitable for new parks, or other historically significant land.¹⁰⁹ The NPT works closely with the National Park Service, other government agencies, and private citizen groups, as well as landowners.¹¹⁰ The NPT's 2007 *Annual Report* reports the major accomplishment of having assisted more than 200 parks over the past twenty-five years and created one new park unit,¹¹¹ but also notes that there are still over six million acres of private "in-holdings" in the national park system, presenting a major challenge for its preservation mission.¹¹²

educational, cultural, research, and service activities relating to the park and its ecosystems." *Id.* The concept is starting to spread internationally. For example, with the support of the U.S. National Parks Trust group, <http://www.parktrust.org>, a private support group called The Friends of China's National Parks is based in United States. See China National Parks, <http://www.parksonline.org/china.html> (last visited Feb. 25, 2009).

¹⁰⁶ National Park Trust, Mission, at <http://www.parktrust.org/> (follow "who we are" hyperlink; then follow "Mission/Vision" hyperlink).

¹⁰⁷ NATIONAL PARK TRUST, 2007 ANNUAL REPORT: SAVING THE LEGACY OF THE NATIONAL PARK SYSTEM 8, available at http://www.parktrust.org/images/stories/PDFs/NPT_2007_AnnualReport_web.pdf.

¹⁰⁸ See *id.* at 14.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* The NPT reported net assets of \$3.5 million in 2007. *Id.* at 18.

¹¹¹ See *id.* at 2, 10. The new unit created by the NPT, in partnership with the Kansas Park Trust, is the 11,000 acre Tallgrass Prairie National Preserve, a remnant of the once-vast American prairie ecosystem. See *id.* at 10.

¹¹² *Id.* at 14.

The NPCA take a complementary, but more aggressive, advocacy and litigation-oriented approach.¹¹³ Founded in 1919 as the “National Park Association” by the same leaders who created the National Park Service, the NPCA’s mission is to “protect and enhance America’s National Parks for present and future generations.”¹¹⁴ One of its earliest projects was “advocating that the Park Service provide food for the elk that live inside Yellowstone during the winter, to prevent the elk from wandering outside the park in search of food and being killed by hunters.”¹¹⁵ For the past 90 years, NPCA has engaged in advocacy for the national parks system and for the National Park Service, has educated decision-makers and the public about the importance of preserving the parks, has lobbied Congress to uphold the laws and support new legislation, has filed lawsuits to strengthen the application of these laws, and has assessed the health of the parks and parks management to better inform its advocacy work.¹¹⁶

NPCA is headquartered in Washington, D.C. and has twenty-four regional offices with over 330,000 members.¹¹⁷ NPCA produces a quarterly magazine and periodic reports on the national park system.¹¹⁸ The NPCA also published a major book on the National Park System in 1988 called *Our Common Lands: Defending the National Parks*, which is an invaluable compendium of articles on the threats to parks and the efforts to address those threats by organizations like NPCA. As the sections below indicate, the NPCA has also been an active plaintiff in many lawsuits against the NPS, often successfully, and sometimes comes to the aid of the agency when it is on the defensive.¹¹⁹

Friends and foes alike are more powerful if they gain standing in the courts. For the NPCA and many similar citizens groups, a major preliminary hurdle to enforcing federal environmental laws is the requirement of “standing”¹²⁰ under the “case or controversy” requirement

¹¹³ See Ansson & Hooks, *supra* note 3, 222 n.66 (noting the effectiveness of the NPCA, “the nation’s only non-profit organization dedicated solely to park issues,” in advancing legislative reform).

¹¹⁴ See National Park Conservation Association, Who We Are, http://www.npca.org/who_we_are (last visited Feb. 25, 2009).

¹¹⁵ See National Park Conservation Association, Who We Are, Timeline, http://www.npca.org/who_we_are/timeline (last visited Feb. 25, 2009).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ National Parks Conservation Association, News and Publications, http://www.npca.org/news_and_publications/ (last visited Feb. 25, 2009).

¹¹⁹ See, e.g., *Hazel Green Ranch v. Dep’t of Interior*, 2007 WL 2580570 (E.D. Cal. Sept. 5, 2007) (friends of NPS granted intervention in quiet title case).

¹²⁰ State and local governments must also prove standing (though this issue is less often

of Article III of the U.S. Constitution.¹²¹ After evolving away from a private-rights model, standing is broken down into a three-part test. "The plaintiff must show that (1) it has suffered injury in fact, (2) that the alleged injury is traceable to the defendant's activity (causation), and (3) that the court is capable of redressing the injury."¹²² In addition to this constitutionally derived test, Congress may impose "zone of interest" limitations by creating protected interests in the statute, and courts may impose "prudential" limitations.¹²³ An association can sue on behalf of its members if it shows that "(1) the members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members."¹²⁴

In general, since the 1970s, American courts have generously granted standing to public interest organizations based upon their environmental, aesthetic, recreational, scientific, and conservation values.¹²⁵

litigated than for citizens and non-profit organizations). For an example of a court finding a city has standing to sue the National Park Service in a management plan context, see *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199, 1205 (9th Cir. 2004), in which the court held that the city of Sausalito had standing to sue under NEPA, ESA, MBTA, and CZMA regarding the Park Service's plan for Fort Baker, a military base near the Golden Gate Bridge in San Francisco transferred to the NPS in 2001, but the court also largely upheld the NPS's management plan. *Sausalito* provides a good example of a court's thorough analysis of the variety of statutory claims that can be used to challenge a management decision by the NPS. See generally *id.* at 1199-1205.

¹²¹ See COGGINS & GLICKSMAN, *supra* note 25, §§ 8:5-8:26 for an excellent detailed analysis of standing; see also MICHAEL AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6:7 (Butterworth Legal Publishers 1995). Other procedural barriers, such as finality, ripeness, exhaustion, mootness, statutes of limitation, and laches also present considerable challenges. See COGGINS & GLICKSMAN, *supra* note 25, §§ 8:29-8:40. Standing, however, may be raised most frequently by defendants bolstered by the U.S. Supreme Court's decisions in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Id.* § 8:7.

¹²² COGGINS & GLICKSMAN, *supra* note 25, § 8:6.

¹²³ See *id.*

¹²⁴ *Id.* § 8:23.

¹²⁵ See *id.* § 8:6; *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 966-67 (9th Cir. 2006) (holding that harm to recreational lives of group's member is sufficient injury to proceed); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1179 (9th Cir. 2000) (holding environmental values to be interests indicating standing); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir. 1996) (holding the potential harm to the Committee's "recreational, aesthetic, and consumptive interests" was sufficient to fall under NEPA's zone of interest); and *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581-83 (9th Cir. 1993) (holding a group's "scientific, recreational and aesthetic" interests sufficient to satisfy injury in fact requirement).

Economic interests need not be alleged; in fact, courts have denied standing to some private organizations asserting only economic interests.¹²⁶ On the other hand, some conservative judges and Justices have shown considerable interest in cutting back on the ability of citizens groups to assert standing and, in some cases, have written some notable opinions that resulted in puzzling dismissal of lawsuits filed by major environmental groups.¹²⁷

In reviewing the claims of environmental organizations, the courts will sometimes scrutinize each individual claim, finding standing for some and not others. Even with standing, the plaintiff may, of course, still lose. For example, the 2006 case *Wilderness Society v. Norton* involved a broad national challenge to the NPS's failure to properly designate wilderness in the areas under its jurisdiction—an argument the D.C. Circuit Court of Appeals rejected because the group lacked standing on all issues but one.¹²⁸ Despite this finding on standing, however, the court then rejected TWS's claims on the merits, concluding that the agency had “unfettered discretion” in the designation process.¹²⁹

An interesting perspective on the standing of large non-governmental organizations (“NGOs”) was presented by the D.C. Circuit Court of

¹²⁶ See COGGINS & GLICKSMAN, *supra* note 25, §§ 8:21, 8:26. On the other hand, in *Bennett v. Spear*, 520 U.S. 154, 164-66 (1997), the U.S. Supreme Court held that ranch operators and irrigation districts affected by a decrease in water availability did have standing to challenge a biological opinion issued under the ESA, abolishing the “zone of interest” test for that statute because Congress said “any person” could bring a lawsuit.

¹²⁷ COGGINS & GLICKSMAN, *supra* note 25, § 8-19 (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)). The plaintiff organization, the National Wildlife Federation had over 4.5 million members, *id.*, and is generally recognized as one of the oldest and largest national NGOs in the conservation era. Nonetheless, writing a 5-4 decision, Justice Scalia found that NWF had not adequately demonstrated its specific interest in the land withdrawal action by the Department of Interior in the early 1980s. *Id.* Further, the court found that the agency's program was not agency action that was final and subject to review. *Id.*

The other well-known NGO standing opinion written by Justice Scalia came two years later in an Endangered Species Act case. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court found that the affidavits submitted by the NGO regarding their members interests in foreign projects initiated by U.S. agencies insufficiently alleged an imminent threat. COGGINS & GLICKSMAN, *supra* note 25, § 8:8. Most of Justice Scalia's fellow Justices, however, may not endorse his narrow view. See *id.* § 8:8 (citing *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 528 U.S. 167 (2000), *Massachusetts v. E.P.A.*, 127 S.Ct. 1438 (2007)).

¹²⁸ 434 F.3d 584, 594 (D.C. Cir. 2006) (finding standing to challenge NPS's failure to create management plans). The court did find, however, that the plaintiff had submitted sufficiently detailed affidavits of its members. *Id.*

¹²⁹ See *id.* at 596-97.

Appeals in the *Utility Air Regulatory Group* case involving the Environmental Protection Agency's ("EPA") Haze Rules.¹³⁰ In response to EPA's challenge to the standing of the National Parks Conservation Association, the court found that even if the NPCA had not shown that its members visited "every park" on the best visibility days (the target of the Haze Rule), it had such a large membership (320,000 members in all 50 states) that it was "reasonable to infer that at least one member will suffer injury-in-fact."¹³¹ Despite this generous interpretation of standing, the court nevertheless found that the NPCA could not win on the merits of its argument to strike the EPA's rule amendments.¹³²

The NPCA was involved in a similar case, also decided in 2005, that endorsed this broad view of standing, garnering favorable results.¹³³ In *NPCA v. Manson*, the NPCA challenged the Department of Interior's finding that a coal-fired electric generating plant in Montana in the vicinity of Yellowstone National Park would not affect air quality in the park.¹³⁴ Under the Clean Air Act's "Prevention of Significant Deterioration provisions," the U.S. EPA was required to ask the NPS whether the proposed coal-plant would adversely affect the park.¹³⁵ Given the agency's "affirmative responsibility" to preserve air quality in "protected areas," NPCA argued that the agency should not have withdrawn "the initial report without adequately discharging [its] procedural obligation to 'consider' the potential adverse impact on air quality in Yellowstone and UL Bend."¹³⁶

When the district court dismissed the case on the basis of standing, NPCA appealed to the D.C. Circuit Court of Appeals. Addressing only the issue of standing, the court held that NPCA satisfied all requirements of the test: "As an organization dedicated to the conservation of, and whose members make use of, public lands, National Parks suffers a cognizable injury from environmental damage to those lands."¹³⁷ The court remanded to the district court for further proceedings.¹³⁸ Ultimately, the plant ran

¹³⁰ *Util. Air Regulatory Group v. E.P.A.*, 471 F.3d 1333 (D.C. Cir. 2006).

¹³¹ *Id.* at 1339.

¹³² *See id.* at 1340 ("[W]e nonetheless squarely reject [NPCA's] claim that the Clean Air Act requires EPA to ensure that any BART-alternative improves visibility at least as much as BART at every Class I area and in all categories of days. The plain language of the Act imposes no such mandate, and EPA's refusal to read one in is reasonable.").

¹³³ *See Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1 (D.C. Cir. 2005).

¹³⁴ *See id.* at 2-4.

¹³⁵ *See id.* at 3 (citing 42 U.S.C. 7475(d)(2)(B) (2000)).

¹³⁶ *Id.* at 3-4.

¹³⁷ *Id.* at 4 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

¹³⁸ *See Manson*, 414 F.3d at 7.

into other difficulties, including a decision by a state hearing officer in 2007 to reject the plant's air permit application.¹³⁹

Not surprisingly, this more liberal standard for nation-wide NGOs may not be followed by more conservative courts. In *Friends of the Earth v. Department of Interior*,¹⁴⁰ a case where the non-profit plaintiffs sought to force the NPS into rulemaking that would restrict off-road vehicles, Judge Lambert flatly rejected the concept of broad NGO standing.¹⁴¹

In environmental litigation, it is not unusual for citizens groups frequently to assert their role as "private attorneys general" both challenging and supporting government agencies making resource decisions.¹⁴² In the case of the NPS, there appear to be particularly strong alliances supporting and opposing the agency from well-established non-profit organizations.¹⁴³ Increasingly, recreational or user groups do not hesitate to bring their own lawsuits or to intervene to backstop a favorable agency decision under review.¹⁴⁴ Thus the agency finds itself in the typical "triangle" of environmental citizen suit litigation. The strong role of NGOs in the national park system, particularly in the judicial review process, appears to be particularly American. The conservation-oriented citizens groups have played a critical role in keeping the NPS from tipping the balance too far in favor of "enjoyment" due to the considerable pressure from organized user groups. Yet, with the courts affording the NPS broad agency discretion, even good friends may not be good enough.

II. CONFLICT: MANAGEMENT AND REGULATION CHALLENGES

The U.S. federal land management agencies have a two-track mandate: to manage affirmatively public lands for specific resource purposes and to regulate negative threats to those resources.¹⁴⁵ The management

¹³⁹ See Clair Johnson, *Roundup Power Permit Invalid*, BILLINGS GAZETTE, July 17, 2007, <http://www.billingsgazette.net/articles/2007/07/17/news/state/24-roundpower.txt>.

¹⁴⁰ *Friends of the Earth v. Dep't of Interior*, 478 F.Supp.2d 11 (D.D.C. 2007).

¹⁴¹ See *id.* at 20-22.

¹⁴² Environmental groups will also step in to help the NPS defend itself against lawsuit by user groups, and vice versa. See, e.g., *Int'l Snowmobile Mfr. Ass'n v. Norton*, 340 F.Supp.2d 1249, 1253 (D. Wyo. 2004) (including such environmental interveners included the Greater Yellowstone Coalition, National Parks Conservation Association, the Wilderness Society, Blue Water Networks, and Natural Resources Defense Council).

¹⁴³ Cf. *Int'l Snowmobile*, 340 F.Supp.2d at 1253, with *Friends of the Earth*, 478 F.Supp.2d at 11-12.

¹⁴⁴ See *infra* Parts III.B-C.

¹⁴⁵ See COGGINS & GLICKSMAN, *supra* note 25, § 7:1 (suggesting the distinction but noting the overlap between the two purposes).

and regulation challenges facing the NPS in the far-flung park system can be particularly daunting.

A. *Chronic Underfunding*

Underfunding and management problems have threatened the integrity of the U.S. National Park System for decades. From the 1970s through the early 1990s, Congress "allowed our national parks to incur a \$3.5 billion backlog in maintenance projects."¹⁴⁶ Yet, during this same time, Congress created 125 new parks, primarily due to pressure from individual members of Congress.¹⁴⁷

In the 1990s, however, Congress attempted to reduce this long neglect by innovative operating procedures, including instituting a "fee demonstration program," which allowed some parks to charge higher fees and keep 80% of the revenue.¹⁴⁸ In 1998, Congress passed an omnibus act focused on systemic reform, including "concessions reform, higher fees on larger concessionaries, park and budget reforms, increased and updated training for park officials, and a less political system for evaluating potential additions to the National Park System."¹⁴⁹

Despite these reforms, underfunding and other problems continue to plague the U.S. National Parks. According to Professor Ansson, "our parks are afflicted with decaying infrastructure, overcrowding, encroaching development, and air pollution."¹⁵⁰ As discussed above, non-profit organizations, as well as countless efforts by individuals nationwide,¹⁵¹ can fill some small part of this gap, but there are increasing concerns about the

¹⁴⁶ Ansson & Hooks, *supra* note 3, at 215; *see also id.* at 221 (noting that the Park Service experienced a \$202 million reduction in revenue between 1977 and 1997, while more than 120 new parks were added during this time).

¹⁴⁷ *See id.* at 216.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* at 217 (citing National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (1998)).

¹⁵⁰ Ansson & Hooks, *supra* note 3, at 214. For more information on the general problems created by under-funding and the need for reform, *see id.* at 242-56; *see also id.* at 256-61 (regarding the need for more stable and ample funding for land acquisitions for parks, including privately held lands inside existing parks).

¹⁵¹ Julie Cart, *Camp? Outside? Um, no thanks.*, L.A. TIMES, Nov. 24, 2006, available at http://massmees.org/index.php?option=com_content&task=view&id=488&Itemid=510 ("According to the park service, volunteers donated more than 5 million hours to the parks last year, saving the agency more than \$90 million.").

deteriorating foundation for the U.S. parks budget, concerns that will only be exacerbated by the current economic crisis in the U.S.¹⁵²

B. *Relentless People Pressure*

The increasing pressure on the U.S. park system by visitors and recreational users, sometimes motorized to the point of industrial, can seem relentless. This is true not only in the U.S., but in other developed countries as well.¹⁵³ One often hears that “we love our national parks to death.”¹⁵⁴ Visitor impacts create a host of long-term environmental impacts as well as management and budget challenges.¹⁵⁵

In 2001, U.S. national parks had 287 million visitors.¹⁵⁶ In the past several years, however, the parks have experienced a “steep decline” in visitation.¹⁵⁷ The *Los Angeles Times* reported a “downward slide of 10 years,” that “[o]vernight stays fell 20% between 1995 and 2005, and tent camping and backcountry camping each decreased nearly 24% during the same period.”¹⁵⁸ This is evident even at the world-famous Yosemite Valley

¹⁵² The likelihood of tighter federal budgets under the new Obama Administration is a scenario raised by the current U.S. fiscal crisis. See Douglass K. Daniel, *Obama: Bailout Likely to Delay Spending Programs*, ATLANTA J. CONST., Sept. 23, 2008, available at http://www.ajc.com/services/content/news/stories/2008/09/23/obama_spending.html?cxntlid=inform_artr. The Bush Administration had already been cutting the National Park Service budget in recent years. See, e.g., Juliet Ellperin, *FY 2007 Budget Proposal: Agency-by-Agency Breakdown, Domestic Programs Take the Hit*, WASH. POST, Feb. 7, 2006, available at <http://www.washingtonpost.com/wp-srv/politics/interactives/budget07/agencies.html>.

¹⁵³ Jeffrey, *supra* note 4, at 187 (discussing the difficulties of the Canadian park system in striking the appropriate balance “in the context of multiple use and ecosystem management approaches,” especially given the dominant role of recreational users and the “potential for conflict arising among resident peoples, commodity producers, recreationists, conservationists, politicians, land administrators, and a host of other stakeholders”).

¹⁵⁴ See Dennis Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 8 (1992); see also Mappes, *supra* note 12, at 635 (“[W]e are nearing a point at which the mere volume of visitors itself will be contrary to preservation”).

¹⁵⁵ Karkkainen, *supra* note 44, at 38 (“The steadily growing popularity of national parks as vacation destinations requires more roads, parking lots, campgrounds, and concessions, and stretches park operating budgets to cover the cost of trash removal, general maintenance, utilities, and employee overtime.”). See also Eric Hudson, Note, *The National Park Service Organic Act and Section 7(A)(1) of the Endangered Species Act: Prioritizing Recreation and Endangered Species in the National Parks*, 22 VERMONT L. REV. 953, 953 (1998) (noting the increase in visitors to the national parks and the impacts of threatened and endangered species).

¹⁵⁶ Ansson & Hooks, *supra* note 3, at 223.

¹⁵⁷ Cart, *supra* note 151.

¹⁵⁸ *Id.*

where only "569,000 vacationers went to Yosemite in July [2008], nearly 20% fewer than in the same month in 1995."¹⁵⁹ The recent spike in U.S. gasoline prices has exacerbated this decrease in visitation.¹⁶⁰

The sliding visitation numbers have caused some consternation. The reasons suggested for the surprising decrease include both a decline in retirees visiting the parks and the failure of the parks to attract youth and minorities.¹⁶¹ A Nature Conservancy study funded by the National Science Foundation also found a correlation between the decrease in visits to national parks and "the increasing popularity of at-home entertainment, including video games and the internet."¹⁶² Author Richard Louv calls this the new "nature deficit disorder."¹⁶³

The record levels of visitation in earlier decades led to drastic measures to control impacts, such as automobile bans.¹⁶⁴ In some parks, such as Yellowstone, the pollution impact from recreational activities resembled a concentrated urban area.¹⁶⁵ For example, the estimated 1000 snowmobiles entering the park produced air pollution "equivalent to the tailpipe emissions of 1.7 million cars," threatening wildlife, air quality, and the natural quiet.¹⁶⁶ In some parks, new, and newly popular, types of outdoor sports have created unforeseen impacts on the natural features of the parks.¹⁶⁷

¹⁵⁹ *Id.*; see also *Out of the Wilderness*, ECONOMIST, July 10, 2008, http://www.economist.com/world/unitedstates/PrinterFriendly.cfm?story_id=11707142 (noting that visitation at Yosemite has dropped for 9 of the past 13 years, but blaming environmentalists for blocking lodging improvements that people desire for visiting national parks, lamenting about a possible cap on visitors to Yosemite supported by conservation groups, and concluding "America's environmental movement emerged in the 19th century to push for national parks. In the 20th century it sold them to the public through photographs and writing. It now seems bent on driving people away from them.").

¹⁶⁰ See Jeff Osgood, *Put Down the Remote. Now.*, DENV. POST, Mar. 23, 2008, available at http://www.denverpost.com/writersontherange/ci_8733156 (pointing to The Nature Conservancy Study finding "high gas prices and the siren's call of the computer and television can account for 97.5 percent of the decline in visits to national parks.").

¹⁶¹ Cart, *supra* note 151 ("Agency officials admit that national parks are doing a poor job attracting two large constituencies—young people and minorities—causing concerns about the parks' continued appeal to a changing population.").

¹⁶² *Id.*

¹⁶³ *Id.* (citing RICHARD LOUV, *LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE-DEFICIT DISORDER* (Algonquin Books 2006) (2005)).

¹⁶⁴ Ansson & Hooks, *supra* note 3, at 224 (noting that high visitation numbers at parks like Grand Canyon National Park and Zion National Park led to bans on automobiles in certain areas).

¹⁶⁵ *Id.* at 224.

¹⁶⁶ *Id.*

¹⁶⁷ See *Int'l Snowmobile Mfr. Ass'n v. Norton*, 340 F. Supp. 2d 1249 (D. Wyo. 2004) (concerning snowmobiles in National Parks).

For example, at Devils Tower National Monument in north-eastern Wyoming, commercial and recreational rock climbing had “increased dramatically” over three decades, reaching 6,000 climbers annually by 1994, with over 200 “named routes” developed up the rock face and over 600 bolts and hundreds of metal pitons implanted into the rock.¹⁶⁸ This recreational pressure created a major management problem and conflicted with the Native American spiritual practices, prompting the NPS to create a special Climbing Management Plan.¹⁶⁹ This climbing v. spirituality conflict indicates the unfortunate clash that can occur between even non-motorized adventure recreation with both spiritual values and the integrity of the park’s special features.

The news of declining visitors may be a sigh of relief for some conservationists but also a great source of worry to others who see an eroding political constituency for protected areas and the NPS budget.¹⁷⁰ Ironically, the recent reports of the decline in visitation have led to calls for *greater* industrial recreation in the parks. As reported by the *L.A. Times*: “Some members of Congress have offered solutions they say would put parks more in step with what Americans want, including more commercialized activities and businesses. With the backing of industry, some politicians have called for opening more parks to motorized recreation.”¹⁷¹ The coming clash is obvious. For the preservationist, parks are “a symbol of nature and its pace and power,” but what is often called “industrial tourism”¹⁷² in our national parks “is often little more than an extension

¹⁶⁸ *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 818, 822 (10th Cir. 1999) (holding that the plaintiff climbers association did not have standing to challenge the NPS’s policy of asking climbers to voluntarily refrain from climbing during the month of June when Native Americans engage in the Sun Dance and other ceremonies in the area). The story of this clash continues today with the voluntary ban still in place. See NPS, Devil’s Tower National Monument, Frequently Asked Questions, <http://www.nps.gov/deto/faqs.htm> (last visited Jan. 28, 2009). Although the policy encourages about 85% of all climbers to refrain from climbing, it is still perceived as a threat to the integrity of Native American practices. See Sacred Land Film Project, Devils Tower, http://www.sacredland.org/endangered_sites_pages/devils_tower (last visited Jan. 28, 2009).

¹⁶⁹ *Bear Lodge*, 175 F.3d at 815.

¹⁷⁰ Tourism advocates take the position that “for the public to understand nature, they need to see, hear, feel, smell, and taste it.” See Nie, *supra* note 13, at 223, 235. Without context, this statement might also be supported by many conservationists. They might argue, conversely, however, that natural resources do not need to be experienced by humans in order to have value for humanity. See *supra* text accompanying note 19 for further discussion.

¹⁷¹ Cart, *supra* note 151.

¹⁷² SAX, *supra* note 27, at 13.

of the city and its life-style transported onto a scenic background.”¹⁷³ The reconciliation of these fundamentally conflicting pressures will continue to be one of the greatest challenges to our national park system in the decades ahead. The recent dip in visitors, however, should not be used as an excuse for elevating use over conservation but rather should provide a “time out” opportunity for considering a stronger strategy to protect the parks’ non-transient natural resource values.

C. *Rampant Concessions*

Another long-running controversy within the national park system is how to manage the private concessions, *e.g.*, hotels, restaurants, and outfitters, which provide essential conveniences to visitors but can also themselves invite considerable adverse impacts on the natural beauty and quiet of the park units.¹⁷⁴ The commercialization of the parks, in general, creates a new set of pressures on the system that encourage human use.¹⁷⁵

The National Park Concessions Policy Act of 1965 “represented Congress’s effort to enunciate a coherent, preservation-based policy with regard to the provision of park amenities,” a policy that would both encourage concessions in often remote and difficult-to-operate areas but ensure that economic enterprises in the parks were controlled and consistent with the preservation mission.¹⁷⁶ This Act proved to be “a very effective tool in encouraging concessionaire investment,” resulting in a nearly \$800 million industry as of 1998.¹⁷⁷ Yet, the parks themselves historically have received as little as 1-2% of this revenue stream.¹⁷⁸ And, the industry sometimes overwhelms the preservation mission: “[M]any parks have been inundated

¹⁷³ *Id.* at 12.

Critics contend that if park service officials become slaves to recreational fashion, national parks would roar with the sound of jet skis, snowmobiles and all-terrain vehicles, and cellphone towers would rise among redwoods and touch-screen computers would dot wilderness trails. “When you put technical contrivances in, it replaces nature, and what sets the parks apart is their authenticity,” said Bill Tweed, former chief resource ranger at Sequoia and Kings Canyon National Parks.

Cart, *supra* note 151.

¹⁷⁴ See Ansson & Hooks, *supra* note 3, at 220-32 (discussing past and current concessions bills and the criticisms of them).

¹⁷⁵ See Rabin, *supra* note 14, at 1904 n.10 (noting that much of the political pressure on the NPS comes from concessionaires rather than from a groundswell of user demands).

¹⁷⁶ Ansson & Hooks, *supra* note 3, at 220.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 221.

with concessions including lodging, restaurants, shopping, campgrounds, and recreational outfitters of all types.”¹⁷⁹

Many of these problems were addressed in 1998 when Congress passed the National Parks Omnibus Management Act.¹⁸⁰ The Act “virtually ended all of the preferential rights concessionaires” had previously enjoyed and authorized parks to retain more of the revenue stream.¹⁸¹ The problems are not completely solved, however, presenting another major challenge for parks in the future, especially as federal budgets become tighter.¹⁸²

D. *External Ecosystem Threats*

Threats to the National Parks from external development, such as mineral exploitation,¹⁸³ also present particular problems from both a resource and an inter-agency relationship point of view.¹⁸⁴ For example, a proposal for a mine within a National Forest and adjacent to Yellowstone National Park, which presented a threat to water quality within the park, created a conflict among the two agencies.¹⁸⁵ The air quality problems created by upwind power plants (including coal) have threatened the Grand Canyon.¹⁸⁶ Other threats to the national park system units include slant drilling,¹⁸⁷ destruction of vegetation by ungulates, invasive species, fire suppression practices, development of adjacent lands,¹⁸⁸ and the small

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 223; National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (2000).

¹⁸¹ Ansson & Hooks, *supra* note 3, at 223.

¹⁸² For more detailed information on the problems with concessions and the need for reform, see *id.* at 226-42 (advocating reform).

¹⁸³ Internal threats such as bio-prospecting also present major challenges to the park system. See generally Holly Doremus, *Nature, Knowledge, and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 *ECOLOGY L.Q.* 401 (1999).

¹⁸⁴ See, e.g., Harry R. Bader, *Not so Helpless: Application of the U.S. Constitution Property Clause to Protect Federal Parklands from External Threats*, 39 *NAT. RESOURCES J.* 193 (1999).

¹⁸⁵ Jeffrey, *supra* note 4, at 168; see also Joseph L. Sax & Robert Keiter, *Glacier National Park and its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207, 259 (1987).

¹⁸⁶ Jeffrey, *supra* note 4, at 168.

¹⁸⁷ See *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 108 (D.D.C. 2006) (estopping a slant drilling proposal that threatened parks and that was unopposed by the NPS when the Sierra Club sued on NEPA grounds and finding that the NPS failed to take a “hard look”).

¹⁸⁸ For more on federal land use controls and the development of adjacent lands, see, for example, Tarlock, *supra* note 10, at 269-74.

size of some parks.¹⁸⁹ Although beyond the scope of this article, these external threats to the parks present an important additional layer of pressure on the national park system and present cutting edge legal issues interconnected to those discussed here related to recreational use.¹⁹⁰

E. Future: Centennial Strategies

The future of the National Park System depends directly on the of the inconsistent generosity of Congress, the strength of advocacy organizations, the disposition of the current President, and political winds.¹⁹¹ With the upcoming centennial of the system, the current agency leadership is building consensus around a strategic plan that suggests a subtle shift in priorities and may have some lasting impact on the parks' direction.¹⁹² In the National Park Service's 2007 report on "park centennial strategies,"¹⁹³ the agency summarized the results of a nationwide "listening" effort and over 6,000 public comments, identifying the several major goals for focusing its future efforts.¹⁹⁴ The first three goals in the strategic plan provide some insight into the George W. Bush Administration's view of the agency's dual mandate.¹⁹⁵

¹⁸⁹ Karkkainen, *supra* note 44, at 39.

¹⁹⁰ For more on the external threats to national parks, see OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (David Simon, Ed., Island Press 1988); see also *id.* at chs. 14-18 (discussing oil, gas, mining, geothermal development, hydropower, and dams); George Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1 (1987); William Lockhart, *External Threats to Our National Parks; An Argument for Substantive Protection*, 16 STAN. ENVTL. L. J. 3 (1997); Robert Keiter, *On Protecting the National Parks From the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985).

¹⁹¹ See, e.g., Madeline J. Kass, *The National Park Service Management Policies Controversy*, 20 NAT. RESOURCES & ENV'T 68, 70 (2006) (suggesting that proposed management policies reflect political priorities and threaten a long-standing alliance among preservationists and recreational park vacationers).

¹⁹² NAT'L PARK SERVICE, THE FUTURE OF AMERICA'S NATIONAL PARKS, SUMMARY OF PARK CENTENNIAL STRATEGIES, A REPORT TO SECRETARY OF INTERIOR (2007) [hereinafter NPS, CENTENNIAL STRATEGIES]. For a similar NPS-commissioned, but independent, "citizens appraisal" of the National Park System conducted almost forty years ago (on the occasion of the 100th anniversary of the establishment of Yellowstone National Park), see CONSERVATION FOUNDATION, NATIONAL PARKS FOR THE FUTURE 1, 11 (2d ed. 1972 Conserv. Found.) (recommending as a first priority that NPS "reassert its traditional role as conservator of the timeless natural assets of the United States" and de-emphasize recreational use).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1.

¹⁹⁵ Goal 1 is:

In these centennial strategies, the NPS seems to have elevated anthropogenic values over conservation, perhaps in an astute effort to maintain its human constituency.¹⁹⁶ Enjoyment is Goal 1.A (“places for people to enjoy”) and some type of conservation follows as Goal 1.B (“improve . . . park resources and assets”).¹⁹⁷ Strikingly absent from the report is a direct emphasis on conservation.¹⁹⁸ The first goal is prefaced by: “The National Park Service leads America and the world in preserving and restoring treasured resources,” but this passive reference does not endorse a goal of preservation,¹⁹⁹ let alone conservation, other than to “improve . . . park resources and assets,” which sounds more like a

Stewardship: The National Park Service leads America and the world in preserving and restoring treasured resources. A. Provide inspiring, safe, and accessible places for people to enjoy—the standard to which all other park systems aspire. B. Improve the condition of park resources and assets. C. Set the standard of excellence in urban park landscape design and maintenance. D. Assure that no compelling chapter in American heritage experience remains untold and that strategically important landscapes are acquired, as authorized by Congress. E. Serve as the pre-eminent resource laboratory by applying excellence in science and scholarship to understand and respond to environmental changes. F. Encourage children to be future conservationists.

Id. at 2-5.

Goal 2 is “Environmental Leadership: The National Park Service demonstrates environmental leadership to the nation. A. Reduce environmental impacts of park operations. B. Inspire an environmental conscience in Americans. C. Engage partners, communities, and visitors in shared environmental stewardship.” *Id.* at 5-7.

Goal 3 is:

Recreational Experience: National Parks are superior recreational destinations where visitors have fun, explore nature and history, find inspiration, and improve health and wellness. A. Encourage collaboration among and assist park and recreation systems at every level—federal, regional, state, local—to help build an outdoor recreation network accessible to all Americans. B. Establish “volun-tourism” excursions to national parks for volunteers to help achieve natural and cultural resource protection goals. C. Expand partnerships with schools and boys and girls associations to show how national park experiences can improve children’s lives. D. Focus national, regional, and local tourism efforts to reach diverse audiences and young people and to attract visitors to lesser-known parks.

Id. at 7-9.

¹⁹⁶ See Nie, *supra* note 13, at 236 (“The NPS has historically prioritized its public use obligation over preservation as a way to build a supportive constituency.”).

¹⁹⁷ NPS CENTENNIAL STRATEGIES, *supra* note 192, at 3.

¹⁹⁸ See *id.* at 2-12.

¹⁹⁹ See *supra* text accompanying note 12 for a discussion on the differences in terminology.

plan to upgrade comfort stations than restore endangered ecosystems and strays from the typical preservation-conservation dialect.²⁰⁰ Notably, the third goal of the strategic plan focuses entirely on "recreational experience."²⁰¹ The specific sub-goals for improving the approaches to recreation in the parks are inspirational and laudable, but this emphasis makes the absence of a specific goal about conservation, which a traditional observer would expect to have been the first or second NPS goal, even more apparent.²⁰²

Centennial strategic plans are not law, but can be a powerful tool for agency leadership, if it so chooses, to shape on-the-ground management decisions.²⁰³ An internal guidance document like the NPS centennial report does raise concerns about a shifting agenda that over-emphasizes recreation.²⁰⁴ This centennial plan could gather dust or be a new compass for NPS, depending almost entirely on the view of the Obama Administration toward our national parks.²⁰⁵ Are they "photo opportunities" and playgrounds for powerful constituents, or natural treasures to be preserved for future generations even if offering few electoral votes? And, in tighter economic times, the support for the parks will depend a lot on the American people's ability to think beyond this generation and to continue investing in special places they may never themselves visit, an especially difficult kind of altruism as Americans' changing lifestyles diminishes their connection to the natural environment.²⁰⁶ With these management, regulatory, and strategic challenges in mind, the next section analyzes the lessons that can be learned from judicial review of conflicts involving the NPS's dual mandate in recent citizen suit litigation.

III. DUALISM AND JUDICIAL REVIEW

The revered natural resource and recreation values embodied by the U.S. National Park System and the concomitant scarcity of these unique values frequently spark conflict among those who seek to preserve

²⁰⁰ NPS CENTENNIAL STRATEGIES, *supra* note 192, at 2-3.

²⁰¹ *Id.* at 7.

²⁰² *Id.* at 7-9.

²⁰³ *Id.* at 1-2. This paper a summary of President Bush's proposals and was written in consultation with Congress. *Id.*

²⁰⁴ *Id.* at 7-9 (recreation proposals).

²⁰⁵ See *id.* at 1-2. This was President Bush's *proposal* and does not have to accepted by the new congressional and executive leadership. *Id.*

²⁰⁶ See generally Oliver R. W. Pegrams & Patricia A. Zaradic, *Is Love of Nature in the US Becoming Love of Electronic Media?*, 80 J. ENVTL. MGMT. 387 (2006).

them versus those who seek to enjoy or use them.²⁰⁷ This section reviews the judicial manifestation of the management and enforcement conflicts created by this dualism. The litigation in the federal court system involving the NPS in the past eight years, some cases involving the Organic Act directly and others tangentially, provides insights into how judicial review and common litigation tools like the APA, NEPA, and *Chevron* can tip the scales toward agency discretion, either in favor of conservation or enjoyment.²⁰⁸

Some cases suggest that just ensuring compliance with the Organic Act, viewed through the standard rules of judicial review, does not give the courts a strong enough legal basis on which to moderate the anthropogenic pressures that risk the long-term impairment of our national parks.²⁰⁹ NEPA litigation helps catch some problematic projects,²¹⁰ but itself cannot serve as a substantive guide. Without a statutory amendment that tips the balance more strongly in favor of conservation, such as the clear priorities given to natural resource values under the Wilderness Act or the Wild and Scenic Rivers Act, the courts cannot alone be expected to constantly come to the rescue when the NPS waffles on its conservation mission in favor of promoting use of the parks and responding to the demands of well-organized users.²¹¹

A. *General Authority, Overlay Laws, and Citizen Suits*

As national agencies managing federal lands, the National Park Service and its parent agency the Department of Interior are subject to strong federal laws that provide broad authority to regulate and also allow the direct intervention of citizens in enforcing the law when they fail to act or act badly.²¹² The U.S. federal park model is based upon a strong

²⁰⁷ See Kass, *supra* note 191, at 70.

²⁰⁸ See, e.g., *Int'l Snowmobile Mfr. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1266 (D. Wyo. 2004) (holding that the NPS's ban on snowmobiles violated NEPA and the APA); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 108 (D.D.C. 2006) (holding that the surface drilling violated NEPA and the Organic Act). See also *infra* Part III.C for further discussion.

²⁰⁹ See *Norton*, 340 F. Supp. at 1265-66 (holding that despite the NPS's agreement with the Organic Act under the "impairment" test, the agency's actions violated NEPA and the APA).

²¹⁰ See *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 739-40 (9th Cir. 2001) (holding that the NPS was required to conduct an environmental impact statement when allowing for the increase of cruise ship traffic to Glacier Bay National Park). See also *infra* Part III.C for further discussion.

²¹¹ See *infra* Part IV.A for further discussion.

²¹² See *infra* note 219 for a list of laws related to the NPS. See *infra* Part III for further discussion of how these laws affect the NPS.

national sovereign, with little interference by state or local governments.²¹³ In general, the Park Service has "broad discretion" as a super-landowner to protect the parks.²¹⁴ This may mean, for example, that the park can assert water rights, acquire rights-of-way, or bring trespass or nuisance actions.²¹⁵ Many commentators have criticized the NPS's timidity in exercising these authorities,²¹⁶ but there does appear to be a strong consensus, at least in academia, that the authorities lay ready to be used.²¹⁷

In carrying out its responsibilities, the National Park Service must follow its own Organic Act, park-specific legislation, and subsequent congressional and executive directives, as well as generic statutory requirements governing all U.S. agency action,²¹⁸ such as the Administrative Procedure Act ("APA"),²¹⁹ the National Environmental Policy Act ("NEPA"),²²⁰ the National Historic Preservation Act ("NHPA"),²²¹ and the Endangered Species Act ("ESA").²²² In addition, as indicated above, there are many specific statutes related to public lands management, such as the Wilderness Act,²²³ that particularly affect the planning and administration of the National Park System. Section C below describes the range of recent citizen suits involving the national park system and how the courts have interpreted the agency's dual mandate in these cases. The APA is a touchstone for citizen suit litigation against the NPS and the

²¹³ Jeffrey, *supra* note 4, at 172 (U.S. "federal control is largely free from interference by the states and allows for a continuity in management style and policy which is much more difficult to achieve in Canada.").

²¹⁴ See *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980), *aff'd*, 659 F.2d 203 (D.C. Cir. 1981).

²¹⁵ *Id.*

²¹⁶ See Coggins, *supra* note 190, at 15; Lockhart, *supra* note 190, at 7-9.

²¹⁷ See Coggins, *supra* note 190, at 8-15 (discussing the many tools the NPS has at its disposal to regulate parks).

²¹⁸ See National Park Service, Department of Interior, Laws, Executive Orders, and Regulations, <http://www.nps.gov/history/laws.htm> (a full list of the numerous laws that related to national protected areas in the U.S.).

²¹⁹ Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000). The NPS is subject to the APA, which means it must conform to the notice and comment requirements for informal agency rule making, as well as other well-established rules for agency decision-making. See *U.S. v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989).

²²⁰ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2000).

²²¹ National Historic Preservation Act, 16 U.S.C. §§ 470 to 470-1 (2000).

²²² Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000); see also Karkkainen, *supra* note 44, at 14-24 (general information on the operation of NEPA and EIS in the context of biodiversity and U.S. protected areas).

²²³ The Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000).

first place to look for decisions affecting the deference given to the agency in interpreting its mandate.²²⁴

B. The Administrative Procedure Act Framework

The Administrative Procedure Act ("APA") of 1946 provides the foundation for all regulatory law related to federal agencies in the U.S.²²⁵ Under the APA, the federal government has expressly waived sovereign immunity for lawsuit seeking nonmonetary relief against federal agencies.²²⁶ Although a few agency decisions are precluded from judicial review by Congress,²²⁷ any agency action that is "committed to agency discretion by law" is reviewable.²²⁸ The scope of judicial review is determined by the APA unless Congress has provided a specific review standard in the statute.²²⁹ The most well-known and often-litigated standard for review derives from 5 U.S.C. § 706(2)(A), allowing a reviewing court to strike down agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²³⁰ The Organic Act does not itself create a private right of action, and therefore a plaintiff seeking to enforce its values must use the APA's procedural leverage to get into court and usually also alleges another specific statutory violation, such as NEPA, the ESA, or the Wilderness Act.²³¹

In the public lands litigation context, the courts have traditionally tended to protect individual rights (such as private claims to natural resources) and usually deferred to the discretion of the agencies "in matters of overall policy and judgment."²³² In some areas, this distinction has

²²⁴ See *infra* text accompanying notes 226-30.

²²⁵ COGGINS & GLICKSMAN, *supra* note 25, § 7:13.

²²⁶ *Id.* § 8:44 (citing amendments to 5 U.S.C. § 702). Sovereign immunity can still be a barrier to suits where the issue is conduct of a government official within that officer's statutory powers as opposed to challenges that the agency's action was "arbitrary and capricious" under the APA. See *id.* § 8:55. Also, if the plaintiffs seek monetary relief through damages, sovereign immunity can still be a strong barrier. *Id.* § 8:4.

²²⁷ *Id.* § 8:42. The NPS "remain[s] immune from APA rulemaking procedures except if a specific statute directs compliance." *Id.* § 7:13 (noting that this is not true for other agencies).

²²⁸ *Id.* § 8:43.

²²⁹ *Id.* § 8:42.

²³⁰ Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (2000).

²³¹ See *Sierra Club v. Mainella*, No. 04-2012, 2005 WL 3276264, at *8 n.6 (D.D.C. Sept. 1, 2005).

²³² COGGINS & GLICKSMAN, *supra* note 25, § 8:1.

"eroded,"²³³ and courts are exercising more oversight over agency decision-making, often called the "hard look doctrine."²³⁴ According to Professors Coggins and Glicksman, "One major catalyst for change has been the emergence of the 'public interest' organizations as effective policy monitors, agency lobbyists, and litigators."²³⁵ In these cases, citizens represented by advocacy organizations and non-profit law firms, "typically claim that federal land management agencies have given insufficient attention to environmental concerns or otherwise ignored the law in licensing resource development."²³⁶ Many private interest groups have adopted the same tactics as public interest groups and attack results they do not like using almost identical procedural defect arguments.²³⁷

The cumulative impact of decades of public interest and user-group organization litigation against the federal agencies—beginning in full force in the 1970s—has reshaped the substantive and procedural landscape of how federal land management agencies behave.²³⁸ Federal courts are now very habituated to APA and other citizens suits, and usually accept public interest plaintiffs "as legitimate representatives of the conservation and preservation goals embodied in the environmental and natural resources legislation enacted since the 1960s."²³⁹ Even when the court recognizes the agency is attempting to do the "right thing," significant procedural violations of the APA can force it to go back to the drawing boards.²⁴⁰ As described by Professors Coggins and Glicksman:

The new lawsuits differ from the old in form as well as objectives. They proceed from new premises, create new problems, and require new procedures. The usual characteristics

²³³ *Id.*

²³⁴ *Id.* § 8:2 (discussing how court were less inclined to apply the "hard look" doctrine to land management agency decisions and that "tradition of judicial deference . . . is waning but far from dead.").

²³⁵ *Id.* § 8:1.

²³⁶ *Id.* § 8:3.

²³⁷ *See, e.g., id.* (citing cases involving resource industry plaintiffs, "legal foundations," and resource user groups). Some commentators have observed that the Administration of President George W. Bush has used these lawsuits as a "Trojan horse" for advancing its own conservative policy objectives by, for example, entering into "sweetheart" settlements contrary to the public interest. *See id.* at n.10 (citing, *e.g.*, Michael Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Protection on Public Lands*, 34 ENVTL. L. REP. 10397 (2004)).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *See Ft. Funston Dog Walkers v. Babbitt*, 96 F. Supp. 2d 1021, 1039 (N.D. Cal. 2000).

of public interest litigation include: (1) the lawsuit is directed against the government agency, and the resource developer who stands to lose if the suit is successful often intervenes on the side of the government; (2) the plaintiffs claim that the agency has violated several federal (and state) statutes; (3) procedural claims are more numerous, and more likely to succeed than substantive claims; (4) the relief demanded is equitable, obviating the need for jury trials; and (5) the request for a preliminary injunction, often with a companion request for summary judgment, often is the critical stage in the litigation.²⁴¹

The usual relief is a remand of the flawed decision back to the agency for correction and reconsideration, which can, in theory, result in the same decision again, but this time better justified or perhaps truly better.²⁴² On the other hand, the delay and policy shift engendered by the remand can, by itself and sometimes coupled with political changes, result in major substantive change in the agency's ultimate decision and the project's fate.²⁴³ As discussed below, in a well-established line of citizen suits, the courts have interpreted the APA's review standard in conjunction with the Organic Act to give unusually broad discretion to the NPS.²⁴⁴

C. *National Park Service Litigation: Monkey in the Middle?*

The National Park Service is frequently involved in litigation where the agency finds itself defending against flying allegations from opposite sides—conservationists and user groups—reminiscent of the children's ball game *Monkey in the Middle*. This section analyzes the range of lawsuits in the past eight years²⁴⁵ involving the National Park Service and its dual conservation-use mandate, focusing on the constant tug-of-war among the various user groups that spills into the court system.

²⁴¹ COGGINS & GLICKSMAN, *supra* note 25, § 8:3.

²⁴² *See id.* §§ 8:52-8:55 (discussing relief in agency lawsuits).

²⁴³ *See id.* § 8:55.

²⁴⁴ *See infra* text accompanying notes 213-15.

²⁴⁵ The review was limited to cases decided primarily after 2000 to provide a more contemporary lens on the judicial review questions examined by this article. This time period also coincides largely with the two terms of the George W. Bush Administration, providing a somewhat cohesive political background to the litigation record, however, the *Babbitt* cases date back to decision made by Secretary of Interior Bruce Babbitt during the Clinton Administration. *See generally* Spiegel v. Babbitt, 855 F.Supp.2d 402 (D.D.C. 1994).

Over 450 reported²⁴⁶ federal cases starting in the year 2000 were screened, yielding a total of about twenty district court cases and twenty circuit court of appeals cases, which together shed some contemporary light on how courts view the agency's responsibility to respond to various user demands within the parks.²⁴⁷ Although only a few recent cases directly address the Organic Act, and some address NPS units other than National Parks, taken together, these cases indicate that the agency has been allowed, under the doctrine of agency deference and dualism, to shift toward a more user-driven mandate.²⁴⁸

This litigation review also hints at the strong role of national politics in park management. In recent years, presidential administrative policy changes from the top have often sparked lawsuits.²⁴⁹ Although

²⁴⁶ Only cases published in the federal reporters were reviewed. There is no way, however, to know how many more cases were unreported. Tracking down the unpublished decisions in a systematic way to supplement this discussion would be an interesting research challenge for further research. The distribution of a set of eighty-eight second-screen district court cases is not even across the nation. The bulk of the lawsuits reported (37.5%) were from the District of Columbia circuit; 28% were from the Ninth Circuit; 11% from the Tenth Circuit; and every other circuit had four or fewer reported decisions. Research on file with author. The circuit distribution of these cases was two in the First Circuit, two in the Second Circuit, three in the Third Circuit, one in the Fourth Circuit, two in the Fifth Circuit, two in the Sixth Circuit, none in the Seventh Circuit, four in the Eighth Circuit, twenty-five in the Ninth Circuit, ten in the Tenth Circuit, four in the Eleventh Circuit, and thirty-three in the District of Columbia Circuit. Research on file with author. The distribution reflects the preference for filing cases in the nation's capital, where major national advocacy groups and the NPS are located, as well as the high number of national parks and intensity of resource-user conflicts in the American West. Compare U.S. Courts <http://www.uscourts.gov/courtlinks/>, with National Parks, http://www.us-parks.com/national_parks.html (a map of the U.S. national parks showing the clustering of parks in the Western states of the Ninth and Tenth Circuits). The Ninth Circuit includes the nine westernmost states, Hawai'i, Alaska, Washington, Oregon, California, Montana, Idaho, Nevada, and Arizona, as well as Guam and the Northern Marianas Islands; the Tenth Circuit includes the states of Wyoming, Colorado, Utah, New Mexico, Kansas, and Oklahoma. U.S. Courts, <http://www.uscourts.gov/courtlinks/>.

²⁴⁷ The district court case review and initial screening of relevant cases was conducted by the author's research assistant Nathaniel Noda; the in-depth analysis of these decisions and the circuit court review were done by the author. Several cases that involved the NPS's decisions to acquire land or alter buildings within the parks involved a different set of legal issues from the administrative law cases covered in this article. See, e.g., *Save Our Parks v. Kempthorne*, No. 06-6859, 2006 U.S. Dist. LEXIS 85206 (S.D.N.Y. Nov. 15, 2006).

²⁴⁸ See *infra* Part III.C.1 for further discussion of dualism. See *infra* text accompanying note 251 for a discussion of cases where the courts have explicitly held that the agency should be given broad deference.

²⁴⁹ A good example of political changes affecting the rules comes from the Clinton era snowmobile cases. See, e.g., *Int'l Snowmobile Mfr. Ass'n (ISMA) v. Norton*, 340 F. Supp.

litigation certainly occurred under the Clinton Administration and will undoubtedly continue under the Obama Administration, the citizen suits filed against the National Park Service since 2000 during the Bush presidency provide an interesting barometer of the shifting political winds that continue to affect this nearly 100-year-old agency. The case analysis strengthens the need for a statutory amendment to clarify the agency's top priorities and to better insulate the agency, permanently, from the vicissitudes of judicial review and shifting political landscapes.

1. The Organic Act: Soft Dualism

A series of court decisions have found that the Organic Act has a soft or silent dual mandate that leaves the NPS "broad discretion" in making its specific management decisions.²⁵⁰ In the past, when the agency was considered to have given conservation its highest priority, this broad discretion may not have been remarkable.²⁵¹ But, with dualism, broad agency

2d 1249, 1259 (D. Wyo. 2004) (concluding that "the NPS made a prejudged political decision to ban snowmobiles in the Parks"); *id.* at 1261 (agreeing that the Fish and Wildlife Service had made "a prejudged political conclusion to ban snowmobiles from the Parks.").

²⁵⁰ See *Nat'l Wildlife Fed'n v. Nat'l Park Serv.*, 669 F. Supp. 384, 391 (D. Wyo. 1987); *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000) (upholding the NPS's decision to conduct a controlled harvest of white-tailed deer at Gettysburg National Military Park); *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 446 (D.C. Cir. 1994); *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (D.C. Cir. 1996) (upholding the NPS regulation that prohibited all bicycle use of off-road areas in the Golden Gate National Recreation Area, rejecting NEPA claim, and upholding final trail plan); *Intertribal Bison Coop. v. Babbitt*, 25 F. Supp. 2d 1135, 1138 (D. Mont. 1998); *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 100 (D.D.C. 2006) (holding that "because the Organic Act is silent as to the specifics of park management, the Secretary has broad discretion on how to implement the statutory mandate" and citing *Davis*, 202 F.3d at 365); *Sierra Club v. Mainella*, No. 04-2012, 2005 WL 3276264, at *1 (D.D.C. Sept. 1, 2005) (Organic Act is silent regarding management so as to give broad discretion to the courts). The courts have also found that the Organic Act does not constitute an affirmative mandate for the NPS to act unless there is some other specific duty to act. *Friends of the Earth v. Dep't of Interior*, 478 F. Supp. 2d 11, 24-25 (D.D.C. 2007) (rejecting citizens' APA challenge seeking system-wide regulations for off-road vehicles because the suit was seeking to get the NPS to affirmatively "enforce" the law and this kind of agency inaction case did not present *Chevron* questions); see also *S. Utah Wilderness Alliance v. Nat'l Park Service*, 387 F. Supp. 2d 1178, 1187-89 (D. Utah 2005) (dismissing Organic Act claims because generalized allegations of failure to comply with statute were insufficient to be a discrete failure to Act and were therefore barred). For an analysis of an earlier *SUWA* case, see Shaw, *supra* note 2, at 815-17 (analyzing *SUWA*'s lawsuit against Walt Dabney, superintendent for Canyonlands National Park, filed in 1995).

²⁵¹ See *SAX*, *supra* note 27, at 11.

discretion can tip equally in favor of user groups, depending upon the leadership at the top of the NPS and the Department of Interior.²⁵² Not surprisingly, the NPS take the position that the interpretation of the touchstone goal of "unimpairment" under the Organic Act rests in the sound professional judgment of park managers.²⁵³

Until recently, the discretion traditionally given to the NPS seemed to always lead courts to uphold the agency's conservation-oriented actions in the face of challenges by user groups.²⁵⁴ In an often-cited 1996 case, *Bicycle Trails Council of Marin v. Babbitt*,²⁵⁵ the Ninth Circuit Court of Appeals held that the NPS's plan, which closed popular bike trails was well within the discretion granted by the Organic Act and the specific act that established the park.²⁵⁶

During the Bush era, one of the most controversial issues has been motorized recreational access. Snowmobiles have generated an unusually high level of conflict and a lot of litigation against the NPS.²⁵⁷ In *Int'l Snowmobile Mfrs. Ass'n (ISMA) v. Norton*,²⁵⁸ a conservative court gave faint praise to the Organic Act in the face of such user pressures.²⁵⁹ The Wyoming District Court found that the Organic Act's "impairment" test gave broad discretion to the NPS to restrict snowmobile use in Grand Teton and Yellowstone National Parks even if the court vehemently disagreed

²⁵² See *supra* note 15 for an example of how leaders at the top of the Department of Interior can affect NPS policies.

²⁵³ NAT'L PARK SERVICE, MANAGEMENT POLICY 2001 § 1.4.5 [hereinafter NPS MP 2001] (discussed in *Wilderness Soc'y v. Norton*, No. 03-64, 2005 WL 3294006, at *8-14 (D.D.C. 2005)); see also NPS MP 2006, *supra* note 4, § 1.4.5.

²⁵⁴ See, e.g., *United States v. Vogler*, 859 F. 2d 638, 642 (9th Cir. 1988) (finding in an in-holding case that Section 1 of the Organic Act "applies with equal force to regulating an established right of way within the park" and that "the regulations here are necessary to conserve the natural beauty of the Preserve; therefore, they lie within the government's power to regulate national parks"); *Nat'l Rifle Ass'n v. Potter*, 628 F. Supp. 903, 905 (D.D.C. 1986) ("[T]he paramount objective of the park system with respect to its indigenous wildlife, and the philosophy which came to pervade the new Park Service to whom it was entrusted, was, from the beginning, one of protectionism."); *Mich. United Conservation Club v. Lujan*, 949 F.2d 202 (6th Cir. 1991) (stating that the NPS's "primary management function with respect to wildlife is preservation").

²⁵⁵ 82 F.3d 1445 (D.C. Cir. 1996).

²⁵⁶ *Id.* at 1454.

²⁵⁷ See *Wyo. Lodging and Restaurant Ass'n v. Dep't of Interior*, 398 F. Supp. 2d 1197, 1203-07 (D. Wyo. 2005) (discussing other numerous snowmobile cases).

²⁵⁸ *Int'l Snowmobile Mfr. Ass'n v. Norton*, 340 F. Supp. 2d 1249 (D. Wyo. 2004).

²⁵⁹ The court found NPS's actions consistent with the Organic Act, but still ultimately ruled against them. *Id.* at 1266.

with the agency's decision.²⁶⁰ The court called it "radical"²⁶¹ and characterized by "political haste, [and] poor judgment"²⁶² but found no solace in the Organic Act and ended up using only NEPA and the APA as its basis for overturning the NPS policy.²⁶³ Plaintiff ISMA had argued that the NPS had impermissibly interpreted the Organic Act by "determining that the conservation portion controlled and subjugated other obligations under the Organic Act."²⁶⁴ It claimed "that there is a dual mandate to balance conservation with visitor enjoyment."²⁶⁵

In contrast, the NPS took the position that it had "broad statutory authority to manage and regulate the National Park System. "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.'"²⁶⁶ The court, very reluctantly, sided with NPS, concluding that "[t]he determination that snowcoach only transportation as a means of providing visitor access, while protecting the Parks' natural resources, was a decision that was within the discretion of the NPS, even though for obvious reasons it was a wrong-headed decision, based on poor judgment."²⁶⁷ Despite the consistency of the NPS's decision with the Organic Act, the court set aside the Snowmobile rule because of the other violations indicating that the discretion of the NPS under the Organic Act is so broad that even a visibly irritated judge felt compelled to agree that conservation can override user interests.²⁶⁸ This reluctant endorsement

²⁶⁰ The NPS restricted snowmobile use because it had found that the groomed winter trails were encouraging bison to leave the park boundaries. *Id.* at 1253. When the NPS was required to prepare an EIS as a result of a lawsuit by the Fund for Animals, the Final EIS ("FEIS") issued in 2000 called for a ban on snowmobiles and allowed only NPS-operated snowcoaches. *Id.* at 1254. On the last day of the Clinton Administration, the final rule issued. *Id.* (citing Snowcoach Rule, 66 Fed. Reg. 7260, 7268 (Jan. 22, 2001)). ISMA sued challenging both the FEIS and the Snowcoach Rule. *Id.* After convoluted changes in the rules and more litigation, the rule was finally implemented in 2003, but then stayed by the D.C. District Court pending a hearing on the merits. *Id.* at 1256.

²⁶¹ *Id.* at 1265.

²⁶² *Id.* at 1266.

²⁶³ The court found that the NPS violated NEPA because "[o]nce the NPS had decided to ban snowmobiles from the Parks, the remainder of the NEPA process was nothing more than *pro forma* compliance. The 2001 Snowcoach Rule was rushed through the NEPA process and all along the way, the public was left out of the process." *Id.* at 1264.

²⁶⁴ *Id.* at 1265.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1266 (quoting *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000)).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

of the NPS's organic authority in the context of the agency's tough stand against snowmobile users, however, ultimately melted into the background of the *ISMA* litigation, and the case otherwise stands out as a setback for the NPS and conservation groups.

The dual mandate in the Organic Act seems to have left other courts feeling like there is no clear standard for reviewing agency decisions on resource-user conflicts. In *River Runners for Wilderness v. Martin*,²⁶⁹ the plaintiffs, private non-commercial river users, challenged the NPS's 2006 Colorado River Management Plan ("CRMP") as arbitrary and capricious under the APA because it allowed "commercial boaters to use the river at levels that interfere with free access by the public and because it concludes that motorized uses do not impair the natural soundscape of the Park."²⁷⁰ The "free access" allegation was grounded in another section of the Organic Act,²⁷¹ but the court's analysis of the term "natural soundscape" did not refer to any statutory or regulatory foundation, except the NPS's NEPA documents, and the court's analysis of the Organic Act claim ended up sounding like a free-writing exercise, a standardless weighing of "considerations."²⁷² Although the court initially quoted the basic "unimpairment" language of the Organic Act,²⁷³ it never returned to the language or intent of the Act, indicating perhaps that it found neither the broad language nor the dual mandate helpful to its analysis.²⁷⁴ The court upheld the NPS plan that favored the commercial boaters.²⁷⁵

²⁶⁹ *River Runners for Wilderness v. Martin*, No. 06-894, 2007 WL 4200677 (D. Ariz. Nov. 27, 2007).

²⁷⁰ *Id.* at *16.

²⁷¹ *See id.* (citing Organic Act, 16 U.S.C. § 3 (2000) ("No natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public.")).

²⁷² *Id.* at *17-18. The term soundscape was used by the NPS in the FEIS for the CRMP. *See id.* at *9.

²⁷³ *Id.* at *16.

²⁷⁴ *Id.* at *16-20; *see also* *Great Old Broads for Wilderness v. Kempthorne*, 452 F. Supp. 2d 71 (D.D.C. 2006). In *Kempthorne*, the plaintiffs challenged permits and a management plan of the NPS and BLM that allowed livestock grazing in the Glen Canyon National Recreation Area. *Id.* at 73. The court held that the grazing permits did not violate the Organic Act apparently because of the confusing way the plaintiffs alleged their claim as one of agency inaction. *Id.* at 79-80 n.8 (noting that the plaintiffs' Organic Act argument was "somewhat difficult to understand"). The plaintiffs did, however, successfully navigate around direct congressional riders that allowed the grazing permits by raising an independent NEPA challenge to the grazing management plan. *Id.* at 80-85 (noting that plaintiff's interpretation of the rider could not stand, but ultimately upholding their other claim). A subsequent request by the plaintiffs for a deadline for agency action was also denied. *See* *Great Old Broads for Wilderness v. Kempthorne*, 462 F. Supp. 2d 61, 64 (D.D.C. 2006).

²⁷⁵ *River Runners*, 2007 WL 4200677, at *19. *See also* *Wilderness Public Rights Fund v.*

Similarly, in 2000, the D.C. Circuit Court of Appeals declined to stop a bear hunt in a National Park because it found that the courts should be particularly deferential to the NPS's interpretation of the Organic Act.²⁷⁶ In *Davis v. Latschar*, plaintiffs challenged the NPS's decision to conduct a controlled hunt for white-tailed deer in Gettysburg National Military Park.²⁷⁷ Residents and animal rights organizations challenged the plan under the Organic Act, NEPA, and the National Historic Preservation Act.²⁷⁸ The Court of Appeals fully endorsed the District Court's decision that had rejected the plaintiffs' claims.²⁷⁹ As the lower court held, "For challenges to an agency's construction of the statutes or regulations that it administers—such as the Park Service's reading of its Organic Act and management policies—the Court's review must be *particularly* deferential."²⁸⁰ It continued: "The Court must defer to the agency's interpretation of a statute that it implements 'so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language.'"²⁸¹ Both courts upheld the NPS's final EIS and decision not to prepare a supplemental EIS for the deer hunt.²⁸²

Several other pre-2000 decisions similarly indicate that the courts seem most interested following a principle of great deference rather than in determining if the Organic Act has any substantive guidance.²⁸³ In some cases, the court's deference to the agency resembles immunity. As Professor Dan Tarlock commented about NPS litigation and the dual mandate, "the Secretary's broad mandate makes his management decisions largely immune from review . . . it will be difficult for courts to find sufficient standards in the statute against which to test the arbitrariness of a park allocation choice."²⁸⁴ Professor Robert Fischman has also criticized

Kleppe, 608 F.2d 1250 (9th Cir. 1979) (referring to the free access issues in the context of the NPS's preference for commercial river users on the Colorado River).

²⁷⁶ *Davis v. Latschar*, 202 F.3d 359, 364 (D.C. Cir. 2000).

²⁷⁷ *Id.* at 359.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 360 (adopting the district court opinion almost in full and reprinting it as part of its own appellate opinion).

²⁸⁰ *Id.* at 364 (emphasis added).

²⁸¹ *Id.* at 365 (citing *OSG Bulk Ships v. United States*, 132 F.3d 808, 814 (D.C. Cir. 1998) and *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984)).

²⁸² *Davis*, 202 F.3d at 360, 367.

²⁸³ See, e.g., *Voyageurs Region Nat'l Park Ass'n v. Lujan*, 966 F.2d 424, 427 (8th Cir. 1992) (allowing snowmobiles in corridors of national park); *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979); *S. Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205, 1211 (D. Utah 1998).

²⁸⁴ Tarlock, *supra* note 10, at 266. See also Keele, *supra* note 11, at 448-49 (stating that the broad dual mandate is like immunity because Congress has not resolved the conflict).

the Organic Act as inherently weak because of its dualism; in his view, it "fails to articulate an answer to the systemic question: what are parks for?"²⁸⁵

2. NEPA Backstops the NPS Conservation Mandate

Many cases against the NPS involve both the Organic Act and the National Environmental Policy Act ("NEPA"). NEPA, the U.S.'s foundational environmental law, requires federal agencies to undertake a pre-action analysis of potential environmental impacts for "major Federal actions" that may "significantly affect" the quality of the human environment.²⁸⁶ NEPA is certainly one of the most frequently litigated statutes in the 40-year history of modern U.S. environmental law.²⁸⁷ In the context of park law, it has also been very frequently used by interested stakeholder groups on all sides of controversies as a tool to redirect or rebuff, with judicial clout, the NPS and other agencies when their actions threaten park values or perceived user interests.²⁸⁸ Proper use of NEPA can legitimize NPS decisions.²⁸⁹ Since 2000, examples of NEPA cases involving National Parks with a pro-conservation result include controversial agency actions at the Grand Canyon,²⁹⁰ Cape Cod National Seashore,²⁹¹ Yellowstone

²⁸⁵ Fischman, *supra* note 2, at 810.

²⁸⁶ The Ninth Circuit Court of Appeals explained well-established NEPA law in *Hale v. Norton*:

NEPA requires the preparation of an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." . . . NEPA ensures that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts," and will make such information available to the public. . . . "NEPA itself does not mandate particular results, but simply prescribes the necessary process." . . . Significantly, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."

476 F.3d 694, 700 (9th Cir. 2007) (citations omitted).

²⁸⁷ See Heather E. Ross, Note, *Using NEPA in the Fight for Environmental Justice*, 18 WM. & MARY J. ENVTL. L. 353, 362 n.41 (1994).

²⁸⁸ See *infra* notes 291-294 and accompanying text.

²⁸⁹ Keiter, *supra* note 16, at 681 (arguing for further application of NEPA to NPS decisions, including the agency's management policies).

²⁹⁰ See, e.g., *Sierra Club v. Lujan*, 716 F. Supp. 1289 (D. Ariz. 1989) (enjoining Grand Canyon North Rim development because the National Park Service had not prepared an environmental impact statement).

²⁹¹ See *Fund for Animals v. Mainella*, 283 F. Supp. 2d 418 (D. Mass. 2003) (holding that the

and Grand Teton National Parks,²⁹² and Glacier Bay National Park in Alaska.²⁹³

In the 2001 *National Parks Conservation Ass'n v. Babbitt* decision, the Ninth Circuit Court of Appeals reviewed NPCA's challenge to the NPS's decision not to prepare an EIS for a plan that would expand cruise ship visits to the Glacier Bay National Park.²⁹⁴ The Park was proclaimed a National Monument in 1925, a National Park in 1980, an international biosphere reserve by UNESCO in 1986, and a World Heritage Site in 1992.²⁹⁵ The priceless nature of this remarkable landscape was not lost on the court. In the first sentence of the opinion, Judge Reinhardt noted the "unrivaled scenic and geological values" of the area and its "wildlife species of inestimable value."²⁹⁶ He began discussing the factual and procedural history by stating: "There may be no place on Earth more spectacular than the Glacier Bay."²⁹⁷

Because there are no roads into the park, visitors must arrive by boat, and approximately 80% of all visitors arrive by large thousand-passenger-capacity cruise ships.²⁹⁸ In 1996, the NPS began to implement a management plan that would increase cruise ship traffic to the Park from 30-72%.²⁹⁹ Despite acknowledging adverse impacts to wildlife and the environment from the noise, pollution, and risk of oil spills from the cruise ships, the NPS did not prepare an EIS.³⁰⁰

The court concluded that, based on the evidence of possible harm and the Park Service's own expert witnesses who admitted the environmental risks of cruise traffic, the NPS made a "clear error of judgment" when it declared "that no significant environmental effects were likely" and it therefore had violated NEPA.³⁰¹ The court ordered the level of

NPS violated NEPA in allowing a pheasant hunting program in the Cape Cod National Seashore).

²⁹² See *Wyo. Lodging & Restaurant Ass'n v. Dep't of Interior*, 398 F. Supp. 2d 1197 (D. Wyo. 2005) (upholding NPS rule that required guides for snowmobiles in Yellowstone and Grand Teton National Parks, holding that the agency had complied with NEPA and given the proposal a sufficiently "hard look"); see also *Fund for Animals v. Jones*, 151 F. Supp. 2d 1 (D.D.C. 2001) (finding that NPS violated NEPA when it authorized a bison hunt and retaining jurisdiction until the NPS complied with NEPA).

²⁹³ *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001).

²⁹⁴ *Id.* at 725.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 725.

²⁹⁷ *Id.* at 726.

²⁹⁸ *Id.*

²⁹⁹ *Nat'l Parks Conservation*, 241 F.3d at 725.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 739.

traffic held to 1996 levels until the NPS completed the NEPA process, concluding: "Glacier Bay Park is too precious an ecosystem for the Parks Service to ignore significant risks to its diverse inhabitants and its fragile atmosphere."³⁰² Obviously persuaded by the national significance of this magnificent area, the court had little problem ruling in favor of the NPCA and finding that NEPA's EIS requirement was triggered.

Similarly, application of NEPA led to a conservation-oriented result (although this time in favor of the NPS) in a 2000 case involving the federal government's decision to reintroduce gray wolves to Yellowstone National Park.³⁰³ In *Wyoming Farm Bureau Federation v. Babbitt*, the Tenth Circuit Court of Appeals reviewed one of the Department of Interior's boldest and controversial wildlife restoration programs under challenge by a coalition of farmers, ranchers, and residents.³⁰⁴ The plaintiffs claimed that the agencies involved—the U.S. Fish and Wildlife Service, the National Park Services, and the U.S. Forest Service—had violated the Endangered Species Act and NEPA.³⁰⁵ The Tenth Circuit Court of Appeals disagreed and upheld the program.³⁰⁶

The Northern Rocky Mountain Gray Wolf has been protected under the ESA as an endangered species since 1978.³⁰⁷ Seeking to restore the wolf to its native habitat, the U.S. Fish and Wildlife Service's recovery plan called for the eventual reintroduction of up to 150 pairs of wolves as a "non-essential experimental population" to Yellowstone,³⁰⁸ as well as in

³⁰² *Id.*

³⁰³ *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000).

³⁰⁴ *Id.* at 1228-29.

³⁰⁵ *Id.* at 1230. One of the strongest environmental laws in the U.S. is the Endangered Species Act, passed by Congress in 1973. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2006)). Under the ESA, once species are listed as either "endangered or threatened," they receive a host of protections designed to bring them back from the brink of extinction, including the obligation that the responsible agency (the U.S. Fish and Wildlife Service or the National Marine Fisheries Service) prepare a "recovery plan" that sets out the specific actions needed to increase the viability and size of the population at risk. *Id.* § 1533. In a few cases, the recovery actions work and species become "delisted." See Katrina M. Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 17 N.Y.U. ENVTL. L. J. 490, 495 n.21 (stating that delistings as a result of recovery constitute approximately one percent of the species listed). In many cases, however, efforts by FWS to expand the range of population of species encounters significant resistance from private parties adversely affected having a protected species on or near their property. *Id.* at 506.

³⁰⁶ *Wyo. Farm Bureau*, 199 F.3d at 1241.

³⁰⁷ *Id.* at 1228.

³⁰⁸ *Id.* at 1229. The ESA authorizes "non experimental populations" of listed species under Section 10(j) of the Endangered Species Act. 16 U.S.C. §§ 1539(j) (2006); see also *Wyo. Farm Bureau*, 199 F.3d at 1233-35 (discussing provisions of the Endangered Species Act).

Idaho and Montana.³⁰⁹ The FWS, in conjunction with the NPS and the Forest Service, prepared an EIS under NEPA to support the reintroduction program.³¹⁰ To address the concerns of ranchers and farmers, the final rules of the reintroduction program allowed a livestock producer who caught a wolf attacking domestic animals to kill it within twenty-four hours, an act that would otherwise violate the ESA.³¹¹ Despite this compromise, the rancher-farmer coalition was still very unhappy with the program, viewing it as a threat to their livestock and use of the area.

Addressing the ESA claim on the merits, the Tenth Circuit relied on *Chevron*, holding that Congress has left considerable “managerial discretion” to the Department of Interior to set the rules for each reintroduction program.³¹² Similarly, in reviewing the NEPA claim, the court found for the agencies, holding that the allegations “boil down to a disagreement over scientific opinions and conclusions,”³¹³ but NEPA does not mandate particular results, only a specific analytical process. Therefore, it rejected the plaintiffs’ claim of error and upheld the wolf reintroduction program.³¹⁴

NEPA has also been a useful foil for the NPS in reaction to user demands that the agency finds inconsistent with its conservation mandate. In the following two cases, unlike in the citizen suits above, the landowners sued *to prevent* the application of NEPA.³¹⁵ Although these are in-holding access cases and do not involve recreational use per se, they present similar conflicts in park uses and reveal how the agency can use NEPA to enhance its conservation mandate.

In 2007, the Ninth Circuit Court of Appeals addressed the issue of the balance of rights between a private owner of a 410-acre in-holding in the Wrangell-St. Elias National Park and Preserve in Alaska and the NPS’s duty to comply with NEPA.³¹⁶ In *Hale v. Norton*, the private landowner had requested permission from the NPS to bring a large trailer and bulldozer along a long-abandoned road, cross the park land multiple times, and bring in supplies for rebuilding a home that had burned down

³⁰⁹ *Wyo. Farm Bureau*, 199 F.3d at 1228.

³¹⁰ *Id.*

³¹¹ *Id.* at 1229.

³¹² *Id.* at 1234.

³¹³ *Id.* at 1240.

³¹⁴ *Id.* at 1241. See also *Yellowstone National Park—Wolves of Yellowstone* (National Park Service), <http://www.nps.gov/yell/naturescience/wolves.htm> (last visited Feb. 11, 2009) (providing information on the Yellowstone wolf populations and restoration program).

³¹⁵ See *infra* notes 317-329 and accompanying text.

³¹⁶ *Hale v. Norton*, 476 F.3d 694 (9th Cir. 2007).

a few years before.³¹⁷ In response to the landowner's request for emergency access, the NPS informed him that an Environmental Assessment under NEPA would be needed to examine, among other things, the impacts of re-opening the road and the equipment causing over 230 crossings of the fragile McCarthy stream, home of a native trout.³¹⁸ The landowner sued in federal district court to force the NPS to grant him the requested access and an exemption from NEPA.³¹⁹

On review, the court first observed that the NPS had the legal authority to reasonably regulate the access of private landowners to their in-holdings in the national parks.³²⁰ Next, the court examined the purpose of NEPA and the private owner's allegations that it conflicted with the NPS's duty to allow "adequate and feasible access" under ANILCA to landowners.³²¹ The court held:

[P]repared in connection with a routine permit application[,] [the EA] might conflict with ANILCA's requirement of "adequate and feasible access," depending on the nature of the application and the possible time and cost involved in a NEPA review. But that is not the situation in the present appeal.

In this case, we hold that the NPS acted reasonably in requiring an EA.³²²

Important factors in the court's decision were the likelihood of environmental damage from the proposed sixteen trips with the bulldozer and the lack of compelling reasons given for the emergency.³²³ In addition, the court noted the agency had promptly responded to the landowner's inquiries, committed to a speedy process, and had offered to pay for the EA itself.³²⁴ The court noted that

³¹⁷ *Id.* at 696.

³¹⁸ *Id.* at 696-97.

³¹⁹ *Id.* at 697.

³²⁰ *Id.* at 699 ("The Hales' ability to use the MGB road within the Park is subject to reasonable regulation. In *United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988), we decisively rejected the argument that the NPS lacks the power to regulate travel to an inholding across federally protected land.").

³²¹ *Id.* at 698-701; see also Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3170(b) (2000).

³²² *Hale*, 476 F.3d at 700.

³²³ *Id.*

³²⁴ *Id.* at 697.

the NPS appears to have done everything it could to accommodate the Hales and to facilitate reasonable access to their property. The Hales, on the other hand, refused to cooperate in the process, and failed to provide the NPS with the information it needed to grant an appropriate permit. In these circumstances, it was entirely appropriate for the NPS to apply a NEPA analysis to the Hales' request.³²⁵

In *Hale v. Norton*, the NPS gained considerable endorsement for its approach to using NEPA to tip the balance in favor of park protection, even in the face of the statutorily protected rights of private in-holders.³²⁶ The key to the agency success seemed to be two-fold: first, it gave the highest priority to conservation³²⁷ and, second, it did try to respond to the land-owners' request, albeit by requiring a NEPA process,³²⁸ demonstrating to the court a responsible course of conduct regarding private property rights that could be judicially endorsed.

3. NEPA Undermines the NPS Conservation Mandate

NEPA itself, however, is "merely a procedural statute" and does not dictate any particular conservation result for the NPS.³²⁹ In some cases, NEPA is simply a litigation tool wielded by the NPS or private-use groups to justify agency decisions that promote the use and enjoyment of the National Parks over conservation.³³⁰

For example, in *Jackson Hole Conservation Alliance v. Babbitt*,³³¹ the court upheld the NPS's FONSI for a controversial new visitor entrance

³²⁵ *Id.* at 701.

³²⁶ *Id.* at 700-01. Similarly, in a 2006 district court decision, the court sided with NPS in a dispute where the owner sought quiet title to an easement and a special use permit to access his land in Glacier National Park with motor vehicles and a snowmobile in winter. 464 F. Supp. 2d 1014, 1017, 1025-26 (D. Mont. 2006). But NPS's failure to act to restrict the "inholdings" of private owners of "stilt" homes in Biscayne National Park, established in 1980, in Florida was upheld in the face of a challenge by the NPCA. *NPCA v. Norton*, 324 F.3d 1229 (11th Cir. 2003). In *NPCA v. Norton*, the court found that NPCA's challenge was not yet ready for review as the NPS was still evaluating its management options with regard to restrictions on the private homes, which had been built on private land in the 1930s and then later included in the park boundaries. *Id.* at 1232.

³²⁷ *Hale*, 476 F.3d at 699 (citing *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988)).

³²⁸ *Id.* at 696.

³²⁹ *Amber Res. Co. v. United States*, 538 F.3d 1358, 1375 (D.C. Cir. 2008).

³³⁰ See *infra* notes 332-341 and accompanying text.

³³¹ *Jackson Hole Conservation Alliance v. Babbitt*, 96 F. Supp. 2d 1288 (D. Wyo. 2000).

to Grand Teton and Yellowstone National Parks despite objections that the NPS failed to consider alternatives "involving increased signage and ranger patrols, or other less invasive alternatives,"³³² failed to consider connected actions,³³³ and did not analyze all environmental impacts.³³⁴ According to the court, taken to the logical extreme, the plaintiffs' argument would mean that a "full-blown EIS is required every time NPS builds an outhouse."³³⁵

In a Hawaii case, citizens groups used NEPA to try to bolster the NPS's interests in a battle with the Federal Aviation Administration ("FAA") regarding increased tourism that could impact Haleakala National Park on Maui.³³⁶ In *NPCA v. U.S. Department of Transportation*, a 2000 decision by the Ninth Circuit Court of Appeals, the NPCA joined with a local Hawaii organization, Malama Pono, to sue the FAA for failing to follow NEPA in evaluating the expansion of the Kahului airport on Maui, and for not considering the impacts of the introduction of alien species to Haleakala National Park.³³⁷

With nary an acknowledgment of the unique volcanic landscape and fragile resources of Haleakala, Judge Kozinski of the Ninth Circuit Court of Appeals held that the FAA did take the requisite "hard look" at the impacts in its final EIS and therefore rejected the NPCA lawsuit.³³⁸ The court found that the NPCA "seek[s] too much from the EIS," and that NEPA "does not guarantee substantive results," only an "informed decision."³³⁹ In a strong dissenting opinion, Judge Betty Fletcher concluded that the opposite was true, calling into question the honesty of the FAA and stating that "FAA has deliberately averted its eyes from a well known environmental problem and from the potential consequences of its proposed action."³⁴⁰

The *NPCA* case shows the divergent views on the bench about the role of NEPA in agency decision-making (and perhaps some legal

³³² *Id.* at 1298.

³³³ *Id.* at 1299.

³³⁴ *Id.* at 1230.

³³⁵ *Id.* at 1300. Judge Brimmer also used colorful language and indicated a strong lack of sympathy to the strong environmental position of the NPS in the *ISMA* snowmobile case. See *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249 (D. Wyo. 2004).

³³⁶ *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 678 (9th Cir. 2000).

³³⁷ *Id.* at 678-80.

³³⁸ *Id.* at 682-83.

³³⁹ *Id.* at 682.

³⁴⁰ *Id.* at 687 (Fletcher, J., dissenting).

realism-based difference in judges' own feelings about the national parks as well). The Kahului Airport case is also a good example of what is well known by many public interest NEPA litigators: the mantra that NEPA is "only procedural" may be true inside the courtroom but the power of the spotlight and pressure of litigation can, itself, force undesirable projects off of political priority lists and result in an ultimate win. In this case, due to concerns about impacts and substantial opposition, the Governor of the State of Hawaii cancelled the state's plan to expand the runway.³⁴¹

The NEPA cases involving the NPS in recent years demonstrate the equivocal results that can occur when courts believe that the NPS just has to follow the right procedure (APA or NEPA) and the review is not guided by overriding conservation values.

D. Judicial Review when Conservation Priorities Are Clear

The softness of the Organic Act becomes clearer when its dual mandate is matched up against a similar statute with a clarion conservation mandate, such as the Wilderness Act.³⁴² In Wilderness Act cases, even where "use and enjoyment" is promoted, the courts look to the strong preference expressed by Congress in favor of preservation of natural ecosystems.³⁴³ If the dual mandate of the National Park Service were modified to tip the balance clearly in favor of conservation, the courts would likely have little trouble following that directive.

In *Wilderness Watch v. Mainella*, the Eleventh Circuit Court of Appeals held in 2004 that the NPS's practice of using motorized vehicles to transport visitors across a designated wilderness area to view historic structures just outside the Cumberland Island National Park in Georgia violated the Wilderness Act and NEPA.³⁴⁴ In 1972, Congress declared Cumberland Island a National Seashore, and then officially designated it as wilderness (under the Wilderness Act) ten years later, putting the NPS in charge of over 19,000 acres.³⁴⁵ The area contains "some of the last

³⁴¹ *Id.* at 679 n.1.

³⁴² Compare National Park Service Organic Act (Organic Act), 16 U.S.C. §§ 1-4 (2006), with National Wilderness Preservation System (Wilderness Act), 16 U.S.C. §§ 1131-1136 (2006).

³⁴³ For a thorough discussion of the Wilderness Act's interplay with the National Park Service, see McCloskey, *supra* note 53, at 459-61 (noting that the NPS resisted the overlay of the Wilderness Act because of its stricter requirements).

³⁴⁴ *Wilderness Watch v. Mainella*, 375 F.3d 1085, 1086 (11th Cir. 2004).

³⁴⁵ *Id.* at 1088.

remaining undeveloped land on the barrier islands along the Atlantic Coast of the United States.³⁴⁶ Visitors to the islands travel by boat only, leaving their vehicles on the shore.³⁴⁷ On the southern end of the island, the Park Service maintained some historic buildings.³⁴⁸ Although the Wilderness Act allows only the most "minimal" motorized vehicles (for park management)³⁴⁹ in order to preserve the wild character of the area, the NPS was using a one-land dirt road to take "piggyback" visitors to the historic buildings, at first in NPS trucks and then in large fifteen-passenger vans.³⁵⁰

Applying the standard judicial review test of *Chevron*, the court held that Congress has spoken clearly in the Wilderness Act about the pre-eminence of wilderness values over the agency's other obligations (such as to preserve historic sites).³⁵¹ The "passenger van tourism" promoted by the NPS's program was inconsistent with the "use and enjoyment" of nature promoted by the Wilderness Act.³⁵² The court further ruled that the NPS's program was subject to the analysis requirements of NEPA and invalid because the agency had failed to consider the impacts prior to making its decision.³⁵³

Even though the court ruled against the NPS, it expressed sympathy for the agency's difficulty in balancing its mandates:

Faced with competing demands from different constituencies in both Congress and the general public, the agency attempted to find a compromise that would satisfy all interested parties and potentially stave off legislative changes to the status of the Cumberland Island wilderness area. Although this goal is laudable, . . . [t]he compromise on public transportation reached in this case cannot be squared with the language of the Wilderness Act.³⁵⁴

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1089 (citing 16 U.S.C. § 1133(c)).

³⁵⁰ *Wilderness Watch*, 375 F.3d at 1089-90.

³⁵¹ *Id.* at 1092.

³⁵² *Id.* at 1093.

³⁵³ *Id.* at 1094-95.

³⁵⁴ *Id.* at 1096. In a later decision, the court awarded substantial attorneys fees and costs to the plaintiffs. *Wilderness Watch v. Mainella*, No. CV202-093, 2005 WL 2290294 (S.D. Ga. Sept. 20, 2005).

Because of the strong mandate in the Wilderness Act, the NPS must be particularly careful to give priority to natural over historic assets when managing wilderness-designated areas.³⁵⁵ It seems less and less certain that a court would reach the same result using the Organic Act's similar language.

The superior strength of the Wilderness Act was also evident in *Isle Royale Boaters Ass'n v. Norton*, a Sixth Circuit Court of Appeals case decided in 2003.³⁵⁶ In *Isle Royale*, the NPS had issued a General Management Plan aimed at controlling motorboat access to Isle Royale National Park, a National Wilderness Area in Northern Lake Superior designated as a national park in 1931 and as wilderness in 1976, because of complaints that the noise interfered with the area's wilderness values.³⁵⁷ A group of motorboat enthusiasts sued the NPS, objecting to the new restrictions that sought to separate motorized and non-motorized access to the park.³⁵⁸

The Court of Appeals found that the agency's actions were consistent with the instructions by Congress in the Wilderness Act and the Organic Act to protect the natural values of the park.³⁵⁹ In its analysis, however, the court relied much more firmly on the Wilderness Act.³⁶⁰ The court found that, because of the vagueness of the Organic Act, the NPS had "broad discretion to determine where docks are located on Isle Royale and, indeed, whether to permit docks at all."³⁶¹

³⁵⁵ See also *Olympic Park Ass'n v. Mainella*, No. C04-5732FDB, 2005 WL 1871114 (W.D. Wash. Aug. 1, 2005) (tipping the balance toward wilderness values in case involving NPS's proposal to replace historic cabins with renovated structures).

³⁵⁶ 330 F.3d 777 (6th Cir. 2003). The district court found no violation of the Wilderness Act. *Isle Royale Boaters Ass'n v. Norton*, 154 F. Supp. 2d 1098, 1113, 1116-19 (W.D. Mich. 2001).

³⁵⁷ *Isle Royale*, 330 F.3d at 780.

³⁵⁸ *Id.* at 779-80.

³⁵⁹ *Id.* at 779.

³⁶⁰ In fact, the court noted that the plaintiffs had not even relied upon the Organic Act in its appellate briefs so the court undertook the analysis *sua sponte* because some of the areas were not covered by the Wilderness Act. *Id.* at 781-82.

³⁶¹ *Id.* at 782.

These goals, and the GMP's plan to achieve them with its changes to the three docks, are well within the policies identified in the Organic Act. Removing docks helps to conserve scenery, and moving docks to reduce noise on the trails facilitates the enjoyment of the scenery, natural objects, and wild life that the island offers. This is consistent with Congress's requirements.

Id. (citing 16 U.S.C. § 1).

On the other hand, for the areas that were also designated as wilderness, the court found that the protection was heightened even though the Wilderness Act's "non-impairment" standard is quite similar to the language of the Organic Act.³⁶² The court explained that "because '[g]reater protections apply to wilderness areas than to ordinary park lands,' . . . the designation increased the Park Service's obligation."³⁶³ Using the Wilderness Act as the new floor, the court found that "there is no question" that the NPS could restrict motorized access:³⁶⁴

As a wilderness area, the park is to be administered "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a). The Park Service must ensure that 'the earth and its community of life are untrammelled by man' and that the land "retain[s] its primeval character." 16 U.S.C. § 1131(c). The Secretary thus has broad discretion to preserve the land and its character.³⁶⁵

Another model for improving the mandate of the NPS is the Wild and Scenic Rivers Act ("WSRA"),³⁶⁶ another statutory overlay on the NPS that considerably heightens judicial scrutiny of the agency's actions. In *Friends of Yosemite Valley v. Norton*,³⁶⁷ decided in 2003, the Ninth Circuit Court of Appeals addressed the issue of the National Park Service's three-volume comprehensive management plan ("CMP") for the Merced "wild and scenic river" running through Yosemite National Park in California.³⁶⁸ The case was brought for plaintiffs Friends of Yosemite Valley and Mariposans for Responsible Growth by a public interest law

³⁶² *Id.* at 783. The Organic Act states its purpose is "to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1 (2006). Compare with the Wilderness Act's provisions that wilderness areas are to be "administered 'for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness.'" 16 U.S.C. § 1131(a).

³⁶³ *Isle Royale*, 330 F.3d at 783 (citing *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1069 (9th Cir. 1997)).

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ 16 U.S.C. §§ 1271-1287 (2000).

³⁶⁷ *Friends of Yosemite Valley v. Norton*, 348 F.3d 794 (9th Cir. 2003), *clarified not in relevant part*, 366 F.3d 731 (9th Cir. 2004).

³⁶⁸ *Friends of Yosemite*, 348 F.3d at 799.

firm in Berkeley, California called Wild Earth Advocates.³⁶⁹ Plaintiffs alleged that the Merced CMP inadequately protected natural values and violated the WSRA, NEPA, and the APA.³⁷⁰

Segments of rivers designated by Congress as “wild and scenic” under the 1968 WSRA impose strict additional administrative burdens on the federal agency whose land is traversed by the river. According to the court, management must place “primary emphasis” on “protecting esthetic, scenic, archaeologic, and scientific features.”³⁷¹ In 1987, Congress put 114 miles of the Merced River under the WSRA, 81 acres of which fell with the jurisdiction of NPS.³⁷² Congress also ordered an updated management plan.³⁷³

In reviewing the plaintiffs’ challenge to the CMP, the Court of Appeals found that the NPS had not sufficiently analyzed “visitor experience and resource protection” issues.³⁷⁴ It concluded that, on remand, the NPS had to adopt a plan that described limits on actual level of visitor use that would not affect the “outstandingly remarkable values” (“ORVs”) of the river.³⁷⁵ The court further held that the NPS’s boundaries were not in compliance with law (violating the APA) because they did not give priority to the ORVs.³⁷⁶

As to the other issues raised by plaintiffs, however, the court found in favor of the NPS, holding that the CMP was prepared with sufficient specificity and data to satisfy the WSRA’s goal of protecting ORVs,³⁷⁷ and that it also satisfied NEPA.³⁷⁸ In conclusion, the court ordered NPS to fix the defective parts of the CMP, expressing concern that the plan was already twelve years overdue and stating that it expected NPS, in the

³⁶⁹ *Id.* at 791. The defendants were Gail Norton, the Secretary of the Interior, and the NPS, whose attorneys were the U.S. Department of Justice Environmental and Natural Resources Division. *Id.* at 789, 791.

³⁷⁰ *Id.* at 792.

³⁷¹ *Id.* at 794 (citing 16 U.S.C. § 1281(a)).

³⁷² *Id.*

³⁷³ *Id.* at 795.

³⁷⁴ *Friends of Yosemite*, 348 F.3d at 796-97. The court held that NPS could not rely on “sample” information but must instead measure “actual” user capacities, which could include setting limits on the number of visitors. *Id.* at 797.

³⁷⁵ *Id.* at 797.

³⁷⁶ *Id.* at 798-99.

³⁷⁷ *Id.* at 799.

³⁷⁸ *Id.* at 800-01. The NPS had prepared a “programmatic EIS,” which was appropriate because the CMP was a broad, land use management tool, not committing the agency to site-specific, irreversible action. *Id.*

interim, to take measures to avoid environmental degradation.³⁷⁹ On remand, the district court held that the NPS violated NEPA by not adequately considering alternatives.³⁸⁰ This decision indicates that when the agency has a strong mandate, as in the WSRA, the court has little difficulty in upholding that policy priority, but will still attempt to respect the agency's own process in fulfilling that mandate.

A final example of a strong congressional mandate resolving user conflicts in the national parks comes from the "overflight" cases.³⁸¹ These cases provide an example of how the courts can more readily defer to the NPS when Congress has identified a high priority resource value such as "natural quiet."³⁸²

In some national parks, particularly the Grand Canyon in Arizona, Rocky Mountain National Park in Colorado, and Hawai'i's Volcanoes and Haleakala National Parks, overflights from noisy airplanes and low-flying helicopters have presented a vexing challenge to the park managers trying to balance recreational needs and preservation. Although the helicopters "leave no footprints," the "natural quiet"³⁸³ as a resource in itself can be dramatically impaired and wilderness values shattered.

In 1987, Congress passed the National Parks Overflights Act, requiring the FAA to propose rules that would restore the natural quiet in Grand Canyon National Park.³⁸⁴ In 1988, the FAA adopted special rules (called SFARs) that established flight free zones, minimum altitudes, and

³⁷⁹ *Friends of Yosemite*, 348 F.3d at 803-04. In 2000, the NPS lost a similar lawsuit for failing to protect ORVs in designating the wild and scenic Niobrara River in Nebraska. *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000). In that case, however, the plaintiff was an adjacent private landowner objecting to the designation. *Id.* at 878. Congress had directed the Secretary of the Interior, who in turn directed NPS to evaluate the river for its wild and scenic values in 1991, and in 1992, NPS began the long evaluation process. *Id.* at 877. The court found significant errors in the NPS administrative process and remanded the plan to the agency. *Id.* at 879-81. Although the landowner may have won the appeal, the result did not guarantee that his land would not be included within the designation.

³⁸⁰ *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1075 (E.D. Cal. 2006); *Friends of Yosemite Valley v. Kempthorne*, 464 F. Supp. 2d 993 (E.D. Cal. 2006), *aff'd in part, rev'd in part*, 520 F.3d 1024 (9th Cir. 2008) (striking the plan and remanding).

³⁸¹ See *infra* notes 384-410 and accompanying text.

³⁸² *Id.*

³⁸³ In a 1994 report, the NPS defined "natural quiet" at the Grand Canyon National Park as "requiring that 50% of the Park experience natural quiet at least 75% of the day." U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1015 (D.C. Cir. 2002) (*Grand Canyon II*).

³⁸⁴ National Parks Overflights Act, Pub. L. No. 100-91, 101 Stat. 674 (1987) (codified at 16 U.S.C. §§ 1a-1 note).

flight corridors in the Park until 1997.³⁸⁵ In 1996, the FAA issued final rules, based on updated NPS recommendations, which confirmed these limits and capped the number of aircraft, but not the number of flights in the park.³⁸⁶

The validity of the FAA rules came before the D.C. Circuit two times. Both times, the FAA was sued by industry, the U.S. Air Tour Association, and by the environmental “friends” group the venerable Grand Canyon National Trust joined by five other environmental organizations. In the 1998 *Grand Canyon I* decision,³⁸⁷ the appellate court rejected both parties’ arguments and held that the FAA’s rule aimed at protecting natural quiet reasonably interpreted the Overflights Act and was therefore valid under the *Chevron* doctrine.³⁸⁸ The court, however, urged the FAA to strengthen the rules by its promised date of 2008; otherwise, the court said it would be inclined to agree with the Trust that FAA would fail in its obligation to achieve the congressional goal of restoring natural quiet.³⁸⁹

In 2002, the FAA promulgated new rules, as promised.³⁹⁰ One of the new rules established a cap on the number of commercial air tours in the Park, setting a base year of 1997-98.³⁹¹ Even with these and other new rules, the FAA pessimistically predicted that “only 32% of the Park” would achieve natural quiet for at least 75% of the day, and that “future air tour growth would reduce that to 25% of the Park in nine to ten years.”³⁹² The same industry and environmental groups sued the FAA again.³⁹³

³⁸⁵ *Grand Canyon II*, 298 F.3d at 1001.

³⁸⁶ *Id.* at 1002.

³⁸⁷ *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 460-64 (D.C. Cir. 1998) (*Grand Canyon I*).

³⁸⁸ *Grand Canyon II*, 298 F.3d at 1003 (explaining the *Chevron* analysis in *Grand Canyon I*).

³⁸⁹ *Id.*

³⁹⁰ In the interim, Congress passed a bill imposing a ban in one major national park (Rocky Mountain National Park) and setting up the framework for caps or bans on flights in other parks. Ansson & Hooks, *supra* note 3, at 225 n.81 (citing William A. Updike, *New Law Limits Park Overflights*, NAT’L PARKS, May 1, 2000). The new law required all parks with flights to complete management plans to control the impacts, and required the Federal Aviation Administration (“FAA”) (an agency both powerful and reluctant to impose controls) to work with the National Park Service on protection of “natural quiet” of the skies over the national parks. Ansson & Hooks, *supra* note 3, at 225; *id.* at n.83 (noting that the bill capped the flights over the Grand Canyon at 90,000 per year).

³⁹¹ *Grand Canyon II*, 298 F.3d at 1003-04.

³⁹² *Id.* at 1004-05.

³⁹³ *Id.* at 997.

In *Grand Canyon II* (*U.S. Air Tour Ass'n v. FAA*), applying standard APA review doctrine and the *Chevron* test, the court rejected the industry petitioners challenges, finding (1) the NPS's change in methodology for measuring audible sound to below ambient level was reasonable;³⁹⁴ (2) deference was due to the NPS and FAA in their preparation of a computer noise model;³⁹⁵ (3) the FAA was not required, before capping flights, to first issue a "quiet technology" rule as newly requested by the Tour Operators;³⁹⁶ and (4) the Air Tour Operators' claims that the new limitations improperly burdened elderly and disabled passengers who often visited the park through an overflight were not based on a truthful interpretation of the record.³⁹⁷

The court agreed with the Grand Canyon Trust on several of its claims: (1) the FAA's definition of "day" based on an average was not entitled to deference because it was insufficiently protective of the visitor experience at particular places and seasons in the Park;³⁹⁸ and (2) the noise methodology used by FAA impermissibly looked narrowly at only tour aircraft and did not add in the noise from other sources such as commercial jets, general aviation, and military flights.³⁹⁹ Ultimately, the court remanded the rule back to FAA with a mandate to strengthen the protections for natural quiet in Grand Canyon National Park, scoring a one-sided victory for the Park and its friends.⁴⁰⁰

The Grand Canyon Trust also sued to enforce "natural quiet" to stop the construction of an airport near Zion National Park in Utah.⁴⁰¹ In *Grand Canyon Trust v. FAA*, Grand Canyon Trust sued the Federal Aviation Administration ("FAA") to require the agency to prepare an Environmental Impact Statement ("EIS") for the construction of a "replacement airport" near Zion.⁴⁰² In 2002, the D.C. Circuit Court of Appeals held that the FAA erred in the preliminary NEPA step by preparing an Environmental Assessment that failed to consider "cumulative impacts" of noise from other sources (such as overflights by tour operators) instead

³⁹⁴ *Id.* at 1005-08.

³⁹⁵ *Id.* at 1008-09.

³⁹⁶ *Id.* at 1009-10.

³⁹⁷ *Id.* at 1011. The court essentially called the Air Tour Operators liars. *See id.* (noting many factual errors in the Air Tour Operators arguments and some had "no truth").

³⁹⁸ *Grand Canyon II*, 298 F.3d at 1017.

³⁹⁹ *Id.* at 1018-19. On this issue, the court noted that the FAA's own noise data contradicted its claim that "other sources" had only minimal impact. *Id.* at 1019.

⁴⁰⁰ *Id.* at 1019.

⁴⁰¹ *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002).

⁴⁰² *Id.*

of just the incremental increase in noise associated with the rebuilt airport.⁴⁰³ The court noted that the NPS had identified Zion National Park as one of the country's "top nine" priorities for preserving natural quiet in the park system.⁴⁰⁴ On remand, the FAA was required to consider the "cumulative impact of noise pollution on the Park . . . in light of air traffic near and over the Park, from whatever airport, air tours near or in the Park, and the acoustical data collected by NPS. . . ."⁴⁰⁵

The pressures to allow industrial tourism that threatens natural quiet continue to influence National Park Service management today. In a recently released set of draft management regulations,⁴⁰⁶ the service has proposed, in the view of the National Parks and Conservation Association, to "fundamentally weaken" the protection for natural air and quiet.⁴⁰⁷ Because of the bitterly opposed stakeholders involved in overflight issues,⁴⁰⁸ litigation seems inevitable with virtually every move of the NPS or the FAA on this issue. These cases indicate how a stronger congressional signal on conservation values could minimize the intrusion of the judicial review process in NPS management of our parks.⁴⁰⁹

IV. A PROPOSAL TO PRIORITIZE ORGANIC ACT VALUES FOR THE NEXT CENTENNIAL

Borrowing from Wallace Stegner, the NPS *Centennial Report* notes that "our national park system concept has been described as 'America's

⁴⁰³ *Id.* at 346-47.

⁴⁰⁴ *Id.* at 345.

⁴⁰⁵ *Id.* at 347.

⁴⁰⁶ NAT'L PARK SERVICE, MANAGEMENT POLICIES (2006), available at <http://www.nps.gov/policy/mp2006.pdf>.

⁴⁰⁷ See Kass, *supra* note 191, at 69 (citing NPCA, SIGNIFICANT CONCERNS REGARDING PROPOSED REVISIONS TO THE NATIONAL PARK SERVICE'S MANAGEMENT POLICIES 1 (Jan. 13, 2006), available at www.npca.org). According to the NPCA, the new policies favor industrial high-impact recreation (such as snowmobiling and off-road vehicle use) over traditional low-impact recreation (such as hiking, birding, and camping). *Id.*

⁴⁰⁸ The author represented citizens groups in Hawai'i in the 1990s attempting to persuade (by petition) the FAA to adopt special flight rules for Hawai'i primarily for the very popular tour helicopter flights. Ultimately, a minimum height restriction was adopted, but there continue to be many complaints that it is routinely violated in the wilderness areas, where the roar of a low-flying helicopter regularly jolts blissful hikers' solitude.

⁴⁰⁹ For an analysis of the relationship between the Organic Act and the ESA, see Hudson, *supra* note 155, at 970 (noting that the Organic Act "may not always provide a clear resolution. However, when an endangered or threatened species is involved, there should be no question that the balance between recreation and preservation should tip in favor of preservation.").

best idea.”⁴¹⁰ An accessible and independent judiciary firmly grounded in the rule of law has also been an American “best idea.” Together, these powerful interrelated ideas have often protected America’s unique ecosystems, history, and landscapes. But, in light of the increasing pressure from people, politics, and economic conditions, these two systems need the reinforcement of a national re-commitment to conservation in our national parks for the next century. Congress should clarify that the national parks’ unique values, which are irreplaceable, should have permanent priority over the temporal enjoyment of the current generation of users.

A. *A Simple Amendment*

Clarifying priorities does not require a massive new law, only a “flick of the oar” amendment to the Organic Act. Using a priorities approach, Congress could easily untangle the dual mandate, considerably strengthen the Organic Act, and shift the burden of proving compatible use to those who threaten the impairment.⁴¹¹ Congress could meaningfully amend Section 1 with only seven new words (and deleting a few more), as follows:

The service thus established shall conserve, 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, giving highest priority which purpose is to conserving the scenery and the natural and historic objects and the wildlife therein and allowing, where proven compatible, ~~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.

⁴¹⁰ NAT'L PARK SERVICE, *supra* note 9, at 2 (quoting Wallace Stegner, *The Best Idea We Ever Had*, 26 WILDERNESS 4 (1983)).

⁴¹¹ According to one view, under the current wording the agency simply has three choices: “emphasize the use of national parks, emphasize preservation, or attempt to balance the two equally.” Kyla Seligsohn-Bennett, Comment, *Mismanaging Endangered and “Exotic” Species in the National Parks*, 20 ENVTL. L. 415, 438 (1990). The problem occurs, as explained above, when the agency actions denigrate the very purpose of creating national parks.

This short amendment would give the NPS and the courts a clearer road-map to resolving conflicts between conservation and enjoyment.⁴¹² Managing for preservation is no easy task⁴¹³ but limiting human impacts to “appropriate use[s]”⁴¹⁴ of the parks, knowing that conservation is the paramount goal, would create much clearer guidance for the NPS.⁴¹⁵ The burden on impairment would be shifted to any activity that might not be compatible with the long-term survival of the parks. This only seems fair. It would not mean that people would be banned from the parks; probably most recreational uses could continue as is, but human enjoyment would be subordinated, in some sense, for its own good.⁴¹⁶

B. Criticism

There are undoubtedly many good arguments against amending the Organic Act as suggested. One strongly held view is that the Organic Act already holds conservation values paramount because it ultimately tells the NPS to leave the parks “unimpaired” for future generations.⁴¹⁷ When the courts and the NPS agree with this view, the duality of the mandate turns into a hierarchy of values (conservation before use, all within unimpairment) and the conflict self-resolves.⁴¹⁸

The most eloquent account of this view comes from Yale historian Robin Winks and his masterful examination in 1997 of the legislative history of the Organic Act’s dual mandate.⁴¹⁹ He concludes that the original

⁴¹² Other commentators have suggested non-statutory approaches to resolving the conflict. Sax bases his *Handrails* argument, in part, on the public trust theory. See JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980). Tarlock criticizes this approach, concluding that “the parks are likely to correspond to Professor Sax’s vision only if Congress and the Park Service want them that way.” Tarlock, *supra* note 10, at 268-69. This sobering comment supports the idea that an amendment may be the only permanent solution.

⁴¹³ See NPS MP 2006, *supra* note 4, § 1.

⁴¹⁴ See *id.* § 1.5.

⁴¹⁵ See generally Richard J. Ansson, Jr., *Ecosystem Management & Our National Parks: Will Ecosystem Management Become the Guiding Theory for Our National Parks in the 21st Century?*, 7 U. BALT. J. ENVTL. L. 87 (2000) (discussing means of improving NPS management policy).

⁴¹⁶ This kind of hierarchical arrangement is similar to the “dominant (or primary) use model promoted in the early modern era [that] continues to thrive as an important paradigm.” Fishman, *NWRS*, *supra* note 46, at 526.

⁴¹⁷ See *infra* notes 420-436 and accompanying text.

⁴¹⁸ *Id.*

⁴¹⁹ See Winks, *supra* note 24, at 575. He argues that the legislative history of the act would appear to support this view, and successive directors of the National Park Service, and for the most part

intent behind the Organic Act was to make preservation paramount.⁴²⁰ To find the meaning of the impairment reference,⁴²¹ Winks traces the story back to the birth of the Organic Act and the involvement of Frederick L. Olmsted Jr., a "famed designer of major parks" whose father had inspired both Central Park and Yosemite,⁴²² and key congressional figure William Kent, "father of the National Park System."⁴²³ According to Winks, it was Olmsted who felt that the new parks system needed an "overriding and succinct statement of purpose (today, one would say 'mission statement')." ⁴²⁴ But, because he "expected and hoped for substantial public use of the parks,"⁴²⁵ he added "for the enjoyment of" in the concluding phrase about leaving the parks unimpaired for future generations.⁴²⁶ Winks comments that "[h]erein lay an ambiguity a potential source for future conflict,"⁴²⁷ adding: "The act cannot have meant that 'unimpaired' was to be taken in its strictest sense . . ."⁴²⁸ Olmsted's conception was not one of absolutism, but relativism.⁴²⁹

On the other hand, Representative Kent from California, who introduced the Organic Act, incorporating Olmsted's language and views, was more of a purist.⁴³⁰ Kent believed that the national parks "must be held 'in a state of nature,'" ⁴³¹ and "one must resist the growing demand at the local level to create parks primarily to attract tourists."⁴³² Ultimately, Winks acknowledges that it is hard to discern true congressional intent,⁴³³ but concludes that the preamble language of the Organic Act "is not, in fact, contradictory, and that Congress did not regard it as contradictory."⁴³⁴

Secretaries of the Interior, as well as chairpersons of the relevant committees and subcommittees in Congress, have usually acted in such a manner as to suggest that the Park Service's first priority should be preservation.

Id. at 613.

⁴²⁰ Winks, *supra* note 24, at 623.

⁴²¹ *Id.* at 597.

⁴²² *Id.* at 596.

⁴²³ *Id.* at 599.

⁴²⁴ *Id.* at 597.

⁴²⁵ *Id.*

⁴²⁶ Winks, *supra* note 24, at 597. This article's proposal would eliminate that phrase.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 598.

⁴³⁰ *See id.* at 599-603.

⁴³¹ *Id.* at 601.

⁴³² Winks, *supra* note 24, at 602.

⁴³³ *Id.* at 622.

⁴³⁴ *Id.* at 622-23. He continues that, "to the extent that a contradictory interpretation can be imputed . . . [the] contradiction can be eliminated" by reference to legislative history,

The leave-unimpaired “mission had and has precedence over providing means of access, if those means impair the resources, however much access may add to the enjoyment of future generations.”⁴³⁵ Thus, for Winks and other commentators who firmly believe that the Organic Act already gives a high priority to conservation values,⁴³⁶ an amendment would not only be unnecessary but would also be an unfortunate concession that conservation may not have been set as the highest value for the past 100 years.

The second objection may be from those who disagree with the Winks view and believe that the dual mandate does not place conservation any higher than enjoyment, and deliberately so.⁴³⁷ According to this view, the duality is intentional, creates desired flexibility, and is the actual mandate written and intended by Congress. Both values must be accommodated.⁴³⁸ The academic hand-wringing about dualism is, in this author’s view, much ado about nothing. Commentator Shaw presents part of this viewpoint:

the private papers of the drafters, rhetorical canons of the time, subsequent congressional action, as well as many judicial interpretations. *Id.* at 623.

⁴³⁵ *Id.* at 623.

⁴³⁶ See, e.g., Keiter, *supra* note 16, at 675 (“[N]onimpairment indicates that resource preservation responsibilities should take precedence over public use in the event of conflict.”); Mappes, *supra* note 12, at 611-16, 618 (arguing that legislative history is not necessary to support a preservation-first interpretation; plain language, subsequent amendments, and judicial interpretation are sufficient to make “preservation the paramount mandate,” but finding that “it must always be checked by the requirement that use and enjoyment be permitted for all people both presently and in the future”); Karen D’Antuono, Comment, *The National Park Service’s Proposed Ban: A New Approach to Personal Watercraft in the National Parks*, 27 B.C. ENVTL. AFF. L. R. 243, 268-70 (2000) (asserting that preservation is the dominant value in the Organic Act based on the plain language and subsequent amendments, management policies, and case law); Hudson, *supra* note 155, at 957 (stating that although the Organic Act lists two purposes, in the event of conflict, legislative and judicial interpretation indicate that “preservation should prevail”); see also John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41, 51 (1984) (cited by Hudson).

⁴³⁷ Professor Martin Nie reads the legislative history very differently than Robin Winks, finding that there is “no evidence that either Congress or those who lobbied for the act sought a mandate for an exacting preservation of natural conditions.” Nie, *supra* note 13, at 34 n.54.

⁴³⁸ Shaw, *supra* note 2, at 830 (“The Organic Act’s dual mandate can be understood in its current terms . . . [and] does not impose an impossible task for park planners.”); see also Nie, *supra* note 13, at 236 (“Both approaches to park management were somehow squared with the NPS’s mandate.”); Scheg, *supra* note 10, at 55, 57 (noting that the Act was drafted by preservationists but the “enjoyment” language restricts that goal); Mappes, *supra* note 12, at 620 (“Congress was clear: Do both.”).

NPS cannot meaningfully distinguish appropriate from inappropriate uses, so it should instead minimize environmental degradation and user conflicts by restricting access to a reasonable level. While NPS management should continue to be slanted toward a strong preservationist ethic, an idealistic, purely preservationist policy cannot and should not be implemented in the face of increasing visitation.⁴³⁹

Thus the goals are interdependent and simultaneous, and prioritizing would conflict with congressional intent expressed in words like "promote," and "enjoyment." The duality, they say, just reflects a valid political compromise that must be respected.⁴⁴⁰

A third objection may be that amending the Organic Act is just "not done" or is so infrequently done that the proposal is just not politically feasible. Critics would say that it is simply not smart politically or practically to make any attempt to put users so clearly secondary to conservation.⁴⁴¹ A frontal assault of the nation's well-organized user groups will surely fail.

A fourth objection could be that an attempt to amend the Organic Act will not achieve the desired result because its importance has been eclipsed by individual establishment legislation, which more powerfully governs the balance of conservation versus enjoyment in each particular park. Professor Robert Fischman has eloquently articulated this view in his analysis of park establishment legislation, concluding that "simple clarification of the Organic Act to stress the preservation prong of the Service's dual mandate, or even amending the Organic Act to embrace explicitly biological diversity, would not be sufficient to achieve comprehensive reform."⁴⁴² Moreover, he notes that "Congress seldom amends overarching legislation."⁴⁴³ At the same time, Fischman advocates for an

⁴³⁹ Shaw, *supra* note 2, at 831.

⁴⁴⁰ Mappes, *supra* note 12, at 636 ("One without the other does not serve the interests of the public nor does it fulfill Congress's mandate.").

⁴⁴¹ Tarlock made a similar practical politics criticism of Sax's *Mountains* vision, stating "the Park Service has long used increased use of the national parks to justify increased appropriations." Tarlock, *supra* note 10, at 259; *see also* Scheg, *supra* note 10, at 60 ("Federal lands constitute a significant percentage of the total acreage of the western states. Representatives of these states fear that imposing specific preservationist duties upon the Secretary would hinder economic development within their states. . . . [P]olitical pressure from the West makes any immediate amendment to park legislation unlikely. . . .").

⁴⁴² Fischman, *supra* note 2, at 782.

⁴⁴³ *Id.* at 781; *see also* Fischman, *NWRS*, *supra* note 46, at 510 ("Congress revisits organic legislation infrequently. . . .").

amendment of the Organic Act that will express a better systemic philosophy, stating that an amendment would act like “a compass exposed to a new magnetic field,”⁴⁴⁴ and that a new conceptual framework “is likely to have a much more profound effect than refined judicial decisions.”⁴⁴⁵ Thus, perhaps amending the Organic Act, for the right reason, may be the right idea.

The last obvious objection is that a conservation-first amendment is simply elitist and undemocratic. This kind of criticism is often levied at preservationists.⁴⁴⁶ A prophetic voice in the long-standing debate over our national parks, Professor Joseph Sax provoked this kind of reaction when he advocated in his 1980 book *Mountains Without Handrails: Reflections on Our National Parks*, a “tough, even harsh, policy” that “access to the national parks should be limited to those who have the sensitivity and willingness to encounter nature of its own terms.”⁴⁴⁷ As Sax’s Chicago colleague Professor Dan Tarlock commented, Sax “begs Congress not ‘to make national parks all things to all people in every location,’ and urges the Park Service to interpret its broad statutory mandate in the preservationist tradition.”⁴⁴⁸ Others have been more pointed in their criticism.

These concerns all include valid points and it is, unfortunately, unlikely that a remote scholarly suggestion of congressional reform will be eagerly picked up and passed even by a progressive Congress which may still be wary of offending user groups in key electoral (especially Western) states. But, the idea is worth posing for debate nonetheless. For decades now, many commentators have contributed to the hearty discussion on the dual mandate and have made wise calls for clarification or prioritization,⁴⁴⁹ but the problem seems only to have become murkier. The contrary

⁴⁴⁴ Fischman, *supra* note 2, at 812.

⁴⁴⁵ *Id.* at 813. See also Fischman, *NWRS*, *supra* note 46, at 526 (stating that the Organic Act “serves as the interpretive pilot to guide implementation of other relevant laws.”).

⁴⁴⁶ See Shaw, *supra* note 2, at 819 (referring to the proposed limitations on ORV use in the Canyonlands and accusing preservationists of being “elitist”). But see Rabin, *supra* note 14, at 1898 (criticizing the Saxian view of preservation not as elitist per se, but as having “less than universal applicability”).

⁴⁴⁷ Tarlock, *supra* note 10, at 258.

⁴⁴⁸ *Id.* at 257.

⁴⁴⁹ Professor Keiter favors further “clarification and legitimization” of the National Park System’s preservation philosophy. Keiter, *supra* note 16, at 666. A similar argument has been made with respect to the Canadian Parks Act, which also has a dual mandate. Shaun Fluker has suggested that “the Parks Act s. 4(1) should be amended to assert that parks are a place where the preservation of natural ecological integrity is the first priority, with human interests of secondary concern.” Shaun Fluker, “*Maintaining ecological integrity is our first priority*”—*Policy Rhetoric or Practical Reality in Canada’s National Parks?*

views among these thoughtful commentators shows, in itself, that a statutory amendment may be the only way to achieve a final resolution of the issue.

In this author's view, the terra firma for the NPS has shifted too much in the past decades of pro-user politics to hope that the elegant, well-reasoned, and admirable views of so many commentators who believe that preservation is already paramount will manifest sufficiently in the judicial system. Indeed, the deference of the courts to the NPS seems now to provide little reference or room for a potentially strong guiding principle of unimpairment. This article proposes an approach that leaves intact both of the historically strong values of the Act, honors the legislative history referenced by Winks and others, and stiffens up the unimpairment priority by making it more explicit.⁴⁵⁰

Shifting the burden to user groups may be the least palatable part of the amendment, but it may be the most important. A similar, and much more articulate, version of this burden-shifting approach was suggested by Olmsted in 1937.⁴⁵¹ Twenty years after drafting the preamble to the Organic Act, Olmsted laid out a clear vision for prioritization that would put a specific burden of proof on actors proposing to impair fundamental preservation values.⁴⁵² In relation to a controversial project to water diversion project that would cut under Rocky Mountain National Park, Olmsted laid out a framework worthy of consideration today:

1) The burden of proof—"and thoroughly well-considered and convincing proof"—must rest upon the advocates of "any enterprise for non-park purposes within the theoretical limits of jurisdiction of a National Park"; 2) the enterprise must be of "real social importance from a *national* [italics added] standpoint and is not to be practically attainable" elsewhere; 3) the enterprise must not "endanger the value of the park for its proper purposes to the slightest appreciable degree"; 4) the danger must be "so slight and of such a nature that the land if subject to it in advance

A Case Comment on Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage), 13 J. ENVTL. L. & PRAC. 131, 142 (2003).

⁴⁵⁰ Nathan Scheg, who suggests it is politically infeasible to prioritize the values in the Organic Act, concludes: "In a world of finite resources and competing demands for use of those resources, difficult choices must be made. Priorities must be established." Scheg, *supra* note 10, at 61.

⁴⁵¹ Winks, *supra* note 24, at 598-99.

⁴⁵² *Id.*

would nevertheless have been wisely considered eminently suitable for selection and permanent maintenance as a National Park"; and 5) the non-park purpose must be "of so much importance nationally than the purposes of the park" as to justify the lessening of the park.⁴⁵³

Despite the dust, Olmsted's 70-year-old proposal gets directly to the point and would make a powerful judicial test if the Organic Act were amended as suggested above.

C. *Moral Compass: Responsibility and Irreplaceability*

Ultimately, one's view of the merits of taking on the conservation versus user conflict head-on may come down to personal moral principles and a commentator's (or member of Congress's) feelings of responsibility to the future, not the law. Many of the academics who have weighed in on the problems caused by the dual mandate have concluded their well-reasoned legal and policy arguments by referencing strong personal or philosophical values that touch upon inter-generational responsibility, a core value of the Organic Act.⁴⁵⁴ There is a heartfelt common responsibility expressed in much of the legal literature on national parks even among those who differ on the theory or details of the legislative history.⁴⁵⁵

For example, even though Professor Dan Tarlock takes issue with some of Professor Joseph Sax's reasoning in *Mountains*, he ultimately agrees with Sax's prescriptions particularly for certain national parks.⁴⁵⁶ He articulates a core value of irreplaceability that echoes the inter-generational responsibility mandate, stating:

For me, however, it is enough that certain national parks are irreplaceable and have occupied an important role in shaping this nation's perception of itself. Thus, there is a case for preventing people from harming the parks, regardless of whether those who visit them are somehow better off from the experience.⁴⁵⁷

⁴⁵³ *Id.* at 599.

⁴⁵⁴ See, e.g., Edwin R. McCullough, *Through the Eye of a Needle: The Earth's Hard Passage Back to Health*, 10 J. ENVTL. L. & LITIG. 389 (1995) (discussing generational responsibility and what it means to manage for future generations).

⁴⁵⁵ See *id.*

⁴⁵⁶ Tarlock, *supra* note 10, at 274.

⁴⁵⁷ *Id.* at 262. He concludes that

one can legitimately ask whether Professor Sax has described a role for the parks for which there is little demand and therefore little possibility

He also refers to the global responsibility we have to protect the "treasures of Western civilization," commenting that they "must be passed on as intact as possible from generation to generation," and that, unlike human-made treasures like art and music, the natural landscape cannot protect itself and "therefore man's policy toward [it] must be based on respect for the original conception."⁴⁵⁸

Professor Robert Rabin, who also critiqued Sax's *Mountains*, expressed a similar philosophical view, referred to the irreplaceability of national parks, and observed that the tourism experience is, in contrast, replaceable.⁴⁵⁹ He states:

Harsh as it may sound, viewing the Tetons in passing—whether in a car, boat, or even on foot—is a thin experience that is nearly replicable elsewhere. By contrast, absorption in a natural setting is no easy matter. It takes time, space, and maximum freedom from the sights and sounds of the workaday world. It cannot be easily found outside the national parks.⁴⁶⁰

He continues, "In my view, national park administration should rest on the unexceptional premise that these federal enclaves are an irreplaceable part of our national heritage."⁴⁶¹

Inherent in Rabin's feelings about irreplaceability is the notion of fragility. He states that the resources of the national parks are "too fragile to withstand an ambience dominated by motorboats, pony rides, convenience shopping, and paved trails."⁴⁶² His sentiment echoes that of Judge Reinhardt in the Glacier Bay case: "[the park] is too precious an ecosystem for the Parks Service to ignore significant risks to its diverse inhabitants and its fragile atmosphere."⁴⁶³ Ultimately, Rabin expresses common ground: "I would join Sax . . . in hoping that before long the preservation ethic once again will be taken seriously by the Park Service."⁴⁶⁴

of realization. Be that as it may, in my judgment, Professor Sax's vision of the national parks is the right one. It should be honored by Congress, the Department of Interior, and, when appropriate, the courts.

Id. at 274.

⁴⁵⁸ *Id.* at 262.

⁴⁵⁹ Rabin, *supra* note 14, at 1901-02.

⁴⁶⁰ *Id.* at 1901.

⁴⁶¹ *Id.* at 1902.

⁴⁶² *Id.* at 1903.

⁴⁶³ National Parks Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001).

⁴⁶⁴ Rabin, *supra* note 14, at 1904.

The convergence of views exemplified by the conversation between Sax, Tarlock, and Rabin, and the commentary on national parks law by so many others, suggests that the issues touched by the dual mandate problem are not just a matter of objective legal analysis but profoundly evoke a strong sense of personal and inter-generational responsibility. One can imagine some members of Congress taking note of this moral imperative more than they would the legal one.

CONCLUSION

Now approaching its 100th anniversary, the U.S. national park system is a remarkable network of special lands treasured by U.S. citizens and international visitors from all corners and all walks of life. For the wanderer and the gawker, U.S. parks are viewed as the ultimate places for refuge, recreation, enjoyment, and aesthetic pleasures that cannot be easily replicated in the urban or even rural landscape. However, given the broad range of people who expect to use parks as their personal recreation area and the high fragility of the natural resources in our National Parks, conflict is inevitable. In setting up the dual mandate in the Organic Act and in its numerous individual designation decisions, Congress itself gave the National Park Service almost impossible tasks: preserve the parks unimpaired for future generations but allow, even promote, human enjoyment.

As the discussion of the contemporary litigation against the NPS demonstrates, the Organic Act may have become too soft to achieve its original core value of perpetuating U.S. national parks in an unimpaired state. Giving a higher priority to conservation in this foundational law would better ensure that, for the next 100 years, the U.S. national parks will not be loved to death but will truly remain as vibrant and wondrous for future generations as they have for ours.